Act I

[Everyone is in their white outfits with black sashes, walks out onto the stage in a line] [ERA Now buttons have been handed out to guests]

Michael Adler: We all realize the importance of the election that took place yesterday. Regardless of the results or your political affiliations or leanings, Hillary Rodham Clinton's candidacy was an historic event for the United States, and it was a long time coming for women. Tonight we want to discuss with you how women got here, how far we have still to go, and our obligations to continue that momentum. As Clinton once declared, women's rights are human rights.

[**7 people step out in irregular order to state a name, and anecdote about the women's suffrage movement**]

We begin this evening with a little refresher on the history of women's equality in the US. Back during the time of the Constitutional Convention, the status of women was on par with children. Women were legal dependents, unable to collect wages or make contracts. But women were already restless in this role, as evidenced by a letter Abigail Adams famously wrote to her husband, John Adams, while he was serving here in Philadelphia in the Continental congress, March 31, 1776:

Linda Alle-Murphy (Speaker 1 – Abigail Adams): "I long to hear that you have declared an independency – and by the way in the new Code of Laws which I suppose it would be necessary for you to make I desire you would **Remember the Ladies,** and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation."

Tay Aspinwall:
To which John Adams replied: **"I cannot but laugh… Depend upon it, we know better than to repeal our Masculine systems."**

As the fight to end slavery and then for equal rights for all men gained momentum, suffragettes joined the fight, hoping that any broadening of the interpretation of the Constitution would include women as well. Lucretia Mott, famous suffragette and founder of Swarthmore College, following her attendance at the Seneca Falls Convention, wrote in 1849 on her Discourse on Women:

Anne Brophy (Speaker 2 – Lucretia Mott): I am Lucretia Mott. "There is nothing of greater importance to the well-being of society at large – of man as well as woman – than the true and proper position of woman. Much has been

said, from time “”to time, upon this subject. It has been a theme for ridicule, for satire and sarcasm. We might look for this from the ignorant and vulgar; but from the intelligent and refined we have a right to expect that such weapons shall not be resorted to, - that gross comparisons and vulgar epithets shall not be applied, so as to place woman, in a point of view, ridiculous to say the least.”

Judge Hope (Speaker 3 – Victoria Woodhull): My name is Victoria Woodhull. I am best known as the first woman to run for the office of the president in 1872, and I did so, despite the fact that women had not yet won the right to vote. I made my fortune before my run, by becoming the first female stock broker and made a fortune on the New York Stock Exchange. I then became a newspaper editor, and women’s rights advocate. In 1871 I was well known as a brilliant orator (if I do say so myself), and was also the first woman to appear before the House Judiciary Committee, where I spoke on women’s suffrage, although I was not well received. Unfortunately, I didn’t win any electoral votes for my presidential bid. During my presidential run in 1871, in Steinway Hall I said:

(Judge Hope continues as Victoria Woodhull): “Our government is based upon the proposition that: All men and women are born free and equal and entitled to certain inalienable rights, among which are life, liberty and the pursuit of happiness. Now what we, who demand social freedom, ask, is simply that the government of this country shall be administered in accordance with the spirit of this proposition. Nothing more, nothing less. If that proposition means anything, it means just what it says, <u>without qualification, limitation, or equivocation.</u> It means that every person who comes into the world of outward existence is of equal right as an individual, and is free as an individual, and the he or she is entitled to pursue happiness in whatever direction he or she may choose.”

Karlene Krenicky (Speaker 4 – Susan B. Anthony): I’m Susan B. Anthony, some of you may have heard of me. I was a Quaker from Massachusetts, born in 1820. I helped start the Women’s National Loyal League to petition to outlaw slavery. After the case of Minor v. Happersett, in 1874, where the Supreme Court ruled that the 14th Amendment did not grant women the right to vote (trust me, I was arrested for trying), I co-founded a newspaper called “The Revolution” with the motto, “Men, their rights, and nothing more; women, their rights, and nothing less.”

Michael Adler: Susan B. Anthony and Elizabeth Cady Stanton abandoned their support of the 14th Amendment when it became clear it would not grant rights to all disenfranchised citizens, controversially the amendment was written to “gender” the constitution; that is its first use of gender is the 14th Amendment’s enfranchisement of male inhabitants of the states. While they started the radical National Woman’s Suffrage Association, Lucy Stone and Julia Ward Howe fought for enfranchisement of black men, arguing that the rising tide lifts all boats through the American Woman’s Suffrage Association. It was 1872. Women could vote. That is, if they lived in the Wyoming or Utah territories, were over 21, and

could find a polling place. In New York, there was no law specifically prohibiting women from voting. Susan B. Anthony and a small group of suffragists took this as an invitation to cast their ballots. They were arrested and convicted of "criminal voting" for their troubles. The suffragist movement would not be deterred. On the eve of Woodrow Wilson's inauguration in 1913, Alice Paul of the National American Woman Suffrage Association led the Women's Suffrage Procession, a march of thousands of suffragists down Pennsylvania Avenue. The march was timed with the inauguration to "protest against the present political organization of society, from which women are excluded."

Natalie Young (Speaker 5 – Jeanette Rankin): My name is Jeannette Rankin, and I was the first woman elected to Congress in 1916, I was known as a progressive and a feminist, and I represented Montana in the House on two separate times. By 1918 women had been granted some form of voting rights in about forty states, and I was instrumental in initiating the legislation that eventually became the 19th amendment. I dedicated my career to championing causes of gender equality, civil rights and a peaceful US.

(Natalie Young continues as Jeanette Rankin): "Men and women are like right and left hands; it doesn't make sense not to use them both."

Tay Aspinwall: In 1919, the mainstream and radical suffragist finally won the first and only guarantee for women's equal rights in the Constitution – the 19th Amendment, which guarantees that the right to vote cannot be denied on account of sex. In 1923, at the 75th anniversary of the Women's Rights Convention in Seneca Falls, Alice Paul, who believed that enactment of an equal rights amendment was required to eliminate legal sex discrimination, introduced the "Lucretia Mott Amendment" which read "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."

The amendment was introduced in every session of Congress until it passed, in revised form, in 1972. Ultimately, the ERA failed to garner the necessary ratification by 38 states within the requisite 7-year deadline imposed by Congress. In the first year after passage by Congress, 22 states ratified the ERA. Progress slowed as opposition began to build, reaching ratification by 35 states in 1977, three short of the necessary 38. Ultimately, the country was unwilling to guarantee women equal rights. Arguments by ERA opponents played on fears it would deny a woman's right to be supported by her husband, women would be sent into combat, abortion rights and same-sex marriages would be upheld. States viewed it as a federal power grab and business interests opposed it on the grounds that it would cost them money.

Jesse Shields (Speaker 6 – Bella Abzug): I'm Bella Abzug, and I graduated law school in the 1940's and was vocal about my frustrations with how often it was assumed I was the secretary by male colleagues. I argued tirelessly throughout my career for the rights of everyone, regardless of gender, race,

religion, or sexual orientation and became the first person to introduce a gay rights bill to Congress. I established both the National Women's Political Caucus alongside Betty Friedan and Gloria Steinem as well as the Women's Environmental Development Organization.

Michael Adler: In 1972, someone's mother, sister, daughter, and maybe even some of the women in this room were out there somewhere thinking, "I could be the first women candidate for a major political party primary;" or "the first female Supreme Court Justice" or "even just a member of a jury." In 1972, Shirley Chisholm was the first women to run on a primary ticket for a major political party. At the time, and until the Supreme Court decision in Taylor v. Louisiana in 1975, women were excluded, as a class, from serving on a jury. Just two years later, in 1977 Norma L. Shapiro became the 1st woman chair of the Philadelphia Bar Association's Board of Governors, and in 1981, Sandra Day O'Connor was nominated to serve as the first women Supreme Court Justice. The Honorable Shirley Chisholm stated before the House of Representatives in 1969:

Caitlin Donnelly (Reading 7 – Shirley Chisholm): "If [a woman] walks into an office for an interview, the first question she will be asked is, 'do you type?' There is a calculated system of prejudice that lies unspoken behind that question. Why is it acceptable for women to be secretaries, librarians, and teachers, but totally unacceptable for them to be managers, administrators, doctors, lawyers, and Members of Congress. The unspoken assumption is that women are different. They do not have executive ability orderly minds, stability, leadership skills, and they are too emotional . . . As a black person, I am not stranger to race prejudice. But the truth is that in the political world I have been far oftener discriminated against because I am a woman than because I am black."

Caitlin Donnelly reads Shirley Chisholm: I'm Shirley Chisholm, the first black woman to serve in Congress, representing New York in the House of Representatives for seven terms. I spent much of my career fighting for educational opportunities and social justice by serving on the House Education and Labor Committee. In 1972 I ran for the Democratic presidential nomination, during I survived 3 assassination attempts. I felt during my candidacy that I received more discrimination as a woman than for being black. Men are men. [shakes head]. After leaving Congress I went on to resume my career in education, but remained active in politics until my retirement.

Tay Aspinwall: Title IX was passed in 1972, and while we generally associate Title IX with sports, it had the effect of opening up professional schools to women. It states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX's sponsor Senator Birch Bayh stated on the Senate floor:

James Goslee reads Senator Birch Bayh: "We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a 'man's place' on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the 'weaker sex' and it is time to change our operating assumptions."

Tay Aspinwall: While all this information may feel like we are giving a history lesson, this history is so recent that it has affected many of the people in this room. 1992 was dubbed, "the year of the woman," seeing, among others, 4 women elected to the United States Senate, and here in Philadelphia, Deborah R. Willig became the 65th Chancellor of the Philadelphia Bar Association. 1993 brought the appointment of a second female Supreme Court Justice, Ruth Bader Ginsburg. It was not until 1995, 117 years after it began, that Roberta Cooper Ramo was elected as the first woman president of the American Bar Association.

Women are much more prevalent in the world of law and politics today. For the 2014-2015 academic year, the breakdown of J.D.'s was close, with men earning almost 53 % to 47% by women. Today, in 2016, there are three women Justices on the Supreme Court and women occupy more than a third of the seats in the federal Circuit Court of Appeals. The state courts average slightly lower.

As of 2014, on average, national, full-time male attorneys were making a yearly salary approximately $16,900 higher than their female co-workers. As we look at these statistics, it is hard not to think, when women are graduating law school at a roughly equal rate, why are they not represented in equal numbers professionally?

Act II

Michael Adler: But before we get to that, we have a presentation about a Philadelphia institution founded 130 years ago to improve the educational, economic and social status of women and girls – The New Century Trust, an organization that has been instrumental in assisting women in achieving those firsts.

Intro of Carey Morgan by Michael Adler

5-7 minute presentation by Carey Morgan

Michael Adler: Thanks Ms. Morgan for her presentation.

Political persuasion aside, as a nation, we have witnessed a historic election and must reflect on the difficult road Hillary Clinton traveled. This election in particular brought sharp focus on the issue of gender bias. Let's take a look at the discussion surrounding the election:

Act III

Male 1 John Coyle:
Male 2 Alonso Arguedas:
Female 1 Jackie Carolan:
Female 2 Debbie Gross:

[Everyone is seated around a table in a c form, facing the audience as best as possible. The format is news desk analysts].

JACKIE CAROLAN: Thank you and welcome back to "Election Results NOW". For those of you just joining our discussion or living under a rock, Donald J. Trump has been elected President after defeating Hillary Clinton, the first female presidential candidate of a major political party in an extremely tight race.

JOHN COYLE: Continuing with our discussion about voter perception, let's hear what the voters are thinking. When asked about his decision in a pre-election interview conducted in Ohio, an Akron bartender said:

> "Trump is going to make the right moves. You don't become a gazillionaire if you don't know what you're doing. He's gotta have something upstairs." As for Hillary Clinton, he said "he doesn't want her in the White House. She was untrustworthy and willing to say anything to get elected." He then added, "Nothing against women, but I don't want a woman president right now."

DEBBIE GROSS: To me, that quote sounds a lot like the stereotype that a woman in power must have *done something* to get there. A lot of times, people are implying something sexual, but often people believe that some sort of "give and take" occurred for a woman to be in a position of power.

JACKIE CAROLAN: I think a lot of times, a woman in a leadership position or a woman who displays self-confidence, is viewed as arrogant or abrasive. A study found that ideally, people want a leader to be decisive, assertive, and independent. Coincidentally, the study found that people feel the ideal traits possessed by a man are the same, decisiveness, assertiveness, and independence. On the contrary, the ideal female is nice, caretaking, and unselfish. The study found that women who excelled as leaders or in traditional male roles, were often perceived as competent, but less likable as their male counterparts.

ALONSO ARGUEDAS: This entire election has focused on Hillary Clinton's likability. After every debate, someone would pose the question "was she likeable." This was only second to the discussion of her horrible choice of suits. I'll admit, I think the wardrobe insults were distributed equally between genders. Saturday Night Live, took a stab Bernie wearing baggy suits in order to conceal

his pajamas underneath, and Trump's hair took on a life of its own, quite literally. But all this talk about what everyone is wearing is irritating and takes away from the issues.

DEBBIE GROSS: The "what she's wearing" discussion does take away from the issues, I for one, would have liked to have heard **more** about Hillary's emails. That said, I think the "what she's wearing" discussion is an issue in itself. Studies have shown that women who wear makeup are rated more likeable, trustworthy, and competent. Women may be penalized in the work place, based solely on the fact that they appear insufficiently feminine.

JOHN COYLE: It **is** an issue. It is ridiculous to think that if **I** put on eyeliner, mascara, and a nice glossy lip liner today, I am somehow more competent at my job than if I did not. Clearly that is not the case, but that is how women are sometimes perceived according to these studies.

JACKIE CAROLAN: I wonder what people will remember as the big talking points of this election by the 2024 election. From 2008, all I remember discussing was the $150,000.00 the Republican National Convention spent on Sarah Palin's wardrobe, not the fact that she was the first female governor of Alaska or the first woman nominee for Vice President on the Republican ticket.

JOHN COYLE: The selection of Sarah Palin as John McCain's running mate helped pave the way this year for Carly Fiorina. Had Ted Cruz been the Republican Party nominee, there was talk that he would have chosen her as his running mate.

DEBBIE GROSS: One of the biggest ways that men can help combat gender bias against women, is sponsorship. With few women in the highest leadership positions, men can play a large role by championing qualified female candidates. One of the best avenues for work place advancement is to have a more senior person back your ideas, introduce you to colleagues, and recommend you for promotion. With few women in the highest positions, the advancement of women really depends on sponsorship from their male counterparts. While it is still only the day after the election, I am a little concerned that President Elect Trump seems to only be considering men for his cabinet.

ALONSO ARGUEDAS: I am going to regret saying this, especially if my wife is still watching, but wouldn't making a conscious effort to boost up women in order to combat gender bias take those opportunities away from qualified men?

JOHN COYLE: Traditional family roles have changed a lot in the past 50 years. In 1967, one in ten women was the "breadwinner" of the family. By 2008 it was almost an even breakdown, with four in ten women as the "breadwinner" of their families. Similarly, many more men have taken on caretaker roles in the family,

but of the laws or policies on paid-leave do not reflect these changes. Eliminating gender bias in the workplace has benefits for both men and women.

DEBBIE GROSS: One persistent bias is that women only earn the "extra money" for the family, which based on these statistics is clearly not the case.

JACKIE CAROLAN: It frightens me to think that women are the main breadwinner in close to half of our nation's households, knowing that on average they make 79 cents to every dollar a man makes. It is 2016, women are graduating law school at equal or higher rates than men, but on average nationally, earning less than a male co-worker a female attorney makes a weekly salary of $1,590.00 compared to the $1,915.00 brought home weekly by her male co-worker. This is $325 a week, or $16,900.00 a year.

ALONSO ARGUEDAS: There are different proposed regulations out there, such as the Fair Pay Act, which are designed to subject employers to severe consequences for failure to address the disparities in salary between men and women. Employers will need to audit salary histories and address any gap in wages based solely on gender. Similarly, other measures, like freedom to discuss your salary with co-workers, will help inform workers if they are undervalued for their work and provide them with some leverage.

DEBBIE GROSS: Recently, there is new legislation passed in Massachusetts and is currently being debated in Harrisburg, that would prohibit employers from asking prospective employees about past wage history. It has been found that women often accept low wages at their first position, setting them up to begin each new position at a lower wage than then their male colleagues.

ALONSO ARGUEDAS: Why don't they just ask for higher wages?

JACKIE CAROLAN: Historically, women and men have different approaches to seeking employment. In many cases, the mechanisms used to advertise jobs and select candidates were originally designed in a male dominated world, and may inadvertently be causing some of the disparity. There was a recent study conducted at an engineering plant that looked at the typical job description when seeking applicants. Many employers describe the traits and capabilities of their "ideal candidate." Men tend to apply even if they don't meet all the requirements, whereas women typically hold back if they do not meet one or more of the requirements. When the plant changed their descriptions to those capabilities needed to perform the role, the number of women hired has increased. The overall quality of work did not suffer.

ALONSO ARGUEDAS: What does this historic election mean in terms of gender bias going forward?

JOHN COYLE: It could mean a number of things. Studies and the results of this election demonstrate that both men and women tend to respond negatively to women in power. The possibility of electing a woman to the highest office in the country may have created some gender backlash. For example, consider this explanation for the results in Pennsylvania, white voters make up four out of five of the Commonwealth's voters. White women were divided about evenly between the candidates. Donald Trump had the support of more than three in five white men, and he did even better among white men without college degrees, getting about seven in 10 of their votes. These statistics indicate gender was likely a strong factor.

DEBBIE GROSS: It is really hard to tell what the future will hold. Perhaps Hillary Clinton said it best herself at the Democratic National Convention in Philadelphia, when she accepted nomination, "Tonight, we've reached a milestone in our nation's march toward a more perfect union: the first time that a major party has nominated a woman for president. Standing here as my mother's daughter, and my daughter's mother, I'm so happy this day has come. I'm happy for grandmothers and little girls and everyone in between. I'm happy for boys and men, too – because when any barrier falls in America, it clears the way for everyone. After all, when there are no ceilings, the sky's the limit, so let's keep going, until every one of the 161 million women and girls across America has the opportunity she deserves to have. But even more important than the history we make tonight, is the history we will write together in the years ahead."

JACKIE CAROLAN: This election brought out the best and the worst views on gender. From the women who cried and thought of their grandmothers as they voted yesterday, to the women who felt forced to defend their support to Donald Trump, and all the men who were honored or crucified for their views, the issue of gender bias touched everyone. It is our responsibility, as a nation, to figure out how to move forward.

POSSIBLE DISCUSSION QUESTIONS

1) If the nominee for the Democratic Party was a man, how do you think this election would have played out?
    a. Donald Trump's campaign clearly made gender an issue on its own. Do you think that issue would have been as prominent as it was, if the Democratic Party Nominee was a man?
2) Do you see or have you experienced gender bias in the work place?
    a. Do you feel that it has increased or decreased over time? (Some statistics to help the discussion if needed):
    b. The National Women's Law Center did a report in 2013 that outlined several persistent stereotypes that women still face in the workplace:
        a.i. Women aren't breadwinners
            a.i.1. Women only earn "extra" money
            a.i.2. In 2008 4/10 mothers were breadwinners but in 1967 it was 1/10
        a.ii. There's something called "Men's work" and women can't do it
            a.ii.1. Jobs involving physical labor and managerial skills
        a.iii. Women are supposed to act like ladies
            a.iii.1. Studies show women can be penalized for looking insufficiently "feminine"
                a.iii.1.a.i.e. women wearing makeup were rated more likeable, trustworthy and competent.
                a.iii.1.b. Women seen expressing anger at work are seen as out of control (think Price Waterhouse v. Hopkins)
        a.iv. Women aren't committed to the job because they are busy being caregivers
            a.iv.1. Women are believed to be unwilling to travel, commute, or work irregular, longer hours because of perceived parenting or caregiving commitments. Also seen as unable to hold management positions or take challenging assignments.
3) What are some persistent stereotypes people see at their firms or offices?

a.i. Men getting mentors? Fast tracking training or crucial assignments?

4) What about in the Court?

a.i. Last year a UK judge, Lord Jonathan Sumption said that judiciary could be destroyed if the selection of candidates skewed in the favor of women.

a.ii. Last year an attorney in CA received sanctions for stating during a deposition: "don't raise your voice at me. It's not becoming of a woman or an attorney…"

a.iii. This summer FL Judge Mark Hulsey apparently said: "women staff attorneys are like cheerleaders who talk during the national anthem."

5) What about from school?

a.i. Ever told to what to wear to interviews? Skirt suits?

6) Has your office/firm taken any steps to combat gender bias in the work place?
   a. If so, what steps have they taken?
   b. Does it seem effective?

7) Mechanisms to combat perceived biases

a. There are some legal remedies that have been proposed verses some anecdotal but intriguing remedies

a.i. In a Washington Post article from September this year, it stated that the women in Obama's administration had come up with the idea of "echoing" each others ideas at meetings to ensure their voices and ideas were heard, and their ideas weren't co-opted by others

a.ii. What about enabling women the right to enforce the equal pay act?

a.ii.1. The EPA of 1963

a.ii.2. Paycheck Fairness Act – would bar retaliation against workers who voluntarily discuss or disclose their wages

a.ii.3. The Fair Pay Act – gives workers the information they need to determine when jobs are undervalued

a.ii.4. Allow workers to challenge discriminatory employment policies or practices together via the Equal Employment Opportunity Restoration Act (overturning the Supreme Courts divided decision in WalMart v. Dukes

a.iii. Make room for pregnancy on the job (make reasonable accommodations for pregnancy required)

a.iv. There is a new legislative initiative to prohibit asking about prior wage history which was passed in MA and is being debated in Harrisburg

8) Ethical Obligations to ensure there is no wage bias? (John)

a. Ethics Section

b. ABA Model Rule 8.4(g) provides:

c. It is professional misconduct for a lawyer to:

d. (g) engage in conduct that the lawyer knows or reasonably should know is harassment **or discrimination** on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

e. While statistics on associate compensation are difficult to come by, a recent survey by Major, Lindsey, and Africa found that the average compensation for male law partners is about 44% higher than that of female parties. Male partners on average make $949,000 while female partners make $659,000.

f. A 2015 study by the American Bar Foundation found that lawyers appearing as lead or trial counsel in civil litigation we 68% male and 32% female. The statistics were even more skewed when considering solely lead counsel. Lead counsel in civil matters were 76% male and 34% female.

Questions for the audience:

1. Does this Model Rule require firms to develop internal processes to ensure male/female pay equity?
2. Is there now an ethical obligation to ensure equal career development opportunities among male/female associates?

Act IV

[Night of election tweets- tweets from the day (everyone brings one) and they are taped to the underside of people's chairs and they are asked to stand and read them]

Are some of these responses surprising? Why, why not?

AMY

Thank you, Mrs. Clinton, for inspiring generations of women over the course of your career. Even though we won't have a female president in the White House this time, you have shown countless young ladies that the possibility exists. They now have seen a woman on the national stage _and_ on the ballot. They bore witness to your tenacity despite relentless scrutiny. They respect you, and they will remember you. Stand tall, straighten that pantsuit, and know you are loved.

LAURA

Let November 9, 2016 be the day a generation of women decided they were running for office.

@TallahForTrump

A vote for Hillary is a vote for the mutilation and oppression of women.

#NeverHillary
#BlackWomen4Trump

@CatsMeow2222

I'm so glad to have an attractive First Lady!!! And a person that went through legal immigration!!! #womenwhovoteTrump

@**garner0586**

It's wonderful to have a REAL lady as First Lady.

@hopesolo (official account)

It's the first time my mom & I have ever voted for the same presidential candidate. #Ivoted #Imwithher

@Wolds2LifeCoach

What happened to dresses? First woman president shouldn't be ashamed to wear a dress #Womenweardresses #pantssuitnation

@AngryBlackLady

I voted for white granny. #ImWithHer #PantsSuitNation #GOTV

@dellydello

Y'all should've knew damn well they wasn't gone let no woman be president right after they get a black man out.

@MeganBrookeTodd

"I was not going to have no woman as my president as long as I'm alive." We have some great customers.

@allyrwilliams

No woman should genuinely be terrified of their president.

@comedyfoodgirl

I'm getting peeved by all this 'now our daughters know they can't become

President. That woman didn't, but it doesn't mean NO WOMAN won't.

Power of the Female Vote

Temple American Inn of Court

November 9, 2016

Table of Contents

Law Review Articles

1. Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993).

2. Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (1993).

3. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17 (2010).

4. Gary C. Jacobson, *Polarization, Gridlock, and Presidential Campaign Politics in 2016*, 667 ANNALS 226 (2016).

5. Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws – A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385 (2013).

6. Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference of Making a Statement?*, 70 TEMP. L. REV. 907 (1997).

7. Morvareed Z. Salehpour, *Election 2008: Sexism Edition – The Problem of Sex Stereotyping*, 19 UCLA WOMEN'S L.J. 117 (2012).

8. Morgan A. Tufarolo, Comment, *You Haven't Come A Long Way, Baby: The Courts' Inability to Eliminate the Gender Wage Gap Fifty-Two Years After the Passage of the Equal Pay Act*, 24 AM. U.J. GENDER SOC. POL'Y & L. 305 (2015).

News Sources

9. Jessica Bennett, *Hillary Clinton Will Not Be Manterrupted*, NEW YORK TIMES (Sept. 27, 2016), http://mobile.nytimes.com/2016/09/28/opinion/campaign-stops/hillary-clinton-will-not-be-manterrupted.html?smid=fb-nytimes&smtyp=cur&_r=0&referer.

10. Stacy Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, NEW YORK TIMES (Aug. 2, 2016), http://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html?mwrsm=Email.

11. Anna Davis, *I Want All the Perks of Maternity Leave – Without Having Any Kids*, NEW YORK POST (Apr. 28, 2016, 2:46 AM), http://nypost.com/2016/04/28/i-want-all-the-perks-of-maternity-leave-without-having-any-kids/

12. Juliet Eilperin, *White House Women Want to be in the Room Where it Happens*, THE WASHINGTON POST (Sept. 13, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/white-house-women-are-now-in-the-room-where-it-happens/.

13. Lizzy McLellan, *Male Partners Make 44 Percent More Than Women, Survey Shows*, LAW.COM (Oct. 12, 2016), http://www.law.com/sites/almstaff/2016/10/12/male-partners-make-44-percent-more-than-women-survey-shows/?slreturn=20160918145710.

14. Lizzy McLellan and Katelyn Polantz, *Is Origination to Blame for Women Partners' Lower Pay*, LAW.COM (Oct. 14, 2016), http://www.law.com/sites/almstaff/2016/10/14/is-origination-to-blame-for-women-partners-lower-pay/.

15. Tricia L. Nadolny, *Council Bill Would Bar Employees From Seeking Salary History*, PHILLY.COM (Sept. 29, 2016, 1:08 AM), http://www.philly.com/philly/news/politics/20160929_Council_bill_would_bar_employers_from_seeking_salary_history.html.

16. Karen Sloan, *Women Law Students Say Pay Disparity is Systemic Problem*, LAW.COM (Oct. 17, 2016), http://www.law.com/sites/almstaff/2016/10/17/women-law-students-say-pay-disparity-is-systemic-problem/.

Other Sources

17. *36 Random Facts About Women*, RANDOM FACTS (Apr. 30, 2009), http://facts.randomhistory.com/2009/04/30_women.html.

18. *Legends of the Bar*, PHILADELPHIA BAR ASSOCIATION, http://www.philadelphiabar.org/page/AboutLegends?appNum=5 (last visited Nov. 17, 2016).

19. *State Fact Sheet – Pennsylvania*, CAWP: CENTER FOR AMERICAN WOMEN AND POLITICS, http://www.cawp.rutgers.edu/state_fact_sheets/pa (last visited Nov. 17, 2016).

20. *Women's Suffrage*, LIBRARY OF CONGRESS: TEACHING WITH PRIMARY SOURCES, http://www.loc.gov/teachers/classroommaterials/primarysourcesets/womens-suffrage/pdf/teacher_guide.pdf (last visited Nov. 17, 2016).

21. Kelly Buchanan, *Women in History: Lawyers and Judges*, IN CUSTODIA LEGIS: LAW LIBRARIANS OF CONGRESS (Mar. 6, 2015), https://blogs.loc.gov/law/2015/03/women-in-history-lawyers-and-judges/.

102 Yale L.J. 2175

Yale Law Journal
June, 1993

Note

THE NINETEENTH **AMENDMENT** AND WOMEN'S EQUALITY

Jennifer K. Brown

A rising demand for women's equality took shape in the middle of the nineteenth century and continues as a transformative force today. Early on, American feminists mobilized energetically to abolish outright discrimination that legally subordinated women to men and made a mockery of the nation's claim to be a community of equals.[1] Women rebelled particularly against their exclusion from the central mechanism of self-governance in a democracy: the right to vote. After winning a series of victories in the states, the suffrage campaign achieved its final success when the Nineteenth **Amendment** to the Constitution was ratified in 1920. Over time the right to vote became a reality for all women, as poll taxes and other racial restrictions were eliminated, and today women exercise the franchise on an equal footing with men. But in the years since women won the vote, Americans seem to have lost track of the revolutionary potential suffrage held for those who labored long, hard years for its enactment. The struggle for women's legal rights has continued almost unabated through the decades since the suffrage victory, but rarely, if ever, has the monumental achievement of the Nineteenth **Amendment** been cited as a constitutional support for women's claim to full equality.

The goal of this Note is to resurrect the broader purposes of the heroic suffrage campaign by arguing that the Nineteenth **Amendment** can and should be recognized as an affirmation of women's constitutional equality. My project is necessarily limited to making a provocative suggestion rather than establishing a constitutional fact. Full exploration of the themes exposed here will require sustained scholarly attention to the rich historical record of the campaign for the Nineteenth **Amendment** and the state suffrage enactments that preceded it, and a willingness to interpret that record in light of today's deeper understanding of the dynamics and persistence of gender hierarchy. Contemporary feminists often try to fit women's interests into a constitutional ***2176** framework that was built without women's active participation. My hope is to provoke consideration of how the Nineteenth **Amendment**-the only one to become part of our Constitution as a result of a mass movement for women's empowerment-might further promote women's equality.

The argument presented here was prompted by the contrasting interpretations of the significance of suffrage that emerged as state courts in the early twentieth century considered whether women's new status as voters qualified them for jury service. This question arose most vividly in states where women's common-law disqualification from jury duty[2] clashed with state law provisions that drew jurors from "electors." My analysis of these cases uncovered two deeply divergent understandings of women's history that produced differing approaches to questions of women's rights.

Some courts espoused a narrow view of the suffrage right which led them to hold that female electors could not be jurors. This "incremental" interpretation of suffrage was grounded in the assumption that women's legal status was fundamentally different from that of men, and that women possessed only those specific rights, responsibilities, and protections that men chose to grant them. A decision to extend to women any new right, such as suffrage, had no general effect on women's legal status; the new right was carefully limited to its terms. The incremental understanding of suffrage is consistent with the

narrow and orthodox meaning attributed to the Nineteenth **Amendment** today-the **Amendment** simply gives women the right to vote.

Other courts held that female electors were eligible to be jurors. These courts acknowledged that women's previous exclusion from the franchise had been based on their assumed natural inferiority to men, but they interpreted the extension of suffrage to women as amounting to a rejection of that assumption. In this "emancipatory" view, the grant of suffrage represented the symbolic and substantive assertion of women's rightful place as men's equals, and as such had ramifications beyond the franchise.

The reevaluation of the relationship between suffrage and equality presented in this Note draws on several sources. Part I describes the early feminist argument for suffrage as a fundamental right of equal citizens in a democracy. The suggestion made here is that the "original intent" of these citizen framers of the Nineteenth **Amendment**-that is, their goal of equality for women-should be considered when interpreting that enactment. Part II focuses on two cases discussing jury service as a citizen's right. These cases, ***2177** *Strauder v. West Virginia*[3] and *Neal v. Delaware,*[4] were important precedents to the woman juror cases because they show how black men's jury rights were intertwined with their citizenship and suffrage rights under the Fourteenth and Fifteenth **Amendments**. Part III presents cases representative of the "incremental" and "emancipatory" conceptions of women's suffrage, and shows how the emancipatory interpretation made a surprise appearance in the Supreme Court's opinion in *Adkins v. Children's Hospital,*[5] a 1923 labor law case. Part IV argues that we can achieve a better understanding of the Nineteenth **Amendment** by evaluating the contrasting views of women's history that support the incremental and emancipatory interpretations of suffrage. This Part evaluates the relative merits of those views, and discusses the continuing movement for women's rights, to conclude that the Nineteenth **Amendment** is most appropriately comprehended as a statement about women's equality beyond the voting booth.

The crux of my argument is that early interpretations of the meaning of suffrage to women's equality offer clues about the constitutional significance of the Nineteenth **Amendment**, clues we should evaluate in light of their conceptual underpinnings. From this angle, we can see that the expansive, "emancipatory" reading of the Suffrage **Amendment** is consistent not only with the egalitarian impetus that drove the suffrage movement, but also with the view of women's history that is embodied by our national experience in the decades since women's suffrage was won. The vision of emancipation from the legacy of sex discrimination continues to animate the women's movement in the United States and all over the world. The durable vitality of this broad vision argues for continued recourse to it as we seek a deeper understanding of what the Nineteenth **Amendment** means for women's equality.

I. VOTING AND EQUALITY

The *Declaration of Sentiments* adopted at the founding event of the American movement for women's equality, the 1848 Woman's Rights Convention in Seneca Falls, New York, shows that from the start, a belief in sex equality drove the feminist campaign to win the vote. The *Declaration,* which paraphrased the *Declaration of Independence,* proclaimed, "We hold these truths to be self-evident: that all men and women are created equal," and listed as the first proof of men's "tyranny" over women, "He has never permitted her to exercise her inalienable right to the elective franchise."[6] To feminist minds, women's inability to vote was a central feature of their oppression by men: "Having deprived her of this first right of a citizen, the ***2178** elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides."[7]

Women's advocates pressed for the vote not only as a means to improve women's lives, but also because it would symbolize recognition of women's "equal personal rights and equal political privileges with all other citizens."[8] As the first right of a citizen, suffrage *meant* citizenship;[9] it was the very substance of self-government.[10] Suffragists thus responded eagerly when Francis Minor, a St. Louis lawyer and husband of Virginia Minor, a Missouri suffrage leader, suggested in 1869 that the newly ratified Fourteenth Amendment's guarantee of citizenship[11] offered women a new basis for asserting the right to vote.[12] The appeal of this idea was evident. In Francis Minor's words, "We no longer beat the air-no longer assume merely the attitude of petitioners. We claim a right, based on citizenship."[13]

This equal citizenship claim to the vote was put to the test when Virginia Minor's suit against the voting registrar of St. Louis for refusing her registration reached the Supreme Court in 1875. The result, *Minor v. Happersett,*[14] was devastating. A unanimous Court declared that voting had nothing to do with the rights of national citizenship protected by the Fourteenth **Amendment**. The Court cited state law limitations on voting rights[15] to hold that voting could not derive from national citizenship because states, not the nation, created voters.[16] According to the Justices, the Fourteenth **Amendment** itself argued against Virginia Minor. Section 2 of the **Amendment** penalizes ***2179** states that deny male inhabitants the right to vote,[17] and the Court asked, " I f suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants?"[18]

In an earlier time, when the national government was conceived as the creature of the states that constituted it,[19] the Court's reliance on states as the sole source of the suffrage right might have had some merit. The Fourteenth **Amendment**, however, created a new relationship between the people and their national government. It made them "citizens of the United States" with "privileges and immunities" that flowed from that citizenship, and guaranteed to them "equal protection of the laws."[20] With national citizenship established by Section 1, and a penalty against states that abridged males' "*right* to vote" in Section 2, the Fourteenth **Amendment** as a whole undermined the Court's position that national citizenship and suffrage were wholly unrelated. Instead, the structure of the **Amendment** suggested that suffrage was a right of national citizenship.[21]

The Supreme Court's decision in *Minor v. Happersett* ignored a deeper problem. As a matter of positive law, the Court's statement that citizenship and suffrage were not coextensive was historically accurate.[22] However, the Justices failed to grapple with the contradiction inherent in a democracy that legislated broad restrictions on the right to vote. This contradiction becomes apparent with the realization that underlying the very existence of an elected legislature is the presumption that at least some people are *entitled* to vote to ***2180** form that legislature, an entitlement that necessarily exists not by legislative enactment, but a pre-political right. The powerful minority that restricted the right to vote to itself-propertied white men-did so not because its members doubted that voting was the foundation of self-government,[23] but because they viewed the majority of the people as incapable of self-governance.[24] A *right* to vote was thus inherent in the very formation of a republican government, and it would seem that the new relationship between the nation's people and the national government that was put in place by the Fourteenth Amendment's declaration of equal national citizenship would give rise to an equal right to voted based in national citizenship[25] and enforceable against state governments.

Even while denying Virginia Minor the right to vote, the Court affirmed that women were unquestionably citizens of the nation.[26] But theirs was a citizenship without substance. *Minor* made it clear that women could not simply claim equal rights under the Fourteenth **Amendment**.[27] Rather, they ***2181** would have to force their way into the Constitution, and the suffrage **amendment** would be their vehicle.[28]

Minor refocused the mobilization already underway to enact a suffrage **amendment** that would admit women to the "constitutional community."[29] The demand for the vote took women's struggle for equality to a new level. Suffrage went beyond "asking to have certain wrongs redressed."[30] Now the American woman "demanded that the Constitutions-State and National-be so amended as to give her a voice in the laws, a choice in the rulers, and protection in the exercise of her rights as a citizen of the United States."[31] The suffragists gradually attained their goal, beginning with scattered victories in the western states[32] and culminating in the ratification of the Nineteenth **Amendment** to the Constitution on August 26, 1920.[33] That **Amendment** proclaims: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The issue of women's right to vote at last resolved,[34] a new question arose. Would this monumental accomplishment, undertaken to end "the prolonged slavery of woman,"[35] reverberate beyond the voting booth? No ***2182** doubt its citizen framers intended such a result. They saw suffrage as a symbol of women's legal and political equality.[36] A purely structural reading of the Constitution could lead to the same conclusion. The Nineteenth **Amendment** nullified the only sex-based distinction in the text of the Constitution, Section 2 of the Fourteenth **Amendment**,[37] arguably giving rise to an inference that in the absence of male-specific rights, men and women would have equal rights.[38] As it happened, virtually the only judicial pronouncements on the scope of women's new suffrage right arose in the woman juror cases. Understanding these decisions requires some discussion of how jury service, like voting, symbolizes citizenship.

II. JURY DUTY AND CITIZENSHIP

The woman juror cases examined in this Note are state court decisions about whether women's ineligibility for jury service was altered by their new status as voters.[39] At first blush, jury service cases may appear to be a poor source of insight into the meaning of women's suffrage laws. To the modern mind, jury duty may evoke little more than the obligation to spend long hours in shabby court facilities, waiting for something to happen. In this light, serving as a juror scarcely seems to be a civil right. The characterization of ***2183** jury duty as a right fades further given our general understanding that the jury's primary function is to protect the rights of the accused.

The female juror cases are significant, however, because the jury stands not only as a protection for defendants, but more fundamentally as a mechanism for community self-governance. The institution of the jury expresses a mutual faith among citizens who assign to each other a function otherwise reserved to professional judges and lawmakers: the power to determine wrongs, to remedy them, and to decide each others' fates. The expression "a jury of one's peers" imbues jury service with a dignitary value. Conversely, when certain members of society are barred from jury service, not because of their duties to the community but because of who they are, they are denied the full measure of trust and respect accorded to equal citizens.[40] Excluding women from jury service also kept them from having a voice in deciding what the law should be, since it was the jury that defined the bounds of "reasonable" behavior and brought community morality to bear on the law.

The significance of jury duty as a right of citizenship is highlighted in two cases that are also important as precedents for the female jury cases. In the first of these, *Strauder v. West Virginia,*[41] the Supreme Court held that a state denied a black defendant equal protection of the law by "compelling him to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone."[42] According to the Court, keeping blacks off Strauder's jury panel violated not only his rights as a criminal defendant, but also a broader principle of equality. The exclusion of black men from the jury pool was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[43] The racial barrier also denied blacks the right "to participate in the administration of the law, as jurors."[44] As one commentator noted, the Court's decision moved "in the direction ... of an increasing emphasis upon the upholding of the dignity and equality, the legal status, of the negro race."[45]

It might appear that the principle of equality and fairness that animated the holding in *Strauder* would guarantee women's equal participation on juries based on the Fourteenth **Amendment** alone, without any consideration of suffrage, at least in cases involving female defendants. Yet *Strauder* did not ***2184** provide women any such guarantee; rather, the Court stated in dicta that a state "may confine the selection [of jurors] to males,"[46] and repeated the contention, made in its earlier Fourteenth **Amendment** jurisprudence, that the **Amendment** was addressed solely to race discrimination.[47] Thus with *Strauder,* the Court established that jury service was an important civil right whose denial breached the Fourteenth Amendment's guarantee of equal citizenship, even while stating baldly that excluding women from juries would not be constitutionally improper. One year later, however, in *Neal v. Delaware,*[48] the Court handed down a decision that clearly supported the proposition that suffrage conferred eligibility for jury service on women in states where electors comprised the jury pool.

The plaintiff in *Neal v. Delaware* was, like Strauder, a black man tried by a jury from which blacks had been excluded. In Neal's case, local officials had deliberately excluded blacks from the jury pool, although no statute directed them to do so. The central holding of *Neal* was that *Strauder*'s equal protection principle applied whether blacks were excluded from juries by official action or by state law. But to reach this issue, the Court dealt with a preliminary consideration of great importance for the woman juror cases: whether the Fifteenth **Amendment**, by making black men electors, had automatically made them eligible for jury service. Under Delaware law all persons qualified to vote could serve as jurors,[49] and under the Fifteenth **Amendment**, black men were qualified to vote. The state constitution, however, still defined "electors" as "white male citizens."[50] This language raised a question. Should jurors be drawn from that class of people who were "electors" when the juror qualifications were established-that is, white men-or were all current electors in the jury pool? The Court resolved this issue by writing that since the Fifteenth **Amendment** made black men electors "the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote."[51]

Neal v. Delaware would seem to have ensured the eligibility of newly enfranchised women for jury service in states that drew jurors from electors, ***2185** especially once the Nineteenth **Amendment** was ratified. The text of that **Amendment** exactly tracked the Fifteenth **Amendment**, substituting "sex" for "race, color, or previous condition of servitude" as the prohibited criterion for denial of the franchise. If a black (male) suffrage **amendment** "enlarged the operation" of state jury qualification statutes to include black men, a women's suffrage **amendment** should work the same enlargement to include women of all races. *Strauder* spoke to the importance of jury service for equal citizenship, and *Neal* affirmed that black men's suffrage had meaning beyond simply voting. It remained to be seen how courts would apply these cases when it came time to interpret the meaning of women's suffrage.

III. TWO MEANINGS OF SUFFRAGE

Women's jury service was the subject of a number of cases decided in the decades following *Neal v. Delaware.* Had courts simply followed *Neal,* and recognized that where jurors were drawn from electors, suffrage made women eligible for jury service, these opinions would hold little interest. But few courts were content simply to apply *Neal*'s straightforward logic; instead, they treated the prospect of female jurors as a complex issue. Some of the cases were decided with little or no discussion of women's aspirations to equality, and many ignored altogether the tie between jury duty and citizenship established by *Strauder* and *Neal.* In other cases, though, courts delved into these issues and developed the emancipatory and incremental interpretations of suffrage to guide their decisions on jury service. The discussion that follows is not intended to establish either of these meanings as the definitive interpretation of the Nineteenth **Amendment**, but rather to show that, within the limited realm of the jury service issue, judges expressed a variety of opinions on the meaning of suffrage. In this analysis, the female juror cases raise the possibility that the Nineteenth **Amendment** can be interpreted as an enactment for women's equality.

A. *The Emancipatory Meaning of Suffrage*

1. *State Court Cases*

Parus v. District Court,[52] decided by the Nevada Supreme Court in 1918, provides the fullest elaboration of a court's reliance on a particular understanding of women's history to support an emancipatory interpretation of suffrage. The petitioner in *Parus* challenged the validity of his indictment because women served on the grand jury that rendered it. Nevada law made ***2186** all qualified electors jurors,[53] and the state constitution recognized women's right to vote,[54] so the apparently simple question before the court was whether women were qualified as jurors, now that they were electors.

The Nevada court first summarized the holding of *Neal v. Delaware*[55] and left the reader to draw the obvious conclusion: just as the Fifteenth **Amendment** qualified black men as electors and therefore jurors, the Nineteenth **Amendment** qualified women as electors and thus jurors.[56]

The majority had to go beyond *Neal* and *Strauder* to meet a dissenter's contention, grounded in Nevada precedent, that because the jury at common law was composed of men, "our constitutional convention provided for a grand jury of *men* as clearly as though the Constitution itself had used the word 'men.' The word 'men' is written into the Constitution by operation of law."[57] The majority's response pointed out that Nevada had already cast aside the property requirement for jurors that existed at common law and had substituted a single criterion for jurors: qualified electorship.[58] The court continued:

> It may be urged that at the time of the framing of our organic law, qualified electorship was not considered as being attributable to women. But time has wrought the unanticipated change, and by **amendment** to our Constitution women have been clothed with the qualification of electorship, and by this change the female citizens of the state have automatically become members of the class from which class alone grand jurors may be drawn, and which classification ... constitutes the only circumscription .... fixing the citizenry from which grand jurors might be in the first instance selected.[59]

The court seems to have sensed that this exercise in logic would not fully satisfy its detractors, and that it must confront the

crucial issue: what justified a departure from women's jury disqualification at common law?[60] The answer, according to the court, was that the old rule for women was a thing of the past:

> Blackstone tells us that the term "homo," though applicable to both sexes, was not regarded in the common law, applicable to the ***2187** selection of grand jurors, as embracing the female. Woman, he says, was excluded propter defectum sexus .... When the people of this state approved and ratified the constitutional **amendment** making women qualified electors of the state, it is to be presumed that such ratification carried with it a declaration that the right of electorship thus conferred carried with it all of the rights, duties, privileges, and immunities belonging to electors; and one of the rights, one of the duties, and one of the privileges belonging to this class was declared by the organic law to be grand jury service. Nor can we with any degree of logical force exclude women from this class upon the basis established by Blackstone, propter defectum sexus, because we have eliminated the spirit of this term from our consideration of womankind in modern political and legal life. Woman's sphere under the common law was a circumscribed one. By modern law and custom she has demanded and taken a place in modern institutions as a factor equal to man.[61]

Speaking of the grand jury's investigatory powers, the judges added:

> Can we reasonably say that although woman, on whom has been conferred the right of electorship, the right to enjoy public office, the right to own and control property, and on whom has been imposed the burden of taxation in a common equality with men, is nevertheless deprived of the privilege of sitting as a member of an inquisitorial body, the power, scope of inquiry, and significance of which affects every department of life in which she, as a citizen and elector, is interested and of which she is a component part? The spirit of the constitutional **amendment** silences such an assertion.[62]

The *Parus* court adopted what I call the emancipatory view of the meaning of suffrage within the context of women's history. In general terms, this view characterized the past as oppressive to women, credited the trend toward equality with bringing about a transformative legal act, and urged that the transformative act be given broad effect to further promote women's equality. According to the *Parus* court, women suffered from oppression in the past; their sphere was "circumscribed." A broad movement for women's equality had taken hold-"she has demanded and taken a place ... as a factor equal to man"-and the "spirit" of *propter defectum sexus*[63] had been eliminated from "modern political and legal life." The grant of suffrage culminated that movement-"time has wrought the unanticipated change"-and suffrage stood for a transformation in women's status as a result: " I t is to be presumed that ***2188** such ratification carried with it ... all of the rights, privileges, and immunities belonging to electors."[64]

The uses of the word "spirit" in this opinion suggest that the *Parus* court was not only construing the state constitution, but also seeking to identify and acknowledge the social forces and deeper principles that shape the law. The court recognized that *propter defectum sexus* represented the common law stance toward women, and stated emphatically that the people had rejected this attitude in their "consideration of womankind in modern political and legal life."[65] The court found the tone of the new age in " t he spirit of the constitutional **amendment**" for women's suffrage; that spirit affirmed women's involvement in matters of governance, in "every department of life in which she, as a citizen and elector, is interested and of which she is a component part," and it "silence d " the notion that women had achieved their gains only to continue to be "deprived" of legal privileges not specifically granted.[66]

The *Parus* court's language was reminiscent of the opinion in *Rosencrantz v. Territory,*[67] a very early case that involved suffrage and women's eligibility for jury service. The *Rosencrantz* court held that a new statute on family relations, together with a women's suffrage law previously enacted, brought women within the class of "electors and householders" who were eligible for jury service. The opinion in *Rosencrantz* interpreted a family relations statute rather than a suffrage enactment. Yet I include it here because the court interpreted the statute by sketching out the same picture of women's history that would later support the emancipatory understanding of suffrage in the *Parus* case. The *Rosencrantz* court bemoaned the "harsh rule of the common law," in which a wife's "identity was largely lost in that of her husband."[68] It celebrated the family relations statute as "radical legislation ... consonant with the spirit of the times," which gave husbands and wives "absolute equality before the law."[69] The court's emancipatory interpretation of a law apparently designed to improve women's property rights

within marriage thus provided the basis for opening the courthouse to women as jurors.

A few years after *Parus,* the Michigan Supreme Court confronted the issue of women's eligibility for jury service with a bold demand: "What was the purpose and object of the people in adopting the constitutional **amendment** striking out the word 'male' from the Constitution? Was it not to do away with all distinction between men and women as to the right to vote, or as to being electors?"[70] The court treated its answer-that the people intended women to ***2189** have all the rights of electors-as a foregone conclusion, but on closer inspection this opinion, *People v. Barltz,* shows that the court considered both the emancipatory and the incremental interpretations of suffrage, and chose the emancipatory view. The incremental view was represented by the court's reference to *Harland v. Territory,*[71] a Washington Territory case that had reversed *Rosencrantz.* In *Harland* the court had denied women's eligibility for jury service, stating that when "the people" had adopted women's suffrage they had intended to give women the vote and nothing more.[72] Rather than adopt the narrow reading of suffrage enunciated in *Harland,* the *Barltz* court cited and approved the liberal reading of suffrage found in *Rosencrantz,*[73] signaling its sympathy with the emancipatory view.

The *Barltz* opinion offers a more detailed discussion of another issue that divided the incremental and emancipatory outlooks on suffrage and women's history: whether the use of the word "men" in jury laws represented an intentional decision by the legislature to exclude women from jury service, and if so, whether such a decision should be honored even after women had been enfranchised. Several provisions in the Michigan state constitution referred to juries of "twelve men,"[74] and in an earlier decision the Michigan court had written, "This right was a trial by a jury of 12 men, good and true."[75] Whether "men" meant *men*[76] was critical to the outcome of *Barltz.* A literal reading of the word would void the claim that women could be jurors.

Deciding the meaning of "men" forced courts to choose between two competing explanations of why women were not men's legal equals. One possibility was that women had been intentionally excluded from juries, presumably based on some judgment about their lack of fitness.[77] On this understanding, legal distinctions between the sexes were not mere byproducts of a social structure that assigned women and men to separate spheres; instead, they had been deliberately created. In one court's words, " T he Legislature ***2190** ordained that jurors shall be men."[78] This view of the origin of women's legal inferiority underlay what I call the incremental view of suffrage. Its adherents recognized that a sex-based distinction in the law could be erased, but insisted this could happen only through an intentional decision to alter women's legal status. A suffrage **amendment** could open the voting booth to women, but it could not put them in the jury box because there had been no distinct decision to remove the legal barrier to their service.

Courts that declined to read "men" literally faced a more complex task. One court simply declared that "[s]ince the world began, in all writings concerning the human race, the word 'man' or 'men' has been used in a generic sense, or as representing the human race."[79] This response, however well-intentioned, was clearly inadequate because until the women's suffrage **amendments**, the literal meaning of "men" in elector and juror statutes was accurate-all voters and jurors *were* men. A more promising approach was to account for how a use of "men" that might once have been literal could, over time, have taken on a generic meaning. One possibility was to retrospectively read the literal use-which dismissed women from political and legal life-as an error. On this view it was quite appropriate that rectification of sex inequality in one area, suffrage, should suffice to correct the error in another, jury service.[80]

Faced with this question, the *Barltz* court cited a California case[81] that had rejected a "men means *men*" claim and approved female jurors. Citations to cases from other jurisdictions and a law dictionary supported the view that " i n some of its uses man is construed to mean 'all human beings, or any human being, whether male or female.'"[82] After quoting two dictionaries in which "a human being" appeared as the first definition of man,[83] the opinion concluded, " I n any view of the case which we are able to take ... Miss ***2191** Gitzen ... was a qualified juror under the Constitution and laws of this state."[84]

The *Barltz* judges asserted that the people's intent in enacting suffrage was to give women all the rights of electors, and declined to take literally earlier laws that spoke of jurors as men. While the opinion in *Barltz* lacked the ringing endorsement of women's new legal equality that marked the *Parus* decision, its conclusion that suffrage made women eligible for jury service seemed to rest on an understated sense that suffrage marked women's emancipation.[85]

2. *The* Adkins *Decision*

The most striking endorsement of suffrage as a symbol of women's emancipation from the inequality of the common law appeared in 1923 when the Supreme Court struck down a Washington, D.C. minimum wage law that applied only to women. The case, *Adkins v. Children's Hospital,*[86] was decided just three years after ratification of the Nineteenth **Amendment**.

Adkins is known today as one of the Court's liberty of contract decisions, which nullified various labor laws as infringements of the constitutional rights of employers and workers to negotiate the terms of employment freely.[87] Before *Adkins,* the Supreme Court had not applied the liberty of contract doctrine to labor laws that affected only women, giving priority instead to a perceived public interest in women's welfare founded on their capacity to bear children.[88] According to the Court, this interest justified otherwise impermissible legislative intrusions into the employment relationship.[89] The *Adkins* decision marked a sharp reversal in the Court's approach to female-specific labor laws, and the Court justified its move by endorsing an equality ***2192** for women that some would have described as paradoxical, if not downright perverse: women and men had an equal right to work without the protection (or as the Court saw it, the inhibition) of a minimum wage.

Whatever its merits as a labor law decision, the *Adkins* case presented a view of women's history that credited the suffrage **amendment** as a virtual declaration of women's equality-at least in most spheres:

> [T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case,* has continued "with diminishing intensity." In view of the great-not to say revolutionary-changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth **Amendment**, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[90]

There are several points to be made about this passage. First, the Court evinced an unmistakably negative view of women's "ancient inequality." Entirely absent was any suggestion that women benefited from the "old doctrine." Instead, the Court described women as "subjected to restrictions" and "special restraint," and implied that insult was added to injury by failing to treat "women of mature age" as legal adults. Limitations in the realm of contractual, political and civil rights were rejected in favor of the "present day trend" of "emancipation." The Court indicated that its assessment of past and present was widely shared, by referring to it as "common thought and usage."

Second, the Court simultaneously espoused opposing views of whether this change had been a gradual transition or a radical transformation. Its quotation from the earlier *Muller* decision, which had approved a woman-only labor law, suggested continuity with the past: inequality was "diminishing" to "the vanishing point." But the Court also depicted a sharp break with what had gone before, calling the changes in the fifteen years since *Muller* not only "great" but "revolutionary." This sense of drastic change was enhanced by the ***2193** Court's use of the word "emancipation," which connotes the single act by which the slave becomes free.

Also notable here was what might be called the penumbra of sex equality that emanated from the Nineteenth **Amendment**.[91] While the *Adkins* case was not about the Nineteenth **Amendment**, the Court's reference to it is remarkable. The **Amendment** appeared not only as a result, but as an engine of social change. Suffrage was the culmination of "revolutionary" developments that forced the Court to abandon a legal system that had treated women " a s minors, though not to the same extent,"[92] developments that led the Court to embrace women as the civil law equals of men. The importance of the Suffrage **Amendment** to the Court's analysis suggested a change of heart foreshadowed at the close of the earlier *Muller* opinion where the Court had written:

> We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive.

> The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.[93]

It almost seems that by denying any connection between suffrage and civil rights, the *Muller* Court had set in motion a mental process that eventually reached quite the opposite conclusion, embodied in the *Adkins* decision: suffrage had everything to do with equality.

The Supreme Court never went beyond the *Adkins* decision's tantalizing hint that the Nineteenth **Amendment** represented more for women than simply the right to vote. Exploration of that possibility took place only in the woman juror cases. None of these cases discussed *Adkins*-indeed, many predated that decision-yet *Adkins* is relevant to the effort to understand and evaluate the jury cases. *Adkins* distinguished between permissible laws concerned with protecting women's health, and unconstitutional restrictions on women's rights.[94] While the line between these categories was not necessarily ***2194** clear-the labor law litigation generally concerned whether health-related laws infringed civil rights-the principles of the *Adkins* decision favored women's jury service. For one thing, jury service posed no conceivable threat to women's health. And, as the Supreme Court had recognized in *Strauder v. West Virginia,*[95] jury service was emblematic of exactly that equally citizenship that the *Adkins* Court suggested women had now attained.

More broadly, the *Adkins* decision's emancipatory vision of the importance of the Nineteenth **Amendment** within women's history suggested that it was not only appropriate, but perhaps necessary that courts recognize the revolution around them by giving full scope to the significance of suffrage. In the emancipatory view, women had stepped forward from an oppressive past to claim the vote and with it, a full measure of equality. The fruit of the arduous suffrage campaign was women's equality before the law.

B. *An Incremental View of Suffrage*

The *Adkins* decision captured the vision of suffrage as a symbol of women's emancipation from the legal inequality of the past, a vision that inspired the cases, considered earlier in this Note, that upheld women's right to be jurors. But in other cases courts held that the attainment of suffrage had been a discrete event in the legal history of women. According to these cases, the attainment of suffrage had no impact on juror qualifications or any other aspect of women's rights because women could not serve as jurors, or achieve any other change in legal status, without explicit legislative authorization. The following pages present this "incremental" interpretation of suffrage.

A full account of the incremental understanding of suffrage appeared in 1921, when the Supreme Judicial Court of Massachusetts upheld the criminal conviction of a female defendant that was rendered by a jury from which all women were excluded. *Commonwealth v. Welosky*[96] presented questions about the scope of women's suffrage from several different angles. First, the Massachusetts jury law specified that all "persons" eligible to vote could be jurors. Since women had become voters by virtue of the Nineteenth ***2195** **Amendment**, the court had to explain why women did not now qualify for jury service. Second, Massachusetts had readily admitted others to the jury box once voter qualifications that had kept them out, such as property requirements, had been lifted. Again the question was, why wouldn't this rule apply to women? The third issue was perhaps the thorniest: Welosky was a female defendant tried by a jury that excluded all women, which seemed to put *Strauder v. West Virginia*[97] and *Neal v. Delaware*[98] firmly on her side. The court would have to distinguish these venerable precedents if it were to rule against Welosky's Fourteenth **Amendment** claim.

The court began by construing the word "person" in the state jury statute-"a person qualified to vote shall be liable to serve as a juror"-to mean men.[99] In fact, the court argued, not only did the legislature mean "men" when it wrote "person," but this was "the only intent constitutionally permissible" because the state constitution had allowed only men to vote when the legislature had enacted the jury statute.[100] This recourse to legislative intent was deeply inconsistent with the relevant precedent, *Neal v. Delaware.*[101] *Neal* involved a state statute defining voters as jurors that was enacted at a time when state suffrage was constitutionally restricted to white males. Yet the State of Delaware had not argued to the Supreme Court that because the only "constitutionally permissible" intent of its legislature when it had authorized electors to be jurors was to make *whites* jurors, a state policy of excluding blacks from juries must later be upheld; the constitutional violation inherent in

trying blacks before all-white juries was clear.

Undaunted by this flaw in its argument, the *Welosky* court turned to the question of why women, unlike other newly enfranchised groups, did not automatically become jurors upon getting the vote. The court explained that when suffrage was expanded among male citizens,

> These concurring enlargements of those liable to jury service were simply an extension to larger numbers of the same classification of persons. Since the word "person" in the statutes respecting jurors meant men, when there was an extension of the right to vote to other men previously disqualified, the jury statutes by specific definition included them.
>
> ***2196** The Nineteenth **Amendment** to the federal Constitution conferred the suffrage upon an *entirely new class of human beings*.... It added to qualified voters those who did not fall within the meaning of the word "person" in the jury statutes.[102]

Why? Because "[t]he change in the legal status of women wrought by the Nineteenth **Amendment** was radical, drastic and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication."[103] The justices seem to have been frightened by the possible implications of the "radical" **amendment**; they urged a policy of strict containment. In fact, the court reached back fifty years to a Massachusetts version of the *Bradwell* case[104] for a reassuring quotation:

> In making innovations upon the long-established system of law on this subject, the legislature appears to have proceeded with great caution, one step at a time; and the whole course of legislation precludes the inference that any change in the legal rights or capacities of women is to be implied, which has not been clearly expressed.[105]

Here was the foundation of the incremental interpretation of suffrage: Women gained new rights not because the law had come to recognize sex equality, but only because law-makers occasionally saw fit to exercise their discretion on women's behalf.

The court's greatest challenge was to explain why a female defendant's jury could be drawn from a pool that excluded women, when it was well established by *Strauder*[106] and *Neal*[107] that a black male defendant could not be tried by a jury drawn from a pool that excluded black men. The court resolved this dilemma by arguing that when it came to the need for constitutional rights, sex and race created "utterly different"[108] situations. First, the justices harked back to the view that the Fourteenth **Amendment** was enacted for the exclusive benefit of blacks, asserting that this principle was "not shaken or affected by later decisions ... recognizing the Fourteenth **Amendment** as extending its protection to all persons, white or black, or corporations."[109] The court did not attempt to explain how the earlier view, that the Fourteenth **Amendment** protected *only* blacks from race discrimination, ***2197** could remain in force once other decisions had expanded the Amendment's reach to "all persons ... or corporations." The effect of its pronouncement was, however, clear: the Fourteenth **Amendment** simply did not apply when women-of any race-challenged their treatment as women.

The justices continued by contrasting the situation of blacks before the Thirteenth, Fourteenth, and Fifteenth **Amendments** with that of women before the Nineteenth **Amendment**. The court, apparently thinking only of white women, described women's status before the Nineteenth **Amendment**:

> Women had not been enslaved. They had been recognized as citizens and clothed with large property and civil rights. Woman has long been generally recognized in this country as the equal of man intellectually, morally, socially. Opportunities in business and for college and university training had been freely open to her.... In many respects laws especially protective to women on account of their sex had been enacted. Most of those formerly imposing limitations, even upon married women with respect to property and business, had disappeared.[110]

In light of this account of women's history, there was little left for the Nineteenth **Amendment** to accomplish and, according to the court, its advocates knew that: "Current discussion touching the adoption of the Nineteenth **Amendment** related exclusively to the franchise. The words of that **amendment** by express terms deal solely with the right to vote."[111] The

Nineteenth **Amendment** granted women the vote and nothing but the vote.

The argument then took a surprising turn. The court cited Supreme Court decisions that approved significant restrictions on women: women had no right to practice law,[112] no right to vote before the Suffrage **Amendment**,[113] and women-specific labor legislation was constitutional.[114] Noting that all these cases rejected Fourteenth **Amendment** challenges, the court wrote, "Those rights appear to us quite as essential to the privileges and immunities of citizens and equal protection of the laws as the duty to serve as jurors."[115] The Massachusetts justices who had just described how women enjoyed equality now pointed to cases that ratified the constitutionality of laws that treated women unequally.[116]

***2198** Despite its evident confusion, the *Welosky* opinion is a comprehensive statement of suffrage as a discrete and incremental alteration of women's legal status. The passage comparing the status of (white) women with that of blacks before emancipation was intended to show that women did not suffer legal or social oppression, and for this reason the justices refused to apply *Strauder*'s Fourteenth **Amendment** holding to defendant Welosky. Yet the *Welosky* court acknowledged that the law continued to approve significant restrictions on women's rights. This contradiction could be resolved only from within the incremental perspective, which accepted inequality between the sexes, and allowed women only those rights that were selected for them. The Massachusetts justices endorsed that perspective by reading the word "person" in the jury statute to mean "men" and by characterizing women as "an entirely new class of human beings" to enjoy the privilege of voting. To them, suffrage was an important but limited achievement. Following this, the conclusion was inevitable that the Nineteenth **Amendment** could not be "extended by implication" to create additional rights; indeed, the "whole course of legislation"[117] argued against such a result. Winning the vote had altered one aspect of women's legal status, but had left unchanged their underlying inequality before the law.

The incremental interpretation of laws affecting women's legal status accepted the status quo of sex inequality as an appropriate and intentional response to perceived differences between men and women. The law treated the sexes differently because they were different. Since women's unequal legal status was accepted and normal, courts adopted a cautious stance toward legislative enactments that altered women's status, giving such enactments their due but not extending them on any abstract theory of sex equality.

The opinion in *Harland v. Territory*[118] is an earlier expression of this incremental view. This case reversed *Rosencrantz,*[119] the earlier Washington Territory case that had established women's eligibility for jury service. In *Harland* the judges determined that the Territory's women's suffrage law was invalid,[120] and stated in lengthy dicta why women, even if electors, could not be jurors. The court embraced women's exclusion from jury service as justified by the rule of the common law that was summarized in Blackstone's phrase, ***2199** *propter defectum sexus.*[121] The opinion quoted Justice Bradley's famous statement that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."[122] " W e ought not to depart from the old order," the judges wrote, "without the most indubitable evidence that the legislature so intended."[123] Presaging the *Welosky* opinion, they asserted that "the fourteenth **amendment** ... is not yet strong enough to overcome the implied limitations of prior law and custom"[124] on women's rights.

The South Carolina Supreme Court also embraced the incremental view of suffrage in *State v. Mittle*[125] when it refused a criminal defendant's challenge to his conviction on the ground that women were excluded from the venire of petit jurors for his trial. The court held that women were ineligible for jury service in the state.[126]

The South Carolina judges represented Mittle's claim as an assertion that the Nineteenth **Amendment** had, in itself, made women jurors. This was probably something of an overstatement, as the route from suffrage to jury service was always traced through a provision that electors were qualified as jurors, but the court spared no energy in its denunciation:

> The right to vote and eligibility to jury service are subjects of such diverse characteristics and demanding such different regulation that it is impossible to consider the one as implied in the other. To hold that one who is a qualified elector is ipso facto entitled to jury service is to deprive the Legislature of the right to prescribe any other limitation upon the right to jury service. It could not prescribe the age limit, the sex, or the mental, moral, or physical qualifications of a juror.[127]

The problem with this argument lay in the South Carolina constitution's two provisions about jurors. The first read, "The petit jury of the circuit courts shall consist of twelve men"; the second, "Each juror must be a qualified elector under the provisions of this Constitution, between the ages of twenty-one and sixty-five years and of good moral character."[128] These provisions ***2200** simply did not supply the court's perceived need for "such different regulation" of voters and jurors. The *Mittle* court also held that "the right of jury service by a woman was expressly denied by the state Constitution" because of the provision for a jury "of 12 men";[129] the court did not pause to consider whether "men" meant *men.*[130]

The opinion in *State v. Mittle* said little about why suffrage should have only an incremental and narrow effect. Assessment of the court's view of women's history is largely a matter of implications drawn from its silence. The South Carolina Supreme Court presented the Nineteenth **Amendment** in a contextual vacuum, which precluded interpreting the **Amendment** as part of a larger drive toward equality. The court's hairsplitting insistence that the Nineteenth **Amendment** did not grant women the right to vote but only prohibited states from denying the franchise based on sex[131] was meaningless as a matter of law-granting the right and prohibiting its denial equally allow women to vote, except for those who are otherwise disqualified. But the court's choice of words cut against the claim that women had equal legal *rights.*

The literal reading of "jury of 12 men" as a bar to women's participation was a tacit acknowledgment that sex-specific legislation was presumptively appropriate. The court did not refer to the debate in other cases over whether "men" should be read literally, but instead simply accepted that legislation could give women inferior status. *State v. Mittle* is an example of the incremental interpretation of suffrage derived more by ignoring than by interpreting women's legal history.

Some other cases that relied at least in part on the incremental interpretation of suffrage to reject female jury service were, like *Commonwealth v. Welosky*[132] (1931), among the later opinions on the question. Cases such as *State v. Kelley*[133] (1924) and *People ex rel. Fyfe v. Barnett*[134] (1925) departed from the more expansive interpretation of the meaning of suffrage expressed in the earlier opinions of *Parus v. District* ***2201** *Court*[135] (1918) and *People v. Barltz*[136] (1920). Their departure is all the more striking given that they also came after the *Adkins* opinion and its endorsement of the emancipatory view. These later opinions may express a retrenchment from, or a backlash against, the spirit of sexual equality that had galvanized the successful suffrage campaigns. Perhaps as the struggle for suffrage receded from political awareness, courts lost sight of the suffragists' rhetoric of women's equality. No doubt that rhetoric had faded from view to some degree even before the Nineteenth **Amendment** was won, as support for women's suffrage expanded from its origins in visionary feminism to the political mainstream. Perhaps these courts shared the concern, expressed in *Welosky,* with limiting the consequences of this "radical, drastic and unprecedented"[137] Nineteenth **Amendment**.

IV. READING LAW BY THE LIGHT OF HISTORY

This sample of the female juror cases offers no definitive answer to the question posed by the Michigan Supreme Court in *People v. Barltz,* "What *was* the purpose and object of the people in ... striking out the word 'male' from the Constitution?"[138] I have explored them here because they illuminate two interpretations of suffrage-one narrow, one more broad-that we can evaluate in light of our national experience and aspirations as they have developed in the years since the ratification of the Nineteenth **Amendment**.

It is clear that as judges struggled to determine the impact of suffrage on women's jury service, they drew constantly on their own conceptions of women's legal history. Those who believed that women fit well within the separate sphere assigned to them by men and the legal system were careful to extend to women only those precise rights that legislatures decided to grant. Implicitly or explicitly, these courts rejected the view that women's inferior legal status was detrimental and assumed the legitimacy of legal distinctions between the sexes. In this view of women's legal history the grant of suffrage was no more than an incremental alteration in women's legal status whose impact was confined to the voting booth.

Other judges took a very different view. In their eyes, women had been subjected to imposed legal inferiority quite long enough. If women had not yet arrived at the status of full equality, they were bound soon to be recognized as men's equals.

These courts looked to other legislative enactments as support for their view that suffrage was a robust expression of women's aspiration toward equality. They drew parallels between the impact of enfranchisement on black men's jury rights and its impact on women's jury service. Interpreting ***2202** suffrage as the people's affirmation of women's equal political rights, they readily extended its force at least from the ballot box to the jury box.

The transformative potential of this latter emancipatory vision of suffrage and the Nineteenth **Amendment** was demonstrated in *Adkins v. Children's Hospital,*[139] where the **Amendment** appeared as a virtual declaration of women's constitutional equality. That potential was soon vitiated as sex-specific legislation was upheld under the caveat in *Adkins* that "the physical differences must be recognized in appropriate cases."[140] The "recognition" of those differences invited a resurgence of special laws aimed at women and justified as sound public policy. The ramifications for women's drive toward legal equality were profound.

In a scathing 1935 survey of the failure of constitutional law to grant or protect women's rights, Blanche Crozier criticized the ascendance of "public policy" as a rationale for "the progressive intrusion of the police power upon personal liberty in the field of women's employment: ... The health of the race brings all paid work of all women within the field of public control."[141] She observed that for a time, women were gaining legal rights "all necessarily in derogation of the common law,"[142] and, as we have seen in the jury cases,

> [I]t began to seem that the common law ... was on the wrong track anyway, and that it was inadequate to say that a constitutional right expressed in the most universal terms nevertheless did not extend to women because women had no such right at common law....
>
> Between the decline of the authority of the common law in this field and the later enormous growth of the application of public policy, there was a hiatus; and this hiatus is the highest point in the constitutional position of women. This interval contains the strongest statements against discrimination based on sex which have ever been made by American courts.[143]

Crozier continued, "Only once did the United States Supreme Court fall into this new trend, which turned out to be only temporary and not the way the law was going. This was in the *Adkins* decision, which we fear is not today in the best of repute."[144] The tone of weary resignation at the conclusion of her discussion is haunting years later, with full equality for women still so distant a goal:

> ***2203** The principle of the constitutionality of discrimination based on sex was slowly weakening during the last years under its old sponsor, the common law; it reached a critical point where even some courts thought it might die; but it weathered the change from ancient to modern nomenclature, and under its new sponsor, public policy, it has fully regained its old strength.[145]

My survey of these cases, originally inspired by the *Adkins* view of suffrage, leaves me with the same feeling of opportunity lost that Blanche Crozier expressed. It was not the suffrage **amendment** alone, or any other legal enactment, that for a time seemed to give such impetus toward equality for women, but instead the "spirit of the **amendment**," and of the movement responsible for its success.

The reasons given in the jury cases for a narrow reading of the Nineteenth **Amendment** are not empty. The argument that the **Amendment** says nothing on its face about jury duty is undeniably accurate. So, to an extent, may be assertions that when legislators enacted jury laws, "men" meant *men.*[146] The heart of this controversy, however, lies not in the words of statutory or constitutional enactments, but in the competing views of the backdrop of women's history, against which the impact of suffrage must be measured. In my view, the choice between the incremental and the emancipatory interpretations of the Nineteenth **Amendment** should take into account both the historically inferior legal status of women and the centrality of suffrage to equal citizenship in a democracy, in order to reach an understanding of what kind of equality women achieved by winning the right to vote.

Today we take for granted the incremental view of women's suffrage. In our constitutional understanding, the Nineteenth **Amendment** stands for no more than women's right to vote. But the conception of women's history that underlies the incremental view, as expressed in these cases, seems deficient. Courts that adopted the incremental view showed little

comprehension of the oppressiveness of the common law to women-a reality those courts that adopted the emancipatory interpretation admitted freely. Moreover, aspects of the incremental view-particularly the literal adhesion to the word "men" and the failure to use constitutional precedents to override women's common-law status-amounted to a position that the Constitution did not apply to women, and that only the express terms of a statute could alter women's rights from what they were at common law.

***2204** The entire thrust of the feminist movement has been to reject these contentions, by reading women *into* the Constitution, and by insisting that maleness has served as a prerequisite for positions of responsibility and authority not because it is a bona fide qualification, but because of the historical oppression of women. The feminist movement's many successes in the legal arena demonstrate that both the judiciary and the legal profession as a whole have rejected the presumption of women's inequality that served as the underpinning for the incremental interpretation of suffrage. Not only are the basic tenets of the incremental viewpoint now discredited, but the belief in women's trajectory toward equality that underlay the emancipatory interpretation of suffrage has continued as a vital force right up to the present.

V. CONCLUSION

The Nineteenth **Amendment** was the product of the revolutionary idea that women have equal status in a democracy. As a nation, we are still pursuing this vision of equality, yet we have allowed this constitutional enactment only a paltry existence. The woman juror cases, with their contrasting incremental and emancipatory interpretations of suffrage, provide good reason to reconsider the limited scope accorded the Nineteenth **Amendment**. This incremental interpretation of women's suffrage turns out to be founded upon a constricted view of women's place in the legal order that has been wholly rejected by modern Americans. The understanding that suffrage was an emancipatory enactment, however, rests on a warm embrace of women's equality that is far more consonant with our national ideals and constitutional values.

The meaning of the Civil War **Amendments** for racial equality has never been treated as a settled matter. Rather, the understanding of their significance is continually informed and reformed, both by new scholarship about their origins, and by an ever broadening awareness of how deeply our institutions and common life must change to realize fully the aspiration of racial justice. The Nineteenth **Amendment** merits a similarly deep, broad, and continuing inquiry, so that the fullest and truest aspirations of this constitutional **amendment** may be recovered and realized.

The Nineteenth **Amendment** brought women into political citizenship after centuries of exclusion by men, a tremendous achievement by any measure of democracy. Perhaps there is yet more this women's **amendment** to the Constitution can accomplish to eliminate the spirit of *propter defectum sexus* "from our consideration of womankind in modern political and legal life."[147]

Footnotes

1 1 HISTORY OF WOMAN SUFFRAGE 16 (Elizabeth Cady Stanton et al. eds., AYER Co. 1985) (1881) ("[W]oman readily perceives the anomalous position she occupies in a republic ... where the natural rights of all citizens have been exhaustively discussed, and repeatedly declared equal."). The *History of Woman Suffrage* comprises six volumes published between 1881 and 1922, while the suffrage campaign was being waged. Three leaders of the movement, Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, edited the first three volumes.

2 Discussing eligibility for jury service, Blackstone referred to the requirement that the jury be composed of "*liber et legalis homo,*" and then clarified: "Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus* ...." 3 WILLIAM BLACKSTONE, COMMENTARIES *362. *Propter defectum sexus* means on account of defect of sex. *See* BLACK'S LAW DICTIONARY 1220 (6th ed. 1990).

3 100 U.S. 303 (1880).

4 103 U.S. 370 (1881).

5 261 U.S. 525 (1923).

6 DECLARATION OF SENTIMENTS (1848), *reprinted in* STANTON, *supra* note 1, at 70.

7 *Id.*

8 2 ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE 747 (AYER Co. 1985) (1882).

9 *See, e.g.,* Percy L. Edwards, *Constitutional Obligations and Woman's Citizenship,* 75 CENTRAL L.J. 244, 246 (1912) (arguing that suffrage carries with it additional responsibilities and that suffrage thus "confer[s] upon women equal political standing with men of full citizenship"); Edward T. Taylor, *Equal Suffrage,* 19 CASE & COMMENT 301, 306 (1912) (personal freedom requires the "fullest rights of citizenship," including the right to vote).

10 *See, e.g.,* STANTON, *supra* note 1, at 15 ("Woman's political equality with man is the legitimate outgrowth of the fundamental principles of our Government ...."); Crystal E. Benedict, *Political Recognition of Women the Next Step in the Development of Democracy,* 19 CASE & COMMENT 327, 330 (1912) (referring to women's suffrage as an "inevitable step towards the fulfillment of democracy"); Charles H. Davis, *Shall Virginia Ratify the Federal Suffrage Amendment?,* 5 VA. L. REG. (n.s.) 354, 356 (1919) ("If our government can only derive its just powers from the consent of the governed, should not the women, equally with the men, give their consent through the ballot?"); Frederick Douglass, *The Rights of Women, reprinted in* STANTON, *supra* at 75.

11 "All persons born or naturalized in the United States ... are citizens of the United States .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

12 Minor made this suggestion in a letter to a suffragist newspaper, *The Revolution.* STANTON, *supra* note 8, at 407-08.

13 *Id.* at 408.

14 88 U.S. (21 Wall.) 162 (1875). Susan B. Anthony was among the many women whose attempts to vote created test cases. The federal prosecution of Anthony for voting is recounted in STANTON, *supra* note 8, at 648-98. The election inspectors who accepted Anthony's vote were jailed for failing to pay fines assessed against them until being pardoned by President Grant. *Id.* at 714-15.

15 *Minor,* 88 U.S. at 172-73.

16 *Id.* at 170-71.

17 Section 2 reads:
Representatives [in Congress] shall be apportioned among the several States according to their respective numbers .... But when the

right to vote at any election ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged ... the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
U.S. CONST. amend. XIV, § 2.

18 *Minor,* 88 U.S. at 174. This constitutional argument against women's suffrage realized the worst fears of those feminists who had opposed ratification of the Fourteenth **Amendment** precisely because of the cited clause of Section 2, which had introduced the word "male" into the Constitution. The bitter conflict over the Fourteenth **Amendment** that arose between suffragists and their former colleagues in the abolition movement, many of whom also supported women's suffrage, is recounted from its feminist protagonists' perspective in STANTON, *supra* note 8, at 313-16; *see also* Nina Morais, Note, *Sex Discrimination and the Fourteenth **Amendment**: Lost History,* 97 YALE L.J. 1153, 1155-58 (1988).

19 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 298-300 (2d ed. 1988) (discussing doctrine of enumerated powers, whereby states ceded to national government only those powers enumerated in the Constitution, while retaining all other powers of government); THE FEDERALIST NO. 39, at 241-45 (James Madison) (Clinton Rossiter ed., 1961) (acknowledging mixture of federal and national traits in government envisaged by Constitution, but arguing that role of states in its ratification, and limitation of federal power to "certain enumerated objects only," safeguard state sovereignty within federal structure).

20 U.S. CONST. amend. XIV, § 1.

21 *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 146 (rev. ed. 1975) (stating that the second section of the Fourteenth **Amendment** "was designed to insure the new freedmen the vote").

22 *But see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 169 (1969) (attributing to Thomas Jefferson the view that "'the right of suffrage' was one with 'the rights of a citizen'").

23 Wood shows how two innovations in political theory placed suffrage at the very center of the American system of representative democracy. *Id.* at 162-70. First, "The American legislatures ... were no longer to be merely adjuncts or checks to magisterial power, but were in fact to be the government-a revolutionary transformation of political authority ...." *Id.* at 163. Second, the legislatures were legitimate only to the extent that they represented the people, being elected by them and exercising power on their behalf: "If the government be free, the right of representation must be the basis of it; the preservation of which sacred right, ought to be the grand object and end of all government." *Id.* at 164. These developments set "the right to vote and the electoral process in general ... on a path to becoming identified in American thought with the very essence of American democracy." *Id.* at 168. *Cf.* THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) ("It is *essential* to such a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it .... It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people ....").

24 *See* WOOD, *supra* note 22, at 168 (quoting characterizations of men who lacked property as "under the power of their superiors" and of "a base, degenerate, servile temper of mind" to explain why "[f]ew in 1776 considered [suffrage] qualifications a denial of the embodiment of democracy in the constitution"). Wood does not discuss why women could not vote, but a later view suggests that they, too, might have been presumed incapable of exercising the franchise intelligently: "I know very well that prejudices against female voting have descended legitimately to us from the Old World; yea, more than anything else, from common law which we lawyers have all studied as the first element in jurisprudence. That system of law really sank the female to total contempt and insignificance, almost annihilated her from the face of the earth. It made her responsible for nothing." CONG. GLOBE, 39th Cong., 2d Sess. 62 (1866) (statement of Sen. Wade). *Cf.* People *ex rel.* Denny v. Traeger, 22 N.E.2d 679 (Ill. 1939):
Until within recent times woman was not thought to be on parity with man and it was considered that she did not possess those qualitative attributes that made her capable of exercising the right of suffrage or of rendering jury service. She was excluded from jury service on the false theory of economic, sociological and legalistic inferiority ....
Id. at 681.

25 As a contemporary critic of *Minor v. Happersett* wrote, "The court tells us in its opinion in this case, that 'there cannot be a nation without a people'-but it seems there may be a nation without voters!" *Woman Suffrage in its Legal Aspect,* 3 CENTRAL L.J. 51, 52 (1876).

26 *Minor,* 88 U.S. at 169. ("[W]omen have always been considered as citizens the same as men").

27 Political and congressional debate over the Fourteenth **Amendment** suggests that the words "persons" and "citizens" were chosen for its text by a Congress that was highly aware of women's rights claims. Morais, *supra* note 18, at 1155-63. Morais argues that in this context of advocacy for women's rights, the use of gender-neutral terms in Section 1, together with the use of "male" in Section 2, indicates that "[t]he framers were willing to allow the Fourteenth **Amendment** to reach questions of women's rights, short of suffrage," *id.* at 1160. Such claims were, however, fruitless: "These courts invariably ruled against women plaintiffs." *Id.* at 1167.

28 In a speech delivered soon after the *Minor* opinion was issued, Matilda Joslyn Gage said, "I know something of the opinion of the women of the Nation, and I know they intend to be recognized as citizens secured in the exercise of all the powers and rights of citizens. If this security has not come under the XIV. **Amendment**, it must come under a XVI., for woman intends to possess 'equal personal rights and equal political privileges with all other citizens.'" STANTON, *supra* note 8, at 742, 747. The broad impact of a Suffrage **Amendment** foreseen in this statement rests, I think, on the early feminists' view that legal recognition of women's equality was just that-the *recognition* of women's inherently equal status. Feminists were not asking that women given rights. They believed women possessed rights equal to those of men, but were forced by the nation's heritage to seek legal acknowledgment of that equality. From this standpoint, one might think that recognizing equal voting rights-meaning, as that did, equal citizenship-would sufficiently demonstrate women's equality in all aspects of the law.

29 This phrase appears in OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE: 1888-1910, at 176-79 (1993).

30 STANTON, *supra* note 1, at 15. For an account of earlier efforts to improve various aspects of women's condition see FLEXNER, *supra* note 21, at 3-102.

31 STANTON, *supra* note 1, at 16. The broader scope of the suffrage demand invited fresh resistance. "[P]olitical rights, involving in their last results equality everywhere, roused all the antagonism of a dominant power, against the self-assertion of a class hitherto subservient. Men saw that with political equality for woman, they could no longer keep her in social subordination ...." *Id.*

32 The first American women were enfranchised by the legislature of Wyoming Territory. Act of Dec. 10, 1869, ch. 31, 1869 Wyo. [Terr.] Sess. Laws 371. Following Wyoming were Utah Territory, Act of Feb. 12, 1870, 1870 Utah [Terr.] Laws 8; Washington Territory, Act of Nov. 23, 1883, 1883 Wash. [Terr.] Laws 39-40; and Colorado, Act of Apr. 7, 1893, ch. 83, § 1, 1893 Colo. Sess. Laws 256. The suffrage movement's great success "on western soil" may have been because the shared rigors of frontier life eased the way for men to perceive women as their legal equals. Edwards, *supra* note 9, at 244; *see also* FLEXNER, *supra* note 21, at 159-66.

33 41 Stat. 1823 (1920) (Secretary of State's certification that Nineteenth **Amendment** ratified).

34 Resolved formally, that is. Efforts to secure full enforcement of voting rights for black women and other women of color began with a constitutional **amendment** that abolished poll taxes, U.S. CONST. amend. XXIV, and continued with passage of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1988).

35 STANTON, *supra* note 1, at 13. The quoted phrase reflects the equality basis of the women's suffrage demand. Suffragists also claimed that women's (presumed) moral virtue-that is, women's difference from men-specially qualified them to vote. Over time, the emphasis shifted back and forth between these equality-based and difference-based arguments for women's suffrage. *See* NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 16-30 (1987); Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878,* 74 J. AM. HIST. 836 (1987).

36 *See supra* text accompanying notes 8-13.

37 *See supra* notes 17-18 and accompanying text.

38 Reading the Nineteenth Amendment's alteration of the Fourteenth **Amendment** in this manner, so that their combined force is to ensure constitutional equality for women, is an exercise in "synthetic interpretation" of the Constitution. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 YALE L.J. 453, 459 (1989). The thought can also be expressed in constitutional arithmetic: The Fourteenth plus the Nineteenth **Amendments** should protect against discrimination on the basis of sex to the same extent that the Fourteenth plus the Fifteenth **Amendments** protect against discrimination on the basis of race. *Cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1202-03 (1991) (arguing that Ackerman's concept of synthesis supports reading Nineteenth **Amendment** together with Second **Amendment** to abolish women's exclusion from military and jury service).
One argument against recognizing the Nineteenth **Amendment** as a statement of women's constitutional equality might be that its most ardent supporters proposed the Equal Rights **Amendment** almost immediately after the Suffrage **Amendment** was ratified. *See* COTT, *supra* note 35, at 125 (ERA, backed by National Women's Party, introduced in Congress in 1923). It seems plausible, however, that feminists read Minor v. Happersett, 88 U.S. (14 Wall.) 162 (1875), as a clear message that women could not rely upon the Fourteenth **Amendment** to secure any right a legislature would deny. In this context an Equal Rights **Amendment** might have seemed prudent even if theoretically unnecessary. As it turned out, no sex-discriminatory statute was held to violate the Equal Protection Clause of the Fourteenth **Amendment** until the case of Reed v. Reed, 404 U.S. 71 (1971).

39 On women's common-law disqualification from jury service see BLACKSTONE, *supra* note 2. This Note considers female jury service cases only for their interpretations of suffrage. Accordingly, I do not discuss the constitutionality *per se* of excluding women from juries. *See* Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that defendant's Sixth **Amendment** right to jury drawn from cross-section of community invalidates requirement that women, but not men, specially register for jury service, overruling Hoyt v. Florida, 368 U.S. 57 (1961) (holding special registration scheme does not violate women's Fourteenth **Amendment** rights)).

40 *See* Powers v. Ohio, 111 S. Ct. 1364, 1366 (1991) (holding that race-based jury selection violates prospective jurors' equal protection rights and "offends the dignity of persons and the integrity of the courts"); Amar, *supra* note 38, at 1187-89 (discussing jury as a form of political participation).

41 100 U.S. 303 (1880).

42 *Id.* at 309.

43 *Id.* at 308.

44 *Id.*

45 Blanche Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B.U. L. REV. 723, 729 (1935).

46 *Strauder,* 100 U.S. at 310.

47 *Id.* at 306-08. The Court relied on its decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class ... will ever be held to come within the purview of [the Fourteenth **Amendment**]."). In *Strauder,* the Court broadened its definition of race discrimination by stating that the Fourteenth **Amendment** would be violated by bars to jury service for white men or "naturalized Celtic Irishmen," 100 U.S. at 307, but did not extend its vision to place women of any race under the Amendment's protection.

48 103 U.S. 370 (1881).

49 *Id.* at 388. Jurors were also required to be "sober" and "judicious." *Id.*

50 *Id.* at 387-88.

51 *Id.* at 389. This principle-that where jurors are drawn from electors, every newly qualified elector is automatically qualified for jury service-was undisputed in *Neal.* The State of Delaware conceded the point, *id.* at 383, as did those who dissented from the Court's opinion, *id.* at 400.

52 174 P. 706 (Nev. 1918).

53 *Id.* at 707.

54 *Id.* at 708.

55 103 U.S. 370 (1881).

56 *Parus,* 174 P. at 708.

57 *Id.* at 713 (Coleman, J., dissenting). The precedents were about juries generally, not women's eligibility for them.

58 *Id.* at 708. Nevada did not admit all electors to jury service; every elector was qualified "who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity." *Id.* at 707.

59 *Id.* at 708-09.

60 *See* BLACKSTONE, *supra* note 2 (discussing common-law disqualification of women).

61 *Parus,* 174 P. at 709.

62 *Id.*

63 See *supra* note 2 for a definition of *propter defectum sexus.*

64 *Parus,* 174 P. at 709.

65 *Id.*

66 *Id.*

67 5 P. 305 (Wash. Terr. 1884), *overruled by* Harland v. Territory, 13 P. 453 (Wash. Terr. 1887).

68 *Id.* at 306.

69 *Id.*

70 People v. Barltz, 180 N.W. 423, 425 (Mich. 1920).

71 13 P. 453 (Wash. Terr. 1887).

72 The court wrote in *Harland,*
The change [to women jurors] is so marked, and the labor and responsibility which it imposes so onerous and burdensome, and so utterly unsuited to the physical constitution of females, that we ought not to depart from the old order without the most indubitable evidence that the legislature so intended.
Id. at 456.

73 *Barltz,* 180 N.W. at 425 ("We are aware that [*Rosencrantz*] has since been overruled by a divided court in *Harland v. Washington,* but the language of the Rosencrantz Case is so appropriate and the reasoning so clear that we are disposed to adopt it.").

74 *Id.* at 424, 425.

75 *Id.* at 424 (quoting McRae v. Grand Rapids, L. & D.R.R., 53 N.W. 561, 562 (Mich. 1892)). *McRae* did not concern women's eligibility for jury service.

76 One court rather colorfully phrased the issue as whether the masculine included the feminine, "as, for example, the word 'horse' at common law was held to include 'mare.'" People v. Lensen, 167 P. 406, 407 (Cal. 1917).

77 *See* Carol Weisbrod, *Images of the Woman Juror,* 9 HARV. WOMEN'S L.J. 59 (1986) (describing how supporters and opponents of women's jury service portrayed their competence as jurors).

78 State v. Kelley, 229 P. 659, 661 (Idaho 1924).

79 Cleveland, Cin., Chi. and St. L. Ry. v. Wehmeier, 170 N.E. 27, 29 (Ohio 1929) (holding that use of "men" in jury statute did not exclude women).

80 The following passage, from an opinion upholding a statute that made women eligible for jury service against a claim that the law violated the constitutional right to trial by jury because that right guaranteed a common law "jury of twelve men," illustrates this view:
Women are now the peers of men politically, and there is no reason to question their eligibility upon constitutional grounds.
The fact that a common-law jury was defined to be a "jury of twelve men," etc., had its origin in the circumstance of the political servitude of women in the early days of juridical history so that they were not the "peers" of a man accused of crime. In the broad sense of the word they are now "freemen," and neither the Constitution nor the laws, when they use the term "men," except in rare instances, use it with reference to sex.
State v. Chase, 211 P. 920, 923 (Or. 1992). Other cases that rejected the literal definition of men include State v. Walker, 185 N.W. 619, 626 (Iowa 1921), and Browning v. State, 165 N.E. 566, 567 (Ohio 1929).

81 *Ex parte* Mana, 172 P. 986 (Cal. 1918), *quoted in* People v. Barltz, 180 N.W. 423, 426 (Mich. 1920).

82 *Barltz,* 180 N.W. at 426.

83 *Id.*

84 *Id.* at 427.

85 Cases that arrived at decisions favorable to women jurors without considering issues of women's status include State v. Walker, 185 N.W. 619 (Iowa 1921), and Commonwealth v. Maxwell, 114 A. 825 (Pa. 1921). The *Walker* opinion cited Neal v. Delaware, 103 U.S. 370 (1881), to support its holding, but said that suffrage and jury duty were *not* related, and that states, if they so wished, could bar women from juries. *Walker,* 185 N.W. at 623.

86 261 U.S. 525 (1923).

87 These decisions, including the most famous, *Lochner v. New York,* 198 U.S. 45 (1905), have been widely criticized as products of a conservative court that defended the interests of the wealthy against the rising power of the working class. *See* sources cited in TRIBE, *supra* note 19, at 566 n.44, 567 n.46. An alternative interpretation analyzes *Lochner* as the principled effort of a Court that believed government was a social contract authorized to pursue only limited ends. These Justices felt compelled to preserve the constitutional value of liberty, as they understood the meaning of that term, from intrusions by legislative majorities. FISS, *supra* note 29, at 157-65.

88 *See, e.g.,* Muller v. Oregon, 208 U.S. 412, 421 (1908) (stating that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest").

89 "Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.* at 422. For comment on the relation between such "public policy" arguments and women's legal status, see *infra* text accompanying notes 141-145.

90 *Adkins,* 261 U.S. at 553.

91 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

92 *Muller,* 208 U.S. at 421.

93 *Id.* at 423.

94 The *Adkins* Court's careful distinction between laws that violated women's equality and those that "properly take the [physical differences] into account" led it to strike down New York's women's minimum wage law, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), while upholding restrictions on women's night work that were justified on health grounds, Radice v. New York, 264 U.S. 292 (1924). This distinction was swallowed up when the Court abandoned *Adkins* and its liberty of contract doctrine to uphold a women-only minimum wage law in West Coast Hotel v. Parrish, 300 U.S. 379 (1937). The *West Coast Hotel* decision, made without reference to the Nineteenth **Amendment**, seemed tacitly to accept the sentiment expressed by Justice Holmes in his *Adkins* dissent: "It will need more than the Nineteenth **Amendment** to convince me that there are no differences between men and women, or that legislation cannot take those differences into account." *Adkins,* 261 U.S. at 569-70 (Holmes, J., dissenting). On the historical conflict within feminism between equal rights and recognition of sexual difference, see COTT, *supra* note 35, at 117-42. For a recent account, see Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking* Gedulgig *after* Cal Fed, 77 CAL. L. REV. 171, 194-96 (1989) (discussing opposing feminist positions concerning California law, upheld by Supreme Court in California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), requiring businesses to grant women maternity leaves, without requiring similar accommodation for men who are new fathers); *see also* International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (holding that Title VII, Civil Rights Act of 1964 prohibits employers from protecting fetal health by barring all fertile women from potentially hazardous jobs).

95 100 U.S. 303 (1880).

96 177 N.E. 656 (Mass. 1931). *Welosky* was preceded by an advisory opinion, rendered by the same court, which also concluded that the Nineteenth **Amendment** was an incremental enactment that did not make women eligible for jury service. *In re* Opinion of the Justices, 130 N.E. 685 (Mass. 1921).

97 100 U.S. 303 (1880).

98 103 U.S. 370 (1881).

99 *Welosky,* 177 N.E. at 660 ("Manifestly, therefore, the intent of the Legislature must have been, in using the word 'person' ... to confine its meaning to men."). The *Welosky* court also repeated the Supreme Court's dictum that the legislature "may confine the [jury] selection to males," *id.* at 664, quoting Strauder v. West Virginia, 100 U.S. 303, 310 (1880). *Welosky* was unusual in that it construed "person" to mean men, but as the cases discussed elsewhere in this section show, a number of courts agreed that both the *Strauder* dictum and the use of male pronouns in reference to juries argued strongly against women's eligibility to serve. *See also supra* text accompanying notes 77-80.

100 *Welosky,* 177 N.E. at 660.

101 103 U.S. 370 (1881); *see supra* text accompanying note 51.

102 *Welosky*, 177 N.E. at 661 (citation omitted) (emphasis added).

103 *Id.*

104 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (denying Fourteenth **Amendment** challenge to Illinois rule that excluded married women from admission to the bar).

105 *Welosky*, 177 N.E. at 661 (quoting Robinson's Case, 131 Mass. 376, 381 (1881), in which the Massachusetts Supreme Judicial Court, following *Bradwell v. Illinois,* denied Lelia J. Robinson's eligibility for admission to the bar on the ground that she could not be a lawyer because of her sex).

106 100 U.S. 303 (1880).

107 103 U.S. 370 (1881).

108 *Welosky*, 177 N.E. at 663.

109 *Id.*

110 *Id.*

111 *Id.*

112 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

113 Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

114 Muller v. Oregon, 208 U.S. 412 (1908).

115 *Welosky*, 177 N.E. at 664.

116 The court also quoted with approval a New Jersey decision, State v. James, 114 A. 553 (N.J. 1921), which held that the constitutional right to a jury trial guaranteed a common law jury consisting of men. *Welosky*, 177 N.E. at 664. One claim Frank James made in appealing his murder conviction was that the exclusion of women from juries violated his right to trial by an impartial jury. The New Jersey high court rejected his argument that the Nineteenth **Amendment** served to qualify women as jurors under a state law that made "citizens" jurors. The *James* opinion relied on BLACKSTONE, *see supra* note 2, the statutory use of "personal pronouns of the masculine gender," 114 A. at 555, and the view that the Nineteenth **Amendment** "emancipate[d] women only so far as the right of suffrage is concerned," *id.* at 556, to confine the meaning of "citizen" in this case to men. The court also rejected James's standing as a man to raise an issue of women's constitutional rights. *Id.* at 557-58.

117 Robinson's Case, 131 Mass. 376, 381 (1881), *quoted in* *Welosky*, 177 N.E. at 661.

118 13 P.453 (Wash. Terr. 1887); *see supra* text accompanying notes 71-72.

119 5 P. 305 (Wash. Terr. 1884); *see supra* text accompanying notes 67-69.

120 The author of the *Harland* opinion betrayed a certain depth of feeling about the subjects of women's suffrage and women's jury service, writing, "Of course, if [the suffrage] act is invalid, the whole superstructure of the argument by which female jury duty is demonstrated falls to the ground, a broken and shapeless mass." *Harland*, 13 P. at 457.

121 *Id.* at 454. *See supra* note 2 for a definition of this phrase.

122 *Id.* at 456 (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).

123 *Id.*

124 *Id.*

125 113 S.E. 335 (S.C. 1922).

126 In fact, the *Mittle* court went one step further, saying of the Nineteenth **Amendment**:
It is a popular, but a mistaken, conception that the **amendment** confers upon women the right to vote. It does not purport to do so. It only prohibits discrimination against them on account of their sex in legislation prescribing the qualifications of suffrage, a very different thing from conferring the right to vote ....
Id. at 337. On this reading, even if jury eligibility could be inferred from the right to vote, women could not claim jury service as a constitutional right because they had no constitutional right to vote.

127 *Id.*

128 S.C. CONST. of 1895, art. V, § 22.

129 *Mittle*, 113 S.E. at 338.

130 The court did, however, write that a state "may confine the selection to males." *Id.* (quoting Strauder v. West Virginia, 100 U.S. 303, 310 (1880)).

131 *See supra* note 126.

132 177 N.E. 656 (Mass. 1931).

133 229 P.659 (Idaho 1924). Kelley's conviction by an all-female jury was overturned in an opinion of the Idaho Supreme Court. Despite a statute that stated, "Words in the masculine gender, include the feminine," *id.* at 661, the judges denied women's eligibility as jurors on the basis of statutory references to jurors as "men," *id.* at 660-61, and the common-law rule of *propter defectum sexus, id.* at 661. They also ignored *Neal v. Delaware,* 103 U.S. 370 (1881), by declaring that "[t]he jury statutes restrict jury duty to men, males, who are citizens and electors; the Suffrage **Amendment** increased the number of electors, but it neither related to nor affected the qualifications of jurors." *Kelley,* 229 P. at 661.

134 150 N.E. 290 (Ill. 1925). In this case, a Chicago woman unsuccessfully sought a writ of mandamus ordering the restoration of her name to the jury roles. The commissioners, erring perhaps because of her unusual name, had placed Hannay Beye Fyfe on the jury list only to remove her upon learning her sex.

135 174 P. 706 (Nev. 1918).

136 180 N.W. 423 (Mich. 1920).

137 Commonwealth v. Welosky, 177 N.E. 656, 661 (Mass. 1931).

138 180 N.W. 423, 425 (Mich. 1920) (emphasis added).

139 261 U.S. 525 (1923).

140 *Id.* at 553.

141 Crozier, *supra* note 45, at 746.

142 *Id.*

143 *Id.* at 746-47.

144 *Id.* at 748. Crozier identified the principle that sex discrimination is unconstitutional as the "actuating philosophy" of the *Adkins* decision, adding, "[T]he *Adkins* case was the immediate fruit of the Nineteenth **Amendment**, although there is no connection whatever between suffrage and the question in the case." *Id.*

145 *Id.* at 748-49.

146 *But see* People *ex rel.* Denny v. Traeger, 22 N.E.2d 679 (Ill. 1939). In this case the Illinois Supreme Court had to decide whether the use of the word "men" in the state constitution's jury provisions excluded women. Referring to the state's constitution which, paraphrasing the *Declaration of Independence,* stated "[a]ll men" have "certain inalienable rights," the court declared that a literal reading of "men" must be rejected because it "would act to remove from many of the governed the protection guaranteed by the bill of rights." *Id.* at 682.

147 Parus v. District Court, 174 P. 706, 709 (Nev. 1918).

77 Judicature 134

Judicature
November-December 1993

THE VOICE OF **SANDRA DAY O'CONNOR**

Sue Davis[a]

WESTLAW LAWPRAC INDEX

JUD -- Judicial Management, Process & Selection
In selected areas, the voting and opinion-writing behavior of the Supreme Court's first woman justice provides scant evidence of a distinctly feminine perspective.

Justice **Sandra Day O'Connor**, the first woman to serve on the U.S. Supreme Court, has neither championed women's rights nor has she engaged in constructing feminist legal theory. From her appointment in 1981 through the 1988 Court term, her voting record closely resembled that of her conservative colleague William H. Rehnquist.[1] Recently, however, she has become more independent, expressing her differences with Rehnquist in her votes and opinions. Her disagreement with the chief justice was ***135** most apparent in the opinions she wrote in two recent decisions involving reproductive rights.[2]

Her growing independence, plus the growing body of scholarship known as "different voice" feminism, encourages consideration of the possibility that **O'Connor** may bring a distinctly feminine (if not feminist) perspective to a previously male institution. More generally, it is also possible that Justice Ruth Bader Ginsburg along with the growing numbers of women judges at all levels of the judicial system will effect major changes in the law and legal process. This article uses techniques developed by scholars of judicial behavior to analyze **O'Connor's** voting record in order to begin to answer such questions.

Background

When **O'Connor** was selected in 1981 to fill the vacancy left by Justice Potter Stewart's retirement, virtually no one doubted that her judicial views would be consistent with President Ronald Reagan's political agenda. As a member of the Arizona Senate, subsequently as a state trial judge, and finally as a judge on the Arizona Court of Appeals, **O'Connor** established a reputation as a strong conservative.[3] She had expressed her views on federalism in a 1981 article published in the William and Mary Law Review in which she advocated reforms to limit the jurisdiction of the federal courts. **O'Connor's** testimony at her Senate confirmation hearings verified that her concept of federalism paralleled the president's, revealed her personal opposition to abortion, and suggested that she would support limiting the exclusionary rule.[4] She also made it clear that she subscribed to judicial restraint.[5] Her political background and professed views provided a solid foundation for the expectation that as a member of the Supreme Court, **O'Connor** would cast conservative votes in civil liberties cases--that is, in cases involving a conflict between an individual and the government, she would support the latter. Her voting behavior was expected to be akin to that of Rehnquist, her former law school classmate.

One aspect of her background, however, was different from that of her Supreme Court colleagues. This, of course, was her sex. When Rehnquist graduated from Stanford Law School at the top of the 1952 class, he became a clerk for Supreme Court

Justice Robert H. Jackson. But when **O'Connor** graduated third in the same class, she was unable to obtain employment as an attorney with a law firm and was offered a job as a legal secretary.[6] Subsequently, she took a position as a deputy county attorney in California. It has been noted that **O'Connor's** gender shaped her career by leading her into the public rather than private sector as well as into the state and local rather than national level. Moreover, **O'Connor** was able to accept part-time work and less than lucrative positions because, as an upper middle class married woman, she did not need an income to support a family.[7]

All of this suggests that **O'Connor's** experience as a woman might be reflected in her judicial decision making. Although she is clearly a conservative justice, her views may differ in important ways from those of her conservative male colleagues.

Research in psychology--most notably the work of Carol Gilligan[8]--has aroused particular interest in the study of female judges because it strongly implies that women may bring a distinct perspective to the judicial decision-making process. Gilligan discovered differences in the ways that male and female children and young adults approach moral issues. She found that the male subjects predominantly defined themselves through separation, measured themselves against an abstract ideal of perfection, and equated adulthood with autonomy and individual achievement; they conceived morality in heirarchical terms. In contrast, many of the females defined themselves through connection with others and activities of care; they perceived morality as an interconnected web. While women tended to perceive conflict as a problem of care and responsibility in relationships, Gilligan found, men tended to emphasize rights and rules. Thus, when presented with a moral dilemma, men sought solutions in rules, while women sought to expand the inquiry to find a solution that would preserve their relationships.

Gilligan's work has been severely criticized on methodological grounds,[9] and scholars who subscribe to other versions of feminism have raised serious questions about the existence and nature of ***136** sex-related differences.[10] Nevertheless, Gilligan's conclusions are intriguing to students of judicial decision making to the extent that they suggest the possibility that women judges, including **O'Connor**, speak in "a different voice" from their male counterparts.

Legal scholar Suzanna Sherry developed a theoretical framework drawing both on Gilligan's work and on political philosophy to apply Gilligan's conclusions to legal theory.[11] Sherry related a feminine perspective in jurisprudence to the classical republican tradition in political philosophy. In contrast to the modern paradigm, which is liberal, individualistic, atomistic, non-teleological, abstract, and rule-based, the classical paradigm is communitarian, holistic, teleological, and contextual, rather than rule-based. Women's emphasis on connection, subjectivity, and responsibility and men's focus on autonomy, objectivity, and rights bear strong similarities to the differences between the classical and modern paradigms. Sherry contended that the exclusion of women from the legal system has had a profound impact: the modern paradigm has dominated political and legal theory as a result of male domination of the public sphere. Consequently, according to Sherry, it is quite likely that "the influx of large numbers of women into that sphere might radically alter the chances of re- integrating the classical paradigm or at least change the likely balance of the resolution of the tension between the two paradigms."[12]

Sherry described the characteristics of a feminine jurisprudence as one that would reflect an emphasis on connection (in contrast to autonomy), contextuality (as opposed to fixed rules), and responsibility (in contrast to rights). A feminine jurisprudence would "encompass . . . aspects of personality and relationship to the world that have nothing to do with one's political preferences"[13] and would, consequently, not necessarily be liberal or feminist.

Sherry searched for evidence of such a feminine perspective in **O'Connor's** opinions. Specifically, she examined the justice's opinions in cases in which the rights in question belonged to individuals as members of communities rather than as autonomous units in order to discover if **O'Connor** values connection, manifested as the right to belong to the community as opposed to individual rights against the community. Sherry located **O'Connor's** communitarian emphasis in the justice's opinions in two areas in which she was allegedly more likely to support a claimant than were her fellow conservatives--the establishment clause and civil rights. Government endorsement of religion may be viewed as depriving individuals of full membership in the community--a right that derives its force from the mutual interdependence of individuals. Likewise, discrimination condemns groups or individuals to outsider status. The fact that she has not been as willing as the other conservatives on the Court to permit violations of the right to full membership in the community attests to **O'Connor's** feminine perspective.[14] Sherry argued that **O'Connor** has tended to support individual rights only when they involve

community membership. Thus, the justice does not support the rights of criminal defendants. Instead, she emphasizes protecting the community from crime at the expense of individual rights of criminal defendants.[15] Moreover, Sherry discerned a contextual approach in **O'Connor's** decision making. She has tended to focus on the virtues of the decision maker rather than the rights of those about whom decisions are made, and she has rejected bright-line rules. Sherry concluded that **O'Connor's** opinions, particularly at the point where they diverge from Rehnquist's, are "highly suggestive of the operation of a uniquely feminine perspective."[16]

Methods

This article examines several aspects of the voting behavior of **O'Connor** and other members of the Court in order to assess the claim that **O'Connor's** decision making reflects a uniquely feminine perspective. The data are from cases involving specified issues decided with a full opinion during the 1981 through 1991 terms.[17]

The study first examines Sherry's assertion that **O'Connor** disagreed with Rehnquist in particular ways that revealed her emphasis on communitarian values. In the language of judicial behavior research, the prediction of Sherry's claim is that **O'Connor** is more likely than Rehnquist to support the claimant--that is, to cast a liberal ***137** vote--in cases that involve the right to full membership in the community. Such cases include civil rights[18] and the establishment clause. Thus, a comparison of the votes of **O'Connor** and Rehnquist in these two areas should reveal that **O'Connor** has cast votes in the liberal direction appreciably more often than Rehnquist. If **O'Connor** values rights that are interdependent but not rights against the community, as Sherry maintained, analysis of her votes in the area of criminal procedure should show roughly the same level of support as Rehnquist's.

