CONSENSUS, DISSENSUS, AND ENFORCEMENT: LEGAL PROTECTION OF WORKING WOMEN FROM THE TIME OF THE TRIANGLE SHIRTWAIST FACTORY FIRE TO TODAY

*Marcia L. McCormick**

INTRODUCTION 646
I. THE PROGRESSIVE ERA SOCIAL MOVEMENTS AND WOMEN'S WORK 647
A. Women, Work, and Labor Laws in the Progressive Era 649
B. Factory Conditions, the Triangle Shirtwaist Factory Fire, and Reactions 654
II. THE SHIFT TO INDIVIDUAL RIGHTS AND ANTI-DISCRIMINATION LAWS 659
III. DISSENSUS AND THE FAILURE OF ENFORCEMENT 674
CONCLUSION 694

> *"Bodies were falling all around us . . . . The girls just leaped wildly out of the windows and turned over and over before reaching the sidewalk . . . . They stood on the windowsills tearing their hair out in the handfuls and then they jumped. One girl held back after all the rest and clung to the window casing until the flames from the window below crept up to her and set her clothing on fire. Then she jumped far over the net and was killed instantly, like all the rest."*
>
> –Benjamin Levy, eyewitness to the Triangle Shirtwaist Factory fire[1]

---

* Associate Professor, St. Louis University School of Law. Thanks to the St. Louis University School of Law Summer Research Stipend Program, which supported the research and writing of this article. This article benefited from the insight and advice of John O'Connell, participants in the St. Louis University School of Law faculty workshop, and the excellent editors at the *New York University Journal of Legislation and Public Policy*. Great thanks to Hayley Collins and Jesse Packard for their excellent research assistance. Any errors or omissions are mine alone.

1. *Stories of Survivors, and Witnesses and Rescuers Outside Tell What They Saw*, N.Y. TIMES, Mar. 26, 1911, at 4 [hereinafter *Stories of Survivors*].

Introduction

Just a few minutes before closing time on Saturday, March 25, 1911, a fire broke out on the factory floor at the Triangle Shirtwaist Factory, which operated on the top three floors of a modern "fireproof" building in New York City. Within half an hour, it was all over. One hundred forty-six of the five hundred employees had died. They had suffocated, burned to death, jumped, or fallen from the building. Those who died had been unable to escape for a number of reasons: there were not enough exits, the exit doors opened into the room, making them difficult to open against the crush of people trying to leave, some doors were locked, there was no adequate fire escape, the layout of the sewing machines blocked workers' paths to the doors, and piles of waste material, much of it soaked with machine oil from the sewing machines, allowing the fire to spread even quicker.[2]

The vast majority of those killed in the fire were girls and young women between sixteen and twenty-three years old.[3] Most were recent immigrants who could barely speak English, and almost all were the main source of financial support for their families.[4] According to one contemporary account:

> The victims–mostly Italians, Russians, Hungarians, and Germans–were girls and men who had been employed . . . after the strike in which the Jewish girls, formerly employed, had become unionized and had demanded better working conditions. The building had experienced four recent fires and had been reported by the Fire Department to the Building Department as unsafe on account of the insufficiency of the exits.[5]

The Triangle Shirtwaist Factory tragedy mobilized the labor movement and progressive reformers, and provided part of the political will to enact significant protective health and safety legislation for workers.[6] And while the Triangle Shirtwaist Factory fire has been

---

2. *141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside*, N.Y. Times, Mar. 26, 1911, at 1 [hereinafter *141 Men and Girls Die*] (describing the scraps and "sewing machines placed so closely together that there was barely aisle room for the girls between them . . .").

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* Elizabeth Faulkner Baker, Protective Labor Legislation, with Special Reference to Women in the State of New York 153–56 (1925). There is debate over whether the fire was used as a symbol by reformers already agitating for protective legislation, Eric G. Behrens, *The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation*, 62 Tex. L. Rev. 361, 365–67 (1983), or whether the fire caused the legislative effort, Arthur F. McEvoy, *The Triangle Shirt-*

cited in legal literature as an important event in the movement for workplace safety standards, however, the gendered nature of the tragedy and its place in the development of laws protecting women as women, rather than as beneficiaries of laws protecting all workers, has not been as fully explored. This contribution seeks to do that.

Part I of this article will situate the fire and the subsequent reforms in the social movements of the time, at the intersection of the labor movement and other progressive causes championed by women. It will also describe why the success of early protective labor legislation depended, in part, on gender. Part II will describe the shift in law from protecting women workers as workers to protecting women workers as women, describing the rise of legislation banning sex discrimination in the workplace, and the tensions in that legislation caused by competing visions of sex equality. Finally, Part III will draw on lessons about enforcement of gender-protective[7] legislation from the era of the fire to today. It will conclude that legislation can serve as a positive first step but, without broad consensus supporting it, it tends to be under-enforced or wholly unenforced and therefore not effective at achieving real or lasting social change. I end with a brief application of these lessons to the Domestic Workers Bill of Rights, New York's recent extension of protections to home care workers, the overwhelming majority of whom are women and many of whom are immigrants, just like the labor force at the Triangle Shirtwaist Factory in 1911.

I.
The Progressive Era Social Movements and Women's Work

In the early part of the twentieth century, the United States was in the midst of the Second Industrial Revolution. Factory owners increasingly relied on machines and redesigned the structure of work that laborers did—changing the way that goods were produced, the tasks that laborers performed, and the manner in which those tasks were

waist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Commonsense Causality, 20 Law & Soc. Inquiry 621 (1994).

7. The reader will note that I used "sex" in the prior sentence and "gender" in this one. Sex and gender have slightly different meanings. Currently, "sex" is typically used to refer to biological, genetic, or gonadal sex, whereas "gender" is usually used to refer to that plus the roles, behaviors, activities, and attributes that are considered to be linked with sex. Gender was not considered separate from sex for most of the history that I discuss. However, I will use both terms somewhat interchangeably, depending on context throughout the article.

performed—to enable mass production of goods.[8] With this development, workers were exposed to an increased likelihood and increasing variety of ways to be injured or killed, not just because they were working with machines, but also because the number of hours and the pace at which they were required to work increased the stress on the workers' bodies from fatigue and made it much more difficult to be careful.[9] These dangers helped create the social conditions that gave rise to the Progressive Era, in which a new group of social reformers sought to use the law as a tool to remedy social problems.

Women played a large role as activists in the progressive movement, in part because activism was one way that middle- and upper-class women could engage in work and politics consistent with the prevailing norm of separate spheres for men and women.[10] Women were viewed as too fragile for politics or most work,[11] but morally superior and thus well suited for charity work and caregiving.[12] Much of the reform sought in the Progressive Era was reform of the workplace, primarily through improved working conditions and reduced working hours. This strand of the Progressive Era movements pro-

---

8. *See generally* WALTER LICHT, INDUSTRIALIZING AMERICA (1995).

9. *See* McEvoy, *supra* note 6, at 629–30, 641–43.

10. In the Progressive Era, men and women were considered by most people to have different natures. Men were better equipped to control the public sphere of politics and business, while women were better suited to the private sphere of the home. NANCY F. COTT, NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 180, 365 (2000). There was a moral component to women's spheres; women were thought to be above the dirty world of business and politics and were responsible for maintaining a moral and religious haven for men and children. *Id.* at 365; *see also* Alice Kessler-Harris, *Problems of Coalition-Building: Women and Trade Unions in the 1920s*, *in* WOMEN, WORK & PROTEST: A CENTURY OF WOMEN'S LABOR HISTORY 110, 115 (Ruth Milkman ed., 1985).

11. The ideal of separate spheres did not operate in a uniform manner for all women. Many women and girls worked outside of the home. Moreover, many women, particularly those who immigrated from or whose ancestors immigrated (or were taken) from countries outside of northern and western Europe, were not necessarily viewed by most in the middle and upper class as part of the same system. *See* COTT, *supra* note 10, at 187–93, 365–67 (describing working women, including slave women). Many African American women viewed work as natural for their gender, and believed that women could work as well and as hard as men could. Rosalyn Terborg-Penn, *Survival Strategies Among African-American Women Workers: A Continuing Process*, *in* WOMEN, WORK & PROTEST: A CENTURY OF WOMEN'S LABOR HISTORY, *supra* note 10, at 139–40. Still, separate spheres were an ideal, at least for a group of white women and some women within other demographic groups. *See* COTT, *supra* note 10, at 365–66. *See generally* Nancy S. Dye, *Introduction*, *in* GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA 1–9 (Noralee Frankel & Nancy S. Dye eds., 1991); DONNA GABACCIA, FROM THE OTHER SIDE: WOMEN, GENDER & IMMIGRANT LIFE IN THE U.S., 1820-1990 (1994).

12. *See* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES 114–16 (1983).

vided another way for women to participate in politics while still acting within their traditional nurturing and caregiving role.

Women in the Progressive Era also focused on increasing the civil and political rights of women beyond their prescribed sphere, not necessarily as a way to destroy the separateness of the spheres, but to protect women within their sphere and to civilize the public sphere of business and politics through their moral superiority.[13] At first, reformers, at least those in the middle and upper classes, saw greater participation by women in voting as a path to better conditions. The National American Woman Suffrage Association, for example, assumed that the vote would enable women workers to better protect themselves in the workplace, which motivated at least some working women to begin supporting the suffrage movement.[14]

A. Women, Work, and Labor Laws in the Progressive Era

During this time period, women made up about twenty percent of the work force, and most were either single or had husbands who were disabled from working.[15] More than half of working women did household work either in other people's homes or by bringing piecework into their own homes.[16] The remaining forty plus percent were teachers, nurses, social workers, clerical workers, or unskilled blue-collar workers.[17] In 1905, the average weekly wage for women was $5.25, but room and board for a single person was at least $2.25 per week; on these wages, many women struggled to support their families.[18] The vast majority of women's jobs were segregated by sex, but when men and women performed the same work, men were paid up to

13. *See generally* ELLEN CAROL DUBOIS, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, *in* WOMAN SUFFRAGE AND WOMEN'S RIGHTS 6–39 (1998).

14. JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 193–94 (1991); *see* GABACCIA, *supra* note 11, at 87–88; KESSLER-HARRIS, *supra* note 12, at 95–98.

15. BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY PRACTICE, AND THEORY 95 (2d ed. 1996) (citing JULIE MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM 187–232 (1982)); GABACCIA, *supra* note 11, at 46.

16. BABCOCK ET AL., *supra* note 15, at 95 (citing KESSLER-HARRIS, *supra* note 12, at 141).

17. *Id.*

18. *Id.* at 95–96 (quoting PHILIP S. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT 264–65 (1979)).

300 percent more than their female counterparts.[19] Jobs also tended to be segregated, and thus pay was determined by race and class.[20]

The progressive movement sought to improve wages, hours, and working conditions for all workers, but the legislation was piecemeal: by industry, sex, or age of the worker.[21] These legislative gains in protective labor legislation at the turn of the century were frustrated by the Supreme Court in the now infamous case of *Lochner v. New York*, where the Court struck down legislation limiting the number of hours that bakers could work to ten hours per day and sixty hours per week, finding that the legislation was a violation of the freedom to contract.[22] The Court had previously allowed such protections for workers in particularly dangerous occupations, but not for the average adult worker.[23] Against this backdrop, workers sought to organize to collectively bargain for better conditions and wages with their employers, and women workers were no exception.

Labor legislation specifically aimed toward protecting women had more success. In the most famous case of sex-protective labor legislation, *Muller v. Oregon*, the protective legislation in question was upheld precisely because it focused on women.[24] The Oregon statute at issue limited the number of hours women could work in a day to ten.[25] While the Court acknowledged that, at least in Oregon, women had the same freedom to contract as men did, it nonetheless acknowledged that women's wage work implicated a substantial pub-

19. *Id.*; *see* GABACCIA, *supra* note 11, at 49.

20. BABCOCK ET AL., *supra* note 15, at 95–96; GABACCIA, *supra* note 11, at 46–47, 49.

21. *See* KESSLER-HARRIS, *supra* note 12, at 186–99, 203 (describing a number of laws that limited the types of jobs, number of working hours, or amount of wages for women and sometimes minors). A description of other types of protective legislation appears in the Supreme Court's opinion in Lochner v. New York, 198 U.S. 45 (1905). Examples are the New York statute at issue in that case limiting hours of labor in bakeries, *id.* at 46, and a Utah law limiting the hours of miners, *id.* at 54–55.

22. *Lochner*, 198 U.S. at 45, 57–63 (1905).

23. *Id.* at 54–55, 58–59 (noting that protections for workers in underground mines and smelting operations and coal workers had been upheld in Holden v. Hardy, 169 U.S. 366 (1898), and Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901), on the grounds that those occupations were dangerous to the health of workers). The Court in *Lochner* suggested that the prior cases presented two justifications for the legitimate use of the police power of the state to limit the hours of work a person could do: if the members of the class suffered from a disability that made them less able to protect their own interests, or if the work to be done was unusually dangerous. *Id.* at 57–62. In *Lochner*, the Court proposed a third potential ground—injuries to the public caused through demands on those workers. *Id.* at 57, 62–63.

24. 208 U.S. 412, 422–23 (1908).

25. *Id.* at 416–17.

lic interest.[26] Echoing much of the separate spheres of philosophy, the Court held that states could protect women workers, not because they were workers or workers in a particular industry, but because they were women. Their status as workers was not irrelevant, but it was their status as women that allowed the state to exercise its police power to limit their work hours. The Court's reasoning is worth quoting extensively:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity[,] continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[27]

In other words, the Court reasoned that the rigors of work placed women in physical danger, especially women who were pregnant or who had young children. The Court seemed to assume that work that happens "at work"—in other words, outside of a woman's own home—is different from and more rigorous than work that would take place at home for that home.[28] This assumption may have been true in some cities for some classes of women, but not likely true in most parts of the country for most classes of women at that time.[29] The notion that children's health depends on their mothers' health provided further basis for finding a public interest in women's health;

---

26. *Id.* at 418–19, 422–23.

27. *Id.* at 421.

