INVENTING THE “TRADITIONAL CONCEPT”
OF SEX DISCRIMINATION

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INTRODUCTION

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

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1 429 U.S. 125 (1976).
3 Gilbert, 429 U.S. at 143.
4 Id. at 145.
5 See id. (“The concept of ‘discrimination,’ of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction.”)
6 Id. at 140 n.18.
7 Id. at 145 (“When Congress makes it unlawful for an employer to ‘discriminate . . . because of . . . sex . . .’ without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant. There is surely no reason for any such inference here.” (omissions in original) (citations omitted)).
constitute discrimination "because of sex" because it did not fall within the longstanding parameters of that term.8

This narrow, anticlassificationist understanding of Title VII’s prohibition of sex discrimination was not cabinéd in the 1970s to cases involving pregnancy. Courts rejected some of the earliest sexual harassment claims on the ground that this practice targeted some but not all members of the relevant class and thus did not constitute discrimination "because of sex."9 Here too, courts commonly cited the lack of legislative history attending Title VII’s sex provision as a reason for interpreting the statute narrowly.10 Sex-based Title VII claims by sexual minorities triggered a similar response. Courts uniformly rejected such claims on the ground that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."11 "Congress had a narrow view of sex in mind when it passed the Civil Rights Act,"12 courts asserted, and that narrow view did not encompass discrimination against gay and transgender employees.13

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

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

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

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

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

13 Id. ("[W]e decline in behalf of the Congress to judiciously expand the definition of sex as used in Title VII beyond its common and traditional interpretation.); see also Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327, 329–30 (9th Cir. 1979) (consolidated on appeal with DeSantis v. Pacific Tel. & Tel. Co.) (concluding "that Congress had only the traditional notions of 'sex' in mind," id. at 329 (quoting Holloway, 566 F.2d at 662), when it enacted Title VII and rejecting the
ing one of the first sex-based claims by a transgender plaintiff, the Seventh Circuit stated: “The total lack of legislative history surrounding the sex amendment coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.”

Although Title VII doctrine has evolved over the past few decades, the “traditional concept” of sex discrimination, as expounded by courts in the 1970s, continues to exert a regulative influence over the law. Most notably, it fuels courts’ ongoing demand that sex discrimination plaintiffs produce opposite-sex comparators — individuals who are similarly situated to themselves in all salient respects aside from biological sex. Only by demonstrating that such comparators were not subject to the same adverse treatment, courts hold, can plaintiffs prove it was their biological sex that triggered the alleged discrimination. This requirement has a devastating effect on plaintiffs’ ability to win sex-based Title VII claims, as adequate comparators are very rarely available in the contemporary workplace. In some cases —

notion that the law should “be judicially extended” beyond this traditional conception, id. at 329–30).

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

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

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

17 See Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 728, 734, 751–64 (2011) [demonstrating that the comparator requirement “sharply narrow[s] . . . the possibility of success for individual litigants,” id. at 734, because individuals who are, inter alia, uniquely situ-
particularly those involving reproductive differences between men and women—they will never be available. Sex discrimination claims by sexual minorities also continue to run aground on the shoals of “tradition.” As in the 1970s, courts today often insist, when confronted with Title VII claims by gay and transgender plaintiffs, “that Congress did not intend the legislation to apply to anything other than ‘the traditional concept of sex,’” and “that if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”

This Article argues that the “traditional concept” of sex discrimination, as articulated by courts, is an “invented tradition.” The historian Eric Hobsbawm famously used that term to refer to social practices that purport to be old, or imply continuity with the past, but are actually quite recent in origin. By claiming to be deeply rooted in history, these practices seek “to give any desired change (or resistance to innovation) the sanction of precedent, social continuity, and natural law.”

Hobsbawm explained, for instance, “that a village’s claim to some common land or right ‘by custom from time immemorial’ often

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18 For instance, no plaintiff in the American legal system has ever persuaded a court that breastfeeding discrimination violates Title VII’s sex provision. See, e.g., Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 439 (6th Cir. 2004) (“No judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination.”); EEOC v. Houston Funding II, Ltd., No. Civ. H-11-2442 (S.D. Tex. Feb. 2, 2012) (“Firing someone because of lactation or breast-pumping is not sex discrimination.”); Martinez, 49 F. Supp. 2d at 310–11 (“In this case, there is and could be no allegation that Martinez was treated differently than similarly situated men. To allow a claim based on sex-plus discrimination here would elevate breast milk pumping — alone — to a protected status. But if breast pumping is to be afforded protected status, it is Congress alone that may do so.” (footnote omitted)); cf. In re Union Pac. R.R. Emp’t Practices Litig., 479 F.3d 936, 944–45 (8th Cir. 2007) (holding that exclusion of contraception from employee health insurance plan does not violate Title VII because contraception coverage was denied to both men and women and therefore “the coverage provided to women [was] not less favorable than that provided to men”). For more on the continuing influence of Gilbert’s narrow formalistic conception of sex discrimination in contemporary employment discrimination law, see Deborah A. Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L. Rev. 511, 551–56 (2009).

19 In re Estate of Gardiner, 22 P.3d 1086, 1104 (Kan. Ct. App. 2001) (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)); see also Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *4 n.52 (E.D. La. Sept. 16, 2002) (asserting that “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex” (quoting Ulane, 742 F.2d at 1085)).

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


22 Id. at 2.
expresses not a historical fact, but the balance of forces in the constant struggle of village against lords or against other villages.”

This Article contends that the “traditional concept” of sex discrimination, as it was articulated in the 1970s, is just such a tradition. Courts claimed that their narrow, formalistic conception of sex discrimination was deeply rooted in history, but in fact, it was quite new. It did not express a historical fact. It made a normative claim — not, in this case, about the boundaries of a particular plot of land but about the limits of Title VII’s prohibition of sex discrimination.

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

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

23 Id.
24 Id. at 12.
crimination claims and made arguments about the protections accorded them under the new law.26

The picture that emerges from this historical record undermines the notion that the concept of sex discrimination was traditionally understood to refer — always and only — to practices that divide men and women into two groups perfectly differentiated along biological sex lines. In fact, there was great uncertainty in 1964, and in the decade after, about the basic parameters of Title VII’s prohibition of sex discrimination. It was not at all clear, for instance, that employment practices that sorted men and women into two perfectly sex-differentiated groups automatically constituted “discrimination” within the meaning of the law. It took years for the EEOC and federal courts to determine whether “protective” labor legislation and sex-segregated help-wanted advertisements discriminated “because of sex,” and the conventional wisdom in this era was certainly not that all sex-differentiated employment practices did so. Nor was it clear that an employment practice had to divide employees along the axis of biological sex in order to count as sex discrimination. In the 1960s, members of all-female flight attendant corps charged that policies terminating their employment when they married or reached their early thirties violated Title VII, even though such policies did not divide workers along biological sex lines; the EEOC determined in the late 1960s that these policies discriminated “because of sex” even in the absence of male comparators. Likewise, it was not until the mid-1970s that the Court held that pregnancy discrimination was not sex discrimination — a proposition that had not been at all clear prior to that point.

Recovering this history reveals how deeply contested and fluid the meaning of sex discrimination was at the time Title VII was passed. It also reveals the extent to which determinations about what constitutes sex discrimination have always turned on judgments about the normative desirability, or acceptability, of employment practices that enforce conventional understandings of sex and family roles. When legal actors in the 1960s debated whether Title VII should bar discrimination “because of sex,” how vigorously this prohibition should be enforced, and what kinds of employment practices it should reach, their discussion was framed by concerns about sexual relations and the family. It was clear, in this period, that Title VII had intervened in a powerful set of practices governing the gendered organization of

26 See EQUAL EMP’T OPPORTUNITY COMM’N, 1ST ANNUAL REPORT 6, 64 (1967) (expressing surprise that 2432, or thirty-seven percent, of the complaints received by the agency in its first year in existence alleged discrimination on the basis of sex); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 123–27 (2006) (discussing the importance of American workers in shaping the content of Title VII’s legal protections in the context of sex).
work and family in the United States, but there was little consensus, and much debate, about which of these practices the law should disrupt and which it should leave in place.

This Article shows that the “traditional concept” of sex discrimination — the idea that employer conduct is discriminatory only and whenever it bifurcates employees along biological sex lines — emerged out of these debates. When Title VII was first enacted, opponents argued that its prohibition of sex discrimination should be stricken, or simply unenforced, because it threatened to weaken the conventional regulation of sex roles, sexual relations, and the American family. When plaintiffs began to file sex discrimination claims in court, employers argued that the statute’s BFOQ exception — which permits discrimination in cases where sex is “reasonably necessary to the normal operation” of a business27 — should be interpreted broadly, to preserve longstanding forms of sex-based regulation. As these strategies faltered, employers increasingly began to argue that the concept of sex discrimination itself was quite narrow, and referred only to practices that formally sort employees along biological sex lines. The employers who made this argument in the late 1960s were quite explicit about their desire to cabin Title VII’s reach. They urged the EEOC and courts to adopt that this narrow, formalistic conception of sex discrimination because it would permit businesses to continue enforcing conventional gender norms and help to preserve the traditional organization of the American family.

Gilbert, and other decisions in the 1970s, obscured this history. These decisions adopted the narrow, formalistic arguments made by employers in the 1960s, but asserted that this method of reasoning about the meaning of sex discrimination lacked any normative underpinnings. Talk of legislative deference and fidelity to tradition replaced discussion of the need to preserve the traditional family and women’s role within it. Recovering the history of the “traditional concept” of sex discrimination reminds us that this narrow form of reasoning did not stand outside normative debates about how far Title VII’s protections should extend, but was instead a part of those debates. This remains true today. Courts’ continued adherence to the “traditional concept” of sex discrimination significantly limits Title VII’s scope and insulates from judicial scrutiny various forms of regulation that maintain social stratification. As we shall see, these limitations are not simply the product of judicial deference: they represent ongoing normative judgments about how forcefully antidiscrimination law should seek to combat employment practices that reinforce traditional gender norms.

Part I of this Article examines the legislative history and early reception of Title VII’s sex provision in the mid-1960s. Conventional wisdom suggests that legislative history sheds no light on the meaning of Title VII’s prohibition of sex discrimination. In fact, legislative history demonstrates quite strikingly how indefinite the contours of Title VII’s sex provision were at the time it was enacted. Proponents and opponents of the statute — inside and outside of Congress — argued that the legislation would disrupt the enforcement of traditional sex and family roles. But there was considerable debate in this period about which particular employment practices the statute barred and how deeply the law should intervene in the longstanding regulation of men and women in the workplace.

Part II examines the largely forgotten history of sex-based employment discrimination law in the years before the Supreme Court heard its first Title VII case. The widely varying and frequently shifting interpretations of Title VII’s sex provision offered by the EEOC and courts in this period dramatically illustrate that the determination of whether an employment practice qualified as discrimination “because of sex” did not always hinge on the formal characteristics of the practice. Debate over the scope of Title VII’s prohibition of sex discrimination in the 1960s focused explicitly on the normative question of how deeply, or even whether, the law should intervene in a set of practices that reflected and reinforced conventional gender norms. This Part shows that the “traditional concept” of sex discrimination emerged in this period as an answer to that question.

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

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

Conventional wisdom dictates that Title VII’s prohibition of sex discrimination has no legislative history.29 When President Kennedy decided in the summer of 1963, in the wake of the Birmingham riots, to pursue civil rights legislation, his aim was to secure legal protections against race discrimination.30 By the time Virginia Representative Howard W. Smith offered an amendment proposing to add “sex” to Title VII,31 the legislative debate over the bill was almost over. Smith’s amendment triggered only a few hours of discussion, and legal commentators have generally characterized his intervention as nothing more than a last-ditch, if ultimately unsuccessful, attempt to derail a piece of legislation to which he was fiercely opposed.32

29 DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW 331 (8th ed. 2010) (discussing the lack of legislative history attending Title VII’s sex provision); JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 375–77 (6th ed. 2007) (same); GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION 222 (2005) (same); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986) (“The prohibition against discrimination based on sex was added to Title VII at the last minute . . . and we are left with little legislative history to guide us in interpreting [this prohibition].”).
30 See President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), available at http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Radio-and-Television-Report-to-the-American-People-on-Civil-Rights-June-11-1963.aspx (“Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law. . . . The old code of equity law under which we live commands for every wrong a remedy, but in too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens and there are no remedies at law. Unless the Congress acts, their only remedy is in the street.”).
32 Representative Smith had been a committed opponent of civil rights legislation throughout his career and was a signatory of the Southern Manifesto, which famously decried the Court’s decision in Brown v. Board of Education and pledged “to use all lawful means to bring about [its] reversal.” 102 CONG. REC. 4460 (1956). Smith’s background, and his ongoing, outspoken opposition to civil rights legislation designed to benefit racial minorities, led many to conclude that his late-breaking amendment was motivated by a desire to disrupt the smooth passage of the civil rights bill. For accounts suggesting Smith’s eleventh-hour intervention was an attempt to kill the civil rights bill by introducing a provision he knew would be unpopular with his colleagues, see, for example, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 14–15 (4th ed. 2007); SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW 161–62 (2003); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–18 (1985); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1283–84 (1991). Some commentators have suggested that Smith’s motivations were more complex than the standard account allows. For accounts suggesting that Smith was acting at the behest of women’s rights advocates and wanted to ensure that, if the legislation passed, white women would be entitled to all the legal protections afforded racial minorities, see Robert C. Bird, More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 150–53, 156–58 (1997); Carl M. Brauer, Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act, 49 J. S. HIST. 37, 41–50.
The circumstances under which “sex” was added to Title VII raise questions about the value of an “archeological” \(^{33}\) expedition into the statute’s legislative history. The documentary record is meager: one afternoon of debate, no committee reports or legislative hearings. Moreover, the values and requirements of American society have evolved substantially since the mid-1960s, and so has the American workplace. For these reasons, Title VII seems particularly suited to a dynamic form of interpretation, \(^{34}\) which considers not only text and legislative history, but “also what [a statute] ought to mean in terms of the needs and goals of our present day society.” \(^{35}\) Indeed, given the piecemeal manner in which Title VII was drafted, \(^{36}\) the fact that the statutory text never defines the words “discriminate” or “sex,” and the enormous social changes that have occurred in this context since 1964, the “historical perspective” seems unlikely to “provide[] . . . decisive[] guidance for solving the interpretive puzzle[s]” \(^{37}\) in contemporary sex discrimination law.

This Part argues that there is nonetheless much to be gained by recovering the largely forgotten legislative history of Title VII’s prohibition of sex discrimination. \(^{38}\) In revisiting the debate that transpired over Title VII’s prohibition of sex discrimination in the winter of 1964, this Part does not aim to develop an account of original meaning or legislative intent capable of resolving current dilemmas in employ-

\(^{33}\) See William N. Eskridge, Jr., Dynamic Statutory Interpretation 13 (1994) (referring to interpretative approaches that look to the past — and particularly to contemporaneous legislative materials — to discover the original meaning or intent of a statute).

\(^{34}\) William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1554–55 (1987) (explaining that “[d]ynamic interpretation is most appropriate when the statute is old yet still the source of litigation, is generally phrased, and faces significantly changed societal problems or legal contexts”).

\(^{35}\) Id. at 1480 (quoting Arthur W. Phelps, Factors Influencing Judges in Interpreting Statutes, 3 Vand. L. Rev. 456, 469 (1950)); id. at 1554 (arguing that because statutes “have different meanings to different people, at different times, and in different legal and societal contexts . . . federal courts should interpret statutes in light of their current as well as historical context”).

\(^{36}\) Id. at 1490 & n.42 (describing the many stages involved in transforming President Kennedy’s proposed job discrimination provision into Title VII of the 1964 Civil Rights Act).

\(^{37}\) Id. at 1490.

\(^{38}\) Although judicial decisions and employment discrimination casebooks have rarely taken the legislative history of Title VII’s sex provision seriously, it has not been entirely dismissed in academic literature. See, e.g., Mary Anne Case, Reflections on Constitutionalizing Women’s Equality, 90 Calif. L. Rev. 765, 767–69 (2002) (rejecting the notion that Smith’s amendment was simply a joke); see also Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 Calif. L. Rev. 755, 771 (2004) (noting that the amendment was strongly supported by a number of feminist legislators in the House); Franke, supra note Error! Bookmark not defined., at 14–25 (arguing that there is “a rich congressional legislative history concerning the equal rights of women,” id. at 15, which includes the brief legislative history of Title VII’s sex amendment but also encompasses debates extending back over several decades).
ment discrimination law. On the contrary, it aims to deconstruct such accounts. Over the past five decades, claims about the narrow mindset and goals of the Eighty-Eighth Congress have exerted a regulative influence over the interpretation of Title VII’s prohibition of sex discrimination. Courts have routinely invoked legislative history — or, rather, the lack thereof — to explain why certain claims fall outside the statute’s scope and why plaintiffs need to satisfy particular evidentiary burdens in order to prove they have truly been discriminated against “on the basis of sex.” Although the boundaries of Title VII’s sex provision have shifted dramatically over the past half-century, courts have consistently asserted that the absence of legislative history and the “traditional” understandings that must have been prevalent at the time the statute passed establish narrow “bounds beyond which a court cannot go without transgressing the prerogatives of Congress.”

