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REVISITING SEX: GENDER AND SEX DISCRIMINATION FIFTY
YEARS AFTER THE CIVIL RIGHTS ACT

TAKING SEX DISCRIMINATION SERIOUSLY

VICKI SCHULTZ[†]

ABSTRACT

The fiftieth anniversary of Title VII's ban on sex discrimination provides an occasion to reflect on its successes and failures in achieving workplace sex equality. Although considerable progress has occurred, advances have been both uneven and unsteady. This Article shows that a primary limit on legal reform has been attitudinal. Before and after Title VII's enactment, private and public officials have defended sex discrimination and inequality by appealing to naturalized conceptions of sex difference. Persistent stereotypes portray women as more devoted to family roles than work roles and, consequently, less committed to their jobs than men. Similar stereotypes portray women as primarily interested in female-typed jobs said to reward feminine traits and values. Viewed through the lens of such assumptions, sex-based disparities in employment are not inequalities: They are the inevitable expression of innate and cultural sex differences.

[†] © Vicki Schultz, Ford Foundation Professor of Law and Social Science, Yale Law School. I would like to thank the members of the *Denver University Law Review* for inviting me to participate in this symposium honoring the fiftieth anniversary of Title VII's ban on sex discrimination. Working on this piece deepened my understanding of the law and enabled me to learn from extraordinary people who shared a desire to get it right; I am indebted to all of them. Fellow symposium participants asked thought-provoking questions when I presented the piece as a keynote lecture. Colleagues Bill Eskridge, Noah Zatz, Adam Romero, Jessica Clarke, Tracey Meares, and Doug NeJaime made helpful comments on later drafts. Students in Yale Law School's Ph.D. seminar on legal scholarship probed the piece's broader implications; YLS librarian Michael VanderHeijden tracked down sources near and far. The Law Review's staff offered expert editorial assistance; Lindsey Dunn worked tirelessly to perfect the Article's form, thus permitting a clearer read of the substance. The greatest level of support came from my capable, caring YLS research assistants. Zachary Herz and Marcus Curtis supplied superb aid with research and editing; Herz helped clarify arguments and craft nomenclature for new ideas. More than anyone else, Selin Akkan performed brilliant, indispensable work to help formulate, research, support, and refine the arguments presented here; she also organized and edited countless drafts and sources. Without her steadfast, intelligent presence this Article could not have been completed. I dedicate the piece to David Fukumoto, who for better and worse inspired me in more ways than he can imagine. Any and all errors are, of course, mine alone.

How, then, has progress occurred under Title VII? The answer lay in reformers challenging essentialist claims about sex difference.

During Title VII's first decade, this Article shows, agencies and courts adopted an expansive reading of Title VII only because the leaders of the emerging women's rights movement pulled activists together to mount a strong, clear, concerted challenge to the existence and relevance of sex difference. Crafting a new conception of equality that captured American women's growing sense of discontent while promising greater freedom to both women and men, early feminists overcame governmental resistance and achieved genuine legal progress. By the mid-1970s, they secured favorable rulings from the agencies, the Supreme Court, and the lower courts under both Title VII and the Constitution and consolidated these gains in Congress.

Yet progress was not universal and the initial momentum did not last. Rather, this Article argues, in areas of the law where feminist groups failed to establish a significant presence, or where they began to take a divided or less decisive stance as the women's movement fractured and faded, the absence of activist demands and oversight permitted courts to retain or revert back to older views attributing workplace inequality to women's difference. Two areas of law illustrate these dynamics. In cases raising women's lack of interest as a defense to sex discrimination, women's rights groups' failure to regularly contest this arcane defense in the courts and agencies, coupled with resurfaced internal division over questions of difference that conveyed a mixed message about women's work preferences, freed conservative judges to accept this defense and legitimate the underlying stereotypes in a wide swath of cases. Pregnancy discrimination law provides a second example, showing how courts stalled, and later backpedaled, as feminists initially wavered and later split over whether to characterize pregnancy as a uniquely female reproductive experience unlike other medical conditions or as a temporary disability similar to others that may affect an employee's ability to work. Despite federal laws and agency rulings adopting the latter approach, images of pregnancy as unique and distinct from other disabilities have continued to resurface, limiting the law's capacity to address this persistent form of discrimination.

Progress under anti-discrimination law is thus difficult to achieve and sustain: It requires continuing, cohesive efforts to challenge difference as a rationale for inequality and renew public support for change. This Article suggests that, going forward, equality advocates can make further headway by disputing not only the existence and relevance of alleged group-based differences, but also their presumed stability and sources. New evidence reveals that many sex, race, and other group-based differences typically said to explain and justify inequalities at work are actually produced there through institutional practices that foster an unnecessary, negative sense of difference and division among employ-

ees. The hope is that, by contesting such practices and exposing their self-reinforcing quality, reformers can further erode both enduring workplace inequalities and the persistent stereotypes cited to justify them.

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INTRODUCTION

Fifty years ago, American women and men won the right to be free from discrimination at work when Congress inserted one word into the text of Title VII of the landmark 1964 Civil Rights Act. That word was “sex.”¹ With the addition of that one word, the world changed forever.²

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e (2012)).

In this Article, I use Title VII's fiftieth anniversary as an occasion to reflect on what has transpired in the wake of its ban on sex discrimination. I must confess that I am a little intimidated by the task before me. How do I sum up the accomplishments and shortcomings of this historic statute? Of the lawyers and judges, legislators and policymakers, activists and ordinary people who have breathed life into it since its inception? How can I convey how much this law has meant, not only to American women, but to the entire nation and even the world, while noting how much work remains to realize its promise? Space limitations require me to make broad generalizations based on limited evidence, and to inevitably shortchange nuance, in portraying the lessons and limits of the law.

This Article is entitled *Taking Sex Discrimination Seriously*. Originally, however, I considered calling it *Taking Sex Seriously*. By that phrase, I meant to refer to the project of taking Title VII's prohibition against sex discrimination seriously. When I first conceived the title, I ran a Google search as a quick preemption check, expecting to find scores of books and articles that addressed sex discrimination in some way. Instead, the top result from my search was a book called *Taking Sex Differences Seriously*,³ described on the author's website as follows:

In his new book, *Taking Sex Differences Seriously*, Dr. Steven Rhoads assembles a wealth of scientific evidence showing that sex distinctions are "hardwired" into our biology. They range from the subtle (men get a chemical high from winning while women get one from nursing) to the profound (women with high testosterone levels are more promiscuous, more competitive, and more conflicted about having children than those with average levels).⁴

Humorous as it seems, the results of my search reveal a key insight about what stands in the way of eliminating sex discrimination at work. Taking sex discrimination seriously requires taking women seriously—not simply as mothers and daughters, friends and neighbors, lovers and spouses, consumers and community volunteers, but also and primarily as employees and independent contractors, day laborers and domestic workers, managers and professionals, entrepreneurs and owners, and others who work for a living, to use common parlance. Taking women seriously in these work roles demands questioning precisely the notion of static sex differences implied in the book quote above, for, all too often, American society and institutions have assumed that women have fundamentally different natures, priorities, and preferences about work than

2. For a moving history revealing the centrality of Title VII to the development of the Second Wave women's rights movement, see RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 70–81 (2000).

3. STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* (2004).

4. *TAKING SEX DIFFERENCES SERIOUSLY*, <http://www.faculty.virginia.edu/sexdifferences> (last visited Mar. 31, 2015).

men. Thus, making progress under Title VII has required successive waves of reformers to resist, anew, the age-old impulse to explain away workplace inequality as the expression of women's own deepest desires and truest selves. Advancing workplace equality has meant taking on common sense assumptions about who "women" are, what they want, and what they should do (while implicitly disputing parallel assumptions about men). More than anything, it has meant challenging difference.

This Article examines the critical link between challenging sex difference and achieving greater equality under Title VII. Over the past three decades, a vibrant literature has explored the critical role of the twentieth century movements for civil rights, women's rights, and gay rights in advancing laws to eliminate discrimination and promote equality.⁵ Newer work emphasizes how a wide array of social actors, including public officials, the press, social activists, lawyers, employers, workers, and ordinary citizens, shape the law's content and development; officials and staff within multiple governmental entities, including executive offices, agencies, courts, and legislatures, participate in the process.⁶ Over time, these diverse actors all help elaborate the meaning of these laws and entrench the underlying constitutional values.⁷ Some

5. Civil rights history has emphasized the influence of social movements on the law. For a recent review of developments in civil rights history over the past three decades, see Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2317–27 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012) [hereinafter MACK, *REPRESENTING THE RACE*]), where Goluboff collects sources and describes the general trends. For a somewhat different characterization of those trends, see Kenneth W. Mack, *Civil Rights History: The Old and the New*, 126 HARV. L. REV. F. 258, 258–60 (2013) [hereinafter Mack, *Civil Rights History*], and Kenneth W. Mack, *Bringing the Law Back into the History of the Civil Rights Movement*, 27 LAW & HIST. REV. 657, 658–61 (2009) [hereinafter Mack, *Bringing the Law Back*]. For an early, influential article that called on legal historians to take up new methods and perspectives, including a bottom-up study of how social actors shaped the content and meaning of constitutional law, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013, 1032–33 (1987).

Legal scholarship has also highlighted the importance of social movements to legal change. For analyses of how twentieth century social movements created a shared constitutional vision that shaped the law, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2194–2353 (2002) [hereinafter Eskridge, *Some Effects*], and William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 491–509 (2001) [hereinafter Eskridge, *Channeling*].

6. For a review of work in civil rights history examining the contribution of various social and governmental actors, see Goluboff, *supra* note 5, at 2319–22. Goluboff concludes that, overall, the literature portrays "law creation as a dynamic and multidimensional process that involves both conflict and collaboration" between multiple actors, including judges, government officials, social movement activists, lawyers, and laypeople. *Id.* at 2320–21. For sociological work emphasizing the role of employers in elaborating the meaning of Title VII, see FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 220–21 (2009). For legal scholarship melding history, political science, and legal theory to analyze the role of multiple governmental actors in effectuating civil rights reforms, see 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 174–99 (2014), and WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 29–74, 209–53, 349–86 (2010).

7. For recent theoretical accounts of how constitutional values are given life not primarily through Supreme Court cases interpreting the text of the Constitution, but instead through the actions of executive officials, agency administrators, lower federal court judges, and federal and state

research specifically examines how women's rights activists inside and outside the government actively influenced and were influenced by the development of sex discrimination law, including Title VII's ban on sex discrimination.⁸

Historians and social scientists have told the story of how women's rights activists in the 1960s and 1970s launched a concerted challenge to commonly held stereotypes about women's difference.⁹ Before Title VII, American employers shared widespread social assumptions about the existence, content, and enduring quality of fundamental sex differences between men and women. In the eyes of employers, women naturally prioritized family caregiving over paid jobs; thus, women were not as serious about employment as their male counterparts and not suited for or interested in the same types of work. Citing these essential differences, employers routinely restricted women's employment prospects, relegating them to lower paying, less secure positions regarded as fitting for their sex.¹⁰ Title VII's sex amendment sparked a social transformation, prompting women's rights groups to abandon an older, protectionist view that defended such restrictions as a means of recognizing and accommodating women's special reproductive roles. Emerging leaders successfully reframed the women's movement around a new, anti-essentialist view that disavowed arguments rooted in sex difference and demanded that women receive the same rights and opportunities as men.¹¹ Building on the successes of the civil rights movement, early

legislators who dynamically engage with social movements and other popular constituencies to produce interpretations that are later consolidated by Congress and entrenched in the legal and social orders, see ACKERMAN, *supra* note 6, and ESKRIDGE & FERREJOHN, *supra* note 6.

8. For examples of work examining the relationship between the women's rights movement and Title VII in the 1960s and 1970s, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 205-54 (1990); CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 138-221 (1988); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 203-96 (2001); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 117-54 (2006); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 29-58 (2011); ROSEN, *supra* note 2, at 70-94; JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 111-19 (2002); and Eskridge, *Some Effects*, *supra* note 5, at 2129-38.

9. See, e.g., HARRISON, *supra* note 8, at 199-200, 217-21; MACLEAN, *supra* note 8, at 119, 129-30, 134, 148-49; MAYERI, *supra* note 8, at 32-33; SKRENTNY, *supra* note 8, at 119.

10. MACLEAN, *supra* note 8, at 123-26; see also KESSLER-HARRIS, *supra* note 8, at 45-53 (tracing such attitudes and discriminatory practices back to the era before World War I).

11. See Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1735-47 (2006) (discussing this transformation, and specifically showing how conflicts with the Equal Employment Opportunity Commission (EEOC) over Title VII's enforcement spurred women's rights activists, led by the nascent National Organization for Women (NOW), to abandon an older, protective cultural frame that stressed respecting women's special biological and social roles in favor of a new one that disavowed sex difference and demanded that women be granted the same opportunities and privileges as men in the workplace and throughout society). For a discussion of the sociological concept of cultural framing, the process through which activists mobilize cultural and legal symbols to create an "action-oriented sets of beliefs and meanings that inspire and legitimate the activities and campaigns of a social movement organization," see *id.* at 1720-21 (internal quotation marks omitted). For a similar but more top-down approach that stresses how governmental officials'

feminists insisted that sex discrimination was no different from race discrimination; they urged an end to sex-segregated employment as part of a larger attack on an increasingly obsolete male-breadwinner, female-caregiver family wage system that specified separate roles for men and women at work and at home.¹² By insisting that women were not fundamentally different from men in ways that mattered to employment, movement leaders articulated a clear, coherent feminist philosophy that demanded respect for women as equal wage earners and citizens and transformed the meaning of gender in society.¹³

Although legal scholarship has begun to explore these insights, the literature has not fully acknowledged how crucial the frontal assault on sex difference was to the successful development of sex discrimination law or how important such an effort remains today. Not only has legal scholarship traditionally underestimated the influence of employment on women's social, economic, and political status and personal self-perception;¹⁴ earlier work also minimized the degree of progress made in sex discrimination law by overlooking the complexity, depth, and

understandings of different social groups' meanings influence official views of policy relating to those groups, see SKRENTNY, *supra* note 8, at 9–16.

12. See, e.g., KESSLER-HARRIS, *supra* note 8, at 246 (noting that the alliance between race and sex discrimination “relocated disparate treatment because of sex from the venue of tradition to that of discrimination”); MACLEAN, *supra* note 8, at 147 (observing that NOW, using reasoning pioneered by civil rights lawyer and feminist Pauli Murray, argued that “[t]he excuses used by employers practicing sex-based discrimination are not substantially different from excuses regarding racial bias” and “can best be met by the same laws, agencies, investigators and government officials”); SKRENTNY, *supra* note 8, at 110–19 (showing that women's rights advocates inside and outside the government pressed the similarities between race and sex discrimination in an effort to secure equal access to all jobs for women and eventually persuaded the EEOC to support their position); Eskridge, *Some Effects*, *supra* note 5, at 2128–30 (explaining how Pauli Murray's work analogizing sex discrimination to race discrimination influenced Congress in enacting Title VII and shaped subsequent arguments made by NOW and other early women's rights advocates); see also MAYERI, *supra* note 8, at 2–8 (reviewing the ways in which feminist advocates in the 1960s and 1970s compared sex discrimination to race discrimination under the Fourteenth Amendment, Title VII, and other laws).

13. See, e.g., HARRISON, *supra* note 8, at 200 (emphasizing that NOW's separation of childbearing from childrearing, and insistence that both men and women could care for children and thus could be equally committed to work, permitted early feminists to demand an expansive equality no earlier group could claim); MACLEAN, *supra* note 8, at 149 (concluding that early feminists' demands for equal access to all jobs and the right to be treated as equals led to changes recognizing women as earners and rights-bearing citizens); ROSEN, *supra* note 2, at 75–78 (showing that NOW's founders rejected sexual difference and advocated giving women equal opportunity and freedom of choice, which required fundamentally transforming the workplace and the home and expanding democracy).

14. For a discussion of how feminist legal scholarship traditionally emphasized the role of heterosexual sexual relations and family arrangements in generating gender inequality, and neglected the influence of paid work, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1899 (2000) [hereinafter Schultz, *Life's Work*]. For an attempt to describe the potentially positive effects of paid work on women's status and identity, see *id.* at 1891–92, 1909–11. Historian Nancy MacLean also emphasizes the importance of job-holding for women's economic, political, social, and personal empowerment, particularly for women of color, and stresses that Black women, including early feminist leaders such as Pauli Murray and Eleanor Holmes Norton, understood this point particularly well. MACLEAN, *supra* note 8, at 6–7, 122–23, 127–28. MacLean laments that, outside of labor history, scholarship on race and gender has neglected studying employment as a central component of equality and inclusion. *Id.* at 342–43.

transformative quality of feminist challenges to difference. During the 1980s, for example, an influential body of feminist legal scholarship charged early women's rights activists with overemphasizing liberal rights to formal equality that merely opened traditionally male roles to women, while allegedly neglecting the interests of women of color, poorer women, and other women who could not or would not take on such roles.¹⁵ This older body of criticism has itself come under recent challenge, as newer legal scholarship has begun to reexamine and rehabilitate the work of early feminists. Contrary to the anti-liberal critique, the newer legal histories suggest that early activists were a racially diverse group who pursued a rich agenda of economic and social independence for women that included equal employment, reproductive choice, and subsidized childcare as part of a larger project of upending the family wage system.¹⁶ Such broader, more accurate portrayals of early feminists' aims and contributions are critically important to future reform efforts, because perceptions of the past inevitably shape evaluations of present circumstances and future possibilities. Overall, however, this promising new line of work reaches no consensus about such contemporary implications, nor does it emphasize the crucial contribution or continuing necessity of challenging difference.¹⁷

15. See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, in FEMINIST LEGAL THEORY: FOUNDATIONS 221, 225 (D. Kelly Weisberg ed., 1993) (criticizing early feminists for pursuing formal equality strategies that harmed ordinary wives and mothers); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 36 n.38 (1990) (stating that "[e]qual treatment also has contributed to the oppression of women, particularly poor, nonprofessional women"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290-91, 1296-97 (1991) (criticizing liberal feminists for seeking reforms that did not benefit women of color and only helped women who conform to traditionally male life plans); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 427 (1981) (arguing that the early feminist focus on formal equality advantaged elite women and neglected the effects of socioeconomic class). See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 208-10, 217-26 (2000) (providing an overview of such feminist criticisms). For further discussion of this body of work that emerged in the 1980s, see *infra* note 444.

16. For older examples of legal scholarship defending early women's rights reformers against later anti-liberal feminist critics' charges, see WILLIAMS, *supra* note 15, at 205-42 (disputing that early feminists ignored the needs of average women who take care of families); Eskridge, *Some Effects*, *supra* note 5, at 2130-31 (arguing that early feminists sought not only formal equality, but also an end to separate spheres as a system and ideology). For more recent examples of this work, see MAYERI, *supra* note 8, at 45-50 (recognizing that early women's rights advocates were a racially diverse group who attempted to address the problems faced by women from all walks of life, not only elite women); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 419 (2011) (showing that early feminists pursued not only formally equal treatment, but also "the redistribution of the costs of pregnancy, childbirth, and childrearing"); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83, 88 (2010) (reiterating that Ruth Bader Ginsburg's goal in bringing the early equal protection cases was to prevent legal and other institutions from prescribing sex roles for both women and men, not simply to end formal legal classifications based on sex).

17. Serena Mayeri's important book, for example, focuses on how women's rights activists deployed the analogy between race and sex discrimination to strategic advantage in the 1960s and 1970s, only to have it limit advances beginning in the 1980s. MAYERI, *supra* note 8, at 45-46, 187. She does not, however, emphasize the lasting contribution that activists' challenge to sex difference made to the law's development. Scholars outside of the law have come closer to doing so, see *supra*

This Article contributes to and extends this newer literature by demonstrating the original and ongoing importance of challenging essentialist ideas about sex difference in order to advance equality under Title VII. Specifically, I offer evidence that the presence or absence of visible, cohesive feminist efforts to challenge sex difference as a rationale for inequality helps explain Title VII's successes and failures. In the first decade of enforcement, my analyses show, agencies and courts adopted expansive readings of Title VII largely because the leaders of the women's rights movement conveyed a clear, concerted demand for the law to stop relying on outdated assumptions about sex difference and start treating women as equal earners and citizens entitled to the same rights and responsibilities as men. This message captured growing public sentiment and created pressure for change that led to many important reforms under Title VII. Yet my case studies suggest that this effect was not universal. In areas of law where early feminists did not campaign to challenge difference, or where they later took a less decisive or divided stance as the women's movement began to fade and fracture, the absence of visible, unified feminist pressure permitted judges to retain or retreat back to older, biased views attributing workplace inequality to women's own preferences.

Although case studies alone cannot support general conclusions about the reasons for stalled progress, the analyses here generate important observations that merit further examination in future research. Methodologically, I suggest, it is crucial for scholars to consider not only the influence of a social movement overall, but also the rise of internal divisions *within* the movement and changes in its presence, visibility, and strength over time, in shaping legal developments.¹⁸ Substantively,

note 13 and accompanying text, but they have not analyzed in detail how the legal system sometimes accepted and sometimes rejected feminist challenges to difference and have not theorized those trends, as I do here.

18. In highlighting these previously neglected factors, I do not mean to suggest they are the only ones that can weaken a social movement's influence on courts and policy makers. For example, scholars have also shown the impact of counter-movements, or social movements that arise to resist or roll back initial reforms. *See, e.g.,* Eskridge, *Channeling*, *supra* note 5, at 467–78; Tahi L. Mottl, *The Analysis of Countermovements*, 27 SOC. PROBS. 620, 620–24, 628–29 (1980); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1362–66 (2006).

In addition, forces other than social movements, including broad economic, political, ideological, and cultural transformations, also contribute significantly to the law's development; scholars too numerous to cite have discussed the influence of such changes on civil rights law. *See, e.g.,* MACLEAN, *supra* note 8, at 336–47 (explaining how the economic downturn and the rise of conservative politics and ideology stalled Title VII reforms); MAYERI, *supra* note 8, at 78–86, 187–91, 199–200, 227 (describing how the rise of political conservatism halted progress under sex discrimination law). But such macro-level changes also affect, and are affected by, the trajectory and strength of social movements and the counter-movements that arise in response. *See, e.g.,* MACLEAN, *supra* note 8, at 337 (explaining how economic recessions in the 1970s severely impacted the industries in which the civil rights movement had made the most progress, reducing the public's perception of the strength of the movement); Cynthia Harrison, *Creating a National Feminist Agenda: Coalition Building in the 1970s*, in FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES 19, 42 (Stephanie Gilmore ed.,

moreover, it is important to expose and analyze the taken-for-granted cultural assumptions that activists sought to challenge as part of the law reform process. Those assumptions reveal not only the progressive pressure points, but also the conservative baselines to which legal decision makers may retreat in the absence of ongoing, concerted demands for change. In considering how the women's rights movement's shifting strength and visibility, internal conflicts, and substantive demands affected Title VII's reach, and in supplementing the historical analysis with newer legal theories and social science evidence, my approach aligns with recent scholarship that draws eclectically from diverse scholarly traditions to understand the law's history and suggest a way forward.¹⁹

The Article begins with a look backward to analyze the lessons and limits of the law. Part I shows that Title VII has facilitated major advances toward eliminating sex discrimination in the workplace, but progress has been uneven and difficult to achieve. From the beginning, reform has been threatened by widely shared, biased assumptions about women's work priorities that deny the very need for legal intervention. Persistent stereotypes hold that, due to innate and cultural sex differences, women are naturally more devoted to family roles, and less committed to and capable at careers or jobs, than men. Similar stereotypes depict women who do work as primarily interested in female-typed jobs said to reward feminine traits and values. Viewed through the lens of such biases, sex-segregated employment and unequal pay do not reflect illegal workplace discrimination—only women's inevitable preferences.

Part II analyzes the conflicts surrounding Title VII's enactment and early enforcement, showing that early women's rights activists continually confronted public and private expressions of such bias, promoted even by officials at the agencies responsible for implementing Title VII's ban on sex discrimination. Ironically, these officials' refusal to take sex discrimination seriously brought once-divided women's groups together to challenge prevailing stereotypes, galvanizing public support and persuading agencies, courts, and Congress to adopt expansive interpretations of the law.

Part III demonstrates that these early advances were neither universal nor unstoppable, showing how progress stalled or reversed where the women's movement failed to exert or sustain a significant, cohesive presence challenging arguments rooted in women's difference. In cases

2008) (discussing the challenges faced by feminist groups and the changing agendas they adopted in response to the rise of conservatism in the Reagan era).

19. Cf. Mack, *Civil Rights History*, *supra* note 5, at 261 (discussing how newer legal histories feel free to draw on recent intellectual currents to deploy tools and methodologies considered outside the traditional law and society repertoire).

alleging women's so-called lack of interest as a defense to sex discrimination, feminist groups' failure to systematically contest this obscure defense in the courts and agencies, followed by renewed internal division over questions of sex difference that signaled disagreement about women's priorities, freed conservative judges to apply sex-biased assumptions and evidentiary standards that uncritically ascribed unequal employment patterns to women's own preferences. Similarly, in pregnancy discrimination cases, after initial waffling and hard-won victories the feminist consensus in favor of comparing pregnancy to disability for job-related purposes broke down, permitting courts to return to older views of pregnancy as unique and unlike other disabilities to uphold decisions denying pregnant women the same protections as similarly disabled employees. These case studies highlight that Title VII setbacks do not always arise from structural changes in employment, employment discrimination, or the economy. Important legal reversals also result from underlying continuities in conventional social attitudes. When reformers fail to exert clear, strong, concerted pressure on legal institutions to renounce stereotyped assumptions, the resulting void of informational accuracy and public accountability makes it possible for courts and policymakers to resurrect the very biases the law was meant to eradicate.

Part IV looks ahead, asking what can be done. For the foreseeable future, I argue, further progress will require continuing to challenge difference as a rationale for inequality—this time contesting not only the existence and relevance of alleged group-based differences, but also their presumed stability and sources. Recent research confirms that many of the very sex- and race-based differences cited to explain inequality at work are instead actually created there through practices that elicit and exaggerate the expected group-based behaviors, thus confirming negative stereotypes and rationalizing further discrimination. This Part suggests how such new evidence might be used to launch a renewed challenge to workplace discrimination, one that seeks to change practices that foster a negative sense of difference and division and ultimately aims to unite employees across perceived boundaries of preexisting difference. Ultimately, I conclude, taking employment discrimination seriously requires taking sex difference seriously, continually confronting outdated perceptions with emerging facts, overcoming preexisting divisions through new connections, and clarifying that men and women from all walks of life stand to gain from greater freedom to forge their own identities and lives, as feminist reformers taught from the beginning.

I. TITLE VII'S IMPORTANT BUT LIMITED REACH

Each time I teach employment discrimination law, I begin the same way. Conscious that most of my students have gone straight through school without spending any real time in the working world, I tell them that this body of law is important because work is important. In our society, work not only provides the means to live; it also confers social

status, dignity, and a sense of self.²⁰ I read to my students testimonials to work's significance by diverse thinkers: Adam Smith, Karl Marx, Rosabeth Moss Kanter, Herbert Hill.²¹

To place the study of employment discrimination law into some social and historical context, I describe the severe race- and sex-based disparities that characterized the American labor force at the time of Title VII's passage. I then quote Daniel Patrick Moynihan's 1960s statement about how inequality in employment profoundly affects everything else:

The principal measure of progress toward equality [is] that of employment. It is the primary source of individual or group identity. In America what you do is what you are: to do nothing is to be nothing; to do little is to be little. The equations are implacable and blunt, and ruthlessly public.²²

Title VII is America's major achievement in acknowledging and addressing these harsh realities. Recognizing work's significance and its inequalities reminds us of why it is important to understand the lessons and limits of the law. With these observations in mind, I assess below the past fifty years, examining the overall advances that have occurred since Title VII's passage, while also noting the areas of stalled progress, and explicating the biased assumptions that undermine the law's promise.

A. Uneven Progress Toward Workplace Sex Equality

Title VII has catalyzed profound changes in the American workforce. These changes have created possibilities for many women and men that could scarcely be imagined before its enactment. The educational and employment opportunities available to me, for example, were vastly different from and superior to the ones open to my mother. Married as a teenager and unable to afford college, she worked her whole life in pink-collar jobs, struggling for respect, decent pay, job security, and ultimately the right to draw unemployment compensation when, despite her successful performance, she was fired for having the temerity

20. For my own attempt to capture the meaning of work in people's lives, see Schultz, *Life's Work*, *supra* note 14. For an illuminating discussion of this issue, see also MACLEAN, *supra* note 8, at 6-7 (discussing how employment is "a key site in determining personal well-being and communal power" and that American society has an "entrenched culture of exclusion that long restricted to white men . . . [the] most desirable jobs at all class levels").

21. Rosabeth Moss Kanter begins her classic book, *Men and Women of the Corporation*, by observing:

The most distinguished advocate and the most distinguished critic of modern capitalism were in agreement on one essential point: the job makes the person. Adam Smith and Karl Marx both recognized the extent to which people's attitudes and behaviors take shape out of the experiences they have in their work.

ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 3 (1977); see also HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 34 (1977) (observing that "the most significant source of identity for western men and women" is work).

22. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 124 (1968) (quoting Daniel P. Moynihan).

to challenge her superiors. By the time I came of age, the social landscape had changed enough to allow an upwardly mobile girl to move away from home to attend a state university and to dare to become a lawyer. My own teenage daughter inherits a world that is even more open than her grandmother's or her mother's. In her first year of college, she aspires to have a career in science or architecture, or both, undaunted by the fact that these fields remain almost entirely populated by men.²³ These generational changes reflect nothing short of a revolution.

My family's narrative provides a window into some of the achievements and limits of the civil rights revolution for women.²⁴ Evidence suggests that today girls and women participate more fully and perform better in school, at all levels, than boys and men.²⁵ The gender gap in employment and wages has declined significantly since the 1960s; women now graduate from college at higher rates than men and have made substantial gains in many professions.²⁶ That said, overall trends in occupational segregation by sex are telling, as they are an important indicator of workplace inequality.²⁷ In the 1970s, sex segregation

23. Evidence from extensive surveys and interviews suggests that sex and race discrimination permeate the architectural profession. See, e.g., KATHRYN H. ANTHONY, *DESIGNING FOR DIVERSITY: GENDER, RACE, AND ETHNICITY IN THE ARCHITECTURAL PROFESSION* 1–2, 133–65 (2001). According to a 2012 American Institute of Architects survey, women make up 49% of architecture students and 39% of interns, but only 17% of firm principals and partners. Amanda Kolson Hurley, *Double Whammy: Would There Be More Women in Architecture If There Were More Women in Development?*, *ARCHITECT*, Sept. 17, 2012, <http://www.architectmagazine.com/architects/would-there-be-more-women-architects-if-there-wer.aspx>. Women are similarly underrepresented in the sciences, comprising, according to a 2013 National Science Foundation report, only about 28% of employed scientists and engineers, in a workforce that remains “largely white and male.” NAT'L CTR. FOR SCI. & ENG'G STATISTICS, NAT'L SCI. FOUND., *WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2013*, at 8 (2013), available at http://www.nsf.gov/statistics/wmpd/2013/pdf/nsf13304_full.pdf. Recent research suggests that sex discrimination continues to plague the hard sciences. See, e.g., Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 *PROC. NAT'L ACAD. SCI.* 16474, 16474 (2012), available at <http://www.pnas.org/content/109/41/16474.full.pdf>; Ernesto Reuben, Paola Sapienza & Luigi Zingales, *How Stereotypes Impair Women's Careers in Science*, 111 *PROC. NAT'L ACAD. SCI.* 4403, 4403 (2014), available at <http://www.pnas.org/content/111/12/4403.full.pdf+html>.

24. For the trends and sources cited in this paragraph and the next, I am indebted to a recent summary by sociologist William Bielby. See generally William T. Bielby, *The Challenge of Effective Interventions: Alternative Paths to Minimizing Workplace Gender Bias*, in *GENDER & WORK: CHALLENGING CONVENTIONAL WISDOM* (2013), available at <http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/bielby.pdf>.

25. See THOMAS A. DIPRETE & CLAUDIA BUCHMANN, *THE RISE OF WOMEN: THE GROWING GENDER GAP IN EDUCATION AND WHAT IT MEANS FOR AMERICAN SCHOOLS* 27–29, 51, 79–81 (2013) (documenting female gains).

26. *Id.* at 27; David A. Cotter, Joan M. Hermsen & Reeve Vanneman, *Gender Inequality at Work*, in *THE AMERICAN PEOPLE: CENSUS 2000*, at 107, 109 fig.1, 116, tbl.5 (Reynolds Farley & John Haaga, eds., 2005).

27. Occupational segregation deprives women of access to the typically higher paying positions occupied mostly by men, reduces women's wages as compared to men, and robs them of upward mobility and freedom of occupational choice. David A. Cotter, Joan M. Hermsen & Reeve Vanneman, *Still Stalled? Occupational Gender Desegregation 1950–2010*, 3 (Aug. 2012) [hereinafter Cotter, *Still Stalled*] (unpublished manuscript) (on file with author) (listing studies linking segregation to pay differences, access to authority, and opportunities for advancement); Schultz, *Life's Work*, *supra* note 14, at 1894 n.40 (citing studies explaining that occupational sex segregation

declined dramatically for the first time, as women moved into fields formerly populated by men.²⁸ Integration continued, but the rate declined in the 1980s, slowed in the 1990s, and stalled completely by 2000.²⁹

These early gains occurred mainly because women moved into formerly male middle-class jobs, and because integrated sectors of the economy expanded more than male-dominated sectors such as manufacturing.³⁰ Overall, more progress has occurred for college-educated women than for less educated women,³¹ and more for white women than for Black women, whose progress began to stall in the 1980s.³² Future strides in achieving integration and deriving the associated benefits will require making more progress for these women, as well as moving substantial numbers of men into traditionally female jobs.³³ Not only do women in blue- and pink-collar fields continue to face barriers: Well-educated women still have difficulty moving into the top echelons of the corporate and professional worlds,³⁴ and mothers face wage penalties and promotional limits that fathers do not.³⁵

is the largest reason for the male-female wage gap); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1757 n.394 (1998) [hereinafter Schultz, *Reconceptualizing*] (same); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 n.2 (1990) [hereinafter Schultz, *Telling Stories*] (same). Part of this wage gap is due to overcrowding, even in the jobs traditionally held by women. See David A. Cotter et al., *All Women Benefit: The Macro-Level Effect of Occupational Integration on Gender Earnings Equality*, 62 AM. SOC. REV. 714, 715, 726, 728 (1997). Being relegated to different forms of employment also negatively affects women's social status and creates a sense that they are second-class citizens. MACLEAN, *supra* note 8, at 6–7 (explaining the sense of stigma and ostracism that people who are confined to a restricted range of less desirable jobs feel); Schultz, *Reconceptualizing*, *supra*, at 1756–61 (explaining the link between occupational sex segregation and hostile work environment harassment); Schultz, *Telling Stories*, *supra*, at 1751 n.2 (explaining how jobs done predominantly by women tend to have less prestige than those done by men).

28. Cotter, *Still Stalled*, *supra* note 27, at 11.

29. See *id.* at 14.

30. Bielby, *supra* note 24, at 6; Cotter, *Still Stalled*, *supra* note 27, at 11–13, 15.

31. KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 224 (2012) (finding that “industries that require a higher proportion of their employees to hold college degrees tend to exhibit lower levels of segregation and higher employment of white women, black women, and black men in good-quality jobs”).

32. *Id.* at 167–69, 245 (showing that progress toward gender integration stalled for Black women in the 1980s, and that occupational segregation by race between white and Black women increased in 43% of industrial categories from 1990 to 2005).

33. Bielby, *supra* note 24, at 6 (citing Cotter, *Still Stalled*, *supra* note 27, at 15).

34. For recent evidence, see Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1555, which showed that

[a]lthough women have been graduated from law, graduate business (MBA), and medical schools since the mid-1970s at a 30% rate, escalating to well over 40% in the 1990s, women constitute only 3.5% of the corporate CEOs, 14% of the executive managers, and 12.5% of the corporate directors, holding approximately 16% of the board seats in the Fortune 500.

For an earlier federal government report investigating the low number of women and minorities in executive positions, see U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 6 (1991), which found in a three-year study of Fortune 1000 companies that women represented 37.2% of employees, 16.9% of management, and 6.6% of executive-level management. This report used the

Despite these uneven gains, a broad snapshot of Title VII law's achievements taken today would reveal a far different picture than one taken in 1964: Congress, courts, agencies, state governments, employers, and labor unions have assembled a vast and impressive set of regulatory protections against sex discrimination. These laws and policies prohibit forms of discrimination that had not been conceived, let alone articulated, when Title VII was enacted. Who would have imagined the law addressing single-sex hiring, sex-plus discrimination, disparate impact discrimination, sexual harassment, pregnancy discrimination, intersectional discrimination, affirmative action, sex stereotyping, same-sex harassment, caregiver discrimination, discrimination based on gender identity, and, within the foreseeable future, sexual orientation?³⁶ Or predicted that these rulings would be extended to men as well as women,³⁷ creating possibilities for greater movement and understanding across previously settled boundaries of sex and gender?

As important as it is to acknowledge the overall progress, such a snapshot view obscures the difficult process of achieving change under Title VII—the resistance, defeats, and sheer struggle that preceded and often accompanied its hard-won safeguards.

B. Persistent Bias About Sex Difference

From the beginning, those who sought to eliminate workplace sex discrimination have had to confront society's widespread failure to take

term “glass ceiling” to refer to “those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in their organization into management level positions.” *Id.* at 1.

35. See, e.g., Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219 (2001) (finding a motherhood wage penalty of about 7% per child for young American women); Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 1 (2003) (using the term “maternal wall” to describe the discrimination that mothers, as opposed to women generally, face in the labor market).

36. For examples of these developments roughly in the order in which they occurred, see *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (single-sex hiring); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (sex-plus discrimination); *Dothard v. Rawlinson*, 433 U.S. 321, 331–32 (1977) (disparate impact discrimination); *Barnes v. Costle*, 561 F.2d 983, 990–92 (D.C. Cir. 1977) (quid pro quo harassment); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, (codified at 42 U.S.C. § 2000e(k) (2012)) (pregnancy discrimination); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032–35 (5th Cir. 1980) (intersectional discrimination); *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (sex stereotyping); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–81 (1998) (same-sex harassment); EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007) (caregiver discrimination); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008) (gender identity discrimination); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (sexual orientation discrimination).

37. For an early example, see *Diaz*, 442 F.2d at 386–88, where the court invalidated female-only hiring for flight attendants in a challenge brought by a male plaintiff. For a more recent case, see *Oncale*, 523 U.S. at 79–81, where the Court held that Title VII permits male plaintiffs to sue for hostile work environment perpetrated by male supervisors and coworkers. For a discussion of the importance to men of challenging occupational sex segregation and other prescribed gender roles, see *infra* notes 251–53 and accompanying text.

women as seriously as men in the realm of employment. Historically, workplace inequalities between men and women have been based on a biased set of attitudes and assumptions casting women as secondary workers³⁸—reluctant entrants to the world of work who are not as serious, or to be taken as seriously, in their career or job roles. Women may work for a living, according to this view, but that does not make them equal to their male counterparts. Even when they are employed, women remain fundamentally creatures of the family and not of the workplace. Thus, when they work, women will naturally be found in jobs that reflect their differences and befit their status as secondary, less skilled, less stable workers.³⁹

Underlying this view is a complex set of overgeneralized assumptions—or stereotypes⁴⁰—about sex differences between women and men. Oversimplified, the key assumptions include the following:

1. Women are different from men in fundamental ways that affect their work preferences, commitments, and capacities. Women are emotional, men are logical; women are cooperative, men are competitive; women are weak, men are strong; women are passive, men are active; women are caring, men are competent; and so on.⁴¹ Women's distinctive attributes suit them for allegedly more nurturing family roles, while men are better suited for more competitive work roles.⁴²

38. See KESSLER-HARRIS, *supra* note 8, at 3–15 (giving a historical overview of how such sex-biased assumptions led to and legitimated women's lack of economic citizenship and second-class status as workers); see also Schultz, *Life's Work*, *supra* note 14, at 1892–94, 1898. In earlier work, I used the term “inauthentic workers” to refer to the ongoing, biased view of women as earners, see, e.g., *id.* at 1892, even though I was acutely aware of its inadequacies. For one thing, the term “workers” is both over- and under-inclusive of the many types of formal and informal arrangements under which people work for pay; the word also has a blue-collar ring that does not begin to capture the diversity of people's work experiences. The term “inauthentic” is similarly problematic. The reference to authenticity was not meant to imply that there is a set of subjective or objective experiences that somehow defines the essence of being a genuine or “real” worker. Rather, it was meant to suggest that, whatever the traits or qualities thought to define being a competent, capable, committed worker, women are often regarded as lacking them.

39. See generally KESSLER-HARRIS, *supra* note 8, at 241 (explaining that, as late as the eve of Title VII, “[m]any continued to view women's marginal places in the workforce as natural, even positive, corollaries to prevailing family roles rather than as products of prejudice, bias, or discrimination”).

40. Social psychologists define stereotypes as “associations and beliefs about the characteristics and attributes of a group and its members that shape how people think about and respond to the group.” John F. Dovidio et al., *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 3, 8 (John F. Dovidio et al. eds., 2010) [hereinafter SAGE HANDBOOK].

41. See, e.g., Peter Glick & Laurie A. Rudman, *Sexism*, in SAGE HANDBOOK, *supra* note 40, at 328, 330, 332–33 (collecting studies showing that across many cultures men are assigned traits associated with power, status, activity, and competence, while women are assigned the opposite ones); CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 58 (2011) (“Men are rated more highly than women on agentic qualities such as instrumental competence, assertiveness, confidence, independence, forcefulness, and dominance. Women are rated more highly than men on communal attributes such as emotional expressiveness, nurturance, interpersonal sensitivity, kindness, and responsiveness.”).

42. See, e.g., Glick & Rudman, *supra* note 41, at 334 (citing research finding that women are valued for being “warm, kind, interested in children, loyal, and sensitive—traits that most directly

2. Women are committed first and foremost to their domestic roles, most importantly to their roles as mothers. As a result, women automatically prioritize family life over paid work and prefer jobs that more readily accommodate their family responsibilities or attach greater reward to their distinctively feminine attributes or values.⁴³

3. As a result of their distinctive attributes, women do not have the same level of commitment to paid work as men, nor do they develop the same level of work competence,⁴⁴ particularly in fields that reward and rely on what are seen as distinctively masculine traits.⁴⁵

4. These sex differences are fundamental and relatively fixed. Rooted in women's nature or psychology or deep-seated social conditioning, these early preferences persist over time and drive women's job choices and behavior throughout their lives.⁴⁶

5. Thus, according to this view, patterns that appear to reflect discrimination or inequality at work are actually a manifestation of women's basic differences from men—sex differences that make women less interested in and less qualified for the jobs typically held by men.

suit them to their prescribed role as doting mothers and loyal wives," while men are valued for "business sense, athleticism, leadership ability, and self-reliance—traits that fit their traditional role as protectors . . . and providers"); Amy J. C. Cuddy & Susan T. Fiske, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 706 (2004) (observing that "[t]he belief that women should be the primary caregivers and men the primary breadwinners is a long-standing part of traditional American culture. To view working moms as more motherly than professional, as more nurturing than task-oriented, upholds the social structure that advances this caregiver/breadwinner ideology" (citation omitted)).

43. Sociologist Mary Blair-Loy calls this key assumption the "family devotion schema"—the idea that "[w]omen's devotion to the family trumps all other commitments" and that "[e]ven if they also do paid work, their primary duty lies in giving their children absorbing and time-consuming care." MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 52 (2003). She defines schemas as "frameworks for viewing, filtering, understanding, and evaluating what we know as reality." *Id.* at 5. She concludes that even though this schema was challenged by women's rights activists in the 1970s, "[n]onetheless, the family devotion schema maintains a strong grip on many people's hearts and minds." *Id.* at 52. Psychologists, as early as the 1970s, confirmed the existence of this schema. *See, e.g.*, Nancy Felipe Russo, *The Motherhood Mandate*, 32 J. SOC. ISSUES 143, 144 (1976). Modern studies in both experimental and real-world settings confirm the perceived tension between mothers' devotion to family and dedication to work. *See, e.g.*, Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298, 1306–07, 1326 (2007).

44. *See, e.g.*, Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 544 (1997) (showing women were perceived to be less competent than men and thus given lower minimum competency standards); *see also* Cuddy & Fiske, *supra* note 42, at 711, 715 (reporting that when working women become mothers, they are viewed as more warm but less competent and less committed to their jobs, whereas when men become fathers, they are viewed as more warm, yet still just as competent).

45. *See, e.g.*, Glick & Rudman, *supra* note 41, at 331 (collecting research finding that women are not viewed more negatively or treated less favorably than men in all contexts, but rather only selectively so when they occupy allegedly masculine domains, including occupational and other powerful social roles typically associated with males).

46. *See* Schultz, *Life's Work*, *supra* note 14, at 1892–98 (discussing this presumption and related social science research).

I have stated these assumptions in descriptive terms, but stereotypes have both descriptive and prescriptive elements, simultaneously projecting a set of distinctive group-based characteristics onto a group of people and implicitly conveying expectations about how members of that group should behave.⁴⁷ Restating the assertions prescriptively goes something like this: Women are better suited for domestic roles, so they should prioritize and perform them. Women should sacrifice or cut back on their work roles, ceding workplace supremacy to men. When women do work for pay, they should stick to jobs that honor their femininity and family roles and not pursue jobs for which men are better suited. And so on.

Three important points bear emphasizing here. First, this view of women and work is race-biased, and undoubtedly biased along other axes of inequality, as social expectations and assumptions vary for different women and in different contexts. Black women, for example, are subject to different pressures and stereotypes concerning work than white women.⁴⁸ Black women are expected to work for pay, often at the most difficult, low-paying jobs, regardless of their status as mothers.⁴⁹ There is evidence that Black mothers themselves are more likely to consider maternal employment ideal for children and are more likely to be employed, than other groups.⁵⁰ Despite these patterns, persistent stereotypes still portray Black women as less committed to and less capable in their jobs.⁵¹ Latina women, especially the foreign born, are

47. Dovidio et al., *supra* note 40, at 7–8; *see also* Glick & Rudman, *supra* note 41, at 334, 336–40 (discussing descriptive and prescriptive dimensions of stereotypes).

48. *See, e.g.*, Irene Browne & Ivy Kennelly, *Stereotypes and Realities: Images of Black Women in the Labor Market*, in *LATINAS AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER, AND ECONOMIC INEQUALITY* 302, 302–26 (Irene Browne ed., 1999) (finding that employers hold negative stereotypes that are specific to Black women); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 181, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CALIF. L. REV. 775, 784–86 (1991) (concluding that race and sex stereotyping “ha[ve] deeply affected the employment experience of women of color” and providing a brief historical overview of the experiences of Black women in the United States and the associated stereotypes).

