

Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition

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ABSTRACT: It is a pillar of employment discrimination law that Title VII's prohibition of "sex" discrimination lacks prior legislative history. When interpreting the meaning of sex discrimination protection under Title VII, courts have stated that it is impossible to fathom what Congress intended when it included "sex" in the Act. After all, the sex provision was added at the last minute by the Southern archconservative congressman Howard "Judge" Smith in an attempt to frustrate the Civil Rights Act's passage. Courts have often interpreted the sex provision's passage as a "fluke" that has left us bereft of prior legislative history that might guide judicial interpretation. It is not surprising, then, that Title VII's sex discrimination prohibition has been rather narrowly construed.

This Article rethinks this received narrative and emphasizes its implausibility in light of the pre-Civil Rights Act contributions feminists made to the national discourse on sex discrimination. It considers not only scholarship on Equal Rights Feminists' role in passing Title VII's sex provision, but also scholarship on the often-overlooked Working-Class Social and Labor Feminists. The Article also explores the contestations between these two groups over the meaning of sex discrimination. It provides a more complex narrative of the provision's parentage than the one previously recognized.

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The Article reframes the narrative by broadening the scope of inquiry in two ways: first, by focusing on Working-Class Social and Labor Feminists' agitation for equality in the workplace, and second, by looking further back in time in order to reconceptualize debates over workplace equality as formative of the discourse on sex discrimination. The Article begins with early twentieth century contestations over protective labor legislation and argues that Working-Class Social Feminists supported labor regulation based not merely on sex stereotypes, but on their understanding of labor regulation as a means to combat sex discrimination. It continues through the New Deal, when an early sex anti-classification provision was inscribed in federal law by Social Feminists to provide equal pay for men and women. It examines the debates over workplace sex discrimination that reverberated in the decades following World War II and persisted through the early 1960s—when Congress passed the Equal Pay Act and the President's Commission on the Status of Women issued its report. The Article considers these developments as part of feminists' sustained efforts to combat sex discrimination, and as stage-setters for the sex provision's passage. It claims that Working-Class Social and Labor Feminists' long agitation for women's equality de-facto constitutes decades' worth of legislative history for the sex provision. When Congress voted to include "sex" discrimination in Title VII, it was already well aware of its robust meanings, thanks in large part to these feminists' efforts to ameliorate systemic disadvantages facing women in the workforce.

Working-Class Social and Labor Feminists' actions and ideology should be considered important influences on the context of the sex provision's birth. As law is the dynamic and indeterminate product of human interaction, its interpretation must account for the complexity of the legacies that infuse it with meaning. To this end, after re-conceiving the history of the sex provision's birth, the Article suggests this history may provide a richer notion of Title VII sex discrimination, one that emphasizes structural features of the market and requires employers to take affirmative measures to offset the features that often result in discrimination.

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INTRODUCTION

It is a pillar of employment discrimination law that Title VII's¹ prohibition on sex discrimination lacks meaningful legislative history.² Scholars have noted that, when interpreting the meaning of sex discrimination protection under Title VII of the Civil Rights Act, courts have recited that no one can fathom what Congress intended when it included "sex" in the Act. Courts often insist that the sex provision lacks legislative history—that it was added at the last minute in an attempt to stymie the passage of the Civil Rights Act, that its passage was essentially a "fluke,"³ and that, as a result, we are left with a dearth of

1. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

2. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1307 (2012) (noting "[i]t is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history"). Franklin's article claimed the canonical understanding of the legislative history of the sex provision as lacking, and pointed to the history *subsequent* to the provision's enactment to argue that that Title VII's "traditional concept" of sex discrimination as applying only to sorting men and women into sex-differentiated groups actually evolved *after* its passage and that this "traditional concept" is an "invented tradition." *Id.* at 1312. *See also* Serena Mayeri, *Intersectionality and Title VII, A Brief (Pre-)History*, 95 B.U. L. REV. 713, 713-18 (2015) (focusing attention on the history of race-sex intersectionality and Title VII). This Article, however, enriches the (prior) legislative history of the sex provision.

3. The term was likely coined early on, as the press dubbed the provision a "fluke" and Herman Edelsberg, executive director of the Equal Employment Opportunity Commission from 1965 to 1967, claimed the sex amendment was a "fluke . . . conceived out of wedlock." DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 182 (2004); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 125 (2006); RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 72 (2000).

legislative history to guide judicial interpretation.⁴ It may not be surprising, then, that Title VII sex discrimination has often been rather narrowly construed,⁵ to the point that some critics have argued that Title VII is currently incapable of providing much-needed gender equality, especially in the domain of women's economic well-being.⁶ More specifically, even though some professional women gained important opportunities from Title VII,⁷ other

4. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) (noting that the sex provision was added to Title VII "at the last minute," thus leaving "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'"); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination [was] notable primarily for its brevity."); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that the Civil Rights Act of 1964 "was primarily concerned with race discrimination," and that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act"); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("The amendment adding the word 'sex' to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (noting that "[t]here is a dearth of legislative history" on that section); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 404 n.4 (6th Cir. 1977) (McCree, J., dissenting) ("The provision on sex discrimination in employment reportedly was added at the last moment by opponents of the prohibitions of [sic] race discrimination, in an unsuccessful attempt to sink the bill by overloading it with unpopular provisions."); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975) (noting that "[t]he legislative history pertaining to the addition of the word 'sex' to the Act is indeed meager," and that the addition "was offered . . . with the intent to undermine the entire Act"), *vacated*, 424 U.S. 737 (1976); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (noting that "the meager legislative history regarding the addition of 'sex' in Sec. 703(a) provides slim guidance for divining Congressional intent. The amendment adding 'sex' was passed one day before the House of Representatives approved Title VII of the Civil Rights Act and nothing of import emerged from the limited floor discussion . . . Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications"); *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"); *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"); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-17 (1985) (describing the events surrounding Congressman Smith's attempt to bury the Act by proposing an amendment adding the word "sex" to Title VII); Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 816-17 (1991); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. PA. L. REV.* 1, 14-25 (1995); Franklin, *supra* note 2, at 1310; Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 *HARV. L. REV.* 1113, 1167 (1971) (describing how the prohibition against sex discrimination was added at the last minute as a floor amendment in the House without any prior hearings or debate and without even a minimum of congressional investigation).

5. See *infra* Part I.

6. See Catherine Albiston, *Institutional Inequality*, 2009 *WIS. L. REV.* 1093, 1095, 1134-51, 1153-54; Deborah Dinner, *The Cost of Reproduction: History and the Legal Construction of Sex Equality*, 46 *HARV. C.R.-C.L. L. REV.* 415 (2011); Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 *HARV. J.L. & GENDER* 569 (2014); Laura A. Rosenbury, *Work Wives*, 36 *HARV. J.L. & GENDER* 345, 384 (2013) (arguing that, while Title VII eliminated absolute barriers to women's employment, women still have not been fully integrated into the workforce). For a broad critique of equal-treatment focused equality, see MARTHA ALBERSTON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 10 (2004); and Martha Albertson Fineman, *Equality: Still Elusive After All These Years*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 251 (Linda C. McClain & Joanna L. Grossman eds., 2009).

7. See, e.g., Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change*, 61 *ME. L. REV.* 1, 21-22 (2009).

women, particularly low-wage workers with familial responsibilities, have not fully realized its promise.⁸ This Article claims that the narrow, canonical story restricts the very idea of sex antidiscrimination by denying the decades of feminist activism and significant legislative experience with questions of workplace inequality that occurred prior to the Civil Rights Act and helped to inspire the sex discrimination prohibition.

In fact, over the past two decades, scholars have shown that the inclusion of “sex” in Title VII was more than a fluke or a joke perpetrated by Southern segregationists. Important studies have been offered on the role of early Equal Rights Amendment (ERA) Feminists, who advocated for legal recognition of sex equality, as well as the influential role of lawyer Pauli Murray.⁹ Studies have shown that ERA Feminists, headed by the National Women’s Party (NWP), were instrumental in passing Title VII’s sex provision¹⁰ and have demonstrated how ERA Feminists struggled for public, formal recognition of women’s equal rights.¹¹ However, this Article focuses on the role of another group of activists within the feminist movement: Working-Class Social Feminists, and later Labor Feminists, who played a key role in promoting equality in the workforce. This Article offers a rethinking of the canonical narrative, rooted specifically in the history of Working-Class Social Feminists and Labor Feminists. It rethinks the received narrative and emphasizes its implausibility in light of the pre-Civil Rights Act contributions feminists made to the national discourse on sex discrimination. It suggests that this rethinking of history may be particularly important for judicial interpretations of Title VII’s sex discrimination provision, particularly in today’s struggles for the employment equality of caregivers (who are still predominantly mothers), and may support a reinvigoration of sex discrimination doctrine.

An initial question must be answered: Who were Working-Class Social Feminists and Labor Feminists? Social Feminists, mainly middle-class Progressives, were active in the early decades of the twentieth century in

8. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3 (2005).

9. Franke, *supra* note 4, at 15-24; Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 770-73 (2004) [hereinafter Mayeri, *Constitutional Choices*]. While these important studies have mentioned Social Feminists, they have not made them their dominant subject of analysis as does this Article. Additionally, while some have deemed Social Feminism as insisting on natural differences of the sexes, *see* Franke, *supra* note 4, at 17-20, considering Working-Class Social Feminists’ and Labor Feminists’ rationales supporting protective labor legislation contributes to a more complex understanding of their motivations and ideologies. Their advocacy was based not merely a belief in women’s frailty and reproductive difference but importantly were rooted in a critique of the market and an appreciation for caretaking that coincided with their support for universally extending protective labor regulation tailored to women.

10. *See* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN’S ISSUES, 1945-1968, at 176-77 (1988); Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 165 (1991); Franke, *supra* note 4, at 23; Mayeri, *Constitutional Choices*, *supra* note 9, at 770.

11. Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 211 (1998).

advancing a host of reforms, from welfare to labor regulation.¹² Some of their efforts, including the development of sex-specific protective labor legislation (which placed caps on hours and floors on wages) have been criticized for being overly maternalistic and for entrenching stereotypes of women's frailty and domesticity by implying that women are a special, vulnerable class in need of protection from the state and stressing women's natural, reproductive roles.¹³ Social Feminists, however, also formed important bonds with activists from working-class backgrounds. The confluence of these groups has led to a branch of feminism known as Working-Class Social Feminism.¹⁴ These working-class, labor-oriented activists, who operated from the 1910s until the 1940s, were affiliated with the predominantly middle-class Social Feminism, but developed their own nuanced understanding of women's labor. Together, the various branches of Social Feminism sought to develop legislative measures to provide better working conditions, especially for women. Working-Class Social Feminists emphasized that such measures were important to correct power imbalances in the workforce,¹⁵ rather than necessary because of women's frailty. After World War II, these feminists were succeeded by a group of

12. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 244, 247-57 (1990). See generally Arienne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J.L. & GENDER 169 (2008) (highlighting the significance of women reformers in the Progressive and New Deal eras) [hereinafter Renan Barzilay, *Women at Work*].

13. While some have critiqued these middle-class social feminists for being overly maternalistic, others have emphasized these feminists' critique of state and society. Compare ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 32 (2001) [hereinafter KESSLER-HARRIS, IN PURSUIT OF EQUITY], with Kathryn Kish Sklar, *The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830-1930*, in MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES 43, 45 (Seth Koven & Sonya Michel eds., 1993). It is important to consider this debate both in terms of class, see Arienne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 418-31 (2012) [hereinafter Renan Barzilay, *Constructive Feminism*], and in terms of subject matter, between Social Feminists working on labor and those working on welfare, see LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 195 (1994). See generally MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003) (on progressive reformers); NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S-1990S (2015) (on protective labor legislation) [hereinafter WOLOCH, A CLASS BY HERSELF].

14. See Arienne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 146-48 (2012) [hereinafter Renan Barzilay, *Labor Regulation*]; Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 418. This group is sometimes referred to as "industrial feminists." See ANNELEISE ORLECK, COMMON SENSE AND A LITTLE FIRE: WOMEN AND WORKING-CLASS POLITICS IN THE UNITED STATES, 1900-1965, at 6, 88 (1995) [hereinafter ORLECK, COMMON SENSE].

15. See, e.g., Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 6, 8-10 (on file with Harvard University, Schlesinger Library, Anderson Papers, Papers of the Women's Trade Union League and its Principle Leaders, General Correspondence and Papers (1918-1960), Microform Reel 4, Frame 730) (explaining the need for protective labor legislation) [hereinafter Anderson, *Should There Be Labor Laws for Women? Yes*]; see also Renan Barzilay, *Labor Regulation*, *supra* note 14, at 134 (noting that Working-Class Social Feminists saw labor regulation as essential to put them on more even grounds with male workers who benefited by affiliation with more powerful unions).

activists termed “Labor Feminists.” Like the Working-Class Social Feminists before them, Labor Feminists had an ideological commitment to advancing working women’s economic status while acknowledging familial responsibilities, but they also increasingly stressed structural features of the market as hurdles to women’s equality.¹⁶

The better-known ERA Feminists supported a liberal, individualistic,¹⁷ legalist route that would remove formal barriers to equality; strived to treat men and women the same under law; and were most concerned with combatting overt barriers to and biases against individual women in the workforce. Working-Class Social Feminists and Labor Feminists, on the other hand, were more inclined to support affirmative measures taken through state regulation of the market to enable equality and combat structural impediments to women’s employment, while at the same time acknowledging familial and caretaking responsibilities. This Article aims to further enrich the history of Title VII’s sex discrimination provision by rethinking the legacy of Social and Labor Feminists, who have been largely obscured by a received history that focuses on ERA Feminists. When they are discussed, Social and Labor Feminists are often portrayed as retrograde supporters of sex-protective legislation who based their views on sex stereotypes of a bygone era. By contrast, this Article shows how Working-Class Social and Labor Feminists rooted their arguments for women’s equality through legislation in critical accounts of the labor market and acknowledgment of the work done at home. They argued that state protection was especially important for low-wage, non-unionized, working-class women who lacked the auspices of collective bargaining and could not afford to outsource domestic labor.

This Article proposes a new understanding of the legislative history of Title VII’s sex provision as built on layers of activism, decades of debates and contestation among factions of reformers, and years of failed attempts to combat sex discrimination in employment.¹⁸ It reframes the history of the sex provision by focusing on Working-Class Social Feminists and Labor Feminists

16. See COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 3; DOROTHY SUE COBBLE, LINDA GORDON & ASTRID HENRY, *FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS* 1-67 (2014); ANNELESE ORLECK, *RETHINKING AMERICAN WOMEN’S ACTIVISM* 29-51 (2015) [hereinafter ORLECK, *RETHINKING AMERICAN WOMEN’S ACTIVISM*]; Dorothy Sue Cobble, *Labor Feminists and the President’s Commission on the Status of Women*, in *NO PERMANENT WAVES: RECASTING HISTORIES OF U.S. FEMINISM* 144-67 (Nancy A. Hewitt ed., 2010) [hereinafter Cobble, *Labor Feminists*]; Eileen Boris & Annelise Orleck, *Feminism and the Labor Movement: A Century of Collaboration and Conflict*, *NEW LABOR FORUM*, Winter 2011, at 33-41; Renan Barzilay, *Constructive Feminism*, *supra* note 13; see also Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. L. REV. 453, 463 (2014) (analyzing the political debates that resulted in the passage of the Pregnancy Discrimination Act).

17. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 125 (1987).

18. Methodologically, this Article maintains that we should understand the legislative history of the sex provision as built on “archaeological” layers, strata that each left residual ideals and rhetoric from which we may glean richer understandings of the legislative history and the realities against which it was created.

and looking further back in time to the long struggle among feminists that began in the early twentieth century. It begins with contestations over the notorious “protective” labor laws, continues with New Deal labor legislation (which incorporated an early sex anti-classification provision in salary setting), and traces the contestations of the post-World War II decades, through the passage of the Equal Pay Act in 1963¹⁹ and the accomplishments of the President’s Commission on the Status of Women, all of which led to Title VII’s sex provision. The Article argues that these debates and developments constitute decades’ worth of legislative history behind Title VII’s sex provision. This history shows that a longstanding desire to ameliorate systemic disadvantages facing women in the workforce set the stage for the provision. The Article claims that, by the time Congress voted to include “sex” in Title VII, sex discrimination was already a well-known, well-documented, robust concept—thanks in large part to the efforts of Social and Labor Feminists.