These assertions about the outer limits of Title VII’s prohibition of sex discrimination are couched in terms of legislative deference and fidelity to history and tradition. But courts making such assertions have rarely consulted the historical record. In fact, they have typically been incurious at best about the legislative history attending Title VII’s sex provision and about the broader debates about sex discrimination occurring in the 1960s. This inattentiveness has obscured both the deep uncertainty, at the time Title VII was enacted, about which employment practices the statute barred, and the fact that the legislative debate treated sex discrimination as “a social phenomenon encased in a social context.”

Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s that the question of what constituted sex discrimination could be answered simply by determining whether an employer had divided employees into two groups perfectly differentiated along biological sex lines. Legislators, both for and against adding “sex” to Title VII, focused on the social meaning of sex discrimination, and their disagreement hinged primarily on the question of whether employers should be permitted to engage in practices that reflected and reinforced conventional understandings of men’s and women’s roles. Recovering this history may not provide definitive answers to hard cases in Title VII law today. But it should prompt us to think critically about the assertion that fidelity to “tradition” compels courts to adhere to a narrow conception of what it means to discriminate “because of sex.”

39 Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).
40 See, e.g., id. at 1085–86 (citing the “total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment’s adoption,” id. at 1085, as proof that “Congress had a narrow view of sex in mind,” id. at 1086, when it decided to bar sex discrimination in employment).
A. The Case Against Adding “Sex” to Title VII

One of the many strange features of the legislative debate over the addition of “sex” to Title VII is the fact that the strongest opposition came from the legislators who were most committed to the project of civil rights. Indeed, the most vocal opponent of the sex amendment was Representative Emanuel Celler, a Democrat from New York who served as the Chairman of the House Judiciary Committee throughout the civil rights era and was a major champion of legislation designed to expand the rights of racial minorities. In part, Celler and his allies were wary of the sex amendment because it was introduced by Representative Smith and was therefore perceived as a distraction from, or even an assault on, the primary agenda of the civil rights bill. But the concerns fueling opposition to the sex amendment were not wholly unconnected to its substance. The leading congressional proponents of the civil rights bill shared the view, common among progressives in this period, that “mores have set off women from men,”42 and that workplace law and policy should acknowledge women’s special role in the family. From this perspective, a proposal to bar sex discrimination in the workplace looked like a threat to a hard-won set of employment practices premised on the notion that women “were marginal participants in labor markets . . . [a]nd . . . were especially deserving of public protection as actual or potential mothers.”43

Disagreements about how the law ought to regulate women’s roles as wives and mothers framed the congressional debate over adding “sex” to Title VII.44 Those who opposed the amendment repeatedly cited, as evidence of the amendment’s undesirability, the documented opposition of leading members of the labor and women’s rights communities to any law that would undermine legal “protections” de-


44 By calling attention to the central role that concerns about gender and the family played in the debate over Title VII’s sex provision, this Part in no way seeks to minimize the role that race played in this debate. Opponents of the sex amendment were undoubtedly concerned about the possibility that this amendment would derail their efforts to combat racial inequality, and proponents of the amendment also invoked race, often in regressive ways, to explain why the amendment was necessary. For more on the uses of race in the debate over Title VII’s sex provision, see Mayeri, supra note 38, at 770–73.
signed to accommodate women’s special responsibilities in the home.\textsuperscript{45} The most important of these documents was the 1963 report by the President’s Commission on the Status of Women (PCSW),\textsuperscript{46} a body convened by President Kennedy chaired by Eleanor Roosevelt.\textsuperscript{47} The PCSW supported the principle that women had a right to work outside the home and should receive equal pay for equal work,\textsuperscript{48} but generally adhered to the view that women’s primary calling remained in the home.\textsuperscript{49} The Committee on Home and Community reported:

Over and above whatever role modern women play in the community . . . the care of the home and the children remain their unique responsibility. No matter how much everyday tasks are shared . . . the care of the children is primarily the province of the mother. This is not debatable as a philosophy. It is and will remain a fact of life.\textsuperscript{50}

In instances where expanded opportunity in employment seemed to threaten women’s commitment to home and family, the PCSW argued against expanded opportunity. Thus although it “identified a number of outmoded and prejudicial attitudes and practices”\textsuperscript{51} among American employers, it did not advocate a law prohibiting sex discrimination in the workplace.\textsuperscript{52} The PCSW feared that such a prohibition would jeopardize regulations that shielded women from the harshest de-

\textsuperscript{45} See, e.g., 110 Cong. Rec. 2577 (1964) (statement of Rep. Celler) (quoting letter from the Women’s Bureau of the Department of Labor opposing the addition of “sex” to Title VII); id. at 2578 (noting the opposition of the President’s Commission on the Status of Women); id. at 2582 (statement of Rep. Green) (quoting a letter from the American Association of University Women opposing the addition of “sex” to Title VII).

\textsuperscript{46} See President’s Comm’n on the Status of Women, American Women (1963), reprinted in American Women: The Report of the President’s Commission on the Status of Women and Other Publications of the Commission 7–95 (Margaret Mead & Frances Balgley Kaplan eds., 1965) [hereinafter AMERICAN WOMEN]. The Executive Order establishing the PCSW charged it with “responsibility for developing recommendations for overcoming discriminations in government and private employment on the basis of sex and for developing recommendations for services which will enable women to continue their role as wives and mothers while making a maximum contribution to the world around them.” Exec. Order No. 10,980, 26 Fed. Reg. 12,059 (Dec. 14, 1961), reprinted in AMERICAN WOMEN, supra, at 207. The PCSW’s Report reflected the tensions inherent in this charge. See also 110 Cong. Rec. 2584 (statement of Rep. Celler) (inviting Representative James Roosevelt, son of Eleanor Roosevelt, to introduce into the Congressional Record “some of the names of the women members and the organizations that are represented on th[e] President’s Commission of which [his] late lamented mother was Chairman”).

\textsuperscript{47} See Margaret Mead, Introduction, in AMERICAN WOMEN, supra note 46, at 1, 3–4.

\textsuperscript{48} See Harrison, supra note 42, at 142–51.

\textsuperscript{49} Id. at 159 (noting that “the commission . . . resolved to remain firmly within the framework of traditional family roles”).

\textsuperscript{50} President’s Comm’n on the Status of Women, Report of the Committee on Home and Community 9 (1963).

\textsuperscript{51} AMERICAN WOMEN, supra note 46, at 20.

\textsuperscript{52} See id. at 48–49.
mands of the workplace and enabled them to fulfill their “day-to-day responsibilit

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

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

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

To this end, Representative Robert Griffin of Michigan offered an amendment to the sex amendment. The Griffin amendment would bar workers from filing a claim of sex discrimination under Title VII unless they also filed a sworn statement that their spouse was unemployed. Griffin explained that if his amendment were adopted, “it would not prevent or prohibit any married woman from working because her husband also has a job.” As a practical matter, however, it would permit employers to prefer male workers over married women, and thereby ensure that a woman who enjoyed the financial support of a husband could not lay claim to a job that might otherwise go to “an unemployed man with a family to support.” In offering this amendment, Griffin was not inventing new social policy, but seeking to preserve the advantages that employment regulation had always ac-

53 See HARRISON, supra note 42, at 151–54.
54 AMERICAN WOMEN, supra note 46, at 35; see also HARRISON, supra note 42, at 140.
56 Id.
57 Id.
58 Id.
59 See id. at 2731 (statement of Rep. Griffin).
60 Id.
61 Id.
corded men — particularly in periods of economic downturn. In fact, his proposal was modeled on a law enacted early in the Great Depression, which mandated that the first federal employees to lose their jobs in the event of layoffs would be those whose spouses were also employed by the federal government. “Virulent campaigns to eliminate [married women] from the labor force persisted” throughout the 1930s, as public and private employers adopted policies restricting or completely barring the employment of married women. Underlying these policies — and the Griffin amendment — was a deeply rooted belief “that women’s access to wage work should be conditioned by family needs.” On this view, men, women, and children would all be better off if workplace regulation encouraged, or even compelled, women to elevate their roles as wives and mothers above their roles as wage-earners.

Griffin’s amendment vividly illustrates the extent to which the debate over Title VII’s prohibition of sex discrimination was a debate about men’s and women’s roles in the family. Legislators who opposed adding “sex” to Title VII argued that it would alter laws and customs governing wife- and motherhood, and in so doing wreak havoc on the institution of the family. In this way, the debate over Title VII’s sex provision closely resembled earlier debates over women’s suffrage. As Reva Siegel has shown, the debate over enfranchising women “was, from surface to core, an argument about the family.” Women’s customary (and legal) obligations to their husbands and children served as a central justification for their exclusion from the public sphere, and women’s disenfranchisement was considered essential to the preservation of family harmony. Opponents of women’s suffrage “depicted the prospect of women voting as an expression of . . . a misplaced individualism that betrayed a selfish disregard for a

62 See id. (arguing that “[t]he fact that many heads of families are out of jobs poses a serious problem for this Nation”).
63 See KESSLER-HARRIS, OUT TO WORK, supra note 43, at 257 (noting that over 1600 people were discharged pursuant to this law, the vast majority of whom were women).
64 Id.
65 Id. at 254.
66 In 1975, conservative activist Phyllis Schlafly revived Griffin’s efforts, calling on Congress to amend Title VII to “authorize employers to give job preference in hiring and promotions, and retentions during layoffs, to the . . . Principal Wage Earner in each family.” Unemployment — Causes and Solutions, PHYLLIS SCHLAFLY REP., Nov. 1975, at 1 (on file with the Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University). Echoing Griffin, Schlafly argued that employment policies favoring male breadwinners were socially beneficial because they “encourag[ed] homemakers to stay in the home, rather than competing in the labor market for the scarce available jobs.” PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 166 (1977).
woman’s responsibilities in sustaining family life. Women’s assertion of individuality appeared socially problematic . . . precisely because it called into question the traditional distribution of authority and division of labor in the family.” To permit women to vote, antisuffragists argued, would run counter to conceptions of the family that had governed Anglo-American law for centuries.

Legislators who opposed adding “sex” to Title VII framed their opposition in similarly family-centric terms. They argued, as antisuffragists had fifty years earlier, that granting women equal access to the public sphere would disrupt understandings of the family that had long structured American life. They depicted women who would compete for jobs in a nation where “many heads of families are out of jobs” as selfish individualists heedless of the needs of their fellow citizens. They claimed that the smooth functioning of American society depended on the subordination of women’s career ambitions to the needs of their families. Opponents of the sex provision also shared the antisuffragist view that the legal regulation of women’s sex and family roles benefitted women themselves. They argued that laws and practices that restricted women’s access to the workplace affirmed the sacrosanct principle that women were mothers first and workers second, and that it was men’s responsibility to ensure that their families were safe and financially sound.

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

68 Siegel, supra note 67, at 996.
70 The legislators who opposed adding “sex” to Title VII did not argue, as antisuffragists had earlier in the twentieth century, that granting women equal access to the public sphere would infringe on male dominance. In fact, legislators in 1964 were quite anxious to deny that laws restricting women’s access to the workforce were a product of men’s authority over women. Yet their repeated claims that women were the true authority figures in American families were themselves rooted in an old and sexist rhetorical tradition. See, e.g., id. at 2577 (statement of Rep. Celler) (reporting that when he argued with his wife, he “usually ha[d] the last two words, and those words are, ‘Yes, dear,’ ” and noting that when George Bernard Shaw wrote his famous play, Man and Superman, “man was not the superman, the other sex was”); id. at 2582 (statement of Rep. Thompson) (noting that men currently permit women to board lifeboats first during aquatic disasters and warning that prohibiting sex discrimination might rob women of this valuable advantage).
function of the female wage was to ensure attachment to family. The male wage, in contrast, provided incentives to individual achievement.  

These observations are true not only of the wage, but also of the constellation of other laws and practices that have historically regulated men’s and women’s participation in the labor market. As opponents of adding “sex” to Title VII recognized, such regulation provided individuals with instructions for living. It did not simply define the tasks men and women performed during the workday. It dictated how they lived, and with whom; it profoundly shaped their identity in both public and private settings. Thus, Celler and his colleagues argued, it may seem “[a]t first blush … fair, just, and equitable” to prohibit sex discrimination in employment, “[b]ut when you examine carefully what the import . . . [of equal rights would be for] American life you run into a considerable amount of difficulty.” To prohibit sex discrimination in employment, opponents argued, would be to reject the basic organizing principles governing relations between men and women and the institution of the family. Such an act, Celler warned, could have “unlimited” consequences for American society.

B. Support for the Sex Amendment

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

To illustrate this point, proponents of the sex amendment endeavored to show that “[m]ost of the so-called protective legislation” did not actually serve to protect women. Representative Martha Griffiths, a Democrat from Michigan, noted for example that employers

71 Alice Kessler-Harris, A Woman’s Wage: Historical Meanings and Social Consequences 19 (1990).
72 For an eloquent description of how work can be “constitutive of citizenship, community, and even personal identity,” see Vicki Schultz, Essay, Life’s Work, 100 Colum. L. Rev. 1881, 1886–92 (2000); see also Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 Cornell L. Rev. 523, 530–33 (1997).
74 Id. at 2578.
75 Id. at 2580 (statement of Rep. Griffiths).
were likely to refuse to hire women to drive haulaway trucks on the ground that they were physically incapable of the work. Yet women were employed as schoolbus drivers — and, Griffiths pointed out, they drove streetcars during the Second World War. Thus, she intimated, it was not the size of the truck that determined which jobs women were permitted to do, but the size of the paycheck and the cultural connotations of the job. Employers reserved for male drivers the high-paying jobs that involved travel and funneled women into low-paying jobs that involved children.

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

Proponents of the sex amendment agreed with their opponents that the debate over Title VII implicated forms of legal regulation that were deeply rooted in American history. They asserted, however, that this was not a proud legal tradition; they argued that the myriad discriminatory employment practices plaguing female workers in the 1960s were part of a long and extensive history of subordination of

76 Id. at 2579.
77 Id.
78 See id. at 2579–80.
79 Id. at 2580 (statement of Rep. St. George).
80 Id.
81 Id. at 2581.
82 Id.
83 Representative St. George’s comments called attention to the fact that “protective” labor policies were generally applied to jobs performed by white women. Black women were excluded from many of the Progressive and New Deal–era policies designed to “protect” women and enable them to spend more time with their children. For more on this topic, see JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 199–200 (1985). See generally GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942 (1995) (examining racial differences in the regulation of women through welfare policy in the interwar period).
women in the American legal system. Representative St. George claimed that to appreciate fully the harm that laws enforcing traditional conceptions of sex and family roles had visited on women, one would have “to go back to the days of the revolution when women were chattels.” 84 Women, she noted, “were not mentioned in the Constitution.” 85 Under the common law tradition of coverture, “[t]hey belonged, first of all, to their fathers; then to their husbands or to their nearest male relative. They had no command over their own property. They were not supposed to be equal in any way, and certainly they were never expected to be . . . equal intellectually.” 86 She suggested that “protective” legislation and other regulations that restricted women’s opportunities in the labor market reflected the same set of gender norms that animated the law of coverture.

