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WOMEN’S WORK IS NEVER DONE[†]

CAROLYN L. WHEELER*

INTRODUCTION

All remedial legislation is a product of the interaction between individuals outside government who agitate for reform, and individuals inside government who draft and vote on legislation. Once enacted, statutes are often altered by the interpretations of enforcement agencies and courts, developed in response to the arguments of litigants. These interpretations in turn often prompt the perceived need for amendments to the initial enactment, which begins the cycle all over again. The legislative enactments needed to rectify the particular inequities facing women in the workplace have required considerable tinkering. This “women’s work is never done” in the sense that we have not yet come up with comprehensive social policies or legislative reforms that address women’s unique needs flowing from their (often) dual roles as family caregivers and workers.

The purpose of this article is to trace the evolution and introduction of three major pieces of legislation addressing discrimination against women in the workplace and discuss how some of the differences in the impetus for their introduction and adoption shaped the nature of the legislation itself, and what consequences that may have had on subsequent enforcement agency and judicial interpretations of the statutes. Specifically this article will consider the unique histories and impacts of the Equal Pay Act (EPA) of 1963, the inclusion of “sex” as a prohibited basis of discrimination in Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act (PDA) of 1978.

[†] The usual formulation of this proverb is “A man may work from dusk to dawn, but a woman’s work is never done.” Here, of course, I am using “work” to refer to the work involved in achieving lasting political, economic, and social reforms undertaken by organized feminists from the early 19th century until the present day

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Before turning to these enactments of the 1960s and 70s, this article first gives an overview of the women's movement that culminated in passage of the Nineteenth Amendment, granting women suffrage, and the different ideas that supported women's suffrage. This survey will then serve as a basis for examining how those ideas evolved among those who supported passage of an Equal Rights Amendment (ERA) as opposed to those who devoted their efforts to social reform to improve the lives of women workers. Understanding the roots of these ideological differences between ERA proponents and social reformers is useful because the same ideas about equal rights animated the discussions of the ERA, the EPA, Title VII, and the PDA in the 1960s and 70s. Understanding these ideas and arguments will also help to illuminate the limits of anti-discrimination laws in effecting the changes needed to address fully women's unique workplace issues related to pay, harassment, and pregnancy, and hopefully lead to additional effective strategies to shatter the glass ceiling that limits women's employment opportunities.

BACKGROUND ON WOMEN'S RIGHTS IN THE 19TH CENTURY

The women and men who attended the 1848 Seneca Falls convention endorsed a Declaration of Sentiments and Resolutions, put into final form by Elizabeth Cady Stanton, which articulated an exhaustive list of grievances: women were denied access to higher education, the professions, and the pulpit, as well as equal pay for equal work. If married, they had no property rights; even the wages they earned belonged legally to their husbands. Women were subject to a different moral code, yet legally bound to tolerate moral delinquencies in their husbands. Wives could be punished, and in case of divorce, a mother had no rights to custody of her children. As the Declaration concluded, in every way, man "has endeavored to destroy [woman's] confidence in her own powers, to lessen her self-esteem, and to make her willing to lead a dependent and abject life." Above all, every woman had been deprived of "her inalienable right to the elective franchise."¹ There were eleven resolutions designed to address these inequities, and the most controversial, the only one not to pass unanimously, was the demand for suffrage.² Despite opposition driven by the fear that the attendees at the convention would appear ridiculous, Stanton refused to back down from the demand for suffrage, saying: "To have drunkards, idiots, horse racing rum-selling rowdies, ignorant foreigners, and silly boys fully recognized, while we ourselves are thrust out from all the rights that belong to citizens, is too grossly insulting to be longer quietly submitted to. The right is ours. We must have

1. ALICE S. ROSSI, *THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR* 416 (1974); *see generally id.* at 415–20.

2. *Id.* at 420.

it.”³ Frederick Douglass, the only African American at the meeting, spoke eloquently in favor of suffrage, saying he could not accept the vote as a black man if women could not also claim that right.⁴

After the Civil War, the broad women's rights agenda narrowed to a primary focus on suffrage. In 1869, Stanton and Susan B. Anthony formed the National Woman Suffrage Association, which focused on winning the franchise at the federal level, while others, led by Lucy Stone, formed the American Woman Suffrage Association, which focused on work at the state level; the two groups merged in 1890, forming the National American Woman Suffrage Association (NAWSA), with Anthony as its first president.⁵ In 1913, Alice Paul founded the Congressional Union, which grew into the National Woman's Party in 1916. Members of Paul's organization focused specifically on lobbying Congress and they also engaged in militant tactics Paul had observed the suffragists in England use—marching, picketing the White House, chaining themselves to the White House fence, getting arrested, and then going on hunger strikes.⁶

Although the central claim for women's suffrage was the argument for equality, in the latter years of the struggle advocates began to argue that women should have the vote because they would bring a moralizing influence to politics, in other words that women should have the vote not because they were equal to men, but because they were different and in some respects better. Historian Aileen Kraditor describes this shift as a move from an “argument from justice” to an “argument from expediency,” which in later years appealed to nativist and frankly racist sentiments (arguing, for example that white women should have the vote to counter the impact of Negro male suffrage guaranteed by the Fifteenth Amendment).⁷ Having deployed every conceivable argument, the fight for women's suffrage took over 80 years and 480 battles in state after state before the women's groups coalesced behind a national strategy of fighting for a constitutional amendment, which itself took “19 campaigns with 19 successive Congresses.”⁸

3. See SALLY G. McMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT* 88–89, app. A at 238–39 (David Fischer & James McPherson eds., 2008).

4. See JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMEN'S RIGHTS CONVENTION* 203 (Anne Firor Scott et. al. eds., 2004); see generally *id.* at 193, 195; see ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 76 (1959).

5. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869, 189–90, 195–96, 200* (1978).

6. FLEXNER, *supra* note 4, at 282–83, 285.

7. See AILEEN KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920*, 39, 39 n.1, 138–71 (1965).

8. CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS*, 107 (1993) (explaining that “fifty-six campaigns of referenda to male voters; 480

Once women obtained the right to vote, what became of the earlier list of goals of the women's rights movement? Several of the goals of the original Declaration of Sentiments were achieved in that women had broader educational and professional opportunities and many common law restrictions had been removed.⁹ As for any unfinished agenda items, for the most part they lost their hold on women's imaginations. Many of the older generations of feminists had died; Stanton died in 1902; Anthony in 1906. Those who were still alive split and followed a number of diverse paths after their success in winning the right to vote.

Carrie Chapman Catt, the president in 1919 of the mainstream suffrage organization, the NAWSA, formed the League of Women Voters (LWV), dedicated to educating newly enfranchised women voters about political issues. She remained active in this organization until her death in 1947.¹⁰

The hardcore feminists in the National Woman's Party (NWP) focused on passage of the ERA, believing that the vote had been only one step toward full emancipation for women, which could only be achieved through the eradication of all legal distinctions between men and women. These feminists had no patience for the ground game of fighting state by state to eliminate specific legal barriers affecting women.¹¹

Other supporters of suffrage, identified by various historians as social feminists or social reformers,¹² continued their long-standing campaigns for legislation to protect the welfare of women and children. A leading reformer in this category was Florence Kelly, who worked with the National Consumers' League (NCL), formed in 1898.¹³ Labor reform had a long history of efforts to regulate working conditions, and those efforts were not gender-specific. One central goal of workers from the 1820s on was to put limits on the workday, and by the 1870s thirteen states had passed ten-hour workday statutes.¹⁴ These efforts suffered a setback when the U.S. Supreme Court struck down New

campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get State party conventions to include woman suffrage planks; 30 campaigns to get presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses"), *quoted in* FLEXNER, *supra* note 4, at 173.

