

HARVARD LAW REVIEW

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ARTICLE

INVENTING THE “TRADITIONAL CONCEPT”
OF SEX DISCRIMINATION

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INVENTING THE “TRADITIONAL CONCEPT” OF SEX DISCRIMINATION

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It is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history. Courts have therefore argued that this prohibition must be restricted to the “traditional concept” of sex discrimination. Traditionally, courts suggest, discrimination “because of sex” referred only to practices that divided men and women into two perfectly sex-differentiated groups. Although Title VII doctrine has evolved over time, this “traditional concept” of sex discrimination continues to exert a powerful regulative influence over the law. It excludes certain claims — such as those by sexual minorities — from coverage and elevates the evidentiary burdens plaintiffs must satisfy in order to prove discrimination “because of sex.”

This Article argues that the “traditional concept” of sex discrimination is an invented tradition. It purports to reflect the historical record, but in fact reflects normative judgments about how deeply the law should intervene in the sex-based regulation of the workplace. Recovering the largely forgotten legislative history of Title VII's sex provision, this Article shows that there was little consensus and much debate in the 1960s about what qualified as sex discrimination. Employers advanced the argument that Title VII applied only to practices that sorted men and women into two perfectly sex-differentiated groups in order to preserve the traditional gendered organization of the workplace and insulate particular employment practices from scrutiny. In the 1970s, courts adopted this interpretation but no longer cited the need to preserve conventional sex and family roles as a justification; instead, courts cited deference to the legislature and fidelity to tradition as justifications for interpreting the law narrowly. This Article shows that history does not compel courts to interpret Title VII's prohibition of sex discrimination in anticlassificationist terms — and that, in fact, in cases where anticlassificationism produces expansive rather than narrow results, courts have routinely departed from it. This tendency should prompt us to think critically about the assertion that deference to the legislature and fidelity to tradition require courts to adhere to a narrow conception of what it means to discriminate “because of sex.” The parameters of Title VII's prohibition of sex discrimination have always been determined by normative judgments about how forcefully the law should intervene in practices that reflect and reinforce conventional understandings of sex and family roles.

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INTRODUCTION

In 1976, in *General Electric Co. v. Gilbert*,¹ the Supreme Court confronted the question of whether pregnancy discrimination qualified as discrimination “because of . . . sex”² under Title VII of the 1964 Civil Rights Act.³ The Court concluded in *Gilbert* that “[t]he legislative history of Title VII’s prohibition of sex discrimination [was] notable primarily for its brevity,”⁴ and shed little light on this question. In place of legislative history, the Court turned to “tradition” for guidance in interpreting the statute. “Traditionally,”⁵ the Court asserted, discrimination was defined as the division of individuals into two groups on the basis of a protected trait — as when Jim Crow laws reserved some water fountains for whites and others for blacks.⁶ Thus, the Court reasoned that, circa 1964, an employment practice would not have qualified as discrimination “because of sex” unless it divided men and women into two groups, perfectly differentiated along biological sex lines. The Court suggested that to interpret Title VII’s sex provision in any other way would be “to depart from the longstanding meaning of ‘discrimination,’”⁷ which must have guided Congress when it passed the Civil Rights Act.⁸ Pledging deference to the legislature and fidelity to tradition, the Court held in *Gilbert* that pregnancy discrimination did not constitute discrimination “because of sex” because it did not fall within the long-standing parameters of that term.⁹

This narrow, anticlassificationist understanding of Title VII’s prohibition of sex discrimination was not cabined in the 1970s to cases involving pregnancy. Courts rejected some of the earliest sexual harassment claims on the ground that the harassment at issue targeted some but not all members of the relevant class and thus did not quali-

¹ 429 U.S. 125 (1976).

² Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

³ Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

⁴ *Gilbert*, 429 U.S. at 143.

⁵ *Id.* at 145.

⁶ *See id.* (“The concept of ‘discrimination,’ of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction.”).

⁷ *Id.* at 140 n.18.

⁸ *Id.* at 145 (“When Congress makes it unlawful for an employer to ‘discriminate . . . because of . . . sex . . .,’ without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant. There is surely no reason for any such inference here.” (alterations in original) (citations omitted)).

⁹ *Id.* at 134–35 (explaining that pregnancy discrimination does not constitute discrimination “because of sex” because it divides workers “into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes,” *id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974)) (internal quotation mark omitted)).

fy as discrimination “because of sex.”¹⁰ Here too, courts commonly cited the lack of legislative history attending Title VII’s sex provision as a reason for interpreting the statute narrowly.¹¹ Sex-based Title VII claims by sexual minorities triggered a similar response. Courts uniformly rejected such claims on the ground that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”¹² “Congress had a narrow view of sex in mind when it passed the Civil Rights Act,”¹³ courts asserted, and that narrow view did not encompass discrimination against gay and transgender workers.¹⁴ Rejecting one of the first sex-based claims by a transgender plaintiff, the Seventh Circuit stated: “The total lack of legislative history surrounding the sex amendment coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.”¹⁵

¹⁰ See, e.g., *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) (asserting that “[t]he substance of plaintiff’s complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor,” and that “[r]egardless of how inexcusable the conduct of plaintiff’s supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff’s sex”); cf. *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (noting employer’s argument that because “the primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex discrimination proscriptions of the Act are not invoked”).

¹¹ See, e.g., *Miller v. Bank of Am.*, 418 F. Supp. 233, 235–36 (N.D. Cal. 1976) (noting that the “Congressional Record fails to reveal any specific discussions as to the amendment’s intended scope or impact,” *id.* at 235, and concluding that Congress could not have intended to invite “a federal challenge based on alleged sex motivated considerations of the complainant’s superior in every case of a lost promotion, transfer, demotion or dismissal,” *id.* at 236); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556–57 (D.N.J. 1976) (finding that a claim of sexual harassment by a supervisor is “clear[ly] . . . without the scope of the Act,” *id.* at 556, and that if such claims were permitted “we would need 4,000 federal trial judges instead of some 400,” *id.* at 557); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that “[t]here is little legislative history surrounding the addition of the word ‘sex’ to the employment discrimination provisions of Title VII,” and that it would “be ludicrous to hold that the sort of activity involved here” — persistent sexual advances by a supervisor that forced female employees to resign — “was contemplated by the Act”).

¹² *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

¹³ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

¹⁴ *Id.* (“[W]e decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.”); see also *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (concluding “that Congress had only the traditional notions of ‘sex’ in mind,” *id.* at 329 (quoting *Holloway*, 566 F.2d at 662), when it enacted Title VII and rejecting the notion that the law should “be judicially extended” beyond this traditional conception, *id.* at 329–30).

¹⁵ *Ulane*, 742 F.2d at 1085; see also *Holloway*, 566 F.2d at 662 (concluding “that Congress had only the traditional notions of ‘sex’ in mind” when it prohibited sex discrimination in employment and that courts are bound to adhere to “this narrow definition”).

Although Title VII doctrine has evolved over the past few decades,¹⁶ the “traditional concept” of sex discrimination, as expounded by courts in the 1970s, continues to exert a regulative influence over the law. Most notably, it fuels courts’ ongoing demand that sex discrimination plaintiffs produce opposite-sex comparators — individuals who are similarly situated to themselves in all salient respects aside from biological sex. Courts hold that only by demonstrating that such comparators were not subject to the same adverse treatment can plaintiffs prove it was their biological sex that triggered the alleged discrimination.¹⁷ This requirement has a devastating effect on plaintiffs’ ability to win sex-based Title VII claims, as adequate comparators are very rarely available in the contemporary workplace.¹⁸ In some cases — particularly those involving reproductive differences between men and women — they will never be available.¹⁹ Sex discrimination claims by

¹⁶ In 1978, Congress enacted the Pregnancy Discrimination Act (PDA), which overturned *Gilbert* and specified that Title VII’s prohibition of sex discrimination encompasses discrimination on the basis of pregnancy. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)). By the late 1970s, courts had begun to recognize sexual harassment as a form of sex discrimination, even though harassment did not necessarily sort employees into two perfectly sex-differentiated groups. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). But see Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11–26 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (noting that although the recognition of sexual harassment as sex discrimination was a significant development in Title VII law, courts in sexual harassment cases have often employed forms of reasoning that preserve the narrow, formalistic account of discrimination that was operative in the early cases). Likewise, in 1989, the Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that a firm that discriminated against a female employee on the basis of sex stereotypes violated Title VII, *id.* at 250–51 (plurality opinion), opening the door to a broader range of claims than courts in the 1970s had recognized. For a discussion of the expansive potential of *Price Waterhouse*, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 95–97 (1995).

¹⁷ See, e.g., *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (“Title VII forbids gender discrimination in employment, but gender discrimination by definition consists of favoring men while disadvantaging women or *vice versa*. The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII. This was made clear more than twenty years ago in *General Electric Co. v. Gilbert*.”).

¹⁸ See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 734, 751–64 (2011) (demonstrating that the comparator requirement “sharply narrow[s] . . . the possibility of success for individual litigants,” *id.* at 734, because individuals who are, *inter alia*, uniquely situated in their jobs or work in small or sex-segregated workplaces — a group that constitutes a large percentage of the American workforce — will only rarely have access to comparator evidence).

¹⁹ For instance, no plaintiff in the American legal system has ever persuaded a court that breast-feeding discrimination violates Title VII’s sex provision. See, e.g., *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (“[N]o judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination.”); *EEOC v. Hous. Funding II, Ltd.*, No. Civ. H-11-2442, 2012 U.S. Dist. LEXIS 13644, at *4 (S.D. Tex. Feb. 2, 2012) (“Firing someone because of lactation or breast-pumping is

sexual minorities also continue to run aground on the shoals of “tradition.” As in the 1970s, courts today often insist, when confronted with Title VII claims by gay and transgender plaintiffs, “that Congress did not intend the legislation to apply to anything other than ‘the traditional concept of sex,’”²⁰ and “that if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”²¹

This Article argues that the “traditional concept” of sex discrimination, as articulated by courts, is an “invented tradition.” The historian Eric Hobsbawm famously used that term to refer to social practices that purport to be old, or imply continuity with the past, but are actually quite recent in origin.²² By claiming to be deeply rooted in history, these practices seek “to give any desired change (or resistance to innovation) the sanction of precedent, social continuity, and natural law.”²³ Hobsbawm explained, for instance, “that a village’s claim to some common land or right ‘by custom from time immemorial’ often expresses not a historical fact, but the balance of forces in the constant struggle of village against lords or against other villages.”²⁴ This Article contends that the “traditional concept” of sex discrimination, as it was articulated in the 1970s, is just such a tradition. Courts claimed that their narrowly circumscribed definition of sex discrimination was deeply rooted in history, but in fact, it was quite new. It did not express a historical fact. It made a normative claim — not, in this case, about the boundaries of a particular plot of land but about the limits of Title VII’s prohibition of sex discrimination.

not sex discrimination.”); *Martinez*, 49 F. Supp. 2d at 310–11 (“In this case, there is and could be no allegation that Martinez was treated differently than similarly situated men. To allow a claim based on sex-plus discrimination here would elevate breast milk pumping — alone — to a protected status. But if breast pumping is to be afforded protected status, it is Congress alone that may do so.” (footnote omitted)); cf. *In re Union Pac. R.R. Emp’t Practices Litig.*, 479 F.3d 936, 944–45 (8th Cir. 2007) (holding that exclusion of contraception from employee health insurance plan does not violate Title VII because contraception coverage was denied to both men and women and therefore “the coverage provided to women [was] not less favorable than that provided to men”). For more on the continuing influence of *Gilbert*’s narrow, formalistic conception of sex discrimination in contemporary employment discrimination law, see Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 551–56 (2009).

²⁰ *In re Estate of Gardiner*, 22 P.3d 1086, 1104 (Kan. Ct. App. 2001) (quoting *Ulane*, 742 F.2d at 1085); see also *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 n.52 (E.D. La. Sept. 16, 2002) (asserting that “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex” (quoting *Ulane*, 742 F.2d at 1085)).

²¹ *Gardiner*, 22 P.3d at 1104 (quoting *Ulane*, 742 F.2d at 1087) (internal quotation mark omitted).

²² Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1–2 (Eric Hobsbawm & Terence Ranger eds., 1983).

²³ *Id.* at 2.

²⁴ *Id.*

“[A]ll invented traditions, so far as possible, use history as a legitimator of action,”²⁵ and the “traditional concept” of sex discrimination is no exception. Its authority derives primarily from the contention that it is deeply rooted in the American legal tradition. When courts focus on the formal characteristics of challenged employment practices, requiring plaintiffs to demonstrate that an employer has sorted employees precisely along biological sex lines before labeling its actions discriminatory, they purport to be deferring to a long-standing and shared consensus about what it means to discriminate “because of sex.” They suggest that this understanding has all the weight of history behind it. Yet when courts constructed this account of Title VII’s sex provision, they started from the premise that the historical record, as it pertained to sex discrimination, was nearly bare. The “traditional concept” of sex discrimination was therefore developed without any actual inquiry into the meaning that had historically been ascribed to this practice.

This Article seeks to recover that history. By 1976, the year the Court decided *Gilbert*, Americans had been debating, interpreting, and making claims on Title VII’s sex provision for over a decade. Congress took up the question of sex discrimination in employment not only in 1964, but also in 1972, when it voted to extend Title VII’s coverage to public employers.²⁶ The Equal Employment Opportunity Commission (EEOC) — the agency charged with implementing Title VII — and numerous federal district and appellate courts elaborated the scope of the law’s protections in dozens of administrative rulings and legal decisions. Outside the three branches of government, the business community, union representatives, and members of the women’s movement testified at administrative and congressional hearings, filed briefs, and issued public statements about the law’s meaning. Workers flooded the EEOC with sex discrimination claims and made arguments about the protections accorded them under the new law.²⁷

The picture that emerges from this historical record undermines the notion that the concept of sex discrimination was traditionally understood to refer — always and only — to practices that divide men and women into two groups perfectly differentiated along biological sex lines. In fact, there was great uncertainty in 1964, and for many years

²⁵ *Id.* at 12.

²⁶ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C.).

²⁷ See EQUAL EMP’T OPPORTUNITY COMM’N, 1ST ANNUAL REPORT 6, 64 (1967) (expressing surprise that 2432, or thirty-seven percent, of the complaints received by the agency in its first year in existence alleged discrimination on the basis of sex); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 123–27 (2006) (discussing the importance of American workers in shaping the development of Title VII’s prohibition of sex discrimination).

after, about the basic parameters of Title VII's prohibition of sex discrimination. It was not at all clear, for instance, that employment practices that sorted men and women into two perfectly sex-differentiated groups automatically constituted "discrimination" within the meaning of the law. It took years for the EEOC and federal courts to determine whether "protective" labor legislation and sex-segregated help-wanted advertisements discriminated "because of sex," and the conventional wisdom in this era was certainly not that *all* sex-differentiated employment practices did so. Nor was it clear that an employment practice had to divide employees along the axis of biological sex in order to count as sex discrimination. In the 1960s, members of all-female flight attendant corps charged that policies terminating their employment when they married or reached their early thirties violated Title VII, even though such policies did not divide workers along biological sex lines; the EEOC determined in the late 1960s that these policies discriminated "because of sex" even in the absence of male comparators.²⁸ Likewise, it was not until the mid-1970s that the Court held that pregnancy discrimination was not sex discrimination — a proposition that had not been at all clear prior to that point.

In the years after Title VII was enacted, legislators and other legal actors often based their determinations of what counted as sex discrimination explicitly on normative judgments about sex and family roles, and about how deeply law should interfere with employment practices that regulated these roles. When Americans in the 1960s debated whether Title VII should bar discrimination "because of sex," how vigorously this prohibition should be enforced, and what kinds of employment practices it should reach, their discussion was framed by concerns about the family and relations between the sexes. It was clear in this period that Title VII had intervened in a powerful set of practices governing the gendered organization of work and family in the United States, but there was little consensus, and much debate, about which of these practices the law should disrupt and which it should leave in place.

This history provides a foundation for thinking differently than courts often have about the concept of sex discrimination animating Title VII law. It provides a basis for conceptualizing "discrimination" in a way that is attentive not only to the formal characteristics of contested employment practices, but also to their social meaning and effects. Congress declared in 1972 that it intended sex discrimination in employment "to be accorded the same degree of social concern" as oth-

²⁸ See *infra* pp. 1348–51.

er prohibited forms of discrimination,²⁹ and in 1978 it rejected *Gilbert*'s narrow, formalistic conception of sex discrimination.³⁰ These legislative interventions, along with the legislative history and early reception of Title VII's sex provision in 1960s, raise questions about the regulative uses of “tradition” in Title VII law today.

Courts today frequently assert that departing from the “traditional concept” of sex discrimination would entangle them in normative or policy judgments best left to Congress. But this Article shows that the “traditional concept” of sex discrimination — the idea that employer conduct is discriminatory only and whenever it bifurcates employees along biological sex lines — itself embodies a robust set of normative judgments about how forcefully the law should interfere in the regulation of sex and family roles. When Title VII was first enacted, opponents argued that its prohibition of sex discrimination should be stricken, or simply unenforced, because it threatened to disrupt the socially beneficial regulation of men's and women's sex and family roles. When plaintiffs began to file sex-based Title VII claims in court, employers argued that the statute's bona fide occupational qualification (BFOQ) exception — which permits discrimination in cases where such discrimination is “reasonably necessary to the normal operation” of a business³¹ — should be interpreted broadly, to preserve longstanding forms of sex-based regulation. As the EEOC and federal courts began to take Title VII's prohibition of sex discrimination more seriously — due in significant part to the emergence of the women's movement — arguments that simply rejected the law or defended the practice of sex discrimination grew less persuasive. As these arguments faltered, employers increasingly began to argue that the concept of sex discrimination itself was extremely narrow and referred only to practices that formally sorted employees along biological sex lines. The employers who made this argument in the late 1960s were quite explicit about their desire to cabin Title VII's reach. They urged the EEOC and the courts to adopt this narrow, anticlassificationist conception of sex discrimination because it would allow businesses more leeway to enforce conventional gender norms and thereby help to preserve the traditional organization of the American family.

²⁹ H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 (report of the House Education and Labor Committee on the Equal Employment Opportunity Act of 1972); *see also* S. REP. NO. 92-415, at 7 (1971) (stating that sex discrimination “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”).

³⁰ *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

³¹ Civil Rights Act of 1964 § 703(e), 42 U.S.C. § 2000e-2(e).

Gilbert and similar decisions in the 1970s obscured this history. These decisions adopted the tightly circumscribed definition of sex discrimination offered by employers in the 1960s, but asserted that this way of reasoning about the meaning of sex discrimination lacked any normative underpinnings. Talk of deference to the legislature and fidelity to tradition replaced discussion of the need to preserve the traditional family and women's role within it. Recovering the history of the "traditional concept" of sex discrimination reveals that this narrow form of reasoning did not stand outside normative debates about how far Title VII's protections should extend: it was a part of those debates. This remains true today. Courts' continued adherence to the "traditional concept" of sex discrimination significantly limits Title VII's scope and insulates from judicial scrutiny various forms of regulation that maintain social stratification. As this Article will show, these limitations are not simply the product of judicial deference: they represent ongoing normative judgments about how forcefully antidiscrimination law should seek to combat employment practices that reinforce traditional understandings of men's and women's roles.

Part I of this Article examines the legislative history and early reception of Title VII's prohibition of sex discrimination. Conventional wisdom suggests that this prohibition has no legislative history. In place of legislative history, courts have developed an account of "tradition" that suggests that the legislators who passed the Civil Rights Act could only have conceived of the concept of sex discrimination in narrow, anticlassificationist terms. This account is based on mistaken assumptions about the way sex discrimination was defined in the mid-1960s and the degree of consensus that existed about which employment practices Title VII rendered illegal. Proponents and opponents of the statute — inside and outside of Congress — argued that the legislation would disrupt the enforcement of traditional sex and family roles. But there was considerable debate in this period about which particular employment practices the statute barred and how deeply the law should intervene in regulation of gender norms in the workplace. These debates show that the meaning of sex discrimination at the time Title VII was enacted was far more malleable and responsive to social concerns than courts have generally recognized.

Part II examines the largely forgotten history of sex-based employment discrimination law in the years before the Supreme Court heard its first Title VII case. The widely varying and frequently shifting interpretations of Title VII's sex provision offered by the EEOC and courts in this period dramatically illustrate that the determination of whether an employment practice constituted discrimination "because of sex" did not always hinge on the formal characteristics of the practice. In the 1960s, debate over the scope of Title VII's prohibition of sex discrimination focused explicitly on the normative question of how deeply, or even whether, the law should intervene in a set of practices

that reflected and reinforced conventional understandings of men's and women's roles. This Part shows that the idea that Title VII applied only to employment practices that divided men and women into two perfectly sex-differentiated groups emerged in this period as an answer to that question. But it was not the only answer. The women's movement, some courts, and Congress itself offered different and more socially attentive accounts of the statute's prohibition of sex discrimination.

Part III begins by examining how *Gilbert* effaced the history of Title VII's sex provision and constructed a new account of what that provision "traditionally meant."³² The Court claimed in *Gilbert* that its narrow, formalistic conception of sex discrimination, which eschewed any concern about the social meaning of contested employment practices, was deeply rooted in the American legal tradition. This claim disguised both the recent provenance of this conception and the normative judgments embedded in the notion that Title VII's prohibition of sex discrimination did not apply to practices such as pregnancy discrimination. This Part ends by examining the formidable influence that the "traditional concept" of sex discrimination still exerts over contemporary employment discrimination law. Framed in terms of deference and fidelity, this concept obscures the normative judgments about sex and family roles that continue to influence determinations about what counts as discrimination "because of sex."

I. RECOVERING THE LEGISLATIVE HISTORY OF TITLE VII'S SEX PROVISION

It is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history.³³ When President Kennedy decided in the summer of 1963, in the wake of the Birmingham riots, to pursue civil rights legislation, his aim was to secure legal protections against race discrimination.³⁴ By the time

³² Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976).

³³ See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute . . . and we are left with little legislative history to guide us in interpreting [this prohibition]."); DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW 331 (8th ed. 2010); JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 375–77 (6th ed. 2007); GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION 222 (2005).

³⁴ See President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), available at <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Radio-and-Television-Report-to-the-American-People-on-Civil-Rights-June-11-1963.aspx> ("Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law. . . . The old code of equity law under which we live commands for every wrong a remedy, but in too many communities, in too many parts of the country, wrongs are in-

Virginia Representative Howard W. Smith offered an amendment proposing to add “sex” to Title VII,³⁵ the legislative debate over the bill was almost over. Smith’s amendment triggered only a few hours of discussion, and legal commentators have generally characterized his intervention as a last-ditch, if ultimately unsuccessful, attempt to derail a piece of legislation to which he was fiercely opposed.³⁶

The circumstances under which “sex” was added to Title VII raise questions about the value of an “archaeological”³⁷ expedition into the statute’s legislative history. The documentary record is meager: one afternoon of debate, no committee reports or legislative hearings. Moreover, the values and requirements of American society have evolved substantially since the mid-1960s, and so has the American workplace. For these reasons, Title VII seems particularly suited to a dynamic form of interpretation,³⁸ which considers not only text and legislative history, but “also what [a statute] ought to mean in terms of

flicted on Negro citizens and there are no remedies at law. Unless the Congress acts, their only remedy is in the street.”).