Second, if it is true, as Sherry contended, that **O'Connor's** support for rights that are interdependent distinguishes her from her conservative male colleagues, it should be revealed by scalogram analysis, a well-known technique that makes it possible to rank the justices by the level of their support for civil liberties.[19] The construction of separate scales for civil rights and criminal procedure makes it possible to compare **O'Connor's** support for claimants in each area relative to the other justices. If she parts company with the other conservatives in cases involving equality, the scales should show an appreciable difference in her position relative to the other justices-- that is, she should occupy a higher position on the civil rights scale than she does on the scale for criminal procedure.

Finally, if **O'Connor's** views differ from the other conservatives in the area of civil rights but converge regarding the rights of criminal defendants, it should also be manifest in the rate at which she writes special opinions-- either concurring or dissenting. Specifically, analysis should reveal that she has written a significantly higher percentage of special opinions in cases involving civil rights than she has in criminal procedure cases.

Results

As predicted, **O'Connor** and Rehnquist voted together in a greater percentage of cases involving criminal procedure (87.2 percent) than they did in cases concerning either civil rights (62.2 percent) or the establishment clause (52.9 percent). As Table 1 shows, a comparison of **O'Connor's** and Rehnquist's liberal votes in the areas of civil rights and the establishment clause revealed the predicted differences between the two justices. **O'Connor** was more supportive than Rehnquist of claims involving equality and more likely than he was to support a claim that a government policy constituted an establishment of religion.

When the civil rights cases were further divided into the areas of discrimination based on (1) sex, (2) alienage, illegitimacy, poverty, and disability, and (3) race, the differences between **O'Connor** and Rehnquist were consistently in the predicted direction. But as Table 1 shows, the differences were not statistically significant for all the areas. Moreover, contrary to the prediction, **O'Connor's** voting behavior in criminal procedure was significantly more liberal than Rehnquist's.

To the extent that the analysis showed **O'Connor** to be more liberal than Rehnquist with regard to civil rights and the establishment clause, the findings are consistent with Sherry's contention that the two conservative justices respond differently to claims that involve exclusion of groups or individuals from full membership in the community. Still, the fact that her voting behavior was significantly more liberal than Rehnquist's in criminal procedure cases leaves open the possibility that the differences between the two justices is not attributable to **O'Connor's** "different voice." Instead, it may well be that **O'Connor** is simply less conservative than Rehnquist.

The second part of the analysis consisted of the construction of separate scales for the issues of criminal procedure and civil rights. These scales were constructed for each of the five "natural" Courts (periods of time when the membership remained the same) since the 1981 term when **O'Connor** joined the Court (Table 2).

Position 1 is the most liberal and was invariably occupied by either Thurgood Marshall or William Brennan as long as they remained on the Court, while Position 9 is the most conservative and was most often occupied by Rehnquist or Antonin Scalia. For each of the three natural Courts through the 1989 term, **O'Connor's** level of support for criminal defendants placed her in Position 7. Her votes in ***138** civil rights cases during the same periods placed her in Position 6. Thus, the results of this analysis suggest that she was somewhat more supportive relative to her conservative colleagues of civil rights claims than of claims of criminal defendants. Commenting on parallel results of scales for 1982, one observer stated, "It is not unreasonable to infer that (**O'Connor's**) experience as a woman in a male-dominated society sufficiently sensitized her to equality issues so as to counter in part her more conservative tendencies."[20]

The scales look considerably different for the last two natural Courts when David Souter replaced Brennan (1990 term) and Clarence Thomas replaced Marshall (1991 term). As the scale scores for those terms show, **O'Connor** occupied Position 5 for both criminal procedure and civil rights in the 1990 term and Position 3 for both issues in the 1991 term. While she has become more liberal in relation to the other justices--perhaps because of personnel changes--she no longer holds a higher position for civil rights than for criminal procedure.

In the final part of the analysis, **O'Connor's** opinion-writing behavior was examined by measuring the rates at which she and the other justices authored special (concurring or dissenting) opinions in criminal procedure and civil rights cases (Table 3). A separate analysis for each natural Court was conducted, because the Court's changing membership could affect the rate at which the justices write concurring and dissenting opinions.

As Table 3 shows, **O'Connor** wrote a higher percentage of special opinions in civil rights cases than in cases involving criminal procedure in all but one of the five periods. The difference was statistically significant, however, only for the first period (terms 1981 through 1985). Still, **O'Connor** wrote a higher-than-average percentage of special opinions in civil rights cases for three of the time periods examined and a lower-than-average percentage in criminal procedure cases in all but the last period.

Conclusion

The analysis has verified Sherry's findings in one sense: Although **O'Connor** is clearly a conservative member of the Court, she is more supportive of claims that involve equality than she is of claims brought by criminal defendants. One may interpret this as evidence that **O'Connor's** voice on the Supreme ***139** Court is distinctly feminine. Another possibility is that, as a victim of discrimination herself, she is more sensitive to claims not only of women but also of members of other traditionally disadvantaged groups.

Overall, the findings presented here do very little to support the assertion that **O'Connor's** decision making is distinct by virtue of her gender. She was, indeed, more liberal than Rehnquist regarding civil rights, but she also was more liberal than he was in the area of criminal procedure. Her position relative to the other justices shifted during three natural courts depending on whether the issue was criminal procedure or civil rights, but that may have simply been due to ideological or legal factors unrelated to her sex. Moreover, that shift disappeared during the last two Court terms. Finally, her dissatisfaction

with the majority's reasoning or resolution of cases involving civil rights, manifested in the higher rates at which she has written special opinions, is not necessarily grounded in her identity as a woman.

O'Connor does not appear to speak in "a different voice," but the possibility remains that other women judges do. This article underscores the need for further work to examine the voting behavior and opinions of women judges in order to gain an understanding of their jurisprudence. If women judges indeed speak in a different voice, the proof will not be found by studying only one jurist. Further work at the level of the federal intermediate appellate courts, the federal district courts, and the state courts where larger numbers of women are currently sitting will be crucial if the question of whether women judges indeed speak in a different voice is to be answered.

Table 1 O'Connor and Rehnquist votes in selected areas

		O'Connor		Rehnquist		
		Voted together		liberal vote		
Area	n	(%)	n	(%)	n	(%)	Z
1981-1995 terms							
Establishment	7/11	(64)	5/11	(45)	1/11	(9)	1.90**
Civil rights	24/42	(57)	18/42	(43)	2/42	(5)	4.08**
Gender	3/7	(43)	4/7	(57)	0/7	(0)	2.36**
Aliens, Etc.*	15/19	(79)	6/19	(32)	2/18	(11)	1.55
Race	17/22	(77)	5/22	(23)	0/22	(0)	2.39**
Criminal procedure	112/123	(91)	17/123	(14)	8/123	(7)	1.79**
1986-1991 terms							
Establishment	2/6	(33)	4/6	(67)	0/6	(0)	2.46**
Civil rights	22/32	(69)	9/32	(28)	5/32	(16)	1.15
Gender	1/3	(33)	2/3	(67)	0/3	(0)	0.246
Aliens, Etc.*	14/22	(64)	7/22	(32)	1/22	(5)	2.09**
Race	18/24	(75)	7/24	(29)	3/25	(12)	1.48
Criminal procedure	120/143	(84)	27/143	(19)	10/144	(7)	3.02**

Footnotes

* Includes discrimination based on alienage, illegitimacy, poverty, disability, residency.

** Difference of proportions test. Statistically significant, probability < .05.

Table 2 Scale scores

Criminal procedure			Civil rights		
Position	Justice	Score	Position	Justice	Score
1981-1985 terms					
1	Marshall	1.00	1	Marshall	1.00
2	Brennan	.85	2	Brennan	.89
3	Stevens	.48	3	Blackmun	.76
4	Blackmun	-.10	4	Stevens	.33
5	Powell	-.51	5	White	-.13
6	White	-.57	6	**O'Connor**	-.22
7	**O'Connor**	-.77	7	Powell	-.33
8	Rehnquist	-.91	8	Burger	-.47
9	Burger	-.97	9	Rehnquist	-.93
1986 term					
1	Brennan	1.00	1	Marshall	1.00
2	Marshall	.94	2	Brennan	.90
3	Blackmun	.70	3	Blackmun	.0
4	Stevens	.15	4	Stevens	.26
5	Powell	-.58	5	Powell	.30
6	Scalia	-.76	6	**O'Connor**	-.50
7	**O'Connor**	-.87	7	White	-.80
8	White	-.93	8	Scalia	-.90
9	Rehnquist	-1.00	9	Rehnquist	-.90
1987-1989 terms					
1	Marshall	.97	1	Marshall	.95
2	Brennan	.89	2	Brennan	.90

3	Stevens	.64	3	Blackmun	.71
4	Blackmun	.36	4	Stevens	.38
5	White	-.53	5	White	-.19
6	Scalia	-.69	6	**O'Connor**	-.32
7	**O'Connor**	-.69	7	Scalia	-.39
8	Rehnquist	-.86	8	Kennedy	-.63
9	Kennedy	-.90	9	Rehnquist	-1.00
1990 term					
1	Marshall	.83	1	Marshall	1.00
2	Stevens	.83	2	Blackmun	1.00
3	Blackmun	.65	3	Stevens	.78
4	White	.13	4	Souter	.25
5	**O'Connor**	-.57	5	**O'Connor**	.11
6	Kennedy	-.74	6	White	.11
7	Scalia	-.91	7	Kennedy	-.33
8	Rehnquist	-.91	8	Scalia	-.78
9	Souter	-1.00	9	Rehnquist	-1.00
1991 term					
1	Stevens	1.00	1	Blackmun	1.00
2	Blackmun	.47	2	Stevens	.78
3	**O'Connor**	.33	3	**O'Connor**	.78
4	Souter	.20	4	White	.11
5	White	.20	5	Kennedy	-.11
6	Kennedy	-.07	6	Souter	-.33
7	Rehnquist	-.60	7	Rehnquist	-.33
8	Thomas	-.85	8	Thomas	-1.00
9	Scalia	-.87	9	Scalia	-1.00

Table 3 Special opinions

	Criminal procedure special opinions/votes	%	Civil rights specialopinions/votes	%
1981-1985 terms				
Marshall	37/160	23.1	23/142	16.2

Brennan	62/163	38.0	24/144	16.7
White	22/162	13.6	18/144	12.5
Burger	19/162	11.7	11/144	7.6
Blackmun	30/162	18.5	24/144	16.7
Powell	22/156	14.1	28/135	20.7
Rehnquist	17/163	10.4	22/143	15.4
Stevens	64/162	39.5	32/143	22.4
O'Connor	14/163	8.6	22/144	15.3*

average = 19.72 average = 15.83

Footnotes

*difference is statistically significant: Z = 1.82 probability = .0344

1986 term

Marshall	7/40	17 5	4/24	16.7
Brennan	10/40	25.0	4/24	16.7
White	7/39	18.0	3/24	12 5
Blackmun	10/40	25.0	5/22	22.7
Powell	5/40	12 5	5/24	20.8
Rehnquist	2/40	5.0	3/24	12 5

Stevens	9/40	22 5	9/24	37 5
O'Connor	5/40	12 5	6/23	26 1
Scalia	8/40	20.0	5/24	20.8
average = 17.56 average = 20.66				

1987-1989 terms

Marshall	22/96	22 9	5/56	8.9
Brennan	28/94	29.7	13/56	23 2
White	7/96	7 2	5/56	8.9
Blackmun	19/96	19.8	12/56	21.4
Kennedy	13/82	15 9	7/41	17 1
Rehnquist	2/96	2 1	4/56	7.1
Stevens	27/96	28 1	22/56	39 3
O'Connor	12/95	12.6	10/55	18 2
Scalia	19/96	19.8	6/56	10.7
average = 17.67 average = 17.20				

1990 term

Marshall	9/30	30.0	2/16	12 5
Souter	2/27	7.4	0/15	0
White	7/30	23 3	2/16	12 5
Blackmun	4/30	13 3	2/16	12 5
Kennedy	5/30	16.7	2/16	12 5
Rehnquist	1/30	3 3	1/16	6.3
Stevens	8/30	26.7	3/16	18.8
O'Connor	2/30	6.7	2/16	12 5
Scalia	9/30	30.0	8/16	50.0
average = 17.48 average = 15.29				

1991 term

Thomas	4/18	22 2	3/14	21.4
Souter	2/21	9 5	1/18	5.6
White	2/21	9 5	0/18	0
Blackmun	3/21	14 3	3/18	16.7
Kennedy	3/21	14 3	2/18	11 1
Rehnquist	1/21	4.8	2/18	11 1

Stevens	8/21	38 1	4/18	22 2
O'Connor	6/21	28.6	3/18	16.7
Scalia	3/21	14 3	6/18	33 3

average = 17.29 average = 15.34

a SUE DAVIS is an associate professor of political science at the University of Delaware.

1 Bloc analyses using all cases decided by a non-unanimous vote for terms 1981 through 1988 show **O'Connor** to be more closely allied with Rehnquist than she was with any of the other justices, with the exception of the 1986 term during which her voting alliance with Powell and Scalia were stronger. In the more recent terms (1989 through 1991), **O'Connor** began to ally herself more closely with Kennedy and Souter than with Rehnquist.

2 Webster v Reproductive Health Services, 492 U.S. 490 (1989) and Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S.Ct 2791 (1992).

3 **O'Connor** served as a member of the Arizona Senate beginning in 1969, and as a judge on the Maricopa County Superior Court from 1974 until 1978 when she was nominated by the governor to the Arizona Court of Appeals. For a brief summary, see Heck and Arledge, Justice **O'Connor** and the First Amendment 1981-84, 13 Pepperdine L. Rev. 993-1019 (1986).

4 U.S. Congress. Senate. Committee on the Judiciary. The Nomination of **Sandra Day O'Connor** to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 97th Congress., 1st Session, 1981:57,79,98,125-27.

5 Id. at 60.

6 Id. at 407-408.

7 Cook, Justice **Sandra Day O'Connor**, in The Burger Court: Political and Judicial Profiles 238-239 (Urbana, Ill.: University of Illinois Press, 1991).

8 Gilligan, In a Different Voice: Psychological Theory and Women's Development (Cambridge, Mass.: Harvard University Press, 1982).

9 See, e.g., Epstein, Deceptive Distinctions: Sex, Gender, and the Social Order (New Haven: Yale University Press and New York: Russell Sage Foundation, 1988); Tavris, The Mismeasure of Woman (New York: Simon and Schuster, 1992).

10 See Baer, Nasty Law or Nice Ladies? Jurisprudence, Feminism, and Gender Differences, 11 Women and Politics 1-31 (1991). Sunstein, Feminism and Legal Theory, 101 Harv. L. Rev. 826-848 (1988); Goldstein, Can This Marriage Be Saved? Feminist Public Policy and Feminist Jurisprudence, in Goldstein, (ed.), Feminist Jurisprudence: The Difference Debate (Savage, Md.: Rowman and Littlefield, 1992). See also, MacKinnon, Toward a Feminist Theory of the State (Cambridge, MA: Harvard University Press, 1989); Williams, Deconstructing Gender, 87 Mich. L. Rev. 797-845 (1989).

11 Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543-615 (1986).

12 Id. at 579.

13 Id. at 583.

14 See, also, Comment, The Emerging Jurisprudence of Justice **O'Connor**, 52 U. Chi. L. Rev. 389-459, 456 (1985), noting that **O'Connor's** opinions in the area of sex discrimination "might be the early work of a Justice committed to furthering equality of the sexes, even when that commitment does not mesh easily with other aspects of her jurisprudence."

15 Supra n. 11, at 604.

16 Id. at 592.

17 Harold J. Spaeth's United States Judicial Data Base, Phase I, was used. Case citation is the unit of analysis.

18 The category of civil rights includes cases involving the right to vote, ballot access, reapportionment, desegregation, employment discrimination, affirmative action, deportation, employability of aliens, gender distrimination, rights of children of unmarried parents, and rights of the disabled, aliens, and indigents.

19 See, e.g., Rohde and Spaeth, Supreme Court Decision Making, Chapter 7 (San Francisco: W.H. Freeman and Company, 1976).

20 Goldman, The Federal Courts as a Political System, Third Edition 144 (New York: Harper and Row, 1985).

End of Document

63 SMU L. Rev. 17

SMU Law Review
Winter 2010

Article

SHATTERING THE EQUAL **PAY** ACT'S GLASS CEILING

Deborah Thompson Eisenberg[a1]

This Article provides the first empirical and rhetorical analysis of all reported Equal **Pay** Act (EPA) federal appellate cases since the Act's passage. This analysis shows that as **women** climb the occupational ladder, the manner in which many federal courts interpret the EPA imposes a wage glass ceiling, shutting out **women** in non-standardized jobs from its protection. This barrier is particularly troubling in light of data that shows that the gender wage **gap** increases for **women** as they achieve higher levels of professional status.

The Article begins by examining data regarding the greater **paygap** for **women** in upper-level jobs. To evaluate the EPA's effectiveness to address **pay** discrimination for these workers, the Article provides an overview of empirical trends in EPA appellate case law. The analysis shows that courts increasingly dismiss EPA cases at the summary judgment stage, despite the fact-intensive nature of the claims, and that **women** in non-standardized professional and managerial jobs are less likely to prevail. The Article examines the two competing notions of "equal work" present in EPA case law and proposes a more effective prima facie standard that better accommodates **women** in non-traditional jobs. The Article then identifies narratives underlying EPA cases that may allow **pay** discrimination to flourish for **women** in upper-level jobs, including the expansion of certain defenses into exceptions that swallow the equal **pay** rule, the presumption of incompetence and lower value for **women** (even at the executive level), and secret **pay** processes that facilitate **pay** disparities. The Article analyzes these narratives in light of other psychological and business research and proposes new remedial models to shatter the EPA's glass ceiling and ensure the promise of equal **pay**.

TABLE OF CONTENTS

*18 I. INTRODUCTION

THE Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co.,[1] and the Lilly Ledbetter Fair Pay Act[2] that abrogated it, put the issue of pay discrimination in the political spot- **19 light.[3] Ledbetter focused narrowly on the statute of limitations for filing a charge of compensation discrimination under Title VII.[4] There is an important back story to Ledbetter that has not received as much scholarly attention: the limited remedial power of the Equal Pay Act (EPA) for women, like Lilly Ledbetter, who break into managerial positions in non-traditional, male-dominated fields but receive substantially less pay than their male peers.[5]

This Article explores how the EPA fails to prevent wage discrimination for women in professional or leadership positions in the modern workplace. To evaluate the EPA's effectiveness, it examines the results of all reported EPA federal appellate cases. The empirical analysis of EPA case law shows that as women achieve higher levels of occupational status, the EPA imposes a "glass ceiling,"[6] shutting out women in non-standardized **20 jobs from its protection. This glass ceiling is particularly troubling in light of data that shows that the gender wage gap increases for women as they climb the economic ladder and achieve higher levels of professional accomplishment.[7]

Ledbetter experienced this glass ceiling with her EPA claim.[8] Ledbetter sued Goodyear for pay discrimination under both Title VII and the EPA.[9] The pay disparity between Ledbetter and the male area managers "ranged from fifteen to forty percent."[10] Her "salary was less than the lowest paid male in the same job and department, and substantially less than men with equal or less seniority."[11] Ledbetter's compensation was so low that it sometimes fell below the minimum salary for a manager established by the company pay policy.[12] Yet, the job descriptions and duties for all managers were the same.[13] Each

manager supervised approximately the same number of employees.[14]

Despite the identical job duties and supervisory responsibilities, the magistrate judge focused on the "particular purpose" and "different products" made by each business center in which the managers worked.[15] The magistrate concluded that "some specialized skill was required for Area Managers to supervise employees in different business centers."[16] The magistrate held that Ledbetter had not made a prima facie showing of equal work and limited the comparators that she could use based on different "skills" that managers might need in different departments.[17]

In contrast to the EPA prima facie standard, Goodyear conceded that Ledbetter was "similarly situated" to all other managers under Title VII.[18] The magistrate dismissed the Title VII claim based on Goodyear's defense regarding Ledbetter's performance.[19] The district judge found ***21** that the magistrate inappropriately made credibility determinations at the summary judgment stage and reinstated the Title VII claim for trial.[20] The judge adopted the magistrate's report in all other respects, including the dismissal of the EPA claim.[21]

The jury awarded Ledbetter $3,843,041.93, which the district court judge reduced to $360,000.[22] Goodyear appealed, arguing that the Title VII claim was untimely filed.[23] Ledbetter did not cross-appeal the entry of summary judgment on the EPA claim.[24] The lower court's dismissal of a large portion of the EPA claim based on the prima facie standard made Ledbetter's counsel concerned that the Eleventh Circuit would not respond favorably to the claim.[25] Additionally, unlike Title VII, compensatory and punitive damages are not available under the EPA.[26] Weighing the EPA's tougher prima facie standard, and greater damages potential under Title VII, Ledbetter's counsel believed they were on more solid appellate ground by simply defending the Title VII victory.[27]

In Ledbetter, Justice Alito, writing for the majority, remarked: "If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts."[28] The Court asserted that the district court dismissed the Title VII and EPA claims "on the same basis"--the employer's defense regarding her performance.[29] As shown above, Justice Alito was only partially correct: the court had also dismissed the EPA claim based on the standard that the compared jobs be "equal."[30]

Like Ledbetter, many **women** either abandon EPA claims on appeal or experience disappointing results if they pursue EPA claims.[31] This Article explores how the EPA provides limited remedial power against wage discrimination in the modern economy, especially for **women** in professional or leadership positions. The EPA was drafted to cover **women** working in manufacturing jobs who perform tasks identical to the person adjacent to them on the factory floor.[32] Rather than adapting the EPA to ***22** the realities of the modern workplace, courts have, over time, interpreted the requirement that the jobs be equal so restrictively that plaintiffs today rarely satisfy the prima facie standard.[33] When they do, courts often accept employers' conclusory claims that the market dictated the inequitable **pay** or that the male employee was somehow more valuable, even when market data is either non-existent or contradicts the employers' claims.[34] In short, the EPA is increasingly becoming an empty promise, unworkable and ineffective to remedy wage discrimination for many **women**.

Much of the scholarship on **pay** discrimination has focused on the concept of comparable worth, "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[35] The comparable worth movement started in the 1980s to highlight the concentration of **women** in lower-**paying** jobs and the inequitable values placed on "women's work" (such as nursing or secretarial services) versus "men's work" (such as truck driving and electrical services).[36]

This Article proposes that new models are needed to attack the gender wage **gap** in the modern age. The economy is changing rapidly. **Women** are increasingly entering diverse occupations and attaining increased representation in managerial and professional positions that were unthinkable when the EPA was passed. To be sure, occupational segregation still exists,[37] and **women** remain underrepresented in managerial positions.[38]***23** But as many professions become more integrated, and as **women** achieve higher levels of leadership status in their fields, the law should ensure non-discriminatory **pay** within the same occupations. The EPA is failing to achieve that goal. The EPA's prima facie standard--which requires that the jobs be equal in terms of skill, effort and responsibility[39]--is not a workable standard for **women** in non-standardized, upper-level jobs and excludes large numbers of **women**. Further, Title VII, under which plaintiffs bear the burden of proving discriminatory

intent,[40] hampers the ability of women to challenge wage disparities.

This Article seeks to understand the reasons for the EPA's increasing powerlessness by analyzing the doctrinal and narrative trends at work in EPA case law. The Article considers how the EPA could be amended to break the wage glass ceiling and provide a remedy more consistent with the realities of today's workplace, proceeding as follows: Part II summarizes the data regarding the gender wage gap, which is substantially larger for women in professional or managerial positions. Part III provides background about the EPA's purpose and standards and describes empirical trends in all reported federal appellate EPA cases since the Act's passage. This Part also analyzes the two competing visions of "equal work" evident in EPA cases and proposes a "comparable work" prima facie standard that better accommodates the changing demographics and realities of the modern workplace. Part IV presents a rhetorical analysis of other narrative themes found in EPA cases to better understand the reasons for the EPA's modern ineffectiveness and the potential causes of the greater paygap for upper-level women. This Part integrates other sociological and business scholarship to better understand these narratives and craft reforms. Finally, Part V concludes the Article.

II. WAGE GAP FOR WOMEN AT THE TOP

The gender composition of the modern labor force is drastically different from that of the 1960s, when Congress passed the EPA. Women are entering (and may soon dominate) occupations that once employed only men. Over the last several decades, women have made substantial entry into professional, managerial, and executive occupations. For example, "[i]n 2007, women accounted for about 51 percent of all persons employed in management, professional, and related occupations, somewhat more than their share of all employed workers (46 percent)."[41] Thirty-three percent of all lawyers, and forty-three percent of all judges, magistrates, and other judicial workers, are women,[42] and their numbers are ***24** increasing.[43]

The proportion of women enrolled in law school increased from 8.6% in the 1970-1971 academic year to 46.9% in 2007-2008.[44]Women comprise 30% of physicians and surgeons, 53.3% of pharmacists, and 48.4% of veterinarians.[45] In 1982-1983, women comprised less than one-third (31.4%) of medical students.[46] In 2007-2008, women represented 48.3% of all medical school students.[47]

Women are also becoming better educated than men.[48] In 2006-2007, women earned 62.2% of all associate's degrees, 57.4% of all bachelor's degrees, 60.6% of all master's degrees, 50% of all professional degrees, and 50.1% of all doctoral degrees.[49] "Among 2007 high school graduates, young women (68 percent) were slightly more likely than young men (66 percent) to be enrolled in college in October 2007."[50]

Despite these educational gains, professional, managerial, and executive women are not earning compensation levels comparable to their male peers.[51] In fact, the paygap between women and men increases with the level of educational attainment and years of work experience.[52] A recent study found that just one year out of college, "women working full time earn only 80 percent as much as their male colleagues earn."[53] The wage gap widens over time: "Ten years after graduation, women fall farther behind, earning only 69 percent as much as men earn."[54] The study found that, "[c]ontrolling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less than their male peers earn."[55]

The wage gap also exists for some of the best educated women: university professors.[56] A study of faculty salaries by the American Association ***25** of University Professors found that across all ranks and institutions, the average salary for women faculty was 81% of the amount earned by men, and that even women of the same faculty rank earned 88% of their male peers' earnings.[57]

In the legal arena, a 2008 survey by the National Association of Women Lawyers (NAWL) found that "[a]t every stage of practice, men out-earn women lawyers"[58] and the income disparity accelerates and "increases as women move up the law firm ladder."[59] NAWL found that "[m]ale associates earn, on average, a median income of about $175,000 and female associates earn, on average, a median income of about $168,000."[60]Women earn $14,000 less than men at the of-counsel

level, $23,000 less at the non-equity partner level, and $87,000 less at the equity partner level.[61] One study of University of Michigan law school graduates found that fifteen years after graduation, **women** earned approximately 60% of their male classmates' earnings.[62]

The gender wage **gap** is evident across many professional and management occupations. Female physicians and surgeons fare even worse than their lawyer sisters, earning only 59.1% of the incomes earned by their male peers.[63] Female medical scientists make 62.3% of their male peers' earnings.[64] **Women** in management occupations earn only 72% of the earnings of comparable **men**.[65] **Women** accountants and auditors make 72.3% of their male peers' compensation, and female financial managers, 63%.[66]

A wage **gap** also exists for female CEOs in the profit and non-profit sectors. One study found that "[f]emale CEOs [in privately held firms] earn 46% less than their male counterparts, after adjusting for age and education."[67] An analysis of 2006 tax filings for more than 58,000 charitable ***26** groups in the non-profit sector found that female CEO's of non-profit organizations "earned 34.8% less than their male counterparts," although the median salary increases for female CEOs slightly outpaced those for **men** at organizations of most sizes.[68]

Although a gender wage **gap** exists for **women** in lower-wage occupational categories, it tends to be smaller than that of their professional and executive sisters. For example, female cooks earn 90.5% of the earnings of their male peers;[69] female food preparation workers, 91.3%;[70] personal and home care aides, 85.9%;[71] office clerks, 94.2%;[72] bookkeepers, 90.2%;[73] bus drivers, 88.1%;[74] and janitors and building cleaners, 81.7%.[75] There are even a few jobs in which women's earnings are on par with, or slightly above, men's earnings.[76] There also remain some blue-collar jobs in which the **paygap** is extremely large.[77] Across most of the occupational spectrum, however, **women** who are among the best educated and have achieved the highest levels of professional status experience a more substantial **paygap** than **women** in lower-wage jobs.

To be sure, occupational segregation still exists, with **women** dominating professions such as nursing, teaching, and social work, and **men** dominating professions such as construction and production work.[78] The recent recession could lead to drastic changes in the gender composition of the workforce, including decreased occupational segregation by sex. The biggest job losses in the current recession have occurred in male-dominated sectors such as manufacturing and construction,[79] while demand ***27** continues to be high in traditionally female-dominated occupations, such as health care.[80] As a result of these dynamics, occupations that traditionally have been dominated by a certain gender may become more integrated.[81] For example, some **men** who have lost jobs in the manufacturing industry have switched to fields like teaching and nursing.[82]

One would expect that a gender wage **gap** would not exist in traditionally female-dominated occupations or that the **gap** would favor **women** rather than **men** because **women** have more experience in those fields. Yet, when **men** enter traditionally female occupations, they typically earn more than their female counterparts. For example, female registered nurses earn 86.6% of male registered nurses' salaries, and female secretaries and administrative assistants earn 83.4% of their male peers' salaries.[83] An effective **pay** discrimination remedy is therefore needed even within traditionally female-dominated professions, and not simply across segregated occupations.

Why is there a greater wage **gap** for **women** who have achieved higher levels of professional status? Why do **men** earn more even in traditionally female-dominated occupations? Although the reasons for the wage **gap** have been the subject of considerable debate, many studies show that an unexplained gender **paygap** exists even after controlling extensively for "choice" factors such as education, actual work experience, training, and family characteristics.[84] As one study found: "Too often, both **women*28** and **men** dismiss the **paygap** as simply a matter of different choices, but even **women** who make the same occupational choices that **men** make will not typically end up with the same earnings."[85] Recently, a salary data company named Payscale.com analyzed its database to determine whether the gender to wage **gap** could be explained by outside factors, such as company size, geographic location, or educational level.[86] Payscale.com found that outside factors explained much of the **paygap** for **women** who earned less than $100,000 a year, but that **women** earned only 87% of comparable men's salaries even after controlling for outside factors for jobs **paying** more than $100,000 a year.[87]

Of course, these statistics are broad numbers, and there is a danger in reading too much into them. But, they are consistent

with the experience of many women--especially those in higher level positions--who seek a remedy for pay discrimination under the EPA and discover that the promise of equal pay does not apply to them.

III. THE EQUAL PAY ACT: FROM BUILDING BLOCK TO GLASS CEILING

A. "Too Little, Too Late": The Passage of the EPA

The idea of equal pay for equal work "dates from the early days of the factory system when women were introduced to industrial labor."[88] A federally appointed Industrial Commission spoke out in favor of equal pay for equal work as early as 1898.[89] During World War I, the National War Labor Board (NWLB) set forth a principle: "If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength."[90] During World War II, the War, Navy, and Labor Departments agreed on an equal pay policy requiring ***29** that wage rates for women and men should be the same.[91] In 1945, the NWLB issued an "equal pay order," which stated that companies did not need to seek the NWLB's approval for "[i]ncreases which equalize the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations."[92]

The concept of equal pay for equal work was not codified in federal law until the EPA passed in 1963. The EPA was the first federal sex discrimination law, preceding Title VII by one year. At that time, women constituted only one-third of the workforce and wage discrimination based on sex was blatant.[93] In one study in 1961, 33% of employers "said they had a double standard pay scale for men and women officeworkers."[94] According to a 1962 Labor Department survey, "91 job orders listed different wages for men and women."[95]

The EPA attacked the "false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work."[96] Supporters had been pushing for an equal pay bill for decades.[97] To gain passage, legislators stripped the bill of many meaningful standards. The prima facie standard was changed from "work of comparable character" to "equal" work.[98] The bill was incorporated into the Fair Labor Standards Act[99] and subject to all FLSA exemptions.[100] This excluded women employed as outside salesmen, in professional, executive and administrative positions, or in industries such as "agriculture, hotels, motels, restaurants, and laundries."[101] Adopting the FLSA remedial scheme also meant that class actions are not permitted.[102] A plaintiff may bring an action on behalf of herself and all others similarly situated, but each affected employee must "opt-in" to the case by ***30** filing a consent form.[103] Unlike Title VII, however, EPA plaintiffs do not have to file a charge with the EEOC prior to bringing suit in court.[104]

Many legislators lamented that the final EPA was not as strong as it needed to be to combat wage discrimination.[105] Representative St. George noted, "It is a little bit too little and, of course, it is too late. But on the other hand it is the best thing we can get at this time."[106] Representative Dwyer commented, "There are a number of weaknesses in this bill which I believe unwisely limit the scope of its application and unnecessarily encumber its enforcement."[107] Representative Dent warned that removing the "comparable work" standard would limit the EPA's effectiveness.[108] He stated, "[L]et us not enter into this day's voting without knowing exactly that the bill does not accomplish its true purpose."[109]

In its final form, the EPA requires that employees of opposite sexes in the same establishment[110] receive equal pay for equal work. An employee satisfies her prima facie case by proving that she[111] and other male employees were paid different compensation for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[112] All three factors--skill, effort, and responsibility--must be satisfied.

At the prima facie stage, the analysis focuses on the positions themselves, not the characteristics of the individuals working in those jobs.[113] The unique characteristics or qualifications of individuals holding the jobs may "operate as a defense to liability rather than as part of a plaintiff's prima facie case."[114]

Upon establishment of a prima facie case, discrimination is presumed, and the burden shifts to the employer to prove that the wage differential ***31** "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[115] The EPA imposes "a form of strict liability on employers who **pay** males more than females for performing the same work--in other words, the plaintiff . . . need not prove that the employer acted with discriminatory intent."[116] Applying an exemption is a matter of affirmative defense; if the employer cannot meet the burden of proof, then the plaintiff prevails as a matter of law.[117]

A prevailing plaintiff may recover the **pay** differential for two years--or three years if she proves a willful violation--plus attorneys' fees and costs.[118] The backpay award may be doubled as liquidated damages.[119] Compensatory and punitive damages are not available under the EPA.[120]

Congress eliminated the white-collar exemption for the EPA in 1972,[121] allowing professional, executive, and administrative employees to bring claims under the EPA. But it did not modify the "equal work" prima facie standard. Consequently, as shown in the next section, plaintiffs in non-standardized jobs have a difficult time showing that they can even compare themselves to their peers.

B. Empirical Analysis of EPA Appellate Case Law

1. Methodology

The database examined to evaluate the remedial effectiveness of the EPA for this Article included all published federal appellate and Supreme Court decisions that have considered an EPA claim.[122] To identify such cases, the term "Equal **Pay** Act" was searched in the reported federal courts of appeal library on Westlaw. The result included 756 cases. From there, a case was excluded if it: (1) involved an EPA claim that had been dismissed or abandoned at the district court level and was not at issue on appeal; (2) involved pleadings or immunity issues at the motion to dismiss stage; (3) made only passing mention of the EPA;[123] or (4) involved only a Title VII **pay** claim, unless the court analyzed the prima ***32** facie standard as if it were an EPA claim.[124] To avoid double counting, decisions that concerned a single case that had been appealed multiple times were combined.[125] The resulting data set included 197 published appellate cases and one Supreme Court case. All cases were entered into an Excel database and coded for analysis.[126]

2. The Numbers

The most striking trend evident in the analysis is the relatively low number of appellate cases for a statue that is forty-six years old. The Supreme Court has interpreted the EPA only once, in Corning Glass Works v. Brennan,[127] which has led to conflicting interpretations among the circuits about the proper scope of "equal work" and the contours of acceptable employer defenses. The relative dearth of federal EPA litigation raises the question whether **women** are simply discouraged from filing or appealing EPA claims. Some attorneys may feel more comfortable working with Title VII's burden-shifting framework or may be concerned about satisfying the EPA's stricter prima facie standard.[128]

Categorizing plaintiffs by type of position worked revealed that 115 worked in non-supervisory roles,[129] 37 worked in mid-level manager or supervisory roles,[130] 23 were university professors,[131] and 23 were professionals or executives.[132] Non-supervisory plaintiffs had a success rate of 57%, winning on appeal 65 times and losing 50 times. Mid-level supervisors ***33** won 18 times, and lost 19 times, a success rate of 49%. Professors lost 15 times, and won 8 times, a success rate of 35%. Professionals and executives won 9 times, and lost 14 times, a success rate of 39%. Supervisory, executive, and professional groups had a combined success rate of 42%.

EPA plaintiffs of all types are substantially more likely to lose their cases on appeal in the current decade than at any other time. For example, in the 1970s, employees won on appeal 23 times and lost 16 times, a success rate of 59%. In the 1980s, employees won on appeal 32 times and lost 29 times, a success rate of 52%. In the 1990s, employees won 29 times and lost 24 times, a success rate of 55%. From 2000 to 2009, however, employees have won EPA claims 16 times and lost 29 times, a

success rate of only 35%.

TABLE 1: EMPLOYEE SUCCESS RATE ON APPEAL BY DECADE

Decade	Total Cases	Employee Win	Employer Win	Employee Success Rate
1970-79	39	23	16	59%
1980-89	61	32	29	52%
1990-99	53	29	24	55%
2000-09	45	16	29	35%

As to type of comparator used by plaintiffs, 90% compared themselves to existing co-workers, 4.6% compared themselves to predecessors, and 5% compared themselves to successors. One case involved both successor and predecessor comparators.[133] Plaintiffs with predecessor comparators were most likely to win, with a success rate of 89%. Plaintiffs with successor comparators were least likely to win, with a success rate of 40%. In cases involving co-worker comparators, the success rate was 49%.

Even though evaluation of EPA claims is supposed to be fact-intensive,[134] courts are increasingly rejecting cases at the summary judgment stage rather than permitting claims to be decided at trial. In the 1970s, 97% of the EPA claims under review had been decided in the district court by a bench or jury trial. In the 1980s, 92% of claims were decided at trial. In the 1990s, 42% of claims were decided at trial. From 2000 to 2009, only 31% of reported appellate cases had been decided at trial in the district court. Given the fact-intensive nature of an EPA case--at ***34** both the prima facie case and affirmative defense stages--summary judgment should rarely be granted.

TABLE 2: STAGE AT WHICH CASE IS DECIDED IN DISTRICT COURT PRIOR TO APPEAL

Decade	Motion for Judgment/Directed Verdict	Summary Judgment	Post Jury Verdict or Bench Trial
1970-79	0	1	38
1980-89	0	5	56
1990-99	3	28	22
2000-09	1	30	14

The actual disposition on appeal over time also shows some interesting trends. Table 3 shows that appellate courts in general are more likely to affirm than reverse the outcome in the district court. In the early years of the EPA, appellate courts were more likely to reverse a jury or bench trial verdict than they were in the decades 1990-1999 and 2000-2009. In the first decade of EPA litigation, the appellate courts reversed 18% of jury verdicts for employees, and 45% of jury verdicts for employers. In the most recent decade, the appellate courts affirmed all verdicts that resulted from trials in the district court. Of course, significantly fewer cases are now decided at trial. From 2000 to 2009, the courts of appeal affirmed grants of summary judgment for the employer by the district courts 92% of the time.

TABLE 3: DISPOSITION ON APPEAL

Disposition	1970-79	1980-89	1990-99	2000-09
Affirmed jury or bench trial verdict for employee	14	27	16	11
Affirmed jury or bench trial verdict for employer	11	23	2	3
Reversed jury or bench trial verdict for employee	3	2	2	n/a
Reversed jury or bench trial verdict for employer	9	4	1	n/a
Affirmed grant of directed verdict for employer	1	n/a	2	1
Reversed grant of motion for judgment for employer	n/a	n/a	1	n/a
Affirmed grant of summary judgment for employer	1	4	18	25
Reversed grant of summary judgment for employer	n/a	1	9	5
Reversed judgment notwithstanding the verdict	n/a	n/a	2	n/a

These results show the tremendous impact that summary judgment practice in the district courts is having on a plaintiff's ability to prevail on EPA claims. To confirm the trend in favor of summary judgment shown in appellate decisions, I examined the dispositions of all reported district court cases that considered whether to grant an employer's motion for summary judgment based on the EPA's prima facie standard or an affirmative defense from December 30, 1999 through December 30, 2009.[135] In the 99 reported cases that evaluated summary judgment motions for EPA claims, the district court granted summary judgment to the employer 71 times, or 72% of the time. District courts found disputed factual issues that precluded summary judgment in only 28 cases, or just 28% of the time.

The circuits that are most hostile to EPA claims are the Seventh, where plaintiffs have a success rate of only 24%, and the Eighth, where plaintiffs have won 39% of the time. As discussed below, these are the circuits that have the most restrictive interpretation of the EPA's "equal work" prima facie standard and are also the circuits that have the most liberal interpretation of the "factor-other-than-sex" affirmative defense. The circuits ***35** that are friendliest to EPA claims are the Sixth, where plaintiffs have a success rate of 85%, and the D.C. Circuit, where the success rate is 75%.

TABLE 4: SUCCESS RATE ON APPEAL BY CIRCUIT

Circuit	Employee Win	Employer Win	Employee Success Rate	Total Cases
First	4	6	40%	10
Second	8	4	67%	12
Third	5	4	56%	9
Fourth	10	7	59%	17
Fifth	10	10	50%	20
Sixth	11	2	85%	13
Seventh	7	22	24%	29
Eighth	15	23	39%	38
Ninth	5	5	50%	10

Tenth	9	6	60%	15
Eleventh	12	7	63%	19
D.C.	3	1	75%	4
Federal	0	1	100%	1

The EPA may be enforced by either private litigants or the government.[136] In 1978, the power to enforce the EPA was transferred from the Department of Labor (DOL) to the EEOC in order to consolidate the enforcement of all anti-discrimination laws under one agency.[137] The number of EPA appellate cases brought by the government has dwindled to nothing. There were twenty-five appellate cases brought by the DOL in the 1970s, one in the 1980s, and one jointly litigated with the EEOC in the 1990s. In the 1980s, fourteen appellate cases involved the EEOC as a plaintiff, many of which were cases that the EEOC took over for the DOL.[138] In the 1990s, there were only four EPA appellate cases involving the EEOC. In the past decade, there have been no EPA appellate cases in which the EEOC was a plaintiff.

Plaintiffs need not exhaust administrative remedies by filing with the EEOC prior to filing an EPA case in court, but the number of EPA complaints received by the EEOC has declined.[139] EPA charges have constituted ***36** approximately 1% of the EEOC's total charge docket for every year from fiscal year (FY) 1997 through FY 2008.[140] This is not to say the EEOC is doing nothing: the number of EPA charges that had outcomes favorable to the charging party (known as "merit resolutions") increased from 14.8% in FY 2007 to 26.8% in FY 2008, and the monetary benefits that the EEOC recovered in EPA cases (through mediation, settlement, or conciliation) increased from $2.4 million in FY 1997 to $9.6 million in FY 2008.[141] Nevertheless, the number of suits filed by the EEOC at the district court level that include EPA claims has been extremely small in recent years. The EEOC filed no cases with EPA claims in FY 2008, and the greatest number of EPA cases it filed in a single year since 1997 was fourteen cases in 2001.[142]

This decline in agency enforcement of the EPA is a disturbing trend. The DOL and EEOC have greater investigative power to reveal and prosecute systemic **pay** discrimination than individual employees. The success rate of appellate plaintiffs represented by a government agency in EPA claims is 73%, but for private plaintiffs it is only 44%.[143] The EEOC, although severely understaffed and underfunded,[144] has more litigation ***37** muscle than the average private plaintiff's attorney.[145]

The empirical trends described here raise several questions. First, why are **women** in professional and supervisory positions more likely to lose their cases than non-supervisory plaintiffs? Second, why do modern appellate courts appear to be less hospitable to EPA claims of all types? Third, do the underlying narratives of these wage discrimination cases offer any insights as to the reasons for the gender wage **gap** more generally? Finally, what can be done to provide a more meaningful deterrent against, and effective remedy for, **pay** discrimination? The next sections analyze the doctrinal and narrative threads at work in EPA cases that may be undermining the effectiveness of the EPA and permitting wage disparities to flourish for **women** in upper-level jobs.

C. A Tale of Two EPAs: Competing Visions of "Equal Work"

The EPA's legislative history evinces opposing visions of "equal work." Congressman Goodell stated that "the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other."[146] The floor manager for the bill in the Senate took issue with that view, stating: "[I]t is not the intent of the Senate that the jobs must be identical. Such a conclusion would obviously be ridiculous."[147] As one court remarked: "The legislative history thus contains ammunition both for those who would insist on a very narrow reading of 'equality,' and for those who would urge a more expansive understanding of the term."[148]

"[E]qual can be read both narrowly and expansively," and courts have interpreted the term in different ways.[149] One court characterized an employer's insistence that the positions be equivalent in all respects as "taking the 'equivalency' concept to

a 'logical' but an illogical conclusion."[150] Other courts have required that the positions be virtually identical.[151] Under the EPA's regulations, the compared jobs need not be identical, but only "substantially equal."[152] The EEOC counsels that what constitutes equal skill, effort, or responsibility "cannot be precisely defined" but should be interpreted considering "the broad remedial purpose of the law."[153]

***38** The prima facie standard in the EPA was developed based on prevailing **pay** practices in the 1960s. "American industry used formal, systematic job evaluation plans to establish equitable wage structures in their plants."[154] These job evaluation plans:

> took into consideration four separate factors in determining job value--skill, effort, responsibility and working conditions--and each of these four components was further systematically divided into various subcomponents. Under a job evaluation plan, point values are assigned to each of the subcomponents of a given job, resulting in a total point figure representing a relatively objective measure of the job's value.[155]

Thus, Congress's intent in defining the equality of jobs based on skill, responsibility, effort, and working conditions was to incorporate "the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act."[156]

The manufacturing concepts on which the EPA was crafted are awkward--if not completely archaic--when applied to our modern, service-oriented, digital economy. For example, the compared jobs must be performed under "similar working conditions."[157] This encompasses "surroundings," which "measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker," and "hazards," which "take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause."[158] The jobs must also be within the same "establishment," which "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business."[159] The regulations are pervaded by examples of manufacturing or hourly wage jobs,[160] but do not contain examples of employees working in professional or managerial positions.

Compensation structures have also drastically changed since the 1960s. First, as Katherine Stone explains, the workplace in the digital age is not based on formal hierarchical structures and centralized decision-making, but on notions of flexibility.[161] "The decentralization of authority and the flattening of hierarchy means that decisions are delegated to a wide range ***39** of people who are permitted to use their individual, often idiosyncratic, discretion."[162] Many salaries, especially at higher levels, are individually negotiated. Rather than the lock-step compensation plans of the industrial era, many job sectors today follow a "winner-take-all" approach, **paying** disproportionately large salaries to individuals perceived to be top performers.[163] These trends have exacerbated internal **pay** inequities.[164]

Second, compensation structures are much more complex today. **Pay** often consists of base salary plus bonuses, stock option grants, severance **pay**, signing bonuses, and other components. At many companies, the criteria by which **pay**, especially certain bonuses and stock options, will be awarded are opaque and not clearly defined, which leads to more ad hoc, discretionary decisions. Subjective processes put **women** at a disadvantage and increase internal **pay** disparities.[165]

Given these changing realities, how should the concept of equal work be applied to jobs in the modern economy? With only one Supreme Court case construing the EPA and regulations centered on manufacturing and clerical work, courts have developed two conceptions of the term "equal": (1) a strict approach to equality that requires that the jobs be fungible, "cookie cutter" images of each other; and (2) a pragmatic approach to equality that focuses on whether the core functions or general purpose of the job is substantially similar. These approaches are described below.

1. The Strict Approach to Equality

For many courts, executive and professional **women** are still exempt from the EPA.[166] Under the strict view of equality, managerial jobs simply cannot be proper comparators. As Judge Posner once remarked:

> The proper domain of the Equal **Pay** Act consists of standardized jobs in which a **man** is **paid**

> significantly more than a **woman** (or anything more, if the jobs are truly identical) and there are no skill differences. An example might be two sixth-grade music teachers, having the same credentials and experience, teaching classes of roughly the same size in roughly comparable public schools in the same school district.[167]

Another district court judge put it more bluntly, stating that a senior vice president of finance's claim that she had a job equal to that of other senior vice presidents "cannot be taken seriously":

> ***40** These are Senior Vice Presidents in charge of different aspects of Defendant's operations; these are not assembly-line workers or customer-service representatives. In the case of such lower-level workers, the goals of the Equal **Pay** Act can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be **paid** commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal **Pay** Act claims.[168]

Many other courts have likewise interpreted the prima facie standard strictly and rejected claims that managerial positions and executives in different departments can be compared under the EPA.[169] A prime example of the strict approach to equality for upper level jobs is Wheatley v. Wicomico County.[170] There, the two plaintiffs were the director and deputy director of the county emergency services department.[171] Both **women** had the highest seniority among department heads and their performance records were exemplary.[172] The plaintiffs argued that they performed management responsibilities substantially similar to that of the other department heads, "with the exception being the subject matter of the department."[173] All of the directors performed the same management functions: supervising subordinates, preparing payroll and scheduling, hiring and firing, conducting staff meetings, attending department head meetings, addressing the County Council, preparing budgets, answering to the County Administrative Director, maintaining county facilities ***41** and property, and otherwise managing their departments.[174] Despite these common management functions, female department heads earned about 80% of what the male directors earned.[175] The plaintiffs earned approximately $25,000 less than the male directors and deputy directors.[176] Most of the female directors, including the plaintiffs, also had salaries that fell below the mid-point of the **pay** grades in which they were classified.

A former Director of the Department of Corrections testified in support of the plaintiff Director's case, stating that plaintiff's job was more demanding and entailed more responsibility than his job, but that he was nevertheless **paid** more.[177] He stated, "I've never seen anyone slighted like Ms. Wheatley was slighted."[178]

The district court entered judgment as a matter of law for the employer.[179] The Fourth Circuit affirmed because the departments performed "completely different functions."[180] The court stated: "Granted, at a high level of abstraction these positions all require directors to do the same thing--supervise, coordinate, and organize. But, the EPA demands more than a comparison of job functions from a bird's eye view."[181] The court "decline[d] to hold that having a similar title plus similar generalized responsibilities is equivalent to having equal skills and equal responsibilities."[182]

In interpreting "equal" so restrictively, many courts have imposed a glass ceiling on the EPA. As shown above, courts are increasingly dismissing EPA claims--at the summary judgment stage--based on the perceived failure of upper-level plaintiffs to satisfy the prima facie standard. Under this strict view of the EPA, only lower-wage **women** who work in standardized, assembly-line, or hourly wage jobs may state claims; **women** who achieve leadership positions in their companies simply are not protected by the EPA. As described in the next section, the EPA and its regulations require a more flexible interpretation of "equal."

2. The Pragmatic Approach to Equality

Under the pragmatic approach to equality, the determination of whether "two jobs entail equal skill, equal effort, or equal responsibility requires a practical judgment on the basis of all the facts and circumstances of a particular case."[183] The "court must compare the jobs in question in light of the full factual situation and the broad remedial purpose ***42** of the statute."[184] Courts following the pragmatic approach apply the regulatory definitions of responsibility, effort, and skill and evaluate the

positions on an aggregate level to determine if the overall functions of the job are the same.

The controlling definitions of "responsibility, effort, and skill" permit differences in degree and subject matter. For example, "responsibility" means the "degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[185] Similarly, differences in the type of effort are irrelevant:

> Where jobs are otherwise equal under the EPA, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.[186]

Likewise, the regulation defining "skill" speaks in terms of the "the amount or degree of skill" required for the compared positions, rather than a specific set of skills.[187]

Under the pragmatic approach, equal responsibility may be found where, for example, executives share the same reporting structure to the CEO and engage in similar managerial responsibilities.[188] In Mulhall v. Advance Security, Inc.,[189] for example, the court found that two executives had equal responsibility because both reported directly to the company president, "and both had ultimate responsibility as corporate heads for their divisions."[190] It was irrelevant that this responsibility was exercised in different ways in different subject areas. "One vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily."[191] Even though the ***43** specific duties differed, the degree of accountability and responsibility was the same.

"Effort" is perhaps easier to apply to white-collar jobs than manual labor jobs. Whereas some of the earliest EPA cases found unequal effort because the **men** performed more strenuous tasks,[192] it is difficult to distinguish non-supervisory jobs in terms of "physical or mental exertion." For example, one court found that the level of effort required to do two different vice president jobs was the same where "[b]oth were required to apply the same base of banking knowledge to their jobs . . . . [B]oth were required to work after-hours and both represented the Bank at public functions."[193]

Under the pragmatic approach, "skill" is evaluated based on the amount of education involved and the core executive or professional abilities needed for the jobs. Do the positions require the same educational credentials, such as a college or professional degree? Even if the jobs differ with respect to subject matter on a micro-level, are the same general problem-solving, analytical, and supervisory abilities required for the positions? For example, one court found equal skill among two bank vice presidents where the plaintiff had more practical working experience and both had attended the same banking schools and computer training.[194] The court disregarded the employer's defense based on the male vice president's college degree because "all the skills needed at the Bank were on-the-job acquired."[195]

Courts using the pragmatic approach find that working in different departments does not defeat the equality of jobs.[196] For example, in Crabtree v. Baptist Hospital of Gadsden, Inc.,[197] the plaintiff "was the first and only female" executive at a hospital.[198] She was also the lowest-**paid** executive.[199] The male executives made an average of $24,180.50 more.[200]***44** The employer argued that the plaintiff needed to show that her job was equivalent in every respect to the other jobs.[201] The trial court found: "Because none of [the hospital's] Assistant Vice Presidents had the same areas of responsibility or the same number of employees under their direct supervision, there would be no way for [plaintiff] in this case to determine the 'equivalency' insisted upon by" the hospital.[202] The court examined equality of the job in conjunction with the size of the disparity itself, concluding:

> From the evidence here the difference in **pay** between the male officers and the single female officer was so disparate that it cannot be attributed to anything but sexual discrimination or to an indifference to the requirement of equal treatment of the sexes in employment. In fact and in law, these amount to the same thing.[203]

More recently, in Denman v. Youngstown State University, the court held that plaintiff general counsel and the rest of a university president's cabinet performed substantially equal work because they "were in the same job grade and job family,"

and each was "responsible for supervising and overseeing a particular [albeit different] area of the university."[204] In Rinaldi v. World Book, Inc., the court found vice presidents in different departments were equal because "all were Vice-Presidents, and all three individuals had administrative responsibilities. Thus, a common core of tasks is established."[205] In Simpson v. Merchants & Planters Bank, the court held that vice presidents who did not perform the same job were nevertheless substantially equal.[206]

A pragmatic approach to equal work is also seen in the EEOC's description of how to determine whether coaching positions are equal under the EPA.[207] Under this notice, differences among coaching positions do not necessarily defeat their comparability. The EEOC explains that coaches-- regardless of the skills they may have in a particular sport or the specific skills taught to the students--typically perform the same basic coaching duties, such as "1) teaching/training; 2) counseling/advising of student-athletes; 3) general program management; 4) budget management; 5) fundraising; 6) public relations; 7) and . . . recruiting."[208] Thus, whether someone has lacrosse skills or volleyball skills, the positions may be compared if the overall skill, effort, and responsibility necessary to perform the common coaching duties are equivalent. The EEOC should issue similar pragmatic guidance for upper-level positions.[209]

***45** Employers often try to defeat a prima facie showing under the EPA by cataloguing a long list of disparate duties performed by the male employees. In cases involving lower-level jobs, courts have been more skeptical of employer attempts to defeat the comparability of jobs based on alleged "differences" in the work performed, so long as the basic core functions of the job are essentially the same.[210] In cases involving non-supervisory jobs, courts typically disregard different duties where they do not otherwise diminish the overall responsibility, effort, and skill of the compared positions.[211] Courts construing lower-wage jobs also require employers to prove that the allegedly different tasks have an economic value commensurate with the **pay** differential.[212] For example, courts construing lower-wage jobs have found that allegedly extra duties did not have the economic value the employer attributed to them because all **men** received the extra **pay** and not just those performing extra duties.[213]

In cases involving upper-level plaintiff employees, however, courts more readily find that positions cannot be compared because of asserted differences in job duties without carefully examining whether the common ***46** core of the positions nevertheless requires substantially the same degree of responsibility, effort, and skill, or whether the alleged differences have an economic value attributed by the employer.[214] Rather, courts are more likely to accept that upper-level jobs are not comparable based on employers' blanket claims that work in different departments simply cannot be compared.[215] Depending on the facts involved, these assertions may be true, but they do not necessarily defeat the comparability of the jobs for EPA purposes. As one court recently held, "To grant summary judgment on the basis of an identified distinction, without requiring proof of a qualitative difference, essentially nullifies the burden of proof on this issue."[216]

3. The Need for a New Prima Facie Standard

Although the EPA requires a pragmatic interpretation of "equal work" and some courts have used it, the empirical survey of EPA cases described above shows a trend towards more restrictive application of the EPA's prima facie standard. Our economy has shifted from standardized manufacturing jobs at one centralized worksite to service and digital jobs at scattered work locations. **Women** are entering many professions and achieving leadership roles, but the **paygap** widens for them when they reach higher-level positions. The EPA needs a more flexible prima facie standard that accommodates these new realities and provides a more effective **pay** discrimination protection for all **women**. The EPA was revolutionary for its time. But as shown by the empirical survey above, the "equal work" standard has rendered the EPA ineffective for a large segment of the modern workforce and has imposed a wage glass ceiling for **women** in upper-level or supervisory positions.

a. A Return to the "Comparable Work" Standard

Congress need not reinvent the wheel in order to change the EPA's prima facie standard. Indeed, it can go back to original concepts. The EPA as initially drafted prohibited unequal **pay** for "comparable work."[217] Many state equal **pay** statutes likewise base their prima facie standard on work of a "comparable" character. For example, under the Maryland Equal **Pay** Act, a plaintiff must show that she and a male comparator "perform work of comparable character or work on the same

operation, in the same business, or of the same type."[218] Arkansas's statute ***47** simply requires "comparable work."[219] Massachusetts uses the phrase "work of like or comparable character or work on like or comparable operations."[220] Idaho,[221] Maine,[222] North Dakota,[223] Oklahoma,[224] and South Dakota[225] use "work on jobs [which] have comparable requirements relating to skill, effort and responsibility." West Virginia[226] and Oregon[227] use "work of comparable character, the performance of which requires comparable skills."

As the empirical analysis of EPA case law shows, the imposition of an "equal work" standard has excluded large portions of the workforce from its protections. As more **women** work in supervisory and professional jobs, the EPA may become a dead letter, applicable only to a narrowing field of standardized manufacturing positions. "Equal **pay** for equal work" would apply only so long as **women** remain in lower-wage positions, but not when they achieved higher-level occupations or supervisory jobs. Amending the EPA to require "work of like or comparable character" would solve the wage glass ceiling issue by permitting supervisors or executives in different departments--who perform comparable managerial tasks and hold similar levels of responsibility and authority--to state a prima facie case.

Compare, for example, Wheatley v. Wicomico County, in which the court held that department heads of different municipal divisions could not be compared under the federal EPA,[228] to the result in Bureau of Labor & Industries v. Roseburg, which decided a claim involving supervisors of different department divisions under Oregon law.[229] The plaintiff in Roseburg was a transit coordinator who alleged that her job was comparable to those of three male public works department employees: the shop superintendent, the maintenance foreman, and the water foreman.[230] The court affirmed a finding by the Oregon Commissioner of the Bureau of Labor and Industries that the plaintiff's job was "substantially similar" to the jobs performed by the three male supervisors.[231] Specifically, the jobs:

> ***48** involved skills which could be gained on-the-job, while working up through the ranks over time. They required technical skills which were substantial. They involved equivalent combinations of substantially similar supervisory, long-range planning, budget-preparing and other administrative skills, efforts and responsibilities. The working conditions for each position involved difficulty.[232]

Given these similarities in supervisory tasks, the court found that the positions could be compared even though the supervisors' work involved different types of tasks.

A recent arbitration case[233] involving a female Chief Technology Officer (CTO) at a technology company provides another example of the "comparable work" standard's ability to better accommodate upper-level positions.[234] The claimant CTO earned substantially less than the **men** on the executive team: her annual salary increases were smaller, her annual bonuses in some years were half that **paid** to her male peers, and her cumulative stock option grants were about one-half to one-quarter of the amount granted to the male executives.[235] Indeed, the company marketed itself as a technology company, and she was leading the technology function. She arguably should have been **paid** more than her male executive peers. The company conceded that her performance was excellent, and she led the largest department that was critical to the business.[236] The arbitrator ruled against her on the federal EPA claim, finding that the specific skills and responsibilities required for the different departments did not satisfy the substantially equal standard of the EPA.[237] In contrast, the arbitrator ruled in her favor under the Maryland EPA's "work of comparable character" standard.[238] Even though the executives led different departments and may have had different specialized skills related to their departments, their central executive and managerial functions constituted work of comparable character.

These state laws are not comparable worth statutes; they still require proof of comparable work. That is, there must be common similarities between the jobs. This approach presents a factual question about the nature of the work, not a value question about the intrinsic "worth" of the job.

In contrast, the Fair **Pay** Act pending in Congress proposes a comparable worth standard, prohibiting **pay** disparities in the same establishment for jobs dominated by one sex, as compared to jobs dominated by the ***49** opposite sex, "for work on equivalent jobs."[239] The comparable worth model is not the best approach for a statutory remedy for **pay** discrimination. First, codifying the conception that some jobs are "female-dominated" and others are "male-dominated" perpetuates the idea that some jobs are the domain of **women** and others of **men**. Second, comparable worth would not provide a remedy, for

example, for a nurse or elementary school teacher claiming that a **man** was brought in to do the same job at a higher **pay** rate than **women** because these are female-dominated jobs.

Third, although comparable worth can be a powerful political mobilizing force to raise consciousness about **pay** inequities, applying the concept in litigation has proved to be unworkable,[240] and courts are hostile to the notion.[241] Comparable worth analysis requires a complex job evaluation study that ranks each position based on a long list of factors to determine if the jobs are "equivalent" in value.[242] Unless a company has actually conducted a job evaluation study, there will be no data on which to base a comparable worth analysis.[243] Further, most compensation consultants will not work for plaintiffs. Even if they did, most plaintiffs cannot afford such a comprehensive analysis and lack access to the data necessary to perform it.

b. Title VII Is Not an Adequate Remedy

Title VII is not an adequate remedy to attack **pay** discrimination in most cases. Title VII requires that the plaintiff prove intent, and the employer bears only the burden of production, rather than the ultimate burden of persuasion.[244] And proving a discrimination case of any kind is extremely difficult. As one court noted:

> Employment discrimination and retaliation, except in the rarest cases, is difficult to prove. It is perhaps more difficult to prove such cases today than during the early evolution of federal and state anti-discrimination and anti-retaliation laws. Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory ***50** or retaliatory intent, nor leave a well-developed trail demonstrating it.[245]

Proving **pay** discrimination is especially challenging. First, unlike hiring and promotions, **pay** decisions are often made in secret,[246] and psychological research has shown that decisionmakers typically undervalue employees if they are **women** rather than **men**.[247] Legal scholars have examined cognitive psychology research to show how unconscious biases can lead to discrimination.[248] When the decisionmaking processes surrounding **pay** are opaque and guided by subjective factors, unconscious biases are more likely to reduce women's wages.[249]

Second, the employer has a monopoly on the information used to make the **pay** decision and should have the burden of proving the reasons for that decision. Employees are typically not privy to the decisionmaking process, and records of the reasons underlying **pay** decisions rarely exist unless the company has an established compensation system. It is therefore easier for an employer to craft post hoc excuses for **pay** disparities to mask discrimination.[250] Indeed, some plaintiffs prevail on EPA claims but lose on Title VII claims due to insufficient evidence of intent.[251]

***51** In contrast to Title VII, the EPA puts the burden of proving an affirmative defense on the employer. "Discriminatory intent is not an element of a claim under the [EPA]."[252] This is especially appropriate in compensation cases because unconscious biases may infect informal processes and employers are better able to demonstrate the reasons for their **pay** decisions.

c. Size Matters

Changing the EPA's prima facie standard to a comparable or similar work standard raises another issue. As written, the EPA requires that compensation be equal, to the penny. "Any wage differential between the sexes, no matter how small and insignificant, is sufficient under the statutory prohibition."[253] Plaintiffs are more likely to prevail, however, when the wage disparity is large because employers have a harder time explaining it away.[254] In cases that involve professional plaintiffs and multiple comparators, courts have averaged the **pay** of various positions.[255]

Courts generally are hesitant to apply the equal **pay** standard to **women** in higher-level positions, in which variability in **pay** is more common than it is for workers on standardized, hourly wage scales. This is especially true where the wage disparity is relatively marginal, such as a few hundred dollars.[256]

***52** If Congress adopts a more pragmatic prima facie standard for the EPA, it should consider a more flexible approach to the

equal pay requirement as well. For example, the law could have a sliding scale: the more similar the job, the more the pay needs to match in monetary value. Thus, standardized, hourly-wage jobs would require more exact parity in pay. For higher-level jobs that involve comparable or similar work, the law should permit marginal variations in pay. Such a concept is included, for example, in the Fair Labor Standards Act for "de minimis" amounts of work activity that do not need to be included in the calculation of "hours worked" that must be compensated by the employer.[257] "Marginal" is, of course, a relative concept. There is the potential for abuse if the law permits variations without clear guidance about what marginal means. And even marginal differences can add up to huge disparities over time.[258] Nevertheless, such a standard would balance concerns about compensation flexibility and discourage quibbling about small amounts while ensuring the promise of fair pay for women at all levels of the occupational spectrum.

IV. RHETORICAL ANALYSIS OF EQUAL PAY CASE LAW

EPA cases contain narratives that offer insights about other causes of the gender wage gap and wage glass ceiling.[259] This Part explores those narratives, analyzes them against the backdrop of other sociological, legal, and business research, and proposes additional reforms to attack the wage glass ceiling in a more comprehensive and proactive way.

A. The Elevation of "the Market" Over the Promise of Equal Pay

Many judges believe that pay disparities result from rational market forces and that markets have no intent.[260] They protest that courts are ill-equipped to scrutinize employer defenses in EPA cases because they presume ***53** that these disparities are justified by the market. As Judge Posner wrote: "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."[261]

Other legal scholars have discussed the idea that courts do not scrutinize employers' decisions regarding upper-level jobs as much as they do for lower-level jobs. Elizabeth Bartholet examined how courts in Title VII cases involving allegations of racial discrimination in employment selection methods show greater deference and apply less scrutiny for upper-level jobs.[262] Deborah Rhode has noted that judges are reluctant to interfere with employer discretion in cases involving upper-level jobs: "Many members of the bench may feel special sympathy toward professionals with whom they identify and selection processes from which they have benefited. Upper-level employment litigation 'confronts courts with their own worlds.' To many judges, the more prestigious the position, the more substantial the costs of intrusiveness."[263]

For many judges, the issue of compensation for upper-level jobs is especially off-limits. For example, in Wheatley v. Wicomico County, the court stated that finding that all department heads were equal:

> would deprive compensation structures of all flexibility and deny employers the chance to create pay differentiations that reflect differing tasks and talents. In passing the EPA, Congress embraced "the principle of equal pay for equal work regardless of sex." Congress did not authorize the courts "to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." There is no question that [plaintiffs] are valuable assets to Wicomico County. But it is not the job of the courts to discard Congress' studied use of the term "equality" and set the price for their services.[264]

Similarly, in Georgen-Saad v. Texas Mutual Insurance Co., the court stated that employers' decisions regarding senior executive pay should not be scrutinized:

> In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc. Requiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale. In a perfect world, we would be able ***54** to grasp the complexities of such calculations and produce a formula that would bring forth the exact amount that any person should be paid at any moment in time. We do not live in such a world.[265]

One court voiced misgivings about the recurrent theme that courts should keep their hands off salary, promotion, and hiring decisions involving professors at universities.[266] The court noted that, in contrast, "[i]n 'blue collar' employment situations courts have tended to view subjective criteria with suspicion."[267]

There are several problems with the market narrative. First, the very purpose of the EPA is to overcome the discriminatory market forces that caused wage inequality. The earliest EPA cases consistently held that the fact that a **woman** may have less bargaining power than a **man** to demand a higher salary does not constitute a valid defense under the EPA.[268] The market itself perpetuates and exacerbates discriminatory **pay** rates. Under the EPA, the abstract notion of "the market" does not trump the promise of equal **pay**.[269]

Second, courts should not accept a market defense where the employer has not presented empirical market data justifying the **pay** rates. In cases in which the employer shows that it conducted an objective, professional survey of market rates and applied the survey recommendations in a non-discriminatory way, market data may be a valid defense. In most cases, however, such market data does not exist. Rather, employers typically rely on their own subjective belief about what the market requires. Courts should not accept ad hoc, subjective conclusions about the market when the employer did not actually review market data to establish **pay** rates. As Martha Chamallas has written, "Courts should shift to a more empirically neutral stance recognizing that wages may or may not be a function of the market, depending on the political or cultural practices of the particular organization."[270]

***55** Some recent EPA cases have rejected market defenses where employers failed to show how they used market information. For example, in Dubowsky v. Stern, Lavinthal, Norgaard & Daly, the court denied the employer's motion for summary judgment where it advanced a "market forces" argument to explain the **pay** disparity between a male and a female attorney.[271] The court explained that "[a] court should not accept a 'market forces' defense unless the employer can rationally explain the use of market information."[272] In Drum v. Leeson Electric Corp., the court reversed a grant of summary judgment where the market data showed that the male comparator's salary was consistent with the market rate for his position, but the plaintiff's salary was significantly lower than the market rate for her position.[273] Since the plaintiff's salary was the outlier, the court held that the employer "must justify her salary to prove the differential is based on a factor other than sex."[274]

A third problem with the market defense is that one magic market rate rarely exists for a particular job. If a company wants to determine market rates, there are myriad modern salary surveys, some of which are considered more reputable and reliable than others.[275] These surveys include data collected and aggregated from those companies that participate in the survey.[276] Companies must **pay** a fee to participate in the surveys, and must contribute their salary information to the survey company.[277] A competent market analysis typically requires that companies hire professional compensation consultants to analyze the data and the positions for which salary information is desired.[278] There are many human agency factors that can affect the structure and outcome of a market compensation analysis, which can allow subjective judgments and unconscious biases to influence the results. For example, results will vary based on the accuracy and comprehensiveness of the survey data used, the companies selected as comparators, and the job positions that are compared.[279] Companies can also choose to assign extra "points" to certain employees for a variety of arbitrary or work-related factors that may alter the range of **pay**.[280] Given all of these discretionary variables, the idea that there is one market rate--unaffected by subjective and potentially discriminatory variables--for any one position is false. Instead, there may be a range of ***56** market comparables, and companies must make subjective judgments about which point on the market range to **pay** a particular employee. Thus, to say that markets have no intent does not mean that a particular salary decision cannot be tainted with discrimination.

A fourth problem with market defenses is that, even when empirical market data is presented by the employer, courts do not scrutinize it as closely as other employer defenses. In many cases, the market data on which employers rely actually show discriminatory patterns.[281] Sociologists Robert Nelson and William Bridges studied the record in four prominent **pay** discrimination cases and found that courts "uncritically accepted employers' assertions that they were following the market when they set wages for predominantly female jobs at lower rates than predominantly male jobs."[282] In many EPA cases in which employers conducted salary surveys or developed salary systems, **women** are found to be **paid** below the recommended salary ranges for their positions, and the **men** are **paid** above those ranges.[283]

The market narrative on which some courts rely to justify their refusal to compare non-standardized jobs under the EPA may be motivated by the hostility that many courts have to the "comparable worth" concept. Some judges may fear that if they allow upper-level positions to be covered by the EPA, they will be endorsing comparable worth. For example, in Sims-Fingers v. Indianapolis, the Seventh Circuit held that a female park manager's job could not be compared to her nine male park managers' jobs because the nine **men** were in charge of larger parks or parks that had additional amenities.[284] Writing for the court, Judge Posner remarked: "[W]hen jobs are heterogeneous a suit under the Equal **Pay** Act is in danger of being transmogrified into a suit seeking comparable **pay**--a theory of liability for sex discrimination under Title VII that has been rejected by this and the other courts to consider it."[285]

This judicial concern about "comparable worth" in the EPA context is misguided. Scrutinizing an employer's proffered market defense does not mean that courts have to make judgments about an employee's worth in the abstract. Courts and juries are well equipped to require employers to produce evidence about the reason for the **pay** disparity--whether it is a merit system or empirical market data--and evaluate that evidence.

***57** The EPA requires that courts closely scrutinize the employer's proffered reasons for the **pay** disparity to determine whether any alleged differences in the work have an economic value commensurate with the differential.[286] Courts do this not by imposing their own value on the jobs at issue, but by evaluating the validity and credibility of employer **pay** practices on a broader scale. If, for example, an employer claims that a **pay** disparity between a female Chief Financial Officer and a male Chief Marketing Officer exists because the CMO performs advertising work and the CFO does not, the court should examine whether other male members of the executive team also receive higher **pay** without doing advertising work. If an employer claims that **pay** disparities resulted from the market, courts should require the employer to show that the "market" on which the employer relied was not simply a subjective hunch about market rates, but was based on concrete empirical data that was reviewed and analyzed in conjunction with a professional compensation consultant while establishing **pay** rates. In addition, courts should be mindful of the human agency factors involved in a market salary survey that can cause discriminatory results. Courts that accept vague, unsupported claims that the market caused a **pay** differential are not properly scrutinizing the employer's affirmative defense as required by the EPA.

B. The "Any Reason Under the Sun" Defense

The attitude that compensation decisions for upper-level positions are above the law is especially problematic in EPA cases because of its fourth affirmative defense--"any factor other than sex."[287] In EPA cases that involve non-supervisory jobs, courts typically reject defenses based on subjective judgments about an employee's relative "worth." For example, under the "merit system" and "seniority system" affirmative defenses of the EPA, employers must prove the existence of a system with objective standards and must show that the system was applied in a non-discriminatory manner.[288] Courts have recognized that permitting a defense to **pay** disparities based on assertions of "merit" and "performance," "if not strictly construed against the employer, could easily swallow the rule."[289]

***58** In cases involving lower-level jobs, courts also strictly construe the "factor-other-than-sex" affirmative defense against the employer and are suspicious of subjective or amorphous claims about the plaintiff's lower "worth" and the alleged need for employer discretion in setting compensation. Take the example of Keziah v. W.M. Brown & Son, Inc., which involved a claim by a non-supervisory sales representative.[290] The employer attempted to explain a salary differential based on the male comparator's "experience and customer base."[291] The Fourth Circuit, however, found that the record as a whole demonstrated that the company failed to prove that the salary differential resulted from "any factor other than sex."[292] The employer in Keziah argued--without objective factual support--that the male comparator was somehow "worth more" and had more future potential.[293] The Fourth Circuit found that "[o]ne of the things undermining the company's defense is the pure subjectivity of the salary-setting process."[294] The salaries in Keziah were based on the supervisor's "subjective evaluation of the individual worth of [the plaintiff] and [the male comparator]."[295] The court found that the company in Keziah "failed to show the existence or application of any salary guidelines or concrete standards for determining salary."[296] Therefore, the court held that the "pure subjectivity of the process," combined with the lack of any clear explanation or support for the supervisor's

evaluations, meant "that the company failed to prove that the salary differential was based on a factor other than sex."[297]

***59** In a majority of circuits[298] and under the EEOC's interpretation,[299] the employer is not permitted to rely on literally any other factor, but only a factor that is job-related and adopted for a legitimate business reason.[300] As courts have explained, "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned."[301]

The circuits that have required that the factor other than sex be job-related and adopted for a legitimate business reason have involved non-supervisory positions (such as clerical work, sales agents, or custodians) or government jobs (a deputy sheriff).[302] They have not involved professional or executive jobs in a private corporate setting. In contrast to the majority approach developed in the non-supervisory context, consider the interpretation of the factor-other-than-sex defense in a case involving a ***60** supervisory employee: Dey v. Colt Construction & Development Co.[303] In Dey, the court described the "factor-other-than-sex" defense as "'a broad catch-all exception [that] embraces an almost limitless number of factors, so long as they do not involve sex.' The factor need not be 'related to the requirements of the particular position in question,' nor must it even be business-related."[304] The Seventh and Eighth Circuits have adopted Dey's approach of deferring to the employer under the fourth affirmative defense regardless of the justification's reasonableness or relation to the job and business at issue.[305] For these courts, "the wisdom or reasonableness of the asserted defense" is irrelevant.[306] As one court opined, the EPA "does not authorize federal courts to set their own standards of 'acceptable' business practices. The statute asks whether the employer has a reason other than sex--not whether it has a 'good' reason. Congress has not authorized federal judges to serve as personnel managers for America's employers."[307]

If presented with this issue, it appears unlikely that the Supreme Court would follow the majority view. In Smith v. Jackson, which held that disparate impact claims are cognizable under the Age Discrimination in Employment Act,[308] the plurality noted that in the EPA, "Congress barred recovery if a **pay** differential was based 'on any other factor' --reasonable or unreasonable-- 'other than sex.'"[309] Given this language, it may only be a matter of time before the Court adopts the minority view that the "factor other than sex" literally means any factor at all (other than an admission of sex discrimination).[310] If this happens, any defense asserted by the employer--no matter how unreasonable or far-fetched--must be accepted by the courts. This would also affect Title VII **pay** claims, for which the EPA's defenses are applicable.[311]

Congress should amend the EPA to clarify the contours of acceptable business defenses for challenged **pay** disparities. One option is to eliminate the "factor-other-than-sex" defense altogether and follow the example of some state equal **pay** statutes that provide a list of specific ***61** affirmative defenses that may justify a **pay** differential.[312] This list could include factors that commonly and legitimately justify **pay** differentials, such as more years of experience, a demonstrated record of higher performance, or greater job responsibility. But, as with the other EPA defenses, the employer would bear the burden of proving that a certain factor or factors actually produced the **pay** disparity, and did not simply theoretically justify it.

The other option is for Congress to codify the majority view that the factor other than sex must be reasonable and business-related. This approach is proposed in the Paycheck Fairness Act, now pending in Congress.[313] Such an amendment is especially important for workers at higher levels, for whom amorphous claims that the market dictated the **pay** disparity are common.

C. Presumption of Incompetence and Lower Value

Many courts are skeptical of discrimination plaintiffs before they learn anything about the nature of the claims. There is a presumption in many discrimination cases that only the poorest performers complain of such things. As one district court judge wrote:

> [T]he very best workers are seldom employment discrimination plaintiffs due to sheer economics: Because the economic costs to the employer for discrimination are proportional to the caliber of the employee, discrimination against the best employees is the least cost effective. Rather, discrimination and retaliation plaintiffs tend to be those average or below-average workers . . . for whom plausible

> rationales for adverse employment actions are readily fabricated by employers with even a meager imagination.[314]

EPA cases involving professional and executive **women** shake up these notions because they are not average workers. Many have stellar performance records and impressive credentials that equal or exceed that of ***62** their male peers. Even then, another narrative pervading EPA cases is the notion that **women** who have achieved managerial positions nevertheless have less value. They are less important--if not the least important--executives in the company.[315] If the plaintiff has impressive credentials, the male comparator is even more impressive and has a better reputation.[316] Even if the plaintiff is in most aspects an equal member of the executive team, her managerial responsibilities are simply support functions and, unlike her male peers, are not part of the core business of the company.[317]

For example, in Stopka, the plaintiff was a vice president leading her employer's largest division in terms of number of employees.[318] She shared similar managerial functions as other division heads.[319] Under the company's Salary Administrative Program, all division vice presidents were ranked equally.[320] Even though she was among those with the greatest tenure, she was **paid** significantly less than male vice presidents, and indeed, was **paid** less than several other **men** who were neither division heads, full vice presidents, nor elected corporate officers.[321] She even earned less than the minimum salary mandated for executives by the salary program.[322]

The company defended the gross disparity on the grounds that Ms. Stopka did not have responsibility for the core business aspects of the insurance company.[323] The company said that it found its salary program to be "unworkable" and used it only as a guideline.[324] The court accepted the company's defenses and found that the male vice presidents performed work that was "substantially more important to the operation of the company."[325]

***63** In many EPA cases, this may, of course, be true. But, this repeated narrative of lower worth raises important questions that may point to underlying causes of the gender wage **gap**. Are **women** being steered towards executive roles that are supportive in nature rather than core business opportunities? Why did these **women** believe that they were equal contributors on the executive team, only to learn in litigation that they were perceived simply as a back office support function? Are **women** receiving the training and opportunities for advancement they need to be successful, or are they being hampered by other administrative work tasks that their male peers do not need to perform?[326] Are they being equitably rewarded for their work, or is there an expectation that **women** will be satisfied with less? Employers should proactively evaluate their compensation systems and examine these issues.

D. **Pay** Secrecy

Modernizing the EPA's standards will help to crack the wage glass ceiling. It will cause employers to take internal **pay** equity more seriously and provide a more effective remedy for **women** at all occupational levels. But nearly a half-century of litigation under the EPA and Title VII shows that litigation-- although a powerful catalyst for social change--can be a clumsy instrument of reform. Litigation is expensive, disruptive for employers, and psychologically and professionally damaging for most **women**.[327] Although we need an effective EPA to express and enforce our nation's commitment to equal **pay**, other changes are needed to shatter the wage glass ceiling.

An important first step is to lift the shroud of secrecy on compensation. Modern compensation structures tend to be secret. Most workers have no idea what the controlling criteria is for their **pay** awards and do not know what their peers make. Many employers have strict **pay** confidentiality policies, the violation of which can lead to termination, even though such policies violate the National Labor Relations Act.[328] As Justice Ginsburg noted in Ledbetter, compensation discrimination is often "hidden from sight."[329] Some **women** are fired when they insist on knowing ***64** the salaries of their male counterparts.[330] Many **women** do not discover gross **pay** disparities until they, for example, receive anonymous letters,[331] review proxy statements,[332] or become publicly ridiculed by their co-workers.[333]

A related theme in EPA cases involving executives is that the **man** simply negotiated a higher salary. For example, in Balmer

v. HCA, Inc., the male comparator was allowed to negotiate his starting salary, but the plaintiff was not permitted to negotiate her salary.[334] Nevertheless, the court found no EPA violation and honored the employer's promise of higher pay to the male employee, to the detriment of the law's promise of equal pay.[335]

In their groundbreaking work, Women Don't Ask, Linda Babcock and Sara Laschever show that most women do not negotiate compensation ***65** rates and other important aspects of their daily lives.[336] They advise that women should "ask for it" and negotiate higher pay.[337] Studies show that if women are armed with knowledge about comparable wage rates, they are more likely to be able to negotiate equitable starting salaries or raises to help prevent pay disparities.[338]

There is one significant problem. Unless wage rates are published, women do not know what to demand. As discussed above, employers have a monopoly on the relevant information. Professional salary studies are not available to individuals, who must rely on informal networking and incomplete data from a variety of sources.[339] Women may not have access to the same network of professionals that men do to determine potential pay ranges.[340] Publishing pay data would help to lessen the paygap by promoting better salary negotiation between employees and employers.

Publishing pay data would have other benefits. Employers who know that their pay scales will be public will be less likely to "play favorites" or permit inexplicable inequities to persist. Employers are more likely to maintain lopsided pay scales if the lower paid employee simply does not know that her peers are getting paid substantially more. Having a transparent pay system and publicly available rates will help to reduce the gender wage gap by arming all employees with the knowledge needed to negotiate for a fair wage rate. This may be one reason that there is a smaller wage gap for women who work for more standardized, hourly rates: everyone knows what the pay rate is, and the employer is unable to vary that rate for discriminatory reasons. Indeed, the paygap is substantially smaller for federal government workers, who have publicly reported wages.[341]

Business scholars have shown that lifting the shroud of secrecy on pay has organizational benefits. For example, Edward Lawler has shown that managers employed by firms with secret pay plans tend to overestimate the pay of managers at their own level and one level below them, and they underestimate the pay of managers one level above them.[342] Such ***66** perceptions may make managers more dissatisfied with their own pay as well as less productive and less motivated to work.[343]

Compensation systems are powerful extrinsic motivators.[344] Requiring published pay data will encourage companies that rely on subjective, ad hoc processes--which tend to undervalue women and invite discrimination--to develop more effective systems guided by clear, objective standards that serve the goals of increased employee motivation and loyalty, greater productivity, and internal pay equity.[345] As Justice Brandeis once said, "sunshine is the best disinfectant."[346]

In addition to eliminating pay secrecy, employers should reexamine their pay scales to ensure that they are guided by well-defined performance criteria, consistent application, and centralized oversight. These principles would serve multiple goals, including internal pay equity. Recent recommendations by The Conference Board Task Force on Executive Compensation in the wake of executive pay scandals urge companies to review their executive compensation plans to ensure that they comply with several guiding principles that--if applied to pay schemes below the CEO level as well--may also attack the gender wage gap for upper level women.[347] The Conference Board reaffirms the importance of pay transparency, clearly defined and understandable pay schemes, and centralized oversight. The Conference Board recommends, for example, that:

> ***67** All boards should examine their executive pay practices and take action to ensure that there are strong links between performance and compensation, . . . that they demonstrate effective oversight of executive pay, that there is transparency with respect to the executive compensation decision making processes, and that board and shareholder dialogue is available to resolve executive compensation issues.[348]

The Conference Board also recommends that companies minimize the potential for controversial pay practices that can result from hiring and negotiating with outside candidates and urges companies not to engage in pay practices simply because they

think other companies are doing it. The Conference Board advises that "'Everyone else does it' or 'It is market practice' are not sufficient justifications" for controversial **pay** practices.[349] Likewise, employers that eliminate ad hoc, highly subjective, and amorphous **pay** processes will foster greater **pay** equity and fairness for all workers.

V. CONCLUSION

As **women** achieve higher professional and leadership status, they are encountering a significant gender wage **gap** that, in many cases, is much greater than that encountered by their sisters in blue-collar employment. For **women** in upper-level jobs, however, the EPA provides less protection or relief. Courts are increasingly interpreting the EPA so restrictively that many plaintiffs cannot satisfy a prima facie standard that the jobs are "equal." Even if they make that showing, the acceptance by courts of unsupported claims about the market or other non-job-related factors are undermining the promise of equal **pay**. Modern-day subjective compensation practices increase the risk of **pay** inequality, but courts are often reluctant to scrutinize them.

This Article seeks to understand the reasons for the EPA's wage glass ceiling and offers proposals to break that barrier. Without change, the EPA will be rendered an "empty shell" for many **women**. And as Congresswoman Dwyer stated in the original debates regarding the EPA: "I can assure you that **women** would not be inclined to welcome an empty shell of a bill--legislation with a title but with no substance. This would be a heartless deception, and Congress would only be fooling itself if it should follow such a course."[350]

*68 APPENDIX

A. Cases Involving Non-Supervisory Workers

Brennan v. Corning Glass Works, 417 U.S. 188, 199 (1974) (inspectors); Yant v. United States, 588 F.3d 1369 (Fed. Cir. 2009) (nurse practitioners); Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 989 (5th Cir. 2008) (administrative assistant); Warren v. Solo Cup Co., 516 F.3d 627, 628 (7th Cir. 2008) (laborer); Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 785 (7th Cir. 2007) (laborer); Holland v. Sam's Club, 487 F.3d 641, 643 (8th Cir. 2007) (forklift driver); Beck-Wilson v. Principi, 441 F.3d 353, 356 (6th Cir. 2006) (nurse practitioner); Wernsing v. Dep't of Human Servs., 427 F.3d 466, 467 (7th Cir. 2005) (investigator); Miller v. Auto. Club of N.M., Inc., 420 F.3d 1098, 1103 (10th Cir. 2005) (laborer); Sandoval v. Boulder, 388 F.3d 1312, 1317-18 (10th Cir. 2004) (call center director); Younts v. Fremont County, 370 F.3d 748, 751 (8th Cir. 2004) (administrative assistant); Taylor v. White, 321 F.3d 710, 712 (8th Cir. 2003) (office worker); Steger v. Gen. Elec. Co., 318 F.3d 1066, 1069 (11th Cir. 2003) (collectors); Gu v. Boston Police Dep't, 312 F.3d 6, 8 (1st Cir. 2002) (senior analysts); Ferroni v. Teamsters, Chauffeurs & Warehouse-**men** Local No. 222, 297 F.3d 1146, 1148 (10th Cir. 2002) (business agents); Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1024 (8th Cir. 2002) (clerk); Fyfe v. Fort Wayne, 241 F.3d 597, 599 (7th Cir. 2001) (laborer); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 185 (4th Cir. 2000) (craftsman); Broadus v. O.K. Indus., Inc., 226 F.3d 937, 939 (8th Cir. 2000) (laborer); Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 922 (7th Cir. 2000) (grocery store workers); Wollenburg v. Comtech Mfg. Co., 201 F.3d 973, 975 (7th Cir. 2000) (production supervisor); Stanziale v. Jargowsky, 200 F.3d 101, 104 (3rd Cir. 2000) (sanitation worker); Belfi v. Pendergast, 191 F.3d 129, 132 (2d Cir. 1999) (office engineer); Hutchins v. Int'l Bhd. of Teamsters, 177 F.3d 1076, 1079 (8th Cir. 1999) (union organizer); Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1359 (10th Cir. 1997) (market analyst); Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 835 (6th Cir. 1997) (analyst); AFSCME v. Nassau, 96 F.3d 644, 645 (2d Cir. 1996) (detention aides); McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 507 (8th Cir. 1995) (clerk); Krenik v. County of Le Sueur, 47 F.3d 953, 956 (8th Cir. 1995) (maintenance assistant); EEOC v. Cherry-Burrell Corp., 35 F.3d 356, 358 (8th Cir. 1994) (buyer); Loyd v. Phillips Bros., Inc. 25 F.3d 518, 521 (7th Cir. 1994) (bookbinder); Gandy v. Sullivan County, 24 F.3d 861, 862 (6th Cir. 1994) (safety director); Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1014 (11th Cir. 1994) (technical writer); Lambert v. Genesee Hosp., 10 F.3d 46, 50 (2d Cir. 1993) (duplicator); Lowe v. Southmark Corp., 998 F.2d 335, 336 (5th Cir. 1993) (leasing representative); Weiss v. Coca-Cola Bottling Co. of Chic., 990 F.2d 333, 334 (7th

Cir. 1993) (laborer); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 522 (2d Cir. 1992) (custodian); EEOC v. Romeo Cmty. Schs. & AFSCME, 976 F.2d 985, 986 (6th Cir. 1992) (custodian); Beavers v. Am. Cast Iron Pipe Co., 975 F.2d 792, 801 (11th Cir. 1992) (machinist); ***69**Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1522 (11th Cir. 1992) (buyer); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1466 (10th Cir. 1992) (clerk); Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 540 (11th Cir. 1991) (printing operator); Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 545 (7th Cir. 1991) (clerk); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1391 (4th Cir. 1990) (teachers); EEOC v. Detroit Health Dep't, 920 F.2d 355, 356 (6th Cir. 1990) (medical technologists); EEOC v. Del. Dep't of Health & Soc. Servs., 865 F.2d 1408, 1411 (3d Cir. 1989) (nurses); Waters v. Turner, Wood & Smith Ins. Agency, Inc., 874 F.2d 797, 798 (11th Cir. 1989) (customer service representative); Ebert v. Lamar Truck Plaza, 878 F.2d 338, 338 (10th Cir. 1989) (laborer); Fallon v. Illinois, 882 F.2d 1206, 1207 (7th Cir. 1989) (veteran service officer); EEOC v. White & Son Enter., 881 F.2d 1006, 1007 (11th Cir. 1989) (laborer); Keziah v. W.M. Brown & Son, Inc., 888 F.2d 322, 326 (4th Cir. 1989) (sales representative); Forsberg v. Pac. Nw. Bell Tel. Co., 840 F.2d 1409, 1411 (9th Cir. 1988) (maintenance administrators); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1568 (11th Cir. 1988) (clerks); Price v. Lockheed Space Operations. Co., 856 F.2d 1503, 1504 (11th Cir. 1988) (technical writer); Goodrich v. Int'l Bhd. of Elec. Workers, 815 F.2d 1519, 1521 (D.C. Cir. 1987) (analyst); Peters v. Shreveport, 818 F.2d 1148, 1150 (5th Cir. 1987) (police communication officers); Brobst v. Columbus Serv. Int'l, 824 F.2d 271, 272 (3d Cir. 1987) (maintenance worker); Gosa v. Bryce Hosp., 780 F.2d 917, 918-19 (11th Cir. 1986) (clerk); Brewster v. Barnes, 788 F.2d 985, 987 (4th Cir. 1986) (correctional officer); Jones v. Flagship Int'l, 793 F.2d 714, 716 (5th Cir. 1986) (EEO officer); Marcoux v. Maine, 797 F.2d 1100, 1101 (1st Cir. 1986) (correctional officer); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 400 (9th Cir. 1985) (tellers); Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1254 (7th Cir. 1985) (administrator); EEOC v. Maricopa County Cmty. Coll. Dist., 736 F.2d 510, 511 (10th Cir. 1984) (clerk); Laffey v. Nw. Airlines, Inc., 740 F.2d 1071, 1075 (D.C. Cir. 1984) (flight attendants); McKee v. McDonnell Douglas Tech. Serv. Co., 700 F.2d 260, 262 (5th Cir. 1983) (data encoder); EEOC v. Ctrl. Kan. Med. Ctr., 705 F.2d 1270, 1272 (10th Cir. 1983) (custodian); Clymore v. Far-Mar-Co, Inc., 709 F.2d 499, 500 (8th Cir. 1983) (clerk); EEOC v. Mercy Hosp. & Med. Ctr., 709 F.2d 1195, 1196 (7th Cir. 1983) (custodian); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1130 (5th Cir. 1983) (EEO officer); Hein v. Or. Coll. of Educ., 718 F.2d 910, 912 (9th Cir. 1983) (teachers); Thompson v. Sawyer, 678 F.2d 257, 263 (D.C. Cir. 1982) (bindery workers); Hill v. JC Penney Co., 688 F.2d 370, 372 (5th Cir. 1982) (seamstress); Kouba v. Allstate Ins. Co., 691 F.2d 873, 874-75 (9th Cir. 1982) (sales agent); Orahood v. Bd. of Trs. of Univ. of Ark., 645 F.2d 651, 653 (8th Cir. 1981) (analyst); Odeomes v. Nucare, Inc., 653 F.2d 246, 248 (6th Cir. 1981) (nurses' aide); EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1244 (8th Cir. 1981) (clerk); Saltzman v. Fullerton Metals Co., 661 F.2d 647, 649 (7th Cir. 1981) (clerk); Horner v. Mary Inst., 613 F.2d 706, 708 (8th Cir. 1980) (teacher); EEOC v. Aetna Ins. Co., 616 F.2d 719, 721 (4th Cir. 1980) (office workers); ***70**EEOC v. Kenosha Unified Sch. Dist., 620 F.2d 1220, 1222 (7th Cir. 1980) (custodian); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 63 (5th Cir. 1980) (buyer); EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095, 1096 (4th Cir. 1980) (office workers); Campbell v. Von Hoffman Press, Inc., 632 F.2d 69, 69 (8th Cir. 1980) (laborer); Strecker v. Grand Forks County Soc. Serv. Bd., 640 F.2d 96, 99 (8th Cir. 1980) (administrator); Marshall v. Sch. Bd., 599 F.2d 1220, 1221 (3d Cir. 1979) (custodian); Marshall v. Dallas Indep. Sch. Dist., 605 F.2d 191, 193 (5th Cir. 1979) (custodian); Ruffin v. L.A. County, 607 F.2d 1276, 1278 (9th Cir. 1979) (correctional officers); Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 569 F.2d 1033, 1035 (8th Cir. 1978) (bank tellers); Marshall v. Sec. Bank & Trust Co., 572 F.2d 276, 279 (10th Cir. 1978) (tellers); Marshall v. Bldg. Maint. Corp., 587 F.2d 567, 569 (2d Cir. 1978) (custodian); Marshall v. Kent State Univ., 589 F.2d 255, 255 (6th Cir. 1978) (custodian); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1166 (3d Cir. 1977) (laborer); Katz v. Sch. Dist., 557 F.2d 153, 155 (8th Cir. 1977) (teacher); Usery v. Richman, 558 F.2d 1318, 1319 (8th Cir. 1977) (cook); Usery v. Columbia Univ., 568 F.2d 953, 955 (2d Cir. 1977) (custodian); Ridgway v. United Hospitals-Miller Div., 563 F.2d 923, 925 (8th Cir. 1977) (nurse); Peltier v. Fargo, 533 F.2d 374, 376 (8th Cir. 1976) (law enforcement); Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 860-61 (10th Cir. 1976) (laborer); Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 437 (D.C. Cir. 1977) (flight attendants); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 150 (3d Cir. 1976) (beauticians and custodians); Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013, 1014 (6th Cir. 1975) (nurses); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 898 (5th Cir. 1974) (tellers); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285 (4th Cir. 1974) (nurses' aides); Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 591 (3d Cir. 1973) (retail sales); Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1044 (5th Cir. 1973) (store clerks); Brennan v. City Stores, Inc., 479 F.2d 235, 237 (5th Cir. 1973) (retail salespeople); Hodgson v. Miller Brewing Co., 457 F.2d 221, 222 (7th Cir. 1972) (technician); Hodgson v. Square D Co., 459 F.2d 805, 807 (6th Cir. 1972) (machine operator); Hodgson v. Sec. Nat'l Bank of Sioux City, 460 F.2d 57, 58 (8th Cir. 1972) (teller); Hodgson v. Golden Isles Convalescent Homes, Inc., 468

F.2d 1256, 1257 (5th Cir. 1972) (nurse aide); Hodgson v. Brookhaven Gen. Hosp., 470 F.2d 729, 730 (5th Cir. 1972) (nurse aide); Hodgson v. First Nat'l Bank, 446 F.2d 47 (5th Cir. 1971) (tellers); Shultz v. Wheaton Glass Co., 421 F.2d 259, 261 (3d Cir. 1970) (packer); Shultz v. Am. Can Co.-Dixie Prods., 424 F.2d 356, 358 (8th Cir. 1970) (machine operator).

B. Cases Involving Mid-Level Supervisors and Managers

Drum v. Lesson Elec. Corp., 565 F.3d 1071 (8th Cir. 2009); Bearden v. Int'l Paper Co., 529 F.3d 828, 830 (8th Cir. 2008) (supervisor); Sims-Fingers v. Indianapolis, 493 F.3d 768, 769 (7th Cir. 2007) (municipal park manager); Brown v. Fred's Inc., 494 F.3d 736, 729 (8th Cir. 2007) (retail ***71** assistant manager); Merillat v. Metal Spinners, Inc., 470 F.3d 685, 687 (7th Cir. 2006) (senior buyer); Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304 (10th Cir. 2006 (marketing service representative); Grabovac v. Allstate Ins. Co., 426 F.3d 951, 953 (8th Cir. 2005) (business consultant); Balmer v. HCA, Inc., 423 F.3d 606, 609 (6th Cir. 2005) (claims supervisor); Horn v. Univ. of Minn., 362 F.3d 1042, 1043 (8th Cir. 2004) (assistant coach); Lawrence v. CNF Transp., Inc., 340 F.3d 486, 489-90 (8th Cir. 2003) (sales executive); Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1021 (7th Cir. 2003) (program administrator); Markel v. Bd. of Regents, 276 F.3d 906, 909 (7th Cir. 2002) (account manager); Rodriguez v. Smithkline-Beecham, 224 F.3d 1, 2-3 (1st Cir. 2000) (manager); Howard v. Lear Corp., 234 F.3d 1002, 1003 (7th Cir. 2000) (human resources coordinator); Berg v. Norand Corp., 169 F.3d 1140, 1143 (8th Cir. 1999) (manager); Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1072 (9th Cir. 1999) (coach); Euerle-Wehle v. United Parcel Serv., Inc., 181 F.3d 898, 899 (8th Cir. 1999) (package manager); Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 942 (1st Cir. 1995) (supervisor); Tomka v. Seiler Corp., 66 F.3d 1295, 1300 (2d Cir. 1995) (account manager); Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1449 (7th Cir. 1994) (controller); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 339-40 (4th Cir. 1994) (manager); Tidwell v. Fort Howard Corp., 989 F.2d 406, 408 (10th Cir. 1993) (supervisor); EEOC v. Delight Wholesale Co., 973 F.2d 664, 666-67 (8th Cir. 1992) (sales manager); Brownlee v. Gay & Taylor, Inc., 861 F.2d 1222, 1224 (10th Cir. 1988) (manager); EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 578 (7th Cir. 1987) (coach); Feazell v. Tropicana Prods., Inc., 819 F.2d 1036, 1039 (11th Cir. 1987) (supervisor); Maxwell v. Tucson, 803 F.2d 444, 445 (9th Cir. 1986) (director); Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 728 (10th Cir. 1984) (director); Epstein v. Sec'y, U.S. Dep't of Treasury, 739 F.2d 274, 276 (7th Cir. 1984) (administrative officer); Morgado v. Birmingham-Jefferson County Civil Def. Corps., 706 F.2d 1184, 1186 (11th Cir. 1983) (program administrator); Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983) (manager); EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1073-74 (4th Cir. 1982) (supervisors); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1280 (8th Cir. 1980) (manager); Pearce v. Wichita, 590 F.2d 128, 130 (5th Cir. 1979) (manager); Christopher v. Iowa, 559 F.2d 1135, 1135 (8th Cir. 1977) (stock room supervisor); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 168 (5th Cir. 1975) (manager); Brennan v. J.M. Fields, Inc., 488 F.2d 443, 444 (5th Cir. 1974) (supervisor).

C. Cases Involving University Professors

Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 695 (7th Cir. 2003); Lavin-McEleney v. Marist Coll., 239 F.3d 476, 478 (2d Cir. 2001); Siler-Khodr v. Univ. of Tex. Health Science Ctr., 261 F.3d 542, 544 (5th Cir. 2001); Kovacevich v. Kent State Univ., 224 F.3d 806, 812 (6th Cir. 2000); Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 117 (2d Cir. 1997); ***72**Smith v. Va. Commonwealth Univ., 84 F.3d 672, 674 (4th Cir. 1996); Strag v. Bd. of Trs. Craven Cmty. Coll., 55 F.3d 943, 945 (4th Cir. 1995); Fisher v. Vassar Coll., 70 F.3d 1420, 1428 (2d Cir. 1995); Chance v. Rice Univ., 984 F.2d 151, 152 (5th Cir. 1993); Houck v. Va. Polytechnic Inst. & State Univ., 10 F.3d 204, 205 (4th Cir. 1993); Brousard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975 (8th Cir. 1991); Schwartz v. Fla. Bd. of Regents, 954 F.2d 620, 622 (11th Cir. 1991); Wu v. Thomas, 847 F.2d 1480, 1482 (11th Cir. 1988); Covington v. So. Ill. Univ., 816 F.2d 317, 318 (7th Cir. 1987); Berry v. Bd. of Supervisors, 783 F.2d 1270, 1271 (5th Cir. 1986); EEOC v. McCarthy, 768 F.2d 1, 2 (1st Cir. 1985); Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1030 (11th Cir. 1985); Bd. of Regents v. Dawes, 522 F.2d 380, 381 (8th Cir. 1975); Soble v. Univ. of Md., 778 F.2d 164, 165 (4th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686, 691 (9th Cir. 1984); Winkes v. Brown Univ., 747 F.2d 792, 793 (1st Cir. 1984); Sweeney v. Bd. of Trs. of Keene State Coll., 569 F.2d 169, 171 (1st Cir. 1978); Keyes v. Lenoir Rhyne Coll., 552 F.2d 579, 580 (4th Cir. 1977).

D. Cases Involving Professionals and Executives

Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 575 (8th Cir. 2006) (assistant VP); Ingram v. Brink's, Inc., 414 F.3d 222, 224 (1st Cir. 2005) (branch supervisor); Wheatley v. Wicomico County, 390 F.3d 328, 332 (4th Cir. 2004) (department head); Tenkku v. Normandy Bank, 348 F.3d 737, 739 (8th Cir. 2003) (VP); Buettner v. Arch Coal Sales Co., 216 F.3d 707, 706-11 (8th Cir. 2000) (VP, secretary, and general counsel); Ryduchowski v. Port Auth. of NY & NJ, 203 F.3d 135, 137 (2d Cir. 2000) (engineer); Brinkley v. Harbour Rec. Club, 180 F.3d 598, 602-03 (4th Cir. 1999) (general manager); Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 797 (6th Cir. 1998) (director of pupil personnel); McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 140 F.3d 288, 295 (1st Cir. 1998) (department head); Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 683 (7th Cir. 1998) (VP); Arrington v. Cobb County, 139 F.3d 865, 868 (11th Cir. 1998) (assistant fire chief); Lindale v. Tokheim Corp., 145 F.3d 953, 954 (7th Cir. 1998) (mechanical engineer); Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373, 375 (7th Cir. 1998) (engineer); Byrd v. Ronayne, 61 F.3d 1026, 1027 (1st Cir. 1995) (attorney); Irby v. Bittick, 44 F.3d 949, 952 (11th Cir. 1995) (deputy sheriff); Mulhall v. Advance Sec., Inc., 19 F.3d 586, 588 (11th Cir. 1994) (VP); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1377 (10th Cir. 1994) (principal); Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 160 (4th Cir. 1992) (VP); Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 835 (3d Cir. 1992) (associate counsel); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 340 (7th Cir. 1988) (executive management); Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501, 1501 (11th Cir. 1985) (assistant VP); Padway v. Palches, 665 F.2d 965, 966 (9th Cir. 1982) (principal); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1053 (2d Cir. 1978) (chemist).

Footnotes

[a1] Visiting Assistant Professor of Law, University of Maryland School of Law. The author thanks Paula Monopoli, Richard Boldt, Martha Ertman, David Gray, Leslie Meltzer Henry, Pete Smith, and the participants at the University of Maryland Faculty Development Workshop for their helpful comments. The author also thanks Kurt Meyer and Alice Johnson, and Susan McCarty at the University of Maryland School of Law library for all of their valuable research and citation help.

[1] 550 U.S. 618 (2007), superseded by statute, Lilly Ledbetter Fair **Pay** Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). In Ledbetter, the Court held that the time for filing a charge of discrimination in disparate-treatment **pay** cases with the Equal Employment Opportunity Commission (EEOC) begins at the time of the **pay**-setting decision and that each paycheck that follows from that discriminatory act does not trigger a new EEOC charging period. Id. at 628. The Court found that "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory **pay** decision was made and communicated to her." Id. In a dissenting opinion, Justice Ginsburg explained that the majority's requirement that a charge be filed immediately for each and every discriminatory **pay** decision did not comport with the realities of **pay** discrimination, which may not become apparent until after the passage of time. Id. at 645 (Ginsburg, J., dissenting). She wrote:
> **Pay** disparities occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative **pay** information, moreover, is often hidden from the employee's view. Employers may keep under wraps the **pay** differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Id. Given the secret and cumulative nature of most **pay** discrimination, and the reluctance of many **women** to complain, "[i]t is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain." Id. Therefore, "[h]er initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex." Id.

[2] Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (2009) (codified at 42 U.S.C. 2000e-5 (2006) and scattered sections of 29 U.S.C.). Under the Lilly Ledbetter Fair **Pay** Act, a person may file a charge of discrimination for **pay** discrimination within 180 (or, in some states that have work sharing agreement with the EEOC, 300) days of any of the following: (1) "when a discriminatory compensation decision or other practice is adopted;" (2) "when an individual becomes subject to a discriminatory compensation decision or other practice," or (3) "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is **paid**, resulting in whole or in part from such a decision or other

practice." 42 U.S.C. 2000e-5(e)(3)(A) (2006). The Act defined the time for filing claims of discrimination in compensation under three statutes: Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (2006), the Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12111 (2006).

3 See, e.g., Heidi Brown, Equal Payback for Lilly Ledbetter, Forbes, Apr. 28, 2009, http://www.forbes.com/2009/04/28/equal-pay-discrimination-forbes-woman-leadership-wages.html; Sheryl Gay Stolberg, Obama Signs Equal-Pay Legislation, N.Y. Times, Jan. 29, 2009, http:// www.nyimes.com/2009/01/30/us/politics/30*l*edbetter-web.html.

4 42 U.S.C. § 2000e-5(f)(1) (2006).

5 For articles examining other implications of Ledbetter, see Jason R. Bent, What the Lilly Ledbetter Fair Pay Act Doesn't Do: "Discrete Acts" and the Future of Pattern or Practice Litigation, 33 Rutgers L. Rec. 31 (2009) (analyzing the issue of when the EEOC charge filing period beings to run where the plaintiff alleges a pattern or practice or unlawful discrete acts of discrimination); Deborah L. Brake, What Counts as "Discrimination" in Ledbetter and the Implications for Sex Equality Law, 59 S.C. L. Rev. 657 (2008) (exploring the implications of Ledbetter for equal protection); Tristin K. Green, Insular Individualism: Employment Discrimination After Ledbetter v. Goodyear, 43 Harv. C.R.-C.L. L. Rev. 353 (2008) (analyzing the insular individualism in Ledbetter and mapping its potential consequences for antidiscrimination law); Paula A. Monopoli, In a Different Voice: Lessons from Ledbetter, 34 J.C. & U.L. 555 (2008) (examining pay disparities for women in academia, particularly the issue of salary confidentiality); Charles A. Sullivan, Raising the Dead: The Lilly Ledbetter Fair Pay Act (Seton Hall Publ. Law, Working Paper No. 1418101, 2009), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1418101 (analyzing the impact of the Ledbetter statute on limitations issues in Title VII claims).

6 Glass ceiling "refers to situations where the advancement of a qualified person within the hierarchy of an organization is stopped at a lower level because of some form of discrimination" based on a protected characteristic such as sex, race, ethnicity, disability, or sexual orientation. Glass Ceiling, http://en.wikipedia.org/wiki/Glass_ceiling (last visited Jan. 23, 2010). "It is believed to be an unofficial, invisible barrier that prevents women and minorities from advancing in businesses." Id.

7 See infra Part II.

8 Brief for the Petitioner at 4, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074), 2006 WL 2610990.

9 Id. (internal citations omitted).

10 Id.

11 Id.

12 Id. When Ledbetter was hired, she made the same compensation as her five male comparators. Ledbetter Exhibit No. 201, Area Manager Base Salary Comparison Chart (on file with author). When she retired in 1998, she was earning a base salary of $44,724.00, but her comparators were receiving substantially more, ranging from $55,679.16 to $59,028.00. Id.