9. WILLIAM H. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970* 22 (1972).

10. *Id.* at 34-35.

11. *See id.* at 112-32.

12. *Id.* at 113-14; WILLIAM L. O'NEILL, *EVERYONE WAS BRAVE* 51-52 (1969).

13. *See generally* KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE* 310-315 (1995).

14. *Ten-Hour Day Movement*, ST. JAMES ENCYCLOPEDIA OF LABOR HISTORY WORLDWIDE: MAJOR EVENTS IN LABOR HISTORY AND THEIR IMPACT (2004), <http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/ten-hour-day-movement>.

York's law setting a ten-hour day for bakers as violating the liberty of contract protected by the Fourteenth Amendment in *Lochner v. New York*.¹⁵

Before *Lochner*, many reformers had worked at the state level to enact protective legislation for women and children, such as the Illinois Factory Act of 1893, which regulated sweatshop conditions, limited hours for women, and prohibited child labor. The eight-hour limitation for women was struck down by the Illinois Supreme Court in 1895 in *Ritchie v. People*,¹⁶ based on the same rationale the U.S. Supreme Court later adopted in *Lochner*. Undeterred, Kelley continued the battle on the national level when she became general secretary of the NCL. The NCL worked with other groups, such as the Women's Trade Union League (WTUL), to win other such reforms and succeeded in enacting hours limits and restrictions on night work for women in eighteen states. These reformers saw legislation protecting women and children as a vehicle, or wedge, for winning reforms that would ultimately benefit men as well. Oregon's ten-hour law for women workers was addressed in *Muller v. Oregon*,¹⁷ and the Court accepted that the state's interest in protecting the health of mothers superseded the freedom of contract doctrine. The Court said that "history discloses the fact that woman has always been dependent upon man," and that a woman, like a child, "has been looked upon in the courts as needing especial care" and "[s]he is properly placed in a class by herself, and legislation designed for her protection may be sustained."¹⁸ After *Muller*, the NCL relied on its rationale in fights for minimum-wage laws in a number of states, and state courts upheld those wage laws as well as the protective laws setting hours limits and night work bans.¹⁹ The NCL, true to its initial concept, then used *Muller* to argue for a maximum hours law for all workers in *Bunting v. Oregon*,²⁰ in which the Court upheld a ten-hour day for both men and women.

Conflicts between advocates of the ERA and protective legislation raged throughout the 1920s. In essence, the two groups had diametrically opposite conceptions of equality. The NWP and ERA proponents saw protective legislation as discriminatory and as overtly harming women's economic opportunities because such laws effectively restricted women's access to better-paying jobs and shifts, reinforcing their being stuck in lower-paying sex-segregated jobs. ERA proponents advocated equal access to all jobs on equal

15. See generally *Lochner v. New York*, 198 U.S. 45 (1905).

16. See generally *Ritchie v. People*, 40 N.E. 454 (Ill. 1895).

17. See generally *Muller v. Oregon*, 208 U.S. 412 (1908).

18. *Id.* at 421–22.

19. WILLIAM L. O'NEILL, *FEMINISM IN AMERICA: A HISTORY* 152 (1989).

20. See generally *Bunting v. Oregon*, 243 U.S. 426 (1917).

terms for all.²¹ The social reformers, or protectionists, based their arguments on women's differences from men, arguing that women's unique childbearing and childrearing responsibilities necessitated special treatment in the workplace.²² Reformers had supported suffrage primarily on the ground that women needed the vote to be able to effectuate other needed reforms. For example, Kelley told a congressional committee in 1910 of a failure to get New York to appropriate money for factory inspections and said that the mayor of New York told her she should stop wasting her time because she had "not a voter in [her] constituency" and both she and the legislators knew that.²³ But once women won the vote, these reformers were ready to attend to their primary goals.

The ERA proponents, such as Alice Paul, were initially willing to include exemptions from the ERA that would save protective legislation. In the end however, because many in the NWP were opposed to protective legislation, the ERA did not include this language. By mid-1922 it was apparent that there was no reconciliation possible between the two groups, and the NCL, the LWV, and the WTUL all publicly announced their opposition to the "blanket equal rights amendment."²⁴ The NWP expressed its disagreement with the reformers by filing an amicus brief in the Supreme Court in *Adkins v. Children's Hospital*,²⁵ arguing against a minimum wage law for women in the District of Columbia.²⁶ The Court agreed with the NWP's position and held the law to be unconstitutional, restoring the *Lochner* freedom of contract standard in the wage context.²⁷ The Court emphasized that *Muller* had not overruled *Lochner* because wages are different from hours.²⁸ The Court also said that the cases justifying special protection for women were no longer relevant, because "[in] view of the great—not to say revolutionary—changes which have taken place since [*Muller*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point."²⁹

21. *Historical Overview of the National Woman's Party*, Library of Congress, <https://www.loc.gov/collections/static/women-of-protest/images/history.pdf>.

22. CHAFE, *supra* note 9, at 129.

23. O'NEILL, *supra* note 12, at 53–54.

24. *Equal Rights Amendment and Protective Legislation*, ST. JAMES ENCYCLOPEDIA OF LABOR HISTORY WORLDWIDE: MAJOR EVENTS IN LABOR HISTORY AND THEIR IMPACT (2004), <http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/equal-rights-amendment-and-protective-legislation>.

25. See generally *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

26. CHAFE, *supra* note 9, at 127.

27. *Adkins*, 261 U.S. at 560–562.

28. *Id.*

29. *Id.* at 553.

Later in 1923, the NWP held a conference in Seneca Falls, New York, to commemorate the 75th anniversary of the Declaration of Sentiments and launch the ERA, then introduced it in Congress in December 1923. Paul drafted the ERA in 1923 with the simple language, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."³⁰ The NWP was joined in its advocacy for the ERA only by the National Federation of Business and Professional Women's Clubs whose members included professional women and skilled workers who had been adversely affected by protective legislation. The NWP's biggest and most formidable opponent was the Department of Labor's (DOL's) Women's Bureau, but the ERA was also opposed by the NCL, the LWV, the Women's Christian Temperance Union, the WTUL, the National Association of University Women, the PTA, the YWCA, and the National Federation of Federal Employees.³¹

Women's Bureau director Mary Anderson was a key figure in the debate. She was a former factory worker and long-time proponent of labor legislation. At a conference in 1926 the NWP passed a resolution directing the Bureau to investigate and explore the effects of the protective legislation, but the final report, *The Effects of Labor Legislation on the Employment of Women*, constituted an overwhelming and somewhat suspect endorsement.³² This report defined the Bureau's stance on the issue until 1938 when the Fair Labor Standards Act (FLSA) was passed, extending at least some protections to covered workers regardless of gender.³³

Notably, by the 1960s, even proponents of this type of legislation had begun to see that it had its downsides in limiting women's opportunities. But they did not want to repeal the laws, just update them to provide necessary protections without limiting work and career opportunities. For example, in 1965, at a White House conference, Mary Keyserling, then head of the DOL Women's Bureau said: "[T]hese laws were put on the books by women's organizations in the interest of women . . . [and] sought to eliminate the real abuses which prevailed widely in industry. . . . [T]he freeing of women from

30. THE EQUAL RIGHTS AMENDMENT, <http://www.equalrightsamendment.org/> (last visited Apr. 6, 2017). The ERA was later reworded to say "Equality under the law shall not be denied or abridged by the United States or by any State on account of sex." It passed in Congress in 1972, but did not receive the necessary number of state votes for ratification; it has been reintroduced every year since then. Paul died in 1977 without seeing the ERA passed.