49. *See, e.g.*, Amy J. C. Cuddy & Elizabeth Bailly Wolf, *Prescriptions and Punishments for Working Moms: How Race and Work Status Affect Judgments of Mothers*, in *GENDER & WORK: CHALLENGING CONVENTIONAL WISDOM*, *supra* note 24, at 4 (observing that, “dating back to slavery, Black mothers have been [and continue to be] expected to participate in the labor force,” while “white mothers are expected to stay home with their children”); *cf. id.* at 7–9 (finding in experiments that white mothers were viewed as more hard-working if they stayed home with their children than if they worked for pay, whereas Black mothers were viewed as more hard-working if they worked for pay than if they stayed home with their children).

50. PEW RESEARCH CENTER, *FROM 1997 TO 2007: FEWER MOTHERS PREFER FULL-TIME WORK* 5 (2007), *available at* <http://www.pewsocialtrends.org/files/2010/10/WomenWorking.pdf> (finding that “African-American mothers . . . are more likely than white or Hispanic mothers to consider employed moms—especially full-time working moms—ideal for children”); U.S. BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATABOOK* 18–19 (2014), *available at* http://www.bls.gov/opub/reports/cps/womenlaborforce_2013.pdf (reporting that 75.3% of all Black women with children under the age of 18 were in the labor force, compared with 70.6% of similar white women, 63.6% of similar Asian women and 64.0% of similar Hispanic women).

51. *See, e.g.*, Browne & Kennelly, *supra* note 48, at 319–20 (finding that white employers assumed Black female employees were single parents even though a majority were not, and also assumed that their status as single parents would lead to poor job performance); Ashleigh Shelby

also subjected to negative stereotypes, assumed to be undocumented immigrants who are not only working, but also reproducing irresponsibly and depleting public resources.⁵² Lesbians, by contrast, frequently are assumed to be childless by choice and thus may be perceived as more committed to their jobs and less negatively affected by motherhood, than most other women.⁵³

Second, and relatedly, then, the overarching cultural schema does not presume that women do not or should not ever work for pay; it acknowledges that many do so. The understanding is, rather, that women who work will prefer and prepare for different jobs than men—typically, traditionally female jobs believed to be especially fitting for the particular women based on applicable stereotypes. For some women, the imagined job fit will turn on the perceived constraints of family roles; for others, it will turn on constraints attributed to physical or cultural differences. Ultimately, however, although the specific content of the stereotypes may vary by race, class, and other social characteristics, the overarching view of women as secondary workers remains, rationalizing not primarily women's total exclusion from, but instead their subordinate position within, the world of work.

Finally, it is worth underscoring that this biased view of women has important implications for men, as well as women. Overall, assumptions about sex differences justify a system of occupational segregation by sex (stratified by race, class, and so on) that relegates different groups of women to separate and unequal jobs, while reserving many superior opportunities for men. This set of arrangements benefits men unevenly, just as it does women. Furthermore, the same biased system that assigns certain preconceived attributes and roles to women assigns other corresponding ones to men. Thus, ultimately, these biases limit equality and freedom for both sexes in the name of sex difference, as discussed more fully below.

Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 409 & n.15 (2007) (stating that "traditional American culture views Black women . . . as less intelligent, competent, and dependable in their professional positions than their White counterparts" and citing studies to support this point).

52. See, e.g., ALEJANDRA MARCHEVSKY & JEANNE THEOHARIS, NOT WORKING: LATINA IMMIGRANTS, LOW-WAGE JOBS, AND THE FAILURE OF WELFARE REFORM 16–17 (2006).

53. Unlike other women, lesbians are frequently assumed not to wish to bear or raise children. See, e.g., Letitia Anne Peplau & Adam Fingerhut, *The Paradox of the Lesbian Worker*, 60 J. SOC. ISSUES 719, 727 (2004) (citing Mary E. Kite & Kay Deaux, *Gender Belief Systems: Homosexuality and the Implicit Inversion Theory*, 11 PSYCHOL. WOMEN Q. 83, 88 (1987)). However, a significant number of lesbians do have or want children. See DAVID M. BRODZINSKY & ADAM PERTMAN, ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY 13 (2011) (stating that one in three lesbian women in the United States are raising children and 41% of childless lesbians expressed a desire to parent a child). Studies reveal that lesbians may be stereotyped as being more committed to employment than heterosexual women, particularly when they become mothers, and that other people may assume heterosexual women have male breadwinners to support them while lesbian mothers are the breadwinners who now have additional financial responsibilities. See, e.g., Peplau & Fingerhut, *supra*, at 728–33.

II. EARLY STRUGGLES OVER THE MEANING OF SEX DISCRIMINATION

The image of women as secondary workers is deeply embedded in our nation's history, culture, and institutions; it is therefore unsurprising that this image has influenced interpretations of the law. From Title VII's inception, politicians, policymakers, the press, and even the agency officials charged with enforcing the statute endorsed these old stereotypes, exhibiting many of the same discriminatory attitudes that women faced from their employers and coworkers. Women's rights activists resisted, appealing to public support to secure interpretations that would promote equality on many levels: interpretations of Title VII as a genuine response to a social problem, not a fluke; interpretations of women workers as serious, not secondary; interpretations of sex-segregated employment as a reflection of discrimination, not choice; and so on. Congress, the agencies, and the courts responded. Over time, genuine legal innovation and social change occurred.

This Part examines the conflicts over interpretation that surrounded Title VII's passage, when activists struggled to rescue the statute from readings that would drain its transformative power. Scholars have highlighted the role of administrative agencies in implementing broad statutes like Title VII as a crucial part of the process of establishing constitutional norms.⁵⁴ The account here draws on such analyses, but isolates key factors not emphasized in earlier work, including the importance of visible unity of the action and advocacy *within* a social movement that aspires to influence the law. This Part shows that, when feminists were able to come together and convey a single, clear demand for the same rights as men, they succeeded in persuading the enforcement agencies, Congress, and the courts to take sex discrimination seriously. Conversely, Part III will show how retrenchment occurred in areas where women's rights advocates took conflicting stances or had little or no presence.

A. *The Storied Enactment of the Sex Amendment as a Joke*

Title VII's adoption sparked an ongoing debate over how to construe the origins and purpose of the sex discrimination provision. Almost immediately, diverse sources coalesced to create a story of origins that disparaged women's right, and even need, to be protected from workplace discrimination.⁵⁵ In this standard story, the amendment banning sex discrimination was a ploy, introduced by southern Congressman Howard

54. William Eskridge, for example, has done important work in this vein. See ESKRIDGE & FERREJOHN, *supra* note 6, at 263–90; *supra* notes 6–8, 18.

55. For an early discussion of the biased nature of the conventional account, see Schultz, *Telling Stories*, *supra* note 27, at 1788 & n.149 (criticizing the conventional account of Title VII's sex provision as a joke and using the term "story of origins" to refer to it as one of "the constitutive myths and ideals we ascribe both to [T]itle VII's ban on sex discrimination, and to ourselves as a nation and as a people in having enacted the legislation" (internal quotation marks omitted)).

W. Smith in a last-ditch effort to defeat the Civil Rights Act and not to address any serious problem.⁵⁶ From the beginning, the news media promoted this view, belittling the problems faced by working women.⁵⁷ Popular accounts of the day disseminated the story of Title VII's ban on sex discrimination as a joke, spreading it into everyday culture.⁵⁸

Ironically, it was officials at the new agency charged with enforcing the provision, the Equal Employment Opportunity Commission (EEOC), who may have done the most to publicize the standard story, lending its biased assumptions an official stamp of approval.⁵⁹ The first chair of the EEOC, Franklin D. Roosevelt, Jr., told the news media that civil rights opponent Congressman Smith added the sex amendment at the last minute to create "ridicule and confusion."⁶⁰ Herman Edelsberg, Executive Director of the EEOC from 1965 to 1967, called the sex discrimination provision "a fluke . . . conceived out of wedlock," that "doesn't carry the same moral overtones as race."⁶¹ EEOC staff attorney David Zugschwerdt stated that sex discrimination was not even on the EEOC's radar because it had come into Title VII "as essentially a ploy by the opponents to try to derail the legislation."⁶² EEOC Executive Director N. Thompson Powers stated that "the Commission [was] very much aware of the importance of not becoming known as the 'sex commission.'"⁶³

Over the years, the conventional account of the sex provision as a joke was repeated so often, by so many sources, that it achieved a kind of mythical status, becoming the standard legislative history.⁶⁴ Law review articles and treatises on employment discrimination law picked up on the narrative and promoted it in legal circles,⁶⁵ and judicial decisions

56. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–42 (1997); Schultz, *Telling Stories*, *supra* note 27, at 1788.

57. ROSEN, *supra* note 2, at 72; SKRENTNY, *supra* note 8, at 111–12. For additional examples, see Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 417–19 (2009) (collecting newspaper articles).

58. See, e.g., CAROLINE BIRD WITH SARA WELLES BRILLER, *BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN* 1–19 (1968).

59. For criticism of the EEOC's stance, see GRAHAM, *supra* note 8, at 205–32; HARRISON, *supra* note 8, at 187–91; SKRENTNY, *supra* note 8, at 111–19; Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1084–85 (1992).

60. Osterman, *supra* note 57, at 416 (quoting Edith Evans Asbury, *Protest Proposed on Women's Jobs*, N.Y. TIMES, Oct. 13, 1965, at 32) (internal quotation marks omitted).

61. *Id.* (internal quotation marks omitted); see also KESSLER-HARRIS, *supra* note 8, at 248 (quoting a comment from Aileen C. Hernandez, the only female EEOC Commissioner, that she had "found no humor in the frequently repeated statement that 'sex' had found its way into Title VII as a 'fluke'—that it was a 'joke'—that it did not need to be enforced—that the 'real' discrimination in society was on the basis of race and ethnic origin and that's where the emphasis of the commission should be directed" (internal quotation marks omitted)).

62. SKRENTNY, *supra* note 8, at 113.

63. HARRISON, *supra* note 8, at 187 (internal quotation marks omitted).

64. Schultz & Petterson, *supra* note 59, at 1085 n.33.

65. See, e.g., ARTHUR B. SMITH, JR., *EMPLOYMENT DISCRIMINATION LAW* 327 (1978); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil*

followed suit. Supreme Court opinions reiterated that Congressman Smith proposed the sex amendment to Title VII “at the last minute on the floor of the House”⁶⁶ “as an attempt to thwart [its] passage.”⁶⁷ Lower court judges across the country repeated this account of the “notorious civil rights opponent” whose attempt to add the sex provision as a joke “backfired.”⁶⁸ Even non-legal academic accounts adopted this conventional interpretation, portraying the sex amendment as “the result of a deliberate ploy by foes of the bill to scuttle it”⁶⁹ that was enacted only as an “[a]ccidental [b]reakthrough.”⁷⁰ To this day, the EEOC’s website still reflects that view.⁷¹

This stock story about Title VII’s origins has not gone unchallenged. From the beginning, commentators offered more complex explanations. Numerous scholarly accounts acknowledge that Congressman Smith was an opponent of the civil rights bill and that he introduced the sex amendment in a mocking tone that hardly suggests an earnest support for women’s rights.⁷² But they deny that these events tell the whole story.

One body of work places the passage of the sex amendment in a feminist context, emphasizing efforts by the National Women’s Party (NWP) and its leader Alice Paul to add the sex provision and the group’s long history of activism to secure equal rights for women,⁷³ the important

Rights Act of 1964, 31 VAND. L. REV. 905, 917 (1978); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966); *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) [hereinafter, *Developments in the Law*].

66. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986).

67. Cnty. of Washington v. Gunther, 452 U.S. 161, 190 n.4 (1981) (Rehnquist, J., dissenting).

68. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984), *aff’d*, 805 F.2d 611 (6th Cir. 1986); see Quick v. Donaldson Co., 90 F.3d 1372, 1381 n.3 (8th Cir. 1996); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 204 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001); see also Bird, *supra* note 56, at 137, 140–41 (collecting Supreme Court and lower court cases).

69. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 234 (1985).

70. GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* 299 (1975); see also ROBERT M. GUION, *ASSESSMENT, MEASUREMENT, AND PREDICTION FOR PERSONNEL DECISIONS* 166 (1998) (stating that sex was added to Title VII by an opponent of the Civil Rights Act “in a misguided and unsuccessful effort to derail support for the proposed Act”).

71. *Shaping Employment Discrimination Law, EQUAL EMP’T OPPORTUNITY COMM’N*, <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited July 5, 2015) (noting that the EEOC was surprised to receive so many charges of sex discrimination because “[a]fter all, the prohibition against sex discrimination had been added as a last minute amendment by Congressman Howard Smith of Virginia who opposed the civil rights legislation and thought that Congress would reject a bill that mandated equal rights for women”).

72. Indeed, Smith’s remarks prompted a patronizing debate that came to be known as “Ladies Day in the House.” Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163, 176–77 (1991) (internal quotation marks omitted).

73. The National Women’s Party (NWP) was a women’s rights group founded in 1913 by Alice Paul in a suffragist campaign. GRAHAM, *supra* note 8, at 136. The NWP had been lobbying for the passage of the Equal Rights Amendment (ERA) since 1923 and “represented the views of elite, white, affluent, professional, and highly educated women.” *Id.* When the President’s Commission on the Status of Women, see *infra* note 75, rejected the ERA, the NWP decided to focus on the passage

work of lawyer-activist Pauli Murray to persuade other groups to join the NWP in supporting the sex provision,⁷⁴ the earlier attention to workplace sex discrimination generated by the report of the President's Commission on the Status of Women⁷⁵ and hearings on the Equal Pay Act,⁷⁶ and the strong support and passionate speeches given by women who were in Congress at the time, led by Representative Margaret Griffiths.⁷⁷ The publication in 1963 of Betty Friedan's best-selling book, *The Feminine Mystique*,⁷⁸ had captured and catalyzed a growing sense of discontent about traditional sex roles among American women.⁷⁹ Although some

of Title VII. GRAHAM, *supra* note 8, at 137; Bird, *supra* note 56, at 148–50. Alice Paul and the NWP saw a connection between Black rights and women's rights and reached out to Congressman Smith to work on adding sex to Title VII. Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 39–43 (1983).

74. Pauli Murray was a Black civil rights lawyer who attended law school to become a civil rights lawyer. MACK, REPRESENTING THE RACE, *supra* note 5, at 207. While law school “equipped [Murray] for effective struggle against Jim Crow,” it was also the place where she “first became conscious of the twin evil of discriminatory sex bias, which [she] quickly labeled Jane Crow.” *Id.* at 227 (internal quotation marks omitted). This Jane Crow idea, that sex discrimination and race discrimination rested upon the same rationalizations, was key for progressive women in the 1950s and 1960s. *See id.* at 233; MACLEAN, *supra* note 8, at 120; MAYERI, *supra* note 8, at 3–4, 14–23. Pauli Murray's memorandum demonstrating the similarities between race and sex discrimination and emphasizing the importance of adding sex to Title VII for Black women played an important role in persuading Congress to add the sex provision. MACLEAN, *supra* note 8, at 121; MAYERI, *supra* note 8, at 22; Eskridge, *Some Effects*, *supra* note 5, at 2128–29. Murray's writings, ideas, participation in early women's rights groups such as the President's Commission on the Status of Women, and active role in founding the National Organization for Women all made important contributions to the formation of modern feminism and the development of legal protections against sex discrimination. *See, e.g.*, HARRISON, *supra* note 8, at 126–34; KESSLER-HARRIS, *supra* note 8, at 229–34, 245, 258–59, 287–88; MACLEAN, *supra* note 8, at 119–22. For more on Murray's life and influence, see MACK, REPRESENTING THE RACE, *supra* note 5, at 207–33.

75. In 1961, President Kennedy established the President's Commission on the Status of Women (PCSW), which “served as a consciousness-raising and idea-sharing forum for feminist lawyers.” Eskridge, *Some Effects*, *supra* note 5, at 2128–29. Although the PCSW rejected the idea that race and sex discrimination were similar and eventually opposed the inclusion of sex in Title VII, Bird, *supra* note 56, at 153–54; Freeman, *supra* note 72, at 172, the PCSW's 1963 report was a bestseller that drew the nation's attention to sex discrimination. HARRISON, *supra* note 8, at 134–36; Freeman, *supra* note 72, at 168–69.

76. One of the PCSW's primary initiatives was passage of the Equal Pay Act in 1963. GRAHAM, *supra* note 8, at 207; Osterman, *supra* note 57, at 419. Congress held three public hearings in connection with the bill, such that, “by the time President Kennedy signed the Equal Pay Act into law on June 10, 1963, both Houses had heard ample testimony on the problems faced by women in the labor force.” Freeman, *supra* note 72, at 168.

77. Bird, *supra* note 56, at 155–56 (noting that the five congresswomen, led by Martha Griffiths, who spoke in favor of the sex amendment “revitalized the debate” and “represented a larger alliance committed to adding sex protections to Title VII”); Brauer, *supra* note 73, at 49–50 (stating that Congresswoman Griffiths argued that a vote by a white man against the sex amendment was “a vote against his wife, or his widow, or his daughter, or his sister” and that her argument influenced nine southern congressmen, who “supported their cause on grounds of chivalry, equity, practicality, and emotion” (internal quotation mark omitted)); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 463–65 (1981) (explaining that Martha Griffiths' testimony “planted fresh seeds or fertilized dormant ones in [the] minds [of] all subsequent speakers in favor of the amendment”). Eleven of the twelve women in the House voted in favor of the sex amendment. HARRISON, *supra* note 8, at 178–79.

78. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

79. Friedan's best-selling book discussed the harms experienced by women who were consigned to the status of homemakers and expected to live through their husbands and children

older, protectionist women's groups opposed Title VII for fear the statute would invalidate state laws that placed limits on women's employment in the name of protecting their special reproductive roles,⁸⁰ that position did not prevail. These laws and their supporters would soon be overtaken by a revitalized, new egalitarian women's movement that would aim to give women the same rights and opportunities as male workers, rather than special protections.⁸¹

A second body of work stresses the complexity of the political context at the time, concluding that Congress's motivation for passing the sex amendment could not have been exclusively or primarily to defeat the civil rights bill.⁸² As this research points out, the House of Representatives rejected other amendments that would have similarly "cluttered up" the bill with unpopular provisions, including sex amendments

rather than having independent work of their own. The book became a popular manifesto, encouraging women to challenge their lot and "destroying, single-handedly and almost overnight, the 1950s consensus that women's place was in the home." STEPHANIE COONTZ, *A STRANGE STIRRING: THE FEMININE MYSTIQUE AND AMERICAN WOMEN AT THE DAWN OF THE 1960S*, at xv (2011); ROSEN, *supra* note 2, at 4–8 (noting that *The Feminine Mystique* "was not without shortcomings" but "broke[] the silence and . . . beg[a]n unmasking the reality of women's lives").

80. Since the 1920s, most states had laws that limited women's employment by restricting their hours of work, imposing weight lifting limits, prescribing rest periods, or denying them access to occupations considered dangerous for women. Commonly known as protective labor legislation, these laws required all women to be treated differently from men in the name of protecting their "special responsibilities as mothers and home-makers" and their unique "physical qualities." KESSLER-HARRIS, *supra* note 8, at 259–60 (internal quotation marks omitted). For decades, these protective labor laws had been hotly debated among women. Groups who supported the Equal Rights Amendment, such as the NWP and the National Federation of Business and Professional Women, had declared that such laws discriminated against women by limiting their employment options and preventing them from competing with men. In contrast, more traditional women's groups and organized labor considered these laws a great achievement because they afforded crucial protections to less skilled female workers, who lacked the bargaining power to secure them on their own. See GRAHAM, *supra* note 8, at 205–06; HARRISON, *supra* note 8, at 7–15; KESSLER-HARRIS, *supra* note 8, at 261–62; see also LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 53–56 (1998) (showing that a prominent strand of women's rights leaders from the 1890s to the 1930s were "maternalist[s]" who supported protective labor legislation recognizing the special reproductive roles of working mothers (internal quotation marks omitted)). These latter, protectionist groups found a base in the Department of Labor's Women's Bureau, created in 1920 and directed in the early 1960s by Esther Peterson, who also led the PCSW in the Kennedy Administration and went on to become Assistant Secretary of Labor in the Johnson Administration. GRAHAM, *supra* note 8, at 206; HARRISON, *supra* note 8, at 109–65. Under Peterson, the Women's Bureau worked with Representatives Emanuel Celler and Edith Green to try to defeat the sex amendment to Title VII. GRAHAM, *supra* note 8, at 207; HARRISON, *supra* note 8, at 177–78. Green was the sole female member of Congress who opposed the amendment. *Id.* at 179. Both Peterson and Green later came to support Title VII. KESSLER-HARRIS, *supra* note 8, at 262–63; Freeman, *supra* note 72, at 179.

81. Opposition to sex-specific labor protections was building, as part of a growing sense of discontent among American women that the Second Wave women's movement would capture and articulate, ultimately, challenging the entire socioeconomic system of separate roles for men and women, sometimes known as the sexual division of labor or the family wage system. See MACLEAN, *supra* note 8, at 149 (describing the women's movement's awakening resistance to this system); ROSEN, *supra* note 2, at 63–140 (same).

82. See, e.g., Bird, *supra* note 56, at 138, 158–60; Brauer, *supra* note 73, at 53–55; Freeman, *supra* note 72, at 164–65, 177–79; Gold, *supra* note 77, at 460–63, 467–69.

to other titles.⁸³ Many members showed up to vote *only* in favor of Title VII's sex amendment, leading to the largest count of votes that day.⁸⁴ In fact, the House approved Title VII's sex amendment not once but twice, the second time knowing the civil rights bill would pass and thus the amendment would not defeat the legislation.⁸⁵ The Johnson administration did not oppose the amendment once it passed the House, and women's rights groups worked with Senator Margaret Chase Smith to overcome resistance in the Senate, where opponents eventually bowed to "the wrath of the women."⁸⁶

A related line of research emphasizes the multi-faceted motivations and arguments of the amendment's supporters, some of whom saw no contradiction between opposing civil rights and supporting women's rights.⁸⁷ Some leaders of the NWP, for example, harbored racist views.⁸⁸ Other leaders, such as Representative Martha Griffiths, supported civil rights, but defended the sex amendment by appealing to race and arguing (fallaciously, from today's perspective) that if Congress banned race discrimination and did not similarly ban sex discrimination, white women would lose out to Black women and Black men.⁸⁹ Prominent African-American lawyer Pauli Murray contended, more accurately, that without the sex amendment, Black women would lose out to Black men.⁹⁰ Martha Griffiths also appealed to class, arguing that the laws allegedly protecting women from unpleasant jobs enabled men to unfairly monopolize higher paying jobs at the expense of working-class women.⁹¹

Although the history of Title VII's sex amendment is complicated and subject to more than one interpretation, the overall conclusion that

83. Freeman, *supra* note 72, at 177–78; see also GRAHAM, *supra* note 8, at 138 (noting that Congressman Dowdy tried to add an amendment making age a protected category in order to derail the bill, but was defeated by a standing vote of 94 to 123).

84. Freeman, *supra* note 72, at 178.

85. Gold, *supra* note 77, at 461. According to Gold, the House of Representatives first voted on the Smith amendment alone on February 8. *Id.* The vote was informal and non-binding because the House was sitting as a committee of the whole. The count on this first vote was 168 to 133. Freeman, *supra* note 72, at 177. Before the House voted on the entire amended bill, a revote was taken on the Smith amendment. The House thus ended up approving the amendment twice, ultimately passing the entire bill by a vote of 290 to 130. Gold, *supra* note 77, at 461.

86. Brauer, *supra* note 73, at 54–55 (internal quotation mark omitted); Freeman, *supra* note 72, at 179.

87. See, e.g., KESSLER-HARRIS, *supra* note 8, at 239–46; Brauer, *supra* note 73, at 42–56.

88. During the House debate, a Republican congresswoman read into the record a letter from the chair of the NWP that "implored Congress to 'prevent a mongrel race in the United States.'" MAYERI, *supra* note 8, at 21, and stated that civil rights statutes excluding sex could be interpreted "in a way that has discriminated against the white, native born American woman of Christian religion." KESSLER-HARRIS, *supra* note 8, at 244 (internal quotation marks omitted). Not all NWP members were racist, however, and many supported the civil rights movement. MAYERI, *supra* note 8, at 21–22.

89. HARRISON, *supra* note 8, at 179; MACLEAN, *supra* note 8, at 118; Brauer, *supra* note 73, at 49–50.

90. MACLEAN, *supra* note 8, at 121; MAYERI, *supra* note 8, at 21–22.

91. HARRISON, *supra* note 8, at 179.

emerges from this research is that the sex amendment was neither a strategic error by civil rights opponents nor an accident, but rather the result of “a small but dedicated group of women, in and out of Congress, who knew how to take advantage of the momentum generated by a larger social movement to promote their own goals, and a larger group of Congressmen willing to make an affirmative statement in favor of women’s rights.”⁹²

In light of the sex amendment’s complex legislative and social history, it is misleading and harmful to reduce the ban on sex discrimination to a joke, as a new generation of scholars interested in women’s rights reiterates.⁹³ This mythical reading reinforces the idea of women as secondary workers, depicting women’s interests as so far outside the realm of employment that it is inconceivable that Congress would redress workplace sex discrimination as a serious social problem. Even at the time of Title VII’s enactment, women’s rights groups and their allies understood the threat posed by the patronizing account of the sex provision as a joke. Activists tried to counter this misconception with a public relations campaign that included sending letters to media outlets and top officials at the EEOC, as well as statements of support from labor unions.⁹⁴ Representative Martha Griffiths even returned to the floor of the House of Representatives in 1966 to criticize the EEOC’s reading of the sex amendment as a joke.⁹⁵ Despite their protests, the weight of authorities buried the truth and espoused the popular version of the story.

The inaccurate interpretation found favor with some news media. At the time of Title VII’s enactment, the *New Republic* asked, “Why should a mischievous joke perpetrated on the floor of the House of Representatives be treated by a responsible administrative body with this kind of seriousness?”⁹⁶ The *New York Times* trivialized the sex amendment by calling it the “Bunny Law” after hearing that someone at a White House conference on equal opportunity had wondered if Title VII would require *Playboy* to employ male bunnies.⁹⁷ The *Wall Street Journal* responded by declaring that “the ‘Bunny’ is safe” because the “boos from lady fans”

92. Freeman, *supra* note 72, at 183; see also Bird, *supra* note 56, at 161 (making a similar point); Brauer, *supra* note 73, at 38 (same); Osterman, *supra* note 57, at 410 (same).

93. See, e.g., Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1308 (2012) (concluding that the legislative debates over the sex amendment reveal that it was not a joke but a referendum on “conventional sex and family roles”); Osterman, *supra* note 57, at 411 (explaining how the incorrect story of the sex amendment as a joke became conventional wisdom).

94. Osterman, *supra* note 57, at 419–20 (describing efforts by the NWP and the newly created National Organization for Women).

95. GRAHAM, *supra* note 8, at 223–25; Osterman, *supra* note 57, at 420.

96. KESSLER-HARRIS, *supra* note 8, at 249 (quoting *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10) (internal quotation marks omitted).

97. *Id.* (citing *De-Sexing the Job Market*, N.Y. TIMES, Aug. 21, 1965, at 20); ROSEN, *supra* note 2, at 72 (same); SKRENTNY, *supra* note 8, at 111–12 (same).

would lead the EEOC to have an “open mind” and be more lax on enforcement of the sex provision.⁹⁸

These comments belittlingly portrayed workplace sex discrimination as a phenomenon primarily involving male exclusion from sexualized, female-only jobs, while ridiculing the idea that men would ever want such jobs. Not only did such a focus obscure discrimination’s harm to women by overlooking that many women might aspire to be something other than Playboy Bunnies or might protest the job’s female-only sexual objectification: By sensationally exploiting the Bunny as an example, these news articles also rendered invisible the more common forms of sex bias built into typical female-only jobs.⁹⁹ Similarly, by mocking the idea that men would ever want to be Bunnies, the stories reinforced stereotypical notions of masculinity that prevented men from pursuing jobs assigned to women and downplayed the resultant harms to men’s occupational freedom. At a more basic level, the stories operated to obscure the larger system of occupational sex-segregation and prescribed gender roles that limited options for men and women alike.

Such narratives may appear to be consigned to the past, but contemporary events suggest that they continue to fuel current attitudes and behaviors. When the EEOC investigated the Hooters restaurant chain in 1995 for hiring only attractive young women as servers, for example, the restaurant launched a high-profile protest, sending scantily clad Hooters girls to march outside the White House carrying signs proclaiming “Hooters Guys? Washington—Get a Grip!”¹⁰⁰ Thirty years after the news media first trivialized Title VII by making jocular references to how it could lead to men as Playboy Bunnies, the press made similar mocking comments about the Hooters case,¹⁰¹ disparagingly depicting large, hairy

98. SKRENTNY, *supra* note 8, at 112 (internal quotation marks omitted) (citing Monroe W. Karmin, *Battling Job Bias: New U.S. Commission Plans Big Push to Open More Posts to Negroes*, WALL ST. J., Oct. 13, 1965, at 1).

99. For examples of how traditionally female jobs both incorporated and invoked stereotypically feminine behavior, see SUSAN PORTER BENSON, *COUNTER CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890–1940*, at 130 (1986) (describing how department store executives trained saleswomen to act as hostesses and treat customers as personal houseguests in a commercial environment); ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 104–05 (1983) (describing how female flight attendants were trained to smile at all times regardless of how badly customers behaved); KANTER, *supra* note 21, at 82–89 (describing how female secretaries were rewarded for personal devotion to one male boss and taught to accept personal praise and flattery instead of money).

100. James Bovard, *The EEOC’s War on Hooters*, WALL ST. J., Nov. 17, 1995, at A18 (internal quotation marks omitted).

101. See, e.g., *id.* (commenting that the script for the EEOC’s latest civil rights triumph may be, “Hi there. My name is Bruce and I’ll be your Hooters Girl tonight” (internal quotation marks omitted)); Laura Myers, *Hooters Howling at Hiring Demand—Told to Sign Up ‘Hooter Guys,’* THE SEATTLE TIMES, Nov. 16, 1995, at A3 (describing Hooters’ rally in Washington D.C. with about 100 Hooters Girls marching with signs saying “Men as Hooter Guys - What a Drag” and quoting Hooters vice president Mike McNeil as saying “A lot of places serve good burgers. The Hooters Girls, with their charm and All-American sex appeal, are what our customers come for” (internal quotation marks omitted)); Dan Rodricks, *EEOC Fights for Hunks to Join Hooters Attractions*, THE

men as servers¹⁰² and ignoring how not only men, but also women, are harmed by sex-segregated hiring of the type the restaurant still practices. Pressured by Congress in response to public opinion, the Commission eventually dropped the Hooters lawsuit,¹⁰³ bowing to older ideas that denied single-sex hiring was sex discrimination and returning, ironically, to the segregation-approving stance it had taken earlier in its history.

B. The Emergence of Movement-Inspired Enforcement

The struggles over how to interpret Title VII's sex discrimination provision extended far beyond the debates about its origin and purpose. These conflicts carried over into the enforcement arena, where women's rights advocates outside and inside the federal government confronted additional bias in the attitudes and actions of leading public officials charged with enforcing the law.¹⁰⁴ Title VII entrusted the newly created EEOC, the Department of Justice (DOJ), and the Department of Labor (DOL) with different enforcement powers.¹⁰⁵ Although these agencies

BALTIMORE SUN, Nov. 15, 1995 (wondering whether the EEOC expects men to "wear orange shorts and bend provocatively while serving shooters" and seeks to change the restaurant's name to "Guys in Orange Shorts" or "Hooters and Hunks"); see also Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REF. 551, 611-32 (1997) (noting that many editorials about the EEOC's investigation were written after Hooters began its public relations campaign and analyzing two such editorials in detail).

102. See, e.g., Photograph of Hooters Guy, in *Day in Sports Photo Gallery*, USA TODAY, <http://usatoday30.usatoday.com/travel/gallery/hooters/contenttemplate4.htm> (last visited Nov. 29, 2014) (depicting a "virile and scruffy" "Hooters Guy" concocted by Hooters in response to the EEOC's charge (internal quotation marks omitted)).

103. Angela D. Morrison, *Duke-Ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U.L. REV. 87, 137 (2013).

104. Scholars have emphasized that the early women's rights movement included both women outside the government and inside it. HARRISON, *supra* note 8, at 192-93; KESSLER-HARRIS, *supra* note 8, at 258-59; ROSEN, *supra* note 2, at 74; Sonia Pressman Fuentes, *The Legal Revolution in American Women's Rights—And the Problems that Remain*, Address at Cornell University 6-8 (Oct. 24, 2012) (transcript available at http://scholarship.law.cornell.edu/avon_clarke/3); see also HARRISON, *supra* note 8, at 213 (describing the influence of Esther Peterson, director of the Women's Bureau at the Department of Labor and later Assistant Secretary of Labor); *id.* at 111-13 (discussing the women who served on the President's Commission on the Status of Women); KESSLER-HARRIS, *supra* note 8, at 284-88 (discussing Congresswoman Edith Green); MACLEAN, *supra* note 8, at 127-28 (discussing EEOC attorney Sonia Pressman Fuentes); MAYERI, *supra* note 8, at 55 (discussing EEOC attorneys Sonia Pressman Fuentes and Susan Deller Ross); SKRENTNY, *supra* note 8, at 115-17 (discussing Congresswoman Martha Griffiths, Aileen Hernandez from the EEOC, Mary Eastwood from the Department of Justice, Catherine East from the Citizens' Advisory Counsel, and Kathryn Clarenbach from the Wisconsin Commission on the Status of Women).

105. The 1964 Act gave the EEOC very limited powers. The EEOC could not bring lawsuits or initiate its own investigations, but could only investigate discrimination claims filed by individuals, refer cases to the Attorney General, and advise and attempt to conciliate claims upon the request of an employer or labor organization. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(g), 78 Stat. 241, 258-59. The Attorney General, who is the head of the Department of Justice, was given authority to initiate pattern or practice actions against private employers. *Id.* § 707. In 1972, Congress extended Title VII's coverage to public employers and consolidated future substantial enforcement authority in the EEOC. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2, 4(a), 86 Stat. 103, 103-07 (1972). Beginning in 1974, the Attorney General's authority over private employers transferred to the EEOC, while the Attorney General retained authority over cases involving state and local governmental entities and litigation in which the EEOC is a party in the Supreme Court. *Id.* §§ 4, 5, 8(e)(1). Although Title VII formally did not bestow any enforcement authority on the Department of Labor, the agency's role in enforcing the executive orders that were

understandably focused their limited resources primarily on eliminating race discrimination in the first few years after Title VII passed, their failure to make any substantial efforts to address sex discrimination harmed the early development of this field of law.¹⁰⁶ However, this reluctance by government officials inspired popular counter-resistance that catalyzed organizing in the fledgling women's rights movement. The resulting feminist pressure led the agencies and courts to adopt innovative reforms in the first decade of Title VII's enforcement, as described below.

1. Equal Employment Opportunity Commission Guidance

Women's rights activists' early skirmishes with the EEOC reveal how difficult it was to secure expansive readings of the sex discrimination provision from the federal enforcement agencies. Numerous scholars have documented the EEOC's early resistance to safeguarding women's rights.¹⁰⁷ Charged with enforcing Title VII but stripped of the usual agency powers, the EEOC had only limited authority under the 1964 Civil Rights Act to advise, investigate, and conciliate discrimination claims filed by individuals, and if conciliation failed, the EEOC lacked the ability to sue or impose sanctions on employers.¹⁰⁸ Despite its weak powers and inadequate budget, the EEOC from its inception marshaled its resources in highly creative ways to document and publicize patterns of race discrimination and pressure employers to eliminate them.¹⁰⁹ In

the parallel to Title VII for government contractors is discussed in Part II.B.3 below. *See infra* note 194 (discussing the Department of Labor's authority).

106. In fact, Alfred Blumrosen, a legal scholar and consultant to the EEOC and the Department of Labor during this era, argues that "[t]he law of sex discrimination lags at least five to eight years behind where it would have been had the administrators of the EEOC in 1965 been as cognizant of the problems of sex discrimination as they became later." ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 141 (1993).

107. Major sources consulted for information about the EEOC's early stance include GRAHAM, *supra* note 8, at 205–32; HARRISON, *supra* note 8, at 187–209; KESSLER-HARRIS, *supra* note 8, at 246–67; MACLEAN, *supra* note 8, at 124–36; SKRENTNY, *supra* note 8, at 85–90, 110–19, 124–28; Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709, 710–22, 724–37 (2004); Fuentes, *supra* note 104, at 4–9; Kevin Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute 11–32* (May 7, 2005) (unpublished student prize paper, Yale Law School), available at http://digitalcommons.law.yale.edu/ylsspps_papers/41.

108. *See supra* note 105; *see also* GRAHAM, *supra* note 8, at 189 (noting that compromises within both the House and Senate changed the EEOC from the quasi-judicial agency modeled after the National Labor Relations Board that liberals originally envisioned into what they feared would be a "largely toothless agency [with] a reactive posture"); Pedriana & Stryker, *supra* note 107, at 712 (noting that "[a] sequence of compromises between liberals and moderate Republicans left the EEOC with no formal adjudicative or prosecutorial powers" and "[t]he final bill authorized the EEOC to do no more than investigate and engage in conciliation talks with discriminatory employers").

109. *See* ACKERMAN, *supra* note 6, at 186–87 (explaining that the early EEOC was overwhelmed with work and had few resources, but adapted by adopting a sophisticated technocratic strategy that targeted the worst offenders based on statistics and mobilized professional expertise against suspect practices); Pedriana & Stryker, *supra* note 107, at 747–48 (noting that Congress left the EEOC "toothless, unorganized, and broke," yet the agency creatively expanded the concept of

contrast, the agency initially declined to vigorously enforce Title VII's prohibition against sex discrimination.

The reasons for the EEOC's early stance were undoubtedly complex. Like most Americans, early EEOC leaders were focused on securing civil rights for Black Americans. The EEOC's one hundred or so permanent employees had come to Washington to fight race discrimination, and most did not want to see the agency's resources diverted to sex discrimination.¹¹⁰ The sense of exigency created by the civil rights movement supported such a focus,¹¹¹ while women's groups had not yet produced similar pressure to move forward in a clear direction. Indeed, when Title VII passed, "American women were neither united, effectively organized, nor psychologically prepared to press . . . for its enforcement."¹¹² Official resistance also reflected a failure to take women's employment seriously that rested on biased assumptions that the women's movement had not yet challenged.¹¹³

At the time, women's groups remained visibly split over whether Title VII permitted female-specific labor laws that restricted women's employment in the name of protecting their distinctive biological and social reproductive roles as mothers.¹¹⁴ After Title VII passed, a number of protectionist groups lobbied the EEOC to permit such laws, even though a growing number of activists within those groups were beginning to doubt their wisdom.¹¹⁵ Similarly, in the years following Title VII's enactment, some women's groups continued to characterize pregnancy as a uniquely female condition that warranted special legal consideration for mother and child,¹¹⁶ while other feminists would begin

race discrimination through its interpretation of Title VII in the areas of seniority systems, employment tests, and other forms of disparate impact discrimination).

110. Pedriana & Stryker, *supra* note 107, at 721; Fuentes, *supra* note 104, at 4; *see also* GRAHAM, *supra* note 8, at 212 (noting that "the commission's dominant constituency was overwhelmingly concerned with black civil rights, not with sex discrimination"); SKRENTNY, *supra* note 8, at 113 (quoting EEOC staff attorney Susan Deller Ross as recalling that EEOC employees "viewed it as an agency whose only serious mission was really to work on black civil rights").

111. Pedriana & Stryker, *supra* note 107, at 721.

112. GRAHAM, *supra* note 8, at 207.

113. *See, e.g.*, KESSLER-HARRIS, *supra* note 8, at 250-51 (noting that most EEOC staff members "believed in the salience of sex differences for economic decision making"); SKRENTNY, *supra* note 8, at 262 (reporting that government officials believed working women's problems were not serious and those attitudes guided policy).

114. For a description of the historic split among women's rights groups, *see supra* notes 80-81 and accompanying text. For a breakdown of the state protective laws that existed when Title VII was enacted, *see* Gola E. Waters, *Sex, State Protective Laws, and the Civil Rights Act of 1964*, 1967 *INS. L.J.* 341, 345 & nn.21-22 (1967).

115. For example, Esther Peterson, Director of the Women's Bureau and the PCSW under President Kennedy, began to doubt and eventually opposed protective labor laws out of concern that the laws actually discriminated against women and would prevent them from taking full advantage of Title VII. HARRISON, *supra* note 8, at 186-87; KESSLER-HARRIS, *supra* note 8, at 262-63. Similarly, although the AFL-CIO initially continued to endorse protective labor laws for women, some individual labor unions and many female officials and members within the AFL-CIO began to disagree with the official line. *Id.* at 263-64.

116. *See* Schwartz, *supra* note 107, at 21, 23.

to question whether that position best served working women's interests.¹¹⁷

These divisions prevented women's groups from sending the EEOC a clear, unified message about how Title VII should be interpreted. As a result, EEOC officials felt little sense of urgency to take aggressive steps to fight sex discrimination.¹¹⁸ In the summer of 1965, for example, women's groups missed an opportunity to influence the agency's first set of interpretive guidelines on sex discrimination. Because there had been no congressional hearings on the sex amendment, the EEOC particularly needed input from women's rights groups.¹¹⁹ But disagreement over protective labor laws left women's groups, such as the new Interdepartmental Committee on the Status of Women (ICSW), paralyzed and unable to take a collective stance,¹²⁰ thus depriving the EEOC of consistent advice on sex discrimination policy from the affected constituency during this formative period. Bowing to pressure from business interests and a letter on behalf of the Department of Labor (led by the Women's Bureau) asking the EEOC to proceed slowly and preserve the status quo,¹²¹ the EEOC announced that Title VII did not invalidate state protective labor laws that restricted women's (but not men's) employment. Instead, the EEOC's 1965 guidelines treated a restriction imposed by such a law as a bona fide occupational qualification (BFOQ) that exempted employers subject to the law from liability under Title VII.¹²²

The absence of concerted social movement pressure and scrutiny not only permitted the EEOC to issue these status quo-preserving rulings—it also enabled agency leaders to be guided by sex stereotypes. Early EEOC officials did not simply ignore or delay implementation of

117. See *infra* notes 412–17.

118. GRAHAM, *supra* note 8, at 207, 213.

119. *Id.* at 212.

120. In 1965 the Women's Bureau urged the ICSW, appointed by President Kennedy to follow through on the work of the original PCSW, to lobby the EEOC "on behalf of women's rights," but the ICSW was unable to do so due to deadlock over "the irrepressible issue of state protective legislation." *Id.* at 212–13. The Citizens' Advisory Council on the Status of Women (Citizens' Advisory Council), a second governmental follow-up committee established by President Kennedy, was similarly unable to reach consensus. HARRISON, *supra* note 8, at 186–87.

121. GRAHAM, *supra* note 8, at 213. When the EEOC was called to interpret how Title VII applied to state protective legislation, the ICSW remained split over how to approach the issues. Its chairman, Willard Wirtz, wrote to President Roosevelt on behalf of the Labor Department and the Women's Bureau, urging the EEOC to preserve women's protective laws. *Id.*

122. Title VII provides employers with a defense commonly known as the "BFOQ" defense. Section 703(e)(1) provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(e), 78 Stat. 241, 256 (codified at 42 U.S.C. § 2000e-2(e) (2012)). Under the EEOC's initial guidelines, a state law that barred women from holding an allegedly dangerous job likely would have constituted as a BFOQ defense, thus excusing employers who refuse to hire women into such jobs. See *Part 1604—Guidelines on Discrimination Because of Sex*, 30 Fed. Reg. 14, 926–28 (Dec. 2, 1965). The EEOC reserved the right to evaluate complaints about particular laws on a case-by-case basis. GRAHAM, *supra* note 8, at 218.

the sex discrimination provision or carefully weigh the likely effects of different approaches: They made highly publicized, derogatory remarks that disparaged the problem of sex discrimination and undermined the legitimacy of efforts to eradicate it. These actions suggested that agency officials were moved as much by sex-biased attitudes as by desires to prioritize civil rights or protect women's perceived vulnerabilities. The tone was set at the EEOC's July 1965 kick-off press conference, when its first Chair, Franklin D. Roosevelt, Jr., played the sex discrimination provision for laughs. When asked by a reporter, "What about sex?" Roosevelt jokingly replied, "Don't get me started . . . I'm all for it."¹²³ Following suit, the agency's first Executive Director, Herman Edelsberg, joked that protection against sex discrimination "didn't spring from Congressman Howard Smith's brow; it all began with Adam's rib."¹²⁴

Less humorously, agency officials publicly defended sex segregation. Edelsberg told a *Washington Post* reporter, for example, that "there are people on this Commission who think that no man should be required to have a male secretary—and I am one of them."¹²⁵ Edelsberg and Vice Chairman Luther Holcomb similarly approved of airlines' practice of hiring female flight attendants into different jobs than men at lower pay and firing the women when they got married or reached the age of thirty-two.¹²⁶ According to Holcomb, "Congress did not seek to abolish the differences between the male and [the] female sex," so if an employer acknowledged those differences by restricting jobs to one sex, he could see no "discriminatory purpose" in such an action.¹²⁷ After all, "[c]ommon sense' dictated that women could better please passengers and make them 'feel well cared for.'"¹²⁸ When the lone female EEOC Commissioner Aileen Hernandez and the agency's first female staff attorney, Sonia Pressman Fuentes, protested such statements and spoke out in favor of more expansive enforcement, they were ridiculed in harsh and often sexist terms.¹²⁹

The bias of these EEOC officials is clear not only from their willingness to make such sexist remarks openly and without embarrassment, but also from the sense of amusement and hilarity they expressed toward

123. GRAHAM, *supra* note 8, at 211 (internal quotation marks omitted).

124. Osterman, *supra* note 57, at 421 (internal quotation mark omitted).

125. KESSLER-HARRIS, *supra* note 8, at 251 (internal quotation marks omitted).

126. MACLEAN, *supra* note 8, at 125.

127. *Id.* (internal quotation marks omitted).

128. *Id.* (emphasis removed). The airlines relied on similar sex stereotypes to defend policies limiting flight attendant jobs to women only in subsequent lawsuits challenging the validity of those policies under Title VII. *See, e.g.,* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387-89 (5th Cir. 1971), discussed *infra* notes 239-43 and accompanying text.