13 Magistrate Judge's Report & Recommendation at 25, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

14 Id.

15 Id.

16 Id. The only evidence to which the magistrate cited for this conclusion was Ledbetter's deposition testimony that "she had to learn the exact procedure for building tires when she went to the Radial Light Truck division, because some of those she would be managing had never built tires before." Id.

17 Id. at 26.

18 Id. at 18.

19 Id. at 21.

20 Mem. Op. on Objections to the Magistrate Judge's Reports & Recommendation at 1-2, Ledbetter v. Goodyear Tire & Rubber Co., No. CV99-C-3137-E (N.D. Ala. July 31, 2002).

21 Id. at 3.

22 Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253, at *1-2 (N.D. Ala. Sept. 24, 2003).

23 Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1171 (11th Cir. 2005).

24 Id. at 1171 n.7.

25 Telephone Interview with Jonathan Goldfarb, Counsel for Lilly Ledbetter (July 6, 2009) (interview notes on file with author). The Eleventh Circuit has a record and reputation of being one of the federal circuits "most hostile to employment discrimination plaintiffs." Kevin M. Clermont & Steward J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 Harv. L. & Pol'y Rev. 103, 119 (2009).

26 Compare 42 U.S.C. § 1981a (2006), with 29 U.S.C. § 206(d) (2006).

27 Telephone Interview with Jonathan Goldfarb, supra note 25.

28 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640 (2007), superseded by statute, Lilly Ledbetter Fair **Pay** Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

29 Id. at 640 n.9.

30 Magistrate Judge's Report & Recommendation at 26, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

31 See infra Part III.A.

32 Id.

33 See infra Part III.C.1.

34 Id.

35 Washington v. Gunther, 452 U.S. 161, 166 (1981).

36 See, e.g., Carin Ann Clauss, Comparable Worth--The Theory, Its Legal Foundation, and the Feasibility of Implementation, 20 U. Mich. J.L. Reform 7 (1986); Sacha E. de Lange, Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement, 31 N.Y.U. Rev. L. & Soc. Change 315 (2007); Mayer G. Freed & Daniel D. Polsby, Comparable Worth in the Equal **Pay** Act, 51 U. Chi. L. Rev. 1078 (1984); Gail C. Kaplan, **Pay** Equity or **Pay** Up: The Inevitable Evolution of Comparable Worth into Employer Liability Under Title VII, 21 Loy. L.A. L. Rev. 305 (1987); Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L. Rev. 1728 (1986); Daniel N. Kuperstein, Note, Finding Worth in the New Workplace: The Implications of Comparable Worth's Reemergence in the Global Economy, 24 Hofstra Lab. & Emp. L.J. 363 (2007); Sandra J. Libeson, Comment, Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community, 16 Comp. Lab. L.J. 358 (1995); see also Gunther, 452 U.S. at 166 n.6 (citing comparable work scholarship).

37 See infra Part II.

38 A 2008 survey of Fortune 500 companies found that:
Women held 15.2 percent of board of director positions, compared to 14.8 percent in 2007. **Women** of color held 3.2 percent of all board director positions .... The number of **women** audit and compensation committee chairs continued to lag behind the overall representation of **women** board directors, even as women's share of nominating/governance committee chairs continued to keep pace with their share of all directorships.
Press Release, Catalyst, Catalyst 2008 Census of the Fortune 500 Reveals **Women** Gained Little Ground Advancing to Business Leadership Positions (Dec. 10, 2008), available at http://www.catalyst.org/press-release/141/catalyst-2008-census-of-the-fortune-500-reveals-**women**-gained-little-ground-advancing-to-business-leadership-positions.

39 See 29 U.S.C. § 206(d)(1) (2006).

40 See infra Part III.C.3.b.

41 Bureau of Labor Statistics, U.S. Dep't of Labor, No. 1011, **Women** in the Labor Force: A Databook 1 (2008), available at http://www.bls.gov/cps/wlf-databook-2008.pdf [hereinafter Bureau of Labor Statistics, 2008 Databook].

42 Id. at 30 tbl.11.

43 See Bureau of Labor Statistics, U.S. Dep't of Labor, No. 1002, **Women** in the Labor Force: A Databook 29 tbl.11 (2007), available at http:// www.bls.gov/cps/wlf-databook-2007.pdf (stating that 32.6% of all lawyers and 35.5% of all judges, magistrates, and other judicial workers, were **women** in 2007).

44 Am. Bar Ass'n, First Year and Total J.D. Enrollment by Gender: 1947-2008, available at http://www.abanet.org/legaled/statistics/charts/stats%20-% 206.pdf. **Women** reached a high of 50.4% of all law school enrollment in 1992-1993. Id.

45 Bureau of Labor Statistics, 2008 Databook, supra note 41, at 31 tbl.11.

46 Ass'n of Am. Med. Colls., U.S. Medical School Applicants and Students 1982-83 to 2007-08, at 3 (2008), available at http:// www.aamc.org/data/facts/charts1982to2007.pdf. **Women** comprised just under half (49.6%) of medical school students in 2003-2004. Id.

47 Id.

48 See Nat'l Ctr. for Educ. Statistics, Fast Facts, http:// nces.ed.gov/fastfacts/display.asp?id=72 (last visited Jan. 23, 2010).

49 Id.

50 Bureau of Labor Statistics, 2008 Databook, supra note 41, at 3.

51 See id.

52 Id.

53 Judy Goldberg Dey & Catherine Hill, AAUW Educ. Found., Behind the **PayGap** 2 (2007), available at http:// www.aauw.org/research/upload/behindPayGap.pdf.

54 Id.

55 Id.

56 Martha S. West & John W. Curtis, Am. Ass'n of Univ. Professors, AAUP Faculty Gender Equity Indicators 11-12 (2006), available at http:// www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf. The latest data from the U.S. Department of Labor shows that the ratio of **women**-to-**men** earnings for postsecondary teachers is 84.8%. Bureau of Labor Statistics, U.S. Dep't of Labor, No. 1017, Highlights of Women's Earnings in 2008, at 15 tbl.2 (2009), available at http://www.bls.gov/cps/cpswom2008.pdf [hereinafter Bureau of Labor Statistics, Highlights of Women's Earnings in 2008].

57 West & Curtis, supra note 56, at 11.

58 Nat'l Ass'n of **Women** Lawyers & NAWL Found., Report of the Third Annual National Survey on Retention and Promotion of **Women** in Law Firms 3 (2008), available at http://www.nawl.org/Assets/Documents/2008+Survey.pdf.

59 Id. at 14.

60 Id. at 13.

61 Id. at 13-14.

62 Mary C. Noonan et al., **Pay** Differences Among the Highly Trained: Cohort Differences in the Male-Female Earnings **Gap** in Lawyers' Salaries 3 (Nat'l Poverty Ctr. Working Paper Series, Paper No. 03-1, 2003), available at http://www.npc.umich.edu/publications/working_papers/.

63 Bureau of Labor Statistics, 2008 Databook, supra note 41, at 58 tbl.18.

64 Id. at 57.

65 Id. at 55.

66 Id. at 55-56.

67 Rebel A. Cole & Hamid Mehran, What Do We Know About Executive Compensation at Privately Held Firms? 33 (Fed. Reserve Bank of N.Y., Working Paper No. 314, 2008), available at http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1156089; see also Marianne Bertrand & Kevin F. Hallock, The Gender **Gap** in Top Corporate Jobs, 55 Indus. & Lab. Rel. Rev. 3, 3 (2001) (using ExecuComp data set and finding that high level **women** executives earned about 45% less than **men** and that **women** managed smaller companies and were less likely to be CEO, Chair, or Company President).

68 Eric Frazier, Raises for Female Executives Match Those for **Men**, but **PayGap** Persists, Chron. of Philanthropy, Oct. 2, 2008, at 6.

69 Bureau of Labor Statistics, 2008 Databook, supra note 41, at 59 tbl.18.

70 Id.

71 Id. at 60 tbl.18.

72 Id. at 62 tbl.18.

73 Id. at 61 tbl.18.

74 Id. at 66 tbl.18.

75 Id. at 60 tbl.18.

76 These include postal service clerks (female:male earning ratio of 104.7%), special education teachers (103%), ticket agents and travel clerks (100.5%), and data entry keyers (102%). Id. at 57 tbl.18, 61-62.

77 These include, for example, production occupations (**women** earn 69.1% of men's **pay**), personal care and service occupations (69.6%), and laundry and dry-cleaning workers (68.5%). Id. at 60 tbl.18, 64-65 tbl.18.

78 Id. at 1, 30-31 tbl.11, 34 tbl.11, 36 tbl.11. The data does not necessarily support the notion that male-dominated professions necessarily **pay** more than female-dominated professions. For example, compare the median weekly earnings for female-dominated professions such as social workers ($757), registered nurses ($1,989), secretaries and administrative assistants ($599), and elementary and middle school teachers ($865) to the median weekly earnings in male-dominated professions, such as industrial truck and tractor operators ($519), construction laborers ($514), carpenters ($615), electricians ($805), and installation, maintenance, and repair occupations ($749). Id. at 57-58 tbl.18, 61-63 tbl.18, 67 tbl.18.

79 Catherine Rampell, As Layoffs Surge, **Women** May Pass **Men** in Job Force, N.Y. Times, Feb. 6, 2009, at A1 (reporting that 82% of job losses during the recession have befallen **men**). The Bureau of Labor Statistics reports that three-quarters of the job losses from the beginning of the recession have been in "manufacturing, professional and business services, and construction." Bureau of Labor Statistics, U.S. Dep't of Labor, Current Employment Statistics Highlights: June 2009, at 6 (2009), available at http://www.bls.gov/ces/highlights062009.pdf [hereinafter Bureau of Labor Statistics, June 2009 Employment Statistics].

80 Bureau of Labor Statistics, June 2009 Employment Statistics, supra note 79, at 16; Bureau of Labor Statistics, 2008 Datebook, supra note 41, at 2.

81 The Department of Labor reports that "many jobs that were nontraditional for **women** in the 1988 were no longer nontraditional for **women** in 2008. Some of these occupations were purchasing managers; chemists; physicians; lawyers; athletes; postal service mail carriers; bailiffs, correctional officers, and jailers; and butchers and other meat, poultry, and fish processing workers." Women's Bureau, U.S. Dep't of Labor, Quick Facts on Nontraditional Occupations for **Women** (Apr. 2009), http://www.dol.gov/wb/factsheets/nontra2008.htm.

82 See, e.g., Allison Linn, Changing Economy Has Many Changing Jobs, MSNBC.com, Mar. 24, 2009, http://www.msnbc.msn.com/id/29640225/ns/business-stocks_and_economy/ (reporting that one **man** switched from a well-**paying** factory job to teaching, and another switched from banking to nursing).

83 Bureau of Labor Statistics, Highlights of Women's Earnings in 2008, supra note 56, at 17 tbl.2, 23 tbl.2.

84 See Equal **Pay** for Equal Work: New Evidence on the Persistence of the Gender **PayGap**: Hearing Before the S. J. Econ. Comm., 111th Cong. 3-4 (2009) (statement of Randy Albelda, Professor of Economics and Senior Research Associate, Center for Social Policy, University of Massachusetts) (noting that many economists have studied the gender wage **gap** and "[n]o matter how sophisticated and complex their models, they always find that some portion of the wage **gap** is unexplained by the sets of variables for which they can measure differences between men's and women's education levels, work experiences, ages, occupation or

industry in which they work, or region of the county they reside"); Francine D. Blau & Lawrence M. Kahn, The Gender **PayGap**, Economists' Voice, June 2007, at 106 (showing that, after controlling for education, experience, occupation and industry, **women** working full-time earned 83.5% of what **men** did, as compared to 81.6% without any adjustments); Joni Hersch, Sex Discrimination in the Labor Market 1, 77 (2006) (concluding that sex discrimination remains a possible explanation of the unexplained gender wage **gap**). As Professor Hersch describes:

> **Women** earn less than **men**, and no matter how extensively regressions control for market characteristics, working conditions, individual characteristics, children, housework time, and observed productivity, an unexplained gender **paygap** remains for all but the most inexperienced of workers. If the unexplained **pay** disparity sometimes favored **women** and sometimes favored **men**, there would be no reason for concern. Unexplained residuals are a fact of life in regression analysis. But systematically and without exception finding that **women** earn less than **men** raises some questions.

Id. at 77.

85 Dey & Hill, supra note 53, at 2-3.

86 Posting of Catherine Rampell to N.Y. Times Economix Blog, **Women** Earn Less Than **Men**, Especially at the Top, http://economix.blogs.nytimes, com/2009/11/16/the-gender-**pay**-**gap**-persists-especially-for-the-rich/ (Nov. 16, 2999, 17:25 EST).

87 Id.

88 Bureau of Nat'l Affairs, Equal **Pay** for Equal Work: Federal Equal **Pay** Law of 1963 3 (1963).

89 Id.

90 Id.

91 Id.

92 Id.

93 American **Women**: The Report of the President's Commission on the Status of **Women** and Other Publications of the Commission 45-46 (Margaret Mead & Frances Balgley Kaplan eds., 1965) (reporting that **women** constituted 32% of all workers in 1960 and that many studies substantiated "[t]he existence of differentials in **pay** between **men** and **women** for the same kind of work").

94 109 Cong. Rec. 9199 (1963) (statement of Rep. Green). He continued: "[A] job for an order clerk in a machine manufacturing industry would **pay** a male worker $100 a week, but a **woman** worker only $56 to $60 a week." Id.

95 Id.

96 Id. at 9212 (statement of Rep. Donohue).

97 See id. at 9204 (statement of Rep. Pepper) (noting that he had introduced equal **pay** bills since 1945); id. at 9202 (statement of Rep. Kelly) (noting that she had been introducing equal **pay** legislation since 1953).

98 Carl E. Van Horn & Herbert A. Schaffner, Work in America: An Encyclopedia of History, Policy and Society 187-88 (2003).

99 29 U.S.C. §§ 201-19 (2006). The FLSA sets a federal minimum wage, id. § 206, requires that employers pay 1.5 times an employee's regular hourly wage for all hours worked over forty hours, id. § 207, and prohibits child labor, id. § 212.

100 109 Cong. Rec. 8391, 9193 (1963) (statement of Rep. St. George).

101 Id.

102 29 U.S.C. § 216(b) (2006). Under the FLSA, typical class actions are not permitted. Id. Each individual plaintiff must file a consent form to "opt-in" to the action. Id.

103 Id.

104 Id.; cf. 42 U.S.C. § 2000e-5 (2006) (requiring that plaintiffs file a charge of discrimination with the EEOC prior to filing Title VII claims in court).

105 See the remarks of Representative St. George, 109 Cong. Rec. 8391, 9193 (1963) ("[I]n the meantime, we are going to have to have these bills which will help, which will do a little, which will get a foot in the door ...."), and Representative Sullivan, id. at 9205 ("It does not go far enough, in my opinion, but, as far as it goes, it is a good bill.").

106 Id. at 9193 (statement of Rep. St. George).

107 Id. at 9199 (statement of Rep. Dwyer).

108 Id. at 9200 (statement of Rep. Dent.).

109 Id.

110 The plaintiff and her comparator(s) must work in the same "distinct physical place of business," but in "unusual circumstances" they may work in separate locations if the employer has a centralized administrative process for hiring and making compensation decisions. 29 C.F.R. § 1620.9 (2009).

111 The pronoun "she" is used throughout this Article, but male employees may bring claims under the EPA for pay disparities with female employees, and many have done so. See, for example, Stanziale v. Jargowsky, in which a male plaintiff prevailed over summary judgment where the employer failed to prove that different experience caused the wage disparity. 200 F.3d 101 (3d Cir. 2000).

112 29 U.S.C. § 206(d)(1) (2006).

113 Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992).

114 Id. at 1533 n.18; see also Mulhall v. Advance Sec., Inc., 19 F.3d 586, 594 n.18 (11th Cir. 1994) ("[I]ndividual employee qualifications are relevant only to defendant's affirmative defenses.").

115 29 U.S.C. § 206(d)(1) (2006).

116 Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1310-11 (10th Cir. 2006).

117 Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

118 29 U.S.C. § 216(b) (2006).

119 Id.

120 Id.

121 The amendment was passed as part of an omnibus bill aimed at postsecondary education. See Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 213(a)(1) (2006)).

122 Federal courts of appeal cases were used for the empirical analysis because they establish the standard of review that lower courts and arbitrators must follow. In addition to the empirical review of federal circuit cases, the conclusions in this Article are based on research of federal district court and arbitration cases that involved plaintiffs in executive or supervisory jobs. Many of those district court and arbitration cases are also discussed throughout the Article.

123 Some FLSA cases, for example, cite to EPA cases for remedial issues, such as limitations or liquidated damages.

124 In Washington v. Gunther, the Court held that the Bennett Amendment made the EPA's defenses applicable to Title VII, but not its prima facie standard. 452 U.S. 161, 171 (1981). Thus, the Title VII cases included are typically prior to Gunther. Some courts, however, still confuse EPA and Title VII standards. See, e.g., Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989).

125 For example, Shultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969); Hodgson v. American Bank of Commerce, 447 F.2d 416 (5th Cir. 1971); and Hodgson v. First Victoria National Bank, 446 F.2d 47 (5th Cir. 1971), were combined because they were the same case. The Supreme Court's decision in Corning Glass Works v. Brennan was used rather than the two lower court cases it reviewed, Brennan v. Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973) (overruled), and Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973) (affirmed).

126 The categories tracked were as follows: circuit, year, plaintiff's position, executive type, job category, type of job, employer type, whether employer was private/public, stage of disposition (summary judgment or trial), disposition (actual court action), whether employee or employer won on appeal, type of defense asserted, type of comparator, whether the prima facie standard was satisfied,

and type of counsel (DOL, EEOC, or private).

127 417 U.S. 188 (1974).

128 See infra Part III.C.3.b for an explanation of why the EPA has a more appropriate burden-shifting framework for **pay** discrimination than Title VII.

129 "Non-supervisory workers" included those who did not have any supervisory responsibility. All cases are listed in Appendix A.

130 "Mid-level supervisors and managers" included those who had supervisory responsibility but did not work at the highest management levels of the organization. See Appendix B.

131 "Professors" included all levels of instructors at colleges and universities. See Appendix C.

132 "Professionals and executives" included individuals who hold professional degrees or licenses and those who worked at top leadership or management positions and had policy-making responsibility. See Appendix D. This category corresponds to those executive, administrative, and professional employees who are exempt from the overtime requirements of the FLSA, see 29 C.F.R. § 541.0, and who were exempt from the EPA until 1972.

133 Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994).

134 See Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985) ("Given the fact intensive nature of the inquiry, summary judgment will often be inappropriate [in EPA cases].").

135 Cases were excluded if the summary judgment issue focused on other legal issues, such as the immunity of a state employer or the issue of whether the plaintiff was an "employee" of the defendant.

136 See 29 U.S.C. § 216(b) (2006).

137 Reorganization Plan No. 1 of 1978, 45 Fed. Reg. 19,807 (May 9, 1978) (to be codified in scattered sections of 29 U.S.C.).

138 See, e.g., EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243 (8th Cir. 1981); EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095 (4th Cir. 1980).

139 In FY 1997, the EEOC received 1,134 EPA complaints. EEOC, Equal **Pay** Act Charges, FY 1997-FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/epa.html. In FY 2007, the EEOC received 818 complaints and it moved up slightly to 954 complaints in FY 2008. Id.

140 EEOC, Charge Statistics: FY 1997 Through FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/charges.html.

141 Id.

142 EEOC, EEOC Litigation Statistics: FY 1997 Through FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/litigation.html.

143 Plaintiffs represented by an agency won thirty-three times and lost twelve times. Private plaintiffs won sixty-seven times, and lost eighty-five times.

144 See Kathryn Moss et al., Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission, 50 Kan. L. Rev. 1, 6 (2001).

145 Some have recommended that enforcement of the EPA be returned to the DOL because it has greater investigative resources and is taken more seriously by employers than the EEOC. Kimberly J. Houghton, The Equal **Pay** Act of 1963: Where Did We Go Wrong?, 15 Lab. Law. 155, 174-75 (1999) (recommending that enforcement of EPA be returned to the DOL because it has more investigative resources and its power to conduct unannounced "sweeps" in targeted industries is feared by employers).

146 109 Cong. Rec. 8686 (1963) (statement of Rep. Goodell).

147 Id. at 9219 (statement of Sen. McNamara).

148 Thompson v. Sawyer, 678 F.2d 257, 271 (D.C. Cir. 1982).

149 Id.

150 Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), aff'd on liability, 749 F.2d 1501 (11th Cir. 1985).

151 See infra Part III.C.1.

152 29 C.F.R. § 1620.13(a) (2009).

153 Id. § 1620.14(a).

154 Corning Glass Works v. Brennan, 417 U.S. 188, 199 (1974).

155 Id. Such job evaluation plans are also the foundation of the comparable worth concept.

156 Corning Glass Works, 417 U.S. at 200.

157 29 C.F.R. § 1620.18(a) (2009).

158 Id.

159 Id. § 1620.9.

160 See, e.g., id. § 1620.14(c) (referring to "jobs on different machines or equipment"); id. § 1620.16(b) (using as examples checkers in grocery store and assembly line to explain "effort"); id. § 1620.17(b)(2) (using as an example sales clerks); id. § 1620.17(b)(3) (using as an example an employee "turning out the lights in his or her department at the end of the business day").

161 Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace 165 (2004).

162 Id.

163 Id. at 267-68.

164 Id.

165 These issues are examined in Part IV.

166 An insightful Note reviews the history of the white-collar exemptions under the EPA and FLSA and shows how these conceptions about New Deal legislation continue to influence courts' interpretation of the EPA. See Juliene James, Note, The Equal **Pay** Act in the Courts: A De Facto White-Collar Exemption, 79 N.Y.U. L. Rev. 1873 (2004).

167 Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771-72 (7th Cir. 2007).

168 Georgen-Saad v. Tex. Mut. Ins. Co., 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002). This case was not appealed.

169 Ratts v. Bus. Sys., Inc., 686 F. Supp. 546, 550 (D.S.C. 1987) (holding the female vice president of marketing and communications could not be compared to four other male vice presidents, all of whom earned substantially more than plaintiff); see also Merillat v. Metal Spinners, Inc., 470 F.3d 685 (7th Cir. 2006) (holding a senior buyer was not equal to male managerial employee); Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999) (holding a female department manager was not equal to male department managers, who earned on average $6,000 to $8,000 more); Stopka v. Alliance of Am. Insurers, 141 F.3d 681 (7th Cir. 1998) (holding a female vice president was not equal to male vice presidents); Sprague v. Thorn Ams., Inc., 129 F.3d 1355 (10th Cir. 1997) (holding that assistant manager jobs were comparable, but not equal, and that "equal work" should not be construed broadly); Orahood v. Bd. of Tr., 645 F.2d 651 (8th Cir. 1981) (holding a female assistant director of institutional studies did not establish equal work with a male assistant controller at the university); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. 1980) (affirming a finding that a female insurance marketing manager did not perform equal work with a male sales account executive), cert. denied, 449 U.S. 1042 (1980); Sensibello v. Globe Sec. Sys. Co., No. 81-4052, 1984 WL 1118 (E.D. Pa. Jan. 10, 1984) (holding female branch/regional manager of security company did not establish equal work with other managers); Serpe v. Four Phase Sys., Inc., 33 Fair Empl. Prac. Cas. 169 (N.D. Cal. 1982) (holding a female international marketing specialist did not establish equal work with three male international marketing employees, or with two account managers), aff'd and rev'd in part on other grounds, 718 F.2d 935 (9th Cir. 1983); Hauck v. Xerox Corp., 493 F. Supp. 1340 (E.D. Pa. 1980) (holding female sales representative did not show equal work with male sales representatives), aff'd, 649 F.2d 859 (3d Cir. 1981).

170 390 F.3d 328, 330 (4th Cir. 2004).

171 Id.

172 Brief of Appellant at 3, 20, Wheatley, 390 F.3d 328 (No. 03-2406), 2003 WL 25486838.

173 Id. at 5.

174 Id.

175 Id. at 8.

176 Id. at 10.

177 Id.

178 Id.

179 Wheatley, 390 F.3d at 332.

180 Id. at 333.

181 Id.

182 Id. at 334.

183 EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1245 (8th Cir. 1981) (citing 29 C.F.R. §§ 800.114-.132).

184 Id.

185 29 C.F.R. § 1620.17(a) (2008) (emphasis added).

186 29 C.F.R. § 1620.16(a) (2008) (emphasis added).

187 Id. § 1620.15(a).

188 See, e.g., Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 578-79 (8th Cir. 2006) (holding Vice Presidents who did not perform the same job both had a high "degree of accountability" in preparing different auditing reports with little supervision, and so the level of responsibility was the same); Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592-93 (11th Cir. 1994) (finding that executives had equal responsibility because both reported directly to the company president, "and both had ultimate responsibility as corporate heads for their divisions"); Denman v. Youngstown State Univ., 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (holding that plaintiff General Counsel and the rest of a university president's cabinet performed substantially equal work because they "were in the same job grade and job family" and each was "responsible for supervising and overseeing a particular [albeit different] area of the university"); Rinaldi v. World Book, Inc., No. 00 C 3573, 2001 WL 477145, at *9 (N.D. Ill. May 3, 2001) (finding that Vice Presidents in different departments were equal because "all were Vice-Presidents, and all three individuals had administrative responsibilities" and "thus, a common core of tasks is established").

189 19 F.3d 586, 592-93 (11th Cir. 1994).

190 Id. at 594.

191 Id. at 595.

192 See, e.g., Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 578 (8th Cir. 2006) ("The inquiry as to whether two jobs are equal is a factual one: ... effort refers to the physical or mental exertion necessary to the performance of a job."); Marshall v. Bldg. Maint. Corp., 587 F.2d 567 (2d Cir. 1978) (holding male "heavy duty" cleaners performed more strenuous work than female "light duty" cleaners).

193 Simpson, 441 F.3d at 578-79; see also Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592-93 (11th Cir. 1994) (finding that the employer failed to show that vice president positions were distinguishable in terms of required effort).

194 Simpson, 441 F.3d at 578.

195 Id.

196 See, e.g., Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1033-36 (11th Cir. 1985) (holding that teaching different subjects as well as teaching physical education, but with different coaching duties, were equal positions); EEOC v. Shelby County, 707 F. Supp. 969, 983 (W.D. Tenn. 1988) (holding that a cashier and exhibit custodian were comparable despite differences in duties because "there is little difference between the degree of responsibility required"); Usery v. Johnson, 436 F. Supp. 35, 38-42 (D.N.D. 1977) (holding sales clerks in different departments equal); Brennan v. Sears, Roebuck & Co., 410 F. Supp. 84, 95 (D. Iowa 1976) (holding that division managers performed equal work).

197 749 F.2d 1501 (11th Cir. 1985).

198 Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400, at *5 (N.D. Ala. Dec. 7, 1983), aff'd, 749 F.2d 1501 (11th Cir. 1985).

199 Id. at *8.

200 See id.

201 Id.

202 Id.

203 Id. at *9.

204 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008).

205 No. 00-C-3573, 2001 WL 477145, at *9 (N.D. Ill. May 3, 2001).

206 441 F.3d 572, 578 (8th Cir. 2006).

207 EEOC, Notice Number 915.002 (Oct. 29, 1997), available at http:// www.eeoc.gov/policy/docs/coaches.html.

208 Id. at II(A)(2)(b).

209 The EEOC should also modernize the EPA's regulations to include examples of professional and supervisory workers. The regulations are pervaded by examples of manufacturing or hourly wage jobs but do not contain examples of employees working in professional or managerial positions. See, e.g., 29 C.F.R. § 1620.14(c) (2009) (referring to "jobs on different machines or equipment"); id. § 1620.16(b) (using examples of checkers in grocery stores and assembly line workers to explain "effort"); id. § 1620.17(b)(2) (using as an example sales clerks); id. § 1620.17(b)(3) (using as an example an employee "turning out the lights in his or her department at the end of the business day").

210 Pursuant to 29 C.F.R. § 1620.20 (2009):
Additional duties may not be a defense to the payment of higher wages to one sex where the higher **pay** is not related to the extra duties. The Commission will scrutinize such a defense to determine whether it is bona fide. For example, an employer cannot successfully assert an extra duties defense where:
(a) Employees of the higher **paid** sex receive the higher **pay** without doing the extra work;
(b) Members of the lower **paid** sex also perform extra duties requiring equal skill, effort, and responsibility;
(c) The proffered extra duties do not in fact exist;
(d) The extra task consumes a minimal amount of time and is of peripheral importance; or
(e) Third persons (i.e., individuals who are not in the two groups of employees being compared) who do the extra task as their primary job are **paid** less than the members of the higher **paid** sex for whom there is an attempt to justify the **pay** differential.

211 For example, in Brewster v. Barnes, the court held that the different tasks performed by male officers did not diminish the "common core of tasks" performed by all correctional officers: "Like the male corrections officers, [plaintiff] spent one hundred percent of her time fulfilling the duties of a corrections officer." 788 F.2d 985, 991 (4th Cir. 1986). In Hodgson v. Fairmont Supply Co., the court held that the sixteen extra duties performed by the male clerks did not justify a higher salary because they had the same common core of duties as the female clerks, and the extra duties were infrequently performed, illusory, or required essentially the same skills and effort as jobs performed by **women**. 454 F.2d 490 (4th Cir. 1972).

212 See, e.g., Soto v. Adams Elevator Equip. Co., 941 F.2d 543 (7th Cir. 1991) ("Differences in responsibility must be substantial to be significant in the EPA context.").

213 Schultz v. Am. Can Co.-Dixie Prods, 424 F.2d 356, 361 (8th Cir. 1970); see also Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285-86 (4th Cir. 1974) (holding that higher **pay** was not related to extra duties when some **men** received higher **pay** without doing the extra work), cert. denied, 420 U.S. 972 (1975).

214 See, e.g., Sims-Fingers v. Indianapolis, 493 F.3d 768 (7th Cir. 2007); Wheatley v. Wicomico County, 390 F.3d 328 (4th Cir. 2004) (holding directors in different departments could not be compared); Magistrate Judge's Report & Recommendation at 25, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

215 See, e.g., Sims-Fingers, 493 F.3d at 772; Wheatley, 390 F.3d at 333.

216 Vehar v. Cole Nat'l Group, Inc., 251 F. App'x 993, 1001 (6th Cir. 2007) (rejecting the employer's argument that differing education and experience levels between plaintiff and her comparator explained the wage differential).

217 See supra Part III.A.

218 Md. Code Ann., Lab. & Empl. § 3-304(a) (LexisNexis 2008).

219 Ark. Code Ann. § 11-4-610(a) (2002).

220 Mass. Gen. Laws Ann. ch. 149, § 105A (West 2008).

221 Idaho Code Ann. § 44-1702(1) (2003).

222 Me. Rev. Stat. Ann. tit. 26, § 628 (2007). See generally Elizabeth J. Wyman, The Unenforced Promise of Equal **Pay** Acts: A National Problem and Possible Solution from Maine, 55 Me. L. Rev. 23 (2003).

223 N.D. Cent. Code § 34-06.1-03 (2004).

224 Okla. Stat. Ann. tit. 40, § 198.1 (West 1999).

225 S.D. Codified Laws § 60-12-15 (2004).

226 W. Va. Code Ann. § 21-5B-3(1)(a) (LexisNexis 2008).

227 Or. Rev. Stat. § 652.220(1)(a) (2007).

228 390 F.3d 328, 332-34 (4th Cir. 2004); see supra notes 176-81 and accompanying text.

229 706 P.2d 956, 959-60 (Or. App. 1985).

230 Id. at 959.

231 The court noted that the "similarly situated" standard is stricter than a "comparable work" standard. Id. Either standard, however, would be more workable and effective than the EPA's "equal work" standard.

232 Id. at 959-60.

233 Many executive employees have contracts that contain mandatory arbitration provisions. This may be another reason that the number of federal appellate cases involving senior executives is so small.

234 Ventura v. Bill Me Later, Inc., Am. Arbitration Ass'n, Case No. 16 166 00549 07 (Interim Award) (on file with author). The author was claimant's counsel.

235 Id. at 2.

236 Id. at 4-6.

237 Id. at 17.

238 Id. at 27-32.

239 Fair **Pay** Act of 2009, S. 904, 111th Cong. (2009). The Act also expands protection based on race and national origin, but discussion of those topics is beyond the scope of this Article.

240 Deborah L. Rhode, Occupational Inequality, 1988 Duke L.J. 1207, 1234-40 (describing hurdles in implementing comparable worth in the courts and opportunities presented by the standard in political and organizing strategies).

241 See, e.g., Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007) (citing courts that have rejected comparable worth); Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) (rejecting comparable worth); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (same).

242 See supra note 36 (citing comparable worth articles that describe the job evaluation process).

243 If a company has conducted a job evaluation study and the company intentionally **pays** the **women** less than the study recommends because of their sex, while **paying** the **men** more, then a Title VII claim would be available. See Clauss, supra note 36, at 12. Such cases were not uncommon in the early days of Title VII. Id.

244 See Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences in the burdens of proof for Title VII and the EPA).

245 Parada v. Great Plains Int'l of Sioux City, Inc., 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007).

246 Tom Krattenmaker, Compensation: What's the Big Secret?, Harv. Mgmt. Comm. Letter, Oct. 2002, at 3.

247 See Linda Babcock & Sara Laschever, **Women** Don't Ask: The High Cost of Avoiding Negotiation--and Positive Strategies for Change 98-100 (2007) (reviewing studies that show that "people's prejudices can powerfully influence the ways in which they respond to **men** and **women** without their realizing it"); Claudia Goldin & Cecilia Rowe, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 716 (2000) (reporting that when auditions for an orchestra were conducted with the performers behind a screen, **women** were substantially more likely to advance out of the preliminary selection round); Rhode, supra note 240, at 1219-20 (discussing studies).

248 See, e.g., Barbara S. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 Yale L.J. 2009 (1995); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995); David Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899 (1993); Amy L. Wax, Discrimination as Accident, 74 Ind. L.J. 1129 (1999).

249 Babcock & Laschever, supra note 247, at 119-20 ("[W]omen fare better when an evaluation process is more structured, includes clearly understood benchmarks, and is less open to subjective judgments." (citing S. Fiske & S.E. Taylor, Social Cognition (1984); M.E. Heilman, The Impact of Situational Factors on Personnel Decisions Concerning **Women**: Varying the Sex Composition of the Applicant Pool, 26 Org. Behav. & Human Performance 386 (1980))).

250 In some cases, there is evidence of gender-based comments or other discriminatory actions that can help to prove intent in Title VII cases. For example, Lilly Ledbetter testified that her supervisor "threatened to give her poor evaluations if she did not succumb to his sexual advances." Brief for the Petitioner, supra note 8, at 5-6. When she questioned him about poor evaluations, he responded that it was "a lot easier to downgrade you. * * * You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." Id. at 6; see also Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 340 (4th Cir. 1994) (employer told plaintiff to be an engineer or a "mama"). For higher level jobs, however, such "smoking gun" evidence is rare.

251 See, e.g., Fallon v. Illinois, 882 F.2d 1206, 1217 (7th Cir. 1989) ("It is possible that a plaintiff could fail to meet its burden of proving a Title VII violation, and at the same time the employer could fail to carry its burden of proving an affirmative defense under the Equal **Pay** Act."); Brewster v. Barnes, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for **pay** discrimination under EPA, but not under Title VII).

252 Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 729 (10th Cir. 1984).

253 Hodgson v. Am. Bank of Commerce, 447 F.2d 416, 420 (5th Cir. 1971).

254 See, e.g., Peltier v. City of Fargo, 533 F.2d 374, 378-79 (8th Cir. 1976) (finding a 50% discrepancy in salary between male and female car markers); Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983) (finding average disparity between male and female executives "so disparate that it cannot be attributed to anything but sexual

discrimination or to an indifference to the requirement of equal treatment of the sexes in employment"), aff'd, 749 F.2d 1501 (11th Cir. 1985).

255 See, e.g., Hein v. Or. Coll. of Educ., 718 F.2d 910, 916 (9th Cir. 1983) (holding that the proper test in a professional setting is whether plaintiff is receiving lower wages than the average wage of all employees of the opposite sex performing substantially equal work).

256 See, e.g., Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007) ("[I]n determining whether equal **pay** is being **paid** for equal work, the size of the **pay** differential, though not determinative, is highly relevant.... The smaller the differential, the more likely it is to be justified by a small difference in the work. The **pay** differential between the plaintiff and [her comparator] is less than 2 percent, and we do not see how anyone could say that her work and his are so far equal that it should be inferred that he is overpaid relative to her."); Brousard-Norcross v. Augustana Col. Ass'n, 935 F.2d 974, 979 (8th Cir. 1991) ("Where the plaintiff's salary is marginally smaller than one comparator and marginally larger than another comparator, in a setting such as this where legitimate factors upon which to base salary differentials (e.g., scholarly work and teaching performance) can result in finely calibrated evaluations, a submissible Equal **Pay** Act claim has not been established."); Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947, 971 (N.D. Iowa 2001) ("To find that the circumstances before the Court--a five-cent differential by two male employees over a period of two years--violates the Equal **Pay** Act would circumscribe employer personnel decisions beyond that contemplated by the Act.").

257 See 29 C.F.R. § 785.47 (2009) ("In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.").

258 Babcock & Laschever, supra note 247, at 6 (explaining how a $5,000 difference in a starting salary can add up to a half-million dollar disadvantage by retirement, assuming each worker received a 3% annual salary increase).

259 Analyzing case narratives is important because what courts say "influences more broadly how people not involved in the immediate legal contest understand that reality." Vicki Schultz, Telling Stories About **Women** and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1757 n.23 (1990). See generally Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411 (1989).

260 See, e.g., Wernsing v. Dep't of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) ("The Equal **Pay** Act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent. To the extent other circuits believe that employers must disregard wages set in markets, they have adopted a variant of the comparable-worth doctrine--the view that wages must be based on 'merit' rather than forces of supply and demand.").

261 Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007).

262 Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

263 Deborah L. Rhode, Perspectives on Professional **Women**, 40 Stan. L. Rev. 1163, 1193-94 (1988). See generally Tracy Anbinder Baron, Comment, Keeping **Women** Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs, 143 U. Pa. L. Rev. 267 (1994).

264 390 F.3d 328, 334 (4th Cir. 2004) (citations omitted).

265 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002).

266 Id. n.14.

267 Sweeney v. Bd. of Trs., 569 F.2d 169, 176 (1st Cir. 1978).

268 Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974) ("The whole purpose of the Act was to require that these depressed wages [of **women**] be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex 'constitutes an unfair method of competition.'"); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) ("[U]se of the 'market force' theory, i.e. a **woman** will work for less than a **man**, is not a valid consideration under the Act."); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 286 (4th Cir. 1974) (finding "the availability of **women** at lower wages than **men**" to be "precisely the criterion for setting wages that the Act prohibits"); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that there is "no excuse" for hiring female workers at a lower rate "simply because the market will bear it"); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (finding that an employer's greater bargaining power with **women** "is not the kind of factor [other than sex] Congress had in mind" in enacting the EPA).

269 See Siler-Khodr v. Univ. of Tex. Health Sci. Ctr., 261 F.3d 542, 547 (5th Cir. 2001) (stating that the market forces defense simply perpetuates discrimination).

270 Martha Chamallas, The Market Excuse, 68 U. Chi. L. Rev. 579, 596 (2001) (reviewing Robert L. Nelson & William P. Bridges, Legalizing Gender Inequality: Courts, Markets, and Unequal **Pay** for **Women** in America (1999)).

271 922 F. Supp. 985, 993-94 (D.N.J. 1996).

272 Id. at 993.

273 565 F.3d 1071, 1073 (8th Cir. 2009).

274 Id.

275 See, e.g., Surveys, http:// www.salary.com/compensation/surveys/index.asp (last visited Jan. 28, 2010).

276 See id.

277 Id.

278 Id.

279 Telephone Interview with Alan W. Smith, Jr., Former CEO, Watson Wyatt Compensation Consulting (July 9, 2009) (interview notes on file with author); see Nelson & Bridges, supra note 270, at 194-96 (describing how a salary survey itself may be shaped by organizational politics and concluding that the market is "socially constructed" by the employer).

280 Telephone Interview with Alan W. Smith, supra note 279.

281 See Nelson & Bridges, supra note 270 (showing how market data on which employers relied in four **pay** discrimination cases actually revealed a pattern of discrimination against **women** employees).

282 Chamallas, supra note 270, at 580.

283 For example, the plaintiffs were **paid** below the mandated salaries for their positions in the company salary plan. See Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting); Wheatley v. Wicomico County, 390 F.3d 328, 331 (4th Cir. 2004); Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 686 n.5 (7th Cir. 1998). In the arbitration case discussed previously, the market review conducted by the employer's expert compensation consultant showed that the claimant was **paid** below market range for her position, but that certain male executive peers were **paid** above the market range for their positions. See supra notes 234-39 and accompanying text.

284 493 F.3d 768. 770-71 (7th Cir. 2007).

285 Id. at 771.

286 29 C.F.R. § 1620.20 (2009).

287 29 U.S.C. § 206(d)(1) (2006).

288 Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1036 (11th Cir. 1985) (rejecting the employer's defense, which was based on "personal, and in many cases, ill-informed judgments of what an individual or his or her expertise is worth" because "[m]erely claiming that teachers of certain subjects or with certain qualifications are worth more does not explain away discrepancies absent an explanation of how those factors actually resulted in an individual employee earning more than another") (quoting the trial court's opinion)). EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980) (explaining that a merit system "must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria," and if not in writing, the system "must also fulfill two additional requirements: the employees must be aware of it; and it must not be based upon sex").

289 Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970); see also Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) ("Subjective evaluations of the employer cannot stand alone as a basis for salary discrimination based on sex.").

290 888 F.2d 322, 324 (4th Cir. 1989).

291 Id. at 325.

292 Id.

293 Id. at 325-26.

294 Id. at 326.

295 Id.

296 Id.

297 Id.; see also EEOC v. White & Sons Enters., 881 F.2d 1006, 1009-10 (11th Cir. 1989) (holding that employer's factor-other-than-sex defense failed because the company had no written or objective system of setting wages).

298 See Steger v. Gen. Elec. Co., 318 F.3d 1066, 1078-79 (11th Cir. 2003) ("Because the evidence showed that the salary retention plan was justified by 'special exigent circumstances connected with the business,' and because there was no evidence which rebutted GE's explanation, the district court did not err in submitting the matter to the jury or in denying Steger's motion for judgment as a matter of law." (quoting Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995)); Belfi v. Prendergast, 191 F.3d 129, 136 (2d Cir. 1999) ("To successfully establish the [factor-other-than-sex] defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential."); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) ("[A]n employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense."); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1992) ("[The factor-other-than-sex] defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988) ("[The factor-other-than-sex] exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business."); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) ("The Equal **Pay** Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.").

299 EEOC, Directives Transmittal No. 915.003, § 10.IV.F.2. & nn.65-66 (Dec. 5, 2000), available at http://www.eeoc.gov/policy/docs/compensation.htmlN_65_ ("An employer ... must show that the factor is related to job requirements or otherwise is beneficial to the employer's business [and] the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.").

300 For articles regarding the "factor-other-than-sex" defense, see Martha Chamallas, **Women** and Part-Time Work: The Case for **Pay** Equity and Equal Access, 64 N.C. L. Rev. 709, 739-49 (1986) (discussing the Bennett Amendment and the fourth affirmative defense); see also Jeanne M. Hamburg, Note, When Prior **Pay** Isn't Equal **Pay**: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal **Pay** Act, 89 Colum. L. Rev. 1085 (1989); Ana M. Perez-Arrieta, Note, Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context, 31 J.C. & U.L. 393 (2005).

301 Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992), cert. denied, 506 U.S. 965 (1992).

302 See, e.g., Belfi v. Prendergast, 191 F.3d 129 (2d Cir. 1999) (clerical work); Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995) (deputy

sheriff); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992) (custodian); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982) (sales agent).

303 28 F.3d 1446 (7th Cir. 1994).

304 Id. at 1462.

305 See id.; Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003).

306 See Taylor, 321 F.3d at 719 (citing Covington v. S. Ill. Univ., 816 F.2d 317, 322-23 (7th Cir. 1987)).

307 Wernsing v. Dep't of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005) (citations omitted).

308 544 U.S. 228. 240 (2005).

309 Id. at 239 n.11 (emphasis added). This portion of the opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

310 Management attorneys have noted the language in Smith. See William E. Doyle, Jr., Implications of Smith v. City of Jackson on Equal **Pay** Act Claims and Sex-Based **Pay** Discrimination Claims Under Title VII, 21 Lab. Law. 183 (2005); see also Respondent's Post-Hearing Brief, Ventura v. Bill Me Later, Inc., Am. Arbitration Ass'n, Case No. 16 166 00549 07 (Interim Award) (on file with author) (arguing that Smith means a factor other than sex does not need to be reasonable or business related).

311 See Washington v. Gunther, 452 U.S. 161, 168-71 (1981) (holding that the EPA's affirmative defenses apply to Title VII claims for compensation discrimination).

312 For example, the Maryland EPA does not include a catch-all defense. The affirmative defenses are limited to:
(1) a seniority system that does not discriminate on the basis of sex; (2) a merit increase system that does not discriminate on the basis of sex; (3) jobs that require different abilities or skills; (4) jobs that require the regular performance of different duties or services; or (5) work that is performed on different shifts or at different times of day.
Md. Code Ann., Lab. & Empl. § 3-304(b) (LexisNexis 2008).

313 See Paycheck Fairness Act, H.R. 12, 111th Cong. § 3 (2009). The bill provides:
The bona fide factor defense ... shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.
Id.

314 Parada v. Great Plains Int'l of Sioux City, Inc., 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007) (citations omitted).

315 See, for example, Brock v. Georgia Southwestern College, 765 F.2d 1026, 1037 (11th Cir. 1985), in which a college claimed that

male teachers were "worth more" and had superior qualities, and Ratts v. Business Systems, Inc., 686 F. Supp. 546, 551 (D.S.C. 1987), in which a CEO testified that the plaintiff occupied the "lowest level of vice president positions."

316 See, e.g., Chance v. Rice Univ., 984 F.2d 151, 153 n.10 (5th Cir. 1993) (plaintiff professor's credentials were "not as impressive" as those of her department colleagues); Am. Arbitration Ass'n, Arbitration Award (2004) (Klein, Arb.), 2004 AAA Employment LEXIS 182 (finding that claimant had "very significant achievements" but higher **pay** was justified because of the male comparator's "unusually high level of accomplishment, experience, and reputation").

317 See, e.g., Stopka v. Alliance of Am. Insurers, 141 F.3d 681 (7th Cir. 1998) (finding that a female executive was not part of the "core business" even though she led the largest department); Goodrich v. Int'l Bhd. of Elec. Workers, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (finding that male union contract analysts performed equal work with plaintiff the majority of the time, but that they also had other tasks that consumed little time but were "significant and essential to the operation and mission" of the union).

318 Stopka, 141 F.3d at 685.

319 Id.

320 Id.

321 Id. at 685-86.

322 Id. at 686 n.5.

323 Id. at 686.

324 Id. at 686 n.5.

325 Id. at 686.

326 Consider the example of the female executive officer at the hospital in Crabtree:
No other officer of the hospital was required to turn in timecards. Crabtree was required to type her own Inspection Control reports. No other officer had to type his own reports. Crabtree was the only officer without a secretary primarily responsible to the officer. She was denied permission to attend a workshop although male officers were allowed to attend. No other officer was not afforded an opportunity for input into the evaluation of a proposed new telephone system.
Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), aff'd, 749 F.2d 1501 (11th Cir. 1985).

327 See Rhode, supra note 263, at 1196 (explaining the considerable "costs of litigation, both in personal and financial terms").

328 See Rafael Gely, **Pay** Secrecy/Confidentiality Rules and the National Labor Relations Act, 6 U. Pa. J. Lab. & Emp. L. 121, 122 n.2, 124-25 (2003).

329 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649-50 (2007) (Ginsburg, J., dissenting) (citing Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1008-09 (10th Cir. 2002) ("[P]laintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries."); McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) ("[P]laintiff worked for employer for years before learning of salary disparity published in a newspaper.")).

330 Crabtree, 1983 WL 30400.

331 Lilly Ledbetter received an anonymous letter informing her of **pay** disparities. See Katie Putnam, Note, On Lilly Ledbetter's Liberty: Why Equal **Pay** for Equal Work Remains an Elusive Reality, 15 Wm. & Mary J. **Women** & L. 685, 689 (2009).

332 Margaret Heffernan, the former CEO at CMGI, told this story:
For years, I was the only **woman** CEO at CMBI. But it wasn't until I read the company's proxy statement that I realized that my salary was 50 percent of that of my male counterparts. I had the CEO title, but I was being **paid** as if I were a director.
Babcock & Laschever, supra note 247, at 104.

333 In one case, the plaintiff "accidentally left her **pay** stub in plain view, and some of her colleagues began laughing and making negative remarks about her **pay**." Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 785 (7th Cir. 2007).

334 423 F.3d 606, 609 (6th Cir. 2005).

335 Id. at 615; see also Reznick v. Associated Orthopedics & Sports Med., P.A., 104 F. App'x 387, 391-92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); EEOC v. Home Depot U.S.A., Inc., No. 4:07CV0143, 2009 WL 395835, at *10 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); Hardwick v. Blackwell Sanders Peper Martin, L.P., No. 25-859-CV-W-FJG, 2006 WL 2644997, at *3-4 (W.D. Mo. Sept. 14, 2006) (holding an EPA claim untimely and noting that even if it were timely, the male comparator had negotiated a higher salary and the plaintiff did not negotiate). But see Mulhall v. Advance Sec., Inc., 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer's defense that wage disparities resulted from negotiations surrounding the purchases of comparators' businesses); Glodek v. Jersey Shore State Bank, No. 4:07-CV-A-2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) (rejecting negotiation defense at the summary judgment stage and stating: "Though salary demands are not entirely irrelevant, it would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it"); Day v. Bethlehem Ctr. Sch. Dist., No. 07-159, 2008 WL 2036903, at *9 (W.D. Pa. May 9, 2008) (mem. op.) (rejecting the school district's defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); Klaus v. Hilb, Rogal & Hamilton Co., 437 F. Supp. 2d 706, 723-24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a $36,000 wage disparity based on the male comparator's negotiation of higher salary).

336 Babcock & Laschever, supra note 247.

337 Id. at 4.

338 See id. at 55, 66-67, 151-52.

339 In a follow-up book, Babcock and Laschever recommend that **women** gather wage information from a vast array of trade journals,

website sources, and personal and professional networks. Linda Babcock & Sara Laschever, Ask For It: How **Women** Can Use Negotiation to Get What They Really Want 91-92 (2009).

340 Babcock & Laschever, supra note 247, at 167.

341 See U.S. Gov't Accountability Office, GAO-09-279, Women's **Pay**: Gender **PayGap** in the Federal Workforce Narrows as Differences in Occupation, Education, and Experience Diminish 3 (2009), available at http:// www.gao.gov/new.items/d09279.pdf (finding that "[f]rom 1988 to 2007, the gender **paygap** ... declined from 28 cents to 11 cents on the dollar" and that for each year "all but about 7 cents of the **gap** can be accounted for by differences in measurable factors such as the occupations of **men** and **women** and, to a lesser extent, other factors such as years of federal experience and level of education").

342 Edward Lawler, Managers' Perceptions of Their Subordinates' **Pay** and of Their Superiors' **Pay**, 18 Personnel Psychol. 413 (1965); see also Liz Wolgemuth, Why Do You Keep Your Salary Secret?, U.S. News & World Rep., June 19, 2008, http://images.usnews.com/money/careers/articles/2008/06/19/why-do-you-keep-your-salary-secret.html (interview with Lawler).

343 Id.

344 See Karen Hopper Wruck, Compensation, Incentives and Organizational Change: Ideas and Evidence from Theory and Practice, in Breaking the Code of Change 269, 305 (Michael Beer & Nitin Nohria eds., 2000) ("Well-designed compensation systems help communicate the definition of outstanding performance and tie an individual's success to progress toward that goal. In doing so, they help align individuals' goals with those of the organization, and help individuals learn how they can best contribute to performance.").

345 The Paycheck Fairness Act proposes that the EEOC:
complete a survey of the data that is currently available to the Federal Government relating to employee **pay** information for use in the enforcement of Federal laws prohibiting **pay** discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws.
Paycheck Fairness Act, H.R. 12, 111th Cong. § 8 (2009). The law should go even further. Employers should be required to report all **pay** data for their employees and contractors, with the gender of the workers noted. This reporting could be accomplished when reporting tax information for W-2s and 1099s, or the EEO-1 form could be revived and revised to require the reporting of individual and aggregate **pay** data by sex, race, ethnicity, and other applicable categories. The information could be published on the DOL's website. The DOL would not be setting the wage rates, but it would merely report the data, segregated by employer type, size, and location.

346 United States v. Hubbard, 650 F.2d 293, 330 (D.C. Cir. 1980).

347 The Conference Board, Conference Board Task Force on Executive Compensation (2009), available at http://www.conference-board.org/ectf. The Conference Board is a global non-profit, nonpartisan independent membership organization of business executives that "creates and disseminates knowledge about management and the marketplace to help businesses strengthen their performance and better serve society." Id. at 2.

348 Id. at 7.

349 Id. at 20.

350 109 Cong. Rec. 9200 (1963) (statement of Rep. Dwyer).

End of Document

ARTICLE: Polarization, Gridlock, and Presidential Campaign Politics in 2016

September, 2016

Reporter
667 Annals 226

Length: 10357 words

Author: By GARY C. JACOBSON

Gary C. Jacobson is Distinguished Professor of Political Science Emeritus at the University of California, San Diego. He specializes in the study of U.S. elections, parties, interest groups, public opinion, and Congress. His most recent book is A Divider, Not a Uniter: George W. Bush and the American People (Longman 2007).

Correspondence: *gjacobson@ucsd.edu*

DOI: 10.1177/0002716216658921

Highlight

The American electorate has grown increasingly divided along party lines in recent decades, by political attitudes, social values, basic demography, and even beliefs about reality. Deepening partisan divisions have inspired high levels of party-line voting and low levels of ticket splitting, resulting in thoroughly nationalized, president- and party-centered federal elections. Because of the way the electoral system aggregates votes, however, historically high levels of electoral coherence have delivered incoherent, divided government and policy stalemate. The 2016 nomination campaigns have exposed deep fissures within as well as between the parties, and their results threaten to shake up electoral patterns that have prevailed so far during this century, with uncertain and perhaps unpredictable consequences for national politics. The 2016 election is certain to polarize the electorate, but the axis of polarization may not fall so neatly along party lines as it has in recent years.

Keywords: partisanship; polarization; gridlock; 2016 election

Text

[*226] The American electorate, poised to choose the next president and Congress, has over the past several decades grown increasingly divided along party lines, by political attitudes, social values, basic demography, and even beliefs about reality. Deepening partisan divisions have inspired high levels of party-line voting and low levels of ticket splitting, resulting in thoroughly nationalized, president- and party-centered federal elections (Jacobson 2015a). As the battles for the 2016 nominations made abundantly clear, however, the Democratic and Republican coalitions are far from monolithic. Donald Trump's rise to the top **[*227]** in the face of nearly unanimous opposition from Republican leaders, donors, and pundits not only exposed deep fissures within the party, but also threatened to disrupt and perhaps reshape the current national party alliance. The 2016 election ends the recent string of presidential contests featuring mainstream candidates from both parties who have inspired cohesively partisan voting patterns. It has the potential to shake up electoral patterns that have prevailed during this century, with uncertain and perhaps unpredictable consequences for national politics.

In this article, I review the electoral trends that have set the stage for 2016 and then consider the potential for the nomination contests, their surprising result, and the ensuing general election matchup between Donald Trump and Hillary Clinton to reconfigure the inherited political landscape. The looming question of whether the 2016 election will constitute a historic turning point or merely a temporary disruption of long-term electoral trends gives the election unusual interest--in addition, of course, to the enormous implications it holds for the future of the country. The election will surely polarize the electorate, although the axis of polarization may not fall so neatly along party

lines as it has in recent years. Departures from party loyalty are not guaranteed, however, for the divisions within the parties are overshadowed by the even wider divisions between them on most national issues and leaders. How these divisions play out in House and Senate elections as well as the presidential contest will determine whether gridlock in Washington--which has made no small contribution to the popular anger and frustration fueling the intraparty insurgencies of Trump and, on the Democratic side, Bernie Sanders--has any chance of being broken.

Gridlock will not be broken easily if at all. The historically high level of electoral coherence observed in recent years has delivered incoherent, divided government and policy stalemate, not because voters have been ambivalent, but because of the way the electoral system aggregates its votes for different federal offices. The Constitution gives presidents, senators, and representatives distinct electoral bases and calendars to complement the division of authority among national institutions--part of its successful design, famously articulated by James Madison in Federalist 51--to thwart simple majority rule. This electoral system, combined with the peculiarities of current partisan divisions, has left American national politics stalemated. In its present configuration, it gives Republicans a major structural advantage, allowing them to win a majority of House seats with a minority of votes. Republican House majorities have been unable to fulfill their campaign vows to undo Barack Obama's policies and alter the direction of national politics, however, because a national Democratic majority renewed Obama's lease on the White House in 2012. Whether this form of divided government continues after the 2016 election will be determined largely by voters' responses to Trump's divisive and disruptive candidacy.

The Contemporary Electorate

Party leaders and partisan voters alike have by almost every measure grown increasingly polarized along party lines during the past several decades. Polarization is most visible at the elite level in the incessant public clashes among partisan warriors in **[*228]** Washington over matters large and small and in record levels of ideological polarization as measured by roll-call votes cast in Congress during Obama's presidency (Poole, Rosenthal, and Hare 2016). But ordinary Americans have also become increasingly polarized by party, and the more active they are politically, the more their divisions echo those of elected leaders. Over the past four decades, largely in response to the more sharply differentiated alternatives presented by the national parties and their candidates, voters have sorted themselves into increasingly distinct and discordant political camps (Abramowitz 2010; Jacobson 2013; Levendusky 2009; Baumer and Gold 2010; Abrams and Fiorina 2015). Their partisan identities, ideological leanings, and policy opinions have become more consistent internally and more divergent from those of rival partisans (Jacobson 2013; Pew Research Center 2014). The political cleavages that once divided up the public in diverse ways now tend to coincide, leaving ordinary Democrats and Republicans in disagreement on a growing range of issues. Traditional partisan divisions over the role and size of government (with a focus on taxes, regulation, and health care) have widened, as have differences over social issues such as abortion, same-sex marriage, immigration, race, and gun control (Abramowitz 2015; Pew 2014). Partisans differ in beliefs about scientific realities as well as in values and opinions; most Democrats, for example, believe humans are heating up the planet, with potentially dire consequences; most Republicans do not (Dugan 2015; Pew 2013).

Polarization also has an affective component, with expressed feelings about the rival party and its leaders growing increasingly negative (Abramowitz 2015; Abramowitz and Webster 2016; Jacobson 2011). Such sentiments are reinforced by growing differences among partisans in their fundamental psychological makeup (Graham, Haidt, and Nosek 2009; Hetherington and Weiler 2015). Attitudinal, affective, and psychological differences between Republicans and Democrats reflect in part the divergent demographic bases of the parties. The Democratic coalition has a larger proportion of young, single, female, secular, urban, ethnic minority, LGBT, unarmed, and highly educated voters; it is weakest in the South. The Republican coalition is overwhelmingly white as well as disproportionately older, married, religiously observant, male, of middling education, suburban or rural, gun owning, and southern (CNN 2012; Pew 2014; Gallup 2016). Crucial for 2016 and beyond, the Democratic coalition comprises growing segments of the population, including Latinos, the fastest growing category; the current Republican coalition is made up largely of shrinking demographic groups. As people have sorted themselves into separate coalitions, they have, by their choices about where to live and work, also sorted themselves into distinctive electoral units, which have consequently become increasingly homogeneous politically and lopsidedly partisan (Bishop 2008; Stonecash, Brewer, and Mariani 2003; Levendusky 2009; Jacobson 2013; Abramowitz 2015).

The Obama Factor

The divisions between ordinary Democrats and Republicans have been growing steadily wider for several decades for multiple reasons, but it is no coincidence that they peaked during Obama's presidency. Presidents always shape their **[*229]** party's popular image and attractiveness as an object of identification, but Obama has been an exceptionally powerful focal point for the organization of political attitudes (Jacobson 2012a, 2015a). The partisan split in evaluations of his job performance is the widest on record. During the first half of 2016, an average of 86 percent of Democrats, but only 11 percent of Republicans, approved of how he was handling his job. [1]

Republican disdain for Obama is not a recent development. Most Republican partisans, especially the conservative majority sympathetic to the Tea Party movement, have regarded Obama as a dishonest radical with a socialist agenda ever since the 2008 John McCain--Sarah Palin campaign portrayed him as one (Jacobson 2012b; Bradberry and Jacobson 2013). To a great many ordinary Republicans, Obama is not merely a conventionally objectionable Democrat but a person whose name, race, upbringing, associations, alleged objectives, and presumed values put him outside the boundaries of what is acceptable in an American leader. The widespread acceptance among Republicans of bogus claims about his birthplace and religion reflects this mindset. As recently as September 2015, 30 percent of Republicans responding to a CNN poll said that Obama was foreign-born (and thus ineligible to be president), and 43 percent said that he was a Muslim (Agiesta 2015). A portion of this is simply opportunistic Obama bashing invited by the survey questions, but even as such it underlines the intensity of so many Republicans' antipathy toward the president and their eagerness to deny his legitimacy. This antipathy has a racial component; numerous studies confirm that racial animus has shaped reactions to Obama since his emergence as a presidential contender and throughout his presidency (e.g., Weisberg and Divine 2009; Piston 2010; Tesler and Sears 2010; Tesler 2013, 2016; Kam and Kinder 2012; Pasek, Krosnick, and Thompson 2012; Tien, Nadeau, and Lewis-Beck 2012).

Disdain for Obama and everything he has done, as well as specious beliefs about his religion and birthplace, are especially prevalent among Trump's supporters, [2] feeding their enthusiasm for a candidate in almost every conceivable way the polar opposite of the president (Axelrod 2016). Catering to sentiments prevalent in the Republican primary electorate, not only Trump but every Republican candidate in 2016 vowed to undo virtually everything Obama has achieved in domestic and foreign affairs.

Ordinary Democrats, in contrast, have from the beginning viewed Obama as a mainstream Democrat pursuing policies regarding health care, economic regulation, race relations, the environment, immigration, abortion, same-sex marriage, gun control, and foreign affairs that largely reflect their party's traditional priorities and current preferences. [3] Even when they have been unhappy with his handling of some specific issues, they have continued to approve of his overall job performance; his average overall job rating among Democrats (86 percent in the first half of 2016) has been higher than his ratings for handling any specific policy domain, including the economy (81 percent), health care (74 percent), foreign policy (71 percent), and terrorism (73 percent). [4] Their inclination to back Obama generally despite some unhappiness with various aspects of his performance is probably reinforced by strongly negative opinions of his Republican and conservative media antagonists; Democrats' approval of his

---

[1] Based on thirty-six Gallup, CBS News/*New York Times*, Pew, and CNN polls.

[2] According to the January 4-10, 2016, NBC News/Survey Monkey poll, 85 percent of Trump supporters strongly disapproved of Obama's performance, second only to Ted Cruz's supporters (90 percent; Clinton, Englehardt, and Lapinski 2016). Trump supporters were especially prone to delusions about Obama's religion and birthplace; a September 2015 Public Policy Polling survey reported that among Republican Trump supporters (29 percent in this poll), 66 percent said Obama was a Muslim, and 61 percent said he was foreign-born. Among all Republicans, the respective figures were 54 percent and 44 percent.

[3] For example, Democratic respondents place themselves, Obama, and the Democratic Party at very similar locations on the American National Election Studies 7-point liberal-conservative and issues scales (ANES 2010).

[4] Averages from Gallup, CBS/*New York Times*, Quinnipiac, and ABC News/*Washington Post* polls from January through June 2016, compiled by author.

performance rose to its highest level since early 2013 as he came under withering attack from the entire Republican field during the 2016 primary debates.

[*230] FIGURE 1 Party Loyalty and Ticket Splitting in Contested Elections, 1952-2014

SOURCE: American National Election Studies Cumulative Data File, 1995-2012; for 2014, the Cooperative Congressional Election Study.

Electoral Consequences

The emergence of polarized partisanship has had profound electoral consequences. Extending a long-term trend, party loyalty in voting for all federal offices reached a postwar high in the two most recent elections (see Figure 1). In the 1970s, an average of 22 percent of self-identified partisans defected to the other party's candidates; since 2008, fewer than 10 percent have done so. In 2012, 91 percent of partisans voted for their party's presidential nominee; in 2014, 93 percent voted for their party's House and Senate candidates. Ticket splitting--voting for a presidential candidate of one party, a House or Senate candidate of the other--has consequently become increasingly rare. In the 1970s, about a quarter voted split tickets; in 2012, only 11 percent did so.

Voting congruence at the individual level produces congruent aggregate outcomes at the district and state levels. The correlation between the district-level vote shares of House and presidential candidates has risen from an average of .62 in the 1970s to .95 in 2012; the square of this correlation specifies the proportion of variance shared by the vote across these offices, which reached a remarkable 91 percent in 2012 (see Figure 2). Meanwhile, the proportion of districts delivering split verdicts--majorities for presidential candidate of one party, House candidates of the other--fell to a postwar low in 2012; only 26 of the 435 House districts produced split outcomes. House candidates now find it exceedingly difficult to win districts that lean even slightly toward the other party at the presidential level. In both 2012 and 2014, only twelve candidates won districts where their party's 2012 presidential candidate ran more than two points behind his national vote percentage. This represents a dramatic change from the 1970s, during which an average of more than fifty House candidates succeeded in winning districts against the partisan grain (Jacobson 2015b).

[*231] FIGURE 2 Presidential Voting and District Level Results, 1956-2012

SOURCE: Compiled by author.

A similar, if less pronounced, trend appears in Senate elections; the state-level correlations between presidential and Senate voting in 2012 of .80 was exceeded only in 1956 in the postwar era (.82), and the state-level correlation between the 2012 presidential and 2014 Senate vote reached .87, the highest for any midterm on record. The incidence of split state-level outcomes has also declined steadily, and going into the 2016 election, 84 of the 100 senators were serving states won by their party's presidential candidate in the most recent election, another postwar record (Jacobson 2015b).

Electoral Coherence Produces Divided Government

The trends depicted in the previous section raise an obvious question: How did the electorate's extraordinary coherence during the two most recent elections **[*232]** nonetheless perpetuate divided government, with a Democratic president facing a solidly Republican House and, after 2014, Senate? The explanation for this apparent paradox lies in the distribution of partisans across electoral units; for the divided government in place today is not the result of ambivalent loyalties and preferences among voters, but of the way votes are aggregated by the electoral system.

In presidential elections, high rates of party-line voting favor whichever candidate represents the larger party in the electorate--always, according to American National Election Studies (ANES; 2010) data from 1952 through 2012, the Democrats (although sometimes by a tiny margin). The ANES and other major surveys found a clear Democratic advantage among party identifiers in 2012, and the distribution of partisans across the states also favored Democrats in the Electoral College (Jacobson 2015a). Extreme levels of party-line voting on both sides

were thus a net plus for Obama, and demographic trends favoring the Democrats nationally suggest the same will generally be true for future Democratic candidates (Jacobson 2016a).

In congressional elections, however, party-line voting and electoral coherence strongly favor Republicans because they enjoy a major structural advantage in the distribution of partisans across congressional districts. Although Republican gerrymanders reinforced this advantage after the 2000 and 2010 censuses, it has existed for decades as a product of coalition demographics. Democrats win the lion's share of ethnic minority, single, young, secular, and LBGT voters who are concentrated in urban districts that deliver lopsided Democratic majorities. Regular Republican voters are spread more evenly across suburbs, smaller cities, and rural areas, so fewer Republican votes are "wasted" in highly skewed districts.

The result is illustrated by Figure 3, which shows that, except after 1964, substantially more House seats have leaned Republican than have leaned Democrat (leaning estimated here as having a district vote for their party's presidential candidate at least 2 percentage points above the national average) for at least six decades. This imbalance was as great in the 1970s as it is today, but with the rise of party-line voting and decline in ticket splitting, it has become much more consequential. Thus, although Obama won by nearly five million votes in 2012, Romney outpolled Obama in 226 districts, while Obama ran ahead in only 209. Democrats actually won a majority of the major-party vote cast nationally for House candidates that year, their share rising from 46.6 percent in 2010 to 50.7 percent in 2012; but with party loyalty so prevalent and split outcomes so rare, their share of seats grew only from 44.4 percent to 46.2 percent. Under the current configuration, Democrats would have to win all of the Democratic-leaning and balanced districts plus eight Republican-leaning districts to reach a majority in the House (218 seats).

The Republicans enjoy a similar if more modest structural advantage in Senate elections. Although Al Gore won (very slightly) more popular votes nationally than George W. Bush in 2000, Bush won more votes in thirty of the fifty states. In 2012, Obama, with five million more votes than Romney, won barely more than half the states (twenty-six). Notice that the proportion of closely balanced House districts in Figure 3 (those delivering presidential results within 2 percentage points of the national vote) has shrunk by nearly two-thirds since the 1980s and after 2012 was below 7 percent. Although critics blame partisan gerrymandering for the trend, its main source is changes in voting behavior and residential sorting, for it is equally evident at the state level (Abramowitz, Alexander, and Gunning 2006; Jacobson 2016b). In 1976, twenty states, accounting for a total of 299 electoral votes, were won by less than 5 percentage points. In 2012, only four states, with a total of 75 electoral votes, fell into this category (Abramowitz 2015, 22). The presidential "battleground" has become much smaller even as closely contested presidential elections have become the norm.

[*233] FIGURE 3 District Partisan Advantage, 1952-2014

SOURCE: Compiled by the author.

Party Factions and Polarization in 2016

The pattern of highly competitive, partisan, polarized, and president-centered national elections characteristic of twenty-first-century America has been challenged in 2016 by the emergence during the nominating campaigns of fissures within the parties, much deeper on the Republican side but also visible among Democrats. Hillary Clinton's anticipated coronation was turned into long slog by Bernie Sanders's challenge from the Left. Sanders's growing appeal to young white liberals cut Clinton's lead in national polls from an average of 25 points in December to single digits in April. Clinton barely eked out a win in Iowa and lost badly to Sanders in New Hampshire, states where liberal whites populate the Democratic coalition. She ran much stronger than Sanders among older and **[*234]** minority voters, and their numbers in subsequent primaries allowed her to survive these and later setbacks to take an insurmountable lead in votes and delegates, even as the Sanders challenge continued through the final primary in June.

For better or worse, Clinton was seen as the heir to Barack Obama, someone who had served in his administration and would defend or extend his major accomplishments on health care, economic regulation, diplomacy, the environment, and immigration. Although she made gestures to the Left in response to Sanders's progress, Clinton's

long career was as a moderate Democrat whose orthodox positions placed her at the median of the Democrats' center-left coalition, just like Obama (RAND 2016). Her problems within the party were more about character than ideology; her responses to investigations into her use of a private email account while secretary of state and her Wall Street links fed the perception among many voters--including Democrats--that she was not trustworthy. [5]

Clinton's candidacy is not, then, by itself potentially disruptive of recent electoral configurations. She is nearly as polarizing as Obama, heir to that aspect of his presidency as well. Republicans have never warmed to Clinton, and they have been especially negative when she is running for president. By spring 2016, a 68-point gap in opinions of Clinton had opened up between partisans, with averages of 77 percent of Democrats but only 9 percent of Republicans viewing her favorably. With Republicans expressing such uniformly negative opinions of Clinton, she could not under normal circumstances be expected to win many cross-party votes. And despite some reservations, she would be an easy choice for the vast majority of Democratic partisans against any conventional Republican nominee. Such a matchup would have almost certainly extended the pattern of polarized partisanship characteristic of the Obama years.

Circumstances were anything but normal in 2016, however. Billionaire developer and entertainer Donald Trump executed a hostile takeover of the Republican Party that exposed its national leaders' impotence and disconnect from a large segment of the party's base. Trump rose to dominate the field by mobilizing and exploiting the anti-immigrant, anti-Mexican, anti-Muslim, anti-Obama, and anti-globalization sentiments simmering in a substantial subset of ordinary Republicans and not a few independents (e.g. Lee et al. 2016; Tesler 2016). His bullying, vulgar, hyperbolic trash talk, unleashed against detractors in both parties and the media, tapped into a rich vein of right-wing populist disdain for cultural, corporate, and political elites. That much of what he said was self-contradictory, wildly misinformed, or flatly untrue, and that his fantastic promises were untethered to any discernible reality, did not seem to faze his supporters in the least (Kessler 2016). Trump's approach invited comparisons with earlier American exploiters of populist bigotry, xenophobia, and fear, such as George Wallace and Pat Buchanan, as well as with current leaders of the nativist Right in European countries. The style and substance of Trump's campaign had even conservatives pondering the extent to which he should be considered a fascist (Douthat 2015; Lee 2015). [6]

Trump exposed a fault line in the Republican coalition that cut across ideology. He found backers in all of the party's ideological factions, but with support concentrated among less educated blue-collar Republicans, especially men, resentful of their eroding economic prospects and declining cultural centrality. Given **[*235]** Trump's disdain for "losers," a label he applies liberally to his detractors, it was ironic though not surprising that his appeal was largely confined to Americans who felt like losers themselves (Pew 2016). Most of his supporters shared Trump's rejection of Republican economic orthodoxy, opposing changes in Social Security and Medicare, free trade, and deference to Wall Street and the U.S. Chamber of Commerce; they did not accept the conventional Republican dogma that the road to prosperity lies in tax cuts for the wealthy, deregulation, and open trade (Tesler 2016). The most powerful draw, however, was his promise of an immigration policy consisting of a wall on the Mexican border, mass expulsions, and exclusion of Muslims. For this, even many conservative Christians gave him a pass for his self-celebrated philandering, multiple marriages, questionable faith, and dubious commitment to their social issue agenda. When Trump vowed to "make American great again," many of his followers (and detractors) heard "make America white again." [7]

---

[5] In the CBS New/*New York Times* poll taken February 12-16, 2016, 60 percent of Democrats deemed Clinton "honest and trustworthy," but 35 percent said she was not; the comparable figures for Bernie Sanders were 77 and 13; see *http://www.cbsnews.com/news/cbs-news-national-poll-hillary-*clinton*-holds-lead-over-bernie-sanders/*.

[6] The general verdict was that he is more of a "proto-fascist," because despite similarities in style and approach with the likes of Mussolini, he has not formed a paramilitary wing to support his movement and has not proposed abolishing American democracy (although he appears ignorant or disdainful of its institutional checks).

[7] Prominent white supremacists were among Trump's most enthusiastic supporters (Mahler 2016).

Trump's sustained lead in national polls appalled mainstream Republican leaders not only because of his unorthodox positions on economic issues, but even more so because of his potential effect on both the short- and long-term fortunes of their party. He excited a substantial and enthusiastic portion of the Republican base, but his appeal did not extend much beyond it. Overall opinions of Trump during the early primary season were the least favorable of any of the leading candidates among partisans in all categories; in polls taken in March and early April of 2016, an average 31 percent expressed a favorable opinion of him, 65 percent, an unfavorable one. [8] He had little crossover appeal; the incidence of unfavorable opinions among Democrats began high (typically more than 80 percent) and grew higher as the campaigns progressed, reaching an average of 87 percent in May and June. Trump's white, male, blue-collar constituency formed a smaller portion of the electorate than the minority groups he insulted and alienated. [9] The very characteristics that attracted his supporters repelled an even larger group of voters--white women and minorities.

Republican congressional leaders worried that Trump's nomination would bring disaster to the Republican ticket, threatening their control of the Senate and even the House (Kamisar 2015; Gerson 2015; Bernstein 2015; Cornwell 2016). They also rightly worried about its long-term implications for their party's future. As I note in my companion piece earlier in this volume, a party's choice of nominee (and platform) updates its popular image and thus attractiveness as an object of identification (Jacobson 2016c; 2016d). Trump's command of the Republican stage for so long in 2016 threatened to redefine who and what the Republican Party stands for in ways that would erode its long-term viability. The Republican autopsy of Romney's 2012 loss had recommended expanding the party's appeal to blacks, Asians, Latinos, women, gays, and young people (Walshe 2013). Trump's nomination had the exact opposite effect, but even if he had fallen short, the nomination contest's damage to the party's standing among these growing segments of the population would have continued to register.

Aside from Trump's danger to their party's electoral future, many mainstream Republican leaders and pundits were genuinely appalled by his character (Goldberg 2015; Will 2015b; Linker 2015). Columnist Peter Wehner, who had **[*236]** served in the Reagan and both Bush administrations, offered this critique: "Mr. Trump's virulent combination of ignorance, emotional instability, demagogy, solipsism and vindictiveness would do more than result in a failed presidency; it could very well lead to a national catastrophe. The prospect of Donald Trump as commander in chief should send a chill down the spine of every American. . . . If Mr. Trump heads the Republican Party, it will no longer be a conservative party, it will be an angry, bigoted, populist one" (Wehner 2016). No fewer than twentytwo "movement" conservative luminaries, including Glenn Beck, L. Brent Bozell III, Mona Charen, Erick Erikson, William Kristol, Yuval Levin, Edwin Meese III, John Podhoretz, and Thomas Sowell contributed to a *National Review* symposium denouncing Trump's candidacy (Conservatives against Trump 2016). Every living former Republican presidential candidate--both Bushes, Bob Dole, John McCain, and most vocally Mitt Romney--opposed his nomination as well.

Failing to derail Trump's nomination, the losing Republican candidates and other party leaders faced an agonizing choice: they could support a nominee many of them thought would be disastrous for the party (and, if he somehow won, for the country), or they could advocate an option that could only help Clinton: abstaining, voting for a conservative third-party candidate, or voting, however unhappily, for Clinton herself. Their dilemma was sharpened by the fact that Republican leaders, like ordinary Republican voters, disliked and distrusted Clinton and loathed the prospect of enduring what they envisioned as a third Obama term. Remarkably, even someone as scathing in his critique of Trump as Wehner said that even if Trump were the nominee, he would never vote for Hillary Clinton; absent an acceptable third party option, he would skip the presidential ballot (Wehner 2016). That Wehner found a

---

[8] Average is from eleven ABC News/*Washington Post*, Bloomberg, Gallup, NBC News/*Wall Street Journal*, Quinnipiac, YouGov, and Associated Press GfK polls.

[9] The share of white voters with no more than a high school education and anti-immigrant views (defined as falling below the median of .57 on the immigration scale from Table 1) in the 2014 Cooperative Congressional Election Study (Ansolabehere 2015) was 17 percent (9 percent if confined to males); the proportion of nonwhites was 21 percent, a share certain to be higher in 2016.

vote for Clinton to be inconceivable despite his opinion of Trump serves as eloquent testimony to how polarized American political elites have become.

Ordinary Republicans not in the Trump camp faced the same unwelcome choices: vote loyally for their party's nominee, abstain from a presidential vote, stay home entirely, defect to a third party (should one be available), or defect to Clinton. Their decisions will determine how far the extraordinary partisan coherence observed in recent elections will recede. Democrats will be united behind Clinton by their desire to protect Obama's legacy and to keep a Republican they detest out of the White House. Clinton's main challenge will be to bring the younger white liberals who formed Sanders's main constituency and reliably Democratic minority voters to the polls. [10] Republican voters are, like their leaders, more divided. Whether they will stay that way is uncertain, but early in the election year they seemed much readier to desert Trump than Democrats were to desert Clinton. In polls taken in March, an average of 87 percent of Democrats said that they would vote for Clinton, whereas only 77 percent of Republicans said that they would vote for Trump. [11] It was numbers like this--and the fact that Clinton was beating Trump by a wider margin than any of the other Republican prospects in horse-race polls--that had Republican leaders so concerned.

A prime worry was that a Trump candidacy would cost them the Senate and perhaps even the House. Their concern was not unfounded in light of the low levels of ticket splitting in recent elections, but party loyalty has also been very **[*237]** high in House and Senate elections, so these two tendencies would be in tension. Whether Republicans and independents who reject Trump will also desert Republican congressional candidates is another crucial question that only the election can answer. Historical experience offers a mixed picture when party-splitting insurgents win nominations. In 1964, according to the ANES, 27 percent of Republicans voted for Lyndon Johnson rather than Barry Goldwater. Of these presidential defectors, 61 percent also defected to the Democratic House candidate, and Republicans lost 47 of the 158 seats they defended in districts won by Johnson. In 1972, 41 percent of Democrats voted for Richard Nixon rather than George McGovern; but only 27 percent of the defectors also voted for the Republican House candidate, and Democrats lost only 15 of the 191 seats they defended in districts won by Nixon. The Goldwater precedent is of course what worries Republican leaders the most, as it should; for the 1964 election took place in an era when, as now, ticket splitting was relatively uncommon, whereas by 1972 split-ticket voting had become much more prevalent (see Figure 1).

Still, in light of the Republicans' formidable structural advantage in the House, it would take a truly disastrous performance by the Republican presidential candidate to cost them control. The Democrats would have to pick up at least thirty seats, which would require, as noted earlier, winning all of the Democrati-cleaning and balanced districts plus eight Republican-leaning districts. Based on the 2014 vote, it would take an across-the-board swing of about 7 percentage points to put the Republican's vote share below 50 percent in a majority of the districts. In June 2016, the authoritative *Cook Political Report*, which classifies all House districts according to their competitiveness, listed thirty-three Republican seats at some risk--two rated likely Democrat, three leaning Democrat, seventeen toss-ups, and eleven leaning Republican--so that Democrats would have to sweep all but three of these seats to reach thirty (*Cook Political Report* 2016). The more of the at-risk Republican seats Democrats failed to take, the more of the likely or solidly Republican seats they would have to win. It is not impossible for the House to change hands in 2016, but it would take a huge pro-Democratic tsunami to make it happen. A Trump candidacy holds the potential to generate one--if he remains as unpopular as he was during the first half of 2016 and especially if disaffected Republicans stay home in droves--but it is by no means a sure thing.

The Senate is a different story. In 1964, Republicans netted a loss of only two Senate seats during the Goldwater rout, but twenty-six of the thirty-five contested seats were already held by Democrats. In 1972, amid rampant ticket splitting, Democrats actually won two additional Senate seats. This year's Senate lineup is the inverse of 1964, with

---

[10] Younger voters are not Trump fans; their average ratio of favorable to unfavorable opinions of Trump in the January and February YouGov polls was 21:71, and this includes all voters under 30, not just Democrats; but younger voters are also notoriously harder to get to the polls than older voters.

[11] Averages are from ABC News/*Washington Post*, CBS News/*New York Times*, CNN, Quinnipiac, and YouGov surveys taken in March 2016.

twenty-four Republican but only ten Democratic seats in play. Seven of the Republican seats are in states won by Obama in 2012, comprising six of the seven Republican seats Cook listed in June as being at risk (six toss up, one leaning Republican). Two Democratic seats were also deemed competitive (one toss up, one leaning Democratic). Thus even with only a modest wind at their backs, the Democrats have a reasonable chance of gaining the four additional seats they would need to control the Senate (assuming they also win the White House and their vice president can break ties). With a **[*238]** real blowout, they could reach a solid majority. Whatever happens in the presidential election, the contest for control of the Senate will be, if recent experience is any guide, extraordinarily intense and wildly expensive, with the many millions of dollars spent independently by outside groups dwarfing the already ample spending by the candidates in states where the outcome is in any doubt (Jacobson and Carson 2016, 91-96). [12] It will be fascinating to see how, and how effectively, the Republican Senate campaigns conducted by candidates and their independent allies in blue and purple states deal with the crosscurrents generated by the Trump insurgency.

Trump's most serious rival among the other sixteen original aspirants turned out to be Texas senator Ted Cruz, another highly polarizing figure with very few friends among national Republican elites, but for somewhat different reasons (Jacobson 2016a). His candidacy, though unsuccessful, is worth reviewing, because should Trump lose, Cruz is almost certain to pursue nomination again in 2020 and, based on his showing in 2016, would be a leading prospect. As with Trump, Republicans worried that Cruz's candidacy would hurt the party's downticket candidates. Cruz began his campaign with very few friends among national Republican leaders, earning the title of "most hated man in the Senate" (Grieder 2013), through demagoguery and personal insults to members on both sides; no senator endorsed him during the preprimary season. Cruz's avowed strategy for winning the general election was to adopt radically conservative positions on virtually every issue and to use apocalyptic, fear-mongering rhetoric to mobilize white middle- and working-class social, religious, and anti-government conservatives who, his campaign claimed, have stayed home in past presidential elections out of indifference to mainstream Republican candidates such as Bob Dole, John McCain, and Mitt Romney. This strategy's drawback for Republicans with long memories was that the last time the party tested the "missing conservative voter" hypothesis, with Barry Goldwater in 1964, the result was the worst Republican electoral debacle since 1936 (Will 2015a). Its premises are, as Republican campaign professionals are unhappily aware (Rove 2015), extremely shaky and would remain so in 2020, for its target constituency already turns out at comparatively high rates.

Cruz's approach was deliberately polarizing, adopting positions placing him further to the Right than any serious Republican candidate in the postwar era, including Goldwater. He would abolish the Departments of Education, Energy, Commerce, and Housing and Urban Development and the Internal Revenue Service. He would eliminate the estate tax and impose a flat 10 percent income tax and the equivalent of a 16 percent value added tax, providing a huge windfall to the wealthiest Americans while sharply reducing federal revenues; the ensuing deficit would be addressed by cuts in social programs for low-income people. He would ban abortion with no exception for rape and incest and work to overturn the right of same-sex couples to marry. He denies human-caused climate change and would roll back any environmental regulation that interfered with energy development. His policy on immigration echoed Trump's, building a wall along the border and denying legal status to any of the eleven million undocumented immigrants already in the country. [13] He would rescind Obama's protection of **[*239]** immigrants brought to the United States as children and eliminate birthright citizenship.

Cruz's rhetoric was as extreme as his program. Its theme was that America is in horrible shape and only a radical return to an imagined pre-New Deal world of small government and state sovereignty would reverse its downward trajectory. The government is not just the problem (Reagan's formulation) but the tyrannical enemy. After one Democratic debate in late 2015, Cruz said, "We're seeing our freedoms taken away every day, and last night was an audition for who would wear the jackboot most vigorously" (Cohen 2015). Cruz also sought support from

---

[12] More than 59 percent of the astonishing $ 667 million spent in the nine most competitive Senate races in 2014 were not under the candidate's control.

[13] He did not, however, endorse Trump's police-state proposal to organize a force of federal agents to round up and quickly expel every man, woman, and child among them.

conservative Christians, promising to defend them against the onslaught of seculars, Muslims, and gays, the last of whom he accused of waging "jihad" against opponents of same-sex marriage (Kutner 2015). There was, in short, nothing in Cruz's campaign suggesting any inclination or capacity to expand his or his party's appeal beyond its most conservative segments.

Cruz's emergence as Trump's strongest rival disconcerted national Republican leaders (and many but not all prominent conservative pundits) as much as Trump's rise to first place, their joint success regarded by some as a threat not only to the party's electoral fortunes in 2016 but to its very soul. Michael Gerson concluded that "for Republicans, the only good outcome of Trump vs. Cruz is for both to lose. The future of the party as a carrier of a humane, inclusive conservatism now depends on some viable choice beyond them" (Gerson 2016). Other prominent Republicans concurred (Rubin 2016; Kim and O'Brien 2016; see also Raju 2016). For David Brooks, "The worst is the prospect that one of them might somehow win. Very few presidents are so terrible that they genuinely endanger their own nation, but Trump and Cruz would go there and beyond" (Brooks 2016, A27).

A Cruz-Clinton contest would have generated somewhat more orthodox partisan divisions than a Trump-Clinton contest, but Cruz's extreme positions and rhetoric would still have been a burden to Republican congressional candidates because it promised to drive away moderate Republicans and independents without attracting a compensating share of Democrats. The Goldwater precedent would be even more apropos than for Trump, for Cruz split his party more along ideological than class lines. Republican denouncers of Trump and Cruz debated who would be the bigger drag on the Republican ticket (Martin 2016; Sherman and Bresnahan 2016), but both were viewed as posing major problems for Republican congressional candidates. Still, establishment Republicans and conservative pundits appeared to find it easier to reconcile a Cruz than a Trump nomination because the former did not challenge conservative economic dogmas and positions on social issues (except by taking them to further extremes) and, compared with Trump, seemed less dangerously ignorant and impulsive. Losing with Cruz would do less long-term damage to the party than losing with Trump.

As the chances of candidates more acceptable to the Republican establishment faded--only John Kasich's candidacy remained alive after Rubio's humiliating defeat in Florida on March 15--the looming prospect of a Trump nomination generated talk among some Republican leaders and conservative commentators of creating a third party option for Republicans repulsed by Trump but unable to **[*240]** stomach voting for Clinton. That this would hand the election to Clinton was acknowledged, but the hope was that it would protect Republican congressional candidates by giving Republicans refusing to vote for Trump a reason to come to the polls. It would also provide a spokesperson for the party's conventionally conservative positions that congressional candidates could point to while rejecting association with a candidate whose persona or agenda would be poison locally (Burns 2016; Friedersdorf 2016). An alternative strategy was to somehow prevent Trump from winning a delegate majority, producing a brokered convention that could pick a candidate more acceptable than Trump or Cruz. Trump's string of victories after he lost Wisconsin on April 5 rendered that strategy moot. Even if deals at the convention succeeded in denying Trump the nomination despite his plurality of delegates, many of his supporters, already disdainful of the party establishment, would certainly have revolted, either staying home or supporting an independent Trump candidacy, again with fatal consequences for the Republican nominee. Cruz, with the second most delegates, would have demanded the nomination were it denied to Trump, and any other choice would anger his supporters as well. Considering their likely consequences, that such scenarios received serious contemplation underlines how badly Trump's ascendancy fractured the Republican coalition.

A Divisive General Election

An election pitting Clinton against Trump promises to be nasty and highly divisive. As they clinched their nominations, Clinton and Trump were underwater on favorability, more so than any previous nominees (Wright 2016). In polls taken in May and early June, net favorability averaged -25 for Trump and -12 for Clinton. When an ABC News/*Washington Post* survey asked in early March whether respondents could see themselves supporting any of then-remaining candidates, the collective response was effectively "none of the above" (see Figure 4). Among partisans, 17 percent of Democrats said they could not see themselves supporting Clinton; among Republicans, 33 percent could not see themselves supporting Cruz, and a remarkable 42 percent could not see

themselves supporting Trump. That Trump nonetheless steamrolled his way to the nomination despite these numbers is truly astonishing.

With most voters expressing negative views of both nominees, the obvious general election strategy for both sides will be to do everything possible to drive up their rival's negatives even further. To win, Trump will have to induce a majority of voters to dislike and distrust Clinton even more than they dislike and distrust him. The Republican campaign and its independent allies will try to whip up fear and persuade the fearful that they and the country would be in mortal danger from ISIS and other enemies if Clinton were to become president. We will hear much about unprotected emails and Benghazi as vehicles to attack Clinton's honesty and judgment.

Clinton's obvious campaign strategy against Trump is also personal, dwelling on what offends people (including many Republicans) about him already: his narcissism, instability, ignorance, bigotry, misogyny, authoritarian instincts, checkered business record, and brazen indifference to truth. On policy, expect a spirited defense of Obama's achievements against Republican pledges to destroy them root and branch, particularly if Obama's approval ratings remain in positive territory. The goal will be to mobilize women, younger voters, religious and ethnic minorities, and moderates against the dire threat posed to their values and interests by Trump in the White House.

[*241] FIGURE 4 Potential Support for Candidates in the General Election

SOURCE: ABC News/*Washington Post* Poll, March 3-6, 2016.

Is There an End to Stalemate and Gridlock?

As it is shaping up, the 2016 election has no prospect of reducing national divisions, although a Trump candidacy may shift the axis of polarization within the electorate away from the strict party lines that has been the norm during this century. What are the election's chances of ending gridlock in Washington? The current stalemate could be broken in several ways. A Clinton victory combined with a Democratic takeover of the House and Senate is one scenario. It would replicate the configurations of the 103rd (1993-94) and 111th (2009-10) Congresses, which enabled Democrats to advance their traditional agenda, particularly in the 111th, with the Affordable Care Act and reforms of the financial system. But these precedents suggest that a unified Democratic government, **[*242]** although capable of important legislative achievements, would be short lived. Given the Republicans' structural advantage, Democrats can only win a House majority by taking a significant number of Republican-leaning House districts, which would be difficult to retain in the 2018 midterm when a flawed Republican presidential candidate no longer heads the ticket and the electorate is predictably older, whiter, and more Republican.

Another possibility is a Republican presidential victory, which would almost certainly be accompanied by the party's retention of the House and Senate. It is entirely unclear how a Trump presidency would affect gridlock, partly because his policy proposals are vague and undeveloped, partly because he would face opposition within his own party's congressional ranks as well as from Democrats to many of his stated objectives. How conventional conservatives such as House Speaker Paul Ryan, Senate Majority Leader Mitch McConnell, and most of the members they lead would respond to Trump's specific proposals for undoing the Affordable Care Act, imposing tariffs, banning Muslim immigrants, and funding a national roundup of undocumented immigrants and the construction of a massive wall on the Mexican border is impossible to predict with any confidence. Trump's ability to rally the public behind any of these proposals would be limited by the fact that a majority of Americans do not support them. An ostensibly unified Republican government would probably be anything but unified in practice, continuing the bitter intraparty conflicts displayed in the 113th Congress, costing John Boehner his speakership, and in the contest for the nomination. If Trump were to nonetheless prevail with Congress, national policy would undergo some truly radical and extraordinarily divisive changes.

Ironically, however, the most likely outcome is that despite all the discontent, anger, and disdain for politics and politicians roiling the electorate in 2016, something close to the status quo will prevail: a Democratic president with politics nearly identical to Obama's facing Republican House and perhaps Senate majorities adamantly opposed to the president but hamstrung by internal divisions over policy and tactics. Hillary Clinton should be the favorite to

win, but even if she does, the Republicans' structural advantage is likely to keep at least the House in Republican hands, with most of the familiar players and problems returning once again when the new Congress convenes in 2017. The same configuration that fueled the Trump and Sanders insurgencies would be back in place.

References

Abrams, Samuel J., and Morris P. Fiorina. 2015. Party sorting: The foundation of polarized politics. In *American gridlock: the sources, character, and impact of polarization*, eds. James A. Thurber and Antoine Yoshinaka, 113-29. New York, NY: Cambridge University Press.

Abramowitz, Alan I. 2010. *The disappearing center: Engaged citizens, polarization, and American democracy*. New Haven, CT: Yale University Press.

Abramowitz, Alan I. 2015. The new American electorate: Partisan, sorted, and polarized. In *American gridlock: the sources, character, and impact of polarization*, eds. James A. Thurber and Antoine Yoshinaka, 19-44. New York, NY: Cambridge University Press.

Abramowitz, Alan I., Brad Alexander, and Matthew Gunning. 2006. Incumbency, redistricting, and the decline of competition in U.S. House elections. *Journal of Politics* 68 (1): 75-88.

Abramowitz, Alan I., and Steven W. Webster. 2016. The rise of negative partisanship and the nationalization of U.S. elections in the 21st century. *Electoral Studies* 41 (1): 12-22.

Agiesta, Jennifer. 14 September 2015. Misperceptions persist about Obama's faith, but aren't so widespread. CNN.

American National Election Studies. 2010. Time series cumulative data file [dataset]. Stanford University and the University of Michigan [producers and distributors]. Available from www.electionstudies.org.

Ansolabehere, Stephen. 2015. Cooperative congressional election study, 2014: Common content. [Computer file] Release 1: April 15, 2015. Cambridge, MA: Harvard University [producer] Available from http://cces.gov.harvard.edu.

Axelrod, David. 25 January 2016. The Obama theory of Trump. *New York Times*, A21.

Baumer, Donald C., and Howard J. Gold. 2010. *Parties, polarization, and democracy in the United States*. Boulder, CO: Paradigm Publishers.

Bernstein, Jonathan. 2015. The Trump effect begins to hit Congress. *Bloomberg Politics*. Available from http://www.bloombergview.com.

[*244] Bishop, Bill. 2008. *The big sort: Why the clustering of like-minded America is tearing us apart*. Boston MA: Houghton Mifflin.

Bradberry, Leigh, and Gary C. Jacobson. 2013. The Tea Party and the 2012 presidential election. *Electoral Studies* 40 (4): 500-508.

Brooks, David. 12 January 2016. The brutalism of Ted Cruz. *New York Times*, A27.

Burns, Alexander. 2 March 2016. Anti-Trump Republicans call for a third-party option. *New York Times*.

Clinton, Josh, Drew Englehardt, and John Lapinski. 12 January 2016. Poll: Obama approval depends on voter characteristics. Available from http://www.msnbc.com/msnbc/poll-obama-approval-depends-voter-characteristics.

CNN. 10 December 2012. *President: Full results: Exit polls*. Available from http://www.cnn.com.

Cohen, Michael A. 15 October 2015. Ted Cruz hits low point in Republican rhetoric. *Boston Globe*.

Conservatives against Trump. 21 January 2016. *National Review Online*. Available from http://c7.nrostatic.com.

Cook Political Report. 2016. House race ratings for 17 June 2016; Senate race ratings for 10 June 2016. Washington, DC.

Cornwell, Susan. 15 January 2016. Republican lawmakers worry about running on Trump's coattails. *Yahoo News*. Available from news.yahoo.com.

Douthat, Ross. 3 December 2015. Is Donald Trump a fascist? *New York Times*.

Dugan, Andrew. 2015. *Conservative Republicans alone on global warming timing*. Gallup. Available from http://www.gallup.com.

Friedersdorf, Conor. 24 February 2016. Will U.S. conservatives mount a third-party challenge if Trump is the nominee? *The Atlantic*. Available from http://www.theatlantic.com.

Gallup. 2016. Election *polls -- Presidential vote by groups*. Available from http://www.gallup.com/poll/139880/Election-Polls-Presidential-Vote-Groups.aspx.

Gerson, Michael. 13 August 2015. Trump declares war on America's demography. *Washington Post*. Available from https://www.washingtonpost.com.

Gerson, Michael. 18 January 2016. For the sake of the Republican Party, both Trump and Cruz must lose. *Washington Post*.
Goldberg, Jonah. 15 September 2015. No movement that embraces Trump can call itself conservative. *National Review*. Available from http://www.nationalreview.com.
Graham, Jesse, Jonathan Haidt, and Brian A. Nosek. 2009. Liberals and conservatives rely on different sets of moral foundations. *Journal of Personality and Social Psychology* 96 (5): 1029-46.
Grieder, Erica. 1 April 2013. The most hated man in the Senate. *Foreign Policy*. Available from http://foreignpolicy.com.
Hetherington, Marc J., and Jonathan D. Weiler. 2015. Authoritarianism and polarization in American politics, still? In *American gridlock: The sources, character, and impact of polarization*, eds. James A. Thurber and Antoine Yoshinaka, 86-112. New York, NY: Cambridge University Press.
Jacobson, Gary C. 2011. *A divider, not a uniter: George W. Bush and the American people*. 2nd ed. New York, NY: Longman.
Jacobson, Gary C. 2012a. The president's effect on partisan attitudes. *Presidential Studies Quarterly* 42 (4): 683-718.
Jacobson, Gary C. 2012b. Polarization, public opinion and the presidency: The Obama and anti-Obama coalitions. In *The Obama presidency: Appraisals and prospects*, eds. Bert A. Rockman, Andrew Rudalevige, and Colin Campbell, 94-121. Washington, DC: CQ Press.
Jacobson, Gary C. 2013. Partisan polarization in American politics: A background paper. *Presidential Studies Quarterly* 43 (4): 688-708.
Jacobson, Gary C. 2015a. Barack Obama and the nationalization of electoral politics in 2012. *Electoral Studies* 40 (4): 471-81.
Jacobson, Gary C. 2015b. Obama and nationalized electoral politics in the 2014 midterm. *Political Science Quarterly* 130 (1): 1-26.
Jacobson, Gary C. 2016a. Age, race, party, and ideology: Generational imprinting during the Obama presidency. Paper presented at the annual meeting of the Midwest Political Science Association, April 7-10, Chicago, IL.
Jacobson, Gary C. 2016b. Partisanship, money, and competition: Elections and the transformation of congress since the 1970s. In *Congress Reconsidered*. 11th ed., eds. Lawrence C. Dodd and Bruce I. Oppenheimer. Thousand Oaks CA: Sage Publications.
[*245] Jacobson, Gary C. 2016c. The coevolution of affect toward presidents and their parties. *Presidential Studies Quarterly* 46 (2): 1-29.
Jacobson, Gary C. 2016d. The Obama legacy and the future of partisan conflict: Demographic change and generational imprinting. *The ANNALS of the American Academy of Political and Social Science* (this volume).
Jacobson, Gary C., and Jamie L. Carson. 2016. *The politics of congressional* elections. 9th ed. New York, NY: Rowman & Littlefield.
Kam, Cindy D., and Donald R. Kinder. 2012. Ethnocentrism as a short-term force in the 2008 American presidential election. *American Journal of Political Science* 56 (1): 326-40.
Kamisar, Ben. 2 December 2015. GOP memo says what to do if Trump is nominee. *The Hill*.
Kessler, Glenn. 15 January 2016. Fact checking the 2016 presidential hopefuls. *Washington Post*. Available from https://www.washingtonpost.com.
Kim, Seung Min, and Connor O'Brien. 21 January 2016. Graham: Choice between Trump, Cruz like "being shot or poisoned." *Politico*. Available from http://www.politico.com.
Kutner, Jenny. 10 April 2015. Ted Cruz: Gay community is waging a "jihad" against people of faith. *Salon*. Available from http://www.salon.com.
Lee, M. J. 25 November 2015. Why some conservatives say Trump talk is fascist. CNN. Available from http://www.cnn.com.
Lee, M. J., Sara Murray, Jeremy Diamond, Noah Gray, and Tal Kopan. 27 January 2016. Why I'm voting for Trump. CNN. Available from http://www.cnn.com.
Levendusky, Matthew. 2009. *The partisan sort: How liberals became Democrats and conservatives became Republicans*. Chicago, IL: University of Chicago Press.
Linker, Damon. 9 December 2015. Why conservative pundits hate Donald Trump. *The Week*. Available from http://theweek.com.
Mahler, Jonathan. 29 February 2016. Donald Trump's message resonates with white supremacists. *New York*

Times.
Martin, Jonathan. 16 January 2016. Donald Trump or Ted Cruz? Republicans argue over who is the greater threat. *New York Times*.
Pasek, Josh, Jon A. Krosnick, and Trevor Thompson. 2012. The impact of anti-black racism on approval of Barack Obama's job performance and on voting in the 2012 presidential election. Unpublished manuscript, Stanford University.
Pew Research Center. 2013. *GOP deeply divided about climate change*. Research report. Washington, DC: Pew Research Center.
Pew Research Center. 2014. *Political polarization in the American public*. Research report. Washington, DC: Pew Research Center.
Pew Research Center. 2016. *Campaign exposes fissures over issues, values and how life has changed in the U.S*. Research report. Washington, DC: Pew Research Center.
Piston, Spencer. 2010. How explicit racial prejudice hurt Obama in the 2008 election. *Political Behavior* 33 (4): 432-51.
Poole, Keith T., Howard Rosenthal, and Christopher Hare. 16 January 2016. More on polarization through the 114th. Voteviewblog.
Raju, Manu. 12 January 2016. The Ted Cruz pile on: GOP senators warn of revolt should he win the nomination. CNN.
RAND. 27 January 2016. Despite "outsider" popularity, voters see little difference between candidates on ideology. Available from http://www.rand.org/news/press.
Rove, Karl. 1 April 2015. The myth of the stay-at-home Republicans. *Wall Street Journal*.
Rubin, Jennifer. 19 January 2016. Does the GOP want a hater as president? *Washington Post*.
Sherman, Jake, and John Bresnahan. 13 January 2016. Pollster: Cruz would hurt Republican House hopefuls most. *Politico*. Available from http://www.politico.com.
Stonecash, Jeffrey M., Mark D. Brewer, and Mack D. Mariani. 2003. *Diverging parties: Social change, realignment, and party polarization*. Boulder CO: Westview Press.
Tesler, Michael. 2013. The return of old-fashioned racism to white Americans' partisan preferences in the early Obama era. *Journal of Politics* 75 (1): 110-23.
Tesler, Michael. 27 January 2016. A newly released poll shows the populist power of Donald Trump. The Monkey Cage, *Washington Post*.
[*246] Tesler, Michael, and David O. Sears. 2010. *The 2008* election *and the dream of a post-racial America*. Chicago IL: University of Chicago Press.
Tien, Charles, Richard Nadeau, and Michael S. Lewis-Beck. 2012. Obama and 2012: Still a racial cost to pay? *PS: Political Science and Politics* 45 (4): 591-5.
Walshe, Shushanna. 13 March 2013. RNC completes "autopsy" on 2012 loss, calls for inclusion not policy change. *ABC News*.
Wehner, Peter. 14 January 2016. Why I will never vote for Donald Trump. *New York Times*.
Weisberg, Herbert F., and Christopher Divine. 2009. Racial attitude effects on voting in the 2008 presidential election: Examining the unconventional factors shaping vote choice in a most unconventional election. Paper presented at the Mershon Conference on the Transformative Election of 2008, October 1-4, Columbus, OH.
Will, George. 1 April 2015 (2015a) Cruz's electoral theory doesn't add up. *National Review*.
Will, George. 12 August 2015 (2015b). Donald Trump is a counterfeit Republican. *Washington Post*.
Wright, David. 22 March 2016. Poll: Trump, Clinton score historic unfavorable ratings. *CNN Politics*. Available from http://www.cnn.com.

Social Science

End of Document

ARTICLE: BEYOND THE PAYCHECK FAIRNESS ACT: MANDATORY WAGE DISCLOSURE LAWS--A NECESSARY TOOL FOR CLOSING THE RESIDUAL GENDER WAGE GAP

Summer, 2013

Reporter
50 Harv. J. on Legis. 385

Length: 25436 words

Author: Marianne DelPo Kulow*

* Associate Professor of Law, Bentley University, Waltham, Massachusetts; B.A. Harvard University, M.A. University of Liverpool, J.D. Boston University.

Highlight

Despite the presence of three federal statutes outlawing gender discrimination in wages, United States women continue to earn only 77 cents to the male dollar. One reason that many identify for part of the remaining gap is that wage discrimination often goes undetected by its victims because salaries of comparably employed males are usually private information. Therefore, some suggest that mandatory wage disclosure laws are necessary to completely close the gap. This Article makes the case for adoption of such a statute.

Text

[*385]

I. Introduction

Despite the presence of three federal statutes outlawing gender discrimination in wages, [1] United States women continue to earn only about 77 cents to the male dollar. [2] The significance of this discrepancy becomes even more

---

[1] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)); Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.§§2000e to 2000e-17 (2006 & Supp. V 2011)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, **123 Stat. 5** (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (2006 & Supp. V 2011)).

[2] Although this figure varies with industry, age, geographic region, level of education, and position held, this is the 2010 U.S. Census median figure for full-time, year-round workers age fifteen and over, of all races, throughout the United States. U.S. Census Bureau, Current Population Reports, tbl.P-40 (2011), available at http://www.census.gov/hhes/www/income/data/historical/people. Income measurements are obtained by asking each person age fifteen and older the amount of income he or she received in the preceding calendar year from each of eighteen potential income sources (e.g., earnings, social security, interest, alimony, etc.). See Carmen DeNavas-Walt et al., U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2011, at 7 tbl.1, App'x A (2012), available at http://www.census.gov/prod/2012pubs/p60-243.pdf. See also Wage Gap Statistically Unchanged and Still Stagnant, Nat'l Committee on Pay Equity, http://www.pay-equity.org (last visited Feb. 8, 2013) ("The wage gap remained statistically unchanged in the last year. Women's earnings were 77.0 percent of men's in 2011, compared to 77.4 percent in 2010, according to Census statistics released September 12, 2012 based on the median earnings of all full-time, year-round workers. Both men's and women's earnings showed slight increases from 2009 to 2010 with men's at $ 47,715 and women's at $ 36,931, a difference of $ 10,784. Fifty years ago women earned 61 percent of what men earned, a Census official noted in releasing the data."); 24 Cents Short: Women Still Lag Behind Men in Earning Power, Nat'l Ass'n for Female Executives (Nov. 29, 2005),

[*386] apparent when one looks at the impact of the gap over an entire working lifetime. A woman who makes 77 cents on the male dollar loses a total of $ 1.2 million dollars over the course of her working life. [3] What is more, progress toward closing this gap has stalled, [4] recent legislative efforts to strengthen existing wage discrimination laws have failed, [5] and there is little reason to believe that gender wage parity will occur without some additional proactive steps. [6]

To determine what new steps would be most effective, it is necessary to understand the reasons for the persistent gap. Many of the factors originally contributing to the wage gap have been substantially ameliorated. [7] Yet a gap remains. Why? One reason for the remaining gap unaddressed by current initiatives is that wage discrimination often goes undetected by its victims because salaries of comparably employed males are usually private information. [8] Hence, the legislative tools available to remedy wage discrimination are underutilized due to a lack of awareness of claims.

---

www.nafe.com/web?service=direct/1/ViewArticle Page/dlinkFullTopArticle3&sp=365&sp=275 [hereinafter 24 Cents Short] ("Women continue to earn less than men--only about 76 cents for every dollar … ."); Judy Goldberg Dey & Catherine Hill, Am. Assoc. Univ. Women Educ. Found., Behind the Pay Gap (2007), available at http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf (examining the gender wage gap for college graduates); Laura Fitzpatrick, Why Do Women Still Earn Less Than Men?, Time, Apr. 20, 2010, available at http://www.time.com/time/nation/article/0,8599,198 3185,00.html; Dep't for Prof'l Emps. Am. Fed'n of Labor and Cong. Indus. Orgs., Fact Sheet 2010: Professional Women: Vital Statistics 2 (2010), available at www.pay-equity.org/PDFs/ProfWomen.pdf [hereinafter Fact Sheet 2010] (citing 2007 Center for American Progress study).

[3] Evelyn F. Murphy & E.J. Graff, Getting Even: Why Women Don't Get Paid Like Men--and What To Do About It 26 (2005). The total varies by level of education; this figure is for a college graduate. A high school graduate will lose $ 700,000. A professional school graduate will lose $ 2 million. Id.

[4] Id. at 3-5 (discussing the slow progress toward closing the gap as well as the times of reversal of that progress); see also White House, Equal Pay Task Force Accomplishments: Fighting for Fair Pay in the Workplace (2012), available at http://www.white house.gov/sites/default/files/equal pay task force.pdf.