31. Kathryn Kish Sklar, *Why Were Most Politically Active Women Opposed to the ERA in the 1920s?*, in *RIGHTS OF PASSAGE: THE PAST AND PRESENT OF THE ERA* 25 (Joan Hoff-Wilson ed., 1986).

32. CHAFE, *supra* note 9, at 119–120.

33. *Id.*

employment discrimination does not demand that they all have identical treatment.”³⁴

EQUAL PAY ACT

Congress held hearings for eighteen years on the issue of pay discrimination against women, without producing any legislation. In 1961, President Kennedy ordered the establishment of the President’s Commission on the Status of Women to examine and recommend remedies to combat “prejudices and outmoded customs [that] act as barriers to the full realization of women’s basic rights.”³⁵ Although the Commission made many recommendations, the only one that led to the immediate introduction of legislation was a recommendation for equal pay.³⁶ The tipping point in favor of this legislation after World War II was the voluminous testimony from unions, various women’s groups, and religious groups, and the evidence that the pay gap was widening: in 1955 there was a 64% differential, in 1961 it was 59%. In support of the proposed Equal Pay Act, Esther Peterson, Assistant Secretary for the DOL, and head of the Women’s Bureau, noted that women were discouraged from entering the workforce because employers undervalued their work—so the pay gap leads to underutilization of good labor. As one scholar has observed, this argument probably was needed to persuade Congress to enact the legislation, but others “saw the real value of the EPA as dignitary in nature, sending the message that gender equality was a priority for those at the highest levels of government.”³⁷

It should be noted that Peterson subscribed to the views the Women’s Bureau had espoused in the 1920s, that the ERA was an unnecessary and pernicious proposal, and that the problems of women workers were best addressed through the type of specific legislative reforms the social reform feminists had advocated over the prior decades.³⁸ Peterson’s twin goals upon being appointed by President Kennedy were to get the EPA passed, and to derail passage of the ERA.³⁹ To accomplish passage of the EPA, Peterson organized a concerted lobbying campaign using her contacts and expertise from her work as a lobbyist for the AFL-CIO.⁴⁰ This campaign took two years and included two hearings in the House and one in the Senate. The final bill

34. EEOC, *White House Conference on Equal Employment Opportunity, Discrimination Because of Sex* 22, 26 (Aug. 19-20, 1965) (panel transcript available in the EEOC Library, Washington, D.C.).

35. JUDITH HOLE & ELLEN LEVINE, *REBIRTH OF FEMINISM* 18 (1974).

36. *Id.*

37. Juliene James, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873, 1878-79 (2004).

38. *Id.*

39. *Id.*

40. *Id.*

was narrower than she had hoped, and applied to only 61% of the female labor force, but by the time it was signed into law, members of Congress had heard a great deal about the problems of women workers.⁴¹ As a result, in part, of the origin of this piece of legislation and the prolonged debate over its terms, the scope of the EPA is quite narrow, its strictures are very demanding, and its remedies are narrowly tailored. The EPA mandates equal wages for men and women doing equal work except where an employer makes a differential payment based on a seniority system, a merit system, a system based on productivity of workers, or “any other factor other than sex.”⁴²

In its only decision construing the EPA, *Corning Glass Works v. Brennan*, the Supreme Court noted that:

Congress’ purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry - the fact that the wage structure of “many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.” The solution adopted was quite simple in principle: to require that “equal work will be rewarded by equal wages.”⁴³

In *Corning*, the Court explained that a plaintiff bears the burden of proving that the employer pays different wages to employees of opposite sexes “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”⁴⁴ The Court also made clear that if a plaintiff makes that showing the burden of proof shifts to the employer to show that the differential is justified under one of the Act’s four exceptions.⁴⁵ The Court held in that case that a wage differential arising “simply because men would not work at the low rates paid women” was illegal under the EPA, because the differential was not based on a factor other than sex.⁴⁶ In another significant interpretation of the statute, the Third Circuit held in *Schultz v. Wheaton Glass Co.*,⁴⁷ that jobs only have to be “substantially equal” not identical. The case involved female “selector-packers” and male “selector-packer-stackers” who were paid more and the court held they were sufficiently similar to support an EPA claim.⁴⁸

41. Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163–184 (1990-1991).

42. 29 U.S.C. § 206(d)(1) (2016).

43. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195–196 (1974) (internal citations omitted).

44. *Id.* at 195–197.

45. *Id.* at 197.

46. *Id.* at 204–05.

47. *See generally* *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970).

48. *Id.*

How much has the EPA helped women workers? According to information presented by the President's National Equal Pay Task Force in June 2013, in the 60s and 70s the Department of Labor (DOL) recovered \$162,063,460 for over 269,601 workers (by 1978 when enforcement responsibility for the statute passed to the EEOC).⁴⁹ In the 80s and 90s, the EEOC obtained a \$42.4 million settlement from General Motors and UAW to resolve a Commissioner charge of a pattern and practice of race and sex discrimination.⁵⁰ In 1985, the EEOC entered into a consent decree with Allstate on an EPA claim for sales agents, obtaining \$5 million for 3200 women; and the EEOC's suit against Teachers Insurance and Annuity Equity Fund resulted in redoing pension benefits in a sex neutral manner for over 800,000 women. From 2000 to 2009, the EEOC found cause in 829 charges and recovered \$52.7 million through administrative enforcement.⁵¹ The EEOC also litigated against Morgan Stanley and obtained \$54 million for sex-based discrimination in compensation, promotion, and other aspects of employment.⁵² Further, according to EEOC Chair Yang's statement on January 29, 2016, the EEOC has recovered \$85 million in monetary relief for those who have faced pay discrimination based on sex.⁵³ Although the oft-noted pay gap has narrowed from 59% to roughly 78% in 2013,⁵⁴ it is not immediately apparent that the EPA has contributed significantly to that change.

As the Task Force Report acknowledged, a large part of the wage gap between men and women is attributable to occupational segregation. 44% of men are in occupations that are 75% male, while only 6% of women are in those occupations.⁵⁵ These male dominated occupations include manufacturing salespersons, farmers and ranchers, architects, transportation supervisors, cutting workers, detectives and investigators, and computer programmers. In 2010, nine of the ten most common occupations for women were majority female – administrative assistants, nurses, cashiers, retail salespersons, nursing and home health aides, waitresses, retail sales supervisors and managers, customer service representatives, and house cleaners.⁵⁶ The explanations for these patterns of employment range from workers' choices to the effects of

49. *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, National Equal Pay Task Force 13 (June 2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf (hereinafter "Task Force Report").

50. Task Force Report, *supra* note 50.

51. Task Force Report, *supra* note 50.

52. Task Force Report, *supra* note 50.

53. EEOC, *Remarks of Chair Jenny R. Yang at the White House Equal Pay Event* (Jan. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/chair-remarks-1-19-2016.cfm>.