As law is the dynamic and indeterminate product of human interaction, its interpretation must account for the complexity of legacies that infuse it with meaning. Working-Class Social Feminists and Labor Feminists’ actions and ideology exerted important but under-studied influence on the birth of Title VII’s sex provision, on the context of its emergence, and on its meaning. It is important to note that affording Social and Labor Feminists the greater recognition they deserve in the history leading up to the sex discrimination prohibition does not necessarily entail lowering our estimation of ERA Feminists’ achievements. Rather, by considering the ideologies of the two groups, we can better flesh out what more could be done at present. The contestation between the two feminist stands over the meanings of sex discrimination provides a complex narrative of the provision’s parentage. The history of both these feminist strands includes a meaningful and rich shared legacy, which can inform today’s legal interpretation of Title VII. This shared feminist legacy may offer a far more robust interpretation of the provision than currently afforded and may support modern-day efforts to enhance the meaning of sex discrimination under Title VII. This is especially important given the serious shortcomings in judicial interpretation of the provision.

Part I points to the growing critique of Title VII’s jurisprudential enfeeblement, especially with regard to women’s marketplace labor equality. Part II discusses the canonical narrative of the sex provisions emergence, including its lack of history and the attention to the ERA Feminists’ legal equality-focused approach. Part III sets out to enrich the history of the provision by further explaining and developing the aforementioned trajectory of efforts to ensure nondiscrimination to show the implausibility of the canonical narrative. It offers a rich narrative of the sex provision’s parentage by considering the debates over the meaning of sex equality and discrimination

19. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2012)).

that ultimately informed the provision. Part IV considers the shared feminist legacy and argues that a bolstered understanding of the structural impediments to equality that preoccupied the sex-discrimination discourse leading up to the provision's enactment should inform today's Title VII's interpretation. Part V suggests possible legal ramifications of this enriched history.

I. TITLE VII'S JURISPRUDENTIAL LIMITATIONS

On the recent occasion of Title VII's fiftieth anniversary, legal commentators evaluated both its accomplishments and its shortcomings.²⁰ Many argued that antidiscrimination law is in "crisis,"²¹ and that judicial interpretation of Title VII's—represented by such cases as *Wards Cove*,²² *Ledbetter*,²³ *Ricci*,²⁴ and *Wal-Mart*²⁵—has "choked off"²⁶ robust commitments

20. See, e.g., MACLEAN, *supra* note 3, at 128 (discussing Title VII's impact on the women's movement); Nancy MacLean, *The Civil Rights Act of 1964: The Difference a Law Can Make*, 11 LABOR 19 (2014) (same); Mayeri, *Constitutional Choices*, *supra* note 9, at 770 (observing that Title VII's passage proved significant in consolidating legal feminism as a "force to be reckoned with"); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995 (2015) (explicating the reach and limits of Title VII's sex discrimination jurisprudence). Title VII's interpretation has also been heavily critiqued for its limitations. See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Michael McCann, *Money, Sex, and Power: Gender Discrimination and the Thwarted Legacy of the 1964 Civil Rights Act*, 91 DENV. U. L. REV. 779 (2014); Toure F. Reed, *Title VII: The Rise of Workplace Fairness and the Decline of Economic Justice, 1964-2013*, 11 LABOR 31 (2014).

21. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); see also Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (noting that fewer cases are filed because litigants are cognizant of lower chances at success); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2001) (claiming employment discrimination plaintiffs are less successful than other litigants); Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. (2011) (asserting the need to shift our primary focus from individual harms, currently espoused by courts interpreting Title VII, to collective harms).

22. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (raising the bar on successful disparate impact claims). Despite Congressional attempts to strengthen civil rights post-*Wards Cove*, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.), the effects of *Wards Cove* were significant, see George I. Lovell, Michael McCann & Kristine Taylor, *Covering Legal Mobilization: A Bottom-Up Analysis of Wards Cove v. Atonio*, 41 LAW & SOC. INEQ. 61, 62 (2016), and disparate impact remains an underutilized doctrinal tool, see Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 597-98 (2004) (noting that disparate impact cases are difficult, if not impossible, for private plaintiffs to undertake); see also *infra* note 35.

23. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (raising the bar for plaintiff's claims under Title VII, which start with filing an EEOC charge, by ruling that the later effects of past discrimination do not restart the clock for timely filing of an EEOC charge). In response to *Ledbetter*, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. & 42 U.S.C.), which amends the Civil Rights Act of 1964 and clarifies that a discriminatory compensation decision or other practice that is unlawful occurs each time compensation is paid pursuant to the discriminatory decision.

24. *Ricci v. DeStefano*, 557 U.S. 557 (2009) (emphasizing the importance of the business necessity defense to disparate impact liability); see also Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whiteness Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73 (2010); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. &

to civil rights. Scholars noted “the stranglehold of discriminatory intent”²⁷ and the limiting effects of the “instantiation of comparators” in antidiscrimination jurisprudence.²⁸ Some have asserted that the Supreme Court’s “cramped interpretation” of Title VII is “incompatible with the statute’s broad remedial purposes.”²⁹ Scholars witnessing the shrinking scope of antidiscrimination law³⁰ have claimed that Title VII’s jurisprudence is currently devoid of a compelling theory of antidiscrimination,³¹ resulting in neglect of the structural and institutional dimensions of the workforce that reinforce sex

MARY L. REV. 197 (2010); Charles A. Sullivan, Ricci v. DeStefano: *End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201 (2009).

25. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (raising the bar for systemic discrimination claims); see also Tristin K. Green, The Future of Systemic Disparate Treatment Law, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Melissa Hart, Civil Rights and Systemic Wrongs, 32 BERKELEY J. EMP. & LAB. L. 455 (2011) (lamenting the court’s myopic focus on individual harms rather than systemic wrongs); Thompson Ford, *supra* note 21, at 518 (claiming *Wal-Mart* was a feature of a long line of cases corroding anti-discrimination law); Michael J. Zimmer, Wal-Mart v. Dukes, *Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012) (arguing that anti-classification rather than anti-subordination rationales dominate Title VII’s jurisprudence).

26. Noah D. Zatz, *Putting Intent in Its Place: A New Direction for Title VII*, 28 CAL. LAB. & EMP. L. REV. 8, 8 (2014).

27. *Id.* (appreciating the relevance of intent but arguing that we should deny its centrality). *But see* Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1922-23 (2009) (claiming that while the intent requirement has support in case law, its significance is exaggerated).

28. *Goldberg*, *supra* note 21. See, e.g., *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007) (holding that a plaintiff cannot establish a prima facie case of sex discrimination against women with young children in the absence of comparative evidence that men with young children are treated more favorably). *But see* *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (noting that evidence of more favorable treatment of working fathers is not needed to show sex discrimination against working 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”).

29. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting); see also WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 271 (discussing *Ledbetter* and other cases).

30. *Goldberg*, *supra* note 21, at 734; see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444, 449-52 (2004) (discussing the dismal fate of most plaintiffs’ discrimination complaints); Lovell, McCann & Taylor, *supra* note 22; see also Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 176-77 (2010) (concluding that employment discrimination plaintiffs “receive cursory attention in legal process and a limited remedy” and that discrimination law “seldom offers an authoritative resolution of whether discrimination occurred”). Employment discrimination plaintiffs who prevail at trial lose on appeal forty-two percent of the time; judgments for employer-defendants are reversed in fewer than eight percent of cases. Clermont & Schwab, *supra* at 450. Some scholars maintain that courts’ hostility toward discrimination claims is ideologically based. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 22-26 (2006) (asserting that courts resist a structural approach to discrimination claims, in part, because many judges are ideologically opposed to second-guessing decisions by employers); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 561 (2001) (arguing that “courts approach cases from a particular perspective that reflects a bias against the claims” and that this ideological bias colors how courts adjudicate discrimination claims).

31. Zatz, *supra* note 26.

discrimination.³² While scholars have noted that today's discrimination is "more subtle, more entrenched, and more systemic in nature" than the discrimination common fifty years ago,³³ many agree that Title VII jurisprudence is "depleted" and fails most dramatically when attempting to deal with complex understandings of discrimination.³⁴ Some have lamented current jurisprudence's hostility toward disparate impact theory, which significantly diminishes Title VII's potential to address workplace norms that disadvantage subordinated classes.³⁵ Title VII's discrimination jurisprudence has been heavily criticized for its inability to provide workplace equality for women.³⁶

32. Albiston, *supra* note 6, at 1095, 1134-51, 1153-54 (claiming that employment discrimination claims are usually more successful when they focus on eradicating discriminatory animus towards identity-based protected groups and not when they challenge the structures of work despite the latter's importance).

33. Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 940, 990-91 (claiming the courts have "dismantled the systemic discrimination edifice. By rejecting the statistical proof offered in the *Wal-Mart* case and treating the city of New Haven's actions in *Ricci* as a form of intentional discrimination, the Court has largely turned its back on these systemic discrimination claims, and at present, it is unclear what kind of proof the Court might accept as indicative of discrimination. It is certainly possible that it would be open to a straightforward disparate impact claim . . . those claims are both rare and increasingly difficult to establish because courts are now willing to accept most employer justifications for the disparate impact").

34. Goldberg, *supra* note 21; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (claiming that structures and dynamics of workplaces and other environments can effectuate exclusion of non-dominant groups but are difficult to trace directly to intentional, discrete actions of particular actors); *see also* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (describing and defending structural discrimination theory); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 665 (2005) (claiming that discriminatory work cultures are too complex and intertwined with valuable social relations to be easily regulated by Courts); Laura T. Kessler, *Re-Theorizing Discrimination Doctrine: The Case of Workers with Caregiver Responsibilities* (forthcoming 2016) (manuscript at 23) (on file with author) (arguing that Title VII generally fails to account for the complex interrelationships between individual employee "choices," gender bias, and workplace structures).

35. Bagenstos, *supra* note 30, at 4 ("[T]here is little reason to believe that a structural approach to employment discrimination law will actually be successful."); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011) (discussing the crisis of disparate impact theory, the importance of disparate impacts theory and its historical roots); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2160-66 (2013) (claiming that despite disparate impact theory's potential for combatting contemporary discrimination it is vulnerable to constitutional challenge and proposing that disparate impact be harmonized with equal protection jurisprudence); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 732-45 (2006) (offering reasons to conclude that disparate impact theory was a "mistake"). Recently, however, the Supreme Court held that racial disparate impact claims are cognizable under the Fair Housing Act in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015). Scholars have also noted that the division between disparate impact and treatment claims is not stark and that courts have "often understood the impact of a practice or policy on a protected group, combined with the lack of any persuasive justification for it, as part of the case for inferring intentional discrimination." Joanna L. Grossman & Deborah L. Brake, *Afterbirth: The Supreme Court's Ruling in Young v. UPS Leaves Many Questions Unanswered*, VERDICT (Apr. 20, 2015), <https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered>.

36. MacKinnon, *supra* note 6. Inequality takes several forms. For instance, social science data show the persistent existence of a wage gap. NAT'L WOMEN'S L. CTR., *Fact Sheet: The Wage Gap is Stagnant in Last Decade*, (2012),

This failure is especially poignant for (active) mothers, who face double, structural discrimination in the workforce as both women and parents.³⁷

Scholars have observed that one of the major obstacles hindering women's workplace equality is the double burden of caregiving they disproportionately face, along with the ineptitude of workplace norms and policies in addressing these responsibilities.³⁸ Most family-work (caretaking) in the United States is performed by women,³⁹ and workplace norms, such as extremely long hours, systematically discriminate against women and caretakers.⁴⁰ Such norms are built around an "ideal worker model," which glorifies the worker whose time is completely available for the employer's use and who is free of significant family and caretaking responsibilities.

In the past decade, there have been efforts to enhance Title VII's sex provision interpretation, and to include under its scope discrimination based on family responsibilities (commonly referred to as family responsibility

http://www.nwlc.org/sites/default/pdfs/poverty_day_wage_gap_sheet.pdf (providing data on full-time earners, who often fare better than the many women who are relegated to part-time, temporary, contingent work). See also DEBORAH L. RHODE, WHAT WOMEN WANT, AN AGENDA FOR THE WOMEN'S MOVEMENT 7, 25-38 (2014) (on a persistent gap in leadership); Lovell, McCann & Taylor *supra* note 22, at 782; U.S. Bureau of Labor Statistics, *Highlights of Women's Earning in 2008*, U.S. DEP'T LABOR (2009), http://www.bls.gov/opub/reports/womens-earnings/archive/womensearnings_2008.pdf (documenting generally lower earnings compared to men as women and occupational segregation). But cf. *On Pay Gap, Millennial Women Near Parity—for Now*, PEW RESEARCH CTR. (Dec. 11, 2013), http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf (noting that young women are making progress and starting near men's earnings).

37. See JOAN C. WILLIAMS, UNBENDING GENDER, WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) [hereinafter WILLIAMS, UNBENDING GENDER]; see also PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 62 (2007). See generally JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010) [hereinafter WILLIAMS, RESHAPING WORK-FAMILY] (arguing that while women carry a significant share of caregiving, there are also impositions of "ideal" worker norms, such as long hours, on men); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (positing that masculinity studies help illuminate the gendered dimensions of work as an institution).

38. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS, HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS 52 (2010); Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 408; see also Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT. L. REV. 1605, 1613, 1617 (2001) (noting that a profound restructuring of social institution is required to resist marginalization of complex understandings of care and arguing that law can be viewed as making possible such practices and explorations); Gilligan Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 1 (2005) (advocating for paid family leave); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1884-85, 1939 (2000) (arguing for a restructuring of paid and unpaid work).

39. 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, 1325 (2008); see also *Women and Caregiving: Facts and Figures*, CAREGIVER.ORG, <https://caregiver.org/women-and-caregiving-facts-and-figures> (most family caregiving is done by women). This is not to suggest that it is natural for women to take on the lion's share of caregiving, but to note that by social construction, this has largely been the case since the industrial revolution. See Frances E. Olsen, *The Family and the Market, A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497-1500 (1983).

40. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. J.L. & GENDER 77, 90-102 (2003); Williams & Bornstein, *supra* note 39, at 1320-21 (ideal worker norms discriminate against caregivers); see also Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 408.

discrimination, or FRD).⁴¹ Scholars have suggested that workplace norms premised on an “ideal worker” model, which idealizes time and availability as the hallmarks of the desired employee, discriminate on the basis of sex and are therefore prohibited by Title VII.⁴² While these scholars insist that such Title VII litigation should expand the meaning of sex discrimination to include challenges to policies premised on workers without familial responsibilities,⁴³ however, others have maintained that Title VII provides little solace for working parents, except in the most extreme and overt cases.⁴⁴ Understanding Title VII’s sex provision’s complicated birth and parentage in a broader context can provide a rich history from which to enhance Title VII sex equality jurisprudence in employment, particularly with regard to caretakers’ workplace equality.

II. CANONICAL NARRATIVES OF THE SEX PROVISION’S EMERGENCE

A. Narratives of Birth

It is a commonplace of employment law that the sex provision lacks meaningful prior legislative history.⁴⁵ By most accounts, Title VII of the 1964 Civil Rights Act was animated solely by a desire to reduce workplace racial discrimination.⁴⁶ “Sex” was added as a secondary, under-theorized basis of action, making gender discrimination the “orphan” child of civil rights law.⁴⁷

The original version of Title VII prohibited employment discrimination on the basis of race, religion, color, and country of origin. During the House floor debates, Representative Howard W. “Judge” Smith, an 81-year-old archconservative from Virginia, offered an amendment adding “sex” to the list

41. See CYNTHIA THOMAS CALVERT, JOAN C. WILLIAMS & GARY PHELAN, FAMILY RESPONSIBILITIES DISCRIMINATION (2014); see also EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), <http://www.eeoc.gov/policy/docs/caregiving.html>; *About FRD*, UC HASTINGS COLL. LAW, CTR. FOR WORK-LIFE LAW, <http://www.worklifelaw.org/frd> (last visited May 19, 2016) (explaining Family Responsibilities Discrimination).

42. Williams & Segal, *supra* note 40.

43. WILLIAMS, UNBENDING GENDER, *supra* note 37, at 104-10; see also Joan C. Williams & Amy J.C. Cuddy, *Will Working Mothers Take Your Company to Court?* 94 HARV. BUS. REV. 3, 8 (2012) (explaining that working mothers are now more likely to sue for caregiver discrimination than in the past and the potential liability is significant, and arguing that employers should design scheduling systems that take into account the fact that all employees have a personal life).

44. Mary Becker, *Caring for Children and Caretakers*, 76 CHI-KENT L. REV. 1495, 1517 (2001); see also Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 330 (2004); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 414-15 (2001).