³⁵ 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

³⁶ Representative Smith had been a committed opponent of civil rights legislation throughout his career and was a signatory of the Southern Manifesto, which famously decried the Court’s decision in *Brown v. Board of Education* and pledged “to use all lawful means to bring about [its] reversal.” 102 CONG. REC. 4460 (1956). Smith’s background and his ongoing, outspoken opposition to civil rights legislation designed to benefit racial minorities have led many to conclude that his late-breaking amendment was motivated by a desire to disrupt the smooth passage of the civil rights bill. For accounts suggesting Smith’s eleventh-hour intervention was an attempt to kill the civil rights bill by introducing a provision he knew would be unpopular with his colleagues, see, for example, WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 14–15 (4th ed. 2007); SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* 161–62 (2003); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–18 (1985); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1283–84 (1991). Some commentators have suggested that Smith’s motivations were more complex than the standard account allows. For accounts suggesting that Smith was acting at the behest of women’s rights advocates and wanted to ensure that, if the legislation passed, white women would be entitled to all the legal protections afforded racial minorities, see 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, 150–53, 156–58 (1997); 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, 41–50 (1983); Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW & INEQ.* 163, 174–76 (1991).

³⁷ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 13 (1994) (referring to interpretative approaches that look to the past — and particularly to contemporaneous legislative materials — to discover the original meaning or intent of a statute).

³⁸ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. PA. L. REV.* 1479, 1554–55 (1987) (“Dynamic interpretation is most appropriate when the statute is old yet still the source of litigation, is generally phrased, and faces significantly changed societal problems or legal contexts.”).

the needs and goals of our present day society.”³⁹ Indeed, given the piecemeal manner in which Title VII was drafted,⁴⁰ the fact that the statutory text never defines the words “discriminate” or “sex,” and the enormous social changes that have occurred in this context since 1964, the “historical perspective” seems unlikely to “provide[] . . . decisive[] guidance for solving the interpretive puzzle[s]”⁴¹ in contemporary sex discrimination law.

This Part argues that there is nonetheless much to be gained by recovering the largely forgotten legislative history of Title VII’s prohibition of sex discrimination.⁴² In revisiting the debate that transpired over Title VII’s prohibition of sex discrimination in the winter of 1964, this Part does not aim to develop an account of original meaning or legislative intent capable of definitively resolving current dilemmas in employment discrimination law. In fact, it aims to deconstruct such an account. Over the past five decades, claims about the narrow mindset and goals of the Eighty-Eighth Congress have exerted a powerful regulative influence over the interpretation of Title VII’s sex provision. Courts have routinely invoked legislative history — or, rather, the lack thereof — to explain why certain claims fall outside the statute’s scope and why plaintiffs need to satisfy particular evidentiary burdens in order to establish they have truly been discriminated against “because of sex.” Although the boundaries of Title VII’s sex provision have shifted dramatically over the past half-century, courts have consistently asserted that the absence of legislative history and the clear parameters of the “traditional concept” of sex discrimination establish narrow “bounds beyond which a court cannot go without transgressing the prerogatives of Congress.”⁴³

³⁹ *Id.* at 1480 (quoting Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)); *see also id.* at 1554 (arguing that because statutes “have different meanings to different people, at different times, and in different legal and societal contexts . . . federal courts should interpret statutes in light of their current as well as historical context”).

⁴⁰ *Id.* at 1490 & n.42 (describing the many stages involved in transforming President Kennedy’s proposed job discrimination provision into Title VII of the 1964 Civil Rights Act).

⁴¹ *Id.* at 1490.

⁴² Although judicial decisions and employment discrimination casebooks have rarely taken the legislative history of Title VII’s sex provision seriously, this history has not been entirely dismissed in academic literature. *See, e.g.*, Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 765, 767–69 (2002) (rejecting the notion that Smith’s amendment was simply a joke); *see also* Franke, *supra* note 16, at 14–25 (arguing that there is “a rich congressional legislative history concerning the equal rights of women,” *id.* at 15, which includes the brief legislative history of Title VII’s sex amendment but also encompasses debates extending back over several decades); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 771 (2004) (noting that the amendment was strongly supported by a number of feminist legislators in the House).

⁴³ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

These assertions about the outer limits of Title VII's prohibition of sex discrimination are couched in terms of deference to the legislature and fidelity to history. But courts making such assertions have rarely consulted the historical record.⁴⁴ In fact, they have typically been incurious at best about the legislative history attending Title VII's sex provision and about the broader history of sex-based regulation in the workplace. This inattentiveness has obscured both the deep uncertainty at the time Title VII was enacted about which employment practices the statute barred, and the fact that the legislative debate treated sex discrimination as "a social phenomenon encased in a social context."⁴⁵ Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s that the determination of whether an employment practice discriminated on the basis of sex could be made simply by asking whether an employer had divided employees into two groups perfectly differentiated along biological sex lines. Whether or not they supported the addition of "sex" to Title VII, legislators who participated in the debate over Title VII's sex provision reasoned about sex discrimination in more substantive and socially attentive ways. Revisiting this debate may not provide conclusive answers to hard cases in Title VII law today. But it should prompt us to think critically about the assertion that fidelity to "tradition" compels courts to adhere to a narrow conception of what it means to discriminate "because of sex."

A. *The Case Against Adding "Sex" to Title VII*

One of the many strange features of the legislative debate over the addition of "sex" to Title VII is the fact that the strongest opposition came from the legislators who were most committed to the project of civil rights. In part, these legislators were wary of the sex amendment because it was introduced by Representative Smith and was therefore perceived as a distraction from, or even an assault on, the primary agenda of the civil rights bill. But the concerns fueling opposition to the sex amendment were also substantive. The leading congressional proponents of the civil rights bill shared the view, common among progressives in this period, that "mores have set off women from men,"⁴⁶ and that workplace law and policy should acknowledge women's special role in the family. From this perspective, a proposal to bar

⁴⁴ See, e.g., *id.* at 1085–86 (citing the "total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption," *id.* at 1085, as proof that "Congress had a narrow view of sex in mind," *id.* at 1086, when it decided to bar sex discrimination in employment).

⁴⁵ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting).

⁴⁶ CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES*, 1945–1968, at 122 (1988) (quoting Rep. Celler) (internal quotation mark omitted).

sex discrimination in the workplace looked like a threat to a hard-won set of employment regulations premised on the notion that women "were marginal participants in labor markets . . . [a]nd . . . were especially deserving of public protection as actual or potential mothers."⁴⁷ Indeed, opponents approached the debate over the sex amendment as a referendum on the question of whether employers should be permitted to regulate their employees in ways that reflected and reinforced long-standing conceptions of women's sex and family roles.⁴⁸

Those who opposed the amendment repeatedly cited, as evidence of the amendment's undesirability, the documented opposition of leading members of the labor and women's rights communities to any law that would undermine legal "protections" designed to accommodate women's special responsibilities in the home.⁴⁹ The most important of these documents was the 1963 report of the President's Commission on the Status of Women (PCSW),⁵⁰ a body convened by President Kennedy

⁴⁷ THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 374 (1992). For more on the history of "protective" labor legislation and the ways in which such legislation reinforced traditional conceptions of men's and women's sex and family roles, see JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 42–69 (1978); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 19–63 (2001); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 180–214 (1982) [hereinafter *KESSLER-HARRIS, OUT TO WORK*]; SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925*, at 41–93 (1987).

⁴⁸ By calling attention to the central role that concerns about gender and the family played in the debate over Title VII's sex provision, this Part in no way seeks to minimize the role that race played in this debate. Opponents of the sex amendment were undoubtedly concerned about the possibility that this amendment would derail their efforts to combat racial inequality, and proponents of the amendment also invoked race, sometimes in racist ways, to explain why the amendment was necessary. For more on the uses of race in the debate over Title VII's sex provision, see Mayeri, *supra* note 42, at 770–73.

⁴⁹ See, e.g., 110 CONG. REC. 2577 (1964) (statement of Rep. Celler) (quoting a letter from the Women's Bureau of the Department of Labor opposing the addition of "sex" to Title VII); *id.* at 2578 (noting the opposition of the President's Commission on the Status of Women); *id.* at 2582 (statement of Rep. Green) (quoting a letter from the American Association of University Women opposing the sex amendment).

⁵⁰ See *PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN* (1963), reprinted in *AMERICAN WOMEN: THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION* 7–95 (Margaret Mead & Frances Balgley Kaplan eds., 1965) [hereinafter *AMERICAN WOMEN*]. The Executive Order establishing the PCSW charged it with "responsibility for developing recommendations for overcoming discriminations in government and private employment on the basis of sex and for developing recommendations for services which will enable women to continue their role as wives and mothers while making a maximum contribution to the world around them." Exec. Order No. 10,980, 26 Fed. Reg. 12,059 (Dec. 14, 1961), reprinted in *AMERICAN WOMEN, supra*, at 207. The PCSW's Report reflected the tensions inherent in this charge. See also 110 CONG. REC. 2584 (statement of Rep. Celler) (inviting Representative James Roosevelt, son of Eleanor Roosevelt, to introduce into the *Congressional Record* "some of the names of the women members and the or-

and chaired by Eleanor Roosevelt.⁵¹ The PCSW supported the principle that women have a right to work outside the home and receive equal pay for equal work,⁵² but generally adhered to the view that women's primary calling remained in the home.⁵³ The Committee on Home and Community reported that "the care of the home and the children remain [women's] unique responsibility. No matter how much everyday tasks are shared . . . the care of the children is primarily the province of the mother. This is not debatable as a philosophy. It is and will remain a fact of life."⁵⁴ In instances where expanded opportunity in employment seemed to threaten women's commitment to home and family, the PCSW argued against expanded opportunity. Thus, although the PCSW "identified a number of outmoded and prejudicial attitudes and practices"⁵⁵ among American employers, it did not advocate a law prohibiting sex discrimination in the workplace.⁵⁶ The PCSW feared that such a prohibition would jeopardize regulations that shielded women from the harshest demands of the labor market⁵⁷ and enabled them to fulfill their "day-to-day responsibility in the home."⁵⁸

Legislators who opposed adding "sex" to Title VII shared the PCSW's fears about the effect that a law prohibiting sex discrimination in employment would have on the regulation of traditional sex and family roles. If the sex amendment became law, Representative Emanuel Celler asked:

Would male citizens be justified in insisting that women share with them the burdens of compulsory military service? What would become of traditional family relationships? What about alimony? Who would have the obligation of supporting whom? Would fathers rank equally with mothers in the right of custody to children? What would become of the crimes of rape and statutory rape? Would the Mann Act be invalidated? Would the many State and local provisions regulating working conditions and hours of employment for women be struck down?⁵⁹

ganizations that are represented on th[e] President's Commission of which [his] late lamented mother was Chairman").

⁵¹ See Margaret Mead, *Introduction*, in AMERICAN WOMEN, *supra* note 50, at 1, 3-4.

⁵² See HARRISON, *supra* note 46, at 142-51.

⁵³ See *id.* at 159 (noting that "the commission . . . resolved to remain firmly within the framework of traditional family roles").

⁵⁴ PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON HOME AND COMMUNITY 9 (1963).

⁵⁵ AMERICAN WOMEN, *supra* note 50, at 20.

⁵⁶ See *id.* at 48-49.

⁵⁷ See HARRISON, *supra* note 46, at 151-54.

⁵⁸ AMERICAN WOMEN, *supra* note 50, at 35; see also HARRISON, *supra* note 46, at 140.

⁵⁹ 110 CONG. REC. 2577 (1964) (statement of Rep. Celler). Representative Celler, the most vocal opponent of the sex amendment, was a Democrat from New York who served as Chairman

Celler argued that nobody, least of all women, would benefit from attempts to dismantle the legal foundation that supported the traditional sex-role structure. Barring employers from discriminating "because of sex," he claimed, would have negative "repercussions . . . throughout . . . all facets of American life,"⁶⁰ and family life in particular.⁶¹ He and other opponents of the amendment suggested that Congress should "say 'vive la difference'"⁶² in matters pertaining to sex and continue to legislate in a manner that supported men and women in their conventional roles.

To this end, Representative Robert Griffin of Michigan offered an amendment to the sex amendment. The Griffin amendment sought to bar workers from filing a claim of sex discrimination under Title VII unless they also filed a sworn statement that their spouse was unemployed.⁶³ Griffin explained that if his amendment were adopted, "it would not prevent or prohibit any married woman from working because her husband also has a job."⁶⁴ However, as a practical matter, it would permit employers to prefer male workers over married women, and thereby ensure that a woman who enjoyed the financial support of a husband could not lay claim to a job that might otherwise go to "an unemployed man with a family to support."⁶⁵ In offering this amendment, Griffin was not inventing new social policy, but seeking to preserve the advantages that employment regulation had always accorded men — particularly in periods of economic downturn.⁶⁶ In fact, his proposal was modeled on a law enacted early in the Great Depression, which mandated that the first federal employees to lose their jobs in the event of layoffs would be those whose spouses were also employed by the federal government.⁶⁷ "Virulent campaigns to eliminate [married women] from the labor force persisted" throughout the 1930s, as public and private employers adopted policies restricting or completely barring the employment of such women.⁶⁸ Underlying these policies — and the Griffin amendment — was a deeply rooted belief "that women's access to wage work should be conditioned by family

of the House Judiciary Committee throughout the civil rights era and often championed legislation designed to expand the rights of racial minorities.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.* at 2731 (statement of Rep. Griffin).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.* (arguing that "[t]he fact that many heads of families are out of jobs poses a serious problem for this Nation").

⁶⁷ *See* KESSLER-HARRIS, *OUT TO WORK*, *supra* note 47, at 257 (noting that over 1600 people were discharged pursuant to this law, the vast majority of whom were women).

⁶⁸ *Id.*

needs.⁶⁹ On this view, men, women, and children would all be better off if workplace regulation encouraged, or even compelled, women to elevate their roles as wives and mothers above their roles as wage-earners.

Griffin's amendment vividly illustrates the extent to which the debate over Title VII's prohibition of sex discrimination was a debate about men's and women's roles in the family.⁷⁰ Legislators who opposed adding "sex" to Title VII argued that it would alter laws and customs governing wife- and motherhood, and in so doing wreak havoc on the home. In this way, the debate over Title VII's sex provision closely resembled earlier debates over women's suffrage. As Reva Siegel has shown, the debate over enfranchising women "was, from surface to core, an argument about the family."⁷¹ Women's customary and legal obligations to their husbands and children served as central justifications for their exclusion from the public sphere, and women's disenfranchisement was considered essential to the preservation of family harmony. Opponents of women's suffrage "depicted the prospect of women voting as an expression of . . . misplaced individualism that betrayed a selfish disregard for a woman's responsibilities in sustaining family life. Women's assertion of individuality appeared socially problematic . . . because it called into question the traditional distribution of authority and division of labor in the family."⁷² Antisuffragists argued that permitting women to vote would run counter to conceptions of the family that had governed Anglo-American law for centuries.

Legislators who opposed adding "sex" to Title VII framed their opposition in similarly family-centric terms. They argued, as antisuffragists had fifty years earlier, that granting women equal access to the public sphere would disrupt understandings of the family that had long structured American life. They depicted women who would compete for jobs in a nation where "many heads of families are out of

⁶⁹ *Id.* at 254.

⁷⁰ In 1975, conservative activist Phyllis Schlafly revived Griffin's efforts, calling on Congress to amend Title VII to "authorize employers to give job preference in hiring and promotions, and retentions during layoffs, to the . . . Principal Wage Earner in each family." *Unemployment — Causes and Solutions*, PHYLLIS SCHLAFLY REP., Nov. 1975, at 1, 1 (on file with the Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University). Echoing Griffin, Schlafly argued that employment policies favoring male breadwinners were socially beneficial because they "encourag[ed] homemakers to stay in the home, rather than competing in the labor market for the scarce available jobs." PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 166 (1977).

⁷¹ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981 (2002). See generally AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920* (1965).

⁷² Siegel, *supra* note 71, at 996.

jobs”⁷³ as selfish individualists heedless of the needs of their fellow citizens. They claimed that the smooth functioning of American society depended on the subordination of women’s career ambitions to the needs of their families. Opponents of the sex provision also shared the antisuffragist view that the legal regulation of women’s sex and family roles benefitted women themselves. They argued that laws and practices that restricted women’s access to the workplace affirmed the sacrosanct principle that women were mothers first and workers second, and that it was men’s responsibility to ensure that their families were safe and financially sound.⁷⁴

It is not surprising that legislators in 1964 should have viewed the issue of sex discrimination in employment through this lens. Sex-based regulation of the labor market, no less than sex-based regulation of other facets of citizenship, had traditionally been understood as a critical means of regulating men’s and women’s sex and family roles. Alice Kessler-Harris has shown, for instance, that sex-based pay differentials were long understood and explicitly justified as a means of steering men and women onto different life paths. Traditionally, she writes, the wages men and women were paid “reflected a rather severe set of injunctions about how [they] were to live. . . . [P]art of the function of the female wage was to ensure attachment to family. The male wage, in contrast, provided incentives to individual achievement.”⁷⁵

These observations are true not only of the wage, but also of the constellation of other laws and practices that have historically regulated men’s and women’s participation in the labor market. As opponents of the sex amendment recognized, such regulation provided individuals with instructions for living. It did not simply define the tasks men and women performed during the workday. It dictated how they lived, and with whom; it profoundly shaped their identity in both public and private settings.⁷⁶ Thus, Celler and his colleagues argued, it

⁷³ 110 CONG. REC. 2731 (1964) (statement of Rep. Griffin).

⁷⁴ The legislators who opposed adding “sex” to Title VII did not argue, as antisuffragists had earlier in the twentieth century, that granting women equal access to the public sphere would infringe on male dominance. In fact, legislators in 1964 were quite anxious to deny that laws restricting women’s access to the workforce were a product of men’s authority over women. Yet their repeated claims that women were the true authority figures in American society were themselves rooted in an old and sexist rhetorical tradition. See, e.g., *id.* at 2577 (statement of Rep. Celler) (reporting that when he argued with his wife, he “usually ha[d] the last two words, and those words are, ‘Yes, dear,’” and noting that when George Bernard Shaw wrote his famous play, *Man and Superman*, “man was not the superman, the other sex was”); *id.* at 2582 (statement of Rep. Thompson) (noting that men currently permit women to board lifeboats first during aquatic disasters and warning that prohibiting sex discrimination might rob women of this valuable advantage).

⁷⁵ ALICE KESSLER-HARRIS, A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES 19 (1990).

⁷⁶ For an eloquent description of how work can be “constitutive of citizenship, community, and even personal identity,” see Vicki Schultz, Essay, *Life’s Work*, 100 COLUM. L. REV. 1881,

may seem “[a]t first blush . . . fair, just, and equitable” to prohibit sex discrimination in employment, “[b]ut when you examine carefully what the import . . . [of equal rights would be for] American life you run into a considerable amount of difficulty.”⁷⁷ To prohibit sex discrimination in employment, opponents argued, would be to reject the basic organizing principles governing relations between men and women and the institution of the family. Such an act, Celler warned, could have “unlimited” consequences for American society.⁷⁸

B. Support for the Sex Amendment

It was a sign of the changes that would soon rock the American political and cultural landscape that proponents of the sex amendment did not deny accusations that adding “sex” to Title VII would threaten the enforcement of traditional sex and family roles. In fact, the chief proponents of the sex amendment argued that this was its core purpose. In response to the claims of Representative Celler and his colleagues, a succession of female legislators from both political parties argued that, in fact, employment practices that enforced the traditional sex-role structure were detrimental to women and their families, and that adding “sex” to Title VII would help to eradicate such practices.

To illustrate this point, proponents of the sex amendment endeavored to show that “[m]ost of the so-called protective legislation” did not actually serve to protect women.⁷⁹ Representative Martha Griffiths, a Democrat from Michigan, noted that employers were likely to refuse to hire women to drive haulaway trucks on the ground that they were physically incapable of the work.⁸⁰ Yet women were employed as schoolbus drivers — and, Griffiths pointed out, they drove streetcars during the Second World War.⁸¹ Thus, she intimated, it was not the size of the truck that determined which jobs women were permitted to do, but the size of the paycheck and the cultural connotations of the job.⁸² Employers reserved for male drivers the high-paying jobs that involved travel and funneled women into low-paying jobs that involved children.

Griffiths’s Republican colleague, Representative Katharine St. George, echoed these arguments. She noted that under current law, women “cannot run an elevator late at night and that is when the pay

1886, 1886–92 (2000); for another such description, see Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–33 (1997).

⁷⁷ 110 CONG. REC. 2577 (statement of Rep. Celler).

⁷⁸ *Id.* at 2578.

⁷⁹ *Id.* at 2580 (statement of Rep. Griffiths).

⁸⁰ *Id.* at 2579.

⁸¹ *Id.*

⁸² *See id.* at 2579–80.

is higher. They cannot serve in restaurants and cabarets late at night — when the tips are higher — and the load . . . is lighter.”⁸³ Thus, St. George argued, the chief effect of “protective” laws was to prevent women “from going into the higher salary brackets.”⁸⁴ If legislators were truly concerned about protecting women, she asserted, they would have extended “protective” legislation to the women most in need of it, such as those who cleaned offices “every morning about 2 or 3 o’clock in the city of New York and . . . quite early here in Washington, D.C.”⁸⁵ But, she declared, “I have never heard of anybody worrying about the women who do that work,”⁸⁶ implying that “protective” legislation had more to do with enforcing conventional notions of (white) women’s sex and family roles than shielding them from actual hazards in the workplace.⁸⁷

Proponents of the sex amendment agreed with their opponents that the debate over adding “sex” to Title VII implicated forms of legal regulation that were deeply rooted in American history. They asserted, however, that this was not a proud legal tradition; they argued that the myriad discriminatory employment practices plaguing female workers in the 1960s were part of a long and extensive history of subordination of women in the American legal system. Representative St. George claimed that to appreciate fully the harm that laws enforcing conventional understandings of sex and family roles had visited on women, one would have “to go back to the days of the revolution when women were chattels.”⁸⁸ Women, she noted, “were not mentioned in the Constitution.”⁸⁹ Under the common law tradition of coverture, “[t]hey belonged, first of all, to their fathers; then to their husbands or to their nearest male relative. They had no command over their own property. They were not supposed to be equal in any way, and certainly they were never expected to be . . . equal intellectually.”⁹⁰ She suggested

⁸³ *Id.* at 2580 (statement of Rep. St. George).