Representative St. George pointed out that “[t]here are still many States where women cannot serve on juries[,] . . . do not have equal educational opportunities[,] . . . [and] do not get equal pay for equal work.” 87 She implied that these practices too reflected stereotyped conceptions of men’s and women’s roles that extend “back, frankly to the Dark Ages.” 88 Representative Griffiths argued that the best contemporary illustration of this tradition was Goesaert v. Cleary, 89 in which the Supreme Court upheld a Michigan law permitting women to bartend only in establishments owned by their fathers or husbands. The Court held in Goesaert that the state had a legitimate reason for wanting to ensure that female bartenders would receive the “protecting oversight” of a male family member. 90 The Court explained that “a man’s ownership provides control” in a situation that might otherwise threaten a woman’s sexual purity, or the morals of her customers. 91 Griffiths argued that adding “sex” to Title VII would strike a much-needed blow against this “vulgar and insulting” ideology and liberate women from the confines of these outmoded conceptions of sex and family roles. 92 “[W]e have fought our way a long way since those days of the Revolution,” 93 St. George argued, and adding “sex” to Title VII

85 Id. For an argument suggesting that feminist claims made during the debate over Title VII influenced the subsequent development of constitutional sex discrimination law, see Case, supra note 38, at 769.
87 Id. at 2580.
88 Id. at 2581.
89 335 U.S. 464 (1948).
90 Id. at 466.
91 Id. at 467.
93 Id. at 2580-81.
94 Id. at 2581 (statement of Rep. St. George).
would help to advance women’s ongoing struggle to overcome stereotyped conceptions of their place in American society.\textsuperscript{95}

Twelve years after this debate transpired, the Court concluded in \textit{Gilbert} that the legislative history of Title VII’s sex provision was “notable primarily for its brevity.”\textsuperscript{96} But in fact, the legislative debate over Title VII’s sex provision emphasized the most distinctive feature of sex discrimination, in 1964 and throughout American history: namely, that it was defined by reference to conventional sex and family roles. Historically, laws restricting women’s right to vote, own property, and enter into contracts were justified by reference to their status as wives and mothers. In the century before Title VII was enacted, courts consistently upheld such laws \textit{because} they reinforced gender norms dictating that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother,” and the primary role of men is to act as “woman’s protector and defender.”\textsuperscript{97} Sex-based employment regulation formed a central part of this tradition. Such regulation was long understood as a means of affirming the notion that men and women play complementary roles in the family, and of ensuring that women’s domestic roles trumped their roles outside the home. Legislators in 1964 disagreed about the normative valence of this tradition, but those most vocal on the topic appeared to share Representative Celler’s view that Title VII constituted an “entering wedge”\textsuperscript{98} in the campaign to dismantle it.

\textbf{C. Uncertainty Regarding the Applications of Title VII’s Sex Provision}

In the fall of 1965, one hundred days after Title VII went into effect, EEOC Chairman Franklin D. Roosevelt, Jr., reported to President Johnson that “[i]mplementation of Title VII’s prohibition against discrimination on account of sex has been a particularly challenging assignment for the Commission.”\textsuperscript{99} Roosevelt acknowledged that “[c]ertain traditional ideas” about women’s sex and family roles would need to be “drastically revised” in response to the new law.\textsuperscript{100} But, he explained, the EEOC was having tremendous difficulty “translat[ing]
this broad but general mandate into comprehensive and comprehensible standards for employer conduct.”

The difficulty for the EEOC was that, as Representative Celler noted, the potential consequences of Title VII’s prohibition of sex discrimination seemed “unlimited.” The statute appeared to “change the whole social concept upon which this country was built of the stability of the family.” Yet what this change would mean in practice was unclear. Roosevelt frequently lamented during his tenure at the EEOC that the text of Title VII’s sex provision and its legislative history offered “little guidance” regarding the question of which employment practices the statute had rendered illegal. The statute did not define the terms “sex” or “discriminate,” and Congress did not discuss in any systematic way how its prohibition of sex discrimination would apply on the ground.

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

Congressional advocates of the sex amendment did not argue that prohibiting sex discrimination would preclude employers from making any distinctions between men and women. They claimed that adding “sex” to Title VII would bar employers from making “invidious distinctions of the sort drawn by the statute [in Goesaert].” Thus, they ar-

101 Id.
104 EEOC Reports, supra note 99, at 6036; see also Administration of Sex Discrimination Provisions of Title VII Discussed by EEOC Chairman, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8005, at 6010 (Aug. 1965) [explaining that the EEOC was “starting out with very few guidelines” to assist in its interpretation of Title VII’s “complex and controversial [sic]” prohibition of sex discrimination (quoting Franklin D. Roosevelt, Jr.); Sex Discrimination in Employment Discussed by EEOC Chairman, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8022, at 6033 (Oct. 12, 1965) [noting that the EEOC “must develop guidelines as we go along” in the context of sex, and that, as a result, the agency did “not have all the answers” about the practical applications of Title VII’s sex provision].
gued that Title VII’s prohibition of sex discrimination would outlaw “protective” labor legislation not because it differentiated between the sexes, but because the effect of “[m]ost of the so-called protective legislation has really been to protect men’s rights in better paying jobs.” This argument left open a very real possibility that sex-based legislation that was genuinely protective of women’s interests would be permissible under Title VII. In fact, one vocal congressional proponent of the sex amendment explicitly stated that adding “sex” to Title VII would not automatically overturn differential legislation designed to benefit women. This assessment was bolstered by an influential memorandum circulated in Congress by lawyer and civil rights activist Pauli Murray in the weeks before the final vote on the civil rights bill. Murray’s memo noted that state law in New York and Wisconsin already prohibited sex discrimination in employment, but that this prohibition was not understood, in either state, to apply to “protective” labor legislation.

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

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106 Id.
107 Id. at 2583 (statement of Rep. Kelly) (“I believe in equality for women, and am sure the acceptance of the amendment will not repeal the protective laws of the several States.”).
108 Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex 24–25 (Apr. 14, 1964) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University). For more on Pauli Murray’s strategic efforts to promote legal protections against sex discrimination in the early 1960s, see SERENA MAYERI, REASONING FROM RACE 14–23 (2011).
109 AMERICAN WOMEN, supra note 46, at 49; see also id. at 19–21 (advocating the removal of all “discriminatory provisions.” id. at 19, from American law).
This distinction, between laws that discriminate on the basis of sex and those that simply differentiate between the sexes, was not confined to the arguments of those who opposed the sex amendment. Pauli Murray, whose advocacy helped to ensure the amendment’s passage, argued in a prominent 1965 law review article (coauthored by Mary Eastwood) that there was a distinction between “social policies that are genuinely protective . . . and those that unjustly discriminate against women.” Murray asserted that “society has a legitimate interest in the protection of women’s maternal and familial functions,” and that laws that genuinely served to protect these functions did not violate Title VII. Differentiation becomes discrimination, Murray explained, only when it “gives men a preferred position by accepted social standards” and “regulates the conduct of women in a restrictive manner.” Thus, Murray argued, the aim of Title VII was not to eradicate all formal sex classifications from the law, but to invalidate employment practices “built upon the myth of the stereotyped ‘woman.’” Representative Griffiths echoed this sentiment in a 1966 speech on the House floor, in which she praised Murray’s “thoughtful article.” Griffiths declared that Title VII’s prohibition of sex discrimination barred employment practices that reflected “outmoded and prejudiced concepts” of women’s roles and reinforced “prejudicial attitudes limiting women to the less rewarded and less rewarding types of work.”

Employment practices need not sort men and women along biological sex lines in order to run afoul of this prohibition. Representative Ross Bass of Tennessee made this point during the legislative debate over Title VII’s sex provision when he criticized airline policies terminating the employment of stewardesses when they married. As Part II will show, the airlines attempted to defend these policies in the late 1960s by arguing that they did not violate Title VII because they did not sort men and women along biological sex lines. As Representative Bass understood the law, however, it was not the formal sorting operation that defined an employment practice as dis-

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112 Id. at 238.
113 Id. at 239.
114 Murray argued that in addition to genuinely protective laws, Title VII permitted sex classifications in the form of separate dormitories and bathrooms for men and women, because these practices carried “no implication of inferiority.” Id. at 240.
115 Id. at 239.
117 Id. at 13,693.
118 Id. at 13,691.
120 See infra TAN 246–247.
criminatory, but the fact that it reflected and reinforced traditional conceptions of women’s roles. He declared on the House floor that he intended to vote for the sex amendment on behalf of “both the unmarried and the married women.”

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

II. DETERMINING WHAT COUNTS AS DISCRIMINATION “BECAUSE OF SEX”

The EEOC was ill prepared for the avalanche of sex discrimination claims filed by American workers in the years after Title VII went into effect. Aileen Hernandez, the only female Commissioner at the time of the EEOC’s founding, recalled that “[m]any of the staff members and several of the Commissioners (including myself) had long histories of work in civil rights and our understanding of (and commitment to) eliminating race discrimination surfaced in our earliest discussions . . . .” Nobody at the EEOC in its early years had comparable experience in the field of women’s rights, and nobody joined the EEOC expecting to work in this area. The agency was therefore caught off-guard when more than a third of the claims it received in its first year pertained to sex discrimination. Sonia Pressman, a young law-

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122 EEOC Reports, supra note 99, at 6036.
125 Id. at 131.
yer who joined the EEOC’s General Counsel’s Office in the fall of 1965, recalled:

[T]hese complaints raised a host of new issues that were more difficult than those raised by the complaints of race discrimination. Could employers continue to advertise in classified advertising columns headed “Help Wanted — Male” and “Help Wanted — Female”? Did they have to hire women for jobs traditionally reserved for men? Could airlines continue to ground or fire stewardesses when they married or reached the age of thirty-two or thirty-five? What about state protective laws that prohibited the employment of women in certain occupations, limited the number of hours they could work and the amount of weight they could lift, and required certain benefits for them, such as seats and rest periods? Did school boards have to keep teachers on after they became pregnant? What would students think if they saw pregnant teachers? . . . Did employers have to provide the same pensions to men and women even though women as a class outlived men? The EEOC “was responsible for deciding these questions,” Pressman observed, but “no one really knew how to resolve them.”

This Part examines how the EEOC, and subsequently federal courts, began to resolve these questions in the years after Title VII was enacted. Scholars have typically portrayed these years as a period of massive resistance, in which the government refused to take the issue of sex discrimination seriously. Indeed, EEOC commissioners routinely expressed concern in this period that the law’s prohibition of sex discrimination would “interfere with its main concern, racial discrimination.” Aileen Hernandez recalled that “Commission meetings produced a sea of male faces, nearly all of which reflected atti-

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126 See id. at 124.
127 Id. at 131.
128 Id.
129 See, e.g., HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972, at 106 (1992) (noting “that in 1965 the American public mind at large, as mirrored in press coverage and political discourse, did not take the new issue of sex discrimination seriously” and that “EEOC chairman Franklin Roosevelt instinctively played to this gallery”); IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 63 (2d ed. 2002) (“The regulatory agencies did not take seriously the prohibition of sex segregation until the 1970s . . . so the level of sex segregation remained essentially the same in 1970 as in 1960.”); Gerald N. Rosenberg, The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law, 49 ST. LOUIS U. L.J. 1147, 1152 (2005) (asserting that the EEOC “decided to treat the prohibition on sex discriminations as a joke,” and that “[t]he result of this attitude was inaction on the part of the federal government. For the . . . four years [after Title VII went into effect], the Justice Department did not file a single sex discrimination suit.”).
130 John Herbers, Women Fighting for Job Rights, N.Y. TIMES, Mar. 27, 1966, at 53; see also GRAHAM, supra note 129, at 107 (noting that one of the EEOC’s early internal studies complained that the agency was “inundated by complaints about sex discrimination that diverted attention and resources from the more serious allegations by members of racial, religious, and ethnic minorities” (quoting FRANCES REISSMAN COUSENS, PUBLIC CIVIL RIGHTS AGENCIES AND FAIR EMPLOYMENT 13 (1969) (internal quotation marks omitted)).
tudes that ranged from boredom to virulent hostility whenever the issue of sex discrimination was raised.”

In the summer of 1965, Luther Holcomb, Vice Chairman of the EEOC, went so far as to request that Congress remove the prohibition of sex discrimination from the law. These tales of resistance, though true, tend to obscure the fact that the second half of the 1960s was also a deeply formative period in sex discrimination law. Congress’s addition of “sex” to Title VII had raised new questions about the legality of longstanding employment practices governing men’s and women’s roles in the workplace. In the absence of any guidelines about how this provision would apply in practice, employers as well as members of the emerging women’s movement and workers themselves offered a range of arguments about what should qualify as sex discrimination. These arguments, and the normative visions underlying them, would play a major role in determining the meaning and scope of Title VII’s prohibition of sex discrimination.

A. “The Sex Provision of Title VII Is Mysterious and Difficult to Understand and Control”

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

If the concept of discrimination “because of sex” were interpreted too broadly, employers informed the EEOC, Title VII would destroy the “family structure.” They pointed out that demanding jobs were reserved to men in order to preserve marital harmony and ensure that

131 Hernandez, supra note 123, at 6.
132 FUENTES, supra note 124, at 132.
135 EEOC, REPORT OF THE WHITE HOUSE CONFERENCE ON EQUAL EMPLOYMENT OPPORTUNITY: AUGUST 19–20, at 7 (1965) (on file with the Lyndon Baines Johnson Library, Austin, TX).
136 White House Transcript, supra note 103, at 125.
women were available to provide care to their husbands and children. Jobs in management, for instance, often required employees to relocate across the country — sometimes multiple times in the course of training.137 If women were permitted to enter such jobs, employers argued, it would have a devastating effect on the stability and well-being of the American family. A female manager might ask her husband to quit his job so that she could move to a new location. Alternatively, she might tell her husband “no, you cannot move” when he “had an opportunity in another state.”138 Employers who attended the White House conference urged the EEOC to keep such dystopian scenarios in mind when determining what would count as sex discrimination under the law.139 Participants were also concerned about the effect that a broad interpretation of Title VII’s sex provision would have on the regulation of sexuality in the workplace. Substantial numbers of women employed outside the home in the 1960s performed jobs that resembled the tasks they performed inside the home: they worked as caregivers, cleaners, teachers, nurses, waitresses, and secretaries.140 In these roles, “female wage-earners . . . [were often] expected not only to perform gender on the job but to perform gender as the job”141 — as when secretaries served as “office wives” to their male bosses, tending to their emotional needs and performing various forms of personal service.142 Thus, when Title VII threatened to disrupt these gendered social arrangements, mild but widespread homosexual panic ensued. At his first press conference as Executive Director of the EEOC, Herman Edelsberg declared that there are those “who think that no man should be required to have a male secretary — and I am one of them.”143 A manager at the U.S. Chamber of Commerce echoed this

137 Id. ("We tell any young person who comes with us on the management-trainee program that he may be expected to move at least five times across the United States during the first fifteen years that he is employed with us.").
138 Id. at 126.
139 Preserving “family harmony” was not employers’ only concern; they also argued that “girls” have a habit of leaving the workforce when they marry, and that no manager “wish[es] to incur training expense on which he is unlikely to realize a return.” Id. at 73.
141 KATHLEEN M. BARRY, FEMININITY IN FLIGHT: A HISTORY OF FLIGHT ATTENDANTS 7 (2007).
142 See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 89–91 (1977) (describing the work of an “office wife” and her relationship with her male boss).
143 HARRISON, supra note 42, at 187 (quoting Herman Edelsberg) (internal quotation marks omitted); see also 112 CONG. REC. 13,689 (1966) (statement of Rep. Griffiths); HARRISON, supra note 42, at 189 (reporting that Edelsberg allegedly circulated a memo at the EEOC suggesting that the agency should adopt an official seal depicting a brown rabbit with a white rabbit “couchant” and a legend reading “Vive la différence”).
sentiment at the White House conference. "I have a very attractive secretary," he declared; "I doubt that I would want a wavy-haired, blond male as my secretary."¹⁴⁴ Also making an appearance at the conference was the male Playboy bunny — the corseted, cotton-tailed specter that loomed over almost all discussions of Title VII’s sex provision in the mid-1960s.¹⁴⁵ Lest this specter become a reality, employers urged the EEOC to take into account the value of workplace policies that respected basic heterosexual norms when interpreting the term discriminate "because of sex."¹⁴⁶ Attendees at the White House Conference offered a range of suggestions about how the EEOC might interpret the statute in a manner consistent with these underlying normative concerns. A number of panelists suggested that the agency, and eventually federal courts, should consult "national mores"¹⁴⁷ in determining what counts as sex discrimination, allowing sex-based employment policies to stand when they reflect deeply rooted cultural norms regarding gender and sexuality. Others argued that the EEOC should look to "socially desirable objectives as a standard in interpreting" the law.¹⁴⁸ They noted that the advantage of this interpretation is that it would enable legal decisionmakers to distinguish between "differential legislation that is socially desirable" and "true discrimination."¹⁴⁹ On this interpretation,

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¹⁴⁴ White House Transcript, supra note 103, at 80.

¹⁴⁵ Id. at 16–17. Shortly after Title VII went into effect, the Wall Street Journal invited its readers to imagine lounging in a Playboy Club and being served drinks by a "shapeless, knobby-kneed male "bunny." Sex & Employment, WALL ST. J., June 22, 1965, at 1. Likewise, an editorial in the New York Times asked whether the specter of men serving drinks in skimpy corsets with cottontails meant that it was no longer safe to "advertise for a wife." De-Sexing the Job Market, N.Y. TIMES, Aug. 21, 1965, at 20.