45. Franklin, *supra* note 2.

46. WHALEN & WHALEN, *supra* note 4.

47. McCann, *supra* note 20, at 779.

of prohibitions.⁴⁸ In an astute effort to curtail the bill's prospects for passage, the "killer amendment"⁴⁹ was added as an "eleventh hour subterfuge."⁵⁰ It was intended to accentuate the absurdity of the idea of equal employment for blacks and whites by linking it with equal employment of men and women—a concept considered an oxymoron at the time. The amendment was indeed greeted with amusement when Congressman Smith presented it. Smith alluded to the hilarity of the bill by referring to a letter he received demanding that Congress equalize the number of men and women so that there would not be a shortage of marriage material to go around.⁵¹ Laughter aside, Smith hoped that the amendment would be so controversial that it would "'clutter up' Title VII so it would never pass at all."⁵² Women's coverage in Title VII did not, according to conventional wisdom, come from strenuous lobbying efforts by women's groups but was rather windfall-like, an unexpected boon of a "deliberate ploy by foes of the bill to scuttle it."⁵³ After a mere two-hour legislative debate, sex discrimination was added accidentally and haphazardly to the list of prohibitions.⁵⁴ No committee meetings and no congressional investigations alluded to what this provision might encompass.

B. Narratives of Conception: The Equal Rights Amendment Feminists

Scholars have noted that, although the belief that there was a lack of congressional intent regarding the addition of sex discrimination has become true "by virtue of repetition,"⁵⁵ it ignores the important role of feminists in promoting the provision.⁵⁶ Scholars have shown how feminists approached Representative Smith and lobbied him effectively to include "sex" in the bill.⁵⁷ These accounts, however, focus predominantly on the role of ERA Feminists, headed by the NWP and active since the 1920s in promoting an Equal Rights Amendment to the U.S. Constitution.⁵⁸

48. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

49. Mayeri, *Constitutional Choices*, *supra* note 9, at 770.

50. Franke, *supra* note 4, at 14.

51. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith); HARRISON, *supra* note 10, at 178.

52. Note, *Developments in the Law*, *supra* note 4, at 1167 (describing how the prohibition against sex discrimination was added at the last minute as a floor amendment in the House without any prior hearings or debate and without even a minimum of congressional investigation).

53. WHALEN & WHALEN, *supra* note 4, at 234.

54. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Barker v. Taft Broad. Co.*, 549 F.2d 400 (6th Cir. 1977); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975).

55. Franke, *supra* note 4, at 15.

56. See Freeman, *supra* note 10, at 165-72 (discussing how congressional consideration of the Equal Rights Amendment and debate over the inclusion of women in employment discrimination legislation predated the inclusion of "sex" in Title VII); see also Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. L. REV. 995, 1014-20 (2014) (challenging the joke myth).

57. See HARRISON, *supra* note 10, at 177.

58. Franke, *supra* note 4, at 15-16, 23-25 (highlighting ERA feminists' role in approaching Smith and the inclusion of "sex" in Title VII as a victory of ERA supporters); see also Mayeri, *Constitutional*

When the Civil Rights Bill was introduced in the House in June of 1963, it did not include “sex” in the list of prohibited categories of discrimination. ERA feminists led by Alice Paul’s NWP began a campaign to include “sex” in the bill. They sought the support of long-time congressional allies, including conservative southerners, among them the staunch segregationist Smith. The NWP also sought the backing of prominent ERA supporters Martha Griffith (D- Mich.) and Katherine St. George (R-N.Y.). The two congresswomen agreed that “sex” should be included in Title VII, but thought the best strategy would be to have Congressman Smith head the motion.⁵⁹ According to some scholars, Smith’s introduction of “sex” into Title VII in February of 1964 marked the “culmination of an odd courtship”⁶⁰ between Southern segregationist politicians and NWP feminists, some of whom were “indifferent or even hostile”⁶¹ to African American civil rights at the time.⁶²

Opposition to the addition of the prohibition on sex discrimination in employment arose immediately from Rep. Celler (D-N.Y.), an avid supporter of the Civil Rights Act who was apprehensive of Smith’s political trick. Celler portrayed a bleak scenario should the amendment pass, listing a parade of “horribles” that included the invalidation of rape laws, retraction of protective labor laws, and compulsory military service for women.⁶³ But a stark response came from Rep. Griffith, a longtime ERA advocate who supported the amendment, stating on record that, lest the amendment pass, “white women would be last at the hiring gate.”⁶⁴ Much of the legislative discussion

Choices, *supra* note 9, at 769-74 (emphasizing, however, the importance of Pauli Murray to the provision’s enactment).

59. Franke, *supra* note 4, at 23. For Smith this would be a win-win: if the Civil Rights Act were to pass, at least white women would enjoy same rights as blacks, and if the amendment would clutter the bill and curtail the passage of it altogether, then it would be a victory for segregationists.

60. Mayeri, *Constitutional Choices*, *supra* note 9, at 770.

61. See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 20, 194 (2011) [hereinafter MAYERI, REASONING FROM RACE] (noting that “some National Women’s Party members marched to the segregationists’ beat. For them, equal rights for women would only be undermined by an association with black civil rights”); Mayeri, *supra* note 2, at 718 (arguing that Pauli Murray’s intersectional approach challenges the narrative that the sex provision’s primary constituencies were white women and lawmakers hostile to civil rights).

62. Mayeri, *Constitutional Choices*, *supra* note 9, at 770 (noting that “[f]or years, one of the NWP’s primary legislative strategies had been to entice Southern congress members to introduce and support amendments to civil rights bills establishing protections for (white) women”). On the suggested reasons for this alliance see LEILA J. RUPP & VERTA TAYLOR, SURVIVAL IN THE DOLDRUMS: THE AMERICAN WOMEN’S RIGHT MOVEMENT, 1945 TO THE 1960S, at 160-162 (1987); and ORLECK, RETHINKING AMERICAN WOMEN’S ACTIVISM, *supra* note 16, at 30-31. See also MAYERI, REASONING FROM RACE, *supra* note 61, at 20-22, 194.

63. 110 CONG. REC. 2577 (1964) (statement of Rep. Celler).

64. 110 CONG. REC. 2577, 2578-2580 (1964) (statement of Rep. Griffith). Such “segregationist solicitude” reflected the concerns of some NWP members. See MAYERI, REASONING FROM RACE, *supra* note 62, at 20-21. But see Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospects of ENDA*, 66 STAN. L. REV. 1333, 1340 (2014) (emphasizing that Griffith also spoke of the plight of black women).

thereafter⁶⁵ echoed an earlier NWP resolution that warned that “the Civil Rights Bill would not even give protection against discrimination . . . to a White Woman, a Woman of the Christian Religion, or a Woman of United States Origin.”⁶⁶ Rep. Edith Green (D- Or.), fearful for the bill’s passage, spoke in opposition to the amendment. Green claimed that race discrimination was far more severe than sex discrimination, that black women faced “double” discrimination, and that adding the amendment would only clutter the bill.⁶⁷ She argued the two issues needn’t be conflated, but rather should be dealt with separately.⁶⁸ Ultimately, the amendment adding the sex provision to Title VII passed, a development that “could be regarded as a victory for ERA supporters.”⁶⁹

However, in order to fully understand the complex legislative history and political dynamics animating the provision’s birth, it is necessary to reexamine its context in two important ways. First, we should focus on Working-Class Social and Labor feminists, a group that was opposed to the ERA and to Paul’s NWP. Recent scholarship on this group’s activism and ideology complicates the story of the quest for sex equality in the workplace. This focus not only sheds important light on Paul’s motivation for approaching Smith, but, more importantly, provides a robust understanding of what sex discrimination meant at the time for these feminists. Second, we must extend the scope of the inquiry further back in time to the early twentieth century in order to uncover the roots of sex discrimination legislation.

III. NARRATIVES OF PARENTAGE: THE ROLE OF WORKING-CLASS SOCIAL AND LABOR FEMINISTS

A. *Protective Labor Legislation: Between Combating and Reinforcing Sex Discrimination*

Since the beginning of the twentieth century, women have been systematically working to combat sex discrimination in the workplace. One method employed to achieve this goal was protective labor legislation. Although protective labor legislation has often been cast as damaging to the

65. 110 CONG. REC. 2577 at 2583 (statements of Rep. Andrews, Rep. Rivers).

66. 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, 43 (1983).

67. 110 CONG. REC. at 2581-2582 (statement of Rep. Green). Congresswoman Green was suspicious of the motives of the amendment’s supporters, stating that those men who supported the amendment were in bitter opposition to women’s equality just a few months earlier during the EPA debates. She stated no one can argue with the rampant discrimination towards women, of which women are made “painfully aware.” *Id.* at 2581.

68. *Id.*

69. Franke, *supra* note 4, at 24. For a brief explanation of the breakdown of votes, see *infra* Section III.E.; HARRISON, *supra* note 10, at 178-81; and WHALEN & WHALEN, *supra* note 4, at 115-19.

ideal of gender equality,⁷⁰ in its early years it was believed by women reformers to ameliorate disadvantages facing women in the workforce.⁷¹ While scholars have noted the harms it created for women's equality by portraying them as in need of protection,⁷² most agree that protective labor legislation nonetheless improved labor conditions for working-class women at the time.⁷³ Whether one takes the position that protective labor legislation for women was a means of enhancing economic equality or a mechanism for entrenching sex stereotypes, protective labor legislation generated awareness, debate, studies, and new policies regarding discrimination against women in the workforce. It is therefore important to consider protective labor legislation as a component of the history that ultimately led to the Title VII sex provision's enactment. The Article thus reframes the history of sex discrimination by focusing on the persistent quest for employment equality that began with the enactment of protective labor legislation.

During the early twentieth century, women's participation in the labor force grew rapidly, largely as a result of young migrant women joining the workforce.⁷⁴ Millions of working-class women entered gainful employment during industrialization.⁷⁵ They were met with harsh working conditions, including extremely long hours, meager pay, employment insecurity, and poor sanitation, to name only a few. Middle-class, educated women reformers, known as Social Feminists, worked in settlement houses and began to criticize labor conditions in the burgeoning sweatshops.⁷⁶ After investigating working conditions in the Chicago garment industry, Social Feminists lobbied the Illinois legislature to enact labor regulation limiting excessive work hours⁷⁷ and sought to ameliorate the dangers to society caused by industrialization and *laissez-faire* economics.⁷⁸ Under pressure from reformers, state legislatures in the early twentieth century began passing what became known as "protective

70. See KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 13, at 31 (noting how the *Muller* decision, which upheld protective labor legislation for women, restricted women's rights as individuals and denied them liberty available to other workers).

71. See WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 8, 10 (noting that union formation proved difficult and the need for legislation became apparent); Renan Barzilay, *Labor Regulation*, *supra* note 14, at 134 (observing that labor regulation put women workers on a more even footing with male wage earners).

72. See generally KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 13.

73. See WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 8; COTT, *supra* note 17, at 135.

74. See JOANNE J. MEYEROWITZ, WOMEN ADrift: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930, at xvii (1988).

75. See Renan Barzilay, *Women at Work*, *supra* note 12, at 175; LYNN Y. WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES 1820-1980, at 13-30 (1985).

76. See Renan Barzilay, *Women at Work*, *supra* note 12, at 177.

77. See KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900, at 238 (1995); Renan Barzilay, *Women at Work*, *supra* note 12, at 179-83.

78. Renan Barzilay, *Women at Work*, *supra* note 12, at 175-88.

labor laws,” which limited hours for workers.⁷⁹ After the Supreme Court invalidated these sex-neutral hour laws in *Lochner*,⁸⁰ however, Social Feminists advocated for the (now infamous) *Muller* decision, which upheld Oregon’s hour laws for women only.⁸¹ Social Feminists strongly supported Oregon’s law but, rather than challenge *Lochner* directly, they sought “to win back one-half the loaf” by arguing that women were a special, vulnerable class that needed the protection of the state. In making their case, they pointed to women’s frailty and reproductive roles.⁸² The Supreme Court followed Social Feminists’ reasoning and upheld the Oregon law, stressing the inherent differences between men and women.⁸³ Improving labor standards for women came at a price, though; it helped to reinforce gender distinctions that often worked to women’s disadvantage.⁸⁴ Still, encouraged by the *Muller* outcome, Social Feminists hoped that labor laws for women would eventually become an “entry wedge” in the fight for universal labor regulation. They viewed labor laws for women as an “opening for the legal possibility of government regulation of private workplaces for all workers,”⁸⁵ arguing that “both men and women need only show a clear relation between their working hours and their good or bad health in order to get hours legislation sustained by the Supreme Court.”⁸⁶ Social Feminists argued that “[s]hortening the workday is something that legislation can effect for women and children today, for men doubtless in the future.”⁸⁷ Minimum wages were next priority; they soon began campaigning for state legislatures to enact minimum wage laws for women. In response to these efforts, Congress passed a minimum wage law for women in the District of Columbia in 1918.⁸⁸

79. *Id.* at 179-83.

80. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York’s hour law for bakers on the ground that labor legislation interfered with the right of contract protected by the Fourteenth Amendment). *But see id.* at 75 (Holmes, J., dissenting) (noting that “a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez-faire*”).

81. *Muller v. Oregon*, 208 U.S. 412 (1908); *see also* Renan Barzilay, *Women at Work*, *supra* note 12, at 184-86.

82. Ann Corinne Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUD. 246, 252 (1979). Progressive labor reformers feared that the Supreme Court might follow *Lochner* and cripple the movement for worker protection. These reformers hoped that the women’s ten-hour law in *Muller* could be distinguished from the general bakery law that was held unconstitutional in *Lochner*. *See id.*

83. *See* KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 13, at 30; NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 25 (1996) [hereinafter WOLOCH, *MULLER*]; Renan Barzilay, *Women at Work*, *supra* note 12, at 185.

84. Kessler-Harris noted the double-edged sword of protective legislation for women, affording some benefits but deepening gendered division of labor. KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 13, at 19-63.

85. ORLECK, RETHINKING AMERICAN WOMEN’S ACTIVISM, *supra* note 16, at 32.

86. WOLOCH, *MULLER*, *supra* note 83, at 43 (quoting Florence Kelley in the *Woman’s Journal*).

87. *Id.* at 44. *But see* JOSEPHINE GOLDMARK, FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY 39 (1912) (noting the “special susceptibility to fatigue and disease which distinguishes the female sex”).

88. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 112.

While the *Muller* Court and the Social Feminists who supported its decision argued that hour laws for women were necessary because of women's fragility and maternal roles, Working-Class Social Feminists stressed the compensatory rationale for women's labor regulation and viewed protective legislation as a means to correct women's unequal bargaining power in the market.⁸⁹ Most young, female immigrant workers supported hour laws and minimum wage laws for women at the time. The ranks of supporters included Mary Anderson and Rose Schneiderman, who had worked long hours in garment factories from an early age for meager pay.⁹⁰ Although Working-Class Social Feminists often worked alongside middle-class women in advocating for legal reform, they had a unique, nuanced understanding of women's workplace experiences that derived from their own experiences in the marketplace. They strived to change marketplace labor to suit their needs.⁹¹ Rather than seeing protective legislation as an obstacle to gender parity, they viewed it as a bridge to genuine economic equality. At the time, prominent male unions refused to accept women workers.⁹² To unions like the American Federation of Labor, women's labor was not real work.⁹³ Women's work was usually characterized as a temporary detour before marriage, a frivolous choice motivated by a love of luxuries or excitement, rather than based on economic necessity or personal fulfillment. Specifically, many claimed that women worked for unnecessary "pin money" and that their employment displaced real workers (i.e., breadwinning male workers).⁹⁴ Working-class women, many of whom had experienced the realities of marketplace labor in factories, began to develop a feminist consciousness and resist the dominant vision of women as second-class members of the workforce. They refused to accept the notion that a woman's place is only in the home.⁹⁵ They articulated a political vision entitled "Bread and Roses,"⁹⁶ which emphasized the need for shorter hours, decent wages, and safe working conditions, along with education, culture, and egalitarian relationships between men and women and between husbands and

89. Of course, it's impossible to draw hard lines between Social Feminists and their working-class allies but focusing on working-class activists sheds light on their unique argumentations and aspirations. Nonetheless these working-class activists shared Social Feminists' ideology of enlisting the state through market regulation to ameliorate working conditions. Renan Barzilay, *Women at Work*, *supra* note 12, at 197; Renan Barzilay, *Labor Regulation*, *supra* note 14, at 138; Renan Barzilay, *Constructive Feminism*, *supra* note 13; *see also* ORLECK, COMMON SENSE, *supra* note 14, at 125; LANDON R.Y. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 14-15 (2000); WOLOCH, *MULLER*, *supra* note 83, at 10.