28. The *Muller* Court applied the medical testimony to the time women spent on their feet "at work," suggesting without discussion that the nature or amount of work at a location was different from the nature or kind of work women did inside their own homes. *Id.*

29. Christine Bose documents how work done by women in and outside of the home in the early twentieth century was often the same kind of work, which actually led to undercounting the number of women in the paid labor force. CHRISTINE E. BOSE, WOMEN IN 1900: GATEWAY TO THE POLITICAL ECONOMY OF THE TWENTIETH CENTURY 22–52 (2001). Moreover, housework and farm labor, the kind of work at home that the majority of women would have been doing, was very physically demanding. *See also* I.M. Rubinow & Daniel Durant, *The Depth and Breadth of the Servant Problem*, 34 MCCLURE'S MAG. 576, 582–83, 585 (1910) (attributing part of the dearth of domestic servants to the difficulty of housework as compared to factory work); *see generally* COTT, *supra* note 10, at 358, 370–71 (describing the kind of work done at home by women during this time period); RUTH SCHWARTZ COWAN, MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY FROM THE OPEN HEARTH TO THE MICROWAVE 151–71 (1983) (same).

conversely, this suggested that there was no corresponding public interest in men's health. Clearly, the Court viewed women as, while not necessarily more fragile than men, naturally designed for motherhood and mothering, rather than working for wages.

But that was not the only proffered justification for treating women differently from men. The Court pragmatically recognized historical realities of male dominance:

> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.[30]

Strikingly, the *Muller* Court acknowledged both the fundamental equality of women, in a legal or dignitary sense, but also their subordination through law and the practical effects of that subordination. The Court noted that education had been denied women in the past and acknowledged that limitations on women's rights can be removed by legislation, both of which suggest that the Court recognized that law was among the factors responsible for women's subordinate status. But the Court also acknowledged that even once legal obstacles had been removed, women would not be on an even field with men because of their history of subordination; the Court viewed law as a

30. *Muller*, 208 U.S. at 421–22.

means to remedy the subordination that would remain. So, the Court concluded, women needed legislation that treated them differently than men to fully remedy their subordination. In other words, it was this prior de jure and continued de facto subordination of persons who should be considered equal in dignity and under the law that would justify special treatment. Such focus on substantive equality at the expense of formal equality was relatively rare, though perhaps not as rare as it is today.[31] And yet, despite recognizing the historical subordination of women and their legal and dignitary equality, the Court seemed to retrench in its next comments. While it at least suggested women and men were capable of the same successes if given the same resources, the Court suggested that men's dominance of women was inevitable because women were less mentally and physically capable, or at least less able to defend themselves from men, whom it saw as unscrupulous by nature:

> Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity

31. *Compare* Ricci v. DeStefano, 129 S. Ct. 2658, 2672–78 (2009) (using formal equality principles to hold that consideration of racial impact of a test was race discrimination), *with id.* at 2681 (Scalia, J., concurring) (suggesting that a statute that requires the government to provide substantive equality or equality of results may violate the Equal Protection Clause), *and id.* at 2689 (Ginsburg, J., dissenting) (putting the city's actions in the context of a long history of race discrimination and promoting the city's actions as necessary for substantive equality). *See also* Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of* Parents Involved, 69 Ohio St. L.J. 1319 (2008) (discussing color-blind and color-conscious approaches by the Supreme Court); J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 946 (1975) (arguing that the Court should promote political equality and equality of opportunity, but refrain from promoting economic equality).

> to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.[32]

Thus, the Court returned to its initial point, adding an essentialized view of male and female nature: women were essentially mothers, essentially weaker, and essentially victims. Moreover, women were the instruments that determined the nation's health, not because of the women themselves and their capabilities, but because women give birth to future Americans, clearly a matter of public interest. As a matter of public interest, the police power of the state could be extended to limit the number of hours women worked in order to protect their health. Tapping into powerful paternalistic stereotypes of women was a successful strategy for worker protection proponents,[33] and the Court's decision in *Muller* is just one example of the tension between equal treatment and "special" treatment for women that continues to inform the debate about equality in this country.

Muller helped pave the way for later cases that upheld maximum hour and minimum wage legislation for all workers.[34] Protective labor legislation for all workers thus got its foot in the door through women.[35] But even for women, the law on the books was insufficient by itself, and maximum hour legislation was just a first step.

B. Factory Conditions, the Triangle Shirtwaist Factory Fire, and Reactions

In the early nineteenth century, large numbers of women were employed in the textile and garment industries, most of them "sweated labor."[36] Factory owners typically "sweated" out the work by hiring male subcontractors to produce their products, who in turn hired almost exclusively female workers to perform the labor.[37] The subcontractors determined the rate of pay for their workers and pocketed the

---

32. *Muller*, 208 U.S. at 422–23.

33. *See* Kessler-Harris, *supra* note 12, at 185–88.

34. *See* Bunting v. Oregon, 243 U.S. 426 (1917) (upholding Oregon's gender-neutral maximum hours law); Babcock et al., *supra* note 15, at 108–11 (noting that *Muller* prompted Oregon's passage of a maximum-hours law applicable to both men and women).

35. *See* Kessler-Harris, *supra* note 12, at 183–84.

36. For more information on the origins of the term "sweated labor" and the rise of the sweatshop, see Laura Hapke, Sweatshop: the History of an American Idea 17–24 (2004). Interestingly, the term was not necessarily seen as negative by the women who worked as "sweated labor." *See id.* at 33–34.

37. *See* Amy Kolen, *Fire*, 42 Mass. Rev. 13, 21 (2001). This practice originally grew out of piecework that seamstresses did for the government before and during the Civil War. With improvements to the sewing machine and the entry of male subcon-

difference between that and what the factory owners had paid them.[38] Working conditions were terrible in most factories. The Triangle Shirtwaist Factory, which produced inexpensive blouses for women that were extremely fashionable at the time of the fire, was no different.[39]

In the first decade of the twentieth century, workers had begun to organize and join the International Ladies' Garment Workers Union.[40] However, most of the industry remained unorganized, likely because most female garment workers were uneducated young immigrants who feared the potential repercussions of organizing. Unions, in turn, viewed these women as too difficult to organize and did not try to unionize them either.[41] Despite the prevailing lack of organization, in mid-November 1909, two hundred women walked out of the Triangle Shirtwaist Factory to protest the discharge of workers for engaging in organizing activity.[42] Spurred in part by the Women's Trade Union League and the American Federation of Labor, workers across New York City went on a general strike which became known as the "Uprising of 20,000."[43] The strike lasted until February 1910, with workers refusing to work until factory owners recognized their unions and acceded to their demands for better wages, hours, and working

---

tractors into the process of garment production, conditions and wages deteriorated, and the sweatshop was born. KESSLER-HARRIS, *supra* note 12, at 77–79.

38. Kolen, *supra* note 37, at 21.

39. ELIZABETH V. BURT, THE PROGRESSIVE ERA 208–09 (2004); Kolen, *supra* note 37, at 21–23.

40. Roger Waldinger, *Another Look at the International Ladies' Garment Workers' Union: Women, Industry Structure, and Collective Action*, *in* WOMEN, WORK & PROTEST, *supra* note 10, at 86, 94–97; *cf.* PHILIP S. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM THE FIRST TRADE UNIONS TO THE PRESENT 134–54 (1982) (discussing women's efforts to organize during this period and the history of the Working Women's Association).

41. *See* GABACCIA, *supra* note 11, at 86; *see also* Kessler-Harris, *supra* note 12, at 113–17 (analyzing the dynamic between women and trade unions). Although organized labor viewed women and low-wage workers generally as unorganizable because of a variety of prejudices, women had organized themselves at least sporadically to carry on boycotts and strikes. *See generally* FONER, *supra* note 40, at 1–204.

42. Kolen, *supra* note 37, at 14. In response to the walkout, the management of the Triangle Shirtwaist Company locked out the entire shop of five hundred workers, causing the majority of those workers to join the strike. *See* FONER, *supra* note 40, at 135.

43. *See* FONER, *supra* note 40, at 133–47; NANCY L. GREEN, READY-TO-WEAR AND READY-TO-WORK: A CENTURY OF INDUSTRY AND IMMIGRANTS IN PARIS AND NEW YORK 54 (1997); ANNELISE ORLECK, COMMON SENSE & A LITTLE FIRE: WOMEN AND WORKING CLASS POLITICS IN THE UNITED STATES, 1900-1965, 53, 57–63 (1995). Estimates of the number of strikers varies from 15,000 to 40,000. FONER, *supra* note 40, at 137.

conditions in written agreements.[44] The Triangle Shirtwaist Factory owners did not sign an agreement, but they orally agreed to abide by the terms common to those written agreements, which helped to end the strike.[45] Although wages and hours were covered by this oral agreement, workplace conditions were not.[46]

The fire captured public sentiment in a powerful way. Thousands, many of them hysterical and trying to help, witnessed it on the street as it was happening, and days later, hundreds of thousands lined the streets as a parade of caskets was taken to be buried.[47] The fact that the casualties of the fire were overwhelmingly women and girls seemed a focal point for the media at the time. On the one hand, some accounts blamed the tragedy on stereotypes of the women themselves, attributing the death toll to female panic.[48] On the other hand, many media accounts emphasized the desperation that led the girls and women to work for the factory, emphasizing how hard they worked, that many of the workers were the primary breadwinners for their families, and the physical privations they endured to care for others.[49] Many eyewitness reports that appeared in newspapers recounted the stories of men's actions during the fire, emphasizing how helpless they felt to protect or save the women, exemplifying themes of male valor and chivalry and female helplessness.[50]

Political actors in the city were mobilized as well:

---

44. McEvoy, *supra* note 6, at 631.

45. *Doors Were Locked Say Rescued Girls*, N.Y. Times, Mar. 27, 1911, at 3; *cf.* McEvoy, *supra* note 6, at 631 ("[A]t Triangle the shirtwaist makers went back to work without union recognition and with few guarantees for improved working conditions.").

46. *See* Orleck, *supra* note 43, at 63.

47. McEvoy, *supra* note 6, at 644; *141 Men and Girls Die*, *supra* note 2, at 1; *300,000 in Fire Parade*, N.Y. Times, Apr. 4, 1911, at 1.

48. *See Crowd of 50,000 Watches the Ruins*, N.Y. Times, Mar. 27, 1911, at 3; *Lack of Fire Drill Held Responsible*, N.Y. Times, Mar. 26, 1911, at 5 (noting that women and girls panic at the prospect of a fire); *Quick Grand Jury Fire Investigation*, N.Y. Times, Mar. 26, 1911, at 5 ("'It seems apparent from a cursory inspection of the scene that the great loss of life was due to panic . . . .'"); *Supt. Miller Home; Won't Talk of Fire*, N.Y. Times, Mar. 30, 1911, at 3.

49. *27 More Identified in Morgue Search*, N.Y. Times, Mar. 28, 1911, at 2; William Mailly, *The Triangle Trade Union Relief*, Am. Federationist, July 1911, at 544; Miriam Finn Scott, *The Factory Girl's Danger*, The Outlook, Apr. 15, 1911, at 817.

50. *See 141 Men and Girls Die*, *supra* note 2, at 1–3; *Blame Shifted on All Sides for Fire Horror*, N.Y. Times, Mar. 28, 1911, at 1; *Death List is 141; Only 86 Identified*, N.Y. Times, Mar. 27, 1911, at 4; *Death List Shows Few Identified*, N.Y. Times, Mar. 26, 1922, at 4; *New York Fire Kills 148*, Chicago Sunday Trib., Mar. 26, 1911, at 1; *Stories of Survivors*, *supra* note 1, at 4; *Thrilling Incidents in Gotham Holocaust that Wiped out 150 Lives*, Chicago Sunday Trib., Mar. 28, 1911, at 2.

> Last night District Attorney Whitman started an investigation—not of this disaster alone but of the whole condition which makes it possible for a firetrap of such a kind to exist. Mr. Whitman's intention is to find out if the present laws cover such cases, and if they do not, to frame laws that will.[51]

Maximum hours legislation might have protected the workers at the Triangle Shirtwaist Factory either by helping those workers to be more careful or by having fewer workers at the factory during its operating hours. Woman-focused hours legislation had been previously enacted in New York in 1899, in response to reports by a legislative committee created to investigate female labor in New York City at the recommendation of then-governor Theodore Roosevelt.[52] This legislation, however, was not enforced by the courts and was repealed a few years later.[53]

Moreover, factory safety legislation had been in place, according to the Wainwright Commission on Employers' Liability with Regard to the Prevention of Accidents and Fires in Factories (Wainwright Commission), but had not been enforced.[54] The Wainwright Commission released a report on April 20, 1911, less than a month after the fire, decrying the poor enforcement of workplace safety laws:

> This failure to enforce the safety regulations on buildings in the course of construction is due, we believe, first to the fact that responsibility for enforcement is divided between the State Labor Commissioner and the City Building Department and therefore not seriously undertaken by either, and, second, to the fact that the law has been interpreted to call for an inspection and enforcement only on complaint. The practical result of enforcing a labor law on complaint is that it is not enforced at all; the employer cannot be expected to complain against himself; the workman cannot in practice

---

51. *141 Men and Girls Die*, *supra* note 2, at 1.

52. Baker, *supra* note 6, at 133, 150–51.

53. *Id.* at 151–52; Comm'n Appointed Under Chapter 518 of the Laws of 1909 to Inquire into the Question of Employers' Liability and Other Matters, Fourth Report to the Legislature of the State of New York 1–7 (1911), *available at* http://books.google.com/ebooks/reader?id=NCsoAAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.RA1-PA249 [hereinafter Comm'n Appointed Under Chapter 518]. The state constitution was ultimately amended to allow the state legislature to create a workers' compensation system. *See Compensation Law Makes Big Changes*, N.Y. Times, June 29, 1914, at 11.

54. *Say Laws Fail to Protect Labor*, N.Y. Times, Apr. 21, 1911, at 8. The Wainwright Commission was created by the New York State Senate in 1909 to "inquire into the working of a law in the State of New York relative to the liability of employer to employees for industrial accidents . . . and . . . to the causes of accidents to employees." Comm'n Appointed Under Chapter 518, *supra* note 53, at 1.

> be expected to complain against his employer; the passerby is too busy or indifferent.[55]

Tests performed by the Commission convinced it that "the way to procure comparative safety for workmen on buildings in the course of construction, is to charge the enforcement of all safety regulations in the first instance expressly on the City Building Departments."[56] Thus, the Wainwright Commission concluded that even the best workplace safety laws can only work as well as their enforcement mechanisms will allow, and the existing divided responsibility scheme and reliance on private complaints amounted to no accountability at all.