¹⁴⁶ The fact that the term "sex" was used to refer both to the categorization of individuals as men and women and to sexual intercourse meant that Title VII’s sex provision routinely triggered concerns about sexuality. In fact, slippage between these two conceptions of "sex" was constant in discussions of Title VII’s sex provision in the 1960s. When a reporter at the EEOC’s first press conference asked Franklin D. Roosevelt, Jr., "What about sex?," the EEOC Chairman replied with a laugh, "I’m all for it." John Herbers, Bans on Job Bias Effective Today, N.Y. TIMES, July 2, 1965, at 32 (quoting Franklin D. Roosevelt, Jr.) (internal quotation marks omitted). When Sonia Pressman began to advocate that the EEOC more actively enforce Title VII’s prohibition of sex discrimination, her male colleagues dubbed her a "sex maniac." Fuentes, supra note 124, at 132 (quoting Charles T. Duncan) (internal quotation marks omitted). This history makes it particularly curious that courts in Title VII cases have so often cited the "plain meaning" or dictionary definition of the word "sex" as proof that sexuality-based discrimination falls outside the scope of the statute. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 & n.4 (9th Cir. 1977) (citing the definition of "sex" in Webster’s Dictionary as, inter alia, "sexually motivated phenomena or behavior" and "sexual intercourse," id. at 662 n.4 (quoting WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1970)) (internal quotation mark omitted), as evidence that "sex" must "be given [its] traditional definition based on anatomical characteristics" when interpreting Title VII, id. at 662).

¹⁴⁷ See, e.g., White House Transcript, supra note 103, at 134.

¹⁴⁸ Id. at 126.

¹⁴⁹ Id. at 105.
panelists suggested, Title VII’s sex provision would not apply either to “protective” labor legislation or to employer-based retirement and benefit plans that (ostensibly) favored women by recognizing their financial dependence on their husbands. A lawyer for a firm in Washington, D.C., advised the EEOC that the federal government’s own conduct in regard to retirement and benefits plans offered “a basis whereby the Commission could consider these . . . plans as not being discriminatory.” He explained that “discrimination” was illegal in the federal civil service “under basically the same standards set up in Title VII,” but that this prohibition was not understood to apply to sex-differentiated benefit plans that favored women. Thus, he argued, the government’s own practices militated in favor of defining Title VII’s sex provision in a manner that preserved benign forms of sex-based regulation.

EEOC Commissioner Samuel Jackson observed in the mid-1960s that “the sex provision of Title VII is mysterious and difficult to understand and control.” This observation captures the anxiety that Title VII’s prohibition of sex discrimination generated in this period. The notion that business practices long taken for granted or even valued might now be defined as discriminatory was unsettling, particularly as the oddly truncated manner in which the proposal to bar sex discrimination became law meant that the “intent and reach of the amendment were shrouded in doubt.” There was still “a good deal of talk at various high levels in Washington about taking sex out of Title VII” in the mid-1960s, and the concept of sex discrimination still triggered laughter in many corners. But it was nonetheless important to the business community and other proponents of the status quo to exert some “control” over the statute, lest the EEOC and courts be influenced by some of the more robust critiques of sex-based regulation that had begun to emerge in this period.

Betty Friedan’s bestselling book, The Feminine Mystique, published in 1963, contained a stark indictment of the male breadwinner–female homemaker model on which American ideals concerning work and

150 Id. at 46.
151 Id.
153 See EQUAL EMP’T OPPORTUNITY COMM’N, supra note 26, at 5.
155 FUENTES, supra note 124, at 129 (noting that in 1965, “[w]ords like ‘sex discrimination’ and ‘women’s rights’ hadn’t yet become part of our national vocabulary” and that “[i]n [her] early speeches for the EEOC, any reference to women’s rights was greeted with laughter”).
family had been constructed. In 1964, Representatives Griffiths and St. George launched a similarly overarching critique of the nation’s gender trouble during the debate over Title VII’s sex provision, asserting that this trouble was pervasive and deeply rooted. Their colleague, Representative Bass, suggested during the same debate that to be responsive to these problems, the law would have to interrogate practices such as the airlines’ practice of firing stewardesses upon marriage — not because this practice sorted men and women along biological lines, but because it forced women to adopt conventional sex and family roles. This way of thinking about discrimination had the potential to generate far-reaching, antistereotyping interpretations of Title VII’s sex provision.

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

B. A Women’s Movement Enters the Debate

One of the first questions the EEOC confronted after the White House Conference was whether Title VII required the desegregation of job advertisements, which were generally segregated by sex and sometimes still segregated by race in the mid-1960s. In one of his first acts as Chairman of the EEOC, Franklin D. Roosevelt, Jr., announced that Title VII barred the segregation of help-wanted ads by

156 See Louis Menand, Books as Bombs, NEW YORKER, Jan. 24, 2011, at 76.
157 See Barry, supra note 141, at 159 (noting that “more and more airlines in the 1950s and 1960s had stopped hiring male flight attendants” and that “[a]s of 1967, a federal court found, no airline in the United States was hiring male candidates as stewards”).
158 White House Transcript, supra note 103, at 115; see also Administration of Sex Discrimination Provisions of Title VII Discussed by EEOC Chairman, supra note 104, at 6012 (explaining that the EEOC would seek to “avoid punitive requirements for employers” in establishing guidelines for interpreting Title VII’s sex provision).
159 White House Transcript, supra note 102, at 62; see also id. at 124 (arguing that in interpreting Title VII’s sex provision you have to ask “how much inconvenience can reasonably be demanded from an employer”).
160 Graham, supra note 129, at 108.
race, and that the practice was now illegal.161 Whether the segregation of help-wanted ads by sex constituted "discrimination" was a more difficult question. Roosevelt announced that he had appointed a seventeen-member advisory committee to study the issue.162

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

The EEOC’s stance on sex-segregated classified advertising underscored the extent to which judgments about the normative desirability or value of a particular employment practice influenced the agency’s determination of whether it constituted “discrimination.”167 For this reason, Aileen Hernandez and Sonia Pressman concluded "the country needed an organization to fight for women like the NAACP fought for African Americans."168 Without such an organization, employers and

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162 Id.; see also Hernandez, supra note 123, at 10 (noting that almost all of the committee’s members were men, and that a majority of them represented newspapers and advertising agencies).
164 Graham, supra note 129, at 111 (quoting Franklin D. Roosevelt, Jr.) (internal quotation marks omitted).
165 Press Release, Equal Emp’t Opportunity Comm’n, supra note 163.
167 EEOC Chairman Franklin D. Roosevelt, Jr., announced in the fall of 1965 that “common sense” would be the rule guiding the agency’s interpretation of Title VII’s sex provision. Thus, Roosevelt informed the press that the new law would not require employers to hire men or women in cases where it would be inappropriate, and that “he did not foresee any ‘revolution in job patterns,’ such as more male nurses and secretaries, as a result of the [EEOC’s] interpretations.” Elizabeth Shelton, Commission Will Enforce Sex Clause in Title VII with "Common Sense", WASH. POST & TIMES-HERALD, Nov. 24, 1965, at C3 (quoting Franklin D. Roosevelt, Jr.).
168 Fuentes, supra note 124, at 135; see also Hernandez, supra note 123, at 7–9 (discussing her recognition, after the White House Conference, of “the need for an outside activist organization to
the organizations representing them were the dominant voices in discussions about how to interpret Title VII’s sex provision, and they urged the EEOC to interpret the statute in a manner that disrupted the status quo as little as possible. The EEOC, occupied with what it perceived as more serious forms of discrimination, was happy to oblige. Most of the Commissioners shared the view of employers in the mid-1960s that sex discrimination was simply not a problem. Sex-segregated help-wanted advertisements did not seem “discriminatory”; they seemed convenient. Likewise, “protective” labor laws still struck many government officials as “in no way violative of Title VII of the 1964 Civil Rights Act,” because these laws “were not enacted for the purpose of discriminating against women, but were enacted in order to prevent women from being . . . injured to the detriment of themselves, their families and society in general.” Absent any understanding of the ways in which employment practices that enforced conventional sex and family roles injured American workers, the EEOC saw no reason to classify as “discrimination” practices that had long been regarded as socially advantageous.

force the Commission to pay serious attention to the problems facing women in the job market,” id. at 8).

169 See Hernandez, supra note 123, at 8–9 (noting that “[t]he Commission had felt the pressure from organizations like the . . . American Newspaper Publishers Association [and] from the Association of Employment Agencies — each lobbying to influence the Commission’s policies and procedures[,] but there was no national women’s group capable of quick, direct and varied action to pressure the Commission”).

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

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

172 Maryland Law on Women’s Working Hours Not in Conflict with Title VII or Federal Equal Pay Act, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8044, at 6069 (Jan. 19, 1966) (noting, in a Maryland Attorney General’s opinion upholding the legality of “protective” labor legislation, that “[t]he functions of women as wives and mothers was a major consideration” in both the passage and the maintenance of these laws). This understanding of “protective” labor legislation was not exclusive to employers and government officials in the mid-1960s. Some labor feminists continued to argue, even after Title VII was enacted, that “protective” labor legislation constituted “necessary and socially desirable and differential legislation,” rather than “true discrimination” of the sort the statute was designed to combat. See White House Transcript, supra note 103, at 105–06 (statement of Olya Margolin, Washington Rep., Nat’l Council of Jewish Women).

173 The EEOC’s own stance in regard to “protective” labor legislation remained equivocal in this period. The agency asked Congress and the states to reexamine their “protective” laws to determine whether they were still supported by solid rationales, but did not issue a ruling finding such laws discriminatory on their face. Shelton, supra note 167.
In the late spring of 1966, Betty Friedan, Pauli Murray, and a number of other feminists dismayed by the EEOC’s interpretation of Title VII’s sex provision, founded the National Organization for Women (NOW).174 Their aim was to create the sort of organization the feminist lawyers at the EEOC believed was necessary to persuade the government and the American public that not all forms of sex-based regulation were benign and that discrimination “because of sex” was a substantial social problem.175 These efforts had already begun in an uncoordinated way in response to the EEOC’s early rulings on sex discrimination. In a widely publicized speech in the fall of 1965, Pauli Murray blasted the agency’s determination that sex-segregated job advertisements did not qualify as discrimination within the meaning of Title VII.176 Representative Martha Griffiths followed Murray’s lead in the spring of 1966 with a scathing speech in Congress.177 These public condemnations of the EEOC catalyzed the formation of NOW,178 as feminists recognized the need to project a broader and more sustained critique of the way in which the agency charged with enforcing Title VII had decided to interpret its prohibition of sex discrimination.

Among the arguments feminists used in the mid-1960s to persuade the EEOC and the American public of the perniciousness of sex discrimination was an analogy to race discrimination, which was generally regarded as a more serious social problem. In her speech condemning the EEOC’s ruling on job advertisements, Murray argued that sex discrimination was no less detrimental to society than race discrimination and declared that women might decide to march on Washington if that was what was required to alter the EEOC’s stance on sex discrimination.179 Murray expanded on this argument in her influential law review article on “Jane Crow,” which emphasized “parallel[s] between antifeminism and race prejudice”180 and asserted that “[w]omen have experienced both subtle and explicit forms of discrimination comparable to the inequalities imposed upon minorities.”181 Representative Griffiths also sounded this theme during the speech she gave on the House floor condemning the EEOC’s ruling on

174 For a brief account of the founding of NOW, see BETTY FRIEDAN, Introduction — Part II: The Actions, in IT CHANGED MY LIFE, supra note 154, at 104–08.
175 Id. at 99–100 (noting that Sonia Pressman’s entreaties about the need for a national organization to combat sex discrimination helped to spur the foundation of NOW).
176 ASBURY, supra note 171.
178 FRIEDAN, supra note 174, at 96, 103; HARRISON, supra note 42, at 191.
179 ASBURY, supra note 171.
180 MURRAY & EASTWOOD, supra note 111, at 234.
181 Id. at 233. For more on Murray’s use of the race-sex analogy in the mid-1960s, see generally Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE LJ. 1045 (2001).
sex-segregated help-wanted ads.  

Griffiths argued that the “long standing tradition [of listing jobs by sex] exerts enormous power” over women’s employment opportunities, relegating them to second-class jobs just as surely as “white only” signs had confined black people to segregated railcars.

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

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183 Id. at 13,691.
184 Murray and Griffiths also emphasized that “race” and “sex” were not mutually exclusive forms of discrimination and often overlapped in ways that injured black women in particular. See, e.g., id. at 13,689 (arguing that vigorous enforcement of Title VII’s sex provision “is especially important to Negro women since they are victims of both race discrimination and sex discrimination, and have the highest unemployment rate and the lowest average earnings”); Pauli Murray, The Negro Woman’s Stake in the Equal Rights Amendment, 6 HARV. C.R.-C.L. L. REV. 253, 255 (1971) (noting that “[w]hen racial and sexual stereotypes operate simultaneously, they are formidable barriers to economic advancement” and that protections against sex discrimination are therefore particularly necessary for black women); Murray & Eastwood, supra note 111, at 243 (noting that “[w]ithout the addition of ‘sex,’ Title VII would have protected only half the potential Negro work force”).
185 See Murray & Eastwood, supra note 111, at 236–41.
186 See id. at 236–37 & n.30–31 (citing, inter alia, Muller v. Oregon, 208 U.S. 412 (1908), in which the Court upheld a maximum hour law for women in part because it protected their maternal functions, and Goeasert v. Cleary, 355 U.S. 464 (1948), in which the Court upheld a law prohibiting women from tending bar in the absence of “protecting oversight” from their fathers or husbands, id. at 466).
187 Id. at 239.
188 Id.
formally classified individuals. Regulation became “discriminatory” when it forced individuals to conform to traditional conceptions of sex and family roles or “relegate[d] an entire class to inferior status” — which, Murray noted, almost, but not all, formal sex classifications did in the mid-1960s.

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

By the end of the 1960s, NOW’s campaign to effect a public re-definition of discrimination based on sex had begun to achieve concrete legal results. As a result of pressure from the women’s movement, the EEOC had begun “to rule almost as aggressively on

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189 Id. at 240.
190 Id. at 239.
191 Id. at 240.
194 Id.
196 Id. at 174–75.
197 Statement of Purpose, Nat’l Org. for Women, supra note 193, at 159–60 (identifying, as one of the organization’s chief concerns the fact that “childbearing… continues to be a most important part of most women’s lives… but still is used to justify barring women from equal professional and economic participation and advance”).
gender as it had from the beginning on race." 199 In 1969, the EEOC issued revised guidelines, which finally determined that sex-segregated job advertising violated Title VII's prohibition of sex discrimination. 200 In 1972, it issued a new set of guidelines — also revising an earlier determination — stating that pregnancy discrimination constituted discrimination "because of sex" under Title VII. 201 The agency also adopted a tougher stance toward "protective" labor legislation, and courts began to invalidate such laws. 202

Congress too responded to pressure from the women's movement with an unprecedented burst of lawmakers designed to further the campaign for sex equality. 204 In March 1972, Congress passed the Equal Rights Amendment (ERA) and sent it to the states for ratifica-

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199 Grah a m, supra note 129, at 115.
200 Hernandez, supra note 123, at 14 (noting that it was a close vote, 3–2, and that the ruling did not take effect for many months because a group of newspapers attempted to enjoin the EEOC from issuing it). For a detailed account of the EEOC's prolonged waverin the question of whether sex-segregated job advertisements constituted discrimination "on the basis of sex," see Nicholas Pedriana, Help Wanted NOW: Legal Resources, the Women's Movement, and the Battle Over Sex-Segregated Job Advertisements, 51 SOC. PROBS. 182 (2004).
202 Nicholas Pedriana, Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978, 21 YALE J. L. & FEMINISM 1, 6 (2009) (noting that the EEOC in the early 1970s "unequivocally ruled — in yet another update of its interpretive guidelines — that state protective laws violated Title VII and . . . [w]ithin a few years, nearly all state protective policies disappeared").
203 See, e.g., Bowie v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld v. S. Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968).
tion. In the same session, Congress passed Title IX of the Education Amendments of 1972, which prohibited sex discrimination in all education programs receiving funds from the federal government. The Ninety-Second Congress also passed the Comprehensive Child Development Act (CCDA), which was intended to fund Head Start, day care and supportive education programs, and was directly responsive to movement claims that women would not experience equality in the workplace as long as they were expected to bear sole responsibility for childcare.

In this period, Congress also reaffirmed and expanded on its commitment to the eradication of sex discrimination in the workplace. In 1972, Congress amended Title VII of the 1964 Civil Rights Act by passing the Equal Employment Opportunity Act, which enabled the EEOC to bring enforcement litigation in federal court and extended the law’s coverage to public employers. Unlike in 1964, Congress in 1972 devoted substantial attention and resources to the issue of sex discrimination and produced a weighty legislative record documenting its commitment to eradicating this form of discrimination. The House Committee Report on the 1972 Amendments explained that reform was necessary because “[d]espite the efforts of the courts and the EEOC, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.” The Report insisted that “[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.” It noted that Title VII’s promise had not been realized in the context of sex, and that the aim of the 1972 Amendments was to revive “the hopeful prospects that Title VII...