90. *See* Renan Barzilay, *Constructive Feminism*, *supra* note 13.

91. *Id.*

92. DIANE BALSER, SISTERHOOD AND SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES 26 (1987).

93. *See generally* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982).

94. *See* WEINER, *supra* note 75, at 39, 108; MCGERR, *supra* note 13, at 131-32; Renan Barzilay, *Labor Regulation*, *supra* note 14, at 146-47.

95. *See generally*, Renan Barzilay, *Constructive Feminism*, *supra* note 13.

96. *See* COTT, *supra* note 17, at 23.

wives.⁹⁷ Since unionization for women proved difficult, they hoped that regulation would redress the power imbalances between female workers and their employers, which led to the terrible working conditions they experienced. To them, “genuine equality” required that women benefit from sex-specific laws that would bring their labor experience closer in line with some standards men had achieved through unionization.⁹⁸

Anderson claimed women-protective laws were “equalizing in their effect.”⁹⁹ She explained the practical need for regulation by pointing to women’s “double shift.”¹⁰⁰ She claimed that women wage earners had one job in the factory and another in the home, leaving them little time and energy to carry on the fight to better their economic status. They therefore needed labor laws.¹⁰¹ Even though Working-Class Social Feminists aimed to eventually regulate hours and wages for all workers—men as well as women—at this stage they were primarily concerned with women workers, who were far more disempowered than their male counterparts. In accordance with the “entry wedge” theory, they hoped that regulating women’s working conditions would be the first step toward wider labor regulation, so that, ultimately, labor regulation tailored to women would improve labor conditions for both sexes.¹⁰² Anderson claimed that, in the long run laws that regulated women’s employment would also benefit men by “serv[ing] to bring the whole industry up to the standard required for the women working in it.”¹⁰³ She insisted that women would stay in the workforce and that their presence would improve conditions for all workers.¹⁰⁴ Anderson and her allies believed that, as more women entered the labor market, the need for regulation tailored to women would grow. Once in place, those regulations could be extended to benefit men as well.¹⁰⁵

97. ORLECK, COMMON SENSE, *supra* note 14, at 6-8.

98. AMY E. BUTLER, TWO PATHS TO EQUALITY: ALICE PAUL AND ETHEL M. SMITH IN THE ERA DEBATE 1921-1929, at 102 (2002); WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 131; *see also* Katherine Turk, “With Wages So Low How Can a Girl Keep Herself?” *Protective Labor Legislation and Working Women’s Expectations*, 2 J. POL’Y HIST. 250, 254 (2015) (explaining that women-occupied industries were under-unionized and overcrowded which weakened women’s bargaining powers).

99. Anderson, *Should There Be Labor Laws for Women? Yes*, *supra* note 15, at 6; *see also* WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 131.

100. MARY ANDERSON, WOMAN AT WORK: THE AUTOBIOGRAPHY OF MARY ANDERSON AS TOLD TO MARY N. WINSLOW 71 (1951); Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 422.

101. ANDERSON, *supra* note 100, at 71; *see also* BALSER, *supra* note 92, at 100; ORLECK, RETHINKING AMERICAN WOMEN’S ACTIVISM, *supra* note 16, at 36.

102. *See, e.g.*, MARY ANDERSON, U.S. DEP’T OF LABOR, THIRD ANNUAL REPORT OF THE DIRECTOR OF THE WOMEN’S BUREAU 17 (1921) (“Long hours of work prevail for both men and women in many industries. This is a condition which should be corrected for both sexes . . .”).

103. Anderson, *Should There Be Labor Laws for Women? Yes*, *supra* note 15, at 16.

104. *Id.* at 15-16; Mary Anderson, *Women’s Future Position in Industry*, AM. INDUSTRIES 27, 28-29 (1920) [hereinafter Anderson, *Women’s Future Position in Industry*].

105. Anderson, *Should There Be Labor Laws for Women? Yes*, *supra* note 15, at 16. In *Bunting v. Oregon*, 243 U.S. 426 (1917), the Supreme Court upheld an Oregon maximum hour law for both male and female workers, and it seemed as though the “entering wedge” of women’s labor laws was advancing labor legislation for men and women. By affirming the law the Court fulfilled reformers’

As part of their agenda, Working-Class Social Feminists supported the predominantly middle-class Social Feminists' efforts to establish a federal bureau to advance women's work. After World War I, the Women's Bureau was established within the U.S. Department of Labor, and Anderson was appointed as its director. As director, Anderson investigated women's working conditions and conceptualized marketplace labor as an important component in working women's lives, alongside but not inherently incompatible with family.¹⁰⁶

B. After Suffrage: A Factional Feud over the ERA and Protective Labor Legislation

After suffrage and the passage of the Nineteenth Amendment to the Constitution, a "factional feud"¹⁰⁷ arose within the feminist movement that would split the movement for decades to come. The rivalry between Social Feminists on the one hand and ERA Feminists on the other starkly divided feminists over how to pursue full-fledged equal citizenship. Some feminists concentrated on obtaining an ERA, while others sought protective labor legislation that would relieve the strain of combining homemaking and marketplace labor.

The debate split feminists largely by class: elite, professional, well-educated women, who could potentially compete with men for attractive managerial and professional jobs (and meet domestic obligations by employing others), found the declaration of formal equality with men attractive and promising.¹⁰⁸ The NWP, which had until then been committed solely to women's suffrage, replaced its old goal with a new one: to bar discrimination and achieve equal rights for women by removing "all disabilities based on sex."¹⁰⁹ NWP feminists continued to advance the ideal of formal parity that had succeeded in the suffrage campaign by arguing for an ERA to the Constitution. They hoped to create formal equality between themselves and their brothers in the belief that eliminating all legal distinctions between men and women was necessary to secure women's equal status in American society.¹¹⁰ NWP Feminists, largely professional and privileged women who were often

"long-sought goal: it extended protective law to men in all sorts of industrial work." WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 102.

106. Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 422-23, 427-28.

107. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 125.

108. MACLEAN, *supra* note 3, at 117-18.

109. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 123.

110. Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 426-27; Mayeri, *Constitutional Choices*, *supra* note 9, at 762. For more on the NWP, see generally SUSAN D. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISTS BETWEEN THE WARS* (1981); CHRISTINE A. LUNARDINI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMEN'S PARTY, 1910-1928* (1986); and Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 J. AM. HIST. 43 (1984).

associated with business,¹¹¹ used the language of liberal individualism and generally accepted a market libertarian interpretation of sex equality.¹¹² ERA and NWP feminists came to view protective labor laws as denying women equal access to employment opportunities.¹¹³ They demanded formal legal equality and rejected any special legislation for women. In their experience, any classification based on sex differences led to women's exclusion, discrimination, and subordination.¹¹⁴ They feared sex-related barriers to positions and opportunities open to their equally educated brothers. The NWP believed in removing barriers to women's individual achievements and allowing women the same freedoms as men. It maintained an unwavering focus on winning legal equality with men.¹¹⁵

By contrast, Social Feminists objected to the ERA, claiming it had ominous implications for women's workplace equality. They specifically feared that the ERA would eliminate protective labor legislation, including the hour laws and minimum wage laws they had fought so hard to implement.¹¹⁶ They warned that the ERA would (intentionally or not) serve as a tool of the worst industrial exploiters.¹¹⁷ Working-Class Social Feminists also rejected NWP's quest for the ERA, fearing it to be an "empty slogan" that would wash out the gains made by protective labor legislation.¹¹⁸ Some called out the ERA as being "by and for the bourgeoisie"¹¹⁹ and believed that it did not represent working-women's voices.¹²⁰ In lieu of an ERA, they supported state

111. COTT, *supra* note 17, at 120-22, 137.

112. COTT, *supra* note 17, at 125; DENNIS A. DESLIPPE, *RIGHTS NOT ROSES: UNIONS AND THE RISE OF WORKING CLASS FEMINISM, 1945-1980*, at 5 (1999).

113. Deborah Dinner, *Law and Labor in the Nineteenth and Twentieth Centuries*, in *A COMPANION TO AMERICAN LEGAL HISTORY* 317 (Sally E. Hadden & Alfred L. Brophy eds., 2013) [hereinafter Dinner, *Law and Labor*].

114. Becker, *supra* note 11, at 211-12.

115. COBBLE, GORDON & HENRY, *supra* note 16, at 10. Paul was primarily concerned with common law constraints on married women and sought to eliminate the common law-sanctioned control of husbands over their wives' ability to make contracts in a free market economy. Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, The First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, 78 J. AM. HIST. 188 (1991). Family law at the time was mostly sex specific, with obligations of support on husbands and fathers, and preference for mothers as custodians. Many states denied married women full rights to contract and property. Other laws denied women jury service, or banned women from bars and wrestling matches. Becker, *supra* note 11, at 211-12.

116. Zimmerman, *supra* note 115, at 190, 200, 203-04.

117. Zimmerman, *supra* note 115, at 203. Kelley agreed women should not be excluded from jury duty, from equal guardianship of children, and from divorce on equal conditions, but believed that specific bills could remedy these exclusions. *Id.*

118. Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 427; *see also* COTT, *supra* note 17, at 134.

119. COTT, *supra* note 17, at 128.

120. Mary Anderson stated that whether one supported the ERA was largely a class issue:

It is a question of whether Mrs. O. K. P. Belmont with all her millions and Alice Paul with a great deal of her own money, as well as other member of the [National] Women's Party, all rich women, are going to dictate the policies of the labor paper or whether that paper is going to be for the interests of working women.

intervention in the market and advocated the law's protection as a way to match the gains made by their brothers through unionization. They championed a reform agenda that called for "constructive" measures to enhance women's workforce equality beyond what could be achieved by individual contract or weak unionization.¹²¹ They sought state responsibility for the subordination associated with women's labor, arguing for "specific bills for specific problems."¹²² Women were often both the breadwinners and caretakers for their families,¹²³ but they still faced disadvantages in the labor market. Most women needed more than legal sex equality—they needed actual sex equality, which Working-Class Social Feminists viewed as inherently intertwined with economic justice.¹²⁴ In sum, at the time, Social Feminists, Working-Class Social Feminists, and a vast number of individual women's organizations supported protective legislation and opposed the ERA for fear it would wipe out existing protective legislation.¹²⁵ The debate was furious.

In 1923, The U.S. Supreme Court, assisted by the NWP, delivered a major blow to Social Feminists in *Adkins v. Children's Hospital*.¹²⁶ In 1918, under pressure by Social Feminists, Congress had passed a law setting minimum wages for women for the District of Columbia. This law's constitutionality was in dispute in *Adkins*. The Children's Hospital of the District of Columbia challenged the board that determined the minimum wage for violating liberty of contract as defined in *Lochner*. Social Feminists provided the Court with a brief supporting the board and now arguing, *inter alia*, for minimum wage laws to redress women's economic disadvantage.¹²⁷ The hospital, on the other hand, sought the expert advice of Alice Paul, who supplied it with NWP literature about the dangers protective legislation posed to women. NWP's rights discourse revived the freedom of contract doctrine under the new guise of equal rights.¹²⁸ The hospital used the equal rights banner to discredit single-sex minimum wage laws. It claimed that women now believed in equal rights with men and in their independence; for these women, minimum wage laws were not discriminations in their favor but discriminations against them.¹²⁹ The

Letter from Mary Anderson, Dir. U.S. Women's Bureau, to Elizabeth Christman (Dec. 1, 1923) (on file with Harvard University, Schlesinger Library, Anderson Papers, Microform Reel 1, Frame 69).

121. Letter from Mary Anderson to Elizabeth Christman, *supra* note 120, *Equal Rights? Yes, But How?* attachment.

122. COTT, *supra* note 17, at 127.

123. Anderson argued that women are often breadwinners and caretakers. *See generally* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN 23: THE FAMILY STATUS OF BREADWINNING WOMEN (1922) (data on the family status of breadwinning women).

124. COBBLE, GORDON & HENRY, *supra* note 16, at 4.

125. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 124. Their argument at that time shifted somewhat from the *Muller* rhetoric of biological vulnerability to economic vulnerability, see Sybil Lipschultz, *Social Feminists and Legal Discourse 1908-1923*, 7 YALE J.L. & FEMINISM 131, 133 (1989).

126. *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 553 (1923).

127. STORRS, *supra* note 89, at 47; WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 114.

128. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 115; Zimmerman, *supra* note 115.

129. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 115.

Adkins Court was convinced. It declared minimum wages for women unconstitutional, echoing the NWP's reasoning that, after suffrage, women no longer needed sex-specific minimum wage legislation that would restrict their freedom of contract.¹³⁰ The Court based its decision on the false premise that the ancient inequality of the sexes had come almost "to the vanishing point" and that, now enfranchised, women were essentially equal to men.¹³¹ The decision crippled the minimum wage campaign and stymied the entering wedge strategy that had served Social Feminists for years.¹³² Moreover, the Court's use of NWP literature to shape its opinion¹³³ underscored for Social Feminists the alliance between ERA proponents and business.¹³⁴ While the NWP applauded the decision, Social Feminists claimed that it would lead to exploitation of the most vulnerable workers.¹³⁵ The animosity between NWP Feminists and Social Feminists only worsened after *Adkins*.

Elated by the *Adkins* victory, Paul proposed an ERA that would declare: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction."¹³⁶ The NWP acknowledged that such an amendment would be in conflict with protective labor laws, but it argued that, if women can be segregated as a class for protective legislation, that same classification can be used to restrict them.¹³⁷ The NWP continued to argue that protective laws injured women and that women "should be treated as individuals under law, not as members of a suspect class."¹³⁸

For Working-Class Social Feminists, the NWP's vision of legal equality was too narrow and abstract: it promised an "empty slogan" rather than actual equality.¹³⁹ Working-Class Social Feminists such as Anderson and

130. The Court reasoned that previous decisions in *Muller* and *Bunting* did not overrule the holding in *Lochner* in protecting freedom of contract. The *Muller* and *Bunting* cases, the Court noted, addressed maximum hours; while the *Adkins* case addressed a minimum wage. However, the same court held hour-laws still valid because of women's "maternal functions" and dependency on men. *But see* Chief Justice Taft, dissenting, argued that there was no distinction between minimum wage laws and maximum hour laws, considering that these essentially both restrict liberty of contract. Chief Justice Taft noted that *Lochner*'s limitation had appeared to be overruled in *Muller* and *Bunting*. Justice Holmes, also dissenting, noted that there were plenty of other constraints on freedom of contract which were considered constitutional and that Courts ought to defer to the legislature when its use of legislative power was reasonable. *See also* Renan Barzilay, *Labor Regulation*, *supra* note 14, at 137.

131. *See Adkins*, 261 U.S. at 525, 553.

132. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 118-19; *see also* Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 259 (1999) (book review) ("The NCL thus faced the discouraging prospect that *Adkins* would precipitate the invalidation of all the protective labor statutes it had worked for decades to enact and defend across the nation.")

133. *See* Eileen Boris, *Labor's Welfare State: Defining Workers, Constructing Citizens*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920-), at 319, 333 (Michael Grossberg & Christopher Tomlins eds., 2008).

134. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 128.

135. Zimmerman, *supra* note 115, at 222-23.

136. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 125; Becker, *supra* note 11, at 215.

137. WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 124.

138. *Id.* at 125.

139. Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 427.

Schneiderman, who considered themselves “good feminists,” objected that “over articulate theorists were attempting to solve the working woman’s problems . . . with the working woman’s own voice far less adequately heard.”¹⁴⁰

Anderson claimed the theoretical approach espoused by women of the upper class did not reflect the needs of working women¹⁴¹ and was too intangible and vague.¹⁴² Working-Class Social Feminists thought that declaring equality was not enough. They feared that formal equality might turn out to be a hollow, abstract legal principle with no real force. Working-Class Social Feminists observed that men and women enjoyed different degrees of economic power in the labor market. Their unequal power derived from myriad reasons, including the prevailing belief that women’s work was not *real* work, women’s limited power within unions, and the strain produced by women’s simultaneous family-care and labor responsibilities.¹⁴³ They argued for increased government intervention in the labor market to ensure some of the benefits their male counterparts enjoyed thanks to their powerful unions. They demanded “constructive legislation for constructive equality through specific legislation for specific discrimination.”¹⁴⁴ They sought equality through a “constructive”¹⁴⁵ approach grounded in working women’s actual conditions and argued for affirmative improvement through specific legislation.