Partly in response to the fire, another state senatorial commission was created, this time to investigate what remedial legislation might be needed to protect the lives and health of factory workers: The Factory Investigation Commission.[57] The commission issued yearly reports from 1911 to 1915, culminating in a final report that encompassed thirteen volumes.[58] As a result of the commission's work between 1912 and 1915, New York enacted thirty-six laws, largely focused on the safety and sanitation in the working environment, but also touching on wages and hours, and excluding women and children entirely from certain types of work.[59] Despite a promising start, this new legislation encountered enforcement problems, but enforcement gradually improved[60] until stronger federal worker protections were enacted in the New Deal.

The new legislation and the new political will towards enforcement, which culminated in the financial difficulties that spawned the reforms of the New Deal, began to make real changes for workers. And the labor legislation protecting women was in little danger of invalidation by the courts after *Muller*.[61] Moreover, as the courts grad-

---

55. Comm'n Appointed Under Chapter 518, *supra* note 54, at 16–17.

56. *Id.*; *see also* Baker, *supra* note 6, at 284–88 (describing the lack of enforcement of labor laws because there was no adequately staffed state body).

57. Baker, *supra* note 6, at 155–56.

58. *Id.* at 156–57.

59. 1 N.Y. Factory Investigating Comm'n, Fourth Report of the Factory Investigating Commission 2–11 (1915).

60. Baker, *supra* note 6, at 292–307.

61. This was true for labor legislation that dealt with hours, health, or safety, but not necessarily true for other kinds of labor legislation. In 1923, the Supreme Court struck down a District of Columbia minimum wage law for women, reasoning in part that the passage of the Nineteenth Amendment made women so equal that they no longer needed special protections in the workplace. Adkins v. Children's Hosp., 261 U.S. 525 (1923). *Adkins* was overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the Court returned to the view that women workers warranted special protection, *id.* at 394–95 (quoting Muller v. Oregon, 208 U.S. 412 (1908)).

ually backed away from the principles of *Lochner*, protective labor legislation for all workers stood on firmer ground.

II.
The Shift to Individual Rights and Anti-Discrimination Laws

The early successes in labor protection for women operated by singling women out, much of the protective legislation of the early to mid-twentieth century focused on workers as workers, and sometimes on the basis of socio-economic class or particular industry. It was not until the 1960s that the primary focus of protective labor legislation would shift to protecting women specifically.

The early debates on protective labor legislation demonstrate a serious conflict over whether sex-specific or sex-neutral legislation would make women better off, and this debate continued well into the second wave of the women's movement in the 1960s and 1970s.[62] Progressive female reformers used radical individualism to gain access to political power, but many promoted an idealized vision of female morality, maternity, home, and family, which stressed dependence and protection for women.[63] However, the popularity of sex-specific protective legislation waned. By the time the Nineteenth Amendment had passed, the National Women's Party, a group that adopted a militant and national strategy for passage of the Amendment, saw that neither suffrage nor sex-specific legislation had eliminated sex discrimination in American life.[64] The National Women's Party thus urged formal legal equality on the basis of sex and proposed an Equal Rights Amendment (ERA) for women.[65] However, not

62. Estelle B. Freedman, No Turning Back: The History of Feminism and the Future of Women 176 (2002); Kessler-Harris, *supra* note 12, at 184–85. Susan Faludi suggests that the debates continued into the 1980s and 1990s as well, but she characterizes the debate as anti-feminist or neo-feminist versus feminist. Susan Faludi, Backlash: The Undeclared War on American Women 312–32 (1991) (describing women activists who opposed an equal rights approach).

63. Hoff, *supra* note 14, at 202–03 (describing the work and words of activists and public figures); *see also* Foner, *supra* note 40, at 120–23 (noting the class differences in the movement); Gabaccia, *supra* note 11, at 87 (noting ethnic and class tensions in the Women's Trade Union League); Kessler-Harris, *supra* note 12, at 86, 90–94, 164–65, 212–13 (describing the class divisions among reformers and the idealization of the domestic sphere by middle class women).

64. Hoff, *supra* note 14, at 206–08; *see also* Cott, *supra* note 10, at 420–21 (describing the effects for women in politics and the workplace of gaining the vote and the shift to an Equal Rights Amendment after sex-specific laws were struck down).

65. Cott, *supra* note 10, at 422–24; Hoff, *supra* note 14, at 206–09. The Equal Rights Amendment was first introduced in the 1920s. Cott, *supra* note 10, at 422;

everyone saw legal rights as a solution to women's lack of equality. Many women believed the fight was better won by attacking gender norms and individual prejudice socially, thereby improving the economic and social position of women without governmental intervention.[66]

The dilemma that women seeking reform faced was quite serious. On the one hand, all workers needed protection, but specifically protecting women ran the risk of reinforcing and justifying their subordination in society.[67] On the other hand, because women were subordinated, they lacked the bargaining or political power that men had to obtain better conditions.[68] When legislation provided sex-specific protections, as the early successful maximum hours legislation did, women benefited in the short term from improvements to some of the worst conditions women faced in the factories.[69] In the long term, however, the limitations tended to discourage employers from hiring women.[70] Employers were not motivated to hire women, whose hours were limited by law, because they could hire men, whose hours were not.[71] In fact, some women working in traditionally male fields lost jobs because of such legislation.[72] Even though many men, represented in much higher proportions by unions, had been successful in collectively bargaining for shorter hours and better pay,[73] such that treating women differently as a legislative matter meant that they were treated more equally as a substantive matter, the legislation deterred employers from hiring women altogether. Perhaps the legislation re-

---

HOFF, *supra* note 14, at 208. The Women's Bureau was also created within the Department of Labor at about the same time. COTT, *supra* note 10, at 418; HOFF, *supra* note 14, at 208; KESSLER-HARRIS, *supra* note 12, at 171. The NWP did not wish to roll back sex-specific legislation at first, but did not see it as the path to empowerment, and grew to oppose it. KESSLER-HARRIS, *supra* note 12, at 207–10; *see also* COTT, *supra* note 10, at 422–24.

66. GABACCIA, *supra* note 11, at 87–88.

67. *See* BABCOCK ET AL., *supra* note 15, at 106–07 (citing comments of Rheta Childe Dorr, Editor of The Suffragist, GOOD HOUSEKEEPING, Sept. 1925, at 156–65); KESSLER-HARRIS, *supra* note 12, at 213.

68. BABCOCK ET AL., *supra* note 15, at 107–08 (citing comments of Mary Anderson, Director of the Women's Bureau, U.S. Dep't of Labor, GOOD HOUSEKEEPING, Sept. 1925, at 173, 180); KESSLER-HARRIS, *supra* note 12, at 213.

69. HOFF, *supra* note 14, at 200; *see* KESSLER-HARRIS, *supra* note 12, at 211.

70. *See* KESSLER-HARRIS, *supra* note 12, at 192–95, 211.

71. *See* BABCOCK ET AL., *supra* note 15, at 86–87, 111–12 (citing KESSLER-HARRIS, *supra* note 12, at 201–02, 212–14).

72. *Id.* at 106.

73. *See generally* KESSLER-HARRIS, *supra* note 12, at 206 (attributing the difference to the protection that unions gave men and the lack of organization of women, and quoting a pamphlet from the National American Woman's Suffrage Association justifying its choice to lobby for sex-specific labor legislation).

moved the cost advantage to employers of hiring women, perhaps women's work was presumed by employers to be of a lower quality, or perhaps the gendered views of work at the time simply governed so strongly that the laws gave employers the excuse to continue to prefer men for at least some kinds of jobs.[74]

The Great Depression and New Deal provided the impetus for enacting substantially more protective labor legislation that was sex-neutral on its face. Among the broadest statutes enacted were those that regulated wages and hours, provided income security for those who could not work, and gave workers more power to demand more from their employers. For example, at the federal level, the Fair Labor Standards Act (FLSA) set a minimum wage and mandated extra pay for hours worked over a weekly threshold for many workers.[75] Although worker injuries were not addressed comprehensively by the federal government,[76] most states enacted workers' compensation systems to provide wage insurance and payment of medical bills for workers injured or killed on the job.[77] The Social Security Act created a system of retirement, unemployment insurance, and welfare benefits for poor families and people with disabilities.[78] And finally, the Wagner Act, which later became the National Labor Relations Act (NLRA), gave workers the right to bargain collectively over wages, hours, and other terms and conditions of employment.[79]

---

74. *See* ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES 7–20, 194–96 (1991).

75. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–19 (2006)).

76. Federal law did address injuries of some employees, those who worked for railroads or on ships, for example. Federal Employers Liability Act, Ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2006)) (governing railroads); Merchant Marine Act of 1920, Ch. 250, § 33, 41 Stat. 1007 (codified as amended at 46 U.S.C. § 30104 (2006)).

77. *E.g.*, N.Y. WORKERS' COMP. LAW § 13-g (McKinney 2011). New York's Workers' Compensation Law, enacted in 1911, struck down, and enacted in a slightly different form in 1914, was a product of the Wainwright Commission's findings. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 11–13 (1998). When the Supreme Court upheld New York's law in *N.Y. Central R.R. v. White*, 243 U.S. 188 (1916), along with similar laws from Iowa, *Hawkins v. Bleakly*, 243 U.S. 210 (1917), and Washington, *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), other states quickly enacted their own such laws; forty-two states by 1920, and all states by 1949. LENCIS, *supra*, at 13; *see also* John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998).

78. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 401–34 (2006)).

79. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

The practical effects of many of these laws did not benefit women workers specifically, even though the laws did not suffer from the theoretical problems and problems in application of the sex-specific laws. Social values played a large role in the lack of opportunities for advancement available to women. The Great Depression led American society to reassert traditional social values and to give men preference in employment[80] even though women's participation in the labor market, which had increased dramatically after World War I, continued to increase steadily in the post-war, Depression, and post-Depression years.[81] Moreover, as explained in Part I, the labor market was extremely sex-segregated at the time, and the structure of the new laws, combined with the underlying gendered cultural norms that prevailed in most segments of society, left women unprotected. For example, the FLSA exempted from coverage professional and administrative employees, including teachers, who were predominantly women.[82] It also exempted in-home domestic and agricultural workers;[83] domestic and agricultural work were leading female occupations at the time.[84] Thus, even though the statute appeared to be sex-

80. HOFF, *supra* note 14, at 208; KESSLER-HARRIS, *supra* note 12, at 251–58, 271–72. Married women in particular were the focus of public pressure to terminate their employment or not seek work in the first place, and many employers explicitly refused to employ married women. *See* JULIA KIRK BLACKWELDER, NOW HIRING: THE FEMINIZATION OF WORK IN THE UNITED STATES, 1900–1995, at 105–07; COTT, *supra* note 10, at 452–54; Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, *in* WOMEN, WORK & PROTEST, *supra* note 10, at 1, 13.

81. BLACKWELDER, *supra* note 80, at 107–08; GABACCIA, *supra* note 11, at 51; KESSLER-HARRIS, *supra* note 12, at 116–17, 224–33. Women's participation in the labor market continued to increase, albeit more slowly, during the Great Depression. KESSLER-HARRIS, *supra* note 12, at 258–59.

82. 29 U.S.C. § 213(a)(1) (2006). The largest occupational category of professional workers are teachers, and the vast majority of teachers below the college level have historically been women. JOHN K. FOLGER & CHARLES B. NAM, EDUCATION OF THE AMERICAN POPULATION 78–80 (reprt. ed. 1976), *available at* http://books.google.com/books?id=Ira8D5bVU0UC&dq=education%20of%20the%20american%20population&pg=PR1#v=onepage&q&f=false. From the 1930s to the 1960s, women made up between eighty-five and ninety percent of elementary school teachers and about sixty-five to forty-five percent of secondary school teachers. *See id.* at 80.

83. 29 U.S.C. §§ 213(a)(5)–(6), (15), (b)(12), (21).

84. KESSLER-HARRIS, *supra* note 12, at 269–70. Domestic service ranked first among industries that employed women from 1870 to 1940. *See* JANET M. HOOKS, WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN'S OCCUPATIONS THROUGH SEVEN DECADES 52 (1947). Race played a large role as well in keeping both agricultural and domestic service workers outside the FLSA's protection. Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1837 (2007). In fact, in 1940, three quarters of all employed African American women worked in either domestic service or agricultural work. Mary C. King, *Occupational Segregation by Race and Sex, 1940-88*, MONTHLY LAB. REV., Apr. 1992, at 30.

neutral, many women did not receive its protections because the wage and hour provisions of the FLSA did not cover many traditionally female jobs.

The National Labor Relations Act provided what appeared to be sex-neutral protections for all workers. In fact, collective bargaining had helped some women attain improvements in their wages, hours, and working conditions, including the agreements that ended the Uprising of 20,000 described in Part I.[85] However, in the early twentieth century, organized labor was dominated by men and trade unions discriminated against women.[86] For example, the American Federation of Labor (AFL) fought to keep women from competing with men in the labor market by banishing women from most jobs dominated by men and sanctioning unequal pay based on sex even for equal work.[87] Moreover, just as the FLSA excluded many female-dominated occupations from coverage, the NLRA excluded domestic service workers from its protections.[88]

The weaknesses in both approaches, equal rights and sex-specific protections, were well summarized by Mary Ritter Beard, possibly the first women's historian, in the late 1930s.[89] The equal rights approach was rather ineffective in a society with so much social and economic inequality. Sex-specific protective labor legislation did little to benefit women or poor people of either sex who were not in the labor market, as it also accepted the vast majority of social and economic inequality in society.[90] Both approaches accepted differences of power among

85. *See supra* notes 42–44 and accompanying text. Marion Crain has also urged that collective bargaining is the most powerful route to female empowerment and that it is the only way to transform the underlying causes of a gendered market and family structure, although she acknowledges that organized labor has not traditionally been welcoming to women. *See generally* Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991).

86. GABACCIA, *supra* note 11, at 86; HOFF, *supra* note 14, at 193; KESSLER-HARRIS, *supra* note 12, at 86, 152–59, 202–03, 268–70. Even one of the most famous women in the labor movement, Mary "Mother" Jones, disapproved of women earning wages and promoted gendered labor roles in her speeches. GABACCIA, *supra* note 11, at 106.

87. HOFF, *supra* note 14, at 200–01; *see* GABACCIA, *supra* note 11, at 86. Not all trade unions promoted discrimination against women. The Knights of Labor had worked to organize women in the latter part of the nineteenth century. *Id.* at 106; KESSLER-HARRIS, *supra* note 12, at 86. Also, women had successfully organized themselves in a number of industries in the last half of the nineteenth century. KESSLER-HARRIS, *supra* note 12, at 85–86. *But see id.* at 155–56 (stating that the AFL promoted equal pay as a way to drive women workers out of the work force).