54. Task Force Report, *supra* note 50, at 7.

55. Task Force Report, *supra* note 50, at 6–7.

56. Task Force Report, *supra* note 50, at 24.

discrimination.⁵⁷ Workers' choices could explain segregation because one group is more "willing to accept unpleasant or dangerous work, longer hours, or physical strain in return for higher wages" or women could "enter occupations that require less investment and result in less earnings growth because they expect abbreviated and discontinuous labor force activity."⁵⁸ On the other hand, the Report notes that "historical patterns of exclusion and discrimination paint a more complex picture" because employers' "outright refusal to hire, severe harassment of women in non-traditional jobs, or policies and practices that screen qualified women out of positions but are not job-related" could explain segregation.⁵⁹ Whatever the cause of occupational segregation, it is apparent that the EPA, with its emphasis on equal pay for equal work, can never adequately address this basic cause of the pay gap.

One of several significant difficulties in obtaining relief under the EPA initially was that, because the EPA was an amendment to the Fair Labor Standards Act (FLSA), the exemptions in that statute applied, so the EPA, like the FLSA, exempted workers employed "in a bona fide executive, administrative, or professional capacity."⁶⁰ Thus, while the EPA benefited blue-collar workers, it provided no assistance to white-collar workers. This exemption was lifted by the Education Amendments of 1972.⁶¹ These 1972 Amendments are much better known as Title IX, which prohibits exclusion from participation in educational programs or activities on the basis of sex.⁶² As one commentator has wryly noted, "Though support for this amendment did come from the education sector, one might rightly question why it was buried in an omnibus bill nine years after the EPA's enactment, the purpose of which was to promote the advancement of postsecondary education through subsidies to institutions and 'for other purposes.'"⁶³ Although lawyers and litigants educated themselves about the removal of the executive exemption from the EPA, and women in professional and executive positions are now technically able to bring claims, courts have interpreted the Act so narrowly as to make white-collar women's claims almost impossible to win. "[L]ack of success in the courtroom presents a serious impediment to the EPA's mandate of equal pay for equal work."⁶⁴ The reason the FLSA originally exempted administrative, professional, and executive workers was that white-collar jobs were considered too different, too independent, and too prestigious to be

57. Task Force Report, *supra* note 50, at 26, 28.

58. Task Force Report, *supra* note 50, at 26.

59. Task Force Report, *supra* note 50, at 26.

60. 29 U.S.C. § 213(a)(1) (2014).

61. Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (1972) (codified at 29 U.S.C. § 213(a)(1) (removing § 206(d)(1) from exemption)).

62. 20 U.S.C. §§ 1681–1688 (1972).

63. James, *supra* note 37, at 1873, 1882 n. 47.

64. James, *supra* note 37, at 1876.

measured against blue-collar counterparts.⁶⁵ In other words, requiring overtime pay for individuals in these executive jobs would have created administrative difficulties because such jobs do not lend themselves to work-spreading, so effective regulation is difficult, and in addition it was thought that such higher level workers make enough money and have enough control over their hours that they should not be able to tax employers for overtime when they work at their own discretion. None of those considerations are applicable in a challenge to pay discrimination based on sex, but courts still seem to apply the proof requirements as if workers in executive and professional positions cannot be meaningfully compared.⁶⁶

The difficulties of establishing a *prima facie* case when challenging pay discrimination in a professional job is illustrated by the EEOC's inability to challenge such discrimination against female lawyers working for the New York Port Authority in *EEOC v. Port Authority of New York and New Jersey*.⁶⁷ The court of appeals upheld the dismissal of the EEOC's complaint because, although EEOC had evidence that male and female supervisory attorneys for the Authority were fungible under the employer's policies and could be moved from one legal department to another, were subject to the same time pressures and deadlines, used the same legal analytical skills regardless of their practice area, had the same job code, had salaries determined on the same "maturity curve," and were evaluated on identical criteria, that evidence was insufficient to show they were engaged in equal work.⁶⁸

Another difficulty for plaintiffs who might challenge unequal pay is that employees usually do not know what others are paid, and many employers specifically prohibit discussion of compensation. This reality affected Lilly Ledbetter when she attempted to sue Goodyear Tire under Title VII for underpaying her compared to men over the course of her employment. Goodyear based pay on performance evaluations, and Ledbetter contended that several of her supervisors in the past had given her poor evaluations because of her sex, so that by the end of her employment she was earning significantly less than her male colleagues. She had never known about the pay differential over the years. Although a jury found in her favor, the Eleventh Circuit reversed, holding that Title VII pay claims cannot be based on discriminatory events that occurred before the last pay decision affecting pay during the 300 day charge filing period. The Supreme Court agreed and rejected her claim because she had not challenged the intentionally discriminatory decision to pay her less within 300 days of the original decision.⁶⁹ Justice Ginsburg found the

65. James, *supra* note 37, at 1889.

66. James, *supra* note 37, at 1892–98.

67. See generally *EEOC v. Port. Auth. of N.Y. & N.J.*, 768 F.3d 247 (2d Cir. 2014).

68. *Id.* at 250–52.

69. See generally *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

Court's rule to be out of step with workplace realities and the remedial purposes of Title VII, and ended her dissenting opinion with an admonition that "[o]nce again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."⁷⁰ Although the *Ledbetter* case addressed the timing rules for claims under Title VII, the facts suggested a difficulty that a woman would have in asserting an EPA violation as well, namely that it is sometimes very difficult to know whether one's compensation is based on discriminatory criteria because one does not know what others are paid.⁷¹

The Court's draconian rule led in very short order to passage of the Lilly Ledbetter Fair Pay Act of 2009,⁷² which restored the prior rules on timeliness of such challenges. This amendment, however, did not alleviate the underlying problem of being ignorant of the existence of a claim of discrimination in compensation. In an amendment that would address that difficulty (and others), members of Congress have introduced the Paycheck Fairness Act, repeatedly since 1997.⁷³ This bill would amend the EPA to permit punishment of employers for retaliating against workers who share wage information, allow for punitive damages, and put the burden on employers asserting a "factor other than sex" defense to prove that the differential is tied to a legitimate business necessity. Although this bill would enhance the protections and remedies of the EPA, it cannot rectify the pay disparities that result from occupational segregation, nor does it do anything to lessen the difficulty of establishing a *prima facie* case in administrative, executive, and professional jobs.

TITLE VII

Although the Civil Rights Act of 1964 was drafted by the Department of Justice at President Kennedy's request principally as a response to compelling demands for racial justice and equality, from its inception the employment provisions in Title VII also prohibited discrimination on the bases of religion, sex, and national origin. The statute says it shall be unlawful for employers, labor unions, or employment agencies to discriminate against an individual in hiring, firing, compensation, or terms, conditions, or privileges of employment

70. *Id.* at 661 (Ginsburg, J. dissenting).

71. The time limitations for an EPA claim are different however, in that a suit may be brought not later than 2 years or 3 years (if willful) after the date of the last event constituting the alleged violation. 29 U.S.C. § 2617(c)(1)–(2) (2008). Also, there is no charge filing requirement as there is under Title VII.

72. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–12, 123 Stat 5 (amending 42 U.S.C. § 2000e-5(e)).

73. *See* Paycheck Fairness Act, S. 2199, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2199>.

because of the individual's "race, color, religion, sex, or national origin."⁷⁴ The statute also makes it unlawful "to limit, segregate, or classify" employees or applicants on any of those bases in a way that deprives them of employment opportunities or adversely affects their status.⁷⁵ The inclusion of sex as a prohibited basis in Title VII presents a classic example of the working of the democratic process in which individuals may vote for a measure for a variety of reasons, with consequences expected by none.