While both groups of activists understood themselves as feminists and advocates for women,¹⁴⁶ ERA Feminists focused on removing legal and political barriers to equality, while Working-Class Social Feminists demanded state intervention through specific regulation for increased economic power for

140. COTT, *supra* note 17, at 134-35, 138. Letter from Mary Anderson, Dir. U.S. Women’s Bureau, to Elizabeth Christman (Dec. 1, 1923) (on file with Harvard University, Schlesinger Library, Anderson Papers, Microform Reel 1, Frame 69).

141. See Letter from Mary Anderson, Dir., U.S. Women’s Bureau, to Elizabeth Christman (Dec. 1, 1923) (on file with Harvard University, Schlesinger Library, Anderson Papers, Microform Reel 1, Frame 69); see also Anderson, *Labor Laws* (on file with Harvard University, Schlesinger Library, Anderson Papers, Microform Reel 4, Frame 730).

142. Of this Anderson wrote:

No one knew better than we did that there were many legal discriminations against women on the statute books of the various states. We were working to get these discriminations removed and we were making headway. But we were certain the so-called equal rights amendment to the Constitution would not do the job . . . there was no definition of “rights.” There was no definition of “equality.” If a state law had different standards for men and women, would the amendment mean that the men should have the women’s standards, or the women have the men’s? No one knew the answer. . . . [The amendment] was unnecessary because most of the real discriminations against women were a matter of custom and prejudice and would not be affected by a constitutional amendment. . . . [The amendment] was dangerous because it might upset or nullify all the legal protections for women workers that had been built up through the years, which really put them on a more nearly equal footing with men workers.

ANDERSON, *supra* note 100, at 163.

143. See Renan Barzilay, *Constructive Feminism*, *supra* note 13; Renan Barzilay, *Labor Regulation*, *supra* note 14.

144. Anderson, *Should There Be Labor Laws for Women? Yes*, *supra* note 15.

145. See *id.*

146. COTT, *supra* note 17, at 134.

working-class women.¹⁴⁷ Working-Class Social Feminists sought to promote a legal standard tailored to women's actual lives, a standard that would include labor regulations like maximum hours and minimum wages. They wanted to turn the ordinary standard of uninhibited labor into one that suited their needs, and then to apply the tailored regulation universally.¹⁴⁸ Using their power in the Women's Bureau, these feminists conducted and publicized studies showing the positive effects of protective legislation for women and pushed back against the ERA. From 1923 until the late 1950s, the NWP's small but determined group of loyalists pressed the ERA in Congress without success; allies of protective legislation, equally determined, attached riders and amendments to exempt protective legislation from ERA coverage. Ultimately, the ERA failed to come to fruition.¹⁴⁹ Still, the debates were far from settled and continued to reverberate up until the passage of Title VII.¹⁵⁰

C. An Early Federal Sex Anti-Discrimination Provision in the New Deal

When the Great Depression hit, Social Feminists saw it as a "golden moment"¹⁵¹ to press for their entry wedge strategy. The growing concern for breadwinning men's unemployment and the Roosevelt administration's eagerness to solve it appeared to provide Social Feminists an opening.¹⁵² They were part of the network surrounding the Roosevelt administration and an engine of its reforms.¹⁵³ Their efforts to establish minimum wages and maximum hours were partially successful when the Fair Labor Standards Act was passed in 1938. The Act established minimum wages and maximum hours for workers employed in interstate commerce.¹⁵⁴ Finally, protective labor regulation—setting hours of work and providing minimum wage—had been federally extended to include both men and women.¹⁵⁵ The Act was a culmination of these feminists' efforts for over three decades to provide for a

147. Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 426-27.

148. *Id.* at 427-28.

149. See HARRISON, *supra* note 10, at 30-38; MAYERI, REASONING FROM RACE, *supra* note 61, at 12; WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 150.

150. See MACLEAN, *supra* note 3, at 117-18.

151. Renan Barzilay, *Women at Work*, *supra* note 12, at 193.

152. See Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2235-36 (1998).

153. See generally SUSAN WARE, BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL (1981) (discussing the political prominence of the women's reform network in the 1930s, organized around Eleanor Roosevelt).

154. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as 29 U.S.C. §§ 201-19); Suzanne B. Mettler, *Federalism, Gender & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 642 (1994). For the Supreme Court decisions leading to the passage of FLSA, see Renan Barzilay, *Women at Work*, *supra* note 12, at 184-86. Excess hours were not prohibited altogether, but were deterred by the overtime penalty. While the FLSA formally applied to men and women, it excluded agricultural and domestic workers, and had significant gender implications. See SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL POLICY 203-04 (1998).

155. See Fair Labor Standards Act §§ 206-07.

minimum wage and regulate working hours for women as an “entry wedge” that would be extended to men.¹⁵⁶

However, often neglected from the history of federal legislation combating sex discrimination in the workforce is an early federal sex antidiscrimination provision that was inscribed in the Fair Labor Standards Act in 1938. This history is important because it demonstrates an early inclusion of “sex” as an anti-classification provision in federal law long before Title VII. It is also significant because Working-Class Social Feminists supported it, suggesting that the ideology of sex equality was to a substantial degree shared by both this group and ERA feminists. Of course, the methodological question of how to obtain equality remained largely in dispute.¹⁵⁷

During the economic downturn, wives with paying jobs became the target of discrimination on the widely accepted theory that the economic crisis would be solved if married women would only leave the labor force.¹⁵⁸ Anderson attempted to dispose of the “pin money theory” upon which these views were based. The “pin money theory” argued that women worked for luxuries, not necessities, and that their employment was ancillary to men’s. Men, on the other hand, worked to support their families and served as society’s breadwinners. Employers often argued that women did not have the same responsibility to provide for their families as men did, and that paying men and women equal wages for the same work would “bring on a revolution” in the way men and women were regarded and treated in the workforce.¹⁵⁹ Under Anderson’s leadership, the Women’s Bureau investigated and found that the majority of women workers were, in fact, working to support their families and themselves.¹⁶⁰ Anderson believed that the “pin money theory” was the basis for the lower wages women earned in comparison to men.¹⁶¹ When Schneidermann had worked on a National Recovery Administration (NRA) board in 1933, she

156. See *Joint Hearings Fair Labor Standards Act of 1937: Hearing on S. 2475 and H.R. 7200 Before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong. 403-04 (1937) [hereinafter *Hearings on FLSA*] (statement of Lucy Randolph Mason, National Consumer League); FRANCES PERKINS, *THE ROOSEVELT I KNEW* 256-57 (1946); Renan Barzilay, *Women at Work*, *supra* note 12, at 186, 204-05, 207.

157. The dispute over method contained two axes: (1) context- whether to adopt one general ERA (that would eliminate protective legislation) or “specific bills for specific ills” (that would keep protective legislation for women), COTT, *supra* note 17, at 127; (2) regulation- over how much should law “intervene” in the market with social feminists significantly inclined to use the power of law to regulate business. Renan Barzilay, *Women at Work*, *supra* note 12, at 197.

158. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 172-73 (2000); Renan Barzilay, *Labor Regulation*, *supra* note 14, at 146.

159. Mary Anderson, *Wages for Women Workers*, in 81 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, A RECONSTRUCTION LABOR POLICY* 123, 124 (1919).

160. Renan Barzilay, *Decent Work and Decent Families*, *supra* note 14, at 146; WOMEN’S BUREAU, U.S. DEP’T LABOR, BULLETIN NO. 63, *THE SHARE OF WAGE EARNING WOMEN IN FAMILY SUPPORT IN 1935* (1936); WOMEN’S BUREAU, U.S. DEP’T LABOR, BULLETIN NOS. 84-85, *WOMEN IN THE ECONOMY OF THE UNITED STATES OF AMERICA* (1937).

161. Renan Barzilay, *Decent Work and Decent Families*, *supra* note 14, at 146-47, and at the basis of discrimination against married women workers. *Id.*

and Anderson observed that women were prescribed lower wages than men when NRA boards established codes.¹⁶² The Women's Bureau's orientation toward sex equality in the workplace led it to protest this form of sex discrimination, and to object to the sex-based wage differentials in the NRA codes and Works Progress Administration (WPA) projects.¹⁶³

During the New Deal, Anderson promoted the inclusion in the Fair Labor Standards Act of a sex antidiscrimination provision. She successfully advocated mandating equality in wage rates set by administrative committees and providing for the same federal minimum wage for both men and women.¹⁶⁴ Anderson wrote Section 8(c) of the Act, which read: "No classification shall be made . . . on the basis of age or sex."¹⁶⁵ The purpose of this provision was to ensure that minimum wages set by commission boards would be based on "the job" without consideration of workers' sex. During congressional debates over the FLSA, Secretary of Labor and Social Feminism affiliate Frances Perkins stated that "the minimum wage should be fixed for the occupation and not according to the age or sex of the employee." When Wisconsin Senator Robert La Follette pressed her by asking, "For the occupation?," Secretary Perkins firmly replied, "Yes."¹⁶⁶

Years later, in her autobiography, Anderson claimed that the clause forbidding differential minimum wages based on sex was almost jeopardized.¹⁶⁷ For Anderson, it was imperative that the FLSA prohibit such

162. ANDERSON, *supra* note 100, at 147-49; ORLECK, COMMON SENSE, *supra* note 14, at 152.

163. GORDON, *supra* note 13, at 195. According to the Women's Bureau report, a wage lower than men's was permitted for women workers in 159 codes, covering 16.6 percent of all persons at work under codes. WOMEN IN THE ECONOMY, *supra* note 160, at 94.

164. See ANDERSON, *supra* note 100, at 147-49; GORDON, *supra* note 13, at 195; Renan Barzilay, *Women at Work*, *supra* note 12, at 205-06.

165. The Original Text of the section 8(c), 29 U.S.C. § 208(c) (1938), *repealed* by Pub. L. No. 110-28, Title VIII § 8103(c)(1)(A), 121 Stat. 189 (2007). Section 8 of the FLSA empowers the administrator of the wage and hours division in the Department of Labor to convene industry committees which recommend the highest minimum wage for each industry, after investigation. Considerations are based on industry wage rates, competition, transportation and production cost, but according to section 8(c) no classification is to be made on the basis of sex.

166. *Hearings on FLSA*, *supra* note 156, at 187 (statement of Sec'y of Labor, Frances Perkins).

167. See Renan Barzilay, *Women at Work*, *supra* note 12, at 205. Anderson recalled this exact exchange:

Then came the federal Wage and Hour Law [FLSA] in which we really made some progress. The act set standards of minimum wages and maximum hours for workers employed in the manufacture of goods used in interstate commerce. I think I had a good deal to do with getting into that law the statement in connection with fixing wage orders that "No classification shall be made under this section on the basis of age or sex." It was an anxious time for me while the hearings on the bill were going on. The secretary of labor was going to appear and the solicitor of the department, Gerard [Gerald] Reilly, was working up her testimony, I talked to him and said, "Well Gerry, I think we had better put in something for her to say about the same minimum for men and women. . . . Unfortunately when [Perkins] came to that part she left out the two lines When the hearing was over, I nearly died because not a word had been said about the same minimum for men and women. The newspaper women all rushed up to me and asked why she had left that out. I answered "God Knows! Go up and ask her." But before they got a chance to, Senator Robert La Follette asked if she did not think that women should have the same minimum as men. She said "Yes," and I heaved a sigh of relief. As she went out she said to me, "I fixed that all right, didn't I?"

sex classification so that minimum wage administrative committees could not set lower, differential pay for women, as they had done under NRA.¹⁶⁸ While this provision is important for marking an early inscription of sex anti-classification in federal employment law, the paucity of case law interpreting the provision indicates that it did not have a significant impact. Nonetheless, the FLSA represented an affirmation of the belief that women's protective legislation would eventually benefit all workers.¹⁶⁹ In a sense, the "entry wedge" strategy had succeeded by (somewhat) limiting work hours and instituting minimum wage for men and women workers.¹⁷⁰ In federalizing previous sex-based wage and hour laws, FLSA represented a facially gender-neutral culmination of a decades-long struggle against oppressive labor conditions and for "a minimum standard of living necessary for the health, efficiency, and general well-being of workers."¹⁷¹

However, Working-Class Social Feminists were not content to end their work with the passage of the FLSA. Anderson petitioned against the exclusion of domestic workers, who were predominantly black women, from the NRA and the FLSA, claiming that their plight was exceedingly serious.¹⁷² She also continued to argue for a general norm of equal pay. Anderson realized that while "equal pay for equal work" was a "catchy slogan," its effect is limited to situations in which women took men's places doing the same exact work, and that, in a labor market that remained segregated by sex, equal pay needed to be applied to the much larger group of women who performed work "comparable" to men's.¹⁷³

During World War II, Anderson shaped the National War Labor Board's determinations on equal pay, especially General Order No. 16, that endorsed "equal pay for comparable quality and quantity of work on comparable operations."¹⁷⁴ The Women's Bureau continued to argue that industry itself would have to change to better meet workers' familial responsibilities.

ANDERSON, *supra* note 100, at 147-48.

168. ANDERSON, *supra* note 100, at 147-49; Renan Barzilay, *Labor Regulation*, *supra* note 14, at 148.

169. JULIE NOVOKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 230-32 (2001); Dinner, *Law and Labor*, *supra* note 113, at 314.

170. But see the critique of the exclusion of agriculture workers and domestic workers, with profound gender implications, in Renan Barzilay, *Labor Regulation*, *supra* note 14, at 144-45.

171. Boris, *supra* note 133, at 334 (internal quotation marks omitted).

172. See Mary Anderson, *The Plight of Negro Domestic Labor*, 5 J. NEGRO EDUC. 66 (1936).

173. COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 98; see Mary Anderson, *The Postwar Role of American Women*, 34 AM. ECON. REV. 237 (1944).

174. Eileen Boris, *Leadbetter's Continuum, Race, Gender, and Pay Discrimination*, in FEMINIST LEGAL HISTORY 240, 243 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011) [hereinafter Boris, *Pay Discrimination*]. However, most women toiled at "sex-segmented occupations" that didn't fall within this mandate. *Id.* Lobbying by Labor Feminists for an Equal Pay Act began since the end of World War II. ROBERT O. SELF, ALL IN THE FAMILY 21 (2012).

D. Post-War Ideological Rivalry: Continuous Attempts to Pass the ERA, Ensure Equal Pay, and Create a Commission on Women's Status

For a growing number of women in the post-World War II years, paid work was no longer a temporary detour until marriage but an on-going experience that they continued to conduct after getting married and having children.¹⁷⁵ Scholars note that “[w]orking-class women expressed a strong allegiance to their family roles as wives, mothers, and daughters . . . but their familial commitment did not preclude the development of a strong identity as a wage earner.”¹⁷⁶ Indeed, “the desire to fulfill one’s family role often fueled the desire to transform one’s job,”¹⁷⁷ even while heterosexual family roles remained central to most women’s lives.

In the decades following World War II, Social Feminists were succeeded by “Labor Feminists” who “articulated a particular variant of feminism that put the needs of working-class women at its core.”¹⁷⁸ The group included Frieda Miller (who succeeded Anderson as Director of the Women’s Bureau),¹⁷⁹ labor activist Esther Peterson,¹⁸⁰ working-class union organizer and NAACP member Myra Wolfgang, African American trade unionist Addie White, Jewish Vassar graduate Kitty Pollack Ellickson, and union activist Caroline Davis, among others.¹⁸¹ Like Social Feminists before them, they opposed the ERA and pressed the state and industry for affirmative social and economic rights. Fearing the ERA would do away with protective labor legislation, they argued that sex-based laws should be evaluated on a case-by-case basis and posited that specific bills should address specific ills.¹⁸² They rejected, for the most part, the NWP’s autonomous, market individual ideal. They believed women and other marginalized groups were deeply interconnected.¹⁸³ They advocated an end to sex and race discrimination and were associated with both the labor and civil rights movements.¹⁸⁴

Labor Feminists increasingly sought to make possible combining satisfying family lives with sustainable work.¹⁸⁵ With more women in the workforce, solving the double day for nonprofessional women meant creating more good

175. See ORLECK, *RETHINKING AMERICAN WOMEN’S ACTIVISM*, *supra* note 16, at 42.

176. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 12.

177. *Id.* at 7-13.

178. *Id.* at 3 (naming these post-World War II feminists “Labor Feminists”).

179. See ORLECK, *COMMON SENSE*, *supra* note 14, at 254.

180. In the 1940s as Miller replaced Anderson as director of the Women’s Bureau, she “use[d] the agency to create a national network of women labor leaders” and advance the Social Feminist agenda. COBBLE, GORDON & HENRY, *supra* note 16, at 14. Esther Peterson met Pauline Newman and Frieda Miller, through the garment workers union, as intergenerational ties provided ideological continuity. *Id.* at 21.