205 The Senate passed the ERA by a vote of 84–8 and sent it on to the states for ratification on March 22, 1972. See 118 Cong. Rec. 9598 (1972); see also Jane J. Mansbridge, Why We Lost the ERA 12 (1986).
207 See id. § 901, 86 Stat. at 373-74. Title IX was enacted to expand the protections of both Titles VI (access to educational opportunities) and VII (employment) of the 1964 Civil Rights Act. Title IX extended Title VI’s antidiscrimination protections to cover discrimination on the basis of sex and extended Title VII’s protections against sex discrimination in employment to educational facilities receiving federal funds. Id.
208 The Comprehensive Child Development Act, S. 1512, 92d Cong. (1971), was added as a new title to the Economic Opportunity Amendments of 1971, S. 2007, 92d Cong. (1971). President Nixon ultimately vetoed the CCDA and it never went into effect. For more on the CCDA and its relation to the women’s movement’s demands for equality in the workplace, see Franklin, supra note 192, at 110–11; Post & Siegel, supra note 204, at 2008–12.
offered millions of Americans in 1964.”  The debate on the House floor echoed these commitments. By the mid-1970s, courts had begun to cite the legislative history of the 1972 Amendments as evidence that Congress intended Title VII’s prohibition of sex discrimination to be interpreted broadly to bring an end to the enforcement of “sexual stereotypes” in the workplace.

As the next section shows, these developments altered the legal justifications and forms of argument employers might persuasively offer in defense of practices challenged under Title VII’s sex provision. When Title VII first went into effect, employers routinely defended sex-based employment practices by arguing that such practices helped to preserve conventional sex roles and maintain the traditional family structure. By the late 1960s, these forms of argument had grown less persuasive to the EEOC and, increasingly, to courts. An employer that offered such arguments ran the risk of being informed that “Title VII rejects just this type of romantic paternalism as unduly Victorian.”

Thus, if employers wished to preserve practices challenged under Title VII’s sex provision, after the emergence of the women’s movement, they would have to rely on an alternative form of argument.

C. The Emergence of Formalism as a Limitation on the Law’s Reach

That alternative form of argument emerged in the battle over airline policies that terminated the employment of stewardesses when they married or reached their early thirties. Whether these policies violated Title VII’s prohibition of sex discrimination was one of the most fiercely contested questions in employment discrimination law in the 1960s. Stewardesses arrived at the door of the EEOC to file complaints about these policies on the morning that Title VII went into ef-

212 Id.
213 See Harris v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 426–27 (N.D. Cal. 1977) (discussing the deep commitment to ending sex discrimination in employment expressed not only by the House Committee on Education and Labor, but also by Congress itself during the legislative debate over the 1972 Amendments).
214 See id.; see also, e.g., Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977) (noting that for “an eight-year period following its original enactment, there was no legislative history” to guide interpretation of Title VII’s sex provision, but that in 1972 “there was considerable discussion on the topic” and “[n]ot surprisingly, it then became evident that Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination”); Melani v. Bd. of Higher Educ., No. 73 Civ. 5434, 1976 WL 589, at *17 (S.D.N.Y. June 23, 1976) (noting that the “legislative history [of the 1972 Amendments] indicates very clearly that Congress intended Title VII to become a powerful tool to eliminate sex discrimination”).
215 Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 236 (1969); see also Seidenberg v. McSorley’s Old Ale House, Inc., 317 F. Supp. 593, 606 (S.D.N.Y. 1970) (stating that “[o]utdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity” will no longer serve to justify the exclusion of women from bars).
fected. Partly as a result of stewardesses’ tenacity in challenging these policies, the EEOC found in its first year that complaints of “loss of jobs due to marriage or pregnancy” outnumbered any other type of sex-based complaint. Because the airlines viewed such regulation as an essential component of their business, they defended these policies with equal tenacity. As a result, the battle over sex discrimination in the airline industry persisted for years at the EEOC, in the courts, and the media.

Part of the attraction for the media was that legal issues involving stewardesses were sexier than those involving, for example, “protective” labor legislation. In the 1950s, airlines had increasingly stopped hiring men to work as flight attendants, and by 1967, no airline in the United States hired men for this job. For decades, airlines had been marketing to their mostly male clientele a fantasy centered on the sexual availability of female flight attendants. Thus, while age and marital termination policies had disappeared from almost all other industries by the mid-1960s, the airlines steadfastly maintained these policies. They viewed young, unmarried stewardesses as an essential part of the service they offered, and they encouraged customers to take the same view. In the 1950s, American Airlines partnered with Metro-Goldwyn-Mayer to produce the movie Three Guys Named Mike, in which a stewardess has romantic dalliances with three men she meets onboard and then happily leaves her job to settle down with the humblest of the three. United Airlines held out the same promise with its 1967 advertising slogan: “Everyone gets warmth, friendliness and extra care — and someone may get a wife.” Initially, this marketing strategy focused on care, depicting stewardesses as pleasantly domestic, able to soothe, comfort, and fix drinks for weary business travelers, but as the 1960s progressed, the focus shifted to sex. Airlines began to outfit stewardesses in miniskirts and hot pants; Braniff choreographed an “air strip” in which stewardesses shed layers of their Pucci uniforms during the course of the flight; National inaugurated its infamous “Fly Me” campaign. As the airlines saw it, older or married women would spoil the fantasy — for cus-

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216 BARRY, supra note 141, at 144–45.
218 BARRY, supra note 141, at 135–36 (noting that the media’s obsession with stewardesses in the 1960s did not stem wholly from an interest in their legal claims).
220 See CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 174–75 (1990) (noting that after 1950, stewardesses were among the only American workers who still faced marriage bars in the workplace).
221 THREE GUYS NAMED MIKE (Metro-Goldwyn-Mayer 1951).
222 BARRY, supra note 141, at 179 (internal quotation marks omitted).
223 Id. at 174–84.
tomers, and also for potential employees. The airlines recruited “girls” to work as stewardesses by portraying the job as a “bride school,” in which they would learn everything they needed to know to become exemplary hostesses, wives, and mothers.224

Because the work of a stewardess was so deeply gendered, the airlines argued that their age and marital termination policies fit squarely within Title VII’s BFOQ exception,225 as did their practice of hiring only women to work as flight attendants.226 The crux of the airlines’ argument was that hiring young, single women for the job of stewardess was a legitimate business requirement because male passengers preferred to be served by such people. Airline executives asserted that flight attending was “a young and pretty girl’s job”227 because nobody could “convey the charm, the tact, the grace, the liveliness that young girls can — particularly to men, who comprise the vast majority of airline passengers.”228 The airlines also claimed that allowing married women into the ranks of stewardesses would disrupt administrative operations, because husbands would constantly call to inquire about their wives’ flight schedules; degrade customer service, because some women would be unable “to handle the competing demands of home and job”; and “put a strain on family harmony,” because the demands of the job would prevent women from fulfilling their daily homemaking and childcare responsibilities.229 Thus, the airlines argued, preserving the industry’s age and marriage policies would benefit society as a whole. Jesse Freidin, who represented the Air Transport Association at a public hearing before the EEOC in 1966, concluded his defense of the airlines’ employment practices by asserting that, “[a]s an acceptable and useful job for young girls [and] as a training ground for future wives and mothers . . . the stewardess corps serves an important social purpose and is universally recognized throughout the nation as being a very good thing.”230 United Airlines adopted a more succinct defense, declaring simply that

224 Id. at 36.
226 For further discussion of the airlines’ shifting reliance on the statute’s BFOQ exception, see infra TAN 241–246.
228 BARRY, supra note 141, at 158 (quoting United Airlines’ brief in the first Title VII lawsuit brought by a stewardess).
230 BARRY, supra note 141, at 157 (quoting Jesse Freidin).
“[s]tewardesses should discontinue flying upon marriage and raise families.”

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

EEOC Commissioner Aileen Hernandez agreed. Hernandez had been pressuring the agency to issue rulings on both the airlines’ policy of excluding men from flight attendant jobs and their age and marital termination policies from the beginning of her tenure at the EEOC. After a full year of delay, Hernandez sent her colleagues a memo lambasting their “callous disregard” of female workers. She argued that the airlines’ defense of their policies rested on “all the limiting stereotypes (benevolent or gallant as they may appear) which dictate the second class status of women workers.” By rejecting this defense, she asserted, “we will have begun the long uphill road to equality of opportunity for women and will indicate that our Commission recognizes the multiple roles women may and should play in our society.”

Much to Hernandez’s relief, the EEOC finally voted in November of 1966 that sex was not a BFOQ for the job of flight attendant. That relief was short lived, however: the Air Transport Association

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232 NOW actively supported the stewardesses’ campaign to eradicate age and marital termination policies from the start. Statement of Goals, Task Force on Equal Opportunity in Emp’t, supra note 195, at 175 (discussing plans to support the airline stewardesses’ campaign).
234 See, e.g., id., at 127–28 (statement of Esther F. Johnson).
235 Id. at 200 (statement of Betty Friedan).
236 Id. at 202.
238 Id. at 23.
239 Id. at 24.
240 Id.
241 BARRY, supra note 141, at 159.
(ATA) immediately obtained a restraining order forbidding the EEOC from issuing its decision until a court determined whether Hernandez's participation had tainted the impartiality of the proceedings. 242 The ATA argued that because Hernandez was involved with NOW, an organization that had recently passed a resolution in support of the stewardesses' cause, she could not be an impartial judge of the airlines' policies. 243 In February of 1967, a federal court in Washington, D.C., granted the ATA's request for a preliminary injunction and permanently enjoined the EEOC from releasing its decision. 244

Although the airlines succeeded in preventing the EEOC's November 1966 ruling from going into effect, 245 the fact that the agency had voted as it did signaled to the airlines that its strategy of relying on the BFOQ exception might not prevail in the long run. Thus, in the ongoing contest over age and marital termination policies, the airlines increasingly began to rely on a different argument. When making the BFOQ argument, the airlines had implicitly acknowledged that these policies constituted sex discrimination, but claimed that such discrimination was justified by legitimate business requirements. Now, the airlines argued that these policies did not constitute sex discrimination at all. 246 Because they affected only some women, the airlines argued, these policies could not logically be categorized as discrimination "because of sex." Rather, the airlines argued, these policies

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243 Id. at 232. The judge noted that "[s]ometime during the period between October 14 to October 29, Mrs. Hernandez had a conversation in her office with Pauli Murray concerning the formation of a women's civil rights group called the National Organization of Women," id. at 230–31, and that NOW had elected Hernandez "Executive Vice-President 'subject to her consent'" before the EEOC voted in the airlines' case, id. at 231.
244 Id. at 232. The judge noted that "[s]ometime during the period between October 14 to October 29, Mrs. Hernandez had a conversation in her office with Pauli Murray concerning the formation of a women's civil rights group called the National Organization of Women," id. at 230–31, and that NOW had elected Hernandez "Executive Vice-President 'subject to her consent'" before the EEOC voted in the airlines' case, id. at 231.
245 Indeed, the EEOC's ruling that sex was not a BFOQ for the job of flight attendant was only temporarily thwarted. See Sprogsi v. United Air Lines, Inc., 444 F.2d 1194, 1197 (7th Cir. 1971) ("After extended hearings, the Commission ruled on February 23, 1968, that female sex was not a bona fide qualification for the position of flight cabin attendant . . .").
246 During testimony before the EEOC, a lawyer for one of the stewardesses' unions called attention to the fact that the airlines had radically altered their position. He noted that "[i]n looking over the transcript of the hearing that this Commission held a year ago . . . [he found] one principal difference." Flight Attendant Transcript, supra note 227, at 202 (statement of Herbert Levy). In the previous year's hearing, the airlines had argued "that there is a bona fide occupational qualification which supports the limitation based upon age or marital status upon flight attendants," id. at 203, arguments which took for granted that these limitations constituted sex discrimination. The lawyer noted that "[i]n this hearing, [they] ha[ve] taken the position that the Commission lacks jurisdiction to d3al [sic] with" these issues because they do not constitute sex discrimination. Id.
discriminated on the basis of age and marital status — grounds that were not covered by Title VII.\footnote{247 Id. at 22 (statement of Jesse Freidin) (noting that the EEOC "has no authority to act in respect to complaints which are in fact based upon considerations of anything other than race, creed, color, nationality [sic] origin and sex").}

If age and marriage policies fell outside the scope of Title VII’s protections, the airlines pointed out, the EEOC and the federal courts would have no jurisdiction over these matters. This result was not a side effect of categorizing age and marriage policies as something other than sex discrimination, but the central — and explicit — purpose of doing so. Indeed, the airlines tried to persuade the EEOC and courts to adopt their narrow definition of sex discrimination for explicitly normative reasons. They argued that policies terminating the employment of stewardesses when they married benefitted American families by ensuring that women fulfilled their “homemaking and child-rearing” responsibilities.\footnote{248 Id. They also urged legal decisionmakers to take account of “[w]hat is best for the public”\footnote{249 Flight Attendant Transcript, supra note 227, at 78 (statement of Walter Rauscher).} when determining the scope of Title VII’s sex provision. Customers preferred “extremely young” and “attractive” flight attendants,\footnote{250 Id. at 81.} the airlines argued, and to survive in a competitive industry, airline companies needed to be able to supply “what the American public wants.”\footnote{251 Id. at 81.} “[O]ur product must be attractive,” a Vice President for American Airlines informed the EEOC: “[W]e . . . cannot afford to have gray packaging. We must have a glamorous product. Our product must be wanted by people.”\footnote{252 Id. at 81.} Moreover, the airlines argued, “[i]t is a free-enterprise system,”\footnote{253 Id. at 109 (statement of Frank Sharp).} the United States was not, and should not be, the kind of country that tried to micromanage the employment practices of private companies.

Because the argument that Title VII should be interpreted formally, to apply only to practices that separate all men from all women, was designed for the same purpose as the BFOQ argument (namely, limiting the law’s reach), airlines in the 1960s often made these arguments simultaneously and interchangeably. When federal courts became involved in disputes over sex-based employment practices, they too sometimes treated these arguments as fungible. In \textit{Cooper v. Delta Airlines, Inc.}\footnote{254 274 F. Supp. 781 (E.D. La. 1967).} the first federal case involving the legality of the airlines’ marriage policies, Delta mounted an extensive BFOQ defense, “with psychological experts and airline personnel officials tes-
tifying that successful passenger service required young, single female attendants.”255 A Louisiana district court found that Delta’s evidence had shown “that ‘single women’ are better stewardesses than ‘married women’ for various reasons viz: better passenger acceptance, change flight schedules easier, less likelihood of pregnancy.”256 Yet rather than finding that Delta’s marriage policy fell into the BFOQ exception, the court found that it did not constitute sex discrimination at all because it did not divide men and women along biological lines. The court was candid about the fact that its decision rested on a normative foundation. It noted that “‘sex’... just sort of found its way into the equal employment opportunities section of the Civil Rights Bill,”257 and that many government officials, including Representative Emanuel Celler, had argued against its inclusion.258 The court then asserted that “Delta has a right to employ single females and to refuse to employ married females,”259 and that it had no intention of interpreting an unpopular law to infringe that right.

Cooper v. Delta was one of the first instances in which a court adopted a formalistic or anticlassificationist approach to limit the reach of antidiscrimination law. This practice would become widespread in the 1970s, reaching its apotheosis, in the context of Title VII law, in Gilbert. Yet formalism as it was practiced by courts and other legal actors in the 1960s differed significantly from the practice the Court would later describe. By the mid-1970s, the Court had begun to depict formalism as “an objective and determinate rule” that “define[s] discrimination solely with reference to the structure of a social practice” and “can be applied without additional value judgments.”260 But as the battles over sex-based employment practices in the 1960s show, courts’ decisions about when and how to apply formalistic approaches were largely dependent on value judgments about the practices they were analyzing. The court in Cooper adopted a formalistic approach explicitly in order to limit Title VII’s reach and preserve employers’ “right” to implement hiring and retention policies that reflected and reinforced conventional sex roles. In the same period, courts and other legal actors often declined to adopt a formalistic approach in cases involving practices such as “protective” labor legislation and sex-segregated job advertising, where doing so would have disrupted the enforcement of traditional sex and family roles. Analysis

255 BARRY, supra note 141, at 162–63.
256 Cooper, 274 F. Supp. at 782.
257 Id. at 783.
258 Id.
259 Id.
of the formal characteristics of employment practices was not the decisive factor in courts’ determination of whether these practices ran afoul of Title VII’s prohibition of sex discrimination; social judgments about the desirability of these practices played a substantial role in such determinations.