The conventional view of how sex was added to Title VII is that a southern opponent of civil rights legislation introduced the "sex amendment" in hopes of derailing passage of the Civil Rights Act.⁷⁶ While it is true that concern with sex discrimination had none of the immediate and visceral impact that concern with race discrimination had in 1963, and there was no sweeping popular pressure for eradicating sex discrimination—no marches, no boycotts, no demonstrations, and no firehoses or bombs used against proponents of equal rights—still it is patronizing, dismissive, and above all, inaccurate, to say the amendment to include sex in the bill was a fluke, a joke, or an accident.

The fluke or accident myth arose primarily because of the absence of any committee report or other formal record of the legislative history.⁷⁷ This absence is attributed to the presumed fact that the sponsor was trying to sabotage the entire Civil Rights Act of 1964 by engaging in a parliamentary ploy that happened to become law. This myth has been debunked by numerous scholars.⁷⁸ In fact, "sex" was added to Title VII after calculated lobbying by women's groups, and with the support of all but one female member of the House of Representatives.⁷⁹

The history of the amendment adding sex is not as sparse as it was once thought to be. The proposal to include sex originated with the NWP, the very group that had been lobbying for the ERA every year since 1923, and which had sought to include sex in every civil rights bill considered by Congress for forty years.⁸⁰ The NWP asked three members of Congress to introduce an amendment to add sex to the Civil Rights Act: Katherine St. George of New York, Martha Griffiths of Michigan, and Howard Smith of Virginia, and all agreed to do what they could.⁸¹ Both St. George and Smith opposed passage of the Act, and were concerned that their sponsorship of the amendment would be

74. 42 U.S.C. § 2000e-2(a)(1) (2012).

75. 42 U.S.C. § 2000e-2(a)(2) (2012).

76. 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, 409 (2009); Freeman, *supra* note 41, at 163, 177.

77. Osterman, *supra* note 76, at 416–424.

78. Osterman, *supra* note 76, at 410.

79. Osterman, *supra* note 76, at 410.

80. Osterman, *supra* note 76, at 414.

81. Freeman, *supra* note 41, at 174.

suspect.⁸² Griffiths thought Smith's sponsorship would guarantee supporting votes from southern Democrats, and he ultimately agreed to propose the amendment.⁸³ The NWP's Paul was pleased with his sponsorship because he had been a friend and supporter of the ERA, having voted for it every year when it was introduced.⁸⁴ Smith apparently agreed to do it because he believed sex discrimination was a serious problem, and that white women would be disadvantaged compared to black women if there were no sex amendment.⁸⁵ That appeal to white supremacy was similar to the arguments advanced by suffragists at the turn of the century.⁸⁶ Smith introduced his amendment by saying, "it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation."⁸⁷ Then he read a letter from a "lady" with a "real grievance" who complained that the imbalance between the number of men and women prevents women from attaining happiness.⁸⁸ This evoked laughter, and led observers to dub the debate "Ladies Day" in the House.⁸⁹ Representative Emmanuel Celler responded to Smith, saying that women were not a minority in his household even though he always had the last words, and those words were "Yes, dear."⁹⁰ The laughter and jocularly subsided as a serious discussion ensued.⁹¹

On the floor of the House the debate was not extensive, but all the principal arguments for and against a prohibition on sex discrimination were thoroughly aired. Its opponents were concerned that the amendment would be a threat to protective legislation premised on the view that women "'were marginal participants in labor markets'" and "'were especially deserving of public protection as actual or potential mothers.'"⁹² The opponents relied heavily on the fact that members of the labor and women's rights communities as well as the President's Commission on the Status of Women were opposed to any law that would undermine the special protections of women.⁹³ Peterson,

82. *Id.* at 174–75.

83. *Id.* at 175.

84. Louis Menand, *The Sex Amendment: How women got in on the Civil Rights Act.*, THE NEW YORKER, July 21, 2014, available at <http://www.newyorker.com/magazine/2014/07/21/sex-amendment>.

85. Osterman, *supra* note 76, at 412–13.

86. Kraditor, *supra* note 7, at 138–185.

87. LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3213 (1968).

88. *Id.* at 3213–14.

89. Freeman, *supra* note 41, at 176.

90. Osterman, *supra* note 76, at 412.

91. *Id.*

92. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1321 (2012) (citation omitted).

93. *Id.* at 1321.

Deputy Secretary of Labor and head of the Women's Bureau, acknowledged that women experienced discrimination in employment but agreed with the conclusion of the President's Commission that "discrimination based on sex . . . involve[d] problems sufficiently different from discrimination based on [the] other factors listed to make separate treatment preferable."⁹⁴ As she described it, it was preferable to have "specific bills for specific ills."⁹⁵

Peterson and other feminists who had fought for protective legislation for women consistently opposed the ERA and initially opposed inclusion of sex in Title VII for the same reason—because they feared that the principle of equal treatment under the law would undermine the few gains women had made.⁹⁶ They also thought the EPA had addressed the principal evil plaguing women in the workforce and that the Civil Rights Act should not be cluttered up with the inclusion of sex.⁹⁷ The Commission's Committee on Home and Community had stated that care of home and children are the "unique responsibility" of women, concluding that "[t]his is not debatable as a philosophy. It is and will remain a fact of life."⁹⁸

Opponents also expressed fear that a law prohibiting sex discrimination in employment would have an adverse effect on the regulation of traditional sex and family roles, and to assist in maintaining proper patriarchal control of the family, Representative Robert Griffin proposed an amendment that would bar a married women from filing a sex discrimination claim unless her husband were unemployed.⁹⁹ The only woman in the House who spoke against the amendment was Edith Green, Democrat of Oregon.¹⁰⁰ She said there was ten times as much discrimination based on race, as on sex, questioned the motives behind the amendment, and worried it would clutter the bill and might undermine passage.¹⁰¹

Proponents of the amendment did not disagree that adding sex to Title VII would undermine protective legislation and traditional family roles, rather they said that was the whole point.¹⁰² Representative Martha Griffiths spoke at length about the deleterious effects of protective legislation, saying that these laws kept women in low-paying jobs.¹⁰³ Representative St. George made the same argument, emphasizing that limitations on women's ability to work late at night means they are not able to make the higher pay associated with such

94. Freeman, *supra* note 41, at 172.

95. Freeman, *supra* note 41, at 166.

96. Osterman, *supra* note 76, at 419.

97. Osterman, *supra* note 76, at 413.

98. Franklin, *supra* note 93, at 1322.

99. Franklin, *supra* note 93, at 1323.

100. Osterman, *supra* note 76, at 413.

101. Osterman, *supra* note 76, at 413.

102. Franklin, *supra* note 92, at 1326.

103. Franklin, *supra* note 92, at 1326.

work.¹⁰⁴ Both female representatives said the history of subordination of women in the American legal system was not a tradition of which to be proud.¹⁰⁵

The vote is what ultimately decided whether sex would be added to Title VII.¹⁰⁶ Members of Congress, who had listened to Peterson's presentations for two years before passing the EPA in 1963, and who listened to the arguments of their female colleagues, were apparently inclined to believe that women faced real discrimination in employment; the women in Congress were convinced by the derisive laughter of their male colleagues, if nothing else, that including sex was both appropriate and necessary.¹⁰⁷ As Representative Griffiths said, "[I]f there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it."¹⁰⁸ In the end, the amendment passed in the House 168 to 133, and the bill itself passed 290 to 130.¹⁰⁹