[5] Consider, for example, the recent failure of the Paycheck Fairness Act, S. 3220, 112th Cong. (2012). See infra note 232 and accompanying text.

[6] Murphy & Graff, supra note 3, at 7 (explaining why the gap will not inevitably close on its own); see also Press Release, Inst. for Women's Policy Research, Pay Secrecy and Paycheck Fairness: New Data Shows Pay Transparency Needed (Nov. 15, 2010), available at www.iwpr.org/press-room/press-releases/pay-secrecy-and-paycheck-fairness-new-data-shows- pay-transparency-needed [hereinafter Pay Secrecy and Paycheck Fairness] (explaining why the Paycheck Fairness Act is insufficient).

[7] These reasons include underlying gender gaps in education, skills, and experience, as well as occupational segregation and career breaks or curtailment for motherhood. See Dey & Hill, supra note 2, at 3; J. Ralph Lindgren et al., The Law of Sex Discrimination 166-72 (4th ed. 2011) (discussing education, experience, and occupational segregation); Murphy & Graff, supra note 3, at 194-213 (discussing the "Mommy Penalty"). See infra Section II.B for a detailed discussion of which of these factors remain and which have been mitigated or eliminated.

[8] Peter Coy & Elizabeth Dwoskin, Shortchanged, Bus. Wk., June 21, 2012, http://www. businessweek.com/articles/2012-06-21/equal-pay-plaintiffs-burden-of-proof ("Pay discrimination is a silent offense."). This conundrum is illustrated well by the plaintiff in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 623-24 (2007), which held that Ledbetter could not proceed with her claim because, although she filed suit within 180 days of when she first learned that she was getting paid less than comparable male employees, she had failed to file within 180 days of when "the alleged unlawful employment practice occurred." While the Lily Ledbetter Act solved for future plaintiffs the dilemma of delayed awareness of a claim, it does not provide a vehicle for acquiring that awareness. See Pay Secrecy and Paycheck Fairness, supra note 6. See infra Section III.B.2 for a more thorough discussion of this issue.

[*387] Mandatory wage disclosure laws may be a solution to this part of the wage gap. [9] Limited salary disclosure laws do exist in the United States. [10] These are primarily for public employees and most were not passed with the goal of eliminating gender wage discrimination. [11] Nonetheless, these laws can impact wage discrimination by providing women with the necessary information to bring a claim. Have they had this effect? If so, is a broader adoption of wage disclosure laws desirable? This Article will address these questions.

Part II examines the history of the gender wage gap, the various explanations that have been proffered for it, and recent data/studies that indicate which of these explanations are obsolete and which remain valid. Part III reviews attempted and suggested gap closing techniques--both cultural and legal--and demonstrates that even the most promising of these fall short of eliminating wage discrimination. Part IV assesses the effectiveness of wage disclosure--both legislatively required and voluntary--in narrowing the gap. Part V proposes the adoption of mandatory wage disclosure legislation as a necessary additional tool in closing the remaining gender wage gap: Congress needs to pass not only the Paycheck Fairness Act but also an amendment to it requiring wage disclosure.

II. History: How Did We Get Here and Why Are We Stuck?

The history of the gender wage gap informs any discussion of effective solutions to the residual gap because some of the cultural assumptions underlying the original gap may continue to undermine women's progress toward pay parity today. [12] It is also vital to critically examine early explanations for the wage gap so as to discern which of these are now outdated (and so, if used, mere excuses) and which ones, in contrast, still at least partially explain the gap and, therefore, need to be addressed.

[*388]

A. The Gap: Where Did It Begin and Where Is It Now?

The original wage gap was premised on the notion that women's work was less valuable than men's work. Colonial America was a very Christian society and the Bible supported the general notion that women were less valuable than men [13]:

> The Lord said to Moses, "Say to the people of Israel, when a man makes a special vow of persons to the Lord at your valuation, then your valuation of the male from twenty years old up to sixty years old shall be 50 shekels of the sanctuary. If a person is a female, your valuation shall be thirty shekels." [14]

---

[9] Pay Secrecy and Paycheck Fairness, supra note 6; Margaret Littman, The Silent Treatment, Working Woman, Aug. 2001, at 76. See also Coy & Dwoskin, supra note 8, at 6 ("Women often don't know when they're getting paid less than men.").

[10] See infra notes 214, 238.

[11] An exception to this is Minnesota, where the pay equity law was for this purpose, but was coupled with comparable worth measures. See *Minn. Stat.§§471.992-.999* (2012); see also infra note 247 and accompanying text.

[12] See Murphy & Graff, supra note 3, at 194-213 (demonstrating that much of the extra wage gap experienced by mothers is based on stereotypes and assumptions that employers make about what hours mothers will be willing to work rather than on women's choices to curtail hours or go to part-time status).

[13] See Symon Patrick, A Commentary Upon the Historical Books of the Old Testament 533 (5th ed. 1738) ("Ver. 4. And if it be a female, then thy estimation shall be thirty shekels. Women could not be so serviceable as Men, and therefore were valued at a less rate: For all that they could do was to spin, or weave, or make Garments, or wash for the Priests … .").

[14] Leviticus 27:1-4.

In addition, the types of work that women did for wages in colonial and revolutionary America--household tasks of sewing, cleaning, and caring for children and the sick--were viewed as unskilled labor that required no particular education or training and, therefore, were worth less than men's work. [15]

Beyond a low valuation of both the worker and the work produced, it was widely believed that women did not need to earn as much as men because they were not supporting a family as men were: women's wages were supplementary income or pocket money, not vital earnings necessary to put bread on the table. [16] In a patriarchal society, it was culturally acceptable for an employer to determine wages as much based on the financial needs of the **[*389]** worker as on the value of the work produced. [17] Indeed, women rarely worked for wages in colonial and revolutionary America because men typically took care of women's financial needs. [18] When women did work in these eras, their wages were turned over to their father or husband since they were not legally allowed to own property. [19] Women typically worked, if at all, in the brief period between adolescence and marriage. [20] Once a woman married and began a family, she rarely continued to work outside the home on a full-time basis. [21] In situations of financial need, a mother might do part-time work in the form of mending, caring for the children of others, or housecleaning. [22] These jobs were acceptable because they were seen as natural extensions of the

---

[15] Lindgren et al., supra note 7, at 172 ("The first [explanation of the wage gap] was that women workers, as a group, possess a different and less valuable set of employment skills than do men workers as a group.").

[16] See Women and Minorities in Management, Reference for Bus., 2d ed., http://www.referenceforbusiness.com/management/Tr-Z/Women-and-Minorities-in-Management.html (last visited Feb. 23, 2013) (stating that "Tradition has held that men were expected to be the primary wage earners of the family, while women were expected to make the home."). These assumptions are dramatically illustrated by women's wages during the two World Wars: when women became the temporary primary bread earners for their families and were doing "men's work," they were paid wages more comparable to men's:

During World War I, women were first guaranteed pay equity in the form of regulations enforced by the War Labor Board of 1918. The Board's equal pay policy required manufacturers, who put women on the payroll while male employees were serving in the military, to pay those women the same wages that were paid to the men. During World War II, a large number of American women took jobs (most for the first time) outside the home. Many of these women worked in the war industries, and in 1942 the National War Labor Board urged employers to make "adjustments which [would] equalize wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations."

A Brief History of the Wage Gap, Pay Inequity, and the Equal Pay Act, Am. Ass'n of Univ. Women, *http://www.aauw.org/what-we-do/legal-resources/online-resource-library/*equal-pay- act (last visited July 19, 2012) (citations omitted).

[17] See *A Brief History of the Wage Gap,* Pay *Inequity, and the* Equal Pay Act*, supra* note 16 ("Until the early 1960s, advertisements for job listings were separated by sex. Almost all of the higher level jobs were for men, and some ads for the exact same job would offer different pay for men and women."). Indeed single men were paid less than husbands and childless men were paid less than fathers. See, e.g., Singled Out: Are Unmarried People Discriminated Against?, Daily Beast, Feb. 6, 2012, *http://www.thedailybeast.com/articles/2012/02/06/singled-out-are-america-s-unmarried-discriminated-against.html*; see also Yinon Cohen & Titchak Haberfeld, Why Do Married Men Earn More than Unmarried Men?, 20 Soc. Sci. Res. 29, 30 (1991); Martha S. Hill, The Wage Effects of Marital Status and Children, 14 J. Hum. Resources 579 (1979).

[18] See Lindgren et al., supra note 7, at 2-4 (quoting 1 William Blackstone, Commentaries).

[19] Id.

[20] Id. at 2; Nadine Taub & Elizabeth M. Schneider, Women's Subordination and the Role of Law, in Politics of Law 339-40 (David Kairys ed., 1998).

[21] Closing the Gap, Economist: Special Report on Women & Work, Nov. 26, 2011, at 4. An exception to this was immigrant garment workers in New York City and these not until turn of the century. A Century of Women 8 (Alan Covey ed. 1994) (based on a documentary script by Jacoba Atlas with Heidi Schulman and Kyra Thompson); see also Taub & Schneider, supra note 20, at 339-40 (discussing mill workers; however, these jobs, too, only became prevalent in the 1800s).

[22] A Century of Women, supra note 21, at 8; see also Taub & Schneider, supra note 20, at 339-40.

woman's role as mother, housekeeper, and comforter. [23] In 1839 states began to pass a series of Married Women's Property Acts. [24] **[*390]** These statutes allowed women to own property, both real and monetary, and by 1895 every state had passed some version of such a statute. [25] As women began to have a right to their own bank accounts, they could retain the wages that they earned. Nonetheless, cultural assumptions persisted that women's wages were merely supplementary to men's wages, [26] and that husbands would hold marital assets. [27] In fact, a series of court decisions reaffirmed that laws could treat women differently from men in the workplace for their own protection. [28] This protectionist rationale [29] provided a powerful defense against equal protection

---

[23] Taub & Schneider, supra note 20, at 339-40 (noting that in the colonial and revolutionary periods of U.S. history, women and men dominated separate arenas of life (men public and women private) and that work was therefore considered a public male task); Barbara Welter, Cult of True Womanhood: 1820-1860, 18 Am. Q. 151, 152 (1966) (noting that in 1820-1860 there were four cardinal virtues for a woman (piety, purity, submissiveness, and domesticity) and four acceptable roles (mother, daughter, sister, wife)).

[24] Linda E. Speth, The Married Women's Property Act: 1839-1865, in Women and the Law: A Social Historical Perspective 69-91 (D. Kelly Weisberg, ed. 1982). These acts were part of a broader women's rights movement. At the first women's rights convention in Seneca Falls, New York in 1848 (organized by Elizabeth Cady Stanton and Lucretia Mott and attended by approximately 300 women and men, including Frederick Douglass), attendees ratified a document paralleling the Declaration of Independence. See Elizabeth Cady Stanton, Declaration of Sentiments (July 1848). The Declaration of Sentiments is widely regarded as the most famous document in the history of feminism. Although there was some statutory movement toward granting women property rights as early as 1839, the Declaration accelerated this movement by launching a campaign to abolish all the common law rules of coverture, including those that limited married women's ability to own property. See Lindgren et al., supra note 7, at 10, 12. There were also other reasons for these laws. "In some states, the acts were limited in scope, shaped primarily to serve the interests of fathers wishing to protect their estates from sons-in-law and husbands seeking to shield their own property from creditors. Typical of this pattern was America's first Married Women's Property Act, passed in Mississippi in 1839. This law (most of which dealt specifically with slaveholdings) guaranteed the right of married women to receive income from their property and protected it against being seized for their husbands' debts, but the law left husbands in sole charge of buying, selling, or managing the property. In other states, especially post-1848 where women's rights movements took a leading role in the campaigns, more ambitious property reform laws were passed, usually during the decade before the Civil War. In New York in 1860, for instance, the lobbying of women's rights advocates helped win passage of one of the nation's most comprehensive Married Women's Property Acts. This law guaranteed wives' right to own, buy, and sell property, to sign contracts, to sue and be sued, to keep their own wages, and to be joint guardians of their children. By the mid-1870s, almost all the states in the North had passed Married Women's Property Acts, and by the end of the century, the southern states had as well. Although the scope of these laws varied widely from state to state, taken together they represented a sweeping transfer of property rights and a historic improvement in the status of American married women." Married Women's Property Acts, Houghton Mifflin Companion to US History, The Reader's Companion to American History (Eric Foner and John A. Garraty, eds., 1991) available at *http://www.answers.com/topic/married-women-s-property-*acts*#ixzz2QBJC* nr9t (last visited on Apr. 11, 2013). See also Wilma Mankiller et al., eds., The Reader's Companion to U.S. Women's History (NY: Houghton Mifflin, 1998), 285, available at http://books. google.com/books?id=D9lhBw8t410C&pg=PA285&#v=onepage&q&f=false (last visited on Apr. 11, 2013); Reader's Companion to U.S. Women's History 285, 358-59 (Wilma Mankiller et al. eds., 1999).

[25] See Kathryn Kish Sklar, Social Justice Feminists in the United States and Germany 149 n.39 (1998).

[26] See discussion supra note 16. Also, women were routinely not given benefits, such as health insurance, on the assumption that they were covered by their husband or spouse. Cf. *Frontiero v. Richardson, 411 U.S. 677, 678-79 (1973)* (finally banning military assumption that spouses of male soldiers were automatically dependents but requiring female soldiers to prove their husbands' actual financial dependence).

[27] As late as the 1970s most marital assets were still held in the husband's name. See, e.g., *Orr v. Orr, 440 U.S. 268, 270 n.1 (1979)* (challenging an Alabama statute that contained the assumption (as late as 1979) that alimony should only paid by men because they held all marital assets and earning power).

[28] E.g., *Goesart v. Cleary, 335 U.S. 464 (1948)* (upholding a Michigan law that permitted women to work as barmaids only if they were the wife or daughter of the male bar owner); *Muller v. Oregon, 208 U.S. 412, 422-23 (1908)* (upholding an Oregon law that restricted the number of hours that women could work while not restricting hours for men).

challenges to gender-biased work laws and reinforced **[*391]** the notion that a woman's first priority ought to be being a good wife and mother. [30] These notions continued well into the twentieth century. [31]

The early cultural norms surrounding women's work played out for many subsequent generations. The first women to enter the full-time work force at the turn of the twentieth century were predominantly immigrants whose husbands' unskilled labor did not produce sufficient income to support the family. [32] Jobs open to these women were extensions of the genteel part-time work done by earlier generations of mothers: factory work involving sewing machines (textile mills), domestic work in wealthier women's homes, daycare, and elementary school teaching. [33] Because these jobs were still considered unskilled and because only women (who were still presumed to be at least partially supported by a father or spouse) did them, low pay continued to be the norm. [34]

Between 1950 and 1990 the United States experienced an unprecedented feminization of the workplace. In 1950 only 28% of adult women worked outside the home, and half of these worked part-time. [35] Women had jobs, not careers, and the concept of wage equity was an alien one. [36] By 1990 over 57% of adult women worked outside the home with over 70% of these working full-time. [37] It was during this period that the gender wage gap was first documented, publicly challenged, and legally addressed. [38] In 1950-1960 women earned fifty-nine to sixty-four cents for every dollar earned by their male counterparts. [39] Women began to speak out about this injustice. **[*392]**

---

[29] Lindgren et al., supra note 7, at 21-29.

[30] Lindgren et al., supra note 7, at 21-29; see also *Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605, at 22 (1908)* (pointing out that long hours could hurt a woman's reproductive system).

[31] See, e.g., *Glover v. Glover, 314 N.Y.S.2d 873, 877 (N.Y. Fam. Ct. 1970)* (punishing divorcee with no alimony for not being a supportive wife). A notable exception to this was during the two World Wars when women assumed men's jobs. Id.; see also A Century of Women, supra note 21, at 34-35. However, at the end of both wars, women surrendered these jobs back to men. Id. at 40.

[32] A Century of Women, supra note 21, at 8.

[33] Taub & Schneider, supra note 20, at 339-40.

[34] Lindgren et al., supra note 7, at 77.

[35] Id. at 77.

[36] A Century of Women, supra note 21, at 42 (quoting Marjorie Sutton, a 1950s homemaker: "There was no such thing in those days as a career, per se. There were women out there working, but I didn't know about them.").

[37] Lindgren et al., supra note 7, at 77; see also Fact Sheet 2010, supra note 2, at 1 ("Almost 60%" of women worked between 1997 and 2008). By way of context, men's labor participation rate in 1999 was 74.7%. Changing Work Behavior of Married Women, Nat'l Bureau of Econ. Research, *http://www.nber.org/digest/nov05/w11230.html* (last visited Feb. 9, 2013).

[38] See, e.g., Women Pushed Down Job, Pay Ladder, Milwaukee J., Dec. 16, 1964, at 9 (in which the head of the U.S. Labor Department's Women's Bureau is quoted as saying that, although 49 percent of women between 18 and 64 hold jobs, the wage gap between men and women "has been widening over the past 24 years in every major industry"). Note that two of the three federal statutes outlawing gender wage discrimination were passed in the 1960s: The Equal Pay Act and Title VII of the Civil Rights Act of 1964.

[39] See Murphy & Graff, supra note 3, at 4 (59 cents); Borgna Brunner, The Wage Gap: A History of Pay Inequality and the Equal Pay Act, Information Please, *http://www.info* please.com/spot/equalpayact1.html (last visited Apr. 3, 2013); see also J. Ralph Lindgren et al., The Law of Sex Discrimination 225 (2d ed. 1993) (showing August 1992 census report, citing figures for 1955 of 64.5 and for 1960 of 60.7). This downward trend in women's wages may be explained by the growing number of women entering the workforce since the initial influx of female workers was primarily comprised of relatively inexperienced workers and in lower paying fields. See June O'Neill, The Trend in the Male-Female Wage Gap in the United States, 3 J. Labor Econ. S91, S114 (1985). Methods of income calculation for 1960 can be found at U.S. Dep't of Commerce, Current Population Reports: Consumer Income: Income of Families and Persons in the United States: 1960, at 19-20 (1962), available at

President Kennedy listened and signed into law The Equal Pay Act of 1963, making it illegal for the first time to pay women less than men for the same work. [40] The phrase "equal pay for equal work" was coined and many believed that the discrepancies would now be remedied. Initially the legal tool seemed effective. By 1971 back wages totaling more than $ 26 million were paid to 71,000 women. [41] However, during this same period the wage gap actually broadened and women in 1971 were earning only 59.5 cents on the male dollar. [42]

After a low of 56.6 in 1973, [43] progress ensued in the 1980s with women's wages climbing to nearly 72 cents of the male dollar by 1990. [44] However, this progress slowed throughout the 1990s, with women earning 74 cents to the male dollar by 2000--a gain of only 2 cents in a decade. [45] In 2010 the gap stood at 77.4 cents. [46] This represents virtually no change since 2005. [47] These figures beg a number of questions. Why is progress toward wage parity so slow? Why has the limited progress flattened? What needs to be done to eliminate the remaining gap? To address these questions, one must first examine the traditional explanations given for the modern gender wage gap.

B. Reasons for the Modern Gap: Explanations or Excuses?

Although the Equal Pay Act of 1963 made it illegal to set wages based on gender or financial need, the two hundred year history of women in the United States workplace set the stage for the wage gap that women continued **[*393]** to encounter in the 1960s when they entered the full-time workforce in record numbers. As detailed in the prior section, patterns of women's work established in colonial and revolutionary America--in terms of both the type of work available to women and the value placed on that work--persisted well into the mid-twentieth century. In addition, as late as 1955 women still rarely headed households [48] and so employers continued to favor married men and fathers in their pay schemes and commonly excluded female employees from any modern

---

http://www2.census.gov/prod2/popscan/p60-037.pdf. See also id. at 2 (reporting average income of women as $ 3300 and of men as $ 5400, for a figure of 61 cents).

[40] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)).

[41] See Brunner, supra note 39.

[42] U.S. Census Bureau, Current Population Reports, supra note 2, at tbl.P-40. Again, this downward trend may be attributable to more women entering the workforce since the first waves of women were relatively inexperienced and entered lower paying fields. See O'Neill, supra note 39, at S93-S94 (noting this trend began in the 1950s).

[43] See O'Neill, supra note 39.

[44] U.S. Census Bureau, Current Population Reports, supra note 2, at tbl.P-40.

[45] Id.

[46] Id.

[47] See Coy & Dwoskin, supra note 8 (noting that the gap "has narrowed only 4 [cents] since 1994 and less than 1 [cents] since 2005"); David Leonhardt, Scant Progress on Closing Gap in Women's Pay, N.Y. Times, Dec. 24, 2006, at 1; 24 Cents Short, supra note 2 ("In recent years, virtually no progress has been made in narrowing the gender wage gap."); The Cashier and the Carpenter, Economist: Special Report on Women and Work, Nov. 26, 2011, at 5.

[48] In 1960 one in ten households was maintained by a woman. By 1991 this figure was eighteen percent, or almost one in five. Lindgren et al. (2d ed.), supra note 39, at 224; see also Majority Staff of U.S. Cong. J. Econ. Comm., 111th Cong., Women and the Economy 2010: 25 Years of Progress But Challenges Remain 9 (2010), available at http://www.jec.senate.gov/public/?a=Files.Serve&File id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa 81 ("In 1983, 20 percent of all families with children (or 6.6 million families) were female-headed households. By 2009, 25 percent of all families with children (9.8 million families) were female-headed households.").

benefits such as medical insurance or retirement plans on the assumption that females were taken care of in these ways by their father or husband. [49]

This is not to say that all gender wage differences encountered by women in the 1960s were the result of intentional discrimination. That was only one piece of the puzzle. The gap that persisted for the remainder of the twentieth century traditionally has been explained in the following ways:

1. Women are less educated and trained than men.

2. Women are less experienced and have less seniority than men.

3. Women are occupationally segregated into lower paying jobs.

4. Women are not attaining the highest paying jobs in their fields.

5. Employers continue to engage in wage discrimination. [50]

The first four of these explanations allows employers to legally pay women less than men under the Equal Pay Act. [51] To what extent do each of these continue to explain the persistent wage gap? As detailed below, the first explanation, while somewhat legitimate in the 1960s and 1970s, is simply no longer valid. The second explanation is no longer true in its original formulation but retains some validity in the context of the impact of reduced hours and career breaks for parenthood. The third and fourth explanations, while still partially accurate, are significantly less true today than when first advanced and, like motherhood, fail to completely account for the remaining twenty-three cent wage gap. Unless some other explanation has been overlooked, this leads to the inevitable conclusion that some illegal wage discrimination **[*394]** continues to exist and is not being adequately addressed by current laws. [52]

1. Women are Less Educated and Trained Than Men

In colonial America girls were not educated. In the period from the American Revolution to the Civil War, girls were given a basic education and first became teachers in significant numbers. From the end of the Civil War to the Depression, women began to go to college, largely in single-sex institutions designed to make them more appropriate wives for educated men. [53] Then came the Depression, followed by World War II, both of which disrupted women's educational progress. [54] When this progress resumed in the post-war era, women began to go to college in more significant numbers and more institutions of higher education became coeducational. [55] Still, when the Equal Pay Act of 1963 was passed, more men than women had graduated from both college and

---

[49] See supra text accompanying notes 16 (men presumed to need benefits but not women), 17 (fathers and husbands paid more than single or childless men), and 18 (women presumed to be financially supported by husband).

[50] See, e.g., Murphy & Graff, supra note 3, at 9; Lindgren et al., supra note 7 , at 166-67, 172 (discussing education, experience, and occupational segregation).

[51] *29 U.S.C. § 206*(d) (2006 & Supp. V 2011). The law provides affirmative defenses for wage differences based on seniority systems, merit systems, quantifiable production differences, and factors other than sex. See *29 U.S.C. § 206*(d)(1).

[52] See Francine D. Blau & Lawrence M. Kahn, The Gender Pay Gap: Have Women Gone as Far as They Can?, 21 Acad. Mgmt. Perspectives, Feb. 2007, at 7, 10-12 (concluding that, after accounting for all other factors, forty-one percent of the gap remains unexplained "and [is] potentially due to discrimination").

[53] Nona P. Lyons, Women's Education, in Encyclopedia of Educational Research 1522-24 (6th ed. 1992).

[54] Id. But see Closing the Gap, supra note 21, at 4 (noting that, from the 1930s onward, more women went to high school and college).

[55] Lyons, supra note 53, at 1523.

graduate schools, [56] justifying employers' claims that men were more educated than women and thus entitled to higher pay as more qualified job applicants.

[*395] Title IX was passed in 1972, banning gender discrimination in education. [57] This broad legislation impacted United States education at every level. For example, Title IX's impact on athletics alone profoundly changed United States culture. Equal access to athletics and athletic experience has, in turn, improved women's ability to compete in the workplace. [58] Most directly relevant to this discussion, Title IX removed myriad barriers to access to higher education. It required gender equity in everything from admissions and financial aid to housing and career counseling. [59] While Title IX permitted private colleges to remain single-sex, it required equal gender access to public colleges, vocational schools, professional schools, and graduate schools. [60] This federal legislation brought about sweeping changes in United States higher education: by 2000, more young women than men were attaining college and graduate degrees. [61] In 2009 the contrast was quite marked, with 35% of women between twenty-five and thirty-four holding a bachelor's degree, compared to 27% of men in the same age range. [62]

---

[56] Between 4.5% and 5.7% of males had bachelor's degrees, while between 3.6% and 4.8% of females had them. For graduate education, 3.6% to 5.2% of men had some, while only 1.4% to 2.1% of women did. These estimates are based on census data from 1960 and 1970. See generally U.S. Census Bureau, Years of School Completed by Persons 14 Years Old and Over, By Age, Color, and Sex, For the United States 1960 and 1950 tbl.173 (1960), available at http://www.census.gov/hhes/socdemo/education/data/cps/1960/cp60pcs1- 37/tab-173.pdf; U.S. Census Bureau, Years of School Completed by Persons 14 Years Old and Over, By Race, Sex, and Age: 1970 tbl.199 (1970), available at http://www.census.gov/hhes/socdemo/education/data/cps/1970/tab-199.pdf. The 1960 table indicates that 4.5% of male population had bachelor's degrees and 3.6% had post-graduate education. U.S. Census Bureau (1960), supra, at 2. In contrast, 3.6% of the female population had bachelor's degrees and 1.4% had post graduate education. Id at 3. By 1970, the next time this data was collected, these figures were 5.7% male bachelor's degrees, 5.2% male graduate education; 4.8% female bachelor's, 2.1% female graduate education. U.S. Census Bureau (1970), supra, at 1. Hence one can assume that in 1963 the numbers were somewhere between the 1960 census numbers and the 1970 census numbers. The latest tables combine bachelor's and graduate degrees so that the relevant ranges would be male 9.7-13.5%; women 5.8-8.1%. In 1960 9.7% of men over twenty-five had a bachelor's degree or higher, while only 5.8% of women did so. U.S. Census Bureau, A Half Century of Learning: Historical Statistics on Educational Attainment in the United States, 1940-2000 tbl.2 (2000), http://www.census.gov/hhes/socdemo/education/data/census/half-century/tables.html. In 1970, 13.5% of men had a bachelor's or higher, while only 8.1% of women did. Id.

[57] Education Amendments of 1972, Tit. IX, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C § 1681 (2006 & Supp. V 2011)).

[58] See Betsey Stevenson, Beyond the Classroom: Using Title IX to Measure the Return to High School Sports, 92 Rev. Econ. & Stat. 284, 299-300 (2010); see also Keith O'Brien, She Shoots She Scores! What Sports Actually Do for Girls--and for All of Us, Boston Globe, Aug. 1, 2010, http://www.boston.com/bostonglobe/ideas/articles/2010/08/01/she shoots she scores.

[59] 20 U.S.C.§§1681(a), 1687(2) (2006 & Supp. V 2011).

[60] 20 U.S.C. § 1681(a)(1) (2006 & Supp. V 2011).

[61] See U.S. Census Bureau, A Half Century of Learning: Historical Statistics on Educational Attainment in the United States, 1940-2000, supra note 56. In 2000, 29.7% of women aged twenty-five to twenty-nine had bachelor's degrees or more, while 24.7% of men in the same age group had the same. Id. Of course, if you compare the entire adult male and female population, men still have a slight edge (26.1% versus 22.9%) but this is due to the remaining discrepancies among older Americans (e.g., of those aged seventy-five or over, 17.7% of men have bachelor's degrees or higher, while only 10.7% of women have the same). See id.

[62] See Camille L. Ryan & Julie Siebens, U.S. Census Bureau, Educational Attainment in the United States: 2009 1 (2012), available at http://www.census.gov/prod/2012 pubs/p20-566.pdf. The report also states:

A larger proportion of women than men had completed high school or more education. A larger proportion of men had received at least a bachelor's degree. However, because women 25 years old and over outnumber men aged 25 and over, the number of

Despite this educational parity, the same U.S. Census document announcing these figures also reports: **[*396]**

> Among all workers, women earned less than men (about $ 28,000 and $ 39,000, respectively). This was also true at each level of educational attainment. Women with a high school diploma earned about $ 21,000 a year. This was less than men without a high school diploma or GED, who earned about $ 22,000. At the high end of educational attainment, women with an advanced degree earned about $ 52,000 a year, which was less than the $ 58,000 that men with a bachelor's degree earned. Working full-time, year-round was associated with higher earnings for both men and women, but there was still an $ 11,000 gender difference in annual median earnings (about $ 48,000 for men and $ 37,000 for women). Women who worked full-time, year-round earned less than men in the all-worker population … . [63]

The final sentence means that even when you include all men (part-time and those not working year round), women working full-time and year-round still earned less. The report continues, noting that full-time, year-round female workers also:

> earned less than full-time, year-round male workers at each educational attainment level. The female-to-male earnings ratio in the total worker population was 0.71, while the ratio for full-time, year-round workers was 0.77… . Women earned 71 percent of what men earned overall, and earned 77 percent of what men earned when working full-time, year-round. At the bachelor's level and below, women who worked full-time earned 73 to 74 percent of what men earned at the same level of education. The earnings of women who worked full-time with advanced degrees were 69 percent of men's earnings. [64]

In other words, women with higher levels of education are actually experiencing a larger wage gap with men (sixty-nine cents to the male dollar) than are their less educated sisters (seventy-seven cents to the male dollar). This data powerfully rebuts the notion that women are experiencing a wage gap due to having less education.

2. Women Are Less Experienced and Have Less Seniority Than Men

This is the corollary to the education explanation discussed above and forms the second leg of the "merit gap" explanation. [65] The idea here is two-fold. First and most basic is the notion that women, compared to men, have not been in the employment pipeline long enough to gain the necessary experience **[*397]** to attain raises or higher-paying jobs. [66] The second, more modern formulation of this explanation is that women accumulate less experience than men during an equivalent number of years on the job due to curtailed hours and/or leaves due to family responsibilities. [67]

The more traditional experience argument made some sense in the years just after the passage of Title IX. In that era, when substantial numbers of women were first entering the professional workforce with college and advanced degrees, it seemed intuitive that these young graduates were at a disadvantage when competing with men who had

---

women with bachelor's degrees is larger than the number of men with these degrees. [Most notably, a]mong people aged 25 to 34, the percentage of women with a bachelor's degree or higher was 35 percent compared with 27 percent of men.

Id. Notably, only 10.7% of population over age twenty-five held bachelor's degrees in 1970, in contrast to 24.4% in 2000, but the relevant figures are the relative percentages of these degrees held by men and women. See Kurt J. Bauman & Nikki L. Graf, U.S. Census Bureau, Educational Attainment: 2000, at 4 fig.3 (2003), available at *http://www.census.gov/prod/2003pubs/c2kbr-24.pdf*. Tables from 2012 provide additional figures. See generally Ryan & Julie Siebens, supra note 62.

[63] Ryan & Julie Siebens, supra note 62, at 14. See also id. at 15-16 for information on data sources and accuracy.

[64] Id.

[65] Murphy & Graff, supra note 3, at 4.

[66] Id.

[67] Id. at 194-213.

been on the job longer. This was particularly convincing in fields that required post-graduate degrees since women had attained these in such small numbers prior to Title IX. [68]

Today this logic no longer holds. For example, women have entered the fields of medicine, law, and business in large numbers since 1980. [69] These women have had decades to move up through the ranks of their respective professions, garnering the necessary experience and training to achieve the top positions and salaries in their fields. Yet pay equity has remained elusive for these experienced and skilled female professionals. In medicine, the top paid specialties remain dominated by men. [70] Even for those women who find their way into the highest paying jobs, their salaries remain less than men in the same jobs. [71] Parallel wage gaps--caused both by glass ceilings and gender wage disparity at the partner and CEO level--occur in law and business, often within the same firm. [72]

[*398] The basic assertion that women are paid less because they are less experienced and have less seniority is best tested within a specific industry. Using private law firms as an example, there was a time when many fewer women were qualified to practice at the top private law firms. [73] Today, however, men and women graduate from even the best law schools in equivalent numbers. [74] Private law firms hire men and women into entry-level positions in equivalent numbers. [75] Male and female junior associates at private law firms plug along the same track toward partnership. Yet, dramatically fewer women attain promotion to partnership and with it the highest paying positions in the firm. [76] Whatever the factors are that keep women lawyers from these top-paying positions, the old excuse of women lacking the necessary training and experience for top pay no longer holds here. In addition, when women do become partners, their compensation remains lower than their male counterparts: women

---

[68] In 1970, 2.1% of females had five or more years of post-secondary education. U.S. Census Bureau, Years of School Completed by Persons 14 Years Old and Over by Race, Sex, and Age: 1970 tbl.199, http://www.census.gov/hhes/socdemo/education/data/cps/1970/tab-199.pdf (last visited Apr. 3, 2013).

[69] Ariane Hegewisch et al., Inst. for Women's Policy Research, Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap 4, available at http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in- the-labor-market-and-the-gender-wage-gap/at download/file (tracking the increasing number of female lawyers from 1972-2009); Statistical Overview of Women in the Workplace, Catalyst (Oct. 17 2012), http://www.catalyst.org/file/672/qt statistical overview of women in the workplace.pdf (providing data on the percentage of women in certain professional roles, including "Fortune 500 Leadership" positions); A Profile and History of Women in Medicine, Am. Med. Ass'n (July 2012), http://www.ama-assn.org/resources/doc/wpc/wimtimeline.pdf; Women in Medicine: An AMA Timeline, Am. Med. Ass'n, http://www.ama-assn.org/resources/doc/wpc/wimtimeline.pdf (last visited Apr. 3, 2013) (noting that "the percentage of medical graduates who were women nearly tripled between 1970-1980").

[70] David Leonhardt, Scant Progress on Closing Wage Gap in Women's Pay, N.Y. Times, Dec. 24, 2006, at 16.

[71] See, e.g., 24 Cents Short, supra note 2; Suzanne Riss, Salary Survey 2005: How Can We Close the Gender Pay Gap?, NAFE Mag., Winter 2005, at 18, 22-23 (breaking out positions within each industry).

[72] Am. Bar Ass'n Comm'n on Women in the Profession, A Current Glance at Women in the Law 2011 5 (2011), available at http://www.americanbar.org/content/dam/aba/marketing/women/current glance statistics 2011.authcheckdam.pdf; The Vicious Cycle of the Gender Pay Gap, Knowledge@Wharton (June 6, 2012), http://knowledge.wharton.upenn. edu/createpdf.cfm?articleid=3016 (discussing how women in the same firms as men get assigned lesser accounts leading inevitably to lower pay).

[73] First Year and Total J.D. Enrollment by Gender: 1947-2010, Am. Bar Ass'n, http://www.americanbar.org/content/dam/aba/administrative/legal education and admissions to the bar/council reports and resolutions/1947 2010 enrollment by gender.authcheckdam. pdf (last visited Apr. 3, 2013).

[74] See Am. Bar Assoc. Comm'n on Women in the Profession, supra note 72, at 3.

[75] Id. at 1.

[76] Id.; see also Sacha Pfeiffer, Many Female Lawyers Dropping off Path to Partnership, Boston Globe, May 2, 2007, at A1.

equity partners in the 200 largest firms in the U.S. earn only 86% of the compensation earned by their male peers. [77] This is certainly not due to lack of experience or training.

Data from private law firms dramatically illustrate the glass ceiling that so many women experience in their efforts to break through to the top levels of responsibility and salary in their respective fields. [78] This is a complex issue that will be discussed further in Section II.B.3. below. For the purposes of this Section, the point is simply that women along the way up the ladder to that ceiling are now numerous so the explanation that women are being paid less because they are not as far up the ladder no longer holds. The wage **[*399]** gap exists long before women hit the glass ceiling [79] and continues even when they break through it. [80]

The second generation of the "experience" explanation is a more challenging one to unravel. This explains the wage gap by differentials in work experience caused by women limiting their hours and/or interrupting their careers for motherhood. [81] Hence, a man and a woman might begin their careers simultaneously but the man is much more likely to plug along continuously while the woman is much more likely to go to part-time work and/or to take a career break of five to ten years. [82] When the woman then reenters the full-time workforce, her total experience on the job is less than that of the comparable male who began the same day that she did years earlier. This experience differential, which has been called the "Mommy Penalty," [83] is impacting some women's wages but this does not necessarily mean that it explains the wage gap.

There does appear to be an additional wage penalty for many mothers beyond that experienced by their childless sisters. [84] Much of this may be caused more by employers' fallacious assumptions about how many hours mothers are willing to work rather than on mothers' actual choices to curtail their hours since even mothers who do not reduce their hours seem impacted by the "penalty." [85] For mothers who are experiencing the "Mommy Penalty,"

---

[77] Barbara M. Flom & Stephanie A. Scharf, Nat'l Ass'n of Women Lawyers, Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms 3 (2011), available at http://nawl.timberlakepublishing.com/files/NAWL%202011 %20Annual%20Survey%20Report%20FINAL%20Publication-ready%2011-14-11(1).pdf; See also Joan C. Williams & Veta T. Richardson, Project for Attorney Retention, New Millennium, Same Glass Ceiling: The Impact of Law Firm Compensation Systems on Women 3 (2010), available at http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf (showing that women law partners are paid significantly less than male partners and that pay gap is greater for partners than for associates).

[78] The "glass ceiling" is a term coined for the invisible but impenetrable barrier on the corporate ladder that keeps women from climbing to the top positions. See Glass Ceiling Definition, Merriam Webster, http://www.merriam-webster.com/dictionary/glass%20ceiling (last visited Apr. 3, 2013). While some women step off this ladder by choice, there are now sufficient numbers of women on the ladder that attrition alone cannot explain the dramatically low numbers of women in top positions.

[79] See, e.g., 24 Cents Short, supra note 2; Riss, supra note 71, at 22-23 (breaking out positions within each industry).

[80] See, e.g., Williams & Richardson, supra note 77, at 3.

[81] Dey & Hill, supra note 2, at 2, 20-22; Baby Blues, Economist: Special Report on Women & Work, Nov. 26, 2011, at 9-10; Here's to the Next Half Century, Economist: Special Report on Women & Work, Nov. 26, 2011, at 16, 19.

[82] Carol Fishman Cohen & Vivian Steir Rabin, Back on the Career Track: A Guide for Stay-At-Home Moms Who Want to Return to Work 201-03 (2008); Murphy & Graff, supra note 3, at 9.

[83] Murphy & Graff, supra note 3, at 9, 194-213; see also Baby Blues, supra note 81 , at 10; 24 Cents Short, supra note 2.

[84] The Wage Gap Between Moms, Other Working Women, Nat'l Pub. Radio (Feb. 7, 2012), http://www.npr.org/2012/02/07/146522483/the-wage-gap-between-moms-other-working-women.

[85] Murphy & Graff, supra note 3, at 194-213 (demonstrating that much of the "Mommy Penalty" is based on stereotypes and assumptions that employers make about what hours mothers will be willing to work rather than on women's choices to curtail hours or go to part-time status).

there are steps that mothers can take to avoid or to minimize it. [86] In addition, legislating a more family-friendly workplace might improve these women's situation, [87] as would a cultural shift toward more equal parental responsibility between mothers and fathers. [88] However, this problem lies **[*400]** largely outside the reach of this Article since it is a bit of a red herring when discussing the gender wage gap because childless women still experience a gender wage gap.

Women without children still experience a wage gap: even when childless women and men are compared, full-time working women earn only 82% as much as full-time working men. [89] Losing eighteen cents per dollar is clearly better than losing twenty-three cents per dollar, but as with other alleged wage gap explanations, removing motherhood does not remove the entire gap. Hence, even when we compare men with women who have no children to detract from their amount of work experience, we still see a wage gap. Therefore, even in its more modern formulation, the explanation of the gap by differences in experience does not tell the whole story. [90]

3. Women Are Not Attaining the Highest Paying Jobs in Their Fields

This is a true statement but it does not explain the persistent wage gap because the gap exists even when comparing only women and men at the same levels of their careers. As mentioned above, women continue to encounter a glass ceiling on their climb up the professional ladder to the top positions in their field. This phenomenon itself has engendered discussion about underlying reasons ranging from discrepancies in education and experience to a lack of female interest in the top paying positions. As discussed in Section II.B.1. above, the education argument no longer holds water since women today are as educated as (or more educated than) men. As discussed in Section II.B.2. above, the experience argument today only offers a partial explanation for the lack of women's advancement, and then only for women who have interrupted their full-time careers. Furthermore, while these women--usually mothers--might be expected to experience a delay in reaching the top positions since it will take them longer to acquire the requisite experience than those who remain full-time from the start, they should eventually achieve the top positions when they return to full-time work and accumulate the missing experience. Thus the absence of women from top positions cannot be attributed to lack of experience now that enough time **[*401]** has passed for even women who took the slow route to have arrived. [91] As for a lack of female interest in top paying positions, women do continue to be segregated into lower paying jobs [92] but this is not the same as the glass ceiling. When we look within any particular industry we simply see fewer women at the top than men. [93]

---

[86] See The Wage Gap Between Moms, supra note 84; Catherine Rampell, The "Mommy Penalty," Around the World, N.Y. Times Economix Blog (Dec. 17, 2012), http://economix. blogs.nytimes.com/2012/12/17/the-mommy-penalty-around-the-world.

[87] See generally Marianne DelPo Kulow, Legislating a Family Friendly Workplace, *7 Nw. J. L. & Soc. Pol'y 88 (2012).*

[88] A Century of Women, supra note 21, at 58 ("Men need to change. Men need to begin to understand that work and family are responsibilities of both sexes. Men need to value parenthood as much as they say they value motherhood." (quoting Ruth Bader Ginsburg)); Dey & Hill, supra note 2, at 3 (noting that fatherhood appears to offer a "wage premium," with fathers spending more time in the office upon becoming a parent, while mothers spend less time at the office).

[89] Chairman's Staff of U.S. Cong. Joint Econ. Comm., 112th Cong., Mother's Day Report: Paycheck Fairness Helps Families, Not Just Women 1 (2012), available at *http://www.jec.senate.gov/public/?a=Files.Serve&File* id=F11e726b-135b-4e1d-8334-2903491d96 91. Some estimates are better. See, e.g., Rampell, supra note 86 (stating that in the United States, the median childless, full-time-working woman of reproductive age earns seven percent less than the median male full-time worker).

[90] See 24 Cents Short, supra note 2 (breaking out positions within each industry); Dey & Hill, supra note 2, at 3 ("The pay gap … cannot be fully accounted for by factors known to affect wages, such as experience (including work hours) … .").

[91] Here's to the Next Half Century, supra note 81, at 19.

[92] See discussion infra Section II.B.4.

[93] Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector, U.S. Equal Emp. Opportunity Comm'n, *http://www.eeoc.gov/eeoc/statistics/reports/glassceiling/index.html* (last modified Mar. 4, 2004) ("Women represent 48 percent of all EEO-1 employment, but represent only 36.4 percent of officials and managers.").

When we see educated and experienced women in the pipeline for high-paying jobs, there appears to be no logical explanation why so many fall short of achieving them. Some women opt out of these high-stress, long-hours jobs due to family responsibilities or other values, but this does not account for the entire phenomenon. [94]

The glass ceiling does negatively impact women's professional advancement and, when wages of all male workers are compared to wages of all female workers, it also aggravates the wage gap because the high-paying jobs above the ceiling skew the male average wage upward. However, the glass ceiling does not tell the whole story about gender wage differences: when we remove the top paying jobs from the comparison the gap still exists; the gap exists at all levels of employment; and even when we compare only workers at the highest levels of their professions, women make less than men. [95]

4. Women Are Occupationally Segregated Into Lower Paying Jobs

As discussed in Section II.A above, for many generations women were simply not welcome in many high-paying jobs because such jobs were considered inappropriate, too dangerous, or too difficult for women. [96] Over time **[*402]** this has changed both culturally and legally. Women demonstrated their ability to do "male" jobs during both World Wars, particularly World War II. [97] Women increasingly went to college and became qualified for "male" jobs. [98] The cultural revolution of the 1960s gave women a voice to complain about "the problem that had no name"--the widespread discontent of housewives in the 1950s and 1960s despite material comforts, happy marriages, and healthy children--and led many women to seek fulfillment outside the home and in a variety of workplaces. [99] Economic realities caused a shift from the one-breadwinner model of the 1970s to a dominant model of the two-earner family with both parents working full time today. [100] The advent of no-fault divorce in the 1970s resulted in an increase in the number of divorced women supporting themselves and their children. [101] In addition, Title VII of

---

[94] Here's to the Next Half Century, supra note 81, at 19 (women are more likely than men to go to part-time or quit); Murphy & Graff, supra note 3, at 225-26 (men are not all ambitious and twenty-four million single, separated, divorced, or widowed women working full-time may be very motivated to earn as much as possible); see generally Sylvia Ann Hewlett, On Ramps Off Ramps: Keeping Talented Women on the Road to Success (2007) (see chapters starting on pages 25 and 57).

[95] See, e.g., Williams & Richardson, supra note 77 (showing that women law partners are paid significantly less than male partners and that pay gap is greater for partners than for associates); Mary Ellen Egan, Top-Paid Female Chief Executives, Forbes (Apr. 28, 2010), *http://www.forbes.com/2010/04/27/ceo-salaries-bonuses-global-companies-forbes-woman-* leadership-boss-10-top-paid-female-chief-executives.html?feed=rss home (demonstrating by illustration that most women CEOs make substantially less than their male counterparts); see also 24 Cents Short, supra note 2 (comparing salaries of men and women at particular job levels); America's Gender Wage Gap, Economist (Apr. 17, 2012), http://www.economist.com/blogs/graphicdetail/2012/04/focus-3 ("The gender wage gap (women's earnings as a percentage of men's) was most pronounced amongst CEOs and financial managers.").

[96] See, e.g., *Goesaert v. Cleary, 335 U.S. 464 (1948)* (illustrating laws that sought to protect women from jobs that were considered inappropriate and dangerous (bartending)); *Muller v. Oregon, 208 U.S. 412 (1908)* (illustrating laws that sought to protect women from jobs that were considered dangerous (long hours) and difficult (long hours)).

[97] See A Century of Women, supra note 21, at 34-35.

[98] See discussion supra Section II.B.1.

[99] See A Century of Women, supra note 21, at 39-45.

[100] The Cashier and the Carpenter, supra note 47, at 2.

[101] W. Bradford Wilcox, The Evolution of Divorce, 1 Nat'l Affairs 81, 81 (2009), available at *http://www.nationalaffairs.com/doclib/20091229* Wilcox Fall09.pdf (stating that from 1960-1980, the U.S. divorce rate more than doubled).

the Civil Rights Act of 1964 [102] opened workplace doors by outlawing gender workplace discrimination. [103] Women now work in substantial numbers in many fields once closed to them.

The changing gender patterns of American labor have been dramatic since the passage of Title VII. In 1972, 2% of dentists were female compared to 30% in 2009. [104] The percentage of total lawyers who are female has increased from 4% to 32%. [105] The number of mail carriers who are female has grown from 6.7% to 34.9%. [106] Still, occupational segregation persists. A number of occupations that require less than a four-year college degree are still dominated by women. For example, 97.9% of all dental assistants were female in 1972, compared with 97.6% in 2009. Similarly, 91.2% of all hairdressers, hairstylists and cosmetologists were female in 1972, compared with 90.4% in 2009. With respect to occupations requiring at least a four-year college degree: 96.8% of all prekindergarten and kindergarten teachers were female in 1972, compared with 97.8% in 2009; 82.7% of all librarians were female in 1972, compared with 81.6% in 2009; and 97.6% of "registered nurses" were female in 1972 compared with 92% in 2009. [107] In a number of reasonably well-paid male-dominated occupations, changes have also been minimal. In 1972 women constituted 0.5% of machinists, 0.6% of electricians **[*403]** and 0.5% of carpenters, and in 2009 only 5.4% of all machinists, 2.2% of all electricians, and 1.6% of all carpenters were female. [108] This segregation matters because a major study by the Institute for Women's Policy Research confirms that average earnings tend to be lower the higher the percentage of female workers in an occupation, and that this relationship is strongest for the most highly skilled occupations. [109] It is unclear whether this negative correlation is a result of discrimination, a cause of discrimination, both, or due to some other factors. However, the study authors do recommend, to correct this inequity, both that women be encouraged to enter "non-traditional" jobs and that equal pay laws be better enforced. [110]

Why does occupational segregation continue in so many jobs despite Title VII and cultural changes? The American Association of University Women Educational Foundation ("AAUW") has asked this question in the context of its recent wage gap study entitled Behind the Pay Gap. [111] The study concludes that school-age girls need encouragement to study science, technology, engineering, and mathematics ("STEM") subjects that lead to higher paying jobs, [112] and young women are choosing to major in college subjects that lead to lower paying jobs. [113]

---

[102] Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, *78 Stat. 241* (codified as amended at *42 U.S.C.§§2000e* to 2000e-17 (2013)).

[103] Although the inclusion of "sex" in Title VII was unexpected, see A Century of Women, supra note 21, at 52 (describing Senator Howard W. Smith's (D-Va.) attempt to block passage of the civil rights bill by inserting the word "sex"), the impact of the statute on women was as great or greater than on any of the other groups protected by the statute.

[104] Hegewisch et al., supra note 69, at 2.

[105] Id.

[106] Id.

[107] Id.

[108] Id. at 3.

[109] Id. at 10-13 (discussing the statistically significant negative relationship between the percentage of female workers and the level of earnings at each skill level studied, noting that the negative relationship is "clearly most pronounced among high-skilled occupations"); see also id. at 8 (defining "high skill" occupations based on the 2010 U.S. Bureau of Labor Statistics occupation classifications which, in turn define "high skill" occupations as those requiring at least a bachelor's degree).

[110] Id. at 13.

[111] Dey & Hill, supra note 2, at iii.

[112] Id. at 30 (discussing the need for more programs in the elementary and high school years to encourage female interest in STEM fields and emphasizing the importance of encouraging girls in high school to take math so as to increase the likelihood of girls choosing a math or science major in college). The ongoing lack of female interest and achievement in STEM subjects has also been the impetus behind many current experiments with single-sex education. See, e.g., James Vaznis, In Detroit, a

Women continue to be concentrated in fields associated with lower earnings, such as education, health, and psychology while male students dominate in the higher-paying fields, such as engineering, mathematics, and physical sciences. [114] Even those women who choose majors with the potential for high-paying jobs often then choose a lower paying job. For example, a mathematician who chooses to teach will earn much less than a mathematician who goes into business or computer science. [115] Hence, self-imposed occupational segregation remains a partial **[*404]** explanation for the gender wage gap [116] and it is important to develop new strategies to address this modern version of the phenomenon. The AAUW, for example, endorses encouraging girls and young women to make different school and job choices. [117]

Still, the AAUW's regression analyses conclude that this modern form of occupational segregation impacts women's wages in lower paying jobs more than it does men's wages in those same jobs. [118] In other words, men who enter traditionally female jobs are disadvantaged by the predominance of women in those jobs, which drives the wages down, but not as much as are women in these jobs, who are twice disadvantaged--first by being in a "female" field and second by being a woman in that field, since men make more than women even in "female" fields. This indicates that the entire wage gap cannot be explained by occupational segregation since even within traditionally lower paying jobs, men still make more than women: [119] in education, nursing, and coaching, women earn less than their male counterparts. [120]

5. Employers Continue to Engage in Wage Discrimination

All four other proffered explanations for the gender wage gap do not completely explain the phenomenon. Thus one can reasonably conclude that some wage discrimination continues to exist. To recap, the wage gap exists even among the youngest generation of adults within which educational parity has been achieved. Educational differences cannot explain this gap. Experience differences also have been largely eradicated. Although the "Mommy Penalty" continues to plague some working mothers, experience differences cannot explain the wage gap that exists between men and childless women. Occupational segregation is not what it once was. Societal barriers to women's access to many high-paying occupations have been removed. Women do continue to self-segregate into lower paying fields, specialties, and positions, but within any given field, specialty, or position the **[*405]** gap still exists, so occupational segregation does not explain the full gap. The glass ceiling does prevent many women

---

Lesson in Same-Sex Schools, Boston Globe, Jan. 2, 2009; Akilah Johnson, Separating Genders Shows Promise at Roxbury School, Boston Globe, Jan. 13, 2012, at A1. Cf., Separated by Sex: Title IX and Single-Sex Education, Am. Ass'n of Univ. Women (2010) (summarizing studies that show benefits of single-sex education, including the AAUW's prior study demonstrating how girls are being shortchanged in co-ed public elementary school classrooms in math and science education).

[113] Dey & Hill, supra note 2, at 2.

[114] Id.

[115] Id. (also stating that women working in computer science earn over 37% more than those who go into education or administrative jobs and that women who choose to work in the non-profit and local government sectors earn less than those in the for-profit and federal government sectors).

[116] It is unclear exactly why young women continue to self-segregate but the AAUW study authors identify a few factors. Id. at 30. First, many young women choose not to major in STEM subjects because they perceive these as uninteresting, but when told of the societal benefits of these subjects the women's interest in them increases. Id. High school math is critical as well: increasing girls' high school math exposure by as little as one course appears to double the likelihood that the girl will pursue math or science at college. Id. Finally, self-assessment appears vital since the higher students assess their abilities in a subject the more likely they are to take classes in that subject or choose it as their major. Id.

[117] Id.

[118] Id.

[119] Ariane Hegewisch & Hannah Liepmann, Inst. for Women's Policy Research, Fact Sheet: The Gender Wage Gap by Occupation 3 (2010), available at http://www.iwpr. org/publications/pubs/free-download-button.png (also stating that women earn less than men in almost all occupations, and illustrating this with tables).

[120] Id.

from attaining the highest paying positions in their fields, but does not explain why women CEOs make less than their male counterparts.

Work remains to discover ways to shatter the glass ceiling, to address the challenges facing working mothers, and to encourage girls and young women to consider fields of study and particular occupations where the highest income is available. However, all of these corrections will not completely address the residual wage gap. If this were true, when we correct for these factors in the current data we would find no gap. This is not the case and thus absent some alternative explanation, we must conclude that some wage discrimination continues to exist.

To address the questions raised at the outset of this Section, the gap began when women first started to work for wages, was first quantified in the 1950s at fifty-nine cents on the male dollar, and today stands stagnant at seventy-seven cents on the male dollar. Progress toward gender wage parity has been slow because the "merit gap" does not tell the whole story. In fact, progress has flattened because the "merit gap" has been mostly closed. This leaves us with a situation where the remaining gap within an industry, comparing full-time workers at the same level of their careers, with comparable education and experience, can only reasonably be explained by wage discrimination. [121] A number of authorities reach this conclusion, [122] including the National Equal Pay Task Force, a group commissioned by President Obama to crack down on violations of the Equal Pay Act and consisting of professionals at the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice ("DOJ"), the Department of Labor ("DOL"), and the Office of Personnel Management ("OPM"). A 2012 White House report of this Task Force's work states: "Decades of research shows that no matter how you evaluate the data, there remains a pay gap--even after factoring in the kind of work people do, or qualifications such as education and experience. Those same studies consistently conclude that discrimination is the best explanation for the difference." [123]

In addition, the AAUW study of college graduates recently concluded:

> The portion of the pay gap that remains unexplained after all other factors are taken into account is 5 percent one year after graduation and 12 percent 10 years after graduation. These unexplained **[*406]** gaps are evidence of discrimination, which remains a serious problem for women in the work force. [124]

A follow up AAUW study by different researchers looked at college graduates just one year after graduation. This study controls for experience, motherhood, and glass ceiling as possible factors, as well as gender differences in negotiation skills [125] since entry-level salaries in the current economy are rarely negotiable. The study found that a mere one year after graduation women are earning eighty-two cents to the male dollar, even when the researchers

---

[121] See, e.g., Murphy & Graff, supra note 3, at 72-81 (detailing examples of jury awards and settlements of discriminatory unequal pay claims).

[122] See, e.g., Nat'l Partnership for Women & Families, The Facts Are Clear: The Wage Gap Is Harming Women and Families 1 (2012), available at http://www.national partnership.org/site/DocServer/The Facts Are Clear Wage Gap.pdf?docID=10501 ("Studies have found that even when all relevant education, career and family attributes are taken into account, there is still a significant, unexplained gap between the wages paid to women and men in the United States.").

[123] White House, supra note 4, at 1.

[124] Dey & Hill, supra note 2, at 3.

[125] Some commentators consider women's inferior negotiating skills to be a sixth possible explanation for the gender wage gap. See, e.g., One Reason for Pay Gap: Women Don't Speak Up, NBC News, May 7, 2007, http://www.nbcnews.com/id/18418454. While a gender gap in negotiating skills has been demonstrated, see discussion infra Section III.A.2 and notes 141-42, and improving women's negotiating skills is an important cultural tool in narrowing the wage gap, see discussion infra Section III.A.2 and note 145, characterizing these skills as part of the cause for the gap implies that employers set wages and raises entirely as a reaction to their employees' negotiating, irrespective of the fairness of those wage decisions. This view relieves the employer of responsibility for ensuring fair wages, as required under the Equal Pay Act and Title VII, see discussion infra Section III.B.2. and notes 180, 193, and places undue responsibility on the female employee to not only be adequately qualified and experienced, but also to privately enforce the equal pay laws.

controlled for occupation chosen and hours worked. The authors stated that these findings demonstrate that "there are solid reasons to conclude that gender discrimination is a problem in the workplace." [126] Given the widely supported conclusion that at least some part of the wage gap is attributable to illegal wage discrimination, any cogent strategy to completely eliminate the remaining gap must include a mechanism to eradicate wage discrimination. We have three federal laws that attempt to achieve this, but clearly their effectiveness has been limited. [127]

III. Solutions: Attempted and Suggested

Suggestions for how to close the gender wage gap include both cultural and legal approaches. Since the 1960s each of the proposed solutions discussed below has been effective in narrowing the gap to some degree but, to date, all techniques attempted have fallen short of eliminating the gap. Wage transparency would enhance the effectiveness of each approach.

A. Cultural Solutions

Cultural solutions to the gender wage gap include two attempts to improve women's work-related interpersonal skills and one acknowledgement **[*407]** that attitudes about what work women can do need to change. The first two of these--more competitive sports and better negotiating skills--put the responsibility on women to become more competitive and assertive. These are both effective strategies that have shown some results but leave women unable to advocate for equal pay when they are unaware of illegal gender differences in compensation. The third cultural approach--patience and generational change--puts little responsibility on those who cling to obsolete assumptions about women and work but, rather, suggests that these attitudes will simply die out over time. This process, far from proven to be inevitable, can only be expedited by making people more aware of unjustified wage disparities.

1. More Competitive Sports

As discussed in Section II.B.1 above, Title IX dramatically impacted female participation in sports. [128] In the decades immediately following the statute's 1972 passage, much was written about the health benefits of female participation in school sports. [129] As the culture changed from begrudging acceptance of female athletes to active support for girls' participation in athletics, the health benefits of sports became more widely popularized. [130] Now researchers are also examining the professional impact of sports participation by girls and young women. A recent

---

[126] Corbett & Hill, Am. Ass'n U. Women, Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation 3 (2012), available at *http://www.aauw.org/GraduatetoaPayGap/upload/AAUWGraduatingtoaPayGapReport.pdf*.

[127] But see White House, supra note 4, at 3-6 (detailing efforts to improve enforcement of existing statutes, including litigation but also efforts to inform workers about unequal pay and rights).

[128] As noted by ESPN:

> In 1971, the year before Title IX became law, fewer than 300,000 girls participated in high school sports, about one in 27 [while 30 years later, in 2002] the number approached 3 million, or approximately one in 21/2 … . The number of women participating in intercollegiate sports in that same span [went] from about 30,000 to more than 150,000. In the [years 1992-2002] alone, the number of women's college teams nearly doubled.

Greg Garber, Landmark Law Faces New Challenges Even Now, ESPN, June 22, 2002, *http://espn.go.com/gen/womenandsports/020619title9.html*.

[129] See generally Jean Zimmerman & Gil Reavill, Raising Our Athletic Daughters (1998); see also Ian Janssen & Allana G. LeBlanc, Systematic Review of the Health Benefits of Physical Activity and Fitness in School-Aged Children and Youth, 7 Int'l J. Behav. Nutrition & Physical Activity 40 (2010).

[130] See, e.g., If You Let Me Play, Nike, *http://www.youtube.com/watch?v=AQ* XSHpIb ZE (last visited Apr. 3, 2013) (presenting a Nike advertisement summarizing benefits of sports for women).

well-respected research study has illustrated for the first time a measurable benefit in employment to girls who play sports. [131] The study found that up to 40% of the overall rise in employment of young women in recent decades can be attributed to the increased opportunity to play sports. [132] This study quantified what many had instinctively understood for decades: the skills learned in sports have important **[*408]** applications in the workplace. Skills that can impact a person's professional success include teamwork, handling both winning and losing, and learning to put off short-term gratification for long-term rewards. [133] Encouraging more girls and young women to participate in competitive sports is one strategy for closing the wage gap. To break down occupational segregation and break through glass ceilings, women need confidence, patience, resilience, and persistence--all traits honed in competitive sports. Nonetheless, employers bent on paying discriminatory wages will not be stopped entirely by women maximizing their competitive skills.

2. Better Negotiation Skills for Women

In 1982 Carol Gilligan first documented that there are gender differences in both psychological and moral development. [134] Among Gilligan's many paradigm-shifting findings were data illustrating that while American men traditionally find their identity in their work, women tend to define themselves by their relationships rather than their material successes. [135] Gilligan found that these differences can impact women negatively when they are evaluated by male criteria. [136] Deborah Tannen researched how these differences in turn lead to differences in how men and women use language. She brought awareness of these differences to a mass audience in 1990 with her best-selling book You Just Don't Understand: Women and Men in Conversation. [137] A few years later Tannen put this into the context of the workplace with Talking from 9 to 5: Women and Men at Work. [138] These works paint a picture of how women use language to connect and to establish relationships, while men use language to collect information and to solve problems. These cross-purposes can put women at a disadvantage when they are being evaluated by male supervisors. For example, if a male supervisor is looking for a succinct, quantitative report and a female employee provides a longwinded, qualitative explanation of a project, the supervisor may undervalue the employee's work or value it less than that of a male who provides reports in a style more like the supervisor's own. Gender communication **[*409]** style differences also impact both the ways in which and the comfort with which men and women negotiate.

---

[131] See generally Stevenson, supra note 58; see also Betsey Stevenson & Justin Wolfers, Equal Opportunity in Sports Makes Both Sexes Richer, Bloomberg, June 18, 2012, *http://www.bloomberg.com/news/2012-06-18/*equal-*opportunity-in-sports-makes-both-sexes-richer*. html.

[132] Stevenson, supra note 58, at 294.

[133] O'Brien, supra note 58.

[134] See generally Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

[135] Id. at 173; see also Leonhardt, supra note 47, at 16 ("The other view is that women consider money a top priority less often then men do. Many may relish the chance to care for children or parents and prefer jobs, like those in the nonprofit sector, that offer more opportunity to influence other people's lives."). This could be a partial explanation for the lack of women in high-paying but highly time-consuming CEO-type jobs.

[136] Gilligan, supra note 134, at 173 ("My research suggests that men and women may speak different languages that they assume are the same … . These languages … contain a propensity for systematic mistranslation, creating misunderstandings which impede communication … .").

[137] See generally Deborah Tannen, You Just Don't Understand: Women and Men in Conversation (1990).

[138] See generally Deborah Tannen, Talking From 9 to 5: Women and Men at Work (1994).

American men are encouraged from an early age to self-promote--whether it be in a pick-up basketball game or in the classroom. In contrast, women traditionally have been taught to be humble, polite, and self-deprecating. [139] They raise their hands, wait their turns, mind their manners, and don't argue. While these traits may be less gender specific today than they were a generation ago, they still lead to a gender difference both in negotiations and in how women who try to negotiate like men are perceived. [140] Studies repeatedly illustrate that women are much less likely than men to ask for promotions, raises, or plum assignments. [141] When women do negotiate they tend to be less successful, perhaps because they are less practiced at it and less socially comfortable doing it. [142]

Other recent studies illustrate that there may also be a legitimate reason for women's hesitation to negotiate. One found that women who negotiate are subtly penalized by their superiors, though more so by male managers than by female managers. [143] Study subjects were less willing to work with women who negotiated than with those who did not, finding the negotiators "less nice." In contrast, people were equally or more willing to work with men who negotiated. Hence, it is not only women who need to be trained to be better negotiators. Men (and women) also need to "unlearn" the social assumptions about women who do negotiate. [144]

Many experts in the field of wage inequity endorse programs to train girls and women how to negotiate well. [145] This certainly appears to be an **[*410]** important piece of the solution to gender wage inequity: if women do not ask for fair pay then employers can continue to fail to give it unless successfully sued. However, negotiating from a level playing field is different than negotiating from a deficit. Women can be taught to negotiate effectively but can only use these skills to remedy a problem if they are aware that one exists. [146] If one discovers that one is being

---

[139] Laurie Rudman, Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management, 74 J. Personality & Soc. Psychol. 629, 629 (1998) (research shows that women are viewed negatively when they behave confidently and assertively and rewarded when they behave in a self-effacing manner).

[140] Id.; Shankar Vedantam, Salary, Gender and the Cost of Haggling, Wash. Post, July 30, 2007, at A7; Dey & Hill, supra note 2, at 30.

[141] Vedantam, supra note 140, at A7 (noting a Carnegie Mellon University anecdote in which no women grad students would ask to teach while men would); Linda Babcock & Sara Laschever, Women Don't Ask: Negotiation and the Gender Divide 2-10 (2003) (describing numerous studies showing that men are many times more likely to negotiate than women); Here's to the Next Half Century, supra note 81, at 19 (quoting Iris Bohnet, professor at Harvard Kennedy School, as saying that women are less likely than men to negotiate for themselves).

[142] Babcock & Laschever, supra note 141, at 46, 62.

[143] Vedantam, supra note 140, at A7 (discussing Hannah Riley Bowles et al., Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask, 103 Organizational Behav. & Hum. Decision Processes 84 (2007) (showing that women who negotiated were perceived as "less nice" and others chose to work with non-negotiators over negotiators)); see also Dey & Hill, supra note 2, at 31.

[144] Vedantum, supra note 140, at A7 (quoting Hannah Riley Bowles: "This isn't about fixing the women … . They are responding to incentives within the social environment.").

[145] See, e.g., Murphy & Graff, supra note 3, at 266-83; Dey & Hill, supra note 2 (recommending that, among other actions, we should encourage women to negotiate for better quality jobs and pay); White House, supra note 4 (listing initiatives to close gap, including funding for negotiation workshops for girls and women); Wage: Women Are Getting Even, Wage Project, http://www.wageproject.org (last visited Feb. 16, 2013) (offering workshops in conjunction with AAUW). See also Thomas Menino, Mayor, City of Boston, State of the City Address (Jan. 29, 2013), available at http://www.wbur.org/2013/01/29/full-text-menino- state-of-the-city-2013 (promising to make Boston the "premier city for working women" and to accomplish this, in part, by being "the very first municipality to help young women negotiate for fair pay").

[146] Blaming women's poor negotiating skills for the problem itself is a bit of a chicken-and-egg argument. As discussed supra note 125, such a view relieves employers from their legal responsibilities to pay fairly and places an undue burden on female workers to privately enforce the fair pay laws through negotiation. Surely once workers identify an inequitable wage situation, good negotiation skills may allow those workers to remedy the problem short of litigation, but the inequity itself should not be entirely blamed on the workers for not proactively ensuring that they are paid fairly.

underpaid compared to one's peers, then one is motivated to approach one's employer, demand an explanation, and negotiate a solution. [147] If one is unaware of any gender wage discrepancy then even the best negotiator will only be asking for a fair raise based on one's current salary. Therefore, improved negotiation skills as a solution to unjustified gender wage differences hinges on an assumption that women know what their male counterparts are being paid so that they can ask for an appropriate wage and not, instead, a lower amount that merely reflects a generous raise from their current salary. Ignorance of this information undermines the entire negotiation, as it would for a man who was being underpaid. [148]

3. Patience or Generational Change

Some say that the gap is stuck, [149] that expecting further patience is not reasonable when wage discrimination has been illegal for nearly fifty years, [150] and that the gap will not inevitably lessen without dramatic intervention. [151] Others say that time will close the wage gap. To some extent this has been true and may continue. Certainly much progress has been made in the sixty-three years since 1950 when women made fifty-nine cents to the **[*411]** male dollar. Perhaps the remaining gap will close over the course of the next sixty-three years. After all, the next generation of working Americans grew up in a country where men and women go to college in equal numbers, where women have equal opportunities with men to play competitive scholastic sports, where social norms about assertive women have waned, and where girls are increasingly encouraged to study STEM subjects, choose college majors that lead to high-paying jobs, and pursue the highest paying jobs that those majors will yield. One can therefore hope that occupational segregation will diminish, that the glass ceiling will finally shatter, and that women will become ever more confident, competitive, and willing to negotiate on their own behalf. Certainly these are among the hopes behind the recommendations of the AAUW study Behind the Pay Gap. [152]

However, even studies and experts who acknowledge that some further progress can be made in these ways are quick to point out that there will still be a few nagging percentage points that cannot be eradicated because they are due to plain and simple wage discrimination. [153] Studies continue to demonstrate that gender discrimination persists. A compelling study of "blind auditions" by symphony orchestras--in which a screen was used to conceal the identity of the candidate--explained 25% of the increase in the number of women in top U.S. symphony

---

[147] Claire Gordon, If You Knew Your Boss' Salary, Would the World Be More Fair?, AOL Jobs (June 5, 2012), http://jobs.aol.com/articles/2012/06/05/if-you-knew-your-bosss-salary- would-the-world-be-fairer (stating that with wage transparency "women can better assess if they're underpaid"). See also Coy & Dwoskin, supra note 8, at 6 ("Pay discrimination is a silent offense.").

[148] See Roger Fisher & William Ury, Getting to Yes 84-91, 109-10 (1981). This work by Fisher and Ury is an internationally-respected treatise on successful negotiation skills, and illustrates that one must be well prepared to negotiate effectively. See also Murphy & Graff, supra note 3, at 271-73 (discussing the importance of learning all you can about what comparable men are earning before entering a negotiation to adjust an unfairly low salary).

[149] See, e.g., Murphy & Graff, supra note 3, at 3; Leonhardt, supra note 47, at 1.

[150] See, e.g., Murphy & Graff, supra note 3, at 3-6.

[151] See, e.g., id. at 221-22.

[152] Dey & Hill, supra note 2, at 30. The researchers recommend the following actions among others to help close the pay gap: (1) Promote careers in STEM in ways that appeal to girls and women; (2) Encourage girls to take advanced courses in mathematics; and (3) Encourage women to negotiate for better quality jobs and pay. Id.

[153] Id. at 33-34.

This report finds that the pay gap between female and male college graduates cannot be fully accounted for by factors known to affect wages. An extensive body of research also finds that some gap in pay between women and men is unexplained. While researchers disagree about the portion of the pay gap that is unaccounted for, many have attributed the unexplained portion to gender discrimination.

Id. at 33.

orchestras. [154] Studies in which identical resumes were reviewed with only the gender of the applicant changed have revealed that similar gender biases still exist in the workplace. [155] More recently, a 2008 study examined the wage trajectories of people who underwent a sex change. Men who transitioned to women earned an average of 32% less after the surgery whereas women who became men earned 1.5% more. [156] Therefore, to completely close the gender wage gap any attempts at cultural solutions must be paired with legal initiatives that financially penalize gender wage discrimination.

[*412]

B. Legal Solutions

Legal initiatives that attempt to close the gender wage gap fall into three categories. First, there are two legal theories that were novel when set forth in the 1960s. These theories, comparable worth and affirmative action, both showed promise but have since fallen into disfavor. There may be a role for each moving forward but, even if there was a public appetite for these approaches, their impact would be limited. Comparable worth could increase the lower pay that is associated with certain jobs due to occupational segregation. Affirmative action could help crack the glass ceiling. However, as was discussed in detail in Sections II.B.3 and II.B.4 supra, eliminating occupational segregation and the glass ceiling, while certainly desirable, would not eliminate the gender wage gap.

The second category of legal initiatives that seek to close the gap includes three federal statutes. These have met with some success. Nonetheless, all three statutes suffer from a common limitation. They each place the burden of implementing the legal tool on the victim of wage discrimination. Many such victims, however, remain unaware that they are victims due to wage secrecy. The final legal approach to eradicating the gender wage gap is to mandate wage transparency. This holds much promise as a means of equipping victims with the necessary information to negotiate or to litigate for fair pay.

1. Comparable Worth and Affirmative Action

In the early years of gender wage gap awareness, two legal strategies emerged to address the particular problem of occupational segregation. The first of these was comparable worth. [157] The concept was that women whose jobs are different than those performed by male employees should nonetheless be compensated on a comparable basis with those male employees if the women's jobs were of comparable value to their employer. [158] By the early 1980s this concept had gained much popularity. By late 1987, twenty-eight states had begun the process of conducting job evaluation studies, twenty states had moved to budgeting and implementation of comparable worth policy, and 167 local jurisdictions had adopted comparable worth policies. [159] These policies attempted to quantify the "worth" of jobs, often by utilizing what was known as the "point method" whereby each job would be rated on a number of factors (such as skill, effort, responsibility, and working conditions) and the total score for each job would be used to compare it to other **[*413]** jobs with similar scores to ensure equivalent pay for jobs with equivalent "worth scores." [160]

---

[154] Claudia Goldin & Cecelia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 738 (2000).

[155] Caryl Rivers, Selling Anxiety: How the News Media Scare Women 123-24 (2007) (discussing a study that placed male and female names on otherwise identical resumes, producing results that pointed to discrimination in professor hiring); Virginia Valian, Why So Slow? The Advancement of Women 127-28 (1999) (discussing a similar study).

[156] Kristen Schilt & Matthew Wiswall, Before and After: Gender Transitions, Human Capital, and Workplace Experiences, 8 B.E. J. of Econ. Analysis & Pol'y, Sept. 2008, at 13.

[157] Lindgren et al., supra note 39, at 242.

[158] See Women, Work, & Wages: Equal Pay for Jobs of Equal Value 91-96 (Donald J. Treiman & Heidi I. Hartmann eds., 1981).

[159] Sara M. Evans & Barbara J. Nelson, Wage Justice: Comparable Worth and the Paradox of Technocratic Reform 41 (1989).

[160] Women, Work, & Wages, supra note 158, at 71-82 (detailing and critiquing job evaluation techniques).

The idea of comparable worth was controversial on a number of fronts. Some questioned whether it is possible to make valid and detailed comparisons of the relative worth of different jobs, even when those jobs are within the same firm. [161] Indeed the job evaluation techniques employed were often both crude and labor-intensive. [162] In the courts, the debate about comparable worth centered on the question of whether an employer truly violates federal law by failing to give equal pay to employees who perform jobs of comparable value to the employer. Some argued that when these discrepancies result in lower pay to those jobs that are predominantly held by women, such a discrepancy by an employer indeed violates Title VII. However, the courts disagreed. In an opinion authored by then Judge, now Justice, Anthony Kennedy, the Ninth Circuit rejected the comparable worth approach as a viable method of establishing a violation of Title VII. [163] In that case, the court viewed comparable worth analysis as a dangerous invitation to serious governmental intervention into "the free market" (whereby businesses and the public place value on jobs based on their relative value to the company and/or to the public) and refused to embrace the policy. [164] As a result, the tremendous momentum of comparable worth policy of the early 1980s dissipated. [165] Nonetheless, Minnesota (1982) and Ontario, Canada (1988), proceeded to implement pay equity plans based on comparable worth models and each met with great success. [166] These are still held out as examples of pay adjustments that can and should be made to address the leftover impacts of generations of gender occupational segregation. [167] There may be a renewed appetite for such measures in light of recent studies illustrating remaining occupational segregation some twenty-five to thirty years later. [168] Still, even if we were to embrace these types of pay adjustments we would fail to address the gender wage gap that continues to exist within each job category. [169]

[*414] The second legal strategy that has been utilized to attempt to address gender occupational segregation is affirmative action. Although affirmative action was not created for this purpose, it holds the potential to address the "pink ghetto." [170] The concept of affirmative action is simple. By taking extra steps to identify and to recruit qualified members of an absent protected group, an employer can improve the representation of qualified members of that protected group in its employ. [171] When Title VII went into effect in 1965, President Johnson signed the first executive order requiring businesses that had contracts with the federal government to implement affirmative action by hiring and promoting racial minorities. [172] Women were not covered by this executive order but two years later

---

[161] See generally Michael Evan Gold, A Dialogue on our Comparable Worth (1983).

[162] Women, Work, & Wages, supra note 158, at 71-82 (detailing and critiquing job evaluation techniques).

[163] *Am. Fed'n of State, Cnty., & Mun. Emp. v. Washington, 770 F.2d 1401 (9th Cir. 1985).*

[164] *Id. at 1407.*

[165] Evans & Nelson, supra note 159, at 41.

[166] See generally Two Progressive Models on Pay Equity: Minnesota and Ontario, Nat'l Comm. on Pay Equity, *http://www.*pay-equity.org/PDFs/ProgressiveModels.pdf (last visited July 19, 2012).

[167] Id.

[168] See id.

[169] Hegewisch & Liepmann, supra note 119, at 3-4 (illustrating that women earn less than men in almost all occupations).

[170] For background on the term "pink ghetto," see Carol Kleiman, Pink-Collar Workers Fight to Leave "Ghetto," The Seattle Times, Jan. 8, 2006, *http://seattletimes.com/html/businesstechnology/2002727003* kleiman08.html ("The term 'pink ghetto' was coined in 1983 in a study of women, children and poverty in America and was used to describe the limits on women's career advancement in these traditional, often low-paying jobs … ."); see generally Louise Kapp Howe, Pink Collar Workers (1977).

[171] Merriam-Webster's Collegiate Dictionary 20 (10th ed.1996).

[172] Jonathan Leonard, Women and Affirmative Action, 3 J. Econ. Persp. 61, 62 (1989).

President Johnson amended his order to require that businesses with federal contracts include women in their affirmative action programs. [173]

Affirmative action is also a controversial policy. Many Americans view affirmative action as overly compensating members of groups that previously experienced discrimination by forcing employers to hire less qualified employees of these groups over more qualified members of the majority group. [174] There have been a myriad of court decisions about the contours of acceptable affirmative action plans and in recent years the Supreme Court has narrowed the ways in which affirmative action can be used. [175] Most recent court cases address the use of race in affirmative action plans and focus on the use of affirmative action in higher education admission. [176] It therefore remains unclear to what extent gender affirmative action plans in employment are legally required or even legally acceptable. [177] At the entry level, affirmative action may well be obsolete. Certainly women have entered many fields in record numbers since the beginning of affirmative action policy, **[*415]** as discussed in Sections II.B.2 and II.B.3 supra. Private law practice exemplifies this trend. [178]

Today gender discrimination in hiring is not a major issue in most occupations although affirmative action remains a useful tool for preserving hard-won gains and for continuing progress toward achieving a more balanced gender ratio at higher levels of employment. [179] While achieving an equitable gender ratio in terms of number of employees at each level is a worthwhile goal in and of itself, the gender wage gap exists both above and below the glass ceiling so, as discussed in section II.B.3 above, removing the glass ceiling will not eliminate the gap. Indeed, since both occupational segregation and the glass ceiling contribute only marginally to the overall gender wage gap, legal strategies which address only these two discrete issues will not get at the heart of wage discrimination. For this we need specific wage discrimination legal tools.

---

[173] Id.

[174] Claire Andre et al., Affirmative Action: Twenty-Five Years of Controversy, Santa Clara Univ., http://www.scu.edu/ethics/publications/iie/v5n2/affirmative.html (last visited July 20, 2012).

[175] Borgna Brunner, Timeline of Affirmative Action Milestones, Infoplease, http://www.infoplease.com/spot/affirmativetimeline1.html (last visited Apr. 4, 2013).

[176] See Nina Totenberg, Supreme Court Wades Into Affirmative Action Issue, Nat'l Pub. Radio, Feb. 21, 2012, http://www.npr.org/2012/02/21/147212858/supreme-court-wades-into- affirmative-action-issue; Adam Liptak, Justices Take up Race as a Factor in College Entry, N.Y. Times, Feb. 22, 2012, at A1; Amy Ziebarth, Solving the Diversity Dilemma, N.Y. Times, June 9, 2003, at A2.

[177] See, e.g., Jonathan S. Leonard, The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment, 4 J. Econ. Persp. 47, 47 (1990) (stating that the "federal policy of affirmative action effectively passed away with the inauguration of the Reagan administration in 1981").

[178] See Am. Bar Ass'n Comm'n on Women in the Profession, supra note 72, at 1, 3 (showing that in 2010, 45.9% of J.D. recipients and 45.4% of associates in private practice were female).

[179] Rosalie Berger Levinson, Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci, 34 Har. J. of Law and Gender, 1, at 32-33 (2011) (discussing reasons why gender affirmative action is still important despite perceptions to the contrary). See also Fed. Glass Ceiling Comm'n, A Solid Investment: Making Full Use of the Nation's Human Capital 15 (1995), at 13, 22, available at http://www.dol.gov/oasam/programs/history/reich/reports/ceiling2.pdf (recommending the use of affirmative action to shatter the glass ceiling for women and minorities). Cf. Analysis of Female Managers' Representation, Characteristics, and Pay, GAO Report 10-892R, Sept. 20, 2010, at 1-2, http://www.gao.gov/assets/100/97082.pdf (noting that women make up 47% of the total workforce but that "women are less represented in management than in the overall workforce"); Ann Howard & Richard S. Wellins, Holding Women Back: Troubling Discoveries--And Best Practices for Helping Female Leaders Succeed, DDI, 2009, at 13 ("Although women were half of the first-level leaders, they represented only about one-third of those at senior and executive levels."); Report of the Seventh Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, Nat'l Ass'n Women Lawyers Found., Oct. 2012, at 3 (noting that 46% of law firm associates are women, but that only 15% of equity partners are women).

2. Three Federal Statutes

The Equal Pay Act of 1963 remains the central piece of federal legislation outlawing gender wage discrimination. [180] The statute contains three main provisions: the "equal pay for equal work" formula; four affirmative defenses; and a limitation on remedies. The "equal pay for equal work" provision prohibits employers from paying male and female employees at different rates for jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." [181] This rule was intended to avoid women being paid less than men in the same job classification. [182] The courts have interpreted the prohibition to also include jobs in **[*416]** different classifications where the work performed by women workers is "substantially equal" to that performed by better paid men. [183] The four affirmative defenses are where a difference in pay is based on: a seniority system; [184] a merit system; [185] a system which measures earnings by quantity or quality of production; [186] or a differential based on any other factor other than sex. [187] These defenses track the early explanations for the gender wage gap and acknowledge a potential merit gap. Over time each of these has been used less, as women's seniority, credentials, experience, and ability to compete in quantifiable ways has closed the merit gap with men. [188]

This statute, which does not require a filing with the EEOC and applies to virtually all employers regardless of size, [189] would appear to provide a powerful tool in combating indefensible gender wage discrimination. However, the statute contains a few hurdles. First, the plaintiff must prove her case by comparison to an actual male employee--not a hypothetical or composite one--in the same establishment. [190] Secondly, a victim must bring a claim under the Equal Pay Act within two years of the discriminatory pay. [191] Since many women learn of wage discrimination only after years of employment, this relatively short window of time in which to file a claim often severely limits how much a victim can recover under the Act: damages under the Equal Pay Act are limited to back pay and liquidated

---

[180] Equal Pay Act of 1963, Pub. L. No. 88-38, *77 Stat. 56* (codified as amended at *29 U.S.C. § 206*(d) (2006 & Supp. V 2011)).

[181] Id. § 206(d)(1).

[182] Lindgren et al., supra note 7, at 168.

[183] *Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974)* ("It is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable … .").

[184] *29 U.S.C. § 206*(d)(1)(i) (2006 & Supp. I 2007).

[185] Id. § 206(d)(1)(ii).

[186] Id. § 206(d)(1)(iii).

[187] Id. § 206(d)(1)(iv).

[188] See Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act, Nat'l Women's L. Ctr. (Apr. 12, 2011), *http://www.nwlc.org/resource/closing-factor-other-sex-loop* hole-equal-pay-act (arguing that the first three defenses are relatively straightforward and therefore now quite limited in use, but the fourth "other than sex" defense has been construed too broadly and needs narrowing). See also Liza Mundy, The Richer Sex: How the New Majority of Female Breadwinners Is Transforming Sex, Love, and Family 57 (2012) ("Women are accruing seniority … and extending their time on the job.").

[189] *29 U.S.C. § 206*(d) (2006 & Supp. I 2007); see also Equal Pay Act Frequently Asked Questions, Am. Ass'n Univ. Women, *http://www.aauw.org/resource/*equal-pay-act-*faq* (last visited Feb. 23, 2013) (explaining the differences between the Equal Pay Act and Title VII, as well as advantages and disadvantages of filing under one or the other); Equal Pay/Compensation Discrimination, U.S. Equal Emp't Opportunity Comm'n, *http://www.eeoc.gov/laws/types/equalcompensation.cfm* (last visited Feb. 14, 2013).

[190] Equal Pay Act Frequently Asked Questions, supra note 189.

[191] *29 U.S.C. § 255*(a) (2006 & Supp. V 2011).

damages so any damages caused by discrimination that occurred more than two years before the claim cannot be remedied. [192]

Title VII of the Civil Rights Act of 1964 bolstered the Equal Pay Act by prohibiting employers from discriminating with respect to compensation. [193] Title VII applies to race, color, religion, national origin, as well as to gender, **[*417]** so the inclusion of compensation underscored that wage discrimination was a type of discrimination that Congress intended to outlaw for all protected groups. This allows for a broader range of pay discrimination claims by women, since no male comparator is required under Title VII. [194] For example, women that hold jobs for which there is no comparable, higher-earning equivalent held by a male cannot recover under the Equal Pay Act, even if they can prove that they were paid less because of their sex. [195] Such a plaintiff may have a viable claim under Title VII. Perhaps most compelling, Title VII permits the recovery of compensatory and punitive damages. [196]

Title VII wage claims, however, originally contained a huge limitation. A victim must bring a wage claim under Title VII within 180 days of suffering, as opposed to becoming aware of, wage discrimination. [197] Courts interpreted this period to begin at the moment that the employer decides to discriminate and issues a discriminatory paycheck. [198] Given that women rarely learn of wage discrimination soon after it occurs, this interpretation effectively precluded most women from utilizing the statute. [199] In 2007 the Supreme Court affirmed this interpretation of the statutory language, holding that Lilly Ledbetter could not collect because, even though she filed her complaint within 180 days of when she first learned that she was getting paid less than comparable male employees, she had failed to file within 180 days of the first unequal paycheck. [200] To avoid this impractically short statute of limitations, the bulk of litigation regarding pay inequity has been asserted under the Equal Pay Act, [201] despite its proof and damages limitations.

---

[192] Compensatory and punitive damages are not available under the Equal Pay Act. See ***29 U.S.C. § 216***(b) (2006 & Supp. II 2008).

[193] Civil Rights Act of 1964, ***42 U.S.C.§§2000e-2***(a)(1) (2006).

[194] Title VII does contain the Bennett Amendment which applies only to gender wage claims. Under this Amendment, "it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [The Equal Pay Act] … ." ***42 U.S.C.§§2000e-2***(h) (2006). The Supreme Court has held that the Bennett Amendment is to be understood as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII, but excluding the provision of the Equal Pay Act that requires equal pay for equal work, thus allowing for a broader range of types of gender wage claims. *Cnty. of Washington v. Gunther, 452 U.S. 161, 168 (1981).*

[195] Deborah L. Brake & Joanna L. Grossman, Title VII's Protection Against Pay Discrimination: The Impact of Ledbetter v. Goodyear Tire & Rubber Co., Reg'l Lab. Rev. (Fall 2007), available at *http://www.hofstra.edu/pdf/academics/colleges/hclas/cld/cld* rlr fall07 title7 grossman.pdf.

[196] *42 U.S.C. § 1981a* (2006).

[197] Id. § 2000e-5(e).

[198] Brake & Grossman, supra note 195.

[199] See *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 625-28 (2007)* (discussing earlier cases where women were unable to collect because their complaints were not timely).

[200] *Id. at 627-29.*

[201] Lindgren et al., supra note 7, at 171.

It therefore became necessary to amend Title VII to correct its gross time limitation on claims. In 2009, President Obama signed into law The **[*418]** Lilly Ledbetter Fair Pay Restoration Act. [202] Under the new law, employees have the right to file a claim under Title VII within 180 days of their most recent illegal paycheck because each paycheck is a new unlawful discriminatory act. [203]

The Lilly Ledbetter Act represents a major improvement in the legislative tools available to combat illegal gender wage discrimination. Nonetheless, even under the new law, women can only successfully sue once they discover an illegal wage discrepancy. While some women make these discoveries inadvertently, most women remain unaware of the compensation of their male colleagues. [204] Hence there is a need for wage disclosure laws.

3. Wage Disclosure

In American culture, it is considered gauche to discuss one's salary [205]: "The way we were raised is that it was bad taste to talk about how much you make." [206] This social norm creates a culture where employers can pay men and women differently with impunity. Since employees rarely share compensation information, such information remains a secret unless employers choose to make it public. Employers have had little incentive to make salary information public because any discrepancies would then be apparent and even legitimate differences would have to be explained. This can lead to inter-employee resentment and lowered morale. [207] Therefore most employers only publish salary information when legislation requires it.

For over a decade the case has been made for greater wage transparency. [208] Working Women magazine took on this issue in 2001 when it surveyed workers about why they keep salary information confidential and **[*419]** under what circumstances they might be willing to disclose it. Not surprisingly, more than half those surveyed explained their silence about their salary by saying that talking about salaries is impolite and 49% stated that none of their coworkers knew what they earned. Interestingly, however, the survey revealed that fewer than 40% of workers would absolutely refuse to share salary information. Indeed, 31% would share the information if it would give a coworker leverage to ask for a raise, 29% would share if it would give the worker herself leverage to ask for a raise, and 28% would share if the other worker were willing to do so as well. [209] These figures demonstrate a willingness to divulge salary information, even against cultural norms, if the revelation would increase wage equity. Still, laws that require employers to publicly disclose wages would obviate the need to overcome this social discomfort.

---

[202] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, ***123 Stat. 5*** (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

[203] Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/laws/statutes/epa ledbetter.cfm (last visited Apr. 4, 2013).

[204] Littman, supra note 9, at 42 (presenting survey data showing that most workers are unaware of the income of their colleagues: 49% say no co-workers know their salary; 38% say only a few know).

[205] Lisa Belkin, Psst! Your Salary Is Showing, N.Y. Times, Aug. 21, 2008, at G2 (quoting Ed Lawler, Director, Center for Effective Organizations, Marshall School of Business, University of Southern California, who has studied salary transparency since 1962: "[Salary secrecy i]s a very American, very middle-class phenomenon."). See also Abby Ellin, Want to Stop the Conversation? Just Mention Your Finances, N.Y. Times, July 20, 2003, at C9; Littman, supra note 9, at 41.

[206] Belkin, supra note 205, at G2 (quoting Professor Lawler).

[207] See Littman, supra note 9, at 41; Belkin, supra note 205, at G2 (describing examples of experience at Golden Lasso, a marketing company in Seattle, where salary information was disclosed by an employee). But see id. (describing examples of workplaces where employers choose to disclose without ill effects).

[208] See generally Littman, supra note 9. The most recent initiative is a push for a petition for a new disclosure law. See Congressional Petition Urges Mandatory Salary Disclosure to Create Pay Equality, Yahoo! News (Apr. 12, 2012), http://news.yahoo.com/congressional- petition-urges-mandatory-salary-disclosure-create-pay-160233320.html.

[209] Littman, supra note 9, at 42.

More recently, The Institute for Women's Policy Research ("IWPR") released survey data in late 2010 demonstrating that social discomfort is not the only reason for pay secrecy in the American workplace. [210] The study reported that 19% of employees say they work in a setting where wage discussions are formally prohibited and/or punishable, and 31% of workers said that such discussions are discouraged by managers. [211] These phenomena were more pronounced in the private sector, where "61% of employees are either prohibited or discouraged from discussing wage and salary information." [212] Hence there is a need at least to legally protect employee wage disclosure. Moreover, mandating employer wage disclosure would not only avoid burdening employees with having to make socially awkward disclosures, but would also protect employees from potential repercussions from employers.

IV. Wage Disclosure Laws

Activists who believe that wage transparency is vital to closing the gender wage gap have pushed for legislative action in the face of employer resistance to both voluntary employer disclosure and employee disclosure. [213] Progress has been slow, particularly in legislation directed at the private sector, but both federal and state legislation requiring wage disclosure by public employers has expanded substantially in the past decade, as has legislation protecting employees who choose to disclose and discuss wages. The impact of these laws reveals much promise for both types of wage disclosure legislation as effective tools in combating the residual gender wage gap.

[*420]

A. Existing Laws

Laws that require mandatory wage disclosure by employers are primarily directed at public sector jobs. [214] Although this means that salaries of government employees must be made public, [215] about 90% of Americans

---

[210] Pay Secrecy and Paycheck Fairness, supra note 6.

[211] Id.

[212] Id.

[213] See, e.g., Nat'l Women's L. Ctr., Congress Must Act to Close the Wage Gap for Women 5-6 (2008), available at http://www.pay-equity.org/PDFs/PayEquityFactSheet May2008.pdf; Congressional Petition, supra note 208.

[214] Examples of laws that require disclosure of public sector job salaries include: Colo. Rev. Stat. Ann. § 30-25-111(1.5) (West 2013) ("Salary information for all county employees and officials shall be published twice annually … ."); Iowa Code Ann. § 331.907(2) (West 2013) ("A copy of the final compensation schedule shall be filed with the county budget at the office of the director of the department of management."); N.H. Rev. Stat. Ann. § 9-F:1(II) (2013) ("The state transparency website shall include the following: … Annual salaries of all full-time state employees, listed by pay type category and in a searchable format … ."); N.D. Cent. Code Ann. § 40-01-09.1 (West 2011) (with respect to city government employees, "salary checks need not be published if the governing body elects to publish an annual salary schedule for each employee"); Or. Rev. Stat. Ann. § 294.250(3) (West 2012) ("Once each year the county shall publish the actual individual gross monthly salary of all regular officers and employees occupying budgeted positions."); S.D. Codified Laws § 6-1-10 (2013) ("The boards of county commissioners, the governing board of each municipal corporation, and school boards shall publish … a complete list of all the salaries of all officers and employees … ."); Tex. Gov't Code Ann. § 25.0172(j) (West 2011) ("Before raising a salary [of a county judge] the commissioners court must publish notice containing information of the salaries affected and the amount of the proposed raise in a newspaper of general circulation in the county."); and ***Wis. Stat. Ann. § 13.695*** (West 2013) ("Each agency shall file with the board … a statement which identifies the officers and employees of the agency who are paid a salary and whose regular duties include attempting to influence legislative action … ."). See also Government in the Sunshine Act, 5 U.S.C. § 552b (2006); Freedom of Information Act, ***5 U.S.C. § 552*** (2006 & Supp. III 2009); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). But note that while the Sunshine Act requires "open meetings" of government agencies, internal matters--presumably including discussion or disclosure of individual low-level wages--are excluded by subsection (c)(2) (matters that "relate solely to the internal personnel rules and practices of an agency"). Section (b)(2) of the Freedom of Information Act uses the same language to exclude internal matters. The

work in the private sector [216] so these laws do not help the majority of American women in their quest to ensure that they are being paid equally to their male counterparts. Despite support from Senator Harkin (D-Iowa), Chair of the Senate Health, Education, Labor, and Pensions Committee, and other key Senators, federal bills requiring wage disclosure in the private sector as part of a package of measures to ensure wage equity have stalled. [217] Thus there is limited federal wage disclosure legislation regarding private sector employees. Some argue that the National Labor Relations Act ("NLRA") can be interpreted to apply to wage disclosure in the private sector, [218] but to **[*421]** date courts have permitted employers to use a number of loopholes to avoid NLRA wage disclosure. [219]

There are a handful of private sector exceptions. Nonprofits must list salaries when applying for grants in some states. [220] Top salaries in publicly traded organizations must often be disclosed as must those in higher education. [221] These exceptions still exclude most American workers, who remain in the dark about how their salaries compare with those of co-workers. [222] Indeed, the bulk of federal legislation regarding private sector wages which exists or has come under serious consideration falls well short of explicitly requiring employer wage disclosure. Instead, proposed legislation focuses on protecting employees from potentially negative ramifications of voluntary employee wage disclosure. [223] For example, the NLRA bars prohibitions on wage discussions [224] and the

---

Administrative Procedure Act provides a framework within which government agencies may take action, but does not directly pertain to compensation disclosure.

[215] See supra note 214.

[216] S. Elizabeth Wilborn, Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace, *32 Ga. L. Rev. 825, 865 n.152 (1998).*

[217] See Jennifer Steinhauer, Republicans Block Bill to Ease Suits over Pay Bias, N.Y. Times, June 6, 2012, at A10.

[218] See, e.g., Rafael Gely & Leonard Bierman, Pay Secrecy/Confidentiality Rules and the National Labor Relations Act, *6 U. Pa. J. Lab. & Emp. L. 121, 138 (2003).*

[219] Nat'l Women's L. Ctr., Fact Sheet: Combating Punitive Pay Secrecy Policies 2 (2012), available at *http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf* (also noting that NLRA's remedies are limited).

[220] Rick Cohen, Nonprofits, Transparency and Sunshine, Nonprofit Q. (Mar. 22, 2010), *http://www.nonprofitquarterly.org/index.php?option=com* content&view=article&id=2038: nonprofits-transparency-and-sunshine&catid=149:rick-cohen&Itemid=117.

[221] See, e.g., I.R.S. Form 990, Part VII: "Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors" (2012); *15 U.S.C. § 78n*(i) (2006 & Supp. VI 2012) ("Disclosure of pay versus performance") (added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, ***124 Stat. 1376*** § 953, "Executive Compensation Disclosures"); *17 C.F.R. § 229.402 (2012)* ("Executive Compensation"); *15 U.S.C. § 77aa*(14) (2006) (Schedule A, Item 14 of the Securities Act) and *15 U.S.C. § 78l*(b) (2006 & Supp. VI 2012) (Section 12(b) of the Exchange Act) (listing the type of information to be included in Securities Act and Exchange Act registration statements, respectively). See generally Executive Compensation and Related Person Disclosure, *71 Fed. Reg. 53,158* (Sept. 8, 2006) (Securities Act Release No. 8732A, Exchange Act Release No. 54302A, Investment Company Act Release No. 27444A) (to be codified at 17 C.F.R. pts. 228, 229, 232, 239, 240, 245, 249, and 247), available at *http://www.sec.gov/rules/final/2006/33-8732afr.pdf*.

[222] Littman, supra note 9, at 42; Pay Secrecy and Paycheck Fairness, supra note 6.

[223] See, e.g., Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (restricting employers from imposing salary confidentiality requirements on employees); Paycheck Fairness Act, H.R. 1338, 110th Cong. (2008) (restricting employers from retaliating against employees for disclosing salary).

[224] ***29 U.S.C. § 152***(3) (2006).

proposed Paycheck Fairness Act would restrict employers from retaliating against employees for disclosing salaries. [225]

While falling short of requiring employer wage disclosure, the Paycheck Fairness Act would do much more than protect employees who choose to disclose their wages. The Act is a multi-pronged attempt to enhance the Equal Pay Act ("EPA"), with provisions ranging from improving EPA remedies to establishing a grant to train women and girls how to better negotiate. [226] Originally introduced by Senator Daschle (D-S.D.) [227] and Representative **[*422]** DeLauro (D-Conn.) in 1997, [228] the bill acknowledges Congress's findings that an unresolved piece of the gender wage gap is the result of wage discrimination and that better legal tools are needed to root out this discrimination. [229] While not requiring mandatory wage disclosure, the Act would improve the collection of pay information by the EEOC to enhance its ability to detect EPA violations and to enforce wage discrimination laws. [230] It also directs the Department of Labor to develop guidelines that would help employers voluntarily compare wages paid for different jobs to attempt to identify pay differences in jobs traditionally held by women. [231] As stated above, it also would protect employees who voluntarily disclose their salaries.

After a previous version of the Paycheck Fairness Act failed in the Senate in 2012, President Obama issued the following statement:

This afternoon, Senate Republicans refused to allow an up-or-down vote on the Paycheck Fairness Act, a commonsense piece of legislation that would strengthen the Equal Pay Act and give women more tools to fight pay discrimination. It is incredibly disappointing that in this make-or-break moment for the middle class, Senate Republicans put partisan politics ahead of American women and their families. [232] Despite the progress that has been made over the years, women continue to earn substantially less than men for performing the same work. [233]

The bill's failure did generate widespread publicity about the Paycheck Fairness Act, and the bill gained additional cosponsors in both houses of Congress. [234] The current bill, introduced by Senator Mikulski (D-Md.) [235] and Rep.

---

[225] Paycheck Fairness Act, H.R. 377, 113th Cong. § 3(b) (2013); see also Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (restricting employers from imposing salary confidentiality requirements on employees); The Paycheck Fairness Act, Nat'l Women's L. Ctr. 3-7 (Apr. 2006), http://www.pay-equity.org/PDFs/PaycheckFairnessActApr06.pdf (summarizing the provisions of a previous version of the bill).

[226] Paycheck Fairness Act, H.R. 377, 113th Cong.§§3, 5 (2013).

[227] Paycheck Fairness Act, S. 71, 105th Cong. (1997).

[228] Paycheck Fairness Act, H.R. 2023, 105th Cong. (1997).

[229] Paycheck Fairness Act, H.R. 377, 113th Cong. § 2 (2013).

[230] Section 206(d) of Title 29 of the U.S. Code already requires some employers to disclose to the EEOC general job classifications and their pay statistics (while maintaining individual confidentiality) but the proposed act would enhance this provision. See H.R. 377.

[231] H.R. 377.

[232] All Republicans voted not to consider the bill, while all Democrats and Independents voted for it; Sen. Mark Kirk (R-Ill.) did not vote, and Sen. Harry Reid (D-Nev.) changed his vote to enable him to bring up the bill again.

[233] The Fight Goes On, Nat'l Comm. on Pay Equity, http://www.pay-equity.org/index. html (last visited Apr. 3, 2013).

[234] The Senate bill now has thirty-eight cosponsors, while the House bill has 168 cosponsors. See S. 84: Paycheck Fairness Act, GovTrack.us, http://www.govtrack.us/congress/bills/113/s84#related (last visited Feb. 12, 2013); H.R. 377: Paycheck Fairness Act, GovTrack.us, http://www.govtrack.us/congress/bills/113/hr377 (last visited Feb. 12, 2013).

[235] Paycheck Fairness Act, S. 84, 113th Cong. (2013).

DeLauro (D-Conn.), [236] would be strengthened by amending it to mandate wage disclosure, [237] though politically this may not be feasible in the short term on the federal level.

[*423] More progress has been made with private employers on the state level, at least in the realm of protecting private sector employees who choose to voluntarily disclose or discuss their salaries. For over a decade California and Illinois both have had state statutes that protect wage-disclosing employees from retaliation by employers. [238] Michigan, [239] Vermont, [240] Colorado, [241] and Maine [242] now have similar wage disclosure statutes and New

---

[236] Paycheck Fairness Act, H.R. 377, 113th Cong. (2013).

[237] See infra Part V.A.

[238] *Cal. Lab. Code § 232* (2001) ("No employer may … discriminate against an employee who discloses the amount of his or her wages."); *820 Ill. Comp. Stat. 112/10(b)* (2001) ("It is unlawful for any employer to discharge or in any other manner discriminate against any individual for inquiring about, disclosing, comparing, or otherwise discussing the employee's wages … .").

[239] *Mich. Comp. Laws Ann. § 408.483a(13a)(1)* (West 2012). The law provides:

(1) An employer shall not do any of the following:

(a) Require as a condition of employment nondisclosure by an employee of his or her wages.

(b) Require an employee to sign a waiver or other document which purports to deny an employee the right to disclose his or her wages.

(c) Discharge, formally discipline, or otherwise discriminate against for job advancement an employee who discloses his or her wages.

Id.

[240] *VT. Stat. Ann. tit. 21, § 495(a)(8)(B)(i-iii)* (West 2012). The law provides:

No employer may do any of the following:

(i) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.

(ii) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.

(iii) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.

Id.

[241] *Colo. Rev. Stat. Ann. 24-34-402* (West 2012). The law provides:

(1) It shall be a discriminatory or unfair employment practice … (i) Unless otherwise permitted by federal law, for an employer to discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with any employee or other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages; to require as a condition of employment nondisclosure by an employee of his or her wages; or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information. This paragraph (i) shall not apply to employers who are exempt from the provisions of the "National Labor Relations Act", *29 U.S.C. sec. 151* et seq.

Id.

[242] *Me. Rev. Stat. Ann. tit. 26, § 628* (2012). The law provides:

An employer may not prohibit an employee from disclosing the employee's own wages or from inquiring about another employee's wages if the purpose of the disclosure or inquiry is to enforce the rights granted by this section. Nothing in this section creates an obligation to disclose wages.

Id.

York has proposed a similar statute. [243] In each of these states employees cannot be **[*424]** barred from discussing their own salaries or inquiring about those of others, nor can employers punish them for engaging in such discussions. Still, none of these statutes create any affirmative duty on a private sector employer to disclose wage information beyond that already required by the EEOC for investigatory and enforcement purposes. To assess effectiveness of a mandatory wage disclosure law, then, we are mostly left with the federal and state statutes that require the disclosure of public sector wages. Law review articles focus on the impact of pay confidentiality clauses and the removal of these clauses. [244] Little has been written examining the impact of employer wage disclosure on the gender gap. [245]

B. Effectiveness

The Minnesota [246] public sector wage disclosure statute, while truly a comparable worth program, does require reporting of salaries as a prelude to restructuring the pay schemes. [247] To the extent that there is clear data available showing that this was successful in closing the wage gap, [248] one can look to it as proof that mandatory wage disclosure is an effective tool. However, the statute did not rely on disclosure alone: it also required employers to make pay adjustments once pay discrepancies were identified between equally "valuable" jobs. [249] Can we leave out this second piece and still have **[*425]** a successful statute? Will employees utilize the information to privately enforce the Equal Pay Act? Alternately, will employers make greater efforts to avoid EPA violations if faced with mandatory salary disclosure? Here is where two federal models and the other state public sector statutes are useful to examine.

---

[243] S. 5674A, 2011-12 S., Reg. Sess. (N.Y. 2011); Assemb. 8348A, 2011-12 Assemb., Reg. Sess., (N.Y. 2011). See generally Wage Secrecy in New York: Why We Need a State Wage Disclosure Law, A Better Balance: The Work & Family Legal Ctr., http://www.abetter balance.org/web/images/stories/Documents/fairness/factsheets/ABB Fact Sheet - Wage Secrecy in NY.pdf (last visited Apr. 4, 2013).

[244] E.g., Brian P. O'Neill, Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter, *40 Seton Hall L. Rev. 1217, 1252 (2010);* Leonard Bierman & Rafael Gely, Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law, *25 Berkeley J. Emp. & Lab. L. 167, 186 (2004)* (discussing federal bills that would "make workplace pay confidentiality/secrecy illegal"); Matthew A. Edwards, The Law and Social Norms of Pay Secrecy, *26 Berkeley J. Emp. & Lab. L. 41 (2005).*

[245] But see David A. Logan, The Perils of Glasnost, *38 U. Tol. L. Rev. 565, 567 (2007)* (observing after a review of the business literature that "there is a split of opinion on whether salary transparency is a sound policy" but concluding that transparency generally favors fairness to the employee).

[246] Ontario has a law very similar to Minnesota's law: Public Sector Salary Disclosure Act of 1996, S.O. 1996, c. 1, Schedule A (Ont., Can.), available at *http://www.e-laws.gov.on.ca/index.html*. See Two Progressive Models, supra note 166, at 1. Other international efforts have also been made. See Reglement Concernant la Declaration de l'Employeur en Matiere d'Equite Salariale/Regulation Respecting the Report on Pay Equity, L.R.Q. 2011, c. E-12.001, a. 4 / Que. Reg. M.O. 2011-001, s. 1 (Que., Can.) (effective Mar. 31, 2011), available at *http://www.ces.gouv.qc.ca/documents/publications/reglementdemes.pdf* ("All businesses employing six (6) people or more and registered with Quebec's Enterprise Registrar will be subject to the requirement to produce an annual declaration in respect of pay equity."); Ann Neir et al., Europe,*39 Int'l Law. 569, 586 (2005)* ("The Swiss government has published two proposals for new regulations regarding auditing and transparency of salaries."); U.K. Eases Gender Pay Disclosure Requirement, Canadian H.R. Reporter (Dec. 2, 2010), http://www.hrreporter.com/articleprint.aspx?articleid=8590 ("The previous Labour government had set up a deadline of 2013 for when employers must publish details of compensation differences under the Equality Act [of] 2010.").

[247] *Minn. Stat. § 471.9981* (2012). See also Two Progressive Models, supra note 166, at 1 (hailing the policies of Minnesota and Ontario as "two progressive models on pay equity").

[248] See Two Progressive Models, supra note 166, at 1.

[249] Id.