Because formalism functioned not as an objective rule for determining the reach of Title VII, but as a tool for implementing more substantive commitments, feminists in the 1960s were just as likely as employers to adopt formalist arguments when these arguments furthered their normative ends. In her impassioned 1966 speech attacking the EEOC’s ruling on sex-segregated job advertisements, for instance, Representative Griffiths analogized the practice to racially segregated waiting rooms in railway stations; she argued that Title VII prohibited such classifications. Yet, Griffiths also argued that segregating help-wanted ads by sex violated the law because this practice perpetuated deeply entrenched forms of inequality and “condone[d] the continuation of outmoded and prejudiced conceptions of restricting women to ‘women’s work.’” Similar concerns motivated feminists in this period to argue that practices such as terminating the employment of stewardesses when they married and discriminating on the basis of pregnancy violated Title VII’s sex provision, though these practices did not formally classify employees on the basis of sex — an understanding that was evidently shared by the hundreds of workers who brought Title VII claims challenging these practices in the 1960s. Formalism, in the hands of feminists, was a tool for disrupting practices that perpetuated traditional conceptions of women’s sex and family roles, but it did not define the concept of discrimination “because of sex”; to determine whether an employment practice fell into this category, it was necessary to consider its social meaning and effects.

As we have seen, the use of formalism by employers and courts sympathetic to their interests was also guided by social concerns. They adopted formalistic approaches when doing so limited the statute’s reach and preserved forms of regulation they considered desirable; in cases where formalism would have disrupted such regulation, they disregarded it. Formalism did not serve in any of these instances as an objective or absolute rule for determining which employment practices qualified as discrimination “on the basis of sex”; it served instead as a vehicle for realizing more substantive judgments about which forms of workplace regulation the law ought to prohibit — or preserve.

262 Id. at 13,693.
D. Non-Formalistic Ways of Reasoning About Sex Discrimination

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

The court in Martin Marietta did not attempt to conceal the normative judgments about men’s and women’s sex and family roles that motivated its decision; nor did it seek to disguise its view that there was something overly formalistic and unnatural about requiring that an employment practice divide all men from all women in order to count as discrimination “because of sex.” Dissatisfaction with this form of reasoning was not confined to the majority. The Chief Judge, joined by two of his colleagues, wrote a stinging dissent from the denial of rehearing en banc in Martin Marietta attacking the court’s formalistic interpretation of the statute. The dissenters argued that

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264 411 F.2d 1 (5th Cir. 1969).
265 Id. at 4; see also id. (arguing that it would be absurd to suggest that Congress could have intended Title VII to outlaw forms of discrimination that were rooted in such fundamental differences between men’s and women’s roles in the family).
266 Id.
267 Id.
268 Id.
269 See id. (repeatedly referring to the company’s policy as “discrimination” and concluding only in order to reach its preferred result that “the seeming discrimination here involved was not founded upon ‘sex’ as Congress intended that term to be understood”).
270 Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing en banc).
when Congress enacted Title VII, “mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude,” and that “one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.” The dissenters argued that these fundamental commitments should guide the determination of what qualifies as discrimination “because of sex.” They also noted that working mothers account for a substantial percentage of the American workforce, that mothers continue to confront significant obstacles to workplace equality, and that President Nixon had recently championed “greatly expanded day-care center facilities” to help mothers overcome these very obstacles. Thus, the dissenters argued, it ran directly contrary to the government’s objectives to permit employers “to deny employment to those who need the work most.”

In the late 1960s, the EEOC itself adopted this antistereotyping approach to Title VII’s sex provision in a landmark series of rulings concerning the airlines’ age and marriage policies. As noted above, the airlines increasingly began to argue in this period that their age and marriage policies did not discriminate on the basis of sex because they did not distinguish between men and women, but only between two groups of women. In the summer of 1968, the EEOC categorically

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271 Id. at 1260.
272 Id. at 1261.
273 Id. at 1261 n.13. The Chief Judge cited approvingly the EEOC’s argument that “it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment,” id., and argued that Title VII should be interpreted to further this project, id. at 1261–62.
274 Id. at 1262. In the early 1970s, Congress repeatedly reaffirmed its own commitment to enabling women to pursue motherhood and paid work with a series of laws designed to increase the availability of childcare. See, e.g., Revenue Act of 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497, 518–20 (instituting a progressive childcare tax deduction for working parents); Comprehensive Child Development Act, S. 1512, 92d Cong. (1971) (authorizing $2 billion for Head Start, day care, and supportive education programs, but vetoed by President Nixon, who changed his mind about daycare in the early 1970s). In the same session, Congress amended and broadened the scope of Title VII, in part because it found that working women continued to face widespread discrimination in the workplace that deprived them of the ability to support their families. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; S. REP. No. 92-415, at 7–8 (1971). For more on the Ninety-Second Congress’s concerted efforts to combat sex discrimination, see supra TAN 204–214.
276 See supra TAN 246–247.
rejected this interpretation, holding that these policies constituted discrimination “because of sex” because they reflected and reinforced conventional understandings of women’s sex and family roles. The EEOC noted that the airlines had defended their policies in precisely these terms, arguing that they were necessary “to avoid the stress on home and family life which would be caused by the absence of married stewardesses from their homes.” In the agency’s view, such arguments merely confirmed that these policies constituted sex discrimination. It did not matter that there was no “actual disparity of treatment among male and female employees”; What defined these policies as discriminatory was that they were based on stereotyped “assumptions about married women” that curtailed their access to the workplace.

In 1971, Justice Thurgood Marshall became the most prominent advocate of this way of reasoning about sex discrimination when he embraced it in *Martin Marietta Corp.* which by then had reached the Supreme Court. The Court in *Martin Marietta* overruled the Fifth Circuit’s determination that barring mothers, but not fathers, of young children from assembly line jobs did not qualify as discrimination “because of sex.” But what the Court gave, it then took away: it suggested that “family obligations, if demonstrably more relevant to job performance for a woman than for a man,” could justify a BFOQ in these circumstances. Rejecting this suggestion in a concurring opinion, Justice Marshall argued that “the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination.” In fact, he argued, Congress “sought just the opposite result. By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes.’”

Marshall cited the EEOC’s recent decisions regarding the airlines’ age and marriage policies as evidence that Title VII did not permit the en-

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280 400 U.S. 542, 544 (1971) (Marshall, J., concurring). *Martin Marietta* was the first sex-based Title VII case to reach the Supreme Court.
281 *Id.* at 544 (per curiam).
282 *Id.*
283 *Id.* (remanding the case to the lower court to determine whether Martin Marietta Corp. could establish that sex was a BFOQ).
284 *Id.* at 545 (Marshall, J., concurring).
285 *Id.* (footnote omitted) (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(1)(ii) (1971)).
force of traditional sex and family roles, regardless of what form that enforcement took.\footnote{286}

Several months later, the Seventh Circuit endorsed this reasoning in Sprogis v. United Air Lines, Inc.,\footnote{287} which held that United’s practice of terminating the employment of stewardesses upon marriage violated Title VII.\footnote{288} The Court in Sprogis rejected the airline’s argument that its marriage policy did not discriminate “because of sex,” but merely differentiated between two groups of women on the basis of a characteristic unprotected by the law. United cited Cooper v. Delta for this proposition, but the Seventh Circuit adopted a critical stance toward that case; it characterized Cooper’s approach as a departure from congressional intent and a betrayal of the statute’s ideals. The court asserted in Sprogis that Title VII was intended to counteract discrimination “resulting from sex stereotypes” and to “eliminate . . . irrational impediments to job opportunities and enjoyment which have plagued women in the past.\footnote{289}

Surveying the legal developments in this period, the author of a 1970 law review article concluded that a new day was dawning in sex discrimination law.\footnote{290} He claimed that when Title VII went into effect, the EEOC failed to grasp “[t]he importance of the sex provision”,\footnote{291} the commissioners seemed “oblivious to sex discrimination”\footnote{292} and hostile toward the idea of trying to combat it. Five years later, however, the agency and federal courts had begun to enforce the law. In cases involving “protective” labor legislation and the BFOQ exception, he noted, “Title VII has been interpreted to . . . reject[] . . . policies based on old-fashioned assumptions and myths about the sexes.”\footnote{293} He predicted that in the future, Title VII would increasingly be used to eradi-

\footnote{286} Id. at 545 & n.2 (citing Colvin v. Piedmont Aviation, Inc., EEOC Decision No. 6-8-6975, [1968–1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8003, at 6011 (June 20, 1968); Neal v. Am. Airlines, Inc., EEOC Decision No. 6-6-5759, [1968–1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6006 (June 20, 1968)). Marshall also cited Representative Ross Bass’s declaration during the legislative debate over Title VII that the law would cover both single and married women as evidence that Congress intended this statute as a bar against the enforcement of traditional sex roles in the workplace. Id. at 545 n.2 (citing 110 CONG. REC. 2578 (1964) (statement of Rep. Bass)).

\footnote{287} 444 F.2d 1194 (7th Cir. 1971).

\footnote{288} Id. at 1197–98.

\footnote{289} Id. at 1198. In Sprogis, the plaintiffs were able to produce male comparators, because United Airlines employed both male and female flight attendants but applied its marriage policy to females. In the airline cases decided by the EEOC in 1968, which struck down the same policy at issue in Sprogis, the plaintiffs were not able to produce male comparators because the airlines in those cases employed only women as flight attendants. In both cases, the legal decisionmakers cited the social meaning and effects of these policies as a reason for striking them down.


\footnote{291} Id. at 268.

\footnote{292} Id. at 269.

\footnote{293} Id. at 284.
cate employment policies that denied women "opportunities to use their talents and fulfill their potential" and reinforced "traditional sex roles and family structure." As for Cooper and the Fifth Circuit's holding in Martin Marietta, the author asserted that "[s]ome judges seem as insensitive to the real meaning of sex discrimination as did the early members of the EEOC." He predicted that judicial resistance to the enforcement of Title VII's sex provision would fade, as the EEOC's had, and that the "overly narrow" and formalistic understanding of sex discrimination adopted by these recalcitrant courts would soon be rejected in favor of a "deeper understanding."

He was wrong.

III. THE INVENTION OF A TRADITION

In 1976, the Court held in General Electric v. Gilbert that discrimination on the basis of pregnancy did not qualify as discrimination "because of sex" under Title VII. In many ways, this decision was a direct descendant of decisions like Cooper and the Fifth Circuit's holding in Martin Marietta. Gilbert relied on the same narrow, formalistic reasoning as these earlier decisions, holding that the term "discriminate . . . on the basis of sex" refers only to practices that sort men and women into two groups perfectly differentiated on the basis of biological sex. Yet courts in the earlier decisions explicitly acknowledged that form followed function in the interpretation of Title VII. They did not claim that the formalistic approach was the only legitimate way to interpret the law; they claimed it was the best way, because it helped to realize a set of broader normative commitments, which generally involved shielding various forms of sex-based regulation from legal interrogation.

Gilbert did not speak in this register. It studiously avoided the kind of "gender talk" that had permeated discussion of Title VII's sex provision over the past decade. In fact, the Court managed to compose an entire opinion on the subject of discrimination against pregnant women without once using the words "mother" or "family." Instead, the Court spoke of values such as deference and fidelity, asserting that its

294 Id. at 283.
295 Id.
296 Id. at 270.
297 Id. at 269.
298 Id. at 273.
300 Indeed, the Fifth Circuit would have been perfectly willing, even pleased, to adopt a broader definition of the term discriminate "because of sex," if it could have used the law's BFOQ exception to preserve sex-based regulations considered benign or normatively appealing. See supra TAN 266–268.
its narrow interpretation of the law was mandated by “tradition.” Briefs filed in Gilbert argued that discrimination against pregnant workers reflected stereotyped assumptions about the incompatibility of work and motherhood and reinforced women’s secondary status in the workplace.301 But the Court rejected the notion that normative concerns should influence the determination of what counts as discrimination “because of sex.” Traditionally, the Court asserted, the term discrimination was defined objectively, by reference to the formal characteristics of a policy or practice. The Court declared itself bound, by its status as interpreter rather than creator of the law, to adhere to this traditional understanding.

Yet as Part II showed, formalism did not function in the 1960s as an objective or neutral rule for determining whether or not a given employment practice ran afoul of Title VII’s sex provision. In the decade after Title VII was enacted, courts and other legal actors applied formalistic reasoning inconsistently and in the service of more substantive judgments about how forcefully the law should constrain workplace practices that reflect and reinforce conventional gender norms. Part III shows that this was no less true in the era of Gilbert. The Court’s decision to view the issue in Gilbert through a formalistic lens was itself dependent on the very social considerations the Court disavowed in its opinion. However, by claiming to disavow such considerations and turning to “tradition” to justify its narrow interpretation of Title VII, the Court obscured the value judgments that have continued to influence what qualifies as discrimination “because of sex.”

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

Historically, women’s capacity to become pregnant and their status as mothers have served as the central justifications for their exclusion from the workforce. Many of the discriminatory practices condemned by congressional proponents of Title VII’s sex provision in 1964 — from “protective” labor legislation to the exclusion of women from juries — were justified by reference to women’s roles as mothers.302

302 See, e.g., Hoyt v. Florida, 368 U.S. 57, 62–63 (1961) (upholding a Florida law excusing women from jury service because women are “still regarded as the center of home and family life,” id. at 62, and will often have “family responsibilities,” id. at 63, incompatible with full participation in the public sphere); Muller v. Oregon, 208 U.S. 412, 421–22 (1908) (upholding a “protective” labor law on the ground that “healthy mothers are essential to vigorous offspring,” id. at 421, and
Even workplace policies that did not explicitly refer to pregnancy and motherhood were often motivated by such concerns: the battle over the airlines’ age and marriage policies was, at its core, a battle about women’s right to continue working when they became mothers. Defenders of these policies routinely cited pregnancy — and the maternal responsibilities that ensued — as the primary justification for “grounding” stewardesses when they reached the maternal stage of their lives.\footnote{See, e.g., Frederic C. Appel, \textit{Woman Pilot Deplores Airlines’ Bar Because of Sex}, N.Y. TIMES, May 23, 1965, at 66 (quoting a United Air Lines spokesman’s observation that “[m]arriage and possible pregnancy preclude women from being considered as long-term employees [sic]” (internal quotation mark omitted)).}

The women’s movement in the 1960s was quite vocal in its opposition to employment discrimination premised on stereotypes about women’s special responsibilities in the home. In 1967, NOW observed that stereotyped conceptions of motherhood were “still [being] used to justify barring women from equal professional and economic participation and advance,”\footnote{Statement of Purpose, Nat’l Org. for Women, supra note 193, at 159–60.} and demanded an end to “discrimination based on maternity.”\footnote{Statement of Goals, Task Force on Equal Opportunity in Emp’t supra note 193, at 174–75.} Stewardesses echoed these claims in their campaign against the airlines’ age and marriage policies. They argued that these policies reflected precisely the kind of outmoded ideas about work and motherhood that Title VII was designed to counteract. During the monumental Women’s Strike for Equality organized by NOW in the summer of 1970,\footnote{For more on the Women’s Strike, see FRIEDAN, supra note 154, at 180–95; Robert C. Post & Reva B. Siegel, \textit{Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act}, 112 YALE L.J. 1943, 1988–89 (2003). The Women’s Strike, which drew tens of thousands of women, was designed “to publicize three core movement claims: (1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education.” Id. at 189. The strikers made these three demands to illustrate the central role that the regulation of women’s sex and family roles played in depriving them of equal opportunity in the workplace.} a contingent of stewardesses led a march in Washington, D.C., bearing signs that read “Storks Fly, Why Can’t Mothers?,” “We Want Our Babies and Our Wings,” and “Mothers Are Still FAA Qualified.”\footnote{BARRY, supra note 141, at 188 (internal quotation marks omitted).}

By the early 1970s, thousands of women had joined in the campaign to end employment practices that discriminated against pregnant women and mothers. Among the chief targets of this campaign were policies that exempted pregnancy from otherwise comprehensive disability insurance plans. Defenders of these policies argued that such exemptions were critical to preserving the traditional organiza-
tion of the American family. The Wall Street Journal editorial board, for instance, opposed extending disability coverage to pregnant women on the ground that it would "weaken the family unit," in part by providing women with "economic protection for bearing children out of wedlock."\(^{308}\) In 1966 — a period in which the EEOC remained openly hostile to Title VII's prohibition of sex discrimination — the agency issued an opinion letter stating that a "benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."\(^{309}\) By the early 1970s, however, the idea that pregnancy discrimination did not constitute sex discrimination was increasingly a minority view.\(^{310}\) In 1972, the EEOC retracted its initial ruling and issued a new guideline stating that Title VII barred the exclusion of pregnancy-related disability from employer benefit plans.\(^{311}\) That same year, the Department of Health, Education, and Welfare issued nearly identical guidelines\(^ {312}\) interpreting Title IX of the Education Amendments of 1972.\(^{313}\) By 1975, numerous federal courts had ruled that pregnancy discrimination was discrimination "because of sex" within the meaning of Title VII.\(^{314}\) All six of the fed-

\(^{308}\) Editorial, Examining Sex Discrimination, WALL ST. J., April 12, 1974, at 6.