129. HARRISON, *supra* note 8, at 187 (quoting Hernandez as stating "that the subject of sex discrimination elicited either 'boredom' or 'virulent hostility'" from her fellow EEOC commissioners); SKRENTNY, *supra* note 8, at 113 (detailing Hernandez's frustration and noting that EEOC General Counsel Charlie Duncan called Fuentes a "sex maniac" for advocating enforcement of the sex provision (internal quotation marks omitted)); Fuentes, *supra* note 104, at 3 (noting that the response was laughter when she tried to speak about women's rights).

the entire concept of women's rights.¹³⁰ That they did not subject racial minorities or disabled people to similarly bemused, belittling commentary conveys the prevalence and taken-for-granted quality of official assumptions about sex differences and women's marginality as workers. Indeed, many of the "jokes" traded on the incongruity between women's desire for workplace equality and their inferior social position. As sociologist John Skrentny has observed, such jocular remarks reveal preconscious beliefs about women that "not only shaped boundaries of appropriateness regarding jokes," but also "guided the boundaries of the appropriateness, and thus the making of policy, for women."¹³¹ In the absence of concerted pressure from women's groups, early EEOC officials resisted the idea that sex discrimination was a serious social problem akin to race discrimination¹³² or that sex-segregated employment reflected labor market discrimination like racial segregation.¹³³

The EEOC quickly learned, however, that sex discrimination was a reality of the American workplace when ordinary working women all over the country began to file individual complaints of sex discrimination. In its first year of operation, from 1965 to 1966, at least one-third of all the charges of discrimination filed with the EEOC alleged sex discrimination, challenging the view that sex discrimination was not a pervasive problem.¹³⁴ The largest portion of complaints challenged discriminatory practices associated with sex segregation, such as exclusionary hiring systems, separate seniority lists, and protective labor laws.¹³⁵ Individuals complained about discrete practices, but the real issue was the larger system of sex-segregated employment that presumed women were suited for some kinds of work but not others. Such segregation harmed women economically, both by denying them access to the higher paying jobs typically held by men and by crowding them into remaining fields in which their oversupply reduced wages.¹³⁶ Segregation

130. SKRENTNY, *supra* note 8, at 260–61. This jocular style was not limited to agency officials or members of the press; even President Nixon indulged it on more than one occasion. In one incident, Nixon dismissed a female reporter's question about how he would address women's absence from governmental supervisory positions and how he viewed women's liberation by laughingly writing off the question since it came from a woman. "After that question, I am not going to comment [on] women's liberation!" Nixon replied. *Id.*

131. *Id.* at 262.

132. *Id.* at 113; *see also* KESSLER-HARRIS, *supra* note 8, at 250–51.

133. *See, e.g.*, HARRISON, *supra* note 8, at 190 (citing EEOC Director Roosevelt's statement that the 1965 guidelines "would not result in a massive assault on sex-segregated jobs"); KESSLER-HARRIS, *supra* note 8, at 251 (quoting an EEOC official as saying, "We're not going out on our charger to overturn patterns [of sex-segregated employment] . . .").

134. *See Shaping Employment Discrimination Law*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited June 15, 2014) (noting that in its first year of operation, 33.5% of all charges of discrimination alleged sex discrimination); *see also* KESSLER-HARRIS, *supra* note 8, at 246 (stating the figure as 37%); MACLEAN, *supra* note 8, at 123 (stating the figure as more than one-fourth); SKRENTNY, *supra* note 8, at 111 (stating the figure as 34% of all claims filed in 1966); Fuentes, *supra* note 104, at 5 (stating the figure as 37%).

135. *See* KESSLER-HARRIS, *supra* note 8, at 247.

136. *See* for more on the economic harms of segregation and its negative impact on women's social status, *see supra* note 27.

also inflicted status and psychic harms, “confining . . . women to a narrow range of jobs in which they nearly always took direction from men and often literally served them”¹³⁷ Segregation also raised citizenship concerns, relegating women to the ranks of family dependents and preventing them from reaching the position of equal wage earners, a position historically equated with that of full-rights-bearing citizen.¹³⁸

Title VII enabled women to express a pent-up sense of injustice over these unrecognized harms. Not only did individual women challenge sex segregation by filing discrimination charges and lawsuits:¹³⁹ The EEOC’s resistance to combatting segregation as a form of prohibited sex discrimination created a collective feminist counter-resistance that urged and ultimately won unprecedented legal reforms. As historians have shown, no single issue brought divided women’s groups together or galvanized the rebirth of the modern women’s movement more than the EEOC’s initial refusal to ban sex-segregated want ads (job advertisements in newspapers indicating “Help Wanted Female” or “Help Wanted Male”).¹⁴⁰ Despite acting quickly to prohibit racially segregated advertisements in August 1965, the EEOC did not similarly outlaw sex-segregated ads, but instead convened a task force composed mostly of advertisers and business interests that unsurprisingly concluded that sex-segregated ads did not violate Title VII.¹⁴¹ Acting on the basis of these

137. MACLEAN, *supra* note 8, at 127.

138. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR*, at xxviii–xxxii (1995) (describing how in nineteenth century America, “the republican citizen was indisputably male” and feminists demanded equal opportunity to enter the labor market because economically dependent women “could make no significant contribution to society”); MACLEAN, *supra* note 8, at 149 (describing how feminists in the 1960s saw equal opportunity in the workplace as essential to recognizing women as “self-reliant earners and citizens, as persons with constitutional rights”); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 64–101 (1991) (linking citizenship to the capacity to earn one’s own living).

139. As historian Nancy MacLean emphasizes, Title VII would not have been effective without the efforts of ordinary working-class women at the grassroots level. Not only did they file complaints of individual discrimination with the EEOC: They also initiated class-wide lawsuits against powerful American companies and industries challenging systemic discrimination that resulted in sex segregation and unfairly limited their employment prospects. MACLEAN, *supra* note 8, at 123–24.

140. See, e.g., GRAHAM, *supra* note 8, at 218 (noting that the “EEOC’s inconsistency and timidity in enforcing women’s rights would likely have provoked the divided women toward greater unity of purpose” anyway, but the EEOC’s “colossal blunder” in backpedaling on sex-segregated want ads goaded women’s groups into a “unified attack on the reeling agency”); HARRISON, *supra* note 8, at 192 (observing that the EEOC’s ruling approving segregated advertising led to widespread protest among women’s groups and “by 1966 virtually every women’s organization protested the EEOC’s cavalier attitude toward sex discrimination”); KESSLER-HARRIS, *supra* note 8, at 258 (stating that “[m]ore than any other single incident, the EEOC’s inconsistent policies on help-wanted advertising galvanized a rising impatience among some women for attention to the language of sex discrimination” and “women of many persuasions began to protest”).

141. HARRISON, *supra* note 8, at 187–88. The American Newspaper Publishers Association (ANPA) insisted upon a business necessity exception for separate-sex classified ads, GRAHAM, *supra* note 8, at 216, while also insisting that the EEOC only had authority over employers, not publishers. *Id.*

pressures¹⁴² and agency officials' belief that "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women,"¹⁴³ the EEOC issued a guideline permitting sex-segregated advertising so long as newspapers published a disclaimer stating that the segregated advertising was not meant to be discriminatory, but rather simply reflected the fact that "some jobs were of more interest to one sex than another."¹⁴⁴

This decision unified and enraged women's activists from across the spectrum, who correctly ascertained that it meant EEOC staff did not believe standard practices limiting women to certain jobs was unfair.¹⁴⁵ When the EEOC took another giant step backward and ruled that even the disclaimer was unnecessary,¹⁴⁶ the EEOC "crossed an invisible line"¹⁴⁷ that provoked the uniform anger of all women's groups and led them to band together in protest. As historian Hugh Graham put it, "The inconsistency between the EEOC's guidelines on sex and race in job advertisements created a symbolic rallying point to unify women leaders who for so long had been paralyzed by their divisions over protective legislation."¹⁴⁸ Older protectionists and newer egalitarian leaders alike began to protest the EEOC's double standard and to press for the agency to treat sex discrimination just as seriously as race discrimination.¹⁴⁹

As part of this emerging counter-resistance, a small but highly devoted group of women in Washington formed a new national organization designed to pressure the EEOC and other legal institutions to

142. The EEOC may also have been influenced partly by then Supreme Court Justice Abraham Fortas's comment to President Johnson that the Supreme Court would strike down a ban on sex-segregated advertising as a violation of the First Amendment. HARRISON, *supra* note 8, at 188.

143. GRAHAM, *supra* note 8, at 217 (quoting the first EEOC Chair, Franklin D. Roosevelt, Jr.).

144. Job Opportunities Advertising, 30 Fed. Reg. 14928 (Dec. 2, 1965); see GRAHAM, *supra* note 8, at 217; HARRISON, *supra* note 8, at 188.

145. KESSLER-HARRIS, *supra* note 8, at 257.

146. Job Opportunities Advertising, 31 Fed. Reg. 6414 (Apr. 28, 1966). Again, the ANPA had a large role in influencing the EEOC to change its policy. GRAHAM, *supra* note 8, at 218–20.

147. KESSLER-HARRIS, *supra* note 8, at 258.

148. GRAHAM, *supra* note 8, at 218.

149. For example, Esther Peterson, the influential DOL protectionist who had earlier opposed Title VII's sex amendment, in 1965 wrote to the *New York Times* protesting its tone of ridicule and urging the *Times* to ask instead "How many jobs are 'women's jobs' merely because they are menial, routine, monotonous and, of course, low-paying?" *Id.* at 222 (internal quotation marks omitted). This change in her position "signaled the imminence of a sea change in feminist thought." *Id.* At the same time, the Citizens' Advisory Council overcame its own historic divisions over protective labor legislation and adopted a pragmatic stance, which allowed them to get on with the rest of their equal employment agenda. *Id.* Also in 1965, Pauli Murray and Mary Eastwood published their law review article, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965), which catalyzed a change in feminist thinking by "finessing the old debates over protective legislation and by pressing hard . . . the case for a race-sex analogy in EEO law." GRAHAM, *supra* note 8, at 222. Edith Green had been the only congresswoman to oppose the addition of sex to Title VII. KESSLER-HARRIS, *supra* note 8, at 284–85. By 1966 she was a board member of NOW, *id.* at 258–59, and in 1970 she chaired congressional hearings on discrimination against women during which she castigated the EEOC, the DOJ, the DOL, and the Department of Health, Education, and Welfare for all failing to "recognize the seriousness of sex discrimination." *Id.* at 286–87.

advance women's rights.¹⁵⁰ Founded by twenty-eight women, including Betty Friedan and Pauli Murray,¹⁵¹ the National Organization for Women (NOW) would grow to become the largest organization of feminist activists in the United States, but it was born of simple outrage at the failure to take working women seriously.¹⁵² NOW launched a frontal assault on the nature, existence and relevance of sex difference.¹⁵³ NOW and other egalitarian activists pressed the analogy between race and sex discrimination not simply for the purpose of eliminating formal sex-based classifications, but primarily for the purpose of challenging the fundamental, biased assumptions about women's difference that justified sex discrimination and inequality throughout society.¹⁵⁴ As historian Cynthia Harrison emphasizes, NOW's rejection of the notion that "biology is destiny" rested on an analytical separation of childbearing from childrearing. This distinction provided the foundation for a coherent, world-changing new feminist philosophy.¹⁵⁵ By insisting that, while only mothers can give birth, both mothers and fathers can care for children—and thus women and men can be equally committed to work—NOW made it possible to demand an expansive equality no earlier group could claim.¹⁵⁶

Jettisoning earlier protectionist claims for special provisions based on women's reproductive roles, NOW and other early egalitarian activists promoted a new vision of equality that was far from narrow or elitist, as some later critics charged. "By spurning the family wage

150. For descriptions of NOW's founding, see GRAHAM, *supra* note 8, at 225–26; HARRISON, *supra* note 8, at 192–96; ROSEN, *supra* note 2, at 74–75; SKRENTNY, *supra* note 8, at 116–17.

151. See *Honoring Our Founders & Pioneers*, NAT'L ORG. FOR WOMEN, <http://now.org/about/history/honoring-our-founders-pioneers/> (last visited Sept. 22, 2014). After Betty Friedan wrote *The Feminine Mystique*, she began visiting the EEOC to gather material for an article she was writing and befriended frustrated female EEOC employees such as Pauli Murray and Sonia Pressman Fuentes, thus forming the "feminist underground" in Washington that eventually led to NOW's creation. For more on Betty Friedan, the influence of *The Feminine Mystique*, and her significant role in the formation of the modern women's rights movement, see COONTZ, *supra* note 79, at 155–57, 160–65, and ROSEN, *supra* note 2, at 4–8. For more on Pauli Murray and the importance of her ideas and activism to the development of both modern feminism and sex discrimination law, see *supra* note 74.

152. See MARYANN BARAKSO, *GOVERNING NOW: GRASSROOTS ACTIVISM IN THE NATIONAL ORGANIZATION FOR WOMEN* 21–23 (2004); SKRENTNY, *supra* note 8, at 116–17 (noting that existing women's rights organizations were not sufficiently organized nor interested in lobbying the EEOC to enforce Title VII's sex provision but Betty Friedan indicated that NOW's first order of business was to make it "clear to Washington, to employers, to unions, and to the nation that someone *was* watching, someone *cared* about ending sex discrimination" (internal quotation marks omitted)).

153. SKRENTNY, *supra* note 8, at 118–19.

154. See, e.g., MACLEAN, *supra* note 8, at 147 (noting that NOW leaders echoed Pauli Murray's race-sex analogy and insisted that the excuses employers gave for practicing sex-based discrimination were not substantially different from those used to justify racial bias and could be met by the same laws and agencies); MAYERI, *supra* note 8, at 30, 33–34 (noting that NOW and other feminist lawyers in the late 1960s drew upon Pauli Murray's sex-race analogy).

155. HARRISON, *supra* note 8, at 199–200.

156. This distinction, popularized and promoted by NOW, was also made by an important group called the President's Citizens' Advisory Council on the Status of Women in its 1970 statement of principles on pregnancy. See *infra* note 416 and accompanying text.

system that had never included most women of color and now failed to provide for growing numbers of white women,” Nancy MacLean concludes, “and by claiming instead access to all jobs and the right to be rewarded as equals, activists overthrew the tradition of ‘coverture’ [which treated women as family dependents] and enabled women to be recognized as self-reliant earners and citizens, as persons with constitutional rights.”¹⁵⁷ NOW’s influence spread far beyond its national headquarters, as local groups and campaigns sprung up all over the country.¹⁵⁸ Encouraged and emboldened by the presence of local activist campaigns in the streets, ordinary women began to fight for equality in the workplace.¹⁵⁹

Spurred by the actions of NOW and other newer egalitarian groups,¹⁶⁰ the EEOC began to take seriously its mandate to eliminate sex discrimination. NOW’s first goal was to convince the EEOC to retract its position on sex-segregated advertising. By August 1968, in clear response to pressure from NOW, the EEOC had revised its guidelines to declare all sex-segregated advertising discriminatory.¹⁶¹ In 1969, as the influence of the protectionist wing began to fade and the prominence of egalitarian Second Wave women’s rights groups like NOW grew,¹⁶² the EEOC also revised its position on state protective laws, stating that they were in conflict with Title VII because they were no longer “relevant,”

157. MACLEAN, *supra* note 8, at 149.

158. *Id.* at 137–42; Eskridge, *Some Effects*, *supra* note 5, at 2130 n.328 (noting that NOW both pressed a national agenda and encouraged local consciousness-raising groups) (citing SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1979)).

159. MACLEAN, *supra* note 8, at 123–24, 130–32.

160. NOW initiated its campaign by writing letters to the President, the EEOC commissioners, and various other executive departments, organizing a national day of protest and regularly picketing the EEOC and the White House, petitioning the EEOC for public hearings, and filing suit against the agency for failing to enforce the ban against sex discrimination. HARRISON, *supra* note 8, at 200, 203–04; SKRENTNY, *supra* note 8, at 118; Fuentes, *supra* note 104, at 8. NOW also formed a spinoff, the Women’s Equity Action League (WEAL), to bring lawsuits. KESSLER-HARRIS, *supra* note 8, at 265, 268; SKRENTNY, *supra* note 8, at 133. The group engaged in a litigation campaign to pressure the DOL to adopt affirmative action for women, *id.* at 133–35, and worked with NOW to secure passage of the ERA in both houses of Congress in 1972. *Id.* at 240.

161. Job Opportunities Advertising, 33 Fed. Reg. 11,539 (Aug. 14, 1968). This decision occurred only a few months after NOW’s general counsel, Marguerite Rawalt, followed through on NOW’s threat to sue the EEOC and the court agreed to dismiss the case only if the EEOC “promised to improve its performance on behalf of women.” HARRISON, *supra* note 8, at 204. In altering its policy on sex-segregated advertising, the EEOC “tacitly noted the contribution of NOW by indicating that it would inform the organization of ‘the disposition of the actions raised by their petition.’” KESSLER-HARRIS, *supra* note 8, at 259. Justice Fortas’s prediction turned out to be wrong: the Supreme Court upheld a similar prohibition on sex-segregated advertising in 1973. HARRISON, *supra* note 8, at 204. *See generally* Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376 (1973).

162. At the EEOC’s 1967 hearings prompted by NOW, the EEOC encountered new thinking among women’s rights groups regarding state protective laws and began to rethink its own position. KESSLER-HARRIS, *supra* note 8, at 265. By then, NOW and other Second Wave activists had sparked a growing feminist consensus that these laws did more harm than good in a post-Title VII world in which sex-segregated employment could be challenged, rather than simply accepted as natural. HARRISON, *supra* note 8, at 204; KESSLER-HARRIS, *supra* note 8, at 267.

they did not take the “capacities, preferences, and abilities of individual females” into account, and they “tend[ed] to discriminate rather than protect.”¹⁶³ In addition, after years of waffling on pregnancy discrimination,¹⁶⁴ renewed feminist activism inside and outside the EEOC prompted the agency to overcome initial ambivalence and move forward in a clear direction. Led by young feminist staff attorneys who embraced the new spirit of egalitarianism,¹⁶⁵ the EEOC issued guidelines on pregnancy discrimination that abandoned an older protectionist position treating pregnancy as unique and deserving of special protection and directed employers instead to treat pregnancy-related problems the same as other temporarily disabilities.¹⁶⁶

In addition to clarifying these important issues, the EEOC participated in a number of high-profile lawsuits that challenged significant patterns of sex segregation under Title VII, as was routinely done in race cases. By 1970, the women’s movement had established a foothold in the EEOC, and the agency overcame its initial reluctance to infer sex discrimination based on women’s statistical underrepresentation as revealed in an employer’s EEO-1 reports.¹⁶⁷ The EEOC used the EEO-1

163. Sex as a Bona Fide Occupational Qualification, 34 Fed. Reg. 13,367, 13,368 (Aug. 19, 1969) (stating that state protective laws “will not be considered a defense . . . or as a basis for the application of the bona fide occupational qualification exception”).

164. In the early years, the EEOC was internally divided and treated pregnancy discrimination inconsistently. The Office of General Counsel’s opinion letters stated at times that Title VII did not prohibit employers from excluding pregnancy from disability policies and at other times that Title VII required employers to give maternity leaves to pregnant women even if no leaves were given other ill or disabled employees. KESSLER-HARRIS, *supra* note 8, at 253–55; Schwartz, *supra* note 107, at 11–15. In its reasonable cause rulings, the EEOC took similarly inconsistent positions. *Id.* at 17–20; *see also* Dinner, *supra* note 16, at 456 (noting that “[c]onfusion and ambivalence characterized the initial response of the EEOC” to pregnancy). These policy inconsistencies paralleled the divided views of influential women at the EEOC in that era. Sonia Pressman Fuentes, the first female lawyer at the EEOC, apparently favored requiring employers to provide pregnant women maternity leaves, even if they did not provide leaves to other employees. *See* Schwartz, *supra* note 107, at 21, 23 (citing an unpublished piece by EEOC staff attorney Sonia Pressman Fuentes entitled *Two Conflicting Theories For Protecting Women Regarding Pregnancy*, which echoed the views of older, protectionist women’s rights groups in describing pregnancy as unique and deserving of special consideration). Aileen Hernandez, the only female Commissioner, wanted to investigate alternative approaches. KESSLER-HARRIS, *supra* note 8, at 254.

165. *See* SKRENTNY, *supra* note 8, at 126 (observing that by 1970, “the women’s movement had established a solid base in the formerly black-oriented EEOC”); Schwartz, *supra* note 107, at 22–28 (explaining that in the early 1970s, a handful of women who identified with the women’s rights movement had become influential at the EEOC, including Sonia Pressman Fuentes, Susan Deller Ross, and Aileen Hernandez). For a discussion of evolving feminists’ views and the EEOC’s approach to pregnancy discrimination, *see infra* note 413.

166. For the text of the EEOC’s 1972 guidelines, *see* Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835, 6837 (Apr. 5, 1972) (codified at 29 C.F.R. § 1604.10 (1973)) (providing that “[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities . . . under any health or temporary disability insurance or sick leave plan . . .”).

167. The EEO-1 form is an annual form the EEOC required all employers to file reporting the racial, ethnic, and gender breakdowns of their workforces using standard occupational categories. The EEO-1 was based on Form 40, a form created by President Kennedy’s Presidential Committee on Equal Employment Opportunity to monitor minority hiring by government contractors. SKRENTNY, *supra* note 8, at 101–04. The EEOC included the category of “women” on this form, along with African-Americans, Latinos, Asian Americans, and American Indians. *Id.* at 103–04; *see also id.* at 125–26 (noting that before about 1970, the EEOC was reluctant to infer sex discrimination

data, as well as individual complaints, to target leading American industries that were the worst offenders. After receiving a disproportionately high number of individual complaints about sex discrimination at AT&T,¹⁶⁸ the telecommunications monopoly that was then the nation's largest employer of women,¹⁶⁹ the EEOC joined the Federal Communications Commission (FCC) in 1970 in a high-profile campaign to eliminate systematic sex discrimination throughout the company. Ultimately, the government won a settlement that disrupted entrenched patterns of sex segregation at AT&T and sent a message to other employers that, whether practiced covertly or overtly, the custom of hiring men and women for different jobs would be regarded as a form of sex discrimination.¹⁷⁰ In 1973, the EEOC similarly investigated and eventually sued Sears, Roebuck and Co., the second largest employer of women after AT&T,¹⁷¹ challenging the sex disparities in employment and pay that permeated its sales force.¹⁷² Although the EEOC would later lose this lawsuit against Sears,¹⁷³ these and other early initiatives, spurred by groups like NOW, undercut the assumption of sexual difference that organized American industry and signaled that Washington was now taking sex discrimination seriously.

2. Department of Justice Litigation

The EEOC was not the only agency responsible for enforcing Title VII, nor the only one that was slow to enforce its sex discrimination prohibition. Until 1974, when responsibility for bringing such cases against private employers transferred to the EEOC, Title VII gave the Department of Justice (DOJ) exclusive authority to initiate Title VII

based on women's underrepresentation and had a tendency to drop the "women" category when investigating and condemning discrimination against minority groups based on the EEO-1 reports).

168. AT&T accounted for 5-7% of all charges pending before the EEOC, and so EEOC technical expert Phyllis Wallace determined that it would be more efficient to bring a pattern or practice case than to process so many individual complaints. MACLEAN, *supra* note 8, at 132; SKRENTNY, *supra* note 8, at 126-27.

169. The Bell System, which included AT&T, was the nation's largest single employer of women in 1971. MACLEAN, *supra* note 8, at 131.

170. The EEOC proved that there was deep sex segregation at AT&T. For example, 92.4% of all employees were concentrated in jobs where the workers were 90% or more of the same sex. SKRENTNY, *supra* note 8, at 127. In fact, Phyllis Wallace's report for the EEOC concluded that "[e]very single wage-earning job was classified as male or female." MACLEAN, *supra* note 8, at 132; *see also* SKRENTNY, *supra* note 8, at 126-28 (describing how the EEOC combined statistics from EEO-1 data, the many individual complaints it received, and a feminist theory of sex discrimination inspired by NOW's involvement in the case to arrive at a historic consent decree with a substantial affirmative action and back pay remedy); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 837-44 (2010) (describing the joint effort between the EEOC and the FCC and the extensive consent decree that resulted).

171. In the 1970s, Sears was the largest employer of low-wage female sales workers and the second-largest employer of women after AT&T. MACLEAN, *supra* note 8, at 139. By the time the Sears case went to trial in the early 1980s, Sears had become the nation's largest private employer of women. *See infra* note 349.

172. *See infra* notes 299-310 and accompanying text.

173. *See infra* notes 307-310 and accompanying text.

lawsuits. The DOJ could file suit "whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]."¹⁷⁴ Beginning in 1967, when Attorney General Ramsey Clark instructed lawyers in the Civil Rights Division to focus on employment discrimination, the DOJ led federal enforcement litigation efforts.¹⁷⁵ In 1967, DOJ lawyers filed six pattern or practice lawsuits, and in 1968 another twenty-six such suits, against private employers.¹⁷⁶ By 1973, the Division had initiated one hundred such lawsuits raising significant precedential issues, including cases against employers in some of the nation's leading industries.¹⁷⁷

Like the EEOC, the DOJ viewed Title VII's major mandate as eliminating race discrimination. It was not until 1970 that the DOJ brought its first lawsuit alleging a pattern or practice of sex discrimination,¹⁷⁸ even though, by then, its attorneys had filed forty or fifty such suits based on race.¹⁷⁹ In congressional hearings on sex discrimination held in 1970, Jerris Leonard, the Assistant Attorney General for Civil Rights at the time, defended the Division's record by insisting that "[t]he truth of the matter is there is, at least as far as what is brought to our attention, far greater discrimination on the ground of race than there is on the ground of sex."¹⁸⁰ His statement echoed earlier remarks by Benjamin Mintz, Deputy Director of the Civil Rights Division, who testified in 1969 that the DOJ had brought only racial discrimination cases that year because

174. Civil Rights Act of 1964, Pub. L. No. 88-352, § 707(a), 78 Stat. 241, 261; see also *supra* note 105 (discussing the authority transferred from and granted to the DOJ in the Equal Employment Opportunity Act of 1972).

175. David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1138 (1989).

176. *Id.*

177. Thomas R. Ewald, *Public and Private Enforcement of Title VII of the Civil Rights Act of 1964—A Ten-Year Perspective*, 7 URB. L. ANN. 101, 113-14 (1974). The DOJ's nationwide suits against the steel and trucking industries, which resulted in expensive and far-reaching consent decrees, instilled fear among employers of major litigation, bad publicity, and large back pay awards if they did not address their discrimination problems. Rose, *supra* note 175, at 1145-46.

178. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Part 2 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. 680, 682 (1970) (statement of Jerris Leonard, Assistant Att'y Gen., Civil Rights Div., Justice Dep't) [hereinafter *1970 House Hearings on Discrimination*]; KESSLER-HARRIS, *supra* note 8, at 277; Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 750 (1974). That first sex discrimination case was *United States v. Libbey-Owens-Ford Co.*, 3 Fair Empl. Prac. Cas. (BNA) 372 (N.D. Ohio Feb. 3, 1971). See *1970 House Hearings on Discrimination*, *supra*, at 680; *Developments in the Law*, *supra* note 65, at 1233 n.225. The lawsuit resulted in a wide-ranging consent decree that covered seniority, promotion, transfer, training, hiring, recruitment, and notice requirements for female hourly paid employees at a manufacturing plant. See generally *Libbey-Owens-Ford Co.*, 3 Fair Empl. Prac. Cas. (BNA) 372.

179. *1970 House Hearings on Discrimination*, *supra* note 178, at 636 (statement of William H. Brown III, Chairman, EEOC); *id.* at 682 (statement of Jerris Leonard, Assistant Att'y Gen., Civil Rights Div., Justice Dep't).

180. *Id.* at 688 ((statement of Jerris Leonard, Assistant Att'y Gen., Civil Rights Div., Justice Dep't); KESSLER-HARRIS, *supra* note 8, at 277.

racial discrimination was a “more serious social problem” than sex discrimination, with “more deeply ingrained” prejudices to battle.¹⁸¹

Although the DOJ did not become as actively involved as the EEOC in combating sex discrimination in the years immediately following Title VII’s passage, activism by NOW and other women’s rights groups probably did influence DOJ lawyers to take steps to address the problem. In the early 1970s, for example, NOW joined a coalition of civil rights and labor groups to pressure the DOJ to sue the country’s nine major steel producers and the United Steelworkers of America alleging a pattern or practice of race and sex discrimination.¹⁸² NOW’s involvement grew out of grassroots efforts by female steel workers in multiple regions, including Chicago, Baltimore, and Pennsylvania.¹⁸³ These steel companies had already been subject to a number of discrimination suits. In an effort to secure an industry-wide solution and avoid future litigation, they negotiated for months with the federal government,¹⁸⁴ whose investigation covered 73% of the steel industry.¹⁸⁵ The final consent decree, signed in April 1974, provided \$30.9 million in back pay for forty thousand women and minorities who had experienced discrimination and established numerical goals and timetables designed to bring the industry into compliance with Title VII in the future.¹⁸⁶

Despite the rampant sex discrimination in the steel industry, it is not clear that the DOJ would have alleged sex discrimination absent NOW’s involvement. None of the DOJ’s early pattern or practice suits had alleged sex discrimination, even though most of those cases involved firms or industries employing few women.¹⁸⁷ Indeed, one of the Civil

181. GRAHAM, *supra* note 8, at 403. Such statements not only understated the problem of sex discrimination: they also created the impression that race discrimination pertained only to men, ignoring the problems of Black women. For a classic article criticizing civil rights law for erasing the problems of Black women, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

182. *United States v. Allegheny-Ludlum Indus., Inc.*, 63 F.R.D. 1 (N.D. Ala. 1974). For an account of the case from a labor history perspective, see JOHN HINSHAW, *STEEL AND STEELWORKERS: RACE AND CLASS STRUGGLE IN TWENTIETH-CENTURY PITTSBURGH* 211–17 (2002).

183. MACLEAN, *supra* note 8, at 130–31 (describing the experience of Alice Peurala, who sued U.S. Steel’s South Works plant in Chicago and paved the way for a larger lawsuit and consent decree when other female steelworkers in Chicago, Pennsylvania, and Baltimore organized with NOW).

184. Casey Ichniowski, *Have Angels Done More? The Steel Industry Consent Decree* 8–15 (Nat’l Bureau of Econ. Research, Working Paper No. 674, 1981), available at <http://www.nber.org/papers/w0674> (describing the extensive litigation the steel industry had already been involved in and the desire among the industry to adopt an industry-wide solution and avoid future litigation).

185. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 834 n.1 (5th Cir. 1975).

186. *Id.* at 834–39 (explaining in detail the nature of the two consent decrees that were reached); SKRENTNY, *supra* note 8, at 127–28 (same). For the text of the actual consent decree, see Consent Decree I, *United States v. Allegheny Ludlum Indus., Inc.*, No. 74 P339, (N.D. Ala. Apr. 12, 1974), available at <http://www.clearinghouse.net/chDocs/public/EE-AL-0115-0005.pdf>.

187. See, e.g., *United States v. Sheet Metal Workers Int’l Ass’n, Local Union No. 36*, 416 F.2d 123, 124–25 (8th Cir. 1969) (suit against building trades council and crafts unions); *In re Trucking*

Rights Division's lead lawyers in the steel industry case made comments, years later, suggesting that, in that case, the sex discrimination claim was added mainly as a bargaining chip to induce the steel industry to agree to hire Black men.¹⁸⁸

Nor would there have been as much pressure to hire women under the steel industry consent decree absent NOW's attention. NOW attempted to intervene in the lawsuit specifically in order to challenge the adequacy of the decree's promotion goal for women.¹⁸⁹ NOW argued that because women had been discriminatorily excluded from entry-level production jobs in the steel mills since the 1940s, a provision in the decree tying the number of women to be promoted to the number of women already employed in production jobs would perpetuate the industry's own past sex discrimination,¹⁹⁰ "'mak[ing] a mockery' out of any obligation on the companies' part to promote females into trades and crafts."¹⁹¹ Ultimately, the Fifth Circuit rejected NOW's challenge on both substantive and procedural grounds.¹⁹² Nonetheless, the lawsuit had a considerable impact upon the lives of the women who already worked in the steel mills or who entered them thanks to the hiring goals, bringing "enormous changes in the status of female workers and revers[ing] the marginalization they had suffered during the 'liberal' 1960s."¹⁹³ In addition, the widespread publicity the suit generated helped establish that it was sex discrimination that explained women's absence from the steel industry, not their lack of interest or competence.

3. Department of Labor Regulations

Like the EEOC and the DOJ, the Department of Labor (DOL) was also slow to take sex discrimination seriously. Although the DOL had no authority to enforce Title VII, its Office of Federal Contract Compliance (OFCCP) was responsible for implementing President Kennedy's 1965 Executive Order 11,246, which prohibited federal contractors from discriminating in employment and required them to take affirmative action to ensure against such discrimination.¹⁹⁴ Once again, women's

Indus. Emp't Practices Litig., 384 F. Supp. 614, 615 (J.P.M.L. 1974) (suit against the trucking industry); NAACP v. Allen, 340 F. Supp. 703, 704-05 (M.D. Ala. 1972) (suit against Alabama Department of Public Safety regarding state troopers).

188. Conversation between Robert T. Moore, Lead Attorney in *Allegheny-Ludlum*, Deputy Section Chief for the Employment Litigation Section of the Department of Justice, Civil Rights Division, and the author sometime between 1983 and 1986, when the author was a trial attorney in the Employment Litigation Section.

189. *United States v. Allegheny-Ludlum Indus., Inc.*, 63 F.R.D. 1, 4 (N.D. Ala. 1974); see also *Allegheny-Ludlum*, 517 F.2d at 841-42 (explaining NOW's arguments in favor of its right to intervene in the steel industry lawsuit).

190. See *id.* at 879-80.

191. *Id.*

192. *Id.* at 840-46, 879-81.

193. HINSHAW, *supra* note 182, at 213.

194. From the 1940s to the 1960s, Presidents Roosevelt, Truman, Eisenhower, and Kennedy issued executive orders barring discrimination by federal contractors and requiring that they take

rights advocates had to exert pressure to convince the OFCCP to give women access to affirmative action policies created for African-Americans and other minorities.

By 1970, as noted above, the EEOC had begun relying on statistical data drawn from employers' annual EEO-1 reports reporting the number of women in each occupation to initiate high profile sex discrimination suits against large companies like AT&T.¹⁹⁵ Long after EEOC attorneys had overcome an initial reluctance to infer sex discrimination from evidence of significant female underrepresentation, DOL officials struggled with relying on such data as a basis for requiring affirmative action for women. The DOL relied on such statistical data to press for greater inclusion of African-Americans and other minorities on the premise that, absent labor market discrimination, these groups ordinarily should constitute approximately the same share of an employer's workforce and jobs as their share of the area labor force.¹⁹⁶ Yet, DOL officials had a hard time accepting that the same basic premise applied to women.¹⁹⁷ By requiring employers to explain or eliminate such disparities, affirmative action was a key policy tool for dismantling entrenched patterns of segregation and inequality in employment. Because only the Labor Department had authority to press directly for affirmative action, and because the policy found its "most explicit regulatory formulation in the hiring goals and timetables" of the OFCCP,¹⁹⁸ the DOL's initial exclusion of women from these policies and programs was potentially very damaging.

affirmative action to address employment discrimination. Exec. Order No. 8802, 3 C.F.R. § 957 (1938–1943) (issued by President Roosevelt on June 25, 1941); Exec. Order No. 9346, 3 C.F.R. § 1280 (1938–1943) (issued by President Roosevelt on May 27, 1943); Exec. Order No. 10,308, 3 C.F.R. § 519 (1951) (issued by President Truman on December 3, 1951); Exec. Order No. 10,479, 3 C.F.R. § 97 (1953) (issued by President Eisenhower on August 13, 1953); Exec. Order No. 10,925, 3 C.F.R. § 86 (1962) (issued by President Kennedy on Mar. 6, 1961); see KESSLER-HARRIS, *supra* note 8, at 275–76. The OFCCP within the DOL had, and still has, authority to implement Executive Order 11,246. Exec. Order No. 11,246, 3 C.F.R. § 167 (1966) (issued by President Johnson on September 24, 1965). The original Executive Order 11,246 prohibited federal contractors from discriminating on the basis of "race, creed, color, or national origin" and mandated that contractors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to" such factors. *Id.* Amended over the years, the Executive Order today bans discrimination on the basis of race, color, religion, sex, or national origin. See *Executive Order 11246, As Amended*, U.S. DEP'T LAB. OFF. FED. CONT. COMPLIANCE PROGRAMS (last visited June 19, 2015), <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

195. See *supra* notes 167–70 and accompanying text.

196. See KESSLER-HARRIS, *supra* note 8, at 276; SKRENTNY, *supra* note 8, at 89, 133; James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 921 (1985). See generally James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341 [hereinafter Jones, *Bugaboo*] (describing the development, theory, and design of the Department of Labor's use of labor market statistics to set minority employment goals for government contractors).

197. Many officials questioned whether women's absence from good jobs and professional schools in which males predominated, and women's resulting lower pay, was the result of their own choices or employer bias. As Kessler-Harris argues, "When it came to women, goals and timetables seemed to undermine the centrality of sex 'difference,' to challenge gender as a system of social order." KESSLER-HARRIS, *supra* note 8, at 276.

198. SKRENTNY, *supra* note 8, at 130.

The original Executive Order did not cover sex discrimination, even though it was meant to be an analogue to Title VII.¹⁹⁹ One of NOW's first successes was convincing President Johnson to amend the Executive Order in 1967 to add sex discrimination.²⁰⁰ Mary Keyserling, director of the DOL's Women's Bureau at the time, argued that this inclusion opened the door for the DOL to apply to sex discrimination the same presumptions it already applied to race discrimination: DOL lawyers could presume that women were skilled and qualified for the full range of jobs and that any significant disparity of women in the workforce reflected the presence of sexually discriminatory barriers and invited an agency investigation or an affirmative action program.²⁰¹

The DOL refused to follow such an approach, prioritizing race and publicly resisting the sex-race analogy just as the EEOC and the DOJ initially had done.²⁰² Secretary of Labor James D. Hodgson told a speechwriter that, while there were benefits to "appeasing women," "women's Lib groups are obviously trumpeting some absurdities."²⁰³ Assistant Secretary of Labor Arthur Fletcher, a key player in race-based affirmative action, remarked that women "were legislated their minority status" through the late addition of "sex" to Title VII and that very few women were victims of economic discrimination.²⁰⁴ As a result of such attitudes, the OFCCP left women out of the Revised Philadelphia Plan, a path-breaking 1969 program that required federal contractors to hire minority men in numbers approximating their share of the relevant industry or labor force.²⁰⁵

Pressing the race-sex analogy, women's rights activists reacted with anger. Led by NOW's litigating arm, the Women's Equity Action League, or WEAL,²⁰⁶ advocates filed a historic class action sex discrimination complaint with the Department of Labor against all universities and colleges holding federal contracts,²⁰⁷ alleging an "industry-wide

199. Exec. Order No. 11,246, 3 C.F.R. § 167 (Supp. 1965) (issued by President Johnson on Sep. 24, 1965); see KESSLER-HARRIS, *supra* note 8, at 275-76; SKRENTNY, *supra* note 8, at 130.

200. Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-1970) (issued by President Johnson on Oct. 13, 1967). The Executive Order is often referred to as "11246 as amended." See KESSLER-HARRIS, *supra* note 8, at 276; SKRENTNY, *supra* note 8, at 130.

201. SKRENTNY, *supra* note 8, at 130-31.

202. *Id.* at 138-39 (citing DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 242 (2001)).

203. *Id.*

204. *Id.* at 139.

205. *Id.* at 89, 132-33; Jones, *Bugaboo*, *supra* note 196, at 364-73. The OFCCP originally developed this approach through its compliance programs for construction contractors across the country, including in Philadelphia, and then later expanded it to apply to all federal contractors when it issued Order 4 in February 1970. Order No. 4, 35 Fed. Reg. 2586, 2587 (Feb. 5, 1970); see SKRENTNY, *supra* note 8, at 132-33. Women were left out of this plan even though sex was covered by the Executive Order that authorized the plan. *Id.*

206. For more on WEAL, see *supra* note 160.

207. WEAL was authorized to bring such a complaint under Executive Order 11,375, 32 Fed. Reg. 14,303 (1967); see Bernice Sandler, *A Little Help From Our Government: WEAL and Contract*

pattern' of sex discrimination against women in the academic community," particularly in admissions quotas, financial assistance, hiring practices, promotions, and pay.²⁰⁸ Educational institutions were, at the time, exempted from coverage under Title VII, so only the newly amended Executive Order 11,246 provided legal remedies for sex discrimination directed at female faculty and staff.²⁰⁹ WEAL and other women's rights activists sought to expose the facts and force the OFCCP to acknowledge that women faced systematic sex discrimination similar to the race discrimination confronted by racial minorities.²¹⁰ This complaint, and the public pressure surrounding it, led the OFCCP to more closely investigate educational institutions and issue guidelines on sex discrimination.²¹¹

These sex discrimination guidelines, issued on June 9, 1970,²¹² again left women disappointed. The OFCCP previously had issued Order No. 4, an order requiring government contractors to use hiring goals and timetables and to correct any identifiable deficiencies in minority employment based on the percentage of racial minorities in the workforce in the area labor market.²¹³ The OFCCP's guidelines made clear that women were not included in this proactive approach to affirmative action. The guidelines vaguely called for employers to make an extra effort to recruit and promote women, but failed to require, or even mention, numerical goals.²¹⁴

Women's rights activists called the guidelines "useless" and insisted that the DOL enforce Order No. 4 with respect to women.²¹⁵ In June 1970, less than a month after the guidelines were released, NOW filed a

Compliance, in ACADEMIC WOMEN ON THE MOVE 439, 440 (Alice S. Rossi & Ann Calderwood eds., 1973).

208. Sandler, *supra* note 207, at 440–41; see also SKRENTNY, *supra* note 8, at 133–34. WEAL wrote to members of Congress to pressure the DOL to act upon the complaint. Sandler, *supra* note 207, at 443. WEAL also filed specific charges with the DOL against the University of Maryland and more than 250 other academic institutions. SKRENTNY, *supra* note 8, at 134; Sandler, *supra* note 207, at 441. Other women's rights groups filed class actions against medical schools, law schools, and other universities. Sandler, *supra* note 207, at 441.

209. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 ("This title shall not apply . . . to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."); see SKRENTNY, *supra* note 8, at 133.

210. SKRENTNY, *supra* note 8, at 133.

211. Sandler, *supra* note 207, at 443.

212. *Sex Discrimination Guidelines*, 35 Fed. Reg. 8888 (June 9, 1970).

213. Order No. 4, 35 Fed. Reg. 2586, 2589 (Feb. 5, 1970); SKRENTNY, *supra* note 8, at 133.

214. *Sex Discrimination Guidelines*, 35 Fed. Reg. at 8889 (requiring affirmative action, but only action such as recruiting at women's colleges, designing advertisements to be more inclusive of women, and committing to include female candidates in training programs); see SKRENTNY, *supra* note 8, at 135. This discrepancy foreshadowed favorable treatment courts later gave employers' evidence of having made "special efforts" to attract women in sex discrimination cases, while not crediting such evidence in race discrimination cases challenging patterns of segregation. For a discussion of the role of evidence of special efforts in persuading courts to accept or reject the lack of interest argument in such cases, see Schultz & Petterson, *supra* note 59, at 1126–27.

215. SKRENTNY, *supra* note 8, at 135–36; see also JUDITH HOLE & ELLEN LEVINE, *REBIRTH OF FEMINISM* 46 (1971) (detailing the problems women's rights groups found with the guidelines).

formal complaint with the DOL, charging 1,300 government contractors with sex discrimination.²¹⁶ House Representative Edith Green, who had initially opposed the sex amendment to Title VII, held hearings and questioned Elizabeth Duncan Koontz, director of the DOL's Women's Bureau, as to why women should not receive the benefits of affirmative action.²¹⁷ In response, Koontz read from an explanatory statement by Secretary of Labor George Shultz. Shultz stated that using goals and timetables to correct for women's underutilization based on area workforce statistics was not appropriate, because "[m]any women do not seek employment," whereas "[p]ractically all adult males do."²¹⁸ Furthermore, Shultz emphasized, even women who do seek employment are not attracted to many lines of work. "Many occupations sought after by all racial groups may not have been sought by women in significant numbers," as he put it.²¹⁹ For these reasons, he concluded, the OFCCP could not rely on the usual statistical methodology; instead, administrators would need to ascertain the level of local women already qualified for and interested in the jobs at issue, as evidenced by female applications for employment, when designing sex-based affirmative action programs for women.²²⁰

Although the Labor Department initially refused to accept the analogy between sex and race discrimination urged by NOW and other women's rights groups, activists eventually succeeded in persuading DOL officials to adopt a more expansive approach to affirmative action for women. After all, as sociologist John Skrentny has observed, there was no language in either Title VII or the executive orders, and "nothing in the concepts of 'civil rights' and 'equal opportunity,' suggest[ing] there should be different models of justice for different groups."²²¹ When Labor Department officials met with women's rights groups in April and May of 1971, the DOL finally acceded to including women in Order No. 4.²²²

Activists' struggle with the DOL reveals that, even as the women's rights' movement unified and gathered momentum, old cultural assumptions died hard. The same approach that DOL officials used to pursue affirmative action for racial minorities was too radical to apply to

216. HOLE & LEVINE, *supra* note 215, at 46; SKRENTNY, *supra* note 8, at 136.

217. SKRENTNY, *supra* note 8, at 135-36. These hearings were held in support of an amendment prohibiting sex discrimination Green sought to make to a law about higher education. *Id.* at 242. While the amendment did not pass, the hearings "provided an occasion for Green to attack the Nixon administration on its initial failure to extend affirmative action to women" and "publicized the problem of women's inequality." *Id.*

218. KESSLER-HARRIS, *supra* note 8, at 279; SKRENTNY, *supra* note 8, at 137.

219. SKRENTNY, *supra* note 8, at 138.

220. *Id.*

221. *Id.* at 140.

222. Revised Order No. 4, 36 Fed. Reg. 23,152 (Dec. 4, 1971); see SKRENTNY, *supra* note 8, at 140-41.

women.²²³ “When it came to women,” as historian Alice Kessler-Harris put it, “goals and timetables seemed to undermine the centrality of sex ‘difference,’ to challenge gender as a system of social order.”²²⁴ Although DOL officials ultimately relented and extended affirmative action policies to cover women, some public officials never fully accepted the idea that, with active steps to eliminate discrimination, women would aspire to train for and work in the same or similar fields, at the same levels of commitment and expertise, as men.²²⁵ The DOL’s position foreshadowed similar arguments about women’s lack of interest in higher paying employment that were later made by employers in Title VII lawsuits and accepted by many courts.²²⁶

C. *The Consolidation of Progress in Congress and the Federal Courts*

The foregoing examples of early enforcement illustrate the dynamic process of official resistance, movement counter-resistance, consensus building, and eventual reform through which progress occurred. By the early to mid-1970s, women’s rights activists and their sympathizers had won important struggles over the meaning of sex discrimination under Title VII. Reflecting the power of the still-strong women’s movement, these activists forced politicians, agency officials, and judges to acknowledge and address the discrimination experienced by working women.