When the bill went to the Senate, President Johnson, Peterson, and various women's groups rallied to support the bill with sex included.¹¹⁰ Since they no longer feared that the amendment was a ploy to derail passage of the Civil Rights Act, they no longer opposed its inclusion.¹¹¹ Although Senator Everett Dirksen wanted to take sex out of the Act, the NWP continued to advocate for it and Margaret Chase Smith, one of only two women in the Senate, supported it.¹¹² In the end the Senate passed the bill with sex included, the House adopted the Senate's version after one hour of debate, and President Johnson signed the bill the same day, on July 2, 1964.¹¹³ Since sex was removed from all the other titles of the Civil Rights Act, it seems safe to say that a majority in Congress thought discrimination against women in the workplace was a real concern that justified legislative action.¹¹⁴

But it also seems safe to say that few who were considering the wisdom of outlawing sex discrimination in 1963-64 could have foreseen where the sex amendment would lead. In the first year after enactment, one-third of charges filed with the EEOC alleged sex discrimination.¹¹⁵ Title VII was definitely born out of the racial tension of the time, but the unexpected inclusion of sex in

104. Franklin, *supra* note 92, at 1326-27.

105. Franklin, *supra* note 92, at 1327.

106. Freeman, *supra* note 41, at 177.

107. Freeman, *supra* note 41, at 177.

108. Freeman, *supra* note 41, at 177.

109. Freeman, *supra* note 41, at 177-78.

110. Freeman, *supra* note 41, at 181.

111. Freeman, *supra* note 41, at 181.

112. Freeman, *supra* note 41, at 179.

113. Osterman, *supra* note 76, at 415.

114. Freeman, *supra* note 41, at 177.

115. Menand, *supra* note 84, at 7.

the statute quickly led women workers and the newly emerging women's movement of the late 1960s to take advantage of the opportunity to pursue equality by filing charges with the EEOC and then by pursuing their claims in the courts.¹¹⁶ The leadership of the EEOC was unprepared to deal with claims of sex discrimination, and had a significant role in fostering the myth that sex had been introduced into the statute by accident.¹¹⁷ EEOC leaders said it was a "fluke," "conceived out of wedlock," and contended that they had a number of problems of interpretation because there was no legislative history.¹¹⁸ They also stated that sex discrimination does not have "the same moral overtones" as race "and there are few women's protest organizations."¹¹⁹ An EEOC official described the prohibition of sex discrimination as an "orphan" and worried about how to apply the bona fide occupational qualification (BFOQ) defense in cases of sex discrimination.¹²⁰ The defense permits an employer to discriminate on the basis of sex if it can prove that sex is a "qualification reasonably necessary to the normal operation of that particular business."¹²¹ EEOC officials suggested the BFOQ defense raises the "bunny" problem, meaning that Playboy Clubs might be forced to hire men as Playboy bunnies.¹²²

When the EEOC promulgated its first guidelines on whether weight-lifting restrictions are legal under Title VII, at the end of 1965, the agency said it had to proceed with caution because it had no legislative history to guide its interpretations.¹²³ It stated that it issued guidelines as "an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers."¹²⁴ The guidelines

116. Menand, *supra* note 84.

117. Osterman, *supra* note 76, at 416.

118. Osterman, *supra* note 76, at 416.

119. Osterman, *supra* note 76, at 416.

120. Osterman, *supra* note 76, at 416.

121. 42 U.S.C. § 2000e-2(e)(1) (2012).

122. Osterman, *supra* note 76, at 416–17.

123. Notably, there is even less history to explain the inclusion of religion in Title VII. There is no mention in the history of any debate or discussion whatsoever. The only mention of religion concerned the amendment to exempt religious corporations and religiously affiliated educational entities from the religious mandate of the Act, EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3197–212 (1968), and a proposed amendment "that would have permitted employers to refuse to hire atheists," *id.* at 3101–02. Despite this absence of any indication of congressional intent, in 1966, EEOC promulgated guidelines on religious discrimination stating that an employer has an obligation to accommodate employees' religious practices unless to do so would create a "serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.2(b) (2017).

124. Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926, 14,927 (Dec. 2, 1965).

stated that weight restrictions will be honored except where the limit is set at an unreasonably low level.¹²⁵

The EEOC's dismissive attitude toward the prohibition on sex discrimination not only helped to foster the myth that sex was added as a joke, it also led directly to the formation of the National Organization for Women which petitioned the EEOC to take the provision seriously.¹²⁶ Representative Griffiths spoke on the House floor in 1966 to criticize the EEOC's use of the legislative history as a rationale for its lax enforcement, saying "I reject that slur on Congress" and arguing that there was no need for an extensive legislative discussion on discrimination against women because the problems had been thoroughly discussed for the preceding two years during debates on the EPA.¹²⁷ Although EEOC leaders professed that they were unsure about what to do, most scholars see this as a period of massive resistance to enforcement by the EEOC.¹²⁸ One Commissioner said the sex provision "is mysterious and difficult to understand and control" but business leaders and feminists were demanding that the EEOC take a position on the viability of protective legislation as well as the legality of sex-specific classified advertising in newspapers. NOW and other feminists succeeded by the end of the 1960s in convincing the EEOC to take positions on gender that were as aggressive as its early positions on race discrimination.¹²⁹ Thus, in 1969, the EEOC issued guidelines stating that sex-segregated job advertising violated Title VII and that pregnancy discrimination constituted discrimination because of sex, and it also adopted a strong stance against protective legislation.¹³⁰

The courts agreed with the EEOC's new-found understanding of the scope and meaning of discrimination on the basis of sex. In *Weeks v. Southern Bell Telephone & Telegraph Co.*,¹³¹ a case involving a weight lifting restriction, the court rejected the company's explanation for its restriction, and held that:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.¹³²

125. Guidelines on Discrimination Because of Sex, *supra* note 124, at 14,927.

126. Osterman, *supra* note 76, at 419–20, n. 69.

127. Osterman, *supra* note 76, at 420.

128. Franklin, *supra* note 92, at 1333.

129. Franklin, *supra* note 92, at 1338, 1345.

130. Franklin, *supra* note 92, at 1345.

131. *See generally* *Weeks v. S. Bell Telephone & Telegraph Co.*, 408 F.2d 228, 232–33, 236 (5th Cir. 1969).

132. *Id.* at 236.

And in *Rosenfeld v. Southern Pacific Co.*,¹³³ the court invalidated the restrictive state protective legislation that limited women to jobs that did not require lifting over twenty-five to thirty pounds, and thus opened up new job opportunities for women. The Ninth Circuit cited to the EEOC's newly adopted regulations, noting that the EEOC had taken its position "after considerable hesitation" but that the EEOC now believes that state laws inconsistent with the objectives of Title VII must be disregarded, and held that this interpretation of the statute is entitled to deference.¹³⁴ So the opponents of the ERA and of adding sex to Title VII were correct in predicting this result. But the reality was that by that time the earlier protective legislation was out of favor and no longer regarded as needed.