⁸⁴ *Id.*

⁸⁵ *Id.* at 2581.

⁸⁶ *Id.*

⁸⁷ Representative St. George’s comments called attention to the fact that “protective” labor policies were generally applied to jobs performed by white women. Black women were excluded from many of the Progressive and New Deal–era policies designed to “protect” women and enable them to spend more time with their children. For more on this topic, see JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 199–200* (1985). See generally GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942* (1995) (examining racial differences in the regulation of women through welfare policy in the interwar period).

⁸⁸ 110 CONG. REC. 2581 (statement of Rep. St. George).

⁸⁹ *Id.* For an argument suggesting that feminist claims made during the debate over Title VII influenced the subsequent development of constitutional sex discrimination law, see Case, *supra* note 42, at 769.

⁹⁰ 110 CONG. REC. 2581 (statement of Rep. St. George).

that “protective” legislation and other regulations that restricted women’s opportunities in the labor market reflected the same set of gender norms that animated the law of coverture.

Representative Griffiths argued that the best contemporary illustration of this tradition was *Goesaert v. Cleary*,⁹¹ in which the Supreme Court upheld a Michigan law permitting women to tend bar only in establishments owned by their fathers or husbands. The Court held in *Goesaert* that the state had a legitimate reason for wanting to ensure that female bartenders would receive the “protecting oversight” of a male family member.⁹² The Court explained that “a man’s ownership provides control” in a situation that might otherwise threaten a woman’s sexual purity, or the morals of her customers.⁹³ Griffiths argued that adding “sex” to Title VII would strike a much-needed blow against this “vulgar and insulting”⁹⁴ ideology and liberate women from the confines of these outmoded conceptions of sex and family roles.⁹⁵ “[W]e have fought our way a long way since those days of the Revolution,”⁹⁶ St. George argued, and adding “sex” to Title VII would help to advance women’s ongoing struggle to overcome stereotyped conceptions of their place in American society.⁹⁷

Twelve years after this debate transpired, the Court concluded in *Gilbert* that the legislative history of Title VII’s sex provision was “notable primarily for its brevity.”⁹⁸ But in fact, the legislative debate over Title VII’s sex provision emphasized the most distinctive feature of sex discrimination, in 1964 and throughout American history: namely, that it was understood as a means of enforcing conventional sex and family roles. Historically, laws restricting women’s right to vote, own property, and enter into contracts were justified by reference to their status as wives and mothers. In the century before Congress enacted Title VII, courts consistently upheld such laws *because* they reinforced the idea that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother,” and the primary role of men is to act as “woman’s protector and defender.”⁹⁹

⁹¹ 335 U.S. 464 (1948).

⁹² *Id.* at 466.

⁹³ *Id.* at 467.

⁹⁴ 110 CONG. REC. 2580 (statement of Rep. Griffiths).

⁹⁵ *Id.* at 2580–81.

⁹⁶ *Id.* at 2581 (statement of Rep. St. George).

⁹⁷ *See id.*

⁹⁸ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

⁹⁹ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in the judgment). One exception to this rule is *Adkins v. Children’s Hospital of the District of Columbia*, 261 U.S. 525 (1923), in which the Court struck down a law limiting women’s working hours after finding that the recently enacted Nineteenth Amendment signaled a change in the way that Americans thought about women’s role in the public sphere. *See id.* at 553.

Sex-based employment regulation formed a central part of this tradition. Such regulation was long understood as a means of affirming the notion that men and women play complementary roles in the family, and of ensuring that women's domestic roles trumped their roles outside the home. Legislators in 1964 disagreed about the normative valence of this tradition, but the most vocal among them appeared to share Representative Celler's view that Title VII constituted an "entering wedge"¹⁰⁰ in the campaign to dismantle it.

C. Uncertainty Regarding the Applications of Title VII's Sex Provision

In the fall of 1965, one hundred days after Title VII went into effect, EEOC Chairman Franklin D. Roosevelt, Jr., reported to President Johnson that "[i]mplementation of Title VII's prohibition against discrimination on account of sex has been a particularly challenging assignment for the Commission."¹⁰¹ Roosevelt acknowledged that "[c]ertain traditional ideas" about women's sex and family roles would need to be "drastically revised" in response to the new law.¹⁰² But, he explained, the EEOC was having tremendous difficulty "translat[ing] this broad but general mandate into comprehensive and comprehensible standards for employer conduct."¹⁰³

The difficulty for the EEOC was that, as Representative Celler noted, the potential consequences of Title VII's prohibition of sex discrimination seemed "unlimited."¹⁰⁴ The statute appeared to "change the whole social concept upon which this country was built of the stability of the family."¹⁰⁵ Yet what this change would mean in practice was unclear. During his tenure at the EEOC, Roosevelt frequently lamented that the text of Title VII's sex provision and its legislative history offered "little guidance" regarding the question of which employment practices the statute had rendered illegal.¹⁰⁶ The statute did

¹⁰⁰ 110 CONG. REC. 2578 (statement of Rep. Celler).

¹⁰¹ *EEOC Reports to President on First 100 Days of Activity*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8024, at 6036 (Nov. 12, 1965) [hereinafter *EEOC Reports*].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 110 CONG. REC. 2578 (statement of Rep. Celler).

¹⁰⁵ Transcript of the White House Conference on Equal Employment Opportunity, Panel 3: "Discrimination Because of Sex" 127 (Aug. 19-20, 1965) [hereinafter White House Transcript] (on file with the EEOC Library, Washington, D.C.) (statement from the floor).

¹⁰⁶ *EEOC Reports*, *supra* note 101, at 6036; see also *Administration of Sex Discrimination Provisions of Title VII Discussed by EEOC Chairman*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8005, at 6010 (Aug. 1965) (explaining that the EEOC was "starting out with very few guidelines" to assist in its interpretation of Title VII's "complex and controversial [sic]" prohibition of sex discrimination (quoting Franklin D. Roosevelt, Jr.)); *Sex Discrimination in Employment Discussed by EEOC Chairman*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8022, at 6033 (Oct. 12, 1965) (noting that the EEOC "must develop guidelines as we go

not define the terms “sex” or “discriminate,” and Congress did not discuss in any systematic way how its prohibition of sex discrimination would apply on the ground.

In fact, when Congress did discuss particular employment practices during its brief debate over the sex amendment, it did not reach any consensus about their postenactment viability. Congress’s discussion of “protective” labor legislation is a case in point. Representative Celler and other opponents of the sex amendment argued during the legislative debate that prohibiting sex discrimination in employment would do away with “protective” labor laws. Proponents of the amendment tended to agree with this assessment. Yet in practice, the question of whether Title VII outlawed “protective” labor legislation was more complicated than this superficial — and momentary — agreement suggested.

Advocates of the sex amendment did not argue that prohibiting sex discrimination would preclude employers from making any distinctions between men and women. They claimed that adding “sex” to Title VII would bar employers from making “invidious distinctions of the sort drawn by the statute [in *Goesaert*].”¹⁰⁷ Thus, they argued that Title VII’s prohibition of sex discrimination would outlaw most “protective” labor legislation not because it differentiated between the sexes, but because the effect of “[m]ost of the so-called protective legislation has really been to protect men’s rights in better paying jobs.”¹⁰⁸ This argument left open a very real possibility that sex-based legislation that was genuinely protective of women’s interests would be permissible under Title VII. In fact, one vocal congressional proponent of the sex amendment explicitly stated that adding “sex” to Title VII would not automatically overturn differential legislation designed to benefit women.¹⁰⁹ This assessment was bolstered by an influential memorandum circulated in Congress by lawyer and civil rights activist Pauli Murray in the weeks before the final vote on the civil rights bill. Murray’s memo noted that state law in New York and Wisconsin already prohibited sex discrimination in employment, but that this prohibition was not understood, in either state, to apply to “protective” labor legislation.¹¹⁰

along” in the context of sex, and that, as a result, the agency did “not have all the answers” about the practical applications of Title VII’s sex provision).

¹⁰⁷ 110 CONG. REC. 2580 (statement of Rep. Griffiths) (quoting *Goesaert v. Cleary*, 335 U.S. 464, 468 (Rutledge, J., dissenting)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2583 (statement of Rep. Kelly) (“I believe in equality for women, and am sure the acceptance of the amendment will not repeal the protective laws of the several States.”).

¹¹⁰ Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex 24–25 (Apr. 14, 1964) (on file with the Schlesinger Library, Radcliffe Institute, Harvard Universi-

"Protective" labor legislation could coexist in 1964 with laws barring sex discrimination in employment due to a distinction, well entrenched in popular consciousness, between "differentiation" and "discrimination." Labor feminists routinely relied on this distinction when discussing the regulation of women in the workplace. The PCSW, a body that included a number of leading labor feminists, declared its support "for equal employment opportunity without discrimination of any kind,"¹¹¹ while also championing some forms of "protective" labor legislation. The PCSW argued that laws that differentiated between men and women constituted "discrimination" only when they deprived women of advantages that were given to men. James Roosevelt, a Democratic Representative from California and son of the esteemed chair of the PCSW, drew on this distinction during the legislative debate over Title VII. Roosevelt expressed full support for efforts to "eliminate . . . discriminations" against women while simultaneously advocating the preservation of "protective" labor legislation.¹¹²

This distinction, between laws that discriminate on the basis of sex and those that simply differentiate between the sexes, was not confined to the arguments of legislators who opposed the sex amendment. Pauli Murray, whose advocacy helped to ensure the amendment's passage, argued in a prominent 1965 law review article (coauthored by Mary Eastwood) that there was a distinction between "social policies that are genuinely protective . . . and those that unjustly discriminate against women."¹¹³ Murray and Eastwood asserted that "society has a legitimate interest in the protection of women's maternal and familial functions,"¹¹⁴ and that laws that genuinely served to protect these functions did not violate Title VII. Differentiation becomes discrimination, Murray and Eastwood explained, only when it "gives men a preferred position by accepted social standards" and "regulates the conduct of women in a restrictive manner."¹¹⁵ Thus, they argued, the aim of Title VII was not to eradicate all formal sex classifications from the law,¹¹⁶ but to invalidate employment practices that pressed women into traditional roles. Representative Griffiths echoed this sentiment in a 1966

ty). For more on Pauli Murray's strategic efforts to promote legal protections against sex discrimination in the early 1960s, see SERENA MAYERI, REASONING FROM RACE 14–23 (2011).

¹¹¹ AMERICAN WOMEN, *supra* note 50, at 49; *see also id.* at 19–21 (advocating the removal of all "discriminatory provisions," *id.* at 19, from American law).

¹¹² 110 CONG. REC. 2582 (statement of Rep. Roosevelt).

¹¹³ Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965).

¹¹⁴ *Id.* at 238.

¹¹⁵ *Id.* at 239.

¹¹⁶ Murray and Eastwood argued that in addition to genuinely protective laws, Title VII permitted sex classifications in the form of separate dormitories and bathrooms for men and women, because these practices carried "no implication of inferiority." *Id.* at 240.

speech on the House floor, in which she praised Murray and Eastwood's "thoughtful article."¹¹⁷ Griffiths asserted that Title VII's prohibition of sex discrimination barred employment practices that reflected "outmoded and prejudiced concepts"¹¹⁸ of women's roles and reinforced "prejudicial attitudes limiting women to the less rewarded and less rewarding types of work."¹¹⁹

Employment practices need not sort men and women along biological sex lines in order to run afoul of this prohibition. Representative Ross Bass of Tennessee made this point during the legislative debate over Title VII's sex provision when he criticized airline policies terminating the employment of stewardesses when they married.¹²⁰ As Part II will show, the airlines attempted to defend these policies in the late 1960s by arguing that they did not violate Title VII because they did not sort men and women along biological sex lines.¹²¹ As Representative Bass understood the law, however, it was not the formal sorting operation that defined an employment practice as discriminatory, but the fact that it perpetuated the notion that women were wives (and mothers) first, and workers second. He declared on the House floor that he intended to vote for the sex amendment on behalf of "both the unmarried and the married women."¹²²

Comments of this kind bespoke an understanding of Title VII's sex provision as a check on employment practices that reflected and reinforced traditional conceptions of men's and women's roles. These comments did not, however, yield any clear insight into how "drastically"¹²³ Congress intended its prohibition of sex discrimination to interfere with such practices. To Franklin D. Roosevelt, Jr., this lack of clarity rendered the legislative history of Title VII's sex provision useless; he often complained that Congress had provided the EEOC with no precise formula for determining whether a particular employment practice violated the statute. In retrospect, however, Congress's uncertainty and disagreement about the scope of Title VII's prohibition of sex discrimination is illuminating. It reminds us that there was no consensus in the mid-1960s about which forms of regulation qualified

¹¹⁷ 112 CONG. REC. 13,692 (1966) (statement of Rep. Griffiths).

¹¹⁸ *Id.* at 13,693.

¹¹⁹ *Id.* at 13,691.

¹²⁰ 110 CONG. REC. 2578 (1964) (statement of Rep. Bass).

¹²¹ See *infra* p. 1351. By the mid-1960s, nearly 100% of flight attendants in the United States were women and no American carrier would hire men for this position. *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 564 (S.D. 1970). Thus, the problem that Bass was identifying was not that the airlines allowed male but not female flight attendants to marry. Though the airline's policy discriminated only between two groups of women, Bass nonetheless regarded it as discrimination "because of sex."

¹²² 110 CONG. REC. 2578 (statement of Rep. Bass).

¹²³ *EEOC Reports*, *supra* note 101, at 6036.

as discrimination "because of sex," and that simply examining how an employment practice sorted the sexes did not provide an answer to that question. Making that determination required normative judgments about how far the law should go in disrupting the enforcement of gender norms in the workplace, and much to Roosevelt's chagrin, Congress left those judgments to the two other branches.

II. DETERMINING WHAT COUNTS AS DISCRIMINATION "BECAUSE OF SEX"

Scholars have typically portrayed the years after the passage of Title VII as a period of massive resistance in which the government refused to take the issue of sex discrimination seriously.¹²⁴ Aileen Hernandez, the only female Commissioner at the time of the EEOC's founding, recalled that "Commission meetings produced a sea of male faces, nearly all of which reflected attitudes that ranged from boredom to virulent hostility whenever the issue of sex discrimination was raised."¹²⁵ Indeed, EEOC commissioners routinely expressed concern in this period that the law's prohibition of sex discrimination would "interfere with its main concern, racial discrimination."¹²⁶ In the summer of 1965, Luther Holcomb, Vice Chairman of the EEOC, went so far as to request that Congress remove the prohibition of sex discrimination from the law.¹²⁷ Yet these tales of resistance tend to obscure the fact that the second half of the 1960s was also a deeply form-

¹²⁴ See, e.g., HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960-1972*, at 106 (1992) (noting "that in 1965 the American public mind at large, as mirrored in press coverage and political discourse, did not take the new issue of sex discrimination seriously" and that "EEOC chairman Franklin Roosevelt instinctively played to this gallery"); IRENE PADOVIC & BARBARA RESKIN, *WOMEN AND MEN AT WORK* 63 (2d ed. 2002) ("The regulatory agencies did not take seriously the prohibition of sex segregation until the 1970s . . . so the level of sex segregation remained essentially the same in 1970 as in 1960."); Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1152 (2005) (asserting that the EEOC "decided to treat the prohibition on sex discriminations as a joke," and that "[t]he result of this attitude was inaction on the part of the federal government"; thus, "[f]or the . . . four years [after Title VII went into effect], the Justice Department did not file a single sex discrimination suit").

¹²⁵ Aileen C. Hernandez, *The Women's Movement: 1965-1975*, in A SYMPOSIUM IN OBSERVANCE OF THE TENTH ANNIVERSARY OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1, 6 (1975) (on file with the EEOC Library, Washington, D.C.).

¹²⁶ John Herbers, *Women Fighting for Job Rights*, N.Y. TIMES, Mar. 27, 1966, at 53; see also GRAHAM, *supra* note 124, at 107 (noting that one of the EEOC's early internal studies complained that the agency was "inundated by complaints about sex discrimination that diverted attention and resources from the more serious allegations by members of racial, religious, and ethnic minorities" (quoting FRANCES REISSMAN COUSENS, PUBLIC CIVIL RIGHTS AGENCIES AND FAIR EMPLOYMENT 13 (1969) (internal quotation marks omitted))).

¹²⁷ SONIA PRESSMAN FUENTES, *EAT FIRST — YOU DON'T KNOW WHAT THEY'LL GIVE YOU* 132 (1999).

ative period in sex discrimination law. Contrary to what the Court later suggested in *Gilbert*, there was no simple test or mathematical formula that legal decisionmakers in the 1960s could apply to determine whether an employment practice violated Title VII's prohibition of sex discrimination. Interpretations of Title VII's sex provision in this period rested quite explicitly on normative judgments about the regulation of men's and women's roles in the workplace.

Recovering this history should prompt us to think critically about the claims that contemporary courts make about the limits of Title VII's prohibition of sex discrimination. Courts today frequently suggest that the "traditional concept" of sex discrimination extended only to employment practices that sorted men and women into two perfectly sex-differentiated groups; they suggest that this definition of discrimination is neutral and objective, and that it guided the interpretation of Title VII from the start. In fact, this Part will show that employers advanced this definition of sex discrimination in the 1960s in an effort to constrain the statute's reach. They encouraged courts to adopt this interpretation of the law precisely because it would shield contested employment practices from judicial review. But as this Part will show, employers' interpretation of Title VII's sex provision was not the only interpretation operative in the 1960s. The women's movement, echoing the congressional proponents of the sex amendment, argued that Title VII barred employment practices that reflected and reinforced traditional conceptions of women's sex and family roles, regardless of whether those practices sorted men and women along biological sex lines. Congress bolstered this argument in 1972, when it extended Title VII's reach and passed numerous additional statutes intended to dismantle the barriers facing women, and particularly mothers, in the workplace. Courts interpreting Title VII's sex provision have almost uniformly overlooked this history. Revisiting it should lead us to think differently about the kinds of claims that might plausibly fall within the ambit of the statute's prohibition of sex discrimination.

A. *"The Sex Provision of Title VII Is
Mysterious and Difficult to Understand and Control"*¹²⁸

The EEOC was ill prepared for the avalanche of sex discrimination claims filed by American workers in the years after Title VII went into effect. Aileen Hernandez recalled that "[m]any of the staff members and several of the Commissioners (including myself) had long histories

¹²⁸ *Federal Mediation Service to Play Role in Implementing Title VII*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8046, at 6074 (Feb. 7, 1966) (quoting an EEOC respondent) (internal quotation marks omitted).

of work in civil rights and our understanding of (and commitment to) eliminating race discrimination surfaced in our earliest discussions"¹²⁹ Nobody at the EEOC in its early years had comparable experience in the field of women's rights, and nobody joined the EEOC expecting to work in this area.¹³⁰ The agency was therefore caught off guard when more than a third of the claims it received in its first year pertained to sex discrimination.¹³¹ Sonia Pressman, a young lawyer who joined the EEOC's General Counsel's Office in the fall of 1965,¹³² recalled:

[T]hese complaints raised a host of new issues that were more difficult than those raised by the complaints of race discrimination. Could employers continue to advertise in classified advertising columns headed "Help Wanted — Male" and "Help Wanted — Female"? Did they have to hire women for jobs traditionally reserved for men? Could airlines continue to ground or fire stewardesses when they married or reached the age of thirty-two or thirty-five? What about state protective laws that prohibited the employment of women in certain occupations, limited the number of hours they could work and the amount of weight they could lift, and required certain benefits for them, such as seats and rest periods? Did school boards have to keep teachers on after they became pregnant? What would students think if they saw pregnant teachers?¹³³

The EEOC "was responsible for deciding these questions," Pressman observed, but "no one really knew how to resolve them."¹³⁴

Approximately two months after Title VII went into effect, six hundred representatives from the business, labor, government, and civil rights communities gathered at the White House for a two-day conference on the EEOC's plans for implementing the statute.¹³⁵ In the panels devoted to race discrimination, the EEOC found that "conferees were eager to move beyond the letter of the law to a sympathetic discussion of those affirmative actions required to make the legal requirement of equal opportunity an operating reality."¹³⁶ Conferees who attended the panel on sex discrimination were eager to discuss a different topic — namely, how to ensure that the law's prohibition of sex discrimination did not interfere too deeply with traditional forms of sex-based employment regulation.

¹²⁹ Hernandez, *supra* note 125, at 7.

¹³⁰ See FUENTES, *supra* note 127, at 131–32.

¹³¹ *Id.* at 131.

¹³² See *id.* at 124.

¹³³ *Id.* at 131.

¹³⁴ *Id.*

¹³⁵ *Educating the Public About Employment Discrimination*, EEOC 35TH ANNIVERSARY, <http://www.eeoc.gov/eeoc/history/35th/1965-71/educating.html> (last visited Feb. 25, 2012).

¹³⁶ EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE WHITE HOUSE CONFERENCE ON EQUAL EMPLOYMENT OPPORTUNITY: AUGUST 19–20, at 7 (1965) (on file with the Lyndon Baines Johnson Library, Austin, Tex.).

If the concept of discrimination “because of sex” were to be interpreted too broadly, employers informed the EEOC, Title VII would destroy the “family structure.”¹³⁷ They explained that demanding jobs were reserved for men in order to preserve marital harmony and ensure that women were available to provide care to their husbands and children. Jobs in management, for instance, often required employees to relocate across the country — sometimes multiple times in the course of training.¹³⁸ If women were permitted to enter such jobs, employers argued, it would have a devastating effect on the stability and well-being of the American family. A female manager might ask her husband to quit his job so that she could move to a new location. Alternatively, she might tell her husband “no, you cannot move” when he “ha[d] an opportunity in another state.”¹³⁹ Employers who attended the White House Conference urged the EEOC to keep such dystopian scenarios in mind when determining what would count as sex discrimination under the law.¹⁴⁰

Participants were also concerned about the effect that a broad interpretation of Title VII’s sex provision would have on the regulation of sexuality in the workplace. Substantial numbers of women employed outside the home in the 1960s performed jobs that resembled the tasks they performed inside the home: they worked as caregivers, cleaners, teachers, nurses, waitresses, and secretaries.¹⁴¹ In these roles, “female wage-earners . . . [were often] expected not only to perform gender on the job but to perform gender *as* the job”¹⁴² — as when secretaries served as “office wives” to their male bosses, tending to their emotional needs and performing various forms of personal service.¹⁴³ Thus, when Title VII threatened to disrupt these gendered social arrangements, mild but widespread homosexual panic ensued. At his first press conference as Executive Director of the EEOC, Herman

¹³⁷ White House Transcript, *supra* note 105, at 125 (statement of Mr. Dotty, Aluminum Co. of Am.).

¹³⁸ *Id.* (“We tell any young person who comes with us on the management-trainee program that he may be expected to move at least five times across the United States during the first fifteen years that he is employed by us.”).