By the time Congress amended Title VII in 1972,²²⁷ the political and cultural climate had changed so much that Congress not only endorsed the important race discrimination precedents established by the federal courts and agencies:²²⁸ Lawmakers also explicitly acknowledged the long-standing patterns of sex segregation and discrimination that characterized America’s workforce and instructed courts and policy-makers to treat sex discrimination as seriously as race discrimination.²²⁹ The 1972 Act culminated, and consolidated, a dynamic process of law

223. SKRENTNY, *supra* note 8, at 140.

224. KESSLER-HARRIS, *supra* note 8, at 276.

225. SKRENTNY, *supra* note 8, at 246–50 (explaining how the Nixon administration’s Office for Civil Rights in the Department of Health, Education, and Welfare later dragged its heels in implementing Title IX of the Civil Rights Act prohibiting sex discrimination in higher education).

226. *See infra* Part III.A.

227. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

228. *See, e.g.*, ACKERMAN, *supra* note 6, at 190 (noting that in the 1972 amendment to Title VII, Congress affirmed *Griggs* and “the leaders of the House-Senate conference prefaced their report with an explicit endorsement of ‘the present case law as developed by the courts,’ declaring that it should ‘continue to govern the . . . construction of Title VII’”).

229. *See* S. REP. NO. 92-415, at 7 (1971) (“While some have looked at . . . women’s rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct.”); H.R. REP. NO. 92-238, at 4–5 (1971) (“[W]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.”).

reform that confirmed advances made by agencies and the courts and called into question the presumed sex differences traditionally used to justify women's inequality in the workplace. The reform process did not stop at the factory gate or office door. Inspired by the women's rights movement's growing strength and unity, Congress addressed women's concerns in realms beyond the workplace and Title VII. Congress not only ratified the Equal Rights Amendment,²³⁰ but also enacted Title IX²³¹ and passed other lesser-known laws prohibiting sex discrimination.²³²

The federal courts also helped consolidate the early gains. Under Title VII, judges adopted innovative approaches in numerous areas to invalidate sex segregation and other inequalities that characterized the American workplace. When employers tried to justify overt sex discrimination by arguing that hiring women or men only was a bona fide occupational qualification (BFOQ) for the job,²³³ for example, courts refused to endorse biased assumptions about sex differences and construed the BFOQ defense narrowly to avoid limiting Title VII's reach. To support a narrow reading, courts relied upon Title VII's legislative history and the EEOC's regulations.²³⁴ The EEOC guideline in question was the one earlier secured by NOW, when activists succeeded in persuading the EEOC to rule that state protective laws violated Title VII.²³⁵

The Fifth Circuit took the lead in developing this important body of BFOQ law. As early as 1969, in *Weeks v. Southern Bell Telephone &*

230. By March 1972, the Equal Rights Amendment, which provided that "[e]quality under the law shall not be denied by the United States or by any State on account of sex," Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. § 1 (1972), won two-thirds of the vote in both houses of Congress. H.R.J. Res. 208, 92d Cong., 118 CONG. REC. 9517-98 (1972) (debate and vote in the Senate with 84 in favor, 8 opposed, and 7 not voting); H.R.J. Res. 208, 92d Cong., 117 CONG. REC. 35782-815 (1971) (debate and vote in the House of Representatives with 354 in favor, 24 opposed, and 51 abstaining); see also SKRENTNY, *supra* note 8, at 232, 240-41 (explaining that after women's leaders put forth a unified front in challenging Title VII's protective legislation, both the ERA and Title IX passed easily); Cynthia Harrison, "Heightened Scrutiny: An Alternative Route to Constitutional Equality for U.S. Women," in *WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE* 347, 353 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) (same).

231. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (1972). For a detailed discussion of the role of the women's movement in the passage of Title IX, see SKRENTNY, *supra* note 8, at 230-62.

232. SKRENTNY, *supra* note 8, at 241 (giving examples of lesser known laws such as the Comprehensive Health Manpower Training Act of 1971, the Nurses Training Act of 1971, the Child Development Act, vetoed by President Nixon, etc. and explaining how Congresswomen Bella Abzug and Martha Griffiths added sex discrimination prohibitions to as many new bills as possible).

233. For an explanation of the BFOQ defense, see *supra* note 122.

234. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (citing to the EEOC's guideline stating that the BFOQ for sex should be interpreted narrowly); *Diaz v. Pan. Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (same); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 nn.3-4 (5th Cir. 1969) (citing to the EEOC's guideline and Title VII legislative reports indicating that the BFOQ should be narrowly construed).

235. See *supra* note 163 and accompanying text.

Telegraph Company,²³⁶ the Fifth Circuit construed the BFOQ defense narrowly to avoid having “the exception . . . swallow the rule.”²³⁷ The court held that in order to prove a BFOQ defense, the employer had to show that “all or substantially all women would be unable to perform” the duties of the job in question.²³⁸ Two years later, in *Diaz v. Pan American World Airways*,²³⁹ the Fifth Circuit held that Pan Am’s policy restricting flight attendant jobs to women only was not justified as a BFOQ exception.²⁴⁰ Pan Am attempted to defend its female-only hiring by arguing that women were better at tending to the “special psychological needs” of the airline’s mostly male passengers.²⁴¹ The Fifth Circuit rejected this argument, ruling that the primary function of a flight attendant was to help transport passengers safely and that soothing them psychologically was tangential to the job.²⁴² Once the court defined the job’s primary duties in mechanical, gender-neutral terms, it became obvious that men could perform them as well as women. Notably, the Fifth Circuit rejected Pan Am’s argument that customers preferred female attendants, holding that it would be contrary to the purposes of Title VII to allow the company to cater to customers’ preferences and prejudices, as “it was, to a large extent, these very prejudices the Act was meant to overcome.”²⁴³

That same year, in 1971, the Supreme Court applied similar reasoning to reject a hiring policy that relied on sex stereotyping and promoted gender roles in *Phillips v. Martin Marietta Corporation*.²⁴⁴ The per curiam opinion invalidating Martin Marietta’s refusal to employ women, but not men, with pre-school age children was brief, but pathbreaking. The Court held that the mere allegation of the “existence of . . . conflicting family obligations” for women was not enough to justify a BFOQ.²⁴⁵ Justice Marshall’s concurring opinion went further, emphasizing that the BFOQ should be construed narrowly and that “[e]ven characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.”²⁴⁶ Citing the *Weeks* decision and the EEOC guideline, Marshall concluded that, in prohibiting sex discrimination, Congress had “intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of

236. 408 F.2d 228 (5th Cir. 1969); see also MACLEAN, *supra* note 8, at 123–24 (explaining how Title VII’s success depended upon the efforts of working-class women like Lorena Weeks, who used the law to expose sex segregation).

237. *Weeks*, 408 F.2d at 235.

238. *Id.*

239. 442 F.2d 385 (5th Cir. 1971).

240. *Id.* at 386.

241. *Id.* at 387.

242. *Id.* at 388.

243. *Id.* at 389.

244. 400 U.S. 542 (1971) (per curiam).

245. *Id.* at 544.

246. *Id.* at 545 (Marshall, J., concurring).

the sexes.”²⁴⁷ In addition to the United States government,²⁴⁸ both the American Civil Liberties Union (ACLU) and NOW filed amicus briefs urging the Justices to disavow the assumption that mothers with young children, but not fathers, were incapable of doing their jobs.²⁴⁹ That Marshall took Title VII’s sex ban on sex discrimination seriously, implicitly rejecting that the sex amendment was a joke and relying on an EEOC guideline that NOW’s activism had helped secure, shows how far the federal courts and agencies had come under the influence of women’s rights groups. Within a few years, the Supreme Court issued other expansive Title VII rulings that rejected arguments based on sex difference.²⁵⁰

The Supreme Court also issued expansive decisions under the Fourteenth Amendment’s Equal Protection Clause. Many of these early cases involved male plaintiffs. As head of the new ACLU Women’s Rights Project, Ruth Bader Ginsburg creatively included male plaintiffs in a series of sex discrimination cases designed to challenge the stereotypical roles for men and women that were part of the larger sexual division of labor targeted by Second Wave feminism.²⁵¹ Ginsburg strategically broadened her arguments to encompass the harms of sex stereotyping to men, promoting the concept that “[f]air and equal treatment for women means fair and equal treatment for members of both sexes.”²⁵² To

247. *Id.* (citing 29 C.F.R. § 1604.1(a)(i)(ii) (1970)).

248. See Brief for the United States as Amicus Curiae, *Martin Marietta*, 400 U.S. 542 (No. 73), 1970 WL 136379. In addition to the Solicitor General, attorneys from the Department of Justice, Civil Rights Division, were counsel of record on the brief. *Id.*

249. Motion for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae for National Organization for Women at 9–12, *Martin Marietta*, 400 U.S. 542 (No. 73), 1970 WL 122570; Motion for Leave to File a Brief Amicus Curiae and Brief of the American Civil Liberties Union, Amicus Curiae at 16, *Martin Marietta*, 400 U.S. 542 (No. 73), 1970 WL 122566. Pauli Murray was one of the counsel of record on the ACLU’s brief. *Id.*

250. See, e.g., *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707–11 (1978) (invalidating city’s pension fund plan requiring female employees to make larger contributions than male employees and rejecting arguments justifying the differential on the ground that, on average, women live longer than men); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (applying disparate impact doctrine to invalidate height and weight requirements for prison guard positions, and rejecting arguments that impact could not be established with reference to general population figures because women of average height and weight would not be interested in such positions).

251. See MACLEAN, *supra* note 8, at 134 (explaining that Ginsburg “oversaw a vast methodical effort to topple a centuries-old legal tradition” and used male plaintiffs to show that men were also hurt by the family wage system); Eskridge, *Some Effects*, *supra* note 5, at 2134 & n.355 (concluding that Ginsburg brought cases before the Supreme Court “challenging sex discriminations that reflected archaic stereotypes” and that her strategy to include male plaintiffs was controversial among feminists but aimed to “show male judges that everybody—including people like them—was harmed by sex discrimination”); Franklin, *supra* note 16, at 119–42 (chronicling the series of cases Ginsburg litigated at the time in hopes of convincing the Supreme Court to adopt her theories regarding sex discrimination); see also Wendy W. Williams, *Ruth Bader Ginsburg’s Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 44–45 (2013) (showing that if cases the Supreme Court decided per curiam or remanded or declined to review are counted, Ginsburg represented far more female plaintiffs than commonly believed). For more information on the Second Wave feminism’s targeting of the larger sex-biased social system sometimes referred to as the family wage system or the sexual division of labor, see *supra* note 81 and accompanying text.

252. Franklin, *supra* note 16, at 92 (quoting Brief for Petitioner-Appellant at 20, *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress,

Ginsburg and other early reformers, challenging the biased system that viewed women as only secondarily committed to employment meant, by definition, challenging the corollary assumption that men were rarely, if ever, committed to family caretaking.²⁵³

In *Frontiero v. Richardson*,²⁵⁴ for example, Ginsburg persuaded the Supreme Court to invalidate a federal statute that required proof of dependency for U.S. servicewomen claiming their husbands as dependents, but not for servicemen claiming their wives.²⁵⁵ The government appealed to administrative convenience, arguing, in Justice Brennan's words, that it was "both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact."²⁵⁶ As the Court noted, this argument assumed that "as an empirical matter, wives . . . frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives."²⁵⁷ The Court rejected this assumption, citing evidence which suggested that the presumption of dependency did not even accurately fit the service wives²⁵⁸ and cast doubt on the wisdom of relying on sweeping descriptive assertions about men and women in general that ignore variation by such factors as occupation and socioeconomic class.

Even if the government's factual assumptions were more accurate, the Court held, the Fourteenth Amendment would still not permit "according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience."²⁵⁹ On one level, this conclusion simply reaffirmed the earlier principle that constitutional values, such as equality, have higher value than efficiency.²⁶⁰ Yet, on another level, the decision reflected a newer understanding of the law's role in shaping the gendered social realities marshaled as "facts" to show the efficacy of making sex-based distinctions under the law. Justice Brennan's opinion for the majority expressed an acute awareness that, although social change was underway, women continued to suffer ongoing, pervasive sex discrimination that relegated them to an inferior status²⁶¹ throughout society in the name

Manuscript Division, Ruth Bader Ginsburg papers, Container 5, Folder: Moritz v. Comm'r [1971]] (internal quotation marks omitted).

253. MACLEAN, *supra* note 8, at 134 (emphasizing that in pursuing sex discrimination cases for the ACLU Women's Rights Project, Ginsburg aimed both to dislodge the family wage system and to demonstrate more broadly "how the notion that men are this way . . . and women are that way . . . ends up hurting both sexes" (internal quotation marks omitted)).

254. 411 U.S. 677 (1973).

255. *Id.* at 679.

256. *Id.* at 689.

257. *Id.* at 688–89.

258. *Id.* at 689 & n.23.

259. *Id.* at 690–91.

260. *Id.* at 690 (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

261. *Id.* at 686–87.

of honoring their special family roles.²⁶² As the Court's ringing indictment of laws promoting stereotypes acknowledged,²⁶³ such discrimination, if left unchecked by the Constitution, would continue to produce the very patterns of female economic dependency that governments invoked in order to justify further differential treatment.

Although Ginsburg has faced criticism for her approach,²⁶⁴ her agenda held promise for unsettling the established sex roles and stereotypes that characterized American life and supported women's workplace marginalization at the time.²⁶⁵ As *Frontiero* illustrates, stereotypes are not simply overgeneralized descriptive statements about what most men and women do or desire; they are also prescriptive ones about what people *should* do. These phenomena operate on the deepest levels of human consciousness and institutional logic, altering people's perceptions and behavior in fundamental ways that appear to confirm the stereotypes' truth. As early feminists knew, removing the law's legitimation of prevailing stereotypes and sex roles would not in and of itself create conditions of equality. But doing so could create new possibilities for women and men who—whether out of daring, or desperation, or a sense of duty—sought to cross settled gender boundaries and take up non-traditional activities. By the mid-1970s, women's rights activists had moved the law forward in preventing employers and legislatures from acting on the basis of traditional understandings of women's and men's proper place in society. As we have seen, Congress, the federal enforcement agencies, and the federal courts all participated in creating this change.

III. JUDICIAL REGRESSION BACK TO OLDER VIEWS OF WOMEN AND WORK

Up to now, my account of Title VII's prohibition on sex discrimination has emphasized the activist efforts and legal reforms that created change. Yet an account that discussed only the advances, and neglected

262. *Id.* at 684–85 (citing a passage from *Bradwell v. Illinois*, 83 U.S. 130 (1872) (Bradley, J., concurring), as an example of the traditional “paternalistic attitude” relegating women to the role of wife and mother).

263. *Id.* at 684–86 (“As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”).

264. See Franklin, *supra* note 16, at 83–86, 92 (providing examples of traditional critiques of Ginsburg's approach as being too narrow and formalistic); Vicki Schultz, *Roundtable Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 206 (2003) [hereinafter Schultz, *Roundtable*] (noting, while not agreeing with the criticism, that some feminists had later criticized *Frontiero* and similar decisions for “privileg[ing] women who ‘acted like men’ while ignoring the plight of those who ‘acted like women’”).

265. See Schultz, *Roundtable*, *supra* note 264, at 206–07 (reading *Frontiero* expansively to acknowledge and prohibit the law's involvement in prescribing the formation of gender roles); Williams, *supra* note 251, at 45–47 (arguing that Ginsburg was targeting the complex “sex-role pigeon-holing” framework that treated “women as yin and men as yang” and rewarded compliance and penalized deviation from societally created gender roles).

the setbacks, would be seriously incomplete. The early years did produce new understandings of workplace sex discrimination and new legal tools for addressing them. But, as we have seen, those reforms did not emerge easily and inevitably from the work of enlightened officials; they resulted from active conflict and struggle. Nor did the initial momentum lead ineluctably to further progress. Instead, over time, reformers confronted new versions of earlier, biased views.

Part II reviewed the legislative history of the sex discrimination provision, the ensuing stories about its enactment, and the early efforts by agencies and courts to enforce the provision. These were the arenas in which activists, academics, the press, and the public waged interpretive struggles that produced momentum and change. This Part analyzes subsequent decisions by the federal courts to show how progress can and did stall, and even reverse, in the absence of a visible, active women's movement challenging sex difference and pressing a cohesive and inclusive set of demands for equality.²⁶⁶

To illustrate this phenomenon, I analyze two different areas of law. The first involves a line of Title VII decisions in which employers sought to defend sex-segregated workforces as the expression of women's own lack of interest in higher paying jobs. Feminist inattention to this relatively obscure "lack of interest" argument,²⁶⁷ coupled with the reemergence of feminist division over the question of women's difference, freed conservative judges to accept conventional assumptions about women's allegedly different job preferences. The second area, pregnancy discrimination law, further illustrates how the courts idled, and even backpedaled, as the women's movement initially waffled and ultimately waned in strength and advocates divided over whether pregnancy should be treated as a uniquely female condition or one comparable to other temporary disabilities that affect both women and men.

266. In flagging judicial retrenchment, I do not mean to suggest that courts are the only institutions that regressed back to earlier, biased views. There are examples of executive, agency and legislative pullback, too. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 270-71* (1987) (documenting similar changes at the Solicitor General's office during the Reagan era); *infra* note 550 and accompanying text (discussing the EEOC's more conservative view of pregnancy in the Bush era in *UAW v. Johnson Controls*); *infra* note 314 and accompanying text (discussing then EEOC Chair Clarence Thomas's more conservative stance on the use of statistical evidence during the Reagan administration). Nonetheless, for a variety of reasons beyond the capacity of this Article to explore fully, including the well-worn observations that federal judges are not democratically elected and are generally more insulated from public pressure and accountability than Congress and administrative agencies, see generally ESKRIDGE & FEREJOHN, *supra* note 6; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), the courts have more leeway than other institutions to resort to their own views and, consequently, a greater capacity to revert back to older, pre-reform attitudes, in the absence of activist pressure or public attention.

267. See generally Schultz, *Telling Stories*, *supra* note 27 (coining the phrase "lack of interest argument" and comprehensively examining cases addressing this argument).

Case studies of course have limits, and some caveats are in order. I do not claim that courts pulled back in all areas of Title VII law or that the retreat was total in the areas examined here—only that regression was the general tendency. Nor do I assert that the social movement factors highlighted here—the absence of initial activist presence, decline of movement strength and visibility, and increased internal division—are the only ones that can weaken a social movement’s influence on the law.²⁶⁸ Over time, as a movement matures and its constituency becomes simply another interest group in ordinary pluralist politics, its exuberance and influence may inevitably weaken.²⁶⁹ Although these factors contribute to or detract from the public consensus a social movement must generate to effectuate legal change, I do not argue that social movement factors alone can fully explain legal resistance or retreat in the areas I examine. As noted above, movement trends cannot easily be separated from concurrent economic, political, and cultural changes that also shape law’s momentum and meaning.²⁷⁰

Regardless of how complex the ultimate explanations for such trends may be, however, the patterns that emerge from the case studies are striking. They document significant regression in two distinct, but important areas of Title VII sex discrimination law. They suggest that, despite enormous initial progress in challenging biased assumptions about women and work, those biases continued to influence legal reasoning and results fifty years later.

A. Women’s Inequality as Lack of Interest

Nowhere does the biased view of working women appear more clearly than in Title VII cases raising the lack of interest argument as a defense to claims of systemic discrimination in hiring or promotion. These cases typically challenge longstanding, entrenched patterns of sex-segregated employment. The plaintiffs present statistical studies showing that women are significantly underrepresented in an employer’s workforce or higher paying jobs, even after controlling for any sex differences

268. See *supra* note 18.

269. Eskridge observes that antidiscrimination statutes have a natural life-cycle. After an initial period when a social movement’s youthful burst of energy generates a growing public consensus that leads to law reform, visible activism eventually dissipates as a movement matures. At that point, administrators and judges return to business as usual, slowing or halting expansion of the law. Congress intervenes to move things forward again only when a new political consensus demands action. Eskridge, *Channeling*, *supra* note 5, at 497–98. Eskridge’s analysis suggests that law reform may stall or wane as part of an evolutionary process in which a social movement matures and its demands simply become part of normal pluralist politics.

270. See generally KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 158–85 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983 (1991); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis*, 24 *J. LEGAL STUD.* 427 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458 (2001). See also *supra* note 18.

in qualifications. Employers argue that the disparities are not due to discrimination, but to women's own choices. "It's not our fault," they say, "women don't want the jobs."²⁷¹

The belief that women lack interest in working for pay, particularly in jobs traditionally filled by men, lies at the heart of the old set of cultural assumptions about difference that hampered initial enforcement efforts. When women demanded affirmative action to address segregation and underutilization in the federal contracting sector, for example, DOL officials doubted that such patterns reflected past or present discrimination; they suggested instead that many women had shunned covered employment, as discussed above. Although the DOL's position provided precedent and paved the way for judges to accept the lack of interest argument, the courts did not issue many decisions²⁷² addressing this argument until the late 1970s.²⁷³ Moreover, when the argument did begin to show up in judicial decisions, it did not at first appear as a sexy, standout defense in high-profile cases. Instead, this obscure judge-made defense was often raised in connection with technical contests over the validity of the plaintiffs' statistical proof, where it largely escaped notice. For these reasons, cases raising the lack of interest argument rarely drew visible activist or feminist attention.²⁷⁴

271. For my previous studies of these issues, see Schultz, *Telling Stories*, *supra* note 27; Schultz & Petterson, *supra* note 59.

272. Although not in a traditional lawsuit, AT&T did raise the lack of interest argument to defend against the federal government's allegations of sex discrimination in the early, high-profile public hearings before the FCC. See Phyllis A. Wallace, *Equal Employment Opportunity*, in EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE 253, 268 (Phyllis A. Wallace ed., 1976) [hereinafter THE AT&T CASE] (describing how AT&T's expert, Dr. Leona Tyler, attributed AT&T's sex segregation to "well-known patterns of occupational interests, preferences, and preparations of women," particularly "cultural sex roles"). For experts' refutations of AT&T's lack of interest argument, see Judith Long Laws, *Psychological Dimensions of Labor Force Participation of Women*, in THE AT&T CASE, *supra*, at 125, 136–50; Ronald Oaxaca, *Male-Female Wage Differentials in the Telephone Industry*, in THE AT&T CASE, *supra*, at 17, 32–33. For an overview of these hearings and the consent decree that resulted, see *supra* note 168–70 and accompanying text.

273. In two studies of all published sex discrimination decisions by lower federal addressing the lack of interest argument between 1967 and 1989, I found only eleven such cases decided before 1977, compared to forty-three decided thereafter. See Schultz, *Telling Stories*, *supra* note 27, at 1776 tbl. 1; Schultz & Petterson, *supra* note 59, at 1095 tbl.1. In contrast to the race discrimination context, where the number of lack of interest cases tracked the distribution of cases filed in each period, in the sex discrimination context, lack of interest cases were underrepresented before 1977 and overrepresented thereafter, relative to filed cases. These figures suggest that employers began to raise the lack of interest argument more frequently in sex discrimination cases after 1977, when the Supreme Court issued three decisions that signaled to lower courts and employers that the lack of interest argument was a potentially valid defense to be analyzed factually, on a case-by-case basis. See Schultz, *Telling Stories*, *supra* note 27, at 1759–65 (discussing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)). In the earlier period, in sex discrimination cases, employers may have focused on trying to defend overtly discriminatory policies by securing broad readings of the BFOQ exception, discussed at *supra* note 122 and text accompanying notes 233–50, and, after that strategy failed, may have appealed to the lack of interest argument to defend more covert forms of discrimination.

274. The widespread public attention given to the *EEOC v. Sears* case, which highlighted the lack of interest argument as discussed *infra* in notes 299–310 and accompanying text, reveals the

*Kyriazi v. Western Electric Company*²⁷⁵ reveals both the stereotyped assumptions underlying the lack of interest defense and the role that energetic feminist advocacy can play in refuting those assumptions. In 1973, Judith Vladeck, a prominent New York City labor attorney who “turned her attention to workplace discrimination . . . [a]s the women’s [rights] movement gained footing,”²⁷⁶ brought suit under Title VII on behalf of Cleo Kyriazi, an industrial engineer, and a class of thousands of other women who were employed or who had sought employment at Western Electric’s Kearney, New Jersey plant.²⁷⁷ The suit challenged several of Western Electric’s practices as sexually discriminatory, including hiring and promotion.²⁷⁸ One of the first women to attend Columbia Law School in the 1940s, Vladeck knew something about how firms denied women job opportunities and failed to take them seriously as professionals.²⁷⁹ She was nevertheless unprepared for the severity of the sex discrimination confronting Kyriazi and other women at Western Electric.²⁸⁰ Sounding the same challenge to sex difference that had emerged with the women’s rights movement, Vladeck spent over a decade fighting for these women, assembling a wealth of evidence showing the systematic nature of the discrimination and unearthing facts refuting the idea that women were responsible for their own second-class status.

Like its telephone-company parent AT&T and other leading electrical manufacturers such as General Electric who were also sued for sex

relative obscurity of the lack of interest argument in cases preceding it. Before the Sears case was publicized, even most feminist scholars did not realize that courts had addressed the lack of interest argument in many previous cases and it was not until 1990 that academic work systematically documented and analyzed the courts’ treatment of this argument. Schultz, *Telling Stories*, *supra* note 27, at 1753–54.

275. 461 F. Supp. 894, 921–23 (D.N.J. 1978), *vacated in part on other grounds*, 473 F. Supp. 786 (D.N.J. 1979).

276. Dennis Hevesi, *Judith Vladeck, 83, Who Fought for Women’s Rights, Dies*, N.Y. TIMES, (Jan. 11, 2007), <http://www.nytimes.com/2007/01/11/nyregion/11vladeck.html>.

277. See *Kyriazi v. Western Elec. Co.*, 527 F. Supp. 18, 19 (D.N.J. 1981); Jennifer J. Armiger, *The Gender of Industrial Decline: Reconsidering Sex Discrimination and Equal Opportunity at Western Electric, 1965–1985*, at 6 (Spring 2010) (unpublished Ph.D. Dissertation, University of Delaware) (on file with author).

278. *Kyriazi*, 461 F. Supp. at 899.

279. Vladeck graduated in 1947 as one of only 26 women in a 174-member class of Columbia Law School. Stephen Miller, *Judith Vladeck, 93, Pioneering Lawyer in Sex Discrimination Lawsuits*, THE SUN, (Jan. 11, 2007), <http://www.nysun.com/obituaries/judith-vladeck-93-pioneering-lawyer-in-sex/46495>. At the time, discrimination among law firms was so widespread and well accepted that Columbia’s placement office did not even send women on job interviews. *Judith Vladeck: A Pioneer in the Field of Labor and Employment Rights for Women*, AM. BAR ASS’N, http://www.americanbar.org/directories/women_trailblazers_project_listing/judith_p_vladeck.html (last visited Dec. 23, 2014). After having three children and working part-time, Vladeck joined her husband’s employment law firm. Miller, *supra*.

280. Vladeck later remarked that, although she did not consider herself a feminist when she initiated the case, she became one as a result of what she learned through the litigation. Conversation between the author and Judith Vladeck, at Yale Law Sch. (sometime in the late 1990s) (on file with author). Vladeck’s “concern with sex discrimination went back at least as far as her legal training,” Miller, *supra* note 279, but it was the *Kyriazi* case that renewed her “vigor” for the issue and set her on her path as a prominent sex discrimination litigator. Armiger, *supra* note 277, at 289, 326, 327.

discrimination in the 1970s,²⁸¹ Western Electric's workforce exhibited the severe patterns of sex segregation that then typified many American industries, in which "females [were] virtually excluded from the highest level positions, while they swell[ed] the ranks of the lowest clerical and operative grades."²⁸² Among Western Electric's 735 officers and managers, for example, less than 2% were female; among its 545 professionals, less than 7% were female, including secretaries and nurses.²⁸³ Even for entry-level operative jobs requiring no training or experience, women were overwhelmingly hired for the lower pay grade.²⁸⁴ The district court found that the "sex-segregation of jobs [was] dramatically summed up by the following statistic: For the period 1967–1976, there were 141 jobs at Western into which only males were hired and 47 jobs into which only females were hired."²⁸⁵

Promotional patterns were even more stratified by sex. Although Western Electric promoted from within and women were more than a third of its labor force, no woman had ever been promoted above the initial supervisory level.²⁸⁶ Even the few women who had managed to climb to that first level "were given responsibility [only] over stereotypically 'female work' and almost exclusively over female populations."²⁸⁷ These disparities could not be explained by differences in seniority, qualifications, or occupation.²⁸⁸ As presiding Judge Stern observed, "women do not even progress within the occupations into which they have been segregated."²⁸⁹

To defend its record, the company argued that "women were not promoted because they were simply not interested in promotion."²⁹⁰ The court rejected this lack of interest argument, however, recognizing that Western Electric's supervisors had the power to elicit or discourage the very "interest" that they claimed women lacked. At Western Electric, employees were not advised of openings and allowed to apply. Instead, supervisors decided unilaterally which employees were interested in promotion; "[i]f [a] supervisor represented that [an employee] was not interested, that individual was not interviewed" or further considered.²⁹¹

281. At the time of the *Kyriazi* suit, Western Electric was an AT&T subsidiary whose operations resembled that of other electricity manufacturers such as General Electric. Armiger, *supra* note 277, at 165. For more on AT&T's sex discrimination investigation and lawsuit, see *supra* notes 168–70 and accompanying text. For more on General Electric's lawsuit, see *infra* notes 389–412 and accompanying text.

282. *Kyriazi*, 461 F. Supp. at 902–03.

283. *Id.* at 903.

284. *Id.* at 906.

285. *Id.* at 907.

286. *Id.* at 908.

287. *Id.*

288. *Id.* at 910. Women had more seniority than men in each pay grade, and they were not promoted at equal rates even within the so-called women's lines of work. *Id.*

289. *Id.*

290. *Id.* at 921.

291. *Id.*

According to Judge Stern, women never had an "opportunity to express their alleged lack of interest, because they were rarely even considered for promotion."²⁹² Indeed, despite company directives to document all instances in which female employees declined opportunities for promotion due to lack of interest, not one of Western Electric's 400 to 500 supervisors could produce any such documentation.²⁹³

In *Kyriazi*, the court not only rejected unproven assertions that women were less interested in promotion than men, but also acknowledged that any such differences may have been the consequence, and not the cause, of the promotional disparities. Western Electric's practices facilitated sex discrimination in ways that were likely to depress women's aspirations. The court condemned the company's overly subjective selection process, for example, concluding that a system giving supervisors the unconstrained discretion to select candidates based on vague, personalistic criteria too readily permitted male supervisors to prefer candidates who looked like themselves, predictably excluding women.²⁹⁴ The judge also chastised Western Electric for ignoring Kyriazi's complaints about discrimination and harassment, recognizing that when her superiors sided with male colleagues who tormented her and "treated her with contempt and ridicule," their actions may well have elicited from Kyriazi some of the negative behaviors cited as the reasons for her discharge.²⁹⁵ Thus, despite observing that Kyriazi was a difficult person who had the "capacity to thoroughly infuriate those who deal[t] with her,"²⁹⁶ the court rejected the company's attempt to pin her dismissal on her own personality. "[W]hile Kyriazi was and is a strong-willed person, who understandably and justifiably bridled at the discriminatory treatment she received by the defendant," Judge Stern wrote, "she was not irrational nor was she unduly difficult to get along with, unless that term is construed to mean that she refused to supinely accede to the male-female stereotyping which confronted her at Western."²⁹⁷

292. *Id.*

293. *Id.* at 922. Indeed, more than ten years after Title VII took effect, Western Electric was still using requisition forms that prompted supervisors to indicate whether they preferred a male or female for every position at the plant. *Id.* at 917; see also Judith P. Vladeck, *The Kyriazi Case Reviewed*, Keynote Speech Before the 1979 Annual Meeting of the Advisory Board of the Institute for Education and Research on Women and Work 4 (1979) (transcript available in the Cornell University Library) (explaining that, as "one of the most dramatic parts of [the] case," Vladeck discovered that Western Electric was using these forms, even though such practices had been unlawful since 1965). During her painstaking document review, Judith Vladeck discovered that Western Electric officials had actually altered evidence, changing some forms to make it appear that supervisors checked both "male" and "female" as preferences. See *Kyriazi*, 461 F. Supp. at 914-20 (describing how Western Electric admitted to this perjury and evidence-tampering at trial and finding that these forms are "direct evidence of discriminatory intent and purpose"); Vladeck, *supra*, at 3-4 (describing how onerous it was to gather this evidence and the harassment her staff faced throughout the discovery process).

294. *Kyriazi*, 461 F. Supp. at 908-09.

295. *Id.* at 934-35.

296. *Id.* at 942.

297. *Id.* at 925.

Kyriazi was the exception and not the rule, however. The favorable decision in the case reflected the presence and skill of an effective feminist advocate whose claims and arguments on behalf of women at Western Electric paralleled women's popular demands for respect as equal wage earners and citizens. In *Kyriazi*, Western Electric alleged women's lack of interest in higher level jobs explicitly and openly in a pioneering case involving extreme facts. Judith Vladeck's response reaffirmed the challenge to sex difference conveyed by early women's movement leaders: Women's allegedly different job preferences did not explain their inferior employment status—sex discrimination did.²⁹⁸ As noted above, however, most cases raising the lack of interest argument did not fit this same profile. The case-by-case invocation of this obscure judge-made defense, often raised in the context of technical arguments about the statistical evidence in little known cases, made it a difficult issue on which to focus sustained activist pressure and attention. By the time the argument began to surface regularly in sex discrimination cases toward the end of the 1970s, factors such as the loss of the ERA, the rise in political conservatism, and the economic slowdown had already stalled the women's movement's momentum, ushering in a gradual breakdown in feminist consensus and weakening activists' ability to overcome regressive arguments made in federal courts to defeat sex discrimination claims. Finally, as frontline activists retreated, the balance of influence shifted to feminist academics to set the terms of the debate. This shift provided an opening for courts to selectively credit feminist scholars who validated arguments based on women's difference. In this changed context, where feminists no longer presented an attentive, cohesive front, courts were able to retreat to stereotyped assumptions about women in the workplace and roll back the movement's hard-won advances.

In contrast to the realistic approach taken in *Kyriazi*, *EEOC v. Sears, Roebuck, & Co.*²⁹⁹ illustrates the regressive reasoning and results that emerged with the courts' uncritical acceptance of the lack of interest defense. In 1973, the same year that the *Kyriazi* suit was filed, the EEOC first began investigating sex discrimination at Sears,³⁰⁰ as part of an ambitious effort to challenge the systematic patterns of sex segregation and inequality that characterized leading American companies at the

298. *Id.* at 921–23. Throughout her long and distinguished career, attorney Judith Vladeck remained committed to this principle and devoted herself to fighting the discrimination and stereotyping she believed continued to dampen women's career prospects decades even after decades of Title VII enforcement. *See, e.g.,* Armiger, *supra* note 277, at 326–27 (giving an overview of Vladeck's most famous sex discrimination cases); Interview by Elizabeth A. Bousquette with Judith P. Vladeck 16 (Nov. 1, 2005) (transcript available at http://www.americanbar.org/content/dam/aba/directories/women_trailblazers/judith_vladeck_oral_history.authcheckdam.pdf) (quoting Judith Vladeck's statement that "most men are trained to think of work outside of the home as 'male'" and "the only time . . . women are welcome in the workplace is when we're at war").

299. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

300. *Id.* at 1278.

time.³⁰¹ The EEOC filed a nationwide Title VII lawsuit in 1979, alleging that Sears had engaged in sex discrimination in hiring and promotion for commission sales, reserving those jobs mostly for men while relegating women to much lower-paying noncommission sales jobs.³⁰² The highly contested case resulted in a ten-month trial, which began in September 1984,³⁰³ and culminated in an eighty-two page opinion two years later in early 1986.³⁰⁴ The EEOC presented statistical studies showing that Sears had significantly underhired female sales applicants for the more lucrative commission sales positions, even after controlling for sex differences in qualifications.³⁰⁵ Sears hired salespeople through a highly subjective process that permitted supervisors to use their own selection criteria, including an employment test containing sex-biased questions.³⁰⁶

The district court ruled in favor of Sears, however, attributing its segregated sales force to women's own job preferences. The court rejected the EEOC's statistical analyses as "virtually meaningless," finding they were premised on a "faulty basic assumption" that female sales applicants were as interested as males in commission selling.³⁰⁷ The judge credited various explanations for women's alleged lack of interest, all based on stereotypical images of women as risk-averse, cooperative secondary earners unsuited for and uninterested in the high-stakes, rough-and-tumble world of commission sales.³⁰⁸ This reasoning not only accepted stereotypes about women's distinctive traits and job preferences; it also accepted as reality Sears's highly masculinized description of a commission salesperson as a "special breed of cat" who has a "sharper intellect and more powerful personality" than a noncommission

301. For a discussion of how the EEOC targeted Sears and AT&T (Western Electric's parent company) as two of the largest companies in the country at the time, see *supra* notes 168-73 and accompanying text.

302. *Sears*, 628 F. Supp. at 1278; see also Ruth Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUD. 375, 377-79 (1986) (explaining the EEOC's investigative efforts and interactions with Sears before it filed suit in 1979). Between 1973 and 1980 the median hourly wages for first year commission sales employees were twice as high as those for all noncommission sales employees. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR ON AMERICAN WOMEN 378-79 (1991); Alice Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 35 RADICAL HIST. REV. 57, 66 n.25 (1986).

303. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 307 (7th Cir. 1988).

304. See generally *Sears*, 628 F. Supp. at 1264.

305. *Id.* at 1287-88 (discussing the EEOC's multiple regression analyses).

306. *Id.* at 1300. The district court exonerated such questions from Sears' employment test as "Do you have a low pitched voice? Do you swear often? Have you ever done any hunting? Have you played on a football team?" *Id.* at 1300 n.29 (internal quotation marks omitted). The district court insisted that these tests were not discriminatory because they were not meant to be used to determine whether a woman would be selected for a commission sales job, *id.* at 1292, 1317-18, yet it also explained that most applicants were tested at some point in the process and the extent to which supervisors relied upon these tests "varied." *Id.* at 1292.

307. *Id.* at 1305.

308. *Id.* at 1307-09. For example, the court accepted testimony that "[w]omen tend to be more interested than men in the social and cooperative aspects of the workplace. . . . They often view noncommission sales as more attractive than commission sales, because they can enter and leave the job more easily, and because there is more social contact and friendship, and less stress in noncommission selling." *Id.* at 1308.

salesperson.³⁰⁹ Thus, women were naturally sociable and cooperative, traits that were the opposite of the ones needed for commission sales. Once the court accepted the company's gendered description of the job, the conclusion that women would not find it equally appealing became inevitable.³¹⁰

As the decision in *Sears* helps clarify, the lack of interest argument is premised on sex stereotypes that support the view of women as marginal workers. The argument is powerful precisely because it draws on the widespread assumption that women and men are different and extends it to an account of gendered job preferences. In this account, gender is totalizing: There is no room to acknowledge that women may exhibit some differences from men, in some contexts, but still aspire to the same types of work.³¹¹ Not only does this oversimplified account obscure variation among women and changes in women's job preferences over time: It also fails to detect employers' role in shaping people's job preferences along gendered lines.³¹² In contrast to *Kyriazi's* acknowledgment that workplace practices can differentially dampen female employees' aspirations, *Sears* assumed that women's allegedly different preferences preexist, and remain largely unaffected by, employers' actions. Thus, the company's use of a potentially biased selection process was of little relevance or concern.³¹³

In the decade between the *Kyriazi* and *Sears* decisions, the political and legal environment had changed. By 1986, Ronald Reagan had been elected President, ushering in a more conservative era. The Chair of the EEOC at the time, Clarence Thomas, publicly discredited the suit against *Sears* brought by his own staff attorneys and denounced the use of statistics to prove discrimination generally.³¹⁴ Along with the shift in

309. *Id.* at 1290 (internal quotation marks omitted) (accepting this description of a commission salesperson from *Sears's* retail testing manual).

310. For a discussion of how jobs can be reified as though human and described in gendered terms that make it seem that only men or only women can do them, see Schultz, *Reconceptualizing*, *supra* note 27, at 1800–04. For a discussion of how the very same job can be described in masculine or feminine terms, see Sandra L. Bem & Daryl J. Bem, *Does Sex-Biased Job Advertising "Aid and Abet" Sex Discrimination?*, 3 J. APPLIED SOC. PSYCHOL. 6, 7–14 (1973); and Robin Leidner, *Serving Hamburgers and Selling Insurance: Gender, Work, and Identity in Interactive Service Jobs*, 5 GENDER & SOC'Y 154, 154, 171–75 (1991).

311. Schultz, *Telling Stories*, *supra* note 27, at 1805.

312. *See id.* at 1815–32 (explaining that the lack of interest argument assumes that women's job preferences are pre-existing and independent, and providing evidence that, to the contrary, employers actually help shape workers' job preferences).

313. *See Sears*, 628 F. Supp. at 1281–85 (refusing to consider the EEOC's argument that the highly subjective hiring and selection processes at *Sears* had a disparate impact upon women); *id.* at 1317–18 (dismissing the EEOC's argument that *Sears's* psychological tests disadvantage women). At the time of this decision, social scientists had shown that subjective selection systems can facilitate the exercise of both sexual and racial bias. *See* Schultz & Petterson, *supra* note 59, at 1128 & n.155; *see also* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 123 (2000) (citing more recent research confirming this point).

314. Robert Pear, *Changes Weighed in Federal Rules on Discrimination: Employment Is at Issue*, N.Y. TIMES, Dec. 3, 1984, at A1 (quoting EEOC Chairman Clarence Thomas as stating that the EEOC "had relied too heavily on statistics" in 50 to 100 of its cases, including *Sears*, and that

political landscape, the women's movement had weakened and the old fault lines had reappeared.³¹⁵ The *Sears* suit reflected these changes. The case was presided over by Judge John Nordberg, a Reagan appointee,³¹⁶ who at one point during the trial asked the EEOC to prove that American women had ever been subject to workplace discrimination.³¹⁷ Nordberg's decision was affirmed by a conservative Seventh Circuit panel.³¹⁸ Feminist historians testified as expert witnesses on opposite sides, articulating new versions of older arguments about women's preferences.³¹⁹

Furthermore, the resurgence of feminist analyses that once again highlighted sex differences, while attributing them to forces outside the labor market,³²⁰ lent legitimacy to the lack of interest argument. The *Sears* court drew on the testimony of a defense expert, historian Rosalind Rosenberg, to endorse an analysis of women's work aspirations that was premised on idealized images of white, middle class motherhood³²¹—even though the women who worked at Sears were, at best, an uneasy fit

statistical disparities can often be explained by other factors “such as culture, educational levels, ‘previous events,’ or commuting patterns”); see also FALUDI, *supra* note 302, at 384 (describing how Clarence Thomas opposed the *Sears* case so strongly that the Sears lawyers considered calling him as their own witness).

315. For descriptions of anti-feminist counter-movements that arose during this period, see MAYERI, *supra* note 8, at 78–86; Eskridge, *Channeling*, *supra* note 5, at 472–73; Eskridge, *Some Effects*, *supra* note 5, at 2138–41; Siegel, *supra* note 18, at 1389–403.

316. See FALUDI, *supra* note 302, at 384 (explaining that Judge Nordberg was a Reagan appointee who “didn’t stand far from Thomas on the issues in the Sears case”).

317. *Id.*; see also KESSLER-HARRIS, *supra* note 8, at 295 (explaining that “Judge Nordberg shared the habits of mind to which [Sears] appealed. In court, he repeatedly placed evidence in the context of his own experience and that of his wife, convinced that his own family experience provided the standard for judging the desires of the wage-earning women who typically sought jobs at Sears”); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 817 (1989) (claiming that “Sears’ attorneys had help from the trial judge in policing gender stereotypes,” as Judge Nordberg “played an active role in shaping the evidence to support his eventual holdings that women lack interest in ‘male’ jobs”).

318. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (affirming the district court’s finding of no discrimination in an opinion written by Judge Harlington Wood, Jr., a Gerald Ford appointee, and joined by Judge Jesse Eschbach, a Reagan appointee, over a vigorous dissent by Judge Richard Cudahy, a Carter appointee); see also Williams, *supra* note 317, at 820 (characterizing the Seventh Circuit panel reviewing the case as conservative).

319. See Milkman, *supra* note 302, at 375–76 (stating that the tension between the testimony of Rosalind Rosenberg and Alice Kessler-Harris in the *Sears* case raised the “tension between equality and difference [that] has divided feminists in a variety of contexts”); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 302 (1991) (linking Rosenberg’s testimony to difference feminism).

320. See Schultz, *Life’s Work*, *supra* note 14, at 1899–919 (describing and criticizing feminist thought that attributes workplace inequality to family-related differences). For the emergence of difference feminism, see also *infra* note 444 and accompanying text.

321. See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986) (accepting Rosenberg’s testimony as “further evidence that men and women were not equally interested in commission sales at Sears”); Offer of Proof Concerning the Testimony of Dr. Rosalind, *reprinted in* Jacquelyn Dowd Hall & Sandi E. Cooper, *Women’s History Goes to Trial: EEOC v. Sears, Roebuck and Company*, 11 SIGNS 751, 757 (1986) [hereinafter Hall & Cooper, *Women’s History*] (arguing that men and women have had historically different interests, goals, and aspirations regarding work and that those aspirations persist into the present); *id.* at 760–66 (arguing that women remain committed to the home, prioritizing family obligations over earning potential).

with the narrative.³²² Claiming that “[t]hroughout American history women have been trained . . . to develop the humane and nurturing values expected of the American mother,” Rosenberg testified that as a result of those allegedly shared maternal values, women dislike the competitive environments said to exist in mostly-male occupations and jobs.³²³ The EEOC’s expert, historian Alice Kessler-Harris, attempted to counter this reasoning by showing that, historically, diverse groups of women—including African-Americans, immigrants, working-class whites, and well-educated professionals—had all entered mostly-male lines of work when the opportunity became available. Contrary to Rosenberg’s assertion, she stated, these women had not perceived a conflict between such work and the values or demands associated with motherhood.³²⁴ The presiding judge dismissed Kessler-Harris’s testimony on the ground that it pertained only to “unusual women,”³²⁵ however, in a move that ignored variation among women and change over time and disregarded women whose experiences the judge considered outside the norm.