Another consequence of passage of Title VII was that women used disparate impact theory successfully to challenge height and weight requirements for other jobs traditionally held by men. Under this method of proving discrimination, a plaintiff does not have to show that an employer intended to discriminate against women, just that a neutral rule or qualification standard had the effect of screening out women disproportionately, and the standard was not justified by business necessity.¹³⁵ For example in *Dothard v. Rawlinson*,¹³⁶ the Court said the minimum height and weight requirements used to screen applicants for positions as correctional counselors in the state penitentiary system had an unlawful disparate impact on women. The Court was persuaded that the height and weight requirements were not job related. However, the Court ruled in favor of the Alabama prison system on its other asserted defense, and held that it had proved that being a man was a BFOQ for the position because sex offenders were scattered throughout the facility and a "woman's ability to maintain order" in such a facility "would be directly reduced by her womanhood."¹³⁷

Women's advocates also used Title VII to seek redress for harassment in the workplace and in *Meritor Savings Bank v. Vinson*,¹³⁸ the Supreme Court held that sexual harassment, if it is sufficiently severe or pervasive, constitutes discrimination in working conditions on the basis of sex. It is not intuitively obvious that harassment would be seen as a form of discrimination, in that it does not necessarily involve a tangible employment action or conduct by a company official. But in 1980 the EEOC had published guidelines on sex discrimination explaining that harassment creates discriminatory terms and

133. *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223, 1227 (9th Cir. 1971).

134. *Id.* at 1226.

135. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 424-25 (1971) (first describing this type of claim and proof in a race case challenging a high school diploma requirement for a labor job).

136. *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977).

137. *Id.* at 335-37.

138. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

conditions of employment that can be actionable under Title VII,¹³⁹ and the Court deferred to the agency's expertise in ruling in Vinson's favor.

In another significant sexual harassment case, *Harris v. Forklift Systems*,¹⁴⁰ the Court clarified the substantive standard for proving actionable harassment. The Court held that Title VII is violated when a workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹⁴¹ The Court expressly noted that a plaintiff does not need to prove that the harassment seriously affected her psychological well-being to prevail.¹⁴² Subsequently, in *Faragher v. City of Boca Raton*,¹⁴³ and *Burlington Industries, Inc. v. Ellerth*,¹⁴⁴ the Court explained the rules for holding an employer liable for the harassment perpetrated by subordinate employees, and held that employers will be strictly liable if the harassment culminates in a tangible employment action (for example, if a supervisor fires an employee who refuses his sexual advances; the type of case previously known as "quid pro quo" harassment). But in cases of hostile environment harassment, where no tangible actions are taken, the Court significantly undermined the likelihood that plaintiffs will obtain relief by creating an affirmative defense that makes it easier for employers to avoid liability in cases of supervisory harassment. The Court held that an employer can avoid liability or damages in supervisor harassment cases if it can prove it had an effective sexual harassment policy and procedure in place at the time of the harassment, and the plaintiff unreasonably failed to avail herself of those procedures.¹⁴⁵ Then, in *Vance v. Ball State University*,¹⁴⁶ the Court made such cases even more challenging by rejecting the EEOC's guidance on the point and adopting a narrow definition of a supervisory employee for purposes of the *Faragher/ Ellerth* rule, holding that an employee is a supervisor for purposes of vicarious liability only if he or she is empowered by the employer to take tangible employment actions against the victim.¹⁴⁷ This result struck Justice Ginsburg as such a departure from prior agency principles and from the realities of the workplace that she said at the end of her dissenting opinion, "The ball is once again in Congress' court to correct the error into which this

139. 29 C.F.R. § 1604.11(a)(1) (2017).

140. *Harris v. Forklift Systems*, 510 U.S. 17, 21–22 (1993).

141. *Id.* at 21.

142. *Id.* at 22.

143. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

144. *See generally Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

145. *Faragher*, 524 U.S. at 807.

146. *See generally Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

147. *Id.* at 2443–54.

Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.”¹⁴⁸

Litigants also, quite reasonably, argued that discrimination on the basis of pregnancy constituted sex discrimination. But these arguments were rejected by the Supreme Court.

PREGNANCY DISCRIMINATION ACT

Soon after Title VII was enacted women began to challenge discrimination on the basis of pregnancy, which many believed was synonymous with sex discrimination. The EEOC has maintained since 1972 that employment policies or practices that adversely affect female employees because of pregnancy, childbirth, and related medical conditions constitute disparate treatment based on sex.¹⁴⁹ The Supreme Court, however, did not agree with that analysis when evaluating a constitutional equal protection claim. In *Geduldig v. Aiello*, the Court in 1974 held that a state law that excluded from disability benefits a temporary disability caused by an uncomplicated pregnancy did not violate the Fourteenth Amendment, because such a program does not discriminate on the basis of sex, but rather simply “divides potential recipients in two groups—pregnant women and nonpregnant persons.”¹⁵⁰

Women continued to use Title VII to bring challenges to the denial of benefits for pregnancy and employer policies that denied them maternity leave, and most lower courts held that *Geduldig* was not applicable to Title VII, which the courts thought did prohibit such discrimination. The courts reasoned that an employer engaged in disparate treatment on the basis of sex if it treated a temporary incapacity due to pregnancy or childbirth less favorably than a temporary disability due to any other reason. The Supreme Court disagreed with this reasoning. Following its logic in *Geduldig*, the Court decided in 1976 in *General Electric v. Gilbert* that such exclusions from disability plan coverage of periods of disability arising from or related to pregnancy are not sex-based within the meaning of Title VII and cannot even be challenged under a disparate impact theory as neutral practices that have an impact based on sex.¹⁵¹ Similarly in 1977, in *Nashville Gas Co. v. Satty*, the Court held that it was not unlawful sex discrimination to exclude pregnancy from a sick leave policy, since that exclusion merely constituted a failure to extend to women a benefit that men could not and did not receive, although the Court concluded that the employer violated Title VII by requiring women to forfeit their seniority on return from a leave necessitated by childbirth.¹⁵²

148. *Id.* at 2466 (Ginsburg, J. dissenting).

149. 29 C.F.R. § 1604.10 (2017).

150. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

151. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 133–34 (1976).

152. *Nashville Gas Co., v. Satty*, 434 U.S. 136, 139–43 (1977).

In response to these decisions women's groups mobilized to seek a legislative fix. The attorney who represented Gilbert and the class of women who challenged General Electric's policy, Ruth Weyand, and many other labor and civil rights activists, feminists, and women's organizations, including the National Organization for Women and the National Partnership for Women and Families, as well as some right-to-life groups, quickly formed a coalition called the Campaign to End Discrimination Against Pregnant Workers and petitioned Congress to amend Title VII to provide that discrimination on the basis of pregnancy is gender-based discrimination.¹⁵³ These women were incensed that the Court had given this "slap in the face to motherhood."¹⁵⁴

Congress swiftly responded by passing the Pregnancy Discrimination Act of 1978. The PDA specifically overruled *Gilbert's* interpretation of Title VII by amending the statute to say that "because of sex" or "on the basis of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions."¹⁵⁵ The PDA contains two separate provisions, each guaranteeing a substantive right. The first is the right against being treated adversely because of pregnancy; the second is the right to be treated, when pregnant and unable to work, the same as other employees who are also unable to work due to temporary disability. As Senator Williams, a sponsor of the Act, stated: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."¹⁵⁶

The first case under the PDA to reach the Supreme Court involved a claim of discrimination against men. In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,¹⁵⁷ the EEOC sued Newport News because its health insurance plan (as amended to comply with the PDA) provided coverage for pregnancy-related conditions for female employees, but provided only limited coverage of pregnancy for employees' wives. The Court focused on the benefits provided to the spouses of male and female employees, and noted that "the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for

153. Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 11 (2009).