The federal public sector wage disclosure laws do seem to have had an impact on the gap. In 2009 the United States Government Accountability Office ("GAO") concluded a study demonstrating that the wage gap in the federal workplace diminished between 1988 and 2007 from 28 cents to 11 cents on the dollar. [250] In other words, in 2007 women in federal jobs were earning 89 cents on the male dollar, in contrast to the 77.8 cents on the male dollar earned by all full-time year-round female workers in the same year. [251] The federal gap moved from 28 cents in 1988 to 19 cents in 1998 to 11 cents in 2007, demonstrating a consistent and dramatic downward trend. [252] The GAO study authors concluded that the closing federal gap is primarily due to men and women in the federal workforce becoming more alike in characteristics related to pay. [253] This overlooks that the merit gap has similarly closed in the private sector, where the gap remains much wider. So, while this and other factors may contribute to the lower gap, one strong implication of this significant difference is that disclosure enhances wage equity. [254] Many commentators have also come to this conclusion. [255] Indeed, even the Department **[*426]** of Labor acknowledged this implication. [256] In the wake of the GAO finding and based on an assumption that wage disclosure contributed to the narrowed federal gap, [257] the Office of Federal Contract Compliance Program's ("OFCCP") initiated a new wage data collection tool, issuing an "advanced notice of proposed rulemaking" ("ANPRM") in August, 2011, that announced plans for this enhanced compensation data collection mechanism. [258] Although the OFCCP previously required a subset of contractors to submit some salary data through an equal

---

[250] U.S. Gov't Accountability Office, GAO-09-279, Women's Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education, and Experience Diminish 11 (Mar. 2009), available at http://www.gao.gov/assets/290/287375. pdf. This study looked at "snapshots" of the federal workforce at three points in time (1988, 1998, and 2007) to show changes in the federal workforce over a twenty-year period. The researchers used Central Personnel Data File data (containing gender, annual salary, and other demographic and occupational factors for federal employees within most of the executive branch as well as a few agencies in the legislative branch, but not employees in the judicial branch and federal contractors) to compute the overall pay gap between men and women. They then performed multivariate analysis to estimate how much of the overall pay gap could be explained by demographic, occupational, and other measurable factors for which they had data. The authors concluded that "for each year we examined, all but about 7 cents of the gap can be accounted for by differences in measurable factors such as the occupations of men and women and, to a lesser extent, other factors such as years of federal experience and level of education." Id.

[251] U.S. Census Bureau, supra note 2, at tbl.P-40 (women's earnings as a percentage of men's earnings for all races combined, based on median earnings of full-time year-round workers).

[252] U.S. Gov't Accountability Office, supra note 250, at 19.

[253] Id. at 38.

[254] Wage disclosure laws may not be the only variable affecting the wage gap as between public and private sectors. For example, the range of public sector jobs may not be as broad as private sector jobs (potentially confounding the robustness of the correlation in hard-to-predict ways); or, compensation in the public sector may come in a different form (i.e., greater benefits and lower wages) which may also have a confounding influence.

[255] See, e.g., Gordon, supra note 147 (stating that "there's good evidence" that wage transparency would give women "a significant pay bump" since the pay gap in the public sector, "where salaries are a lot more transparent" is 11% instead of 23%).

[256] See Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Aug. 10, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm (explaining reasons for new public wage disclosure regulations).

[257] Memorandum from John Berry, Director, Office of Personnel Management and Jacqueline Berrien, Chair, Equal Employment Opportunity Commission, to Chief Human Capital Officers, Directors of Equal Employment Opportunity 1 (Aug. 15, 2011), available at http://www.eeoc.gov/federal/upload/eeoc opm equal pay memo signed.pdf (acknowledging unexplained gap); Non-Discrimination in Compensation; Compensation Data Collection Tool,76 Fed. Reg. 49,398 (Aug. 10, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm (explaining reasons for new regulations).

[258] Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (Aug. 10, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/html/2011-20299.htm.

opportunity survey, [259] the Bush administration discontinued this Clinton-initiated program. [260] The proposed enhanced tool would be much more comprehensive than the original one. The majority of the 2,400 comments posted to the government portal in response to the ANPR supported the proposal. [261] The new regulation will provide a systematic survey of pay practices of all federal supply and service contractors (who account for 25% of the civilian workforce). [262] A Notice of Proposed Rulemaking ("NPRM"), the next step toward implementation, is scheduled to be issued in June 2013. [263] The many groups supporting this **[*427]** change [264] believe that this wage disclosure tool, even without any comparable worth wage adjustment requirements attached to it, is crucial in narrowing the wage gap. Just as the gap has narrowed substantially in the face of salary disclosure for federal employees, the hope is that the same will occur for private employees of federal contractors.

The gap impact of the state public sector wage disclosure statutes (other than Minnesota) is harder to evaluate. U.S. Census data, while broken out by gender and by state, is not broken out by public and private sector jobs so gender wage differences within each sector are not easily calculated. Perhaps the pending change at the OFCCP will encourage public/private sector census wage reporting in coming years. It would be ideal to demonstrate that the wage gap for public sector employees in states with wage disclosure laws is narrower than that for private sector employees in those states and/or public sector employees in states without wage disclosure laws. In the interim, one worthy observation is that in Norway, where salary information has been publically available since 2002, the gender wage gap narrowed markedly in the following years. [265]

V. Recommendations

A mandatory wage disclosure law would enhance all efforts to close the gender wage gap. Inappropriate wage differences in the face of educational parity (such as those found in the AAUW study of college graduates a mere one year out of college) could be more easily identified and remedied. The financial perils of occupational segregation could be more readily illustrated to young women choosing a college major and career path. Gender wage differences within particular jobs (whether these be traditionally male or female jobs, or bottom tier, mid-level

---

[259] In addition to its basic compliance evaluation, "in 2000, OFCCP instituted a reporting requirement, the Equal Opportunity Survey (EO Survey), which required a subset of contractors to submit information to OFCCP independent of OFCCP compliance evaluations. *65 Fed. Reg. 68022, 68046* (Nov. 13, 2000). The EO Survey required contractors to submit information about personnel activities, compensation and tenure, and certain information about the contractor's affirmative action program." Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. at 49,399.

[260] Coy & Dwoskin, supra note 8, at 7.

[261] Jay-Anne B. Casuga, OFCCP's Pay Data Collection Tool Proposal Draws More Than Two Thousand Comments, Bloomberg BNA (Oct. 25, 2011), *http://www.bna.com/ofccps-* pay-data-n12884903975; Non-Discrimination in Compensation; Compensation Data Collection Tool,76 Fed. Reg. at 49,399 ("All comments received, including any personal information provided, will be available online at *http://www.regulations.gov* and for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue, NW, Washington, DC 20210.").

[262] Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. at 49,399-400; Coy & Dwoskin, supra note 8, at 7 (stating that employees of these contractors comprise 25% of the civilian workforce).

[263] OFCCP Unveils Its 2013 Regulatory Agenda, Federal Contractor Compliance Watch (Feb. 3, 2013), *http://federalcontractorcompliancewatch.com/2013/02/03/ofccp-unveils-its-2013-regulatory-agenda*.

[264] E.g., the American Civil Liberties Union, the NAACP Legal Defense & Educational Fund Inc., and the National Women's Law Center. See Jay-Anne B. Casuga, OFCCP's Pay Data Collection Tool Proposal Draws More Than Two Thousand Comments, Bloomberg BNA (Oct. 25, 2011), *http://www.bna.com/ofccps-*pay-*data-n12884903975*.

[265] Rebecca Fernandez, How Much Transparency Is Too Much?, OpenSource.com, Mar. 25, 2010, *http://opensource.com/business/10/3/how-much-transparency-too-much*. See also David Brancaccio, In Norway a Different View of Transparency, Aug. 20, 2012, MarketPlace, *http://www.marketplace.org/topics/wealth-poverty/*pay-*check/norway-different-view-* transparency.

or CEO level jobs) could be more easily illustrated to employers and to courts. Wage differences currently explained by the "Mommy Penalty" could be more fully explored to ensure that there is a true correlation between reduced experience and pay. Negotiations with employers would be better informed conversations. The EEOC would have comparison data readily available when wage discrimination claims are brought. Employers would have objective data to analyze when assessing the potential biases of their own managers.

Without a mandatory wage disclosure law, it will be impossible to completely close the gap as there will never be a way to thoroughly ferret out all **[*428]** remaining wage discrimination. Instead, enforcement of equal pay laws will continue to be piecemeal and erratic, driven by inadvertent discoveries of wage inequities. [266] Models exist for such a law at both the state and federal level. [267] Implementation can be structured to be minimally disruptive to private sector employers. In fact, the experience of private companies that engage in voluntary wage transparency indicates that such policies actually improve employee morale and increase the efficiency of the labor market, making the policies a win-win for employers and employees. [268] The time is ripe to enact a mandatory wage disclosure statute in conjunction with the Paycheck Fairness Act to ensure that the toolkit of approaches to eradicate the gender wage gap is complete.

A. Mandatory Wage Disclosure Law

A mandatory wage disclosure law for private sector employers would track those already in place for state and federal government employers as well as those for private higher education employers. [269] Employers would be required to make annual postings for each employee. These postings would be available to all other employees as well as to all relevant government agencies, such as the EEOC and the IRS. In the truly public listing, the information could be listed without name or other information that would make an employee readily identifiable. Technology exists to limit access to this identifying information to only those inside the company and the government agencies. Nonetheless, all employees should have access to individual salaries, along with at least the gender, age, and length of service of each employee. This is because the publishing of salary ranges or bands (or medians) does not provide a male comparator needed for proof under the Equal Pay Act. If a woman sees that her salary is at the bottom of a band (or below the median), she may suspect discrimination and may be more likely to negotiate appropriately for a raise but without knowing the gender of others in the salary band, she does not have the requisite evidence of gender discrimination. [270] For smaller companies and as an interim measure for larger companies while corporate culture adjusts to the new transparency, the law could allow for the publishing of job bands broken down by gender, race, age, and length of service. This would be some help to underpaid women, as being at the bottom of a band would at least raise a red flag that would motivate a worker to seek more information from her manager and would give her more **[*429]** information than mere median salaries for her job for someone with her education and experience.

This law would go well beyond the Salary Disclosure to Promote Equality Act currently being proposed by congressional petition. [271] That proposal focuses almost entirely on fairness in the setting of an employee's initial wage. If drafted into a bill and enacted into law, it would merely require: the inclusion of the pay range for all job postings; no credit checks for job candidates; no requirement for applicants to share salary history; no past

---

[266] See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).*

[267] See supra notes 214, 221.

[268] Daniel Indiviglio, The Case for Making Wages Public: Better Pay, Better Workers, Atlantic Monthly, July 20, 2011, http://www.theatlantic.com/business/archive/2011/07/the- case-for-making-wages-public-better-pay-better-workers/242238/#bio.

[269] See supra notes 214, 221.

[270] Equal Pay Act Frequently Asked Questions, supra note 189.

[271] See Congressional Petition, supra note 208.

employer sharing of an employee's salary history. [272] While these are all helpful provisions they do not address the need of employees to be aware of the wages of their colleagues to protect against wage discrimination. The broader law proposed here would provide all employees with access to wage information on their colleagues.

Employers would have the option of annotating wage data with information about an employee's education, experience, seniority, and workplace performance accomplishments as a way to digitally explain any apparent discrepancies between the salaries of employees doing similar work. [273] Companies would be encouraged to implement a process for confidential inquires into apparent wage discrepancies. Other key provisions would be a minimum company size for statutory coverage and a staged implementation of the law, giving larger employers one year in which to comply and smaller employers two years. [274]

This proposal is not unlike that proposed by the DOL's Women's Bureau. The Bureau encourages employers to voluntarily move to an "open pay policy," making the business case for such policies by pointing out a number of benefits. According to the DOL these policies: "stop speculation about pay--workers will know they are being paid fairly[;] make it clear that top performers are rewarded, which creates an incentive to work harder[;] stop meritless complaints about unequal pay[; and] identify pay disparities so they can be fixed." [275] The National Equal Pay Task Force supports the DOL's educational efforts [276] and a number of large employers, such as Costco Wholesale Corporation and Dell Incorporated, are accepting the DOL's challenge. [277]

[*430]

B. Implementation

Any legislative proposal that ignores the concerns of private sector employers has little hope of success. Employers worry that wage disclosure will wreak havoc in the workplace. [278] Beyond the cost of the additional paperwork involved in compliance with a wage disclosure statute, [279] the concern is that employees will be distracted and demoralized by the information. [280] Learning that a colleague earns more than one does, even for legitimate reasons, can breed anger, resentment, and/or jealousy. [281] Company morale may be negatively impacted and managers may be detoured from their daily tasks by the time needed to manage wage issues. [282] In

---

[272] Id.

[273] Access to these annotations, which themselves might be considered somewhat private information, could be limited to those inside the company.

[274] See, e.g., Two Progressive Models on Pay Equity: Minnesota and Ontario, supra note 166, at 1-2 (noting that staged implementation was successfully used in the Minnesota and Ontario laws).

[275] An Employer's Guide to Equal Pay, Women's Bureau, U.S. Dep't of Labor 3 http://www.dol.gov/equalpay/equalpay-employer.pdf (last visited Feb. 16, 2013).

[276] See generally White House, supra note 4.

[277] Gordon, supra at note 147 (stating that Costco Wholesale Corp. and Dell Inc. have moved to more transparency); Harvey Meyer, Full Disclosure, Hum. Res. Executive, June 16, 2010, http://www.hreonline.com/HRE/view/story.jhtml?id=456550026 (detailing the transparency policies at both Costco and Dell, neither of which reveals individual salaries).

[278] See Littman, supra note 9, at 41.

[279] But see Coy & Dwoskin, supra note 8, at 7 (stating that "fears about excessive paperwork are overblown").

[280] See Littman, supra note 9, at 41.

[281] Belkin, supra note 205, at G2 (describing negative examples of experiences at two companies where salary information was disclosed).

[282] Id. See also John Case, When Salaries Aren't Secret, 79 Harv. Bus. Rev. 5 37, 46 (2001), available at http://hbr.org/2001/05/when-salaries-arent-secret/ar/1.

addition, employees may not wish others to know about their compensation--either out of embarrassment at how low (or high) it is or simply because it has traditionally been a private matter. [283] Employers do not want to violate their employees' privacy by posting wage information in a place with public (or even company) access. [284] Employers also worry that EPA violations, even if inadvertent, will garner negative press for their organizations. [285]

The first answer to all of these concerns is that state and federal government workplaces are already subject to mandatory wage disclosure laws and somehow all of these worries are handled in those workplaces. Under many state laws the exact salaries of readily identifiable employees are publically posted. [286] The sky has not fallen in. As to the argument that the public sector culture is different than that of the private sector on issues of compensation, this may be a chicken-and-egg argument since the culture is impacted by the long-term openness and standardization of salary information. Moreover, a number of the state wage disclosure statutes include disclosure requirements for selected private sector employees. [287] These workplaces have similarly managed the public disclosure requirements without undue drama. Finally, the sorts of additional information that this proposal suggests that employers choose to add to explain apparent discrepancies--education, experience, accomplishments--would only be available within the company and would actually be no more than one might include in a resume or LinkedIn profile. [288]

[*431] The second answer to employers' concerns about wage transparency is that we live in an era of decreasing privacy. [289] The Internet has changed our access to previously private information and it has influenced our attitudes about what information should be readily accessible. In particular, millennials voluntarily share much private information and they tend to do it very broadly in social network forums [290] as well as more professional sites, such as LinkedIn. More importantly, millennials' attitudes about sharing salary and bonus information is radically different than those of their parents. [291] Researchers have already documented organizational changes resulting from changing attitudes about sharing work-related information--including unfair allocation of bonuses and plum assignments, as well as safety violations and sexual harassment claims. [292] Of course, voluntary disclosure

---

[283] See Littman, supra note 9, at 42.

[284] See Case, supra note 282 at 44.

[285] Id.

[286] See laws and parenthetical descriptions of requirements, supra note 214.

[287] See laws cited, discussion and parenthetical descriptions, supra notes 221, 223.

[288] See sample profiles at *http://www.linkedin.com*.

[289] See Case, supra note 282, at 44-49 (comments of the last of four expert commentators address this phenomenon).

[290] Id. at 49.

[291] Some commentators have noted:

> Human resource policies and, to a greater extent, managerial practices, tend to assume that people won't talk about salaries, bonuses and other intimate details of their employment relationship. That assumption won't be safe as Millennials come into the workforce with a decade or more of exposure on myspace, Friendster, Facebook and other social networking sites. There's already evidence that they will openly share salary information, coaching conversations and development plans--testing the integrity of the organizational systems.

Celia Berenguer et al., Catalyst for Change The Impact of Millennials on Organization Culture and Policy, Monitor Group 3-5 (2009), *http://www.monitor.com/Portals/0/MonitorContent/imported/MonitorUnitedStates/Articles/PDFs/Catalysts* for Change Millennials.pdf.

[292] Id.

of one's own salary may be different than having your employer disclose this information but it seems fair to say that millennials are less likely to consider such information private. [293]

The generationally-changing perceptions of privacy do not address the sensibilities of the entire workforce, nor the particular situations of private companies transitioning to wage disclosure. Still, much can be done to ensure against employer concerns coming to fruition. In this author's proposal, small companies would be excluded from mandatory compliance with the law. All companies would be given time to phase in a wage reporting system. During this time companies could carefully review their pay schemes and make prophylactic corrections to any inadvertent EPA (or other) violations. Explanations for legitimate wage disparities can be provided to employees in advance of full public disclosure. Salaries on public websites can be listed without names or other identifying information and in some cases grouped together into salary ranges. [294]

[*432] To see that it is possible to be a successful company while having wage transparency and to demonstrate that employees will accept transparency, it is useful to look at what happens when employers voluntarily disclose salary information. [295] A 2008 survey of 10,000 employees found that effective company salary disclosure actually dispels bad feelings that employees get when comparing their salaries to informal sources and estimates on "websites like Glassdoor, Salary.com, and Payscale" and increases employee "intent to stay" by thirty-four percent and worker effort by fifteen percent. [296] Here again is the business case for wage transparency.

Two examples of companies engaging in voluntary wage disclosure are WorldBlu in Austin, Texas, and Motek, in Beverly Hills, California. WorldBlu, a company that coaches others on the creation of more "democratic workplaces," has eleven employees and they all know what one another makes. [297] The company's chief executive predicts that this openness about company ledgers "will become the norm." [298] At Motek, a company that develops software for warehouses, "employees at the same level receive identical salaries and raises are negotiated for the entire team." [299] Everyone knows what every other employee's salary is and the company's chief executive claims that "there's no comparing or jealousy or backstabbing." [300] "It's the unknown that causes infighting," she states. [301] Neither company has publicly reported on the impact of their wage transparency on gender differences in pay but the company comments quoted in this paragraph indicate that if any such discrepancies did exist they have

---

[293] Indiviglio, supra at note 268 ("The Facebook generation has a far more liberal attitude towards sharing personal information than previous generations. As it begins to dominate the workforce, more pay disclosure could become very common.").

[294] But see supra note 72 (explaining why all employees need access to individual salary listings, not just salary ranges).

[295] Gordon, supra note 147 (stating that examining the experience of "companies that voluntarily take an open book approach to salaries" reveals that it does not in fact "bludgeon morale"). See also DelPo Kulow, supra note 87, at 106-08 (demonstrating that voluntary industry policies can be examined to measure the potential effectiveness of mandatory policies and arguing for making family friendly workplace policies mandatory to avoid piecemeal use of the policy (and doing so via federal law to avoid of regional disparities)).

[296] Gordon, supra note 147.

[297] Belkin, supra note 205, at G2.

[298] Id.

[299] Id.

[300] Id. (describing these two workplaces). See also Worldblu: Freedom and Democracy at Work, Worldblu, http://www.worldblu.com (last visited Apr. 4, 2013) ("[A] global network of organizations committed to practicing freedom and democracy in the workplace," and receiving recent press from The New York Times, The Wall Street Journal, BusinessWeek, and others).

[301] Gordon, supra at note 147 (quoting CEO Ann Price).

been addressed. Indeed, commentators have asserted that wage transparency would not only benefit workers but would make the labor market more efficient. [302]

These companies are not alone in experimenting with transparent salaries. In addition to the relatively cautious forays into wage transparency being **[*433]** attempted by Costco and Dell, [303] Whole Foods has emerged as a frontrunner in complete salary transparency. Any employee interested in the salary of any other employee can access a binder available in every store and find out what everyone got paid in the prior year, from CEO John Mackey to the lowest paid employee. [304] Whole Foods has consistently won awards for employee satisfaction, including making the list of Fortune's "100 Best Companies to Work For" thirteen years in a row. [305] Clearly wage transparency has not created a morale problem for the company. While this level of transparency does demand a high level of communication, it can be used effectively to drive expectations and teamwork. [306] Whole Foods' experience dramatically illustrates the business case for wage transparency.

To assist companies with the decision of whether to voluntarily disclose wages, a Harvard Business Review ("HBR") case set out a fictitious company where a vindictive employee published everyone's salaries. [307] The case provided a forum to discuss the advantages of an open salary system. [308] These included not only a fair compensation system but also a better employee understanding of the business, increased productivity, and a culture of trust. The four commentators on this HBR case each offered different perspectives, but all concluded that the hypothetical employee disclosure could be turned into a positive situation. [309] Of the four, two commentators--Dennis Bakke, CEO of AES Corporation, and Bruce Tulgan, a management consultant who has authored books on managing Generation X--advocated for publishing all employee salaries with identifying information. [310] A third commentator, Victor Sim, Vice President of total compensation for Prudential Insurance, supported publication of the information without individual names attached. [311] The last commentator, Ira Kay, a compensation consultant, **[*434]** supported the publication of salary ranges or bands. [312] All acknowledged that more transparency leads to a better operation, including higher profitability. The two commentators who ran companies (rather than merely

---

[302] Indiviglio, supra note 268 (noting that while wage transparency may make low-paid workers unhappy, this is actually healthy because these poor performers will move on, finding positions better suited to their skills and vacating positions that can then be filled by employees whose skill set and/or temperament are a better fit for the job).

[303] Meyer, supra note 277 (explaining that Costco doesn't reveal its employees' salaries but "about 90 percent of the company's 145,000 employees are hourly and pay scales for those workers are published in an 'employee agreement'… so, based on their hours worked, the hourly employees can fairly well surmise co-workers' wages and their own pay potential." At Dell "managers tell employees their compensation is influenced by market data and how their performance compares with peers" and the human resource department "recently created tools that enable managers to frame more fair, honest and consistent communication about pay...[that] help more tightly align Dell's 'meritocracy' philosophy with actual pay practices").

[304] Gordon, supra note 147.

[305] Id.

[306] Sarah Mills, Salary Transparency Goes Market, Sept. 2008, http://nkdorg.blogspot. com/2008/09/salary-transparency-goes-market.html.

[307] Case, supra note 282, at 37.

[308] John Case, When Salaries Aren't Secret, Bloomberg Businessweek (Oct. 11, 2007), http://www.businessweek.com/managing/content/oct2007/ca20071011 158943.htm.

[309] Case, supra note 282, at 44-49.

[310] Id. at 46, 49.

[311] Id. at 44. He also notes that Prudential is legally required to report all salaries over $ 60,000 and, while successful in getting the insurance department to modify its requirements so that information on most employees could be supplied without names, continues to supply names for the top earners.

[312] Id. at 48.

consulting on compensation issues) acknowledged that their own companies--AES Corporation, a $ 6.3 billion global electricity company, and Prudential Insurance--engaged in wage transparency already to some degree. More and more employers are considering the business case for wage transparency. [313]

VI. Conclusions

Mandatory wage disclosure laws are a logical next step in the long effort to close the gender wage gap in the United States. The stalled progress on the gap illustrates that the "merit gap" is mostly closed. Multiple reliable studies indicate that even after correcting for the remaining impact of differential education among older workers, experience differences due to motherhood, self-imposed occupational segregation, and the glass ceiling, a wage gap remains that can most likely be explained by wage discrimination. The Lily Ledbetter Fair Pay Restoration Act has helped women better access the tool of Title VII in asserting their legal rights but many women remain unaware that they are victims of wage discrimination and/or lack access to salary data of a male comparator in their organization--necessary for an Equal Pay Act claim. Mandatory wage disclosure laws would rectify this and would allow all aggrieved women to more effectively use both Title VII and the Equal Pay Act.

Wage disclosure laws are already in place for public sector workers and selected private sector employees. The existing wage disclosure laws have not been unduly burdensome on the workplace and have yielded some promising results in narrowing the gender wage gap in the federal government workplace. Widespread private sector disclosure laws could be easily modeled on the existing mandatory wage disclosure laws. Careful drafting and implementation, based on experience with earlier laws, can minimize any legitimate employer concerns about the impact of disclosure laws on the private workplace. The OFCCP is on the verge of requiring wage disclosure for all federal contractors, effectively requiring wage disclosure for 25% of private sector employees. Why not extend this requirement to all private employers?

In a time of easy electronic access to information, with a generation of young adults culturally open to broader sharing of previously private information, with the technology available to protect access to the information, and with the business case growing for wage transparency, the time is ripe to **[*435]** adopt mandatory wage disclosure laws for all United States employers. On the eve of the fiftieth anniversary of the passage of the Equal Pay Act, it is time for Congress to add the last logical legal requirement necessary to finally fulfill the promise of equal pay for equal work.

Harvard Journal on Legislation

Harvard Journal on Legislation

[313] See Meyer, supra note 277 (discussing the increased request for wage details from employees, the large number of downloads of webinars on wage transparency, and the increasing number of companies willing to experiment with these new policies).

70 Temp. L. Rev. 907

Temple Law Review
Fall 1997

Emerging Issue in State Constitutional Law

STATE EQUAL RIGHTS AMENDMENTS: MAKING A DIFFERENCE OR MAKING A STATEMENT?

Paul Benjamin Linton[a1]

*908 INTRODUCTION

Eighteen states have adopted constitutions or constitutional **amendments** providing that **equal** **rights** under the law shall not be denied because of sex.[1] Although a few of these provisions were included in nineteenth century ***909** state constitutions,[2] most of them are of more recent vintage, having been adopted between 1970 and 1978, a period roughly coextensive with the pendency of the Federal **Equal** **Rights** **Amendment** ('**ERA** ').[3] The failure of the **ERA** of passage and the United States Supreme Court's refusal to treat sex as a suspect basis for classification in the absence of the **ERA**[4] suggests that the interpretation of state **equal** **rights** provisions has a significance independent of federal **equal** protection analysis. This article measures that significance.[5]

The adoption of modern state **equal** **rights** provisions[6] was accompanied by a chorus of calls for constitutional guarantees of **equality** of **rights** for women. ***910** Odas Nicholson, one of the principal co-sponsors of the Illinois **equal** **rights** provision at the 1970 Illinois Constitutional Convention, stated that "[w]omen have not been treated like 'persons' for such a long time that we prefer to have this matter spelled out specifically, rather than leaving to a court interpretation whether or not women are, in fact, 'persons,' and entitled to **equal** protection of the laws."[7] Her co-sponsor, Mary Lee Leahy echoed these sentiments, saying that "there has been no United States Supreme Court decision saying that the **equal** protection clause of the Fourteenth **Amendment** . . . applies to women."[8]

A commentary written for the proposed Louisiana Constitution noted that the supporters of the **equal rights** section argued that "denial of **equal rights** to women in the past has been used as the basis for legal, financial, social and political discrimination."[9] One witness who testified before the Committee on Bill of **Rights** and Elections stated, "Women must have **rights** and privileges of first class citizens . . . for the state and nation as a whole to achieve the economic and social progress to which all citizens aspire."[10] Additionally, a delegate to the New Hampshire Constitutional Convention of 1974 argued that an **equal rights amendment** was necessary "to invalidate existing statutes on our books which clearly are discriminatory."[11]

In an article written before the Texas **Equal Rights Amendment** was adopted, one writer, referring to the text of the proposed **amendment**, said, ***911** "[t] hese simple words bear mute testimony to the fierce struggle of women in their fight for **equality**. . . . [t]hey do not reflect the fact that women still lag 50 years behind the racial minorities in their battle for civil liberties."[12] A typical judicial expression of this sentiment may be found in the Maryland Court of Appeals observation, made in 1985, that "**equal rights amendments** to state constitutions were prompted by a long history of denial of **equal rights** for women."[13]

As these and many similar statements indicate, **equal rights** advocates claimed that adoption of **equal rights amendments** was necessary to combat systematic and widespread discrimination in the law in favor of men. Twenty years have passed since the last state **equal rights amendment** was adopted, which affords an ample opportunity to determine whether these claims find any support in the reported case law.

I. Determining the Standard of Review

The majority of states adopting **equal rights** provisions apply a more rigorous standard of review to sex-based classifications than the current federal standard. Two states (Pennsylvania and Washington) apply what has been described as an "absolutist" standard, i.e. if the classification is based on sex, it is invalid, unless it is based upon physical differences between the sexes.[14] ***912** Eight states (California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, and Texas) apply the strict scrutiny standard of review, under which sex-based classifications are presumed invalid and will not be upheld unless the state demonstrates that the classification is the least restrictive means possible of promoting a compelling governmental purpose.[15] One state (Alaska), dissatisfied with the rigidity of federal **equal** protection analysis, employs a more flexible "sliding scale" approach under ***914** which "'[t]he applicable standard of review for a given case is to be determined by the importance of the individual **rights** asserted and by the degree of suspicion with which [the court] view[s] the resulting classification scheme.'"[16] "As the **right** asserted becomes 'more fundamental' or the classification scheme employed becomes 'more constitutionally suspect,' the challenged law 'is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.'"[17] Three states (Colorado, Louisiana, and Virginia) follow the federal standard.[18] Finally, four states (Montana, New Mexico, ***915** Utah, and Wyoming) have not settled upon a standard of review.[19] Notwithstanding the higher standard of review that has been applied in most ***916** of the states adopting **equal rights** provisions, the results of the cases litigated under these provisions have been mixed.

II. Criminal Law Issues

A. Rape

State courts uniformly have rejected state **equal rights** challenges to statutes defining rape as a crime that can be committed only by a male against a female.[20] Among the reasons given for the decisions in these cases are the following: the differences in physiology, relative size and strength of men ***917** and women, making it difficult, if not impossible, for a woman to force a man to have sexual intercourse with her against his will; the greater vulnerability of women as rape victims, especially with respect to pregnancy and injury to their reproductive organs; and the fact that male rapes of females represent a major social problem, while female rapes of males do not.[21]

B. Statutory Rape

Consistent with their decisions upholding forcible rape statutes, state courts also have upheld statutory rape statutes that apply directly only to males.[22] In addition to the reasons mentioned above, courts have emphasized the need to protect immature females from predatory males and from the potentially devastating physical, psychological, and social consequences of unwanted pregnancy.[23]

C. Incest

One state supreme court has rejected the argument that making incest between a father and a daughter a more serious offense than incest between a mother and son violated the state **equal rights** provision. Without deciding whether the legislature's classification of incest was based on sex (and therefore subject to strict scrutiny, the applicable standard), the Illinois Supreme Court held that "the State has demonstrated an interest which justifies, under either standard [strict scrutiny or rational-basis], the classification at issue."[24] The court explained:

> [A] female victim of a father-daughter incestuous relationship is exposed to potential harm to which male victims of incestuous relationships are not exposed. . . . The possibility that the female victim ***918** may become pregnant . . . adds considerably to the potential harm that may result from a father-daughter incestuous relationship. A female who is impregnated by her father is confronted with a traumatic experience beyond the experience of the incestuous act itself. The female must either endure the pregnancy and give birth to a baby or make the decision to have an abortion. If a child is born as a result of the incest, the female victim must either care for the child herself or give the child up for adoption. The physical change in a female who becomes pregnant could in itself be a source of trauma to the female. The potential psychological damage to the victim of a father-daughter incestuous relationship is admittedly difficult to estimate, but it is surely existent and considerable. Additionally, a pregnant woman is exposed to some physical dangers.[25]

The Illinois Supreme Court agreed with the State's view that "the physical and psychological dangers of incest are greater when the offense is committed by a male and the victim is his daughter," and held that "the State's interest in protecting potential victims of incestuous relationships justifies the statutory classification at issue."[26]

D. Prostitution

State courts are divided on whether prostitution statutes that apply only to women are constitutional, with the majority ruling that such statutes are constitutional.[27] The difference in outcomes appears to have turned on whether a given court believed that the greater incidence of female prostitution provides a justifiable basis for the discrimination.[28]

*919 E. Sentencing and Parole Eligibility

The Pennsylvania Supreme Court has held that neither sentencing statutes nor parole eligibility rules may take sex into account.[29]

F. Sex-Based Age Discrimination in Criminal Law and Procedure

Both the Illinois Supreme Court and the Texas Court of Criminal Appeals have held that statutes allowing boys to be tried as adults at age 17, but prohibiting prosecution of girls as adults until they reached age 18, violated the state **equal rights** provision.[30] Additionally, in Ex parte Tullos,[31] the Texas Court of Criminal Appeals held that a statute subjecting 17-year old

males who had been convicted of drunken driving to much harsher criminal penalties than 17-year old females who had been convicted of the same offense, violated the state **equal rights amendment**.[32]

G. Prison Regulations

The Hawaii Supreme Court has upheld a prison regulation that women visitors wear appropriate undergarments, including brassieres.[33] Additionally, both the Texas Court of Appeals and the Pennsylvania Commonwealth Court have rejected state **equal rights** challenges to prison regulations limiting the hair length of male prisoners, but not female prisoners.[34] Both courts held that prisoners enjoy only diminished constitutional **rights** and that a prison regulation does not violate a prisoner's **rights** if it is reasonably related to legitimate penological interests, such as the security, health, and safety of the institution, its staff, and inmates.[35]

III. Employment Issues

All state **equal rights** provisions prohibit discrimination in public employment on account of sex, either by their explicit terms or by necessary implication, and provisions in two states also prohibit sex discrimination in private employment as well.[36] Though an analysis of sex discrimination ***920** claims brought against private employers is outside the scope of this article (which deals with public law, not private conduct), it must be noted that relatively few sex discrimination cases have been brought under state **equal rights** provisions by public or private employees.[37]

A. Eligibility for Position

In Long v. California State Personnel Board,[38] the California Court of Appeal upheld a rule allowing only men to serve as chaplains in a youth correctional facility.[39] The court explained that the rule did not prevent any woman "from pursuing the occupation of minister or chaplain. It merely prevents petitioner from pursuing that occupation at the [youth] facility."[40] The ban on sex-based discrimination in the California Constitution (Article I, Section 8) "does not prohibit regulation of an occupation in such ways as to exclude one sex under certain justifiable circumstances; rather, it forbids a prohibition from the pursuit of that occupation by either sex."[41]

B. Physical Performance Standards

The California Supreme Court has held that "an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants."[42] Consistent with that decision, the court upheld a requirement that applicants for a local police department be able to scale a smooth, six-foot wall, even though physical agility standards have a disparate impact on women.[43]

C. Maximum Work Hours

In 1912, the California Supreme Court upheld a statute limiting the number of hours per day and per week women could work in certain occupations.[44] More recently, the Texas Court of Appeals held that a law limiting ***921** the number of hours a woman could be required to work per day and per week without her consent, and mandating overtime pay for all time in excess of 40 hours per week, discriminated against men in favor of women in violation of the state **equal rights amendment**.[45]

D. Mandatory Maternity Leave

The Louisiana Court of Appeals has held that the automatic reassignment of a police officer to administrative duty or leave upon the diagnosis of pregnancy violates Article I, Section 3 of the Louisiana Constitution, which prohibits discrimination on the basis of sex or physical condition.[46]

E. Workers' Compensation Benefits

In Arp v. Workers' Compensation Appeals Board,[47] the California Supreme Court held that a provision of the workers' compensation law applying a conclusive presumption of total dependency to widows, but not to widowers, denies **equal** protection of the laws to both widowers and employed women.[48]

F. Unemployment Compensation Benefits

In a decision reversed by the United States Supreme Court, the Utah Supreme Court held that a statute declaring a person ineligible for unemployment compensation for twelve weeks before and six weeks after the expected date of childbirth, and during any week of unemployment when it is found that her total or partial unemployment is due to pregnancy, does not violate Article IV, Section 1 of the Utah Constitution because, "in the matter of pregnancy there is no way to find **equality** between men and women."[49] The Washington Supreme Court held otherwise in a decision citing, but not relying upon, the state **equal rights amendment**.[50] A lower Pennsylvania state court has held that a statute that denied unemployment compensation benefits to any worker who left a job to accompany a spouse, except those workers who were the sole or principal supporters of their families, did not discriminate against women in violation of the state **equal rights amendment**, ***922** even though only one-fifth of working wives provided more than fifty percent of the support for their families.[51]

G. Conflict of Interest Rules

In Coyne v. State ex rel. Thomas,[52] the Wyoming Supreme Court held that spouses of county school district employees were not disqualified by conflict of interest rules from serving on school district boards.[53] Basing its decision on Article VI, Section 1 of the Wyoming Constitution, the court rejected the argument that a husband and wife:

> constitute a single entity for the purpose of incompatibility of office and position, with a community of interest and a natural family sentiment which will prevent one of them, as trustee of a school district, from exercising impartial and independent judgment in the public interest on a matter in which the other is involved as an employee of the district.[54]

H. Affirmative Action

Two state courts have sharply disagreed on whether their **equal rights** provisions allow affirmative action to remedy the effects of past discrimination against women and minorities.[55]

IV. Welfare Issues

A. Abortion Funding

The Pennsylvania Supreme Court has rejected an argument that limitations on abortion funding violate the Pennsylvania **Equal Rights Amendment**.[56] The court explained:

> [W]e cannot accept [the] rather simplistic argument that because only a woman can have an abortion then the statute [restricting ***923** public funding of abortion] necessarily utilizes "sex as a basis for distinction. . . ." [Citation omitted]. To the contrary, the basis for the distinction here is not sex, but

> abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women [whether to carry the child to term or have an abortion].

The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence, there are certain laws which necessarily will only affect one sex. Although we have not previously addressed this situation, other **ERA** jurisdictions have; and the prevailing view amongst our sister state jurisdictions is that the **ERA** "does not prohibit differential treatment [between] the sexes when, as here, that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[57]

On the other hand, in dicta, the Connecticut Superior Court has expressed the view that such restrictions violate the Connecticut **Equal Rights Amendment**.[58]

B. Dependency Determinations

The Connecticut Supreme Court has held that welfare department regulations that allowed a legally liable son with a working spouse to take exemptions for minor children for purposes of computing monthly contributions for the support of an indigent parent were invalid, on the grounds that they violate the **equal rights** guarantee of the Connecticut Constitution.[59] Similarly, the Washington Court of Appeals has held that a welfare regulation limiting Aid to Families with Dependent Children-Employable (AFDC-E) benefits only to families of unemployed fathers was unconstitutional.[60]

*924 V. Family Law Issues

A. Sex-Based Age Discrimination in Determining Eligibility to Marry

The Illinois Supreme Court has held that the state may not establish different ages at which men and women may marry.[61]

B. Actions for Breach of Promise to Marry

One court has held that to avoid the ban on sex discrimination in the state constitution, the common law cause of action for breach of promise of marriage (that has been abolished in most states) could be brought by either a man or a woman.[62]

C. Antenuptial Agreements

In Simeone v. Simeone,[63] the Pennsylvania Supreme Court, citing the Pennsylvania **Equal Rights Amendment**, held that both parties to an antenuptial agreement, regardless of sex, stand on **equal** ground in the bargaining process.[64] Referring to earlier decisions that had imposed a full disclosure requirement on men, but not women, in negotiating antenuptial agreements, the court stated:

> Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income and assets.

Accordingly, the law has advanced to recognize the **equal** status of men and women in our society [citing Article I, Section 28, of the Pennsylvania Constitution]. Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. . . . It would be inconsistent, ***925** therefore, to perpetuate the standards governing prenuptial agreements that were described in [earlier] decisions, as these reflected a paternalistic approach that is now insupportable.[65]

D. Prohibition of Same-Sex Marriages

Only a few state courts have considered challenges to statutes and policies restricting marriage to members of the opposite sex. In Singer v. Hara,[66] the Washington Court of Appeals held that Washington's prohibition of same-sex marriages did not violate the state **equal rights amendment**.[67] The court explained:

> [I]t is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus, the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex." Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the **ERA**, because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males. In short, we hold that the **ERA** does not require the state to authorize same-sex marriage.[68]

In Baehr v. Lewin,[69] however, the Hawaii Supreme Court, in a plurality opinion, said that the Hawaiian statute prohibiting same-sex marriages did discriminate on the basis of sex and could be justified only by a compelling state interest.[70] One justice of the five-member court concurred in remanding the case for a hearing to determine whether sexual orientation is "biologically fated," but did not join the plurality opinion.[71] Two justices dissented.[72] ***926** On remand, the trial court declared the statute unconstitutional,[73] and following that decision the Hawaii Legislature proposed an **amendment** to the Hawaii Constitution allowing the state to ban same-sex marriages.[74]

E. Selection of Surnames

State courts interpreting state **equal rights** provisions uniformly have held that women are not required to take their husbands' last names upon marriage, and that there is no paternal or maternal preference in determining a child's surname.[75]

F. Determination of Domicile

The Louisiana Supreme Court has held that a statute providing that a wife can have no domicile other than that of her husband for purposes of establishing venue to bring an action for annulment of marriage, separation, or divorce unreasonably discriminates against women in violation of Article I, Section 3 of the Louisiana Constitution.[76] Additionally, both the Texas Court of Civil Appeals and the Virginia Court of Appeals have stated that, subsequent to the adoption of the state **equal rights amendment**, courts may no longer assume that a wife takes her husband's domicile upon marriage.[77]

G. The "Double Declaration" Rule

The Louisiana Court of Appeals has held that the irrebuttable presumption that immovable property purchased by the husband during marriage is community property unless the husband declares at the time of acquiring the property both that the property was purchased with funds belonging to him separably and that it was being acquired for his individual estate did not violate ***927** the state **equal rights** provision.[78] The court arrived at this holding even though no such presumption applies to the wife who purchases immovable property during the marriage and who may assert and prove that the purchase was made with separate funds at any time.[79]

H. Presumptions Regarding Spousal Gifts

The Pennsylvania Supreme Court addressed the "one-sided presumption" that when a wife contributes toward the purchase of property by the entirety, a trust is created in her favor, but that when a husband contributes toward the purchase of property by the entirety, a gift to the wife is intended.[80] The court held that this presumption, "can no longer stand in view of the passage of the Pennsylvania **Equal Rights Amendment**."[81]

I. Ownership of Household Goods

Two state courts have held that the common law presumption that all household goods in the joint possession of a husband and wife belong to the husband cannot survive the adoption of state **equal rights amendments**.[82]

*928 J. Confidential Relationships

The Maryland Court of Special Appeals has cited the state **equal rights amendment** as authority for rejecting the common law doctrine of confidential relationships. Under this doctrine, a husband is the dominant partner in a marriage, and, as a consequence, a confidential relationship between the husband and wife exists as a matter of law. Under this relationship, the wife is entitled to assume that in any financial transactions with her husband, the husband is acting in her best interests.[83]

K. Presumption Regarding Will Revocation

In In re Estate of Armstrong,[84] the Utah Supreme Court held that a statute conclusively presuming that the will of a man (but not a woman) is revoked upon his subsequent marriage, unless he has made other written provision for his wife, did not violate the state **equal rights** guarantee.[85] In In the Matter of Estate of Baer,[86] the same court, without mentioning the state **equal rights** provision, held that a statutory scheme providing a distributive share only for widows and not widowers did not violate the **equal** protection guarantee of either the federal or state constitution.[87]

L. The "Tender-Years" Doctrine

Under the "tender-years" doctrine, a late nineteenth century American legal doctrine,[88] courts normally would award custody of children, especially young children, to their mothers, believing them to be better suited to provide for their emotional and physical needs.[89] As one commentator noted, "[t]he courts, which previously had suggested that custody ought to go to the innocent party in a divorce, now were awarding custody to 'guilty' wives whose husbands had obtained divorces from them. This represented a complete turnabout from the old English cases awarding custody to the adulterous husband."[90]

Although two state courts continue to approve of the "tender-years" doctrine in the face of their respective states' **equal rights** provisions mandating **equality** of treatment between the sexes,[91] most state courts that have ***929** addressed this issue have recognized that the doctrine cannot be reconciled with the sex-**equality** mandated by **equal rights** provisions.[92]

M. The Necessaries Doctrine

Under the common law doctrine of necessaries, "a husband has the duty to support his wife and is responsible for the cost of necessary goods and services furnished to his wife by third parties if he has failed to provide the ***930** necessaries himself."[93] Because "the husband and wife were considered one legal entity--their two identities merging upon marriage so that the husband's identity subsumed that of the wife," the married woman was "legally incapable of incurring any obligations independent of her husband so that she was completely dependent upon him for providing items necessary to her maintenance."[94] The husband's duty to support his wife included the cost of necessaries provided to his wife by third parties. "Liability was based on the husband's presumed failure to provide the necessaries himself, or upon the theory that the wife was acting as his agent when she bought the necessaries."[95] Accordingly, "[a] creditor could sell necessaries to the wife and rely upon the law to force the husband to pay for them."[96] A wife, however, was not liable for necessaries provided to her husband who could contract for them himself.[97]

Although state courts are not in agreement as to how the sex-based discrimination in the necessaries doctrine should be corrected (i.e., whether to extend the doctrine to both spouses or to abolish the doctrine altogether), all of them are in agreement that this common law doctrine does not withstand scrutiny under **equal** **rights** provisions.[98]

N. Support Obligations

Closely related to the necessaries doctrine, but broader in scope, is the obligation of the husband to provide for his wife and children. The common law rule that only men were liable for support has been broadened to include women. State courts uniformly have interpreted their **equal** **rights** provisions to impose reciprocal and mutual support obligations upon both husbands and ***931** wives.[99] Courts also have recognized that criminal neglect statutes that apply only to men are unconstitutional.[100]

O. Alimony

A number of state courts have recognized that statutes or common law rules allowing temporary or permanent alimony to be paid only to the wife and not to the husband violate state **equal** **rights** principles.[101] The United ***932** States Supreme Court reached the same result on **equal** protection grounds in Orr v. Orr.[102]

P. Actions for Loss of Consortium

At common law, only the husband could sue for loss of consortium.[103] State courts uniformly have recognized that the common law cause of action must be extended to women to avoid running afoul of state **equal** **rights** provisions.[104]

Q. Actions for Criminal Conversation

In Irwin v. Coluccio,[105] the Court of Appeals of Washington abolished the common law action for criminal conversation.[106] The court explained that the rationale for allowing the action, which was "regarded as an invasion of a husband's property **right** in the body and services of his wife, an exclusive **right** reserved to him for his personal enjoyment," offends "the **right** of every woman to be treated as an **equal** member of society."[107]

*933 R. Interspousal Tort Immunity

> The doctrine of interspousal tort immunity is a common law concept derived from the legal fiction that the husband and wife become one person in law. Married women could not sue or be sued without joinder of their husbands. The wife's personal and property **rights** as well as her legal existence were considered suspended during the marriage (coverture). The husband acquired all his wife's choses in action and could assert them in his own name. He became liable for the torts of his wife. This concept necessarily made it impossible for one spouse to maintain an action against the other.[108]

Although the common law doctrine has been abolished in most states by statute or court decision,[109] a few state courts have relied upon their state **equal** **rights** provisions to limit or abolish the doctrine.[110]

VI. Education Issues

A. Housing

In a decision reversed on other grounds, the Texas Court of Civil Appeals held that a state university regulation allowing male students, but not female students, to live in off-campus private housing violated Article I, Section 3a of the Texas Constitution.[111] The New Mexico Supreme Court, however, rejected an **equal** **rights** challenge to a state university rule barring visitation to persons of the opposite sex in bedrooms of the university's residence halls.[112]

*934 B. Sex-Based Hair Length Regulations

The Texas courts have held that disputes over hair-length regulations that apply only to high school boys and not to high school girls are nonjusticiable.[113]

C. Opportunity to Participate in Sports

Equal opportunity to participate in sports has been the subject of considerable litigation under state **equal** **rights** **amendments**. In Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.,[114] the Massachusetts Supreme Judicial Court held that an athletic association rule, which provided that no boy could play on a girl's team though a girl could play on a boy's team if that sport was not offered for girls, violated the state **equal** **rights** **amendment**.[115] In an earlier advisory opinion, the same court held that a proposed bill prohibiting women from participating with men on football and wrestling teams would constitute impermissible sex discrimination.[116] In Darrin v. Gould,[117] the Washington Supreme Court struck down a rule forbidding female high school students from playing on interscholastic football teams.[118] The court held that players' eligibility had to be determined on the basis of their individual characteristics.[119] Twelve years later, the same court held that a state university could not exclude football from its calculation for determining **equal** opportunities for women athletes, scholarships, and distribution of nonrevenue funds.[120] In Petrie v. Illinois High School Ass'n,[121] the Illinois Appellate Court, in a divided opinion, rejected a challenge to the validity of: (1) a high school's rule restricting membership in the sole volleyball team sponsored by the school to girls, and (2) the high school association's rules restricting membership on teams participating in the only volleyball tournament sponsored by the association to girls.[122] The court noted that, in general, "high school boys are substantially taller, heavier and stronger than their girl counterparts and have longer extremities," and that "[high school girls] are generally at a substantial physical disadvantage in ***935** playing volleyball."[123] The majority concluded that "[t]he classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes."[124]

A Pennsylvania decision held that an association by-law barring girls from competing or practicing with boys in any athletic contest was invalid.[125] The court said that the

> notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the [[[b]y-[l]aw in light of the **ERA**. Nor can we consider

> the argument that boys are generally more skilled. The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic.[126]

D. Sex-Based Scholarships

Two state courts have held that private scholarship funds may not discriminate on the basis of sex or race.[127]

VII. Illegitimacy Issues

A. Paternity Proceedings

State courts are divided on whether state **equal rights amendments** confer upon the natural father of a child born to a woman married to another man a **right** to bring a paternity action if the mother has a **right** to bring such an action against the natural father.[128] State courts recognize, however, that ***936** there is an obvious biological justification for requiring greater evidence of paternity than of maternity:

> The classification here made is not "entirely unrelated to any differences between men and women." The differences are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy. When born of her, the fact of motherhood is obvious. Not so of fatherhood. The proof of fatherhood, or the proof of the lack thereof, must come from an external source. The entire classification within the act . . . is premised on this basic and obvious distinction, it is not invidious, but "realistically reflects the fact that the sexes are not similarly situated" in the circumstances. Men do not bear children and give birth to them.

Furthermore, to word the enactment without gender classification would result as a purpose of the enactment to be a determination of the existence or nonexistence of a presumed mother in addition to that of a presumed father. Such result would be an absurdity. Nature identifies the mother at the time of birth. There is no need to engage in presumptions.[129]

B. Adoption

State courts have held that statutes requiring the consent of the mother of an illegitimate child, but not that of the natural father, to the adoption of the child, violate state **equal rights amendments**.[130]

*937 C. Legitimating Children

In In re McLean,[131] the Texas Supreme Court struck down a statute making it more difficult for men than for women to legitimate illegitimate children.[132]

D. Personal Injury Actions

The United States Supreme Court has held that a state may bar a father who has not legitimated a child from suing for the wrongful death of the child.[133] The Washington Court of Appeals, however, has held that a statute allowing the father of an illegitimate child to bring an action for injury to or death of the child only if he has regularly contributed to the child's support, but not imposing a similar limitation on the **right** of the mother to bring an action, violates the state **equal rights amendment**.[134]

E. Inheritance Rights

The Utah Court of Appeals has held that a statute preventing fathers from inheriting from their illegitimate children unless they have openly acknowledged the children as their own does not violate the state or federal constitution.[135] The Illinois Supreme Court, however, has held otherwise.[136] Additionally, both the Connecticut Supreme Court[137] and the Massachusetts Supreme Judicial Court[138] have held that a statute basing the inheritance **rights** of illegitimate children on the sex of the child's parent violates the state **equal** **rights** **amendment**.

VIII. Other Issues

A. Age of Majority

In a decision later reversed by the United States Supreme Court on federal **equal** protection grounds, the Utah Supreme Court held that a statute ***938** establishing different ages of majority for men and women did not violate either the state or federal constitution.[139]

B. Sex-Based Insurance Rates

In Hartford Accident & Indemnity Co. v. Insurance Commissioner,[140] the Pennsylvania Supreme Court relied upon the state **equal** **rights** **amendment** in upholding the state insurance commissioner's rule disapproving sex-based automobile insurance rates.[141] The Pennsylvania Commonwealth Court later struck down an attempt by the state legislature to authorize such sex-based rates by statute.[142]

C. Jury Service and Peremptory Challenges

An early Wyoming decision held that a male defendant lacked standing to object to the exclusion of women from petit juries.[143] A later decision from the same court recognized the **right** of women to serve on juries.[144] More recently, state courts have disagreed on whether statutes allowing women, but not men, to be automatically excused from jury duty if they were needed to take care of minor children or disabled persons constitute impermissible sex discrimination.[145] Before the United States Supreme Court held that the use of peremptory challenges to exclude men or women from petit juries solely on account of their sex violated the **Equal** Protection Clause of the Fourteenth **Amendment**,[146] five state courts reached the same result in interpreting their state **equal** **rights** provisions.[147] However, in State v. Adams, ***939** [148] the Louisiana Court of Appeals held that the State's use of peremptory challenges to exclude males from a jury hearing a case charging a female with prostitution did not violate the **equal** **rights** guarantee of the Louisiana Constitution.[149]

D. Maintenance of Public Morals

The Texas Court of Appeals and the Washington Supreme Court have affirmed convictions for disorderly conduct and lewd conduct, respectively, of women who appeared topless at a public beach or swimming pool.[150] Courts generally have deferred to legislative and administrative judgments prohibiting women, but not men, from soliciting alcoholic drinks in commercial establishments,[151] and forbidding bars and restaurants from employing topless waitresses and entertainers.[152] Collectively, these decisions have observed that there are physiological and sexual distinctions between the female breast and the male breast, that female breasts differ both internally and externally from male breasts, and that the female breast is a mammary gland.[153] An Illinois Appellate Court has held that a ban on massages by ***940** members of the opposite sex constitutes impermissible sex discrimination,[154] but the California Court of Appeal has held otherwise.[155]

Conclusion

As the above survey indicates, most of the litigation brought under state equal rights provisions to date has involved statutes, ordinances, administrative regulations or judicial doctrines that discriminated (or were alleged to have discriminated) against men in favor of women. This may come as a surprise to many. Certainly, it was not the expectation of the proponents of state equal rights amendments. Yet, as Professor Leo Kanowitz, no opponent of women's rights, has said,

> a casual glance at the treatment males have received at the hands of the law solely because they are males suggests that they have paid an awesome price for other advantages they have presumably enjoyed over females in our society. Whether one talks of the male's unique obligation of military service, his primary duty for spousal and child support, his lack of the same kinds of protective labor legislation that women have traditionally enjoyed, or the statutory or judicial preference in child custody disputes that has long been accorded to mothers vis-a-vis fathers of minor children, sex discrimination against males in statutes and judicial decisions has been widespread and severe.[156]

Precisely for this reason, "although the idea of the ERA is closely associated in the public mind with the feminist movement, the large majority of appellate litigants claiming violations of their rights under a state ERA have, so far, been men."[157] Moreover, "many of the statutes challenged in these cases were, in fact, discriminating against men."[158] Women have brought relatively few cases under state equal rights provisions alleging discrimination in employment and education, two areas where women have been subjected to discrimination, either because the provisions do not reach private conduct (in the case of private employment and private education) or, as is more likely, because these areas have been adequately addressed in comprehensive federal legislation.[159] What one commentator said in reference to the proposed ***941** Federal Equal Rights Amendment applies with full force to the adopted state equal rights amendments:

> The ineffectiveness of the ERA, except as a symbol, has been overlooked in the increasingly shrill forecasts--and necessary rebuttals to the forecasts--of frightening or unwanted changes in society or the family that the amendment may produce. Some of the forecast changes may indeed take place. They may be cause for alarm or for gratification. In any event, public discussion of all such possibilities should be welcomed. However, any possibility that ratification of the ERA will produce those changes, or that nonratification will prevent them, is almost beyond rational discourse.[160]

When she proposed the equal rights provision on the floor of the 1970 Illinois Constitutional Convention, Odas Nicholson said: "We have been told about privileges which women have that they should not give up for rights. As for my cosponsor and myself, we would prefer rights over privileges, if we had to make that choice."[161] The ultimate irony in the adoption of equal rights amendments, not only in Illinois but elsewhere, is that in many respects women have given up "privileges" they always have enjoyed in exchange for "rights" that never were in jeopardy. Whether the symbolism of having enshrined a statement of equal rights under law in the constitutions of eighteen states was worth this price is a question women who live in those states must answer for themselves.

Appendix: Text of States' Equal Rights Amendments

A. Alaska:

"No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section." Alaska Const. art. I, § 3 (1972).

B. California:

"A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." Cal. Const. art. I, § 8 (1879).[162]

*942 C. Colorado:

"**Equality** of **rights** under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." Colo. Const. art. II, § 29 (1973).

D. Connecticut:

"No person shall be denied the **equal** protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political **rights** because of religion, race, color, ancestry, national origin or sex." Conn. Const. art. 1, § 20 (1974).[163]

E. Hawaii:

"**Equality** of **rights** under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section." Haw. Const. art. 1, § 3 (1972).

"No person shall be deprived of life, liberty or property without due process of law, nor be denied the **equal** protection of the laws, nor be denied the enjoyment of the person's civil **rights** or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Haw. Const. art. 1, § 5 (1978).

F. Illinois:

> All persons shall have the **right** to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These **rights** are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these **rights** and provide additional remedies for their violation.

Ill. Const. art. I, § 17 (1971).

"The **equal** protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts." Ill. Const. art. I, § 18 (1971).

G. Louisiana:

> No person shall be denied the **equal** protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. ***943** Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

La. Const. art. I, § 3 (1974). "In access to public areas, accomodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition." La. Const. art. I § 12 (1974).

H. Maryland:

"**Equality** of **rights** under the law shall not be abridged or denied because of sex." Md. Const. decl. of **rights**, art. 46 (1972).

I. Massachusetts:

> All people are born free and **equal** and have certain natural, essential and unalienable **rights**; among which may be reckoned the **right** of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. **Equality** under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const. pt. I, art. 1 (1976).

J. Montana:

> The dignity of the human being is inviolable. No person shall be denied the **equal** protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political **rights** on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art. II, § 4 (1973)

K. New Hampshire:

> All men have certain natural, essential and inherent **rights**--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. **Equality** of **rights** under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

N.H. Const. pt. 1, art. 2 (1974).

L. New Mexico:

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied **equal** protection of the laws. **Equality** of **rights** under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18 (1973).

***944 M. Pennsylvania:**

"**Equality** of **rights** under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, § 28 (1971).

N. Texas:

"**Equality** under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This **amendment** is self-operative." Tex. Const. art. I, § 3a (1972).

O. Utah:

"The **rights** of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy **equally** all civil, political and religious **rights** and privileges." Utah Const. art. IV, § 1 (1896).

P. Virginia:

"[T]he **right** to be free from any governmental discriminaton upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." Va. Const. art. I, § 11 (1971).

Q. Washington:

"**Equality** of **rights** and responsibility under the law shall not be denied or abridged on account of sex." Wash. Const. art. XXXI, § 1 (1972).

R. Wyoming:

"In their inherent **right** to life, liberty and the pursuit of happiness, all members of the human race are **equal**." Wyo. Const. art. 1, § 2 (1890).

> Since **equality** in the enjoyment of natural and civil **rights** is only made sure through political **equality**, the laws of this state affecting the political **rights** and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Wyo. Const. art. 1, § 3 (1890).

"The **rights** of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall **equally** enjoy all civil, political and religious **rights** and privileges." Wyo. Const. art. 6, § 1 (1890).

Footnotes

a1 B.A. Honors (History), J.D., Loyola University of Chicago. Mr. Linton is an attorney in private practice in Chicago and has published numerous articles on state and federal constitutional law.

1 The text of the provisions (and their effective dates) is set forth in the Appendix to this article. Of the twenty-three provisions (some states have adopted more than one), only three expressly address private conduct. See Ill. Const. art. I, § 17 (concerning employment and housing); La. Const. art. I, § 12 (addressing public areas, accommodations, and facilities); Mont. Const. art. II, § 4 (prohibiting discrimination on account of sex by the state or "any person, firm, corporation, or institution"). Although the Illinois provision has been cited in a few cases, see infra note 37 and accompanying text, neither the Louisiana provision nor the Montana provision has been cited in any state case involving sex discrimination. Two lower courts in Pennsylvania have held or implied that private action can be reached by the state **equal rights amendment** (Pa. Const. art. I, § 28). See Bartholomew v. Foster, 541 A.2d 393, 396 (Pa. Commw. Ct. 1988) (stating that "to invoke the provisions of the Pennsylvania **Equal Rights Amendment** we

conclude that there is no requirement of state action as arguably found under the proposed **Equal Rights Amendment** to the United States Constitution"), aff'd by an **equally** divided court, 563 A.2d 1390 (Pa. 1989); Welsch v. Aetna Ins. Co., 494 A.2d 409, 412 (Pa. Super. Ct. 1985) (stating in dictum that case holding state action to be necessary element for cause of action under Pennsylvania **Equal Rights Amendment**, "no longer followed with respect to its analysis of the E.R.A.") (citing Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (1980)). Both cases concerned insurance, a highly regulated business, and neither was approved by a majority opinion of the Pennsylvania Supreme Court. Despite these rulings, it is premature, to state that the Pennsylvania **Equal Rights Amendment** reaches private conduct generally.

[2] See, e.g., Cal. Const. art. I, § 8 (included in 1879); Utah Const. art. IV, § 1 (included in 1896); Wyo. Const. art. 1, § 3 (included in 1890).

[3] The **ERA** provided in its entirety:
Sec. 1. **Equality** of the **rights** under the law shall not be denied or abridged by the United States or by any state on account of sex.
Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Sec. 3. This **amendment** shall take effect two years after the date of ratification.
S.J. Res. 8, 92d Cong. (1971); H.R.J. Res. 208, 92d Cong. (1971).

[4] See Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (declining to cast fifth vote to treat sex as suspect classification while **ERA** was pending before states).

[5] In researching this article, the author has checked every state court citation to each state's **equal rights** provision, examined virtually every in-state law review reference to that provision, read most of the principal law review articles discussing the impact of state **equal rights amendments**, and, where the materials were available, reviewed the constitutional convention (or legislative) debates over the submission of each **equal rights** provision to the electorate. There are many law review articles that analyze either a particular state **equal rights** provision or a specific **equal rights** issue. See, e.g., Paul M. Kurtz, The State **Equal Rights Amendments** and Their Impact on Domestic Relations Law, 11 Fam. L.Q. 101 (1977) (analyzing impact of state **equal rights amendments** on domestic relations law). There are, however, relatively few articles that even attempt a general survey of the cases decided under all of the state provisions. See, e.g., Judith Avner, Some Observations on State **Equal Rights Amendments**, 3 Yale L. & Pol'y Rev. 144 (1984); Dawn-Marie Driscoll & Barbara J. Rouse, Through a Glass Darkly: A Look at State **Equal Rights Amendments**, 12 Suffolk U. L. Rev. 1282 (1978); Beth Gammie, Note, State **ERAs**: Problems and Possibilities, 1989 U. Ill. L. Rev. 1123; Dawn C. Nunziato, Note, Gender **Equality**, States as Laboratories, 80 Va. L. Rev. 945 (1994); Elizabeth A. Sherwin, Note, Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks, 13 N.Y.U. Rev. L. & Soc. Change 115 (1984-85); Lujuana Wolfe Treadwell & Nancy Wallace Page, Comment, **Equal Rights** Provisions: The Experience under State Constitutions, 65 Cal. L. Rev. 1086 (1977). Most of these articles are incomplete or out-of-date. The most comprehensive article, an annotation in the American Law Reports, now is almost twenty years old. See Phillip E. Hassman, Annotation, Construction and Application of State **Equal Rights Amendments** Forbidding Determination of **Rights** Based on Sex, 90 A.L.R.3d 158 (1979). An excellent compilation and analysis of the relevant caselaw may be found in Jennifer Friesen, State Constitutional Law 145-97 (2d ed. 1996).

[6] Both Utah and Wyoming conferred the **right** to vote upon women a full generation before the Federal Constitution was amended to provide the same **right**. See Utah Const. art. IV, § 1 (1896); Wyo. Const. art. 6, § 1 (1890). Although both state constitutions also guaranteed **equality** of **rights** for men and women, see Utah Const. art. IV, § 1 (1896), Wyo. Const. art. 1, §§ 2, 3, art. 6, § 1 (1890), the focus of the debates in both conventions was on female suffrage. See 1 Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895, To Adopt a Constitution for the State of Utah 420-91, 496-601, 679-767 (Star Printing Co. 1898); Journal and Debates of the Constitutional Convention of the State of Wyoming 344-59 (Daily Sun, Book & Job Printing, 1893). There was virtually no debate on either Article 1, Section2 or Article 1, Section3 of the Wyoming Constitution. See id. at 718-21, 723-29, 847-48.

[7] 5 Record of Proceedings, Sixth Illinois Constitutional Convention December 8, 1969-September 3, 1970, at 3669 (1972) [hereinafter Sixth Illinois Constitutional Convention]. Surprisingly, when another delegate asked Ms. Nicholson if she could "give

an example of a present [i.e., 1970] law [that] discriminates against one or the other of the sexes, either men or women," she replied that she could not. Id. at 3671. In the more than twenty-five years since the 1970 Illinois Constitution went into effect on July 1, 1971, no statute, ordinance, school district policy, or judicial doctrine has been invalidated by an Illinois court on the grounds that it discriminated against women in favor of men. See generally, Paul Benjamin Linton & Ryan S. Joslin, The Illinois **Equal Rights** Provision at Twenty-Five: Has It Made a Difference?, 21 S. Ill. U. L.J. 275 (1997).

8 Sixth Illinois Constitutional Convention, supra note 7, at 3675. Both Ms. Nicholson and Ms. Leahy overlooked an 1874 decision of the Supreme Court holding that women are "persons," as that term is used in the Fourteenth **Amendment**, and "citizens" of the United States and of the state in which they reside. See Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165 (1874).

9 Public Affairs Research Council, Constitutional Commentary, No. 6, at 2-3 (Aug. 29, 1973).

10 Louis Jenkins, The Declaration of **Rights**, 21 Loy. L. Rev. 9, 17 n.44 (1975) (quoting testimony of Elsie J. Allen to Committee on Bill of **Rights** and Elections on April 6, 1973, in Baton Rouge, LA).

11 Mary K. Cabrera & Jared R. Green, The New Hampshire **Equal Rights Amendment**: A Powerful, Yet Rarely Invoked Anti-Discrimination Weapon, 33 N.H. Bar J. 496, 498 (1992) (quoting Journal of Constitutional Convention 151, 153 (1974)).

12 Joan Harvill, Note, Is the Texas **Equal Rights Amendment** the Answer?, 15 S. Tex. L. Rev. 111, 127 (1974).

13 Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 822 (Md. 1985).

14 Pennsylvania:
In Henderson v. Henderson, 327 A.2d 60 (Pa. 1974), the Pennsylvania Supreme Court, relying on Article I, Section27 of the Pennsylvania Constitution, declared unconstitutional a former statute that allowed the payment of temporary alimony, attorney fees, and expenses to the wife in a divorce action, but not to the husband. Id. at 62. The court explained,
as it is appropriate for the law where necessary to force the man to provide for the needs of a dependent wife, it must also provide a remedy for the man where circumstances justify an entry of support against the wife. In short, the **right** of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.
Id. Furthermore, the court stated that:
[t]he thrust of the **Equal Rights Amendment** [Article I, Section27] is to insure **equality** of **rights** under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal **rights** and responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.
Id.; see also Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974) (striking down discriminatory parole eligibility rules) ("sex may no longer be accepted as an exclusive classifying tool"). Pennsylvania, however, recognizes that real biological differences between the sexes may justify a disparity in treatment. See, e.g., Fischer v. Department of Public Welfare, 502 A.2d 114, 126 (Pa. 1985) (upholding restrictions on public funding of abortion).
Washington:
In Darrin v. Gould, 540 P.2d 882 (Wash. 1975), the Washington Supreme Court held that the state **equal rights amendment**, Article XXXI, Section1, was "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests" and absolutely prohibits discrimination based on sex. Id. at 889. In a footnote, however, the court acknowledged that three possible exceptions to this blanket rule would be "the regulation of cohabitation in sexual activity between unmarried persons; protection of fundamental **rights** of privacy; and dissimilar treatment on account of a characteristic unique to one's sex." Id. at 890 n.8. In Darrin, the court struck down a high school athletic association rule forbidding female high school students from playing on interscholastic football teams without regard to their individual abilities. Id. at 884; see also National Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) ("[t]he **ERA** absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny'") (citing Darrin, 540

P.2d at 886); In re Welfare of Hauser, 548 P.2d 333, 337 (Wash. Ct. App. 1976) (stating Washington **Equal Rights Amendment** "is an absolute prohibition against discrimination based on sex") (quoting Darrin, 540 P.2d at 889).

15 California:
Although earlier California Supreme Court opinions appeared to adopt an "absolutist" position on sex-based discrimination, see Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 533 (Cal. 1971) (striking down state statute forbidding women from tending bar); see also Matter of Maguire, 57 Cal. 604, 608 (1881) (plurality opinion) ("[t]here are no exceptions in [this] section [what is now art. I, § 8]"), a later opinion of the same court held that "[c]lassifications predicated on gender are deemed suspect in California," Hardy v. Stumpf, 576 P.2d 1342, 1344 (Cal. 1978). In Hardy, the court upheld a requirement that applicants for a local police department be able to scale a smooth, six-foot wall, even though physical agility standards have a disproportionate impact on women. Id. at 1344; see also Arp v. Workers' Compensation Appeals Bd., 563 P.2d 849, 855 (Cal. 1977) ("to pass muster under the California **equal** protection clause, a statutory classification founded upon the suspect category of sex must represent the narrowest and least restrictive means by which the objective can be achieved").
Connecticut:
Daly v. DelPonte, 624 A.2d 876, 883 (Conn. 1993) (interpreting Article I, Section 21 of Connecticut Constitution).
Hawaii:
Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) ("sex is a 'suspect category' for purposes of **equal** protection analysis under Article I, Section 5 of the Hawaii Constitution and [a law that discriminates on the basis of sex] is subject to the 'strict scrutiny' test") (remanding case to trial court for evidentiary hearing on issue of whether statutory prohibition of same sex marriages satisfied strict scrutiny standard); see also Holdman v. Olim, 581 P.2d 1164, 1169 (Haw. 1978) (assuming, but not deciding, that strict scrutiny is applicable standard under Article I, Section 21, of Hawaii Constitution).
Illinois:
In People v. Ellis, 311 N.E.2d 98 (Ill. 1974), the Illinois Supreme Court, after considering the text of Article I, Section18 of the 1970 Illinois Constitution and reviewing the floor debate on Section18, found "inescapable the conclusion that [Section18] was intended to supplement and expand the guarantees of the **equal** protection provision of the [Illinois] Bill of **Rights** [Article I, Section2] and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'" Id. at 101 (striking down former provision of Juvenile Court Act that allowed 17-year old males, but not 17-year old females, to be tried as adults for criminal offenses).
Although there is a conflict in appellate decisions regarding the reach of Article I, Section17 of the Illinois Constitution, which prohibits discrimination in employment and housing, compare Thakkar v. Wilson Enter., Inc., 458 N.E.2d 985, 989 (Ill. App. Ct. 1983) (finding Section 17 prohibits discrimination only in hiring and promotion, and not in firing or demotion), with Ritzheimer v. Insurance Counselors, Inc., 527 N.E.2d 1281, 1285-86 (Ill. App. Ct. 1988) (contra), and although a standard of review has not been articulated clearly, "it is clear that...the enumerated characteristics of race, creed, etc. [color, national ancestry and sex], should play no role in the treatment of employees by their employers," Rockford Mem'l Hosp. v. Department of Human **Rights**, 651 N.E.2d 649, 658 (Ill. App. Ct. 1995) (citing Ritzheimer, 527 N.E.2d at 1281), leave to appeal denied, 657 N.E.2d 638 (Ill. 1995).
Maryland:
Early Maryland cases quite clearly adopted an "absolutist" position, holding that Article 46 of the Maryland Declaration of **Rights** forbids all sex-based discrimination, without exception. See Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 822 (Md. 1985) ("the E.R.A. flatly prohibits gender-based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, **rights** and responsibilities as between men and women"); id. at 825 ("the Maryland E.R.A. absolutely forbids the determination of such '**rights**,' as may be accorded by law, solely on the basis of one's sex, i.e., sex is an impermissible factor in making any such determination"); Turner v. State, 474 A.2d 1297, 1301 (Md. 1984) ("a law that imposes different benefits and different burdens upon persons based solely upon their sex violates the Maryland **ERA**") (striking down "Female Sitters Law" which made it unlawful for certain businesses to employ "female sitters," i.e., women employees who would solicit customers to buy food and beverages from them); Kline v. Ansell, 414 A.2d 929, 933 (Md. 1980) ("Maryland's law [allowing action for criminal conversation to be brought only by the husband] provides different benefits for and imposes different burdens upon its citizens based solely upon sex. Such a result violates the **ERA**."); Rand v. Rand, 374 A.2d 900, 903 (Md. 1977) ("language mandating **equality** of **rights** can only mean that sex is not a factor") (child support obligations); Bell v. Bell, 379 A.2d 419, 421 (Md. Ct. Spec. App. 1977), cert. denied, Bell v. Bell, 282 Md. 729 (1978) (finding common law presumption that husband is dominant spouse cannot stand under **Equal Rights Amendment**). Later cases, however, backed away from this absolutist position and have adopted the strict scrutiny standard instead. See Tyler v. State, 623 A.2d 648, 651 (Md. 1993) ("sex, like race, is a suspect classification subject to strict scrutiny"); Murphy v. Edmonds, 601 A.2d 102, 109 n.7 (Md. 1992) ("[i]n Maryland, because of the **Equal Rights Amendment** to the Maryland Constitution (Article 46 of the Maryland Declaration of **Rights**), classifications based on gender are suspect and subject to strict scrutiny"); Briscoe v. P.G. Health Dep't, 593 A.2d 1109, 1115 n.7 (Md. 1991); see also State v. Burning Tree Club, Inc., 554 A.2d 366, 387 (Md. 1988)

("state action providing for segregation based upon sex, absent substantial justification, violates the E.R.A."), cert. denied, 493 U.S. 816 (1989). The shift from an absolutist standard, allowing no sex-based classifications (other, perhaps, than those based on physical differences between the sexes) to the strict scrutiny standard apparently began with the Maryland Court of Appeals' decision in State v. Burning Tree Club, Inc., 554 A.2d 366 (Md. 1988). Two years before, the Maryland Court of Special Appeals, after reviewing the earlier cases cited above, said: "The Maryland Court of Appeals has held...that the **Equal Rights Amendment** of the Maryland Constitution prescribes an 'absolute standard' and not a balancing test. Therefore, once discrimination is proved, a court cannot consider arguments attempting to 'balance' the discriminatory practice against other concerns." Peppin v. Woodside Delicatessen, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986) (upholding county ordinance banning sex discrimination in places of public accommodation) (citing Rand, 374 A.2d at 903).

Massachusetts:

Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977) ("that degree of scrutiny [for sex-based classifications] must be at least as strict as the scrutiny required by the Fourteenth **Amendment** for racial classifications") (interpreting Part I, Article 1 of the Massachusetts Constitution); see also Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980) ("[a] statutory classification based on sex is subject to strict judicial scrutiny under the State **ERA** and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proven purpose") (modifying statute restricting **right** of illegitimate child to inherit from his or her father).

New Hampshire:

LeClair v. LeClair, 624 A.2d 1350, 1355 (N.H. 1993) (interpreting Part I, Article 2 of the New Hampshire Constitution).

Texas:

In the Interest of McLean, 725 S.W.2d 696, 698 (Tex. 1987) (striking down statute making it more difficult for men than for women to legitimate illegitimate children) (interpreting Article I, Section 3a of Texas Constitution).

16 State Dep't of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993) (quoting State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983)).

17 Id. An early version of this standard was applied in Plas v. State, 598 P.2d 966 (Alaska 1979). In Plas, the Alaska Supreme Court held that in view of the gender neutrality mandated in Article I, Section 3 of the Alaska State Constitution, a statute which prohibits soliciting or procuring for the purpose of prostitution could not be limited to women. Id. at 967-68. The court struck the language "by a female" from the statute, thereby making it gender neutral. Id. at 968. The court held that in assessing **equal** protection claims under the Alaska Constitution, it would "consider the purpose of the statute, the legitimacy of that purpose, the means used to accomplish the legislative objective, and 'then determine whether the means chosen substantially further the goals of the enactment.'" Id. (quoting State v. Erickson, 574 P.2d 1, 12 (Alaska 1978)).

18 Under the federal standard, a classification based upon sex must be substantially related to the achievement of important governmental objectives. Craig v. Boren, 429 U.S. 190, 197 (1976).

Colorado:

Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1015 (Colo. 1982) (en banc) ("the State must show that the classification serves important governmental objectives and that it is substantially related to the achievement of those objectives") (interpreting Article II, Section 29 of the Colorado Constitution); see also Austin v. Litvak, 682 P.2d 41, 49 (Colo. 1984) (en banc) (stating gender based classification must substantially relate to achieving important government objective); R. McG. v. J.W. 615 P.2d 666, 670 (Colo. 1980) (en banc) (holding discrimination between natural mothers and natural fathers not substantially related to important government interest). But see Civil **Rights** Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1988) (en banc) (stating in dictum that Article II, Section 29 of the Colorado Constitution "prohibits unequal treatment based solely on circumstances of sex ... and requires that legislative classifications based exclusively on sexual status receive the closest judicial scrutiny").

Louisiana:

Pace v. State, 648 So. 2d 1302, 1305 (La. 1995) ("[w]hen a statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, it is presumed to deny the **equal** protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective") (citing Sibley v. Board of Supervisors of La. State Univ., 477 So. 2d 1094, 1107-08 (La. 1985) (construing Article I, Section 3 of the Louisiana Constitution).

Virginia:

In Archer v. Mayes, 194 S.E.2d 707 (Va. 1973), the Virginia Supreme Court upheld statutes permitting women to opt out of jury

duty because of their responsibilities in caring for children or disabled persons. Id. at 710. Plaintiffs alleged that "the statutory exemption discriminates against men and in favor of women [in violation of Article 1, Section 11 of the Virginia Constitution] in that men who care for children sixteen years of age or younger or persons having mental or physical impairments are not permitted to claim exemption from jury duty." Id. at 709. The Virginia Supreme Court rejected this argument, stating, "[w]here a statute is based on a reasonable classification that bears a rational relationship to the objective of the State...there is no impermissible discrimination under the Constitution of Virginia." Id. at 711.

Ten years after Archer was decided, the Virginia Supreme Court revisited the standard of review. In Schilling v. Bedford City Memorial Hospital, Inc., 303 S.E.2d 905 (Va. 1983), the court held that the necessaries doctrine, which makes a husband responsible for family necessities, but does not impose such an obligation on the wife, contains a gender-based classification not substantially related to serving important government interests that therefore is unconstitutional. Id. at 907-08. Adopting the federal intermediate standard of review applicable to sex-based discrimination, the court stated that "for a sex-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective." Id. at 907.

19 Montana:

Although the Montana Supreme Court has recognized that the United States Supreme Court has applied "intermediate scrutiny" to sex-based classifications, see Butte Community Union v. Lewis, 712 P.2d 1309, 1312 (Mont. 1986) (citing Craig v. Boren, 429 U.S. 190, 197 (1976), for proposition that classification must be substantially related to important government objective); see also Arneson v. State, 864 P.2d 1245, 1247 (Mont. 1993) (restating intermediate scrutiny test but refusing to apply to age-based classification absent constitutionally based directive), and has fashioned its own "middle-tier" test where specific directives in the Montana Constitution protect interests in education and welfare, see State ex rel. Bartmess v. Board of Trustees of Sch. Dist. No. 1, 726 P.2d 801, 804-05 (Mont. 1986) (holding educational **rights** subject to constitutional protection thereby triggering "middle-tier" scrutiny); Deaconess Med. Ctr. of Billings, Inc. v. Department of Soc. & Rehabilitative Serv., 720 P.2d 1165, 1168 (Mont. 1986) (holding abridgement of welfare demands more than rational basis); Butte Community Union, 712 P.2d at 1313-14 (finding Article XII, Section 3(3) of the Montana Constitution mandates greater protection of welfare **rights**); see also In re Wood, 768 P.2d 1370, 1375 (Mont. 1989) (recognizing that Montana employs a three-tier **equal** protection analysis), it has not determined yet which level of scrutiny applies to sex-based classifications under Article II, Section 4 of the Montana Constitution, see McKamey v. State, 885 P.2d 515, 521 (Mont. 1994) (stating strict scrutiny applies to classifications based on race or national origin); Meech v. Hillhaven West, Inc., 776 P.2d 488, 502 (Mont. 1989) (identifying race and national origin as suspect classes); Cottrill v. Cottrill Sodding Serv., 744 P.2d 895, 897 (Mont. 1987); Oberg v. City of Billings, 674 P.2d 494, 495 (Mont. 1983) (identifying "wealth, race, nationality and alienage" as "[e]xamples of suspect criteria").

Nevertheless, although **rights** of persons under the state **equal** protection clause "may be greater than **rights** founded on the federal [**equal** protection] clause," Pfost v. State, 713 P.2d 495, 500 (Mont. 1985), the Montana Supreme Court "has consistently followed the lead of the United States Supreme Court in interpreting the **equal** protection clauses of both the state and federal constitutions," In re Montana Pac. Oil & Gas Co., 614 P.2d 1045, 1048 (Mont. 1980); see also In re C.H., 683 P.2d 931, 938 (Mont. 1984) ("[t]he **equal** protection provisions of the federal and state constitutions are similar and provide generally equivalent but independent protections") (citing Emery v. State, 580 P.2d 445, 449 (Mont. 1978)). This may suggest that the Montana Supreme Court will apply the federal intermediate scrutiny standard to sex-based classifications challenged under the Montana **Equal Rights Amendment**.

New Mexico:

Without discussing the possible impact of Article II, Section 18 of the New Mexico Constitution on its analysis, the New Mexico Supreme Court has held that "[c]lassifications based on gender" trigger an intermediate or a heightened standard of review under which the State must "prove that the classification is substantially related to an important governmental interest." Marrujo v. New Mexico Highway Transp. Dep't, 887 P.2d 747, 751 (N.M. 1994) (citation omitted).

Utah:

Although an early decision of the Utah Supreme Court applied the rational-basis standard in interpreting Article IV, Section 1 of the Utah Constitution, see Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974) (upholding statute establishing different ages of majority for men and women), a more recent decision of the Utah Court of Appeals, observing that the Utah Supreme Court has not determined the standard of review yet, stated that the state standard is "at least as stringent as the [federal] **equal** protection intermediate review for gender discrimination," Estate of Scheller v. Pessetto, 783 P.2d 70, 76 (Utah Ct. App. 1989) (preventing fathers from inheriting from illegitimate children, unless they have openly treated the children as their own, does not violate state or federal constitution).

Wyoming:

The Wyoming Supreme Court has recognized the various **equal** protection standards that have been employed by the United States Supreme Court, but has not determined which standard applies to sex-based classifications under Article I, Sections 2 and 3, and

Article VI, Section 1 of the Wyoming Constitution. See Johnson v. State Hearing Exam'rs Office, 838 P.2d 158, 164-67 (Wyo. 1992) (discussing various standards). The court, however, has held that "the personal and political **rights** secured by the **equal** protection provisions of Article I, Sections 2 and 3, are not absolute, and...those sections do not preclude the legislature from imposing reasonable restrictions on such **rights** in the public interest." White v. State, 784 P.2d 1313, 1318 (Wyo. 1989) (citing Haskins v. State ex rel. Harrington, 516 P.2d 1171, 1173-74 (Wyo. 1973)). Interpreting another provision of the Wyoming Constitution guaranteeing **equal** **rights**, the Wyoming Supreme Court held that the "[c]ivil **rights** mentioned in [Article VI, Section 1] include the **rights** of property, marriage, protection by the laws, freedom of contracts, trial by jury, etc." Ward Terry & Co. v. Hensen, 297 P.2d 213, 215 (Wyo. 1956) (citing 14 C.J.S. Civil **Rights** § 1).

20 See People v. Barger, 550 P.2d 1281, 1283 (Colo. 1976) (holding rape statute passes constitutional muster); People v. Green, 514 P.2d 769, 771 (Colo. 1973) (holding rape statute does not violate **equal** protection as there is no specific gender classification); State v. Rivera, 612 P.2d 526, 529 (Haw. 1980) (stating rape statute does not violate **equal** protection where there is no classification based solely on gender); People v. Medrano, 321 N.E.2d 97, 98 (Ill. App. Ct. 1974) (finding compelling reason for gender classification in rape statute); State v. Fletcher, 341 So. 2d 340, 348 (La. 1976) (finding gender classification does not constitute invidious discrimination against men); Brooks v. State, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975) (stating limitation of culpability to males constitutes a rational classification related to objective of statute); State v. Craig, 545 P.2d 649, 653 (Mont. 1976) (finding vast majority of rapes committed by men); Finley v. State, 527 S.W.2d 553, 556 (Tex. Crim. App. 1975) (finding several states have rejected **equal** protection claims); State v. Young, 523 P.2d 946, 948 (Wash. Ct. App. 1974) (finding no authority supporting **equal** protection claim).

21 See Rivera, 612 P.2d at 530 (finding statute based on physiological characteristics unique to males); Medrano, 321 N.E.2d at 98 (finding rape statute constitutional due to differing impact on male and female victims) (citing State v. Kelly, 526 P.2d 720, 723 (Ariz. 1974) (en banc)); Fletcher, 341 So. 2d at 348 (stating classification based on gender is reasonable because rape of females is social problem); Brooks, 330 A.2d at 673 (stating protection of females from rape is legitimate and essential legislative objective that justifies classification based on sex), cited with approval in Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 822 n.3 (Md. 1985); Craig, 545 P.2d at 653 (finding vast majority of rapes committed by men); Finley, 527 S.W.2d at 556 (finding state has legitimate interest in preventing unwanted pregnancies and physical injury to women).

22 See State v. Miller, 663 So. 2d 107, 109 (La. Ct. App. 1995) (holding **equal** protection issue well settled in state law); Ex parte Groves, 571 S.W.2d 888 (Tex. Crim. App. 1978) (finding several states have upheld similar **equal** protection statutes); State v. Housekeeper, 588 P.2d 139, 141 (Utah 1978) (finding valid basis for laws tailored to protect young females).
In Michael M. v. Superior Court, 450 U.S. 464 (1981), the Supreme Court held that statutory rape statutes that make men alone criminally liable for the act of sexual intercourse do not violate the **Equal** Protection Clause. Id. at 473.

23 See, e.g., State v. Bell, 377 So. 2d 303, 306 (La. 1979) (emphasizing danger of pregnancy, harm to reproductive organs, and mental harm); Housekeeper, 588 P.2d at 141 (discussing illegitimate children as social problem).

24 People v. Boyer, 349 N.E.2d 50, 51 (Ill. 1976).

25 Id. at 51-52.

26 Id. at 52; see also People v. Yocum, 361 N.E.2d 1369, 1369 (Ill. 1977) (relying on Boyer, 349 N.E. 2d at 50).

27 Compare Plas v. State, 598 P.2d 966, 968 (Alaska 1979) (holding statute could not be limited to female prostitution), with State v. Tookes, 699 P.2d 983, 988 (Haw. 1985) (holding there was insufficient evidence of invidious discrimination), and State v. Hollins, 375 So. 2d 923, 923 (La. 1979) (findng gender classification reasonable in light of social problems caused by prostitution), and State v. Butler, 331 So. 2d 425, 430 (La. 1976) (finding prostitution presents major social problem), and State v. Devall, 302 So. 2d 909, 911 (La. 1974) (finding classification reasonable in light of social problems caused by prostitution); see also Commonwealth

v. King, 372 N.E.2d 196, 207 (Mass. 1977) (holding gender-neutral prostitution statute could not be enforced only against female prostitutes unless Commonwealth could demonstrate a compelling interest requiring such a policy); Commonwealth v. An Unnamed Defendant, 492 N.E.2d 1184, 1187-88 (Mass. App. Ct. 1986) (affirming dismissal of prostitution charges where police department had informal policy of arresting only female prostitutes); State v. Sandoval, 649 P.2d 482, 487 (N.M. Ct. App. 1982) (holding prositution statute gender neutral).
One difficulty with the result in Plas that the Alaska Supreme Court overlooked was that by striking the words "by a female" from the prostitution statute, the court was expanding, by judicial decision, the scope of a crime to include conduct that had not been deemed criminal by the legislature, in violation of a statute providing that conduct must be defined as criminal by statute in Alaska. See Alaska Stat. § 11.81.220 (Michie 1996).

28 See Plas, 598 P.2d at 968 (finding males can be prostitutes); Hollins, 375 So. 2d at 923 (finding male prostitution not a social problem); Devall, 302 So. 2d at 913-14 (finding demand for women's sexual services was greater, leading to social problems).

29 Commonwealth v. Saunders, 331 A.2d 193, 195 (Pa. 1975) (stating statute providing minimal sentences for men but not women violated state **equal rights amendment**); Commonwealth v. Butler, 328 A.2d 851, 856 (Pa. 1974) (finding sentencing scheme that made women eligible for parole immediately upon commencement of their sentences, but men not eligible until they had served their minimum sentences, violated **equal rights amendment**).

30 People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974); Ex Parte Trahan, 591 S.W.2d 837, 840 (Tex. Crim. App. 1979) (en banc).

31 541 S.W.2d 167 (Tex. Crim. App. 1976).

32 Id. at 168.

33 Holdman v. Olim, 581 P.2d 1164, 1170 (Haw. 1978) (stating that "[w]e think it is clear that the directive takes into account a physical characteristic which is possessed uniquely by women visitors to the prison").

34 Wise v. Commonwealth, 690 A.2d 846 (Pa. Commw. Ct. 1997); Morris v. Collins, 916 S.W.2d 527, 528 (Tex. App. 1995).

35 Wise, 690 A.2d at 848-49; Morris, 916 S.W.2d at 528-29.

36 See, e.g., Ill. Const. art. I, § 17; Mont. Const. art. II, § 4.

37 Virtually all of the reported cases under Article I, Section 17 of the Illinois Constitution and its implementing legislation have involved either discriminatory acts of private employers or individual acts of sexual harassment by supervisors of public employees, and not sexually discriminatory policies or practices of the state, its units of local government, or school districts. But see School Dist. No. 175, St. Clair County, Ill. v. Illinois Fair Employment Practices Comm'n, 373 N.E.2d 447, 452 (Ill. App. Ct. 1978) (finding that school district had refused to hire defendant primarily because of her sex). Although the Montana **equal rights** provision (Article II, Section4) applies to private conduct, as well as to public law, see State v. Long, 700 P.2d 153, 156 (Mont. 1985) (finding that the Montana Constitution prohibits discrimination by both state and individual actors), it has not been invoked yet in any private sex discrimination cases.

38 116 Cal. Rptr. 562 (Cal. Ct. App. 1974).

39 Id. at 563.

40 Id. at 567.

41 Id.; but see Maryland State Bd. of Barber Exam'rs v. Kuhn, 312 A.2d 216, 220 (Md. 1973) (forbidding cosmetologists from cutting and shampooing men's hair in same manner as women's hair).

42 Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 533 (Cal. 1971).

43 Hardy v. Stumpf, 576 P.2d 1342, 1344 (Cal. 1978).

44 Ex parte Miller, 124 P. 427, 427-28 (Cal. 1912).

45 See Vick v. Pioneer Oil Co., W. Div., 569 S.W.2d 631, 634 (Tex. App. 1978) (finding that "[e]ven though the statutory provisions become operative by free choice, the statute does not offer a male the same opportunities as females to invoke its benefits").

46 Allison-LeBlanc v. Department of Pub. Safety, 671 So. 2d 448, 452-53 (La. Ct. App. 1995).

47 563 P.2d 849 (Cal. 1977).

48 Id. at 849-50.

49 Turner v. Department of Employment Sec., 531 P.2d 870, 871 (Utah 1975), rev'd on other grounds, 423 U.S. 44, 46 (1975) (finding that "[t]he Fourteenth **Amendment** requires that unemployment compensation boards.. must achieve legitimate state ends through more individualized means when basic human liberties are at stake").

50 Hanson v. Hutt, 517 P.2d 599, 603 n.3 (Wash. 1974).

51 Gilman v. Unemployment Compensation Bd. of Review, 369 A.2d 895, 896 n.2 (Pa. Commw. Ct. 1977).

52 595 P.2d 970 (Wyo. 1979).

53 Id. at 970-71.

54 Id. at 974; accord Montrose County Sch. Dist. v. Lambert, 826 P.2d 349, 352 (Colo. 1992) (noting that "[t]he separateness of spouses in Colorado is clearly established by Colorado's **Equal Rights Amendment**").

55 Compare Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) (upholding county set-aside program) (noting that "[a]s long as the law favoring one sex is intended solely to ameliorate the effects

of past discrimination, it simply does not implicate the **ERA**"), with Louisiana Assoc. Gen. Contractors, Inc. v. State, 669 So. 2d 1185, 1196 (La. 1996) (striking down set-aside program) (stating Article I, Section 3, of the Louisiana Constitution "absolutely prohibits any state law which discriminates on the basis of race"). In light of the Supreme Court's increasing hostility towards affirmative action programs, see, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applies to all racial classifications, including federal highway construction set-aside program), the future of government set-aside programs like the one upheld by the Washington Supreme Court in Pierce County is, to say the least, questionable.

56 Fischer v. Department of Pub. Welfare, 502 A.2d 114, 118 (Pa. 1985).

57 Id. at 125 (citations omitted); see also Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 397 (Mass. 1981) (failing to decide case on basis of state **equal rights amendment**).

58 See Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (dictum) (invalidating funding limitations on other, non-constitutional grounds); see also Doe v. State, 579 A.2d 37, 39 n.4 (Conn. 1990) (finding no state constitutional basis for awarding attorney's fees and observing that Hyde **Amendment** does not violate women's due process or **equal** protection); Doe v. Heintz, 526 A.2d 1318, 1320 n.3 (Conn. 1987) (noting United States Supreme Court upheld constitutionality of early formulation of Hyde **Amendment**, which restricted to some federal funding of abortions, on **equal** protection grounds).

59 Page v. Welfare Comm'r, 365 A.2d 1118, 1119 (Conn. 1976).

60 Maxwell v. Department of Soc. & Health Serv., 636 P.2d 1102, 1104 (Wash. Ct. App. 1981).

61 Phelps v. Bing, 316 N.E.2d 775, 776-77 (Ill. 1974). At common law, males of the age of fourteen or older and females of the age of twelve or over could contract a binding marriage. 1 William Blackstone, Commentaries On The Laws Of England 436 (7th ed. 1775). One commentator has speculated that "[a] lthough there is no historical evidence of the reasoning for the distinction between males and females, presumably it was based on assumptions about the ability to procreate." Kurtz, supra note 5, at 123. In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court struck down a statute establishing different ages at which men and women could purchase alcoholic beverages. Id. at 210.

62 Scanlon v. Crim, 500 S.W.2d 554, 555 (Tex. App. 1973).

63 581 A.2d 162 (Pa. 1990).

64 Id. at 165-66.

65 Id. at 165.

66 522 P.2d 1187 (Wash. Ct. App. 1974).

67 Id. at 1195.

68 Id.; see also De Santo v. Barnsley, 476 A.2d 952, 956 (Pa. Super. Ct. 1984) (failing to reach question under Pennsylvania **Equal**

Rights **Amendment**).

69 852 P.2d 44 (Haw. 1993).

70 Id. at 67.

71 Id. at 69 (Burns, J., concurring).

72 Id. at 70 (Heen, J., dissenting, joined by Hayashi, J.).

73 Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996).

74 H.R. 117, 19th Leg. (Haw. 1997).

75 In re Erickson, 547 S.W.2d 357, 359 (Tex. App. 1977) ("[t]o deny her this **right** [i.e., to revert to her maiden name] would be a violation of **equal** protection under the law by creating an invalid classification based on sex"); see also Lassiter-Geers v. Reichenbach, 492 A.2d 303, 306 (Md. 1985) (assuming without deciding that in making decision based upon child's best interest, court was prohibited by Article 46 of Maryland Declaration of **Rights** from relying upon any "**right** which a father had by prior custom or law to have a child bear his surname"); Overton v. Overton, 674 P.2d 1089, 1091 (Mont. 1983) (stating that changing child's surname does not violate Article II, Section 4 of the Montana Constitution); Hamby v. Jackson, 769 P.2d 273, 277 (Utah Ct. App. 1989) (stating that paternal or maternal preference for child's surname is improper).

76 Craig v. Craig, 365 So. 2d 1298, 1301 (La. 1978); see also In re Ayers, 536 P.2d 610, 612 (Wash. 1975) (Hamilton, J., dissenting) (questioning whether wife's legal duty to follow her husband to domicile of his choice survived adoption of state **equal** **rights** **amendment**).

77 Geesbreght v. Geesbreght, 570 S.W.2d 427, 430 (Tex. App. 1978) (determining "domicile by operation of law, i.e., analogous to what was formerly that of a wife arising upon her marriage," court stated that cases decided prior to adoption of state **equal** **rights** **amendment** were '[o]f little value'); Kerr v. Kerr, 371 S.E.2d 30, 33 (Va. Ct. App. 1988) ('the outmoded expectation that a wife is expected to follow her husband's change of abode is no longer applicable').

78 Phillips v. Nereaux, 357 So. 2d 813, 817-21 (La. Ct. App. 1978). In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Supreme Court struck down on **equal** protection gounds a former Louisiana statute that allowed husbands, but not their wives, to execute mortgages on jointly owned real estate without spousal consent. Id. at 456.

79 Phillips, 357 So. 2d at 820.

80 In Pitts v. United States, 408 S.E.2d 901 (Va. 1991), the court discussed co-tenancy **rights** under the law:
The common law recognized four co-tenancies, namely, a joint tenancy, a tenancy by the entirety, a tenancy in common, and a tenancy by coparcenary....A joint tenancy and a tenancy by the entirety shared four essential characteristics, that is, unity of time, unity of title, unity of interest, and unity of possession. Although survivorship was a feature of both estates, they differed in other respects. [A] joint tenant [can] transfer his undivided share in the land to a third person and thereby convert the estate into a tenancy in common,...[b]ut because a husband and wife were considered a juristic person separate and distinct from the spouses themselves,...each owned the entire undivided estate as tenants by the entireties, and neither could sever the tenancy by alienating

its interest during coverture.
Id. at 903 (internal quotations and citation omitted).

81 Butler v. Butler, 347 A.2d 477, 480 (Pa. 1975) (adopting rule that "anytime either a husband or a wife contributes towards the purchase of entireties property their contribution is presumed to be a gift to the other"); see also In re Estate of Harrington, 648 P.2d 556, 576-77 (Wyo. 1982) (Brown, J., dissenting) ("[t]he presumption that the wife does not intend a gift is also based upon the proposition that under the common law the wife has no duty to support the husband, while the husband does have a duty to support the wife" and this presumption probably contravenes the mandate of Article VI, Section 1 of the Wyoming Constitution that "male and female citizens are to enjoy **equal** **rights** under the law, including the **right** to protection by the laws").

82 See DiFloridio v. DiFloridio, 331 A.2d 174, 179 (Pa. 1975) (stating purpose of **equal** **rights** **amendment** was to eliminate sex as basis for distinction); Ward Terry & Co. v. Hensen, 297 P.2d 213, 216 (Wyo. 1956) (stating that common law doctrine that husband had the absolute and exclusive **right** to the control, use, possession, rents, issues, and profits of property owned in tenancy by the entirety was "contrary to the spirit if not the letter of our constitutional and statutory provisions").

83 Bell v. Bell, 379 A.2d 419, 421 (Md. Ct. Spec. App. 1977) (stating that in light of Maryland **Equal** **Rights** **Amendment**, courts cannot presume that husband is dominant figure in marriage); see also Eckstein v. Eckstein, 379 A.2d 757, 761 (Md. Ct. Spec. App. 1978) (following Bell).

84 440 P.2d 881 (Utah 1968).

85 Id. at 882-83.

86 562 P.2d 614 (Utah 1977).

87 Id. at 615-17.

88 See Kurtz, supra note 5, at 137-38 nn.123-29.

89 See, e.g., Ellis v. Johnson, 260 S.W. 1010, 1012 (Mo. Ct. App. 1924).

90 See Kurtz, supra note 5, at 138.

91 Broussard v. Broussard, 320 So. 2d 236, 238 (La. Ct. App. 1975); Harper v. Harper, 229 S.E.2d 875, 877 (Va. 1976) (applying rule without discussion of state **equal** **rights** provision).

92 In In re Marriage of Franks, 542 P.2d 845 (Colo. 1975), the Colorado Supreme Court held that statistical evidence showing that, in the vast majority of cases, mothers were given custody of minor children did not, in and of itself, prove that courts improperly favored women over men in awarding custody in divorce proceedings in violation of Article II, Section 29 of the Colorado Constitution. The statistics did not indicate whether custody was contested or even desired by the fathers in any significant number of cases. Id. at 852; see also Menne v. Menne, 572 P.2d 472, 473 (Colo. 1977) (same).
In Anagnostopoulos v. Anagnostopoulos, 317 N.E.2d 681 (Ill. App. Ct. 1974), the Illinois Appellate Court, citing Article I, Section 18 of the 1970 Illinois Constitution, rejected the mother's claim that she had a "paramount claim to custody of a young child." Id. at 683-84. In a later case, the same court noted that "there is today no inflexible rule which requires that custody of children,

especially of tender age, be vested in the mother." Marcus v. Marcus, 320 N.E.2d 581, 585 (Ill. App. Ct. 1974). Relying in part on Article I, Section 18, the court stated that "[e] quality of the sexes has entered this field." Id. "The fact that a mother is fit is only one facet of the situation and, standing by itself, does not authorize a denial of custody to the father, when this appears necessary because of other considerations." Id.; see also In re Custody of Switalla, 408 N.E.2d 1139, 1142-43 (Ill. App. Ct. 1980); Blonsky v. Blonsky, 405 N.E.2d 1112, 1118 (Ill. App. Ct. 1980); In re Marriage of Sieck, 396 N.E.2d 1214, 1222 (Ill. App. Ct. 1979); Lane v. Lane 352 N.E.2d 19, 22 (Ill. App. Ct. 1976). But see Masterson v. Masterson, 351 N.E.2d 888, 889 (Ill. App. Ct. 1976) (applying tender-years doctrine); Huey v. Huey, 322 N.E.2d 560, 561 (Ill. App. Ct. 1975) (applying the tender-years doctrine without consideration of the **equal rights** provision).

In McAndrew v. McAndrew, 382 A.2d 1081 (Md. Ct. Spec. App. 1978), the Maryland Court of Special Appeals, overruling a prior opinion, held that "[a] parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female." Id. at 1086.

In Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635 (Pa. 1977), a plurality of the Pennsylvania Supreme Court, citing Article I, Section 28 of the Pennsylvania Constitution, questioned:

[T]he legitimacy of a doctrine that is predicated upon traditional stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling evidence of a particular nature..., or merely as a makeshift where the scales are relatively balanced,...such a view is offensive to the concept of the **equality** of the sexes which we have embraced as a constitutional principle within this jurisdiction.

Id. at 639-40. A majority of the court endorsed this view in Ellerbe v. Hooks, 416 A.2d 512, 515 (Pa. 1980).

In Pusey v. Pusey, 728 P.2d 117 (Utah 1986), the Utah Supreme Court stated, "[w]e believe the time has come to discontinue our support.. for the notion of gender-based preferences in child custody cases." Id. at 119 (overruling Cox v. Cox, 532 P.2d 994 (Utah 1975)); see also In re Murray, 622 P.2d 1288, 1290-91 (Wash. Ct. App. 1981) (suggesting that the tender-years doctrine was not compatible with the state **equal rights amendment**).

93 Mark S. Brennan, Comment, The New Doctrine of Necessaries in Virginia, 19 U. Rich. L. Rev. 317, 317 (1985).

94 Id. at 318-19.

95 Id. at 319.

96 Id.

97 Id.

98 See County of Clearwater, Minn. v. Petrash, 598 P.2d 138, 139 n.1 (Colo. 1979) (stating that under state **equal rights amendment**, both parents have a duty to support their children); In re Estate of McGloon, 548 N.E.2d 438, 440 (Ill. App. Ct. 1989) (modifying doctrine to impose reciprocal obligations upon both husbands and wives); Condore v. Prince George's County, 425 A.2d 1011, 1019 (Md. 1981) (abolishing necessaries doctrine); Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344, 1346-47 (N.H. 1995) (expanding necessaries doctrine to apply **equally** to all married individuals); Swidzinski v. Schultz, 493 A.2d 93, 95 (Pa. Super. Ct. 1985) (stating that **equal rights amendment** intended to equalize benefits and burdens between genders); Schilling v. Bedford City Mem'l Hosp., Inc., 303 S.E.2d 905, 907 (Va. 1983) (finding gender classification not substantially related to promoting prompt and efficient medical services).

99 Yale Univ. Sch. of Med. v. Collier, 536 A.2d 588, 590 (Conn. 1988) (stating Section 20 of Connecticut Constitution "provides the constitutional underpinnings for contemporary departure from the primary duty of one spouse to the joint duty of each spouse to support his or her family"); Ducote v. Ducote, 331 So. 2d 133, 138 (La. Ct. App. 1976) ("the father and the mother are jointly obligated to support, maintain and educate their children"); Rand v. Rand, 374 A.2d 900, 905 (Md. 1977) ("[a]pplying the mandate of the E.R.A. to the case before us, we hold that the parental obligation for child support is not primarily an obligation of the father but is one shared by both parents"); Silvia v. Silvia, 400 N.E.2d 1330, 1332 (Mass. App. Ct. 1980) (finding gender-neutral child

support statute was "fully consistent with the **Equal Rights Amendment**"); Commonwealth ex rel. Stein v. Stein, 406 A.2d 1381, 1382-83 (Pa. 1974) (extending statutes affording wives but not husbands in rem support remedies to avoid constitutional issue); Kaper v. Kaper, 323 A.2d 222, 223 (Pa. Super. Ct. 1974) (state **equal rights amendment** admits no exception in area of domestic relations); Friedman v. Friedman, 521 S.W.2d 111, 115 (Tex. App. 1975) (stating that parents have **equal** obligations in accordance with their abilities, to contribute to support and maintenance of children); Cooper v. Cooper, 513 S.W.2d 229, 234 (Tex. App. 1974) ("[i]f '**equality** under the law shall not be denied or abridged because of sex', it must be presumed that the legislature intended that the duty of the spouse to support their [sic] minor children is **equal**"); Perkins v. Freeman, 501 S.W.2d 424, 430 (Tex. App. 1973) ("each spouse has the duty to support his or her minor children"), rev'd on other grounds, 518 S.W.2d 532 (Tex. 1974); accord White v. Adock, 666 S.W.2d 222, 225 (Tex. App. 1984); Ulrich v. Ulrich 652 S.W.2d 503, 504 (Tex. App. 1983); Grandinetti v. Grandinetti, 600 S.W.2d 371, 372 (Tex. App. 1980); Krempp v. Krempp, 590 S.W.2d 229, 230 (Tex. App. 1979); Lipshy v. Lipshy, 525 S.W.2d 222, 227 (Tex. App. 1975) (stating under state **equal rights amendment**, "disparate earning capacities, business opportunities and ability ... may justify the recovery of an attorney's fee by the husband rather than by the wife"); see also Smith v. Smith, 534 P.2d 1033, 1036 (Wash. Ct. App. 1975) (noting that the Washington **Equal Rights Amendment** "firmly requires **equal** responsibilities as well").

100 See Coleman v. State, 377 A.2d 553, 554 (Md. Ct. Spec. App. 1977) (reversing conviction on constitutional grounds); Commonwealth v. Baggs, 392 A.2d 720, 721-22 (Pa. Super. Ct. 1978) (interpreting neglect statute to apply to women as well as men to avoid **equal rights** issue); accord Commonwealth v. Vagnoni, 416 A.2d 99, 100 (Pa. Super. Ct. 1979); Commonwealth v. Rebovich, 406 A.2d 791, 792-93 (Pa. Super. Ct. 1979) (interpreting statutory language as applicable to both genders); see also State v. Fuller, 377 So. 2d 335 (La. 1979) (deciding case under **Equal** Protection Clause of the Fourteenth **Amendment**).

101 See Lovell v. Lovell, 378 So. 2d 418, 420-21 (La. 1979) (involving permanent alimony); Smith v. Smith, 382 So. 2d 972, 974 (La. Ct. App. 1980) (involving alimony pendente lite); Hoffmann v. Hoffmann, 437 A.2d 247, 249 (Md. Ct. Spec. App. 1981) ("[t]he effect of the adoption of Article 46 was not to remove from the law the obligation of a husband, when ordered by a court, to pay alimony to the wife but to add to the law the duty of a wife, when so ordered by a court, to pay alimony to the husband"); see also Tidler v. Tidler, 435 A.2d 489, 495 (Md. Ct. Spec. App. 1981) (holding **equal rights** provision of Maryland Constitution commands court to consider assessment of attorney fees); Buckner v. Buckner, 415 A.2d 871, 872-73 (N.H. 1980) (interpreting divorce statute to allow alimony award to both husband and wife to avoid conflict with **equal rights** guarantee); Schaab v. Schaab, 531 P.2d 954, 957 (N.M. 1974) (finding **equal rights amendment** mandates "**equal** protection" of husband and wife in alimony disputes); Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (noting that **right** of support depends upon relative financial circumstances of parties, not upon their sex).
The Louisiana Court of Appeals held that a statute requiring a wife to live with her husband and "to follow him wherever he chooses to live" could not be invoked to deny the wife permanent alimony when she failed to move with her husband who was in the tugboat business. Crosby v. Crosby, 434 So. 2d 162, 163 (La. Ct. App. 1983).

102 440 U.S. 268 (1979).

103 "Consortium ... can generally be defined to include the mutual **right** of the husband and wife to that affection, solace, comfort, companionship, society, assistance and sexual relations necessary to a successful marriage." Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978).

104 See Schreiner v. Fruit, 519 P.2d 462, 465 n.16 (Alaska 1974) ("[d] iscrimination on the basis of sex in granting only the husband the **right** to sue for loss of consortium would...violate [Article I, Section 3 of] the Alaska Constitution"); Hopkins v. Blanco, 320 A.2d 139, 140 (Pa. 1974) ("if a husband may recover for loss of consortium, to deny the wife an **equal right** would be invalid under the Pennsylvania Constitution"); Miller v. Whittlesey, 562 S.W.2d 904, 906 (Tex. App. 1978) (stating **equal rights amendment** "has modified the common law to such an extent that it would be improper to deny a cause of action based on the sex of the party bringing the action"), aff'd, 572 S.W.2d 665, 668 n.5 (Tex. 1978) (failing to reach constitutional issue); Lundgren v. Whitney's, Inc., 614 P.2d 1272, 1275 (Wash. 1980) ("judicial classification by sex [in common law rule allowing husband, but not wife, to sue for damages for loss of consortium due to the negligence of a third party] violates the **Equal** Protection Clause of the Fourteenth **Amendment** and Washington's **Equal Rights Amendment**").