¹³⁹ *Id.* at 126 (statement from the floor).

¹⁴⁰ Preserving “family harmony” was not employers’ only concern; they also argued that “girls” have a habit of leaving the workforce when they marry, and that no manager “wish[es] to incur training expense on which he is unlikely to realize a return.” *Id.* at 73 (statement of Harry G. Crook, Dir. of Emp. Relations, Westinghouse Elec. Corp.).

¹⁴¹ See Kim A. Weeden, *Profiles of Change: Sex Segregation in the United States, 1910–2000*, in OCCUPATIONAL GHETTOS 131, 162–76 (Maria Charles & David B. Grusky eds., 2004) (using U.S. census data to show the concentration of men and women in various job categories throughout the twentieth century).

¹⁴² KATHLEEN M. BARRY, FEMININITY IN FLIGHT: A HISTORY OF FLIGHT ATTENDANTS 7 (2007).

¹⁴³ See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 89–91 (1977) (describing the work of an “office wife” and her relationship with her male boss).

Edelsberg declared that there are those "who think that no man should be required to have a male secretary — and I am one of them."¹⁴⁴ A manager at the U.S. Chamber of Commerce echoed this sentiment at the White House Conference. "I have a very attractive secretary," he informed the EEOC; "I doubt that I would want a wavy-haired, blond male as my secretary."¹⁴⁵ Also making an appearance at the Conference was the male Playboy bunny — the corseted, cotton-tailed specter that loomed over almost all discussions of Title VII's sex provision in this period.¹⁴⁶ Lest this specter become a reality, employers urged the EEOC to take into account the value of workplace policies that respected basic heterosexual norms when interpreting the phrase discriminate "because of sex."¹⁴⁷

Attendees at the White House Conference offered a range of suggestions about how the EEOC might interpret the statute in a manner consistent with these underlying normative concerns. A number of panelists suggested that the agency, and eventually federal courts,

¹⁴⁴ HARRISON, *supra* note 46, at 187 (quoting Herman Edelsberg) (internal quotation marks omitted); *see also* 112 CONG. REC. 13,689 (1966) (statement of Rep. Griffiths); HARRISON, *supra* note 46, at 189 (reporting that Edelsberg allegedly circulated a memo at the EEOC suggesting that the agency should adopt an official seal depicting a brown rabbit with a white rabbit "couchant" and a legend reading "Vive la différence").

¹⁴⁵ White House Transcript, *supra* note 105, at 80 (statement of Gene Kenney, U.S. Chamber of Commerce).

¹⁴⁶ *Id.* at 16–17 (statements of Richard K. Berg, Deputy Gen. Counsel, Equal Emp't Opportunity Comm'n, and Evelyn Harrison, Deputy Dir., Bureau of Programs & Standards, U.S. Civil Serv. Comm'n). Shortly after Title VII went into effect, the *Wall Street Journal* invited its readers to imagine lounging in a Playboy Club and being served drinks by a "shapeless, knobby-kneed male 'bunny.'" *Sex & Employment*, WALL ST. J., June 22, 1965, at 1. Likewise, an editorial in the *New York Times* asked whether the specter of men serving drinks in skimpy corsets with cottontails meant that it was no longer safe to "advertise for a wife." *De-Sexing the Job Market*, N.Y. TIMES, Aug. 21, 1965, at 20.

¹⁴⁷ The fact that the term "sex" was used to refer both to the categorization of individuals as men and women and to sexual intercourse meant that Title VII's prohibition of sex discrimination routinely triggered discussions of sexuality. In fact, slippage between these two conceptions of "sex" was constant in discussions of Title VII's sex provision in the 1960s. When a reporter at the EEOC's first press conference asked Franklin D. Roosevelt, Jr., "What about sex?," the EEOC Chairman replied with a laugh, "I'm all for it." John Herbers, *Bans on Job Bias Effective Today*, N.Y. TIMES, July 2, 1965, at 32 (quoting Franklin D. Roosevelt, Jr.) (internal quotation marks omitted). When Sonia Pressman began to advocate that the EEOC more actively enforce Title VII's prohibition of sex discrimination, her male colleagues dubbed her a "sex maniac." FUENTES, *supra* note 127, at 132 (quoting Charles T. Duncan) (internal quotation marks omitted). This history makes it particularly curious that courts in Title VII cases have so often cited the "plain meaning" or dictionary definition of the word "sex" as proof that sexuality-based discrimination falls outside the statute's scope. *See, e.g.,* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 & n.4 (9th Cir. 1977) (citing the definition of "sex" in Webster's Dictionary as, *inter alia*, "sexually motivated phenomena or behavior" and "sexual intercourse," *id.* at 662 n.4 (quoting WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1970)) (internal quotation mark omitted), as evidence that "sex" must "be given [its] traditional definition based on anatomical characteristics" when interpreting Title VII, *id.* at 662).

should consult “national mores”¹⁴⁸ in determining what qualifies as sex discrimination, allowing employment policies to stand when they reflect deeply rooted cultural norms regarding gender and sexuality. Others argued that the EEOC should look to “socially desirable objectives as a standard in interpreting” the law.¹⁴⁹ The advantage of this interpretation is that it would enable legal decisionmakers to distinguish between “differential legislation that is socially desirable” and “true discrimination.”¹⁵⁰ Panelists suggested that on this interpretation, Title VII’s sex provision would not apply either to “protective” labor legislation or to employer-based retirement and benefit plans that (ostensibly) favored women by recognizing their financial dependence on their husbands. A lawyer for a firm in Washington, D.C., advised the EEOC that the federal government’s own conduct in regard to retirement and benefits plans offered “a basis whereby the Commission could consider these . . . plans as not being discriminatory.”¹⁵¹ He explained that “discrimination” was illegal in the federal civil service “under basically the same standards set up in Title VII,”¹⁵² but that this prohibition was not understood to apply to sex-differentiated benefit plans that favored women. Thus, he argued, the government’s own practices militated in favor of defining Title VII’s sex provision in a manner that preserved benign forms of sex-based regulation.

EEOC Commissioner Samuel Jackson observed in the mid-1960s that “the sex provision of Title VII is mysterious and difficult to understand and control.”¹⁵³ This observation captures the anxiety that Title VII’s prohibition of sex discrimination generated in this period. The notion that business practices long taken for granted or even valued might now be defined as discriminatory was unsettling, particularly as the truncated manner in which the proposal to bar sex discrimination became law meant that the “intent and reach of the amendment were shrouded in doubt.”¹⁵⁴ There was still “a good deal of talk at various high levels in Washington about taking sex *out* of Title VII” in the mid-1960s,¹⁵⁵ and the concept of sex discrimination still triggered

¹⁴⁸ *E.g.*, White House Transcript, *supra* note 105, at 134 (statement of Evelyn Harrison, Deputy Dir., Bureau of Programs & Standards, U.S. Civil Serv. Comm’n).

¹⁴⁹ *Id.* at 126 (statement from the floor).

¹⁵⁰ *Id.* at 105 (statement of Olya Margolin, Washington Rep., Nat’l Council of Jewish Women).

¹⁵¹ *Id.* at 46 (statement of James F. Rill, Partner, Collier & Shannon).

¹⁵² *Id.*

¹⁵³ *Federal Mediation Service to Play Role in Implementing Title VII*, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8046, at 6074 (Feb. 7, 1966) (quoting an EEOC respondent) (internal quotation marks omitted).

¹⁵⁴ *See* EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 27, at 5.

¹⁵⁵ BETTY FRIEDAN, “*The First Year*”: *President’s Report to NOW, Washington, D.C., 1967*, in “IT CHANGED MY LIFE”: WRITINGS ON THE WOMEN’S MOVEMENT 123, 124 (Harvard Univ. Press 1998) (1976).

laughter in many corners.¹⁵⁶ But it was nonetheless important to the business community and other proponents of the status quo to exert some “control” over the statute, lest the EEOC and courts decide to build on some of the more robust critiques of sex-based regulation that had begun to emerge in this period.

Betty Friedan’s bestselling book, *The Feminine Mystique*, published in 1963, contained a stark indictment of the male breadwinner–female homemaker model on which American ideals concerning work and family had been constructed.¹⁵⁷ In 1964, Representatives Griffiths and St. George launched a similarly overarching critique of the nation’s gender trouble during the debate over Title VII’s sex provision, asserting that this trouble was pervasive and deeply rooted. Their colleague, Representative Bass, suggested during the same debate that to be responsive to these problems, the law would have to interrogate practices such as the airlines’ practice of firing stewardesses upon marriage — not because this practice sorted men and women along biological lines, but because it forced women to adopt conventional sex and family roles. This way of thinking about discrimination provided a foundation for far-reaching, antistereotyping interpretations of Title VII’s prohibition of sex discrimination.

Yet employers leaving the White House Conference in the summer of 1965 had reason to be optimistic that the EEOC might instead adopt a narrow interpretation of the statute. Deputy General Counsel Richard Berg had been quick to assure employers that the agency would take their interests into account when deciding which employment practices qualified as sex discrimination; he assured them, for instance, “that the Commission is not going to take the position that all state protective legislation for women goes out the window.”¹⁵⁸ How far Title VII’s prohibition of sex discrimination would reach, it was too early to say. But Berg promised the assembled crowd that the EEOC would determine the statute’s scope by “balancing” the law’s egalitarian commitments against the interests of employers and the mores of American society.¹⁵⁹

¹⁵⁶ FUENTES, *supra* note 127, at 129 (noting that in 1965, “[w]ords like ‘sex discrimination’ and ‘women’s rights’ hadn’t yet become part of our national vocabulary” and that “[i]n [her] early speeches for the EEOC, any reference to women’s rights was greeted with laughter”).

¹⁵⁷ See Louis Menand, *Books as Bombs*, NEW YORKER, Jan. 24, 2011, at 76.

¹⁵⁸ White House Transcript, *supra* note 105, at 115 (statement of Richard K. Berg, Deputy Gen. Counsel, Equal Emp’t Opportunity Comm’n); see also *Administration of Sex Discrimination Provisions of Title VII Discussed by EEOC Chairman*, *supra* note 106, at 6012 (explaining that the EEOC would seek to “avoid punitive requirements for employers” in establishing guidelines for interpreting Title VII’s sex provision).

¹⁵⁹ White House Transcript, *supra* note 105, at 62 (statement of Richard K. Berg, Deputy Gen. Counsel, Equal Emp’t Opportunity Comm’n); see also *id.* at 124 (arguing that in interpreting Ti-

B. A Women's Movement Enters the Debate

One of the first questions the EEOC confronted after the White House Conference was whether Title VII required the desegregation of job advertisements, which were generally segregated by sex and sometimes still segregated by race in the mid-1960s.¹⁶⁰ In one of his first acts as Chairman of the EEOC, Franklin D. Roosevelt, Jr., announced that Title VII barred the segregation of help-wanted ads by race and that the practice was now illegal.¹⁶¹ Whether the segregation of help-wanted ads by sex constituted "discrimination" was a more difficult question. Roosevelt announced that he had appointed a seventeen-member advisory committee to study the issue.¹⁶²

One month later, in September of 1965, the EEOC announced the results of its study.¹⁶³ The agency determined that the practice of dividing job advertisements into male and female columns did not qualify as sex discrimination because "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women."¹⁶⁴ Thus, the EEOC concluded, segregating ads by sex simply helped applicants and employers find what they were looking for. The EEOC initially required employers who advertised in sex-segregated columns to "specifically state[] that the job is open to males and females,"¹⁶⁵ but upon reflection determined that this requirement constituted too onerous a burden. In the spring of 1966, the agency withdrew its initial guideline and issued a new guideline which permitted employers to place job advertisements in male or female columns without "stat[ing] specifically that both sexes may apply."¹⁶⁶

The EEOC's stance on sex-segregated classified advertising underscored the extent to which judgments about the desirability of a particular employment practice influenced the agency's determination of whether it constituted discrimination "because of sex."¹⁶⁷ For this rea-

the VII's sex provision you have to ask "how much inconvenience can reasonably be demanded from an employer").

¹⁶⁰ GRAHAM, *supra* note 124, at 108.

¹⁶¹ John Herbers, *U.S. Bars Race Designation in Job Ads*, N.Y. TIMES, Aug. 19, 1965, at 16.

¹⁶² *Id.*; see also Hernandez, *supra* note 125, at 10 (noting that almost all of the committee's members were men, and that a majority of them represented newspapers and advertising agencies).

¹⁶³ Press Release, Equal Emp't Opportunity Comm'n (Sept. 22, 1965) (on file with the EEOC Library, Washington, D.C.).

¹⁶⁴ GRAHAM, *supra* note 124, at 111 (quoting Franklin D. Roosevelt, Jr.) (internal quotation marks omitted).

¹⁶⁵ Press Release, Equal Emp't Opportunity Comm'n, *supra* note 163.

¹⁶⁶ Press Release, Equal Emp't Opportunity Comm'n (Apr. 27, 1966) (on file with the EEOC Library, Washington, D.C.).

¹⁶⁷ Franklin D. Roosevelt, Jr., announced in the fall of 1965 that "common sense" would be the rule guiding the agency's interpretation of Title VII's sex provision. Thus, Roosevelt informed the

son, Aileen Hernandez and Sonia Pressman concluded that "the country needed an organization to fight for women like the NAACP fought for African Americans."¹⁶⁸ Without such an organization, employers and the associations representing them would remain the dominant voices in discussions about how to interpret Title VII's sex provision,¹⁶⁹ and they urged the EEOC to interpret the statute in a manner that disrupted the status quo as little as possible. The EEOC, occupied with what it perceived as more serious forms of discrimination, was happy to oblige. Most of the Commissioners shared the view of employers in the mid-1960s that sex discrimination was simply not a problem.¹⁷⁰ Sex-segregated job advertisements did not seem "discriminatory"; they seemed convenient.¹⁷¹ Likewise, "protective" labor laws still struck many government officials as "in no way violative of Title VII of the 1964 Civil Rights Act," because these laws "were not enacted for the purpose of discriminating against women, but were enacted in order to prevent women from being . . . injured to the detriment of themselves, their families and society in general."¹⁷² Absent any un-

press that the new law would not require employers to hire men or women in cases where it would be inappropriate, and that "he did not foresee any 'revolution in job patterns,' such as more male nurses and secretaries, as a result of the [EEOC's] interpretations." Elizabeth Shelton, *Commission Will Enforce Sex Clause in Title VII with "Common Sense,"* WASH. POST & TIMES-HERALD, Nov. 24, 1965, at C3 (quoting Franklin D. Roosevelt, Jr.).

¹⁶⁸ FUENTES, *supra* note 127, at 135; *see also* Hernandez, *supra* note 125, at 7–9 (discussing her recognition, after the White House Conference, of "the need for an outside activist organization to force the Commission to pay serious attention to the problems facing women in the job market," *id.* at 8).

¹⁶⁹ *See* Hernandez, *supra* note 125, at 8–9 (noting that "[t]he Commission had felt the pressure from organizations like the . . . American Newspaper Publishers Association [and] from the Association of Employment Agencies — each lobbying to influence the Commission's policies and procedures[,] [b]ut there was no national women's group capable of quick, direct and varied action to pressure the Commission").

¹⁷⁰ *See* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1734 (1991) ("For feminists, a central problem remains the lack of social consensus that there is in fact a problem. To the public in general, and lawmakers in particular, sex-based disparities have often appeared natural, functional, and, in large measure, unalterable.").

¹⁷¹ Edith Evans Asbury, *Protest Proposed on Women's Jobs*, N.Y. TIMES, Oct. 13, 1965, at 32 (quoting Franklin D. Roosevelt, Jr., who claimed in defense of the EEOC's ruling that segregating help-wanted ads by sex was "for the convenience of readers, so they don't have to hunt through all the ads" (internal quotation marks omitted)).

¹⁷² *Maryland Law on Women's Working Hours Not in Conflict with Title VII or Federal Equal Pay Act*, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8044, at 6069 (Jan. 19, 1966) (noting, in a Maryland Attorney General's opinion upholding the legality of "protective" labor legislation, that "[t]he functions of women as wives and mothers was [sic] a major consideration" in both the passage and the maintenance of these laws). This understanding of "protective" labor legislation was not exclusive to employers and government officials in the mid-1960s. Some labor feminists continued to argue, even after Title VII was enacted, that "protective" labor legislation constituted "necessary and socially desirable and differential legislation," rather than "true discrimination" of the sort the statute was designed to combat. White House Transcript, *supra* note 105, at 105–06 (statement of Olya Margolin, Wash. Rep., Nat'l Council of Jewish Women).

derstanding of the ways in which employment practices that enforced conventional sex and family roles injured American workers, the EEOC saw no reason to classify as “discrimination” practices that had long been regarded as socially advantageous.¹⁷³

In the late spring of 1966, Betty Friedan, Pauli Murray, and a number of other feminists dismayed by the EEOC’s interpretation of Title VII founded the National Organization for Women (NOW).¹⁷⁴ Their aim was to create the sort of organization the feminist lawyers at the EEOC believed was necessary to persuade the government and the American public that discrimination “because of sex” was a substantial social problem.¹⁷⁵ These efforts had already begun in an uncoordinated way in response to the EEOC’s early rulings. In a widely publicized speech in the fall of 1965, Pauli Murray blasted the agency’s determination that sex-segregated job advertisements did not qualify as discrimination within the meaning of Title VII.¹⁷⁶ Representative Martha Griffiths followed Murray’s lead in the spring of 1966 with a scathing speech in Congress.¹⁷⁷ These public condemnations of the EEOC catalyzed the formation of NOW,¹⁷⁸ as feminists recognized the need to project a broader and more sustained critique of the way in which the agency charged with enforcing Title VII had decided to interpret its prohibition of sex discrimination.

Among the arguments feminists used in the mid-1960s to persuade the EEOC and the American public of the perniciousness of sex discrimination was an analogy to race discrimination, which was generally regarded as a more serious social problem. In her speech condemning the EEOC’s ruling on job advertisements, Murray argued that sex discrimination was no less detrimental to society than race discrimination and declared that women might decide to march on Washington if that was what was required to alter the EEOC’s stance.¹⁷⁹ Murray expanded on this argument in her influential law review article on “Jane Crow,” which emphasized “parallel[s] between antifeminism and race prejudice”¹⁸⁰ and asserted that “[w]omen have experienced both subtle and explicit forms of discrimination comparable to the inequali-

¹⁷³ The EEOC’s own stance in regard to “protective” labor legislation remained equivocal in this period. The agency asked Congress and the states to reexamine their “protective” laws to determine whether they were still supported by solid rationales, but did not issue a ruling finding such laws discriminatory on their face. Shelton, *supra* note 167, at 3.

¹⁷⁴ For a brief account of the founding of NOW, see BETTY FRIEDAN, *Introduction — Part II: The Actions*, in “IT CHANGED MY LIFE,” *supra* note 155, at 93, 104–08.

¹⁷⁵ *Id.* at 99–100 (noting that Sonia Pressman’s entreaties about the need for a national organization to combat sex discrimination helped to spur the foundation of NOW).

¹⁷⁶ Asbury, *supra* note 171, at 32.

¹⁷⁷ See 112 CONG. REC. 13,689–94 (1966) (statement of Rep. Griffiths).

¹⁷⁸ FRIEDAN, *supra* note 174, at 96, 103; HARRISON, *supra* note 46, at 191.

¹⁷⁹ Asbury, *supra* note 171, at 32.

¹⁸⁰ Murray & Eastwood, *supra* note 113, at 234.

ties imposed upon minorities."¹⁸¹ Representative Griffiths also sounded this theme during the speech she gave on the House floor condemning the EEOC.¹⁸² Griffiths argued that the "long standing tradition [of listing jobs by sex] exerts enormous power" over women's employment opportunities, relegating them to second-class jobs just as surely as "white only" signs had confined black people to segregated railcars.¹⁸³

It is not surprising that the women's movement should have invoked race-sex analogies in its campaign to alter the EEOC's interpretation of Title VII's sex provision. "Sex" was listed alongside "race" in the text of the statute; it was natural to argue that they should be treated as equally weighty concerns.¹⁸⁴ But feminists also focused on the family, and the way in which ideas about women as wives and mothers had limited their opportunities in the workplace. In her "Jane Crow" article, Pauli Murray invoked the same long history of discrimination that Representatives Griffiths and St. George had cited during the legislative debate over Title VII's sex provision.¹⁸⁵ Murray noted that laws restricting women's opportunities in the workplace had historically been, and still were, justified by reference to traditional conceptions of their sex and family roles.¹⁸⁶ In light of this history, she contended, it would be a mistake to assume that "equal rights for women" meant "identical treatment with men. This is an oversimplification."¹⁸⁷ What women sought in the context of employment was "equality of opportunity . . . without barriers built upon the myth of the stereotyped 'woman.'"¹⁸⁸ Thus, Murray claimed, policies that

¹⁸¹ *Id.* at 233. For more on Murray's use of the race-sex analogy in the mid-1960s, see generally Serena Mayeri, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001).

¹⁸² See 112 CONG. REC. 13,692 (statement of Rep. Griffiths).

¹⁸³ *Id.* at 13,691.

¹⁸⁴ Murray and Griffiths also emphasized that "race" and "sex" were not mutually exclusive forms of discrimination and often overlapped in ways that injured black women in particular. See, e.g., *id.* at 13,689 (arguing that vigorous enforcement of Title VII's sex provision "is especially important to Negro women since they are victims of both race discrimination and sex discrimination, and have the highest unemployment rate and the lowest average earnings"); Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 255 (1971) (noting that "[w]hen racial and sexual stereotypes operate simultaneously, they are formidable barriers to economic advancement" and that protections against sex discrimination are therefore particularly necessary for black women); Murray & Eastwood, *supra* note 113, at 243 (noting that "[w]ithout the addition of 'sex,' Title VII would have protected only half the potential Negro work force").

¹⁸⁵ See Murray & Eastwood, *supra* note 113, at 236-41.

¹⁸⁶ See *id.* at 236-37 & nn.30-31 (citing, inter alia, *Muller v. Oregon*, 208 U.S. 412 (1908), in which the Court upheld a maximum-hour law for women in part because it protected their maternal functions, and *Goesaert v. Cleary*, 355 U.S. 464 (1948), in which the Court upheld a law prohibiting women from tending bar in the absence of "protecting oversight" from their fathers or husbands, *id.* at 466).

¹⁸⁷ *Id.* at 239.