The *Sears* case received a great deal of attention, but it was not an anomaly. Earlier studies of federal court decisions that addressed the lack of interest argument between the late 1960s and the late 1980s found that judges accepted the lack of interest argument in about half of the sex discrimination cases in which it was made.³²⁶ These decisions not only delivered victories to employers on the underlying claims; they also reasoned about the evidence in ways that favored employers.

Courts departed from the evidentiary approach established in early race discrimination precedents,³²⁷ imposing on sex discrimination plaintiffs more onerous standards of proof reflecting the biased assumptions about women’s job preferences that the evidence was intended to overcome.³²⁸ In sex discrimination cases, for example, evidence that the employer had engaged in past discrimination did not lead courts to

322. Evidence showed, for example, that of the women employed at Sears in 1981 who responded to a survey question on spousal income, 28% had husbands who were unemployed, 35% had husbands who earned less than the national median income for men, and of the remaining 37%, half had husbands with incomes below \$25,000 per year. Schultz, *Telling Stories*, *supra* note 27, at 1753 n.10.

323. Hall & Cooper, *Women’s History*, *supra* note 321, at 763.

324. Written Testimony of Alice Kessler-Harris, *reprinted in* Hall & Cooper, *Women’s History*, *supra* note 321, at 771–74.

325. *Sears*, 628 F. Supp. at 1314.

326. Schultz, *Telling Stories*, *supra* note 27, at 1766–69, 1776 (describing method of constructing a data set containing all lower federal court decisions addressing the lack of interest argument since Title VII’s effective date and reporting that in sex discrimination cases decided from 1967–1989, the courts accepted the argument in 42.6% of cases); Schultz & Petterson, *supra* note 59, at 1089–95, 1097 (describing methodology and concluding that from 1967–1989, the courts accepted the argument in 57.4% of cases).

327. For a detailed narrative description of this body of race discrimination cases, see Schultz, *Telling Stories*, *supra* note 27, at 1771–75. For a detailed statistical analysis of these cases and how they differed from sex discrimination cases, see Schultz & Petterson, *supra* note 59, at 1100–66.

328. Schultz & Petterson, *supra* note 59, at 1113–34, 1180.

invoke the futility doctrine, under which an alleged failure to apply is ascribed not to any lack of interest in the work, but to a sense of futility caused by the employer's record or reputation for discrimination.³²⁹ In fact, evidence of past discrimination actually hurt sex discrimination plaintiffs, because many judges interpreted women's longstanding absence from mostly-male occupations and jobs as a sign that women had *never* been interested—not that employers had excluded or discouraged them.³³⁰ Courts denied the history of labor market discrimination against women, reverting back to the biased explanations for sex segregation that prevailed when Title VII was enacted.

The courts' failure to acknowledge the existence of sex discrimination in the labor market led them to accept uncritically employers' arguments that they had tried and failed specifically to attract women; courts ruled more frequently for employers who testified to making such special efforts, even though supporting documentation and a comprehensive plan were often lacking.³³¹ Courts also abandoned their traditional skepticism toward the lack of interest argument coming from employers who used highly subjective, standardless selection systems. Although such subjective systems have been shown to facilitate both sex- and race-based bias,³³² the courts did not attach significance to their use in sex discrimination cases,³³³ suggesting that judges simply did not see discrimination as the cause of sex segregation. Nor did courts penalize employers' failure to openly post, advertise, or recruit for job openings in sex discrimination cases. Judges were no more likely to reject the lack of interest argument where employers had relied on word-of-mouth recruiting systems or other closed, "old boy" systems for disseminating information about job opportunities,³³⁴ even though a long line of race discrimination cases recognized that such systems can differentially dampen job interest.³³⁵

329. Schultz, *Telling Stories*, *supra* note 27, at 1781–89; Schultz & Petterson, *supra* note 59, at 1122 tbl. 4, 1123–25; *see also* Schultz, *Telling Stories*, *supra* note 27, at 1772–74 (discussing the development and application of the futility doctrine in early race discrimination cases).

330. Schultz, *Telling Stories*, *supra* note 27, at 1782–85; Schultz & Petterson, *supra* note 59, at 1124–25.

331. Schultz, *Telling Stories*, *supra* note 27, at 1789–93; Schultz & Petterson, *supra* note 59, at 1126–27.

332. *See supra* note 313.

333. Schultz & Petterson, *supra* note 59, at 1128.

334. *Id.* at 1127–28.

335. *See* Schultz, *Telling Stories*, *supra* note 27, at 1773–74 (explaining how, in early race discrimination cases, courts recognized that informal, word-of-mouth recruiting systems had led to fewer minority applications and thus must be remedied through affirmative recruitment of minorities); *see also* Schultz & Petterson, *supra* note 59, at 1127 n.150 (citing cases rejecting the lack of interest argument due, in part, to a recognition that informal, word-of-mouth recruiting systems are racially biased); *id.* at 1127 n.152 (explaining that "extensive literature documents that male workers are more likely to share job information with other men than with women" and secure their jobs through personal contacts, whereas women are more likely to rely on formal job search).

In sex discrimination cases, moreover, courts insisted that plaintiffs supplement statistical proof with anecdotal evidence of discrimination.³³⁶ Despite important precedents holding that statistical evidence alone suffices to prove a pattern or practice of discrimination,³³⁷ courts condemned sex discrimination plaintiffs who failed to present anecdotal evidence,³³⁸ emphasizing the importance of testimony from individual victims of discrimination.³³⁹ In fact, anecdotal evidence was the only type of proof that helped plaintiffs overcome the lack of interest argument in sex discrimination cases.³⁴⁰ Without seeing and hearing from real, live women who had sought and been denied mostly-male jobs, judges had difficulty believing that ordinary women genuinely wanted such jobs³⁴¹ or that discrimination explained why they did not hold them.

These lower court trends were largely attributable to politically conservative judges: Judges appointed by Republican presidents were significantly more likely to accept the lack of interest argument than judges appointed by Democratic presidents.³⁴² More liberal, mostly

336. Schultz & Petterson, *supra* note 59, at 1125–26. In contrast, in race discrimination cases, “direct or anecdotal evidence of discrimination made little or no difference to the outcome of the lack of interest argument.” *Id.* at 1125.

337. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) (holding that “gross statistical disparities . . . alone” may constitute prima facie proof of a pattern or practice of discrimination); Schultz, *Telling Stories*, *supra* note 27, at 1773–74 (collecting early race discrimination cases relying on statistical proof and placing little or no emphasis on anecdotal evidence of discrimination in rejecting the lack of interest argument); Schultz & Petterson, *supra* note 59, at 1123–26 (making a similar point).

338. Conservative courts have explicitly disregarded statistical proof without additional evidence of individual discrimination victims. Schultz, *Telling Stories*, *supra* note 27, at 1795–96; Schultz & Petterson, *supra* note 59, at 1125. For example, in *Sears*, the court “berated the EEOC for failing to produce individual victims of discrimination,” Schultz, *Telling Stories*, *supra* note 27, at 1796, stating that it was “almost inconceivable” that in a nationwide suit involving more than 900 stores, the EEOC could not produce one witness to credibly testify that she had been discriminated against. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1324 (N.D. Ill. 1986). Yet, as Susan Faludi points out, the EEOC actually had presented testimony from individual victims at trial. *FALUDI*, *supra* note 302, at 385–87.

339. Schultz, *Telling Stories*, *supra* note 27, at 1796 (finding that in half of the cases where courts accepted the lack of interest defense, “judges pointed to the fact that plaintiffs had produced no individual victims”). Even liberal judges relied heavily upon anecdotal evidence to reject the lack of interest argument, indicating an overall ambivalence as to whether women were generally as interested in men in certain kinds of work. *Id.* at 1796–97; Schultz & Petterson, *supra* note 59, at 1125.

340. See Schultz, *Telling Stories*, *supra* note 27, at 1794 tbls. 5 & 6 (showing the relation between the presence of anecdotal evidence and the success of the lack of interest argument); Schultz & Petterson, *supra* note 59, at 1125–26 (demonstrating the positive influence of anecdotal evidence upon a plaintiff’s likelihood of prevailing and concluding that courts are reluctant to find discrimination absent anecdotal evidence).

341. See Schultz, *Telling Stories*, *supra* note 27, at 1795 (“Anecdotal evidence has served to convince judges that the ‘modern’ woman exists—that women have managed to emerge from early life experiences with aspirations for nontraditional work. This image allows judges to attribute current patterns of sex segregation to employers’ ‘coercion’ rather than to women’s own ‘choice.’”).

342. Schultz & Petterson, *supra* note 59, at 1171–73 & tbl.10 (showing that courts accepted the lack of interest argument in 66.7% of the cases in which Republican presidents appointed the district court judge or a majority of the appellate judges on the panel, but they did so in only 48.1% of cases where Democratic presidents appointed the district court judge or a majority of the appellate panel); *id.* (showing that 70.8% of Republican judges accepted the lack of interest argument, while only 38.7% of Democratic judges did so).

Democratic judges frequently rejected the lack of interest argument, sometimes acknowledging that the argument reflects overly broad stereotypes³⁴³ about women's job interests and sometimes even recognizing that an employer's past record and reputation for discrimination can create the apparent lack of interest the employer cites to justify current sex disparities.³⁴⁴ Overall, however, such decisions tended to adopt the same troubling evidentiary approaches as their more conservative counterparts.³⁴⁵ Absent systematic guidance from enforcement agencies or feminist advocates, judges lacked a coherent framework for ascertaining and analyzing women's job preferences.³⁴⁶

Had early women's rights activists energetically pursued this issue with arguments that built on the movement's early successes—challenging the sex-biased assumptions typically underlying the lack of interest argument, presenting a dynamic explanation for gendered job preferences, and insisting on women's latent interest in all forms of work—courts might well have rejected the lack of interest argument roundly in sex discrimination cases, just as they did in race discrimination cases in the civil rights era. Feminists might have persuaded the EEOC to issue policy guidance on the lack of interest argument, as occurred on other important sex discrimination issues. Instead, activism on the issue was muted and plaintiffs' victories failed to cohere into a systematic rollback of the defense. Over time, judicial rulings on the lack of interest argument helped normalize sex segregation and revived older stereotypes about women and work.

Although the lack of interest argument gained momentum decades ago, it is clear that the argument retains its vitality and hold on the judiciary. The Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*³⁴⁷ provides a striking if subtle example of the way in which courts continue to rely on the essentialist assumptions underpinning the lack of interest argument, extending them to new issues such as class certification. In 2004, female employees filed a nationwide class action suit

343. See, e.g., *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326 (N.D. Cal. 1992) (holding that job interest surveys cannot be used as a defense in disparate treatment cases because “[e]ven in a situation where gender stereotypes about work interest patterns reflect reality, it is unlawful for an employer to discriminate against those whose work interests deviate from the stereotype”).

344. See, e.g., *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1282–1283 (11th Cir. 2000) (rejecting lack of interest argument from an Old World restaurant that historically refused to hire women as servers, and recognizing that the restaurant's own past discrimination and present current reputation for discrimination instead caused recent sex-based disparities); *Stender*, 803 F. Supp. at 326–27 (stating that “[i]nsofar as women's attitudes towards work are shaped in part by the past discrimination of their employer, the results of job interest surveys must reflect that past discrimination. To give much credence to proof which is tainted by the lingering effects of the past discrimination of an employer would be to prevent courts from recognizing and taking into consideration the very evolution in women's work interests which Title VII was enacted to encourage”).

345. See Schultz, *Telling Stories*, *supra* note 27, at 1785–88, 1795–97; Schultz & Petterson, *supra* note 59, at 1124–25, 1173.

346. See Schultz, *Telling Stories*, *supra* note 27, at 1799–815.

347. 131 S.Ct. 2541 (2011).

against Wal-Mart, claiming the company's use of a highly subjective, standardless system for promotion and pay discriminated against women based on their sex.³⁴⁸ By then, Wal-Mart had eclipsed Sears as the world's largest retailer and the nation's largest employer of women.³⁴⁹ When the plaintiffs asked the district court to grant a motion to certify a nationwide class of women, they presented statistical studies showing pervasive, company-wide disparities: Women were significantly under-represented in each managerial classification in nearly every geographic region in which Wal-Mart was located; women were also promoted two years later on average than comparable men.³⁵⁰

The evidence highlighted Wal-Mart's highly centralized, company-wide selection policies.³⁵¹ Wal-Mart did not post notice of most promotional positions or permit employees to freely apply for them.³⁵² Instead, the company deliberately delegated to store managers the discretion to use their own unspecified, subjective criteria to nominate and select employees for promotion.³⁵³ Although Wal-Mart's system produced few female promotions, even in comparison to its competitors,³⁵⁴ the company's expert attributed the disparities to "differing job aspirations and interests between men and women which exist in the general labor force and cannot be blamed on Wal-Mart."³⁵⁵

348. *Id.* at 2547; First Amended Complaint, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-02252 MJJ), 2001 WL 34134868.

349. Before Wal-Mart, Sears was the largest retailer in the nation. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1278 (N.D. Ill. 1986). For many years, including those when the EEOC filed and prosecuted its lawsuit, Sears was also the largest private sector employer of women in the United States. Milkman, *supra* note 302, at 376. Wal-Mart is now the largest retailer and private employer in the world. *Wal-Mart*, 222 F.R.D. at 141. At the time the case was filed, Wal-Mart was also the nation's largest employer of women. BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 58 (2005).

350. *Wal-Mart*, 222 F.R.D. at 160–61 ("On average, it took women 4.38 years from date of hire to be promoted to assistant manager, while men took 2.86 years. It took 10.12 years for women to reach Store Manager, compared with 8.64 years for men."). Overall, the district court found that [p]laintiffs present[ed] largely uncontested descriptive statistics which show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower the percentage of women.

Id. at 155.

351. *Id.* at 151–53.

352. Until January 2003, Wal-Mart did not post openings for its Assistant Management Training Program and posted only a small number of openings for the Co-Manager position. *Id.* at 149. In addition, despite its stated policy to post hourly Support Manager positions, Wal-Mart did not post 80% of such openings. *Id.* Although Wal-Mart did post openings for Store Manager positions, it did not use an open application process; instead, "candidates were required to obtain permission from their District Manager before being allowed to apply." *Id.* Furthermore, store managers were allowed to nominate employees for management training in a "tap on the shoulder process" based on largely subjective criteria. *Id.* at 148 (internal quotation marks omitted).

353. *Id.* at 152–53.

354. See *infra* note 372.

355. *Wal-Mart*, 222 F.R.D. at 161.

The district court rejected this lack of interest argument, finding that Wal-Mart's system provided female employees "no ability to apply for, or otherwise formally express their interest in, openings as they arose."³⁵⁶ The court credited expert testimony concluding that Wal-Mart's uniform corporate culture promoted sex stereotyping and influenced managers to favor men for promotions.³⁵⁷ Female employees confirmed that view, providing numerous examples of sexism and discrimination by Wal-Mart managers.³⁵⁸ The court rejected Wal-Mart's effort to discredit and disaggregate the evidence, ruling that female employees had demonstrated sufficiently common methods and claims of sex discrimination to certify a class action.³⁵⁹

The trial court's decision implicitly acknowledged the uniform harm sustained by female employees at Wal-Mart. In the hands of an employer who has hired or promoted few women, such as Wal-Mart, a failure to advertise and recruit openly for jobs or promotional positions does more than passively exclude women from the web of information about employment opportunities: It actively signals that the employer prefers insiders and that newcomers, such as women, are not welcome.³⁶⁰ The employer's use of a highly subjective selection system is similarly destructive not simply because the absence of standards passively permits supervisors to exercise bias, but also because its opacity actively discourages women from seeking opportunities. When newcomers such as women cannot predict whether they have the qualifications for the job, or even discern what the necessary qualifications are, it becomes difficult to make the "futile gesture"³⁶¹—to overcome the sense, reinforced by an employer's exclusionary record or reputation, that the employer has men in mind for the job and women are not welcome.³⁶² Thus, allegedly neutral practices can create active exclusion.

The Supreme Court failed to see these processes at work in *Wal-Mart*, however, and held that female employees had failed to establish the "convincing proof of a companywide discriminatory pay and promo-

356. *Id.* at 149.

357. *Id.* at 153–54.

358. *Id.* at 165–66 (describing some of the anecdotal evidence that women were told that "[m]en are here to make a career and women aren't," "[r]etail is for housewives who just need to earn extra money," "you're a girl, why do you want to be in Hardware," and that a store manager "needed a man in the job" of sporting goods department manager).

359. *Id.* at 166.

360. See Schultz, *Telling Stories*, *supra* note 27, at 1811–13.

361. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1282 (11th Cir. 2000) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365–66 (1977)).

362. In *Joe's Stone Crab*, the district court below and a member of the Eighth Circuit panel reviewing the case recognized this reality. On top of the general futility that the Eleventh Circuit majority recognized derived from the employer's history of exclusion of women, they argued that the employer's current informal, word-of-mouth method of recruiting system and highly subjective hiring practices were also factors that deterred otherwise interested women. *Id.* at 1293 (Hull, J., concurring in part and dissenting in part); *EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727, 741 (S.D. Fla. 1997), *vacated*, 220 F.3d 1263 (11th Cir. 2000).

tion policy” required to show a common question of law or fact for purposes of class certification.³⁶³ Although the Court’s decision reversing the grant of class certification did not formally endorse or even explicitly rule on Wal-Mart’s lack of interest argument, the opinion’s benign, below-the-surface explanations for the employment disparities subtly affirmed the argument’s underlying premises. Not only did the ruling terminate the class action, making it more difficult for women to challenge similarly pervasive employment and pay inequalities under Title VII: The reasoning also sanctioned the troubling evidentiary approaches taken by many lower courts in sex discrimination cases accepting the lack of interest argument.

Writing for the majority, Justice Scalia’s opinion discarded decades of judicial findings that overly subjective, discretionary decision-making systems provide “a ready mechanism for discrimination” that facilitates and masks bias.³⁶⁴ The Court acknowledged that highly subjective, discretionary systems such as Wal-Mart’s do not produce clear, consistent, objective standards of evaluation or ensure that decision makers apply the same standards evenhandedly to all candidates.³⁶⁵ Indeed, the majority conceded, “[t]he whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.”³⁶⁶ Nonetheless, the fact that Wal-Mart’s discretionary system facilitated double standards and discrimination did not mean that its female employees had common Title VII claims, because although some managers might exercise their discretion in biased ways, most would not. “[L]eft to their own devices,” wrote Justice Scalia, “most managers in any corporation—and surely most managers in a corporation that forbids

363. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–57; *see also id.* at 2553–54 (setting a requirement of “significant proof” that the company “operated under a general policy of discrimination” in order to prove that an individual’s claim and a class’s claim will share common questions of law or fact (internal quotation marks omitted)).

364. *Rowe v. General Motors*, 457 F.2d 348, 359 (5th Cir. 1972). For examples of early cases, *see Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 240 (5th Cir. 1974) (describing how courts have ordered that employers develop objective criteria “in order to eliminate the possible discrimination inherent within subjective employment determinations”); *Brown v. Gaston Cnty. Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972) (concluding that “the lack of objective guidelines for hiring and promotion . . . are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company’s work force”). For more recent cases, *see Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (stating that subjective evaluations leave a supervisor “free to indulge a preference, if he has one, for one race of workers over another” and that subjective and vague criteria “do not allow a reasonable opportunity for rebuttal” and leave no objective criteria for an employee “to point to in order to show competence”); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1390 (5th Cir. 1983) (stating that “[a]lthough proof of discriminatory motive is generally required in disparate treatment cases, the evidence of subjective, standardless decision-making by company officials, which is a convenient mechanism for discrimination, satisfies this requirement”); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988) (noting that “undisciplined system[s] of subjective decisionmaking” may allow supervisors to exercise bias and act on the basis of “subconscious stereotypes” and have “precisely the same effects as a system pervaded by impermissible intentional discrimination”).

365. *See Wal-Mart*, 131 S. Ct. at 2554–55.

366. *Id.* at 2553.

sex discrimination—would select sex-neutral, performance-based criteria . . . that produce no actionable disparity at all.”³⁶⁷ By denying the existence of discrimination or depicting it as an aberrant problem,³⁶⁸ the analysis assumed away the question of commonality the Court was supposed to consider.

Not only did the *Wal-Mart* Court legitimate subjective decision-making systems: The majority also drained even the minimal “special efforts” requirement of all content by announcing that the mere fact that Wal-Mart had a written policy forbidding sex discrimination and threatening penalties showed that the company did not engage in the alleged sex discrimination.³⁶⁹ Under this reasoning, Wal-Mart was not required to cite any affirmative efforts to attract or promote female employees, let alone document that women turned down job offers at disproportionate rates. Remarkably, the opinion did not even mention—let alone condemn—Wal-Mart’s closed, “tap on the shoulder” system that permitted managers to promote their favorite candidates without even apprising other employees of available openings. In disregarding such aspects of Wal-Mart’s selection process, the Court both abandoned a longstanding judicial commitment to opening up and rationalizing employee selection processes in ways that eliminated insider favoritism³⁷⁰ and obscured the ways in which Wal-Mart’s practices actively produced the unequal patterns of promotion and pay its expert attributed to women’s own lack of interest.

The Supreme Court not only concluded that the statistical evidence did not suffice to show common patterns of sex discrimination: the opinion actually suggested that proof of significant sex disparities prevailed at every one of Wal-Mart’s 3,400 stores would not necessarily show such patterns. “Some managers will claim that the availability of women, or qualified women, or interested women, in their stores’ areas does not mirror the national or regional statistics,” Justice Scalia stated for the majority.³⁷¹ In this thinly-veiled, updated version of the lack of interest argument, sex differences in job preferences are not universal, they are local: Women who work at a Wal-Mart store in, say, rural Arkansas might be less interested in moving up through the managerial ranks than women who work in one in urban California. Under this logic,

367. *Id.* at 2554.

368. *Id.*

369. *Id.* at 2553; see *supra* note 331 (describing the lower courts’ earlier evaluation of employers’ claims to have made special efforts to attract and hire women).

370. Historically, the judicial focus on rationalization provided a method to expose and challenge the processes of insider favoritism, stereotyping, and bias that disadvantaged outsiders, including women and minorities. For an argument that one of Title VII’s main consequences and contributions to American life has been that of spurring employers to rationalize their selection systems by making them more open, objective and accountable in ways that benefit almost all employees, see Vicki Schultz & Selin Akkan, *Rationalizing the Workplace: Title VII’s Lasting Contribution after 50 Years* (Sept. 27, 2013) (unpublished manuscript) (on file with author).

371. *Wal-Mart*, 131 S. Ct. at 2555.

even highly disaggregated proof showing similar patterns of exclusion and inequality at individual stores all over the country would not suffice to sustain a class action.³⁷² At each store, the Court suggested, those patterns might reflect only area women's different preferences or qualifications, rather than deeply rooted, persistent, and company-wide employment attitudes, policies and practices.³⁷³

Traditionally, courts relied on anecdotal evidence to overcome such arguments, citing testimony from individual women who were denied or discouraged from pursuing jobs.³⁷⁴ The Supreme Court rejected such testimony from 120 female Wal-Mart employees, however, insisting that a finding of commonality required testimony from a higher number and share of class members³⁷⁵—including more women from every state and perhaps even from every Wal-Mart store.³⁷⁶ The majority quoted favorably from the Ninth Circuit dissenting opinion by Judge Kozinski, which characterized the female employees of Wal-Mart as having “little in common but their sex and this lawsuit.”³⁷⁷ Ironically, this statement failed to appreciate that it is not Title VII suits, but sex discrimination itself that targets individuals who are otherwise different and reduces them to the common denominator of their sex. Thus, the Court wrote off evidence that Wal-Mart's practices had transformed a diverse collection of individuals into an artificial class of *women*—a group whose bosses disparaged them as “little Janie Q's,”³⁷⁸ denied them promotions on the ground that “[m]en are here to make a career and women aren't,”³⁷⁹ and

372. See *id.* at 2556 (“Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.”). Inexplicably, the majority opinion failed to mention that the plaintiffs had submitted expert evidence that controlled for any potential differences in women's interest at the individual store level. Expert witness Dr. Marc Bendick concluded that, compared to competitor stores in the same local labor markets, Wal-Mart had a “shortfall” in female managers in 79.5% of its stores. Declaration of Marc Bendick, Jr., Ph.D in Support of Plaintiffs' Motion for Class Certification at 21, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004) (No. C-01-2252 MJJ), 2003 WL 24571703 [hereinafter Bendick *Wal-Mart* Declaration]. Bendick controlled for any differences in the percentage of qualified, interested women in those areas and concluded that the dearth of female managers at Wal-Mart compared to its local competitors was not geographically isolated, but rather was prevalent throughout the nation in both rural and urban areas for the past twenty-four years. *Id.* at 9, 21–23. The Supreme Court, however, found the evidence insufficient to show “the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.” *Wal-Mart*, 131 S. Ct. at 2555.

373. But see Bendick *Wal-Mart* Declaration, *supra* note 372, at 30–32 (concluding that women's significant under-representation at Wal-Mart is not based on differences in candidate interest, reporting, or geographic region, but rather are tied to Wal-Mart's corporate culture and policies).

374. Schultz & Petterson, *supra* note 59, at 1125–26.

375. *Wal-Mart*, 131 S. Ct. at 2556 & n.370.

376. *Id.* (noting that the anecdotes only describe experiences in 6 states and in 235 out of 3,400 Wal-Mart stores).

377. *Id.* at 2557 (quoting *Dukes v. Wal-Mart*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J., dissenting)).

378. *Wal-Mart*, 131 S. Ct. at 2564 (Ginsburg, J., concurring in part and dissenting in part).

379. *Id.*

deprived them of equal pay because “retail is for housewives who just need to earn extra money.”³⁸⁰

In disavowing that such practices systematically deter female employees from seeking and training for promotions, *Wal-Mart's* reasoning reaffirmed a line of caselaw that denies the reality of workplace sex discrimination and casts doubt on the need for Title VII. The Court's subtle invocation of women's lack of interest and availability fit a familiar pattern, flying largely under the radar screen and escaping close public scrutiny. Although working women had achieved many advances toward sex equality, by the time of the *Wal-Mart* decision the idea of women's rights as a vigorous, unified, in-the-streets social movement demanding the same rights as men was little more than a memory. In the more staid world ushered in by the millennium, even the Supreme Court felt free to adopt reasoning subtly interpreting inequality as the natural expression of sex differences.³⁸¹

B. Pregnancy's Problems as Uniquely Female and Unlike Other Disabilities

Pregnancy discrimination law provides a second example of how important it is for a social movement to be both engaged and unified in order to advance legal change, or at least to prevent regression. Whereas the lack of interest cases suffered from an absence of sustained activist attention, pregnancy discrimination cases have been negatively affected by a lack of feminist and agency consensus. When women's rights activists came together to insist that pregnant women are no different from other employees who receive or should receive workplace protections, progress occurred. But when some feminists publicly dissented from this view and promoted pregnancy's distinctiveness and centrality to women's special reproductive role, the resulting feminist disagreement lent courts greater freedom and enhanced legitimacy in returning to older approaches emphasizing pregnancy as a marker of essential sex difference.

The history of pregnancy discrimination law is complex,³⁸² but one set of themes emerges clearly. Pregnancy often entails physical impair-

380. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 166 (N.D. Cal. 2004), *rev'd*, 131 S. Ct. 2541 (2011).

381. Only a few years later, working women had already felt the negative consequences of the decision. *See, e.g.*, Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PROPUBLICA (Sep. 27, 2013, 9:53 AM), <http://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case>.

382. Although I am not aware of any single comprehensive history of pregnancy discrimination law, parts of the history have been ably recounted in many different sources. Accounts consulted here include Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 71–82 (2013); Dinner, *supra* note 16, at 422–64; Eskridge, *Some Effects*, *supra* note 5, at 2136–37; Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 518–36 (1983); Patricia A. Shiu & Stephanie M. Wildman,

ments, (such as nausea, fatigue, and a reduced lifting capacity) shared by many other medical conditions; it also culminates in a physical event, childbirth, which requires a period of recovery like many illnesses. Yet, popular images of pregnancy portray it as a unique experience that is foundational to womanhood and incomparable to any other condition—images that together comprise what I refer to as the uniqueness view of pregnancy. Due to the persistence of this view, efforts to define pregnancy functionally as a condition that can interfere with the ability to work like many others, thus bringing it under the conceptual framework of disability, have never fully succeeded. In the more conservative, totalizing version of the uniqueness view, pregnancy reflects a choice to pursue motherhood over work that inevitably reduces women's work commitments and competencies.³⁸³ In the more liberal version of this view approved by some feminists, pregnancy and motherhood do not automatically alter women's work aspirations, but they do conflict with standard workplace norms in ways that require accommodation of the female experience.³⁸⁴ Both uniqueness approaches reject comparing pregnancy to similarly disabling conditions and set pregnant women apart from other employees.

Despite their different political valences, both versions of the uniqueness view have had negative effects on the law. In the 1970s, the Supreme Court deployed the conservative version of uniqueness to women's disadvantage, upholding policies treating pregnant employees less favorably than other workers with similar disabilities,³⁸⁵ in the 1980s, the Court used the more liberal version to women's advantage, upholding laws treating pregnant employees more favorably than such other workers.³⁸⁶ In recent decades, the legal status of pregnancy has returned full circle: Pregnancy discrimination claims are on the rise,³⁸⁷

Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave, 21 YALE J.L. & FEMINISM 119, 126–44 (2009); Lise Vogel, *Debating Difference: Feminism, Pregnancy, and the Workplace*, 16 FEMINIST STUD. 9, 10–15 (1990); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 979–84, 989–1004 (2013); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 333–51 (1985); Colette G. Matzzie, Note, *Substantive Equality and Anti-Discrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 198–207 (1993); Schwartz, *supra* note 107, at 24–28. Here I offer my own interpretation of the underlying events.

383. In the conservative view, pregnancy is a physical symbol of women's difference that provokes all the conventional biased assumptions about how women's alleged differences lead them to automatically prioritize family roles over work roles, discussed *supra* at text accompanying notes 40–47. For an insightful discussion of how pregnancy triggers these biases, see Brake & Grossman, *supra* note 382, at 102–07 (describing how pregnancy provokes stereotyped views of mothers as less competent and less committed to their work).

384. See *infra* notes 428–44 and accompanying text.

385. See *infra* notes 389–417 and accompanying text.

386. See *infra* notes 445–51 and accompanying text.

387. See, e.g., *Pregnancy Discrimination Charges*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited May 24, 2015) (showing a 46% increase in pregnancy discrimination complaints filed with the EEOC

and employers once again subject pregnant women to harsher treatment than more favored employees. Courts rely on pregnancy's uniqueness to approve such discriminatory treatment, making ever more fine-grained distinctions between pregnant women's problems and other physical disabilities.³⁸⁸ Although the uniqueness view of pregnancy has sometimes delivered pregnant women short-term victories, ultimately it distances pregnant women from their coworkers in ways that reinforce the very differences and inequalities that early women's rights activists successfully challenged.

1. Division Over the Uniqueness and Disability Views of Pregnancy

The Supreme Court's mid-1970s decisions in *General Electric Co. v. Gilbert*³⁸⁹ and *Geduldig v. Aiello*³⁹⁰ illustrate the problems associated with the uniqueness view of pregnancy. Both cases upheld the validity of temporary disability plans that excluded pregnancy, plans that at the time were not unusual. Over the years, American employers had used the state protective labor laws that were meant to protect women from overwork as the basis for crafting a host of policies that treated pregnant workers differently and less favorably than similarly disabled men.³⁹¹ In the name of protection, employers routinely subjected pregnant women to a barrage of discriminatory practices, refusing to hire them, firing them, denying them health care coverage and sick pay, and forcing them to take maternity leave—typically without pay, benefits, seniority, or reinstatement rights—regardless of whether they wanted to continue working.³⁹² Employers justified these exclusionary policies by appealing to the conservative version of the uniqueness view of pregnancy. They argued that, unlike other temporarily disabled employees, pregnant women were merely secondary workers who did not intend to return to

between fiscal years 1997 to 2011); *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [hereinafter EEOC 2014 Pregnancy Discrimination Guidance] (collecting sources showing that "pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace" and that women of color are particularly affected).

388. See, e.g., Widiss, *supra* note 382, at 963, 1004, 1008–09.

389. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

390. 417 U.S. 484, 494 (1974). The analysis here will focus on *Gilbert*, as it involved Title VII and was later overruled by Congress in the Pregnancy Discrimination Act (PDA) in 1978 following extensive activist efforts.

391. See, e.g., Vogel, *supra* note 382, at 12; Widiss, *supra* note 382, at 981–82. For a general discussion of state protective laws and the role of traditional women's groups and organized labor in advocating them, see *supra* notes 80, 114–22 and accompanying text.

392. See, e.g., Vogel, *supra* note 382, at 12; Widiss, *supra* note 382, at 963, 978–79. Because most private employers excluded pregnancy from their disability plans (as was permitted in many states), pregnant women received no replacement income during these mandatory leaves. Vogel, *supra* note 382, at 12.

work after giving birth and who therefore lacked the work commitment to warrant the usual protections.³⁹³

In both *Geduldig* and *Gilbert*, the Court upheld such plans, implicitly agreeing with employers that pregnancy is fundamentally different from other medical conditions because pregnancy is a choice.³⁹⁴ “Pregnancy is, of course, confined to women,” Justice Rehnquist wrote for the majority in *Gilbert*. “But it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a ‘disease’ at all, and is often a voluntarily undertaken and desired condition.”³⁹⁵ Because pregnancy was distinguishable from covered disabilities and was not completely coextensive with sex, the Court held, there was no basis for inferring that General Electric (GE) had excluded pregnancy from coverage as a pretext for discriminating against women.³⁹⁶

Although commentators have made wide-ranging and important criticisms of *Geduldig* and *Gilbert*,³⁹⁷ the literature has largely overlooked the troubling, self-reinforcing quality of their reasoning and results. As Justice Brennan’s dissent pointed out, GE’s plan covered many potentially voluntary “disabilities.”³⁹⁸ The Court’s appeal to voluntariness did not distinguish pregnancy from other covered conditions, but it did obscure the coercion involved in forcing pregnant women out on unpaid leave.³⁹⁹ By becoming pregnant, the analysis hints, women choose not only to have children, but also to place family above work in a way that people with other medical conditions do not.⁴⁰⁰ The language of choice subtly appeals to totalizing notions of pregnancy and motherhood: Pregnancy is a singular, defining moment in a woman’s life that unleashes a host of other differences, including different priorities and preferences about work.⁴⁰¹ Indeed, Justice Rehnquist’s reference to

393. Dinner, *supra* note 16, at 425–26, 455–56 (showing that both in the *Gilbert* case and in opposition to the passage of the PDA, employers argued that pregnant women did not deserve disability benefits because their general patterns of intermittent employment demonstrated that they were not committed workers with the same level of labor force attachment as men).

394. *Gilbert*, 429 U.S. at 136; *Geduldig*, 417 U.S. at 489–92.

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

396. *Id.*

397. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 n.107 (1984) (collecting numerous articles criticizing *Geduldig* and *Gilbert* in the decade following the decisions).

398. *Gilbert*, 429 U.S. at 151 (Brennan, J., dissenting) (noting that GE’s disability plan covered “sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery”).

399. *Id.* at 150 n.1 (noting that GE’s current policies frequently forced pregnant women onto leave).

400. *Id.*

401. In briefs urging the Court to hold that excluding pregnancy was not sex discrimination, General Electric and other employers made these arguments explicitly, insisting that pregnant women “more often than not did not return to work after delivery” and that those who did “would be tempted to malingering” to stay home longer with their children. Some argued that because new mothers don’t ordinarily return to work, providing pregnancy disability benefits would serve as a

women's "differing roles in the scheme of human existence" invoked precisely this image of pregnancy as the gateway to a life of domesticity and difference.⁴⁰² In the Court's analysis, failing to pay disability benefits to pregnant employees simply reflected a natural order in which women stop working when they become pregnant. The majority failed to contemplate that this gendered pattern did not simply spring from nature, but rather from man-made policies that relegated women to marginal jobs and forced them home without pay when they became pregnant.

Justice Brennan's dissent acknowledged that reality. In contrast to the "hypothetical"⁴⁰³ world of neutral actuarial risk analysis presumed by the majority, Brennan's analysis depicted employer disability policies as the artifacts of a labor market permeated with "stereotypes and signals concerning the pregnant woman employee."⁴⁰⁴ These biases had shaped employment policies at General Electric, the Justice emphasized: The trial court had found that the company's "discriminatory attitude" toward women was "a motivating factor in its policy"⁴⁰⁵ and that its disability plan was not neutral "in its intent."⁴⁰⁶ Indeed, the disability plan was a part of GE's long history of discriminating against women, "who were presumed to play only a minor and temporary role in the labor force."⁴⁰⁷

Justice Brennan not only recognized the history of discriminatory treatment of pregnant women by General Electric and other American companies: He acknowledged that such discrimination had negatively affected women's labor market attachment. The Justice highlighted the real-world effects of policies like GE's, citing "the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs *both financially burden women workers and act to break down the continuity of the employment relationship,*

"unique form of severance pay" not given to other workers. Dinner, *supra* note 16, at 424-46 (quoting from briefs filed by General Electric and various amici).

402. In the part of the opinion analyzing whether the disability plan's exclusion of pregnancy had an illegal disparate impact, the majority concluded that the company was not required to include pregnancy and thus provide a greater economic benefit to women "because of their differing roles in 'the scheme of human existence.'" *Gilbert*, 429 U.S. at 139 n.17. Here, Justice Rehnquist changed the wording used by the district court judge, who had referred to pregnancy as "women's biologically more burdensome place in the scheme of human existence." *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 383 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). The subtle change of phrase belies a view that pregnancy is more than just a temporary biological condition; it is the pathway to motherhood, a social role unlike any other that marks women as different and defines their destinies.

403. *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting).

404. *Id.* at 160.

405. *Id.* at 150 (quoting *Gilbert*, 375 F. Supp. at 383).

406. *Id.* (quoting *Gilbert*, 375 F. Supp. at 382) (internal quotation marks omitted).

407. *Id.* at 149 n.1. Originally, the company did not even allow its female employees to participate in the disability plan, on the theory that "women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." *Id.* Eventually, GE allowed women to participate in the plan, but continued to cap their wages at two-thirds the level paid to men. *Id.*

thereby exacerbating women's comparatively transient role in the labor force."⁴⁰⁸ Thus, in contrast to the majority's opinion, Brennan's dissent acknowledged that the interrupted employment patterns exhibited by many American women did not simply reflect a choice to prioritize pregnancy and childrearing over paid work. Instead, those patterns were partly attributable to discriminatory employment policies that pressured or encouraged pregnant women to leave the labor force, thereby creating the very intermittency employers later cited to justify those policies.

Justice Brennan's dissent reveals the importance of an engaged, unified activist feminist presence pressing for change in the law. Although their view did not prevail in *Gilbert*, by that time feminist activists had forged a new consensus about pregnancy discrimination, successfully lobbied the EEOC, and laid the groundwork for new Congressional thinking on the issue. The dissent explicitly acknowledged the influence of feminist organizations. To support finding GE's plan discriminatory,⁴⁰⁹ he cited the EEOC's 1972 guidelines on pregnancy discrimination, which instructed employers to treat pregnancy-related disabilities the same as other temporary disabilities for purposes of insurance and sick leave plans.⁴¹⁰ While the majority refused to defer to the guidelines due to the agency's initial waffling,⁴¹¹ Brennan commended the EEOC for comprehensively studying the issue with input from organizations like the feminist Citizens' Advisory Council.⁴¹² The EEOC had enacted the guidelines in response to the efforts of two young staff attorneys who were persuaded by the Council's 1970 declaration that pregnancy should be treated as a temporary disability for all job-related purposes.⁴¹³

408. *Id.* at 158 (emphasis added).

409. *Id.* at 152.

410. *Id.* at 156 (citing Employment Policies Relating to Pregnancy and Child Birth, 29 C.F.R. § 1604.10(b) (1975)). The guidelines were originally promulgated in 1972. See Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835, 6837 (Apr. 5, 1972).

411. *Gilbert*, 429 U.S. at 140–45. For a description of the EEOC's early ambivalence and inconsistency, see *supra* note 164.

412. *Gilbert*, 429 U.S. at 156–58 (Brennan, J., dissenting). The Citizens' Advisory Council was an important, highly visible successor to President's Kennedy's Commission on the Status of Women. Their 1970 statement of principles declared that "[c]hildbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society." CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, U.S. DEP'T OF LABOR, JOB-RELATED MATERNITY BENEFITS 3 (1970) (emphasis omitted) (citing Citizen Advisory Council's earlier October 29, 1970 Statement of Principles). The Council was the first feminist group to adopt a functional disability approach to pregnancy.

413. Swayed by the Council's 1970 Statement of Principles, new attorney Susan Deller Ross argued that the EEOC should take that same approach comparing pregnancy to other disabilities similarly affecting an employee's ability to work. ESKRIDGE & FEREJOHN, *supra* note 6, at 30–31; Schwartz, *supra* note 107, at 23–24. By then, nascent feminist groups had increased demands to address pregnancy discrimination and begun to embrace the newer egalitarian thinking that shunned protectionist claims based on sexual difference. In this new climate, Ross and her colleague Nancy Stanley prevailed and the EEOC's 1972 guidelines on pregnancy discrimination adopted the functional disability approach, Schwartz, *supra* note 107, at 24–28, overcoming the agency's earlier ambivalence. See *supra* note 164. Thus, feminist debate inside and outside the government was crucial to the development of the EEOC's new approach. Dinner, *supra* note 16, at 456–57; Widiss,

This approach represented a shift from the Advisory Council's earlier position, which, influenced by traditional feminist protectionist concerns,⁴¹⁴ had advocated maternity leaves extending beyond the period of actual physical disability in order to recognize women's maternal caregiving role.⁴¹⁵ In a ground-breaking move, the Council's new position separated the initial period of physical disability due to pregnancy and childbirth from the subsequent period of infant care and bonding.⁴¹⁶ This distinction allowed both pregnancy and caregiving, which previously had been seen as exclusively female experiences, to be compared to other life experiences affecting both men and women: Pregnancy could be conceptualized as a temporary disability, like many others that may affect both male and female employees; maternal bonding could be reconceived as parental caregiving, something both fathers and mothers can provide. Thus, the Council's new functional disability approach helped consolidate an emerging feminist consensus to move beyond the view of pregnancy as a unique and defining experience for women, just as activists were doing at the time with respect to other policies that presumed women's essential difference.⁴¹⁷

Debate over the nature of pregnancy and its relationship to women's employment reemerged, however, in subsequent efforts to pass the Pregnancy Discrimination Act of 1978 (PDA)⁴¹⁸ and to interpret it in the case of *California Federal Savings and Loan v. Guerra* (commonly referred to as *Cal. Fed.*).⁴¹⁹ Soon after *Gilbert* was announced, a group of women's rights advocates, lawyers and law professors centered in East Coast institutions mobilized to overturn it.⁴²⁰ Building on the Advisory Council's report, the EEOC's pregnancy discrimination guidelines, and Justice Brennan's dissent in *Gilbert*, these East Coast feminists pushed

supra note 382, at 989–91; Schwartz, *supra* note 107, at 28. For an in-depth account of the evolution of the EEOC's approach in this early era, see Schwartz, *supra* note 107, at 9–28.

414. See *supra* note 80.

415. See Dinner, *supra* note 16, at 450–51, 453.

416. See *id.* at 454–55. (discussing this issue and citing statements by Citizens' Advisory Council Chair Jacquelyn Gutwillig about the innovation and importance of distinguishing legally between childbirth and childcare).

417. See *supra* notes 148–49 and accompanying text.

418. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

419. 479 U.S. 272 (1987).

420. Georgetown law professor Wendy Williams and ACLU attorney Susan Deller Ross took the first steps towards organizing the coalition that helped draft and pass the PDA. Susan Deller Ross had been a lawyer at the EEOC who worked on the EEOC's 1972 guidelines relating to pregnancy and childbirth and persuaded the EEOC to adopt the disability approach based on the Citizens' Advisory Council's 1970 Statement of Principles. Widiss, *supra* note 382, at 993; Schwartz, *supra* note 107, at 24–28; *supra* note 413 and accompanying text. Williams had argued before the Supreme Court in *Geduldig* on behalf of the women challenging the law excluding pregnancy from California's disability insurance plan. Schwartz, *supra* note 107, at 35–36. Most of the East Coast women's rights organizations supported these feminists' efforts and the disability approach they urged Congress to adopt in the PDA. *Id.* at 63. For an account of how these feminists came together and organized a broad coalition to support the PDA, see *id.* at 58–69.

Congress to adopt a functional disability approach.⁴²¹ Like the members of the Council, they believed that, for purposes of employment discrimination law, it was best to compare pregnancy to other illnesses or disabilities that similarly affected an employee's ability or inability to work. Their view reflected both practical and normative considerations.⁴²² These activists recognized the deeply embedded urge to treat pregnancy as unique, but worried that giving into that urge and affording pregnant women leaves not available to other employees affirmed stereotypes about pregnant women's primary commitment to family and risked harming their employment prospects.⁴²³ They also believed it was fundamentally unfair to give pregnant women benefits that male and female employees who suffered from similarly disabling conditions did not receive.⁴²⁴

Congress adopted the disability approach advocated by these feminists in the PDA. The statute not only defines sex discrimination to include pregnancy discrimination; it also requires employers to treat pregnant women "the same . . . as other persons not so affected but similar in their ability or inability to work."⁴²⁵ Committee reports and

421. See, e.g., Vogel, *supra* note 382, at 15–19; Widiss, *supra* note 382, at 999–1001.

422. See Shiu & Wildman, *supra* note 382, at 136. These feminists did not equate pregnancy with disability in any metaphysical or experiential sense; they were making a practical, legal argument that based the definition of pregnancy on the purpose for which it was being defined. As Wendy Williams put it:

[w]hen a woman goes into labor, the measures appropriate for someone having a heart attack won't help; but if both childbirth and a heart attack cause an inability to work and income loss, it makes sense to encompass both within a disability program designed to cushion the economic effects of temporary inability to work.

Williams, *supra* note 382, at 357.

423. See CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra* note 412, at 4 (noting that affording pregnant women benefits not available to other temporarily disabled workers "could very well result in reluctance to hire women of childbearing age"); see also Brief of American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 9, *Cal. Fed.*, 479 U.S. 272 (No. 85-494), 1986 WL 728369, at *9 [hereinafter *ACLU Cal. Fed. Brief*] (arguing that giving pregnant workers benefits not extended to other disabled employees "places women perpetually outside the mainstream of the labor force, permanently marginalizing their role as workers"); Williams, *supra* note 382, at 367 (including similar observations by one of the original feminist architects of the PDA); Schwartz, *supra* note 107, at 73 (quoting a similar observation by Susan Deller Ross, another architect of the PDA).