105 648 P.2d 458 (Wash. Ct. App. 1982).

106 Id. at 461.

107 Id. at 460 (citing Article 31, Section 1 of the Washington Constitution); see also Kline v. Ansell, 414 A.2d 929, 933 (Md. 1980) (same) ("[t]he common law cause of action for criminal conversation is a vestige of the past" and "cannot be reconciled with our commitment to **equality** of the sexes"); Gasper v. Lighthouse, Inc., 533 A.2d 1358, 1359 (Md. Ct. Spec. App. 1987) (following Kline); Fadgen v. Lenkner, 365 A.2d 147, 152 (Pa. 1976) (abolishing tort of criminal conversation).

108 Price v. Price, 718 S.W.2d 65, 66-67 (Tex. App. 1986) (Butts, J., dissenting from judgment affirming dismissal of wife's action against husband for negligently inflicted personal injuries).

109 Id. at 69-71.

110 See Boblitz v. Boblitz, 462 A.2d 506, 522 (Md. 1983) ("any ancient deprivation of **rights** based upon sex would contravene the basic law of this State"); Stoker v. Stoker, 616 P.2d 590, 591 (Utah 1980) (interpreting Married Women's Act in light of state **equal rights** provision to allow a wife to sue her husband for intentionally inflicted personal injuries); see also Price, 718 S.W.2d at 67 (Butts, J., dissenting) (stating Texas **Equal Rights Amendment** "provides for sexual '**equality** under the law"' and, together with statutes recognizing women's **rights**, "invalidate[s] the common law rationale for the fictional unity of the husband and the wife"). But see Steffa v. Stanley, 350 N.E.2d 886, 889 (Ill. App. Ct. 1976) ("the bar against tort actions between spouses during coverture applies **equally** to male and female and cannot therefore be said to discriminate by denying or abridging [the wife's] **rights** on the basis of sex"); Smith v. Smith, 361 A.2d 756, 757 (Pa. Super. Ct. 1976) (holding state **equal rights amendment** did not require abrogation of interspousal tort immunity).

111 Texas Woman's Univ. v. Chayklintaste, 521 S.W.2d 949, 949-50 (Tex. App.), rev'd on other grounds, 530 S.W.2d 927 (Tex. 1975).

112 Futrell v. Ahrens, 540 P.2d 214, 218 (N.M. 1975).

113 Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447, 447 (Tex. 1995); Mercer v. Board of Trustees, North Forest Indep. Sch. Dist., 538 S.W.2d 201, 206-07 (Tex. App. 1976); see also MacLean v. First Northwest Indus. of Am., 635 P.2d 683, 688 (Wash. 1981) (rejecting challenge to "ladies' night" price-ticketing practices at professional sporting events, stating that "[t]o decide important constitutional questions upon a complaint as sterile as this would be apt to erode public respect for the **Equal Rights Amendment** and deter rather than promote the serious goals for which it was adopted").

114 393 N.E.2d 284 (Mass. 1979).

115 Id. at 296.

116 371 Op. Mass. 426, 427-28 (1977).

117 540 P.2d 882 (Wash. 1975).

118 Id. at 893.

119 Id.

120 Blair v. Washington State Univ., 740 P.2d 1379, 1382-83 (Wash. 1987).

121 394 N.E.2d 855 (Ill. App. Ct. 1979).

122 Id. at 856.

123 Id. at 861.

124 Id. at 862.

125 Commonwealth ex rel. Packel v. Interscholastic Athletic Ass'n, 334 A.2d 839, 843 (Pa. Commw. Ct. 1975).

126 Id.

127 Lockwood v. Killian, 425 A.2d 909, 913-14 (Conn. 1979) (modifying trust to delete criteria based on race and sex); In re Certain Scholarship Funds, 575 A.2d 1325, 1329 (N.H. 1990) (invoking doctrine of cy pres to reform terms of educational trusts administered by state actors to eliminate references to sex and religion); see also Ebitz v. Pioneer Nat'l Bank, 361 N.E.2d 225, 227 (Mass. 1977) (relying, in part, on state **equal rights amendment** to resolve ambiguity in eligibility criteria for scholarship fund to include women as well as men).

128 Compare R. McG. v. J.W., 615 P.2d 666, 672 (Colo. 1980) ("where [[[a] statutory scheme allows a natural mother to seek a judicial declaration of paternity in the natural father in connection with a child born to the natural mother during her marriage to another, the **equal** protection guarantee of the federal and state constitutions as well as the Colorado **equal rights amendment** require that a claiming natural father be accorded standing to file and proceed with his claim for a judicial declaration of paternity in himself with respect to a child born to the natural mother during her marriage to another"), and In re M.P.R., 723 P.2d 743, 744-45 (Colo. Ct. App. 1986) (following R. McG.), and Henderson v. Wietzikoski, 841 S.W.2d 101, 103-04 (Tex. App. 1992) (deciding case under state constitution only), with PBC v. DH, 483 N.E.2d 1094, 1097 (Mass. 1985) (denying putative father adjudication of paternity of a child conceived by a woman while she was married to another man); and A v. X, Y, & Z, 641 P.2d 1222, 1222 (Wyo. 1982) (denying putative father adjudication of paternity of child born to woman while she was married to another man); see also Michael H. v. Gerald D., 491 U.S. 110, 117-30 (1989) (rejecting procedural and substantive due process claims of adulterous putative father seeking hearing to establish paternity of child born to woman married to another man).

129 A v. X, Y, & Z, 641 P.2d at 1225; see also Lalli v. Lalli, 439 U.S. 259, 268-69 (1978) ("That the child is the child of a particular woman is rarely difficult to prove. Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed, the mother may not know who is responsible for a pregnancy.") (citations and internal quotation omitted); In re J.M., 590 So. 2d 565, 571-72 (La. 1991) ('The State has as great an interest in establishing maternity as paternity. However, because paternity is usually significantly more difficult to prove, we are not prepared to say that the statute [requiring blood testing] is unconstitutional because it addresses blood testing for paternity alone.').

130 See Adoption of Walker, 360 A.2d 603, 606 (Pa. 1976) ("The only differences between unwed fathers and unwed mothers are those based on sex. This is an impermissible basis for denying unwed fathers **rights** under the [[[Adoption] Act."); In re McLean, 725 S.W.2d 696, 697 (Tex. 1987) (holding gender-based distinctions in Texas Family Code constitute discrimination). But see Swayne v. L.D.S. Social Servs., 795 P.2d 637, 641 (Utah 1990) (finding no due process violation of state **equal rights amendment** in not requiring consent of natural father to adoption of illegitimate child where father did not file acknowledgment of paternity with state health department) ("[E]ven if we were to accept the proposition that the Utah Constitution defines gender as an inherently suspect classification, defendant's claim would fail since 'the mere existence of a biological link' by itself has not been deemed to create a fundamental **right** in an unwed father to parent his illegitimate child.").
The United States Supreme Court has held that a statute requiring the mother's consent to the adoption of a child born out of wedlock, but not the father's, violates the **Equal** Protection Clause. See Caban v. Mohammed, 441 U.S. 380, 394 & n.16 (1979) (holding sex-based distinction between unmarried mothers and unmarried fathers violates Fourteenth **Amendment**).

131 725 S.W.2d 696 (Tex. 1987).

132 Id. at 698-99.

133 Parham v. Hughes, 441 U.S. 347, 352-53 (1979).

134 Guard v. Jackson, 921 P.2d 544, 546 (Wash. Ct. App. 1996).

135 Estate of Scheller v. Pesetto, 783 P.2d 70, 77 (Utah Ct. App. 1989).

136 Estate of Hicks, 675 N.E.2d 89, 94 (Ill. 1996) (finding that challenged statute "is based upon the presumption that a particular parent will be involved or uninvolved in his illegitimate child's life simply because that parent happens to be a man or a woman").

137 Nagle v. Wood, 423 A.2d 875, 878 (Conn. 1979); see also Trimble v. Gordon, 430 U.S. 762, 770-73 (1977) (striking down Illinois statute providing that illegitimate child could inherit from father's estate only if parents intermarried and the father acknowledged paternity) (deciding case on **equal** protection grounds).

138 Lowell v. Kowalski, 405 N.E.2d 135, 137 (Mass. 1980); see also Paquette v. Koscotas, 421 N.E.2d 483, 485 (Mass. App. Ct. 1981) (following Lowell).

139 Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974) ("[G]irls tend generally to mature physically, emotionally and mentally before boys, and... generally tend to marry earlier."), rev'd on other grounds, 421 U.S. 7 (1975).

140 482 A.2d 542 (Pa. 1984).

141 Id. at 543-44.

142 Bartholomew v. Foster, 541 A.2d 393, 398 (Pa. Commw. Ct. 1988), aff'd per curiam, 563 A.2d 1390 (1989).

143 McKinney v. State, 30 P. 293, 296-97 (Wyo. 1892).

144 State v. Yazzie, 218 P.2d 482, 483 (Wyo. 1950) (holding that under **equality** provisions of the Wyoming Constitution, "women in Wyoming are men's **equal** before the law").

145 Compare Archer v. Mayes, 194 S.E. 707, 711 (Va. 1973) (holding "opt-out" statutes are based on "a reasonable classification that bears a rational relationship to the objective of the State"), and Johnson v. State, 548 S.W.2d 700, 703 (Tex. Crim. App. 1977) (holding statute allowing women with small children to be excused from jury duty does not violate state **equal rights amendment**), with State v. Machia, 449 A.2d 1043, 1048-49 (Conn. Super. Ct. 1979) (stating in dictum that the failure to extend "opt-out" statute to both men and women would violate state constitution).

146 See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 127-28 (1994) (holding gender discrimination in peremptory strikes violates **Equal** Protection Clause).

147 See People v. Lann, 633 N.E.2d 938, 951 (Ill. App. Ct. 1994) (holding gender-based classifications in jury selection unconstitutional); Tyler v. State, 623 A.2d 648, 650-51 (Md. 1993) (holding gender-based classifications in peremptory challenges violates Maryland law); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (holding peremptory challenges to exclude members of discreet groups unconstitutional); State v. Gonzales, 808 P.2d 40, 49 (N.M. Ct. App. 1991) (holding racial and gender discrimination in jury selection violates state law); State v. Burch, 830 P.2d 357, 362-63 (Wash. Ct. App. 1992) (holding gender-based discrimination in jury selection violates state and federal law).

148 533 So. 2d 1060 (La. Ct. App. 1988).

149 Id. at 1062-63.

150 Carreras v. State, 936 S.W.2d 727, 730 (Tex. App. 1996); City of Seattle v. Buchanan, 584 P.2d 918, 920 (Wash. 1978).

151 See Occhino v. Illinois Liquor Control Comm'n, 329 N.E.2d 353, 356 (Ill. App. Ct. 1975) ("classification reflects the judgment of the legislature that solicitation of [beer] has been a greater problem with respect to female employees than [male employees]"); State v. Corky, 458 So. 2d 904, 906 (La. 1984) ("[T]he legislative history of the B[ar]-drinking statute indicates that the practice of drinking by women in retail alcohol outlets was a serious problem."); De Francis v. City of Bossier, 322 So. 2d 333, 339 (La. Ct. App. 1975) ("[A]ppellant has not shown that solicitation of drinks by males constitutes a social evil of any significance."). But see Turner v. State, 474 A.2d 1297, 1301-02 (Md. 1984) (holding Maryland "female citizens" law unconstitutional).

152 See Crownover v. Musick, 509 P.2d 497, 506 (Cal. 1973) (holding state law prohibiting female nudity in bar does not violate **equal** protection); Locker v. Kirby, 107 Cal. Rptr. 446, 450-51 (Cal. Ct. App. 1973) (upholding liquor control commission rule prohibiting licensees from employing or using topless waitresses on premises where liquor is sold); Dydyn v. Department of Liquor Control, 531 A.2d 170, 175 (Conn. Super. Ct. 1987) (holding state liquor law does not violate **equal** protection); Messina v. State, 904 S.W.2d 178 (Tex. App. 1995); MJR's Fare of Dallas v. City of Dallas, Inc., 792 S.W.2d 569, 575 (Tex. App. 1990) (rejecting challenge to zoning ordinance placing distance restrictions on sexually oriented business where ordinance required complete and opaque covering of areola of female breast but not imposing similar requirement on male performers). But see Williams v. City of Fort Worth, 782 S.W.2d 290, 297 (Tex. App. 1989) (holding ordinance was unconstitutional where defendant presented no evidence that prohibiting exposure of female, but not male, breast, was justified by physical differences between men and women).

153 See Locker, 107 Cal. Rptr. at 450-51 (noting historical distinctions in perceptions of male and female breasts); Dydyn, 531 A.2d at

175 (noting societal and cultural perceptions of female breasts); Carreras, 936 S.W.2d at 730 (noting distinctions between society's perception of male and female breasts); MJR's Fare of Dallas, Inc., 792 S.W.2d at 575 (holding state law allows gender distinctions where physical characteristics require it); Buchanan, 584 P.2d at 920 (noting "real difference" between sexes with regard to breasts).

154 Wheeler v. City of Rockford, 387 N.E.2d 358, 359 (Ill. App. Ct. 1979).

155 See Ex parte Maki, 133 P.2d 64, 66-67 (Cal. Ct. App. 1943).

156 Leo Kanowitz, 'Benign' Sex Discrimination: Its Troubles and Their Cure, 31 Hastings L.J. 1379, 1394 (1980).

157 Treadwell & Page, supra note 5, at 1106. The experience in state courts in the twenty years since this article was published confirms this assessment.

158 Id. at 1107.

159 5 U.S.C. § 201 (1994) (mandating anti-discrimination policy in federal employment); 5 U.S.C. § 2302(b)(1) (1994) (prohibiting discrimination in personnel policies); 20 U.S.C. § 1221e(a) (1994) (mandating anti-discrimination policy in educational institutions receiving federal funds), id. § 1681 (prohibiting discrimination in education); 23 U.S.C. § 324 (1994) (prohibiting discrimination in federal aid to highways); Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by **Equal** Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating **equal** pay); Civil **Rights** Act of 1964, Title VII, 42 U.S.C. § 2000, as amended by **Equal** Employment Opportunity Act of 1972, Pub. L. 92-261, and Pregnancy Discrimination in Employment Act of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982) (prohibiting discrimination in public and private employment)); Public Works and Economic Development Act **Amendments** of 1971, 42 U.S.C. § 3123 (1994) (prohibiting discrimination in federally-funded public works projects); see also Civil **Rights** Act of 1964, Title VIII, 42 U.S.C. § 3604 (1994) (prohibiting discrimination in sale or rental of housing).

160 Charles E. Corker, Bradwell v. State: Some Reflections Prompted by Myra Bradwell's Hard Case That Made 'Bad Law,' 53 Wash. L. Rev. 215, 245 (1978).

161 Sixth Illinois Constitutional Convention, supra note 7, at 3670.

162 An **amendment** in 1974 added protection for "race, creed, color, national or ethnic origin" to the original text.

163 An **amendment** in 1984 added protection for "physical or mental disability."

End of Document

ARTICLE: ELECTION *2008: SEXISM EDITION: THE PROBLEM OF SEX STEREOTYPING*

Spring, 2012

Reporter
19 UCLA Women's L.J. 117

Length: 20932 words

Author: Morvareed Z. Salehpour*

* 2010 J.D. graduate from the UCLA School of Law and associate at the Los Angeles office of Baker & Hostetler LLP. I would like to thank Professor Russell Robinson for the valuable guidance, comments, suggestions, and encouragement, he provided throughout the process of developing this article. I would also like to thank all my peers in the Critical Race Studies Writing Workshop at UCLA School of Law for their time and the valuable aid they providing me throughout the process of developing this article.

LexisNexis Summary

… Referring to Title VII motivating factor analysis, I will show that even if other factors came into play or gender benefited the women in some ways, sex stereotyping and the double bind still played a role in disadvantaging both female candidates. … Thus, this paper demonstrates that the media's sexist treatment of Hillary Clinton and Sarah Palin during the 2008 election coverage and commentary led to discriminatory sex stereotyping reminiscent of Title VII sex discrimination. … Supporters of effected candidates, women's rights supporters, and media watchdogs can take part in vocal and active counter-speech in order to draw attention to the need for change in the media coverage and begin that change. … Thus, voters, particularly the undecided voters so important to winning presidential elections, rather than simply accepting the media's word and falling subject to perpetuation of societal sexist views, will begin to evaluate media coverage and commentary of female candidates. … This is particularly important given the prevalence of the discriminatory media treatment of the female candidates in the 2008 election cycle and the fact that it extended through the whole range of female stereotypes from the "power-hungry bitch" to the "attractive simpleton."

Highlight

It does seem as though the press at least is not as bothered by the incredible vitriol that has been engendered by the comments by people who are nothing but misogynists.

- Hillary Clinton [1]

Text

[*118]

I. Introduction

---

[1] Lois Romano, Clinton Puts Up a New Fight: The Candidate Confronts Sexism on the Trail and Vows to Battle On, Wash. Post, May 20, 2008, at C01, available at *http://www.washingtonpost.com/wp-dyn/content/article/2008/05/19/AR200805190* 2729.html.

After years of "working long hours, [and] pushing vigorously to meet deadlines," Ann Hopkins, a senior manager at the accounting firm of Price Waterhouse, was up for partner. [2] Out of the 88 candidates for partner, she was the only woman. Ann, being aggressive in her work, had secured more major contracts than any of the other candidates for partnership. [3] She was praised for her strength, independence, forthrightness, decisiveness, and productivity. [4] However, Ann was denied partnership. [5] Partners at Price Waterhouse criticized her for being too masculine. [6] She was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" [7] in order to have a better chance at making partner. Faced with the denial of partnership, Ann brought a Title VII sex discrimination claim against Price Waterhouse. [8] The Supreme Court ruled that Price Waterhouse's denial of partnership was illegal because Price Waterhouse had illegally sex stereotyped Ann Hopkins by putting her in a double bind by "objecting to aggressiveness in women … whose positions require this trait." [9] The firm had illegally disadvantaged **[*119]** her by requiring her simultaneously to act more masculine and more feminine.

Like Ann, women running for elected office face similar pressures of sex stereotyping. However, while Ann could turn to Title VII for protection, women in politics do not have the same protection available because employment laws do not extend to elected positions, though elected positions are still jobs. Thus, there exists a gap in employment law as it currently stands. In particular, this comment argues that the presidential primaries and the general election are very much like a long interview or a review for job promotion, situations in which anti-discriminatory employment laws do apply. Given this, the media can be seen as a dominant player, like a partner in an accounting firm who influences the votes of others by framing the female candidate and making gender salient. [10] The media serve to play to and perpetuate existing societal sexist views by basing and framing their treatment of female candidates on such views. This process becomes particularly important because once candidates have been framed in a particular light, it is extremely difficult for these candidates to create a new frame for themselves. [11] Thus, the media's heightened scrutiny of female candidates influences how voters (excluding core supporters) perceive the candidate or feel about the candidate. [12] This affects how voters choose to vote, **[*120]** creating a discriminatory effect very similar to that which occurs in Title VII workplace discrimination cases.

---

[2] *Price Waterhouse v. Hopkins, 490 U.S. 228, 231-34 (1989)* (plurality opinion).

[3] Id.

[4] *Id. at 234.*

[5] *Id. at 231-32.*

[6] *Id. at 235.*

[7] Id.

[8] *Id. at 231-32.*

[9] *Id. at 251.* For the establishment of the impermissibility of the double bind and sex-based stereotyping see id.

[10] See *id. at 236* (discussing partner at Price Waterhouse repeatedly commenting that he could not consider women seriously for partner since he believed they were incapable).

[11] See infra note 12.

[12] The media has the power to influence undecided voters through its agenda-setting power to decide which issues are important, and through its ability to characterize candidates' personalities in order to influence whether voters feel positively or negatively about a candidate. Maxwell E. McCombs et al., Contemporary Public Opinion: Issues and the News 81-82 (1991). By focusing on certain attributes of the candidates rather than others, the media influence voters' images of the candidates. Id. This influence is important since statistical data shows that voters' views of candidates based on personal attributes play a significant role in voting. Id.

In order to explore this discriminatory effect, this paper will focus on the field of presidential politics in the context of the 2008 presidential race because the offices of president and vice president are the highest-ranking and most important jobs in the United States and because sex stereotyping of the female candidates was rampant during the 2008 election cycle. [13] From the outset, I acknowledge that Title VII legal remedies are unlikely to succeed in the election context. Instead, this paper argues that, if future female presidential candidates are to receive fairer treatment in the media and take part in a fair election process, it is necessary to recognize that our society does not accept similar discriminatory treatment in other job situations. Additionally, counter-speech, such as this paper, can function both to acknowledge the sexist treatment that occurred in the 2008 election cycle and to balance the discriminatory narratives that the media construct about female candidates in future elections.

As part of this argument, Part II will look at the interplay of gender performance and sex-based stereotyping, particularly the double bind, as described in Title VII workplace discrimination cases.

Part III will look at how media coverage of Hillary Clinton and Sarah Palin not only clearly demonstrated the existence of sexism in presidential politics, but also showed the complexity **[*121]** and range of prevailing sex stereotyping. [14] In particular, it will illustrate how the media discriminated against Clinton for not fitting the female stereotype by depicting her as too aggressive and mannish and how they discriminated against Palin for fitting the female stereotype by objectifying and sexualizing her at the same time that they questioned her intelligence. Thus, while the media's treatment of the women spanned the spectrum of sex-based stereotyping, gender discrimination substantially hampered both women in their candidacy for political office. The media forced both women to combat these stereotypes and to navigate the double bind, which requires women in Clinton's and Palin's positions to simultaneously behave more masculinely and more femininely, an extra task not required of male candidates [15] In response, both women attempted to achieve a working balance between these simultaneous demands in order to avoid sexist treatment. To counter her sexist treatment, Clinton may have tried to soften her image by crying [16] and

---

Since "the power to influence is a power which has always been exercised by all forms of news media," politicians are aware of the importance of favorable new coverage. Project, Media and the First Amendment in a Free Society, 60 Geo. L.J. 867, 941 (1972); Lee E. Goodman, The Internet: Democracy Goes Online, in Law and Election Politics: The Rules of the Game 97, 97 (Matthew J. Streb ed., 2005). As an aide advised President Carter,

> Like it or not, there exists in fact an eastern liberal news establishment which has tremendous influence in this country all out of proportion to its actual audience. The views of this small group of opinion-makers … are noted and imitated by other columnists and newspapers throughout the country and the world. Their recognition and acceptance of your candidacy as a viable force with some chance of success could establish you as a serious contender worthy of financial support of major party contributors.

Id. at 98.

[13] See, e.g., NOW's Media Hall of Shame: 2008 Election Edition, Nat'l Org. for Women, http://www.now.org/issues/media/hall of shame/ (last visited Oct. 19, 2008). This issue is particularly pressing given that there were two women candidates in the recent presidential election cycle. It takes on greater weight if one considers that while there have been no female presidents in the United States, other countries throughout the world have had women presidents or prime ministers. Some well-known examples include Margaret Thatcher and Golda Meir, Prime Minister of Israel. Jone Johnson Lewis, Women Prime Ministers and Presidents: 20th Century, About.com: Women's History (2010), http://womenshistory.about.com/od/rulers20th/a/women heads.htm. This is especially interesting if one considers that many of these countries that have had women presidents and prime ministers are developing countries that the general American public may consider less "advanced" than the United States. Examples include: Elisabeth Domitien, Prime Minister of the Central African Republic; Corazon Aquino, President of the Philippines; and Mireya Elisa Moscoso de Arias, President of Panama. Id.

[14] A range that extends from the treatment of women as the homely and unattractive intellectual "bitch" to their treatment as the empty-headed, but sexy "ditz."

[15] See Devon W. Carbardo & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1262 (1999) (discussing how outsider groups feel they have to do extra work to overcome negative stereotypes).

[16] Gail Sheehy, Hillaryland at War, Vanity Fair, Aug. 2008, available at http://www.vanityfair.com/politics/features/2008/08/clinton200808.

Palin may have tried to display strength while maintaining femininity by calling herself "a pit bull with lipstick" [17] and wearing a fashionable wardrobe. [18] However, even though they used differing strategies to combat the double bind, both women ultimately failed to do so effectively.

Part IV will discuss other factors that critics may argue could have influenced the harsher media treatment of Clinton and Palin and explore allegations that gender may have helped the women. Referring to Title VII motivating factor analysis, I will show that even if other factors came into play or gender benefited the women in some ways, sex stereotyping and the double **[*122]** bind still played a role in disadvantaging both female candidates. I end by concluding that the offices of president and vice president are an unregulated workplace in which sex stereotyping violative of the spirit of Title VII occurs. I argue that while no legal remedy may exist, societal sex discrimination in this context and its perpetuation by the media must be acknowledged through counter-speech in order to increase the number of accurately informed voters and give viable female candidates a fair chance at succeeding.

II. Title VII Sex Stereotyping

This is the longest job interview in the world. Think about the decision as a hiring decision!

- Hillary Clinton [19]

Sex stereotyping occurs when employers require or expect women to behave according to the female stereotype. [20] In the leading case, Price Waterhouse v. Hopkins, an accounting firm denied partnership to Ann Hopkins for being too aggressive and not feminine enough. [21] The partners disliked her "brusqueness" and her "use of profanity." [22] Though she was the most successful candidate for partnership, [23] the firm passed her over because partners thought she was overcompensating for her gender and felt that she needed to behave and appear more femininely in order to have a better chance of making partner. [24] One partner even recommended that she take charm school classes. [25] It was apparent that Price Waterhouse only looked at female candidates for partnership

---

[17] E.g., Rebecca Sinderbrand et al., 'Lipsick on a Pig:' Attack on Palin or Common Line?, Cnn, Sept. 10, 2008, http://www.cnn.com/2008/POLITICS/09/10/campaign.lipstick/; Hannah Strange, Obama Hits Back at McCain in 'Lipstick on a Pig' Row, Times Online, Sept. 10, 2008, http://www.timesonline.co.uk/tol/news/world/us and americas/us elections/article4726524.ece.

[18] E.g., Jeanne Cummings, RNC Shells Out $ 150K for Palin Fashion, Politico, Oct. 22, 2008, http://www.politico.com/news/stories/1008/14805.html; Sam Stein, Palin Clothes Spending Has Dems Salivating, Republicans Disgusted, Huffington Post, Oct. 22, 2008, http://www.huffingtonpost. com/2008/10/22/palin-clothes-spending-ha n 136740.html.

[19] Sheehy, supra note 16.

[20] See Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights 158 (2006); Kenji Yoshino, Covering, 111 Yale L.J. 769, 917 (2001) [hereinafter Yoshino, Covering]. According to psychologist Susan Fiske, the female stereotype "is to be socially concerned and understanding, soft and tender, and the overall stereotype for a man … is that [he] will be competitive, ambitious, independent, and active." Id. at 916 (quoting Ann Branigar Hopkins, So ordered: Making Partner the Hard Way 236 (1996).

[21] Price Waterhouse v. Hopkins, 490 U.S. 228, 233-37, 250-51 (1989) (plurality opinion).

[22] Id. at 234-35.

[23] Id. at 234.

[24] Id. at 235.

[25] Id.

"favorably if partners believed they maintained **[*123]** their femininity while becoming effective professional managers." [26]

Ruling that sex stereotyping of employees is illegal, the Supreme Court stated, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group." [27] Further, Price Waterhouse specifically establishes the principle that women cannot face simultaneous demands to emphasize and deemphasize their womanhood in order to find a right balance between masculine and feminine traits; the Court determined such demands create an impermissible double bind violative of Title VII. [28]

However, there are several areas of law in which the disparate treatment of women arising from how they perform their gender is allowed to stand. [29] Even in employment law and under Title VII, the protection of women from sex-based stereotyping is not absolute. [30] Several precedents establish that women's choices of dress and appearance can be legally punished in many situations. [31] These precedents illustrate the gaps that exist in employment law in the prevention of discriminatory treatment of women based on sex stereotypes.

[*124] In Jespersen v. Harrah's Operating Co., Inc., the Ninth Circuit allowed Harrah's Casino to fire a successful female bartender for failing to wear make-up. [32] Looking at Harrah's grooming list, it becomes apparent that women had more requirements than men. [33] While men were faced only with generalized requirements to keep hair above their shirt collars, have clean and trimmed nails, and wear no nail polish or make-up, women had requirements with much more specificity. [34] Women were required to wear their hair down and teased, curled, or styled, to only wear white, pink, red, or clear nail polish, to wear nude colored stockings, and to wear powder, blush, mascara, and lipstick "applied neatly in complimentary colors." [35] Though their grooming standards would have

---

[26] *Id. at 236.*

[27] *Id. at 251.* Price Waterhouse was a plurality opinion in which Justices Marshall, Blackmun, and Stevens joined Justice Brennan's delivery of the Court's opinion while Justices White and O'Connor filed concurring opinions and Justices Scalia and Rehnquist joined Justice Kennedy's dissenting opinion. *Id. at 231.*

[28] *Id. at 251.* In the Supreme Court's words, the tension between these competing concurrent demands creates an "intolerable and impermissible catch 22." Id.; See also Yoshino, Covering, supra note 20, at 780, 910, 917 (discussing how Price Waterhouse can be interpreted as protecting women from both covering and reverse covering demands).

[29] An example outside of the employment context is court toleration of sex-based discrimination in such contexts as street harassment. See, e.g., Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women, *106 Harv. L. Rev. 517 (1993).*

[30] For example, churches are able to deny women positions as ministers. See, e.g., *Combs v. Central Texas Annual Conference of United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).* Another example is the exception for discrimination in small businesses. *42 U.S.C. § 2000e*(b) (2007). A further example of such a gap in employment law is the exception for casting discrimination. See Russell K. Robinson, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, *95 Calif. L. Rev. 1 (2007)* (discussing the use of discriminatory casting in the film industry).

[31] See Devon Carbado et al., Foreword: Making Makeup Matter, *14 Duke J. Gender L. & Pol'y 1, 2-4 (2007)* (discussing that identity discrimination can occur through grooming standards such as dress, make-up, hair styling, etc.).

[32] *Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1105, 1113 (9th Cir. 2006).*

[33] *Id. at 1107.*

[34] Id.

[35] Id.

consumed more time and expense, [36] the court determined that women faced no unequal burden and were not subject to discriminatory sex stereotyping because both men and women were subject to a "Personal Best" policy. [37] As a result, the court required that women like Jespersen, who found wearing make-up in "conflict with [their] self-image," to do so or face losing their jobs. [38] Thus, these women were required to perform against their own understanding of their gender identity if they wished to keep their jobs.

Similarly in Craft v. Metromedia, Inc., the Eighth Circuit upheld a TV station's decision to reassign a woman anchor to reporter for not adhering to make-up and dress guidelines. [39] Despite the station's assurances to Craft that she would not be given a "make-over," criticisms regarding her appearance were made soon after she was hired. [40] As time passed, the station gave her more and more guidelines and recommendations to follow in her appearance. [41] Unlike the male journalists, she not only faced greater, but also "daily scrutiny of her appearance." [42] Among the measures it took, the station provided her with a **[*125]** clothing calendar that detailed what she had to wear every day and a book of clothing and makeup recommendations called Women's Dress for Success. [43] Eventually, after several surveys, the station determined that Craft was not adequately meeting the appearance standards required for the position; they chose to demote her to reporter because viewers saw her "as too old, too unattractive, and not deferential enough to men." [44] The station determined that she was not effectively softening the station's image, a requirement imposed only on female anchors. [45] Thus, Craft was forced to lose her job because she did not perform her identity to the expected female stereotype. [46] However, the court ruled that Craft was not subject to discriminatory sex stereotyping when the station subjected her to appearance requirements and demoted her to reporter. [47] It chose to ignore the evidence of sex stereotyping by the station in the course of its actions. The court refused to acknowledge the inequality of the measures, but rather considered the unequal measures simply part of "management's efforts to pursue with personnel their individual weaknesses." [48] It seemingly legitimized the station's sex stereotyped requirement that women maintain an image of "professional elegance" while men only maintain a "professional image." [49]

---

[36] Carbado et al., supra note 31, at 6-7. See *Jespersen, 444 F.3d at 1107* for a list of the specific requirements for males and females.

[37] *Id. at 1111-13.*

[38] *Id. at 1108.*

[39] *Craft v. Metromedia, Inc., 766 F.2d 1205, 1207-08 (8th Cir. 1985).*

[40] *Id. at 1208.*

[41] *Id. at 1208-09.*

[42] *Id. at 1213.*

[43] *Id. at 1208-09.*

[44] *Id at 1209.* Thus, here the TV station was playing to and perpetuating societal sex stereotyping of women just as the media played to and perpetuated social sex stereotyping of women in their treatment of Clinton and Palin.

[45] *Id at 1208.*

[46] *Id. at 1209.*

[47] *Id. at 1217.*

[48] *Id. at 1214.*

[49] Id.

Such promulgation of sex stereotyping is generally negative and subjects women to lower "workplace standing and advancement opportunities." [50] So, in situations such as Jespersen and Craft, where women are not protected from these negative stereotypes, a woman may find herself having to take part in "identity-negating conduct" [51] in order to fit the stereotype. She may also find herself being forced to do 'extra work' in an attempt to deflect or conform to these stereotypes or to find the correct balance in the double bind. [52] This 'extra work' forces women to **[*126]** "perform comforting acts to make insiders comfortable with the [woman's] outsider status." [53] This push will be stronger for unprotected women in male-dominated arenas. [54] Further, because women are subject to multiple female stereotypes, an attempt to overcome one stereotype poses a chance that another stereotype will come into play, such as assertiveness being taken as "bitchiness." [55]

Additionally, many women also have to navigate other identities, such as race, when performing their gender. [56] As a result, these women have a more difficult time trying to find the correct gender performance because the interplay between these other identities and gender creates particularized gender stereotypes that they have to overcome. [57] Thus, female minorities have additional 'extra work' because, unlike a white woman or a man of color who only has to overcome one "but for … characteristic[]" to be considered part of the privileged group, [58] a woman of color will have to overcome a specialized intersection of both. [59] For example, an Asian American woman who chooses to perform her gender more femininely, will likely also have to deal with the racialized gender stereotype that Asian American women are quiet and passive. [60] Similarly, an African American woman must **[*127]** consider racialized gender stereotypes, [61] such as the "Mammy" and the "Jezebel," when shaping her gender performance. [62]

Sadly, the lack of protection from these negative stereotypes and the extra performance demands they create for women of all colors is not limited to situations like Jespersen and Craft. In reality, there are many such gaps in employment law and the political arena is one of these areas where women remain unprotected from discriminatory sex stereotyping and face increased performance demands.

---

[50] Carbardo & Gulati, supra note 15, at 1269-70.

[51] Id. at 1266, 1277. Carbardo and Gulati also refer to this as a "denial of self." Id. at 1288. For a general discussion of this see id. at 1288-90.

[52] Id. at 1262, 1277. This 'extra work' consists of extra time and effort. Id. at 1279.

[53] Id. at 1301.

[54] See id. at 1269 (stating that the more the stereotype conflicts with the qualities the employer is looking for, the more work the employee will have to do to counter it).

[55] Id. at 1292.

[56] For example, a minority female candidate, similarly situated to Clinton or Palin, would also face additional pressures to overcome her race in addition to demands to behave more masculinely and more femininely at the same time. See Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 4 (1990). For a more detailed discussion of the intersectionality of race and gender see Devon W. Carbado & Mitu Gulati, The Fifth Black Woman, *11 J. Contemp. Legal Issues 701, 708, 713-715 (2000).*

[57] See Carbado & Gulati, supra note 56; Gowri Ramachandran, Intersectionality as "Catch-22": Why Identity Performance Demands Are Neither Harmless nor Reasonable, *69 Alb. L. Rev. 299 (2005).*

[58] Kimberle 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, 151 (1989).

[59] Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, *43 Stan. L. Rev. 1241, 1244 (1990)* (stating that one cannot look at the gender and the race of women of color separately).

[60] Carbado & Gulati, supra note 56, at 703; Ramachandran, supra note 57, at 328.

[61] White women do not face this additional danger when performing their gender.

[62] See Ramachandran, supra note 57, at 311.

In particular, female candidates running for president or vice president fall within this gap in employment law because they are, in effect, applying for a job: in this case, the most prominent positions in the United States government with a long interview season consisting of the primary and general elections. Further, in this lengthy interview, in which candidates have to partake in hundreds of media interviews, [63] the media play a prominent role in influencing the votes of undecided voters upon whom the elections turn. [64] Thus, the vulnerability of these women to sex stereotype discrimination can be considered an unregulated area in employment law. These women, like the women harmed by the rulings in Jespersen and Craft, have no legal remedies under Title VII although they are subject to the discriminatory sex stereotyping which Title VII means to prevent. Further, like Hopkins, they are subject to a double bind that causes them to do 'extra work' in order to perform comforting strategies to balance the conflicting demands placed on them.

Therefore, it must be recognized that although many may claim that gender equality has been achieved or almost achieved, the treatment of the female candidates in the 2008 presidential race is critical evidence that females are still subject to discriminatory norms. At the very least, it must be recognized that the stereotyping that women in these positions face leads to extra **[*128]** performance demands that are only permitted due to a gap in employment discrimination law.

III. Sex Stereotyping of Clinton and Palin

Both Hillary Clinton and Sarah Palin were subject to sex stereotyping and the double bind by the public and the media. This section explores the sex stereotypes perpetuated by the media and applied to the candidates. It demonstrates how the candidates' differential treatment manifests the complex and broad range of female stereotypes (from the "too aggressive bitch" to the "sexy simpleton"). Finally, it explores how the candidates tried to combat this sex stereotyping. However, as a caveat to the analysis in this section, I acknowledge that I cannot be certain of the candidates' actual motivations, but must base my analysis on speculation about their motivations in shaping their responses to the double bind.

A. Clinton's Attempt to Combat the Stereotypes and Balance the Double Bind

This section explores the societal sex stereotypes the media perpetuated in respect to Clinton, and her attempt to combat these stereotypes and to navigate the double bind.

1. Media Stereotypes

Like Ann Hopkins in Price Waterhouse, Clinton had an image of being too aggressive and assertive. The media criticized her for it, depicting her as the stereotypical cold "bitch." [65] Similar to Hopkins, she was regularly criticized for being too masculine and "overcompensating for being a woman." [66] Tucker Carlson of MSNBC, when talking about Clinton after being presented with a Hillary nutcracker, [67] stated: "That is so perfect. I have often said, when

---

[63] The fact that candidates have to partake in such interviews with the press is apparent from the controversy that arose when Palin refused to partake in interviews. See Michael Calderone, Sarah Palin Has Yet to Meet the Press, Politico, Sept. 6, 2008, http://www.politico.com/news/stories/0908/13208.html; No Questions: Palin Won't Talk to Press, Huffington Post, Sept. 5, 2008, http://www.huffington post.com/2008/09/05/no-questions-palin-wontt n 124256.html.

[64] See Geo. L.J., supra note 12, at 124.

[65] See Amanda Fortini, The "Bitch" and the "Ditz:" How the Year of the Woman Reinforced the Two Most Pernicious Sexist Stereotypes and Actually Set Women Back, N.Y. Mag., Nov. 24, 2008, available at http://nymag.com/news/politics/nationalinterest/52184/.

[66] Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plurality opinion).

[67] The Official Site of Hillary Nutcracker and Corkscrew Bill: America's Fun Couple, http://www.hillarynutcracker.com/ (last visited Feb. 22, 2008).

she comes on television, I involuntarily cross my legs." [68] In the same vein, on another occasion, he criticized **[*129]** her for overcompensating for her gender when he said, "There's just something about her that feels castrating, overbearing, and scary." [69] Clinton was being criticized for the same aggressiveness and assertiveness that would have been valued in a man as a sign of a strong leader.

Some equated this aggressiveness and assertiveness as evilness and lunacy when seen in Clinton. Along these lines, Chris Matthews called her a "she-devil" and pictured her with horns. [70] Don Imus of MSNBC called her "Satan" 11 times and labeled her a "buck-toothed witch." [71] Political cartoons conveyed the same message by regularly portraying her as a wicked witch out to get Obama. [72] Her aggressiveness and ambition were used to portray her as dishonest, manipulative, and untrustworthy. Ken Rudin of NPR, while a guest on CNN's Sunday Morning, criticized her ambition and aggressiveness by saying, "Hillary Clinton is Glenn Close in Fatal Attraction. She's going to keep coming back, and they're not going to stop her." [73] Bill Mitchell, a CNN political cartoonist, portrayed her as an Obama stalker [74] and a masked, psychotic, chain-saw wielding killer. [75] The New Republic headlined their May 7, 2008 issue with an article on Clinton titled "The Voices in Her Head: Hillaryland's Fatal Psychodrama." [76] They combined it with a cover picture of her looking crazed and added talk bubbles making nonsense claims like "I **[*130]** bowl with Jesus!" and crazed claims like "You'll take away this nomination from my cold, dead hands!" [77] The dedication and steadfastness admired in male candidates was, in Clinton, a sign of the crazed women who would not move on from trying to get the nomination.

Further, Clinton, like Hopkins, was also criticized for not being feminine enough. She was openly criticized for stepping so far out of the female stereotype and the expectation of the domestic sphere tied to it. Pundits regularly portrayed her as the shrill overbearing wife that was getting too uppity and needed to return to her household duties. Glenn Beck called her a "stereotypical bitch" who would drive all men crazy after four years of listening to her "nagging." [78] Marc Rudov of FOX News agreed, stating that when she spoke with her "nagging voice," "men

---

[68] Tucker Carlson on Clinton: "When she comes on television, I involuntarily cross my legs," Media Matters for America (July 18, 2007, 5:06 PM ET), *http://mediamatters.org/items/200707180009*. A comment that he repeated on three separate occasions. Id.

[69] Tucker on Sen. Clinton: "There's just something about her that feels castrating, overbearing, and scary" Media Matters for America (Mar. 20, 2007, 7:32 pm ET) *http://mediamatters.org/mmtv/200703200013*.

[70] Chris Matthews Teased Segment by Asking Whether Clinton is a "She Devil," Media Matters for America (Nov. 19, 2007, 4:07 PM ET), http://mediamatters. org/items/200711190004.

[71] Imus Smeared Hillary Clinton, "that buck-toothed witch, Satan," and Gore, "the phoniest bastard on the planet," Media Matters for America (May 24, 2006, 8:06 PM ET), *http://mediamatters.org/items/200605250001*.

[72] See, e.g., Daniel Kurtzman, Political Cartoon, About.com: Political Humor, *http://politicalhumor.about.com/od/hillaryclinton/ig/Hillary-*Clinton*-Cartoons/Hillary-Melting.-1tN.htm*.

[73] NPR's Rudin: "Hillary Clinton is Glenn Close in Fatal Attraction. She's going to keep coming back and they're not going to stop her", Media Matters For America (April 28, 2008), *http://mediamatters.org/items/200804280002*.

[74] Bill Mitchell, What Does She Want?, CNN (May 22, 2008), http://www. cnn.com/POLITICS/analysis/toons/2008/05/22/mitchell/index.html.

[75] Bill Mitchell, McCain Wins In PA, CNN (Apr. 23, 2008), http://www.cnn. com/POLITICS/analysis/toons/2008/04/23/mitchell/index.html.

[76] Posting of Jeffe Fecke to Shakesville, http://shakespearessister.blogspot. com/2008/04/bitchez-is-cra-zee.html (Apr. 22, 2008).

[77] Id.

[78] CNN's, ABC's Beck on Clinton: "She's the stereotypical bitch", Media Matters For America (Mar. 15, 2007), *http://mediamatters.org/items/20070315001*.

heard, 'take out the garbage.'" [79] Thus, Rudov and Glen relegated Clinton to the role of a housewife who had nothing better to say than "take out the garbage." Such comments denied her the right to be in the public/political sphere and portrayed her as outside her rightful place - the home. Mike Barnicle of the Boston Herald further promulgated this view on MSNBC by stating that Clinton looked "like everyone's first wife standing outside a probate court" in reference to how she looked in her reactions to Obama during a debate. [80] In this statement, he was telling Clinton, and voters, that she was performing her given role as a woman too aggressively and was now the hated, grasping "ex-wife." One of the worst criticisms was made by Charlotte Allen of the Washington Post, who said,

By all measures, [Hillary Clinton] has run one of the worst - and, yes, stupidest - presidential races in recent history, marred by every stereotypical flaw of the female sex… . What is it about us women? Why do we always fall for the hysterical, the superficial and the gooily sentimental? … I don't understand why more women don't relax, enjoy the innate abilities most of us possess (as well as the ones fewer of us possess) and revel in the things most important to life at which nearly all of **[*131]** us excel: tenderness toward children and men and the weak and the ability to make a house a home… . Then we could shriek and swoon and gossip and read chick lit to our hearts' content and not mind the fact that way down deep, we are … kind of dim. [81]

Clinton was being criticized for daring to leave the home and challenging the female stereotype of the good mother and housewife.

In addition, Clinton's appearance was criticized for not being feminine enough. She was ridiculed for her pantsuits and average looks. For example, Cameron Cardow, in his cartoons in the Ottawa Citizen, repeatedly took jabs at Clinton's pantsuits. [82] Similarly, Ron Fournier of the Associated Press accused Clinton of hiding behind her pantsuit on one occasion. [83] The media regularly used the most unflattering pictures of her in the most awkward positions to portray her as ugly and hysterical. [84] They criticized her for being a crazy old hag, rather than a good-looking, feminine woman, as apparent from the constant portrayals of her as a witch. [85] Rush Limbaugh went further to question if Americans would "want to watch a woman get older before their eyes on a daily basis." [86] No one voiced similar concerns about seeing one of the male candidates age before their eyes as president. [87]

---

[79] Fox News graphic: "Rudov: Clinton's 'nagging voice' is reason she lost male vote',Media Matters For America (Jan.4,2008), *http://mediamatters.org/items/200801050004*.

[80] All-male Morning Joe panel laughed as Barnicle compared Clinton to "everyone's first wife standing outside a probate court", Media Matters For America (Jan 23, 2008), *http://mediamatters.org/items/200801230004*.

[81] Charlotte Allen, We Scream, We Swoon. How Dumb Can We Get?, Wash. Post, Mar. 2, 2008, at B01, available at *http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022902992.html*.

[82] Cameron Cardow, Pantsuit, Ottawa Citizen, June 2, 2008, available at http://www.caglecartoons.com/viewimage.asp?ID=[9A3AA335-5393-4B74-B034-C2 A5DA47C569]; Cameron Cardow, Still Moving, Ottawa Citizen, June 4, 2008, available at http://www.caglecartoons.com/viewimageasp?ID=[56D47D7F-E743-4E 2C-979D-184B7BF92EC9].

[83] Rick Klein & Mike Chesney, Clinton Plays Gender Card, ABC News, Nov. 2, 2007, *http://abcnews.go.com/Politics/TheNote/story?id=3811025&page=1*.

[84] Rebecca Traister, The Witch Ain't Dead, and Chris Matthews is a Ding-Dong, Salon.com, Jan. 9, 2008, *http://www.salon.com/mwt/feature/2008/01/09/hillary* nh/.

[85] See sources cited supra notes 70-71.

[86] Taking lead from Drudge, conservative echo chamber hypes Clinton photo, Media Matters For America (Dec. 18, 2007), *http://mediamatters.org/items/20071219* 0002.

Finally, just as Hopkins' success in bringing in the most business was ignored, Clinton's experience and competence were **[*132]** sometimes downplayed; because she was a woman, everything she had accomplished so far was attributed to her husband. She was denied her qualifications and accomplishments. [88] Chris Matthews treated her dismissively and refused to admit that she had any merits of her own. On one occasion, he stated, "Let's not forget, and I'll be brutal, the reason she's a U.S. Senator, the reason she's a candidate for president, the reason she may be a front-runner is … her husband messed around." [89] In fact, Chris Matthews was so dismissive of her that on one occasion he pinched her cheek. [90] It was as if he was telling her, "You're so cute, thinking you can become president." One cannot imagine him doing the same thing to McCain or Obama or any other male presidential candidate. If he had done so, it would surely have been openly criticized by the rest of the media, unlike this treatment of Hillary Clinton that was virtually ignored.

Moreover, Clinton's stereotype as the bitch did not save her from some in the media who sexualized her in order to dismiss her ability and qualifications. [91] For example, a Mad TV spoof **[*133]** music video of the Democratic primaries, set to the tune of Umbrella by Rihanna, showed Clinton as only being in the race in order to sleep with Obama. [92] In the spoof, the Obama impersonator claimed, that "[Hillary's] got her eyes on the prize and I'm talking about my junk." [93] They portrayed her as an unserious contender for the position of president and applied to her the stereotype that, deep down, all women were inherently only motivated by their desire for "the prize."

2. Clinton's Response

---

[87] In fact as males age, society views them as becoming "distinguished" looking while women are seen as aging and losing their looks. Jan Wilson, Men Look Distinguished and Women Have Had a Procedure, Article Alley (Dec. 14, 2008), *http://www.articlealley.com/article* 719271 28.html.

[88] The qualifications she touted were mostly from her time as Senator of New York and First Lady. Thus, she not only spoke of the experience she had gained in Congress, but also actively talked about the experience she had gained as First Lady including her trips abroad and her active involvement in Bill Clinton's administration. See Anne E. Kornblut & Alec MacGillis, Hillary Clinton Embraces Her Husband's Legacy, Wash. Post (Dec. 22, 2007), at A01, available at http://www.washingtonpost.com/wpdyn/content/article/2007/12/21/AR2007122102588.html and Sheey, supra note 16. Examples of major qualifications she claimed from her time as First Lady included creation of the Children's Health Insurance Program, helping bring peace to Northern Ireland in the 1990s, and negotiating open Macedonian borders to refugees of Kosovo. Karen Tumulty et al., Assessing Clinton's "Experience," Time (Mar. 13, 2008), available at *http://www.time.com/time/politics/article/0,8599,1721966-1,00.html*. However, her decision to greatly rely on the experience she gained during her time as First Lady may have led her to face criticisms that her run was a co-presidency, or that her experience only derived from her husband. See, e.g., Kornblut & MacGillis, supra and Terrence Smith, The Clinton Co-Presidency, Huffington Post (Dec. 18, 2007), *http://www.huffingtonpost.com/terrence-smith/the-*clinton-*copresidency* b 77338.html. This can be seen from Maureen Dowd of the New York Times stating, as if discounting Hillary Clinton's abilities and competence, "It's odd that the first woman with a shot at becoming president is so openly dependent on her husband to drag her over the finish line." Maureen Dowd, Op-Ed., Two Against One, N.Y. Times (Jan. 23, 2008), available at http://www.nytimes.com/2008/01/23/opinion/23dowd.html.

[89] After vowing not to underestimate Clinton, mAtthews asserted, "The reason she may be a front-runner is her husband messed around", Media Matters For America (Jan. 9, 2008), *http://mediamatters.org/items/200801090008*.

[90] Posting of Jessica Valenti to Feministing, *http://www.feministing.com/archives/008372.html* (Jan. 9, 2008, 03:46 PM).

[91] This sexualization was different than the sexualization of Palin discussed later. While Palin was sexually objectified, Clinton was rather sexualized in an "unsexy" way consistent with Part III.A.2's forthcoming discussion of the portrayal of Clinton's cleavage by the media as unwanted because of her age. For example, the Mad TV spoof not only referenced the fact that her husband cheated on her, but also portrayed her in "granny" bras and panties. Mad TV (FOX television broadcast Nov. 24, 2007).

[92] Id. This "music video" was not only sexist, but also racist. It subjected Obama to several racial stereotypes as well, such as black men have large genitalia and white women want to sleep with the dangerous, but sexy black man. See id.

[93] Id.

Clinton had to maintain an image of aggressiveness and assertiveness in order to show voters that she had the strength required to be president. She had to show voters that she was qualified and prepared for the position and had the stereotypically masculine qualities associated with the position of president. Especially in light of dismissive comments like Matthews's, which denied her any accomplishment of her own and implied that she could not stand on her own qualifications, Clinton likely understood the need to combat the traditional female stereotype of the soft-spoken, gentle, and sensitive listener, viewed as incompatible with being a strong leader. [94] Clinton may have known that she would have to continue to promote her masculine qualities and tout her experience in order to be considered **[*134]** viable. Thus, in the face of such dismissiveness towards her abilities, Clinton may have decided to continue to be aggressive and begin to actively stress her 35 years of experience and achievements, particularly those from her time as First Lady. [95] To maintain her aggressive image, she made statements such as, "I'm a fighter and I will get up every day in the White House, and I will fight for you." [96] Similarly, her heightened emphasis on her experience was apparent in her release of an advertisement asking whom voters wanted answering that 3 a.m. phone call. [97]

However, Clinton may have come to realize that she may have gone too far with her attempts to combat the stereotype of the vulnerable and weak female. Her proactive performance of comforting strategies to better fit herself into the male-dominated field, may have led her to face another female stereotype. She had become confined to the category of "bitch" and likely felt she had to feminize herself while maintaining her image as aggressive and assertive.

As a result, Clinton may have tried to demonstrate her "warmer, kinder, compassionate side." [98] For example, she made changes in her dress and her behavior. She tried to dress more femininely, particularly by wearing more colors and make-up that matched her clothes. [99] However, her actions were not enough and the media attacked her for these attempts. For instance, the Washington Post criticized her attempts to dress more femininely, accusing her of showing cleavage when she wore a more feminine shirt with a lower cut. [100] The article claimed, "it was startling to see that small acknowledgment of sexuality and femininity." [101] Clinton was blamed for straying from her "desexualized uniform." [102] "The cleavage stirred … discomfort … . No one wanted to see that." [103] "Just

---

[94] Men on the other hand may have more leeway in their performance of the leader role since they are assumed to more easily fit into the role of the strong leader and are not subject to the stereotype that their default role is that of a soft-spoken, gentle, and sensitive listener. Thus, while a woman who is soft-spoken will be automatically assumed to be solely a listener and thus, an ineffective leader, a soft-spoken man is not subject to such an inference. Rather a soft-spoken man may even be admired for the fact that he is soft-spoken while a woman with the same quality is seen as incompetent. For example, during the 2008 election, the fact that Obama was soft-spoken appealed to many voters and many in the media. See Nedra Pickler, Remember Lincoln, Obama Allies Say, Wash. Post (Jan. 16, 2007), available at *http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR200701* 1601168.html and Todd Purdum, Raising Obama, Vanity Fair, (Mar. 2008), available at *http://www.vanityfair.com/politics/features/2008/03/obama200803*. Thus, often men are allowed to openly exhibit qualities that women are forced into hiding.

[95] See Tumulty et al., supra note 87.

[96] Sheey, supra note 16.

[97] Julie Bosman, Clinton on Experience, N.Y. Times (Mar. 1, 2008), available at *http://www.nytimes.com/2008/03/01/us/01adbox.html?scp=9&sq=*clinton*+3+a.m.+* ad&st=nyt.

[98] Sheey, supra note 16.

[99] See Robin Givhan, Hillary Clinton's Tentative Dip into New Neckline Territory, Wash. Post (July 20, 2007), at C01, available at http://www.washingtonpost. com/wp-dyn/content/article/2007/07/19/AR2007071902668.html; Sheey, supra note 16.

[100] Givhan, supra note 98.

[101] Id.

[102] Id.

look away," they encouraged **[*135]** readers. [104] Thus, not only was she criticized for her attempt to feminize herself, but she was also denied the ability to dress femininely because she was too old to be "sexy." [105]

In another attempt to make her image more feminine, Clinton may have even allowed herself to show some emotion by getting misty-eyed the day before the New Hampshire primary. [106] However, the media criticized her for being too emotional with headlines reading: "Clinton Fights Back Tears," "Clinton Gets Emotional," and "Hillary Gets Leaky." [107] Maureen Dowd asked, "Can Hillary Cry Her Way Back to the White House?" [108] One of Clinton's male competitors, John Edwards, attacked her, saying that a president needed "strength and resolve." [109] Thus, at the same time that the media criticized her for being too manly and too cold, the media (and even her opponents) criticized her for being emotional. Clinton was being criticized for being too feminine now. Her tears, which would have been admired in a man as a show of emotion, were criticized as a sign of weakness. [110] She was portrayed as the weak female who was out of **[*136]** her league and had been brought to tears by it. [111] However, this reactionary media criticism may also have arisen due to a potential belief in the media that Clinton was performing, so they treated her worse for it. As Carbado and Gulati state, "to the extent that the outsider is perceived as acting strategically, her actions will be discounted and probably resented. Therefore, the outsider not only has to perform,

---

[103] Id.

[104] Id.

[105] See Robinson, supra note 30, at 28 for a discussion of how females actors in the film industry are subject to age-based role trapping that pressures them into maintaining the "young sexy appearance" as long as possible since as they age, they are regarding as losing sex appeal and thus, lose roles. The same perception of women is true in society at large. As women age, they are considered "unsexy" and expected to hide away their sexuality. Essentially, they are required to present themselves as asexual as apparent from the Washington Post's allegation that Clinton had a "desexualized uniform." Givhan, supra note 98.

[106] See Sheey, supra note 16.

[107] Traister, supra note 83.

[108] Maureen Dowd, Op-Ed., Can Hillary Cry Her Way Back to the White House?, N.Y. Times (Jan. 9, 2008), available at http://www.nytimes.com/2008/01/09/opinion/08dowd.html.

[109] Traister, supra note 83.

[110] For example, while Hillary Clinton was criticized for getting choked up, Former President George H. Bush was admired for his fatherly pride when he sobbed in describing his son, Jeb Bush's, gubernatorial loss in Florida in 1994. Today (NBC television broadcast Dec. 5, 2006). Similarly, George W. Bush became emotional and teared up several times during his presidency, but was overwhelming not criticized for it. Martha Brant, West Wing Story: Bush's Tears, Newsweek(Apr. 3, 2002), available at http://www.newsweek.com/id/63537. One example of such tears was while paying tribute to his father during a recent commencement speech. CBS Evening News (CBS television broadcast Dec. 12, 2008). Rather than being seen as weak or "breaking under pressure" as a women would, his tears were seen by many as a sign of his emotional connection to the nation. Brant supra; Evan Thomas, The Politics of Tears: Clinton is Just the Latest Pol to Use Emotion to Effect, Newsweek (Jan. 9, 2008), available at http://www.newsweek.com/id/88458. Likewise, Ronald Reagan's tearing up was also considered such a show of "warm-hearted sentiment." Thomas, supra. Further, male presidential candidates who have teared up have also faced no criticism. For example, the emotional moments of Republican candidate Mitt Romney, who teared up several times, received much less coverage than Clinton's emotional moment. Id. This differing treatment suggests that men may have a greater ability than women to get emotional without fear of political repercussions.

[111] However, though the media criticized her for her tears, the emotion she allowed herself to show may have actually helped her in gaining the support of women voters who felt a closer tie to her as a result of the emotion she had shown. Karen Breslau, Hillary Tears Up: A Muskie Moment, or a Helpful Glimpse of 'the Real Hillary'?, Newsweek (Jan. 7, 2008), available at http://www.newsweek.com/id/85609. Such voters related to her emotional statement that the election is "about our country. It's about our kids' future. It's about all of us together. Some of us put ourselves out there and do this against some difficult odds." Id. These voters also felt that they were finally seeing the "real Hillary." Id.

but she has to perform well." [112] Such a theory can be supported by media accusations that Clinton faked the tears to get the support of women. [113] For example, in response to her tears, one reporter said, "I'll bet she spent hours thinking about it beforehand. Crying doesn't work in campaigns. Only in relationships." [114]

If Clinton was not performing well, so that the media were able to pick up on the fact that she may have been performing, it was likely due to several factors limiting candidates' abilities to act more femininely or more masculinely. For Clinton, these limiting factors included her age, physical appearance, and core supporters. Clinton's age and looks posed a challenge in her attempts to present a more feminine persona. Her age and figure may have made her unable to attractively wear the more feminine skirt suit and confined her to the pantsuit, thus limiting her ability to feminize her appearance. Her age and looks may also have prevented her from wearing the more form fitting clothes of Sarah Palin or growing her hair longer to appear more feminine.

Additionally, Clinton had to consider her core supporters. To prevent the loss of core supporters, candidates have to be sure that they do not move too radically toward feminization or masculinization. Clinton, however, appears to have been limited not only by her feminist support, but also by her own feminist ideals. **[*137]** It seems likely that because of her own feminist leanings and the fact that many feminists supported her, she had less room to cater to the female stereotype by acting more femininely as she faced losing that core support base. It may also be that Clinton, in order to maintain her feminist base, took part in some acts that contradicted the comforting strategy she had undertaken. [115] For instance, while she attempted to feminize herself, she continued to support women's issues and remained aggressive in order to preserve her position with her core feminist base.

B. Palin's Attempt to Combat the Stereotypes and Balance the Double Bind

As a newcomer to the national political field, Sarah Palin had no existing national media image like Hillary Clinton, but, like Ann Hopkins and Hillary Clinton, she was still subject to the double bind. The role of vice president is seen as requiring masculine qualities, especially because the vice president is understood to be a "heartbeat away" from the presidency. Female candidates, however, also face pressures to exhibit femininity while displaying the required masculine qualities. Palin's decision on how to deal with this double bind differed from Clinton's in that Palin seemed to embrace her femininity and play it up, trying to use it to her advantage. However, Palin was still unsuccessful in her efforts of balancing the double bind. In fact, she was often subject to treatment that derived from female stereotypes, such as objectification and perceptions that she lacked intelligence. Her label of the "Hot VP," which emerged from her own party, exemplified this. [116]

As soon as she came to the national spotlight, Palin was criticized for being a bad mother and neglecting her children (who would take care of her baby with Down syndrome! [117]) to run for **[*138]** vice president. [118] But Palin

---

[112] Carbardo & Gulati, supra note 15, at 1291.

[113] See Traister, supra note 83.

[114] Dowd, supra note 107.

[115] See Carbardo & Gulati, supra note 15, at 1306-07 (discussing how outsiders "who engage in comfort strategies may engage in some visible discomfort strategies to retain status in the outsider community").

[116] See Mark Leibovich, Among Rock-Ribbed Fans of Palin, Dudes Rule, N.Y. Times (Oct. 18, 2008), available at http://www.nytimes.com/2008/10/19/us/politics/19 palin.html?ref=politics (discussing button stating "Proud to be voting for a hot chick."); Average Joe American, http://averagejoeblogs.blogspot.com/2008/09/hot-button.html (Sept. 3 2008, 11:14:00 PM) (providing examples of political buttons including one saying, "From the coldest state comes the Hottest VP.").

[117] See John F. Harris & Beth Frerking, Clinton Aides: Palin Treatment Sexist, Politico, Sept. 11, 2008, available at http://www.politico.com/news/stories/0908/13129. html. For example John Roberts of CNN said, "Children with Down's syndrome require an awful lot of attention. The role of vice president, it seems to me, would take up an awful lot of her time, and it raises the issue of how much time will she have to dedicate to her newborn child?" Id. Similarly, Sally Quinn of the Washington Post said, "Her first priority has to be her children. When the phone rings at 3 in the morning and one of her children is really sick what choice will she make?" Id.

also likely knew that many found her attractive. From the beginning, the media focused on her looks. David Weiner of the Huffington Post talked about her being a "VPILF." [119] A whole website was dedicated to this idea. [120] In what was likely an effort to balance this feminine framing and present herself as an aggressive, but feminine leader, Palin defined herself as a "hockey mom," [121] a "pit bull with lipstick," [122] someone who had been nicknamed "Sarah Barracuda" for her aggressiveness [123] and was an "avid hunter" in her free time. [124] While she presented herself as the experienced maverick governor from Alaska, [125] she likely made sure to maintain a feminine image. At the same time she "tout[ed] her 'executive experience,'" [126] she may have taken steps to dress and appear femininely and retain her image as a mother by bringing her family on stage and, on one occasion, having her youngest daughter recorded saying, "Vote for my mommy and John McCain." [127] She **[*139]** spoke of being a "tough executive" who stopped the "Bridge to Nowhere" and challenged corruption in Alaska, [128] but she simultaneously spent $ 150,000 on wardrobe and make-up to present the image of a stylish, attractive woman. [129]

Further, Palin, probably realizing that many found her attractive, may have regularly winked, waved, and smiled at the cameras and the public in a likely attempt to use her attractiveness to her advantage. [130] She may have tried to

---

[118] See Bob Cusack, Pro-Hillary Clinton Group Decries 'Sexism' at Palin, The Hill (Sept. 2, 2008), available at http://thehill.com/leading-the-news/pro-hillary-clinton-group-decries-sexism-at-palin-2008-09-02.html; Fortini, supra note 64; Posting of Francesca Donner to Front Lines, http://blogs.wsj.com/frontlines/2008/09/01/sarah-palin-mother-of-five-soon-to-be-grandmother-of-one/ (Sept. 1, 2008, 5:46 PM); Sarah Palin, Now starring In "What Kind of a Mother...", http://open.salon.com/blog/heather michon/2008/08/29/sarah palin now starring in what kind of a mother (Aug. 29, 2008, 4:54 PM).

[119] David Weiner, VPILF, Huffington Post (Aug. 29, 2008), http://www.huffingtonpost.com/david-weiner/vpilf b 122404.html. For those who may not be aware VPILF (VP I'd like to fuck) is an offshoot of MILF (Mother I'd like to fuck).

[120] VPilf.com, http://www.vpilf.com/ (last visited Feb. 22, 2008).

[121] Michael Cooper and Elisabeth Bumiller, Alaskan is McCain's Choice; First Woman on G.O.P. Ticket, N.Y. Times (Aug. 29, 2008), available at http://www.nytimes.com/2008/08/30/us/politics/29palin.html; Sinderbrand et al., supra note 17.

[122] Sinderbrand et al., supra note 17; Strange, supra note 17.

[123] Posting of Dan Beucke to Election 2008, http://www.businessweek.com/election/2008/blog/archives/2008/08/mccains vp choi.html (Aug. 28, 2008).

[124] Steve Gorman, Moose Hunter Palin Draws Comedians' Fire, Reuters (Sept. 4, 2008), http://www.reuters.com/article/vcCandidateFeed2/idUSN03334497 20080904.

[125] Beucke, supra note 122.

[126] Robin Abcarian, Sarah Palin Touts Her Executive Experience, LA Times (Sept. 5, 2008), available at http://www.latimes.com/news/politics/la-na-trailpalin5-2008sep05,0,5129232.story.

[127] Ted Anthony, Analysis: GOP Contradicts Self on Palin Family, USA Today (Sept. 3, 2008), available at http://www.usatoday.com/news/politics/2008-09-03-3753354928 x.htm.

[128] Beucke, supra note 122.

[129] See Cummings, supra note 18 and Stein, supra note 18.

[130] See Fortini, supra note 64. A female minority candidate would likely not have the same ability to attempt to use her attractiveness to her advantage because she would not easily fall into the "white" image of attractiveness that is promulgated by the media and into which Sarah Palin easily falls. Thus, in this instance, Palin was benefited by her race because she had the choice to use her good looks to her advantage, an opportunity a female minority candidate may not have. Further, women of different racial backgrounds likely have differing degrees of difficulty in trying to take advantage of their good looks. For example, women of certain minorities are generally viewed as more attractive than women of other minorities because they are perceived

gain supporters through her looks by using the stereotype of a good-looking woman to her advantage. Thus, unlike Clinton, Palin's strategy to combat the stereotypes and double bind she faced may have included pandering to the stereotype [131] at the same time that she tried to present herself as a strong leader. Palin seems to have tried to play into the female stereotype so that she, seeming unthreatening to the current system, would attract voters.

The media and voters did not appreciate her efforts. They became more obsessed with her appearance. There was regular **[*140]** coverage of her wardrobe and make-up, [132] especially her hair. [133] Such concerns were not raised for any of the male candidates in the elections with the same prevalence or popularity. The Boston Herald worried for her "long locks" suffering in her updos. [134] She was criticized for spending such an extravagant amount on wardrobe, [135] but it served to demonstrate how deeply obsessed the media were with what she wore, especially when shows like Access Hollywood were covering her $ 150,000 wardrobe in detail. [136] Further, both the excessive amount spent and the extensive coverage demonstrated that, because she was a woman, Palin had less leeway with her wardrobe. While the male candidates could easily wear the same suit on multiple occasions with no one batting an eyelash, Palin did not have the same freedom. As a female, she would be judged on every wardrobe choice she made. [137] If the media had not criticized her extravagant wardrobe, **[*141]** they would likely have

---

as closer to the "white" standard. Thus, Asian American, bi-racial, and Latina women may be considered sexier than black women. An example of this can be seen in a recent photo-shopped L'Oreal advertisement that featured attractive, African American singer Beyonce Knowles, but that had made her look white by lightening both her skin color and her hair color. Posting of Caroline to She Knows the Buzz, *http://thebuzz.sheknows.com/girls/beyonce-girls/since-when-is-beyonce-white* (Aug. 6, 2008).

[131] Some may have viewed Clinton's emotional tears as pandering to the female stereotype as well. However, it seems more likely that Clinton may have allowed herself to get emotional in an attempt to frame herself in a more feminine way in order to contradict allegations of being too masculine rather than as a strategy of gaining votes by fitting herself in a certain female stereotype, as Palin may have done. Further, it is more likely that Clinton was not trying to pander to stereotypes with her show of emotions because, as a feminist, she is opposed to the promulgation of stereotypes. See Dorothee Benz, The Media Factor Behind the 'Hillary Factor,' Extra!, Oct. 1992, available at *http://www.fair.org/index.php?page=1206* (discussing the Tammy Wynette and tea and cookies statements which are explored more in Part IV.A.1.b dealing with Clinton Hate).

[132] The Huffington Post was even concerned over whether her lipliner was a tattoo or not and the speculation was of course accompanied with a picture slideshow. Anya Strzemien, Is Sarah Palin's Lipliner a Tattoo?, Huffington Post (Sept. 30, 2008), available at *http://www.huffingtonpost.com/2008/09/30/is-sarah-palins-lipliner* n 130352.html.

[133] See, e.g., Willow Lindley & Anya Strzemien, Sarah Palin: A Brief History of Hair, Huffington Post (Oct. 31, 2008), available at http://www.huffingtonpost. com/2008/10/31/sarah-palin-a-briefhisto n 139573.html (including slideshow photo analysis); Willow Lindley & Anya Strzemien, Sarah's Sexy Hair: A Desperate Bid for Votes?, Huffington Post, Oct. 8, 2008, available at *http://www.huffingtonpost.com/2008/10/13/is-sarahs-new-hairstyle-p* n 133048.html (including slideshow photo analysis).

[134] Lauren Beckham Falcone, Stylists to Passe Sarah Palin: Let Your Hair Down, Boston Herald (Sept. 4, 2008), available at *http://www.bostonherald.com/news/us* politics/view.bg?articleid=1116858.

[135] See, e.g., Patrick Healy & Michael Luo, $ 150,000 Wardrobe for Palin May Alter Tailor-Made Image, N.Y. Times (Oct. 22, 2008), available at http://www.ny times.com/2008/10/23/us/politics/23palin.html?fta=y; Stein, supra note 18.

[136] Healy & Michael Luo, supra 135. However, it is also likely that Palin and the Republican Party may have contributed to such criticisms by portraying Palin as the normal, blue-collar, all-American woman, an image contradicted by the $ 150,000 wardrobe. See Palin, Motherhood and Apple Pie, Media Matters for America(Sept. 11, 2008, 3:17 PM ET), *http://mediamatters.org/mmtv/200809110013* (discussing Republican strategist, John Feehery's, statement that Palin represented "motherhood and apple pie and everything good about America.").

[137] There appears to be a social norm that female candidates are expected to not only present themselves in a professional manner as required of male candidates, but also present themselves in a fashionable way (reminiscent of the "professional elegance" standard of the TV station in Craft) or face criticism. See Booth Moore, Sarah Palin's $ 150,000 Wardrobe Malfunction?, LA Times (Oct. 22, 2008, 9:16 AM PT), available at *http://latimesblogs.latimes.com/alltherage/2008/10/palins-economic.html*. This social expectation for women in the public eye to be fashionable is also apparent in the media obsession

criticized her poor wardrobe a la Hillary Clinton and her pantsuits. As a result, Palin, because she could not politically afford to wear the same suit on multiple occasions, was likely compelled to spend more on her wardrobe than her male counterparts.

Additionally, such efforts to play into the female stereotype may have backfired for Palin in that they appear to have increased her objectification by the media, the public, and her supporters. For example, George Gurley of the New York Observer, a Republican and John McCain supporter, wrote that his first thought about Palin was, "I want to have sex with her," before he continued to make even more explicit comments about her. [138] He bemoaned her lack of cleavage during her convention speech, [139] treating her as a sexual object. [140] Further, this sexual objectification led to dismissive treatment. Gurgley said he wanted Palin to take care of him, to bake pancakes for him. [141] He was essentially telling her she was out of place in the political sphere and relegating her back to her "true" role in the domestic sphere. If this was not enough, in reaction to watching one of her old interviews, he dismissively said, "What a delightful nose!," [142] very reminiscent of Matthews pinching Clinton's cheek and, sadly, having the same effect as well. With this statement, Gurgley dismissed Palin. It was as if he were saying, "You are too cute to belong here in the man's world."

Also prevalent was evidence of Sarah Palin's sexual objectification by the public. Such objectification included T-shirts twisting the Republican chant of "Drill, Baby, Drill" into a caricature **[*142]** of her having sex with McCain and another picturing a woman's silhouette next to an oil drill and saying, "I'd drill that." [143] A pornographic film called Nailin' Paylin [144] and a Palin blow-up doll [145] were also made. These characterizations not only sexually objectified Palin, but also played on her position as vice presidential nominee by portraying her as subordinate to the male figure. Thus, her attempt at providing a gender comfort strategy and using it to her advantage failed. As a result, the media, and much of the public, dismissed her as a sex object and did not see her as a viable political candidate.

At the same time, like Clinton, Palin had several factors limiting her performance, specifically her inability to act more masculinely. For Palin this limitation arose from her family circumstances and her support base. As a mother

---

over Michelle Obama's wardrobe. See, e.g., Michelle Obama: A First Lady Fashionista, CBS News (Nov. 7, 2008), available at http://www.cbsnews.com/stories/2008/11/07/earlyshow/main4583142.shtml?source =RSS&attr= 4583142; Booth Moore, Michelle Obama's Inauguration Wardrobe Reviewed, LA Times: All the Rage (Jan. 20, 2009, 12:23 PM PT), available at http://latimesblogs.latimes.com/alltherage/2009/01/michelle-obamas.html; Stalking Michelle Obama's Style, SF Chron: SF Unzipped (Oct. 15, 2008, 10:15 AM), available at http://blog.sfgate.com/chronstyle/2008/10/15/stalking-michelle-obamas-style.

[138] George Gurley, My Vice President, N.Y. Observer (Sept. 16, 2008), available at http://www.observer.com/2008/style/my-vice-president.

[139] Id.

[140] The fact that the media and the public wanted to see the "Hot VP's" cleavage while wanting the cleavage of the "old and ugly bitch" Hillary Clinton hidden away demonstrates the differing female stereotypes the two women candidates were subjected to. It also demonstrates the differing treatment of the two women based on age. While Clinton was too old for the public and the media to see as sexy, Palin seems to have just made it into the category of the "young, sexy female" who is the perfect sex object. See Givan, supra note 99.

[141] Gurley, supra note 138.

[142] Id.

[143] Ann Friedman, Palin Sexism Watch: Sexist Stereotypes Edition, Feministing (Sept. 16, 2008, 3:47 PM), available at http://feministing.com/2008/09/16/palin sexism watch sexist ster.

[144] Nailin' Paylin, Huffington Post (Oct. 24, 2008 2:00 PM), available at, http://www.huffingtonpost.com/2008/10/24/nailin-paylin-another-min n 137592.html (updated Nov. 24, 2008, 5:12 AM).

[145] Jessica Valenti, Palin Sexism Watch: Sex Doll Edition, Feministing (Oct. 13, 2008, 5:11 PM), available at http://feministing.com/2008/10/13/palin sexism watch sex doll ed/.

of five, including a newborn, she was limited in her ability to downplay her motherhood. Having younger children and a baby with Down syndrome ensured that one of the first identifications she would receive would be that of a mother, even if she did not desire motherhood to be one of her prominent identifications. Further, her conservative base also limited her in her ability to act more masculinely. If she behaved more masculinely, not only did she risk losing the support of the conservative women who related to her as a mother and who saw her as one of themselves, [146] but she also risked losing her conservative (and largely sexist) male base. This conservative male base consisted of many men who found her good-looking and objectified her based on her looks. [147] Their objectification limited Palin in how strong and less feminine **[*143]** she could portray herself. [148] Further, they too expected her to be the good mother, the good child-rearer. [149] Therefore, they also limited her masculinization in that respect. Consequently, if she stopped being the "Hot VP" and good mother, she would likely have lost the support of not only these conservative male supporters, but also the conservative female supporters who believed in the female stereotype.

Thus, just as Clinton's masculinization of herself seemed to have gone too far, Palin's feminization of herself seemed to have gone too far, especially in light of her limited ability to masculinize herself. She continued to receive dismissive treatment. Matthews, before a debate, asked if Biden would help Palin with her chair; [150] something that would not be asked if she had been a man and, more importantly, had never been asked about Clinton prior to a debate. Her sexual objectification combined with her often uninformed answers in interviews (such as her failure to know what the Bush Doctrine was [151] and not being able name a single magazine or newspaper she read [152] or another Supreme Court case that she disagreed with other than Roe v. Wade [153]), brought into play the stereotype of the attractive but dumb woman. The media began to call Palin a "bimbo" [154] and a "ditz." [155] Stephanie Miller, host of a nationally syndicated progressive talk radio show, called her an "idiot," a "sack of stupid," and a stupid "Barbie." [156]

Thus, while the stereotype of the good-looking woman and mother may have helped Palin in gaining some votes from conservative women and men who were attracted to her, it hurt women **[*144]** as a whole since her

---

[146] See, e.g., David Jackson, Conservative Women 'So Excited' over Palin, USA Today, Sept. 10, 2008, available at http://www.usatoday.com/news/politics/election 2008/2008-09-09-women N.htm?loc=interstitialskip; Emily Ramshaw, Conservative Women Applaud Choice of Palin, Dallas Morning News, Aug. 29, 2008, available at Denton Record-Chronicle, http://www.dentonrc.com/sharedcontent/dws/news/politics/national/stories/082908dnpoleagle.249380f3.html; Kim Severson, They Raise Children, Pray and Support Palin, N.Y. Times, Sept. 4, 2008, available at http://www.nytimes.com/2008/09/05/us/politics/05women.html.

[147] See Leibovich, supra note 116.

[148] See id.

[149] See id.

[150] A.J.W., Whether Biden Will Help Palin With Her Chair at Debate, Media Matters for America (Oct. 2, 2008, 4:58 PM ET), available at http://mediamatters.org/items/200810020015.

[151] Seth Colter Walls & Sam Stein, Palin's ABC Interview: Stumped on Bush Doctrine, Seems to Contradict McCain on Pakistan, Huffington Post (Sept. 11, 2008 7:13 PM), available at http://www.huffingtonpost.com/2008/09/11/palins-abc-interviewstum n 125818.html (updated Oct. 12, 2008, 5:12 AM).

[152] CBS Evening News (CBS television broadcast Sept. 30, 2008).

[153] CBS Evening News (CBS television broadcast Oct. 1, 2008).

[154] E.g., Ed Schultz, a radio host, used "bimbo alert" in reference to her. Harris & Frerking, supra note 117.

[155] See Fortini, supra note 65; Friedman, supra note 143.

[156] The Stephanie Miller Show (KTLK radio broadcast Nov. 3, 2008). In fact Palin was commonly referred to as "Caribou Barbie." E.g. David Freddoso, Following 'Caribou Barbie,' Nat'l Rev., (Sept. 5, 2008 10:00 AM), available at http://www.nationalreview.com/articles/225546/following-caribou-barbie/david-freddoso.

performance of the stereotype served to confirm it. As a result, the negative inferences that arise from the stereotype will continue to harm future female candidates. [157] Donny Deutsch of CNBC called Palin the "new feminist ideal." [158] He claimed that Palin had figured out what she needed to be a "woman in power:" a "supermom," "sexy," "at the perfect age" (44, an age at which she had experience, but still "physical appeal"), "a lioness," "funny," "real," "rock solid," "feisty," and "smart." [159] He said that 40 years of feminists had not figured out this ideal, but Palin had. [160] He stated Clinton had not figured it out either. [161] She did not wear a skirt, he said. [162] Most damning of all for women in general, Deutsch essentially told women if they wanted to be successful as powerful women in business, they had to adopt the ideal Palin had created. [163] The stereotypes Palin promulgated were taking women a step backwards. Women were being told that in order to be successful, it was necessary that they be good mothers, be attractive, and, most importantly, wear skirts to ensure everyone knew they were "powerful women." [164] Hence, Palin had "reinforced some of the most damaging and sexist ideas of all: that women are undisciplined in their thinking; that women are distracted by domestic concerns or frivolous pursuits like shopping; and that women are not smart enough, or not serious enough, for the important jobs." [165]

Therefore, in the face of the failure of Palin and Clinton to combat sex stereotyping and navigate the double bind effectively, it is evident that presidential politics is an unregulated workplace in which future women candidates will be similarly disadvantaged by facing the double bind and by being expected to play into the female stereotype. Potentially most striking is that, as it currently stands, women in Clinton's and Palin's positions will be required to undertake the extra and difficult task of finding a working balance between the competing pressures of **[*145]** the double bind in the context of presidential politics in order to remain viable candidates.

IV. Criticism: Other Potential Factors Affecting Treatment and Potential Benefits of Sex

Critics of the views promulgated in this paper may argue that factors other than sex were involved in Hillary Clinton and Sarah Palin receiving negative treatment in the media's coverage of their campaigns. For Clinton, they may argue that these factors include Clinton's feminist background, media dislike of her, and her husband's behavior. For Palin, they may argue that these factors include her alleged lack of experience and the poor interviews she gave. These critics will argue that in the absence of sex-based discrimination, Clinton and Palin would still have lost their respective races because of these other legitimate factors. They will argue that, as a result, there is less of a necessity to acknowledge the sex discrimination the candidates received. Additionally, critics may also argue that, if anything, gender helped rather than hurt these women.

A. Applicability of Title VII Motivating Factor Analysis

Under Title VII motivating factor analysis, the employer is allowed a limited affirmative defense under 42 U.S.C. § 2000(e)-5(g)(2)(B), which allows the remedy available to the employee to be decreased when "the same action [would have been taken] in the absence of the impermissible motivating factor." [166] While awards to victims of

---

[157] See Carbardo & Gulati, supra note 15, at 1304-05 (discussing how performance that confirms stereotypes, although it may be to an individual's advantage, will only burden others in the group).

[158] Squawk on the Street (CNBC television broadcast Sept. 5, 2008).

[159] Id.

[160] Id.

[161] Id.

[162] Id.

[163] Id.

[164] Id. (emphasis added).

[165] Fortini, supra note 65.

[166] *Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003).*

illegal discrimination typically include damages, in the face of the employer's limited affirmative defense under 42 U.S.C. § 2000(e)-5(g)(2)(B), victims' remedies are limited to "declaratory relief, certain types of injunctive relief, and attorney's fees and costs." [167] Critics could use the existence of this limited affirmative defense to argue that there need not be acknowledgment of the media's negative treatment of Clinton **[*146]** and Palin: although sexist motivations may have come into play, other legitimate factors would still have led Clinton and Palin to lose their respective races in the absence of sexist treatment. They may argue that the legitimate factors that contributed to Clinton's negative treatment by the media included her feminism and feminist support, the prior media dislike of her, and her husband. For Palin, critics may argue that the legitimate factors were her lack of experience and her poorinterviews. Therefore, critics may claim that there is less of a need to acknowledge the sexist treatment of either candidate because the harm of the sexist treatment is not as great as it would have been if sex had been the sole motivating factor for their negative treatment and the respective loss of the presidency or the vice presidency.

However, even if the critics are correct that other legitimate factors existed, the existence of the other legitimate factors does not mean that the sex stereotyping that occurred did not matter or did not play a role. Under 42 U.S.C. § 2000(e)-2(m), mixed-motive Title VII cases are allowed to stand. [168] Thus, although the remedy is different if an employer would have made the same adverse decision in the absence of considering sex, the employer is still liable for illegal discrimination if such an illegitimate consideration came into play. [169] Legitimate reasons for negative treatment of the employee do not protect employers from a finding of illegal discrimination. The Supreme Court affirmed this in Desert Palace, Inc. v. Costa. [170]

In Desert Palace, Catharina Costa, a warehouse worker and heavy equipment operator, had many problems with co-workers and management. [171] She was finally fired after she got into a physical fight with a co-worker. [172] However, while working she had been stalked by a supervisor, more harshly punished than male workers for similar conduct, offered less overtime than male workers, and endured sex-based slurs. [173] The Supreme Court affirmed that this was a mixed motive case and, thus, affirmed **[*147]** the district court's jury ruling that the employer was liable for gender discrimination. [174] As a result, under Desert Palace, an employer will be liable as long as the employer "used a forbidden consideration with respect to 'any employment practice.'" [175] Therefore, under Title VII motivating factor analysis, even if sex stereotyping was not the motivating factor for the negative treatment, as long

---

[167] *Id. at 94.* For a direct statement of the law, see 42 U.S.C. § 2000(e)-5(g)(2)(B) (2007) (providing that: (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).).

[168] 42 U.S.C. § 2000(e)-2(m) 2007 ("except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") (emphasis added); *Desert Palace, 539 U.S. at 94.*

[169] *Desert Palace, 539 U.S. at 97.*

[170] *Id. at 90.*

[171] *Id. at 95.*

[172] Id.

[173] *Id. at 96.*

[174] *Id. at 101-02.*

[175] *Id. at 98.*

as it was a factor, it constitutes discrimination. Hence, even if the candidates still would have lost in the absence of the discriminatory treatment, gender, at the very least, still played a role in their increased negative treatment. Thus, it is appropriate to consider the treatment of the candidates as discriminatory and to acknowledge that discrimination through counter-speech. [176] Further, it is appropriate to use counter-speech to acknowledge and discuss this discriminatory negative treatment because these "legitimate" factors were interwoven with gender and arose from sex-based discrimination as discussed below in the following subsections. Therefore, the legitimate factors, in reality, also work to demonstrate that sex was an influential factor in the media treatment of these candidates.

1. Clinton:

Critics may consider Clinton's feminism and feminist support, the prior media dislike of her, and her husband, as legitimate factors that contributed to her negative treatment by the media.

a. Feminist Background and Leanings

Clinton was often criticized for her feminist background and her support for women's issues. Thus, according to some, these feminist ideals and goals may have played a role in the negative treatment she received. For example, Marc Rudov on The O'Reilly Factor stated that:

"Of course, the main problem I have is if a woman has a female agenda. If she doesn't have a female agenda, if she just wants to be an executive for all the people, then all I care about is if she's qualified. And I have no qualms about having **[*148]** a female president. But if we take Hillary Clinton, she specifically does have a female agenda." [177]

Thus, some people appeared to have a problem with the fact that Clinton promoted women's issues and rights. This view was sexist in itself because it required a female candidate to abandon women's rights in order to be seen as a viable candidate. In fact, it seems as if a male candidate may have an easier time raising women's issues than a female candidate. His efforts are more likely to be seen as those of an "executive for all the people" rather than a "female agenda," solely because he is a man. Thus, it cannot as easily be said that he is violating his gender stereotype and he cannot be accused of trying to advance himself, or others like him, by attempting "to level the playing field." [178]

b. Clinton Hate

Others may argue that the negative media treatment of Clinton developed from the media's dislike of her from her husband's time in office and from the fact that, during that time, she became "one of the most demonized politicians

---

[176] See discussion infra Conclusion.

[177] Ann Friedman, Hillary Sexism Watch: 'Female Agenda' Edition, Feministing (Mar. 19, 2008), available at *http://feministing.com/2008/03/19/hillar* sexism watch female age/.

[178] In a similar vein, candidates who are racial minorities will be criticized if they are seen as supporting minority issues and having, for example, an "African-American agenda" rather than being an "executive for all the people." Thus, like women who face pressures not to focus on women's issues, minorities face pressures not to focus on minority issues. Like Obama, they are required to appear "post-racial," supporting "American issues" rather than "African-American issues." Andrea Billups & David R. Sands, Obama Term Expected to Be Post-racial, Wash. Times, Nov. 9, 2008, available at *http://www.washingtontimes.com/news/2008/nov/09/obama-presidency-expected-to-be-post-racial/*. To be successful they must avoid the "race-conscious campaign" and tout the election as a "color-blind election." Id. Thus, like the female and male candidates above, a white candidate will have greater ability to raise racial issues than a minority candidate, as can be seen from the failure of Jesse Jackson and Al Sharpton. Id. This outcome is racist in itself because minority candidates must downplay racial issues in favor of viability. Further, this result suggests that female minority candidates will have the additional pressure and 'extra work' of not only appearing "post-feminist," but also "post-racial" in order to be successful.

in America." [179] However, this media dislike arose due to her failure to follow the traditional female stereotype during her husband's run for office and his terms in office. [180] For example, she was criticized for **[*149]** openly speaking out against the female stereotype. [181] Criticism of Clinton began from the moment she stated, in January of 1992 during an interview with 60 Minutes, that she was "not some little woman standing by my man like Tammy Wynette," the country music singer-songwriter responsible for the song "Stand by Your Man. [182] Wynette herself responded by called Clinton a bitch. [183]

This dislike and criticism only grew after subsequent statements and actions, like her statement that instead of focusing on her career, she "could have stayed home and baked cookies and had teas." [184] Further, Clinton garnered criticism for performing against the female stereotype by taking an active role in her husband's administration. From the beginning of Bill Clinton's administration, Hillary was involved both openly and behind the scenes in major matters. [185] For instance, she played a central role in developing a health care reform plan and was blamed when it failed. [186] She was also known for making trips abroad in order to make ties with other countries and to speak out against social justice issues, particularly women's issues. [187] This only increased criticism that she was a "radical feminist." [188] Thus, even if the negative media treatment of Clinton during the 2008 election had not been specifically gender based, it would still have originated in sexism if it resulted from the generalized dislike for her that derives from Hillary's past performance against the female stereotype.

c. Bill as Liability

Additionally, critics may argue that another factor that led to Hillary Clinton's increased negative treatment was the prominent role in her campaign played by her husband, Bill Clinton, who was also a very divisive figure and who made various controversial statements during the campaign. [189] He was accused of being **[*150]** out of control (such as arguing with reporters and lashing out at Obama) and dragging her campaign down. [190] However, this heightened coverage of Bill Clinton and the media obsession with his statements was sexist in and of itself as it

---

[179] Janet Hook & Mark Z. Barabak, Clinton Winning over the Skeptics: The Demonized Image Fades When Voters Are Reintroduced to Her, LA Times, Oct. 8, 2007, at A-1, available at http://articles.latimes.com/2007/oct/08/nation/na-dems8.

[180] See Benz, supra note 131.

[181] Id.

[182] Id.

[183] Tammy Wynette & the KLF, An American In Mumu Land, Entm't Weekly, Feb. 7, 1992, available at http://www.ew.com/ew/article/0,,309431,00.html.

[184] Benz, supra note 131.

[185] See Smith, supra note 88.

[186] See Kornblut & MacGillis, supra note 88 and Smith, supra note 88.

[187] See Kornblut & MacGillis, supra note 88.

[188] Benz, supra note 131.

[189] Don Frederick, Bill Clinton in the Wilderness, LA Times, Feb. 15, 2008, at A-18, available at http://articles.latimes.com/2008/feb/15/nation/na-trailvanish15. See Peter Nicholas, Some Fear the Other Clinton's Behavior May Hurt the Party, LA Times, Jan. 25, 2008, at A-25, available at http://articles.latimes.com/2008/jan/25/nation/na-clinton25; Sheey, supra note 16; The Bill Clinton Factor: Boon or Liability, ABC News, Jan. 21, 2008, http://abcnews.go.com/WN/Story?id=4167485&page=1 [hereinafter Bill Clinton Factor].

[190] See Peter Nicholas, Some Fear the Other Clinton's Behavior May Hurt the Party, LA Times, Jan. 25, 2008, at A-25, available at http://articles.latimes.com/2008/jan/25/nation/na-clinton25; Sheey, supra note 16; The Bill Clinton Factor: Boon or Liability, ABC News, Jan. 21, 2008, http://abcnews.go.com/WN/Story?id=4167485& page=1 [hereinafter Bill Clinton Factor].

arose from the husband-wife relationship. [191] There was not similar heightened coverage of the other candidates' spouses. Rather, Cindy McCain and Michelle Obama, were portrayed as playing supportive roles for their husbands instead of playing major roles in defining their husbands. [192] But by labeling Bill as a "liability" [193] for her, the media were saying that Hillary could only be defined through her husband.

In fact, some members of the media alleged that Clinton's run was a co-presidency or just another (Bill) Clinton presidency. [194] Thus, they were also denying her qualifications and claiming that, in actuality, Bill Clinton was running for a third term; but, facing term limits, was campaigning under Hillary's name. [195] No such allegations of co-presidencies were made about any of the male presidential candidates. Rather, while Clinton's husband had been portrayed as the force behind her, **[*151]** the media relegated Michelle Obama and Cindy McCain to secondary roles to their husbands and flippantly subjected them to female stereotypes. [196]

2. Palin:

Critics may consider Palin's lack of experience and her poor interviews as legitimate factors that contributed to her negative treatment by the media.

a. No Experience

Some critics may argue that a factor that led to increased negative treatment of Palin is the fact that many considered her to have little or no experience necessary for the position of vice president. She was particularly criticized for having little foreign policy experience. [197] Palin was ridiculed for claiming foreign policy qualification

---

[191] Note, it does not matter that Bill Clinton is a former president because the media focus was on him as Hillary's husband. They claimed he was a liability as her spouse, not as a former president; the media was directly tying him into her qualifications while the female spouses were only portrayed as a benefit to the candidates.

[192] See Jill Lawrence, Michelle Obama: 'I Don't Want to Be a Distraction,' USA Today, July 14, 2008, available at http://www.usatoday.com/news/politics/election 2008/2008-06-29-MichelleObama N.htm; Jill Lawrence, The Quiet Force in McCain's Campaign, USA Today, July 14, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-04-14-cindy-mccain N.htm [hereinafter Lawrence, Quiet Force].

[193] See, e.g., Frederick, supra note 189; Bill Clinton Factor, supra note 190.

[194] See, e.g., Patrick Healy, For Clintons, Delicate Dance of Married and Public Lives, N.Y. Times, May 23, 2006, available at http://www.nytimes.com/2006/05/23/nyregion/23clintons.html; Kornblut & MacGillis, supra note 88; Smith, supra note 88; Karen Tumulty, Hillary: Love Her, Hate Her, Time, Aug. 20, 2006, available at http://www.time.com/time/magazine/article/0,9171,1229103-1,00.html; Bill Mitchell, Two for One, CNN, May 9, 2008, available at http://www.cnn.com/POLITICS/analysis/toons/2008/05/09/mitchell/index.html.

[195] See Cam Cardow, Hillary, Ottawa Citizen, May 22, 2007, available at http://www.caglecartoons.com/viewimage.asp?ID=[95450750-AF29-40C3-ABAA-6DAD1AE6D8FA].

[196] For example, the media and the public were obsessed with Michelle Obama's wardrobe and fashion sense rather than her accomplishments. See, e.g., Guy Trebay, She Dresses to Win, N.Y. Times, June 8, 2008, http://www.nytimes.com/2008/06/08/fashion/08michelle.html? r=1; Michelle Obama: First Lady of Fashion, ABC News, http://abcnews.go.com/GMA/popup?id=5322917 (last visited Oct. 10, 2011); Mrs. O, http://www.mrs-o.com (last visited Oct. 10, 2011). Further, Cindy McCain was often derogatively portrayed as a "Stepford wife." See, e.g., Matthew Balan, CNN's Carol Costello: Cindy McCain 'Stepford Wife', NewsBusters (May 22, 2008, 3:45 PM), http://newsbusters.org/blogs/matthew-balan/2008/05/22/cnn-s-carol-costello-cindy-mccain-stepford-wife; Lawrence, Quiet Force, supra note 192. Additionally, the coverage they received was more gendered than that which Bill Clinton received. For example they received Vogue covers while Bill Clinton received heightened coverage of his campaigning. See Balan, supra.

[197] See Kate Linthicum, Republican Senator is No Fan of Palin, L.A. Times, Sept. 19, 2008, available at http://articles.latimes.com/2008/sep/19/nation/na-trail hagel19.

because of Alaska's proximity to Russia - because Russian land could be seen from an island in Alaska. [198] Some even disparaged her for only getting her passport during the past year. [199] Further, many feared that if McCain died, she would not be qualified to be president. [200] Critics may argue that **[*152]** this only added to the negative criticisms that arose from her qualifications.

However, such criticisms of her lack of experience also had a sexist undertone. After all, she was not the first candidate to run in a presidential race with no foreign policy experience. Bill Clinton, being governor of Arkansas before his run for president, similarly had little to no foreign policy experience. [201] George W. Bush also had little to no foreign policy experience when he ran in 2000 and, when speaking on foreign policy, he made similar types of gaffes as Palin. [202] For example, he said he enjoyed meeting a foreign minister from Slovakia who had come to Texas; in reality, he had met the prime minister of Slovenia. [203] On other occasions, he said, he would have "a foreign-handed foreign policy" [204] and that the "foreign policy stuff was a little frustrating." [205] He continued to make such gaffes before his second bid for election as well. For example, in 2003, he said: "This very week in 1989, there were protests in East Berlin and in Leipzig. By the end of that year, every communist dictatorship in Central America had collapsed." [206] Jimmy Carter and Ronald Reagan (who was even called "an amiable dunce" once [207]) were also among those who had no foreign policy experience. [208] Therefore, if it is acceptable for a winning presidential candidate to lack foreign policy experience, Palin's heightened negative treatment could not have been the result of this. This is especially true because she was running for the subordinate position of vice president, even if there was a chance that she might become **[*153]** president at some later point. This disparity in treatment between Palin, the inexperienced vice presidential nominee, and inexperienced male presidential candidates clearly suggests that gender played a role in the heightened negative treatment she received from the media.

b. Poor Interviews

---

[198] See, e.g., Cooper & Bumiller, supra note 121; Linthicum, supra note 197; Greg Mitchell, Cindy McCain on ABC Today: Palin Has National Security Experience Because Alaska Is Close To Russia, Huffington Post (Aug. 31, 2008, 10:12 AM), http://www.huffingtonpost.com/greg-mitchell/cindy-mccain-on-abctoday b 12 2759.html.

[199] Linthicum, supra note 197.

[200] See, e.g. Thomas B. Edsall, The Palin Plunge: Voters Sour on McCain VP Pick, Huffington Post (Oct. 18, 2008, 4:58 PM), http://www.huffingtonpost.com/2008/10/18/the-palin-plunge-voters-s n 135857.html; CBS News RAW: Matt Damon Rips Sarah Palin (CBS web broadcast Sept. 10, 2008), http://www.cbsnews.com/video/watch/?id=4435771n. (footage of Matt Damon calling Palin's run a "bad Disney movie" and expressing fear at the thought that if McCain died then Palin would take over).

[201] See, e.g., Clay Waters, Sarah "No Foreign Policy Experience" Palin - But What About Bill?, Times Watch (Oct. 1, 2008, 5:41 PM), http://www.mrc.org/timeswatch/articles/2008/20081001054155.aspx; Judy Woodruff & Bruce Morton, Bush Lacks Gore's Foreign Policy Expertise: How Much International Experience Have Past Presidents Had?, CNN (June 24, 1999, 1:43PM), http://www.cnn.com/ALL POLITICS/stories/1999/06/24/president.2000/foreign.policy/index.html.

[202] See Woodruff & Morton, supra note 201.

[203] Id.

[204] Jacob Weisberg, The Complete Bushisms, Slate (Jan. 20, 2009, 3:48 PM), http://www.slate.com/articles/news and politics/bushisms/2000/03/the complete bushisms.html.

[205] Id.

[206] President George W. Bush, Address at the National Endowment for Democracy Anniversary Dinner (Nov. 6, 2003) in Lend Me Your Ears: Great Speeches in History 578, 581 (William Safire ed., 3d ed. 2004) (emphasis added).

[207] Fortini, supra note 65.

[208] Woodruff & Morton, supra note 201.

Critics may also argue that another factor that led to Palin's increased negative treatment was the public perception of her as unintelligent, due in large part to the uninformed and unresponsive answers she gave in interviews, particularly her interviews with Katie Couric of CBS Evening News. For instance, during an interview with Couric, Palin, when asked, could not name the title of a single magazine or newspaper she read to stay informed. [209] In another Couric interview, Palin misunderstood the economic bailout and began talking about how it was about healthcare reform, job creation, spending reductions, reducing taxes, and trade. [210] While speaking with Couric, Palin was also unable to name any other Supreme Court cases other than Roe v. Wade with which she disagreed. [211] In an interview with Charlie Gibson of ABC News, when asked if she supported the Bush Doctrine, her answer made it clear that she did not know what the doctrine was, forcing Gibson to define it for her. [212] Many perceived these gaffes as a sign of her lack of intelligence. Further, in the eyes of many people, her claims to Gibson and Couric that Alaska's proximity to Russia and Canada gave her foreign policy experience [213] were also seen as signs of stupidity. In particular, many people interpreted those statements as stupid because she replied evasively when Gibson asked her what insight that proximity gave her into Russian actions; she said, "They're our next door neighbors. And you can actually see Russia from land here in Alaska." [214]

With such faux pas, Palin may have drawn negative attention and coverage by making others think she was unintelligent. However, much of the negative media treatment that Palin received **[*154]** throughout the election criticizing her intelligence was, in fact, gendered in nature. This demonstrates that sexism was influencing criticisms of her intelligence. That is particularly apparent in the fact that rather than being treated as solely unintelligent, she was treated as the particularized female stereotype of the "ditz" as discussed in Part III.B. Not only was she considered stupid or dumb as Bush often had been, but criticisms of her stupidity were more often along the lines of gendered terms such as bimbo, [215] ditz [216] or Barbie. [217] One online article from the National Ledger gave Palin her own doctrine, the "Bimbo Doctrine." [218] Thus, she was not only criticized as stupid, but was also criticized as the stereotypical good-looking, but stupid woman.

B. Potential Benefits of Sex: Voters Voting Based on Gender

This section will explore and respond to critics' potential arguments that gender helped rather than hindered Clinton and Palin in the 2008 election. It will particularly look at the benefits that the candidates' may have received because of their gender from voters of a particular gender.

1. Female Voters

---

[209] CBS Evening News, supra note 152.

[210] CBS The Early Show (CBS television broadcast Sept. 25, 2008).

[211] CBS Evening News, supra note 153.

[212] Walls & Stein, supra note 151.

[213] Id.; CBS Evening News: Exclusive: Palin on Foreign Policy (CBS television broadcast Sept. 25, 2008).

[214] Walls & Stein, supra note 151.

[215] See Harris & Frerking, supra note 117.

[216] See Fortini, supra note 65; Friedman, supra note 143.

[217] See supra note 156 and accompanying text.

[218] Jackson Simpson, The Sarah Palin Bimbo Doctrine: Hillary Clinton Won't Share Stage, Nat'l Ledger (Sept. 17, 2008), *http://www.nationalledger.com/news-tech/the-sarah-palin-bimbo-doctrine-425628.shtml*.

A potential benefit that both Clinton and Palin were able to reap was that certain women voters supported them because of their gender. [219] For Clinton, many women who supported women's rights and advancement flocked to support her, instead of her black male competitor, with the hope of seeing the first female president inaugurated. [220] For Palin, conservative women flocked to support her because they saw her as one of their **[*155]** own. [221] They could relate to her as a church going, middle-class mother and sympathize with her for having a child with a disability, a pregnant daughter, and a son being deployed to Iraq. [222]

However, even though Clinton and Palin may have benefited from being women, this does not justify the media disadvantaging them by subjecting them to stereotypes and pressuring them with the double bind. It is a fallacy that just because someone received a benefit, they cannot claim discrimination. For example, returning to Ann Hopkins and Price Waterhouse, if she had been hired through affirmative action, that benefit would not prevent her from being subject to discrimination once she began working at the firm. In this hypothetical, just because Ann was hired in part because she was a woman, she is not deprived of Title VII protection from discriminatory sex stereotyping or other protections such as the ban on sexual harassment once hired. Similarly, here the benefits Clinton and Palin may have received from being women does not mean they were not subject to discrimination.

Moreover, the fact that women are voting in support of a female candidate partially, primarily or wholly because of her gender demonstrates that women's views are not being heard equally in the current political environment. [223] If women's positions in general were not disadvantaged in the political realm, women would not feel an urgency to elect the first female president/vice president or "one of their own" to office. Thus, the supposed benefit to female candidates cannot be taken in isolation, **[*156]** but must be considered in light of a long history of subordination and disadvantagement of women.

Further, it is important to consider the racial aspects of such a potential benefit. If Clinton and Palin did receive a benefit from the support of certain women voters because of their gender, an interesting thought is whether a female minority candidate in the same position would have received a similar benefit. It seems that any benefit that a minority woman may have received would be more limited because some women voters take the candidate's race into consideration as well when making their decision. In particular, some white women may let their concerns for race outweigh their desires for gender advancement. As a result, while Clinton and Palin, as white women, may

---

[219] See Kay S. Hymowitz, Sexism Isn't Holding Hillary Back, City J. (Apr. 28, 2008), http://www.city-journal.org/2008/eon0428kh.html.

[220] See Stephen Braun, Clinton Is Happy to Play the Gender Card, L.A. Times, Apr. 7, 2007, at A2, available at http://articles.latimes.com/2007/apr/07/nation/na-hillary7 (stating, for example, that she had the support of NOW and Emily's List); Amanda Fortini, The Feminist Reawakening: Hillary Clinton and the Fourth Wave, N.Y. Mag., Apr. 21, 2008, available at http://nymag.com/news/features/46011.

[221] See Jackson, supra note 146; Ramshaw, supra note 146; Severson, supra note 146; Red State Feminists, http://redstatefeminists.org (last visited Oct. 12, 2011).

[222] See Jackson, supra note 146; Ramshaw, supra note 146; Severson, supra note 146.

[223] For example, this is apparent from the very low number of women compared to men in the national political field. In 2009, only 17 out of 100 senators were women. Ann Friedman, Some Minor Gains for Women in Politics, Feministing (Nov. 5, 2008), http://www.feministing.com/archives/012014.html. Similarly, only 74 out 432 members of the House of Representative were women and only 8 governors were female. Id. This representation was even lower for female minorities. For example, the House of Representatives only had 12 African American women, 7 Latina women, and 2 Asian American women. Id. More importantly, numbers since 2008 have not dramatically changed. Currently, there are 17 female senators,76 female members of the House of Representatives, and 6 female governors. Jennifer E. Manning & Colleen J. Shogan, Cong. Research Serv., Women in the United States Congress: 1917-2012, at 107 (2012); Karl Jurtz, How Many Women Governors? v3 2011, The Thicket at StateLegislatures (Jan. 26, 2011) http://ncsl.typepad.com/the thicket/2011/01/how-many-women-governors-v3-2011. html.

have received the support of women from all racial and ethnic groups, [224] a minority female candidate seems more likely to have a base of support from racial and ethnic women minorities rather than all women.

2. Male Voters

Additionally, critics will argue that a potential benefit that Sarah Palin was able to take advantage of was that certain male voters supported her because of her gender. She received the support of some men because of her good looks and the fact that these men were attracted to her. [225] However, the critics' argument is flawed because Palin did not receive any real benefit from these male supporters who only contributed to her sexist treatment by sexually objectifying Palin. These supporters came to her rallies to look at her. [226] They spoke about how hot she was and how much she turned them on. [227] Some went so far as to masturbate while at her rallies. [228] Thus, their behavior not only subjected Palin to sexist treatment, but also aided the media in engaging in sexist treatment because Palin's supporters were **[*157]** already doing it. In reality, because their support was based in sexism, these voters served to disadvantage Palin by subjecting her to more sex stereotyping.

V. Conclusion

This paper argues that given the similarity of presidential elections to an interview for a job and the fact that the positions of president and vice president are jobs in the federal government, Title VII workplace discrimination ideas can be applied to presidential elections. Particularly, the media's treatment of the female candidates in the 2008 election allows for exploration of sex discrimination in this context. Thus, this paper demonstrates that the media's sexist treatment of Hillary Clinton and Sarah Palin during the 2008 election coverage and commentary led to discriminatory sex stereotyping reminiscent of Title VII sex discrimination.

In spite of this, I do not argue for a legal remedy or the extension of Title VII protection to political campaigns. Instead, I acknowledge that potential legal remedies will raise First Amendment concerns as a defense to the media's conduct. Opponents of legal remedies will argue that the public interest in free press and free political speech outweighs concerns of discrimination against presidential candidates subject to sex stereotyping. Since the Supreme Court has upheld the importance of political speech and advocacy whether in the form of advocating action or just communicating facts as the media do, [229] critics will argue that the media's coverage and commentary of presidential campaigns and candidates [230] is subject to stringent First Amendment protections. Thus, they argue that if legal action is taken to prevent discriminatory sex stereotyping, it will have a chilling effect

---

[224] See Romano, supra note 1 (including an example of Clinton receiving support from Pakistani women). Further, looking at the Democratic primary exit polls, the numbers show that the majority of Latina women voted for Hillary Clinton, however, the majority of African American women voted for Obama. See, e.g., CBS News, Behind the Clinton-Obama Draw, CBS News: Politics (June 18, 2009, 6:22 PM), *http://www.cbsnews.com/2100-250* 162-3795497.html.

[225] See Leibovich, supra note 116.

[226] Leibovich, supra note 116.

[227] David Rothmiller, Palin's Male Supporters Getting Harder, Policywanker (Oct. 22, 2008, 1:27 PM), *http://policywanker.blogspot.com/2008/10/palins-male-supporters-getting-harder.html* (post of an Associated Press article).

[228] Id.