¹⁸⁸ *Id.*

were truly benign or genuinely beneficial to women did not constitute discrimination “because of sex,” regardless of how they formally classified individuals.¹⁸⁹ Regulation became “discriminatory” when it forced individuals to conform to traditional conceptions of sex and family roles or “relegate[d] an entire class to inferior status”¹⁹⁰ — which, Murray noted, most, but not all, formal sex classifications did in the mid-1960s.¹⁹¹

NOW’s founding documents, written the year after Murray’s article, expressed similar concerns about the way in which sex-role stereotypes, particularly those concerning men’s and women’s roles in the family, impeded equal employment opportunity.¹⁹² NOW’s *Statement of Purpose*, published in the fall of 1966, rejected the assumption “that marriage, home and family are primarily woman’s world and responsibility” and that the work of providing financial support fell primarily to men.¹⁹³ In the domain of employment, NOW argued, “the traditional assumption that a woman has to choose between marriage and motherhood, on the one hand, and serious participation in industry or the professions on the other”¹⁹⁴ perpetuated long-standing inequalities. With these concerns in mind, NOW’s Task Force on Equal Opportunity in Employment concluded that the organization should launch a “campaign for rigorous enforcement of Title VII of the Civil Rights Act.”¹⁹⁵ The Task Force advocated using Title VII to eliminate “protective” labor legislation and sex-segregated job advertisements and to eradicate pregnancy discrimination,¹⁹⁶ which enforced conventional understandings of women’s family responsibilities in a particularly powerful way.¹⁹⁷

¹⁸⁹ *Id.* at 240.

¹⁹⁰ *Id.* at 239.

¹⁹¹ *Id.* at 240. Legal feminists in the 1960s often relied on anticlassificationist arguments when challenging the legality of employment practices that classified on the basis of sex. But they did not argue, as employers later did, that employment practices run afoul of Title VII’s prohibition of sex discrimination only when they formally classify on the basis of sex and that if an employment practice fails to divide men and women into two perfectly sex-differentiated groups it cannot, by definition, constitute discrimination “because of sex.”

¹⁹² For a more extensive discussion of the role of antistereotyping arguments by the women’s movement in the 1960s, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 105–14 (2010).

¹⁹³ Statement of Purpose, Nat’l Org. for Women (Oct. 29, 1966), reprinted in FEMINIST CHRONICLES 1953–1993, at 159, 162 (Toni Carabillo et al. eds., 1993).

¹⁹⁴ *Id.*

¹⁹⁵ Statement of Goals, Task Force on Equal Opportunity in Emp’t (1967), reprinted in FEMINIST CHRONICLES, *supra* note 193, at 174, 174.

¹⁹⁶ *Id.* at 174–75.

¹⁹⁷ Statement of Purpose, Nat’l Org. for Women, *supra* note 193, at 159–60 (identifying, as one of the organization’s chief concerns, the fact that “childbearing . . . continues to be a most important part of most women’s lives . . . [but] still is used to justify barring women from equal professional and economic participation and advance”).

By the end of the 1960s, NOW's campaign to effect "a public redefinition of discrimination based on sex"¹⁹⁸ had begun to achieve concrete legal results. As a result of pressure from the women's movement, the EEOC had begun "to rule almost as aggressively on gender as it had from the beginning on race."¹⁹⁹ In 1969, the EEOC issued revised guidelines, which finally determined that sex-segregated job advertising violated Title VII's prohibition of sex discrimination.²⁰⁰ In 1972, it issued a new set of guidelines — also revising an earlier determination — stating that pregnancy discrimination constituted discrimination "because of sex" under Title VII.²⁰¹ The agency also adopted a tougher stance toward "protective" labor legislation,²⁰² and courts began to invalidate such laws.²⁰³

In 1972, Congress ratified these moves with an unprecedented burst of lawmaking designed to combat sex discrimination in all areas of American life.²⁰⁴ In March of that year, Congress passed the Equal

¹⁹⁸ NAT'L ORG. FOR WOMEN, *THE FIRST FIVE YEARS 1966–71*, at 16 (1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

¹⁹⁹ GRAHAM, *supra* note 124, at 115.

²⁰⁰ Hernandez, *supra* note 125, at 14 (noting that it was a close vote, 3–2, and that the ruling did not take effect for many months because a group of newspapers attempted to enjoin the EEOC from issuing it). For a detailed account of the EEOC's prolonged wavering on the question of whether sex-segregated job advertisements constituted discrimination "because of sex," see Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement, and the Battle Over Sex-Segregated Job Advertisements*, 51 SOC. PROBS. 182 (2004).

²⁰¹ See EEOC Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10 (2011) (first adopted on April 5, 1972).

²⁰² Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 6 (2009) (noting that the EEOC in the early 1970s "unequivocally ruled — in yet another update of its interpretive guidelines — that state protective laws violated Title VII" and that "[w]ithin a few years, nearly all state protective policies disappeared").

²⁰³ See, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968).

²⁰⁴ See, e.g., State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 122, 86 Stat. 919, 932 (prohibiting sex discrimination in the disbursement of federal funds for fiscal assistance to state and local governments); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 816, 903 (prohibiting sex discrimination in any program that receives federal funds under the Federal Water Pollution Control Act or the Environmental Financing Act); Act of Oct. 14, 1972, Pub. L. No. 92-496, § 3, 86 Stat. 813, 813–14 (expanding the mandate of the U.S. Commission on Civil Rights — a bipartisan group charged with studying problems facing minorities — to include sex discrimination); Act of Dec. 15, 1971, Pub. L. No. 92-187, §§ 1–3, 85 Stat. 644, 644 (amending sections 2108, 5924, and 7152 of Title 5 of the United States Code to provide equal employment benefits to married female federal employees); Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, § 110, 85 Stat. 431, 461, and Nurse Training Act of 1971, Pub. L. No. 92-158, § 11, 85 Stat. 465, 479–80 (amending Titles VII and VIII of the Public Health Service Act to prohibit sex discrimination in admissions to training programs for health professionals funded under these Titles); Act of Aug. 5, 1971, Pub. L. No. 92-65, §§ 112, 214, 85 Stat. 166, 168, 173 (prohibiting sex discrimination in access to programs funded under the Public Works and Economic Development Act of 1965 or the Appalachian Regional

Rights Amendment (ERA) and sent it to the states for ratification.²⁰⁵ In the same session, Congress passed Title IX of the Education Amendments of 1972,²⁰⁶ which prohibited sex discrimination in all education programs receiving funds from the federal government.²⁰⁷ The Ninety-Second Congress also passed the Comprehensive Child Development Act (CCDA), which was intended to fund Head Start, day care, and supportive education programs, and which was directly responsive to movement claims that expectations about women's family responsibilities constrained their opportunities in the workplace.²⁰⁸

In this period, Congress also directly reaffirmed its commitment to combatting sex discrimination in the workplace by amending Title VII. The Equal Employment Opportunity Act of 1972²⁰⁹ enabled the EEOC to bring enforcement litigation in federal court and extended Title VII's coverage to public employers. Unlike in 1964, Congress in 1972 devoted substantial attention and resources to the issue of sex discrimination and produced a weighty legislative record documenting its commitment to ending this form of discrimination. The House Committee Report on the 1972 Amendments explained that reform was necessary because "[d]espite the efforts of the courts and the [EEOC], discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable."²¹⁰ The Report insisted that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any

Development Act of 1965). For more on these and other legislative initiatives taken by the Ninety-Second Congress to combat sex discrimination, see JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION 202-04* (Longman 1975) (1975); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1994-96 (2003).

²⁰⁵ The Senate passed the ERA by a vote of 84-8 and sent it to the states for ratification on March 22, 1972. See 118 *CONG. REC.* 9598 (1972); see also JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 12 (1986).

²⁰⁶ Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. § 1681-1688 (2006)).

²⁰⁷ See *id.* § 901, 86 Stat. at 373-74. Title IX was enacted to expand the protections of both Titles VI (access to educational opportunities) and VII (employment) of the 1964 Civil Rights Act. Title IX extended Title VI's antidiscrimination protections to cover discrimination on the basis of sex and extended Title VII's protections against sex discrimination in employment to educational facilities receiving federal funds. *Id.*

²⁰⁸ The Comprehensive Child Development Act, S. 1512, 92d Cong. (1971), was added as a new title to the Economic Opportunity Amendments of 1971, S. 2007, 92d Cong. (1971). President Nixon ultimately vetoed the CCDA and it never went into effect. For more on the CCDA and its relation to the women's movement's demands for equality in the workplace, see Franklin, *supra* note 192, at 110-11; Post & Siegel, *supra* note 204, at 2008-12.

²⁰⁹ Pub. L. No. 92-261, 86 Stat. 103.

²¹⁰ H.R. REP. NO. 92-238, at 5 (1971), reprinted in 1972 U.S.C.A.N. 2137, 2141; see also S. REP. NO. 92-415, at 7-8 (1971).

type of unlawful discrimination."²¹¹ It noted that Title VII's promise had not been realized in the context of sex, and that the aim of the 1972 Amendments was to revive "the hopeful prospects that Title VII offered millions of Americans in 1964."²¹² The debate on the House floor echoed these sentiments.²¹³ By the mid-1970s, courts had begun to cite the legislative history of the 1972 Amendments as evidence that Congress intended Title VII's prohibition of sex discrimination to be interpreted broadly to bring an end to the enforcement of "sexual stereotypes" in the workplace.²¹⁴ If Congress's intentions in 1964 were unclear, the "legislative history [of the 1972 Amendments] indicates very clearly that Congress intended Title VII to become a powerful tool to eliminate sex discrimination."²¹⁵

As the next section shows, these developments altered the legal justifications and forms of argument employers might persuasively offer in defense of practices challenged under Title VII's sex provision. When Title VII first went into effect, employers routinely defended sex-based employment practices by arguing that such practices helped to preserve conventional sex roles and maintain the traditional family structure. By the early 1970s, these forms of argument had grown less persuasive to the EEOC and, increasingly, to courts. An employer that offered such arguments ran the risk of being informed that "Title VII rejects just this type of romantic paternalism as unduly Victorian."²¹⁶ Thus, after the emergence of the women's movement, employers who wished to preserve practices challenged under Title VII's sex provision would have to rely on an alternative form of argument.

²¹¹ H.R. REP. NO. 92-238, at 5, *reprinted in* 1972 U.S.C.A.N. 2137, 2141.

²¹² *Id.*

²¹³ See *Harriss v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 426-27 (N.D. Cal. 1977) (discussing the deep commitment to ending sex discrimination in employment expressed not only by the House Committee on Education and Labor, but also by Congress itself during the legislative debate over the 1972 Amendments).

²¹⁴ See *id.*; see also, e.g., *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (noting that for "an eight-year period following its original enactment, there was no legislative history" to guide interpretation of Title VII's sex provision, but that in 1972 "there was considerable discussion on the topic" and "[n]ot surprisingly, it then became evident that Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination").

²¹⁵ *Melani v. Bd. of Higher Educ.*, No. 73 Civ. 5434, 1976 WL 589, at *17 (S.D.N.Y. June 23, 1976).

²¹⁶ *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (1969); see also *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970) (stating that "[o]utdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity" will no longer serve to justify the exclusion of women from bars).

*C. The Emergence of a More Effective Strategy
for Limiting the Law's Reach*

That alternative form of argument emerged in the battle over airline policies that terminated the employment of stewardesses when they married or reached their early thirties. Whether these policies violated Title VII's prohibition of sex discrimination was one of the most fiercely contested questions in employment discrimination law in the 1960s. Stewardesses arrived at the door of the EEOC to file complaints about these policies on the morning that Title VII went into effect.²¹⁷ Partly as a result of stewardesses' tenacity in challenging these policies, the EEOC found in its first year that complaints of "loss of jobs due to marriage or pregnancy" outnumbered any other type of sex-based complaint.²¹⁸ Because the airlines viewed such regulation as an essential component of their business, they defended these policies with equal tenacity. As a result, the battle over sex discrimination in the airline industry persisted for years at the EEOC, in the courts, and in the media.

Part of the attraction for the media was that legal issues involving stewardesses were sexier than those involving, for example, "protective" labor legislation.²¹⁹ In the 1950s, airlines had increasingly stopped hiring men to work as flight attendants, and by 1967, no airline in the United States hired men for this job.²²⁰ For decades, airlines had been marketing to their mostly male clientele a fantasy centered on the sexual availability of female flight attendants. Thus, while age and marital termination policies had disappeared from almost all other industries by the mid-1960s, the airlines steadfastly maintained these policies.²²¹ They viewed young, unmarried stewardesses as an essential part of the service they offered, and they encouraged customers to take the same view. In the 1950s, American Airlines partnered with Metro-Goldwyn-Mayer to produce the movie *Three Guys Named Mike*, in which a stewardess has romantic dalliances with three men she meets onboard and then happily leaves her job to settle

²¹⁷ BARRY, *supra* note 142, at 144-45.

²¹⁸ DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT* 215 (2004). The fact that claims involving marriage and pregnancy discrimination were the most common claims brought under Title VII's sex provision when it was first enacted tends to undermine the Court's assertion in *Gilbert* that such forms of discrimination would not traditionally have been understood as discrimination "because of sex."

²¹⁹ BARRY, *supra* note 142, at 135-36 (noting that the media's obsession with stewardesses in the 1960s did not stem wholly from an interest in their legal claims).

²²⁰ See *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 564 (S.D. Fla. 1970); BARRY, *supra* note 142, at 159.

²²¹ See CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 174-75 (1990) (noting that, after 1950, stewardesses were among the only American workers who still faced marriage bars in the workplace).

down with the humblest of the three.²²² United Airlines held out the same promise with its 1967 advertising slogan: "Everyone gets warmth, friendliness and extra care — and someone may get a wife."²²³ Initially, this marketing strategy focused on care, depicting stewardesses as pleasantly domestic, able to soothe, comfort, and fix drinks for weary business travelers, but as the 1960s progressed, the focus shifted to sex. Airlines began to outfit stewardesses in miniskirts and hot pants; Braniff choreographed an "air strip" in which stewardesses shed layers of their Pucci uniforms during the course of the flight; and National inaugurated its infamous "Fly Me" campaign.²²⁴ As the airlines saw it, older or married women would spoil the fantasy — for customers, and also for potential employees. The airlines recruited "girls" to work as stewardesses by portraying the job as a "bride school," in which they would learn everything they needed to know to become exemplary hostesses, wives, and mothers.²²⁵

Because the work of a stewardess was so deeply gendered, the airlines argued that their age and marital termination policies fit squarely within Title VII's BFOQ exception,²²⁶ as did their practice of hiring only women to work as flight attendants.²²⁷ The crux of the airlines' argument was that hiring young, single women for the job of stewardess was a legitimate business requirement because male passengers preferred to be served by such people. Airline executives asserted that flight attending was "a young and pretty girl's job"²²⁸ because nobody could "convey the charm, the tact, the grace, the liveliness that young girls can — particularly to men, who comprise the vast majority of airline passengers."²²⁹ The airlines also claimed that allowing married women into the ranks of stewardesses would disrupt administrative operations, because husbands would constantly call to inquire about their wives' flight schedules; degrade customer service, because some women would be unable "to handle the competing demands of home and job"; and "put a strain on family harmony," because the demands

²²² THREE GUYS NAMED MIKE (Metro-Goldwyn-Mayer 1951).

²²³ BARRY, *supra* note 142, at 179 (internal quotation marks omitted).

²²⁴ *Id.* at 174–84.

²²⁵ *Id.* at 36.

²²⁶ 42 U.S.C. § 2000e-2(e)(1) (2006).

²²⁷ For further discussion of the airlines' shifting reliance on the statute's BFOQ exception, see *infra* pp. 1351–52.

²²⁸ Transcript of Testimony Heard Before the Equal Employment Opportunity Commission, on September 12, 1967, on the Subject of "Occupational Qualifications for Position of Flight Cabin Attendant Within Meaning of Section 703(e) of the Civil Rights Act" (with Corrections), at 203, *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559 (S.D. Fla. 1970) (No. 69-206-Civ-CF) (on file with the National Archives, Atlanta, Ga.) [hereinafter Flight Attendant Transcript] (statement of Herbert Levy, counsel for Air Line Pilots Association).

²²⁹ BARRY, *supra* note 142, at 158 (quoting United Airlines' brief in the first Title VII lawsuit brought by a stewardess).

of the job would prevent women from fulfilling their daily homemaking and childcare responsibilities.²³⁰ Thus, the airlines argued, preserving the industry's age and marriage policies would benefit society as a whole. Jesse Freidin, who represented the Air Transport Association at a public hearing before the EEOC in 1966, concluded his defense of the airlines' employment practices by asserting that, "[a]s an acceptable and useful job for young girls [and] as a training ground for future wives and mothers . . . the stewardess corps serves an important social purpose and is universally recognized throughout the nation as being a very good thing."²³¹ United Airlines adopted a more succinct defense, declaring simply that "[s]tewardesses should discontinue flying upon marriage and raise families."²³²

To the women's movement, the airlines' age and marital termination policies embodied precisely the type of prejudiced and outmoded attitudes about women's sex and family roles that Title VII was designed to combat.²³³ In testimony before the EEOC, Betty Friedan characterized these policies as "the most flagrant kind of sex discrimination."²³⁴ She and other feminists who testified on the airlines' employment practices argued that these practices robbed women of the ability to support their families by depriving them of the higher pay, pensions, and other benefits that accrue to long-term employees.²³⁵ Friedan argued that these policies offered a particularly "blatant[]" illustration of the way in which employers push women out of the workforce and compel them to assume dependent roles in marriage.²³⁶ She claimed that such activity was illegal under Title VII, and that if the EEOC "were going to enforce the law" even minimally, it "must tell the airlines to cease and desist from this practice."²³⁷

EEOC Commissioner Aileen Hernandez agreed. From the beginning of her tenure at the EEOC, Hernandez had been pressuring the agency to issue rulings on both the airlines' policy of excluding men from flight attendant jobs and their age and marital termination policies.²³⁸ After a full year of delay, Hernandez sent her colleagues a

²³⁰ *Neal v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6009 n.11 (June 20, 1968); *see also id.* at 6009-11.

²³¹ BARRY, *supra* note 142, at 157 (quoting Jesse Freidin).

²³² GEORGIA PANTER NIELSEN, *FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION* 87 (1982) (quoting United Airlines) (internal quotation marks omitted).

²³³ NOW actively supported the stewardesses' campaign to eradicate age and marital termination policies from the start. *See* Statement of Goals, Task Force on Equal Opportunity in Emp't, *supra* note 195, at 175 (discussing plans to support the airline stewardesses' campaign).

²³⁴ Flight Attendant Transcript, *supra* note 228, at 39 (statement of Betty Friedan).

²³⁵ *See, e.g., id.* at 127-28 (statement of Esther F. Johnson).

²³⁶ *Id.* at 200 (statement of Betty Friedan).

²³⁷ *Id.* at 202.

²³⁸ *See* Hernandez, *supra* note 125, at 22-24.

memo lambasting their "callous disregard" of female workers.²³⁹ She argued that the airlines' policies rested on "stereotypes" that reinforced "the second class status of women workers."²⁴⁰ By rejecting these policies, she asserted, "we will have begun the long uphill road to equality of opportunity for women and will indicate that our Commission recognizes the multiple roles women may and should play in our society."²⁴¹ Much to Hernandez's relief, the EEOC finally voted in November of 1966 that sex was not a BFOQ for the job of flight attendant.²⁴² That relief was short lived, however: the Air Transport Association (ATA) immediately obtained a restraining order forbidding the EEOC from issuing its decision until a court determined whether Hernandez's participation had tainted the impartiality of the proceedings.²⁴³ The ATA argued that because Hernandez was involved with NOW, an organization that had recently passed a resolution in support of the stewardesses' campaign, she could not be an impartial judge of the airlines' policies.²⁴⁴ In February of 1967, a federal court in Washington, D.C., granted the ATA's request for a preliminary injunction and permanently enjoined the EEOC from releasing its decision.²⁴⁵

Although the airlines succeeded in preventing the EEOC's November 1966 ruling from going into effect, the fact that the agency had voted as it did signaled to the airlines that their strategy of relying on the BFOQ exception might not prevail in the long run.²⁴⁶ Thus, in the ongoing contest over age and marital termination policies, the airlines increasingly began to rely on a different argument. When making the BFOQ argument, the airlines had implicitly acknowledged that these policies constituted sex discrimination, but claimed that such discrimination was justified by legitimate business requirements. Now, they argued that *these policies did not constitute sex discrimination at all*.²⁴⁷ Because these policies affected only some women, the airlines

²³⁹ *Id.* at 23.

²⁴⁰ *Id.* at 24.

²⁴¹ *Id.*

²⁴² BARRY, *supra* note 142, at 159.

²⁴³ Air Transp. Ass'n of Am. v. Hernandez, No. 3096-66, 1966 WL 190 (D.D.C. Nov. 21, 1966).

²⁴⁴ Air Transp. Ass'n of Am. v. Hernandez, 264 F. Supp. 227, 230-31 (D.D.C. 1967).

²⁴⁵ *Id.* at 232. The judge noted that "[s]ometime during the period between October 14 to October 29, Mrs. Hernandez had a conversation in her office with Pauli Murray concerning the formation of a women's civil rights group called the National Organization of Women," *id.* at 230-31, and that NOW had elected Hernandez "Executive Vice-President 'subject to her consent'" before the EEOC voted in the airlines' case, *id.* at 231.

²⁴⁶ Indeed, the EEOC's ruling that sex was not a BFOQ for the job of flight attendant was only temporarily thwarted. See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197 (7th Cir. 1971) ("After extended hearings, the Commission ruled on February 23, 1968, that female sex was not a bona fide qualification for the position of flight cabin attendant . . .").

²⁴⁷ During testimony before the EEOC, a lawyer for one of the stewardesses' unions called attention to this shift in the airlines' argument. He noted that "[i]n looking over the transcript of

argued that they could not logically be categorized as discrimination “because of sex.” Rather, the airlines argued, these policies discriminated on the basis of age and marital status — grounds that Title VII did not cover.²⁴⁸

If age and marriage policies fell outside the scope of Title VII’s protections, the EEOC and the federal courts would have no jurisdiction over these matters. This result was not a side effect of categorizing age and marriage policies as something other than sex discrimination, but the central — and explicit — purpose of doing so. Indeed, the airlines tried to persuade the EEOC and courts to adopt their narrow definition of sex discrimination for explicitly normative reasons. They argued that policies terminating the employment of stewardesses when they married benefitted American families by ensuring that women fulfilled their “homemaking and childrearing” responsibilities.²⁴⁹ They also urged legal decisionmakers to take account of “[w]hat is best for the public” when determining the scope of Title VII’s sex provision.²⁵⁰ Customers preferred “extremely young” and “attractive” flight attendants,²⁵¹ the airlines argued, and to survive in a competitive industry, companies needed to be able to supply “what the American public wants.”²⁵² “[O]ur product must be attractive,” a Vice President for American Airlines informed the EEOC: “[W]e . . . can not afford to have gray packaging. We must have a glamorous product. Our product must be wanted by people.”²⁵³ Moreover, the airlines contended, “[i]t is a free-enterprise system”;²⁵⁴ the United States was not, and should not be, the kind of country that tried to micromanage the employment practices of private companies.