88. 29 U.S.C. § 152(3) (2006).

89. Beard's opinion, which was solicited for the National Women's Party's publication *Equal Rights*, although it did not get published then, is reprinted in HOFF, *supra* note 14, at 216–18.

90. *Id.* at 217.

classes of people, and both sought to emulate male standards for women rather than addressing the root causes of inequality.[91]

World War II was a potential turning point. Labor shortages caused by the shortage of men and increased demand for material from the military increased women's labor market opportunities significantly, especially for African American women.[92] At the same time, however, the underlying gender norms of society had not changed, and it is not clear that the increase in work available for or taken by women had a significant impact on those norms.[93] In what might appear to have been an important advance, the federal government seemed to promote sex equality as national policy by allowing employers an exception to the strict wage control laws to raise women's wages to the level of men doing comparable work.[94] However, this order was motivated by desire to maintain wage rates for men who would presumably be returning to the jobs presently held by those women, and Congress did not pass a proposed bill that would have mandated equal pay.[95] Although equal pay legislation continued to be introduced for several years, Congress did not pass it, and no progress on this front was made in the early post-war years.[96] In the years that followed, however, the rate of women's participation in the labor force climbed steadily such that by 1975, nearly half of all women in the United States worked, and most of them worked full time.[97]

---

91. *See id.* at 221.

92. Cott, *supra* note 10, at 482–84; Kessler-Harris, *supra* note 12, at 273–99. The female labor force grew by more than forty-six percent in the early 1940s. Blackwelder, *supra* note 80, at 123–24. And although labor market opportunities increased for African American women because more jobs were available due to the absence of men and better jobs became available as white women were given even better opportunities, racial discrimination and segregation still resulted in higher unemployment rates for African American women, *id.* at 128–31, and employment in usually the least desirable jobs. *Id.*; Cott, *supra* note 10, at 482–83.

93. Kessler-Harris, *supra* note 12, at 274–99. By February of 1946, more than two-thirds of the female wartime entrants to the labor force had left it. Blackwelder, *supra* note 80, at 123–24.

94. Nat'l War Labor Bd. Gen. Order No. 16 (1942), *reprinted in* Wartime Wage Control and Dispute Settlement: Laws, Regulations, General Orders, Directors, Official Interpretations, Policy Statements 135–36 (1945).

95. Kessler-Harris, *supra* note 12, at 289–90; *see also* Cott, *supra* note 10, at 484. Five states did pass legislation mandating equal pay for men and women: New York, Massachusetts, Michigan, Illinois, and Rhode Island. Dorothy S. Brady, *Equal Pay—What Are the Facts?*, *in* Women's Bureau Bull. No. 243, Report of the National Conference on Equal Pay 14–15 (1952), *cited in* Kessler-Harris, *supra* note 12, at 381.

96. *See* Cott, *supra* note 10, at 484; Kessler-Harris, *supra* note 12, at 298. .

97. Kessler-Harris, *supra* note 12, at 301. These increases were seen in married women and women with young children, in addition to the demographic groups that

The Cold War saw greater pressure for federal legislation to support women's wage work. The reformers sought a program for paid maternity leave for federal workers, programs to provide job training for women in nontraditional fields, adjustment of resources to promote childcare and housekeeping services for working women, policies and programs to encourage part-time employment, government criticism of policies that required or encouraged women to leave the workforce or not enter it in the first place, and reform of the Social Security program to provide sex equality in Social Security benefits.[98] As part of President Johnson's War on Poverty, federal programs to provide job training for women and child care for mothers were created.[99] In addition, public support for the ERA rose in this era, as did pressure to enact legislation prohibiting discrimination in employment on the basis of sex.[100] However, there was significant resistance to this more aggressive equality legislation, which could have limited the power of governments to classify on the basis of sex, invalidated existing legislation, or coerced private parties into refraining from discrimination.[101]

The executive branch also became more involved in developing and implementing equality policies. President Kennedy, at the urging of Esther Peterson, Director of the Women's Bureau, and Vice President Johnson, created a national Commission on the Status of Women in 1961.[102] This marked a renewed political effort for legislative solutions to promote women's equality. In addition, the Equal Pay Act was passed in 1963.[103] While the passage of the statute was an important victory, it fell somewhat short of what many activists desired. The Equal Pay Act was introduced at least in part to take attention away from the ERA,[104] and did not apply to domestic or agricultural work-

---

had traditionally worked for wages. *See* COTT, *supra* note 10, at 493–94, 534, 576; KESSLER-HARRIS, *supra* note 12,. at 302–03

98. COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN (1963); *see also* COTT, *supra* note 10, at 535–37; KESSLER-HARRIS, *supra* note 12, at 304.

99. KESSLER-HARRIS, *supra* note 12, at 312. During the Nixon Administration, Congress had passed the Comprehensive Child Development Act, which would have created day care facilities available to all children regardless of a family's ability to pay. COTT, *supra* note 10, at 582. President Nixon vetoed the legislation. *Id.*

100. *See* KESSLER-HARRIS, *supra* note 12, at 305–11.

101. COTT, *supra* note 10, at 533–36; *see also* KESSLER-HARRIS, *supra* note 12, at 313.

102. HOFF, *supra* note 14, at 231–32; KESSLER-HARRIS, *supra* note 12, at 313.

103. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2006)).

104. HOFF, *supra* note 14, at 232 (quoting Esther Peterson, who urged creation of the President's Commission on the Status of Women to "substitute constructive recommendations for the present troublesome and futile agitation about the 'equal rights amendment,'" and who helped introduce and usher the Equal Pay Act through Con-

ers because it was tied to the Fair Labor Standards Act.[105] Moreover, while the Equal Pay Act originally called for equal pay for "work of comparable character on jobs [that require] comparable skills,"[106] a concept of comparable worth that might address pay disparities caused by sex segregation in occupations, the language enacted required equal pay for "equal work," which cabined the inquiry to jobs that would be nearly identical, precluding any remedy to pay disparities caused by occupational sex segregation.[107]

The following year, the Civil Rights Act of 1964 was enacted, prohibiting discrimination in employment because of race, color, national origin, religion, or sex.[108] Sex was added to the list of statuses protected by Title VII at the last minute by a Southern Democrat, and

---

gress). The move to take attention away from the ERA was not necessarily motivated by a desire to maintain gender inequality or to avoid difficult political issues. Notably, this mirrored the fight over protective legislation versus equal rights in the Progressive Era. COTT, *supra* note 10, at 534–36.

105. KESSLER-HARRIS, *supra* note 12, at 314.

106. HOFF, *supra* note 14, at 233.

107. The Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. §§ 206(d), 209, 211, 213, 215–19, 255–56, 259–60, 262 (2006)). The act defines "equal work" as that work "the performance of which requires equal skill, effort, and responsibility, [for jobs] which are performed under similar working conditions, except where such payment [difference] is made pursuant to . . . any factor other than sex." 29 U.S.C. § 206. While comparing skill, effort, and responsibility could provide some flexibility to remedy pay disparities caused by occupational segregation, by allowing a defense when the difference is based on any factor other than sex, the statute effectively limits its application to situations where men and women with the same qualifications, experience, and length of service are doing the same job. An alternative approach, which would have addressed the inequality associated with occupational sex segregation, was "comparable worth," where pay would be determined not by job category, but by assessing substantially equal work that required similar amounts of training, skill, and judgment to perform and that provided services at the same level of importance to society. *See* COTT, *supra* note 10, at 582–83; HOFF, *supra* note 14, at 253. This alternative approach has been very controversial. *See, e.g.*, Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934 (1986); Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 892–93 (1986); Ronnie J. Steinberg, *Social Construction of Skill: Gender, Power, and Comparable Worth*, 17 WORK & OCCUPATIONS 449, 455, 476 (1990). The Supreme Court implicitly acknowledged that comparable worth was a valid legal theory, at least in the narrow situation in which Title VII was used to challenge pay practices where there were no male employees performing substantially equal work for higher wages. *See* County of Washington v. Gunther, 452 U.S. 161 (1981); HOFF, *supra* note 14, at 253. The following year also saw a judicial contribution to combating occupational sex segregation when the Court held unconstitutional a nursing school's exclusion of men because it tended to perpetuate the stereotype that nursing was women's work. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–31 (1982).

108. Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

there is almost no legislative history indicating what Congress thought sex equality should look like.[109] Although it is widely believed that this addition was designed to defeat the bill,[110] some evidence suggests that a significant number of representatives and senators approved the amendment and voted for the Act because it would also promote sex equality.[111] The evidence is somewhat equivocal in part because less than fifty percent of the House actually voted for the addition of the word "sex" in Title VII.[112] The push to legislate against sex discrimination was not accidental, though. Activists were also working to get states and municipalities to prohibit sex discrimination in employment through legislation, and successfully encouraged President Johnson to issue executive orders prohibiting sex discrimination by federal contractors and requiring them to institute affirmative action programs.[113]

These legislative changes and the debates surrounding them revealed the tension between the gender norm of women as primarily focused on home and family and the anti-discrimination norm, which focused on allowing women greater access to the public sphere.[114] They also revealed the tension between policies that sought to protect women workers because they lacked substantive equality with men and policies that treated men and women equally for purposes of access to social goods like jobs.[115] These tensions in many ways mirrored the special treatment and equal treatment debates of the early twentieth century;[116] in both time periods, these tensions resulted in

---

109. 110 Cong. Rec. H2577-84 (1964).

110. Cott, *supra* note 10, at 547; Hoff, *supra* note 14, at 233–34; Kessler-Harris, *supra* note 12, at 314; *see* 110 Cong. Rec. H2577-84 (reflecting suspicion by members of Congress of the sponsor's motivations). Representative Smith, the sponsor of this addition, denied that defeating the bill was his motive. Hoff, *supra* note 14, at 233.

111. Mary Frances Berry, Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution 61 (1986) (describing how Representative Martha Griffiths (D.-Mich.) rallied support among the many northern Democrats and by Republicans for inclusion of sex as a protected status); *see also* Rosalind Rosenberg, Divided Lives: American Women in the Twentieth Century 188 (2008); Cott, *supra* note 10, at 547–48. Representative Griffiths and Senator Margaret Chase Smith successfully held the entire bill hostage to defeat an effort to remove the word "sex" in committee. Kessler-Harris, *supra* note 12, at 314.

112. Hoff, *supra* note 14, at 233. Forty percent of the members of the House were absent from the vote count on the bill. *Id.*

113. Exec. Order No. 11,375, 3 C.F.R. 684 (1966–1970); Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970).

114. Kessler-Harris, *supra* note 12, at 315–17.

115. *Id.*

116. *See* Hoff, *supra* note 14, at 259–75, 296–98, 317–18, 330–31, 356–64.

backlash against the legislation and the movement for a constitutional amendment.[117]

Not all of the legislative developments during this time period focused on discrimination and sex. Another important worker protection, one that was gender-neutral, was enacted that focused on workers as a class, and it was arguably the legislative development that would have helped the victims of the Triangle Shirtwaist Factory fire the most. Enacted in 1970, the Occupational Safety and Health Act sought to create minimum standards for worker safety in most workplaces in the country.[118] That statute created the Occupational Safety and Health Administration to promulgate safety standards and regulations, and to enforce them along with the substantive provisions of the Act.[119]

Despite this example, most of the protective legislation enacted since the 1960s has been directed toward protecting narrow classes of people specifically. During this time period, legislation to protect women was enacted, cases were brought to enforce and expand equality guarantees,[120] and women continued to participate in the labor force in ever-increasing numbers and in increasingly diverse jobs, even though significant sex segregation persisted.[121] In 1972, Title VII was amended to apply to state and local governments and to give the Equal Employment Opportunity Commission the power to bring suits against employers for discriminating in the workplace.[122] The ERA passed in Congress and was sent to the states for ratification.[123] Later

---

117. *Id.* at 234, 245; KESSLER-HARRIS, *supra* note 12, at 317–18. *See generally* FALUDI, *supra* note 62 (documenting the backlash against the women's movement in the 1980s and 1990s).

118. Pub. L. No. 91-596, 84 Stat. 1590 (1970).

119. 29 U.S.C. § 656 (2006). The decision and enforcement are exercised under the power of the Secretary of Labor. *See* § 655.

120. HOFF, *supra* note 14, at 245–47. For an excellent summary of the actions of the three branches of the federal government and the actions of social movement activists, see *id.* at 236–44, comparing these activities in a chart that traces from 1963 to 1990, and *id.* at 395–407, summarizing legislation, executive orders, and Supreme Court cases from 1963 to 1990. Some of these actions were Supreme Court decisions, a list of which is provided *infra* note 1267.

121. COTT, *supra* note 10, at 577–80.

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

123. That ratification stalled, three states shy of the number needed. Some of the credit for defeating the ERA must go to Phyllis Schlafly's group STOP ERA, which not only opposed an equal rights approach to sex issues but also advocated for traditional values and gender roles. *See* FALUDI, *supra* note 62, at 232–35 (tracing the New Right's rise to passage of the ERA in 1972 and the recognition of a fundamental right to abortion in Roe v. Wade, 410 U.S. 113 (1973)); HOFF, *supra* note 14, at 321–25 (describing Schlafly's group).

that year, the Patsy T. Mink Equal Opportunity in Education Act, popularly known as Title IX, was passed, prohibiting recipients of federal funds from discriminating, including in employment, on the basis of sex.[124] Two years later, the Women's Educational Equity Act instituted funding for educational programs and research that benefited women and girls. The Act also encouraged them to enter nontraditional fields.[125] In 1975, the Equal Credit Opportunity Act was enacted, prohibiting discrimination in credit provision on the basis of sex.[126] Finally, in 1978, Congress passed the Pregnancy Discrimination Act to make clear that discrimination on the basis of pregnancy constituted discrimination on the basis of sex within the meaning of Title VII, superseding the Supreme Court's holding that it did not.[127]

Several Supreme Court cases during this time period considered state law restrictions on women in many aspects of their lives.[128] Many of these restrictions were struck down as violations of the Constitution, and provisions that classified on the basis of sex became subject to heightened scrutiny.[129] These constitutional decisions supplemented the federal legislation that was being enacted by limiting the ways that states could enforce their own laws limiting the rights of women.

---

124. Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681–88 (2006)).