181. See COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 5.

182. Cobble, *Labor Feminists*, *supra* note 16, at 156.

183. *Id.* at 148.

184. *Id.*

185. COBBLE, GORDON & HENRY, *supra* note 16, at 24-29.

jobs (with higher wages and shorter hours), improving access to them, and transforming work patterns, norms and practices that didn't allow for caregiving alongside marketplace labor. Scholars have argued that Labor Feminists began to notice how jobs were designed for men under the assumption that men would have a full time housewife at home. Since men do not get pregnant or nurse, no parental leave was available and work schedules were constructed without giving thought to the schedules of children or other family responsibilities.¹⁸⁶ These feminists believed that a range of reforms were necessary to remedy women's subordinate status. This goal would require securing women the right to participate in market work along with social supports to help care for their families.¹⁸⁷ Amidst working-women's claims to the Women's Bureau that the state should ensure that employment structures could accommodate them as they were,¹⁸⁸ Labor Feminists insisted that the marketplace must adapt work patterns to women's typical life courses and demanded fundamental shifts in cultural norms and workplace practices and policies.¹⁸⁹ In this sense, they echoed the ideas that Working-Class Social Feminists had espoused earlier: the need for labor regulations tailored to women's lives but which could eventually be applied universally. Post-War Labor Feminists championed a reform agenda that called for an end to "sex discrimination," equal pay for comparable work, economic security with shorter hours, and social supports from the state and employers to ease the burdens of childbearing and childrearing. Some scholars have noted that theirs was a feminism that claimed equality on the basis of their "humanity" rather than their "sameness" with men; where the so-called "masculine" standard didn't fit their needs, they rejected it.¹⁹⁰

The factional feud that had occupied the feminist movement before the Great Depression was reinvigorated by the War's end. During World War II, while "Rosie the Riveter" was performing work in lieu of enlisted male workers, the NWP lobbied for the ERA.¹⁹¹ As the momentum behind the ERA grew after the War, Labor Feminists realized they needed a more "positive" strategy to oppose it.¹⁹² Responding to the NWP's renewed push for the ERA in the 1940s, Labor Feminists decided to posit just such an approach.¹⁹³ In 1945, Miller, newly appointed to head the Women's Bureau, set up the Women's Bureau Labor Advisory Committee, which was tasked with devising a

186. *Id.* at 30-31

187. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 3-4.

188. Turk, *supra* note 98, at 264.

189. COBBLE, GORDON & HENRY, *supra* note 16, at 31.

190. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 7-8.

191. From the 1940s on, the Republican Party endorsed the ERA because it would eliminate protectionist legislation disliked by business. Democrats opposed the ERA at the time because of their ties with organized labor, which supported said protective legislation. Becker, *supra* note 11, at 215.

192. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 63-64; HARRISON, *supra* note 10, at 26; Franke, *supra* note 4, at 17.

193. Franke, *supra* note 4, at 17; Freeman, *supra* note 10, at 166.

“positive” strategy to stymie the ERA. The Committee included Esther Peterson, Caroline Davis, and Pauline Newman.¹⁹⁴ Out of the Committee meetings sprang two bills: the Equal Pay Act (introduced in Congress in 1945) and the Women’s Status Bill (introduced in 1947), which recommended a presidential commission on the status of women.¹⁹⁵ The Women’s Status Bill called for a review of the economic, social, civil, and political status of women, along with an investigation of the nature and extent of sex-based discrimination. Miller and Peterson, its leading proponents, based their claim for the bill on the “useful precedent” of President Truman’s Committee on Civil Rights.¹⁹⁶ The Federal Equal Pay Bill, modelled after Anderson’s National War Labor Board’s General Order 16, prohibited wage differentials for comparable work or for work of comparable skill and proposed committees to audit job classification and wage setting systems for sex bias.¹⁹⁷ Advocates argued that the “quality and quantity” of women’s work equalled that of men and therefore merited equal pay, but also pointed out that “equal to” should not be confused with “same as,” since jobs and skills need not be identical to be considered equal under the law.¹⁹⁸ Similar bills were introduced throughout the following years.¹⁹⁹ Labor Feminists lobbied for an executive order establishing a federal commission on the status of women tasked with ending the discrimination and disadvantages faced by women workers. They believed that women’s oppression merited a variety of governmental interventions; that barriers of race and class are serious obstacles to women’s advancements; and that some degree of sex-based protective legislation was socially advantageous to women. They advocated for an end to sex- and race-based discrimination while pointing out that ending discrimination was not enough; without additional, positive guarantees, most working women would not be able to take advantage of equal employment opportunities.²⁰⁰ They therefore pressed for a wide range of positive rights to be enforced by state and employers. These rights included government-funded childcare, and changes in workplace policies to make it easier to combine wage earning and caregiving. Many Labor Feminists, African American and otherwise, saw the civil rights movement as

194. Cobble, *Labor Feminists*, *supra* note 16, at 144-53.

195. See COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 52, 63-64.

196. Cobble, *Labor Feminists*, *supra* note 16, at 154-55. Some scholars claim the Women’s Status Bill had important continuities with the 1936 Women’s Charter initiated by Anderson and social feminists. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 249 n.58. The charter demands included full political and civil rights for women, full opportunity for work, compensation without discrimination on the bases of sex, safeguards for motherhood through maternity insurance. See JUDITH SEALANDER, *AS MINORITY BECOMES MAJORITY: FEDERAL REACTION TO THE PHENOMENON OF WOMEN IN THE WORK FORCE, 1920-1963*, at 80-81 (1983).

197. KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 13, at 234-35; Boris, *Pay Discrimination*, *supra* note 174.

198. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 114.

199. *Id.* at 106-07; WOLOCH, *A CLASS BY HERSELF*, *supra* note 13, at 169.

200. Cobble, *Labor Feminists*, *supra* note 16, at 148.

essential for women's equality and viewed the fate of workers, women, and other subordinated groups as deeply interconnected.²⁰¹

With the return of a Republican to the White House in the 1950s, however, Labor Feminists turned their attention to local politics and became increasingly involved in the civil rights movement by pushing unions to end race discrimination. The equal pay movement that had formed around the Women's Bureau centered now on the National Committee for Equal Pay,²⁰² chaired by Anderson.²⁰³ Even though a federal Equal Pay bill did not pass at the time, Labor Feminists continued to promote the idea of equal pay and, by the end of the 1950s, twenty states had approved equal pay laws.²⁰⁴

E. Anti-Discrimination in the 1960s: Equal Pay, The President's Commission on the Status of Women, and the Enactment of the Title VII Sex Provision

The civil rights movement of the 1950s sparked a public debate about equality and discrimination. With Kennedy's election in 1960, Labor Feminists believed a new day was dawning. The following years would indeed witness a surge of legislation affecting women's rights at work, including the Equal Pay Act (EPA) and Title VII. From the perspective of Labor Feminists, these were the products of decades of agitation for women's workplace equality.

Esther Peterson supported Kennedy during his campaign and was appointed by him as director of the Women's Bureau in 1961. The needs of wage-earning women and the civil rights movement were very much in her mind.²⁰⁵ She aimed to shift the focus of the Bureau from "professional women" and instead "bring back the spirit of the bureau" from the days of Mary Anderson and Frieda Miller by focusing on working-class, low-income women.²⁰⁶ Under her leadership, Labor Feminists contended that women desired a "secure home *and* a satisfying job," an ideal difficult to attain because of "prevailing institutions and work practices largely shaped *by* and *for* men."²⁰⁷ They called on government to offset some of the disadvantages associated with the "double burden" of home and work. Some believed that structural changes in employment practices would help women combine their two roles successfully, while others stressed the restructuring of caring responsibilities. To these ends, Peterson revived the 1940s agenda, pushing for

201. See COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 121-44, 171, 173-74.

202. *Id.* at 99, 106-07.

203. Sister John Mary Daly, Mary Anderson, Pioneer Labor Leader 244 (1968) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

204. COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 105.

205. KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 13, at 214.

206. COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 153.

207. *Id.* at 160. Peterson explained her position against ERA by arguing that it would take years of litigation for it to do anything "for women at the bottom" while they would lose the little protections they had. Becker, *supra* note 11, at 219.

a presidential commission on the status of women to help women move into “full partnership and genuine equality of opportunity” and suggest “new and expanded services required for women as workers, wives, and mothers.”²⁰⁸

Kennedy agreed and signed an executive order establishing the President’s Commission on the Status of Women (PCSW) in 1961 to propose measures to overcome discrimination on the basis of sex. Congress supported the Commission’s establishment in a joint resolution.²⁰⁹ Peterson acted as vice-president and executive vice-chairman of the Commission,²¹⁰ which consisted of cabinet officers, members of Congress and academia, labor leaders, and representatives of women’s organizations. Its members included Mary Callahan of the National Council for Negro Women, William Schnitzler from the AFL-CIO, and Congresswoman Edith Green (D-OR). Its seven subcommittees included additional members, such as trade union activists Caroline Davis and Bessie Hillman and civil rights activist and lawyer Pauli Murray, among others.²¹¹ The Commission brought together women leaders from all over the country²¹² against the “backdrop of a standoff”²¹³ between ERA opponents and proponents.²¹⁴ While its membership was diverse, Labor Feminists shepherded the Commission under Peterson. Its main purpose was to end “unfair discrimination against women” as workers, wives and mothers, through “constructive recommendations.”²¹⁵ Contention regarding the meaning of discrimination permeated the deliberations of many of its subcommittees. The Commission focused public attention and led to a public dialogue on women’s workplace subordination and discrimination.²¹⁶

Equal pay, which had occupied a central space in Labor Feminists’ agenda for decades, now also took center stage.²¹⁷ Congresswoman Edith Green

208. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 159-60.

209. See Exec. Order No. 10980, 26 F.R. 12059 (1961), reprinted in *Equal Pay Act of 1962: Hearing Before the Subcomm on Labor of the S. Comm. on Labor and Public Welfare*, 87th Cong. 15 (1962) (establishing the President’s Commission on the Status of Women); 107 CONG. REC. 93, at 19 (daily ed. Jan. 4, 1961) (indicating Rep. Celler’s introduction of H.J.R. 92, which would establish a commission on the legal status of women).

210. AMERICAN WOMEN: THE REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 4-12 (Margaret Mead & Frances Balgley Kaplan eds., 1965); PATRICIA G. ZELMAN, *WOMEN, WORK AND NATIONAL POLICY: THE KENNEDY-JOHNSON YEARS* 23-38, 58 (1982).

211. AMERICAN WOMEN, *supra* note 210, at 77-85. The subcommittees were to study women’s status in education, home, employment, protective labor legislation, social insurance and taxes, and civil and political rights. Pauli Murray, an African American activist, attorney and scholar, who was a member of the civil and political rights committee, later played an important role in the passage of the sex provision, as demonstrated in MAYERI, *REASONING FROM RACE*, *supra* note 61, at 1-40.

212. Becker, *supra* note 11, at 231.

213. MAYERI, *REASONING FROM RACE*, *supra* note 61, at 17.

214. The Democratic Party endorsed an ERA in 1960. Adding this to the Republican endorsement of earlier decades, it seemed the prospects of the ERA were improving. WOLOCH, *A CLASS BY HERSELF*, *supra* note 13, at 193.

215. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 145-60.

216. KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 13, at 224, 233.

217. *Id.* at 234-38.

introduced an Equal Pay Bill in 1961, which mandated equal pay for “work of comparable character”²¹⁸ and garnered the support of the National Committee for Equal Pay and multiple labor unions.²¹⁹ Women defended the bill in committee hearings; for example, Caroline Davis’ testimony pointed to the “immorality of discrimination on the basis of sex”²²⁰ by citing at length from John Stuart Mill’s feminist classic *The Subjection of Women*.²²¹ She argued that government regulation was needed because voluntary organizations like her union, the United Auto Workers, could not solve the problem alone.²²² Esther Peterson read letters the Bureau had received from women all around the country, including mothers protesting the lack of opportunity to support their families.²²³ As Peterson argued that wages should be set without bias on the grounds of sex,²²⁴ she showed graphs of the differential earnings of men and women,²²⁵ discussed the marital status of women in the workforce,²²⁶ the promotion of employment opportunities and concluded that old ideas about women’s work needed to be “torn down.”²²⁷ She discussed the growing female participation in the workforce, the importance of equal pay for comparable work, and the prospects of young female college graduates, claiming that the purpose of equal pay was to set a “rate for the job” but that it may also have “far reaching benefits” by opening up new job opportunities for women.²²⁸

During hearings on the Act, Congresswoman Katherine St. George (R-N.Y.), a longtime ERA supporter, rose to amend the bill and substitute “work of comparable character” with “equal work”; she stated that the path to equality lay in “equal treatment” and women’s claim to equal citizenship based on

218. See *Equal Pay Act of 1962: Hearing on S. 2494 and H.R. 11677 Before the Subcomm. on Labor of the S. Comm. On Labor and Public Welfare*, 87th Cong. 72 (1962) (statement of Nat’l Ass’n of Mfrs.) (critiquing “comparable work” language).

219. See *id.* at 75 (statement of James B. Carey, Sec’y-Treasurer, AFL-CIO Industrial Union Dep’t); COBBLE, THE OTHER WOMEN’S MOVEMENT, *supra* note 3, at 163. The original provision under consideration was: “Employers must pay equal wages to employees doing comparable work, the performance of which requires comparable skill.” 108 CONG. REC. 14,754 (1962).

220. COBBLE, THE OTHER WOMEN’S MOVEMENT, *supra* note 3, at 163.

221. *Hearing on S. 2494 and H.R. 11677*, *supra* note 218, at 90-91 (statement of Caroline Davis, Dir., UAW Women’s Dept., United Automobile, Aircraft & Agric. Implement Workers of Am.).

222. *Hearing on S. 2494 and H.R. 11677*, *supra* note 218, at 88-89 (statement of Caroline Davis).

223. *Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 88th Cong. 66 (1963) (statement of Esther Peterson, Assistant Sec’y of Labor).

224. COBBLE, THE OTHER WOMEN’S MOVEMENT, *supra* note 3, at 164.

225. See *Equal Pay for Equal Work Act: Hearings on HR 8898, HR 10226 Before the Select Subcomm. on Labor of H. Comm. on Education and Labor*, 87th Cong. 35, 63-64, 66-77 (1962) (statement of Esther Peterson, Assistant Sec’y of Labor).

226. *Id.* at 37.

227. *Id.* at 77; see also Esther Peterson Collection, Harvard University, Schlesinger Library, Box 52, Folder 1031 (Equal Pay Hearings from March 1962) [hereinafter Esther Peterson Collection]; *Hearings on S. 882 and S. 910*, *supra* note 223, at 66-68 (statement of Esther Peterson).

228. *Hearing on S. 2494 and HR 11677*, *supra* note 218, at 6, 7 (1962) (statement of Esther Peterson). New opportunities would be opened for women because the fear that women would work for less—undercutting men’s wages—would be eliminated. See also Esther Peterson Collection, *supra* note 227, at Box 52, Folder 1032 (Equal Pay Hearings from August 1962).

sameness with men.²²⁹ Despite protests by Labor Feminists that this amendment would weaken the bill and against the PCSW's forthcoming recommendation for legislation implementing "equal pay for comparable work," the Equal Pay for Equal Work bill passed as amended.²³⁰ The National Committee for Equal Pay saw the bill's passage as a step forward that could "possibly be improved later"; the Committee was satisfied that the principle of equal pay had at least been widely recognized.²³¹ Peterson observed that, for the many women who had suffered from wage discrimination, the recognition of their equality carried additional symbolic meaning.²³²

Importantly, by the time President Kennedy signed the Equal Pay Act in June 1963, both houses of Congress "had heard ample testimony on the problems faced by women" in the workforce.²³³ Congress specifically used the language of "discrimination on account of sex" in its deliberations on the Equal Pay Act²³⁴ and in the Act's text.²³⁵ The Act helped bring to the fore the term "discrimination" with regard to sex,²³⁶ as its stated aim was to "prohibit discrimination on account of sex in the payment of wages."²³⁷ The decades-long struggle to combat sex discrimination in pay concluded with a signing ceremony in President Kennedy's office on June 10, 1963, with Mary Anderson, Esther Peterson, Francis Perkins, and Caroline Davis in attendance.²³⁸ However, there was worry that equal pay for equal work would mean net job *loss* for women (who now had to be paid the same as men) and that, since most women fell out of its reach (because they performed different work than men), the drive to enter men's jobs took greater urgency, since other routes to higher pay were now foreclosed.²³⁹

229. 108 CONG. REC. 14,768 (1962). She believed that under a comparable standard, quality of work could be compared, which might lead to further discrimination against women doing equal work. *Id.* at 14,767; *see also* COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 165 (discussing St. George's amendment). "Republicans heavily supported St. George's amendment to change the wording, and it passed 138 to 104." HARRISON, *supra* note 10, at 96.