[229] Laurence H. Tribe, Constitutional Choices 201 (1985) (citing *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982)).*

[230] Critics will argue that since advocacy is protected as well as communicating fact, political commentary by the media is protected as well and thus, no action should be taken to address sex stereotyping in either the media coverage or the commentary.

on free speech by suppressing political speech. Further, it will disallow the media from adequately performing its First Amendment-based purpose of being a check on the government. [231]

[*158] However, the public interest in free speech does not mean that the discrimination should be ignored. My proposal to acknowledge the costs and burdens imposed on women by this discriminatory treatment does not threaten any of the First Amendment values served by the media. Rather, my proposal is to attempt to achieve recognition of discriminatory sex stereotyping as a function of the First Amendment. I argue that, because the media play a key role in presidential elections, [232] an attempt must be made to make the public aware of this discriminatory sex stereotyping through counter-speech. [233]

"No candidate can succeed without the press." [234] The media have great influential power over undecided voters who are important in determining the outcome in presidential elections. [235] Thus, if the media are supposed to be the source of "truth," it is apparent that a problem exists when the media promote sexist views in their coverage of the candidates. Clearly, certain groups of people will take these "untruths" of the media as true, which influences their votes. Therefore, at the very least, the public should be aware that the media perpetuated and engaged in sex stereotyping and did not promote the "truth" in relation to the female candidates in the 2008 presidential election. Since the public cannot hold the press accountable, [236] these "untruths" need to be recognized at least through counter-speech such as this paper.

Thus, people who agree that treatment of the female candidates was based upon discriminatory sex stereotyping can partake in counter-speech in order to protest and call out the media for promulgating societal sexist stereotyping and in order to produce **[*159]** change. Some of the most effective forms of counter-speech may be through blogs (particularly, popular mainstream blogs such as the Huffington Post and through niche blogs such as Feministing) and other online forums, as well as vocalized protests from organized groups like Media Matters for America and the National Organization of Women ("NOW"). Supporters of effected candidates, women's rights supporters, and media watchdogs can take part in vocal and active counter-speech in order to draw attention to the need for change in the media coverage and begin that change.

For instance, counter-speech by such groups resulted in what little mainstream recognition there has been of Clinton's sexist treatment. Clinton supporters, women's rights supporters [237] and groups (including NOW [238]), and

---

[231] See Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 634-35 (1975). Since few can participate in government, the media functions as a watchdog on the government.

[232] See Thomas E. Patterson, The Miscast Institution, in Media Power in Politics 202, 204 (Doris A. Graber ed., 5th ed. 2007).

[233] According to proponents of the First Amendment, to counteract false speech, more speech is needed rather than government regulation:

To courageous, self reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927). This is the doctrine of counter-speech.

[234] Patterson, supra note 232, at 204.

[235] See Geo. L.J., supra note 12, at 124.

[236] See Patterson, supra note 232, at 206.

[237] See, e.g., Hillary Sexism Watch, Feministing, *http://www.feministing.com/cgi-bin/movabletype/mt-search.fcgi?IncludeBlogs=2&search=%22hillary+sexism+* watch%22 (last visited Oct. 12, 2011); Clinton/Palin Sexism Watch, Shakesville, *http://shakespearessister.blogspot.com/2008/09/*clinton-*sexism-watch-111-palin-sexism.html* (last visited Oct. 12, 2011).

media watchdogs (including Media Matters for America [239]) actively argued, particularly online, that she was receiving sexist treatment during the campaign. Although these concerns were not acknowledged at all in the mainstream until the race was over, [240] and even then minimally, this counter-speech did lead to official recognition of sexist treatment, though late, by the Democratic Party. Finally, on June 1, 2008, when Clinton no longer had any hope of the presidency, the Democratic Party acknowledged that she had faced sexist treatment. It was only then that Howard Dean, Chair of the Democratic National Committee, spoke out about her treatment:

This article has demonstrated that a substantive engagement with the challenges posed by transgender identities and experiences can transform feminist praxis in productive ways. Transgender identities are not, as premised by VRR, a third sex that can be neatly added alongside normative gender categories without fundamentally altering the existing formulation. Instead, they call into question the borders that differentiate male from female and make visible the demanding work of **[*160]** policing those boundaries, th There has been an enormous amount of sexism in this campaign on the part of the media, including the mainstream media… . There have been major networks that have featured numerous outrageous comments that if the words were reversed and they were about race, the people would have been fired. [241]

Further, these groups' active criticism of Chris Matthews and Keith Olbermann led both anchors to be demoted from being hosts of MSNBC's major political coverage for the remainder of the election due to their biased coverage. [242]

Similar to Clinton supporters and such groups, Republicans also used counter-speech. From the beginning, Republican officials were vocal about alleged sexist treatment of Palin. [243] For example, less than a month after Palin's nomination, Jane Swift, the Republican former Governor of Massachusetts, stated that Palin was subject to "an outrageous smear campaign." [244] In fact, Republican officials were able to use counter-speech to more effectively draw some mainstream attention and press to the sexist treatment of Palin. [245] However, their ability to use counter-speech more effectively than Clinton supporters and women's rights groups was likely the result of Republicans, because of their conservative ideology, having greater freedom to claim sexism than individuals and groups who are seen as feminists and thus, too sensitive to sexism.

---

[238] National Organization for Women, supra note 13.

[239] Chris Matthews Monitor, Media Matters for America, *http://mediamatters.org/action* center/matthews monitor/ (last visited Oct. 19, 2008).

[240] See, e.g. Katharine Q. Seelye & Julie Bosman, Media Charged with Sexism in Clinton Coverage, N.Y. Times, June 13, 2008, available at http://www.nytimes. com/2008/06/13/us/politics/13women.html; Domenico Montanaro, Clinton: Sexism, the Downfall?, MSNBC, June 13, 2008, *http://firstread.msnbc.msn.com/archive/2008/06/13/1138240.aspx*.

[241] Walter Alarkon, Dean Derides 'Sexist' Media Coverage, The Hill, June 1, 2008, *http://thehill.com/homenews/campaign/1400-dean-derides-sexist-media-coverage*. Because women of color face racialized gender stereotypes, Dean's above mentioned comments take on an interesting spin since racialized gender stereotypes are even less acknowledged than solely sex or race stereotypes, which are based on the experiences of white women and men of color respectively rather than including the experiences of women of color as well.

[242] Robert Dougherty, Chris Matthews, Keith Olbermann Demoted from MSNBC Election Coverage, Assoc. Content, Sept. 8, 2008, *http://www.associatedcontent.com/article/1017796/chris* matthews keith olbermann demoted.html?cat =2.

[243] This may in part be due to the Republicans' hope that by nominating a woman, they could appeal to Democratic women voters who had been disgusted with the sexist treatment of Hillary Clinton.

[244] Harris & Frerking, supra note 117.

[245] See id.

While women's rights supporters are likely to be seen as radical feminists when they make claims of sexism, Republicans do not face that danger. In fact, Clinton supporters and others who pointed out her sexist treatment during the race were ignored or **[*161]** pushed aside as irrational "feminists" with invalid concerns. [246] If Clinton herself tried to raise the issue during her race, she was accused of playing the gender card and punished for it. [247] When Clinton spoke about "the double standards a woman running for president faces," claiming that a woman candidate could not get "too emotional," Maureen Dowd criticized her for "playing the female victim." [248] Clinton was even accused of playing the gender card [249] for simply stating that "We're ready to shatter the highest glass ceiling" when referring to her run as the first female presidential candidate. [250] Her accusers told her to stop "whining" and "complaining;" [251] they ironically told her to "take these attacks like a man." [252]

After the primaries were over, many still criticized Clinton and others who had cried out against sexism. [253] These critics still claimed that those charges were baseless and invalid. [254] Further, women in the media who partook in this counter-speech by speaking out against the treatment of Clinton and Palin, faced similar criticisms. For example, Kate Couric received much criticism for speaking out against the sexism in the media coverage of Clinton's campaign. In response to Couric's statement that she felt "that Senator Clinton received some of the most unfair, hostile coverage [she had] ever seen," Keith Olbermann labeled her as the "Worst Person in the World" [255] and accused her of **[*162]** speaking "nonsense" and being "a little Kool-aid ish." [256] Thus, even though Couric was a prominent member of the media, she was still treated as the irrational, radical feminist.

Consequently, counter-speech may initially be more or less effective (based upon the social views of the individuals or groups partaking in it) in achieving widespread recognition of the media's promulgation of societal sex stereotyping, particularly during the period of time in the race when recognition most matters. However, at the very least, even if occurring after the election, the counter-speech reaches some voters who may realize that there is bias in media coverage. This knowledge will hopefully lead the public to be more informed and more skeptical of the

---

[246] See, e.g., Fortini, supra note 65; Elaine Hopkins, Unmasking Sexism in Media Coverage of Hillary Clinton, Huffington Post, Mar. 11, 2008, http://www.huffingtonpost.com/elaine-hopkins/unmasking-sexism-in-media b 90916.html.

[247] See Fortini, supra note 65; Klein & Chesney, supra note 83.

[248] Dowd, supra note 108.

[249] If a woman of color had been in the position of Hillary Clinton (or Sarah Palin), she would also have had to face racial stereotyping, particularly racialized gender stereotypes such as those Michelle Obama faced through the "Baby Mama" comment made by Fox. See National Organization for Women, supra note 13. Thus, a woman of color would be accused of not only playing the gender card, but also the race card if she tried to point out the stereotypes facing her.

[250] Klein & Chesney, supra note 83.

[251] Peggy Noonan, Op-Ed., Sex and the Sissy, Wall St. J., May 23, 2008, at A11, available at http://online.wsj.com/article/SB121148557268715077.html?mod= todays columnists.

[252] Ruth Marcus, Damsel in the Debate, Wash. Post, Nov. 2, 2007, at A21, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/11/01/AR 2007110102146 2.html.

[253] See Bernard Chapin, Claims of Sexism: Hillary Clinton's Last Refuge, Pajamas Media (June 13, 2008, 9:24 AM), http://pajamasmedia.com/blog/claims-of-sexism-hillary-clintons-last-refuge/.

[254] See id.

[255] Rachel Sklar, Katie Couric Is Rubber and Keith Olbermann Is Glue, Huffington Post (June 12, 2008, 10:15 AM), http://www.huffingtonpost.com/2008/06/12/katie-couric-is-rubber-an n 106714.html; Kelly Moeller, Olbermann Slams Couric for Saying Clinton "Received Some of the Most Unfair, Hostile Coverage I've Ever Seen," Political Punch (June 12, 2008, 2:00 PM), http://blogs.abcnews.com/politicalpunch/2008/06/olbermann-slams.html.

[256] Moeller, supra note 255.

media. As a result, they will be able to view the media treatment of future female candidates with discernment. Thus, voters, particularly the undecided voters so important to winning presidential elections, rather than simply accepting the media's word and falling subject to perpetuation of societal sexist views, will begin to evaluate media coverage and commentary of female candidates. Further, they will question its validity before forming their opinions of the candidates and deciding how to vote. This is particularly important given the prevalence of the discriminatory media treatment of the female candidates in the 2008 election cycle and the fact that it extended through the whole range of female stereotypes from the "power-hungry bitch" to the "attractive simpleton."

Without public knowledge of past discriminatory treatment by the media, these voters will continue to be influenced by sexist media treatment that plays into societal sexist views. Indeed, they will be influenced without realizing that the negative media treatment derives not from fact, but from discriminatory sex stereotyping of female candidates that arises from society and is being perpetuated by the media. Thus, even if public knowledge is not widespread and only some voters are informed of past discrimination, there is still a benefit. It will not only lead to some informed votes, but it will also be a step toward more widespread recognition of the discriminatory treatment that occurred during the 2008 election and that will likely face future female candidates **[*163]** as well. In fact, some of these newly knowledgeable voters may not only discredit the media's coverage, but may also choose to partake in counter-speech as well. This will aid in raising awareness of the discriminatory sex stereotyping. Most importantly, because no legal remedy exists for these candidates in the face of such sexist treatment, the only way for a viable female candidate to have a fair chance at success is if the public recognizes the existence of such discriminatory treatment, even if it only begins with a few.

UCLA Women's Law Journal

UCLA Women's Law Journal

COMMENT: YOU HAVEN'T COME A LONG WAY, BABY: THE COURTS' INABILITY TO ELIMINATE THE GENDER WAGE GAP FIFTY-TWO YEARS AFTER THE PASSAGE OF THE EQUAL PAY ACT

2015

Reporter
24 Am. U.J. Gender Soc. Pol'y & L. 305

Length: 15280 words

Author: Morgan A. Tufarolo*

* Morgan received a BA in English from the University of Tampa where she graduated magna cum laude. She is currently a student at American University Washington College of Law and expects to graduate with her JD in 2017. She would like to thank her family for sticking by her through this process, especially her mom, Nancy Tufarolo, who fielded countless late night phone calls and reassured her endlessly, as well as her dog, Gatsby, who always managed to reduce her stress levels with much needed puppy love. She would also like to thank her friends, especially Liz Wheeler and Aly Mance, for always providing encouragement when she needed it most. Lastly she would like to give a massive thank you to the staff of the Journal of Gender, Social Policy & the Law; without them this article would not have been possible.

Text

[*306]

I. Introduction

The Equal Pay Act states that no employer shall discriminate on the basis of sex by paying employees of opposite sexes different wages for equal work on jobs that require near identical skill, effort, and responsibility, and are performed under equal working conditions. [1] Although Congress enacted the Equal Pay Act fifty-two years ago, the wage gap still exists today. [2] The wage gap has become a statistical indicator that is used to measure the status of women's wages compared to men's; the most current data from 2014 shows that women earned 78.6 percent as much as their male counterparts. [3] Often employers reason that the gender wage gap spurs from the life choices women make, the degrees **[*307]** they choose to pursue, and the job fields they enter into. [4] Employers often

---

[1] See *29 U.S.C. § 206*(d)(1) (2007) (detailing the rules and regulations for employers concerning equal pay for employees regardless of their sex).

[2] See Christianne Corbett & Catherin Hill, Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation, The American Association of University Women, 2 (2012), *http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf* (asserting that one third of the pay gap between men and women is still unexplained).

[3] See Gender Wage Gap Again Narrows Slightly, Remains Statistically Unchanged, National Committee on Pay Equity, *http://www.pay-equity.org* (last visited Jan. 3, 2016) (noting that the wage gap only narrowed by 0.3 of a percent from 2013 to 2014).

[4] See The Simple Truth About the Gender Pay Gap, The American Association of University Women, 8 (2015), *http://www.aauw.org/files/2015/02/The-Simple-Truth_Spring-2015.pdf* (noting that women go into lower paying professions, such as teaching, making up for part of the wage gap).

blame the gender wage gap on a woman's choice to have children; however, a man's decision to start a family frequently has no impact on his salary or career. [5]

While these fallacies exist to provide society with a reason for the wage gap, employers' explanations tend to cover up a much uglier truth: women face a seven percent wage disparity immediately after graduating college. [6] All factors accounted for, and ten years after graduation, full-time female workers were found to have a 12 percent unexplained difference in their earnings compared to equally situated males. [7] This evidence proves that even between equally qualified and educated men and women, men continue to earn more than their female counterparts in most fields. [8]

While statistics alone provide a bleak outlook on the gender wage gap, court decisions set an even gloomier stage. [9] Once a plaintiff makes out a prima facie case under the Equal Pay Act, the burden then shifts to employers to justify the lower wage through one or more affirmative defenses, including a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any "factor other than sex." [10] Court opinions often find that the **[*308]** differential based on any "factor other than sex" is a theoretical catchall where employers find arbitrary ways to justify a woman's lower pay. [11] Therefore, courts have concluded that to successfully establish a "factor other than sex" defense, an employer must prove that it had a legitimate business reason for implementing the gender-neutral factor that resulted in the pay difference. [12] Although courts tend to find more frequently for employers in disparate pay cases, the Equal Employment Opportunity Commission (EEOC) continues to represent women who are discriminated against in the workforce; in 2011, monetary awards for sex based discrimination cases resolved through the EEOC totaled just over $ 145 million. [13]

This Comment argues that the Equal Pay Act has not resulted in the change it meant to implement, and the continuing wage disparity between men and women proves this. Part II of this Comment summarizes the various approaches different circuits take to resolve Equal Pay Act claims, especially in relation to the affirmative defenses employers are allowed, as well as modification of the elements necessary for a prima facie Equal Pay Act case, and

---

[5] See id. (describing that employers are less likely to hire mothers compared to childless women, and when employers do make an offer to a mother, they offer her a lower salary than they do childless women).

[6] See id. at 8 (detailing that after accounting for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status, a seven percent difference in the earnings of male and female college graduates one year after graduation was still unexplained).

[7] See The Simple Truth About the Gender Wage Gap, supra note 4, at 8, 9 (stating that a wage gap still remains between men and women whose education and career paths are the same because men are more willing to negotiate their starting salaries).

[8] See Corbett, supra note 2, at 8 (noting that among business majors, women earned just over $ 38,000, while men earned just over $ 45,000, showing a vast pay discrepancy).

[9] See *E.E.O.C. v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 249 (2d Cir. 2014)* (dismissing a case when similarly situated female attorneys with the same job title as their male counter parts failed to prove their claim of unequal pay as plausible, rather than possible).

[10] See *29 U.S.C. § 206*(d)(1)(2007) (explaining the affirmative defenses available to employers who pay a woman less than a man).

[11] See *Belfi v. Prendergast, 191 F.3d 129, 139 (2d Cir. 1999)* (holding that the Long Island Railroad's use of policies for implementing a lower pay wage for a female employer could rationally be found as gender-based discrimination).

[12] See *E.E.O.C. v. J.C. Penny Co., 843 F.2d 249 (7th Cir. 1988)* (noting that the "factor other than sex" defense does not include "literally any other factor," but a factor that, at a minimum, was adopted for a legitimate business reason).

[13] See Corbett, supra note 2, at 11 (documenting that in 2011 the EEOC received more than 28,000 complaints of sex discrimination, including wage disparities, which is an increase of about 18 percent compared with a decade earlier).

the effect that the Iqbal and Twombly possibility versus plausibility paradox has had on Equal Pay Act claims. [14] Part III argues that circuits should follow the reasoning of the Fifth Circuit's substantially equal definition to evaluate Equal Pay Act claims, that the original language "comparable character" that was previously in the Equal Pay Act should be reenacted so as to allow for more successful Equal Pay Act claims, and that the affirmative defenses, especially the "factor other than sex," should be strictly monitored by the courts so as to prevent arbitrary dismissal of Equal Pay Act claims. [15] Part IV concludes that the Equal Pay Act was meant to implement equal wages for men and women employed in similarly situated positions, and that courts should mirror the Second and **[*309]** Fifth Circuits' approaches to appropriately address and evaluate Equal Pay Act claims so as to reduce the gender wage gap. [16]

II. Background

A. The Prima Facie Elements of an Equal Pay Act Claim

To prove a violation of the Equal Pay Act a plaintiff must first establish a prima facie case of discrimination by showing the following: the employer pays different wages to employees of the opposite sex; the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and the jobs are performed under similar working conditions. [17] Much confusion still exists as to the meaning of the word "equal" within the act, and contradictory judgments often result from the interpretation of the word. [18] The Equal Pay Act states

> No employer … shall discriminate … on the basis of sex by paying wages to employees … at a rate less than the rate at which he pays wages to employees of the opposite sex … for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. [19]

1. Equal Effort, Responsibility, and Skill

The Fifth Circuit Equal Pay Act cases provide the fairest and most correct evaluation of equal work for equal pay. [20] The Fifth Circuit compared male and female sales persons job responsibilities and pay by citing to two cases that address the same factual issue but resulted in **[*310]** conflicting decisions. [21] While deciding an Equal Pay Act

---

[14] See infra Part II.

[15] See infra Part III (arguing that the terminology of the Equal Pay Act should be changed from "equal" to "comparable" to allow for more claims to survive dismissal and to help circuits come to a more uniform consensus of the meaning of the Equal Pay Act and how to evaluate claims that fall under it).

[16] See infra Part IV (concluding that for the Equal Pay Act to effectively help employees who are suffering from unequal pay due to their gender, courts must resolve the meaning of equal, define exactly what "factors other than sex" consist of, and more justly adjudicate the plausibility verses possibility standard).

[17] See *Corning Glass Works v. Brennan, 417 U.S. 188, 189 (1974)* (stating the elements of a prima facie case for an Equal Pay Act claim to make it clear for plaintiffs bringing suit).

[18] See *Brennan v. City Stores, Inc., 479 F.2d 235, 238-39 (5th Cir. 1973)* (stating that although the standard of equality is clearly meant to be taken as higher than mere comparability, and as lower than absolutely identical, there still remains an area of equality under the Equal Pay Act which is ambiguous, especially in relation to "equal skill, effort, and responsibility").

[19] See *29 U.S.C. § 206*(d)(1) (1963).

[20] See *Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 723 (5th Cir. 1970)* (asserting that males and females should have been paid the same amount for doing equal work).

[21] See *Brennan, 479 F.2d at 239* (comparing *Schultz v. Brookhaven Gen. Hosp., 305 F. Supp. 424 (N.D. Tex. 1969),* rev'd sub nom. *Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970)* (male orderly's position equal to that of female aide) with *Hodgson v. Good Shepard Hosp., 327 F. Supp. 143, 144 (E.D. Texas 1971)* (male orderly position not equal to female maid) to show that courts interpret the meaning of "equal" differently in similar cases).

claim, the Sixth Circuit discussed the meaning of equal work for equal pay, finding that both male and female employees' work was equal since they both cared for patients, bathed patients, distributed food trays, fed patients, took temperatures, and changed clothes and bed linens, and thus should have been compensated with equal pay. [22] The Third Circuit also found that female aides and male orderlies performed equal work and deserved equal pay. [23]

However, the Tenth Circuit found that an issue of material fact existed as to whether a female employee's work was substantially equal to that of male employees. [24] The court decided that a trier of fact could conclude that the female employee was simply more efficient, upholding a more lenient standard of substantially equal work. [25]

2. Interpreting the Meaning of "Equal'

As guidance for equal work, the Fifth Circuit noted that jobs do not entail equal effort, even though they entail most of the same routine duties. [26] If the more highly paid job includes additional tasks which (1) require extra effort, (2) consume a significant amount of time of all those whose pay differentials are to be justified in terms of them, and (3) are an **[*311]** economic value commensurate with the pay differential, then the differential is justified. [27] However, the Tenth Circuit decided a case concerning the duties of a secretary, and found that the secretary's job was not equal to the work done at the order desk. [28] The court reasoned that since the secretary was hired as a receptionist, since a significant portion of her duties involved secretarial-receptionist work, and since only some of the duties she performed were also performed by order desk employees, but not as frequently, the work was not substantially equal. [29]

B. Circuit Splits Concerning Affirmative Defenses, Primarily "Factors Other Than Sex"

An evaluation of the different circuits in relation to Equal Pay Act claims proves that each circuit decides these cases differently. For example, the Sixth Circuit found for employees 85 percent of the time, while the Seventh

---

[22] See *Odomes v. Nucare, Inc., 653 F.2d 246, 250 (6th Cir. 1981)* (finding that Congress did not intend the phrase "equal work" to require that the jobs be identical, but rather that only substantial equality of skill, effort, responsibility, and working conditions is required).

[23] See *Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970)* (finding that there are problems of construction with the Equal Pay Act's language and that legislative history and the bills that preceded it yield little guidance in the understanding of its provisions).

[24] See *Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015)* (finding that a female employee's job was substantially equal to a male employee's job, and that job differences that are not significant will not support a wage differential).

[25] See *id. at 1197-98* (finding the two jobs were similar enough to warrant equal pay and the work performed was identical). But see *Sprague v. Thorn Am. Inc., 129 F.3d 1355, 1364 (10th Cir. 1997)* (holding that the court does not construe the equal work requirement of the Equal Pay Act broadly).

[26] See *Brookhaven Gen. Hosp., 436 F.2d at 725* (stating that employers cannot confuse the purpose of the Equal Pay Act by calling for extra effort only occasionally, or only from a few male employees).

[27] See id. (providing circumstances in which unequal pay would be justified); see also *Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 863 (10th Cir. 1976)* (determining that both female aides and male orderlies were primarily involved in basic patient care and that any differences in duties did not involve significantly greater amounts of skill, effort, or responsibility).

[28] See *Nulf v. Int'l Paper Co., 656 F.2d 553, 561 (10th Cir. 1981)* (holding that order desk employees engage in different jobs than secretaries, allowing for differences in pay).

[29] See id. (declaring that "it is the overall job, not its individual segments, that must form the basis of comparison" (quoting *Gunther v. County of Washington, 602 F.2d 882, 887 (9th Cir. 1979)).*

Circuit only found for the employee 24 percent of the time. [30] The varied treatment of Equal Pay Act claims in each Circuit makes it confusing for plaintiffs bringing these claims: the meaning of the Equal Pay Act and precedent set out in major Supreme Court cases becomes misconstrued in favor of the employer rather than using the Equal Pay Act to support undercompensated employees. [31]

[*312] As Corning Glass Works v. Brennan demonstrates, courts also struggle with reconciling when a "factor other than sex" can and should be addressed, what the term means, and what Congress intended it to mean. [32] The Corning Glass Works court interpreted the meaning of the "factor other than sex" affirmative defense as recognizing that the language of the Equal Pay Act specifies many factors that may be used to measure the relationships between jobs and a difference in pay, while other courts did not reach the same conclusion. [33] The court in Denman v. Youngstown State University concluded that the pay differential of a female employee whose contract was not renewed was not based on a "factor other than sex," thereby narrowing the factor other than sex defense in the Northern District of Ohio. [34] The same issue was also addressed in a Second Circuit case in Aldrich v. Randolph Center School District, where a female employee was being kept from a custodial position and pay grade because of a civil service examination. [35] The Ninth Circuit also addressed "factors other than sex" in Maxwell v. City of Tucson and found that Congress added the phrase to the Equal Pay Act as a "broad general exception" so that employers would be able to implement gender-neutral job evaluations and classification systems. [36] However, the court found that the need must be legitimate. [37]

[*313] In the more employer friendly Seventh Circuit, the court found that a proper job reclassification within the framework of a position and pay classification system qualifies under the "factor other than sex" affirmative defense.

---

[30] See Deborah Thompson Eisenberg, Shattering the Equal Pay Act's Glass Ceiling, *63 SMU L. Rev. 17, 34 (2010)* (noting that the Seventh and Eighth Circuits have the most restrictive interpretation of the Equal Pay Act's "equal work" prima facie standard and are also the circuits that have the most liberal interpretation of the "factor other than sex" affirmative defense).

[31] See *id. at 30* (lamenting that the final Equal Pay Act is not as strong as it needs to be to combat wage discrimination by citing Representative Dent's warning that removing the "comparable work" standard would limit the Equal Pay Acts' effectiveness); see also *Winkes v. Brown Univ., 747 F.2d 792, 796 (1st Cir. 1984)* (finding that a female professor received an offer from a different institution and the University had sought to match that offer to retain her by giving her a raise). But see *Belfi v. Prendergast, 191 F.3d 129, 139 (2d Cir. 1999)* (finding that when a male employee came onto the job and his salary far surpassed plaintiff's, the employer's justification of paying the new employee more to entice him to take the job in a competitive market was not legitimate).

[32] See *Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974)* (stating that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections that statutory definitions were vague).

[33] See *id. at 201* (finding that the most telling evidence of congressional intent of the Equal Pay Act is the amended definitions of equal work; "skill," "effort," "responsibility," and "working conditions").

[34] See *Denman v. Youngstown State Univ., 545 F. Supp. 2d 671, 678 (N.D. Ohio 2008)* (stating that to be entitled to summary judgment, the defendant must prove that no genuine issue of material fact exists as to whether pay is due to a "factor other than sex." In this case the court found that a reasonable jury could determine that sex played a role in the $ 10,000-$ 40,000 wage difference).

[35] See *Aldrich v. Randolph Cent. Sch. Dist., 63 F.2d 520, 526-27 (2d Cir. 1992)* (holding that the job classification system did not show grounding in legitimate business considerations and therefore was not a "factor other than sex," and could not be used as an affirmative defense to pay cleaners less than custodians, unless legitimate business reasons could be shown).

[36] See *Maxwell v. City of Tucson, 803 F.2d 444, 447-48 (9th Cir. 1986)* (holding that the City of Tucson failed to show how the reclassification of a woman's position to the lower level was based on a real change in duties and responsibilities when she was actually directing a municipal program identical to that of her male predecessor, but at a lower salary level).

[37] See *id. at 448* (determining that no legitimate need existed to pay a female employee less because the jobs were identical).

[38] Through this defense, the employer is able to determine the legitimate organizational needs and changes that the Ninth Circuit did not find apparent in Maxwell v. City of Tucson. [39] The Seventh Circuit also found in Dey v. Colt Construction & Development Co., and Covington v. Southern Illinois University that prior wages constitute as a "factor other than sex" in Equal Pay Act claims, and therefore found that the employer was justified in the salary disparity. [40]

C. Possibility Versus Plausibility

In one of the more recent Equal Pay Act cases concerning equal pay for equal work, a group of female attorneys filed suit against their employer, the Port Authority of New York and New Jersey, in an unsuccessful effort to prove that the male attorneys were unfairly compensated at a higher pay rate than the female attorneys. [41] While the Second Circuit cited that the lack of actual content of the work performed by the attorneys was the reason for the dismissal of the claim, the court focused heavily on plausible claim standards in an effort to prove that the EEOC did not meet its pleading standard. [42] The court continuously asserted that the EEOC did not bring enough plausible information to assert a claim; however, the EEOC alleged that the claimants and comparators had the same job code. [43] The **[*314]** EEOC also argued that the attorneys were paid within the bounds of an attorney "maturity curve" based on years of legal experience, were evaluated according to the same performance criteria, and were not limited to distinct legal divisions. [44] These arguments are valid when bringing an Equal Pay Act claim and the EEOC's case should not have been dismissed. [45]

III. Analysis

A. Circuit Splits Concerning Equal Pay Act Claims Should be Resolved by Implementing a Broader Interpretation of the Equal Pay Act Because There is a Lack of Consensus for Judges and Confusion on Equal Pay Act Proceedings for Parties.

---

[38] See *Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1261-62 (7th Cir. 1985)* (holding that the employer's reorganization was a legitimate reason for the pay differential based on "factors other than sex").

[39] See id. (determining that finding against the employer would force employers to either forego legitimate organizational planning, or to hire only someone of the same sex whenever an employee left his or her job or was fired at a critical time).

[40] See *Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1449 (7th Cir. 1994)* (finding that although a male successor was paid more than his female predecessor, prior wages counted as a "factor other than sex" under affirmative defenses for employers); *Covington v. S. Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987)* (concluding that the Equal Pay Act does not preclude an employer from carrying out a policy which, although not based on employee performance, has in no way been shown to undermine the goals of the Equal Pay Act).

[41] See *E.E.O.C. v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 252, 256 (2d Cir. 2014)* (noting that while the EEOC carried out its investigation, nothing about the actual content of the work done by the dozens of attorneys either within or across practice areas at the Port Authority was addressed).

[42] See *id. at 253* (stating that Twombly and Iqbal require that a complaint support the viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face, not just simply possible).

[43] See *id. at 259* (holding that since the EEOC's allegations were conclusory they did not meet the requisite level of facial plausibility).

[44] See *id. at 258* (finding that although the EEOC provided information regarding the similarities of the attorneys' jobs, it was not enough to bring a claim).

[45] See *id. at 254-55* (stating the prima facie elements of an Equal Pay Act claim).

Patterns are developing across the decisions made in various federal courts, and these decisions continue to conflict with one another. [46] Often, courts confuse the meaning of equal work, some ruling that work of comparable character is suitable, while others state that equal work is not a standard to be interpreted broadly. [47] With confusion among circuits pertaining to the definition of a word such as "equal", it seems that courts are purposefully confusing their parties so as to bar future Equal Pay claims without giving a clear precedent as clarification. [48] The result of such actions unfairly leaves underpaid workers with no further recourse, and employers are legally allowed to continue to pay certain employees less **[*315]** money than equally situated employees of a different gender because a court refuses to speak on the direct definition of a word, but can quash a case for failure to meet the definition of an undefined word. [49]

Courts also differ on the meaning of the phrase "factor(s) other than sex," which provides certain circuits with exceptions and broad catchalls for employers seeking affirmative defenses in Equal Pay Act claims; for example, in the Seventh Circuit in Covington v. Southern Illinois University, the court states that "factors other than sex" were prevalent in the case of a female assistant professor who was paid less than her male predecessor because Southern Illinois University's salary retention policy happened to qualify as a policy other than sex. [50]

1. Congress and Circuits Should Follow the Fifth Circuit's Meaning of "Equal Work,' and Comparable Work Should be Added to that Definition to Open Up the Possibilities of More Equal Pay Act Claims.

In Corning Glass Works v. Brennan, the employer argued that the opposing counsel failed to prove that the employer ever violated the Equal Pay Act because day shift work was not performed under similar working conditions as the night shift work. [51] However, the court in Corning Glass Works took into consideration four separate factors in determining job value: skill, effort, responsibility, and working conditions, which is very similar to the congressional intent reflected in the Equal Pay Act itself. [52] The Court decided that the day shift staffed by

---

[46] See *Denman v. Youngstown State Univ., 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008)* (establishing that an employee proved a prima facie case of sex-based pay discrimination when females were not awarded raises, but equally situated male workers were). But see *Sprague v. Thorn Am. Inc., 129 F.3d 1355, 1364 (10th Cir. 1997)* (holding that the employee did not demonstrate that she occupied substantially the same position or performed substantially the same tasks as the assistant managers, and therefore her Equal Pay Act claim failed).

[47] See *Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 723, 724-25 (5th Cir. 1970)* (finding that although the employer contends that roles of orderlies and aides were substantially distinguishable in terms of "secondary and tertiary" duties, the jobs still reflected equal work because the duties were similar). But see *Nulf v. Int'l Paper Co., 656 F.2d 553, 561 (10th Cir. 1981)* (noting that when significant amounts of time are spent on different tasks the jobs are no longer considered equal).

[48] See *E.E.O.C. v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 256 (2d Cir. 2014)* (stating that a three year investigation conducted by the EEOC still did not unearth any relevant information pertaining to an Equal Pay Act claim, resulting in the case's dismissal).

[49] See *Nulf, 656 F.2d at 561* (stating that since Congress rejected the equal pay for "comparable work" concept, it was then a substantial identity of job functions that Congress sought to address, and not simply comparable skill and responsibility, which the Act reads).

[50] See *Covington v. S. Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987)* (finding that the Equal Pay Act does not preclude an employer from establishing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied, or has a discriminatory effect, even though discrimination is a moot point in Equal Pay Act claims).

[51] See *Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974)* (finding that while a person not employed in the industrial business might assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations).

[52] See id. (determining that "working conditions" in an industrial sense involves two sub factors, surroundings and hazards).

women who were paid less was in fact equal to the night shift staffed by men who were paid more. [53] At this juncture, the employer requested that the Court differentiate **[*316]** between jobs that the employer itself had always equated. [54] Circuit courts should replicate the Supreme Court's approach to equal work because it fairly drew conclusions between the employer's own working condition similarities and differences and evaluated those against the facts of the case and the meaning of the Equal Pay Act. [55] As Corning Glass Works demonstrates, an employer cannot hide behind the guise of working conditions as a reasonable excuse for a pay differential when every element of the work performed is in fact equal, other than the time of day. [56]

The Court in Corning Glass Works also touched on Congress' intent of equal work, and the varying opinions from both the Second and Third Circuits. [57] While the Second Circuit found that shift differentials should be excluded as a broad general exception for differentials in determining equal work, the Third Circuit found that in comparing work of one employee to the work of another, standing as opposed to sitting, pleasantness of surroundings, periodic rest times, hours worked, and differences in shifts should all be considered as part of the working condition factor when determining pay. [58] By imposing the logic used and the consensus reached in Corning Glass Works, more courts could fairly evaluate Equal Pay Act claims and have a distinct understanding of the meaning of "equal." [59] However, many courts are reluctant to incorporate this line of reasoning and believe that the Equal Pay Act should not revert back to its previous interpretation of equal, which meant work was comparable, or "substantially equal," in nature and working conditions. [60]

[*317]

a.

"Equal" Should be Interpreted as "Comparable," via the Fifth Circuit's Reasoning.

The difficulty with defining the word "equal" was also addressed correctly in City Stores, where the Fifth Circuit took care to evaluate the job responsibilities of male and female clothing salespeople. [61] The court identified that both

---

[53] See *id. at 203* (stating that the day and night shift jobs in this instance are of equal work considering surroundings and hazards).

[54] See *id. at 204* (holding that the Equal Pay Act does allow for nondiscriminatory shift differentials to influence pay rates).

[55] See *id. at 202* (finding that while there are many factors which may be used to measure the relationship between jobs and a variance in wages, nowhere in any of the employer's definitions of working conditions is time of day stated as relevant to a difference in pay).

[56] See *id. at 203* (holding that the performance of the inspection work by the employees, whether day or night, is of equal character as defined by the Equal Pay Act).

[57] See *id. at 198* (comparing the meaning of equal pay across different circuits).

[58] See *id. at 188* (noting that when the case had multiple branches in different circuits before it was consolidated, the Second Circuit modified and found for the employee, while the Third Circuit found for the employer).

[59] See *id. at 199* (commenting that at the conception of the Equal Pay Act, equal pay for equal work was more readily stated in principle than reduced to statutory language, and therefore was more malleable in definition and applicable to a broad range of jobs).

[60] See *id. at 200* (indicating that courts criticized the beginning drafts of the Equal Pay Act as "unduly vague and incomplete" as it related to the definition of equal work).

[61] See *Brennan v. City Stores Inc., 479 F.2d 235, 237, 241 (5th Cir. 1973)* (explaining that the slightest of variations in job tasks does not eliminate the equality of the job or call for a differential in pay).

genders were responsible for marking and fitting clothes as well as selling items to customers, and that the differences between marking cuffs, crotches, and waistbands of men's suits and adjusting hemlines, shoulders and waists of women's dresses were wholly insubstantial. [62] The employer argued that the jobs were different in nature, but evidence in trial indicated that the employer knew otherwise. [63] City Stores emphasizes that restrictions apparent in the Equal Pay Act as labeling jobs equal only when they are virtually identical are actually meant to apply only to jobs that are substantially identical or equal, leading to the definite possibility of confusion in interpreting the meaning of "virtually identical" and "substantially identical." [64]

The meaning of "equal" in Corning Glass Works leans much closer to "substantially identical," and therefore allows for a looser interpretation as it was applied to the case. [65] Although not identical to the decision in City Stores, the Fifth Circuit defends its decision by asserting that legal concepts, such as the definition of the word "equal" under the Equal Pay Act, are predisposed to interpretation only through contextual study, and a case-by-case basis. [66] This idea of a case-by-case basis is both beneficial **[*318]** and burdensome. [67] It allows for a looser interpretation of the word "equal," which could help provide employees alleging unfair pay differentials more success with passing the summary judgment stage and even eventually winning cases; however, it simultaneously provides a source of confusion for employees who are trying to understand the definition of a term that is integral to the essence of their claim. [68]

The Fifth Circuit in Brookhaven General Hospital also addressed the meaning of equal work when it determined that work is not equal in effort if the job entails additional tasks which "(1) require extra effort, (2) consume a significant amount of time from of all those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential." [69] The Fifth Circuit properly applied this approach when it decided that similarly situated male orderlies and female aides were unfairly paid different salaries because the tasks performed, the responsibility given, and the skills necessary for both positions were substantially equal. [70] This method of approaching Equal Pay Act claims is the most logical and straightforward; the Act itself calls for

---

[62] See id. (finding when jobs entail the same fundamental work, but with different descriptions, such as sewing men's cuffs or women's hemlines, the jobs are still substantially equal).

[63] See *id. at 241* (describing that statements from the Administrator and the Labor Department's Interpretative Bulletin both took the position that the job of selling men's clothing was equal to selling women's).

[64] See *id. at 238* (noting that when Congress enacted the Equal Pay Act, it substituted the word "equal" for "comparable" to show that the jobs involved should be very much alike, or closely related to each other; also construed as "virtually identical").

[65] See *id. at 237-38* (finding that the marking and fitting duties as well as the sales responsibilities of the men and women at the store were of equal character, and should therefore be compensated the same amount).

[66] See *id. at 239* (declaring that "semantic distinctions" such as "substantially equal," "essentially the same," "sufficiently similar," or "equivalent" do not indicate that a court has applied an incorrect standard or definition of equality, especially as it applied to comparing jobs at the store in question).

[67] See id. (dismissing any flaws with ambiguous terminology and allowing for confusion regarding the meaning of "equal" to persist).

[68] See *Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 723 (5th Cir. 1970)* (holding that equal work calls for equal pay). Compare id. (finding that the work performed by a male orderly is equal to that of a female aide), with *Hodgson v. Good Shepard Hosp., 327 F. Supp. 143, 143 (E.D. Texas 1971)* (holding that a male orderly position is not equal to a female aide and their pay should not be equal).

[69] See *Brookhaven Gen. Hosp., 436 F.2d at 725* (providing the equal effort criteria necessary to consider when evaluating an Equal Pay Act claim).

[70] See *id. at 723, 725* (noting that even the employer conceded that the duties which occupied the better part of the time of both groups of employees demanded equal skill, effort, and responsibility).

equal pay for jobs that entail similar working conditions, as well as equal skill, effort, and responsibility. [71] The court also noted that the overall controlling factor of the Equal Pay Act is job content, which is defined as the actual duties that the employees are called upon to perform, not just the job descriptions prepared by the employer. [72] This line of reasoning helped to push the aides' case forward through summary judgment because the court decided to rely on the testimony of the employees as to what their daily tasks encompassed, leading to a more informative perspective of the aides' daily tasks, and giving insight into the equal skill, effort, and **[*319]** responsibility of both gender's positions. [73]

This method of investigation and understanding used by the Fifth Circuit is necessary to hear Equal Pay Act claims that are brought to trial, and allows for a larger number of cases to satisfy the prima facie standard, making it possible for more women to assert Equal Pay Act claims without being dismissed. [74] The Fifth Circuit also noted that Equal Pay Act claims should not be abandoned because a man's bargaining power is greater than a woman's, resulting in the man earning more because he demanded it and his employer granted it. [75]

b. Various Interpretations of "Equal' in Relation to Equal Pay Act Claims Must be Eliminated.

The ruling of a U.S. District Court in Texas, however, found that the jobs of male orderlies and female aides were vastly different in skill, responsibility, working conditions, and effort because of the various additional tasks placed on the orderlies, making the pay differential acceptable. [76] Orderlies were distinguished as requiring a higher skill set for being trained in male catheterizations, application and removal of casts, correct methods of lifting patients particularly in critical, obese, or geriatric patients, and sterile procedures. [77] The court also found that orderlies were required to demonstrate more effort in terms of lifting, handling equipment, moving, turning, and transporting patients, and that these tasks were an integral part of their daily work. [78] The court also found that the orderlies' responsibility was greater than that of the aides because an orderly works throughout the hospital, including in emergency rooms, not just on a designated floor, as the aides do. [79] Lastly, the court found that orderlies **[*320]** had different working conditions than aides, and that the orderlies were subjected to a more taxing and demanding

---

[71] See *id. at 722* (describing that the elements of an Equal Pay Act prima facie case must be met prior to the merits of the case being evaluated).

[72] See *id. at 724* (illustrating that the testimony in this case established that some aides did more than what was noted in their job description, which may or may not fairly describe all that the job entails).

[73] See *id. at 725* (focusing on the individual tasks performed over and above routine patient care, it became clear that the tasks performed only by aides required as much skill as the most skilled tasks performed by orderlies, and that the additional duties assigned to both groups involved "substantially equal' responsibility).

[74] See id. (determining that the trial judge was correct to not only place her reliance on job descriptions provided by employers, but also on employee testimony).

[75] See *id. at 726* (asserting that the hospital's argument that it paid orderlies more because it could not get them for less is moot).

[76] See *Hodgson v. Good Shepard Hosp., 327 F. Supp. 143, 149 (E.D. Texas 1971)* (holding that the evidence clearly established a substantial difference between the position of aide and orderly so equal pay was not required).

[77] See *id. at 147* (noting that higher wages were acceptable for orderlies because their skill set was more demanding).

[78] See id. (justifying higher pay for orderlies because they exerted more effort).

[79] See *id. at 148* (demonstrating that the aide does not have substantially identical and equal responsibilities to that of the orderly since the orderly has greater responsibility in several areas of the job, specifically male catheterizations).

work environment that entailed disagreeable contact with the very ill, severely injured and dying, the unruly and violent, and addicts. [80]

All of these reasons taken together seem to satisfy the point that orderlies performed more tasks that consumed a significant amount of time, and thus warranted a higher pay; therefore the definition of equal was appropriately applied. [81] However, discrepancy with laws cited in the Fifth Circuit become prevalent in the court's opinion when the court notes that the frequency of these tasks being performed by orderlies can range anywhere from once or twice a week to five times a day. [82] Such a vast difference in occurrence and timing of unequal tasks begins to question the validity of how often they actually occur, and whether a higher pay is warranted. [83] Although the court alluded to the expert testimony of qualified experts in the field of Job Evaluation and Personnel Engineering, the facts provided as to how frequently these extra tasks were performed were weak, the holding drawn from them was conclusory, and more attention should have been paid to the Fifth Circuit's interpretation. [84] Finally, the court noted that it is not enough to simply show that the work done by both orderlies and aides is similar or comparable: it must be substantially identical. [85] This reasoning creates a higher threshold for Equal Pay Act claims and results in decisions for the employer since substantially identical work is very difficult to prove. [86]

[*321] In Brennan v. South Davis Community Hospital, both female maids and aides brought an Equal Pay Act claim against their employer alleging that the work of the female maids and aides was equal to the work of the male orderlies and janitors, respectively. [87] The Tenth Circuit applied the same reasoning as the lower court, agreeing that employers should not be allowed to skirt the proper meaning of the Equal Pay Act by drawing "overly fine" distinctions in the tasks at issue. [88] The court applied the logic that higher pay is not related to extra duties when the extra task calls for a marginal amount of time and is of small importance, when the extra duties do not actually exist, or when employees of the opposite sex also perform duties of equal skill, effort, and responsibility. [89] A decision was made on the grounds of "substantially equal," rather than "identical," and this allowed the female

---

[80] See id. (asserting that working conditions of such an unpleasant caliber were rarely ever confronted by aides, and therefore additional pay for the orderlies was permissible).

[81] See *Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 725 (5th Cir. 1970)* (holding that work is unequal if extra tasks are required that consume a significant amount of time).

[82] See *Good Shepard Hosp., 327 F. Supp. at 148* (conceding that the extra work performed by the orderlies is not conducted at identifiable times or places because the additional work is not readily separable from the orderlies' other job duties, but noting that this should not matter and the tasks should not be considered incidental or occasional).

[83] See *Brookhaven Gen. Hosp., 436 F.2d at 725* (dictating that employers may not misinterpret the Equal Pay Act so much as to call for extra effort only occasionally, but still permit a wage discrepancy because extra effort is exerted sometimes).

[84] See *Good Shepard Hosp., 327 F. Supp. at 147* (noting that qualified experts found, through surveys and investigation, that major differences existed between the jobs of aides and orderlies).

[85] See id. (holding that the work of orderlies and aides is not substantially identical because the orderlies engage in more substantial work than the aides).

[86] See *Brennan v. City Stores Inc., 479 F.2d 235, 238 (5th Cir. 1973)* (commenting that Congress' change to the Equal Pay Act to replace "comparable" with "equal" altered the meaning of the bill and created a higher and more difficult threshold to meet).

[87] See *Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 863 (10th Cir. 1976)* (holding that the employer violated the Equal Pay Act because men and women were not paid equal wages for equal work).

[88] See *id. at 861* (finding the employer's extra task approach unfounded and incorrectly applied to the facts of the case).

[89] See *id. at 862* (determining that the male orderlies' extra duty of catheterization needs to be evaluated as part of the entire job, just as maids encounter extra duties).

maids and aides to prevail in their claim. [90] The Tenth Circuit's logic resonates with that of the Fifth Circuit, and encourages Equal Pay Act claims to survive dismissal, leaving open a broader meaning of "equal" work. [91] The Fifth and Tenth Circuits' reasoning that jobs can be compared on a lower threshold of equality is the kind of shift that the Supreme Court should implement to encourage Equal Pay Act cases from dismissal. [92]

Additionally, the court considered equal effort to mean similar "physical or mental exertion" needed for the performance of a duty, rather than an identical duty. [93] The court determined that occasional or infrequent performance of a duty that happens to require extra effort, either physically **[*322]** or mentally, could not by itself justify unequal effort or unequal pay; however, significant amounts of time spent on different tasks may not be considered equal effort. [94] Therefore, the occasional snow shoveling, carrying of large garbage cans, filling of soda machines, and handling of a larger floor cleaner did not call for a higher salary for the janitors than the maids because the effort exerted through these activities was equal to the effort the maids exerted in their own job duties. [95] By allowing a more open interpretation of "equal" rather than "identical," the Tenth Circuit mirrored the Fifth Circuit, and was able to effectively conclude that the similar work done by female maids and aides was justifiably equal and deserving of the same pay grade as their male janitor and orderly counterparts. [96]

The Tenth Circuit also decided Nulf v. International Paper Co., and the court reached a different opinion as to the equality of work done by a secretary in comparison to order desk employees. [97] While the court noted that equal work is not to be construed broadly, in the same paragraph it also used the terms "substantially equal," rather than identical, still keeping true to its more liberal interpretation of equal work. [98] Although the court's decision in Nulf seems counterintuitive in relation to Brennan v. South Davis Community Hospital, the court reasoned that the secretary who complained of unequal pay did not spend a significant amount of time doing order desk tasks, and that her secretarial job consumed at least fifty percent of her time. [99] To further explain its logic, the court noted that even if aspects of two jobs are similar, that is not enough to form a basis of comparison for equal pay. [100] This

---

[90] See id. (stating that "when jobs are substantially equal, a minimal amount of extra skill, effort, or responsibility cannot justify wage differentials").

[91] See *id. at 863* (holding that both aides and orderlies were involved in basic patient care and any differences in job duties did not involve significantly greater amounts of skill, effort or responsibility).

[92] See *id. at 861* (commenting that the best approach for determining if work is equal is a case-by-case analysis because different circumstances call for different interpretations of the statute).

[93] See *id. at 864* (noting that although extra effort may be exerted in different ways in two jobs, this does not allow for a difference in pay).

[94] See id. (finding that all of the work performed by both the maids and janitors was within the general cleaning function and minute variances in effort did not allow for unequal pay).

[95] See id. (finding that maids also did jobs the janitors did not, such as changing drapes, cleaning bathrooms, stripping beds, cleaning mattresses, and making beds).

[96] See *id. at 860* (asserting that maids and aides should be equally compensated to janitors and orderlies because the work done by each is equal).

[97] See *Nulf v. Int'l Paper Co., 656 F.2d 553, 560 (10th Cir. 1981)* (finding that a secretary was not erroneously paid less than desk order employees because their work was not equal).

[98] See id. (commenting on Congress' disapproval of "comparable work" and "like jobs," but still allowing a "substantially equal" standard).

[99] See id. (stating that because the complainant was spending half of her time on non-order desk duties, it cannot be determined that her job was substantially equal to the order desk job).

[100] See *id. at 561* (holding that the overall job is the only basis to be considered for equal pay, not individual parts).

decision reflects Brennan v. South Davis Community Hospital because it follows the logic that when significant amounts of time are spent on different tasks, the jobs are inherently unequal **[*323]** and therefore do not necessarily require equal pay. [101]

Sprague v. Thorn Americas Inc., a case decided by the Tenth Circuit after Nulf, continued to implement the "substantially similar" job requirement in Equal Pay Act claims. [102] A female secretary, Sprague, took on additional responsibilities, including conducting meetings and updating products; however, she did not receive a higher pay. [103] While Sprague argued that her employer paid males in positions similar to hers higher wages, the court found that her job differed significantly from males in other departments because her department produced less than one-tenth of the revenues of the departments managed by the male assistant managers. [104] Since Sprague's job duties entailed far less responsibility than the male assistant managers given the smaller size of her department and her position was that of a secretary, rather than an assistant manager, her work was "merely comparable" rather than "substantially equal," and could not support an Equal Pay Act claim. [105]

Another case out of the Tenth Circuit, Riser v. QEP Energy, again upheld the standard of "substantially equal" work being the basis for equal pay. [106] Riser, a female employee, sued her employer based on the reasoning that younger men who took over job responsibilities very similar to hers were paid higher wages than she was. [107] While deciding the case, the court acknowledged the importance of equal skill, effort, and responsibility the jobs held, and that the determination of each element must be based on the actual content of the job, not only the job description **[*324]** or title. [108] This job content determination is the appropriate way to decide the equality of the jobs and their pay because job titles and descriptions can be misleading, whereas actual job duties portray the whole scope of the job. [109] Since the new jobs that were given to men with a higher pay contained duties that were carved directly out of Riser's own duties, the court was correct in determining - regardless of Riser's job description - that Riser's performance was equal to that of her male counterparts. [110] Because a reasonable jury could find that Riser's job was "substantially equal" to both the Fleet Administrator and the Facilities Manager in skill, effort,

---

[101] See *Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 862 (10th Cir. 1976)* (noting that jobs that involve different tasks which consume substantial amounts of time are not equal because the duties and responsibilities are more encompassing).

[102] See *Sprague v. Thorn Am. Inc., 129 F.3d 1355, 1365 (10th Cir. 1997)* (finding that a woman's position was not "substantially equal" to that of the male assistant managers).

[103] See *id. at 1364* (noting that these additional responsibilities were also performed by Assistant Product Managers in other departments who received higher wages).

[104] See id. (reasoning that the difference in revenues between the departments indicated that the tasks and functions performed by Sprague were dissimilar in level of experience and level of complexity, rendering her job unequal to her male counterparts).

[105] See *id. at 1365* (stating that the "equal work" requirement of the Equal Pay Act should not be construed broadly so that failure to provide equal pay for "like jobs" is not actionable).

[106] See *Riser v. QEP Energy, 776 F.3d 1191, 1198* (holding that job differences that are "not significant in amount or degree will not support a wage differential.") (quoting *S. Davis Comm. Hosp., 538 F.2d at 862).*

[107] See id. at 1194 (describing that Riser's salary was $ 47,382 annually, while a male Fleet Administrator was hired on at $ 62,000 annually).

[108] See id. (reasoning that simply because Riser's job title was not "Fleet Administrator" or "Facilities Manager" did not preclude her from equal pay for the same work).

[109] See id. (noting that Riser logged 541 hours of overtime in fleet administration and facilities management duties, neither of which were in her job description or title).

[110] See id. at 1197 (finding that Riser performed the entirety of fleet-administration tasks that were passed to a male employee with the title Fleet Administrator).

and responsibility, the Tenth Circuit, while following the logic of the Fifth Circuit, correctly held that equal pay was required for Riser. [111]

The Third Circuit also addressed "equal work" in Shultz v. Wheaton Glass Co., where male and female selector-packers were paid unequal wages for the same work. [112] The company's employer attempted to defend the wage differential on the fact that male employees had sixteen additional tasks and also did the work of snap-up boys, making the jobs substantially different. [113] However, the court found that the male selector-packers only spent eighteen percent of their total time on this work and the work was forbidden to women. [114] In addition, it was not found that every male selector-packer performed the extra work; extra work was done by some male selector-packers only when the extra sixteen tasks were not performed by snap-up boys. [115] The Third Circuit correctly found that even if all male **[*325]** selector-packers did perform the sixteen additional tasks an inadequate basis for the differential in wages paid to the male and female workers would still exist. [116] The court also determined that if some female selector-packers were unwilling or unable to do the work of snap-up boys, then a wage differential between the male and female workers might be justified. [117] However, the court found that this could also mean that there may have been male selector-packers who were unwilling or incapable of doing the work of snap-up boys, thereby removing any justification for the wage differential. [118]

The Third Circuit correctly reasoned that the motive behind the employer's pay plans was to keep women in a subordinate role. [119] While evaluating the basis for the lower wages of the female selector-packers compared to the males, the court turned to the wording of the Equal Pay Act. [120] The court found that the Equal Pay Act (as it was in 1970 and still is today) provided inadequate guidance "in the construction of its provisions in concrete circumstances." [121] The court addressed the history of the Equal Pay Act and noted that Congress chose to specify equal pay for "equal" work even though Congress was aware of the National War Labor Board's regulations

---

[111] See id. at 1198 (holding that QEP divided Riser's position and assigned the tasks she was performing to the two new positions, which were then filled by male employees compensated at notably higher pay rates).

[112] See *Shultz v. Wheaton Glass Co., 421 F.2d 259, 263 (3d Cir. 1970)* (finding that the male selector-packers earned twenty-one and a half cents per hour more than females for equal work).

[113] See *id. at 262* (stating that additional tasks such as lifting more than thirty-five pounds, stacking cartons, and locating glassware in the warehouse were performed by men).

[114] See *id. at 263* (holding that there was no finding of fact as to what percentage of time was spent by male selector-packers either on average or individually in performing this different work).

[115] See id. (finding that no basis exists for an assumption that all male selector-packers performed any or all of these sixteen additional tasks).

[116] See id. (finding that the additional sixteen tasks were only justified at a pay rate of two cents more per hour, rather than the twenty-one-and-a-half cents per hour that male selector-packers were paid over the women selector-packers).

[117] See *id. at 264* (noting that no investigation as to whether the female selector-packers could perform the work of snap-up boys ever transpired).

[118] See id. (determining that simply because some of the male selector-packers were willing and able to do the work of snap-up boys did not justify that all males received twenty-one-and-a-half cents more per hour than all females).

[119] See id. (inferring this by the 10 percent differential between male and female selector-packers, and the two cents difference between snap-up boys and female selector-packers).

[120] See id. (noting that there are problems of construction with the Equal Pay Act because terms are exceedingly ambiguous).

[121] See *id. at 265* (finding that at the time, the Equal Pay Act had not been authoritatively construed by the Supreme Court).

from World War II that required equal pay for "comparable" work. [122] Equal pay for "comparable" work would set a looser standard for Equal Pay Act claims and would allow more cases to survive dismissal. [123] However, Congress was not prepared to implement such a standard. [124] Instead, the court noted that Congress did not require **[*326]** jobs to be identical, as some circuits may interpret the Equal Pay Act, but only that jobs be substantially equal. [125]

c. Focus on Congress' Intent of the Meaning of "Equal' Should Also be Taken into Consideration in Equal Pay Act Claims.

The Equal Pay Act was not fashioned to dispute entirely different jobs; the assumption that differences would "necessarily be apparent" in various job classifications was obvious, therefore warranting varied pay scales. [126] However, the Third Circuit correctly states that Congress' intention was not to allow artificially created job classifications which did not substantially differ from the genuine job classification to be an escape for employers. [127] Therefore, the female selector-packers were correct in asserting that their job classifications were very nearly identical, and at the least substantially equal to the male selector-packers, and should have been compensated equally. [128]

In Odomes v. Nucare, Inc., the Sixth Circuit decided that that male orderlies were unfairly paid more than female aides. [129] The orderlies were engaged in a primarily male dominated training program and their employer attempted to explain the unfair wage differential through the training program. [130] However, the court correctly found that the training program was an illusory "post-event justification" for unequal pay for equal work given the fact that most of the tasks the orderlies and aides performed were substantially equal. [131] Both the orderlies and aides performed patient care as their primary job function, which included bathing patients, distributing food trays, feeding, taking temperatures, and **[*327]** changing clothes and bed linens. [132] The employer contended that the work of the orderlies and aides were not equal in accordance with the Equal Pay Act, and therefore the unequal wages were justified. [133] The employer argued that male orderlies not only cared for patients, but they also

---

[122] See id. (determining that the National War Labor Board's regulations were only meant to show the feasibility of administering a federal equal pay policy).

[123] See id. (holding that comparable work standards would give employees more freedom in asserting Equal Pay Act claims).

[124] See id. (noting the National War Labor Board's decisions were not meant to be guiding principles for the Equal Pay Act).

[125] See id. (holding that any other interpretation of the Equal Pay act would destroy its "remedial purposes" of eliminating gender wage discrepancies).

[126] See id. (reasoning that when the Equal Pay Act was initially created, it was not meant to equate unlike jobs, as they would be substantially different (or unequal) by nature).

[127] See *id. at 265-66* (finding that such an allowance would render the content of the Equal Pay Act useless).

[128] See *id. 267* (holding that no adequate findings exist that could be made to support or justify the wage differential).

[129] See *Odomes v. Nucare, Inc., 653 F.2d 246, 247 (6th Cir. 1981)* (finding that justifications for unequal pay for equal work were illusory because the jobs were substantially similar).

[130] See *id. at 251* (noting that training programs which appear to be available only to employees of one sex, as is the case here, will be carefully examined to determine whether such training programs are legitimate).

[131] See *id. at 251* (finding that the work of the nurse aides and orderlies consisted primarily of the same tasks).

[132] See *id. at 249* (commenting on the fact that orderlies bathed less numerous male patients, the nurse's aides bathed more numerous female patients, and orderlies performed additional tasks that aides performed when no orderly was available).

[133] See *id. at 250* (describing Nucare as contending that the primary and only duty of the aides was patient care, although it is conceded that patient care also was the primary duty of the orderlies).

performed heavy lifting chores and that at least one orderly provided security to an otherwise all female nightshift. [134] The court rejected this argument and found that female aides were also equally capable of the heavy lifting that was required, and orderlies were simply there to provide assistance with lifting if it was necessary, and most of the time it was not. [135] In addition, when an orderly performed security checks of the premises, one or more aides generally accompanied him, proving that aides were just as involved in work-related duties that were initially thought to only pertain to men. [136] Given the circumstances, the Sixth Circuit was properly able to determine that the jobs performed by the aides and orderlies were substantially equal because the tasks were very similar, and each gender was capable and willing to perform them. [137]

Other courts could have construed the meaning of the Equal Pay Act more narrowly; finding that the additional training, the necessity of having a male orderly on duty for security, and the occasional additional tasks warranted a higher pay for the male orderlies. [138] An interpretation of that sort would limit the number of Equal Pay Act claims that could be argued, making a far stricter limitation on the equality of work, rather than just "substantially" equal. [139] Since the Sixth Circuit found that the jobs **[*328]** performed by the male orderlies were also as effectively and frequently performed by female nurse's aides, the court correctly evaluated the meaning of "substantially equal" work, which mirrored Congress' intent. [140]

2. Congress and Circuits Should Come to a Consensus on the Meaning of "Factors Other Than Sex" Because the Phrase is Interpreted as a Catchall for Employers, Where Instead it Should be Narrowly Monitored as it is in the Second Circuit.

"Factors other than sex" were addressed in Belfi v. Prendergast, where a female Long Island Railroad employee was paid significantly less than her male peers. [141] The Second Circuit noted that under the Equal Pay Act, although a plaintiff must make out a prima facie case, she does not need to prove a discriminatory animus on her employer's part. [142] The employer's four possible affirmative defenses include (1) a seniority system; (2) a merit system; (3) a system which measures earning by quantity or quality of production; or (4) a differential based on any factor other than sex. [143] Both the Sixth and Second Circuits have held that the "factor other than sex" defense

---

[134] See *id. at 250* (noting that testimony of the orderlies asserted that they did little or nothing that the aides did not do).

[135] See *id. at 251* (indicating that aides and orderlies helped each other perform the same tasks).

[136] See id. (suggesting that this extra task that was given as a reason for an increased wage for male orderlies was an illusory cover up, since female aides accompanied the orderlies).

[137] See id. (finding that additional duties are either too insubstantial in amount or too inconsistently assigned, and therefore the two jobs were equal).

[138] See *id. at 250* (indicating that one of the most frequently litigated questions is whether additional small tasks require the necessary effort to make the jobs substantially unequal).

[139] See id. (noting that the issue of equality of work must be resolved by an overall comparison of the work, not its individual segments).

[140] See id. (determining that Congress did not intend through the use of the words "equal work" that the jobs must be identical).

[141] See *Belfi v. Prendergast, 191 F.3d 129, 139 (2d Cir. 1999)* (finding that genuine issues of material fact existed as to whether the employer's reasons for pay disparity were pretextual).

[142] See *id. at 135* (noting that the Equal Pay Act allows employers four affirmative defenses, and that the burden of persuasion shifts to the employer to prove the disparity is justified by one of the defenses).

[143] See *id. at 136* (clarifying that to successfully establish a "factor other than sex" defense "an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential").

"does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." [144]

After an employer identifies an affirmative defense, the plaintiff may counter it by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex-discrimination, as the employee in Belfi did. [145] The employer asserted a combination of seniority and "factors other than sex" to explain the wage differential between the female railroad employee and her male peers. [146] However, the Second Circuit found that **[*329]** when the burden of persuasion shifted back to the employee to show that the employer's explanations were a pretext for gender-based discrimination, the court sided with the employee. [147] First, the court determined that the female employee was not paid a new minimum salary for the position that she held. [148] Second, a new male employee was paid more than a female employee, and seniority was given as the explanation. [149] Third, the seniority system was not found to be a legitimate explanation. [150]

The Second Circuit correctly determined that the employer had a different, and improper, justification for every reason why its female employee was paid less than her male counterpart. [151] The court reasoned that the employer's use of polices in the employee's case were unfair because they did not relate to a legitimate business purpose, and left the employee with no way to approach or remedy the obvious wage discrepancy. [152] While the employer asserted "factors other than sex" as a defense, the Second Circuit correctly concluded that a trier of fact could rationally find that the wage discrepancy was motivated by gender-based discrimination. [153] The outcome of this case proves that "factors other than sex" defenses are not meant to be all encompassing, and to allow overly broad definitions of the defense would unfairly preclude employees from bringing claims. [154]

The employer in Aldrich v. Randolph Central School District attempted to justify a wage differential between female cleaners and male custodians by the necessity of a civil service examination. [155] The employer asserted **[*330]** that the civil service examination and classification system was a "factor other than sex" and therefore was a

---

[144] See id. (quoting *EEOC v. J.C. Penny Co., 843 F.2d 249, 253 (6th Cir. 1988)* holding that the "factor other than sex" defense cannot be used as a catchall for employers).

[145] See id. at 133, 139 (describing that the employee claims she was underpaid from 1989 to 1994 compared to her male peers).

[146] See id. at 136 (claiming the gender-neutral application of the Salary Plan as a "factor other than sex").

[147] See id. at 138 (finding three reasons that prove genuine issues of material fact exist regarding the pretext).

[148] See id. (noting the railroad's own rule that an employee hired or promoted to a given position should normally be paid the position's minimum salary).

[149] See id. (finding that the new male employee had no seniority over the female employee because he was employed after her, yet he was paid more).

[150] See id. at 138-39 (finding that the seniority rule was not a bar to equal pay for male employees doing the same work).

[151] See id. at 139 (describing explanations to include lack of seniority, the employee not meeting guidelines for an inequity increase, and the employer's need to attract union workers to management).

[152] See id. (holding that the employee raised genuine issues of material fact that made it clear the employer was discriminating based on gender).

[153] See id. (indicating that circumstantial evidence raises questions of fact that may lead a jury to find that the employer also unreasonably applied its policies due to gender).

[154] See id. (concluding that summary judgment is inappropriate where "factors other than sex" are being utilized as an overly broad defense).

[155] See *Aldrich v. Randolph Cent. Sch. Dist., 63 F.2d 520, 522 (2d Cir. 1992)* (indicating that the custodian position is a competitive position under civil service rules and applicants must take an examination to be eligible for the job).

legitimate affirmative defense. [156] In this case, the Second Circuit again properly analyzed the most effective way to determine what "factors other than sex" are in Equal Pay Act Claims. [157] The court determined that the language of the statute recognized many factors that may be used to measure the relationships between jobs and pay disparity, but these factors must be bona fide. [158] The court found that the civil service examination the employers asserted was not enough to stand as a "factor other than sex" as it was only a gender-neutral classification system. [159] While evaluating the facts of the case, the court asserted that Congress' intent was not that an employee would lose an Equal Pay Act claim after making out a prima facie case of wage discrimination simply because the employer chose to "call one employee a cleaner and another employee a custodian." [160]

The Second Circuit noted that in the instant case, the employer never proved that the job classification system (i.e., the civil service examination) had any grounding in legitimate business considerations, and therefore it cannot be a "factor other than sex." [161] To show any possibility that the civil service examination qualifies as a "factor other than sex," the Second Circuit correctly held that the employer must prove that the exam for custodians and the practice of filling the custodian's position only from among the top three scorers on the exam are related to performance of the custodian's job; doing otherwise would allow for a catchall interpretation of the defense. [162] If the employer can prove that the exam justifies the **[*331]** wage differential because the exam is job-related, then the affirmative defense may stand. [163] However, the employer had only asserted the defense of a "factor other than sex" without any support as to the impact of the exam on job performance. [164]

The reasoning of the Second Circuit was also implemented in the Ninth Circuit's decision in Maxwell v. City of Tucson, where the court properly applied the same "factor other than sex" analysis in the case of a municipal employee who accepted a program director's position at a reduced salary and then alleged sex-based wage discrimination against the municipality. [165] The major question in the case was whether the employer sustained its

---

[156] See *id. at 522-23* (noting that the female employee who brought the Equal Pay Act claim was never a top scorer on the examination).

[157] See *id. at 524* (declaring that Congress specifically rejected "blanket assertions of facially-neutral job classification systems" as a "factor other than sex" defense).

[158] See *id. at 525* (noting that "only a "bona fide job classification program' where job-related distinctions underlie the classifications will qualify as a "valid defense to a charge of discrimination'").

[159] See id. (stating that when a differential in pay is rooted in business-related differences in work responsibilities and qualification, then it may be a "factor other than sex").

[160] See id. (commenting that such an affirmative defense would provide "a gaping loophole in the statute" through which pretexts for discrimination would be permitted).

[161] See *id. at 526-27* (finding that the district court erred by allowing the employer's classification system as "literally a "factor other than sex"").

[162] See *id. at 527* (expressing that a female employee was doing custodian's work and being paid less than male custodians under the guise that the civil service examination allows it).

[163] See id. (articulating that a "factor other than sex" may only be asserted as a defense if there is a legitimate business reason, otherwise the defense is simply discriminatory).

[164] See id. (holding that since factual issues exist in regards to the civil service examination's relation to job performance, summary judgment for the employer was improperly granted).

[165] See *Maxwell v. City of Tucson, 803 F.2d 444, 444 (9th Cir. 1986)* (finding that the municipality failed to establish a "factor other than sex" defense to Equal Pay Act allegations).

burden of proving one of the exceptions to the Equal Pay Act, and the court found that it did not. [166] While the Ninth Circuit found that other circuits have differed on which job classifications qualify under the "factor(s) other than sex" defense, the proper application of the standard entails legitimate business purposes for the reclassification. [167] The court determined that the City failed to meet its burden of proof because the employee presented evidence that the duties and responsibilities of her position had actually increased, while her wages decreased, proving that a finder of fact could logically conclude that the wage disparity was not supported by an affirmative defense. [168]

The Seventh Circuit in Patkus v. Sangamon-Cass Consortium analyzed "factors other than sex" in a less fair and more employer-friendly way. [169] The female employee's male successors, who performed substantially **[*332]** equal work as the female employee, were paid higher salaries when they took over her position, but the Seventh Circuit did not find this to be a violation of the Equal Pay Act. [170] The court incorrectly reasoned that because the reorganization plan was implemented after the female employee left her position, it did not mean the employer would not have been willing to pay the female employee a higher salary had she stayed in her position. [171] The court neglected the fact that the reorganization and the higher wages were only implemented after the departure of the female employee, and refused to condemn such actions as sex discrimination. [172] By allowing the employer to use the "factor other than sex" catchall excuse, the Seventh Circuit allowed unequal wages to be legally justified by reasoning that employers have the right to change and revise the job-evaluation and pay systems they implement. [173] While the Seventh Circuit raises important points about the need for employers to be able to implement change in their workforce, a reading of "factors other than sex" that is closer to the analysis in the Second Circuit would have provided a less employer biased outcome, and would have reduced the catchall interpretation of the defense. [174]

The Seventh Circuit in Dey v. Colt Construction & Development Co. again misapplied the "factor other than sex" defense. [175] The court referred to the "factor other than sex" defense as a catchall exception that "embraces an

---

[166] See *id. at 447-48* (illustrating that the primary purpose of the "factor other than sex" was to permit employers to utilize bona fide gender-neutral job evaluation and classification systems).

[167] See *id. at 445* (noting that the city claimed the reclassification of the job from Director to Administrator justified lower wages because the work load had decreased, therefore falling under the "factor other than sex" defense).

[168] See *id. at 447-48* (describing that legitimate organizational needs would be permitted as a "factor other than sex;" however, in the instant case, the evidence shows no organizational needs or changes to explain the wage disparity).

[169] See *Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1261-62* (noting that the employee's evidence did not establish Equal Pay Act violations because the restructuring was considered a plausible affirmative defense).

[170] See *id. at 1261* (finding that because the position and pay changes were based on a long-term reorganization plan, they are allowable as "factors other than sex").

[171] See id. (noting that the reorganization was already planned for because it was discussed prior to the female employee's departure, and the plan would have been implemented with or without the departure of the female employee).

[172] See id. (holding that the court is barred from finding an Equal Pay Act violation in the absence of some reason to connect the change in personnel to the implementation of the new plan).

[173] See id. (determining that a holding of the contrary would be to force employers either to "forego legitimate organizational planning or to hire only someone of the same sex whenever an employee left a job at a critical time").

[174] See *id. 1261-62* (holding that there is little reason to question that the reorganization was a legitimate reason for the pay differential based on "factors other than sex;" how this allows too large a loophole in the Seventh Circuit).

[175] See generally *Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1449 (7th Cir. 1994)* (finding that the pay disparity was based on a "factor other than sex" although themes of sex discrimination existed).

almost limitless number of factors, so long as they do not involve sex," and did not find it unfair or illegitimate to leave a large loophole for employers to pass through. [176] While the Second Circuit finds **[*333]** it important to assert that there must be a legitimate business reason for the "factor other than sex" defense, the Seventh Circuit incorrectly concluded that the factor only needs to be bona fide, and that the factor must not be discriminatorily applied or have a discriminatory effect. [177] In the instant case, this logic allowed the employer to pay a lower wage to its female employee, while paying a male employee in the same position a higher wage. [178] Although a more advanced degree may in some situations justify higher wages, the Seventh Circuit did not require, or question, whether the higher degree related to legitimate business reasons for the pay discrepancy, therefore allowing a potentially facially discriminatory pay practice to continue without further investigation. [179]

B. The Prima Facie Elements of an Equal Pay Act Claim Should Not be Hindered by the Issue of Possibility Versus Plausibility Because it Bars Claims

The Second Circuit, while providing useful guidance on how to analyze "factors other than sex," recently issued a decision in E.E.O.C. v. Port Authority of N.Y. & N.J. that seriously hinders the ability of claimants to bring an Equal Pay Act claim. [180] While the female attorneys pled their claim and brought evidence sufficient to prove that they were unfairly paid less than the male attorneys at the Port Authority, the court still concluded that the information was not adequate to find a violation of the Equal Pay Act. [181] The court's continued concern with the EEOC's making of "broad generalizations" when comparing the work done by female and male employees lead the court to incorrectly decide that the claim may have been possible, but was not plausible. [182]

[*334] For every argument the EEOC made, the Second Circuit had a reason for why all of the testimony and evidence was not sufficient enough to bring an Equal Pay Act claim. [183] The EEOC determined that the same professional degree and admission to the bar was necessary for both female and male sexes, as well as the same physical and mental exertion, the same degree of accountability and supervision, and even the same work location. [184] However, the court ruled that this was all general and broad information that did not prove the work performed by the attorneys was equal. [185] The court relied heavily on analysis from Twombly and Iqbal, stating that a

---

[176] See *id. at 1462* (noting that it is not the court's place to second-guess the employer's business judgment).

[177] See id. (commenting that the court cannot question the company's decision to pay more for an advanced degree belonging to a man when there is no evidence that it paid women with similar degrees a lesser amount).

[178] See id. (determining the "factor other than sex" defense was justified because the male employee had more advanced business degrees and the employer had initially offered the male employee less money, but then the salary was negotiated up).

[179] See *id. at 1464* (noting that the court is convinced the male employee's higher salary was unrelated to his sex).

[180] See generally *E.E.O.C. v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 248-49 (2d Cir. 2014)* (dismissing the case on the basis that despite years of discovery, nothing about the actual content of the work done by the female attorneys was provided).

[181] See *id. at 256* (finding that the EEOC alleged all claims of unequal work for equal pay in a conclusory fashion, therefore providing no basis for the claims).

[182] See *id. at 257-58* (detailing all of the evidence found through discovery to be unreasonable inferences, even though the EEOC found comparators, similarly situated employees, and evidence that the pay disparity was not explained by "factors other than sex").

[183] See *id. at 250* (stating that even though the EEOC compared dates of bar admission, dates of service with the Port Authority, salaries, and divisions to prove the pay discrepancy, the court was still unconvinced by the plethora of evidence).

[184] See *id. at 250-51* (revealing that the EEOC found many similarities between female and male attorneys detailing why they should be compensated equally).

[185] See *id. at 256* (noting that the complainant did not allege "enough facts to state a claim for relief that is plausible on its face").

complaint must support the "viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face." [186] The court conceded that the equal work inquiry does not demand evidence that a plaintiff's job is "identical to a higher-paid position, but that the standard is nonetheless demanding," and it must be proved that the jobs compared are "substantially equal." [187] The EEOC identified 338 pairs of claimants that shared similar bar admission dates and years of service, who worked in the same division at the same time, yet the Second Circuit did not find this information plausible for an Equal Pay Act claim. [188] Despite evidence to the contrary, the court reasoned that the EEOC's allegations read as nothing more than a claim that suggests the "sheer possibility" that the Port Authority violated the Equal Pay Act. [189] The Second Circuit's failure to explicitly state what would have been considered a plausible pleading leaves both complainants and other circuits in confusion and without a legitimate example to base future claims on. [190] The EEOC **[*335]** provided substantial evidence as to a violation of the Equal Pay Act, yet the Second Circuit refused to review this information, instead claiming that the EEOC did not bring enough facts or provide enough focused information, without providing in its analysis what a proper claim with plausible evidence would look like. [191]

IV. Conclusion

Bringing an Equal Pay Act claim has become more challenging in recent years as pleading standards have been analyzed with stricter scrutiny. [192] Because of higher pleading standards and circuit courts that have continued to find in favor of employers, employees have recently discovered that challenging wage disparity is a far more difficult task than it should be. [193] If circuit courts could come to a consensus concerning pleading standards, prima facie elements, and the affirmative defenses of Equal Pay Act claims, judges and complainants would have a clearer understanding of what the law calls for, making it easier to state a valid claim. [194]

More specifically, the Supreme Court, circuit courts, and Congress should implement the Fifth Circuit's correct interpretation of equal work. [195] Comparable work should also be placed back into the definition of equal work so that more Equal Pay Act claims would be allowed in courts, moving the equal work standard closer to "substantially

---

[186] *Id. at 253* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)* (noting that a complaint offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do").

[187] See id. at 255-56 (determining that the EEOC's bald recitation of the elements of an Equal Pay Act claim and its assertion that the attorneys at issue held "the same job code" are plainly insufficient to support a claim).

[188] See id. at 256 (stating that the EEOC failed to demonstrate that all Port Authority attorneys perform "substantially equal" work).

[189] See id. at 258-59 (commenting that the EEOC has alleged, at most, that some female nonsupervisory attorneys were paid less than some male nonsupervisory attorneys at the Port Authority).

[190] See id. at 258 (holding that the EEOC's pleadings cannot be said to contain enough facts to raise a reasonable expectation that discovery will reveal evidence of illegality).

[191] See id. at 259 (finding that the EEOC has not plausibly plead that the pay differentials existed despite the attorney's performance of "substantially equal" work, and therefore, without any nonconclusory allegations to support the claim, the EEOC's complaint was properly dismissed).

[192] See id. at 256 (finding that broad statements are not enough to bring an Equal Pay Act claim because factual assertions must be present and well-grounded in the basis of the complaint).

[193] See id. (holding that the complaint of wage disparity was properly dismissed even though plaintiffs brought years' worth of collected evidence to prove the unjust wages).

[194] See *Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974)* (stating that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections that statutory definitions were vague).

[195] See *Brennan v. City Stores, Inc. 479 F.2d 235, 238 (5th Cir. 1973)* (finding that the standard for "equal work" is higher than mere comparability, but lower than absolutely identical).

equal," and closer to the Fifth Circuit's reading of the definition. [196] The "factor other than **[*336]** sex" defense should also be more narrowly tailored and defined in the way the Second Circuit has derived meaning from it: using it as a legitimate reason for differences in pay, rather than a catchall for employers to find excuses to pay male employees more than females. [197] Failure to reach a consensus on the meaning of equal work, the meaning of "factors other than sex," or the appropriate pleading standard for Equal Pay Act claims could mar the purpose of the statute, and prevent women from obtaining the wages they are entitled to. [198]

End of Document

---

[196] See *Corning Glass Works, 417 U.S. at 199* (noting that the comparable standard was more readily used in the earlier years of the Equal Pay Act, but has since been eliminated to the detriment of Equal Pay Act claims).

[197] See *Aldrich v. Randolph Cent. Sch. Dist., 63 F.2d 520, 526 (2d Cir. 1992)* (stating that when a differential in pay is rooted in business-related differences in work responsibilities and qualification, then it may be a "factor other than sex").

[198] See *Sprague v. Thorn Am. Inc., 129 F.3d 1355, 1364 (10th Cir. 1997)* (stating that the "equal work" requirement of the Equal Pay Act should not be construed broadly, and therefore failure to provide equal pay for "like jobs" is not actionable).

OP-ED CONTRIBUTOR

Hillary Clinton Will Not Be Manterrupted

By JESSICA BENNETT
SEPTEMBER 27, 2016

When it was all over, the score went something like this:

Donald Trump: 40. Hillary Clinton: 1.

That was my rough calculation anyway, of the times that Mr. Trump interrupted Mrs. Clinton, and vice versa, during the first presidential debate on Monday night.

But to be honest, I lost track.

I noted Mr. Trump scoffing, "Who gave it that name?" as Mrs. Clinton criticized what she called the "Trump loophole" in his tax plan ("Mr. Trump, this is Secretary Clinton's two minutes," the moderator, Lester Holt, interjected); chiming in with a "That's for sure" as Mrs. Clinton acknowledged making a mistake in using a private email server. There was an "ugh" when she criticized his depiction of the black community, and a repeated "Wrong!" as she described his support for the Iraq war (a description that was not, in fact, wrong).

At the 26-minute mark, the website Vox posted a graphic showing that Mr. Trump had interrupted Mrs. Clinton a whopping 25 times. Shortly thereafter, The Huffington Post proclaimed, "This is what manterrupting looks like."

There was a time, not so long ago, when Kanye West was the most famous manterrupter — man-interrupting a woman, of course — of our era. You may recall, back in 2009, when he jumped onstage during Taylor Swift's acceptance speech at the MTV Video Music Awards, grabbed the microphone, and declared, "Beyoncé had one of the best videos of all time!" Whether or not you agreed with

his musical assessment then, what was clear last night was that Mr. Trump stole Mr. West's interruption crown.

To anyone who has observed Mr. Trump speak, it shouldn't have been surprising: Shouting, talking over, bulldozing, mansplaining — these are Mr. Trump's linguistic trademarks. Yet to the rest of us, or at least the 51 percent of us who are women, Mr. Trump's behavior was also painfully familiar, reminiscent of the types of dismissals so many of us deal with every day.

"To the men amazed Clinton hasn't snapped: Every woman you know has learned to do this. This is our life in society," one woman mused to her 300 Twitter followers the night of the debate. By morning, she'd been retweeted more than 7,000 times.

Women don't imagine this behavior.

Women are in fact twice as likely to be interrupted as men are — by both men and women — and more so if they are a member of a minority group. And you know that old trope about the "chatty" female? It's not true. It's actually men who talk more than women: 75 percent more in male-dominated groups like legislatures (and, one might presume, politics).

People reacting to the debate at a watch party in Rosemont, Penn.
MARK MAKELA FOR THE NEW YORK TIMES

Mrs. Clinton has lots of experience in speaking in crowds of men, but for the rest of us, it can be tricky: Women are less likely to speak up, and less likely to be heard, in groups that are mostly men — which is why gender equality in places where people are required to speak is so important. That might explain why even the women of the Obama White House have employed a method they call "amplification": making sure at meetings that other women are present, then repeating one another's ideas — with credit to the author. With this method, not only are they less likely to be interrupted, they're also less likely to have their ideas stolen; in mixed settings, research has shown, women are less likely to have their own ideas attributed to them — in many cases because male credit is simply inferred.

This is subtle sexism. It is the kind of behavior that may not be malicious, or even conscious; it is bias exhibited by well-intentioned voters, Bernie Sanders-supporting progressives and even feminists. Individually, the things — interruptions, being condescended to, losing credit for your ideas — may not seem like that big a deal. But they add up.

Subtle sexism is everywhere in this election, and not just from Mr. Trump. It's in the way we question whether Mrs. Clinton is trustworthy, even though she's been

rated by PolitiFact, the Pulitzer Prize-winning fact-checkers, as much more honest than her opponent.

It's in our scrutiny of her qualifications, despite an abundance of evidence showing she is, in fact, the most qualified candidate, and research showing that women must be twice as qualified to be perceived as once as good, and more so if they are from minority groups.

Subtle sexism is calling Mrs. Clinton "shrill" — a term that's used twice as frequently to describe women by the media, according to the linguist Nic Subtirelu — or its being suggested by journalists (or the chairman of the Republican National Committee, for that matter) that she should "smile!"

Subtle sexism is the fact that — while, indeed, Hillary Clinton has made mistakes — we judge mistakes more harshly in women, and remember those mistakes longer. It's that she must strike a near-impossible balance between niceness and authority — a glimmer of weakness, and she doesn't have the "stamina"; but too much harshness and she's "cold," "aloof," "robotic," scolded by a man who is all but frothing at the mouth for not having the right "temperament." It's saying that she wasn't being "nice." (Since when has "niceness" been a qualification for a presidential candidate?) It's saying she doesn't "look" presidential, which might as well mean male.

The root of subtle sexism is not all Mr. Trump, or anyone else, for that matter. It's culture: for hundreds of years, men's voices have been the ones to take charge. As early as middle school, boys are eight times as likely as girls to call out answers in classroom discussions, while girls are taught to raise their hands and wait their turn. That dynamic plays out in movies and on television, where male actors engage in more disruptive speech, and take up twice as much speaking and screen time as their female peers (they're also more likely to play characters who have jobs in fields like science, law or politics).

Which means perhaps we shouldn't be surprised that, according to a recent study by a Vanderbilt professor, the average person finds it easier to pair words like "president" and "executive" with male names and pictures, while words like "assistant" and "aide" cause us to think instinctively female. Or that, according to another study, conducted during the primaries, support for Mrs. Clinton drops eight points when voters are reminded of her gender.

You'll notice: Mrs. Clinton didn't snap at Mr. Trump when he interrupted her last night. Rather than engage in the Trump game of verbal chicken, she stood back,

calmly, collectedly, and let him self-destruct. It's safe to assume it's a tool she's had six decades to perfect.

Jessica Bennett, a contributor to The New York Times Styles section, is the author of "Feminist Fight Club: A Survival Manual for a Sexist Workplace."

Follow The New York Times Opinion section on Facebook and Twitter (@NYTOpinion), and sign up for the Opinion Today newsletter.

Trump Says Transition's Going 'Smoothly,' Disputing Disarray Reports

With Trump's Signature, Dozens of Obama's Rules Could Fall

TRANSITION BRIEFING

Ivanka Trump and Jared Kushner Will Not Seek Security Clearances, Sources Say

Officer Who Shot Philando Castile Is Charged With Manslaughter

Megyn Kelly's Cautionary Tale of Crossing Donald Trump

Back to top

Home
World
U.S.
Politics
The Upshot
New York
Business Day
Technology
Sports
Opinion
Science
Health
Arts
Photos
Style
Video
Most Emailed

More Sections

Settings

The New York Times | http://nyti.ms/2aKzR5C

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

Illegal in Massachusetts: Asking Your Salary in a Job Interview

By STACY COWLEY AUG. 2, 2016

In a groundbreaking effort to close the wage gap between men and women, Massachusetts has become the first state to bar employers from asking about applicants' salaries before offering them a job.

The new law will require hiring managers to state a compensation figure upfront — based on what an applicant's worth is to the company, rather than on what he or she made in a previous position.

The bipartisan legislation, signed into law on Monday by Gov. Charlie Baker, a Republican, is being pushed as a model for other states, as the issue of men historically outearning women who do the same job has leapt onto the national political scene.

Nationally, there have been repeated efforts to strengthen equal pay laws — which are already on the books but tend to lack teeth — but none have succeeded so far. Hillary Clinton has tried to make equal pay a signature issue of her campaign, while Donald J. Trump's daughter Ivanka praised her father for his actions on this issue when she spoke at the Republican National Convention.

By barring companies from asking prospective employees how much they earned at their last jobs, Massachusetts will ensure that the historically lower wages and salaries assigned to women and minorities do not follow them for their entire careers. Companies tend to set salaries for new hires using their previous pay as a base line.

"I think very few businesses consciously discriminate, but they need to become aware of it," said State Senator Pat Jehlen, a Democrat and one of the bill's co-sponsors. "These are things that don't just affect one job; it keeps women's wages down over their entire lifetime."

Federal law already prohibits gender-based pay discrimination, but violations are hard to prove and wage gaps persist in nearly every industry.

Nationally, women are paid 79 cents for every dollar that men earn, according to the United States Census Bureau. A number of factors affect that statistic, including the career fields women choose, but economists consistently find evidence of pay disparities not offset by other variables.

The Massachusetts law, which will go into effect in July 2018, takes other steps as well to combat pay discrimination. Companies will not be allowed to prohibit workers from telling others how much they are paid, a move that proponents say can increase salary transparency and help employees discover disparities.

And the law will require equal pay not just for workers whose jobs are alike, but also for those whose work is of "comparable character" or who work in "comparable operations." Workers with more seniority will still be permitted to earn higher pay, but the law effectively broadens the definition of what is equal work.

Other states have also been stepping up their protections. In May, Maryland passed a law that requires equal pay for "comparable" work, and California last year enacted a law that is one of the nation's strictest, requiring employers to be able to prove that they pay workers of both genders equally for "substantially similar" jobs. It, too, had the backing of important local trade groups, including the California Chamber of Commerce.

And Massachusetts joins at least 12 other states that already require companies to let employees compare notes about how much they are paid.

The distinguishing feature in the Massachusetts law is that job seekers will no longer be compelled to disclose their salary or wages at their current or previous jobs — which often leaves applicants with the nagging suspicion that they might have been offered more money if the earlier figure had been higher. People will still be allowed to volunteer their salary information.

"This is a sea change, and we hope it will be used as a model in other states," said Victoria A. Budson, executive director of the Women and Public Policy Program at Harvard's Kennedy School of Government and chairwoman of the Massachusetts Commission on the Status of Women. The law in her state, she said, "will help every single individual who applies for a job, not just women."

Efforts to pass a national anti-secrecy law, the Paycheck Fairness Act, have been repeatedly blocked by congressional Republicans. Opponents, including the U.S. Chamber of Commerce, a powerful business lobbying group, say that such laws would increase litigation and unfairly restrict employers' compensation decisions.

But proponents of equal pay laws say that attitudes are shifting among businesses. In Massachusetts, for instance, the Greater Boston Chamber of Commerce was an early and enthusiastic backer.

"That really set the tone," said State Representative Ellen Story, a Democrat and co-sponsor of the bill. "Now it wasn't just members of the women's caucus, it was business leaders, too, asking for this."

The Massachusetts attorney general will be in charge of enforcing the law, which also gives workers the right to sue companies directly for violations.

In June, 28 businesses nationwide, including large employers like Gap, Pepsi and American Airlines, signed an Equal Pay Pledge promoted by the White House in which they committed to conducting annual audits of their pay by gender across all job categories.

"Companies that want to do the right thing are seeing that these new laws really pose no threat," said Vicki Shabo, vice president of the National Partnership for Women & Families, which tracks the fair pay bills introduced in state legislatures. "It's absolutely started to pick up. These laws are not just passing in completely blue places," she added," they're passing with bipartisan votes."

Businesses are also beginning to talk more openly about the often uncomfortable things those audits find. PricewaterhouseCoopers published the results of a pay analysis it did of its British staff. It found a 15.1 percent pay disparity between men and women, and changed its promotion practices to bring more women into senior leadership roles. Salesforce, a cloud software company, says it spent $3 million last year to raise the salaries of female employees to match their male counterparts.

Academic research has illustrated the negative effect pay disparity has not just on individuals, but also on the broader economy. Closing the gender wage gap would lower the poverty rates in every state, according to an analysis by the Institute for Women's Policy Research.

Just as important, according to advocates of equal pay, are the changing demographics in boardrooms and statehouses.

Ms. Jehlen, one of the Massachusetts bill's co-sponsors, recalled the first time she testified about equal pay issues before the legislature's labor committee: All the members were men.

She and others had taken up the cause on behalf of a group of female cafeteria workers who filed a lawsuit in 1991 seeking parity with male janitors, who did comparable work, the cafeteria workers said, but were paid significantly more. The Massachusetts Supreme Judicial Court ruled against the women, saying that the state's equal pay law was not clear in its definition of comparable work.

This week, one of those cafeteria workers attended the ceremony at which Governor Baker signed the new law.

"For me," Ms. Jehlen said, "that was the most emotionally powerful thing."

A version of this article appears in print on August 3, 2016, on page A1 of the New York edition with the headline: Pay Equity the Aim, Interviewers Can't Ask 'What Do You Make?'.

LIVING

I want all the perks of maternity leave — without having any kids

By Anna Davies

April 28, 2016 | 2:46am

Meghann Foye has never had a kid, but believes childless women are entitled to a "meternity" leave of their own to reflect on their lives.
Photo: Tamara Beckwith/NY Post; Hair and makeup by Shannon Grey Williams for NEXT Artists

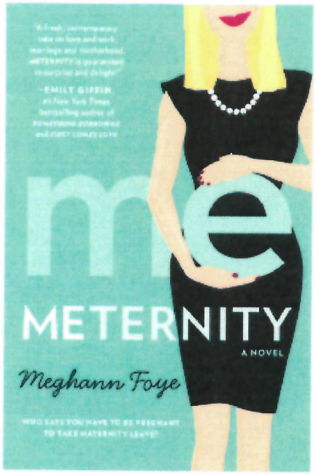
Meghann Foye, 38, was jealous of co-workers clocking out for maternity leave, and decided she needed a break of her own. Here, the author of the novel "Meternity" (Mira, out now), tells The Post's ***Anna Davies*** *why she believes every woman deserves mandated "me time."*

I was 31 years old in 2009, and I loved my career. As an editor at a popular magazine, I got to work on big stories, attend cool events, and meet famous celebs all the time.

And yet, after 10 years of working in a job where I was always on deadline, I couldn't help but feel envious when parents on staff left the office at 6 p.m. to tend to their children, while it was assumed co-workers without kids would stay behind to pick up the slack.

"You know, I need a maternity leave!" I told one of my pregnant friends. She laughed, and we spent the afternoon plotting my escape from my 10-hour days, fake baby bump and all.

Of course, that didn't happen. But the more I thought about it, the more I came to believe in the value of a "meternity" leave — which is, to me, a sabbatical-like break that allows women and, to a lesser degree, men to shift their focus to the part of their lives that doesn't revolve around their jobs.



For women who follow a "traditional" path, this pause often naturally comes in your late 20s or early 30s, when a wedding, pregnancy and babies means that your personal life takes center stage. But for those who end up on the "other" path, that socially mandated time and space for self-reflection may never come.

When I graduated from college in the early 2000s, I enjoyed the same unspoken expectation shared among my fellow Gen-Xers: If you poured your heart and soul into your career, you would eventually get to a director level and have the flexibility, paycheck and assistants beneath you to begin to create a work-life balance. Then the 2008 recession hit, and people were lucky to have jobs at all. Assistants and perks disappeared across industries, and I felt like the cultural expectation was that we should now be tethered to our desks and our smartphones.

It seemed that parenthood was the only path that provided a modicum of flexibility. There's something about saying "I need to go pick up my child" as a reason to leave the office on time that has far more gravitas than, say, "My best friend just got ghosted by her OkCupid date and needs a margarita" — but both sides are valid.

And as I watched my friends take their real maternity leaves, I saw that spending three months detached from their desks made them much more sure of themselves. One friend made the decision to leave her corporate career to create her own business; another decided to switch industries. From the outside, it seemed like those few weeks of them shifting their focus to something other than their jobs gave them a whole new lens through which to see their lives.

While both men and women would benefit from a "meternity" leave after a decade or so in the workforce, the concept is one that would be especially advantageous for women. Burnout syndrome is well-documented in both sexes, but recent research suggests that women may experience it at greater rates; researchers postulate that it's because women (moms and non-moms alike) feel overloaded by the roles they have to take on at work and at home.

Bottom line: Women are bad at putting ourselves first. But when you have a child, you learn how to self-advocate to put the needs of your family first. A well-crafted "meternity" can give you the same skills — and taking one shouldn't disqualify you from taking maternity leave later.

I may not have been changing diapers, but I grappled with self-doubt.

- Meghann Foye

As for me, I did eventually give notice at my job and take a "meternity" of my own. I may not have been changing diapers, but I grappled with self-doubt for the year and a half that I spent away from the corporate world. And I grieved the loss of my dad, who had just died after a long illness. But a "meternity" done right should be challenging. It should be about digging into your whole life and emerging from it more confident in who you are.

It also gave me the opportunity to help someone achieve their "meternity" dreams — even if that person was a fictional character. My first novel, "Meternity," was just released, and is about a woman who fakes a pregnancy and discovers some hard truths about what it's really like to "have it all."

Ultimately, what I learned from my own "meternity" leave is that any pressure I felt to stay late at the office wasn't coming from the parents on staff. It was coming from myself. Coming back to a new position, I realized I didn't need an "excuse" to leave on time. And that's what I would love the take-away for my book to be: Work-life balance is tough for everyone, and it happens most when parents and nonparents support and don't judge each other.

I want kids in the future, and I might still take a traditional maternity leave. I might not. But either way, I'm happy my "meternity" taught me to live on my own terms and advocate what works for me.

Counterpoint: The Post's Kyle Smith says parents in the workplace should be worshiped by their childless peers

Purchase "Meternity" on Amazon.

FILED UNDER BOOKS, MATERNITY LEAVE, THE WORKPLACE

The Washington Post

PowerPost

Women in Power

White House women want to be in the room where it happens

By Juliet Eilperin September 13

When President Obama took office, two-thirds of his top aides were men. Women complained of having to elbow their way into important meetings. And when they got in, their voices were sometimes ignored.

The Post is exploring how women gain, consolidate and experience power in politics and policy.

So female staffers adopted a meeting strategy they called "amplification": When a woman made a key point, other women would repeat it, giving credit to its author. This forced the men in the room to recognize the contribution — and denied them the chance to claim the idea as their own.

"We just started doing it, and made a purpose of doing it. It was an everyday thing," said one former Obama aide who requested anonymity to speak frankly. Obama noticed, she and others said, and began calling more often on women and junior aides.

For decades, women have struggled to crack the code of power in the White House, where grueling hours, hyper-aggressive colleagues and lack of access to the boss have proved challenging to women from both parties. The West Wing is also home to the ultimate glass ceiling: Men have had a lock on the Oval Office for more than 200 years.

That could change if Democrat Hillary Clinton prevails in November. Not only would she break a gender barrier by winning the presidency, she also could bring in a female chief of staff — another first in the White House — as she did as first lady, as a senator and as Obama's secretary of state.

During Obama's second term, women gained parity with men in the president's inner circle; Clinton has actually had women outnumber men at times among her senior staff.

Despite his barbs directed against women, GOP nominee Donald Trump has installed some female managers while working in the male-dominated construction industry, and he has at least three women playing senior roles in his campaign.

The White House is unlike any workplace in America. Power is defined by proximity to a single individual: the president. Being "in the room" — whether it's the Oval Office or the 7:30 a.m. senior staff meeting where the chief of staff hashes out the administration's top priorities — is crucial to exerting influence.

And the job is a constant race against the clock: Presidents have as few as four years to pursue an agenda and cement a legacy. Burnout is endemic, and top White House aides typically leave after less than three years.

“Given the short period you are in the White House, you leverage every minute to ensure that you can be there, fully committed and totally present,” said Juleanna Glover, who served as press secretary to Vice President Richard B. Cheney during President George W. Bush’s first term.

Women often struggle just to get a foot in the door. Presidents typically select their most senior advisers from the male-dominated ranks of their campaigns. As late as the Eisenhower administration, the only women working in the West Wing were secretaries — and they were barred from dining with men in the White House mess.

“Regardless of the weather, we had to slog out to any hole-in-the-wall we could find,” recalled Patty Herman, who worked there until she met and married the White House correspondent for CBS. “Now, I understand, that’s changed.”

Once your foot is in the door, you have to get a seat at the table. Anne Wexler, who served as Jimmy Carter’s assistant for public outreach, complained that Chief of Staff Hamilton Jordan never invited her to a key daily meeting where aides offered ideas to the president, even though Jordan publicly described Wexler as “the most competent woman in Democratic politics.”

“Personally, I never spent a great deal of time with the president,” Wexler said in a 1980 interview for Carter’s presidential library. “I think that was a mistake on [Carter’s] part.”

Bonnie Newman got a job in the Reagan administration in 1981 after playing squash with Helene von Damm, who had acted as Ronald Reagan’s personal secretary since the 1960s. Although von Damm had “access and proximity” to the president, Newman recalled, “there weren’t a whole lot of other women” in the West Wing. “So when you looked around, you looked a little out of place.”

In Bill Clinton’s presidency, several women gained greater influence, including the first lady, who spearheaded his signature health-care reform initiative. But Hillary Clinton retreated to a more traditional role after the initiative foundered. And the president’s affair with intern Monica Lewinsky served to undermine his claims of gender progress.

In the early days of the Obama administration, the West Wing was a well-documented bastion of testosterone, due largely to the dominating roles of men such as Chief of Staff Rahm Emanuel, now mayor of Chicago, and then-economic adviser Lawrence H. Summers. At a dinner in November 2009, several senior female aides complained to the president that men enjoyed greater access and often muscled them out of key policy discussions.

“If you didn’t come in from the campaign, it was a tough circle to break into,” said Anita Dunn, who left her post as White House communications director shortly after that meeting. Dunn says it was a matter of simple math: “Given the makeup of the campaign, there were just more men than women.”

The atmosphere has changed considerably in Obama’s second term. Many of the original players have moved on. Today, Obama’s closest aides — the ones who sit in the 7:30 a.m. meeting and earn the top White House salary of $176,461 a year — are equally divided between men and women. Overall, the average man still earns about 16 percent more than the average woman. But half of all White House departments — from the National Security Council to the Office of Legislative Affairs — are headed by women.

“I think having a critical mass makes a difference,” said White House senior adviser Valerie Jarrett, who came in with the president and remains one of his top aides. “It’s fair to say that there was a lot of testosterone flowing in those early days. Now we have a little more estrogen that provides a counterbalance.”

National security adviser Susan E. Rice also has served throughout Obama’s administration. In previous positions, Rice said, she had to push to get into key gatherings. “It’s not pleasant to have to appeal to a man to say, ‘Include me in that meeting,’” she said.

Now, said Domestic Policy Council Director Cecilia Muñoz said, “the folks who were jockeying to get into meetings or struggling over manifests are just kind of not around anymore.”

Even the speaking order in such meetings can make a difference. Toward the end of George W. Bush’s second term, legislative affairs director Candi Wolff and press secretary Dana Perino sat at the ends of Chief of Staff Joshua Bolten’s long table, and spoke first because the legislative and media climate were more relevant than new policy proposals at that point.

“It was Dana and me, tag-teaming,” Wolff recalled.

Second terms have traditionally served as a critical period for women, an opportunity to move up after the men move out. After Obama’s reelection, Jennifer Palmieri replaced Dan Pfeiffer as communications director. She remembers the moment the president expressed his confidence in her and shared his high expectations.

“This is it, you’re in the room. There is no other room: This is the Oval Office,” Palmieri recalls him saying. “You’re here for a reason, and I want to know what you think.”

Sylvia Mathews Burwell, secretary of health and human services, describes a “woman pull” during Clinton’s second term, when she was promoted from deputy chief of staff to deputy director of the Office of Management and Budget. Another woman, Maria Echaveste, got Burwell’s former position, and a third woman, Minyon Moore, moved into Echaveste’s spot.

In George W. Bush’s second term, Condoleezza Rice and Margaret Spellings were promoted to the Cabinet, becoming secretary of state and secretary of education, respectively. Other women moved into more senior White House jobs, including Wolff and Perino.

Regardless of when they served, women described a constant struggle to balance work and family, especially if they had young children. After Bush was elected in 2000, longtime aide Karen Hughes said she recoiled when incoming Chief of Staff Andrew Card tried to establish a 24/7 work schedule.

Hughes said she called Bush and told him that she didn’t “have to be there at 10:30 at night” to do her job.

Bush responded quickly, Hughes said, telling Card: “Don’t run off all my working mothers!”

Although Card made accommodations, Hughes left the White House after a year and a half, saying the job was too hard on her “homesick” Texas family. That fact hit her one Saturday morning, she said, when her teenage son asked her to bake him some brownies and she was simply too exhausted to do it.

Sarah Bianchi had two children under 3 when she joined the White House in June 2011 as a deputy assistant to the president and the vice president’s head of economic policy. She left in May 2014 to return to the private sector.

“Half the battle from there is parenting,” Bianchi said. “We’re just not doing well enough on this.”

White House aides say a slew of recent changes has improved conditions for working mothers. Last year, when legislative affairs director Katie Beirne Fallon and public engagement director Paulette Aniskoff were pregnant, the General Services Administration set up a tasteful Japanese screen in a West Wing bathroom to provide a private spot for pumping breast milk. (Years earlier, then-Deputy Chief of Staff Alyssa Mastromonaco had successfully procured a tampon machine.)

Meanwhile, the administration encourages staff to take advantage of up to 12 weeks of paid medical and family leave — a much more generous benefit than what most federal workers receive.

Aniskoff said she assumed she would have to quit when her son was born but decided to stay after Jarrett helped her work out the logistics.

“Even though I know theoretically that we had paid leave and all these things,” Aniskoff said, “I just didn’t know that it applied to me.”

Karen Tumulty contributed to this report.

Loretta Lynch says women face risk of ‘not being seen.’ She speaks from experience.

Wanted: Female candidates for federal office

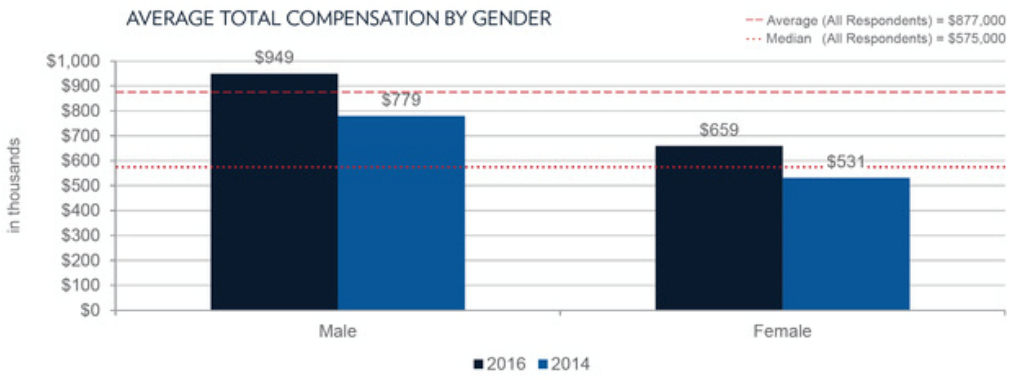
She's been a secret weapon in Congress for 40 years. Here's how she's seen power change.

Juliet Eilperin is The Washington Post's White House bureau chief, covering domestic and foreign policy as well as the culture of 1600 Pennsylvania Avenue. She is the author of two books—one on sharks, and another on Congress, not to be confused with each other—and has worked for the Post since 1998. Follow @eilperin

Share :

BY LIZZY MCLELLAN **PUBLISHED:** OCT 12, 2016

Male Partners Make 44 Percent More Than Women, Survey Shows



Source: Major, Lindsey & Africa's 2016 Partner Compensation Survey

(http://images.law.com/contrib/content/uploads/sites/292/2016/10/Compen Survey-Gender-Article-2016101217241.jpg)

The average compensation for male law partners is about 44 percent higher than that of female partners, a new survey released Thursday by Major, Lindsey & Africa found.

The legal search firm's biannual partner compensation survey found that male partners make $949,000 on average and female partners make about $659,000.The survey was fielded in conjunction with ALM Legal Intelligence.

The gender wage gap actually decreased slightly from the 2014 survey, which found that the average male partner made 47 percent more than the average female partner. Compensation for male partners increased 22 percent from the 2014 survey, and female partner compensation increased by 24 percent.

Still, the survey results paint a bleak picture for partner pay equity. Based on the 2016 results, women partners make on average about 69 cents for every dollar male partners make. That's a greater disparity than statistics on compensation by gender for all lawyers or only equity partners.

TRENDING NOW


Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/nearly-40-percent-of-law-firms-waste-c-suite-talent/)


ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/sanctions-two-more-law-schools-for-lax-admissions/)


Report: The New Law Firm C-Suite (/sites/2016/11/16/report the-new-law-firm-c-suite/)


Your Clients Just Aren't That Into You (/sites/ali/2016/11/13/yo clients-just-arent-that-into-you/)


Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/election-fuels-worry-over-lawyer-loan-forgiveness/)

Data from the U.S. Census Bureau from 2014 showed that full-time women lawyers are paid 77.4 percent of what their male counterparts are paid. The National Association of Women Lawyers, in its 2015 report, said the typical woman equity partner earns 80 percent of what the typical male equity partner earns. That actually shows a wider gap than NAWL reported in its first annual survey in 2007, when it was 84 percent.

Much of the inequity is due to origination, said Jeffrey Lowe, managing partner in Major, Lindsey & Africa's Washington, D.C., office and author of the study. On the survey, male partners reported average origination of $2.59 million, and female partners $1.73 million. Origination and working attorney receipts have become the main determinants of partner compensation, he said.

"That's the crux of the issue: Why are men generating more business than women?" Lowe said. "Is there some boys club aspect or not?"

Still, the women partners made improvements in that area since 2014. They showed a 40 percent increase in originations, the survey said, while the originations by male partners increased 18 percent.

The percentage of women partners who are dissatisfied with their compensation has grown, according to the Major, Lindsey & Africa survey. In 2016, 8 percent of women said they were not at all satisfied with their compensation, compared to 5 percent in 2014. Nineteen percent of the women partners said they were not very satisfied. But 27 percent said they were very satisfied, which showed an increase from 23 percent in 2014. Forty-six percent said they were somewhat satisfied.