\(^{310}\) Mayeri, supra note 108, at 67.

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


\(^{313}\) Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. § 1681-1688 (2006)). Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

eral appellate courts that had considered the issue reached the same conclusion.\footnote{See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting) (citing Commc’ns Workers of Am., 513 F.2d 1024; Wetzel, 511 F.2d 199, vacated on jurisdictional grounds, 424 U.S. 737 (1976); Gilbert, 519 F.2d 661; Tyler, 517 F.2d at 1097–99; Satty, 522 F.2d 850; Hutchison, 519 F.2d 961).}

This trajectory came to an abrupt halt in 1974, when the Supreme Court rejected an equal protection challenge to a provision of the California insurance code that exempted pregnancy from the state’s otherwise comprehensive disability insurance program.\footnote{Geduldig v. Aiello, 417 U.S. 484 (1974).} The lower court found that the provision violated equal protection because it was based on “sexual stereotypes,”\footnote{See Aiello v. Hansen, 359 F. Supp. 792, 798 (N.D. Cal. 1973).} but the Supreme Court rejected this finding. It held, in Geduldig v. Aiello,\footnote{417 U.S. 484.} that pregnancy discrimination was not sex discrimination because it did not divide men and women along the axis of biological sex, but merely differentiated between two groups of women.\footnote{Id. at 496–97 & n.20.} Two years later, the Court endorsed this formalistic approach in Gilbert, which extended the holding in Geduldig into the context of Title VII. In Gilbert, however, the Court offered a new justification for its holding. Whereas the Court in Geduldig simply asserted that pregnancy discrimination was not sex discrimination, the Court in Gilbert claimed that this understanding was deeply rooted in history and tradition. Citing the “long history of judicial construction”\footnote{Gilbert, 429 U.S. at 145.} of the term discrimination in cases involving race, the Court asserted that this term had “traditionally”\footnote{Id.} been understood to refer only to practices that formally classified on the basis of a protected trait.

This was a formative moment in contemporary antidiscrimination law. The mid-1970s marked the end of the long Warren Court era, in which the Court had worked to dismantle racial stratification in a diverse array of social institutions, regardless of whether that stratification resulted from overt racial classification or less formal means of maintaining racial hierarchy.\footnote{In the late 1970s, Alan David Freeman identified 1974 as the year in which the Court adopted colorblindness as its primary approach to questions in race discrimination law. Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1102 (1978); cf. Mayeri, supra note 108, at 76–105 (discussing the conservative turn in the Court’s race discrimination jurisprudence in the mid-1970s and its effects on the way that feminist litigators approached sex discrimination cases). See generally Laura Kalman, Right Star Rising: A New Politics, 1974–1980 (2010) (dating the emergence of the modern conservative movement to the mid-1970s and examining its substantial effects on Supreme Court personnel and race discrimination doctrine).} The Court began in the mid-1970s to
identify formal classification, rather than racial subordination or substantive inequality, as the evil that constitutional and statutory antidiscrimination law was intended to prevent.\footnote{323} Under this new regime, busing and affirmative action became problems to remedy,\footnote{324} and laws and practices that helped to maintain de facto segregation in schools, neighborhoods, and workplaces ceased to register as legal concerns.\footnote{325} \textit{Geduldig} extended the Court’s turn toward formalism into the context of sex. But it was \textit{Gilbert}, two years later, that consolidated the idea that discrimination “because of sex” referred only to practices that divided men and women into two groups along the axis of biological sex.\footnote{326} \textit{Gilbert} constructed a history and a pedigree for this idea, suggesting that courts had no choice but to interpret \textit{Title VII} in a formalistic manner if they wished to remain faithful to the American legal tradition.

For an opinion that purports to be grounded in a longstanding interpretive tradition, \textit{Gilbert} contains notably few historical citations. Of the cases it does cite, some seem to undermine its claim that the term “discrimination” has been understood throughout American history in exclusively formalistic terms. One of these cases, \textit{Morton v. Mancari},\footnote{327} involved a \textit{Title VII} challenge to the Bureau of Indian Affairs’ longstanding practice of granting explicit employment preferences to qualified Indians. The Court rejected this challenge. It held that the “preference [wa]s a longstanding, important component of the Government’s Indian program,” and that historically, this program had not been understood to constitute the kind of racial discrimination that \textit{Title VII} was designed to counteract.\footnote{328} Asserting the importance of analyzing the concept of “discrimination” in a context-specific and historically sensitive manner, the Court declared:

\footnote{323}{See generally I. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007) (examining the development of “reactionary colorblindness” and its emergence in the Court’s race discrimination jurisprudence in the 1970s).}


\footnote{326}{See Gilbert, 429 U.S. at 145.}

\footnote{327}{417 U.S. 535 (1974).}

\footnote{328}{Id. at 550. Although it had characterized American Indians in racial terms in previous cases — and the lower court had done so in this case — the Court in \textit{Mancari} decided to characterize the BIA’s employment policy as a political preference. \textit{Id.} at 553–54. The Court’s shifting understanding of what counts as a racial classification provides a further demonstration of the ways in which formalistic approaches to questions involving discrimination are inherently dependent on value judgments about the practices at issue. For a more detailed examination of the Court’s determination that the BIA’s preference for Indians did not constitute discrimination “on the basis of race,” see generally Carole Goldberg, What’s Race Got to do With It?: The Story of Morton v. Mancari, in \textit{RACE LAW STORIES} 237 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).}
A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference . . . .

In this case, the Court portrays formalistic reasoning about discrimination as an overly rigid approach to a concept that is necessarily defined in terms of social meaning and practical effects.

Mancari was not the only case cited in Gilbert in which the Court had recently rejected a formalistic approach to the concept of discrimination. In his dissenting opinion in Gilbert, Justice Brennan noted that the Court had also rejected such an approach in another 1974 case, Lau v. Nichols. In Lau, the Court held that San Francisco’s failure to provide special language instruction to Chinese-speaking students in its public schools violated Title VI’s prohibition of race, color, and national origin discrimination, despite the fact that the city had not formally classified any students on these bases. The Court held in Lau that given the broad social objectives underlying the statute, its antidiscrimination provisions should be interpreted to require the school district to “take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” The Court noted that the school district’s failure to do so had “all [the] earmarks of the discrimination banned by the regulations,” suggesting that the term “discrimination” did not necessarily entail classification.

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

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329 Mancari, 417 U.S. at 550.
330 Gilbert, 429 U.S. at 159 (Brennan, J., dissenting).
332 Id. at 568 (quoting the Department of Health, Education, and Welfare’s 1970 guidelines requiring school receiving federal funds to take such measures).
333 Id.
334 Gilbert, 429 U.S. at 159 (Brennan, J., dissenting).
335 See id. at 148–49 & n.1.
This was not a bug, but a feature of the Court’s new formalist rhetoric. In the 1960s, employers and courts were explicit about the normative concerns motivating their adoption of a narrow, anticlassificationist approach to Title VII. They argued that interpreting the law to apply only to employment practices that divided men and women into two perfectly sex-differentiated groups would limit the statute’s reach and help to maintain the traditional gendered organization of the family. By the mid-1970s, however, justifications for employment practices that explicitly relied on stereotyped conceptions of men’s and women’s roles had become increasingly less persuasive in the legal arena.336 Concerted efforts by the women’s movement had convinced courts, at least in some cases, that regulations enforcing such stereotypes violated antidiscrimination law.337 Formalism provided a “cooler” way of approaching such issues338: It enabled the Court to respond to charges that it was upholding employment practices that “fostered [sexually] stratified job environments to the disadvantage of [women]”339 by asserting that it was simply deferring to congressional intent and remaining faithful to tradition.

Eric Hobsbawm observes that “traditions” are often invented for the purpose of “establishing or legitimizing institutions . . . or relations of authority.”340 By the 1970s, arguments based explicitly on gender stereotypes had lost some of their power to legitimate narrow interpretations of Title VII’s sex provision. The argument that “tradition” compelled courts to interpret the statute narrowly sounded in far more anodyne notions of deference and fidelity. These notions

336 See Franklin, supra note 192.
337 In 1961, the Supreme Court upheld a Florida law excusing women from jury service on the ground that “woman is still regarded as the center of home and family life” — a role that entailed “special responsibilities” and was presumably incompatible with full participation in civic life. Hoyt v. Florida, 368 U.S. 57, 62 (1961). By the early 1970s, the Court had begun to reject stereotyped conceptions of men’s and women’s roles as a justification for sex-based state action. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a federal law requiring husbands, but not wives, of service members to prove dependency in order to qualify for benefits); Reed v. Reed, 404 U.S. 71 (1971) (striking down an Idaho statute that preferred men to women in the appointment of estate executors).
338 Cf. Goldberg, supra note 17, at 794 (noting that “[t]he comparator heuristic, as it is used by most courts . . . gives the appearance that the facts of differential treatment, rather than the courts’ own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene”).
339 Gilbert, 429 U.S. at 160 (Brennan, J., dissenting) (alterations in original) (quoting McDonell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)) (internal quotation marks omitted).
340 Hobsbawm, supra note 21, at 9. Hobsbawm notes that the invention of tradition “occur[s] more frequently when a rapid transformation of society weakens or destroys the social patterns for which ‘old’ traditions had been designed . . . or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible” to suit current needs. Id. at 4–5. This may be especially true in a legal context, where claims of obedience to precedent or original understanding carry special weight and may be particularly useful in justifying revolutionary interpretations of the law.
more anodyne notions of deference and fidelity. These notions appeared to have nothing to do with concerns about gender and the family. Yet the adoption of formalism here and not elsewhere suggests that social judgments about the practice of pregnancy discrimination influenced the Court’s determination that Title VII’s sex provision did not reach this far. In other words, Gilbert did not transcend the debate over how strictly Title VII should regulate employment practices that enforced traditional gendered conceptions of the family: it took a side in that debate.

B. The Persistent Demand for Opposite-Sex Comparators

Ostensibly, Gilbert is no longer good law. When Congress enacted the PDA, it rejected the Court’s interpretation of Title VII and declared that pregnancy discrimination was a form — perhaps the iconic form — of discrimination “because of sex.” Numerous legislators in 1978 expressed surprise that it was necessary to clarify this point, as it seemed obvious that “the assumption that women will become pregnant and leave the labor force . . . is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.” In fact, the consensus in both the House and Senate was that the PDA simply restored the understanding of Title VII’s sex provision held by Congress, “the EEOC and the overwhelming majority of the Federal courts which addressed this issue prior to the Gilbert decision.”

The Court has since acknowledged on numerous occasions that “[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in . . . Gilbert.” In other words, the PDA “not only overturned

342 H.R. REP. NO. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751; see also 124 CONG. REC. 21,442 (1978) (statement of Rep. Tsongas) (explaining that the PDA would “put an end to an unrealistic and unfair system that forces women to choose between family and career — clearly a function of sex bias in the law, which no longer reflects the conditions of women in our society”).
343 124 CONG. REC. 21,440 (statement of Rep. Thompson); see also S. REP. NO. 95-331, at 7–8 (1977) (“The bill is merely reestablishing the law as it was understood prior to Gilbert . . . .”); 124 CONG. REC. 36,819 (statement of Sen. Stafford) (“Congress in 1964 . . . intended to prohibit discrimination in employment on the basis of pregnancy when it enacted the original Civil Rights Act.”); id. at 21,442 (statement of Rep. Myers) (“This legislation will clarify the original intent of Congress that sex discrimination in title VII includes pregnancy-based discrimination.”); id. at 21,440 (statement of Rep. Thompson) (“H.R. 6075 seeks only to clarify what most feel was the original intent of Congress in enacting the Civil Rights Act — that the title VII prohibitions against sex discrimination in employment include discrimination based on ‘pregnancy, childbirth, or related medical conditions.’”).
344 Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983); see also Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 284–85 (1987) (explaining that “the first clause of the PDA reflects Congress’ disapproval of the reasoning in Gilbert,” id. at 284, while “the second
the specific holding” in *Gilbert*, it “also rejected the test of discrimination employed by the Court in that case.”\(^{345}\) Despite this seemingly categorical rejection, however, *Gilbert’s* reasoning about what it means to discriminate on the basis of sex — and the “test of discrimination” it established — continues to limit the protections available to workers under Title VII.

The most formidable obstacle confronting employment discrimination plaintiffs today is courts’ ongoing demand for comparator evidence. In most circumstances, courts in Title VII cases continue to require that sex discrimination plaintiffs adduce opposite-sex comparators — individuals similarly situated to themselves in all relevant respects aside from biological sex.\(^{346}\) Only by comparing the plaintiff to such a comparator, courts hold, is it possible to determine that the alleged discrimination was truly based on “sex.”

This requirement expresses in doctrinal terms *Gilbert’s* formalistic conception of discrimination: it is not concerned with the social meaning or practical effects of a challenged employment practice, but only with whether it divides men and women into two groups along the axis of biological sex. In fact, courts applying the comparator requirement often describe sex discrimination in explicitly mathematical terms. A passage oft-quoted in sex discrimination decisions suggests a married woman can show that she has suffered sex discrimination only by comparing herself to a married man because when one “cancel[s] out the common characteristics of the two classes being compared [(e.g.,] married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and *sex remains the only operative factor in the equation.*”\(^{347}\)

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\(^{345}\) *Newport News,* 462 U.S. at 679 (“Proponents of the [PDA] repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision.”).

\(^{346}\) *Goldberg,* supra note 17, at 750 (noting that comparators “constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination’s very definition. On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination.” (footnote omitted)).

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

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

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

There are some exceptions to courts’ otherwise pervasive insistence that plaintiffs in sex discrimination cases produce opposite-sex comparators. When Congress enacted the PDA, it implicitly rejected

\footnotesize{348 See Goldberg, supra note 17, at 751–64 (discussing the many “circumstances in which courts’ insistence on the production of comparators inhibits or precludes discrimination claims,” id. at 751); see also Joan Williams, Unbending Gender 66 (2000) (noting that “[m]ost women work with other women” and that “[t]hree-fourths of all working women still work in predominantly female occupations).

349 See, e.g., supra note 18. The Patient Protection and Affordable Care Act amended Section 7 of the Fair Labor Standards Act to require employers to provide breastfeeding mothers with break time and a private space in which express milk, but it did not amend Title VII’s prohibition of sex discrimination. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 577–78 (codified at 29 U.S.C. § 207(r)(1)–(4) (2010)).


351 See, e.g., Martinez, 49 F. Supp. 2d at 309 (“Title VII forbids gender discrimination in employment, but gender discrimination by definition consists of favoring men while disadvantaging women or vice versa. The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII. This was made clear more than twenty years ago in General Electric Co. v. Gilbert”); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (finding that “under the principles set forth in Gilbert, the plaintiff could not establish that she had been discriminated against “on the basis of sex”). For more on courts’ continuing reliance on Gilbert in such cases, see Widiss, supra note 18, at 551–56.}
the Court’s suggestion in *Gilbert* that comparators are definitionally required to establish discrimination “because of sex.” Plaintiffs alleging pregnancy discrimination do not need to produce opposite-sex comparators to win sex-based Title VII claims. Likewise, in 1989, the Court held in *Price Waterhouse v. Hopkins* that Title VII barred employers from taking adverse employment actions based on an assumption or insistence that employees “match[] the stereotype associated with their group.” This holding permits plaintiffs to prove sex discrimination without producing comparator evidence, as the Court suggested that evidence of sex stereotyping alone may be sufficient to show “that gender played a part” in an employer’s decision.