230. Section 6(d) of the Fair Labor Standards Act, as amended by the Equal Pay Act of 1963, prohibits paying women less than the rate paid to male employees "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 57 (codified at 29 U.S.C. § 206(d)).

231. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 166-67.

232. Statement by Assistant Sec'y of Labor Esther Peterson on the Passage of the Equal Pay Bill (May 23, 1963) (on file with the Esther Peterson Collection, *supra* note 227, Box 54, Folder 1047).

233. Freeman, *supra* note 10, at 168; *see also* WOLOCH, *A CLASS BY HERSELF*, *supra* note 13, at 196.

234. *See, e.g.*, H.R. REP. NO. 88-309, at 1 (1963) (describing the bill as "[l]egislation to eliminate wage discrimination based upon sex of the employee"); *Equal Pay for Equal Work Pt. 1*, *supra* note 225, at 2, 190.

235. 1 EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 73.

236. KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 13, at 238.

237. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 57 (codified at 29 U.S.C. § 206(d)).

238. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 166; HARRISON, *supra* note 10, at 104.

239. COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 167-68.

Concurrently, in June 1963, the House Judiciary Committee, chaired by Rep. Celler, was holding hearings on a comprehensive civil rights bill to strengthen voting rights and access to public education for African-Americans and prohibit race-based discrimination in public accommodations, federally assisted programs, and employment.²⁴⁰ By October 1963, a few months after the publication of Betty Friedan's *The Feminine Mystique*,²⁴¹ the PCSW's final report was published under the guidance of Peterson and her colleague Kitty Ellickson. At the time, approximately twenty-three million women were in the workforce.²⁴² On average, three out of five working women were married, and, among married women, one third were working in the marketplace.²⁴³ The PCSW report brought public attention to the necessity for "equal employment opportunities"²⁴⁴ for women. It documented widespread workplace discrimination against women²⁴⁵ and pointed out that, despite achieving on average more schooling than men, women in the workforce generally worked in jobs below their capabilities. The report called for "elimination of restrictions on women's employment, and assurance of fair compensation and equal job treatment based on merit."²⁴⁶ The Committee's report used the language of discrimination and prescribed specific "affirmative steps" that should be taken through regulation "to assure nondiscrimination on the basis of sex and to enhance constructive employment opportunities for women."²⁴⁷ The Commission did not endorse the Equal Rights Amendment but rather, pursuant to Murray's analysis, concluded that equal rights for women were already constitutionally guaranteed under the Equal Protection Clause.²⁴⁸ The Commission's report condemned sex discrimination and offered a concrete set of constructive recommendations aimed at achieving gender equality.²⁴⁹ The

240. Civil Rights Act of 1964, H.R. 7152, 88th Cong. (1963). President Kennedy publicly explained that the events in Birmingham signified the long-overdue need to commit "that race has no place in American life or law." WHALEN & WHALEN, *supra* note 4, at xx. Shortly thereafter the Bill was introduced. *Id.*

241. ORLECK, RETHINKING AMERICAN WOMEN'S ACTIVISM, *supra* note 16, at 79.

242. AMERICAN WOMEN, *supra* note 210, at 45.

243. *Id.*; Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 242 (1965).

244. AMERICAN WOMEN, *supra* note 210, at 48, 118; Murray & Eastwood, *supra* note 243, at 242.

245. ORLECK, RETHINKING AMERICAN WOMEN'S ACTIVISM, *supra* note 16, at 78.

246. Murray & Eastwood, *supra* note 243, at 242; AMERICAN WOMEN, *supra* note 210, at 45-54.

247. AMERICAN WOMEN, *supra* note 210, at 23.

248. Murray & Eastwood, *supra* note 243, at 236. In 1962, Murray submitted a paper to the Committee on Civil and Political Rights of the PCSW describing her proposal to seek equality through the Fourteenth Amendment rather than the ERA. She considered the question of sex-specific law and read *Muller*'s purpose "to compensate for some of the burdens which rest upon women." Becker, *supra* note 11, at 226. She suggested a nuanced, functional approach to the forty-year conflict between feminists and posited that the Supreme Court could uphold the sex-specific laws only if they were in fact compensatory. *Id.* at 226-28; MAYERI, REASONING FROM RACE, *supra* note 61149, at 16-20. Under Murray's analysis, the protective cover of the Fourteenth Amendment was broad enough to reach sex discrimination. Murray & Eastwood, *supra* note 243, at 238.

249. See generally AMERICAN WOMEN, *supra* note 210 (making specific recommendations on how to ensure nondiscrimination).

report aimed to open up opportunities for women in the market and enhance their satisfaction in non-market endeavours. It called for “affirmative steps which should be taken through legislation, executive or administrative action to assure non-discrimination on the basis of sex, and to enhance constructive employment opportunities for women.”²⁵⁰ It recognized that “women desired self-realization in a multitude of ways,”²⁵¹ acknowledging the work done both in the home and in the market. It claimed that the problems women faced were *structural*, not individual or private, and that government, employers, and unions were obliged to make long-overdue changes to promote gender equality.²⁵² It called for a presidential order, similar to Kennedy’s 1962 executive order that mandated equal opportunity among federal contractors on the basis of race, to mandate equal opportunity on the basis of sex.²⁵³ It called for equal opportunity for women in hiring, promotion, and training, in both federal service and the private sector.²⁵⁴ It argued that women’s right to employment could only be achieved by eliminating the barriers that faced women (especially low-income women and mothers).²⁵⁵ Its specific recommendations included paid maternity leave,²⁵⁶ universal childcare services,²⁵⁷ an end to sex-based wage discrimination, and legislation guaranteeing equal pay for comparable work.²⁵⁸ It attempted to promote equality by levelling the playing field for women in general and working mothers in particular.²⁵⁹

In one of his last public appearances, President Kennedy released the Commission’s report at a White House ceremony in the first week of November 1963. The report was widely heralded. It made front-page news in the *New York Times*, NBC’s *Today Show* interviewed Peterson, and the *Associated Press* ran a four-part series on it.²⁶⁰ The government itself distributed 83,000 copies of the report.²⁶¹ Discrimination against and subordination of women received peak coverage.²⁶²

250. *Id.* at 23.

251. COBBLE, *THE OTHER WOMEN’S MOVEMENT*, *supra* note 3, at 169.

252. *Id.*

253. AMERICAN WOMEN, *supra* note 210, at 48.

254. *Id.*

255. *See id.* at 16, 20-21, 23, 35-39. Esther Peterson publically defended mothers’ employment. *See* Esther Peterson, *Working Women*, 93 DAEDALUS 671, 680 (1964).

256. AMERICAN WOMEN, *supra* note 210, at 64.

257. *Id.* at 36, 113, 211.

258. AMERICAN WOMEN, *supra* note 209, at 19-23, 57-58, 131-132; Cobble, *Labor Feminists*, *supra* note 16, at 160.

259. Cobble, *Labor Feminists*, *supra* note 16, at 160. But see a lukewarm assessment of the recommendations in KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 13, at 213-25.

260. ROSEN, *supra* note 3, at 67.

261. *Id.*

262. WOLOCH, *A CLASS BY HERSELF*, *supra* note 13, at 196.

Almost simultaneously with the PCSW report's publication, the Civil Rights Act was reported favorably.²⁶³ Most civil rights activists launched a campaign for the (male) "Negro worker (and his wife)" despite high rates of participation in the labor force among African American women.²⁶⁴ Not surprisingly, therefore, "sex" had not been mentioned. But the NWP was "enraged" that the PCSW report did not endorse the ERA,²⁶⁵ and rejected the arguments made against the ERA's adoption.²⁶⁶ The NWP, bemoaning the fact that the bill did not give protection against discrimination to a "[w]hite [w]oman, a [w]oman of Christian [r]eligion, or a [w]oman of United States [o]rigin,"²⁶⁷ launched a campaign to include a prohibition against sex discrimination in the civil rights bill. Although the NWP maintained that ERA was all the protection women needed, it did not want white women placed at a disadvantage if the federal government insisted on offering protection to black workers. The NWP therefore turned to southern segregationist, Representative Howard W. Smith, an "archconservative southerner [who] . . . opposed the whole idea of the bill"²⁶⁸ and served as chairman of the House Rules Committee, to add "sex" to Title VII. Scholars noted that if the addition "were to result in the bill's demise, Smith, and several NWP members, would be satisfied. Yet if the bill were to pass, Smith agreed with the NWP that it had to include women in its scope: otherwise white women would lack an advantage granted to black men."²⁶⁹

Pursuant to the NWP's advice, Smith introduced an amendment to the pending Civil Rights Act to include "sex" in the categories protected against employment discrimination.²⁷⁰ The eighty-year-old representative's cunning strategy seems to have been to sink the bill altogether by making it ridiculous.²⁷¹ The amendment was intended to point out the absurdity of the idea of employment equality between blacks and whites by linking it with equal employment between the sexes, an absurdity at the time. When Smith introduced the amendment,²⁷² he assured the House that he was very serious about his proposal but immediately mocked the issue by reading aloud a letter

263. H.R. REP. NO.88-914, pt.1, at 1 (1963); HARRISON, *supra* note 10, at 176; Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457 (1981).

264. MACLEAN, *supra* note 3, at 60.

265. Brauer, *supra* note 66, at 41.

266. The report proposed a way out of decades old argument by applying Pauli Murray's argument to ascribe the Equal Protection doctrine to apply to women, thereby insuring equal rights while not unnecessarily jeopardizing protective legislation. See generally COBBLE, *THE OTHER WOMEN'S MOVEMENT*, *supra* note 3, at 175; MAYERI, *REASONING FROM RACE*, *supra* note 61, at 1-40.

267. HARRISON, *supra* note 10, at 176.

268. HARRISON, *supra* note 10, at 177.

269. *Id.*

270. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

271. Mary Anne Case, *From the Mirror of Reason to the Measure of Justice*, 5 YALE J.L. & HUMAN. 115, 124 (1993).

272. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

he had received in support of the amendment that complained women were cheated out of husbands because there were too few men to go around.²⁷³ According to some accounts, this was exactly the “trump card” Smith had been waiting to play.²⁷⁴ An arch foe of civil rights, Smith counted on his amendment passing and making the bill so controversial that it would be voted down either in the House or the Senate.²⁷⁵

Smith’s strategy put proponents of the bill in a tough spot, as many feared the amendment would threaten protective legislation for women that progressives in labor and social reform groups had worked hard to achieve.²⁷⁶ At first, Labor Feminists opposed the amendment on two grounds. First, the PCSW had asserted that race and sex discriminations were rather distinct forms of discrimination and best treated separately. Second, they feared the amendment would jeopardize the bill, which they adamantly supported in accordance with their belief that the fight against racism had priority since blacks were more heavily discriminated against than women.²⁷⁷ A debate unfolded. Former NWP member Congresswoman Martha Griffiths supported the amendment, claiming that, without it, white women would be last at the “hiring gate.”²⁷⁸ She acknowledged the plight of black women but also noted that, without the amendment they would have a cause of action against employers who hired only white men, while white women would not.²⁷⁹

Congresswoman Edith Green spoke in opposition to the amendment. Green claimed that race discrimination was far more severe than sex discrimination; that black women faced “double” discrimination on account of their sex and race; and that adding the amendment would only clutter the bill.²⁸⁰ She acknowledged the rampant discrimination against women in the workplace, of which women were made “painfully aware,” but remained suspicious of the motives of the amendment’s supporters, pointing out that the same men now supporting the amendment were in bitter opposition to women’s equality just a few months earlier during the Equal Pay Act debates.²⁸¹ After a two-hour discussion, the coalition of women in favor of the amendment, Republicans sympathetic to the ERA, and opponents of civil rights legislation voted to add the sex discrimination provision by a vote of 168 to 133.²⁸² A couple of days later, the House passed the entire bill 290 to 130. Of all the congressmen who

273. *Id.*

274. WHALEN & WHALEN, *supra* note 4, at 115.

275. MACLEAN, *supra* note 3, at 70; Freeman, *supra* note 10, at 177.

276. MACLEAN, *supra* note 3, at 70.

277. 110 CONG. REC. 2577 (1964) (remarks of Rep. Celler); HARRISON, *supra* note 10, at 177-78.

278. 110 CONG. REC. 2578 (statement of Rep. Griffith); *cf.* Case, *supra* note 64 (claiming Griffith was especially concerned with intersectionality discrimination).

279. 110 CONG. REC. 2579 (statement of Rep. Griffith); *see also* 110 CONG. REC. 2580-81 (statement of Rep. St. George).

280. 110 CONG. REC. 2581-82 (statement of Rep. Green).

281. *Id.* at 2581.

282. COBBLE, THE OTHER WOMEN’S MOVEMENT, *supra* note 3, at 176.

spoke for the adoption of the sex amendment, all except one ultimately voted against the Act.²⁸³

Keen on avoiding conference, the White House decided to pursue a Senate vote on the bill exactly as passed in the House. Pursuant to Pauli Murray's assessment that unless "sex" were included in the bill, black women would be further discriminated against,²⁸⁴ Labor Feminists lobbied for the sex amendment's retention, not wanting to risk jeopardizing the bill by opening it up for further debate.²⁸⁵ These women lobbied Senators for the amendment, and Murray circulated a memorandum arguing that omitting sex would weaken civil rights by dividing the interests of two oppressed groups—women and minority women, citing at length from the PCSW report.²⁸⁶ The Senate endorsed the bill (including the sex provision) 76 to 18, and two weeks later the House adopted the Senate bill by more than a two-thirds majority. President Johnson signed the measure into law on July 2, 1964.²⁸⁷

The paths to the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 remain distinct.²⁸⁸ Yet scholars writing just after the passage of the EPA and Title VII understood these two legislative schemes as interconnected parts of the equality agenda for women: "The Federal Equal Pay Act of 1963, the prohibition against sex discrimination in employment in Title VII of the 1964 Civil Rights Act, and counterpart state laws . . . have provided opportunities for developing a new era in male-female relationships in American society"²⁸⁹ for which "agitation . . . had been going on for many years."²⁹⁰ Scholarship in the 1960s thus viewed the Fair Labor Standards Act (as amended by the Equal Pay Act), the PCSW report, and Title VII as part of the government's clear concern with women's equity. The rich, shared history of the major strands of feminism leading up to Title VII's sex provision should inform our understanding of the meaning and scope of sex discrimination under Title VII.

283. HARRISON, *supra* note 10, at 179.

284. Murray's argument was that, if "sex" were not added to Title VII, Negro women would have shared with white women the common fate of discrimination since it is exceedingly difficult to determine whether a Negro woman is being discriminated against because of race or sex. Without the addition of 'sex,' Title VII would have protected only half the potential Negro work force.

Murray & Eastwood, *supra* note 243, at 243. She argued that black women particularly needed protection against discrimination because they are more often heads of families than white women. *Id.* For an in-depth analysis of Murray's contribution to women's rights, see MAYERI, *supra* note 149, at 20-22. See also MACLEAN, *supra* note 3, at 121; Susan M. Hartmann, *Pauli Murray and the 'Juncture of Women's Liberation and Black Liberation,'* 14 J. WOMEN'S HIST. 74, 77 (2002).

285. COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 177.

286. See HARRISON, *supra* note 10, at 180-81; MAYERI, REASONING FROM RACE, *supra* note 149, at 22.

287. HARRISON, *supra* note 10, at 180-81.

288. Boris, *Pay Discrimination*, *supra* note 174, at 247.

289. Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 309 (1968).

290. *Id.* at 310.

IV. A RICH LEGACY

The shared history of various strands of feminism provides a meaningful, rich, and important legacy for Title VII interpretation. Along with individual antidiscrimination right and the removal of overt barriers promoted under ERA Feminists' equality approach, Labor Feminists focused on regulating the workplace in ways that would be tailored to women's needs and life patterns. Their immediate goal was to level the employment playing field for women, but they hoped their gains could eventually be extended to men as well. These feminist visions are part of the rich history of Title VII's sex provision.