Because the argument that Title VII should be interpreted to apply only to practices that sort men and women along biological sex lines was designed for the same purpose as the BFOQ argument (namely,

the hearing that this Commission held a year ago . . . [he found] one principal difference.” Flight Attendant Transcript, *supra* note 228, at 202 (statement of Herbert Levy). In the previous year’s hearing, the airlines had argued “that there is a bona fide occupational qualification which supports the limitation based upon age or marital status upon flight attendants,” *id.* at 203, an argument that took for granted that these limitations constituted sex discrimination. The lawyer noted that “[n]ow, in this hearing, [they] ha[ve] taken the position that the Commission lacks jurisdiction to deal [sic] with” these issues because they do not constitute sex discrimination. *Id.*

²⁴⁸ *Id.* at 22 (statement of Jesse Freidin) (noting that the EEOC “has no authority to act in respect to complaints which are in fact based upon considerations of anything other than race, creed, color, nationality [sic] origin and sex”).

²⁴⁹ *Neal v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6009 n.11 (June 20, 1968); *see also id.* at 6009-11.

²⁵⁰ Flight Attendant Transcript, *supra* note 228, at 78 (statement of Walter Rauscher).

²⁵¹ *Id.* at 81.

²⁵² *Id.* at 91.

²⁵³ *Id.* at 75.

²⁵⁴ *Id.* at 109 (statement of Frank Sharp).

limiting the law's reach), airlines in the 1960s often made these arguments simultaneously and interchangeably. When federal courts became involved in disputes over sex-based employment practices, they too sometimes treated these arguments as fungible. In *Cooper v. Delta Airlines, Inc.*,²⁵⁵ the first federal case involving the legality of the airlines' marriage policies, Delta mounted an extensive BFOQ defense, "with psychological experts and airline personnel officials testifying that successful passenger service required young, single female attendants."²⁵⁶ A Louisiana district court found that Delta's evidence had shown "that 'single women' are better stewardesses than 'married women' for various reasons *viz*: better passenger acceptance, change flight schedules easier, less likelihood of pregnancy."²⁵⁷ Yet rather than finding that Delta's marriage policy fell within the BFOQ exception, the court found that it did not count as sex discrimination at all because it did not divide men and women into two perfectly sex-differentiated groups. The court was candid about the fact that this determination rested on a normative foundation. It noted that "sex' . . . just sort of found its way into the equal employment opportunities section of the Civil Rights Bill,"²⁵⁸ and that many government officials, including Representative Emanuel Celler, had argued against its inclusion.²⁵⁹ The court then asserted that "Delta has a right to employ single females and to refuse to employ married females,"²⁶⁰ and that it had no intention of interpreting an unpopular law to infringe that right.

Less than a decade after *Cooper*, the Supreme Court held in *Gilbert* that pregnancy discrimination did not constitute discrimination on the basis of sex because it did not divide men and women along biological sex lines. By that time, courts had begun to depict this test as "an objective and determinate rule" that "define[s] discrimination solely with reference to the structure of a social practice" and "can be applied without additional value judgments."²⁶¹ But as the battles over sex-based employment practices in the 1960s show, courts' decisions about when and how to apply such a test were largely dependent on substantive judgments about the practices they were analyzing. The court in *Cooper* focused on the formal characteristics of the airlines' marriage policy explicitly in order to limit Title VII's reach and to preserve em-

²⁵⁵ 274 F. Supp. 781 (E.D. La. 1967).

²⁵⁶ BARRY, *supra* note 142, at 162–63.

²⁵⁷ *Cooper*, 274 F. Supp. at 782.

²⁵⁸ *Id.* at 783.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 15 (2003) (critiquing this account).

employers' "right" to implement hiring and retention policies that reflected and reinforced conventional sex roles. In the same period, courts and other legal actors often declined to adopt this approach in cases involving practices such as "protective" labor legislation and sex-segregated job advertising — cases in which this approach would have been more disruptive of gender norms than they were then willing to countenance. Analysis of the formal characteristics of employment practices was not the decisive factor in determinations of whether these practices ran afoul of Title VII's prohibition of sex discrimination; such determinations rested on social judgments about the desirability of maintaining or disrupting particular forms of gender-based regulation.

D. Antistereotyping Conceptions of Title VII

After the court in *Cooper* deployed anticlassificationist reasoning to limit the reach of Title VII's sex provision, other courts began to follow suit, particularly in the Fifth Circuit.²⁶² In 1969, in *Phillips v. Martin Marietta Corp.*,²⁶³ the Fifth Circuit upheld a policy that barred mothers but not fathers of preschool-age children from working on assembly lines on the ground that this policy did not discriminate "because of sex." The court acknowledged that its holding was based on a strong conviction that employers should not be compelled to ignore "the differences between the normal relationships of working fathers and working mothers to their pre-school age children."²⁶⁴ The court admitted that its own inclination would be to hold that this "seeming difference in treatment" was justified under Title VII's BFOQ exception.²⁶⁵ It noted, however, that the EEOC had "rejected this possible reading of the statute."²⁶⁶ Because the EEOC had rejected the possibility of a BFOQ, the court concluded that its only option for preserving the employer's policy was to hold that it did not discriminate "because of sex." If the only "permissible" way to limit the statute's reach was to "conclud[e] that the seeming discrimination here involved was not founded upon 'sex,'" the court explained, it would have "no hesitation" in reaching that conclusion.²⁶⁷

²⁶² See, e.g., *Lansdale v. United Air Lines, Inc.*, No. 68-1458-CIV-CA, 1969 WL 139, at *2 (S.D. Fla. Dec. 2, 1969) (finding that United's practice of terminating the employment of stewardesses upon marriage does not violate Title VII's sex provision because it does not discriminate "because of sex," but rather on the basis of marital status).

²⁶³ 411 F.2d 1 (5th Cir. 1969).

²⁶⁴ *Id.* at 4; see also *id.* (arguing that it would be absurd to suggest that Congress could have intended Title VII to outlaw forms of discrimination that were rooted in such fundamental differences between men's and women's roles in the family).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

The court in *Martin Marietta* did not attempt to conceal the normative judgments about men's and women's sex and family roles that motivated its decision, nor did it seek to disguise its view that there was something overly formalistic and unnatural about requiring that an employment practice divide all men from all women in order to count as discrimination "because of sex."²⁶⁸ Dissatisfaction with this form of reasoning was not confined to the majority. The Chief Judge, joined by two of his colleagues, wrote a stinging dissent from the denial of rehearing en banc in *Martin Marietta* attacking the court's formalistic interpretation of the statute.²⁶⁹ The dissenters argued that when Congress enacted Title VII, "mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude,"²⁷⁰ and that "one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families."²⁷¹ The dissenters argued that these fundamental commitments should guide the interpretation of Title VII's sex provision. They also noted that working mothers account for a substantial percentage of the American workforce, that mothers continue to confront significant obstacles to workplace equality, and that President Nixon had recently championed "greatly expanded day-care center facilities" to help mothers overcome these very obstacles.²⁷² Thus, the dissenters argued, it ran directly contrary to the government's objectives to permit employers "to deny employment to those who need the work most."²⁷³

²⁶⁸ See *id.* (referring to the company's policy as "discrimination" and concluding only in order to reach its preferred result that "the seeming discrimination here involved was not founded upon 'sex' as Congress intended that term to be understood").

²⁶⁹ *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257 (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing en banc).

²⁷⁰ *Id.* at 1260.

²⁷¹ *Id.* at 1261.

²⁷² *Id.* at 1261 n.13. The Chief Judge cited approvingly the EEOC's argument that "it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment," *id.*, and argued that Title VII should be interpreted to further this project, *id.* at 1261-62.

²⁷³ *Id.* at 1262. In the early 1970s, Congress repeatedly reaffirmed its own commitment to enabling women to pursue motherhood and paid work with a series of laws designed to increase the availability of childcare. See, e.g., Revenue Act of 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497, 518-20 (instituting a progressive childcare tax deduction for working parents); Comprehensive Child Development Act, S. 1512, 92d Cong. (1971) (authorizing \$2 billion for Head Start, day care, and supportive education programs, but vetoed by President Nixon, who changed his mind about day care in the early 1970s). In the same session, Congress amended and broadened the scope of Title VII, in part because it found that working women continued to face widespread discrimination in the workplace that deprived them of the ability to support their families. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; S. REP. NO. 92-

In the late 1960s, the EEOC itself adopted this antistereotyping approach to Title VII's sex provision in a landmark series of rulings concerning the airlines' age and marriage policies.²⁷⁴ As noted above, the airlines increasingly began to argue in this period that these policies did not discriminate on the basis of sex because they did not sort employees along biological sex lines.²⁷⁵ In the summer of 1968, the EEOC categorically rejected this interpretation, holding that these policies constituted discrimination "because of sex" because they reflected and reinforced conventional understandings of women's sex and family roles. The EEOC noted that the airlines had defended their policies in precisely these terms, arguing that they were necessary "to avoid the stress on home and family life which would be caused by the absence of married stewardesses from their homes."²⁷⁶ In the agency's view, such arguments merely confirmed that these policies constituted sex discrimination. It did not matter that there was no "actual disparity of treatment among male and female employees"²⁷⁷; what defined these policies as discriminatory was that they were based on stereotyped "assumptions about married women"²⁷⁸ that curtailed their access to the workplace.

In 1971, Justice Thurgood Marshall became the most prominent advocate of this way of reasoning about sex discrimination when he embraced it in his concurring opinion in *Martin Marietta*,²⁷⁹ which by then had reached the Supreme Court. The Court in *Martin Marietta* overruled the Fifth Circuit's determination that barring mothers, but not fathers, of young children from assembly-line jobs did not qualify as sex discrimination.²⁸⁰ But what the Court gave, it then took away: it suggested that "family obligations, if demonstrably more relevant to job performance for a woman than for a man,"²⁸¹ could justify a BFOQ in these circumstances.²⁸² Rejecting this suggestion, Justice

415, at 7-8 (1971). For more on the Ninety-Second Congress's concerted efforts to combat sex discrimination, see *supra* pp. 1345-47.

²⁷⁴ See *Colvin v. Piedmont Aviation, Inc.*, EEOC Decision No. 6-8-6975, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8003, at 6011 (June 20, 1968); *Dodd v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5762, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8001, at 6001 (June 20, 1968); *Neal v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6006 (June 20, 1968).

²⁷⁵ See *supra* p. 1351.

²⁷⁶ *Colvin*, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6014.

²⁷⁷ *Neal*, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6010.

²⁷⁸ *Colvin*, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6014.

²⁷⁹ 400 U.S. 542, 544 (1971) (Marshall, J., concurring). *Martin Marietta* was the first sex-based Title VII case to reach the Supreme Court.

²⁸⁰ *Id.* at 544 (per curiam).

²⁸¹ *Id.*

²⁸² *Id.* (remanding the case to the lower court to determine whether Martin Marietta Corp. could establish that sex was a BFOQ).

Marshall argued that "the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."²⁸³ In fact, he argued, Congress "sought just the opposite result. By adding the prohibition of job discrimination based on sex to the 1964 Civil Rights Act, Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'"²⁸⁴ Marshall cited the EEOC's recent decisions regarding the airlines' age and marriage policies as evidence that Title VII did not permit the enforcement of traditional sex and family roles, regardless of what form that enforcement took.²⁸⁵

Several months later, the Seventh Circuit endorsed this reasoning in *Sprogis v. United Air Lines, Inc.*,²⁸⁶ which held that United's practice of terminating the employment of stewardesses upon marriage violated Title VII.²⁸⁷ The court in *Sprogis* rejected the airline's argument that its marriage policy did not discriminate "because of sex" but merely differentiated between two groups of women on the basis of a characteristic unprotected by the law. United cited *Cooper* for this proposition, but the Seventh Circuit adopted a critical stance toward that case; it characterized *Cooper*'s approach as a departure from congressional intent and a betrayal of the statute's ideals. The court asserted in *Sprogis* that Title VII was intended to counteract discrimination "resulting from sex stereotypes" and to "eliminate . . . irrational impediments to job opportunities and enjoyment which have plagued women in the past."²⁸⁸ This reasoning echoed the claims that the proponents of adding "sex" to Title VII made during the congressional debate over Title VII in 1964, and that Congress would reiterate in the debate over

²⁸³ *Id.* at 545 (Marshall, J., concurring).

²⁸⁴ *Id.* (footnote omitted) (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(1)(ii) (1971)).

²⁸⁵ *Id.* at 545 & n.2 (citing *Colvin v. Piedmont Aviation, Inc.*, EEOC Decision No. 6-8-6975, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8003, at 6011 (June 20, 1968); *Neal v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6006 (June 20, 1968)). Marshall also cited Representative Ross Bass's declaration during the legislative debate over Title VII that the law would cover both single and married women as evidence that Congress intended this statute as a bar against the enforcement of traditional sex roles in the workplace. *Id.* at 545 n.2 (citing 110 CONG. REC. 2578 (1964) (statement of Rep. Bass)).

²⁸⁶ 444 F.2d 1194 (7th Cir. 1971).

²⁸⁷ *Id.* at 1197-98.

²⁸⁸ *Id.* at 1198. In *Sprogis*, the plaintiffs were able to produce male comparators because United Airlines employed both male and female flight attendants but applied its marriage policy only to females. In the airline cases decided by the EEOC in 1968, which struck down the same policy at issue in *Sprogis*, the plaintiffs were not able to produce male comparators because the airlines in those cases employed only women as flight attendants. See cases cited *supra* note 274. In both cases, the legal decisionmakers cited the social meaning and effects of these policies in explaining why they were striking them down.

the 1972 Amendments. It reflected a conception of Title VII's sex provision as a check on the enforcement of sex-role stereotypes that had historically limited men's and women's opportunities.

Surveying the legal developments in this period, the author of a 1970 law review article concluded that a new day was dawning in sex discrimination law.²⁸⁹ He asserted that when Title VII went into effect, the EEOC failed to grasp "[t]he importance of the sex provision";²⁹⁰ the commissioners seemed "oblivious to sex discrimination"²⁹¹ and hostile toward the idea of trying to combat it. Five years later, however, the agency and federal courts had begun to enforce the law. In cases involving "protective" labor legislation and the BFOQ exception, he noted, "Title VII has been interpreted to . . . reject[] . . . policies based on old-fashioned assumptions and myths about the sexes."²⁹² He predicted that in the future, Title VII would increasingly be used to eradicate employment policies that denied women "opportunities to use their talents and fulfill their potential"²⁹³ and that reinforced "traditional sex roles and family structure."²⁹⁴ As for the Fifth Circuit decisions, the author asserted that "[s]ome judges seem as insensitive to the real meaning of sex discrimination as did the early members of the EEOC."²⁹⁵ He predicted that judicial resistance to the enforcement of Title VII's sex provision would fade, as the EEOC's had, and that the "overly narrow"²⁹⁶ and formalistic understanding of sex discrimination adopted by these recalcitrant courts would soon be rejected in favor of a "deeper understanding."²⁹⁷

He was wrong.

III. THE INVENTION OF A TRADITION

In 1976, the Court held in *General Electric Co. v. Gilbert*²⁹⁸ that discrimination on the basis of pregnancy did not qualify as discrimination "because of sex" under Title VII. In many ways, this decision was a direct descendant of decisions like *Cooper* and the Fifth Circuit's holding in *Martin Marietta*. *Gilbert* relied on the same narrow, anticlassificationist reasoning as these earlier decisions, holding that the term "discriminate on the basis of sex"²⁹⁹ refers only to practices

²⁸⁹ See Richard A. McDaniel, *Sex Discrimination*, 2 RUTGERS-CAMDEN L.J. 267, 267 (1970).

²⁹⁰ *Id.* at 268.

²⁹¹ *Id.* at 269.

²⁹² *Id.* at 284.

²⁹³ *Id.* at 283.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 270.

²⁹⁶ *Id.* at 269.

²⁹⁷ *Id.* at 273.

²⁹⁸ 429 U.S. 125 (1976).

²⁹⁹ *Id.* at 133.

that sort men and women into two groups perfectly differentiated on the basis of biological sex. Yet courts in the earlier decisions explicitly acknowledged that form followed function in the interpretation of Title VII's sex provision. They did not claim that their narrow, formalistic approach was the only legitimate way to interpret the law;³⁰⁰ they claimed that it was the best way, because it helped to realize a set of broader normative commitments, which generally involved shielding various forms of sex-based regulation from legal interrogation.

Gilbert did not speak in this register. It studiously avoided the kind of "gender talk" that had permeated discussion of Title VII's sex provision over the past decade. In fact, the Court managed to compose an entire opinion on the subject of discrimination against pregnant women without once using the word "mother" or "family." Instead, the Court spoke of values such as deference and fidelity, asserting that its narrow interpretation of the law was mandated by "tradition." Briefs filed in *Gilbert* argued that discrimination against pregnant workers reflected stereotyped assumptions about the incompatibility of work and motherhood and reinforced women's secondary status in the workplace.³⁰¹ But the Court rejected the notion that normative considerations should influence the determination of what counts as discrimination "because of sex." Traditionally, the Court asserted, the term discrimination was defined objectively, by reference to the formal characteristics of a policy or practice. The Court declared itself bound, by its status as an interpreter rather than a creator of the law, to adhere to this traditional understanding.

Yet as Part II showed, the assessment of whether an employment practice formally differentiated between the sexes did not function in the 1960s as an objective or neutral rule for determining whether it ran afoul of Title VII's prohibition of sex discrimination. In the decade after Title VII was enacted, courts and other legal actors applied formalistic reasoning about sex discrimination inconsistently and in the service of more substantive judgments about how forcefully the law should constrain workplace practices that reflect and reinforce conventional gender norms. This Part shows that this was no less true in the era of *Gilbert*. The Court's decision to resolve the question in *Gilbert* by asking whether pregnancy discrimination divided men and women

³⁰⁰ Indeed, the Fifth Circuit would have been perfectly willing, even pleased, to adopt a broader definition of the term discriminate "because of sex," if it could have used the law's BFOQ exception to preserve sex-based regulations it considered benign or normatively appealing. *See supra* pp. 1354–55.

³⁰¹ *See, e.g.*, Brief of the American Civil Liberties Union as Amicus Curiae Supporting Petitioner, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (No. 73); Brief of the National Organization for Women as Amicus Curiae Supporting Petitioner, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (No. 73).

along biological sex lines was itself dependent on the very social considerations the Court disavowed in its opinion. However, by claiming to disavow such considerations and turning to “tradition” to justify its narrow interpretation of Title VII, the Court obscured the value judgments that have continued to influence what counts as discrimination “because of sex.”

*A. Pregnancy and the “Traditional” Understanding
of Sex Discrimination*

Historically, women’s capacity to become pregnant and their status as mothers have served as central justifications for their exclusion from the workforce. Many of the discriminatory practices condemned by congressional proponents of Title VII’s sex provision in 1964 — from “protective” labor legislation to the exclusion of women from juries — were justified by reference to women’s roles as mothers.³⁰² Even workplace policies that did not explicitly refer to pregnancy and motherhood were often motivated by such concerns: the battle over the airlines’ age and marriage policies was, at its core, a battle about women’s right to continue working when they became mothers. Defenders of these policies routinely cited pregnancy — and the maternal responsibilities that ensued — as a primary justification for “grounding” stewardesses when they reached the maternal stage of their lives.³⁰³

The women’s movement in the 1960s was quite vocal in its opposition to employment practices premised on stereotypes about women’s special responsibilities in the home. In 1967, NOW observed that stereotyped conceptions of motherhood were “still [being] used to justify barring women from equal professional and economic participation and advance,”³⁰⁴ and demanded an end to “discrimination based on maternity.”³⁰⁵ Stewardesses echoed these claims in their campaign against the airlines’ age and marriage policies. They argued that these policies reflected precisely the kind of outmoded ideas about work and

³⁰² See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 62–63 (1961) (upholding a Florida law excusing women from jury service because women are “still regarded as the center of home and family life,” *id.* at 62, and will often have “family responsibilities,” *id.* at 63, incompatible with full participation in the public sphere); *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (upholding a “protective” labor law on the grounds that “healthy mothers are essential to vigorous offspring,” *id.* at 421, and that ensuring “the proper discharge of [women’s] maternal functions,” *id.* at 422, justifies the restriction on their right to work).

³⁰³ See, e.g., Frederic C. Appel, *Woman Pilot Deplores Airlines’ Bar Because of Sex*, N.Y. TIMES, May 23, 1965, at 66 (quoting a United Airlines spokesman’s observation that “[m]arriage and possible pregnancy preclude women from being considered as long-term employes” (internal quotation mark omitted)).

³⁰⁴ Statement of Purpose, Nat’l Org. for Women, *supra* note 193, at 159–60.

³⁰⁵ Statement of Goals, Task Force on Equal Opportunity in Emp’t, *supra* note 195, at 174–75.

motherhood that Title VII was designed to counteract. During the monumental Women's Strike for Equality organized by NOW in the summer of 1970,³⁰⁶ a contingent of stewardesses led a march in Washington, D.C., bearing signs that read "Storks Fly, Why Can't Mothers?," "We Want Our Babies and Our Wings," and "Mothers Are Still FAA Qualified."³⁰⁷

By the early 1970s, thousands of women had joined in the campaign to end employment practices that discriminated against pregnant women and mothers. Among the chief targets of this campaign were policies that exempted pregnancy from otherwise comprehensive disability insurance plans. Defenders of these policies argued that such exemptions were critical to preserving the traditional organization of the American family. The *Wall Street Journal* editorial board opposed extending disability coverage to pregnant women on the ground that it would "weaken the family unit," in part by providing women with "economic protection for bearing children out of wedlock."³⁰⁸ In 1966 — a period in which the EEOC remained openly hostile to Title VII's prohibition of sex discrimination — the agency issued an opinion letter stating that a "benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."³⁰⁹ By the early 1970s, however, the idea that pregnancy discrimination did not constitute sex discrimination was a minority view.³¹⁰ In 1972, the EEOC retracted its initial ruling and issued a new guideline stating that Title VII barred the exclusion of pregnancy-related disability from employer benefit plans.³¹¹ That same year, the Department of Health, Education, and Welfare issued

³⁰⁶ For more on the Women's Strike, see FRIEDAN, *supra* note 155, at 180–95; and Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1988–89 (2003). The Women's Strike, which drew tens of thousands of women, was designed "to publicize three core movement claims: '(1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education.'" *Id.* at 1989 (quoting Judy Klemesrud, *A History-Making Event*, *N.Y. TIMES*, Aug. 23, 1970, § 6 (Magazine), at 6, 14). The strikers made these three demands to illustrate the central role that the regulation of women's sex and family roles played in depriving them of equal opportunity in the workplace.

³⁰⁷ BARRY, *supra* note 142, at 188 (internal quotation marks omitted).

³⁰⁸ Editorial, *Examining Sex Discrimination*, *WALL ST. J.*, Apr. 12, 1974, at 6.