125. Pub. L. No. 93-380, 88 Stat. 484, 554 (1974).

126. Pub. L. No. 93-495, 88 Stat. 1500 (1974).

127. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)) (overruling Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that discriminating on the basis of pregnancy was not discrimination "based upon gender as such")).

128. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that classifications on the basis of sex warranted intermediate scrutiny); Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down laws that kept women off juries on the basis of sex); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that discrimination on the basis of pregnancy was not discrimination on the basis of sex warranting any sort of heightened scrutiny under the Equal Protection Clause); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down a law requiring mandatory unpaid maternity leave as a violation of the Due Process Clause); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality) (stating that sex should be considered a suspect class); Roe v. Wade, 410 U.S. 113 (1973) (recognizing that the constitutional right to privacy extended to decisions to terminate a pregnancy and limiting the ability of states to prevent exercise of that right); Reed v. Reed, 404 U.S. 71 (1971) (striking down a state law that gave men automatic preference to be executors of estates as a violation of the Equal Protection Clause); Griswold v. Conn., 381 U.S. 479 (1965) (holding that a fundamental right to privacy prevented states from prohibiting access to contraception).

129. *E.g.*, *Boren*, 429 U.S. 190. Intermediate scrutiny requires that the legislation at issue bear a substantial relationship to an important government purpose. *Id.* at 197-98.

Of all of these developments, Title VII and Title IX represented particularly important gains for women in the workplace and education. They have not been uniformly successful at ending discrimination, however. The reasons for this lack of success are more fully explored in Part III but, in short, it can be attributed to a combination of design flaws, the stickiness of gender norms, the way status-based rights work, and the lack of support for a broad or flexible application of the laws.

While the 1970s were a particularly active time for women's equality, the 1980s also saw some attempts to promote equality for women. In 1981, the first Economic Equity Act was introduced in Congress.[130] This legislation sought a number of changes: 1. it sought to eliminate sex distinctions in a number of areas including in benefits provided to armed services members; 2. it sought to restructure a number of programs in order to make marital status irrelevant or to benefit spouses equally regardless of sex; 3. it sought to restructure the tax code to provide greater recognition of the contributions of homemakers; 4. it sought to support child care programs; and 5. it sought to prohibit discrimination in insurance.[131] That legislation did not pass, but it did form the basis for child support and pension legislation in the 1980s.[132]

Despite the introduction of this expansive legislation, the 1980s saw a decrease in executive and judicial support for sex discrimination legislation.[133] For example, the executive branch during both the Rea-

130. H.R. 3117, 97th Cong. (1981); S. 888, 97th Cong. (1981); HOFF, *supra* note 14, at 273.

131. *See* H.R. 3117; S. 888. While the bills themselves cannot be found online, information about the legislation, including a summary of it, can be found by searching the Library of Congress' THOMAS database. THOMAS, http://thomas.loc.gov/home/thomas.php# (last visited Oct. 22, 2011).

132. *See* HOFF, *supra* note 14, at 241, 273–74, 402. The Economic Equity Act was a broad bill, focused on gender equity, but the child support and pension legislation that eventually passed had been part of less comprehensive bills. The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. §§ 657–662 (2006)) (requiring states to strengthen their support laws, to enact guidelines for the appropriate amount of support, and provide greater assistance to collect that support, providing grants to improve interstate enforcement of child support orders); The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1433 (1984) (amending the Employee Retirement Income Security Act and the Internal Revenue Code to ensure that women who took time out of the workforce for childrearing and surviving and divorced spouses were treated more equitably by the retirement plan of their own employer or their former spouses' employer).

133. The 1980s also represented a period of erosion of other rights at the federal and state level that had helped women achieve independence through control of their reproductive health with access to contraception and abortion. During the same time period, however, real legislative gains were made at the state level through reform of

gan and Bush administrations issued statements critical of affirmative action, comparable worth, and class action suits to enforce discrimination laws.[134] And after the Supreme Court interpreted the scope of Title IX narrowly and broadening legislation was introduced, it was defeated by filibuster three years in a row.[135] The Civil Rights Restoration Act finally overcame a filibuster in 1987, passed, and was vetoed by President Reagan.[136] Congress overrode that veto in 1988.[137]

In the late 1980s and early 1990s, sex discrimination legislation enjoyed a resurgence. In 1990, Congress passed legislation requiring large companies to give up to twelve weeks of unpaid leave to workers for the birth or adoption of a child, or for their own or a family member's serious illness.[138] That legislation was vetoed by President Bush, but was eventually enacted and signed into law by President Clinton in 1993 as the Family and Medical Leave Act.[139] In 1991, Congress amended Title VII to supersede Supreme Court opinions that had interpreted Title VII too narrowly, and to provide for compensatory and punitive damages for successful plaintiffs and for jury trials.[140] In 1994, Congress passed the Violence Against Women Act,[141] which, among other things, created a federal right to be free from crimes motivated by gender and a cause of action for damages for

---

the criminal laws related to domestic violence, sexual assault, and rape. A thorough discussion of the expansion and contraction of reproductive rights and resources to support reproductive choice, as well as discussion of other issues that relate to women's well being, like laws regulating marriage and divorce, property rights, violence against women, pornography, women's health, and sexual autonomy are beyond the scope of this article.

134. HOFF, *supra* note 14, at 241. The Justice Department and the Civil Rights Commission, as well as officials within those organizations, issued statements hostile to affirmative action, *id.*, and comparable worth, Linda M. Blum & Peggy Kahn, *Comparable Worth*, *in* THE READER'S COMPANION TO U.S. WOMEN'S HISTORY 119, 121 (Wilma Mankiller et al. eds., 1998). Hoff does not specify which other organizations, if any, the other criticism came from. HOFF, *supra* note 14, at 241. This criticism was bolstered by conservative social movement activists seeking to reverse legislation and executive and judicial branch support for equal rights on the basis of sex and sex equity in all aspects of American life. FALUDI, *supra* note 62, at 229–56 (describing the efforts of the Heritage Foundation and other New Right groups in the 1980s).

135. HOFF, *supra* note 14, at 241–42, 256.

136. *Id.* at 242, 256–57.

137. Pub. L. No. 100-259, 102 Stat. 28 (1988); HOFF, *supra* note 14, at 257.

138. HOFF, *supra* note 14, at 244.

139. Pub. L. No. 103-3, § 2, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601–54 (2006)); HOFF, *supra* note 13, at 244.

140. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075 (codified as amended in scattered sections of 42 U.S.C.).

141. Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1796–1956 (1994) (codified in scattered sections of the U.S.C.).

anyone, male or female, injured by gender-motivated violence.[142] Although this provision of the act was invalidated by the Supreme Court as exceeding Congress' Commerce Clause powers,[143] funding provisions of the legislation and other reforms remain.[144]

Currently, we are experiencing yet another resurgence in legislative efforts to combat discrimination on the basis of sex and to promote sex equity and equality. Fair pay issues have been a primary focus. For example, in 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which amended Title VII to clarify that its short statute of limitations begins running with each paycheck that carries out discriminatory pay.[145] Additionally, as part of the Patient Protection and Affordable Care Act, the Fair Labor Standards Act was amended to require employers to give women covered by the statute reasonable breaks and a location that is not a bathroom to express breast milk.[146]

Legislation is currently pending to provide greater enforcement and remedies for pay discrimination[147] as well as equal pay for

---

142. *Id.* at § 40302, 108 Stat. at 1941 (codified at 42 U.S.C. § 13981 (1994)). The statute also: created training and grant programs; created a national domestic violence hotline; required a coordinated community response to domestic violence, sexual assault, and stalking crimes; strengthened federal penalties for repeat sex offenders and included a federal rape shield law; required states and territories to give full faith and credit to orders of protection issued by other states, tribes, and territories; and created legal relief for battered immigrants. *See generally* Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. at 1796–1956 (1994). The Act was reauthorized in 2000, and an Office on Violence against Women (OVW) was created in the Department of Justice to provide technical assistance and grants to groups developing programs, practices, or policies aimed at ending violence against women in the form of domestic violence, dating violence, sexual violence, and stalking. The grant programs were also expanded, as were interstate stalking laws and immigration protections. Pub. L. No. 106-386, §§ 1001–1603, 114 Stat. 1464, 1464–91 (2000) (codified in scattered sections of the U.S.C.). The most recent reauthorization act created programs to help trafficking victims, to increase the federal DNA database, and to provide the grant programs administered by the OVW. Pub. L. No. 109-162, 119 Stat. 2960 (2006).

143. United States v. Morrison, 529 U.S. 598 (2000).

144. *Cf. id.* (ruling that only 42 U.S.C. § 13981 was beyond Congress' power).

145. Pub. L. No. 111-2, 123 Stat. 5 (2009). The legislation had originally been introduced in 2007 in response to *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618 (2007), in which the Supreme Court had held that the statute of limitations began running when the original discriminatory decision was made but did not start anew with each paycheck. H.R. 2831, 110th Cong. (2007); S. 1843, 110th Cong. (2007). The bills died in the Senate in 2008. *See Bill Summary and Status, 110th Congress (2007-2008), H.R. 2831, All Congressional Actions*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02831:@@@X.

146. Pub. L. No. 111-148, § 4207, 124 Stat. 119, 577 (2010) (codified at 29 U.S.C. § 207(r) (2006 Supp. IV)).

147. Paycheck Fairness Act, H.R. 1519, 112th Cong. (2011); Paycheck Fairness Act, S. 797, 112th Cong. (2011). The same legislation passed the House in 2008, but died

equivalent jobs.[148] Several pieces of legislation to provide paid family or medical leave are also pending,[149] as are bills to prohibit discrimination on the basis of sexual orientation or identity,[150] to end the exclusion of women from military ground combat,[151] to promote women-owned businesses,[152] and to promote opportunities for academic jobs in the sciences and engineering for women.[153] There have even been proposals to amend the Constitution to ensure sex equality and reproductive rights[154] and to remove the ratification deadline for the ERA in order to reinvigorate it.[155] Whether these bills have the political support for enactment or the public interest to spur debate and action remains to be seen.

---

in the Senate. *See Bill Summary and Status, 110th Congress (2007–2008), H.R. 1338, All Congressional Actions*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01338:. In 2010, it passed the House, but fell two votes short of cloture in the Senate. *See Bill Summary and Status, 111th Congress (2009-2010), H.R. 12, All Congressional Actions*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00012:.

148. Fair Pay Act of 2011, H.R. 1493, 112th Cong. (2011).

149. *E.g.*, Federal Employees Paid Parental Leave Act of 2011, H.R. 616, 112th Cong. (2011); Family and Medical Leave Enhancement Act of 2011, H.R. 1440, 112th Cong. (2011); Healthy Families Act, H.R. 1876, 112th Cong. (2011); Healthy Families Act, S. 984, 112th Cong. (2011); Family Economic Success Act, S.10, 112th Cong. (2011).

150. Employment Nondiscrimination Act, H.R.1397, 112th Cong. (2011).

151. Women's Fair and Equal Right to Military Service Act, H.R.1928, 112th Cong. (2011).

152. Women's Business Ownership Act of 2011, H.R. 744, 112th Cong. (2011).

153. Fulfilling the Potential of Women in Academic Science and Engineering Act of 2011, H.R. 889, 112th Cong. (2011).

154. H.J. Res. 31, 112th Cong. (2011). The text of the proposed amendment provides:

> Article–
>
> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. Reproductive rights for women under the law shall not be denied or abridged by the United States or any State.
>
> Section 3. Congress shall have power to enforce and implement this article by appropriate legislation.
>
> Section 4. This amendment shall take effect two years after the date of ratification.

155. H.R.J. Res. 47, 112th Cong. (2011). The text of the proposed amendment provides:

> That notwithstanding any time limit contained in House Joint Resolution 208 of the Ninety-second Congress, second session, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by three additional States.

III.
Dissensus and the Failure of Enforcement

As the discussion in Part II helps to demonstrate, the road to equality in this country has been long and slow. With one of the greatest legislative milestones in that movement, Title VII of the Civil Rights Act of 1964, enacted almost half a century ago, activists and scholars are expressing ever more frustration that we haven't reached our destination yet.[156] The problem is not, as some claim, simply one of remedies, a hostile judiciary, overly complicated legal analyses, or ever-craftier discriminators. These all may be significant problems, but they are dwarfed in importance by the fundamental fact that in this country we lack consensus on what discrimination is, what practices are discriminatory, and what role the government should take in redressing such practices. Without a greater level of consensus, our laws that prohibit "discriminat[ion] . . . because of" sex cannot possibly be effective.[157]

Title VII and the other laws that prohibit status-based discrimination in the workplace were enacted to create social change.[158] But the words of a statute alone cannot accomplish change, especially when those words address broad concepts. Those who enforce the law and those who obey it must interpret those words, and their interpretations will inevitably be framed by their individual perspectives.

The critics of the Civil Rights Act of 1964 shared this concern, although they were primarily concerned that Title VII went too far to

---

156. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 2 & n.3, 5–6 (2006); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Cal. L. Rev. 1169 (2006); Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 Harv. J.L. & Gender 353 (2007); Rachel F. Moran, *Whatever Happened to Racism?*, 79 St. John's L. Rev. 899, 900 (2005).

157. Title VII uses these terms in its prohibition of discrimination. It provides that:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

158. Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity 4 (1993) (arguing that "the effort to ameliorate long standing patterns of race and sex subordination [through Title VII] is perhaps *the most ambitious social reform effort ever undertaken in America*." (emphasis added)).

promote equality. As the authors of the minority report of the House Judiciary Committee wrote, "The depth, the revolutionary meaning of this act, is almost beyond description. It cannot be circumscribed, it cannot be said that it goes this far and no farther. The language written into the bill is not of that sort."[159] A separate minority report further bemoaned, "With all of its concern for inequality in employment opportunities, [Title VII] wholly fails to define 'equality.' Nowhere in the title can be found language to guide the [Equal Employment Opportunity] Commission in its investigation of charges of racial discrimination."[160]

If racial equality was problematic on this score, sex equality was exponentially more problematic. As explained in Part II, sex was added to the list of statuses protected by Title VII at the last minute, and there is almost no legislative history suggesting what Congress thought sex equality meant.[161] The first director of the Equal Employment Opportunity Commission, in fact, considered the inclusion of "sex" in the statute a "fluke," and largely sought to ignore it.[162] That proved impossible, however; more than a third of the charges the agency processed in its first year were sex discrimination charges, and women activists increased the pressure to take sex discrimination seriously, in part through the struggle for ratification of the ERA, beginning in 1972.[163] As the renewed focus on the ERA by activists might suggest, formal equality became firmly entrenched as the legal model of sex equality.[164] In fact, Title VII was quickly used to strike down

159. E.E. Willies et al., Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, *reprinted in* Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2069 (1968).