424. Reformers in both the 1970s and '80s cited contemporary data showing that women and men lost roughly the same amount of time from work due to disability, including pregnancy-related issues. *ACLU Cal. Fed. Brief*, *supra* note 423, at 25; CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra* note 411, at 4. The Citizens' Advisory Council concluded in 1970 that giving pregnant women more benefits than men and women who were similarly disabled "is not sociologically or economically justified and would be divisive." CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra* note 412, at 4. Wendy Williams similarly emphasized that a disability approach could foster policy changes that would benefit all workers, whereas extending benefits to pregnant workers alone could "shift attention from the fact that the employer has a generally inadequate sick leave policy to the fact that some employees have special privileges." Williams, *supra* note 382, at 371.

425. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012). The PDA is commonly referred to as having two clauses. The first extends the terms "'because of sex' or 'on the basis of sex'" in Title VII to include "because of or on the basis of pregnancy, childbirth, or other related medical conditions." *Id.* The second clause states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including

floor debates reveal that Congress specifically rejected the idea that pregnancy is such a distinct experience that pregnant women cannot be compared to non-pregnant employees with similarly limiting disabilities.⁴²⁶ Indeed, in considering the PDA, Congress demonstrated a sophisticated awareness that stereotypes distinguishing women from other employees based on pregnancy had historically harmed women and had justified failing to take them seriously as workers.⁴²⁷

During the 1980s, however, a group of feminist advocates based in West Coast institutions began to champion a different approach. In contrast to the disability approach urged by East Coast women's groups and adopted by Congress and the EEOC in the 1970s, these feminists articulated a newer, more liberal version of the view that pregnancy is a unique, female-specific experience that cannot and should not be compared to other disabling conditions. Composed primarily of feminist law professors and lawyers, this group used this uniqueness argument to defend state laws requiring employers to provide job-protected disability leaves to pregnant women, even if they did not offer them to other temporarily disabled employees, against claims that the laws violated the PDA's command to treat pregnancy the same as other conditions similarly affecting the ability to work.⁴²⁸

receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

426. For example, a Senate committee report stated, "[b]y defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability with other conditions." S. REP. NO. 95-331, at 4 (1977); *See also* H.R. REP. NO. 95-948, at 4 (1978) (calling the bill's approach "narrow" and emphasizing that it would not require employers to treat pregnant employees specially, but would rather "simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work"); Widiss, *supra* note 382, at 995-96 (noting that "[a]s a threshold matter, legislators considered and rejected arguments that pregnancy differed from classic disabilities") (citing S. REP. NO. 95-331, at 4 (1978); H.R. REP. NO. 95-948, at 4 (1978)).

427. *See, e.g.*, S. REP. NO. 95-331, at 6 (1978) (noting that employers' discriminatory policies toward pregnant women "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs"); H.R. REP. NO. 95-948, at 3, 6-7 (1978) (noting that "[a]s testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs" and that "[w]omen are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant"); 123 CONG. REC. 29,385 (1977) (remarks of Sen. Williams) ("Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers.").

428. Members of this group supported California's and Montana's pregnancy-specific leave statutes in cases challenging their validity under the PDA that were winding through the courts, such as *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (1982), and *California Federal Savings & Loan v. Guerra*, 479 U.S. 272 (1987). Dinner, *supra* note 16, at 474. The East Coast and West Coast feminist groups debated the validity of these statutes and their respective views of pregnancy in two key articles, one by Wendy Williams advocating the East Coast group's functional disability approach, Williams, *supra* note 382, at 325, 351-52, and another by Linda Krieger, then a law professor at Berkeley, and Patricia Cooney advocating the West Coast group's liberal uniqueness approach. Krieger & Cooney, *supra* note 382. Linda Krieger represented the party

These advocates had admirable intentions: They believed that women could never achieve workplace equality without the benefit of affirmative protections for pregnancy that other groups did not need.⁴²⁹ Articulating this position, an amicus brief filed by a coalition spearheaded by members of the group in the *Cal. Fed.* case argued that, because only women can become pregnant, statutes requiring employers to give only pregnant women job-protected leaves do not discriminate, but rather *prevent* discrimination by allowing women to keep their jobs while exercising the same procreative choice as men.⁴³⁰ To support this argument, the brief described pregnancy as unique to women in stark, unmistakable terms, urging that because “women, and women alone,” bear the risks associated with pregnancy and childbirth, they require special protection.⁴³¹

In other writings, feminists in this tradition were even more explicit in stressing pregnancy’s uniqueness and its profound, definitional effect on women. Many rejected the PDA’s approach comparing pregnancy to other disabilities.⁴³² In the eyes of most of society, after all, “pregnancy

of interest in the initial state proceedings in *Cal. Fed.*, and Patricia Shiu later took over the case. Shiu & Wildman, *supra* note 382, at 130; Widiss, *supra* note 382, at 999 n.167. Other women in this group filed briefs as amicus counsel in the *Cal. Fed.* case, discussed more fully below. See *infra* notes 445–51 and accompanying text. Although the debate between the East Coast and West Coast feminists is commonly referred to as the “equal treatment” versus “special treatment” debate, see, e.g., WILLIAMS, *supra* note 15, at 206; Shiu & Wildman, *supra* note 382, at 139, those terms do not capture the complexity of the controversy or convey any sense of the important dimensions of the issues discussed here.

429. See, e.g., Krieger & Cooney, *supra* note 382, at 515.

430. Brief for the Coalition for Reproductive Equality in the Workplace (CREW) et al. as Amici Curiae Supporting Respondents at 35–38, 43–45, *Cal. Fed.*, 479 U.S. 272 (No. 85-494), 1986 WL 728372 [hereinafter *CREW Cal. Fed. Brief*]. CREW was a coalition of reproductive rights and labor groups organized by the Southern California chapter of the ACLU, which filed an amicus brief in *Cal. Fed.* defending the California statute, while the national ACLU filed a brief opposing the law as written. Shiu & Wildman, *supra* note 382, at 137–38. The CREW coalition included influential UCLA law professor Christine Littleton and then-USC law professor Judith Resnik. *Id.* at 138. The national ACLU brief was written by attorneys in the Women’s Rights Project, *id.* at 137–38, the unit headed earlier by Ruth Bader Ginsburg. See *supra* text accompanying note 251.

431. The passage from the CREW brief in its entirety reads:

Women, *and women alone*, are at risk of illness from pregnancy. Women, *and women alone*, may have to have surgery during the childbirth process. Women, *and women alone*, may need time physically to recuperate from childbirth. To deny women’s specific role in childbirth is to relegate women to the position of having to choose between childbirth and work.

CREW *Cal. Fed. Brief*, *supra* note 430, at 21 (emphasis added).

432. See, e.g., Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work*, in *DOUBLE EXPOSURE: WOMEN’S HEALTH HAZARDS ON THE JOB AND AT HOME* 196, 202 (Wendy Chavkin ed., 1984) (arguing that pregnancy is not comparable to disability because it is not an illness but rather a unique condition); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1136, 1139 (1986) (noting that pregnancy is unique and thus treating it like a disability or an illness is illogical, and that “it would be a shame to treat” a free, natural choice “as if it were something unfortunate like a workplace injury”); Christine A. Littleton, *Reconstructing Sexual Inequality*, 75 CAL. L. REV. 1279, 1292–93 n.82 (1987) (arguing that treating pregnancy like a hernia may not help women if existing benefit schemes are paltry or insufficient); Scales, *supra* note 15, at 429–30 (criticizing the PDA for failing to recognize pregnancy’s uniqueness and comparing it to a disability); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 930 n.7,

[was] presumed to be natural and good, whereas disabilities [were] presumed to be unnatural and bad."⁴³³ To these feminists, identifying pregnancy as a "disability" implied that what was "normal" was to be *not* pregnant, or, as they saw it, to be male.⁴³⁴ The functional disability approach was misguided, in their view, because it "stigmatize[d] child-bearing as a pathological departure from an implicitly male norm."⁴³⁵ These feminists sought to normalize pregnancy and childbirth and other female reproductive experiences.

Professor Ann Scales's pioneering 1980 law review article⁴³⁶ provides an early, clear example of this reasoning. Scales criticized the disability approach reflected in the PDA, castigating Congress for "refus[ing] to accept the idea that pregnancy is in any way a unique condition."⁴³⁷ Scales argued that because pregnancy and breastfeeding "really [do] differentiate women from men, it is crucial that we overcome any aversion to describing these functions as 'unique.'"⁴³⁸ "Uniqueness is a 'trap,'" Scales contended, "only in terms of an analysis . . . which assumes that maleness is the norm. 'Unique' does not mean uniquely *handicapped*."⁴³⁹ In her view, liberal feminists and politicians wrongfully sought to develop institutions that would "nullify the effect of . . . the natural differences," and that such change could occur

only if pregnancy were strictly confined to the category of 'disability,' if it were treated like a growth to be removed, if pregnant workers departed from and returned to work without recognition of their new motherly status and if the heterosexual nuclear family were abolished and social institutions for childrearing developed so that the birth would have no effect on the life of the pregnant person.⁴⁴⁰

Overall, these writings suggest that the critique was motivated by a desire to preserve or elevate women's social status in relation to preg-

942 (1985) (arguing that "fundamentally, pregnancy is neither a disability nor a dysfunction, but a normal moment in the human reproductive process specific to women"); see also Vogel, *supra* note 382, at 22-23 (noting that many of these feminists were "repelled by . . . the . . . representation of pregnancy as a disability").

433. Matzkie, *supra* note 382, at 194.

434. See, e.g., Chavkin, *supra* note 432, at 202-03; Finley, *supra* note 432, at 1147-48; Krieger & Cooney, *supra* note 382, at 545; Law, *supra* note 397, at 1007; Scales, *supra* note 15, at 430; Siegel, *supra* note 432, at 930 & n.7; see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 35 n.104 (1995) (noting that many feminists have "sought to recapture the notion that pregnancy is an ability women have that men lack, rather than a *disability*") (emphasis in original).

435. Vogel, *supra* note 382, at 23.

436. Scales, *supra* note 15.

437. *Id.* at 405; see also *id.* (criticizing Congress for "act[ing] from the premise that pregnancy is not a special condition and not entitled to special treatment").

438. *Id.* at 435 (alteration in original).

439. *Id.* (emphasis added) (footnote omitted).

440. *Id.* at 429.

nancy and mothering,⁴⁴¹ a status thought to be demeaned by comparisons to disability. In embracing such aims, these advocates implicitly invoked (while refashioning) traditional protectionist aims that earlier women's movement leaders had set aside in Title VII's wake,⁴⁴² publicly signaling a breakdown of feminist consensus and heralding a newly divided future. Long after the controversy over pregnancy-specific benefits ended, many feminists continued to distinguish pregnancy from disability⁴⁴³ and to criticize arrangements allegedly embodying a male norm.⁴⁴⁴

The reemergence of the uniqueness view of pregnancy among feminists split a previously unified group, signaling a lack of cohesion and providing space for the Supreme Court to revive older assumptions about women's difference. In 1987, in *Cal. Fed.*, the Court was called upon to decide whether the PDA's second clause preempted the California law, referred to above, requiring employers to provide job-protected disability

441. Professor Scales argued, as a theoretical matter, that women's physical reproductive capacity was the original source of their social differentiation from, and subordination, to men. *Id.* at 425 (arguing that the sexual division of labor was rooted in women's reproductive capacity, which kept "women, due to pregnancy, nursing and the maintenance of children, . . . restricted in their function to childbearing and the productive tasks that could be accomplished in the home"); see also Siegel, *supra* note 432, at 954 (contending that "[s]ocial relations are hierarchically organized around the reproductive difference that exists between women and men"). This theoretical grounding may help explain why this line of feminist analysis tended to highlight and naturalize pregnancy in legal argument.

442. See *supra* notes 80, 148–56 and accompanying text.

443. See WILLIAMS, *supra* note 15, at 219 (explaining that some feminists saw an approach that equated pregnancy and disability as calling for assimilation into male-defined institutions and norms and worsening the situation of many women); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 448 nn.24–25 (2012) (collecting sources).

444. For a classic critique of the male norm, see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (1987) (arguing that "[m]en's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit . . ." and so on) (footnote omitted). For other examples, see WILLIAMS, *supra* note 15, at 207 (contending that gender equality requires "dismantling . . . masculine norms"); Finley, *supra* note 432, at 1120 (arguing that the law "leaves unquestioned the notion that life patterns and values that are stereotypically male are the norm . . ."); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1051 (1987) (observing that society is constructed from the "male point of view," and defining maleness as a social and not simply a biological category).

In feminist legal circles, there was substantial overlap between these criticisms of approaches allegedly preserving male norms and criticisms of the allegedly elitist strategies used by early women's rights advocates. See *supra* note 15 and accompanying text. Both sets of criticisms emerged in the late 1970s and early 1980s, and both targeted formal equality approaches on the ground that they failed to challenge implicitly male-defined norms or to otherwise take account of women's enduring differences and disadvantages. Over time, these criticisms spawned and became part of a larger feminist tradition that stressed and sought accommodation for women's distinctive life experiences. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 56–75 (3d ed., 2013) (describing the development of feminist theories in this tradition); ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-1975*, at 4–5, 199–202, 243–86 (1989) (describing the historical development of this strand of difference feminism); DEBORAH RHODE, *JUSTICE AND GENDER* 309–15 (1989) (describing the feminist debate over sexual difference that began in the late 1970s and early 1980s).

leaves for pregnancy but not for similar disabilities.⁴⁴⁵ Given the clash between women's rights advocates on this issue, the "feminist legal community was 'in a state of tension and disarray'" at the time.⁴⁴⁶

The Court upheld the validity of the California statute, ruling it did not conflict with the PDA.⁴⁴⁷ Justice Marshall's opinion for the majority acknowledged that, if read literally, the text of the PDA would preclude treating pregnancy more favorably than other disabilities with a similar affect on work ability.⁴⁴⁸ The Court rejected such a plain reading, however, reasoning that the California law served the underlying purpose of Title VII by permitting "women, as well as men, to have families without losing their jobs."⁴⁴⁹ This reasoning tracked the West Coast feminists' argument that, because only women can become pregnant, mandating pregnancy-specific leave does not promote discrimination, but rather avoids it by providing women the same choices as men.⁴⁵⁰ In adopting such an analysis, the Court rejected the position of the East Coast women's rights groups—who argued that the California law conflicted with the PDA's directive to treat pregnancy the same as other, similarly disabling conditions, but urged resolving the conflict by extending the statute's protections to all such conditions, thus affirming a broad version of the functional disability approach.⁴⁵¹

445. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 275–77, 279–81 (1987); see also *Shiu & Wildman*, *supra* note 382, at 125, 127 (providing detail on the California statute). The Court explicitly noted the limited scope of the statute, stressing that it mandated leave only for the period of physical pregnancy-related disability and did not include additional time for infant care and bonding like a traditional maternity leave. See *Cal. Fed.*, 479 U.S. at 290 (noting this fact and emphasizing that a statute extending leave beyond the period of physical disability would problematically "reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers"). But see WILLIAMS, *supra* note 15, at 225 (observing that doctors typically certify pregnant women as medically disabled for periods of six to eight weeks after birth, longer than the period of actual disability, to account for the fact that new mothers often provide virtually all of the newborn care).

446. *Shiu & Wildman*, *supra* note 382, at 137.

447. See *Cal. Fed.*, 479 U.S. at 285, 291.

448. See *id.* at 290–91.

449. *Id.* at 289. The Court's citation to *Griggs* in the preceding paragraph may suggest the Justices believed the California statute furthered Title VII's goals by alleviating a disparate impact on pregnant women that would result from employers' failure to provide temporary disability leave. *Id.* at 288 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)). The opinion cited no empirical support for any such impact.

450. CREW *Cal. Fed. Brief*, *supra* note 430, at 7, 10–15.

451. ACLU *Cal. Fed. Brief*, *supra* note 423, at 36–42, 48–64; Brief of the Nat'l Org. for Women et al. as Amici Curiae In Support of Neither Party at 11, 20, 26, *Cal. Fed.*, 479 U.S. 272 (No. 85-494), 1986 WL 728368 [hereinafter NOW *Cal. Fed. Brief*]. NOW and the ACLU urged the Court to read the California law and Title VII together to "impos[e] mutual and complementary obligations" upon California employers to give job-protected leave to all disabled employees. NOW *Cal. Fed. Brief*, *supra*, at 4–11; see ACLU *Cal. Fed. Brief*, *supra* note 423, at 48–52. NOW also argued that if the laws were not so read, the California law would conflict with Title VII and that this conflict could only be remedied by extending leave to all disabled employees. NOW *Cal. Fed. Brief*, *supra*, at 11–31. In an alternative holding, the Court accepted a thin version of NOW and the ACLU's argument, concluding that even if the PDA were read to prohibit giving leave to pregnant women only, the California statute would still not be preempted, because the statute merely established minimum benefits that employers must provide to pregnant workers and employers were

Although *Cal. Fed.* and *Gilbert* typically are portrayed as polar opposites,⁴⁵² a close analysis of the two decisions reveals a remarkably similar view of pregnancy, albeit marshaled to different ends. The *Cal. Fed.* opinion did not discuss the nature of pregnancy, but, like the reasoning in *Gilbert*, the analysis in *Cal. Fed.* presumed pregnancy's uniqueness. This assumption is clear from the Court's choice of the appropriate comparative baseline for purposes of determining whether discrimination has occurred under the PDA. In concluding that the California law furthered Title VII's goals by "allow[ing] women, as well as men, to have families without losing their jobs,"⁴⁵³ the Court implicitly specified the relevant comparators as women, who become pregnant in order to have families, versus men, who do not.⁴⁵⁴ Framing the comparison this way treated pregnancy as a unique aspect of womanhood and female family-building that men cannot and do not experience—just as the framework in *Gilbert* treated pregnancy as a unique, additional risk faced by women, but not men.⁴⁵⁵ In both cases, the Court relied on pregnancy's alleged uniqueness to conclude that the laws at issue did not, and could not, discriminate because the comparators were not similarly situated with respect to pregnancy. In both cases, the Court's focus on women's versus men's capacity to become pregnant precluded comparing pregnant women to employees with other disabling medical conditions,⁴⁵⁶ thus assuming away the policy question of which sort of com-

free to give other similarly disabled employees benefits, *Cal. Fed.*, 479 U.S. at 290–91, and therefore "compliance with both statutes '[wa]s theoretically possible.'" *Id.* at 291 (quoting Transcript of Oral Argument at 6, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494)). The Court did not, however, hold, as NOW and the ACLU requested, that the California statute could only be saved by interpreting it to *require* all covered employers to extend disability leave to all disabled employees.

452. See, e.g., Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 NYU L. REV. 309, 323 n.82 (2001) (noting that in recognizing the "realities of 'social context,'" the Court took "markedly different" positions in *Cal. Fed.* and *Gilbert*); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 47 (1991) (portraying *Gilbert* as a "false start" and *Cal. Fed.* as a move "in the correct direction"); Michael J. Vargas, *Title VII and the Trans-Inclusive Paradigm*, 32 LAW & INEQ. 169, 181 n.74 (2014) (calling *Cal. Fed.* "a complete reversal of [the Court's] prior position" in *Gilbert*); Linda Hassberg, Comment, *Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace*, 40 BUFF. L. REV. 217, 221 (1992) (describing *Cal. Fed.* as a case that "clearly jettisoned the Geduldig/*Gilbert* approach").

453. *Cal. Fed.*, 479 U.S. at 289.

454. Other parts of the opinion confirm this analysis. In a passage parallel to the one quoted in the text, the Court reasoned that the California statute guaranteed equal employment opportunity by "ensur[ing] that [women] will not lose their jobs on account of pregnancy." *Id.* at 272–73. This statement specified the relevant comparators as pregnant women, who lose their jobs absent leaves, versus non-pregnant women and men, who do not—a formulation that once again foreclosed comparing pregnancy to any other medical condition and assumed employees do not lose their jobs due to conditions other than pregnancy.

455. See *Gilbert*, 429 U.S. at 139 ("For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.").

456. Although Justice Brennan's dissent in *Gilbert* clarified that the Court's comparative framework treated pregnancy as unique and precluded comparing pregnancy to other disabling conditions, see, e.g., *id.* at 136 (stating that pregnancy is "significantly different from the typical

parison would better serve Title VII's goals.⁴⁵⁷ In both cases, moreover, the Court's analyses foreclosed discussion of the important feedback effects issue raised in Brennan's *Gilbert* dissent.⁴⁵⁸ Specifically, the Justices failed to consider whether, regardless of their supporters' good intentions, laws singling out pregnant women for different treatment might lead to increased stereotyping, discrimination, and resentment against them and women generally, entrenching even more deeply the unequal employment patterns and biased perceptions traditionally used to justify sex discrimination.

At first it may seem puzzling that the liberal majority in *Cal. Fed.* would endorse a perspective on pregnancy so similar to the one adopted by a more conservative Court in *Gilbert*. After all, Congress had overruled *Gilbert* and repudiated its reasoning in the PDA, and women's rights groups had spearheaded this result. Early feminists had encountered the idea that pregnancy is uniquely female and unlike other disabilities—among employers, at the EEOC, and in the courts—as part of a larger set of stereotypes that rationalized inequality as the natural expression of women's allegedly distinctive biological and social roles. To make progress under Title VII, they overcame internal divisions, set aside traditional protectionist arguments valorizing pregnancy and motherhood, and came together to champion the functional disability approach. By the time the *Cal. Fed.* case reached the Supreme Court in 1987, however, the country had become far more conservative along both political and cultural lines. As the women's movement faced resistance and faded in strength and unity, the earlier feminist consensus

covered diseased or disability"); *id.* at 150–53 (Brennan, J., dissenting) (comparing pregnancy to other voluntary and reproductive conditions and emphasizing that the Court's analysis precluded such comparisons), the majority so took this framework for granted that the opinion did not explicitly acknowledge that the analysis precluded other comparisons. The concurring and dissenting opinions came closer to doing so. *See, e.g., Cal. Fed.*, 479 U.S. at 295 (Stevens, J., concurring) (agreeing that the California statute may avoid comparing pregnant women to men suffering somewhat similar disabilities by giving pregnant women preferential treatment); *id.* at 297–300 (White, J., dissenting) (disagreeing with the Court's holding and citing the PDA's legislative history to show that Congress's focus was on comparing pregnant women to other similarly disabled workers to ensure equal treatment).

457. For a more approving interpretation of *Cal. Fed.* that attempts to rescue it from the pitfalls of uniqueness thinking, see Noah Zatz, *Disparate Impact and the Unity of Equality Law 48–50* (Feb. 22, 2015) (unpublished manuscript) (on file with author). Zatz defends *Cal. Fed.* on the ground that pregnancy-specific leave is simply a targeted remedy for disparate impact discrimination. *Id.* at 48–49. But a leave policy (or other employment policy) may or may not have a disparate impact on pregnant women or women generally in any particular case, depending on the age, socioeconomic status, general health, and other characteristics of the employees who hold the job (or who would do so in the absence of employment discrimination); the issue demands empirical examination. *See, e.g., EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991). In some labor markets and workplaces, for example, almost all female workers will complete childbearing by the age of 30, *see, e.g., Mary E. Becker, From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1233 (1986), while employees overall will experience an increasing number of non-pregnancy-related medical problems beginning at that age. Thus, if the employees in a workplace and labor market tend to be 30 or older, an inadequate leave policy may not have a disparate impact on pregnant employees or on female employees as a result of pregnancy.

458. *See supra* text accompanying note 408.

in favor of challenging sex difference had broken down.⁴⁵⁹ In this newly conservative climate, older views of pregnancy and motherhood as foundational female experiences warranting special recognition witnessed a resurgence among feminists and their detractors.⁴⁶⁰ As older societal divisions over sex difference and pregnancy reappeared and some feminist advocates refashioned uniqueness arguments to defend pregnancy-specific benefits, the Supreme Court found new freedom to return to earlier assumptions about pregnancy as a distinctive female condition in *Cal. Fed.*⁴⁶¹ This time, arguments from a subgroup of feminists lent legitimacy and support to the Court's decision.

2. Theoretical Disadvantages of the Uniqueness View

In rejecting the disability framework in favor of a uniqueness view of pregnancy, the Supreme Court endorsed an approach that has had far-reaching, negative consequences for pregnant workers and other employees. Traditionally, as in *Gilbert*, conservatives used assertions of pregnancy's uniqueness to defend denying pregnant workers benefits afforded other employees. West Coast feminists flipped these assertions in *Cal. Fed.* to argue that pregnancy's uniqueness means it need not be compared to conditions shared by men to merit legal protection. Despite the limiting quality of these arguments, the uniqueness view of pregnancy urged by feminist advocates and accepted by the Court in *Cal. Fed.* held the potential for broader transformation. At bottom, 1980s feminist arguments against comparing pregnancy to disability and forcing women to rely on a "male norm" contained an important critique of the hidden androcentrism affecting institutional life.⁴⁶² Because sex bias often provides a lens for exposing other biases and broader harms,

459. For a discussion of the effect of the political and legal landscape of the late 1970s and early 1980s upon the momentum of the women's rights movement, see *supra* notes 314–19 and accompanying text. Note that the period between the PDA's 1978 enactment and the Supreme Court's 1987 *Cal. Fed.* decision is, not coincidentally, the same as the one between the 1978 *Kyriazi* decision and the 1986 *Sears* decision discussed in Part III.A *supra*.

460. For a discussion of the rise of conservative social movements venerating women's maternal role, see DONALD T. CRICLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE (2005); MAYERI, *supra* note 8, at 81–82, 86–87, 199; Linda K. Kerber, "A Constitutional Right to be Treated Like . . . Ladies": Women, Civic Obligation, and Military Service, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 121–22. For a discussion of the rise of feminist thought emphasizing women's difference and unique reproductive role from during this period, see *supra* notes 428–44 and accompanying text.

461. The issue raised in *Cal. Fed.* is still live. At least six states mandate leaves for pregnant employees regardless of whether such leaves are available to other, similarly disabled employees. For statutes with a separate provision requiring leave for pregnant employees above and beyond that given other temporarily disabled workers, see CAL. GOV'T CODE § 12945(a) (West 2013); CONN. GEN. STAT. § 46a–60(a)(7)(b) (2013); HAW. CODE R. § 12-46-108(a); IOWA CODE § 216.6(2)(b), (e) (2013); N.H. REV. STAT. ANN. § 354-A:7(VI) (2013); OHIO ADMIN. CODE 4112-5-05 (g) (2014); see also LA. REV. STAT. ANN. § 23:342(3)–(4) (2013) (regarding temporary transfers).

462. For an analysis of androcentrism, see NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 20 (1997) ("Certainly, a major feature of gender injustice is androcentrism: the authoritative construction of norms that privilege traits associated with masculinity. Along with this goes cultural sexism: the pervasive devaluation and disparagement of things coded as 'feminine,' paradigmatically—but not only—women.") (footnote omitted).

feminists and other reformers might have used this critique as a tool for challenging taken-for-granted workplace structures that harmed not only pregnant women or women in general, but also employees with disabilities and perhaps even all employees.⁴⁶³ But uniqueness proponents did not deploy their perspective on pregnancy or perceived sex bias as a springboard to redress leave inadequacies generally or to extend protections for pregnant women to other employees across lines of sex or physical ability in the pregnancy cases, as East Coast feminists advocating the disability approach had sought to do in *Cal. Fed.*

Even more troublingly, advocates did not defend the uniqueness view of pregnancy on normative grounds. Conservatives used uniqueness arguments to defend denying pregnant women benefits given other employees, and liberals used them to defend giving pregnant women benefits denied others. In both cases, uniqueness proponents simply highlighted women's special reproductive role, made analytical distinctions between pregnancy and other disabilities, or implicitly shifted the baseline for comparison without ever articulating why it was *fair* or *right* to exclude other employees from the analysis.⁴⁶⁴ Uniqueness advocates' failure to defend pregnancy's distinctive legal status in normative terms contrasted sharply with the stance taken by advocates for the disability approach, who argued explicitly that it would be unwarranted and unfair to give pregnant women benefits denied other temporarily disabled workers.⁴⁶⁵

Ironically, uniqueness arguments that distanced pregnancy from disability overlooked the close parallels in the status of women and people with disabilities. Historically, American legal and social institutions regarded both groups as "dependents" who could participate only marginally if at all, in the realm of employment;⁴⁶⁶ this legacy of exclusion continues to affect and marginalize both groups. Distancing pregnancy from disability also ignored the insights of the social disability model, developed in the early 1980s and championed by many as a model for the Americans with Disabilities Act (ADA).⁴⁶⁷ This model

463. Cf. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 112 (2002) (arguing that attention to race and "gender can help expose the ways in which the pervasive hierarchies of power are often perpetuated" and thus broadly benefit everyone); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 *IND. L.J.* 1219, 1282 (2011) (arguing that an approach that promotes inclusiveness and not simply universal protections would permit "equality norms to spark re-evaluation of universal standards" without ignoring the problems of marginalized workers).

464. See, e.g., *supra* notes 394–96 and accompanying text (discussing how the Supreme Court in both *Geduldig* and *Gilbert* distinguished pregnancy from other disabilities as a voluntary choice); *supra* notes 453–58 and accompanying text (discussing how the Supreme Court shifted the baseline in *Cal. Fed.*).

465. See *supra* note 424 and accompanying text.

466. CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT 7* (2010) (noting these parallel histories).

467. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

redefined the term “disability” to refer not to a dreaded medical condition or physical defect, but rather to a negative interaction between people’s bodies and their social and institutional environments.⁴⁶⁸ From such a perspective, pregnancy looks very much like a disability, and employers’ unwillingness to accommodate pregnant women’s physical needs looks like just the sort of harm laws prohibiting disability discrimination are designed to prevent. In disassociating pregnancy from disability, uniqueness arguments suppressed similarities and squandered potential alliances between pregnant women and a broader class of people with disabilities.

At the same time, appeals to pregnancy’s uniqueness obscured important differences among women in relation to pregnancy and employment.⁴⁶⁹ In portraying pregnancy as a quintessentially female experience, the uniqueness view presented an artificial sense of unity among women around their reproductive experiences, an exaggeration that later became the subject of extensive critique by other feminists, including feminists of color.⁴⁷⁰ African-American women, for example, do not receive the same valorization for pregnancy and motherhood as upper and middle class white women;⁴⁷¹ they are presumed to need less protection from work’s rigors, even while pregnant.⁴⁷² Similar observations undoubtedly could be made about the cross-cutting influence of other social factors such as age, physical ability, and sexual orientation.⁴⁷³ Ultimately, pregnancy is perceived and experienced differently by different women, who bring distinctive, though sometimes overlapping, issues to the workplace.

468. Cox, *supra* note 443, at 450; Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 653–59 (1999); Arlene S. Kanter, *The Law: What’s Disability Studies Got To Do With It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 416, 426–28 (2011).

469. Vogel, *supra* note 382, at 23 (noting that feminists who favored pregnancy-specific leaves saw pregnancy as a universal female phenomenon that “marks all women, constituting a strength and source of unity but also creating specific needs”).

470. Legal feminists in the 1990s produced a rich scholarship pointing out such essentialist tendencies in earlier feminist work. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (providing a classic critique of how essentialist tendencies in feminist legal thought neglect the crosscutting influence of race and obscure the potentially distinctive experiences of Black women and other women of color); Crenshaw, *supra* note 181, at 151 (providing a similar critique of the same tendencies in antidiscrimination law); see also Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048–49 (1992) (showing how such essentialist analyses can replicate the dominant categories of male/female, dominant/subordinate that feminists seek to criticize).

471. See Brake & Grossman, *supra* note 382, at 106 (noting that for women for whom having children is “tagged as socially valuable,” pregnancy is regarded as a revered state, but for many women of color, unmarried women, and poorer women who are viewed as “irresponsible reproducers, and are expected to work” pregnancy is denigrated as a form of work avoidance); *supra* note 48 (collecting sources).

472. See Brake & Grossman, *supra* note 382, at 105 (stating that “[w]omen of color historically have been both less revered while pregnant and presumed to be less in need of protection from the rigors of work”); *supra* note 49 (collecting sources).

473. See, e.g., *supra* note 53 (collecting sources suggesting that lesbians are not expected to have children at all).

The uniqueness view also downplayed relevant connections between men and women, reinforcing unnecessary division along sexual lines. True, men cannot become pregnant. But Title VII does not seek to define pregnancy from a metaphysical or experiential standpoint—only for the pragmatic purpose of eliminating discrimination and advancing equality on the job. Not only can pregnant employees who need leaves, flexibility, or light duty accommodations be compared to other men and women who need the same benefits due to other illnesses or disabilities: To the extent that pregnancy is treated not simply as a physical condition but also as a gateway to parenting and caregiving, pregnant women can also be compared to men and women who are preparing for the arrival of a new child, parenting, or caring for themselves or for other loved ones, as feminists expanding on the functional disability approach would later successfully argue.⁴⁷⁴

3. Practical Disadvantages of the Uniqueness View

Despite the disadvantages of the uniqueness view, images of pregnancy as a distinctive female experience that is unlike other conditions have persisted, reinforcing sex differences and harming both working women and men. Pregnancy discrimination was and is a serious problem. As noted above, pregnancy discrimination complaints increased over the past decade.⁴⁷⁵ Many employers refuse to hire and promote pregnant women, fire them when they become pregnant, or force them onto unpaid leave or out of the workforce altogether after denying them temporary work adjustments given other employees with similar disabilities.⁴⁷⁶ Research reveals persistent negative stereotyping and hostility

474. See *infra* notes 620–33 and accompanying text (discussing the Family and Medical Leave Act).

475. See *supra* note 387.

476. Although pregnant women face many types of discrimination, research suggests they are especially vulnerable to termination. Like employment discrimination claims generally, most pregnancy discrimination complaints relate to discharge. See, e.g., Reginald A. Byron & Vincent R. Roscigno, *Relational Power, Legitimation, and Pregnancy Discrimination*, 28 GENDER & SOCIETY, 435, 436–37 (2014) (concluding from raw EEOC data that over half of the pregnancy discrimination complaints made to the EEOC and state agencies over the past fifteen years pertained to discharge); Peggy Mastroianni, Legal Counsel, EEOC, Written Testimony at EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/mastroianni.cfm> (stating that most pregnancy discrimination charges over the past ten fiscal years have involved discharge based on pregnancy). Discharge can result when employers simply fire women because they are pregnant or deny requests for accommodation that would allow pregnant women to continue working. See, e.g., STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS 11–12 (2011) (describing numerous cases in which low-income women were fired after informing their employers of their pregnancies); NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (Jan. 2014) (estimating from survey data that more than one-quarter million pregnant workers per year are denied reasonable accommodation requests by their employers). Pregnant women also experience discrimination in hiring and promotion. See, e.g., BORNSTEIN, *supra*, at 13 (describing several cases in which employers rescinded job offers when they discovered hires were pregnant or reduced employees' work assignments and responsibilities when they learned about employees' pregnancies); NAT'L PARTNERSHIP FOR WOMEN & FAMILIES,

directed at pregnant women, who are often seen as unreliable, incompetent, and uncommitted employees who impose unfair burdens on others.⁴⁷⁷

The PDA was intended to forbid such discriminatory treatment.⁴⁷⁸ Yet, longstanding cultural assumptions about women's difference and pregnancy's uniqueness have hampered the law's effectiveness. In the years following the PDA's enactment, as we saw earlier, women's rights groups failed to take a united stance advocating a functional disability approach; nor did the agencies issue unambiguous interpretations or pursue vigorous enforcement of the PDA.⁴⁷⁹ In the absence of such clear, unified efforts challenging pregnant women's difference, the lower courts fell back on older stereotypes about pregnancy's distinctiveness to rationalize discriminatory treatment. Judges ruled in favor of employers who refused to hire pregnant women or fired them upon learning they were pregnant, often accepting tropes about their lack of dependability.⁴⁸⁰ Courts also approved policies artificially distinguishing pregnant women from non-pregnant employees with similar work limitations, such as policies limiting light duty or other accommodations to employees with on-the-job, but not off-the-job, injuries or illnesses.⁴⁸¹ Such decisions are particularly likely to harm women who work in low-wage jobs, male-dominated occupations, and rigidly structured workplaces, sectors that are disproportionately inhabited by low-income

supra, at 3 (reporting that 19% of surveyed women who resumed work with the same pre-birth employer lost opportunities for pay increases or promotions).

477. For empirical evidence and analysis demonstrating this point, see Byron & Roscigno, *supra* note 476, at 439–440, 447–450; see also NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 3, 10–11 (2008) (citing cases and studies showing negative stereotyping and hostility toward pregnant women); Brake & Grossman, *supra* note 382, at 103–04 (citing similar studies).

478. See, e.g., 123 CONG. REC. 29,387 (1977) (statement of Sen. Javits) (noting that “[m]any women temporarily disabled by pregnancy have been forced to take leave without pay or to resign,” while “other employees who face temporary periods of disability do not have to face the same loss” and arguing that the PDA would resolve this “injustice” by requiring “equal treatment when disability due to pregnancy is compared to other disabling conditions”); *id.* at 33,289 (statement of Rep. Marks) (indicating Congress's disapproval of disability plans such as the one in *Gilbert*, noting that this forces many pregnant women into situations where they must take leave without pay, and indicating that the new bill would “require those employers who do provide disability coverage to treat pregnancy-related disability the same as any other nonwork-related disability with regard to benefits and leave policies”).

479. See, e.g., Annalyn Kurtz, *8 Rights of Pregnant Women at Work*, CNN (July 28, 2014, 11:47 AM), <http://money.cnn.com/2014/07/25/news/economy/rights-pregnant-workers> (explaining that in July 2014 the EEOC issued guidance on pregnancy discrimination for the first time in 30 years).

480. See, e.g., Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workplace*, 50 ME. L. REV. 225, 225–26, 235–40 (1998) (giving numerous examples of cases and describing the two main stereotypes affecting the courts' rulings).

481. See, e.g., NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 16 (2013), available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf; Brake & Grossman, *supra* note 382, at 110, 113; Cox, *supra* note 443, at 469 n.156 (collecting cases); Matzzie, *supra* note 382, at 227; see also Widiss, *supra* note 382, at 963–64 & n.6.

women and women of color who need Title VII's protection the most.⁴⁸² The consequences are often severe for the affected women, as the cases show.

Arizanovska v. Wal-Mart Stores, Inc.,⁴⁸³ for example, involved a retailer's refusal to exempt a pregnant stocker from a fifty-pound lifting requirement even though non-pregnant employees who were temporarily unable to perform heavy lifting received such exemptions in the form of light duty assignments.⁴⁸⁴ Arizanovska had miscarried once before when Wal-Mart refused her light-duty request and when she asked for light duty per her doctor's orders for a subsequent pregnancy, Wal-Mart again refused her request and suggested she take unpaid FMLA leave; when she refused to do so citing a need to support her family, she was fired from her job and suffered a second miscarriage shortly thereafter.⁴⁸⁵ Wal-Mart's policy disallowed light duty for a "non-work-related short-term medical restriction that prevents the associate from performing his or her job."⁴⁸⁶ It also denied light duty for "a medical condition that is not a disability, but which prevents you from performing your job, *including pregnancy*."⁴⁸⁷ Thus, even on its face, the policy categorically excluded pregnant women from light duty while offering it to some other employees with similar lifting restrictions.⁴⁸⁸ In fact, Arizanovska's store manager testified that if an employee broke her arm or wrist outside work, Wal-Mart would find some form of accommodation, but the company would not do the same for a pregnant employee, because pregnancy is "not an impairment."⁴⁸⁹ The Seventh Circuit upheld summary judgment for Wal-Mart, concluding that the policy did not violate the PDA because it denied light duty to both pregnant and non-

482. See, e.g., NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 1, 5, 7; Brake & Grossman, *supra* note 382, at 69, 71, 110, 112-14; Cox, *supra* note 443, at 452; see also EEOC 2014 Pregnancy Discrimination Guidance, *supra* note 387 (noting that much of the recent increase in pregnancy discrimination complaints "has been fueled by an increase in charges filed by women of color").

483. 682 F.3d 698 (7th Cir. 2012).

484. *Id.* at 701. For an account of the underlying facts from the plaintiff, see NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 18. For a more detailed analysis of the case, see Brake & Grossman, *supra* note 382, at 110-12.

485. *Arizanovska*, 682 F.3d at 701; NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 18.

486. *Arizanovska v. Wal-Mart Stores, Inc.*, 94 Empl. Prac. Dec. 44,314, 44,315 (S.D. Ind. 2011).

487. *Arizanovska*, 682 F.3d at 701 (emphasis added).

488. See NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 16, 25 n.39 (pointing to a Wal-Mart memorandum to its employees giving job reassignment accommodation to disabled workers but not to pregnant workers).

489. *Arizanovska*, 94 Empl. Prac. Dec. at 44,317 (internal quotation marks omitted). The district court refused to credit this evidence, finding that the store manager who made the statement was not involved in making accommodations. *Id.*

pregnant employees with short-term, non-job-related lifting restrictions.⁴⁹⁰

In *Young v. United Parcel Service, Inc.*,⁴⁹¹ the Fourth Circuit issued a similar decision that was recently reviewed by the Supreme Court.⁴⁹² UPS denied pregnant driver Peggy Young's request to be excused from lifting more than twenty pounds, as her doctor ordered; like Arizanovska, Young had previously miscarried.⁴⁹³ UPS's policy granted light duty only to employees whose restrictions resulted from injuries sustained on the job, impairments covered by the ADA, and medical conditions precluding driver certification from the Department of Transportation (DOT).⁴⁹⁴ Based on the policy, UPS denied Young's request, forcing her onto unpaid leave and eventual loss of medical insurance.⁴⁹⁵ Young argued that by offering light duty to three other classes of employees, while failing to provide it to pregnant employees who were similarly unable to perform heavy lifting, the policy violated the PDA's command to treat women "affected by pregnancy . . . the same . . . as other persons not so affected but similar in their ability or inability to work."⁴⁹⁶

The Fourth Circuit rejected Young's argument, however, concluding, to the contrary, that "[b]y *limiting* accommodations to those employees . . . UPS ha[d] crafted a *pregnancy-blind* policy."⁴⁹⁷ The court reviewed the policy through the lens of the traditional uniqueness view of pregnancy, reflexively accepting distinctions that treated pregnant women less favorably than many other employees based on the source of their medical limitations. In a striking example of such superficial, circular reasoning, the Fourth Circuit held that Young was "not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury."⁴⁹⁸ Similarly, the court found

490. *Arizanovska*, 682 F.3d at 698, 703. Wal-Mart recently changed its policy to provide that women experiencing a "temporary disability caused by pregnancy" may be eligible for some forms of reasonable accommodation. See Lydia DePillis, *Under Pressure, Wal-Mart Upgrades Its Policy for Helping Pregnant Workers*, WASH. POST, Apr. 5, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers> (internal quotation marks omitted). In addition to mounting legal pressure, Wal-Mart faced protest from female employees who had carried out an active grass-roots campaign against pregnancy discrimination. See Lativia Johnson, *Wal-Mart Put Me Through Hell: Inside the Retailer's Pregnancy Discrimination Horror*, SALON (Apr. 6, 2015, 2:58 AM), http://www.salon.com/2015/04/06/walmart_put_me_through_hell_inside_the_retailers_pregnancy_discrimination_horror (describing Respect the Bump, a group of Wal-Mart employees who organized to fight against the retailer's treatment of pregnant workers).

491. 707 F.3d 437 (4th Cir. 2013), *vacated and remanded*, 135 S. Ct. 1338 (2015).

492. For a discussion of the Supreme Court's opinion, see *infra* text accompanying notes 524–29.

493. See *Young*, 135 S. Ct. at 1344.

494. *Young*, 707 F.3d at 446. For an account of the facts providing more detail from the plaintiff herself, see NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 15.

495. See *Young*, 707 F.3d at 441.

496. *Id.* at 445 (quoting second clause of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012)).

497. *Id.* at 446 (emphasis added).

498. *Id.* at 450–51.

that Young did not resemble workers with ADA-protected disabilities, because “[w]ith near unanimity, federal courts have held that pregnancy is not a ‘disability’ under the ADA.”⁴⁹⁹ Nor was Young comparable to employees who had lost Department of Transportation (DOT) driving certification, because “no legal obstacle [stood] between her and her work.”⁵⁰⁰ Thus, in order to prove a PDA violation, Young could compare her light duty denial only to that of other employees who were not covered by UPS’s policy—not to any of the covered employees whom the policy afforded better treatment.

Not only did the court’s analysis eliminate most UPS drivers as PDA comparators,⁵⁰¹ making it virtually impossible for Young to prove that UPS’s policy or the decision to deny her light duty was discriminatory⁵⁰²: The reasoning also transformed Young’s request exclusively into a demand for preferential treatment. Disregarding evidence that UPS considered pregnant drivers a unique liability,⁵⁰³ the court emphasized only that Young’s position would “grant pregnant employees a ‘most favored nation’ status”⁵⁰⁴ over any non-pregnant employees who were similarly “unable to lift as a result of an off-the-job injury or illness.”⁵⁰⁵ The Fourth Circuit’s decision was not unusual: At the time of the decision, several other circuits had upheld similar policies.⁵⁰⁶

499. *Id.* at 443 (quoting *Wenzlaff v. NationsBank*, 940 F. Supp. 889, 890 (D. Md. 1996)).

500. *Id.* at 450.

501. *See, e.g.,* *Brake & Grossman, supra* note 382, at 90; Eliza H. Simon, *Parity by Comparison: The Case for Comparing Pregnant and Disabled Workers*, 30 COLUM. J. GENDER & L. (forthcoming July 2015) (manuscript at 7, 32–33).

502. Under this reasoning, Young could not prove a PDA violation through either direct or circumstantial evidence. The Fourth Circuit held that the policy itself did not provide direct evidence of discrimination, because it treated pregnant women the same as non-pregnant employees whose lifting restrictions resulted from *off-the-job* injuries or other non-covered conditions. *Young*, 707 F.3d at 446–49. Nor did a UPS supervisor’s statement that Young was “too much of a liability” while pregnant provide direct evidence of discriminatory purpose, *id.* at 441, 449 (internal quotation marks omitted), because the supervisor had not actually made the decision to deny her light duty. *Id.* at 449. Young also failed to make a *prima facie* case with circumstantial evidence under the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because she had not shown that UPS treated her less favorably than non-pregnant drivers who were not covered by the light duty policy. *Young*, 707 F.3d at 449–51.

503. *See, e.g., Young*, 707 F.3d at 441 (noting that when Young asked UPS to accommodate her lifting restriction, a manager told her that she was “too much of a liability” while pregnant and could not come back until she was no longer pregnant); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1355 (2015) (noting testimony from a UPS union steward that “‘the only light duty requested [due to physical] restrictions that became an issue’ at UPS ‘were with women who were pregnant’” (alteration in original)).

504. *Young*, 707 F.3d at 446.

505. *Id.* at 448.