³⁰⁹ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (quoting letter) (internal quotation mark omitted).

³¹⁰ MAYERI, *supra* note 110, at 67.

³¹¹ Guidelines on Discrimination Because of Sex, 37 *Fed. Reg.* 6835, 6837 (Mar. 31, 1972) (codified as amended at 29 C.F.R. § 1604.10 (2011)) ("Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.").

nearly identical guidelines³¹² interpreting Title IX of the Education Amendments of 1972.³¹³ By 1975, numerous federal courts had ruled that pregnancy discrimination was discrimination “because of sex” within the meaning of Title VII,³¹⁴ including all six of the federal appellate courts that had considered the issue.³¹⁵

This trajectory came to an abrupt halt in 1974, in *Geduldig v. Aiello*,³¹⁶ when the Supreme Court rejected an equal protection challenge to a provision of the California insurance code that exempted pregnancy from the state’s otherwise comprehensive disability insurance program.³¹⁷ The lower court found that the provision violated equal protection because it was based on “sexual stereotypes,”³¹⁸ but the Supreme Court rejected this finding. It held in *Geduldig* that pregnancy discrimination was not sex discrimination because it did not divide men and women along the axis of biological sex but merely differentiated between two groups of women.³¹⁹ Two years later, the Court endorsed this approach in *Gilbert*, which extended the holding in *Geduldig* to the context of Title VII. In *Gilbert*, however, the Court offered a new justification for its holding. Whereas the Court in *Geduldig* simply asserted that pregnancy discrimination was not sex discrimination, the Court in *Gilbert* claimed that this understanding was deeply rooted in history and tradition. Citing the “long history of

³¹² OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH, EDUC., & WELFARE, HIGHER EDUCATION GUIDELINES: EXECUTIVE ORDER 11246, at 12–13 (1972) (prohibiting discrimination against pregnant women).

³¹³ Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)). Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

³¹⁴ See, e.g., *Tyler v. Vickery*, 517 F.2d 1089, 1097–99 (5th Cir. 1975); *Comm’n Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975); *Satty v. Nashville Gas Co.*, 384 F. Supp. 765, 771 (M.D. Tenn. 1974), *aff’d*, 522 F.2d 850 (6th Cir. 1975); *Hutchison v. Lake Oswego Sch. Dist.*, 374 F. Supp. 1056, 1065 (D. Or. 1974), *aff’d*, 519 F.2d 961 (9th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 381–82 (E.D. Va. 1974), *aff’d*, 519 F.2d 661 (4th Cir. 1975), *rev’d*, 429 U.S. 125; *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1162 (W.D. Pa. 1974), *aff’d*, 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); *Healen v. E. Airlines, Inc.*, No. 18097, 1973 U.S. Dist. LEXIS 11973, at *24 (N.D. Ga. Dec. 26, 1973); *Dessenberg v. Am. Metal Forming Co.*, No. C 72-48 T, 1973 U.S. Dist. LEXIS 11650, at *4 (N.D. Ohio Oct. 3, 1973); *Lillo v. Plymouth Local Bd. of Educ.*, No. C 73-184-Y, 1973 U.S. Dist. LEXIS 11651, at *2–3 (N.D. Ohio Oct. 3, 1973); *Vick v. Tex. Emp’t Comm’n*, No. 70-H-1164, 1973 U.S. Dist. LEXIS 12104, at *7 (S.D. Tex. Aug. 30, 1973); *Doe v. Osteopathic Hosp. of Wichita, Inc.*, 333 F. Supp. 1357, 1362 (D. Kan. 1971).

³¹⁵ See *Gilbert*, 429 U.S. at 147 (Brennan, J., dissenting) (citing *Comm’n Workers of Am.*, 513 F.2d 1024; *Wetzel*, 511 F.2d 199; *Gilbert*, 519 F.2d 661; *Tyler*, 517 F.2d at 1097–99; *Satty*, 522 F.2d 850; *Hutchison*, 519 F.2d 961).

³¹⁶ 417 U.S. 484 (1974).

³¹⁷ *Id.* at 497.

³¹⁸ *Aiello v. Hansen*, 359 F. Supp. 792, 798 (N.D. Cal. 1973).

³¹⁹ *Geduldig*, 417 U.S. at 496–97 & n.20.

judicial construction"³²⁰ of the term discrimination in cases involving race, the Court asserted that this term had "traditionally"³²¹ been understood to refer only to practices that formally classified on the basis of a protected trait.

This was a formative moment in contemporary antidiscrimination law. The mid-1970s marked the end of the long Warren Court era, in which the Court had worked to dismantle racial stratification in a diverse array of social institutions, regardless of whether that stratification resulted from overt racial classification or less formal means of maintaining racial hierarchy.³²² The Court began in the mid-1970s to identify formal classification, rather than racial subordination or substantive inequality, as the evil that constitutional and statutory antidiscrimination law was intended to prevent.³²³ Under this new regime, busing and affirmative action became problems to remedy,³²⁴ and laws and practices that helped to maintain de facto segregation in schools, neighborhoods, and workplaces ceased to register as legal concerns.³²⁵ *Geduldig* extended the Court's anticlassificationist turn to the context of sex. But it was *Gilbert*, two years later, that consolidated the idea that discrimination "because of sex" referred only to practices that divided men and women along the axis of biological sex.³²⁶ *Gilbert* constructed a history and a pedigree for this idea, suggesting that courts had no choice but to interpret Title VII's prohibition of sex discrimination in a narrow, formalistic manner if they wished to remain faithful to the American legal tradition.

For an opinion that purports to be grounded in a long-standing interpretive tradition, *Gilbert* contains notably few historical citations. Of the cases it does cite, some seem to undermine its claim that the term "discrimination" has been understood throughout American histo-

³²⁰ *Gilbert*, 429 U.S. at 145.

³²¹ *Id.*

³²² In the late 1970s, Alan David Freeman identified 1974 as the year in which the Court adopted colorblindness as its primary approach to questions in race discrimination law. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1102 (1978); cf. MAYERI, *supra* note 110, at 76–105 (discussing the conservative turn in the Court's race discrimination jurisprudence in the mid-1970s and its effects on the way that feminist litigators approached sex discrimination cases). See generally LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974–1980* (2010) (dating the emergence of the modern conservative movement to the mid-1970s and examining its substantial effects on Supreme Court personnel and race discrimination law).

³²³ See generally Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (examining the development of "reactionary colorblindness" and its emergence in the Court's race discrimination jurisprudence in the 1970s).

³²⁴ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Milliken v. Bradley*, 418 U.S. 717 (1974); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

³²⁵ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Milliken*, 418 U.S. 717.

³²⁶ See *Gilbert*, 429 U.S. at 145.

ry in exclusively anticlassificationist terms. One of these cases, *Morton v. Mancari*,³²⁷ involved a Title VII challenge to the Bureau of Indian Affairs' (BIA) long-standing practice of granting explicit employment preferences to qualified Indians. The Court rejected this challenge. It held that the "preference [was] a longstanding, important component of the Government's Indian program" and that, historically, this program had not been understood to constitute the kind of racial discrimination that Title VII was designed to counteract.³²⁸ Asserting the importance of analyzing the concept of discrimination in a context-specific and historically sensitive manner, the Court declared:

A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference³²⁹

In *Mancari*, the Court portrayed formalistic reasoning about discrimination — the very sort of reasoning the *Gilbert* Court employed — as an overly rigid approach to a concept that is necessarily defined in terms of social meaning and practical effects.

Mancari was not the only case cited in *Gilbert* in which the Court had recently rejected a formalistic approach to the concept of discrimination. In his dissenting opinion in *Gilbert*,³³⁰ Justice Brennan noted that the Court had also rejected such an approach in another 1974 case, *Lau v. Nichols*.³³¹ In *Lau*, the Court held that San Francisco's failure to provide special language instruction to Chinese-speaking students in its public schools violated Title VI's prohibition of race, color, and national origin discrimination, despite the fact that the city had not formally classified students on these bases. The Court held in *Lau* that, given the broad social objectives underlying the statute, its antidiscrimination provisions should be interpreted to require the school district to "take affirmative steps to rectify the language defi-

³²⁷ 417 U.S. 535 (1974).

³²⁸ *Id.* at 550. Although it had characterized American Indians in racial terms in previous cases — and the lower court had done so in this case — the Court in *Mancari* decided to characterize the BIA's employment policy as a political preference. *Id.* at 553–54. The Court's shifting understanding of what counts as a racial classification provides a further demonstration of the ways in which anticlassificationist approaches to questions involving discrimination are inherently dependent on value judgments about the practices at issue. For a more detailed examination of the Court's determination that the BIA's preference for Indians did not constitute discrimination "on the basis of race," see generally Carole Goldberg, *What's Race Got to Do with It?: The Story of Morton v. Mancari*, in RACE LAW STORIES 237 (Rachel F. Moran & Devon Wayne Carbadó eds., 2008).

³²⁹ *Mancari*, 417 U.S. at 550.

³³⁰ *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting).

³³¹ 414 U.S. 563 (1974).

ciency in order to open its instructional program to these students."³³² The Court noted that the school district's failure to do so had "all [the] earmarks of the discrimination banned by the regulations,"³³³ suggesting that the term "discrimination" did not necessarily entail classification.

In his dissent in *Gilbert*, Justice Brennan noted that in *Lau*, "a unanimous Court recognized that discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals."³³⁴ Brennan accused the Court in *Gilbert* of adopting a mindlessly formalistic approach to the concept of sex discrimination — one that obscured legally salient questions about the social meaning and effects of pregnancy discrimination and the ways in which it reflected and reinforced traditional conceptions of women's sex and family roles.³³⁵

This was not a bug but a feature of the Court's formalist rhetoric. In the 1960s, employers and courts were explicit about the normative concerns motivating their adoption of a narrow, anticlassificationist approach to Title VII. They argued that interpreting the law to apply only to employment practices that divided men and women into two perfectly sex-differentiated groups would limit the statute's reach and help to maintain the traditional, gendered organization of the family. By the mid-1970s, however, justifications for employment practices that relied explicitly on stereotyped conceptions of men's and women's roles had become less persuasive in the legal arena.³³⁶ Concerted efforts by the women's movement had convinced courts, at least in some cases, that regulations enforcing such stereotypes violated antidiscrimination law.³³⁷ Reasoning that relied on the formal characteristics of challenged practices provided a cooler way of approaching such is-

³³² *Id.* at 568 (quoting Dept. of Health, Educ., & Welfare, Identification of Discrimination, 35 Fed. Reg. 11,595, 11,595 (July 18, 1970) (requiring schools receiving federal funds to take such measures)).

³³³ *Id.*

³³⁴ *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting).

³³⁵ *See id.* at 148–49 & n.1.

³³⁶ *See generally* Franklin, *supra* note 192.

³³⁷ In 1961, the Supreme Court upheld a Florida law excusing women from jury service on the ground that "woman is still regarded as the center of home and family life" — a role that entailed "special responsibilities" and was presumably incompatible with full participation in civic life. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). By the early 1970s, the Court had begun to reject stereotyped conceptions of men's and women's roles as a justification for sex-based state action. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating a federal law requiring husbands, but not wives, of service members to prove dependency in order to qualify for benefits); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Idaho statute that preferred men to women in the appointment of estate executors).

sues³³⁸: it enabled the Court to respond to charges that it was upholding employment practices that “fostered [sexually] stratified job environments to the disadvantage of [women]”³³⁹ by asserting that it was simply applying the traditional test for discrimination and not finding any.

Eric Hobsbawm observes that “traditions” are often invented for the purpose of “establishing or legitimizing institutions . . . or relations of authority.”³⁴⁰ By the 1970s, arguments based explicitly on sex stereotypes had lost some of their power to legitimate narrow interpretations of Title VII’s sex provision. The argument that “tradition” compelled courts to interpret the statute narrowly sounded in far more anodyne notions of deference and fidelity. These notions appeared to have nothing to do with concerns about gender and the family. Yet the adoption of formalistic reasoning in *Gilbert* but not in other cases suggests that social judgments about the practice of pregnancy discrimination influenced the Court’s determination that Title VII’s sex provision did not reach this far. In other words, *Gilbert* did not transcend the debate over how strictly Title VII should regulate employment practices that enforced conventional understandings of women’s sex and family roles: it took a side in that debate.

B. *The Persistent Demand for Opposite-Sex Comparators*

Ostensibly, *Gilbert* is no longer good law. When Congress enacted the Pregnancy Discrimination Act³⁴¹ (PDA), it rejected the Court’s interpretation of Title VII and declared that pregnancy discrimination was a form — perhaps the iconic form — of discrimination “because of sex.”³⁴² Numerous legislators in 1978 expressed surprise that it was necessary to clarify this point, as it seemed obvious that “the assumption that women will become pregnant and leave the labor force . . . is

³³⁸ Cf. Goldberg, *supra* note 18, at 794 (“The comparator heuristic, as it is used by most courts . . . gives the appearance that the facts of differential treatment, rather than the courts’ own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene.”).

³³⁹ *Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting) (alterations in original) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)) (internal quotation marks omitted).

³⁴⁰ Hobsbawm, *supra* note 22, at 9. Hobsbawm notes that the invention of tradition “occur[s] more frequently when a rapid transformation of society weakens or destroys the social patterns for which ‘old’ traditions had been designed . . . or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible” to suit current needs. *Id.* at 4–5. This may be especially true in a legal context, where claims of obedience to precedent or original understanding carry special weight and may be particularly useful in justifying revolutionary interpretations of the law.

³⁴¹ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

³⁴² See *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1974–80 (2009) (Ginsburg, J., dissenting) (discussing the passage of the PDA and its swift and wholehearted repudiation of *Gilbert*).

at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."³⁴³ In fact, the consensus in both the House and Senate was that the PDA simply restored the understanding of Title VII's sex provision held by Congress, "the EEOC and the overwhelming majority of the Federal courts which addressed this issue prior to the Gilbert decision."³⁴⁴

The Court has since acknowledged on numerous occasions that "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in . . . *Gilbert*."³⁴⁵ In other words, the PDA "not only overturned the specific holding" in *Gilbert* but "also rejected the test of discrimination employed by the Court in that case."³⁴⁶ Despite this seemingly categorical rejection, however, *Gilbert*'s reasoning about what it means to discriminate on the basis of sex — and the "test of discrimination" it established — continues to limit the protections available to workers under Title VII.

The most formidable obstacle confronting employment discrimination plaintiffs today is courts' ongoing demand for comparator evidence. In most circumstances, courts in Title VII cases continue to require that sex discrimination plaintiffs adduce opposite-sex comparators — individuals similarly situated to themselves in all relevant respects aside from biological sex.³⁴⁷ Courts hold that only by

³⁴³ H.R. REP. NO. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751; see also 124 CONG. REC. 21,442 (1978) (statement of Rep. Tsongas) (explaining that the PDA would "put an end to an unrealistic and unfair system that forces women to choose between family and career — clearly a function of sex bias in the law, which no longer reflects the conditions of women in our society").

³⁴⁴ 124 CONG. REC. 21,440 (statement of Rep. Thompson); see also S. REP. NO. 95-331, at 7-8 (1977) ("[T]he bill is merely reestablishing the law as it was understood prior to *Gilbert* . . ."); 124 CONG. REC. 36,819 (statement of Sen. Stafford) ("Congress in 1964 . . . intended to prohibit discrimination in employment on the basis of pregnancy when it enacted the original Civil Rights Act."); *id.* at 21,442 (statement of Rep. Myers) ("This legislation will clarify the original intent of Congress that sex discrimination in [T]itle VII includes pregnancy-based discrimination."); *id.* at 21,440 (statement of Rep. Thompson) ("H.R. 6075 seeks only to clarify what most feel was the original intent of Congress in enacting the Civil Rights Act — that the [T]itle VII prohibitions against sex discrimination in employment include discrimination based on 'pregnancy, childbirth, or related medical conditions.'").

³⁴⁵ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983); see also *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-85 (1987) (explaining that "the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*," *id.* at 284, while "the second clause . . . illustrate[s] how discrimination against pregnancy is to be remedied," *id.* at 285); *Newport News*, 462 U.S. at 679 ("Proponents of the [PDA] repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision.").

³⁴⁶ *Newport News*, 462 U.S. at 676.

³⁴⁷ *Goldberg*, *supra* note 18, at 750 ("[Comparators] constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition.

comparing the plaintiff to such a comparator is it possible to determine that the alleged discrimination was truly based on sex.

This requirement expresses in doctrinal terms *Gilbert's* formalistic conception of discrimination: it is concerned not with the social meaning or practical effects of a challenged employment practice but only with whether it sorts men and women along the axis of biological sex. In fact, courts applying the comparator requirement often describe sex discrimination in explicitly mathematical terms. A passage oft quoted in sex discrimination decisions suggests that a married woman can show that she has suffered sex discrimination only by comparing herself to a married man because when one “cancel[s] out the common characteristics of the two classes being compared ([e.g.,] married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and *sex remains the only operative factor in the equation.*”³⁴⁸

This requirement sharply curtails plaintiffs’ ability to prove they have been discriminated against “because of sex.” People who work in small or sex-segregated workplaces or who are uniquely situated in their jobs will often be unable to produce comparators, meaning that they effectively reside outside the scope of Title VII’s protection.³⁴⁹ The comparator requirement also excludes from protection workers who face discrimination on the basis of capacities that are unique to one sex, such as breast-feeding. For this reason, no plaintiff in the American legal system has ever persuaded a court that breast-feeding discrimination violates Title VII’s sex provision.³⁵⁰ Courts have universally concluded in such cases that:

[D]rawing distinctions among women . . . on the basis of their participation in breast-feeding activity, simply is not the same as drawing distinc-

On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination.” (footnote omitted).

³⁴⁸ *E.g.*, *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (second alteration in original) (quoting LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 40.04, at 40-12 (2d ed. 1996) (emphasis added)); *see also* *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at *8 (E.D. Mich. Mar. 22, 2007) (same); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 882 (M.D. Tenn. 2004) (same); *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999) (same).

³⁴⁹ *See* *Goldberg*, *supra* note 18, at 751-64 (discussing the many “circumstances in which courts’ insistence on the production of comparators inhibits or precludes discrimination claims,” *id.* at 751); *see also* JOAN WILLIAMS, *UNBENDING GENDER* 66 (2000) (noting that “[m]ost women work with other women” and that “[t]hree-fourths of all working women still work in predominantly female occupations”).

³⁵⁰ *See, e.g.*, *supra* note 19. The Patient Protection and Affordable Care Act amended Section 7 of the Fair Labor Standards Act to require employers to provide breast-feeding mothers with break time and a private space in which to express milk, but it did not amend Title VII’s prohibition of sex discrimination. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 577-78 (codified as amended at 29 U.S.C. § 207(r)(1)-(4) (Supp. IV 2010)).

tions between women and men A prohibition against breast-feeding merely divides people into two groups: (1) women who breast-feed . . . ; and (2) individuals who do not breast-feed [A]lthough the first group includes exclusively women . . . the second group includes members of both sexes If anything, such classifications establish “breast-feeding discrimination,” which . . . is not discrimination on the basis of sex . . . under the law.³⁵¹

This reasoning closely tracks the Court’s reasoning in *Gilbert*. In fact, courts applying the opposite-sex comparator requirement in cases involving reproductive differences between men and women often cite *Gilbert* as authority.³⁵²

There are some exceptions to courts’ otherwise pervasive insistence that plaintiffs in sex discrimination cases produce opposite-sex comparators. When Congress enacted the PDA, it implicitly rejected the Court’s suggestion in *Gilbert* that comparators are definitionally required to establish discrimination “because of sex.” Plaintiffs alleging pregnancy discrimination do not need to produce opposite-sex comparators to win sex-based Title VII claims. Likewise, in 1989, the Court held in *Price Waterhouse v. Hopkins*³⁵³ that Title VII barred employers from taking adverse employment actions based on an assumption or insistence that employees “match[] the stereotype associated with their group.”³⁵⁴ This holding permits plaintiffs to prove sex discrimination without producing comparator evidence, as the Court suggested that evidence of sex stereotyping alone may be sufficient to show “that gender played a part” in an employer’s decision.³⁵⁵

³⁵¹ *Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884, 893 (S.D. Ohio 2000).

³⁵² See, e.g., *Martinez*, 49 F. Supp. 2d at 309 (“Title VII forbids gender discrimination in employment, but gender discrimination by definition consists of favoring men while disadvantaging women or *vice versa*. The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII. This was made clear more than twenty years ago in *General Electric Co. v. Gilbert*.”); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (finding that “under the principles set forth in *Gilbert*,” the plaintiff could not establish that she had been discriminated against “because of sex”). For more on courts’ continuing reliance on *Gilbert* in such cases, see Widiss, *supra* note 19, at 551–56.

³⁵³ 490 U.S. 228 (1989).

³⁵⁴ *Id.* at 251 (plurality opinion).

³⁵⁵ *Id.* (emphasis omitted). However, in practice, it has often proven difficult, even after *Price Waterhouse*, to establish sex-based Title VII claims in the absence of comparator evidence. See Claire-Therese D. Luceno, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost-Effective Solutions for a Flexible Workplace*, 3 HASTINGS BUS. L.J. 157, 162–68 (2006) (discussing courts’ continued insistence on comparator evidence in Title VII cases involving claims of sex stereotyping). Sexual harassment doctrine provides another means of establishing a sex-based Title VII claim without producing an opposite-sex comparator, but here too, plaintiffs face significant obstacles to proving their claims. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 86–87 (2011) (arguing that the doctrinal framework courts have developed in the context of sexual harassment screens out many cases that should be covered under Title VII by imposing evidentiary burdens not warranted by the statutory language).

In the past decade, a number of courts have held that evidence of stereotyping on the basis of sex and family roles is sufficient to establish a claim of sex discrimination even in the absence of comparator evidence. In 2009, the First Circuit held that a woman who was told she had been denied a promotion not because of anything she “did or didn’t do,” but because she “had a lot on [her] plate” with four children at home had established a claim of sex discrimination sufficient to survive summary judgment,³⁵⁶ even though she produced no evidence that she was treated differently from male employees with young children.³⁵⁷ In 2004, the Second Circuit held that a school psychologist whose employer denied her tenure after repeatedly remarking on the incompatibility of work and motherhood and suggesting that “ha[ving] little ones at home”³⁵⁸ would prevent her from adequately performing her job had stated a claim under Title VII.³⁵⁹ The court held that the plaintiff need not produce a comparator because “the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based.”³⁶⁰

³⁵⁶ *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 42 (1st Cir. 2009) (quoting Nanci Miller, plaintiff’s immediate supervisor); *see also, e.g.*, *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (holding that a supervisor’s questioning remarks about whether a female employee “would be able to manage her work and family responsibilities” after having a second child supported a finding of discriminatory animus when she was fired shortly thereafter); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044–45 (7th Cir. 1999) (holding that a jury in a PDA case could have concluded that “a supervisor’s statement to a [pregnant] woman . . . that she was being fired so that she could ‘spend more time at home with her children’ reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake”); *Plaetzer v. Borton Auto., Inc.*, No. Civ.02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of fathers is not needed to show sex discrimination against mothers where an “employer’s objection to an employee’s parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible”). For further discussion of such cases, see generally Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

³⁵⁷ *Chadwick*, 561 F.3d at 45–46 (rejecting the district court’s conclusion that the plaintiff’s stereotyping evidence established only that the employer had discriminated against caregivers, not that it had discriminated “because of sex”); *see also id.* at 42–43 & n.4 (rejecting the employer’s argument that its decision to award the promotion to another woman with children effectively foreclosed the plaintiff from making a sex discrimination claim).