160. Richard H. Poff & William Cramer, Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer, *reprinted in* Equal Employment Opportunity Comm'n, *supra* note 159, at 2110.

161. 110 Cong. Rec. H2577-84 (1964) (providing the only discussion of adding "sex" to the list of protected classes, most of which did not give examples of what sex discrimination was, and noting in part that the topic was not addressed in any of the hearings about the bill).

162. Herman Edelsberg, Exec. Dir., Equal Emp't Opportunity Comm'n, Statement at the New York University Annual Conference on Labor (Aug. 25, 1966), *in* 62 Lab. Rel. Rep. (BNA) 253–55 (1966) (referring to the addition as "conceived out of wedlock" and viewing men as entitled to female secretaries); *see also* Flora Davis, Moving the Mountain: The Women's Movement in America since 1960 46–47 (1999); Hoff, *supra* note 14, at 235; Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring about Social Change? 252–53 (2008).

163. *See* Hoff, *supra* note 14, at 235; Rosenberg, *supra* note 162, at 253–56.

164. *See* Hoff, *supra* note 14, at 235 (noting that numerous lower courts in the 1970s held that Title VII superseded sex-specific protective legislation). The operative text of the Equal Rights Amendment is substantially similar to the text of the Four-

the sex-specific protective state legislation enacted in the early part of the twentieth century.[165]

The entrenchment of formal equality does not demonstrate consensus on what sex discrimination is, however.[166] The lack of consensus about what equality means for women among reformers at the time of the Triangle Shirtwaist Factory fire carried over to the enactment of Title VII and its early enforcement. Even more troubling, as explained in Part II, we continue to lack consensus on what sex equality means in 2011. Our current lack of consensus on what discrimination means may be a result of the kind of ossification that develops when laws are not regularly revisited and when court interpretations pile up, and the principal evil the law has sought to prohibit becomes

---

teenth Amendment. *Compare* S.J. Res. 8, 92d Cong. 86 Stat. 1523, 118 Cong. Rec. 9598 (1972) ("Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex"), *and* H.R.J. Res. 208, 92d Cong., 117 Cong. Rec. 35815 (1971), *with* U.S. Const. amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."). Because that language from the Fourteenth Amendment has been interpreted to embody a norm of formal equality, that same language in the ERA would likely be interpreted the same way. *See generally* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1014 (1986) (arguing that the Court usually uses a formal equality model for the Fourteenth Amendment); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470, 1474–75 (2004) (noting that the formal-equality rationale dominates the "modern equal protection tradition").

165. *E.g.*, Rosenfeld v. So. Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968).

166. *See, e.g.*, Martha Chamallas, Introduction to Feminist Legal Theory 16–22 (2d ed. 2003) (describing differing approaches to equality among feminist activists and theorists); Freedman, *supra* note 62 (describing the history of approaches to feminism and sex equality); Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982) (documenting studies that suggest that women and men may think and act differently, but suggesting that any hierarchy based on those differences is socially constructed); bell hooks, Feminist Theory: From Margin to Center (1984) (critiquing views of sex discrimination that posit an "essential woman"); Listen Up: Voices from the Next Feminist Generation (Barbara Findlen ed., 1995) (third-wave feminist essay collection); Catharine A. MacKinnon, Sexual Harassment of Working Women 143–213 (1979) (describing two approaches to sex discrimination and arguing that harassment is discrimination under either approach); Carol Smart: Feminism and the Power of Law 66–89 (1989) (discussing the theoretical approaches to sex discrimination). There are also those who disagree that society discriminates on the basis of sex at all, or who argue that if society does discriminate, the feminist movement itself has created that discrimination. *E.g.*, Suzanne Venker & Phyllis Schlafly, The Flipside of Feminism: What Conservative Women Know – and Men Can't Say (2011); *see also* Faludi, *supra* note 62 (describing the way that the media, the Reagan and Bush administrations, and some academics portrayed the feminist movement as the cause of most of women's problems in the late twentieth century).

more distant in time.[167] But we do not even have clear first principles courts could draw on to spur innovation because of the lack of consensus at the creation of Title VII's prohibition.

While some would disagree, I would argue that the use of the terms "discrimination" and "because of [a protected status]" to describe what conduct is prohibited has had the opposite effect of the effect that was predicted in the minority report; that, in fact, it has resulted in a very narrow prohibition on employer conduct. A number of different disciplines have contributed explanations for why statutory language that lacks broad consensus might not be optimally effective for social transformation. For example, chaos theory—or more precisely, its offshoot, the theory of complex adaptive systems—has been suggested as a metaphor for the way that law and society interact, and it suggests that laws will often produce unexpected results.[168] Even if the system of law is not itself a complex adaptive system, the concept nonetheless carries, at least as a metaphor, significant force. Law as a practice is a sufficiently complex operation to make this comparison attractive. We lawyers like to think that most statutes are clearly written and uniformly applied, but the method of a law's creation, the number of interpreters of law, broad wording of laws, and the process of interpretation make uniformity of meaning not only unlikely, but practically impossible.[169]

Philosophy, particularly the work of Foucault, has contributed to the discourse on this subject as well. Foucault wrote extensively about the way that knowledge, or claims to truth, is organized by disciplines and institutions that shape the way that people think and perpetuate themselves by doing so, in a recursive fashion.[170] Cognitive psychological research supports Foucault's description of the perpetuation of knowledge; our perception is framed in fundamental ways by our be-

---

167. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (describing the process of ossification of labor law).

168. *See*, *e.g.*, Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933 (1994); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996). Some argue that the law *is* a complex adaptive system, while others say that the science simply proves a useful metaphor. I am not making a claim one way or the other, since this article aims not to predict how the law will behave, but instead to describe why it behaves the way that it does.

169. *See generally* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989) (arguing that although indeterminacy of law exists, it is moderate and does not undermine law's legitimacy).

170. *See generally* MICHEL FOUCAULT, ARCHEOLOGY OF KNOWLEDGE (Rupert Swyer trans., Random House 1982) (1972); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES (Vintage Books 1994) (1971).

liefs and our experiences, and that framing reinforces our beliefs in a recursive fashion.

According to this research, the process is a natural one. The things in our world are infinitely varied, and if we had to fully process the impact of each variation we encountered, we would be incapable of acting.[171] Thus, in order to function, we generalize about things—objects and people alike—based on a few encounters with them, use those generalizations to define categories, and in the future, quickly sort what we encounter into those categories without reflection.[172] We use the definitions of our categories to define the thing we have encountered and to predict how that thing is likely to act or be acted upon.[173] This sorting function facilitates quick judgments, makes the world seem more predictable, and allows us to act.

Although this process is important to our ability to function, relying on categories, which involves essentially creating group identities, has far-reaching consequences. When we have assigned an object to a group, we perceive it as more like other things within that group and less like things outside of that group.[174] This process gets personalized when people are given group identities. Even when the distinction is arbitrary, as with people randomly assigned to teams, people view members of their own group (the in-group) as more like themselves, and others (the out-group) as more different from them than if the

171. *See* Eleanor Rosch, *Human Categorization*, *in* STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 1–2 (Neil Warren ed., 1977) ("Since no organism can cope with infinite diversity, one of the most basic functions of all organisms is the cutting up of the environment into classifications by which nonidentical stimuli can be treated as equivalent.").

172. Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27, 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

173. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188–89 (1995).

174. *See* Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 J. ABNORMAL & SOC. PSYCHOL. 350, 355 (1956) (finding that when nonsense syllables were linked to a spot on a spatial continuum, participants tended to judge nonsense syllables linked to another spot as more different than no syllables were linked to any spot); Krieger, *supra* note 173, at 1186 (describing two studies and citing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101, 104 (1963) (when lines were grouped, participants judged the comparative length of those lines as more similar when they compared lines within the same group and more different from each other when they compared a line to one in the other group than the same people did when they compared the length of lines not assigned to any group); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969) (describing the above experiment in more detail).

others had no group identity.[175] We don't only assign others to groups; we identify ourselves to groups as well, and that process has similarly important consequences. People who identify as part of a group are also far less able to see differences among members of the out-group even when those people are given information about the individuals in the out-group identical to what they are given about individuals in the in-group.[176]

Groups or categories are created by the "salience" of characteristics.[177] Once a characteristic, such as gender or race, becomes salient to a person (matters or makes a difference), that characteristic defines a group. But what becomes salient is neither inevitable nor natural. Individuals define what is salient in any given context, often choosing what their culture defines as salient.[178] Because choices about salience are within our control, we can control how our brains categorize people into groups.[179] Thus, to some extent, truly moving towards equal-

175. Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 58, 61 (David M. Messick & Ann E. Tennbrunsel eds., 1996); Ann Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, *in* STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

176. David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, *in* PREJUDICE, DISCRIMINATION AND RACISM 127, 131 (John F. Dovidio & Samuel L. Gaertner eds., 1986). Numerous studies that support this assertion are summarized in Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup–Outgroup Perception*, *in* PREJUDICE, DISCRIMINATION & RACISM, *supra* at 165, 168–73. Some of these studies involved asking members of student groups to rate the similarity of members of their own and other groups and to assess the traits of members of their own and different groups asking people to assess how likely someone in their group would fit a stereotype and how likely someone outside of their group would, and asking people with a particular opinion to rate the similarity of people with the same or a different opinion. *Id.*

177. *See* Krieger, *supra* note 173, at 1190 (describing how categorical structures are triggered).

178. That is not to say that in every instance individuals make a conscious choice about which characteristics matter. Conscious adoption is possible, but individuals also absorb information about what characteristics matter to others (and therefore should to them) from exposure to the culture they live in. *See* H.J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973) ("Stereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society."); Richard Nisbett, *Culture and Systems of Thought*, 108 PSYCHOL. REV. 291, 291–92 (2001) (describing their review of the literature on how societies differ in systems of thought and drawing conclusions about how those differences influence cognitive processes).

179. Even though some categories become salient because we absorb them, as explained, *supra* note 177, the lack of fully self-aware adoption does not mean that

ity requires a critical mass of us to at least understand our categories and examine our actions to see whether they could be causing harm.

One consequence of these cognitive structures is the tendency to stereotype, or essentially create, a cognitive shortcut that links personal traits with salient characteristics in order to simplify the task of perceiving, processing, and retaining information about people.[180] Once set, these cognitive shortcuts "bias[ ] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people," and they influence judgment continuously.[181]

These cognitive shortcuts create expectations that transform the way we perceive others, remember things about others, and interpret motivations for the actions of others.[182] We tend to remember the things a person actually did only if those actions fit our stereotypes of that person; we tend to believe we remember a person doing things consistent with the stereotypes even if the person never did them; and, we tend to forget the things that did not conform to those stereotypes.[183] Additionally, we tend to assume that a person who acts consistently with a stereotype acted because of innate characteristics (that

---

salience and categorizations are outside of our control. They do not function entirely automatically and can be confronted and changed by conscious effort. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 244–47, 255–56 (2002); Ann C. McGinley, *¡Viva la Évolucion!: Recognizing Unconscious Motivation in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 430–32 (2000); *see also* JACK MEZIROW, TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING (1991); Jack Mezirow, *Transformation Theory of Adult Learning*, *in* IN DEFENSE OF THE LIFEWORLD 39 (M.R. Welton ed., 1995). Therefore, even though some discrimination may happen without full, contemporaneous self-awareness, it is still an appropriate subject of regulation by the government. *See* Marc Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459 (analogizing liability for discrimination caused by cognitive bias to the law related to dangerous conditions on land); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1234 (1999). *But see* Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130–34 (1999) (arguing that there should be no remedy for the kind of discrimination that is caused by implicit bias).

180. Krieger, *supra* note 173, at 1187–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321–22 (2000). While this description of stereotypes may sound very benign, in a society with power imbalances such as ours, stereotypes may perpetuate and even aggravate those power imbalances.

181. Krieger, *supra* note 173, at 1188. Just as for salience, which defines groupness in the first place, we decide what behaviors to attribute to particular groups either consciously or through exposure to culture. David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, *in* 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 53, 64 (Leonard Berkowitz ed., 1979).

182. *See* Krieger, *supra* note 173, at 1200–09.

183. *Id*. at 1207–09 (summarizing research on stereotypes and memory); *see also* Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41–45 (1978).

they will usually act this way because they are this type of person), but a person who acts inconsistently with a stereotype acted because of transitional or situational factors (that they do not usually act this way because they are not this type of person).[184] For example, if we believe that women are hypersensitive to issues of gender, then we are likely to believe that a particular woman's complaint about sex discrimination is motivated by her hypersensitivity, regardless of whether it was or whether this particular woman is at all sensitive to such issues. Thus, not only does discrimination occur through an ongoing process of interaction that often happens outside of our normal self-awareness, but the judgments we make about situations to which we are external observers are colored in the same way through the same process. Consequently, those who interpret and enforce the law are prone to the same kinds of biases about people and situations that we all are. To the extent that those who interpret and enforce the law tend to belong to majority groups and to the extent that some stereotypes of women and people of color are pervasive in our culture, they will tend to interpret the claims of women and people of color as not constituting any sort of discrimination.

Therefore, prohibiting "discrimination" "because of" a protected class or group status, as Title VII states, is inherently problematic. The language used in the statute is indeterminate and overly broad; thus, it is susceptible to the sorting functions and stereotyping problems described above. Decisionmakers bring into the decision-making process their own worldviews about what discrimination is, what people who claim they have been discriminated against are like, and what members of particular races, sexes, religions, and national origins are like. These worldviews influence the way that decisionmakers interact with people and how they view the interactions of others.

It is easy to understand why a Congress that sought to transform society may have chosen to use broad language to combat discrimination and to single out only some statuses for protection. Providing legal protection on the basis of group identities that have been salient in our society for some time reflects the very real discrimination exper-

184. Krieger, *supra* note 173, at 1204–07. A good example of such attribution bias is given by Joan Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 433–34 (2003). Because women with children are presumed to innately put their children, rather than their jobs, as their first priority, when a woman with children is late to work, her boss is likely to assume that her innate characteristic of prioritizing childcare responsibilities was the cause. Because men are presumed to put work first, a man late for work may be assumed to have been caught in traffic, a transitional cause.

ienced by members of non-majority groups. However, Title VII defines groups by their generic labels rather than by their non-majority status or history of discrimination. In other words, protected classes are comprised as people with *a race* or *a sex*, not as African Americans or women. This structure has the potential to allow for evolution as societal conditions change or our understanding of discrimination on any of these bases changes, but it also has the potential to protect the dominant race and sex (or religion or national origin) from changes in the status quo. Additionally, defining legal protection by group status means that those who enforce the statute, when considering matters related to people outside their own group, may not be able to perceive that a person's experience was truly negative enough to count as discrimination or that what happened was caused by the person's membership in the group.