154. *Id.*

155. 42 U.S.C. § 2000e(k) (2012). The amendment provides:

(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

156. 123 CONG. REC. 29658 (1977).

157. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

pregnancy-related conditions.”¹⁵⁸ This established facial discrimination because of sex in the literal sense. The Court relied on EEOC guidelines in reaching its conclusions; the first reiterated a principle of antidiscrimination law, that an employer is free to provide no benefits, but if it does provide benefits, it must do so on a nondiscriminatory basis; and the second distinguished between the level of coverage for employees and for dependents, stating that under Title VII an employer can choose to cover employees more fully than dependents, but must cover pregnancy-related conditions of spouses at the same level as all other conditions of spouses, male or female.¹⁵⁹

The second PDA case to reach the Supreme Court embodied the central tactical and philosophical controversy among advocates of women’s rights that remains alive today: that of equal versus special treatment for pregnancy. In *California Federal Savings & Loan Association v. Guerra*, the plaintiff challenged her employer’s refusal to reinstate her in her job when she returned from a four-month “pregnancy disability leave” mandated by state law.¹⁶⁰ The state enforcement agency interpreted the leave statute as including a right to post-leave reinstatement.¹⁶¹ The employer argued the state law was preempted by the PDA, and could not stand because it opened employers to charges of reverse discrimination under Title VII by requiring preferential treatment for pregnant women.¹⁶² Feminists who embraced the equal treatment approach to pregnancy argued the PDA literally mandates equal treatment, and that the employer could achieve the equal treatment required by Title VII without violating state law if it extended the same leave and reinstatement rights to non-pregnant employees. Feminists who advocated special treatment of pregnancy argued that the special characteristics of pregnancy and the realities it created for women required special accommodations for working women so that they would not experience job setbacks as a result of becoming parents. Thus, they argued that the state law was compatible with Title VII’s goal of equal employment opportunity for women. The Supreme Court concluded that the PDA established a floor, not a ceiling, on pregnancy benefits, and that the state statute and the PDA shared the goal of promoting equal employment opportunity.¹⁶³ The majority held that the special leave provided by the California statute was “narrowly drawn” and therefore did not represent a

158. *Id.* at 684.

159. Appendix, Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604.10 (1979) (codified the EEOC guidelines that the Court used in *Newport News Shipbuilding & Dry Dock Co.*).

160. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 272 (1987).

161. *Id.* at 277.

162. *Id.* at 279.

163. *Id.* at 280.

return to archaic protective legislation that had been based on stereotypical notions about the abilities of pregnant workers.¹⁶⁴

While Title VII mandates equal treatment of men and women, it creates a limited exception to the prohibition on discrimination, as mentioned earlier in discussing *Dothard v. Rawlinson*. If sex is a BFOQ for a job, an employer may discriminate on the basis of sex. The BFOQ defense requires a showing that being of one sex is reasonably necessary to the normal operation of the particular business or enterprise. In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, the third PDA case to reach the Supreme Court, the Court considered the BFOQ exception in the context of a pregnancy case.¹⁶⁵ Johnson Controls manufactured batteries and prohibited all fertile women from jobs involving lead exposure because that exposure was arguably harmful to developing fetuses.¹⁶⁶ The company defended this “fetal protection” policy on the basis of moral and ethical concerns for the next generation, and out of concern for potential tort liability if children of mothers who had been exposed to lead were born with defects.¹⁶⁷ The Supreme Court justices all agreed the policy excluding women was discriminatory, the question was whether it was justified as a BFOQ. The Court concluded the policy obviously discriminated on the basis of sex and pregnancy and that it could not be saved by the BFOQ defense because there was no suggestion that potentially or actually pregnant women were less capable of making batteries than nonpregnant employees.¹⁶⁸

Finally, in *Young v. United Parcel Services, Inc.*, the Court considered a much more challenging issue of pregnancy discrimination—whether employers are required to accommodate pregnant women who have temporary medical restrictions by allowing them to do “light duty” work if such work is available to others who have temporary disabilities.¹⁶⁹ UPS accommodated three classes of employees by allowing them to take light duty status if they had on-the-job injuries, if they had disabilities within the meaning of the Americans with Disabilities Act, and if they were unable to drive because of license restrictions, but it did not allow this accommodation to Peggy Young when her midwife advised her not to lift over 20 pounds.¹⁷⁰ The Court was not persuaded by the EEOC’s position that the PDA’s second clause requires such an accommodation whenever an employer has a policy that provides the

164. *Id.* at 290.

165. *See generally* Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW, et al. v. Johnson Controls, Inc., 499 U.S. 187 (1991).

166. *Id.* at 190.

167. *Id.* at 206.

168. *Id.* at 206–207.

169. *See generally* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2016).

170. *Id.* at 1344.

accommodation to others similar in their inability to work, regardless of the reason they are unable to work.¹⁷¹ The Court adopted a narrower rule that where a pregnant plaintiff shows that others similar to her were accommodated, the burden shifts to the employer to justify its reasons for the refusal to accommodate her, and its reason must be something more than that it would be more expensive or less convenient to accommodate pregnant women.¹⁷² If the employer explains its reasons, the plaintiff then may challenge it as a pretext by showing that the employer's "policies impose a significant burden on pregnant workers" and the employer's reasons are "not sufficiently strong to justify the burden."¹⁷³ Essentially, the Court held that UPS might have accommodated too many other workers to be able to meet its burden of proving a valid reason for excluding pregnant workers.

The arguments in the *Young* case are reminiscent of the divide between earlier feminists who emphasized arguments based in claims of equality and those whose arguments were based in claims of difference and the need for special treatment. Although militant feminists like Alice Paul and other supporters of the ERA thought protective legislation was injurious to women and that the rationale for it ran counter to demands for equal treatment under the law, many of those differences seemed muted in 2016. The needs of pregnant workers have not really changed in the two centuries women have been working outside the home, but the willingness of courts to recognize and respect those needs without indulging in romantic paternalism has undergone substantial change, thanks to the heroic efforts of women willing to sue to advance women's rights to fair and equal treatment, and to the readiness of the enforcement agencies and members of Congress to step up when necessary.

The Pregnancy Discrimination Act, like Title VII itself and the Equal Pay Act, provides a microcosmic view of our constitutional system in operation, revealing the dynamic interplay of congressional legislative enactments, enforcement agency interpretations, and judicial construction of those enactments as the law is shaped and reshaped in response to changing circumstances. The legislative processes were radically different with the three statutes discussed here, in that the EPA was a carefully constructed enactment designed in response to a Presidential Commission's recommendation passed after two years of hearings and debates; the Title VII sex amendment added a single word to the statute, was discussed for two hours on the House floor, but was inserted at the behest of a determined and insistent small group who fought for it for over 40 years in one form or another; and the PDA was a specifically targeted statute designed to "overrule" a decision of the Court that was viewed as wrongheaded by a large and diverse group of activists who

171. *Id.* at 1351–52.

172. *Id.* at 1354.

173. *Id.* at 1354.

formed an organized effort to get what was needed with surgical precision. The success of these statutes in transforming the lives of working women cannot be overstated, but what strikes me as really remarkable is that the intellectual and emotional arguments advanced by litigants and activists in the last 53 years mirror or echo the arguments organized feminists first advanced in the early 19th century. And, there is still work to be done.