506. Several circuits had employed the reasoning in *Young* to uphold on-the-job injury requirements. *See Serechny v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206–08 (5th Cir. 1998). The Sixth and Tenth Circuit had taken a different view, permitting comparison of PDA plaintiffs to employees with on-the-job injuries for purposes of a *prima facie* case, but ultimately requiring proof that policies or decisions denying accommodations to employees with off-the-job injuries are a pretext for pregnancy discrimination. *See EEOC v. Horizon/CMS Healthcare Corp.*,

These decisions revived and complicated the older debate about the uniqueness versus disability approaches to pregnancy. The reasoning and results in these cases harken back to *Gilbert*,⁵⁰⁷ updating the earlier uniqueness view by approving artificial, allegedly facial neutral distinctions that cast pregnancy as a uniquely female liability and choice that does not resemble or warrant the same protections as other disabilities. The persistent view of pregnancy as a singular, female condition blinded judges to the way such distinctions often target pregnant women for mistreatment. Contrary to the Fourth Circuit's analysis, UPS's light duty policy was not pregnancy-neutral: It was facially discriminatory. True, the policy did not explicitly exclude pregnant workers from light duty, as facially discriminatory policies typically do.⁵⁰⁸ But it nonetheless excluded virtually *all* pregnant women, without ever mentioning pregnancy, by using rules that served as definitional proxies.⁵⁰⁹

Consider the provision limiting light duty to employees with work limitations arising from on-the-job injuries. Because UPS drivers do not become pregnant in the normal course of doing their jobs, the on-the-job injury requirement denied accommodations to virtually 100% of the pregnant drivers,⁵¹⁰ all of whom were women—and it did so *by definition* and not simply because of disparate impact. The on-the-job injury requirement was equivalent to a rule limiting light duty to employees with

220 F.3d 1184, 1195 & n.7 (10th Cir. 2000) (suggesting without expressly holding same); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that a pregnant worker may be compared to a worker injured on the job). The Sixth Circuit later limited *Ensley-Gaines* to its facts and followed an approach similar to that of the Fourth Circuit, holding that an employer's on-the-job injury policy was "pregnancy-blind" and therefore non-discriminatory. *Reeves*, 446 F.3d at 641.

507. See, e.g., *Brake & Grossman*, *supra* note 382, at 67, 85–86, 122–23; *Dinner*, *supra* note 16, at 478; *Widiss*, *supra* note 382, at 1004.

508. Ordinarily, facially discriminatory policies explicitly treat some people differently based on sex or pregnancy, such as pre-Title VII policies restricting flight attendant jobs to women only. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 385–86 (5th Cir. 1971). Some facially discriminatory policies single out a subset of people, in which case courts typically use a "sex-plus" analysis that looks at whether the policy treats men and women in that subset differently in order to determine whether discrimination has occurred. See, e.g., *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197–98 (1991) (concluding that a policy that treated fertile women differently from fertile men was facially discriminatory); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (reaching same conclusion about a policy that treated women and men with preschool age children differently).

509. The term "definitional proxy" is my own; I have not seen this term or concept or my proposed facial discrimination analysis of such proxies elsewhere in the literature. Mary Anne Case has used the term perfect proxy, arguing that the Supreme Court will uphold an explicitly discriminatory policy only when it is based on a "perfect proxy" that "must be true of either all women or no women or all men or no men." Mary Ann Case, "*The Very Stereotype the Law Condemns*": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449–50 (2000). Like Case's perfect proxy, a definitional proxy applies to all women or, under the PDA, all pregnant women, but the similarity ends there. As the text below clarifies, a definitional proxy analysis reveals whether an apparently neutral rule is actually facially discriminatory, not whether such a rule will survive a sex discrimination challenge under the Constitution or Title VII. See *infra* text accompanying notes 510–17.

510. Theoretically, an already-pregnant worker injured on the job would be eligible for light duty for limitations arising out of that on-the-job injury, though not for limitations arising from the pregnancy itself. For the sake of convenience, the text refers to drivers whose work limitations arise out of pregnancy as pregnant drivers.

a certain high level of testosterone: Such a rule might disqualify some male drivers, to be sure, but it would not *automatically* disqualify *all* of them, across the board, by definition, as it would do pregnant ones—who, simply by virtue of being pregnant females, would *never* register the required hormonal levels.⁵¹¹ From this vantage point, UPS's policy was analogous to the policy in *Gilbert* that Congress invalidated in the PDA.⁵¹² In *Gilbert*, GE's temporary disability policy categorically excluded pregnancy and all pregnant women from covered "sicknesses and accidents,"⁵¹³ by definition, while it did *not* so categorically exclude all employees affected by other disabling conditions. Similarly, in *Young*, UPS's light duty policy categorically excluded pregnancy and all pregnant women from covered on-the-job injuries, by definition, while it did not so categorically exclude all employees affected by other, similarly limiting conditions. In both cases, the covered terms served as proxies that excluded pregnancy as a matter of definition.

Although both policies might have a disproportionate impact, that effect is not their central flaw or the flaw of definitional proxies generally.⁵¹⁴ Rather, the problem is their automatic, across-the-board, linguis-

511. For example, a rule limiting light duty to workers with a testosterone level of 600 ng/dl or higher would exclude some men, but would exclude all women, pregnant or not. See *Testosterone*, MEDLINE PLUS MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/003707.htm> (last updated Feb. 20, 2014) (showing that normal male testosterone levels range from 300 to 1000ng/dl while normal female testosterone levels range from 15 to 70ng/dl); *Reference Values for Testosterone, Total in Pregnancy*, PERINATOLOGY.COM, <http://perinatology.com/Reference/Reference%20Ranges/Testosterone.htm> (last visited May 14, 2015) (showing that a pregnant female's testosterone levels can range as high as 309 ng/dl in the third trimester).

512. See, e.g., *Young*, 135 S. Ct. 1338, 1353 (recognizing that Congress's "unambiguous" intent in passing" the PDA was to overturn "both the holding and reasoning" of *Gilbert* (internal quotation mark omitted)) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983)).

513. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

514. There are a number of reasons why disparate impact is typically not the best framework for analyzing policies containing definitional proxies, like UPS's on-the-job injury requirement. First, as the analysis in the text reveals, the on-the-job requirement was and is more invidious than policies typically scrutinized for disparate impact, such as a policy limiting leave to people employed for a year or more. Such a rule would likely exclude some pregnant employees and some non-pregnant ones, but it would not categorically eliminate *all* pregnant employees, by definition, like an on-the-job injury rule. As noted above, a one-year leave rule may or may not have a disparate impact under the PDA, depending on the demographics of the workforce, see *supra* note 457, and the methodology used to assess impact. Some courts have used an empirical approach to evaluate disparate impact under the PDA, while struggling with the proper baseline for measuring impact. See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654 & n.10 (N.D. Ill. 1991) (discussing whether to compare pregnant versus non-pregnant, or male versus female, employees for purposes of measuring impact). Other courts have dispensed with empirical evaluation and concluded that if all or most pregnant women would be negatively affected by a policy, the policy has a disparate impact. See Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 44-46 (2009) (citing such cases). The latter approach to disparate impact converges with the analysis for determining whether there is a BFOQ defense justifying a facially discriminatory policy, see, e.g., *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969)(employer pleading BFOQ defense must prove there is a "factual basis for believing[] all or substantially all women would be unable to perform safely and efficiently the duties of the job"); see also *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (citing approvingly to this standard). It seems inappropriate to use the same analysis in such potentially dissimilar contexts: Ordinarily, employers must satisfy this stringent

tic pinpointing of a socially identifiable, stigmatized group such as pregnant women for disfavor—a problem only made worse by the reality that forcing pregnant women out of their jobs feeds perceptions that they are unreliable and uncommitted to their work, thus exaggerating their purported difference from other employees and fueling and justifying further discrimination.⁵¹⁵ In these respects, the on-the-job injury rule is akin to other laws and policies targeting people for caste-like treatment by way of definition, rather than by explicit mention, that courts treated as facially discriminatory.⁵¹⁶ In cases like *Young*, however, assumptions

BFOQ standard to defend facially discriminatory policies but may defend policies with a disparate impact standard under a less onerous business necessity standard, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), a test that seems too lenient for policies that automatically disqualify an entire class, as do facially discriminatory policies. For these reasons, at least some of the pregnancy-related cases courts have analyzed as disparate impact would be better analyzed as facial discrimination by definitional proxy. See, e.g., *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) (styling the analysis as disparate impact, but concluding that plaintiff could prove a PDA violation by presenting testimony that “all or substantially all pregnant women” would be unable to meet hospital’s requirement of lifting more than 150 pounds).

515. See generally *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting that stereotypes create a “self-fulfilling” cycle of discrimination that forces women to “continue to assume the role of primary family caregiver” and refuels employers’ “stereotypical views about women’s commitment to work”); Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 107 (2012) (observing that stereotypes can become a self-fulfilling prophecy as employers expect women to put less time and effort into their jobs and therefore offer them lower paying jobs and earnings, and these employment differentials lead women to assume primary responsibility for household labor); see also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 41 (2010) (stating that even short withdrawals from the labor force create substantial effects on women’s economic equality).

516. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2607–08 (2015) (invalidating state laws that “define marriage between one man and one woman” even though such laws do not expressly mention same-sex couples or sexual orientation); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating a law limiting the definition of a “marriage” for federal purposes to a legal union between “a man and a woman”); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating the Oklahoma constitution’s infamous “grandfather” clause which exempted from the state’s stringent literacy test all persons who were entitled to vote on or before January 1, 1866, the effective date of the Fifteenth Amendment, or their lineal descendants). In some of these cases it seems obvious that the definitional proxies were subterfuges intended to deny same-sex couples the right to marry and Blacks the right to vote, respectively. *Obergefell*, 135 S. Ct. at 2597 (observing that in recent years many states enacted Defense of Marriage Acts to ensure the continuing exclusion of same-sex couples, in light of legal developments recognizing same-sex marriage elsewhere); *Windsor*, 133 S. Ct. at 2693–94; *Guinn*, 238 U.S. at 364–65. But in other cases, such deliberately discriminatory purpose is not clear: Instead, the invalidated laws and policies may simply reflect traditional assumptions about the naturalness of the governing social order. Here, state laws defining marriage as a union between a man and a woman that were enacted before gay and lesbian people became socially and politically visible come to mind. See *Obergefell*, slip op. at 2596 (observing that by the time of the Nation’s founding, marriage was simply understood to be a voluntary union between a man and a woman); *id.* at 2613 (Roberts, C.J., dissenting) (same); see also Zachary Herz, *The Marrying Kind*, 82 TENN. L. REV. (manuscript at 43) (forthcoming 2015) (explaining how New York’s marriage law reflected an inability to imagine same-sex unions, rather than specific hostility toward them). The Supreme Court’s decision in *Obergefell* nonetheless invalidates all laws limiting marriage to a man and a woman, regardless of whether they were enacted in an era in which the heterosexual character of marriage was simply taken for granted or were reenacted in recent years in order to consciously exclude or demean same sex unions. *Obergefell*, 135 S. Ct. at 2604–05 (holding that “same-sex couples may exercise the fundamental right to marry in all states”). For additional examples of cases involving definitional proxies, see generally Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525 (2013) (analyzing numerous cases in which the Supreme Court has treated classifications that do not explicitly discriminate on the basis of race as suspect racial classifications in order to promote values underlying the Equal Protection Clause).

that pregnant women's problems are distinct and less deserving of accommodation than those faced by workers with on-the-job injuries, and that these distinctions are rooted in gender-neutral workers' compensation schemes, helped obscure the definitional discrimination.⁵¹⁷

In overlooking this facial discrimination analysis, judges and stakeholders missed a method of invalidating UPS's policy that would protect pregnant workers while avoiding the prospect of preferential treatment and rejecting the uniqueness view of pregnancy. Courts typically enjoin further use of a facially discriminatory policy, giving the employer the choice of extending the policy to apply evenhandedly to all employees regardless of sex, or eliminating it for everyone.⁵¹⁸ In *Young*, applying the on-the-job requirement to all employees was facially discriminatory, so the solution was to enjoin its use altogether, forcing UPS to grant (or deny) light duty to all pregnant and all non-pregnant drivers with similar lifting restrictions *without regard to whether they resulted from an on-the-job injury*. The reasoning and result would prevent UPS and other employers from discriminatorily excluding pregnant employees from light duty, while at the same time avoiding a reading of the PDA that would require accommodating them at the expense of any non-pregnant coworkers with similarly limiting off-the-job injuries.⁵¹⁹ In promoting

517. Although employers, including UPS in this case, typically defend on-the-job injury requirements as legitimate nondiscriminatory efforts to hold down the cost of complying with sex-neutral workers' compensation schemes, *see, e.g.*, Widiss, *supra* note 382, at 985 & n.94, 1032; Brief for Respondent at 43–44, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 5464086, social scientists have noted the sex bias reflected in traditional workers' compensation systems. *See, e.g.*, Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid*, in *WOMEN, THE STATE AND WELFARE* 123, 133–45 (giving a history of workmen's compensation in the United States and noting that the program was developed "for the white northern men employed in heavy industry"). Even today, workers' compensation schemes can contain considerable sex bias, such as California's which is being targeted for legislative reform because it penalizes female workers injured on the job by attributing all or most of their disabilities to preexisting, female-specific health factors such as pregnancy or menopause. *See, e.g.*, Melody Gutierrez, *Gender Bias Rampant in Workers' Comp Cases, Women's Groups Charge*, SFGATE (Mar. 4, 2015, 8:47 AM), <http://www.sfgate.com/politics/article/Gender-bias-rampant-in-workers-comp-cases-6113269.php>. A mechanical designer who developed carpal tunnel syndrome had her award reduced on the ground that she was post-menopausal, for example, while female firefighters and police officers who develop breast cancer due to exposure to hazardous materials receive far less compensation than their male counterparts who develop other types of cancer. *Id.* Even though these decisions do not explicitly discount disability payments for women, they use health factors as definitional proxies, thus providing additional examples of facial discrimination.

518. *See, e.g.*, *Manhart v. L.A. Dep't of Water & Power*, 387 F. Supp. 980, 984 (C.D. Cal. 1975), *vacated on other grounds*, 435 U.S. 702 (1978) (granting permanent injunction against use of facially discriminatory policy requiring larger contributions to pension plans from women, an aspect of the injunction not appealed and not in controversy before the Supreme Court); *Diaz v. Pan Am. World Airways, Inc.*, 346 F. Supp. 1301, 1305 (S.D. Fla. 1972) (granting prospective injunction, upon vacation and remand from the Fifth Circuit, against further application of a facially discriminatory policy refusing to hire men as flight attendants).

519. Although the facial discrimination analysis by definitional proxy in the text focuses on the on-the-job injury requirement, UPS's rule limiting light duty to drivers whose conditions temporarily disqualified them from DOT commercial driver certification was similarly facially discriminatory. The DOT's policy explicitly included numerous medical conditions that result in temporary lifting restrictions, but it did not include (and thus effectively excluded) pregnancy as such a condition. Petitioner's Brief at 44 n.17, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4441528 [hereinafter

such an even-handed, inclusive result, the approach would not only honor the PDA's command to treat pregnancy "the same . . . as" other conditions that similarly affect the ability or inability to work: It would also move the law forward in the spirit of a feminist-inspired disability approach that insisted on linking the interests of pregnant women with those of other employees with disabilities in a broad and inclusive fashion.

Despite these virtues, neither the advocates for Young, the United States, nor the major women's rights groups advocated such an approach in the Supreme Court. Instead, these groups argued that the PDA requires an employer who provides accommodations to employees injured on the job (or any other subset of employees), to do so for pregnant employees with similar work restrictions—even if the employer does not accommodate non-pregnant workers not injured on the job. Thus, in their view, UPS's formal policy alone violated the PDA, even without further evidence.⁵²⁰ Their amicus briefs relied on Congress's authority to provide pregnant women protections not given other non-covered workers, citing the EEOC's 2014 enforcement guidance⁵²¹ and the Court's decision in

Petitioner's *Young* Brief]. Thus, UPS's rule restricting light duty to DOT-disqualifying conditions automatically excluded all pregnant drivers, as matter of definition, while it did not so exclude all non-pregnant drivers with similar lifting restrictions.

Whether UPS's rule limiting light duty to drivers whose restrictions resulted from ADA-covered disabilities was similarly facially discriminatory is a more complex question beyond the scope of analysis here. It is true that normal pregnancy itself was not and is not considered a disability under the ADA. But under the version of the ADA that prevailed at the time, temporary impairments like those typically resulting from normal pregnancy apparently were not considered disabilities generally. Brief for the United States as Amicus Curiae Supporting Petitioner at 20–21, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 2089966 [hereinafter Solicitor General's *Young* Brief]. Thus, even though UPS's ADA-disability requirement categorically disqualified from light duty all women with temporary work restrictions resulting from normal pregnancy, it may have also categorically excluded all non-pregnant employees with similar work temporary restrictions, in which case it would not be facially discriminatory. The issue has been rendered moot by subsequent amendments to the ADA. *See infra* note 535.

520. *See, e.g.*, Amicus Curiae Brief of the American Civil Liberties Union and a Better Balance et al., in Support of Petitioner at 12–15, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4536938 [hereinafter ACLU *Young* Brief]; Brief of Law Professors and Women's Rights Organizations as Amici Curiae in Support of Petitioner at 10–11, 13, 21–23, 27–28, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2013 WL 2103656 [hereinafter Law Professor *Young* Brief]; Brief of the Leadership Conference on Civil and Human Rights as Amicus Curiae in Support of Petitioner at 10–11, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4631950; Petitioner's *Young* Brief, *supra* note 519, at 28–30, 41–42; Solicitor General's *Young* Brief, *supra* note 519, at 19 n.3, 21–23.

521. The EEOC issued Pregnancy Discrimination Guidance on July 14, 2014. *See* EEOC 2014 Pregnancy Discrimination Guidance, *supra* note 387. The guidelines prohibit an employer from refusing "to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." *Id.* § I.A.5; *see also* § I.C.1.b. & Ex. 10 on light duty). The guidelines also provide that a plaintiff need not always proceed through the *McDonnell Douglas* burden-shifting framework and clarified that employees with on-the-job injuries or ADA-covered disabilities are indeed proper comparators for PDA plaintiffs. *Id.* § I.C.1.c.

Cal. Fed., but failing to address the fairness issue in substantive terms.⁵²² None of the groups urged the Court to extend the PDA to require employers to grant protections to these other uncovered workers, as the champions of the functional disability approach had done in an earlier era.⁵²³

The Supreme Court rejected these groups' reading of the PDA and declined to defer to the EEOC's recently released guidance,⁵²⁴ holding instead that Congress did not intend to favor pregnant employees over other non-covered workers and thus the policy itself was not discriminatory.⁵²⁵ Justice Breyer's opinion for the majority carefully preserved rights for pregnant women, however, by permitting Young and other pregnant workers to prove individual disparate treatment by showing that apparently neutral policies or decisions like UPS's were adopted or applied with discriminatory purpose.⁵²⁶ Courts typically enjoin further use of such covertly discriminatory policies for all employees, just as they do overt or facially discriminatory ones.⁵²⁷ Thus, the Court's approach will not require employers to give pregnant women benefits not given other non-covered employees with similar work restrictions, or vice versa, by way of either liability or remedy. Yet, in contrast to the facial discrimination by definitional proxy approach outlined above, the Court's method of honoring the spirit of the disability approach came at what is likely to be a considerable cost to pregnant workers. As commentators have noted, individual disparate treatment cases of all types are notoriously difficult to prove.⁵²⁸ Notwithstanding the majority's effort to

522. See, e.g., ACLU *Young* Brief, *supra* note 520, at 14–15; Law Professor *Young* Brief, *supra* note 520, at 10–12, 21–22, 27–28; Petitioner's *Young* Brief, *supra* note 519, at 28–30, 41–42; Solicitor General's *Young* Brief, *supra* note 519, at 22–23, 27–28.

523. Compare ACLU *Young* Brief, *supra* note 520, at 14–15 (arguing that the Court need not be concerned about adopting a reading of the PDA's second clause that would allow employers to give pregnant women accommodations that are not given other employees with similarly restricting off-the-job injuries because such workers are, "unlike women, [] not subject to systemic, class-wide economic discrimination"), with ACLU *Cal. Fed.* Brief, *supra* note 423, at 48–64 (arguing to the Court that if employers are required by law to give pregnant workers accommodations not available to other similarly restricted employers, Title VII's basic remedial principles require the employers to extend such accommodations to all such workers).

524. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1351 (2015).

525. *Id.* at 1350.

526. *Id.* at 1353–54.

527. See, e.g., *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982) (stating that the remedy for an apparently neutral system that was adopted with a discriminatory purpose would include "an injunction against the future application of the system"); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) (stating that a broad, class-wide injunction against the continuation of a discriminatory practice is justified when a pattern or practice of discrimination is found).

528. For discussion of the many problems Title VII plaintiffs face in proving individual disparate treatment, see generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); see also LAURA BETH NIELSEN ET AL., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003* (2008), showing that employment discrimination cases are almost universally disparate treatment cases, *id.* at 3, 17, that although most disparate treatment cases are settled, over one third are dismissed or disposed of on summary judgment for the employer, *id.* at 40, that of those that go to trial, plaintiffs win in only 7% of cases decided by judges and 30% of those decided by juries, *id.* at 47, and that outcomes in individual cases are much less favorable to plaintiffs than

ease the standards of proof in these cases,⁵²⁹ the evidentiary framework leaves trial courts more than ample leeway to undermine the PDA by importing old biases about pregnant women's unique liabilities.

4. Implications for Reform

These decisions show that the practical failures of the PDA cannot be separated from the normative and theoretical failures of the uniqueness view of pregnancy. Notably, the major legal reforms feminists currently propose to address the negative lower court trends all involve identifying pregnancy more closely with disability.⁵³⁰ One approach would define "normal" pregnancy as a "disability" entitled to reasonable accommodation under the ADA,⁵³¹ a strategy urged by some feminist commentators long ago⁵³² but rejected by the EEOC and the courts when women's rights groups failed to advocate for it.⁵³³ A second would define

those in cases brought by multiple plaintiffs or the EEOC, *id.* at 41, 44, 46. For discussion of some of the difficulties pregnancy discrimination complainants in particular face in proving disparate treatment, see Goldberg, *supra*, at 759, 762–64; Greenberg, *supra* note 480, at 232–47; Grossman & Thomas, *supra* note 514, at 34–36, 39–41. For criticism of the *McDonnell Douglas* framework generally, see Widiss, *supra* note 382, at 1017–18. For a discussion of plaintiffs' low success rates in Title VII cases and the biases judges bring to their evaluation of these claims generally, see Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

529. The Supreme Court made an effort to ease the evidentiary requirements for PDA plaintiffs in *Young*. The Court concluded that for purposes of a *prima facie* case, pregnant women may compare their treatment to that of any class of employees "similar in their ability or inability to work," including, for example workers with on-the-job injuries, and not only other non-covered workers such as those injured off the job. *Young v. United Parcel Serv. Inc.*, 135 S. Ct. 1338, 1355 (2015). In addition, the Court emphasized that proof that the employer's policy imposes a 'significant' burden or disparate impact on pregnant women without a "sufficiently strong" legitimate, non-discriminatory reason to justify the burden may support a finding of purposeful discrimination. *Id.* at 1354. Notwithstanding these efforts, under the Court's framework, the ultimate question of whether the employer acted for the purpose of discriminating against pregnant women is a question of pure fact committed to the discretion of the trial court that can be reversed only for clear error. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 287–88 (1982) (labeling the question of whether a policy reflects an intent to discriminate a "pure question of fact, subject to . . . [a] clearly erroneous standard").

530. As noted above, some feminists still maintain that pregnancy is fundamentally different from disability. *See supra* text accompanying note 443. The tide seems to have turned, however; more recent scholarship accepts or even embraces associating pregnancy with disability under the ADA or the PDA or both. Cox, *supra* note 443, at 449 (challenging "the prevailing assumption that characterizing pregnancy as 'disability' for ADA purposes is inappropriate, unwise, and harmful to women" and arguing explicitly that feminists and the law should embrace that characterization); Widiss, *supra* note 382, at 965 n.11, 1008–10 (urging courts to compare to pregnant workers under the PDA people with conditions reasonably accommodated under the amended ADA, which now covers minor and temporary impairments); Simon, *supra* note 501 (manuscript at 8–9) (arguing that ADA-covered employees should be comparators for PDA plaintiffs); *see also* Brake & Grossman, *supra* note 382, at 117 (agreeing that there are good reasons to cover pregnancy as a disability under the ADA, thus defining pregnancy discrimination as a form of disability discrimination, and also arguing for continuing to challenge disparate treatment of pregnancy as a form of sex discrimination under the PDA, implicitly accepting the PDA's disability approach).

531. *See generally* Cox, *supra* note 443.

532. *See, e.g.,* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27, 51 (1995); Matzzie, *supra* note 382, at 193.

533. *See* Matzzie, *supra* note 382, at 195 (explaining that women's rights groups failed to advocate for the inclusion of pregnancy under the scope of the ADA when the EEOC engaged in rulemaking proceedings for regulations under the ADA); *see also* Cox, *supra* note 443, at 448 n.25 (documenting that such groups also failed to urge the EEOC to consider pregnancy a disability in

not pregnancy itself, but the impairments that arise as a result of pregnancy, as disabilities covered by the ADA.⁵³⁴ Since Congress amended the ADA in 2008 to cover even temporary and minor impairments,⁵³⁵ including temporary lifting restrictions, this position has become even more plausible.⁵³⁶ A third approach argues that, just as employers must accommodate these temporary and minor impairments under the amended ADA, employers must accommodate pregnancy-related impairments of the same sort in order to satisfy the PDA's command to treat pregnant women the same as other similarly disabled employees.⁵³⁷ The fourth strategy seeks to enact a new federal law that would give pregnant workers the right to reasonable accommodations, thus affording them a right already available to other employees with disabilities under the ADA.⁵³⁸ Research suggests most pregnant women do not want special treatment⁵³⁹ and would thus be likely to support such strategies. Thus, many women's rights advocates implicitly acknowledge that the uniqueness view of pregnancy has backfired and now seek to help pregnant workers by relying on the very identification with disability that troubled some feminists in the past.

History suggests that these efforts will only succeed, however, if advocates can remain united in their vision and can rally visible public support for such an approach, challenging pregnancy's presumed distinctiveness and repudiating arguments that privilege women's special reproductive or familial roles. Success under the PDA requires vigorously challenging pregnant women's, and all women's, difference—refusing to distance the problems of pregnant workers from those faced by employees with other disabilities and advancing approaches that expand the circle of identification and inclusiveness wider.

The Supreme Court's 1991 decision in *Automotive Workers v. John-*

2009, when the EEOC issued revised regulations to address the 2008 amendments to the ADA, and that in fact the only letter submitted to the EEOC by a women's rights organization, Legal Momentum, implicitly conceded that pregnancy was not a disability).

534. See Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 114 (2013).

535. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

536. See Solicitor General's *Young* Brief, *supra* note 519, at 24–25.

537. See Widiss, *supra* note 382, at 1006–09; Simon, *supra* note 501 (manuscript at 8–10); see also NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 14, 16 (explaining that individuals with pregnancy-related impairments that fall under the new ADAAA should be protected but that courts and the EEOC have not yet had strong moves in this direction).

538. See, e.g., Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013) (extending to employees with pregnancy or childbirth-related restrictions the ADA's requirement of reasonable accommodation unless there is an undue hardship to the employer); see also NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, *supra* note 481, at 21 (describing the potential benefits of the act).

539. See, e.g., Laura M. Little et al., *Professional Image Maintenance: How Women Navigate Pregnancy in the Workplace*, ACAD. MGMT J., Feb. 2015, at 8, 23 (reporting that interviewed pregnant employees perceived their pregnancies as a threat to their professional image and that the majority strongly agreed that "I want others to know that who I am at work is the same as before the pregnancy," kept up the same pace of work, and avoided asking for special accommodations in order to prove their continued work commitment and competence).

son Controls, Inc.,⁵⁴⁰ confirms these themes, showing how ideas about pregnancy's uniqueness can harm *all* fertile women and men and reiterating the key role of unified feminist efforts to repudiate such assumptions in achieving effective legal change. *Johnson Controls* involved the validity of a policy that excluded all women "capable of bearing children" from jobs requiring exposure to lead, nominally for the purpose of fetal protection.⁵⁴¹ The policy was overtly sex-based: It applied to all fertile women (including those well past reasonable childbearing age),⁵⁴² while permitting all men to work with lead despite evidence of harm to offspring caused by lead exposure in males.⁵⁴³ The policy seriously restricted women's opportunities, banning women from all jobs from which they might eventually be promoted into battery-making and relegating them to jobs that paid less.⁵⁴⁴

The case raised the prospect of a far-reaching judicial retrenchment, but the Court refused to rely on old ideas about women's difference and pregnancy's uniqueness to uphold the employer's policy. Instead, the Justices unequivocally invalidated sex-specific fetal protection policies,⁵⁴⁵ holding that under Title VII and the PDA, employers may not discriminate against women based on reproductive capacity unless female, but not male, reproduction interferes with the ability to do the essential function of the job of battery making.⁵⁴⁶ Noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities,"⁵⁴⁷ the Court concluded that "[i]t is no more appropriate for the courts than it is

540. 499 U.S. 187 (1991).

541. *Id.* at 192.

542. Brief Amicus Curiae in Support of Petitioners by Trial Lawyers for Public Justice at 8–9, *Johnson Controls*, 499 U.S. 187 (No. 89-1215), 1990 WL 10022470 [hereinafter *Trial Lawyers Johnson Controls Brief*]. The UAW, represented by Marsha Berzon, carefully chose plaintiffs who called attention to this point, including a 50-year-old woman who was excluded based on the risk to a potential fetus, as well as a man who wished to be excluded because of the harmful effects of lead on his own fertility. *Johnson Controls*, 499 U.S. at 192; *Trial Lawyers Johnson Controls Brief*, *supra*, at 8–9.

543. *Johnson Controls*, 499 U.S. at 221 (citing *Int'l Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 889–90 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991)).

544. *Johnson Controls*, 886 F.2d at 907 (stating that "it is clear that the defendant's fetal protection policy is excessively cautious," partly because it excludes "a presumptively fertile woman from any job from which she might ultimately be promoted into battery making, even if her present job does not expose her to lead"); *Trial Lawyers Johnson Controls Brief*, *supra* note 542, at 4 (noting that while the link between *Johnson Controls'* policy and fetal health is tenuous, it is not tenuous that "[e]xisting women are denied well-paying jobs and advancement opportunities and are branded with the stigma of being regarded as marginal, expendable workers"). As the Seventh Circuit observed, rigorous implementation of such fetal protection policies nationwide could have excluded women from more than twenty million jobs. *Johnson Controls*, 886 F.2d at 914 (Easterbrook, J., dissenting).

545. *Johnson Controls*, 499 U.S. at 211 (holding "that Title VII, as so amended [by the PDA], forbids sex-specific fetal-protection policies").

546. *Id.* at 206.

547. *Id.* at 211.

for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."⁵⁴⁸

Johnson Controls confirms the continuing cultural resonance and conservative valence of the uniqueness view of pregnancy. In fact, in *Johnson Controls*, it was not feminists, but anti-feminist groups such as Concerned Women for America who appealed to the idea of pregnancy as a unique marker of female difference, arguing in an amicus brief that the company's broad sex-specific exclusion was a justifiable reaction to the "natural difference" between the sexes that pregnancy represents.⁵⁴⁹ The brief filed by the Bush administration's EEOC also endorsed pregnant women's difference, urging that narrowly drawn fetal protection policies, such as those limited to already pregnant women, should be permitted under Title VII's BFOQ exception.⁵⁵⁰

The case also corroborates the continuing importance of unified feminist efforts to challenge difference. In *Johnson Controls*, women's rights organizations were united in explicitly attacking any special connection between womanhood and childbearing.⁵⁵¹ They argued that pregnancy was *not* universal; that women experienced reproduction differently; and that the PDA forbids employers from relying on assumptions about women's reproductive goals and capacities, directing them to consider only women's ability to perform the work before them.⁵⁵² These feminists also endorsed the PDA's comparative framework, emphasizing that, under both the PDA and Title VII, fertile women must be compared

548. *Id.*

549. Brief Amicus Curiae of Concerned Women for America in Support of Respondent at 16, *Johnson Controls*, 499 U.S. 187 (No. 89-1215) ("There are real differences between men and women and these differences do not simply disappear because a case is brought under Title VII. The policy at issue in this case focuses on this 'natural difference' between men and women. There is no myth; there is no stereotyping.").

550. For the EEOC's general argument that a sex-based fetal protection policy can be justified as a BFOQ, see Brief for the United States & the EEOC Supporting Plaintiffs at 31-45, *Johnson Controls*, 499 U.S. 187 (No. 89-1215). For the EEOC's specific argument that it would be "harsh and incongruous" to deny the BFOQ defense to an employer excluding only actually pregnant women, see *id.* at 37-39.

551. See Brief Amici Curiae of Equal Rights Advocates, The NOW Legal Defense & Education Fund, National Women's Law Center, & Women's Legal Defense Fund in Support of Petitioners at 12 n.3, *Johnson Controls*, 499 U.S. 187 (No. 89-1215) [hereinafter ERA *Johnson Controls* Brief] ("The Johnson Controls-type stereotype undoubtedly arises because of the centrality and strength of the mother-infant relationship in our culture, leading employers simply to forget about fathers. This is especially so during pregnancy, when the fetus is enclosed in the woman's body, and the father's connection to the fetus has no such visible and obvious manifestation.").

552. See ERA *Johnson Controls* Brief, *supra* note 551, at 40-41 (arguing that, "far from allowing courts to consider fetal health concerns which have no impact on the woman's job performance abilities, Congress mandated equal treatment"); Brief Amici Curiae in Support of Petitioners by American Civil Liberties Union et al. at 41-42, *Johnson Controls*, 499 U.S. 187 (No. 89-1215) [hereinafter ACLU *Johnson Controls* Brief] (arguing that, even if it substantively disagrees with it, the Court is bound by Congress's conclusion "that employers may not substitute their evaluation of the risks and benefits of work (including the risks and benefits to current and future children) for the decisions of women themselves").

to fertile men in terms of their ability to make batteries and cannot be treated as the guardians of the next generation.⁵⁵³

At the time, women's rights groups were working to build support for a new law, enacted two years later as the Family and Medical Leave Act,⁵⁵⁴ that would affirm the PDA's logic and extend its reach by granting unpaid leave not only to pregnant women and temporarily disabled employees, but also to new mothers and fathers and to men and women caring for sick or disabled family members.⁵⁵⁵ Feminists were also actively pursuing legislation that would overrule Supreme Court decisions that interpreted Title VII narrowly.⁵⁵⁶ Their efforts would soon culminate in the Civil Rights Act of 1991.⁵⁵⁷ Although the bill said nothing about fetal protection policies specifically, the fact that Congress was prepared to override restrictive Supreme Court decisions in response to feminist organizing and public outcry may well have contributed to the resounding plaintiff victory in *Johnson Controls*.⁵⁵⁸ Thus, in *Johnson Controls*, as in early pregnancy discrimination developments, progress occurred because feminists exerted concerted pressure on Congress and the courts to reject still-prevalent stereotypes assuming women prioritize their reproductive roles over their work roles.

This lesson was only partially heeded in *Young v. UPS*. It is true that women's rights groups presented a similarly united front, galvanizing a broad coalition of interested groups and rallying public opinion generally in an effort to persuade the Supreme Court to construe the PDA to

553. See ACLU *Johnson Controls* Brief, *supra* note 552, at 16–17 (“Because women are as capable of producing batteries as men are, the plain language of Title VII, as amended by the PDA, clearly prohibits Johnson Controls’ policy . . .”); ERA *Johnson Controls* Brief, *supra* note 551, at 41 (“Congress intended to prohibit employers from considering anything other than the employee’s actual ability to perform the job—concerns about the health of fetuses or potential fetuses are simply not relevant.”).

554. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

555. See, e.g., DONNA R. LENHOFF & LISSA BELL, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 3–11, available at <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> (describing the extensive efforts to pass the FMLA, which was first drafted in 1984).

556. Women’s rights and civil rights groups were particularly concerned about aspects of the Court’s decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, as recognized in *Burrage v. United States*, 134 S. Ct. 881 (2014), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, as recognized in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

557. Although the first bill they supported was vetoed by President Bush, 136 CONG. REC. S16,418-01 (daily ed. Oct. 22, 1990), feminists and other groups soon persuaded Congress to overrule these and other decisions narrowing Title VII in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071.

558. See, e.g., Eskridge, *Some Effects*, *supra* note 5, at 2137 n.374 (arguing that the Supreme Court was “[c]hastened by Congress’s immediate and angry override of *Geduldig* and *Gilbert*” when it applied the PDA expansively in *Johnson Controls*). For a general discussion of this constitutional override process, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1336–37 (2014).

provide strong protections for pregnant women.⁵⁵⁹ Women's rights advocates and agency officials agreed that the law forbids artificial distinctions treating pregnant women less favorably than other classes of similarly disabled employees. Feminists urged the Court not to fall back on older views of pregnancy as a marker of women's workplace marginalization.⁵⁶⁰ They persuaded the EEOC to issue new guidance adopting this position⁵⁶¹ and galvanized public support and sympathy for pregnant workers.⁵⁶²

These efforts showed admirable unity but they did not coalesce around challenging pregnant women's difference. In fact, as discussed above, these groups advocated an interpretation of the PDA that would require employers to give pregnant women accommodations not available to *all* their coworkers with similar work restrictions—leaving it to conservative EEOC commissioners to voice concerns about fairness to these other employees.⁵⁶³ Apparently, over time, the contemporary inheritors and presumed defenders of the functional disability approach had internalized some aspects of the uniqueness view of pregnancy,

559. Beyond the usual women's rights organizations and the federal government, other groups that filed amicus briefs in support of Young included members of Congress, some of whom were in Congress when the PDA was passed, state and local legislators, pro-life organizations, labor organizations, healthcare providers, small businesses, local chambers of commerce, and human rights groups. *Young v. United Parcel Service*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service> (last visited July 24, 2015); see also Brigid Schulte, *Lawmakers, Civil Rights Leaders Tell Supreme Court to Support Pregnant Workers*, WASH. POST (Sept. 11, 2014), <http://www.washingtonpost.com/news/local/wp/2014/09/11/lawmakers-civil-rights-leaders-tell-supreme-court-to-support-pregnant-workers>.

560. See, e.g., Law Professor Young Brief, *supra* note 520, at 3, 14–20 (arguing that employers' failure to accommodate pregnancy as generously as other conditions similarly affecting work is based upon and perpetuates gender stereotyping of pregnancy as unique and women as unfit for the workplace); ACLU Young Brief, *supra* note 520, at 15–32 (same); Brief of Amicus Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young at 19, 27–29, *Young v. United Postal Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536934 (arguing that Congress passed the PDA because it thought that pregnancy “warrants at least as much protection as other significant interests” and did not intend for pregnant women to receive preferential treatment).

561. See Chai R. Feldblum, Commissioner, EEOC, Statement on Approval of the Enforcement Guidance on Pregnancy Discrimination and Related Issues, at app. A (July 14, 2014), available at <http://chaifeldblum.com/wp-content/uploads/2014/07/Feldblum-Statement-on-Pregnancy-Guidance-07.14.14.pdf> (showing support for the EEOC's 2014 guidelines by various women's rights groups).

562. See, e.g., Dahlia Lithwick, *A Pregnant Worker's Right to Sue*, SLATE (Mar. 25, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/young_v_ups_supreme_court_decision_a_victory_for_pregnant_women_facing_discrimination.html (explaining that the *Young* case “has garnered an enormous amount of attention from women and women's rights groups, and from across the ideological spectrum”); *Stand with Peggy Young and all Pregnant Workers*, A BETTER BALANCE, <http://www.abetterbalance.org/web/blog/entry/stand-with-peggy-young-and-all-pregnant-workers> (last visited May 26, 2015) (describing a partnership between at least three women's rights organizations for a rally in front of the Supreme Court during the oral argument for *Young* and social media engagement using the hashtag #StandWithPeggy).

563. See Constance S. Barker, Commissioner, EEOC, Statement on Issuance of EEOC Enforcement Guidance and Other Related Issues (July 14, 2014), available at <http://www.disabilityleavelaw.com/wp-content/uploads/sites/173/2014/07/Commissioner-Barker-Public-Statement-July-14-2014.pdf>; Hon. Victoria A. Lipnic, Commissioner, EEOC, Statement on Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), available at [http://op.bna.com/dlrcases.nsf/id/kmgm-9lznpp/\\$File/lipnic.pdf](http://op.bna.com/dlrcases.nsf/id/kmgm-9lznpp/$File/lipnic.pdf).

implicitly regarding pregnant women's situation as sufficiently distinctive to merit protections not conferred on some other employees. This time, a majority of the Supreme Court reaffirmed the vision of equality animating the disability approach, but, in the absence of clear unified guidance from feminist advocates and the agencies for how to honor that approach, the Court's analysis avoided reinforcing pregnant women's distinctiveness only by abandoning them to evidentiary pitfalls. Perhaps, in their zeal to protect vulnerable women like Peggy Young, participants in the litigation failed to pay sufficient homage to the message conveyed by an earlier generation who had repudiated arguments rooted in difference and fought to establish the disability approach in the law: Challenge difference, identify with others, and leave no one behind. For ultimately, it is not pregnant women or women, but people, whose uniqueness should be recognized.

IV. PAST LESSONS AND FUTURE DIRECTIONS

What can be learned from this sweeping summary of legal developments since Title VII began prohibiting sex discrimination? Does the past hold any lessons for the future?

In this Part, I draw the key conclusions and sketch some implications for the future. Building on insights from the literature on social movements and legal change, I begin by proposing some conclusions about how women's rights activism influenced the development of Title VII sex discrimination law. I then draw inspiration from this history to chart a new direction for the future.

A. The Continuing Need to Challenge Difference

The history of Title VII's prohibition on sex discrimination tells an important story about legal change: Progress toward workplace equality under the law has depended on the presence of strong, unified feminist activism challenging sex difference. The first decade of Title VII's development saw genuine legal progress, but only because the leaders of the new women's rights movement pulled together and presented a clear, compelling vision and demand for equality that galvanized popular support and pressured legal institutions to change. They fought for and won interpretations of Title VII that repudiated sex stereotypes and eroded sex segregation.

Later, however, as the women's movement matured, faded, and dissipated due to rising opposition and renewed feminist division, the courts retreated to older biases about women and work, and Title VII's progress reversed or stalled. The parallel trends in both the lack of interest cases and in pregnancy discrimination law suggest that, when activists fail to make visible, energetic, popularly-supported efforts to push the law forward, or when internal divisions convey a mixed message about the preferred direction for change, legal institutions can escape accountabil-

ity to a unified constituency. As a result, courts and policymakers have greater freedom to retain or return to earlier views that attribute workplace inequality to preexisting sex differences.

History suggests, then, that future progress under Title VII depends on renewed activism that puts forward a clear, compelling vision, garners public support, and creates pressure for change. But history also suggests that the *content* of that vision makes a difference. Consciously or unconsciously, social activism and legal advocacy are always guided by a normative vision. Early feminists dreamed of a society in which people would no longer be limited or divided by rigid sex differentiation; they envisioned workplaces in which women and men could work shoulder to shoulder as equals across lines of previously assumed difference. To create that world, they challenged the existence of sex differences, arguing that women were no different from men in ways that mattered to employment or to equality.

Future progress toward workplace sex equality will require renewed determination to challenge assumptions about difference that justify the status quo—this time, challenging not the reality but the self-reinforcing quality of alleged differences by focusing attention on how employers help *create* the differences they cite to justify discriminatory policies.

Today's barriers to workplace equality are updated versions of the ones targeted by early women's rights groups—practices, which, as we have seen, can produce sex differences. Early feminists mobilized Title VII and the Constitution to overturn laws and customs that prescribed different roles for women and men based on sex, reinforcing a male-breadwinner, female-caregiver system in which women were expected to be only secondary earners, if they worked at all.⁵⁶⁴ Such separatist practices may be less explicit today,⁵⁶⁵ but they continue. Employers still

564. See *supra* notes 160–66, 251–65 and accompanying text.

565. Many commentators have emphasized the less explicit, less conscious nature of contemporary employment discrimination. See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1071–81 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161, 1164–65, 1199–1216 (1995). Nonetheless, many explicit forms of sex discrimination do continue. See, e.g., *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991) (involving a policy explicitly excluding fertile women from a category of jobs); *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077–78 (9th Cir. 2004) (involving appearance standards that required women, but not men, to wear stockings, colored nail polish, makeup, and particular hairstyles); *Press Release, Ruby Tuesday Sued by EEOC for Sex Discrimination*, EEOC (Jan. 22, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/1-22-15.cfm> (involving explicit exclusion of men for a temporary job opportunity out of "fears about housing employees of both genders together"); see also NAT'L WOMEN'S LAW CTR., SEX DISCRIMINATION IN THE AMERICAN WORKPLACE STILL A FACT OF LIFE (July 1, 2000), available at <http://www.nwlc.org/resource/sex-discrimination-american-workplace-still-fact-life> (collecting "just a few egregious examples" from "the large number of cases demonstrating the sex discrimination women continue to face in our country today"). Because sex stereotypes are so widely accepted and believed to justify discrimination, sex discrimination may be more likely than other forms to assume an explicit form.

assign people to different work roles based on sex, as Part III showed, overtly or covertly denying women and men jobs regarded as sex-inappropriate,⁵⁶⁶ for example, and denying jobs, benefits, and other protections to certain people based on sex, such as pregnant women;⁵⁶⁷ employers also continue to single out various subsets of men and women for less favorable treatment, such as women of color and gay and lesbian employees, based partly on their sex.⁵⁶⁸ Other practices may be more understated, but they also reinforce sex-differentiated roles. Employers impose differential standards for dress and behavior based on sex, for example, penalizing women and men who fail to conform to sex- or gender-based expectations for how they should look or act at work.⁵⁶⁹ Supervisors and co-workers continue to subject people to hostile treatment based on sex, warning women and men away from sex-atypical jobs and reproducing sex-segregated employment.⁵⁷⁰ Although discrimi-

566. See, e.g., *supra* notes 271–381 and accompanying text.

567. See, e.g., *supra* notes 475–96 and accompanying text.

568. See, e.g., *supra* notes 48–53, 181 and accompanying text; see also *infra* note 569 (discussing cases where race and sexual orientation are implicated alongside sex).