Giving life to the prohibition through a statute only adds to this indeterminacy. This type of indeterminacy is a result of several factors. First, statutes are a product of collective action; a large number of people work together to form the text (or at least to agree on the text) that comprises the statute. Each of those people knows the meaning of what he or she intends the text to mean, but those meanings can differ from person to person.[185] Divining what the end product means is not simply a search for truth, but a process of creating a fictional unitary meaning from a myriad of potential meanings, and a person's belief system will inform that process of creation.

"Meaning" here refers not just to meaning in a narrow sense—that is, encompassing what the particular words mean—but also in an operational sense, to encompass what effect the words should have on the world. For example, most people might agree that "discrimination" means making any kind of distinction or differentiation, but some may

185. The elusive nature of statutory interpretation and how courts should engage in it has been debated by many. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251–54 (1992) (describing the views of Judge Posner and Judge Easterbrook of the Seventh Circuit, and Justice Scalia, the three most prominent voices in the current statutory interpretation debate). For more on the debate between Judge Posner, on the one hand, and Judge Easterbrook and Justice Scalia on the other, *compare* United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.) *with id.* at 1331–38 (Posner, J., dissenting). *See also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 275 (1990) (discussing whether an objective method of statutory interpretation is possible); ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–29 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (rejecting the notion that legislative bodies can have "intents"). For an alternate view of statutory interpretation, see, for example, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38–47 (1994), describing and criticizing overreliance on the text to the exclusion of other interpretive tools.

argue that "discrimination" as used in Title VII requires animus against a person's protected status, and therefore that sex discrimination requires animus against women.

The phrase "because of," when linked to the protected classes, also suffers from an indeterminacy problem. Proving causation can be a complicated issue both conceptually and factually. Conceptually, it is not clear what it means for a label or identity of a person to cause an action to be taken against that person. Some may argue that if a negative effect experienced by a person is correlated strongly with membership in that person's group then that alone should constitute sufficient reason to conclude that something about membership in that group is causing the negative effect.[186] Others may disagree that such correlation is enough of a link to suggest causation.[187] Additionally, it may not even be entirely clear just how one person's status causes another person to take some action, and even if there is agreement that "motive" describes how status can cause action, there will likely be substantial disagreement on what role exactly that motive must take. Any kind of contribution may be sufficient;[188] simple but-for causation,[189] proximate cause,[190] or a single or predominant cause might be required.[191]

---

186. This is essentially the kind of causation that the disparate impact theory of discrimination allows for. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (allowing a claim under Title VII when requirements for a job fall more harshly on one group than another unless those requirements are closely linked to a minimum ability to do the job).

187. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that a decisionmaker must act because of a protected class, not in spite of it). This disagreement could be attributed to the distinction between the disparate impact and disparate treatment theories of discrimination, but the disparate impact theory of discrimination appears to be in some danger of being rejected or undermined by the Supreme Court. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009) (describing disparate impact as tangential to Title VII); *id.* at 2681–83 (Scalia, J., concurring) (questioning Congress' power to prohibit disparate impact discrimination by private employers).

188. 42 U.S.C. § 2000e-2k (2006) (providing for liability, although not damages, if a plaintiff demonstrates that protected status was a motivating factor in the decision).

189. Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 242 (1989) (interpreting "because of" in Title VII to allow for the possibility that protected class need not be the only motivation, but providing a defense if it is not the but-for cause of the adverse employment action).

190. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192–94 (2011) (holding that statutory language which prohibits actions on the basis of military servicemember status and further describes causation in terms of motivating factor encompassed a notion of proximate cause that allowed any contributing cause that was close enough to the effect to count).

191. Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350–51 (2009) (holding that "because of" in the Age Discrimination in Employment Act meant that plaintiffs had to

The room for disagreement is exacerbated by the listing of statuses in Title VII as if they were truly separate categories capable of scientific identification and separation. Not only is it surprisingly difficult to identify what "sex" means, but when we focus on only one aspect of a person's multiple identities, we tend to obscure how those multiple identities acting together may have led to what happened to that person. There are debates about whether "sex" encompasses only the biological differences that are true for all or nearly all women, or also differences in behavior that are believed to be linked to sex.[192] The debate over balancing work and family is a great example of this. While women are overwhelmingly more likely than men to be responsible within the family for caregiving even when they are also wage earners outside the home, penalizing employees because they provide care is not considered sex discrimination.[193] Another classic example is present in grooming codes that regulate behavior along gender lines: having sex-specific rules for appearance is generally not considered to be discrimination even when employers classify men and women and prescribe different rules for each.[194] Finally, there are also debates about whether sexual identity or sexual orientation is a part of what sex is or whether they are something separable from sex.[195]

Moreover, just as motives that mix protected status and non-protected status reasons may create problems with proving causation, so do motives that focus on one subgroup of a protected status. If only one subgroup is affected, there may be no discrimination against the member of the subgroup on the basis of the larger status. Pregnancy is a classic example of this because even though the class of people who

---

demonstrate that age was the but-for reason for the adverse employment action in terms that made it sound as if but-for meant the predominant factual cause).

192. *See, e.g.*, LOUANN BRIZENDINE, THE FEMALE BRAIN (2006) (arguing that women and men have different behavior linked to neurological differences); CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE (2010) (pointing out the weaknesses in research linking behavior to neurological differences and arguing that researchers' biases make them construct findings to support those differences); REBECCA M. JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES (2010) (same).

193. *See* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (1999); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 80–94, 106 (1989).

194. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1080, 1083 (9th Cir. 2004) (upholding a requirement that women wear "full" makeup and men not wear any as not discriminatory even though men and women are required to do different things).

195. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991).

are pregnant is entirely comprised of women, the class of people who are not pregnant is comprised of both men and women. It was this lack of perfect symmetry between the classes that led the Supreme Court to hold that discrimination on the basis of pregnancy was not sex discrimination.[196]

Another problem similar to the multiple motives problem occurs because we all have multiple identities: we all have a race, a sex, a religion (or identify as not ascribing to a religion), and a national origin. These intersecting identities, though present in every case, can become problematic for those for whom more than one identity is actually visible, as when more than one identity is non-majority and implicated in the case. For example, if a black woman is fired because of stereotypes of black women, she may be found not to have suffered any discrimination at all if those stereotypes differ from stereotypes of white women or black men. In such a situation, a decisionmaker would be likely to find that the black woman was not discriminated against because of her *race* because other members of her *race* didn't suffer from application of that stereotype. That decisionmaker would also likely find that she was not discriminated against because of her *sex* because other members of her *sex* didn't suffer from application of that stereotype.[197]

Contributing even further indeterminacy, there will be significantly more divergence about application; that is, in determining whether any particular act constitutes discrimination. People may agree that discrimination is the arbitrary, detrimental treatment of another, but may disagree about whether the arbitrary treatment of a member of a class that is usually privileged is really discrimination.[198]

---

196. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that discrimination on the basis of pregnancy was not discrimination on the basis of sex under Title VII even though only women were affected); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that pregnancy and sex were analytically distinct under the Equal Protection clause). Gilbert was superseded by the Civil Rights Act of 1991. *See supra* note 127 and accompanying text.

197. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). For more on how a focus on women's rights has worked primarily for upper and middle class white women, see, for example, FREEDMAN, *supra* note 62, at 73–94; RACE-ING JUSTICE AND ENGENDERING POWER (Toni Morrison ed. 1992); Julianne Malveaux, *Comparable Worth and Its Impact on Black Women*, 14 REV. BLACK POL. ECON. 47 (1985).

198. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (subjecting any racial classification, even those that benefited traditionally excluded racial groups, to strict scrutiny); Johnson v. Transp. Agency, 480 U.S. 616 (1987) (holding that an employment decision that benefited women was not discrimination within the meaning of Title VII as long as it was taken pursuant to a valid affirmative action plan).

Similar to the debates caused by the causation language in Title VII, defining discrimination might create disagreements on whether an effect alone can constitute discrimination or whether it must always involve intent. And they might disagree on whether certain characteristics or behaviors are so linked to a protected status that differentiating on the basis of those characteristics or behaviors constitutes discrimination.[199] Finally, they may disagree on whether certain acts are bad enough to constitute discrimination.

While statutes are particularly prone to this consensus problem, all law must be interpreted by those who enforce it, from judges, administrators, bureaucrats, and public officials, to almost any public employee—anyone who has some kind of power from a government body—regardless of the law's source. Moreover, the law is further interpreted by those who aim to comply with it. Each of these enforcers and compliers operates under his or her own set of cognitive biases. Thus, unless all of the actors have the same, or at least fundamentally similar, belief systems, divergent interpretations and applications of law are inevitable. The cognitive processes of people in the aggregate will bend the law from its intended consequences if the meaning of the language and the background worldview do not share broad consensus. The law is subservient to the dominant culture, and so even when law is used to transform society, it usually gets transformed into a reinforcement of traditional values, unless society is also being transformed from within.

The lack of consensus on what constitutes discrimination has been demonstrated in the real world by the disconnect between what scholars and many others believe constitutes discrimination and the success—or lack thereof—employees have had seeking a legal remedy for that conduct. Several scholars have documented the hurdles that employees face in employment discrimination litigation, the primary means of enforcing our employment discrimination laws. Scholars have documented how few cases are brought,[200] how few cases go

199. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2559–65 (1994) (noting that regulation of appearance traits has generally been found to be discrimination based upon the trait, rather than the sex that closely correlates with that trait and thus not a violation of Title VII); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1080 (2010) (discussing the link between hairstyles and race).

200. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 26–30 (1992) (reporting on a 1980 study by the Civil Litigation Research Project).

to trial,[201] how few cases are resolved in favor of employees,[202] and how little private class action lawsuits seem to affect company practices.[203] In other words, litigation seldom provides a mechanism for systemic reform or a meaningful remedy for individuals.[204]

Part of the reason for these results is the implicit biases of the decisionmakers that I have described. Also, we don't just have implicit biases for racial, ethnic, and sex groups; we also have implicit biases about people who claim they have been discriminated against. For example, individuals often predict that if they were to experience discrimination in the workplace, they would confront the discriminator or report the matter to a supervisor, but when these individuals are actually faced with discrimination, most do not do those things.[205] Nonetheless, people may hold others to this higher standard, and become suspicious when only one employee complains.[206] Additionally, those who complain that they have been discriminated against are often negatively perceived by others, even those who know that the

---

201. *E.g.*, Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 120 n.330 (1999) (suggesting that only ten percent of employment discrimination cases go to trial); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440–41, 444 (2004) (suggesting that seventy percent of employment discrimination cases settle and plaintiffs win just over four percent of pretrial adjudications).

202. Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 556–58, 566 (2003) (finding that cases decided in favor of plaintiffs are four times more likely to be reversed than those found in favor of defendants); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283–84, 309 (1997) (arguing that meritorious cases are lost or reversed on appeal); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558, 560–61 (2001) [hereinafter Selmi, *Hard to Win*] (asserting that employers prevail in ninety-eight percent of federal court employment discrimination cases resolved at the pretrial stage).

203. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003) (documenting how class actions fail to affect shareholder price or real management change in most cases).

204. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 175, 184–88, 194–96 (2010) (studying employment discrimination cases filed between 1988 and 2003, the authors studied the resolution of those cases, accounting for the stage of litigation at which they were resolved in addition to the substantive outcome).

205. Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 824 (2006) (having participants predict how they would act if discriminated against, exposing them to discrimination in a laboratory setting, and giving them the opportunity to report).

206. *Id.*; *see also* Selmi, *Hard to Win*, *supra* note 202, at 556–57, 561–71.

complaint is valid; that is, even when a person who hears about a complaint of discrimination knows that the person actually was discriminated against.[207] These cognitive biases infect enforcers' judgments about which practices constitute discrimination because of a protected class within the meaning of Title VII.

To further complicate matters, consider the broader context of employment issues and the prevailing worldview about the place of law in the economy. The employment discrimination laws are rights-based tools created to promote economic equality.[208] These laws serve to provide the public goods of justice and greater equality, ensuring that access to employment is distributed justly.[209] Economic mobility is important for social and political stability, as well as a feeling of economic security in the United States, and a permanent underclass, or one group of people permanently dependent on another, threatens that stability. The greater the economic stratification along sex lines, the more visible the permanence of the underclass or dependent class will be, and the greater the likelihood that the group will be more cohesive, which could mean that its members would be more likely to organize and rise up.[210]

---

207. Kaiser & Major, *supra* note 205, at 818–19 (describing an experiment where participants were asked to evaluate characteristics of a subject who complained of discrimination after the participants were told that the subject had been discriminated against).

208. *See, e.g.*, ADDITIONAL VIEWS ON H.R. 7152 OF HON. WILLIAM M. MCCULLOGH, HON. JOHN V. LINDSAY, HON. WILLIAM T. CAHILL, HON. GARNER E. SHRIVER, HON. CLARK MACGREGOR, HON. CHARLES MCC. MATHIAS, HON. JAMES E. BROMWELL, H.R. Rep. 914, pt. 2, *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 159, at 2147–51. As these representatives wrote, "[t]he right to vote . . . does not have much meaning on an empty stomach." Additionally:

> The effect of this severe inequality in employment is felt both on the personal level and on the national level. On the personal level an entire segment of our society is forced into a condition of marginal existence. . . . A nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages in skilled occupational categories. All that is needed is the institution of proper training programs and the elimination of discrimination in employment practices.

Id. at 2149.

209. *See* HOFF, *supra* note 14, at 319 (labeling Title VII as embodying "significant redistributive public policy"); Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405 (2006) (arguing that antidiscrimination law is a mechanism of distributive and not just corrective justice).

210. These factors all helped explain the largest slave rebellion in U.S. history, for example, DANIEL RASMUSSEN, AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S LARGEST SLAVE REVOLT (2011), and the uprisings in the spring of 2011 across the Middle East and North Africa, Liz Alderman, *Wealthy Nations Move to Bolster Arab Democracy*, N.Y. TIMES, May 28, 2011, at A1.