Even sex-based protective labor legislation, now notorious for its stereotypical portrayal of women as weak and domestic, represented for Working-Class Social Feminists the idea that law could compensate for women's unequal bargaining power in the market. Shortly after the passage of Title VII, Murray and Eastwood noted that the underlying goal of *Muller's* upholding of maximum hour laws for women was "to secure a real equality of right" for women in their unequal struggle for subsistence.²⁹¹ The "thrust" of that decision, according to them, was to "equalize the bargaining position of women in industry,"²⁹² though other acknowledged grounds for the decision included maternal health and the wellbeing of the race.²⁹³ Throughout the decades that followed *Muller*, feminists advocated constructive, affirmative measures to compensate women for their unequal power in the workplace. The President's Commission aimed to implement constructive measures to provide for equality in the workplace, including universal childcare and more job opportunities for women. Attempts to effectively equalize the workplace took many forms, from the now-discredited sex-specific restrictions on long hours upheld in *Muller*, to the minimum wage advocated in *Adkins*, to the call for maternity leave in PCSW. But it is clear that equalizing power by changing some of the structural features of the workplace designed with "ideal worker" norms in mind and offsetting some of the burdens of family-care was an enduring goal underlying the history of sex antidiscrimination. This history calls for a robust interpretation of the concept of discrimination. Working-Class Social and Labor Feminists hoped that protective labor legislation for women would someday be extended to men rather than eliminated. Such a broad

291. Murray & Eastwood, *supra* note 243, at 237.

292. *Id.*

293. In the 1960s, Murray proposed to distinguish between policies genuinely protecting maternal functions, and those that unnecessarily discriminate against women as individuals. She stated that "the assumption that equal rights for women is tantamount to seeking identical treatment with men" is "an oversimplification." Rather, she asserted that women "as individuals" seek equality of opportunity for employment without barriers built upon the "myth of the stereotyped woman," while, as women, they seek freedom of choice regarding whether to develop their maternal and familial functions, to develop different capacities, or to pursue a combination of these choices. Murray & Eastwood, *supra* note 243, at 239.

understanding of antidiscrimination must recognize the actual inequalities still suffered by women as a subordinated group, and must address them in order to comply with antidiscrimination's broad remedial purposes. But, as we now know, it must not stop there. It must also extend policies originally tailored to the gendered realities of caregiving to both men and women, so as to avoid the reinforcement of women's secondary status as workers and to normalize men's caretaking roles.²⁹⁴

During congressional debates over the "sex" amendment, both its proponents and opponents briefly addressed the possibility that it might eliminate protective labor legislation for women.²⁹⁵ Shortly thereafter, however, and given the extremely curt consideration given to this issue during the Civil Rights Act legislative deliberations, some imagined an approach that would not eliminate protective labor legislation for women but rather require that such legislation be applied to both sexes. This approach would comply with Title VII on the one hand, while sustaining hard-fought labor protections for women on the other.²⁹⁶ Labor Feminists noted that the relationship of Title VII to protective labor legislation was hardly discussed during congressional debates over the "sex" amendment, and so, they argued, such an interpretation could be contemplated. Expanding protective labor legislation (historically tailored to women) universally would, in a way, be a continuation of the "entering wedge" ideology. Yet, while this interpretation was considered,²⁹⁷ it was believed to be "unrealistic" and ultimately the move was away from protective legislation towards the prohibition of class discrimination.²⁹⁸ In the years after the passage of Title VII, sex-based protective laws were rendered illegal.²⁹⁹

294. See Renan Barzilay, *supra* note 13, at 427 (enacting such standards to both men and women would promote women's opportunities in substantial ways).

295. 110 CONG. REC. 2580-83 (1964). Even Rep. Martha Griffith suggested during the debate over the "sex" amendment that a clause to save protective laws would be feasible in order to garner labor support. HARRISON, *supra* note 10, at 170.

296. See Esther Peterson, Assistant Sec'y of Labor, U.S. Dep't of Labor, Address at the Training Seminar of the Equal Emp't Comm'n: Prohibition to Discriminate in Employment on the Basis of Sex – Title VII of the Civil Rights Act (July 8, 1965) (on file with the Esther Peterson Collection, *supra* note 227, Box 55, Folder 1085) (considering the application of rest periods and paternity benefits to men as well as limiting excessive hours for men and women); Edith Cook, Assoc. Solicitor of Labor, Remarks Before the Citizen's Advisory Council on the Status of Women (Oct. 13, 1964) (on file with the Esther Peterson Collection, *supra* note 227, Box 55, Folder 1076) (women and the equal employment provision in Title VII).

297. The Interdepartmental Committee and the Advisory Council on the Status of Women submitted a report to the EEOC supporting enforcement of Title VII, but preserving some state protective laws and extending them to men. KATHLEEN A. LAUGHLIN, *WOMEN'S WORK AND PUBLIC POLICY: A HISTORY OF THE WOMEN'S BUREAU 1945-1970*, at 94, 109 (2000). See also Brigid O'Farrell, *American Women: Looking Back, Moving Ahead: The 50th Anniversary of the President's Commission on the Status of Women Report*, WOMEN'S BUREAU, U.S. DEP'T LABOR 30 (2015), <http://www.dol.gov/wb/PCSW-03-30-2015.pdf>.

298. Murray & Eastwood, *supra* note 243, at 249-53.

299. See MAYERI, REASONING FROM RACE, *supra* note 149, at 37; WOLOCH, A CLASS BY HERSELF, *supra* note 13, at 267-68; Dinner, *Law and Labor*, *supra* note 113, at 320.

Today, Title VII is considered a fairly modest law. It did not guarantee full employment or present any significant challenge to the basic structure of the labor market. It protected only against outright discrimination.³⁰⁰ Yet, the complex history of the sex provision's birth may transform this understanding. For decades, feminists argued against sex discrimination and presented Congress with the ERA legislative proposals and equal pay bills. Shortly before Congress amended Title VII to include "sex," it had heard ample testimony on women's marketplace subordination during the EPA's lengthy legislative process. In addition, the President's Commission on the Status of Women report generated massive publicity of sex discrimination in the national discourse while also proposing concrete measures to remedy women's marketplace inequality. The decades of debates between feminist factions (in and out of Congress) over the meaning of equality show that, by the time Congress enacted Title VII, "sex discrimination" was a well-known, well-documented, rich concept. The feminist visions that shaped the concept are part of the rich history of the sex provision, and yet their promise remains to be realized in full.³⁰¹

Current understandings of sex discrimination, shaped by the anti-stereotyping approach,³⁰² have made us suspicious of legal measures designed to alleviate the burdens of caretaking. But, if part of the aspiration that led to the inclusion of the "sex" provision was a genuine concern with leveling playing fields by changing work norms to enable employment equality for workers who are caregivers, current understandings neglect the more robust and rich concept of antidiscrimination that prevailed at the time of the Civil Rights Act's adoption. This does not mean we should re-implement sex-specific protective labor laws of the earlier era that applied only to women, but rather that some protective labor laws (limitations on hours, for example) could be applied universally, to men and women, to offset the penalizing effects of caretaking (effects that are still born disproportionately by women). Such "protective" labor legislation would be in accordance with Working-Class Social and Labor Feminists' concern with both caregiving and labor and would represent the culmination of the "entry wedge" strategy. Such legislation might even be acceptable in the eyes of some ERA Feminists if applied equally to both women and men. Feminist scholars have long argued for legislative measures that promote parental (not only maternal) responsibilities and make it feasible and practical for both women and men to play active and meaningful

300. Risa L. Goluboff, *Review*, 27 *LAW & HIST. REV.* 222, 223 (2009) (reviewing NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006)).

301. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 4-5 (2007) (claiming that pre-*Brown v. Board of Education* understandings of civil rights among activists included affirmative rights and economic equality).

302. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. REV.* 83, 88-90 (2010).

roles in both the labor market and the family.³⁰³ A fuller understanding of the history of the sex discrimination prohibition may promote such legislative initiatives. Until then, scholars suggest using Title VII as a way to protect caregivers in the labor market.³⁰⁴

V. RE-CONCEIVING TITLE VII'S SEX PROVISION

Since Congress enacted Title VII, the proportion of women in the marketplace has significantly increased. The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts in the 1970s.³⁰⁵ Unionization rates are at an historical low.³⁰⁶ Income from women's employment is important to the economic security of families, particularly among lower-paid workers, and is crucial to changing gender-role dynamics within heterosexual families. Yet, economic equality still lies out of reach for many women. The Equal Employment Opportunity Commission recently addressed the work/family conflict, concluding that women, who still do the lion's share of caretaking, are severely penalized in the workforce. For low-wage women, caretaking often entails dismissal from jobs or precarious work, while professional women still face "glass ceilings" and "maternal walls" due to their familial responsibilities.³⁰⁷

Working-Class Social Feminists argued long ago that the workplace must be regulated to obtain actual equality for women, and Labor Feminists advocated for a broad restructuring of the market that would reconfigure the "masculine patterns" of work that did not fit their needs.³⁰⁸ Working-Class Social and Labor Feminists sought workplace policies that reflected caregivers' life patterns. They aimed to design workplace law not around what we would now call "ideal workers"³⁰⁹—workers unencumbered by familial caregiving responsibilities—but specifically with workers who need time for caregiving responsibilities in mind. These reformers hardly achieved what they envisioned, but their presence in legal history needs to be brought to the forefront, considered part of the history of sex antidiscrimination, and adapted to today's world. This Article suggests two ways that their history may prove

303. See generally Schultz, *supra* note 38; Renan Barzilay, *Constructive Feminism*, *supra* note 13, at 428.

304. See Williams & Segal, *supra* note 40, at 103-08.

305. EEOC, *Enforcement Guidance*, *supra* note 41.

306. Melanie Trotman, *Membership Rate Falls for U.S. Unions in 2014*, WALL ST. J. (Jan. 23, 2015), <http://www.wsj.com/articles/membership-rate-falls-for-u-s-unions-in-2014-1422028558>.

307. EEOC, *Enforcement Guidance*, *supra* note 41, at 3.

308. COBBLE, THE OTHER WOMEN'S MOVEMENT, *supra* note 3, at 7-8.

309. See generally WILLIAMS, UNBENDING GENDER, *supra* note 37, at 3-4.

particularly important to current-day interpretation of Title VII's sex provision, especially with regard to workers with caregiving responsibilities.³¹⁰

First, this history is particularly important for the current-day employment equality of mothers. Motherhood—the most prominent form of caregiving—is most likely to trigger gender stereotypes at work today.³¹¹ These stereotypes arise because the workplace is currently designed around the “ideal worker,” a worker unencumbered by family caretaking responsibilities and completely available at the employer's service.³¹² The “ideal worker” model equates the amount of time spent at work with value as a worker.³¹³ Since most caretaking is still done by women, workplace norms designed around such an “ideal worker” model discriminate against women.³¹⁴ Scholars have initiated and documented a growing body of law, FRD,³¹⁵ which addresses cases in which employers treat employees with caregiving responsibilities in accordance with stereotypical attitudes about how that employee will behave rather than on the employee's individual interests and capabilities.³¹⁶ While many FRD cases are primarily concerned with biases against caregivers, the larger project of “family responsibilities discrimination” argues that designing good jobs around men's bodies and traditional gender roles is discrimination that actually raises gender stereotypes in everyday interactions.³¹⁷ Scholars have encouraged the litigation of such cases in the hopes of deterring employers from engaging in role-based discrimination and ultimately changing such work patterns.³¹⁸ Their approach relies, *inter alia*, on the interpretation of Title VII's sex provision.³¹⁹ This Article's enriched history of the sex provision, with its emphasis on caregiving alongside marketplace labor, may support and enhance interpretations of FRD, which stresses alongside the illegality of blatant biases against mothers (and caregivers who operate contrary to gender norms) also the unlawfulness of structural impediments to equality. Ultimately, the rich understanding of Title

310. The consequences may certainly benefit male caregivers acting against the gendered norms of caretaking and breadwinning. See WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 37, at 79-83.

311. Williams & Bornstein, *supra* note 39, at 1326.

312. See Williams & Segal, *supra* note 40, at 80.

313. Other features that alternately should mark a worker as “ideal” can include effectiveness, thoroughness, skillfulness, and loyalty.

314. Williams & Segal, *supra* note 40, at 80. Of course, these norms have a detrimental effect on men, as well. See WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 37, at 80.

315. Williams & Bornstein, *supra* note 39, at 1313; Catherine Albiston, Kathryn Burkett Dickson, Charlotte Fishman & Leslie F. Levy, *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1285-87 (2008).

316. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

317. So for example, long hours are a workplace policy that not only impacts caregivers, causing some to be pushed out of the labor force, but even for those who do remain, the policy may actually raise overt sex-stereotypes by employers in every day work interactions. *Id.* at 179-81.

318. Williams & Segal, *supra* note 40, at 80.

319. Williams & Bornstein, *supra* note 39, at 1335-41; see also CALVERT, WILLIAMS & PHAELAN, *supra* note 41, at 41-125.

VII's history presented in this Article should include interpretations of sex discrimination that deter policies that do not allow for familial caregiving (such as long hours or no paid sick leave). Such interpretations would bolster and support current efforts to enhance the meaning of sex discrimination under Title VII.

Second, the enriched history may invigorate theories of discrimination that focus on the discriminatory structure of work—particularly disparate impact theory.³²⁰ Scholars have lamented the courts' general enfeeblement of disparate impact claims.³²¹ Some scholars have claimed that modern discrimination is far less overt and easily proven, and that systemic obstacles to equality bear increasing significance for marginalized groups.³²² Facially gender-neutral norms like long hours, travel requirements, and limited leaves often have a disparate impact on caregivers (who are still predominantly women and mothers) and significantly affect their employment opportunities in systemic ways. Rethinking the origins of Title VII's sex provision may invigorate the interpretation of disparate impact liability with regard to women who are caregivers. Working-Class Social and Labor Feminists' focus on structural features of the workplace and their impediments to equality may help support claims that structural workplace norms make it harder for women to achieve genuine equal opportunity, without forcing plaintiffs to prove discriminatory animus towards specific individuals *per se*. Working-Class Social and Labor Feminists' understanding of the discriminatory consequences of structural features of the labor market, and their notion that law should be "equalizing" in its "effect,"³²³ may strengthen disparate impact claims and enhance arguments that workplace structures that do not take into account norms and practices that result in sex discrimination are actually discriminatory. Once such claims are invigorated by courts, hopefully, employers will be inclined to reshape their work policies to better enable caretaking (for example, by introducing a general cap on hours or providing generous family leave) so as not to face Title VII liability. These new norms, which would be designed with caretaking in mind, should be applied universally to men and women, effectively bringing the entry wedge strategy full circle.

CONCLUSION

This Article provides an excavation of the historical foundations of a robust and expansive notion of employment equality grounded in the experience of

320. Under the disparate impact theory, employers' practices, procedures and policies that appear to be neutral on their face may be found to violate Title VII if they have a significantly negative impact on workers of one sex, for examples see CALVERT, WILLIAMS & PHAELAN, *supra* note 41, at 106-12.

321. *See, e.g., supra* note 35.

322. *See, e.g.,* Thompson Ford, *supra* note 21.

323. Anderson, *Should There Be Labor Laws for Women? Yes, supra* note 15, at 6.

Working-Class Social and Labor Feminists in decades leading up to the enactment of Title VII's sex provision. It offers a rich history of the birth of the sex discrimination prohibition by focusing on Working-Class Social and Labor Feminists' efforts to achieve employment and economic equality, especially for workers with familial caretaking responsibilities. These feminists enlisted the law in order to compensate them for their unequal power in the workplace, which resulted from structural impediments generated by the market, unions, and the family—most notably, women's limited powers within unions and women's positioning within the family as caretakers. They sought state regulation of the market and state responsibility for women's employment equality. The Article claims that their efforts in obtaining protective labor regulation, their role in the enactment of sex anti-classification in the Fair Labor Standards Act, their quest for equal pay in the post-War decades, the enactment of the Equal Pay Act in 1963, and their role in the 1963 President's Commission on the Status of Women informs the history of the prohibition on sex discrimination in Title VII. Without a robust understanding of the sex discrimination provision's legislative history, we risk receiving even weaker and more convoluted court decisions that deny the provision's substantive importance. Furthermore, the narrative presented in this Article could provide for a fuller account of the meaning of sex discrimination under the Civil Rights Act and a basis for an informed interpretation of what constitutes sex discrimination in employment. Such a reconfiguration would seriously take into account structural features of the market, as well as the fact that women continue to provide the lion's share of family caretaking, and would require workplace policies that apply equally to men and women and ensure antidiscrimination by keeping caretaking in mind. This rethinking of the history of Title VII sex discrimination aspires to spark a reinterpretation of the antidiscrimination mandate as including work policies that ensure equal opportunity, especially for working caretakers who are still disproportionately mothers.