569. Examples from Title VII caselaw are too numerous to cite. For more recent examples, see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232–33, 235 (1989) (involving a national accounting firm with only 1% female partners denying partnership to a woman after telling her she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”); *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1036–37 (8th Cir. 2010) (involving a hotel dismissing a female receptionist for appearing too “tomboyish” and lacking the “pretty,” “Midwestern girl look” the hotel “considered especially important for women working at the front desk”); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009) (involving coworkers who harassed a male machine operator for speaking in a high voice, walking and sitting in an effeminate manner, being well-groomed, refusing to curse, and discussing “art, music, interior design, and decor”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (involving coworkers harassing a male waiter for walking and carrying his tray “like a woman” and not engaging in heterosexual sex with a female coworker); *Schroer v. Billington*, 577 F. Supp. 2d 293, 295–300, 305–06 (D.D.C. 2008) (involving a federal agency rescinding job offer after learning that the candidate was in the process of transitioning from male to female, partly because the candidate looked like “a man in women’s clothing” and would not seem credible when testifying before Congress); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at *1–3 (D. Ga. Apr. 25, 2008) (involving a theme park firing a Black female worker for refusing to comply with requests to change her cornrow hairstyle). For earlier cases, see *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1207–10 (8th Cir. 1985) (involving a news station reassigning female television news anchor due to what the judge described as a “below-average aptitude” regarding clothing and makeup and a telephone survey of viewers ranking her last among her peers in good looks (internal quotation marks omitted)); *Gerdom v. Cont’l Airlines, Inc.*, 692 F.2d 602, 603 (9th Cir. 1982) (involving an airline firing female flight attendants for exceeding weight requirements because they were supposed to be thin and attractive); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978) (involving an insurance company refusing to hire a male mail room clerk applicant because his interviewer found him to be “effeminate”); *Slack v. Havens*, 522 F.2d 1091, 1092–93 (9th Cir. 1975) (involving an industrial plant firing Black female employees who refused an order to clean their department, even though other workers were not required to do such janitorial tasks, because “Colored people should stay in their places” and “Colored people are hired to clean because they clean better” (internal quotation marks omitted)).

570. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (involving a railroad company supervisor telling the only woman in his department that women should not be working there and making insulting and inappropriate comments to her in front of other coworkers); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76–77 (1998) (involving oil platform crew members who forcibly subjected another male worker to sex-related, humiliating actions before the rest of the crew and threatened to rape him); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (involving an equipment rental company president who made repeated sexual innuendos towards

nation is now understood to include sex and gender biases that extend beyond the male versus female dyad⁵⁷¹ and influence institutional dynamics and individual behavior in subtle ways, the basic separationist structure of discrimination has not fundamentally changed: Discriminatory employment practices still identify people according to predefined social groups and foster interactions that treat them differently based on preconceptions about those groups.⁵⁷²

Defenders still justify such practices, and the resulting employment patterns, by claiming they simply reflect preexisting sex differences. Sex-based disparities in hiring, pay, promotion, retention, the treatment of pregnant women—“the entire spectrum of disparate treatment of men and women”⁵⁷³—are all justified as the natural reflection of women’s different capacities, choices, or competences. But these appeals to the alleged facts rely on inaccurate descriptive stereotypes, while obscuring the prescriptive component and self-reinforcing quality of the underlying practices.⁵⁷⁴ The military still prevents women from fully engaging in combat roles, for example, both because men simply *are* more aggressive and war-like and because they should be.⁵⁷⁵ Employers adopt grooming

female manager in the presence of customers and other employees); *see also* Schultz, *Reconceptualizing*, *supra* note 27, at 1755–74 (arguing for a new understanding of hostile work environment sex harassment as an attempt to warn women away from the work sphere and define work and work competence as masculine); Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2140–44 (2003) [hereinafter Schultz, *Sanitized Workplace*] (explaining how sexuality is used against women in both male-dominated and female-dominated fields); Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1262–63 (2007) (applying Schultz’s argument to harassment by customers and the way employers and supervisors encourage such harassment through inaction).

571. Evidence shows that men can exercise gendered expectations toward other men. *See, e.g.*, Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 721–26 (2010); Schultz, *Reconceptualizing*, *supra* note 27, at 1774–88. Women also exercise similar gender bias toward other women. *See* Ramit Mizrahi, Note, “Hostility To the Presence of Women”: *Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579, 1594–97 (2004). The form and content of gender bias often differs by other axes of inequality such as race, *see, e.g.*, Crenshaw, *supra* note 181, at 152–60; Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 313–14 (1996); Kessler-Harris, *supra* note 302, at 67–71; Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2787 (2007), and sexual orientation, *see, e.g.*, Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715, 731, 766–67 (2014); Zachary R. Herz, Note, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 422–23, 425–26 (2014). We have more nuanced views and debates about the nature and significance of stereotyping and performance expectations based on sex, race, sexual orientation, and other axes of inequality. For examples, *see* Case, *supra* note 434, at 2–3; Herz, *supra*, at 443; and *see generally* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013).

572. *See, e.g.*, CARBADO & GULATI, *supra* note 571, at 1–45; Kang & Banaji, *supra* note 565, at 1071–90; Krieger, *supra* note 565, at 1199–1217; Schultz, *Telling Stories*, *supra* note 27, at 1824–39.

573. *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

574. For an illuminating discussion of the prescriptive and descriptive elements of sex stereotyping, *see generally* Herz, *supra* note 571.

575. Although the Department of Defense rescinded the regulation precluding women from combat roles in 2013, Memorandum from the Chairman of Joint Chiefs of Staff & Secretary of Defense on the Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule to

codes requiring women to wear makeup and men to cut their hair short, both because women and men allegedly already do these things and because they *should* do them.⁵⁷⁶ Firms hire few if any women for the male-dominated jobs, both because women are purportedly too feminine to do a “man’s job” and because women *shouldn’t* do such jobs.⁵⁷⁷ Medical practices refuse to hire male obstetrician-gynecologists, both because female patients are said to have “a natural . . . human inclination toward [sexual] modesty,”⁵⁷⁸ and because women are *supposed to be* sexually modest. Gay men are harassed or ostracized by their heterosexual male colleagues both because they aren’t seen as sufficiently masculine and tough to be, say, football players,⁵⁷⁹ and because, if the straight

the Secretaries of Military Dep’ts 1 (Jan. 24, 2013), available at <http://www.defense.gov/news/WISRJointMemo.pdf>, female soldiers still do not have the same combat opportunities as males, as “the military reserved for its commanders the continued right to exclude women from combat if the commanders could assert a particular military necessity as a justification.” Tim Bakken, *A Woman Soldier’s Right to Combat: Equal Protection in the Military*, 20 WM. & MARY J. WOMEN & L. 271, 272 (2014). See also *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding male-only registration for the draft). For explanations for these policies, see Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 557–59 (1991) (arguing that military restrictions are designed to enforce “traditional images of masculinity”); Susan Faludi, *The Naked Citadel*, THE NEW YORKER, Sept. 5, 1994, at 62, 65–66, available at http://www.hendrix.edu/uploadedfiles/admission/naked_citadel.pdf (making a similar argument about a military school’s male-only admission policy).

576. See, e.g., *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076, 1077–78, 1083 (9th Cir. 2004) (upholding a casino’s decision to fire a female bartender for refusing to comply with a new policy requiring women, but not men, to wear makeup); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1087, 1092 (5th Cir. 1975) (upholding a publishing company’s decision not to hire a male display artist with shoulder length hair on the grounds that grooming codes that merely reflect “generally accepted community standards” are not discriminatory).

577. See, e.g., *Mazus v. Dep’t of Transp.*, 489 F. Supp. 376, 388 (M.D. Pa. 1979) (finding that a state transportation department did not discriminate against women in its hiring patterns because the idea that “very few females seek this type of outside laboring work because it is physically demanding and generally unappealing to them” is an “obvious fact [that] does not carry with it the imprint of attributing to women a stereotyped role in our society”); *Logan v. Gen. Fireproofing Co.*, 6 Fair Empl. Prac. Cas. (BNA) 140, 144 (W.D.N.C. 1972) (upholding a chair manufacturer’s refusal to hire a Black woman and stating that “[c]ommon sense tells us that few women have the skill or the desire to be a welder or a metal fabricator, and that most men cannot operate a sewing machine and have no desire to learn. The evidence clearly establishes this pattern in Rutherford County”).

578. Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357, 376 (2004); see also *id.* at 382–834, 387–88, 391–92 (arguing that being female should be a BFOQ for OB-GYNs under Title VII because female patients prefer same-sex doctors for privacy and therapeutic reasons, rather than due to malignant gender biases). But see Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1261–62 (2003) (arguing that BFOQ caselaw adopting such reasoning “casts [women] as . . . essentially and necessarily modest in a way that resonates with tendencies to proprietize women and deny them sexual agency”).

579. See, e.g., Melissa Jeltsen, *Former NFL Coach: Openly Gay Player Michael Sam ‘Bringing Baggage’ to Locker Room*, HUFFINGTON POST (Feb. 10, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/02/10/michael-sam-herm-edwards_n_4760565.html (reporting that when Michael Sam, the first openly gay football player to be drafted into the NFL, disclosed his homosexuality in the New York Times, he was promptly condemned by a former NFL coach as a potential disruption who could complicate his team’s image and locker room unity); Ty Schalter, *How Can Gay NFL Prospect Michael Sam Fit into Homophobic Locker-Room Culture?*, BLEACHER REPORT (Feb. 15, 2014), <http://bleacherreport.com/articles/1960845-how-can-gay-nfl-prospect-michael-sam-fit-into-homophobic-locker-room-culture> (reporting that an NFL investigation uncovered homophobia and racism in a team locker room, prompting commentators to question how Michael Sam would be received).

men are to maintain their image, the gay men *can't* be.⁵⁸⁰

Once such discriminatory practices are in place, they interact dynamically with the underlying stereotypes to set in motion self-perpetuating and self-justifying cycles.⁵⁸¹ Requiring women to wear makeup at work, where they tend to be visible, strengthens the perception that most women (or working women) wear it. This perception in turn leads more women to wear makeup, an increase that further fuels and validates the idea that women do and should; the requirement thus entrenches makeup as a female professional norm. By the same token, requiring women who work in mostly-male fields to wear makeup can highlight the perception that they are different and out of place, further marginalizing them and reinforcing the masculine image of the job.⁵⁸² Restricting women from equal military combat roles similarly preserves the image of combat as an inherently masculine activity, warning women away, lowering their rates of application, denying them access to required skills, and refueling the perception that only men are really interested in and fit for combat roles. The restrictions mark the women who defy prescriptive stereotypes by going into combat roles as deviant and less competent, regardless of their qualifications, further feeding the stereotypes.⁵⁸³ These processes shore up men's sense of superiority and ownership over combat roles, strengthening their traditional protective stance toward the (weaker, less aggressive) women in society. Ultimately, the stereotypes and the restrictive standards take on a life of their own, producing a mostly male pool of qualified candidates who are combat roles and confirming the truth of the underlying stereotypes. Thus, challenging both descriptive and prescriptive ideas about sex difference remains crucial to ending workplace discrimination and fulfilling Title VII's aims.

The normative defense for challenging difference for the purpose of

580. See, e.g., McGinley, *supra* note 571, at 722 (observing that dominant conceptions of heterosexual masculinity project images of homosexuals as "other" in order to establish a certain view of heterosexual manhood); Schultz, *Reconceptualizing*, *supra* note 27, at 1774–89 (observing that heterosexual men often denigrate their gay male co-workers as a way of shoring up their own fragile senses of masculinity and preserving the image of the job as suitably masculine); Soucek, *supra* note 571, at 728–29 (making a similar observation).

581. See *infra* notes 586–92 and accompanying text.

582. See McGinley, *supra* note 570, at 1262 (explaining that in jobs that are no longer sex-segregated but retain a masculine identity, such as that of a blackjack dealer or bartender, when employers sexualize female employees through appearance and grooming codes, they subjugate them within the power structure of the job and encourage harassment).

583. See, e.g., Glick & Rudman, *supra* note 41, at 334, 338 (citation omitted) (noting that gender role subcategories are used to "isolate" or "encapsulate" people who "deviate" from gender prescriptions" and that those who show that they are exceptions to a stereotype are "at serious risk of social rejection"); *id.* at 335 (citing to and discussing studies that show that in masculine domains, lowered expectations for female competence lead to evaluations where a woman is considered to be performing well—for a woman); Schultz, *Reconceptualizing*, *supra* note 27, at 1762–69 (showing that women who work in male-dominated jobs are frequently regarded as less competent, regardless of how they perform); Schultz, *Telling Stories*, *supra* note 27, at 1832–39 (same).

eroding workplace discrimination is the same today as it was for early women's rights activists: Gender-biased expectations violate both freedom and equality interests. Early feminists understood that workplace discrimination constrained women's choices and consigned them to an inferior social and economic status, but they also saw how it limited men's lives. By attacking sex discrimination and the ideology of sex difference, they sought to expand the law in both equality and freedom-enhancing directions.⁵⁸⁴ These goals remain important, but unfulfilled. Many women and men still experience sex or gender-based employment discrimination that limits their access to good jobs, lowers their wages, and prevents them from achieving economic parity.⁵⁸⁵ At the same time, discrimination also prevents people from achieving more intangible goals, such as doing the types of work they love, working with their preferred associates, earning enough to live the lives they want to live, assuming the social roles and identities they desire, and even enjoying the types of intimate relationships they value—let alone choosing a sex-atypical job for the thrill of violating social taboos. Challenging discrimination and difference gives both women and men more freedom to craft their own lives, unconstrained by government or industry prescriptions and pressures.

Challenging difference for these purposes does not mean denying it: It means *denaturalizing* difference by questioning its origins and stability. Under Title VII, it means critically examining claims that workplace inequalities are attributable to sex differences in job preferences or abilities—or asking whether those differences are the cause or the consequence of the inequalities.

Over the past few decades, extensive research in the social sciences has given us a better understanding of how institutional processes can actually evoke group-based differences that later appear to be exogenous and natural.⁵⁸⁶ Basic features of the institutions in which people spend time and energy, such as workplaces and universities, may in a very real sense produce group-based differences by shaping the way their inhabitants perceive, express, and react to each other's social identities. Differences that appear to be stable and independent are in fact quite malleable

584. See, e.g., *supra* notes 251–65 and accompanying text.

585. For an analysis of how earning capacity affects bargaining positions, thus influencing many aspects of heterosexual relationships, see, for example, Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 598–603 (1985). For an analysis of how this literature applies to same-sex couples, see Vicki Schultz & Michael Yarborough, *Will Marriage Make Gay and Lesbian Couples Less Egalitarian? A Cautionary Tale* 23–29 (June 2012) (unpublished manuscript) (on file with author).

586. For a description of relevant social science research, see Vicki Schultz, *Antidiscrimination Law as Disruption: The Emergence of a New Approach to Understanding and Addressing Discrimination* (Mar. 2013) [hereinafter Schultz, *Antidiscrimination*] (unpublished manuscript) (on file with author). For a recent, comprehensive analysis of the social science by researchers in the field, see generally SAGE HANDBOOK, *supra* note 40.

and context specific.⁵⁸⁷ Institutional practices that highlight certain aspects of people's social identity, such as their sex, and assign negative stereotypes to them can actually elicit from the targeted group the lower performances and negative behaviors that were predicted, thus lending confirmation to stereotypes.⁵⁸⁸ Institutions can also subtly pressure people into behaving in ways that conform to prescriptive stereotypes, thus making the stereotypes a self-fulfilling prophecy.⁵⁸⁹ Such practices naturalize group-based differences, making it appear that they are preexisting properties of the employees involved and justifying further distinctions in opportunity and reward (such as job assignment, promotion or pay).⁵⁹⁰ Thus, work organizations can actually *create* difference by making sex matter in ways that simultaneously reinforce negative stereotypes and rationalize inequality.⁵⁹¹ Such research confirms the intuitions of far-sighted judges like Justice Brennan, who acknowledged early on that observed differences in women's work patterns or preferences can be produced by the employment disparities they are thought to explain.⁵⁹²

B. Toward a More Expansive Approach to Title VII

Title VII can and should take these insights into account. A new approach to discrimination law can recognize and address discrimination's self-reinforcing quality.⁵⁹³ To ensure further progress, the law seeks to (1) identify, and change, discriminatory employment practices that reinforce negative stereotypes and foster unnecessary difference and division, and (2) endorse practices that encourage people to relate to each

587. Schultz, *Antidiscrimination*, *supra* note 586, at 42.

588. Research on stereotype threat provides a particularly vivid illustration, showing that in a wide range of situations in which negative stereotypes about a group may be applied and that group-based identity is made salient, people who are the targets of the stereotype predictably react in ways that lower their performance and lend confirmation to the stereotype. See CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 5–13 (2010) (explaining the general concept of stereotype threat and describing the research). In one classic example, women who are told that a difficult math test is not associated with any sex difference in performance perform as well as men, but when they believe the test is associated with past sex differences, they significantly underperform, confirming the stereotype that women are not as good at math as men. Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 8–22 (1999). For further discussion, see Schultz, *Antidiscrimination*, *supra* note 586, at 53–56.

589. See, e.g., SAGE HANDBOOK, *supra* note 40, at 8, 217, 280, 336–37; Kang & Banaji, *supra* note 565, at 1086–90.

590. Schultz, *Antidiscrimination*, *supra* note 586, at 42.

591. See KANTER, *supra* note 21, at 263 (“[P]redictions get made on the basis of stereotypes and current notions of who fits where in the present system; people are then ‘set up’ in positions which make the predictions come true.”).

592. See *supra* notes 403–08 and accompanying text.

593. For a sustained account of this new approach, see Schultz, *Antidiscrimination*, *supra* note 586; and see also Vicki Schultz, *Reimagining Affirmative Action 23–24* (Feb. 2014) (unpublished manuscript) (on file with author).

other as equals across boundaries of sex and race.⁵⁹⁴ Title VII law and policy can play an important role by making these two goals explicit and marshaling public and private expertise to help institutions meet them. Title VII enforcement can play another important role by pointing toward the need for broader structural solutions when anti-discrimination law alone proves inadequate to achieve these important aims.

Recognizing that discriminatory employment practices create group-based differences through feedback loops would inject a dose of healthy realism into Title VII law and produce fairer, more accurate outcomes. Cases raising the lack of interest argument provide a prime illustration. Arguments that sex-based employment disparities reflect women's lack of interest in higher paying jobs assume that women hold stable, sex-linked job preferences that are rooted in female nature or family roles.⁵⁹⁵ Research shows, however, that women, like men, form their work aspirations primarily in response to labor market and workplace dynamics.⁵⁹⁶ Discriminatory employment practices can reduce women's incentive to pursue fields historically closed to them, steering women instead to stereotypically female employment and leading them to display the gendered work attitudes and behaviors that come to be viewed as preexisting female attributes.⁵⁹⁷ Explicitly gendered job descriptions and test questions can drive women from the workforce or from better jobs, but so can purportedly more neutral methods like word-of-mouth recruiting, tap-on-the-shoulder promotional systems, and highly subjective selection processes.⁵⁹⁸ The resulting dearth of women can increase the risk of sex stereotyping and harassment on the job,⁵⁹⁹ warning women away, reducing their performance, and refueling the stereotypes. Acknowledging that such employment practices can shape women's job preferences along gendered lines would frame cases raising the lack of interest argument differently, leading courts to evaluate the evidence with better informed judgment and to insist on more objective documentation that employers have not created the sex differences they cite.

An approach that highlights how discriminatory employment practices can produce harmful sex differences and divisions can also cast new light on pregnancy discrimination cases and other situations involving

594. For an illuminating discussion of the tradeoffs between the targeted remedies offered by anti-discrimination law and the more universal ones offered by broader forms of labor and employment law, see generally Clarke, *supra* note 463.

595. For detailed documentation of this assumption in the caselaw, see Schultz, *Telling Stories*, *supra* note 27, at 1799–1814.

596. For an extended discussion of this point and the supporting social science literature, see *id.* at 1815–39.

597. *Id.*

598. See *supra* notes 360–62, 370 and accompanying text.

599. See Schultz, *Sanitized Workplace*, *supra* note 570, at 2140–44; Schultz, *Reconceptualizing*, *supra* note 27, at 1760 n.407, 1800–01.

workplace standards that are criticized as androcentric. Just as such an approach does not require denying difference, neither does it require accepting workplace standards that mask hidden bias, as some feminists have feared. Indeed, the point is to target and change practices that produce inequality by marking some people as different and inferior employees. But the approach does clarify the importance of framing and addressing such bias with the conscious aim of denaturalizing difference. As other scholars have observed, terms like “male norm”⁶⁰⁰ risk reinforcing sex and gender roles by oversimplifying and taking for granted the complex social patterns described as typically male (and female).⁶⁰¹ Thus, referring to fields occupied mostly by men, such as engineering or firefighting, as “male” may reify the work as somehow inherently masculine and signal agreement that it is more suitable for men. Similarly, referring to prevalent workplace norms, such as full-time work schedules or inadequate leave policies, as male-oriented not only risks communicating that such work patterns are somehow more fitting for men: It also obscures commonalities between the working patterns of many men and women,⁶⁰² differences within each group,⁶⁰³ and shifts over time in a way that portrays average white, middle-class tendencies⁶⁰⁴ toward male market and female home specialization as universal and unchangeable.⁶⁰⁵ Conversely, asserting that inadequate leave policies

600. See *supra* note 444; see also WILLIAMS, *supra* note 15, at 213–14 (explaining the male norm as a staple of feminist analysis and describing her ideal-worker concept as an updated version).

601. As Catherine Albiston puts it: “To state that the structure of work is ‘male’ merely pushes the reification back one step, . . . recreat[ing] new versions of the same gender divisions” ALBISTON, *supra* note 466, at 78.

602. The term may obscure similarities in the hours of many men and women, such as the fact that married women work thirty-five hours a week or more, at rates roughly equivalent to single men. See U.S. DEP’T OF LABOR, *Persons at Work in Nonagricultural Industries by Age, Sex, Race, Hispanic or Latino Ethnicity, Marital Status, and Usual Full- or Part-Time Status*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/cpsaat22.pdf> (last visited Sep. 26, 2014).

603. The term may obscure racial differences between employed women, such as the fact that Black and Asian women are more likely white or Hispanic women to work thirty-five hours per week or more, see *id.*, as well as racial differences between employed men, such as the fact that Black and Latino men have more difficulty than white men finding full-time work. See, e.g., BARRY BLUESTONE & MARY HUFF STEVENSON, *THE BOSTON RENAISSANCE: RACE, SPACE, AND ECONOMIC CHANGE IN AN AMERICAN METROPOLIS* 222–25 (2000); DEIRDRE A. ROYSTER, *RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS* 65–67 (2003); James M. Quane et al., *The Urban Jobs Crisis: Paths Toward Employment for Low-Income Blacks and Latinos*, HARV. MAG., May–June 2013, at 42–44, available at <http://harvardmag.com/pdf/2013/05-pdfs/0513-42.pdf>.

604. In today’s economy, the term may also misleadingly overlook common patterns among low-wage women, who frequently patch together multiple, contingent jobs with varying, unpredictable schedules. Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1217 n.39 (2009) (collecting sources); Liz Watson et al., *Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences*, NAT’L WOMEN’S LAW CTR. (Apr. 2014), http://www.nwlc.org/sites/default/files/pdfs/collateral_damage_scheduling_fact_sheet.pdf.

605. Although some such workplace standards are rooted in historical family-wage ideals, see Dinner, *supra* note 16, at 437, those ideals always applied unevenly by race and class and were never realized fully even for the white middle classes. See Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 131–32 (Judy Fudge & Rosemary Owen eds., 2006).

or rigid time schedules privilege males may convey a belief that those policies are somehow good for men or that men prefer them, providing another example of how descriptive statements can carry normative implications and overlooking the significant bias against men who take leave from work for family or disability-related reasons.⁶⁰⁶ Such claims also disregard the ways in which such biases against heterosexual men may combine with their higher relative earnings to discourage them from taking time off, while encouraging their female partners to do so,⁶⁰⁷ thus helping create the sex-based employment patterns that are commonly attributed to preexisting preferences.

Emphasizing how exclusionary workplace standards help create sex-based work patterns through such feedback effects avoids naturalizing them, while creating pressure for change. From this perspective, the problem is not that women are forced to comply with male-oriented workplace standards that fail to accommodate their preexisting differences: The problem is that stereotypes and discriminatory practices help *create* the perceived and actual group-based differences that prevent women and many men from succeeding at work. Women who work in jobs held predominantly by men are often regarded as less capable and are therefore denied access to the training needed to succeed regardless of whether they comply with organizational norms,⁶⁰⁸ just as mothers who leave work early are presumed to do so for family reasons and are therefore treated as less reliable employees regardless of their actual motivations.⁶⁰⁹ Men who leave work for more than a week or two to bond with their newborns are similarly perceived and treated as shirk-

606. For evidence of such significant bias, see ALBISTON, *supra* note 466, at 169–78; Julie Holliday Wayne & Bryanne L. Cordeiro, *Who is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 *SEX ROLES* 233, 242 (2003).

607. Rosenblum, *supra* note 515, at 106 (noting the many reasons given for “men’s failure to take parental leave” and arguing that the two that “stand out” are money and stigma, because “[i]n a heterosexual two-parent household, financial incentives heavily favor the man working and the woman caretaking,” since “men earn more money and the family cannot afford to lose this income through unpaid leave”); see also Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 *WIS. WOMEN’S L.J.* 257, 264–65 (2003) (explaining that financial inability is the leading reason why men and women do not take FMLA leave, that in households with a working man and woman, the man is the higher wage earner 80% of the time, and that low-income fathers face even more difficulty in attempting to take FMLA leave).

608. Schultz, *Reconceptualizing*, *supra* note 27, at 1762–69; Schultz, *Telling Stories*, *supra* note 27, at 1836–37. For additional research, see Glick & Rudman, *supra* note 41, at 335 (citing to and discussing studies that show that in masculine domains, lowered expectations for female competence lead to evaluations where a woman is considered performing well—for a woman); Janet T. Spence & Robert Helmreich, *Who Likes Competent Women? Competence, Sex-Role Congruence of Interests, and Subjects’ Attitudes Toward Women as Determinants of Interpersonal Interaction*, 2 *J. APPLIED SOC. PSYCHOL.* 197, 210–12 (1972) (showing that negative stereotypes of women render evaluations that they are less competent than men).

609. Cf. Joan C. Williams, *Hitting the Maternal Wall*, *ACADEME*, Nov.–Dec. 2004, at 16, 19 (“Academic mothers also often report a form of attribution bias: colleagues who before they had children used to assume that the women were writing or at a conference when they were not in the office may well assume after they return from maternity leave that they are taking care of kids—even if they are at the library working on a book.”).

ers,⁶¹⁰ as are employees who take time off to attend to personal illnesses or disabilities,⁶¹¹ regardless of their actual dedication to their work.

An approach that targets and seeks to prevent stereotyping and the negative sense of difference and division that result from exclusionary employment practices can unify these cases and help guide the law toward fairer, more inclusive solutions. Reconsidering pregnancy law from such a perspective, for example, clarifies the virtues of framing pregnancy as a condition comparable to disability, a position endorsed by Congress in the Pregnancy Discrimination Act (PDA),⁶¹² and extending the comparison to cover other analogous conditions and circumstances as Congress did in the subsequent Family and Medical Leave Act (FMLA).⁶¹³ In each case, the law's comparative logic not only pushed outward toward broader comparisons that increased protections for other employees in need; the logic also makes it possible to challenge the notion that each targeted group is essentially different and to promote a sense of common identity among covered employees.

Properly understood and deployed, the PDA's comparative approach can disrupt settled stereotypes. Comparing pregnant women to other employees, and showing that the same employment practices and policies harm all of them in similar ways, undermines essentialist thinking that would attribute each group's allegedly distinctive harms to preexisting differences; highlighting these shared harms also creates a basis for empathy and identification among previously unaffiliated groups. As the pregnancy discrimination cases reveal, inadequate disability leave or light duty policies may harm women who are pregnant, but they also harm male and female employees with other temporary illnesses or disabilities who want to hold onto their jobs. Once such a practical frame of reference has been adopted, it becomes clear that pregnant women may be compared not only to ill or disabled employees, but to many other people who have similar needs for leaves or accommodations: the partners or parents of pregnant women, for example, who assist them and accompany them to medical appointments, and attend to them during childbirth; new mothers and fathers, who feed and care for infants; parents, who care for sick children; grown children, who care for ailing parents; sick or disabled employees, who care for themselves; and

610. ALBISTON, *supra* note 466, at 169–70 (reporting from interviews with workers who had called a state-wide legal assistance hotline with family and medical leave questions that men who took more than a week or two off from work to bond with their newborns were widely criticized and perceived as shirkers).

611. *Id.* at 170–71 (reporting from the same set of interviews that men who took leave to care for ill family members encountered sexism and assumptions that they were not committed to their work, and citing a man who was criticized by coworkers and given a disciplinary letter by his employer when he took leave to care for his terminally ill wife); *id.* at 174–78 (reporting from the same set of interviews that employees who took time off to attend to personal illnesses or disabilities were also frequently perceived as shirkers).

612. See *supra* notes 413–27 and accompanying text.

613. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, 6–7.

even healthy people who simply need frequent bathroom breaks just like many pregnant women. Considering the long list of employees who could benefit from more generous policies, it becomes impossible to argue that the problem lies with pregnant women's unique condition, rather than with inadequate policies. The brilliance of equating pregnancy with other illnesses and disabilities lies partly in its power to unsettle such preconceptions.

Properly applied, a comparative approach of the sort embodied in the PDA not only challenges biased perceptions, but can also help change the discriminatory practices that can reproduce pregnancy-related differences and inequalities over time. As emphasized above, the PDA has a simple mandate: It requires employers to treat women affected by pregnancy and childbirth the same as other employees who are similarly affected in their ability or inability to work.⁶¹⁴ Now that amendments to the Americans with Disabilities Act (ADA) have clarified that employers must provide reasonable accommodations to covered employees who have only temporary and minor illnesses,⁶¹⁵ a properly construed PDA would require employers to give pregnant women similar accommodations.⁶¹⁶ Faithful application of the PDA and its underlying principles would go a long way to prevent employers from singling pregnant women out for accommodation denials that force them out on leave or out of the workforce—let alone from refusing to hire women in the first place or firing them due to their pregnancies.⁶¹⁷ Thus, properly interpreted, the PDA could invalidate many employment practices that contribute to the unequal, intermittent employment patterns employers cite as justifications for treating pregnant women less favorably in the first place.

Yet the PDA has its limits. Over time, experience under the PDA revealed problems that could not easily be addressed within a Title VII framework. For example, under the PDA, employers are only required to grant pregnant women the same protections given similarly disabled employees. Firms need not create or improve protections such as leave policies for their workers unless existing ones cause an unjustified disparate impact. Absent or inadequate leaves are not presumed, but rather must be proven, to have a disparate impact on women based on numerical analyses of the needs of actual employees.⁶¹⁸ Thus, as in other areas of Title VII law, the PDA does not require employers to create jobs or employment benefits, but only to distribute existing ones equally. Similarly, the PDA protects only pregnant women; it provides no help to

614. See *supra* notes 418–27 and accompanying text.

615. See *supra* note 535 and accompanying text.

616. See *supra* note 537 and accompanying text.

617. For a description of the rising number of pregnancy discrimination claims, see *supra* note 387.

618. See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 651–55 (N.D. Ill. 1991).

employees who need leaves of absence for parenting or other important reasons. Some courts have further limited the PDA's reach, as discussed above.⁶¹⁹

Despite these limits, the PDA's logic of comparing pregnancy to other conditions that interfere with the ability to work paved the way for expanding the law to provide more affirmative protections for pregnant women and other groups. Drawing on this approach, activists created the momentum for broader legislation to address some of the PDA's revealed inadequacies. The FMLA, enacted in 1993, expands on the PDA and offers a more universalistic, inclusive approach.⁶²⁰ It categorizes pregnancy as a "serious health condition" for which any covered employee is granted twelve weeks of unpaid, job-protected leave when the condition renders the employee unable to perform the functions of the job.⁶²¹ Like the PDA, this approach demystifies the allegedly distinctive nature of pregnancy and situates pregnant employees alongside others who have health issues that require time away from work. In addition, the law allows covered workers, regardless of sex, to take leave to care for new children or sick family members.⁶²² Thus, like the PDA, the force of the FMLA lies not in its accommodation of any group's unique differences, but rather in the law's recognition that, when viewed from a pragmatic perspective, pregnancy is no different from other serious health conditions or important life circumstances that many, if not all, employees will face at some point at risk of losing their jobs. Although the FMLA has serious shortcomings,⁶²³ the law's sex-neutral, more

619. See *supra* notes 475–529 and accompanying text.

620. For more on activist efforts to pass the FMLA, see *infra* notes 628–33 and accompanying text.

621. Family & Medical Leave Act § 102, 29 U.S.C. § 2612(a)(1) (2012); see also H.R. REP. NO. 103-8, pt. 1, at 40 (1993) ("Examples of serious health conditions include but are not limited to . . . ongoing pregnancy, miscarriages, complications of illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth."); S. REP. NO. 103-3, at 29 (1993) (same); 29 C.F.R. § 825.120(a)(4) (2013) ("The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child."). An employee is only "covered" by the FMLA and eligible to take leave if the employer employs more than fifty people and the employee has worked at the employer for at least twelve months and worked at least 1,250 hours during the previous twelve-month period. Family & Medical Leave Act § 101, 29 U.S.C. § 2611 (2012).

622. In addition to workers with serious health conditions, the FMLA also requires covered employers to provide covered employees with up to twelve weeks of unpaid, job-protected leave for the birth of a child or care of a newborn or newly adopted child or foster child or for care of a spouse, child, or parent who has such a serious health condition. Family & Medical Leave Act § 102, 29 U.S.C. § 2612(a)(1) (2012).

623. Commentators have observed numerous limitations. For example, the FMLA's statutory definitions of employer and employee coverage disproportionately exclude low-wage workers from coverage. ALBISTON, *supra* note 466, at ix; Dinner, *supra* note 16, at 442. In addition, the unpaid nature of the leave makes it more difficult for low-income workers, single parents, or other people lacking partners who can provide financial support to take leave, and, within heterosexual unions where the woman earns less than the man, perpetuates the gender-biased patterns the statute was meant to unsettle. Rosenblum, *supra* note 515, at 106. For discussion of other limitations, see ALBISTON, *supra* note 466, at 142–46; ESKRIDGE & FEREJOHN, *supra* note 6, at 58–59; HELENE JORGENSEN & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY

universalist approach also aims directly to disrupt sex stereotypes: By providing more generalized access to leave, the FMLA challenges the widely held notion that women—who are pregnant, who may become pregnant, or who are working mothers—are somehow less reliable than other workers.⁶²⁴

Overall, the broad comparative approach taken in the PDA and the FMLA creates new possibilities for breaking down stereotypes, altering discriminatory working dynamics, and fostering cross-group bonds that discrimination often undermines. The FMLA's expansion of the circumstances meriting leave enables new cross-cutting alliances among previously unaffiliated employees, including some employees not associated with historically disadvantaged groups. In some workplaces or situations, for example, pregnant women may identify with coworkers with disabilities, creating an alliance that challenges common stereotypes of both groups as passive, dependent, weak, and lacking in competence and capacity; they might also form a broader association with other women, who are also frequently perceived in those terms. In other circumstances, pregnant women might choose affiliations centered around sex, gender, and family caregiving, challenging common stereotypes of pregnant women, mothers, and involved fathers, for example, as overly devoted to domestic life and less dedicated to work. People with disabilities can also make multiple connections, bonding with pregnant women to challenge stereotypes about dependency, or with men who care for family members to challenge stereotypes about lack of work commitment, or with employees who care for disabled people to combat misperceptions about disability, and so on. Indeed, as with the PDA, the FMLA's cross-cutting logic and well-rehearsed limits push toward even broader remedies to alleviate the gender, race, and class biases that currently restrict coverage and leave-taking under the statute,⁶²⁵ ulti-

REQUIREMENTS? (2014); Clarke, *supra* note 463, at 1233–37; Rosenblum, *supra* note 515, at 103–08; Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 406–10 (1999); Widiss, *supra* note 382, at 1005–06; Halverson, *supra* note 607, at 261–70.

624. See Family & Medical Leave Act § 2(b)(4), 29 U.S.C. § 2601(b)(4) (2012) (stating that one purpose of the FMLA is to “minimize[] the potential for employment discrimination on the basis of sex by ensuring *generally* that leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis”) (emphasis added); see also *Coleman v. Ct. of Appeals of Maryland*, 132 S.Ct. 1327, 1350 (2012) (Ginsburg, J., dissenting) (noting that the FMLA's universality was “essential to its design” and that Congress “assiduously avoided a legislative package that, overall, was or would be seen as geared to women only” and thus “reduced employers’ incentives to prefer men over women, advanced women’s economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work”).

625. For a discussion of the FMLA's class and gender bias, see *supra* note 623. For a discussion of FMLA's race bias, see Amy Armenia & Naomi Gerstel, *Family Leaves. The FMLA and Gender Neutrality: The Intersection of Race and Gender*, 35 SOC. SCI. RES. 871 (2006). In recent years, legislation has been proposed to amend the FMLA to deal with some of these perceived shortcomings. See, e.g., JORGENSEN & APPELBAUM, *supra* note 623, at 9–11 (proposing various changes to expand coverage, such as covering smaller employers, reducing the work hours or tenure required for employee eligibility, converting to a system of employee eligibility based on earnings, and providing partial income replacement during leave); NAT'L P'SHIP FOR WOMEN & FAMILIES, FACT SHEET: THE FAMILY AND MEDICAL INSURANCE LEAVE ACT (THE FAMILY ACT) (2015),

mately pressing toward even greater expansion by encouraging uncovered employees to compare themselves to covered employees, and vice versa.⁶²⁶

The FMLA, then, holds promise for denaturalizing pregnancy, disability, caretaking, and perhaps even wider categories of human experience by fostering new affiliations that permit people to see each other, and to work together, in new ways that disrupt previously settled boundaries and understandings. In this regard, it is worth noting that comparing pregnancy to disability has not suggested that it is somehow not normal, as some feminists feared. In fact, under FMLA, disability has emerged as normative: Contrary to expectations, both women and men take leave most often not to care for children or families, but to attend to their own personal disabilities or illnesses.⁶²⁷

The FMLA is important for another reason. Like other successful initiatives to promote workplace equality, its successful passage was the result of an engaged, unified feminist effort to exert sustained public pressure for legal reform.⁶²⁸ The effort began as early as 1984 when representatives of the organized women's movement, including Wendy Williams, an architect of the PDA, met with Congressman Howard Berman and then-state legislator Maxine Waters to discuss a gender-neutral medical leave bill.⁶²⁹ The following year, the Women's Legal Defense Fund (WLDF) worked with Berman's office to write the legislative proposal that would eventually become the FMLA. Over the

available at <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf> (discussing H.R. 1439, the FAMILY Act, which would amend FMLA to cover eligible employees in all companies regardless of size and provide them with up to 12 weeks of partially paid leave); Kenneth T. Short, *The Employer's Legal Resource: Proposed Bill to Amend FMLA Introduced*, DOERNER, SAUNDERS, DANIEL & ANDERSON (Mar. 3, 2014), <http://www.dsda.com/News-Publications/Newsletters/27603/The-Employers-Legal-Resource-Proposed-Bill-to-Amend-FMLA-Introduced> (describing H.R. 3999, which would amend FMLA to cover employees in companies with 25 rather than 50 employees and provide up to 24 hours of leave for "parental involvement" activities).

626. The FMLA has recently been expanded to cover same-sex spouses, for example, see *Final Rule to Revise the Definition of "Spouse" Under the FMLA*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/fmla/spouse/index.htm> (last visited July 24, 2015), and immediate family members caring for covered military service members and veterans, see *Fact Sheet #28M: The Military Family Leave Provisions under the Family and Medical Leave Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs28m.pdf> (last updated Feb. 2013). The logic of these expansions presses toward broader application. If spouses may take time off to care for each other, for example, why not employees who care for friends or loved ones who are not related by marriage or blood or bound within nuclear families? Similarly, if people may take time off to care for new children or sick or disabled family members, why not employees who nurture or mentor young people who are not family members? And so on.

627. In 2012, an overwhelming 57% of all employees who took leave over the prior year did so for this reason, compared to only 22% who did so to bond with a new child, and 19% who did so to care for a sick relative. U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 70 exh. 4.4.2 (2012), available at <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>. In the same study, 8.7% of all female employees and 7.2% of all male employees took leave because of a personal illness. *Id.* at 138 exh. 7.2.3.

628. LENHOFF & BELL, *supra* note 555, at 4.

629. *Id.*

next seven years, the WLDF would lead the push for passage of the legislation, not only uniting various feminist organizations, but also building a diverse coalition of backers that included labor, disability, children's, religious, and senior citizens' groups.⁶³⁰

The gender-neutral, expansive approach embodied in the FMLA embodied both a normative vision and a strategic choice. By framing medical leave as a family issue rather than a women's issue, feminist activists galvanized the support of interest groups that may have otherwise sat on the sidelines or actively opposed the bill;⁶³¹ these unlikely allies proved instrumental to the Act's ultimate passage. The broadly inclusive, anti-sex stereotyping capabilities of the FMLA also represented a new iteration of an older feminist vision: The dream of a world in which pregnant women and all women would assume their rightful place alongside men and all other employees—the sick and able-bodied, the parents and the childfree, the caretakers and the carefree, women and men of all races, ethnicities, religions, and walks of life—and together they would create workplaces that met fundamentally *human* needs to address life's triumphs and travails. Like their predecessors, they challenged difference⁶³²—this time, not only sex differences, but other differences said to make people less fit for employment. Thus, with a clear vision of equality, active engagement, and a unified message, women's rights groups achieved an important, if imperfect, victory for workplace equality. The Supreme Court upheld the statute in 2003, with Justice Rehnquist, who had written for the majority in *Gilbert*, now authoring an opinion recognizing that “mutually reinforcing stereotypes [create] a self-fulfilling cycle of discrimination” that harms both women and men by locking them into traditional sex roles.⁶³³

CONCLUSION

The history of developments under Title VII's sex discrimination provision suggests that antidiscrimination law can facilitate progress toward equality, but change requires continuing, committed, cohesive activist efforts to challenge essentialist ideas about difference cited to explain and justify inequality. This conclusion is sobering, because such social activism is difficult to establish and sustain; much depends on timing, as well as organization, effort, and vision. Yet, the message is

630. *Id.* at 5; Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17 (2004) (noting that the FMLA was pioneered by the Women's Legal Defense Fund and shepherded through seven years on Capitol Hill by a non-governmental working group they led).

631. LENHOFF & BELL, *supra* note 555, at 4–7; WHO SPEAKS FOR AMERICA'S CHILDREN? THE ROLE OF CHILD ADVOCATES IN PUBLIC POLICY 158 (Carol J. De Vita & Rachel Mosher-Williams eds., 2001).

632. Many of the feminists involved in the passage of the FMLA had been involved in the passage of the PDA and had taken the equal treatment approach in the *Cal. Fed.* debate. See LENHOFF & BELL, *supra* note 555, at 4; Grossman, *supra* note 630, at 42–43.

633. *Nevada Dep't of Human Res. v. Hibbs*, 538 U. S. 721, 735–36 (2003).

also realistic and hopeful, because reform requires forging new connections that make legal institutions more responsive and durable over time.

Early women's rights activists created a vision and blueprint for coming together to challenge sex difference in a way that facilitated these goals. Drawing inspiration from civil rights struggles, these feminists set aside internal divisions, disavowed gender privileges rooted in claims of difference, insisted that both men and women stood to gain from eliminating prescribed sex roles, and fought for a world in which they would stand shoulder to shoulder, as equals, with an expanded sense of mutual identification and empathy rooted in a more common experience.

Future advances toward equality will require renewed, reunited efforts to challenge difference—this time around, contesting not only the reality and relevance of alleged group-based differences, but also their inevitability and origins, by showing that institutions help *create* the very differences they cite to justify discriminatory policies. By targeting and changing institutional practices that fuel negative stereotyping and foster an unnecessary sense of difference and division, the law can promote greater equality and expand individual freedom for women and men from all walks of life. The history of feminist activism under Title VII suggests that, in the right circumstances, such challenges can also foster new forms of identification and solidarity with others who once seemed essentially different, allowing people to connect across previously settled boundaries of sex, gender, physical ability, race, and other categories of perceived difference.⁶³⁴

Ultimately, then, moving forward under the law requires using new insights to challenge age-old claims of naturalized difference, as far-sighted reformers have done from the beginning. Progress means putting forward a pluralist vision that promotes enhanced equality, freedom, and solidarity by permitting people greater scope to invent their own lives, do the work they want to do, craft their own identities and relationships, act and express themselves as they choose, and affiliate and stand with other people as equals—free of prescribed expectations based on sex, gender, or other stereotypical categories. Properly understood, such an approach to sex discrimination law does not aim to abolish or devalue traditional forms of femininity or masculinity. But neither does it aim to preserve

634. For an insightful analysis of how short-sighted approaches to employment discrimination law can set employees against each other in a zero-sum game, and how Title VII can promote greater solidarity across previously divisive lines of race and sex, see generally Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63, 81–82 (2002). For a moving analysis of how such crosscutting affiliation between white women and men and women of color, brought about by alliances by the Second Wave feminist movement and the civil rights movement, transformed the legal and social landscape for everyone, see MACLEAN, *supra* note 8, at 153–54 (“When white women—so long the beneficiaries of the family wage and ‘protection’—demanded to stand on their own two feet and chose African Americans as allies, the culture of exclusion started to give way as never before.”).

them. The process involves disentangling sex from gender,⁶³⁵ so that people may take on whatever old or new, conventional or heterodox, integrated or recombined, or as yet unimagined roles, activities, aspirations, relationships, and personae they desire at work and at home and throughout society, regardless of the bodies into which they are born.

Taking sex discrimination seriously, in the end, means not simply taking women seriously, but taking *people* seriously, searching for new ways to use law to deliver us all from enforced difference (and conformity), unleashing new potential for individuality and connection and in the process requiring examination of some of our most deeply held, unexamined ideas about each other and about ourselves.

635. Early feminists developed an analytical distinction between sex, by which they referred to the biological indicia of femaleness or maleness, and gender, by which they referred to the social roles of femininity and masculinity expected of the people who were perceived as female and male, respectively. See, e.g., Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (Rayna R. Reiter ed., 1975) (developing this typology). More recent feminist work suggests that it may not be possible to disentangle sex from gender, because the categories of female and male are not always clear cut and obvious from biological or other natural indicia or unmediated by already-gendered social perceptions. See generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.-Apr. 1993, at 20, 21 (providing biological evidence that the categories of male and female do not adequately reflect the range of human bodily variation). Despite these important insights, the aspiration of decoupling sex from gender remains important to the cause of sex equality, if not wholly within reach. Broadly understood, sex equality also involves unloosening sexuality from sex and gender, but that larger subject is beyond my scope here. For my own attempt to discuss these matters in the context of sexual harassment law, see Schultz, *Sanitized Workplace*, *supra* note 570, at 2074-87.