But because the employment discrimination laws are external limitations on what is perceived to be primarily an economic relationship between private parties,[211] their enforcement is guided by principles in serious tension with one another. This tension allows cognitive shortcuts greater power over people's conduct and permits actors in the enforcement system to privilege the principles they consider to be on more solid consensual ground, like the consensus that government should not interfere with economics or with private relationships. Economic relationships are private and governed primarily by the market, which means that these relationships are left to private ordering. The link between economics, privacy, and a preference for private ordering are such core American values that they need not be spoken of in many situations. Yet the employment discrimination laws operate as external limitations on how those economic and private relationships can be structured. These external limitations are thus always in tension with the economic principle of laissez-faire and the privacy principle, or the extent to which we privilege privacy. This tension grows the more that a person views the economic relationship as essentially economic and private as well as when there is less consensus on the substance of discrimination or the legitimacy of its regulation. The desire for a laissez-faire economy is in direct conflict with governmental regulation, which results in an even more limiting interpretation of anti-discrimination legislation.

---

211. Employment statutes and cases ground regulation of employers in notions of property in capital investment. They presume that employers retain the discretion to manage their businesses and at least part of their business is in deciding whom to hire, what to have employees do, how much to pay them, how to treat them, and how, when, and why to discharge them. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947, 953–58 (1984) (grounding the practical and theoretical principles underlying the at-will presumption in employment relationships in a combination of contract and property principles, both of which are most often economic subjects). This economic grounding is evident in the language of labor cases especially. For example, "[The employee] surrenders his labor as a whole, and in return receives a compensation package . . . . Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment."

Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 (1979) (considering whether a union trustee for a pension plan could be liable for securities fraud). "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it." Adair v. United States, 208 U.S. 161, 174 (1908). In employment discrimination cases, the economic justification is conveyed by the common exhortation that courts do not sit as super-personnel boards, second-guessing the employer's business decisions. *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 Wm. & Mary L. Rev. 1031, 1115–16 & 1116 n.337 (2004) (documenting the hundreds of cases that recite this general principle).

The imposition of substantive rules that frustrate the operation of the market or invade the autonomy of the parties can create significant doctrinal and practical tension. In theory, if the employment relationship is merely an economic one, the market should be able to regulate all aspects of employment, and the efficient outcome will be the just outcome.[212] Limitations are not only unnecessary, but are also unjust. In privacy terms, individuals should be allowed to structure the relationships that best work for them in order to maximize personal utility. Limitations on the operation of the market or autonomy of the parties run counter to core Western notions of liberty and autonomy.

The employment discrimination laws are not as clearly grounded in economic principles, however. They may have an economic justification, but that has not been the common understanding of their function.[213] We do not speak of them as correcting for market failure in the operation of the labor market, for example. Anti-discrimination laws are instead rights-based, creating rights to equal opportunity and treatment. Being rights-based rather than economically grounded, anti-discrimination laws create significant tension with the economic model,[214] and the conflict is exacerbated by insufficient consensus on the scope of the right to be free from discrimination, particularly on the basis of sex.[215]

---

212. *See* GARY BECKER, THE ECONOMICS OF DISCRIMINATION 44 (2d ed. 1971) (arguing that discrimination is economically inefficient). The principles of utility and choice have been used to find that disparities in pay and job segregation are not actually the cause of discrimination within the meaning of Title VII. *E.g.*, EEOC v. Sears Roebuck & Co., 839 F.3d 302 (1988) (finding evidence that women were choosing jobs that paid less). *See generally* FALUDI, *supra* note 62 (describing how anti-feminist activists and the media focused on women's unhappiness to make the case that women did not actually desire more equal footing with men).

213. *See* Jacob Gersen, *Markets and Discrimination* 82 N.Y.U. L. REV. 689, 696–714 (2007) (outlining the law and economics analyses of the extent of employment discrimination and the potential forces driving it); David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1130–31 (1989) (outlining the economic arguments advanced in favor of Title VII but noting that those who advanced that argument concluded by saying that despite the economic justification, prohibiting discrimination in employment was "the right thing to do" and an inalienable right).

214. *See* Anthony S. Chen, *The Party of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945-64*, 112 AM. J. SOCIOLOGY 1713 (2007) (studying why some states adopted fair employment practice laws much more slowly than others and concluding the slowness was a result of key GOP office holders allied with organized business and motivated by free-market, anti-regulatory ideology).

215. *See supra* notes 109–12 and accompanying text on the way "sex" was added to Title VII; *supra* notes 166, 186–99 and accompanying text on the lack of consensus about what sex is and what constitutes discrimination.

I do not mean to suggest that our project of eradicating discrimination in employment is doomed to failure; on the contrary, I think we can get there. What we need to do does not involve tinkering with the laws, adding remedies, getting new judges, or fine-tuning the legal tests—or at least it does not involve doing those things alone. Rather, the path to success lies in a much broader, more amorphous project: we need to reach a greater consensus as a nation on what "discrimination" "because of" a protected status means and why we protect certain things and not others, or we need to work to remedy the harm of employment discrimination by bypassing the legal model of Title VII altogether.

Any process involved in achieving a greater consensus will have to include difficult national conversations about race, color, gender, national origin, religion, age, and disability, all statuses that are currently protected. Part of that conversation must also concern why these groups are protected, from whom they are protected, whether different status groups should be treated identically, and what these statuses mean. We also need to have difficult conversations about statuses not yet explicitly protected as such on a federal level, but which we also think disadvantage some, such as class, familial status, sexual orientation, and gender identity. And we need to have difficult conversations on why some statuses are not considered important enough to protect, why we rely on status alone instead of protecting conduct or autonomy, and what makes those things we don't protect different. Beyond that, we need to have much more public discussion of what it means to discriminate and what conduct exactly the law should penalize.

There are a number of ways that we can begin to have these discussions as a country. The smallest step toward this goal might be to allow litigants in individual cases to argue why the actions taken in their cases constitute discrimination even if the employer did not make a fully self-aware decision to treat the employee differently because of that person's protected status and only for that reason. A larger step could be to engage in this conversation through Congress's debates on current proposed legislation, such as the legislation pending to provide paid leave to workers,[216] to provide equal pay for equivalent work,[217]

216. *E.g.*, Federal Employees Paid Parental Leave Act of 2011, H.R. 616, 112th Cong. (2011); Family and Medical Leave Enhancement Act of 2011, H.R. 1440, 112th Cong. (2011); Healthy Families Act, H.R. 1876, 112th Cong. (2011); Healthy Families Act, S. 984, 112th Cong. (2011); Family Economic Success Act, S. 10, 112th Cong. (2011).

217. Fair Pay Act of 2011, H.R. 1493, 112th Cong. (2011).

to allow women into combat,[218] or to add sexual orientation and identity to the classes protected.[219] We might also task the Civil Rights Commission or the Equal Employment Opportunity Commission with issuing reports on the state of the nation's workplaces, and we might harness the power of the media to tell more stories of employees who feel wronged. We might even create a web-based repository of stories by employees who feel they were discriminated against, and stories by employers about how they decide to take the actions they do.[220]

In a way, that is exactly what the Triangle Shirtwaist Factory fire did for the broader society at the time:[221] it made visible injustice in the workplace that was hidden from public view. It made visible the terrible working conditions that existed in garment factories. It made visible how much power the factory owners had over employees. It made visible how the structure of work and the lack of limitations caused terrible injuries. It made visible the central role of women and girls in supporting their families. It made visible the strength, capability, intelligence, and work ethic of these women and girls in opposition to prevailing notions of the physical, mental, and emotional inferiority of women. It made visible the class and cultural biases built into the notion of separate spheres. And it made visible the ways in which women as consumers were complicit in the exploitation of women.

The increased visibility that resulted was no panacea, but without the invisible being made visible, it would likely have taken far longer for the safety reforms to have been enacted and at least partially enforced.[222] Likewise, without the invisible being made visible today, our protective legislation withers and becomes ineffectual. Like bacteria and bugs that become resistant to yesterday's cures, discrimination becomes resistant to the rigid and narrow application of yesterday's laws.

---

218. Women's Fair and Equal Right to Military Service Act, H.R. 1928, 112th Cong. (2011).

219. Employment Nondiscrimination Act, H.R. 1397, 112th Cong. (2011).

220. To some extent, the large number of blogs on various aspects of human resources, employment and labor law, and employment relations in general have taken on this kind of role, but there is no comprehensive and centralized kind of repository like that provided for incidents of street harassment, where people can submit stories anonymously, and the stories are linked to a map of where they occurred, the details, and pictures if the poster included those details. STOP STREET HARASSMENT, http://www.stopstreetharassment.org (last visited Oct. 4, 2011).

221. Each of the assertions that follows comes from the sources cited and analyzed *supra* Part I.B.

222. *See supra* notes 57–59 and accompanying text.

So far, we have not chosen the second path: to bypass the model that Title VII provides us. While the states and Congress continue to experiment with new protections for workers, particularly women workers, that experimentation is limited to variations on a single model that focuses on litigation as the primary means of enforcement and prohibits actions which are defined so broadly as to have little meaning, either extending that model to new workplaces or to new identity groups.

One recent experiment is New York's extension of wage and hour protections and protections against sexual harassment to domestic workers.[223] The Domestic Workers Bill of Rights is the first of its kind in the country to protect workers in private households—and these workers need protection.

The Domestic Workers Bill of Rights does not protect workers on the basis of their race, national origin, or sex, but it essentially functions as protective legislation on those grounds because of the underlying demographics of domestic workers in New York. With this population, there are many parallels to the workers at the Triangle Shirtwaist Factory at the time of the fire. Most domestic workers in New York are women and immigrants from the Caribbean, Asia, Latin America, and Africa: ninety-three percent of domestic workers in New York are women, and ninety-five percent are people of color.[224] Over a quarter make less than minimum wage and live below the poverty line, one-third say they have been abused at work, two-thirds say they receive overtime pay rarely or never, and a mere ten percent have access to health insurance coverage.[225]

While this extension of rights is an important victory for some of New York's most vulnerable workers, it may prove an illusory one. Enforcement relies upon giving aggrieved workers a private cause of action for violations of their rights,[226] likely because policing domestic workers' workplaces—private homes—would be particularly challenging. This enforcement mechanism is the same as that of the more established anti-discrimination laws, and because of the danger of retaliation and the tendency of courts to avoid interfering with economic relationships, it is one of the reasons that they are not fully enforced. Moreover, many domestic workers are employed "under the table,"

223. N.Y. Assembly Bill 1470-B, 2009–2010 Legislative Session (2010).

224. Albor Ruiz, *Domestic Workers Bill of Rights Law Finally Grants Protection for Over 200,000 People*, N.Y. Daily News, Sept. 2, 2010, at 50.

225. *Id.*

226. *See* N.Y. Executive Law §§ 296-B, 297 (McKinney Supp. 2011); N.Y. Lab. Law §§ 170, 161, 651, 663 (McKinney Supp. 2011).

their income not reported, and at least some are not legally eligible to work in the United States.[227] These workers are highly unlikely to seek the protection of the law and are especially exploitable. Without visibility of what is really happening inside these workplaces, which are largely invisible because they are private homes, it is all too easy for employers of domestic workers to violate the law and difficult for the law to be enforced. This statute's protections will likely wither from lack of use.

Conclusion

A century after the Triangle Shirtwaist Factory fire, women workers as a group are better off. Our workplaces are mostly safer, and the laws on the books have helped many of us attain equal access to jobs and a right to equal pay for equal work. Nonetheless, significant gaps remain, sometimes at levels similar to those a century ago, and women as a group are not doing as well as men as a group on almost any measure of achievement, status, or well-being.[228] Moreo-

227. N.Y. State Dep't of Labor, Feasibility of Domestic Worker Collective Bargaining 7–9 (2010), *available at* http://www.labor.ny.gov/sites/legal/laws/pdf_word_docs/domestic-workers/domestic-workers-feasibility-study.pdf (describing off-the-books or under-the-table arrangements in New York and reporting that at least thirty-four percent of employers surveyed believed their domestic workers were undocumented, and seventy-six percent of domestic workers surveyed said they were not U.S. citizens, although the workers did not report whether they were legally able to work); *see also* Doreen J. Mattingly, *The Home and the World: Domestic Service and International Networks of Caring Labor*, 91 Annals Ass'n Am. Geographers 370, 370–71 (2001) (examining the structure of paid household work in San Diego); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. Rev. 45, 52–54, 57–58 (2000) (describing paid household work); Diana Vellos, *Immigrant Latina Workers and Sexual Harassment*, 5 Am. Univ. J. Gender & L. 407, 409, 412, 418–20 (1997) (describing the sexual and economic exploitation of undocumented domestic workers).

228. Scholars have noted the lack of racial and gender equality in the work force under almost any measure: employment rates, wages, job integration, and labor force participation. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 2 & nn.3, 5–6 (2006); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Cal. L. Rev. 1169, 1169–90 (2006); Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 Harv. J.L. & Gender 353, 353–57 (2007); Rachel F. Moran, *Whatever Happened to Racism?*, 79 St. John's L. Rev. 899, 900 (2005). For data, see Council of Econ. Advisors, Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin (1998), *available at* http://www.gpoaccess.gov/eop/ca/pdfs/ca.pdf; Office of Mgmt. & Budget & Econ. & Statistics Admin., U.S. Dep't of Commerce, Women in America: Indicators of Social and Economic Well-Being (2011), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf; *see also* Jessica Martin, *Widening Racial Gap Exists in Key Factors for Economic Well-Being According to New Study*, Washington University in St. Louis (July 15, 2009), http://news.wustl.edu/news/Pages/

ver, even with all of the laws we have a century after the Triangle Shirtwaist Factory fire, a lack of enforcement problem similar to that faced by the Triangle Shirtwaist Factory workers remains present.

The last century saw us move from protecting women as workers in a world where workers were supposed to be men, to protecting women as women (at least as long as they were similar enough to men). We have been deeply conflicted on how best to approach the problems of inequality, and yet, we mostly just tinkered in the margins, making slight variations on approaches not designed to change the status quo very much. Since we ignored the underlying realities of our segregated workforce and the structural and societal inequalities that shaped it, the status quo of those underlying realities and structural inequality remained largely intact. The next century challenges us to merge the interests of more women and more workers into our solutions, to address the interests of women who historically have been left behind in a more nuanced and substantive way.

14334.aspx (reporting on a study not yet published by Mark R. Rank, professor of social welfare at Washington University).