In the past decade, a number of courts have held that evidence of sex stereotyping is sufficient to establish a claim of sex discrimination in the absence of comparator evidence. In 2009, the First Circuit held that a woman who was told she had been denied a promotion not because of anything she “did or didn’t do,” but because she “had a lot on [her] plate” with four children at home had established a claim of sex discrimination sufficient to survive summary judgment, even though she produced no evidence that she was treated differently than

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352 490 U.S. 228 (1989).
353 Id. at 251 (plurality opinion).
354 Id. (emphasis omitted). However, in practice, it has often proven difficult, even after *Price Waterhouse*, to establish sex-based Title VII claims in the absence of comparator evidence. See Claire-Therese D. Luceno, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost-Effective Solutions for a Flexible Workplace*, 3 Hastings Bus. LJ. 157, 162–68 (2006) (discussing courts’ continued insistence on comparator evidence in Title VII cases involving claims of sex stereotyping). Sexual harassment doctrine provides another means of establishing a sex-based Title VII claim without producing an opposite-sex comparator, but here too, plaintiffs face significant obstacles to proving their claims. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 86–87 (2011) (arguing that the doctrinal framework courts have developed in the context of sexual harassment screens out many cases that should be covered under Title VII by imposing evidentiary burdens not warranted by the statutory language).
355 Chadwick v. Wellpoint, Inc., 561 F.3d 38, 42 (1st Cir. 2009) (quoting Nanci Miller, plaintiff’s immediate supervisor); see also, e.g., *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (holding that a supervisor’s questioning remarks about whether a female employee would be able to manage her work and family responsibilities after having a second child supported a finding of discriminatory animus when she was fired shortly thereafter); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044–45 (7th Cir. 1999) (holding that a jury in a PDA case could have concluded that “a supervisor’s statement to a [pregnant] woman . . . that she was being fired so that she could ‘spend more time at home with her children’ reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake”); *Plaetzer v. Borton Auto., Inc.*, No. Civ.02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of fathers is not needed to show sex discrimination against mothers where an “employer’s objection to an employee’s parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work; or that work and motherhood are incompatible”). For further discussion of such cases, see generally Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 Hastings L.J. 1311 (2008).
male employees with young children.\textsuperscript{356} In 2004, the Second Circuit held that a school psychologist whose employer denied her tenure after repeatedly remarking on the incompatibility of work and motherhood and suggesting that “ha[v]ing little ones at home”\textsuperscript{357} would prevent her from adequately performing her job stated a claim under Title VII.\textsuperscript{358} The court held that the plaintiff need not produce a comparator because “the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based.”\textsuperscript{359}

The fact that these decisions were hailed as significant developments or even new departures in employment discrimination law\textsuperscript{360} illustrates how powerfully Gilbert’s formalistic reasoning has influenced courts’ understanding of what it means to discriminate “because of sex.” The Court claimed in Gilbert that the concept of sex discrimination had always been defined in exclusively formalistic terms. Yet as Part II showed, “discrimination” was never defined solely in these terms: The EEOC determined as early as 1968 that comparators were not necessary to establish a claim of sex discrimination under Title VII.\textsuperscript{361} In three major cases involving the airlines’ age and marriage policies, the agency declared that “[t]he concept of discrimination based on sex does not require an actual disparity of treatment among

\textsuperscript{356} Chadwick, 561 F.3d at 45–46 (rejecting the district court’s conclusion that the plaintiff’s stereotyping evidence established only that the employer had discriminated against caregivers, not that it had discriminated “on the basis of sex”); see also id. at 42–43 & n.4 (rejecting the employer’s argument that its decision to award the promotion to another woman with children effectively foreclosed the plaintiff from making a sex discrimination claim).

\textsuperscript{357} Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 115 (2d Cir. 2004).

\textsuperscript{358} See id. at 113.

\textsuperscript{359} Id. at 121. In 2007, the EEOC adopted this interpretation in a guidance document specifying that discrimination against workers with caregiving responsibilities may constitute sex discrimination under Title VII “regardless of whether the employer discriminates more broadly against all members of the protected class,” Equal Emp’T Opportunity Comm’n, Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities 10 (2007), available at http://www.eeoc.gov/policy/docs/caregiving.pdf, or regardless of whether the employee can show that he or she was treated differently than a similarly situated member of the opposite sex, see id. at B (“[I]nvestigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.”).


\textsuperscript{361} See supra TAN 275–279.
male and female employees.”\textsuperscript{362} The airlines had argued in these cases that a plaintiff could not prove sex discrimination without producing an opposite-sex comparator.\textsuperscript{363} Because many carriers refused to employ male flight attendants in this period,\textsuperscript{364} the airlines hoped that requiring stewardesses to produce comparator evidence would insulate their age and marriage policies from scrutiny under Title VII. The EEOC categorically rejected this approach. In the agency’s view, it was “sufficient” for a finding of sex discrimination “that a company policy or rule” — such as those that reinforced stereotyped conceptions of women’s sex and family roles — “is applied to a class of employees because of their sex.”\textsuperscript{365}

The EEOC’s holdings in the airline cases were based on an understanding (shared by the Court in \textit{Mancari} and \textit{Lau}) that discrimination was “a social phenomenon encased in a social context,”\textsuperscript{366} rather than simply a matter of formal line-drawing. Indeed, the EEOC in 1968 rejected the airlines’ argument that if their policy of firing stewardesses upon marriage were found to constitute “discrimination . . . it [could] be remedied by applying the no-marriage rule to male flight attendants.”\textsuperscript{367} Even without engaging in any formal classification, the EEOC suggested, such a policy would continue to push women out of the workplace and perpetuate the notion that after a woman married, her place was in the home. This, in the agency’s view, rendered the policy impermissible under Title VII.\textsuperscript{368} As we have seen, the EEOC was not the only legal decisionmaker in this period to adopt a broad view of Title VII’s prohibition of sex discrimination. Twice in the 1970s, Congress amended Title VII in ways that affirmed its commitment to expansive and nonformalistic understandings of the law’s sex provision.\textsuperscript{369}

\textsuperscript{362} Ne\textit{al v. Am. Airlines, Inc.}, EEOC Decision No. 6-6-5759, [1968–1969 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8002, at 6010 (June 20, 1968); \textit{see also} cases cited supra note 275.


\textsuperscript{364} Earlier in the twentieth century, stewards were common, but by 1967, no airline in the United States was hiring male candidates for the job. \textit{See} Diaz v. Pan Am. World Airways, Inc., 311 F. Supp. 559, 564 (S.D. Fla. 1970).

\textsuperscript{365} \textit{Neal}, [1968–1969 Transfer Binder] Empl. Prac. Dec. (CCH) at 6010. The EEOC noted that opposite-sex comparator evidence could be used to “buttress[]” claims of sex discrimination, but rejected the airlines’ contention that comparators were a required element of such claims. \textit{Id.} at 6011.


\textsuperscript{368} \textit{Id.}

\textsuperscript{369} \textit{See supra} TAN 209–214, 341–343.
When courts today hold that sex discrimination cannot be shown without recourse to opposite-sex comparators, they often suggest that they are simply deferring to congressional intent and remaining faithful to the traditional conception of what it means to discriminate “because of sex.” But the rule that plaintiffs cannot win Title VII claims in the absence of comparator evidence is not compelled by history. The original proponents of this rule, in the 1960s, were employers explicitly seeking to limit the reach of Title VII’s sex provision. Originally, this rule was conceived as a means of shielding a variety of employment practices from judicial scrutiny by shifting the focus away from the social meaning and practical implications of these practices and toward questions about their formal characteristics. Courts’ ongoing demand that plaintiffs produce opposite-sex comparators in order to prove that they have been discriminated against “because of sex” continues to have this effect today. It reinscribes Gilbert’s formalistic reasoning about sex discrimination in the law decades after Congress rejected that reasoning.

C. Ongoing Departures from Formalism

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

One reason courts have applied formalism inconsistently is that it does not reliably constrain what counts as discrimination “because of sex.” Requiring women in all-female workplaces to produce male comparators precludes them from demonstrating that they have been discriminated against “because of sex” and shields the regulation of such women from scrutiny under Title VII. In this context, formalism limits the law’s scope. In other contexts, however, formalism gener-

370 See, e.g., Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 439 (6th Cir. 2004) (noting “that no judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination”); Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) (declaring that “if breast pumping is to be afforded protected status, it is Congress alone that may do so”).
ates far-reaching and expansive results — it ostensibly outlaws all differential treatment of men and women in the workplace unless an employer can show that such treatment is justified by a BFOQ. Thus, although the formalistic approach to Title VII shuts the door to some claims, it opens the door to others.

It opens the door, for instance, to claims regarding the vast array of sex-based clothing and grooming regulations that govern the typical American workplace. Workers began to challenge these regulations under Title VII’s sex provision in the 1970s. From a formalistic standpoint, their claims were strong. Women were permitted to wear long hair and dresses, men were not; employers who implemented these policies were clearly sorting men and women into two groups perfectly differentiated along biological sex lines. The Court in Gilbert had identified this method of sorting as the defining characteristic of sex discrimination. Yet when plaintiffs challenged such regulations, courts almost always held that they did not violate Title VII’s prohibition of sex discrimination. To hold otherwise, courts suggested, would “have significant and sweeping implications” for social relations and the American workplace. Courts noted that “[e]mployers, like employees, must be protected,” and opined that no employer should “be coerced into countenancing, regardless of the consequences to his business, what society may frown upon” unless “fundamental human rights” were at stake. Even after the Court’s declaration in Price Waterhouse that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” courts have continued to hold that sex-differentiated grooming requirements do not qualify as sex discrimination under Title VII. In order to explain this line of cases, it seems clear that “we would have to seek an explanation in the domain of social, not formal, logic.”

371 For more on the early clothing and grooming cases, see ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 36–39 (2001); Siegel, supra note Error! Bookmark not defined., at 13–15.
372 Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc).
374 Id. Often in these early cases, courts equated sex-differentiated grooming regulations with sex-segregated bathrooms, a practice they regarded as obviously beyond the reach of Title VII’s prohibition of sex discrimination. See, e.g., Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402, 403 (D.D.C. 1972). Here too, courts relied on normative judgments, and not on the application of a formal, antidifferentiation principle, to define the concept of discrimination “on the basis of sex.”
376 See, e.g., Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (holding that a grooming policy requiring female but not male employees to wear make-up and style their hair does not constitute sex discrimination under Title VII).
377 Siegel, supra note Error! Bookmark not defined., at 15.
Courts’ treatment of Title VII claims by sexual minorities is similarly difficult to explain on the basis of formal logic alone. “Sex-plus” doctrine, which originated in the early 1970s, enables plaintiffs to demonstrate that they have been discriminated against on the basis of sex by showing that they have been treated differently than members of the opposite sex with whom they share a particular, ostensibly non-sex-related characteristic. *Martin Marietta* can be understood as a “sex-plus” case, as the employer in that case discriminated against mothers but not fathers of school-age children. Under the logic of *Martin Marietta*, gay and transgender employees who face discrimination can also state claims of sex discrimination. In fact, sexual minorities began to make such claims in the 1970s. They argued that an employer discriminates “because of sex” when it punishes male but not female employees who date men, or when it punishes people born male who present as women, but not people born female who do the same. The Court in *Gilbert* suggested that the social meaning of a practice was irrelevant to the question of whether it constituted discrimination “because of sex.” Courts claimed that the determining factor in sex-based Title VII cases was whether the plaintiff could satisfy the opposite-sex comparator requirement. Unlike women employed in all-female workplaces, gay and transgender plaintiffs could often adudge opposite-sex comparators. Yet, when courts in the 1970s saw the results that the formalistic approach to Title VII yielded in this context, they quickly abandoned it. Judges uniformly rejected Title VII claims by sexual minorities in this period, even though these plaintiffs seemed to satisfy the test courts had established, in the context of pregnancy and elsewhere, for proving discrimination. But this gave rise to a difficult question: Why was comparator evidence insufficient to prove sex discrimination when the plaintiffs who brought it were gay or transgender? In explaining their departure from formalism in these cases, courts revealed a great deal about the larger social concerns animating sex-based employment discrimination law in this period.

In *Smith v. Liberty Mutual Insurance Co.*, a Georgia district court confronted a question of first impression: Did Title VII’s sex provision

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

protect a plaintiff whose application for a job was rejected due to his “affectional or sexual preference” for men. The court began its analysis by contrasting the United States with “the German Third Reich.” In Nazi Germany, the court explained, the government dictated the choices of its citizens in all matters. In the United States, however, the law’s reach was limited, and it was “the duty of the courts to protect employers’ freedom of choice outside those limited areas where the law has restricted it. After this preamble, the court acknowledged that the plaintiff could prove sex discrimination in a technical sense, by producing opposite-sex comparators who shared his sexual preference for men. The court concluded, however, that the comparator test was simply “a ‘shorthand’ way” of implementing the statute’s prohibition of sex discrimination, and should not be used to extend that prohibition in socially detrimental ways. Interpreting the statute’s antidiscrimination mandate more broadly, the court argued, would impinge on employers’ “freedom of action.”

The Fifth Circuit echoed this reasoning in its analysis of Smith’s claim. It suggested that Congress probably did not intend “to include all sexual distinctions in its prohibition of discrimination,” and that the role of courts was to determine “whether a line [could] legitimately be drawn beyond which employer conduct is no longer within the reach of the statute.” The court concluded that a line could be drawn in this case, on prudential grounds: to extend Title VII’s protections to sexual minorities would be too disruptive of traditional gender norms and not respectful enough of employers’ interests. Every other court that confronted a sex-based Title VII claim brought by a gay or transgender plaintiff in the 1970s and 1980s reached the same conclusion. They asserted that “Congress never considered nor intended

380 Id. at 1099.
381 Id. at 1100.
382 Id. at 11001.
383 Id.
384 Id.
385 Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978) (quoting Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)) (internal quotation mark omitted).
386 See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning . . . do[es] not outlaw discrimination against a person who has a sexual identity disorder . . . .”); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (rejecting a male-to-female preoperative transsexual’s sex discrimination claim because “for the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’”); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”); Terry v. EEOC, No. 80-C-408, 1980 U.S. Dist. LEXIS 17289, at *8 (E.D. Wis. Dec. 10, 1980) (denying relief to a preoperative male-to-female transsexual because Title VII “does not protect males dressed or acting as females and vice versa”); Powell v. Read’s, Inc., 436 F. Supp. 369, 371 (D. Md. 1977) (holding that to grant relief to a male-to-female transsexual
that this 1964 legislation apply to anything other than the traditional concept of sex,"387 and that they were not authorized "to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation."388

As society’s views about sexual minorities have changed, courts have begun haltingly to rescind some of the limitations imposed on sex-based Title VII doctrine in the 1970s. In the past decade, a few courts have determined that discrimination against transgender workers violates Title VII’s prohibition of sex discrimination because it punishes these individuals for failing to "match[] the stereotype associated with their group."389 In 2008, a district court in Washington, D.C., found that the Library of Congress had violated the rights of a transgender job applicant when it withdrew an offer of employment after learning of the applicant’s impending male-to-female transition.390 The court found "that the Library’s hiring decision was infected by sex stereotypes,"391 and that by refusing to employ the plaintiff "because her appearance and background did not comport with . . . sex stereotypes about how men and women should act and appear," the Library had violated Title VII’s sex provision.392 This ruling echoed an earlier pair of cases in which the Sixth Circuit held that "discrimination against a plaintiff who is transsexual — and therefore fails to act and/or identify with his or her gender" — constitutes sex discrimination, and that "[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."393 Some courts have also held — in theory at least — that discrimination against gay and lesbian workers may constitute sex discrimination if it is motivated by their failure to conform to traditional gender norms.394

(D. Md. 1977) (holding that to grant relief to a male-to-female transsexual waitress would be "inconsistent with the plain meaning of the words" of Title VII).
387 Ulane, 742 F.2d at 1085.
388 Id. at 1086.
391 Id. at 305.
392 Id. at 308.
393 Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); see also Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005) (upholding a jury verdict in favor of a transgender plaintiff who argued that he had been discriminated against on the basis of his failure to conform to sex stereotypes); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding that transgender individuals may bring discrimination claims based on sex stereotyping because Title VII’s sex stereotyping doctrine does "not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female" who fails to do so).
394 Although courts have recognized that gay and lesbian plaintiffs may prevail on sex stereotyping claims, they have often rejected such claims on the ground that the plaintiffs failed to prove that it was truly their biological sex and not their sexual orientation that motivated the
These decisions have inspired passionate criticism from judges who continue to adhere to the notion that "Congress had a narrow view of sex in mind when it passed the Civil Rights Act," and that the statute’s protections should not extend to sexual minorities, even by way of sex stereotyping doctrine. These judges have accused their colleagues of "mak[ing] a moral judgment" that discrimination against homosexuals is wrong, rather than honestly "constru[ing] a statute" that was enacted in 1964. They have asserted that ":[i]n the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted." They argue that it is ludicrous to suggest that a law that emerged from this historical context could fairly be read to apply to gay and transgender individuals. Judge Richard Posner has been particularly vocal in his criticism of these developments. In fact, Posner argues that Title VII law has completely "gone off the tracks in the matter of 'sex stereotyping."' because it has departed from the "traditional concept" of sex discrimination, which refers only to practices that evince hostility toward men or women as a class. To suggest that Title VII creates "a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels" is ridiculous, Posner asserts; and it is no less ridiculous to suggest that the law protects gay men — unless they can show that the employer who discriminated against them was motivated by hostility to men in general. Posner claims that to attribute any other interpretation of the term sex discrimination "to the authors of Title VII is to indulge in a most extravagant legal fiction."

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

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

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