³⁵⁸ *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004).

³⁵⁹ *See id.* at 113.

³⁶⁰ *Id.* at 121. In 2007, the EEOC adopted this interpretation in a guidance document specifying that discrimination against workers with caregiving responsibilities may constitute sex discrimination under Title VII “regardless of whether the employer discriminates more broadly against all members of the protected class,” EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 10 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>, or regardless of whether the employee can show that he or she was treated differ-

The fact that these decisions were hailed as significant developments or even new departures in employment discrimination law³⁶¹ illustrates how powerfully *Gilbert*'s formalistic reasoning has influenced courts' understanding of what it means to discriminate "because of sex." The Court claimed in *Gilbert* that the practice of "discrimination" had always been defined in exclusively anticlassificationist terms. Yet as Part II showed, "discrimination" was never defined solely in these terms: the EEOC determined as early as 1968 that comparators were not necessary to establish a claim of sex discrimination under Title VII.³⁶² In three major cases involving the airlines' age and marriage policies, the agency ruled that "[t]he concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees."³⁶³ The airlines had argued in these cases that a plaintiff could not prove sex discrimination without producing an opposite-sex comparator.³⁶⁴ Because many carriers refused to employ male flight attendants in this period,³⁶⁵ the airlines hoped that requiring stewardesses to produce comparator evidence would insulate their age and marriage policies from scrutiny under Title VII. The EEOC categorically rejected this requirement. In the agency's view, it was "sufficient" for a finding of sex discrimination that a company policy or rule rested on stereotyped conceptions of women's sex and family roles.³⁶⁶

ently than a similarly situated member of the opposite sex, *see id.* at 8 ("[I]nvestigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.").

³⁶¹ *See, e.g.,* Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1476 (2008) (describing *Back* as a "landmark development"); Carmel Sileo, *Second Circuit Tears Down "Maternal Walls,"* TRIAL, July 2004, at 95, 95 (characterizing *Back* as "stunning," *id.* (quoting Joan Williams, director of the Worklife Program at American University's Washington College of Law) (internal quotation marks omitted), and a "landmark" case).

³⁶² *See supra* p. 1356.

³⁶³ *Neal v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6010 (June 20, 1968); *see also* cases cited *supra* note 274.

³⁶⁴ *See Dodd v. Am. Airlines, Inc.*, EEOC Decision No. 6-6-5762, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8001, at 6004 (June 20, 1968) ("The [Air Transport Association's] argument is premised on the fact that if all the incumbents in a job classification are members of one sex, any conditions of employment relating to that job cannot be based on sex."); *Neal*, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6010 n.20 (same).

³⁶⁵ Earlier in the twentieth century, stewards were common, but by 1967, no airline in the United States was hiring male candidates for the job. *See Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 564 (S.D. Fla. 1970).

³⁶⁶ *See Neal*, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6010. The EEOC noted that opposite-sex comparator evidence could be used to "buttress[]" claims of sex discrimination

The EEOC's holdings in the airline cases were based on an understanding (shared by the Court in *Mancari* and *Lau*) that discrimination was "a social phenomenon encased in a social context,"³⁶⁷ rather than simply a matter of formal line-drawing. Indeed, the EEOC in 1968 rejected the airlines' argument that if their policy of firing stewardesses upon marriage were found to constitute "discrimination . . . it [could] be remedied by applying the no-marriage rule to male flight attendants."³⁶⁸ The EEOC suggested that, even without engaging in any formal classification, such a policy would continue to push women out of the workplace and perpetuate the notion that after a woman married, her place was in the home. In the agency's view, this outcome rendered the policy impermissible under Title VII.³⁶⁹ As noted above, the EEOC was not the only legal decisionmaker in this period to adopt a broad view of Title VII's prohibition of sex discrimination. Twice in the 1970s, Congress amended Title VII in ways that affirmed its commitment to expansive and nonformalistic understandings of the law's sex provision.³⁷⁰ These legislative interventions provide a foundation for contemporary interpretations of the statute that would invalidate employment practices that reinforce conventional understandings of men's and women's sex and family roles regardless of the basis on which they formally classify workers.

When courts today hold that sex discrimination cannot be shown without recourse to opposite-sex comparators, they often suggest that they are simply deferring to congressional intent and remaining faithful to the traditional conception of what it means to discriminate "because of sex."³⁷¹ But history does not compel the rule that plaintiffs cannot win Title VII claims in the absence of comparator evidence. The original proponents of this rule, in the 1960s, were employers seeking to limit the reach of Title VII's sex provision. Originally, this rule was conceived as a means of shielding a variety of employment practices from judicial scrutiny by shifting the focus away from the social meaning and practical implications of these practices and toward questions about their formal characteristics. Courts' ongoing demand that plaintiffs produce opposite-sex comparators in order to prove that

but rejected the airlines' contention that comparators were a required element of such claims. *Id.* at 6011.

³⁶⁷ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting).

³⁶⁸ *Neal*, [1968-1969 Transfer Binder] *Empl. Prac. Dec.* (CCH) at 6011.

³⁶⁹ *Id.*

³⁷⁰ *See supra* pp. 1346-47, 1366.

³⁷¹ *See, e.g., Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (noting "that no judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination"); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) (declaring that "if breast pumping is to be afforded protected status, it is Congress alone that may do so").

they have been discriminated against "because of sex" continues to have this effect today. It reinscribes *Gilbert's* formalistic reasoning about sex discrimination in the law decades after Congress rejected that reasoning.

*C. The Malleability of the "Traditional Concept"
of Sex Discrimination*

Courts employing formalistic reasoning in ways that limit the scope of Title VII's sex provision — whether in *Gilbert* or in more recent decisions requiring opposite-sex comparators — begin from the premise that this form of reasoning provides an objective and determinate rule for deciding when discrimination has occurred. Yet as this section will show, courts in Title VII cases have never consistently adhered to an anticlassificationist conception of sex discrimination. Courts in the 1970s routinely abandoned this conception when it yielded legal results inconsistent with social norms and their own judgments about the practices that plaintiffs were seeking to disestablish. It was this set of norms and judgments — and not a neutral, mathematical rule — that ultimately determined the parameters of Title VII's prohibition of sex discrimination. Indeed, socially inflected judgments continue to determine the law's parameters today.

One reason courts have applied formalistic reasoning inconsistently in the context of Title VII law is that it does not reliably constrain what counts as discrimination "because of sex." Requiring women in all-female workplaces to produce male comparators precludes them from demonstrating that they had been discriminated against "because of sex" and shields the regulation of such women from scrutiny under Title VII. In this context, the anticlassification principle limits the law's scope. In other contexts, however, this principle generates far-reaching and expansive results — it ostensibly outlaws *all* differential treatment of men and women in the workplace unless an employer can show that a BFOQ justifies such treatment. Thus, although this approach to Title VII shuts the door to some claims, it opens the door to others.

In the 1970s, workers began to challenge sex-based clothing and grooming requirements under Title VII.³⁷² From an anticlassificationist standpoint, their claims were strong. Women were permitted to wear long hair and dresses, men were not; employers who implemented these policies were clearly sorting men and women into two groups perfectly differentiated along biological sex lines. The

³⁷² For more on the early clothing and grooming cases, see ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 36–39 (2001); Siegel, *supra* note 16, at 13–15.

Court in *Gilbert* identified this method of sorting as the defining characteristic of sex discrimination. Yet when plaintiffs challenged such regulations, courts almost always held that they did not violate Title VII's prohibition of sex discrimination. To hold otherwise, courts suggested, would "have significant and sweeping implications"³⁷³ for social relations and the American workplace. Courts noted that "[e]mployers, like employees, must be protected,"³⁷⁴ and opined that no employer should "be coerced into countenancing, regardless of the consequences to his business, what society may frown upon" unless "fundamental human rights" were at stake.³⁷⁵ Even after the Court's declaration in *Price Waterhouse* that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,"³⁷⁶ courts have continued to hold that sex-differentiated grooming requirements do not qualify as sex discrimination under Title VII.³⁷⁷ In order to explain this line of cases, it seems clear that "we would have to seek an explanation in the domain of social, not formal, logic."³⁷⁸

Courts' treatment of Title VII claims by sexual minorities are similarly difficult to explain on the basis of formal logic alone. "Sex-plus" doctrine, which originated in the early 1970s, enables plaintiffs to demonstrate that they have been discriminated against on the basis of sex by showing that they have been treated differently than members of the opposite sex with whom they share a particular, ostensibly non-sex-related characteristic. *Martin Marietta* can be understood as a "sex-plus" case, as the employer in that case discriminated against mothers but not fathers of school-age children. Under the logic of *Martin Marietta*, gay and transgender employees who face discrimination can also state claims of sex discrimination. In fact, sexual minorities began to make such claims in the 1970s. They argued that an employer discriminates "because of sex" when it punishes male but not female employees who date men, or when it punishes people born male who present as women, but not people born female who do the same.

³⁷³ *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc).

³⁷⁴ *Willingham v. Macon Tel. Publ'g Co.*, 352 F. Supp. 1018, 1021 (M.D. Ga. 1973).

³⁷⁵ *Id.* Often in these early cases, courts equated sex-differentiated grooming regulations with sex-segregated bathrooms, a practice they regarded as obviously beyond the reach of Title VII's prohibition of sex discrimination. *See, e.g.*, *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973); *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402, 403 (D.D.C. 1972). Here too, courts relied on normative judgments, and not on the application of a formal antidifferentiation principle, to define the concept of discrimination "because of sex."

³⁷⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

³⁷⁷ *See, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (holding that a grooming policy requiring female but not male employees to wear make-up and style their hair does not constitute sex discrimination under Title VII).

³⁷⁸ Siegel, *supra* note 16, at 15.

The Court in *Gilbert* suggested that the social meaning of a practice was irrelevant to the question of whether it constituted discrimination "because of sex." Courts claimed that the determining factor in sex-based Title VII cases was whether the plaintiff could satisfy the opposite-sex comparator requirement. Unlike women employed in all-female workplaces, gay and transgender plaintiffs could often adduce opposite-sex comparators.³⁷⁹ Yet, when courts in the 1970s saw the results that the formalistic approach to Title VII yielded in this context, they quickly abandoned it. Judges uniformly rejected Title VII claims by sexual minorities in this period, even though these plaintiffs seemed to satisfy the test courts had established, in the context of pregnancy and elsewhere, for proving discrimination. But this gave rise to a difficult question: why was comparator evidence insufficient to prove sex discrimination when the plaintiffs who brought it were gay or transgender? In formulating answers to this question, courts revealed a great deal about the larger social concerns animating sex-based employment discrimination law in this period.

In *Smith v. Liberty Mutual Insurance Co.*,³⁸⁰ a Georgia district court confronted a question of first impression: did Title VII's sex provision protect a plaintiff whose application for a job was rejected due to his "affectional or sexual preference" for men?³⁸¹ The court began its analysis by contrasting the United States with "the German Third Reich."³⁸² In Nazi Germany, the court explained, the government dictated the choices of its citizens in all matters. In the United States, however, the law's reach was limited, and it was "the duty of the courts to protect"³⁸³ employers' freedom of choice outside those limited areas where the law has restricted it. After this preamble, the court acknowledged that the plaintiff could prove sex discrimination in a technical sense, by producing opposite-sex comparators who shared his sexual preference for men. Yet, the court concluded that the comparator test was simply "a 'shorthand' way"³⁸⁴ of implementing the statute's prohibition of sex discrimination, and should not be used to ex-

³⁷⁹ It is possible to frame the comparator equation differently and show that there is no sex discrimination in these cases because gay and transgender employees of both sexes are subject to the same form of discrimination. But this type of analytical move is possible in almost any case: consider an employer who defends a mandatory, female-only, parental-leave policy by arguing that it is discriminating against both men and women who fail to conform to traditional gender norms. Formal logic alone cannot tell us which way of looking at the problem is the right one. To make that determination, we need to rely on independent judgments about whether particular employment practices entrench traditional gender norms and about how far Title VII should go in disrupting such practices.

³⁸⁰ 395 F. Supp. 1098 (N.D. Ga. 1975).

³⁸¹ *Id.* at 1099.

³⁸² *Id.* at 1100.

³⁸³ *Id.* at 1101.

³⁸⁴ *Id.*

tend that prohibition in socially detrimental ways. Interpreting the statute's antidiscrimination mandate more broadly, the court argued, would impinge on employers' "freedom of action."³⁸⁵

The Fifth Circuit echoed this reasoning in its analysis of Smith's claim. It suggested that Congress probably did not intend "to include *all* sexual distinctions in its prohibition of discrimination," and that the role of courts was to determine "whether a line [could] legitimately be drawn beyond which employer conduct is no longer within the reach of the statute."³⁸⁶ The court concluded that a line could be drawn in this case, on prudential grounds: to extend Title VII's protections to sexual minorities would be too disruptive of traditional gender norms and not respectful enough of employers' interests. Every other court that confronted a sex-based Title VII claim brought by a gay or transgender plaintiff in the 1970s and 1980s reached the same conclusion.³⁸⁷ They asserted that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex,"³⁸⁸ and that they were not authorized "to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation."³⁸⁹

As society's views about sexual minorities have changed, courts have haltingly begun to rescind some of the limitations imposed on sex-based Title VII doctrine in the 1970s. In the past decade, a few courts have determined that discrimination against transgender workers violates Title VII's prohibition of sex discrimination because it punishes these individuals for failing to "match[] the stereotype associated with their group."³⁹⁰ In 2008, a district court in Washington, D.C., found that the Library of Congress had violated the rights of a transgender job applicant when it withdrew an offer of employment

³⁸⁵ *Id.*

³⁸⁶ *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978) (quoting *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)) (internal quotation mark omitted).

³⁸⁷ *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, . . . do[es] not outlaw discrimination against a person who has a sexual identity disorder . . ."); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (rejecting a male-to-female preoperative transsexual's sex discrimination claim because "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex'"); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."); *Terry v. EEOC*, No. 80-C-408, 1980 U.S. Dist. LEXIS 17289, at *8 (E.D. Wis. Dec. 10, 1980) (denying relief to a preoperative male-to-female transsexual because Title VII "does not protect males dressed or acting as females and vice versa"); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (holding that to grant relief to a male-to-female transsexual waitress would be "inconsistent with the plain meaning of the words" of Title VII).

³⁸⁸ *Ulane*, 742 F.2d at 1085.

³⁸⁹ *Id.* at 1086.

³⁹⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

after learning of the applicant's impending male-to-female transition.³⁹¹ The court found "that the Library's hiring decision was infected by sex stereotypes,"³⁹² and that by refusing to employ the plaintiff "because her appearance and background did not comport with . . . sex stereotypes about how men and women should act and appear," the Library had violated Title VII's sex provision.³⁹³ This ruling echoed an earlier pair of cases in which the Sixth Circuit held that "discrimination against a plaintiff who is transsexual — and therefore fails to act and/or identify with his or her gender" — constitutes sex discrimination, and that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."³⁹⁴ Some courts have also determined — in theory at least — that discrimination against gay and lesbian workers may constitute sex discrimination if it is motivated by their failure to conform to traditional gender norms.³⁹⁵

These decisions clearly reflect changed views about discrimination against sexual minorities in the workplace. The extension of sex-based Title VII protections to gay and transgender workers is the result of developments not in formal logic,³⁹⁶ but in social logic; courts in the

³⁹¹ *Schroer v. Billington*, 577 F. Supp. 2d 293, 299–300 (D.D.C. 2008).

³⁹² *Id.* at 305.

³⁹³ *Id.* at 308.

³⁹⁴ *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (upholding a jury verdict in favor of a transgender plaintiff who argued that he had been discriminated against on the basis of his failure to conform to sex stereotypes); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding that transgender individuals may bring discrimination claims based on sex stereotyping because Title VII's sex stereotyping doctrine does "not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female" who fails to do so).

³⁹⁵ Although courts have recognized that gay and lesbian plaintiffs may prevail on sex stereotyping claims, they have often rejected such claims on the ground that the plaintiffs failed to prove that it was truly their biological sex and not their sexual orientation that motivated the stereotyping. Thus, although some courts have moved beyond the biological conception of sex discrimination in theory, they often continue to apply it in fact. *See, e.g., Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261–65 (3d Cir. 2001) (accepting that harassment based on sex stereotyping may violate Title VII, but rejecting the individual plaintiff's claim); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085–86 (7th Cir. 2000) (same); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260–61 (1st Cir. 1999) (same).

³⁹⁶ Interestingly, in addition to finding that the Library of Congress had engaged in illicit sex stereotyping, the court in *Schroer* found that the Library had violated formal equality: "The evidence establishes that the Library was enthusiastic about hiring David Schroer — until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination 'because of . . . sex.'" *Schroer*, 577 F. Supp. 2d at 306. This passage dramatically illustrates the way in which social judgments about particular employment practices influence courts' perceptions of whether a violation of formal equality has occurred. In this case, the court found that Diane Schroer satisfied the comparator requirement, but, in most cases, courts have found

twenty-first century are beginning to develop new understandings of the ways in which discrimination against sexual minorities can reflect and reinforce gendered conceptions of sex and family roles. The standard account of Title VII's sex provision suggests that such claims are beyond the pale. For decades, courts confronted with such claims have held that they fall outside the "traditional concept" of sex discrimination and cannot be sustained. Yet as this Article has shown, the boundaries of Title VII's prohibition of sex discrimination have always been in flux. When Congress passed Title VII in 1964, what counted as discrimination "because of sex" was deeply unclear. As we have seen, that determination has never been made solely by examining the formal characteristics of contested employment practices; it has always depended on normative judgments about which forms of regulation the law should prohibit and which it should preserve. Thus, although courts have often assumed otherwise, history does not foreclose sex-based claims by sexual minorities. Congress laid a foundation for such claims in 1964 when it intervened in a system of regulation that enforced conventional understandings of sex and family roles, and its subsequent interventions in the 1970s only strengthened this foundation. If courts have traditionally deemed sex-based claims by sexual minorities beyond the law's reach, it is not because history compels such a result. It is because courts have made a normative judgment, in the case of gay and transgender workers, that a line ought to "be drawn beyond which employer conduct is no longer within the reach of the statute."³⁹⁷

CONCLUSION

Decisions extending Title VII protection to gay and transgender workers have inspired passionate criticism from judges who continue to adhere to the notion that "Congress had a narrow view of sex in mind when it passed the Civil Rights Act,"³⁹⁸ and that the statute's protections should not extend to sexual minorities, even by way of sex stereotyping doctrine. These judges have accused their colleagues of "mak[ing] a moral judgment" that discrimination against homosexuals is wrong, rather than honestly "constru[ing] a statute" that was enacted

that transgender employees cannot satisfy this requirement. This determination cannot be made solely by recourse to logical principles; it ultimately rests on normative judgments about whether Title VII should protect against this form of discrimination.

³⁹⁷ *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978) (quoting *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)) (internal quotation mark omitted).

³⁹⁸ *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002) (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984)).

in 1964.³⁹⁹ They have asserted that “[i]n the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted.”⁴⁰⁰ They argue that it is ludicrous to suggest that a law that emerged from this historical context could fairly be read to apply to gay and transgender individuals. Judge Richard Posner has been particularly vocal in his criticism of these developments. In fact, he argues that Title VII law has completely “gone off the tracks in the matter of ‘sex stereotyping,’”⁴⁰¹ because it has departed from the “traditional concept” of sex discrimination, which refers only to practices that evince hostility toward men or women as a class. To suggest that Title VII creates “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels”⁴⁰² is ridiculous, Posner asserts; and it is no less ridiculous to suggest that the law protects gay men — unless they can show that the employer who discriminated against them was motivated by hostility to men in general. Posner claims that to attribute any other interpretation of the term sex discrimination “to the authors of Title VII is to indulge in a most extravagant legal fiction.”⁴⁰³

This Article argues that the “traditional concept” of sex discrimination, as courts have articulated it over the past three and a half decades, is itself a legal fiction. When courts began in the 1970s to argue that the concept of discrimination on the basis of sex referred only to practices that divided workers into two groups perfectly differentiated along the axis of biological sex, they claimed that this understanding was deeply rooted in the American legal tradition. They claimed that the framers of the Fourteenth Amendment had understood the concept of discrimination in these terms, and that when Congress enacted the 1964 Civil Rights Act, it understood the concept of sex discrimination in this way as well. Given this history, courts contended they had no choice but to interpret Title VII’s sex provision in narrow, formalistic terms. They argued that this was the only neutral reading of the statute and that interpreting its prohibition of sex discrimination in any other way would constitute judicial activism.

Yet, as this Article has shown, the notion that sex discrimination refers only, and always, to practices that divide workers into two per-

³⁹⁹ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1078 (9th Cir. 2002) (en banc) (Hug, J., dissenting) (quoting *Higgins*, 194 F.3d at 259).

⁴⁰⁰ *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002).

⁴⁰¹ *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003) (Posner, J., concurring).

⁴⁰² *Id.* at 1067.

⁴⁰³ *Id.*

fectly sex-differentiated groups was not deeply rooted in American history — it emerged in response to the passage of the 1964 Civil Rights Act. In the 1960s, employers and sympathetic legal decisionmakers were concerned that the statute would have sweeping implications for the way that gender and the family were regulated in the United States. They were concerned that it would upend traditional gender norms and sexual conventions, and disrupt forms of regulation that defined what it meant to be a man or a woman. They developed an arsenal of arguments for limiting the statute's reach, and among them was the argument that Title VII's prohibition of sex discrimination should be interpreted in a narrow, formalistic way.

Today, that argument is deeply embedded in Title VII doctrine, and it continues to serve the purposes for which it was designed. It constrains the law's understanding of what constitutes discrimination "because of sex" and makes it difficult for plaintiffs to prove that they have been the victims of such discrimination. Today, however, the justifications for this argument are not framed in normative terms. They are framed in terms of history, or, more often, "tradition." My aim in this Article has been to trace the origins and development of the "traditional concept" of sex discrimination and to understand that concept for what it is: an argument in a long-standing, and ongoing, debate about how hard Title VII should press against the social norms that prescribe distinct sex and family roles for men and women.