Male partners seemed slightly more content with their compensation, according to the results, as 6 percent said they were not at all satisfied, 13 percent were not very satisfied, 32 percent were very satisfied and 48 percent were somewhat satisfied with their pay.

Partners who said they were unsatisfied were asked what factors played a role in their compensation. Only 10 percent cited gender bias, down from 12 percent in 2014. About 24 percent attributed their pay dissatisfaction to cronyism.

The compensation inequity between male and female partners could be related to equity versus nonequity partnership, Lowe said, as the survey showed equity partners getting about three times more than nonequity partners. Lowe noted that while 25 percent of respondents overall were women, the survey did not break down the gender of equity and nonequity partner ranks. But a survey by The American Lawyer released earlier this year showed that at 254 of the largest U.S. law firms by head count, women made up 27 percent of nonequity partners and only 17 percent of equity partners.

Lowe said firms seem to be recognizing that pay equity is a problem. But oftentimes it takes prodding from a client to motivate real change, he said.

"Many firms want to address it," Lowe said, "but when you try to address it with them it becomes a question of, 'How much business do [these lawyers] have?'"

OTHER SURVEY RESULTS

MOST POPULAR FROM THE ALM NETWORK

Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/nearly-40-percent-of-law-firms-waste-c-suite-talent/)

Move Over LSAT, There's Another Test in Town (/sites/almstaff/2016/11/over-lsat-theres-another-test-in-town/)

Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/election-fuels-worry-over-lawyer-loan-forgiveness/)

ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/sanctions-two-more-law-schools-for-lax-admissions/)

FEATURED FIRMS

Major, Lindsey & Africa also found average compensation for all law firm partners surveyed increased 22 percent from 2014 to 2016, reaching $877,000. Equity partners earned $1.1 million on average, and nonequity partners made $367,000 on average.

When divided by practice areas, labor and employment partners had the lowest average compensation, at $597,000, and corporate partners had the highest at $1.06 million.

The average compensation by race was $876,000 for white partners, $956,000 for Hispanic partners, $797,000 for black partners and $875,000 for Asian partners. Since 2014, average compensation increased by 100 percent for Hispanic partners, 39 percent for black partners and 36 percent for Asian partners.

Lowe noted that, while these were "nice gains," the survey gets relatively few respondents of color because the legal profession is "overwhelmingly white." Of more than 2,000 respondents, 1,900 were non-Hispanic and white, he said.

*Contact Lizzy McLellan at **lmclellan@alm.com (mailto:lmclellan@alm.com)**. On Twitter: @LizzyMcLellTLI.*

MORE STORIES

Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/16/rep nearly-40-percent-of-law-firms-waste-c-suite-talent/)

Move Over LSAT, There's Another Test in Town (/sites/almstaff/2016/11/15/mo over-lsat-theres-another-test-in-town/)

Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/16/tru election-fuels-worry-over-lawyer-loan-forgiveness/)

ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/16/ab sanctions-two-more-law-schools-for-lax-admissions/)

BY LIZZY MCLELLAN AND KATELYN POLANTZ **PUBLISHED:** OCT 14, 2016

Is Origination to Blame for Women Partners' Lower Pay?

In the face of a glaring pay gap between male and female partners, some firm leaders point to the emphasis on origination credit as the key culprit. But moving away from such a model may not be so easy.

A survey released this week by Major, Lindsey & Africa showed that male law partners are paid 44 percent more than female law partners, on average. Among the survey respondents, all partners at large firms, the average male partner makes $949,000, compared to $659,000 for the average female partner. Based on those numbers, women partners make 69 cents for every dollar male partners make.

Of more than three dozen leaders of large law firms contacted about how their firms work to combat gender pay disparity, most declined to comment or did not respond to requests for comment. Of those that did, some said the traditional methods for determining law partner compensation are to blame for disparity.

TRENDING NOW


Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/nearly-40-percent-of-law-firms-waste-c-suite-talent/)


ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/sanctions-two-more-law-schools-for-lax-admissions/)


Report: The New Law Firm C-Suite (/sites/2016/11/16/report the-new-law-firm-c-suite/)


Your Clients Just Aren't That Into You (/sites/ali/2016/11/13/yo clients-just-arent-that-into-you/)


Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/election-fuels-worry-over-lawyer-loan-forgiveness/)

"I'm disappointed, but I'm not surprised," said Beth Wilkinson, a trial lawyer formerly with Paul, Weiss, Rifkind, Wharton & Garrison who co-founded the boutique Wilkinson Walsh + Eskovitz this year. "Firms pay people based on two basic things: hours and bringing in business. Both, I think, are a challenge for women over their careers."

Jeffrey Lowe, managing partner in Major, Lindsey & Africa's Washington, D.C., office and author of the study, made a similar observation. Origination and working attorney receipts have become the main determinants of partner compensation, he said.

Women did see a larger rise in origination than men in the latest survey, with originations by women growing 40 percent compared to an 18 percent rise for men. But it wasn't enough to bridge the gap between overall originations between the sexes. According to the survey, male partners reported average origination of $2.59 million while female partners reported $1.73 million in average origination.

"That's the crux of the issue: Why are men generating more business than women?" Lowe said. "Is there some boys' club aspect or not?"

Lisa Smith, a principal at consulting firm Fairfax Associates, said the origination gap is a major cause of the compensation gap between men and women partners. When Fairfax works with law firms on compensation reviews, they do find significant differences in origination along a gender breakdown, Smith said. Some of that may be due to undercrediting, particularly if women fight less for their origination credit than their male counterparts do, she said.

"What's more fundamental is sort of the sponsorship and mentorship along the way," Smith said. "I think that's where the gaps happen—women aren't always brought along in the same way" as men.

Mark Stewart, chairman of Ballard Spahr, said his firm determined that focusing on origination was not the best way to determine compensation.

An emphasis on origination "can perpetuate unfairness to certain groups," Stewart said. "We don't have those battles about who actually brings in clients."

Ballard Spahr took a hard look at origination when it re-evaluated its compensation system, he said, and created a system he says is more fair. Instead of origination credits, the firm has a relationship partner for each client, then provides billing credits for partners who work on the matters that result from those relationships.

Partnership at Ballard Spahr is about 25 percent women, Stewart said, and 22 percent of the partners on its most-compensated partners list are female. The firm's compensation committee is half female, he said, and the executive committee is 40 percent female.

Stewart said his firm's compensation system is "gender neutral." While some may argue that origination credits rightly reward a partner for bringing in a client, Stewart said that is a job not done alone. Partners who bring in business rely on the firm's reputation and on the team that will be working on the matter, he said.

Wilkinson said her firm avoids the pressure placed on men and women to work long hours by using only alternative fee arrangements instead of billing clients hourly. The firm, with four female partners and four male partners, also doesn't track vacation time. Instead, it hopes that its lawyers will take the time off they need when appropriate, such as when founding partner Alexandra Walsh took a sabbatical this year to travel with her family.

David Hashmall, chairman of Goodwin Procter, said his firm is undertaking a number of initiatives to address the gender pay gap in law. One of the moves, he said, will be assessing the firm's practices against the recommendations of the American Bar Association's Commission on Women in the Profession. Goodwin was the first law firm to sign a City of Boston pledge to close the gender wage gap, he said.

"Internally, pay equity is top of mind among firm leadership and the sole topic at our upcoming meeting of firm leaders and women equity partners," Hashmall said. "Through these and other significant initiatives, Goodwin is dedicated to eliminating gender pay disparity."

Yet even for firms dedicated to advancing gender parity, change could take years.

Lewis Rose, managing partner of Kelley Drye & Warren, described how the firm plans to increase the number of female lawyers on its management committee and its compensation committee in the near future. Diversity in leadership will aid leadership throughout the firm, he said. The compensation group, an appointed body of four, will increase from one to two female members next year, and the 10-person management committee could increase from two to three female members through an election, Rose said. At the same time, the firm started a sponsorship program for younger women to better connect with office and practice leaders.

The firm also doesn't compensate solely based on origination credit, and instead has a months-long memo and interview process to determine salaries.

But even in that sort of system, where pay still relies on sharing matters, billing hours and dedication to the job, there's the Catch-22: Women lawyers may prioritize their families more than their male colleagues at some points in their lives, Wilkinson said. Thus, they do not reach the top level of pay at firms.

"Women have more desire to get home. With a big emphasis on hours, it could make some women feel like they are never going to be at the top," Wilkinson said.

At Kelley Drye, the firm's very top earners are all men.

Asked why that is, Rose said, "I don't think I have an answer. I think I will have women who will be at the highest levels" in about five years. "I think in our firm, we look a lot different than we did five years ago."

Women and men grouped slightly below, into the firm's "top tier" below the all-stars, are equitably split, Rose said. The system is fair, and he's received no complaints of gender disparity, he said.

"If you're treating people fairly, treating people how they want to be treated … the statistics are probably going to follow each and every person's priorities," Rose said.

Orrick, Herrington & Sutcliffe took its approach one step further than Kelley Drye. The firm counts each year how many women versus men step up in compensation and reports the results to its partners. A firm spokesperson called it an "equity test" that evaluates compensation decisions "for unconscious bias" before pay is finalized. "In each of the past two years, we found that a significantly greater percentage of women than men moved up in compensation level," the firm said.

In addition, the firm recently launched sponsorship and coaching programs for women and a collaborative credit allocation approach, the spokesman said. One-third of the partners on Orrick's compensation committees are women.

Historically, female equity partners' salaries have always lagged behind men, even more so than the gap between nonequity partners' and associates' salaries by gender.

The ALM Annual Survey of Law Firm Economics found last year that female equity partners made, on average, 77 cents to every dollar male partners made. Previous years back to 2010 looked about the same, at 79 cents for female equity partners to every dollar of compensation for men.

At the associate level, when base salary is most likely to be lockstep for all lawyers, women on average have made between 89 cents in 2010 to 94 cents in 2015 on every dollar their male colleagues made.

'Hard to Have a Firm' Without Origination Credit

Changing the compensation system will not single-handedly create parity, Smith said, as qualitative judgments will likely continue to play a role, and the nature of those judgments are not going to change with the system.

"I don't know that de-emphasizing origination is going to close the pay gap," Smith said. "Without rewarding the people who bring business to the firm, it's hard to have a firm."

But firms can improve the way they track origination, she said, moving away from the "first-touch" credit and rewarding those who maintain client relationships. Smith noted that in the present law firm market, origination has become more important for competitive purposes, and therefore has become a greater driver for compensation. But firms can also improve parity by giving more thought to mentorship and helping diverse lawyers develop relationships with clients.

Clients will likely drive this improvement, as they place greater value on diversity, Smith said. For senior partners who have work to pass on, she said, it means "not just going to the people who look like them."

Susan Beck and Rebecca Cohen contributed to this report.

Contact Lizzy McLellan at **lmclellan@alm.com (mailto:lmclellan@alm.com)**.

On Twitter: @LizzyMcLellTLI.

Contact Katelyn Polantz at **kpolantz@alm.com (mailto:kpolantz@alm.com)**.
On Twitter: @kpolantz.

MORE STORIES

Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/16/re nearly-40-percent-of-law-firms-waste-c-suite-talent/)

Move Over LSAT, There's Another Test in Town (/sites/almstaff/2016/11/15/m over-lsat-theres-another-test-in-town/)

Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/16/tr election-fuels-worry-over-lawyer-loan-forgiveness/)

ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/16/aba-sanctions-two-more-law-schools-for-lax-admissions/)

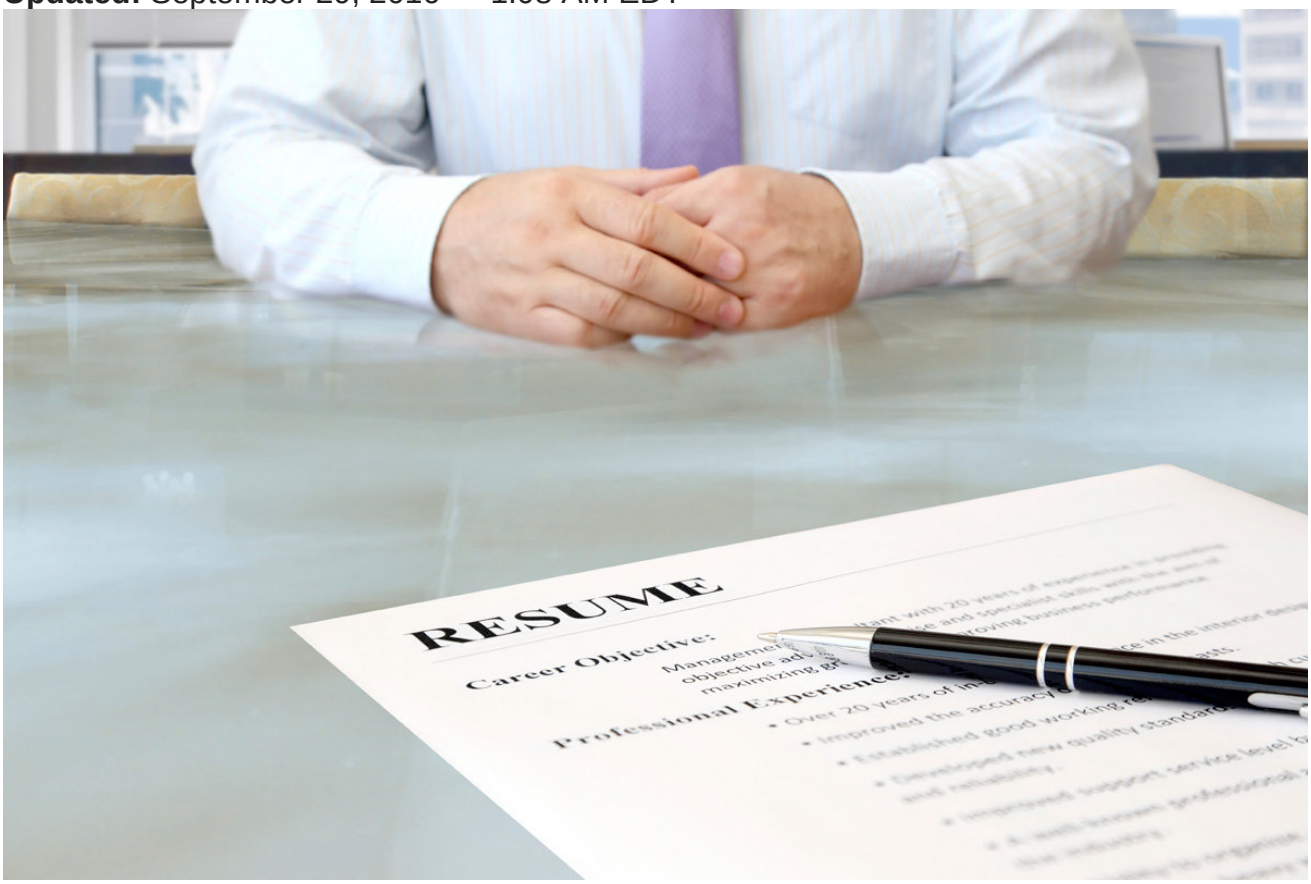
Philly.com

news

— Politics

Council bill would bar employers from seeking salary history

Updated: September 29, 2016 — 1:08 AM EDT



iStockphoto

Aiming to close the pay gap between men and women, City Council will consider barring employers from asking applicants how much they have made in previous jobs.

by **Tricia L. Nadolny**, Staff Writer

Aiming to close the pay gap between men and women, Philadelphia City Council will consider barring employers from asking applicants how much they made in previous jobs.

Advocates say such legislation targets a persistent problem: women and minorities receiving low wages in their first jobs that follow them into the future.

"It's just fair to pay people for what the job is worth, not for what they had been paid in the past," said Councilman William K. Greenlee, who will introduce the legislation. "Is past salary really a true consideration? It should be based on what the job is and what the person's experience and abilities are."

The legislation mirrors a bill passed this summer in Massachusetts, the first such law.

The effort has spurred other spin-offs, including a bill introduced in the Pennsylvania statehouse last week and one introduced in August in New York City. Federal legislation was introduced in the House earlier this month.

Gender pay inequality is taking a more prominent spot on the national stage. Democratic presidential nominee Hillary Clinton has repeatedly raised the subject, making it a central theme of her campaign. Republican nominee Donald Trump's daughter Ivanka, in her speech at this summer's Republican National Convention, heralded her father's support of equal pay.

According to the U.S. Census Bureau, women make 79 cents for every dollar made by men. The divide is less severe but still substantial in Philadelphia, according to a 2015 review by the American Association of University Women, which found women in the two congressional districts that encompass the city make 88 percent and 90 percent of what men make. In the districts that represent the suburbs surrounding Philadelphia, the disparity ranges from 78 percent to 87 percent.

Proponents of wage-gap legislation say the problem starts with women being paid less than men in their first job, creating an inequality maintained when they are asked to state their salary histories when applying for new jobs.

"Basing compensation on an applicant's prior wages instead of the value of the work perpetuates and amplifies the wage gap, which typically widens as women get older," said Terry L. Fromson, managing attorney at the Pennsylvania Women's Law Project.

Fromson said the wage gap is more acute for minorities, "which makes this legislation especially important in diverse cities like Philadelphia."

Greenlee's legislation would bar employers not just from asking about salary history but from seeking out that information on their own. Pay information, for example, is accessible online for many government employees.

Applicants who think the law has been broken could file a complaint within 300 days to the city's Commission on Human Relations, which would have the ability to fine employers $2,000 and order them to pay other damages, including the applicant's attorneys' fees.

Kate Hagedorn, director of civic affairs for the Philadelphia Chamber of Commerce, said the chamber was reaching out to its members for input on the proposed law and declined to comment. The state legislation was introduced last week by Reps. Maria Donatucci and Donna Bullock, Democrats whose districts include parts of Philadelphia. That bill would bar questions about salary history while also making it illegal for employers to prohibit employees from discussing their salaries with one another, a restriction that could keep workers in the dark about pay inequalities.

Greenlee said he plans to pursue the city legislation despite the state bill because he thinks it could have a better chance of gaining traction in a city like Philadelphia than statewide. He pointed to the city's legislation requiring employers to provide paid sick leave and creating an office to investigate wage theft, both efforts led by his office.

"I don't think there's anything wrong with us pursuing this," Greenlee said. "And if in the end we pass this law and later the state passes it or, even better, the whole country passes it, beautiful."

tnadolny@phillynews.com

215-854-2730 @TriciaNadolny

More Coverage

- Study: 'Big Soda' spent $67M to block beverage taxes nationwide
  Sep 23 - 1:08 AM

- Philly proposes to exempt community gardens from stormwater charges
  Sep 12 - 4:34 PM

Published: September 28, 2016 — 2:20 PM EDT | **Updated:** September 29, 2016 — 1:08 AM EDT
The Philadelphia Inquirer

BY KAREN SLOAN **PUBLISHED:** OCT 17, 2016

Women Law Students Say Pay Disparity is Systemic Problem

(http://images.law.com/contrib/content/uploads/sites/292/2016/10/Graduation-Ceremony-Article-201610171052.jpg) Photo: Rittikrai_Pix/Shutterstock.com

Natalie Vernon has spent the past year drawing attention to gender inequality in all corners of the legal profession as president of the Harvard Law Women's Law Association.

So when a new salary survey released last week by legal recruiting firm Major, Lindsey & Africa concluded that male partners at large firms make an average of 44 percent more than their female colleagues, the third-year law student was disappointed but not surprised.

"Unfortunately, we've seen studies like this before," she said.

Vernon's reaction was echoed by female students at several law campuses with reputations as Big Law feeder schools, who said they hope the glaring pay discrepancy will serve as a wake-up call to those still unaware of the problem.

The survey found that male partners on average earn $949,000 compared with the average $659,000 earned by female partners—a difference of $290,000.

TRENDING NOW


Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/nearly-40-percent-of-law-firms-waste-c-suite-talent/)


ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/sanctions-two-more-law-schools-for-lax-admissions/)


Report: The New Law Firm C-Suite (/sites/2016/11/16/report the-new-law-firm-c-suite/)


Your Clients Just Aren't That Into You (/sites/ali/2016/11/13/yo clients-just-arent-that-into-you/)


Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/election-fuels-worry-over-lawyer-loan-forgiveness/)

"It's unacceptable," said Casey T.S. Jonas, a third-year student at the University of Virginia and president of the Virginia Law Women. "It's yet another example of what the experience of a woman at a big law firm might be—that no matter how hard you work or how high you rise, you're still going to see this pay gap, which is only one symptom of a greater issue."

The dearth of women in the law firm partnership ranks—they make up just 21 percent of law firm partners, according to the American Bar Association—has generated much discussion throughout the legal industry. Rose Kenerson and Caitlin Lackner, co-presidents of the Penn Law Women's Association, see partnership promotions and the gender pay gap as interconnected problems. Some women leave law firms in part because they recognize that they won't earn as much as their male colleague, they said.

"We think this could be a contributing factor in Big Law law firms having fewer women at the top of the pyramid, despite women making up half the population of most top law schools," Kenerson said.

Mid-level female associates may step off the law firm track once they see pay diverge and feel they have little power to change how firms allocate funds, Vernon added.

The partner pay gap alone isn't likely to dissuade female law students from pursing associate positions at large firms, the students said. Law students tend to be more concerned with landing a job at a firm they like in a city where they want to live and are probably not focused on pay gaps at the highest echelon of the profession, Kenerson said.

"I would doubt that people interested in going the Big Law route would be turned off on this," Jonas said. "But I do wonder if there will be those who see that maybe there isn't quite the payoff they were hoping for."

Gender inequality isn't just a problem at large firms, Vernon noted. The disparities first emerge on law campuses, where women are traditionally underrepresented on law reviews and obtain fewer federal court clerkships.

Campus women's groups play a vital role in positioning students for successful careers and pushing back against the conditions that depress female attorney pay and close off routes to advancement, according to these student leaders.

Virginia Law Women each year hosts a Big Law reception, which combines career-oriented panels with a networking reception where students can connect with female associates and partners at large firms.

The Penn Law Women's Association is planning a panel discussion on the Big Law gender pay gap in the spring, and a session on how young female attorneys can generate business early in their careers.

The Harvard Law Women's Law Association advocates for more opportunities for women at the earliest stages of their legal career and encourages students to start building the professional network that will help them succeed later on and counter the "boys' network" that contributes to partner pay gap.

"To me, this isn't just a women's problem," Vernon said. "It's a problem for all of us—law students, associates, partners, the legal profession in general—to grapple with. Hopefully we can get there, that it's not just an article we talk about."

Contact Karen Sloan at **ksloan@alm.com (mailto:ksloan@alm.com)**. On Twitter: @KarenSloanNLJ

MORE STORIES

[Report: Nearly 40 Percent of Law Firms Waste C-Suite Talent (/sites/almstaff/2016/11/16/re nearly-40-percent-of-law-firms-waste-c-suite-talent/)]

[Move Over LSAT, There's Another Test in Town (/sites/almstaff/2016/11/15/m over-lsat-theres-another-test-in-town/)]

[Trump's Election Fuels Worry Over Lawyer Loan Forgiveness (/sites/almstaff/2016/11/16/tru election-fuels-worry-over-lawyer-loan-forgiveness/)]

[ABA Sanctions Two More Law Schools for Lax Admissions (/sites/almstaff/2016/11/16/ab sanctions-two-more-law-schools-for-lax-admissions/)]

RANDOM FACTS

RELATED TOPICS

RANDOM FACTS AND INTERESTING TRIVIA FOR THE CURIOUS MIND

Abortion Facts
Adoption Facts
Baby Facts
Birth Control Facts
Blonde Hair Facts
Breast Cancer Facts
Crazy Laws
Dating Facts
Divorce Facts
Eating Disorders Facts
Father Facts
HIV/AIDS Facts
Housewife Facts
Human Attraction Facts
Human Heart Facts
Hymen Facts
Intercourse Facts
Kissing Facts
Left-Handedness Facts
LGBT Facts
Love Facts
Marriage Facts
Men Facts
Mother Facts
Orgasm Facts
Penis Facts
Pregnancy Facts
Redhead Facts
Sex Facts
Sex Trivia

36 Random Facts About . . .
Women

1. The word “woman” is believed to have derived from the Middle English term *wyfman*, broken down simply as the wife (*wyf*) of man. In Old English, women were described simply as *wyf*, while the term *man* was used to describe a human person, regardless of gender.[c]
2. The English word “girl” was initially used to describe a young person of either sex. It was not until the beginning of the sixteenth century that the term was used specifically to describe a female child.[c]
3. The biological sign for the female sex, a circle placed on top of a small cross, is also the symbol for the planet Venus. The symbol is believed to be a stylized representation of the Roman goddess Venus’ hand mirror.[d]
4. While many stars and moons are christened with female names, Venus is the only planet in our solar system given the name of a female goddess.[d]
5. The breasts of human women are much larger in proportion than those of other female mammals. The prominent size, while not necessary for milk production, is most likely a result of sexual selection.[a]

Human women have proportionately larger breasts than any other female mammal

6. The English language originally delineated between women in different stages of life with the terms “maiden,” “mother,” and “crone.” A maiden referred to a young girl who was unmarried, a mother referred to a woman in her child-bearing years, and a crone described a post-menopausal woman.[c]

Sleep Facts

Swimsuit Facts

Underwear Facts

Urine Facts

Vagina Facts

Virginity Facts

Wedding Facts

American Wedding History

Bikini History

Birth Control History

Breast Cancer History

Eating Disorders History

Handbag History

High Heels History

Lingerie History

Miniskirt History

Pregnancy Test History

Women's Fashion History

7. The average height of a woman in the U.S. is approximately 5 feet 4 inches, and the average weight is about 163 pounds. These figures vary greatly throughout the world, due to differences in nutrition and prenatal care.[a]
8. In almost every country worldwide, the life expectancy for women is higher than for men.[g]
9. While the population of males is slightly greater than females worldwide (98.6 women for every 100 men), there are roughly four million more women than men in the U.S. In the age 85-and-older category, there are more than twice as many women as men currently living in the U.S.[h]
10. The most common cause of death for American women is heart disease, which causes just over 27% of all mortalities in females. Cancer ranks just below, causing 22% of female deaths.[a]
11. Worldwide, women are nearly twice as likely to be blind or visually impaired as men. Experts attribute this difference to the greater longevity of women (leading to more age-related visual impairment) and specific eye diseases that are intrinsically more common in women such as dry eye syndrome and Fuch's Dystrophy.[a]
12. Depression is the most common cause of disability in women, and approximately 25% of all women will experience severe depression at some point in their lives.[a]
13. Over 90% of all cases of eating disorders occur in women, and nearly seven million women in the U.S. currently suffer from anorexia nervosa or bulimia.[a]
14. Approximately one in five women worldwide reports being sexually abused before the age of 15.[a]
15. About 14 million adolescent girls become pregnant each year, with over 90% of those girls living in developing countries.[a]
16. Each day 1,600 women die as result of pregnancy or childbirth complications. Nearly 99% of these deaths occur in developing nations.[a]

About 1,600 women die each day as result of pregnancy or childbirth complications

17. Approximately 95% of all women in the U.S. have been married at least once by the age of 55.[h]
18. Of the 154.7 million women currently living in the U.S., nearly 83 million are mothers.[h]
19. The probability of a woman giving birth to a baby girl instead of a baby boy increases significantly the nearer the mother lives to the equator. While the cause of this gender selection is unknown, scientists believe the constant sunlight hours and abundant food supply in tropical regions may favor female births.[e]
20. Approximately 5.6 million women in the U.S. reported themselves as stay-at-home moms in a 2007 census report.[h]
21. The first Mother's Day was held on May 10, 1908, and was organized by Anna Jarvis in West Virginia and Philadelphia. As the event gained popularity throughout the country, Congress designated the second Sunday in May as a national day of recognition for mothers in 1914.[b]
22. International Women's Day is held each year on March 8. The annual event was first observed worldwide in 1909.[h]

23. In the U.S., Congress established a national week of recognition for women's history in 1981. This recognition, held during the second week of March, was later expanded into a full month by a congressional resolution in 1987. The month of March is now designated as National Women's History Month.[h]

24. According to a 2007 Census Bureau report, one-third of American women aged 25 to 29 have earned a bachelor's or advanced college degree.[h]

25. More American women work in the education, health services, and social assistance industries than in any other industry. These three industries employ nearly one-third of all female workers.[h]

The first country to grant women the right to vote in the modern era was New Zealand in 1893

26. Women in the U.S. labor force currently earn just over 77 cents for every one dollar men earn.[h]

27. Approximately 14% of active members in the U.S. armed forces today are women. In 1950, women comprised less than 2% of the U.S. military.[h]

28. The first woman to run for U.S. president was Victoria Woodhull, who campaigned for the office in 1872 under the National Woman's Suffrage Association. While women would not be granted the right to vote by a constitutional amendment for nearly 50 years, there were no laws prohibiting a woman from running for the chief executive position.[b]

29. The first female governor of a U.S. state was Wyoming governor Nellie Tayloe Ross, elected in 1924. Wyoming was also the first state to give women the right to vote, enacting women's suffrage in 1869.[b]

30. The first country to grant women the right to vote in the modern era was New Zealand in 1893.[f]

31. The first woman to rule a country as an elected leader in the modern era was Sirimavo Bandaranaike of Sri Lanka, who was elected as prime minister of the island nation in 1960 and later re-elected in 1970.[f]

32. Women currently hold 17% of Congressional and Senate seats and 18% of gubernatorial positions in the U.S.[h]

33. According to an ancient Sumerian legend, the universe was created by a female, the goddess Tiamat. This role of a female creator is not unique, as the Australian Aboriginal creation myth also credits the creation of life to a woman.[d]

34. The earliest recorded female physician was Merit Ptah, a doctor in ancient Egypt who lived around 2700 B.C. Many historians believe she is the first woman recorded by name in the history of all of the sciences.[d]

35. A person's gender is biologically determined by the sex chromosomes, one set of a human's 23 pairs of chromosomes. Women have two X chromosomes, while men have one X and one Y chromosome.[a]

36. The world's first novel, *The Tale of Genji*, was published in Japan around A.D. 1000 by female author Murasaki Shikibu.[d]

-- Posted April 30, 2009

References

[a] Carlson, Karen J., Terra Ziporyn, and Stephanie Eisenstat. 2004. *The New Harvard Guide to Women's Health*. Cambridge, MA: Harvard University Press.

[b] DuBois, Ellen Carol and Lynn Dumenil. 2005. *Through Women's Eyes: An American History with Documents*. Cranbury, NJ: Bedford/St. Martins.

[c] Oxford English Dictionary. 2nd ed. 20 vols. 1989. Oxford, UK: Oxford University Press.

[d] Pomeroy, Sarah B. 1991. *Women's History and Ancient History*. Chapel Hill, NC: University of North Carolina Press.

[e] Reilly, Michael. April 1, 2009. "More Girls Born in the Tropics." Accessed April 13, 2009.

[f] Seager, Joni. 2003. *The Penguin Atlas of Women in the World: Revised and Updated*. New York, NY: Penguin Books.

[g] United Nations Statistics Division. 2006. "Statistics and Indicators on Women and Men." Accessed April 14, 2009.

[h] U.S. Census Bureau. 2009. "Women's History Month: March 2009." Accessed April 11, 2009.

PHILADELPHIA BAR ASSOCIATION

Follow us on:

Legends of the Bar

Criteria:

The Legends of the Philadelphia Bar Committee met regularly over a fifteen-month period (August 1999 to November 2000). Consideration was limited to legends of the past. Nominees were required to have a record of extraordinary skill and service to the bar, the profession and the community in a career of at least thirty years at the bar, unless the candidate came late to the law, or retired early, and some or all of the following qualifications:

I. A breadth of achievement rather than a single accomplishment;

II. An enduring contribution to the law;

III. A deep commitment to achieving equal access to justice for all citizens;

IV. A profound respect for the ethical principles that govern the profession:

V. A leadership role in advancing the interests of the community; or

VI. A recognized ability to mentor, lead or inspire others in the pursuit of law and justice.

Note: The initial recommendations of the Committee were to provide general rather than specific qualifications and to agree that only the provisions of Paragraph 1 were mandatory and that compliance with all of the other qualifications would not be required.

Legends:

David Lloyd

David Lloyd (1656-1731) performed legal services for William Penn in London and was sent by Penn to become Pennsylvania's attorney general in 1686 when Pennsylvania was threatened with the loss of its charter because of unrest among the settlers. He was an early revolutionist and proponent of democracy. He was also active in judicial reform and became chief justice of Pennsylvania in 1718.

Andrew Hamilton

Andrew Hamilton (1676-1741) is best remembered for his successful defense of printer John Peter Zenger against charges of seditious libel in the Royalist Supreme Court of New York in 1735. The jury's "not guilty" verdict was later described by Constitutional Convention delegate Gouverneur Morris as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." The verdict was also described in the press as having been brought about by Zenger's "smart Philadelphia lawyer," an appellation that has endured to the present day. A native of Scotland, Hamilton came to America in 1697 and, after reading the law, was admitted to the bar of the Chesapeake Peninsula of Virginia. He later moved to Kent County, Maryland, and then to Philadelphia. Hamilton represented the family of William Penn. He served as recorder of Philadelphia, prothonotary of the Supreme Court and as a member of the Pennsylvania Assembly. In 1732, he designed and supervised the construction of Philadelphia's Independence Hall.

Tench Francis

Tench Francis (died 1758) was Pennsylvania's attorney general in 1745, succeeding Andrew Hamilton. He was the first Philadelphia lawyer to master the technical difficulties of the profession. He prepared forms and precedents of pleadings for use by his fellow lawyers. Francis was the author of a "commonplace" book praised by Horace Binney for its usefulness throughout several decades after its publication.

Benjamin Chew

Benjamin Chew (1722-1810) had an unsurpassed knowledge of common and statutory law and was known for his solid judgment, superior memory and a remarkable work ethic. Chew was also known for his precision and brevity in making legal arguments, as contrasted with the many verbose lawyers who practiced in his time.

John Dickinson

John Dickinson (1732-1808), who wrote many of the documents leading to the American Revolution, is best remembered as a political theorist and statesman. His petition to King George III as a member of the First Continental Congress in the fall of 1774, appealing to the King for "peace, liberty and safety," was highly praised for its eloquence. He was a

strong believer in education and the abolition of slavery. Dickinson College is named after him. He fought in the Revolutionary War, as a private in the Delaware militia, during the Battle of the Brandywine.

Thomas McKean

Thomas McKean (1734-1817) served as chairman of the Philadelphia Committee of Observation, playing a part in the movement for independence and new state governments during the Revolutionary War. He was also a signer of the Declaration of Independence. In 1777, McKean was commissioned chief justice of Pennsylvania. He was elected governor of Pennsylvania in 1799.

Francis Hopkinson

Francis Hopkinson (1737-1791) studied law under Benjamin Chew, served in the Continental Congress in 1776 and voted for and signed the Declaration of Independence. Hopkinson, who claimed to have designed the first American flag, has been honored as "The Father of the Stars and Stripes." He served as a judge of the Court of Admiralty from 1779 to 1789. He was appointed by President George Washington to serve as the first judge of the U.S. District Court for the Eastern District of Pennsylvania. Hopkinson was a noted essayist, artist and musician.

James Wilson

James Wilson (1742-1798) was the fourth justice appointed to the U.S. Supreme Court in 1789. He had been one of the most forceful delegates in the Constitutional Convention. In the 1770s, he served in the Continental Congress and signed the Declaration of Independence. Wilson's early law practice involved mainly property disputes in the courtrooms in Carlisle, Reading and Lancaster, Pennsylvania. Returning to Philadelphia in 1778, his practice often involved the unpopular defense of businessmen accused of consorting with the occupying British forces. On one occasion, a group of armed militia expressed their displeasure with Wilson by assaulting his house at Third and Walnut streets. A score of prominent citizens rallied to Wilson's defense, and a fierce firefight ensued. Thereafter, the house was known locally as "Fort Wilson." In December 1790, Wilson began a short-lived series of law lectures at what is now the University of Pennsylvania. It was the first formal instruction on law at that institution. A shrinking money market in the 1790s brought financial ruin and hastened the tragic death of this "founding father" of the nation.

Nicholas Waln

Nicholas Waln (1742-1813) was admitted to the bar in 1762 and quickly (before reaching the age of 21) had one of the largest trial caseloads of any Philadelphia lawyer. He left Philadelphia in 1763 to study at the Inns of Court in London, returned in 1764 and achieved immediate success and prosperity. He left the practice of law to become an extraordinarily eloquent and famous Quaker preacher. He mentored many successful Philadelphia lawyers.

Jared Ingersoll

Jared Ingersoll (1749-1822) was called "a most consummate advocate" and "without comparison" in handling a jury trial, by no less an authority than Horace Binney. His cases before the U.S. Supreme Court in the 1790s included Chisolm v. Georgia and Hylton v. United States, among the first to flesh out the structure of the federal system. He counted Stephen Girard among his clients. He was a delegate to the 1787 Constitutional Convention, served twice as attorney general of Pennsylvania, and was the Federalist candidate for Vice President of the United States in 1812. A founding member of The Law Library Company of Philadelphia in 1802, Ingersoll was elected the first Chancellor of The Associated Members of the Bar of Philadelphia in 1821.

Edward Tilghman

Edward Tilghman (1750-1815) was a superb jury trial lawyer who talked to jurors as if he was one of them. He mastered what was in his time the most intellectually difficult area of the law, contingent remainders and executory devises. A contemporary analysis of his capabilities noted that he was "an advocate of great powers, purest integrity and brightest honor."

William Lewis

William Lewis (1750-1819) specialized in defending people charged with high treason. Lewis was very active in efforts to abolish slavery and promoted the Act of 1st March 1780 for the gradual abolition of slavery in Pennsylvania. He was a confidant of, and consultant to, Alexander Hamilton while Hamilton served as treasury secretary.

Gouverneur Morris

Gouverneur Morris (1751-1816) graduated from Kings College in 1768 at the age of 16, was admitted to the New York bar at 19 and built up a superb practice. During the Revolution he worked to support the Continental Congress and helped prepare the New York Constitution. He was a member of the Continental Congress in 1778-1779. After being defeated as a congressman, he moved to Philadelphia and again built an excellent practice. He was a delegate to the Constitutional Convention of 1787 and wrote much of

the Constitution. He became minister to France in 1792 and served as U.S. senator from 1800 to 1802. He also served as chairman of the commission that governed the building of the Erie Canal.

William Bradford Jr.

William Bradford Jr. (1755-1795) was appointed by President George Washington in 1794 as the second attorney general of the United States. A former justice of the Pennsylvania Supreme Court, he also served for eleven years as the state's attorney general. He influenced the revision of criminal jurisprudence in Pennsylvania through a statute substituting hard labor for the death penalty.

William Tilghman

William Tilghman (1756-1827) was appointed to the bench of the U.S. Circuit Court in 1801 by President John Adams. In 1806, Governor McKean appointed him chief justice of the Pennsylvania Supreme Court.

Alexander J. Dallas

Alexander J. Dallas (1759-1817) served as secretary of the Commonwealth of Pennsylvania, U.S. attorney for the Eastern District of Pennsylvania under President Thomas Jefferson and finally as secretary of the Treasury under President James Madison. He took over the bankrupt treasury of the young republic and left it in a solvent state after two years in office.

William Rawle

William Rawle (1759-1836) was a lawyer and district attorney of early nineteenth-century Philadelphia. He studied law with the attorney general to the Royal Governor of New York, completed his studies in London at the Middle Temple, and returned to Philadelphia in 1783 to set up an active practice. Rawle was a charter member of The Law Library Company of Philadelphia and was elected its first Chancellor when that organization became the Law Association. Rawle & Henderson still bears his name; it is the law office with the longest continuous practice in the United States.

Peter Stephen Du Ponceau

Peter Stephen Du Ponceau (1760-1844) was the second Chancellor of the Philadelphia Bar Association. He came to America as secretary to Baron von Steuben and served at Valley Forge during the Revolution. Du Ponceau became an assistant to Robert Livingston, U.S. secretary for foreign affairs, and was quite useful in the role because he spoke English,

Latin and French; understood German, Italian and Spanish; and could translate Danish and Dutch. He was a charter member of The Law Library Company of Philadelphia. He argued many cases before the U.S. Supreme Court.

Joseph B. McKean

Joseph B. McKean (1764-1826) was the son of Thomas McKean. From 1800 to 1808 he served as the attorney general of Pennsylvania. He was appointed associate judge of the District Court for the city and county of Philadelphia in 1817 and eventually became president judge.

Joseph Hopkinson

Joseph Hopkinson (1770-1842), the son of Francis Hopkinson, was admitted to the bar in 1791 and quickly developed a notable reputation as a trial lawyer. He served as counsel for Justice Samuel Chase in defense of an impeachment charge. Elected to Congress in 1814, he was appointed by President John Quincy Adams as judge for the U.S. District Court for the Eastern District of Pennsylvania in 1828. He composed "Hail Columbia."

John Sergeant

John Sergeant (1779-1852) was a charter member of The Law Library Company of Philadelphia and served as Chancellor of the Law Association from 1845 to 1852. Sergeant studied law in the office of Jared Ingersoll. He served in Congress from 1815 to 1820. In 1832 he was the Whig candidate for Vice President. In 1836 he was a member of the Pennsylvania Constitutional Convention.

Horace Binney

Horace Binney (1780-1875) was a charter member of the Philadelphia Bar Association. Binney represented the First and Second Banks of the United States as well as several major insurance companies. In 1832, he was one of the leading advocates in Congress for the renewal of the charter of the Second Bank of the United States. In 1843, he came out of retirement to represent the City of Philadelphia in a landmark case involving the will of Stephen Girard and its charitable bequest that established Girard College. Binney's victory in the U.S. Supreme Court assured the future of Girard College and affirmed the City's handling of Stephen Girard's multimillion-dollar estate. Binney was the official reporter for the Pennsylvania Supreme Court from 1807 to 1814 and was Chancellor of the Philadelphia Bar Association from 1852 to 1854. Twice he was offered nominations to the U.S. Supreme Court. After retiring from the practice of law, he continued to be Philadelphia's most prominent public citizen, taking leadership positions on major issues of that era. Binney also wrote historical sketches of some of the Philadelphia lawyers and judges of his day.

Richard Rush

Richard Rush (1780-1859) served as U.S. attorney general, secretary of state and was a U.S. minister to England until 1825, when President John Quincy Adams appointed him secretary of the Treasury. As minister to Great Britain in 1818, Rush negotiated the agreement that fixed the 49th parallel as the boundary between Canada and the United States from Minnesota west. In 1836 President Andrew Jackson sent Rush to England to pursue from a British court the legacy of James Smithson to the United States. Rush was successful in gaining the full amount of the legacy ($515,169). This money was used to create the Smithsonian Institution. Rush bequeathed his estate to the Philadelphia Public Library.

George M. Dallas

George M. Dallas (1792-1864) was of the first generation of Philadelphia lawyer-leaders born in the post-Colonial, independent epoch. He seemed to move freely through local, state and federal office, something that happened frequently from Colonial times through the mid-twentieth century. He served as mayor of Philadelphia, attorney general of Pennsylvania, Vice President of the United States (under President James K. Polk), and minister to Russia, and later Great Britain. Dallas, Texas, is named after him.

David Paul Brown

David Paul Brown (1795-1872) was a renowned lawyer, orator and dramatist. A protégé of William Rawle, he won distinction and praise for his brilliant and successful defense of Judge Robert Porter in a famous impeachment trial. He wrote reviews of books and plays and wrote a tragedy in verse produced in 1830. Brown was a skilled cross-examiner who was retained in almost every important criminal case in the Philadelphia courts.

Eli Kirk Price

Eli Kirk Price (1797-1884) was a leading authority in real estate law. He authored "Law of Limitation Liens Against Real Estate," which became an act adopted by the Assembly in 1853. While a member of the state Senate, he took the lead in bringing about the Consolidation Act of 1854, which extended the boundaries of the City of Philadelphia to coincide with the boundaries of Philadelphia County, a consolidation that roughly tripled the size of Philadelphia.

William Morris Meredith

William Morris Meredith (1799-1873) served as president of the Select Council of Philadelphia, as secretary of the Treasury under President Zachary Taylor, and as attorney general of Pennsylvania during the Civil War (a position of crucial importance). He was the sixth Chancellor of the Philadelphia Bar Association and the first president of the Union League. He died while serving as president of the Pennsylvania Constitutional Convention.

John Cadwalader

John Cadwalader (1805-1879), a leader of the Philadelphia bar, taught numerous students how to practice law. The hallmark of his teaching style was his emphasis on the highest standards of practice and excellence in the performance of legal services. Cadwalader served as a federal district judge from 1858 to 1879 and was a U.S. congressman.

George Mifflin Wharton

George Mifflin Wharton (1806-1870) was known for his courteous demeanor and powerful arguments during his many appearances before the state Supreme Court. He led a long and successful legal career and was one of the most active Philadelphia Bar members of his day.

George Sharswood

George Sharswood (1810-1883) served for fifteen years as a justice of the Pennsylvania Supreme Court, including four years as chief justice. He previously sat on the District Court of Philadelphia for twenty-two years. Sharswood was considered by lawyers to be a great judge. He had a reputation for being extremely practical, decisive, rigidly impartial, quick to grasp facts, firm in controlling the courtroom, and lucid in his jury charges. He was also a professor at the University of Pennsylvania, serving as dean for eighteen years beginning in 1852.

George Washington Biddle

George Washington Biddle (1818-1897) served on the Philadelphia Common Council, was a member of the Pennsylvania Constitutional Convention in 1872-1873, represented the United States in the Bering Sea dispute with Great Britain, and was in the group representing the Tilden interests in Florida during the dispute over the election of 1876. Biddle was Chancellor of the Philadelphia Bar Association from 1880 to 1891. He donated his law library to the University of Pennsylvania.

Theodore Cuyler

Theodore Cuyler (1819-1876) was general counsel of the Philadelphia Railroad Company. He also served as director of the Philadelphia public schools.

Richard Coxe McMurtrie

Richard Coxe McMurtrie (1819-1894) served as Chancellor of the Law Association from 1891 to 1894. Known to have an acidic tongue, McMurtrie was a prominent lawyer with high social standing. On April 4, 1887, the amended charter of the City of Philadelphia-sometimes called the Bullitt Law-went into operation, and McMurtrie was appointed a director by the mayor.

George H. Earle Sr.

George H. Earle Sr. (1823-1907) was a recognized leader in the area of municipal tax reform after the Civil War. He risked his successful law practice by asserting himself in support of the cause of abolition.

F. Carroll Brewster

F. Carroll Brewster (1825-1898) was the first president of The Lawyers' Club. In this role, he helped advance the legal community by unifying the bar and promoting effective legislation and judicial reform. He also served as Pennsylvania attorney general, Philadelphia city solicitor and judge.

John Christian Bullitt

John Christian Bullitt (1827-1902) came to concentrate his practice on the organization and reorganization of commercial businesses, representing the Drexel interests. In the more public parts of his career, he participated in the 1872-1873 Pennsylvania Constitutional Convention and drafted the provision calling for compensation for owners of property seized for public use. The Bullitt Bill of 1885 became the Philadelphia City Charter in 1887, and earned Bullitt the title "Father of Greater Philadelphia." His practice was among the most remunerative in Philadelphia, and he was among the first to employ significant numbers of younger lawyers.

George Harding

George Harding (1827-1902), a student of John Cadwalader after his graduation from the University of Pennsylvania in 1846, quickly became the leading patent lawyer in the United States. Admitted to the bar in 1849, Harding was deeply involved in the litigation over the Morse telegraph patent and the McCormick reaper. He was responsible for the establishment of several fundamental doctrines of U.S. patent law.

Wayne MacVeagh

Wayne MacVeagh (1833-1917) was a captain in the Union Army and held legal positions as Chester County district attorney and U.S. attorney general. He also served his country abroad as minister to Turkey and chief counsel at the Venezuela Arbitration at The Hague.

Samuel Dickson

Samuel Dickson (1837-1915) handled organization and reorganization matters for clients such as the Reading Railroad, and his partnership with John Christian Bullitt was the predecessor of Drinker, Biddle & Reath. A scholar more than an advocate, he served as librarian for the Law Association from 1860 to 1865 and as Chancellor from 1899 to 1908. He was the first chairman of the State Board of Law Examiners, holding the position from 1902 to 1915.

Caroline Burnham Kilgore

Caroline Burnham Kilgore (1838-1909) was a trailblazer, the first woman to be admitted to the bar in the Commonwealth of Pennsylvania. Hers is a story of persistence in the face of adversity. She struggled for sixteen years, from 1870 to 1886, against cultural and statutory obstacles, knowing full well that even if she succeeded, she would not be afforded the opportunity to achieve a status comparable to that of the significant lawyers of her time. Nonetheless, Kilgore persevered, reading the law in the office of her husband-to-be, applying to attend lectures given by prominent Philadelphia judges at the University of Pennsylvania, reapplying when her requests were refused, applying for admission to the bar, lobbying the legislature to change the applicable statutory law, and finally gaining admission to the courts of Philadelphia and Pennsylvania after the law was amended. Kilgore joined her husband in the practice of law, and continued the practice after his death. She persevered in her quest for admission to the bar not for herself, but for the benefit of generations of women lawyers who would follow. In so doing, Kilgore achieved a status in the bar above and beyond most of her contemporaries.

John Graver Johnson

John Graver Johnson (1841-1917) was described by The New York Times as being "in the opinion of some well-qualified judges, the greatest lawyer in the English-speaking world." Barons of industry, J.P. Morgan, Andrew Carnegie and Henry Clay Frick among them, rushed to retain Johnson. Prestigious Philadelphia lawyers regularly sought him out to serve as co-counsel. Major Philadelphia businesses, including Baldwin Locomotive Company, Pennsylvania Company, John B. Stetson and John Wanamaker, relied on his lawyering skills. Still, Johnson's door was open to the average person. Judges, lawyers and civic officials sought his advice before making important personal decisions. Johnson had an incisive mind and a photographic memory. He worked day and night on all kinds of legal matters, paying little attention to the outrageously low fees that he charged. Johnson handled an astounding 168 cases in the U.S. Supreme Court and approximately 2,000 cases in the Pennsylvania Supreme Court. On two occasions he was offered nominations to the U.S. Supreme Court. A self-taught art critic, his collection of approximately 1,300 paintings is on display at the Philadelphia Museum of Art.

Samuel W. Pennypacker

Samuel W. Pennypacker (1843-1916) had a distinguished career as a lawyer, judge and governor of Pennsylvania. After seeing active service at Gettysburg and then beginning his legal career, Pennypacker was appointed, then re-elected twice, as a judge of the Court of Common Pleas No. 2. He went on to become president judge, a position from which he resigned in 1902 in order to accept the Republican nomination for governorship. Governor Pennypacker's term saw the creation of the State Police Force, the State Health Department, and the passage of election and registration laws.

Mayer Sulzberger

Mayer Sulzberger (1843-1923) was a prominent judge, a positive influence on Jewish lawyers, one of the founding trustees of Dropsie College, and a member of the Board of Gratz College and a number of other prominent Jewish organizations. Sulzberger was born in Baden, Germany. He came with his parents to America when he was 5 years old. After graduating from high school, he read the law in the office of Moses Aaron Dropsie. He was admitted to the bar in 1876 and soon gained recognition as one of the city's best trial lawyers. In 1894, Sulzberger gave up the practice of law in favor of a position on the bench of Common Pleas No. 2. It was because of Judge Sulzberger that C.P. No. 2 was known as "the Jewish Court."

Francis Rawle

Francis Rawle (1846-1930) was a founder of the American Bar Association in 1878. He held several positions in that organization, including treasurer and president. Rawle was an overseer of Harvard University, vice president of The Historical Society of Pennsylvania and a reviser of Bouvier's Law Dictionary in 1883, 1887 and 1910.

Hampton L. Carson

Hampton L. Carson (1852-1929) served as Chancellor of the Philadelphia Bar Association from 1912 to 1914. He was a professor of law at the University of Pennsylvania and editor of its legal gazette. Carson also served as secretary of the Constitutional Centennial Commission of 1887.

Richard C. Dale

Richard C. Dale (1853-1904) studied with Judge Robert N. Willson before joining John Christian Bullitt and Samuel Dickson in their law office, where he handled litigation matters. Like Theodore Flowers, Dale was struck down early in life, just as his career was on the rise.

Alexander Simpson Jr

Alexander Simpson Jr. (1855-1935) was one of the founders of the Pennsylvania Bar Association and served as its president and chairman of its Committee on Law Reform for more than twenty years. His treatise on federal impeachments in England and in the United States was recognized as authoritative worldwide. In 1918, he was appointed for life to the Pennsylvania Supreme Court.

Francis Shunk Brown

Francis Shunk Brown (1858-1940) was attorney general of Pennsylvania from 1915 to 1919. He was a highly respected lawyer with a strong commitment to public service. Brown was special counsel to the Pennsylvania Tax Commission from 1909 to 1911, a member of the Board of City Trusts from 1903 to 1940, and president of the Lawyers Club for forty-two years. He was Chancellor of the Philadelphia Bar Association from 1927 to 1929.

John Marshall Gest

John Marshall Gest (1859-1934) was a Philadelphia Orphan's Court judge and author of the well-known book, The Lawyer in Literature (1913). He was an avid collector of ancient law books and bequeathed nearly 125 volumes of Roman and Canon Law to Jenkins Law Library.

John Hampton Barnes

John Hampton Barnes (1860-1952) was Chancellor of the Philadelphia Bar Association from 1924 to 1926. His clients included the Pennsylvania Railroad and Girard Trust Company. He helped create a new Philadelphia City Charter in 1919 as a member of the Charter Revision Committee. He served as a senior partner at Dechert Price & Rhoads.

James M. Beck

James M. Beck (1861-1936) served as a Republican member of Congress from 1927 to 1934. He was appointed U.S. solicitor general by President Warren G. Harding in 1921. He also served as U.S. attorney for the Eastern District of Pennsylvania from 1896 to 1900. A leading constitutional authority, Beck argued many cases before the U.S. Supreme Court, including Neely v. Henkel, regarding the governance of Cuba after the Spanish-American War.

Thomas D. Finletter

Thomas D. Finletter (1862-1947) was lauded as a model judge on the Philadelphia Court of Common Pleas. Prior to his career on the bench, he served as both an assistant city solicitor and assistant district attorney, and had a distinguished career as a lawyer.

Ralph B. Evans

Ralph B. Evans (died 1936) headed Evans, Bayard & Frick, a predecessor firm of Pepper Hamilton. He was a leading authority on cross-examination. He was also considered a pre-eminent trial lawyer who excelled in appellate court appearances.

Russell Duane

Russell Duane (1866-1938), a founder of the Committee of Seventy, served for many years as its chairman. Duane taught trial practice at the University of Pennsylvania Law School for more than thirty years. He was a founder of Duane, Morris & Heckscher.

George Wharton Pepper

George Wharton Pepper (1867-1961) was the personification of an "Old Philadelphia" gentleman. Pepper was a professor of law (1889-1910) and a U.S. senator (1922-1926) in addition to being a first-rate appellate lawyer. His impeccable manners and adherence to a gentleman's code of conduct set the standard for all Philadelphia lawyers in the first half of the twentieth century. He represented high-profile clients ranging from Gifford Pinchot, the "Great Conservationist," to Major League Baseball. Pepper was an outstanding orator, both in the courtroom and at public functions. He never spoke from a written text nor did he use notes; he relied on his quick intellect and a photographic memory. Pepper's 1935 argument in the U.S. Supreme Court in opposition to the Agricultural Adjustment Act is remembered today as the epitome of oral advocacy. Pepper was Chancellor of the Philadelphia Bar Association from 1930 to 1932. He served as president of the American Law Institute from 1936 to 1947. He was a founding partner of Pepper Hamilton.

William Draper Lewis

William Draper Lewis (1867-1949) brought legal education in Philadelphia into the twentieth century, and then, half a generation later, was a leader in the movement for the improvement of American law. As dean of the University of Pennsylvania Law School, Lewis assembled a faculty of full-time scholars and teachers, rather than practitioners, and moved the school itself away from Center City and the practicing bar to West Philadelphia and a university setting. In 1923, he was named the first director of the American Law Institute, and his twenty-four-year tenure in that position cemented the Institute's ties to the City of Philadelphia.

Robert von Moschzisker

Robert von Moschzisker (1870-1939) began studying law at age 13 in the office of Edward Shippen, whose practice he joined in 1896 after being admitted to the bar. He was elected judge in the Philadelphia Court of Common Pleas in 1903. In 1909 he was appointed justice of the Pennsylvania Supreme Court and served as chief justice from 1921 to 1930.

Roland S. Morris

Roland S. Morris (1874-1945) was a founding partner of Duane, Morris & Heckscher in 1904. He served as chairman of the Democratic State Committee of Pennsylvania and thereafter as U.S. ambassador to Japan. Morris was Chancellor of the Philadelphia Bar Association from 1933 to 1935 and a professor of international law at the University of Pennsylvania Law School.

Owen Josephus Roberts

Owen Josephus Roberts (1875-1955) was an associate justice of the U.S. Supreme Court from 1930 to 1945. Roberts first gained nationwide attention in 1924 when President Calvin Coolidge appointed him special counsel to investigate and prosecute criminal activity associated with the government's lease to private interests of oil reserves valued at more than $100 million. The highly publicized "Teapot Dome" investigation lasted six years and was an acknowledged success. In 1941, President Franklin D. Roosevelt called on Roberts to conduct an investigation of the devastating attack on Pearl Harbor. Prior to his appointment as special counsel in the "Teapot Dome" investigation, Roberts served as an assistant district attorney before developing a successful private litigation practice. He also taught law at the University of Pennsylvania and, during World War I, was specially appointed to prosecute espionage cases. After retiring from the Supreme Court, Roberts was appointed dean of the University of Pennsylvania Law School. He was one of the founders of Montgomery, McCracken, Walker & Rhoads.

Stevens Heckscher

Stevens Heckscher (1875-1931) taught legal ethics at the University of Pennsylvania Law School. His most famous case, and an example of his thoroughness and preparation, involved Albright College and the Evangelical Church and two sects of that church. By the time he won the case in the state Supreme Court, he was recognized by church leaders as the ultimate authority on Church history.

Christopher Stuart "Chippy" Patterson Jr.

Christopher Stuart "Chippy" Patterson Jr. (1875-1933) was a criminal lawyer who had come from an influential and socially prominent family. He represented the poorest people in the city in the early decades of the twentieth century. He was the subject of a popular book by Arthur H. Lewis, The Worlds of Chippy Patterson (New York, 1960).

Thomas Raeburn White Sr.

Thomas Raeburn White Sr. (1875-1959) was a prominent corporate lawyer. In 1924, he formed the partnership of White, Parry and Maris, the beginnings of what is now White and Williams. He fought political corruption as counsel to the Committee of Seventy and as a city solicitor, ultimately directing the arrest of more than 200 people for various political crimes.

William A. Gray

William A. Gray (1875-1965) was a criminal lawyer, assistant district attorney and Republican Party stalwart. He was both a witness to history and a participant. He began life at the end of the post-Civil War Reconstruction period and lived to see the civil rights movement that sought to complete the task of achieving racial justice in America.

Horace Stern

Horace Stern (1878-1969), son of immigrants, became a brilliant and esteemed chief justice of the Pennsylvania Supreme Court. His legal opinions were marked by clarity of thought and intellectual integrity. Stern was the first Jew to sit on the Penn-sylvania Supreme Court and the first Jewish trustee of the University of Pennsylvania. As a young law professor at the University of Pennsylvania Law School, Stern teamed up with student Morris Wolf to form the law firm Stern and Wolf, the predecessor of Wolf, Block, Schorr and Solis-Cohen. Stern was also very active in the community, having served as president of the Federation of Jewish Charities and having been a founder of the American Jewish Committee.

Henry S. Drinker

Henry S. Drinker (1880-1965) was the Drinker of Drinker Biddle & Reath. Representing management in labor matters, he handled the Coronado Coal case for fourteen years, including two appearances before the U.S. Supreme Court. He was also heavily involved in the Franklin Sugar antitrust litigation. His treatise, Legal Ethics, is a standard work on the subject.

William Clarke Mason

William Clarke Mason (1881-1957) became one of the most active and successful trial lawyers of his time. A partner in the law firm of Morgan, Lewis & Bockius from 1922 until his death, Mason also served as Chancellor of the Philadelphia Bar Association, president of the Pennsylvania Bar Association and member of the ABA's Board of Governors.

Walter Biddle Saul

Walter Biddle Saul (1881-1966) was a trial lawyer in the field of construction and engineering liability. He helped found Saul, Ewing, Remick & Saul in 1921. Saul was on the Board of Education for twenty-five years and was so invaluable to public education that a high school was named after him while he was still alive.

Charles Edwin Fox

Charles Edwin Fox (1883-1937) was co-founder of Fox & Rothschild, which later became Fox, Rothschild, O'Brien & Frankel. Although he never attended college, he graduated from the University of Pennsylvania Law School. He served as Philadelphia district attorney, first president of the Big Brother and Big Sister Foundation and chairman of the board of the Crime Prevention Association of Philadelphia.

Robert T. McCracken

Robert T. McCracken (1883-1960) played an influential role in the fields of law, municipal reform, higher education, religion and business. In addition to being one of the founding partners of the firm now known as Montgomery, McCracken, Walker & Rhoads, he served as Chancellor of the Philadelphia Bar Association and president of the Pennsylvania Bar Association. He was a leading member of the commission that drafted Philadelphia's Home Rule Charter; a trustee of the University of Pennsylvania, serving as chairman of the board from 1948 to 1956; chancellor of the Pennsylvania Diocese of the Episcopal Church; and a director of the Pennsylvania Railroad.

Morris Wolf

Morris Wolf (1883-1978) founded the firm that is now Wolf, Block, Schorr and Solis-Cohen in 1903 by boldly asking his law professor, Horace Stern, to become his law partner. Wolf was independently wealthy and practiced law only because he had a passion for using his first-rate legal mind to solve his clients' problems, to whom he was fiercely loyal. He never lost this consuming zest for the practice of law, which he imbued into his law firm through his commanding intellect, his intense scholarly interest in the law, his force of will, and his legendary ability to win the confidence of clients. Wolf was a major force in the Philadelphia legal, business and Jewish communities for three-quarters of a century.

Grover Ladner

Grover Ladner (1885-1954) was a Pennsylvania Supreme Court justice and founder of Clark, Ladner, Fortenbaugh & Young. While in practice, he was considered an expert on conveyancing. A great conservationist, he was instrumental in the passage of the Pure Streams Act and fought to improve the quality of Philadelphia's water.

Francis Biddle

Francis Biddle (1886-1968), of the long line of famous Philadelphia Biddles, was appointed by President Harry S Truman as a U.S. judge on the war crimes tribunal in Nuremberg in 1945. Under President Franklin D. Roosevelt, Biddle served as the U.S. attorney general from 1941 to 1945. He was chairman of the National Labor Relations Board in 1934-1935 and served on the Third Circuit Court of Appeals from 1938 to 1940. Biddle wrote the autobiographical A Casual Past (1961) and In Brief Authority (1962).

William A. Schnader

William A. Schnader (1886-1968) was responsible for drafting a comprehensive codification of Pennsylvania's administrative, banking, corporation, fiscal and insurance laws during his four years as attorney general (1931-1934) and another eight years as a deputy in that office (1922-1930). He was also responsible for the successful defense of those laws in court. In 1940, during an argument in the Pennsylvania Supreme Court, Schnader suffered a massive stroke. His right arm was permanently paralyzed. He required the frequent use of a wheelchair. Undaunted, Schnader turned his talents to the improvement of the law. He forged an alliance of the National Conference of Commissioners on Uniform State Laws and the American Law Institute to promulgate a Uniform Commercial Code that was eventually adopted by all fifty states. Schnader's leadership role in that effort earned him the title of "The Father of the Uniform Commercial Code." In 1949, Schnader was appointed chairman of the committee that drafted Philadelphia's Home Rule Charter; and in 1968 he was a leading force in the revision of the Pennsylvania Constitution. He was a founder of Schnader Harrison Segal & Lewis.

Leon J. Obermayer

Leon J. Obermayer (1886-1984) was the founder and originator of The Shingle, now known as The Philadelphia Lawyer, a Philadelphia Bar Association publication begun in 1938.

Eugene V. Alessandroni

Eugene V. Alessandroni (1887-1966) served on the Philadelphia Court of Common Pleas. He was honored in 1959 as one of fifty living Philadelphians who had done the most for the community over the past half-century. The Order Sons of Italy in America Lodge of Pipersville, Pennsylvania, is named in his honor.

Claude Carroll Smith

Claude Carroll Smith (1888-1983) became one of Philadelphia's leading Quakers. He rewrote the Quaker Book of Discipline and was a leader in the negotiations between two branches of the Quaker faith, leading to their unification. Smith joined Duane, Morris & Heckscher in 1917 and was a senior partner there from 1945 to 1979.

Herbert Funk Goodrich

Herbert Funk Goodrich (1889-1962) was a dean of the University of Pennsylvania Law School and a judge of the Third Circuit Court of Appeals. He was director of the American Law Institute, which has shaped American law through the Restatements. He also chaired the commission that reorganized the state's county relief system into the Department of Public Assistance.

Joseph Welles Henderson

Joseph Welles Henderson (1890-1957) became a partner in the nation's oldest continuously practicing law firm, Rawle & Henderson, in 1917, expanding the firm's admiralty practice. He served as president of the American Bar Association in 1943 and was a member of the Board of Philadelphia City Trusts.

Herbert E. Millen

Herbert E. Millen (1890-1957) was the first black judge appointed to the bench in Pennsylvania and the thirteenth black judge appointed in the United States. He served on the Philadelphia Municipal Court. He was an active member of the City Charter Commission, which drafted the Home Rule Charter.

John D.M. Hamilton

John D.M. Hamilton (1892-1973) was chair of the Republican National Committee and speaker of the Kansas House of Representatives. A powerful litigator, he accepted a court appointment to defend Harry Gold, who confessed to passing atomic secrets to the Soviet Union in 1950. Hamilton was chairman of Pepper Hamilton from 1955 to 1964.

C. Brewster Rhoads

C. Brewster Rhoads (1892-1973) served as Chancellor of the Philadelphia Bar Association from 1954 to 1955. In 1922, Rhoads joined the law firm of Roberts, Montgomery and McKeehan, the predecessor to Montgomery, McCracken, Walker & Rhoads. At the time of his death, he was a senior partner in the firm.

John C. Bell Jr.

John C. Bell Jr. (1892-1974) was chief justice of the Pennsylvania Supreme Court from 1961 to 1971. He served a four-year term as Pennsylvania lieutenant governor, which culminated in nineteen days as governor when Governor Edward Martin left office for the U.S. Senate. He also served as an assistant Philadelphia city solicitor and assistant district attorney.

Lemuel Brad Schofield

Lemuel Brad Schofield (c.1893-1955) tried several landmark cases in the Pennsylvania and federal courts. Such training prepared him for some of the toughest administrative challenges of his day when he went on to serve in turn as Philadelphia's director of public safety (then the fire and police departments), and as U.S. commissioner of immigration and naturalization. He was nicknamed "The Major."

J. Austin Norris

J. Austin Norris (1893-1976) was a strong advocate for equality of opportunity. He used political power to advance the status of black lawyers with the expectation that those lawyers would bring about further social change. Norris was the leader of Philadelphia's Seventh Ward, a member of the Board of Revision of Taxes and the editorial voice of several black newspapers. His law firm produced more than a dozen judges and top government officials.

James F. Masterson

James F. Masterson (1894-1970) was known as a great mentor. Three of his former associates have served on the bench. In 1938, Masterson served as counsel for former Democratic Governor George Earle III, when Republicans unsuccessfully tried to impeach him.

Walter B. Gibbons

Walter B. Gibbons (1894-1972) was generally recognized as the first "non-establishment" Chancellor of the Philadelphia Bar Association (1943-1944). Gibbons maintained a general practice of law and also lectured on commercial law at Temple University. He was chairman of the Caveat Club, an informal organization of lawyers who presented humorous skits and hosted annual dinners. Gibbons was a member of the Board of City Trusts and the Board of Managers of the House of Detention. He was a founding member of the Saint Thomas More Society of Philadelphia and a board member of many Catholic educational and charitable institutions.

Robert M. Bernstein

Robert M. Bernstein (1894-1987) was a pioneer in personal injury litigation. A senior partner at Bernstein, Bernstein & Harrison, he practiced law for more than seventy-one years. The walls of his office were lined with letters and autographs of famous people he knew, including Albert Einstein and Golda Meir.

Albert B. Maris

Albert B. Maris (1894-1989), at the time of his death, was the longest-sitting federal judge in the nation. He was appointed to the U.S. District Court in 1936 and the Third Circuit Court of Appeals in 1938. He was instrumental in putting together the internal laws of the Virgin Islands and revising the judicial codes of Guam and American Samoa.

James Patrick McGranery

James Patrick McGranery (1895-1962), while on the federal bench, presided over the espionage trial of Harry Gold, which highlighted what it meant to be a loyal citizen and moral human being. McGranery served as President Harry S Truman's attorney general.

Arthur Littleton

Arthur Littleton (1895-1973) was the twenty-ninth Chancellor of the Philadelphia Bar Association and a president of the Pennsylvania Bar Association. He was a partner at Morgan, Lewis & Bockius, where he enjoyed a reputation as an outstanding trial and appellate lawyer. Littleton was a founding member of the National Conference of Bar Presidents.

Robert Dechert

Robert Dechert (1895-1975) distinguished himself by mentoring young lawyers in the firm he managed with Curtis Bok and Owen Rhoads. President Dwight D. Eisenhower named him general counsel of the Department of Defense in 1957. The taxation course he taught at the University of Pennsylvania Law School is believed to have been the first in a major law school.

J. Harry LaBrum

J. Harry LaBrum (1896-1970) was a partner in LaBrum & Doak, where he handled admiralty and corporate matters. He became president of the Philadelphia Board of Education in 1961. He was known for his adoption of a progressive fiscal policy for schools that included greater expenditures and increased funding.

Philip F. Newman

Philip F. Newman (1896-1987), an authority in real estate law, was proud of his role in the acquisition and development of most of the properties lining the perimeter of Rittenhouse Square. In 1961, his firm of Newman & Master merged with the firm now known as Blank Rome Comisky & McCauley, where he served as senior partner and counsel.

Curtis Bok

Curtis Bok (1897-1962) practiced law for fifteen years, served on the Philadelphia Court of Common Pleas for twenty, and then served on the Pennsylvania Supreme Court during the last four years of his life. He had a reputation for skill, courtesy and integrity and as a champion of the rights of the underdog. In one noted case on the Common Pleas bench, Bok ruled that a Philadelphia bookseller had not violated obscenity laws by selling works by authors like William Faulkner. Bok recognized the value of tradition while moving his city and commonwealth into the twentieth century.

Gerald F. Flood

Gerald F. Flood (1898-1965) was a state Superior Court judge, and one of the youngest judges to serve on the Philadelphia Court of Common Pleas. Known for his outspokenness and espousal of minority rights, he became the first chairman of the Fair Employment Practice Commission. An excellent pianist, he played in his father's orchestra and later organized his own band.

Raymond Pace Alexander

Raymond Pace Alexander (1898-1974) was the first African-American judge of the Philadelphia Court of Common Pleas, appointed in 1959. He was largely responsible for the end of de jure segregation in Pennsylvania public schools, and urged General George C. Marshall to end segregation in the armed forces. A president of the National Bar Association and a co-founder of the National Bar Journal, he also served on Philadelphia City Council from 1956 until his appointment to the bench.

Sadie Tanner Mosell Alexander

Sadie Tanner Mosell Alexander (1898-1989) blazed trails. She was the first African-American woman to earn a Ph.D. (in 1921, one of three awarded to African-American women that year, and the first in economics); to attend or graduate from the University of Pennsylvania Law School or to be an editor of its Law Review; to be admitted to the Pennsylvania bar (in 1927); and to serve as a lawyer in the Philadelphia City Solicitor's Office. She drafted the section of the Philadelphia Home Rule Charter that created the Commission on Human Relations, and served on it for many years. President Harry S Truman appointed her to the President's Committee on Civil Rights, President John F. Kennedy appointed her to the Lawyers' Committee on Civil Rights Under Law, and President Jimmy Carter appointed her chair of the White House Conference on Aging.

Nochem S. Winnet

Nochem S. Winnet (1898-1990) emigrated from Poland in 1905. He began his legal career with the law firm of Aarons, Weinstein & Goldman. Winnet served on the Municipal Court from 1940 to 1950. He then joined Fox, Rothschild, O'Brien & Frankel. In honor of his ninetieth birthday, the firm published Winnet's memoirs in a volume titled Vignettes of a Lucky Life.

Richardson Dilworth

Richardson Dilworth (1898-1974) was a complex and often-controversial civic leader. He came to Philadelphia after graduating from Yale in 1926. A combat veteran of World War I, Dilworth gained prominence in his representation of a major newspaper publisher, Triangle Publications. He also became the leading lawyer of the firm that is now Dilworth Paxson. After World War II, during which he served in the South Pacific, Dilworth focused his energies on politics. He was elected to the offices of city treasurer, district attorney and mayor. During his mayoral term, the face of Philadelphia changed dramatically through a nationally recognized urban redevelopment program. Near the close of his career, Dilworth served for six years as president of the Board of Education.

Earl G. Harrison

Earl G. Harrison (1899-1955), serving under Presidents Franklin D. Roosevelt and Harry S Truman, presided over alien registration and went on to work on the plight of refugees in the aftermath of World War II. Harrison returned from government service to become dean of the University of Pennsylvania Law School and vice president of the university. When he resigned from the university, he returned to private practice. He remained a public servant throughout his life.

Carl W. Funk

Carl W. Funk (1900-1981) was a nationally recognized authority on banking law. A member of Drinker Biddle & Reath, he served as legal counsel to the banking industry, including the Philadelphia Clearing House. A captain in the U.S. Naval Reserve, he became an expert on priorities and allocations and wrote Navy manuals on termination of contracts.

David F. Maxwell

David F. Maxwell (1900-1985), an expert in corporate law, became well known in the courtroom as a combative litigator. In 1929, he became partner in the law firm of Edmonds and Obermayer (now Obermayer, Rebmann, Maxwell and Hippel). He chaired the American Bar Association's first post-World War II trip to London, where he was received by Queen Elizabeth II in Buckingham Palace.

Joseph Sill Clark

Joseph Sill Clark (1901-1990), along with Richardson Dilworth, brought reform to Philadelphia government with the adoption of the Home Rule Charter in 1951. Clark was elected city controller in 1949 and was elected mayor in 1951. He was elected to the U.S. Senate five years later, and re-elected in 1962. Clark was a floor leader in the effort to secure passage of the Civil Rights Act of 1964.

Morris Duane

Morris Duane (1901-1992) was the long-time chairman of Duane, Morris & Heckscher. He was an inspirational lawyer who conducted his law practice with devotion to all clients, rich and poor. He was known for his concern for the health of his colleagues, firm employees and their families.

Abraham D. Caesar

Abraham D. Caesar (1901-1995) was founder of Caesar, Rivise, Bernstein, Cohen & Pokotilow. He co-authored with his partner, Charles W. Rivise, Interference Law and Practice, which has been cited and relied on by the courts and the U.S. Patent and Trademark Office in hundreds of reported opinions. He is founder of the South Philadelphia High School Alumni Association Scholarship Fund.

Joseph Ominsky

Joseph Ominsky (1901-2000) achieved the distinction during his lifetime of being Philadelphia's youngest leader in the Pennsylvania Legislature and its oldest practicing lawyer. In 1935, he was elected to the Pennsylvania House of Representatives. Ominsky's legal career spanned the years from 1930 to 2000. He was the senior lawyer and founder of a general law practice.

Thomas Biddle Kenilworth Ringe

Thomas Biddle Kenilworth Ringe (1902-1957) tried cases for the Philadelphia Rapid Transit Company and was an assistant city solicitor before joining Morgan, Lewis & Bockius in 1937, remaining there until his death. He specialized in antitrust and regulatory cases, and his trademark was total preparation. Ringe was the litigator of choice for the Philadelphia Electric Company and Scott Paper Corporation.

Thomas D. McBride

Thomas D. McBride (1902-1965) served with distinction as Pennsylvania attorney general and later as a justice of the Pennsylvania Supreme Court. He was a respected criminal defense attorney in Philadelphia. He fearlessly provided counsel for unpopular causes, including the defense of eight Communists charged with conspiracy to overthrow the U.S. government. He was Chancellor of the Philadelphia Bar Association from 1956 to 1957.

Samuel B. Fortenbaugh Jr

Samuel B. Fortenbaugh Jr. (1902-1985) was a founder of Clark, Ladner, Fortenbaugh & Young. An outstanding admiralty lawyer, he was best known for his work in Hickman v. Taylor, the 1947 landmark U.S. Supreme Court case concerning discovery of a lawyer's written witness interviews.

Laurence Howard Eldredge

Laurence Howard Eldredge (1902-1982) was a lawyer who was best known as a legal scholar. His published contributions to tort law have been called among the most valuable. After practicing with Norris, Lex, Hart & Eldredge, he established his own office specializing in trial and appellate work. Among other positions, he served as president of the Better Business Bureau.

Edward N. Polisher

Edward N. Polisher (1902-2004) the dean of the estate planning bar, went directly from high school to Dickinson Law School and graduated at the age of 20 years. He had to wait until his next birthday before he could be admitted to the bar. He then practiced estate planning and tax law for the next 78 years. His practice began at the start of federal taxation and continued at the crest of the development of estate planning throughout the 20th century. He also taught law as an adjunct professor, wrote two books on estate planning and served in leadership positions on many charitable organizations, including the gerontological research entity named in his honor as the Edward and Esther Polisher Institute.

Ernest Scott

Ernest Scott (1903-1973) was chairman of Pepper Hamilton from 1964 to 1971. He served as Chancellor of the Philadelphia Bar Association in 1962. A graduate of the University of Pennsylvania and its Law School, Scott later served as a university trustee.

John Mulder

John Mulder (1904-1966) was best known for his work as the first director of ALI-ABA, a position he held from 1947 to 1962. He was responsible for developing the original program and for its growth and improvement. Mulder was also a partner at Wexler, Mulder and Weisman.

Abraham L. Freedman

Abraham L. Freedman (1904-1971), although perhaps best known for his time on the trial and appellate federal bench, also played a prominent role in the watershed reform period of the early 1950s when the Democratic Party displaced the Republican Party that was

dominant since the Civil War era. Freedman was a member of the three-person committee that drafted the Home Rule Charter, which has given shape to city government ever since. He worked with public housing in a time of high ideals and optimism. Freedman was also an authority on domestic relations law.

Theodore Voorhees

Theodore Voorhees (1904-1991) was the first vice president of the Philadelphia Reading Railway Company. A former partner in Dechert, Price & Rhoads, he challenged the legal profession to provide a lawyer and an unprejudiced jury for every defendant. Voorhees served as Chancellor of the Philadelphia Bar Association in 1964.

Louis Lipschitz

Louis Lipschitz (c.1904-1993) was recognized as one of the bar's finest criminal defense lawyers. A scholarly and successful attorney, he was honored by the Philadelphia Bar Association's Criminal Justice Section in 1982.

Edward W. Furia

Edward W. Furia (1905-1971) was a U.S. magistrate for the Eastern District of Pennsylvania. He also served as U.S. commissioner for the Eastern District of Pennsylvania, clerk of the Quarter Sessions Court and attorney for the state Banking Department.

John Patrick Walsh

John Patrick Walsh (1905-1973) at the time of his death was the dean of the Philadelphia private criminal defense bar. He was chair of the Philadelphia Bar Association's Criminal Justice Committee and Judiciary Committee, and recipient of the Temple University Legion of Honor. Once a newspaper reporter, his first love was the Fourth Estate.

Virgil E. Woodcock

Virgil E. Woodcock (1905-1974) founded the firm of Woodcock Washburn Kurtz Mackiewicz and Norris in 1938. Prior to that, he worked at General Electric as a patent attorney. As an active member of the American Patent Law Association, Woodcock was instrumental in drafting the 1952 Patent Act.

Abraham E. Freedman

Abraham E. Freedman (1905-1980) practiced with the firm Freedman and Lorry, excelling in plaintiffs' personal injury work. His work in the development of the rights of merchant seamen, longshoremen and waterfront workers earned him a national reputation in

admiralty and maritime law. Freedman was lead counsel for appellants in Hickman v. Taylor, the 1947 landmark U.S. Supreme Court case concerning discovery of a lawyer's written witness interviews.

Robert Nelson Cornelius Nix Sr.

Robert Nelson Cornelius Nix Sr. (c.1905-1987) was a Philadelphia lawyer and a member of the U.S. Congress from 1958 to 1979. He was one of the first African-American lawyers to become a major political leader in Philadelphia and the first black representative from Pennsylvania. Congressman Nix's son later served as chief justice of the Pennsylvania Supreme Court.

Robert D. Abrahams

Robert D. Abrahams (1905-1998) helped establish Abrahams, Loewenstein, Bushman & Kauffman. In 1939 he created the Philadelphia Neighborhood Law Office Plan, charging only three dollars per half-hour consultation. He served as chief counsel of the Legal Aid Society of Philadelphia for more than forty years.

Samuel E. Ewing

Samuel E. Ewing (1906-1981) was a member of Saul, Ewing, Remick & Saul, where his brother, Joseph, was a name partner. He handled much of the firm's mortgage foreclosure work in the wake of the Great Depression. He later became vice president and general attorney at Radio Corporation of America (RCA).

C. Clark Hodgson Sr.

C. Clark Hodgson Sr. (1906-1987) was a partner at Stradley, Ronon, Stevens & Young. He practiced law in Philadelphia for more than fifty-six years. He was president of the Catholic Philopatrian Literary Institute and counsel for the Archdiocese of Philadelphia.

Lewis Weinstock

Lewis Weinstock (died 1987), of LaBrum and Doak, specialized in admiralty, real estate, corporate and probate law, and appellate practice. He made significant contributions to post-law-school legal education and conducted working seminars on corporate law for students at his alma mater, the University of Pennsylvania Law School.

Maurice Heckscher

Maurice Heckscher (1907-2001) was a trusts and estates lawyer, a member of a well-known Philadelphia family, and a civic leader. During World War II, he served as assistant general counsel to the War Production Board. After the war, he returned to the practice of law in Philadelphia. He served on the boards of many business corporations and many

charitable and educational institutions, including the American Philosophical Society, Natural Lands Trust, and the Philadelphia Zoological Society.

Milford J. Meyer

Milford J. Meyer (1907-1981) was known for his expertise in railroad, negligence and automobile law. He was the founder of Meyer, Lash, Hankin and Poul. He was an editor and author with the George T. Bisel Company, where he co-authored the Civil Practice Handbook. He served as mayor of Royal Palm Beach, Florida, where he had retired.

Israel "Iz" Packel

Israel "Iz" Packel (1907-1987) was a lawyer, a professor of law, an acting law school dean, a state attorney general, a judge and a Pennsylvania Supreme Court justice. In 1972, Governor Milton J. Shapp appointed Packel to the Superior Court bench and, from 1973 to 1975, to serve as attorney general. In 1977, he was appointed to the Pennsylvania Supreme Court.

Bernard G. Segal

Bernard G. Segal (1907-1997) was a brilliant business counselor and appellate advocate. He argued nearly fifty cases in the U.S. Supreme Court. He also made major contributions to the Philadelphia and American Bar Associations. He was the first Jew to serve as Chancellor of the Philadelphia Bar Association and the first Jew to become president of the ABA. He reorganized the operations of the Philadelphia Bar Association, making it possible for many new members to excel within the Association. A long-time advocate of merit selection of judges, Segal is credited with having persuaded President Dwight D. Eisenhower to seek the views of the ABA on the qualifications of prospective candidates for the federal judiciary. As chairman of the ABA's Standing Committee on the Federal Judiciary, Segal established a deserved reputation for thorough and impartial evaluation of judicial nominees. In 1963, his leadership in civil rights activity led to the creation of the Lawyers' Committee for Civil Rights Under Law. President John F. Kennedy appointed Segal as one of the first co-chairmen of that committee.

Andrew B. Young

Andrew B. Young (1907-2003) specialized in taxation and estates law, and was a leader in promoting the commercial interests of the Philadelphia metropolitan area. He lectured on taxation and finance at the Wharton School of the University of Pennsylvania and at six other universities. He held leadership positions on the tax committee of the Philadelphia Bar Association and the tax section of the American Bar Association. He also served as president of the Greater Philadelphia Chamber of Commerce.

John B.H. Carter

John B.H. Carter (1908-1972) was editor-in-chief of the Temple Law Quarterly. He served as a law clerk for Pennsylvania Supreme Court Justice Alexander J. Simpson.

J. Sydney Hoffman

J. Sydney Hoffman (1908-1998) was a senior judge in Pennsylvania Superior Court. Known for his keen legal mind and clarity of thought, he established the Accelerated Rehabilitative Disposition Program. He authored many dissenting opinions that became law in Pennsylvania. Hoffman had also served on the Family Court and Juvenile Court benches.

Donald J. Farage

Donald J. Farage (1909-1998) was a professor of law at the Dickinson School of Law for fifty-two years. He was the author of Pennsylvania Annotations to the Restatement of Judgments. He served as president of the International Academy of Trial Lawyers and director of the International Society of Barristers. Farage specialized in personal injury law.

Fairfax Leary Jr.

Fairfax Leary Jr. (1910-1990) helped write the Uniform Commercial Code. He was legal counsel for the General State Authority in Harrisburg in the 1950s and 1960s. A former partner at Saul, Ewing, Remick & Saul, he taught at Widener School of Law until his retirement.

Esther Polen

Esther Polen (1910-2003) was a general practice lawyer who began the practice of law after raising two children. She was extremely active in Bar Association and civic activities, and encouraged women to make careers in the law. She taught brief writing at Temple University School of Law and also lectured at several other universities. In the Philadelphia Bar Association, she served as secretary of the Association and as chair of the Family Law Section and the Women's Rights Committee. She was a board member of the National Conference of Christians and Jews, and held leadership positions in many Jewish agencies.

Lewis H. Van Dusen Jr.

Lewis H. Van Dusen Jr. (1910-2004) was a Philadelphia lawyer who lived up to—and surpassed—the expectations of his socially prominent family. After graduating from Princeton University summa cum laude, he attended Harvard for one year and completed his legal education at Oxford University as a Rhodes Scholar. During World War II, he interrupted his law practice and participated in action in Europe and North Africa, returning to his Philadelphia law office with Purple Heart and Bronze Star medals. He was known throughout the legal community as an authority on professional ethics. He served as

Chancellor of the Philadelphia Bar Association and president of the Pennsylvania Bar Association. He was a director of the Greater Philadelphia Movement, Inglis House (persons with physical disabilities), and numerous charitable and educational institutions.

Walter E. Alessandroni

Walter E. Alessandroni (1912-1966) became the youngest Chancellor of the Philadelphia Bar Association in 1958. He was appointed U.S. attorney for the Eastern District of Pennsylvania by President Dwight D. Eisenhower in 1959 and later served as Pennsylvania attorney general. Alessandroni was also executive director of the Philadelphia Housing Authority.

Louis J. Goffman

Louis J. Goffman (1912-1982) served as Chancellor of the Philadelphia Bar Association in 1969, and president of the Pennsylvania Bar Association in 1978-1979. He was a senior partner at Wolf, Block, Schorr and Solis-Cohen, and represented many leading commercial institutions, including Provident National Bank.

Joseph S. Lord III

Joseph S. Lord III (1912-1991) was one of the lawyers to defend members of the Communist Party of Pennsylvania accused of plotting to overthrow the U.S. government, in violation of the Smith Act. Appointed to the federal bench in 1961, Judge Lord spent thirty years as a district judge, including ten years as chief judge. The list of his cases includes the Electrical Equipment Conspiracy Litigation, which he handled early in his tenure, and the suit to desegregate Girard College.

James M. Marsh

James M. Marsh (1913-2006) was an appellate lawyer whose fluid writing style and genial personality masked the intensive preparation that went into every one of the hundreds of appeals that he handled. His career path was unique. While serving as an enlisted man in the U.S. Army during World War II, his commanding officer recommended him for law school, even though he had no college degree. He was accepted at Temple University School of Law and became its first graduate to be chosen for a clerkship with a justice of the Supreme Court of the United States. In addition to his appellate practice, he wrote many published articles on legal subjects. He served as chairman of the Pennsylvania Legislative Task Force on the Commonwealth Procurement Code and was also active on many committees of the Philadelphia and Pennsylvania Bar Associations.

Robert L. Trescher

Robert L. Trescher (1913-2002) was a civil trial lawyer with long-standing ties to the University of Pennsylvania. In addition to his trial practice of law, he taught constitutional law classes at the university and also served as a trustee. In 1966, he was elected to the office of Chancellor of the Philadelphia Bar Association. He was also elected a fellow of the American College of Trial Lawyers.

William White Jr.

William White Jr. (1914-1990) began practicing law with Duane, Morris & Heckscher in 1939, specializing in estates and trusts. He found his greatest satisfaction in working as a civic leader. He was a founding member and president of the Old Philadelphia Development Corporation from 1971 to 1986, playing a major role in redeveloping Society Hill and much of Center City.

Helen Chait

Helen Chait (1914-1992) became the first woman lawyer to hold a leadership position in the City Law Department. She was appointed chief counselor of the Department in 1957, the third-highest position. She served as chair of the Philadelphia Tax Revenue Board from 1960 to 1966.

Sylvan M. Cohen

Sylvan M. Cohen (1914-2001) was a lawyer expert in the practice of real estate law. He was a pioneer in the development of real estate investment trusts ("REITs"), which made it possible for small investors to acquire interests in large real estate transactions. He founded and became president of the Pennsylvania Real Estate Investment Trust. He served as president of the National Association of Real Estate Investment Trusts and the International Council of Shopping Centers. He served in many leadership positions in the Philadelphia Bar Association and was chairman of the Board of Governors, the State Civil Committee and the Supreme Court Advisory Committee, among others. He was tireless in his efforts for charitable activities that included chairmanship of the Allied Jewish Appeal, chief barker of the Philadelphia Variety Club, vice-president of United Way, and a member of the steering committee for Business Leaders Organized for Catholic Schools. He also served as a trustee or director of the Albert Einstein Medical Center, the Hebrew University, various schools of the University of Pennsylvania, the Police Athletic League and many others.

Lois G. Forer

Lois G. Forer (1914-1994) was an advocate for the powerless. In practice, she was co-founder and first director of the Juvenile Law Center, established in 1966. Some years earlier, while a deputy attorney general of Pennsylvania, she handled the case that compelled the Barnes Foundation to open to the public. In her service as a judge, and especially in her writing, she voiced outrage at how the legal system handled those unable to manipulate it to their advantage, especially women, the young and the poor. Her books include No One Will Listen: How Our Legal System Brutalizes the Youthful Poor, The Death of the Law, and Money and Justice: Who Owns the Law. The last of these won the American Bar Association's Silver Gavel Award in 1985.

H. Ober Hess

H. Ober Hess (1914-2004) was a prominent lawyer specializing in taxation and trusts and estates. In addition to the practice of law, he served as the managing partner of his law firm. He was also an associate professor of taxation at Temple University School of Law; and served as a trustee of Ursinus College and of Philadelphia College of Art. He was chairman of the Philadelphia Bar Association's Tax Section for two years and served for 64 years as the editor of The Fiduciary Review. He held leadership positions supporting the Philadelphia Orchestra Association, the Academy of Music and Lankenau Hospital.

Harold E. Kohn

Harold E. Kohn (1914-1999) achieved his national reputation in the early 1960s by winning a $29 million judgment against the giants of the electrical equipment industry for conspiring to fix prices. Following that triumph, he achieved great success in antitrust litigation involving numerous other industries. He was also instrumental in creating the procedural means for courts to deal with matters of such vast magnitude: the class action rules and the Panel on Multidistrict Litigation. Not a lawyer of one dimension, Kohn was also recognized for his devotion to civil liberties. He represented Ralph Ginzburg in appeals of a 1963 conviction for mailing obscene literature, argued the Two Guys store chain's challenge to the constitutionality of Sunday-closing laws, and handled a Vietnam War-era challenge to the draft as unconstitutional sex discrimination.

Raymond J. Broderick

Raymond J. Broderick (1914-2000) was a U.S. District Court judge for the Eastern District of Pennsylvania. He served on the federal bench for twenty-nine years. His groundbreaking rulings in Halderman v. Pennhurst State School and Hospital went to the U.S. Supreme Court and are credited with ushering in a new era of legal rights for the mentally disabled.

Leon S. Forman

Leon S. Forman (1914-2006) was an authority on bankruptcy and creditors' rights. He practiced law for more than sixty years. He served as chairman of the Philadelphia Bar Association's corporation, banking and business law section, and as chairman of the Pennsylvania Bar Association's bankruptcy committee. The National Conference of Bankruptcy Judges presented him with its Excellence in Education Award. He was a member of the American Law Institute. He taught bankruptcy and creditors' rights at the Law School of the University of Pennsylvania and at Temple University School of Law.

Irving R. Segal

Irving R. Segal (1914-2002) known to all as "Buddy," is best remembered for the remarkable feat of persuading the Interstate Commerce Commission and the regulatory commissions of each individual state to grant full territorial operating rights to United Parcel Service, despite the rigid monopoly-oriented restrictions of public service law. The effort extended about 35 years and involved more than 50 separate hearings. After nationwide operating authority was obtained, he successfully defended UPS in an antitrust case premised on allegations of monopolization. He represented other major businesses, including AT&T, the Bell Telephone Company of Pennsylvania, RCA and NBC. He was recognized with the 50-year Award of the American Bar Foundation, and with the Irving R. Segal Lectureship in Trial Advocacy at the University of Pennsylvania Law School.

John R. McConnell

John R. McConnell (1915-2004) was primarily a civil defense trial lawyer who, on occasion, represented plaintiffs and criminal defendants. His courtroom demeanor was engaging and unpretentious, masking his exhaustive preparation and absolute determination to win the case. His clients included major business corporations such as Philadelphia Electric Company and the Reading Railroad, municipal bodies such as the School District of Philadelphia, and significant individuals including two judges who were accused of felony crimes. In 1971, he served as Chancellor of the Philadelphia Bar Association. He also served as president of the National Association of Railroad Counsel. He was a fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. For more than 20 years, he taught trial techniques at Temple University School of Law and at Villanova Law School. After retiring from the practice of law, he taught high school for six years at his alma mater, St. Joseph's Prep.

Cecil B. Moore

Cecil B. Moore (1915-1979) was an activist leader of the National Association for the Advancement of Colored People, a member of Philadelphia City Council and a criminal trial lawyer. He was also a community leader who confronted major corporations and

institutions in efforts to increase black participation and employment. Girard College, the U.S. Post Office and Trailways Bus Company were three of Moore's many targets. He was flamboyant, whether arguing in court or debating in City Council, and was very effective in obtaining results for his clients or constituencies.

Harvey N. Schmidt (1915-2002) was a lawyer in general practice who persevered and ultimately prevailed over racial prejudice in the legal community. He served as a judge of the Court of Common Pleas of Philadelphia and as the executive director of Community Legal Services. He is best remembered as one of the founders of a small law firm that produced more than a dozen judges and government officials.

Robert B. Wolf

Robert B. Wolf (1915-2005) was a corporate lawyer specializing in bankruptcy, acquisitions and mergers whose volunteer efforts greatly improved the system of juvenile justice in Philadelphia and Pennsylvania. After serving as an infantry officer in World War II, he was assigned as a staff member to the Nuremberg Tribunal and the prosecution of Nazi war criminals. Upon returning to Philadelphia, he resumed his corporate law practice. He was a permanent member of the American Law Institute. Also, he served as chairman of the Pennsylvania Commission on Crime and Delinquency, and as chairman of the Citizens Crime Commission Committee on Children and Youth. He was appointed by the U.S. District Court as a master to review and report on overcrowding at the Youth Services Detention Center.

Edwin P. Rome

Edwin P. Rome (1916-1987) holds the reputation as one of the most tenacious, yet also compassionate and respected, lawyers in Philadelphia history. He joined the firm of Blank & Rudenko in 1954 and was one of the named partners in Blank Rome Comisky & McCauley. He is best known for his court-appointed and pro bono criminal defense work.

Helen Spigel Sax

Helen Spigel Sax (1916-2004) was an estate-planning lawyer and a pioneer among women lawyers aspiring to partnership in large law firms. She also served as president of the Girl Scouts of Greater Philadelphia and was a board member of the National Museum of American Jewish History, among other educational and charitable institutions.

Robert W. Sayre

Robert W. Sayre (1916-2006) a successful antitrust and securities litigator, as well as a specialist in healthcare law, is best remembered for his work in furtherance of civil rights. In 1953, he was one of a team of ten lawyers who volunteered to defend nine members of the

Communist Party who could not obtain counsel after being accused of violation of the Smith Act (advocating the overthrow of the U.S. government). The defense team was an all-star group, and their effort has achieved legendary status in the history of the Philadelphia Bar Association. He was one of the founders of Philadelphia's Lawyers Committee for Civil Rights. When the Committee was incorporated as the Public Interest Law Center of Philadelphia ("PILCOP"), he continued to serve on its Board, including service as its chairman.

Charles Wright

Charles Wright (1918-1993) used his position as judge to fight against the deliberate exclusion of African Americans from jury duty as well as for racial balance in jury trials. In 1950, Judge Wright was one of the founders of The Barristers' Association of Philadelphia, Inc. In 1965, he became only the fourth African American to sit on what is now the Philadelphia Court of Common Pleas.

Martin Vinikoor

Martin Vinikoor (1918-1976) was noted as one of Philadelphia's finest criminal defense lawyers. He was active in politics and became head of the Defender Association of Philadelphia. He obtained the first large grant from the city to support that association. He became an assistant district attorney and later a professor at Temple Law School.

Barton E. Ferst

Barton E. Ferst (1919-2006) was a pre-eminent lawyer in the field of taxation, the author of a widely used textbook on accounting for lawyers, and a teacher of taxation, accounting and estate planning in the Law School and the Wharton School of the University of Pennsylvania. He held leadership positions on committees of both the Philadelphia and Pennsylvania Bar Associations. He served on the Board of Gratz College and was active in many charitable and civic organizations.

Henry T. Reath

Henry T. Reath (1919-2005) was a trial and appellate lawyer who handled both major commercial cases and major public interest matters. Among his significant cases were the defense of Japanese electronics manufacturers against predatory pricing antitrust claims and representation of the Court of Common Pleas of Philadelphia in a mandamus action to require the City of Philadelphia to appropriate operating funds for the court. His aggressive litigation style reflected his highly decorated wartime experience in the Battle of the Bulge. He served as chairman of the Board of Governors of the Philadelphia Bar Association and was a dedicated advocate for merit selection of judges. He helped to found Community Legal Services of Philadelphia and was active on the boards of many charitable institutions.

Juanita Kidd Stout

Juanita Kidd Stout (1919-1998) rose from humble beginnings to become a highly respected jurist and, at age 68, the first African-American woman to be a justice of any state's highest court. After service in the Philadelphia District Attorney's Office, Judge Stout was elected to the Philadelphia Court of Common Pleas and sat on that bench for many years before being appointed to the Pennsylvania Supreme Court. Judge Stout's distinguished career was highlighted by many high-profile cases.

Henry W. Sawyer III

Henry W. Sawyer III (1919-1999) was best known as a fiery, relentless advocate of freedom of religion and freedom of speech. To Sawyer, the intermingling of religion and government represented the ultimate threat to religious freedom, and he succeeded in establishing that principle through tireless efforts in the courts, including the U.S. Supreme Court.

Robert M. Landis

Robert M. Landis (1920-2005) was a civil trial lawyer who specialized in labor law, bar association activity and child welfare work. In his early years, he served as deputy city solicitor for the City of Philadelphia. He was a fellow of the American College of Trial Lawyers. He was elected Chancellor of the Philadelphia Bar Association and president of the Pennsylvania Bar Association. He was chairman of the American Bar Association Standing Committee on Coordination of Federal Judicial Improvements. He also served as president of the National Association of Railroad Trial Counsel. He was president of the Children's Aid Society of Pennsylvania and was a director of the Child Welfare League of America.

George P. Williams III

George P. Williams III (1921-1983) was a civil trial lawyer who handled a wide variety of litigation, ranging from complex antitrust and telephone rate cases to personal injury defense. Six feet, four inches tall, and about 250 pounds, Williams was an imposing figure in the courtroom. He often joked that he had trained most of his courtroom adversaries during the fifteen years he taught evening classes at Temple Law School. Williams was a director of United Parcel Service, a company that he represented in operating rights cases throughout the country.

Herman I. Pollock

Herman I. Pollock (died 1972) was the original head of the Defender Association of Philadelphia. He developed the Association from a group of a few volunteers and then a few paid members, turning over the reins to Martin Vinikoor when he retired. Pollock served as the chief public defender of Philadelphia from 1946 to 1968.

Francis E. Marshall

Francis E. Marshall (1922-2003) was a civil trial lawyer who specialized in the defense of the interests of major insurance companies. A highly decorated veteran of World War II, he had a powerful, theatrical voice and made effective use of gestures and dramatic pauses. His courtroom presence was well suited to the substantial amounts of money at issue in the significant cases that he handled.

Charles R. Weiner

Charles R. Weiner (1922-2005) was a judge of the United States District Court for the Eastern District of Pennsylvania for 38 years. He was particularly well known for his ability to bring about settlements of the cases assigned to him. He had an instinctive sense of what was necessary for a settlement and he would not hesitate to schedule several cases for settlement conferences at the same time, using different locations within the courthouse for each conference and dividing his time among them as he saw fit. His handling of asbestos cases in the Multidistrict Litigation Program has been emulated by many state and federal judges throughout the country. He was an adjunct faculty member at the University of Pennsylvania and at Temple University. He served as chairman of the national council of overseers of Dropsie University and was a board member of many charitable organizations, particularly those dealing with the treatment of mental health issues.

William M. Marutani

William M. Marutani (1923-2004) personified the higher calling of the bar, dedicating much of his life to the causes of the underprivileged and oppressed. His parents were immigrants from Japan. At the age of 19 years, in the wake of the Japanese attack on Pearl Harbor, he was incarcerated in a government detention facility in Tule Lake, California. Later, he was commissioned an officer in the United States Army, a member of the famed "Nisei Regiment." In 1953, he graduated from the law school of the University of Chicago and began the practice of law in Philadelphia. He was a volunteer attorney for the Lawyers' Committee for Civil Rights Under Law, handling cases in Louisiana and Mississippi. As national counsel for the Japanese American Citizens League, he argued the case of Loving v. Virginia before the Supreme Court of the United States. As a judge of the Court of Common Pleas of Philadelphia, he ruled that Philadelphia's Central High School could not remain an all-male institution. President Carter appointed him to the Commission on Wartime Relocation and Internment of Civilians.

Judith J. Jamison

Judith J. Jamison (1925-2001) is best remembered as a judge of the Court of Common Pleas of Philadelphia. She was the first woman in Pennsylvania to be assigned to the bench of the Orphans' Court Division. Prior to her service as a judge, she was an assistant attorney general of Pennsylvania. She was a member of the Pennsylvania Supreme Court Orphans' Court Rules Committee, and of the National Association of Women Judges. She served on the Board of Directors of City Trusts and on the boards of several charitable organizations; and she has received several awards, including the Philadelphia Bar Association's Sandra Day O'Connor Award.

Franklin Poul

Franklin Poul (1925-2006) specialized in antitrust law, securities cases and other complex commercial litigation. He authored the Pennsylvania annotations to Section 7 of the Uniform Commercial Code. He was well known among lawyers for his pro bono involvement in significant civil liberties litigation.

James E. Beasley

James E. Beasley (1926-2004) was a civil trial lawyer who handled many high-profile cases and represented many high-profile Philadelphians over his 48 years at the bar. He was a self-made man who overcame many obstacles to succeed as a lawyer. He dropped out of high school and enlisted in the Navy. He served on a submarine during World War II. He worked as a truck driver. Financed by the GI Bill, he completed high school, college and law school. He mainly represented plaintiffs, many of them in complex cases such as defamation, medical malpractice and products liability actions. In the courtroom, he was able to communicate clearly to juries and those juries usually responded favorably to his arguments in the more than 400 cases that he handled. The James E. Beasley School of Law at Temple University is named in his honor.

William F. Hall Jr.

William F. Hall Jr. (1926-2001) was a U.S. magistrate judge, government lawyer and private practitioner. He was regional counsel for the U.S. Department of Housing and Urban Development from 1968 to 1974 and represented HUD during the bitterly contested Whitman Park litigation. Hall also settled many cases arising from the MOVE litigation.

William R. Klaus

William R. Klaus (1926-2005) was a champion of equal justice under law. An expert in banking and international commercial transactions, he was one of the lawyers who formed Philadelphia's Community Legal Services, an organization to provide free legal services to indigent persons. He then served as president of Community Legal Services for 19 years.

He was co-founder of the Philadelphia Commission for Effective Criminal Justice, which addressed what was needed for the system to provide fair and effective criminal justice. At the national level, he chaired the ABA Standing Committee on Legal Aid and Indigent Defendants, and also served as president of the National Legal Aid and Defender Association. Particularly noteworthy was his public defense of the legal aid program against criticism leveled at it by the vice president of the United States. He served as Chancellor of the Philadelphia Bar Association in 1974.

Anthony S. Minisi

Anthony S. Minisi (1926-2005) was best known by his college nickname, "Skippy." He was a civil trial lawyer whose courtroom skills mirrored his aggressive style of play on the football field. He specialized in the defense of personal injury cases, including negligence, products liability and toxic tort claims, as well as domestic relations disputes. He was chairman of the Board of Governors of the Philadelphia Bar Association, chairman of the Committee of Seventy, chairman of the Easttown Township Board of Supervisors, and a leader in many other civic organizations. He is a member of the College Football Hall of Fame by reason of his record as a halfback for the University of Pennsylvania and the United States Naval Academy.

Lawrence Prattis

Lawrence Prattis (1927-2003) is best remembered for his 19-year tenure as a judge of the Court of Common Pleas of Philadelphia where he handled mostly civil cases, and for his dedication to the development of low-income housing. Trial lawyers appreciated his calm demeanor while exercising complete control of what was taking place in the courtroom. He was a lecturer at Villanova Law School and was a board member of the Philadelphia Housing Authority and the United Fund of Philadelphia.

A. Leon Higginbotham Jr.

A. Leon Higginbotham Jr. (1928-1998) was a towering man with a voice like thunder. He articulated the legal experience of black America with scholarship and understanding. He was a successful lawyer, a partner in Philadelphia's premier black law firm during an era when black lawyers were subjected to many inequities. From 1964 to 1977, Higginbotham was a highly respected federal trial judge, and then served sixteen years on the Third Circuit Court of Appeals, holding the position of chief judge before his retirement in 1993. From 1965 to 1966, he was vice-chairman of the National Commission on the Cause and Prevention of Violence. Higginbotham wrote two scholarly books on law and black citizens, In the Matter of Color and Shades of Freedom. He also taught at the University of Pennsylvania Law School and at Harvard. In 1995, Higginbotham received the Presidential Medal of Freedom, the country's highest civilian honor.

Hiliary H. Holloway

Hiliary H. Holloway (1928-2000) excelled as public sector attorney and large-firm partner while retaining the core values that made him an example to the young, starting in his own household. He was the first African-American officer at the Federal Reserve Bank of Philadelphia, where he advanced to first vice president and general counsel. The positions, while challenging, allowed him a schedule that permitted him to be a real father. After retiring from the Federal Reserve, he became the first African-American partner at the Marshall Dennehey firm. He frequently summarized his life view with: "It's not the I.Q., it's the I will."

Robert N. C. Nix Jr.

Robert N. C. Nix Jr. (1928-2003) was the first African-American to be elected to the Supreme Court of Pennsylvania and the first to serve as Chief Justice. A former deputy Attorney General, his practice of law was mainly criminal defense and his volunteer activities were concentrated in municipal committees and nonprofit organizations that affected the rights of low-income inner-city residents. He was elected to the Court of Common Pleas of Philadelphia in 1967. In 1971, he was elected to the Supreme Court of Pennsylvania, becoming chief justice in 1984. During his tenure on the Supreme Court, Chief Justice Nix earned the reputation of making an innovative review of the principles applicable to each case, without necessarily yielding to the rationale of other courts, including the Supreme Court of the United States. His term as chief justice was marked with civility and humor.

Stanford Shmukler

Stanford Shmukler (1930-2006) was a highly successful criminal defense lawyer who did not hesitate to represent unpopular defendants. In 1975, he represented an avowed Nazi, the leader of the KKK in Pennsylvania, who was accused of plotting to blow up a synagogue. He was not deterred, even in the face of death threats and the firebombing of his home. He donated half his fees from the case to his synagogue and the other half to Israel. He argued two cases before the Supreme Court of the United States, one of them a part of the landmark decision *Miranda v. Arizona*. He was a member of the Board of Governors of the Philadelphia Bar Association and Chair of its Criminal Law Section. He served as Executive Director of the Pennsylvania Supreme Court's Criminal Procedural Rules Committee.

Harry Lore

Harry Lore (1932-1996) was a contributor to The Shingle and The Philadelphia Lawyer for more than twenty years. He was deemed a "Renaissance man" because of the breadth and depth of his knowledge of law, literature, history, philosophy and religion. Lore was one of Central High School's most illustrious, although often unsung, alumni.

Patrick T. Ryan

Patrick T. Ryan (1932-1999) was a prominent antitrust defense lawyer. Ryan joined Drinker Biddle & Reath in 1957. He was elected managing partner of the firm in 1972 and was re-elected for successive terms until he retired. Ryan defended General Electric in a price-fixing case, and he defended the Walt Disney Corporation in an intellectual property suit brought by the Philadelphia Orchestra.

Edward R. Becker

Edward R. Becker (1933-2006) was a lawyer's lawyer who became a judge's judge. His judicial opinions were marked by outstanding scholarship, logical consistency and substantial length. He was nominated to a seat on the U.S. District Court for the Eastern District of Pennsylvania in 1970 and, in 1981, to a seat on the Third Circuit Court of Appeals, where he later served as chief judge. He was known as one of the circuit judges most frequently cited by the Supreme Court of the United States. His opinion on the reliability of scientific evidence formed the basis of the Supreme Court's landmark ruling in *Daubert v. Merrell Dow Pharmaceuticals*. He originated the rationale for class action certification adopted by the Supreme Court in 1995. He wrote approximately 2,000 judicial opinions. Through his years of success, he never lost contact with his roots and continued to live in the working-class Frankford neighborhood in the house where he grew up, and continued to travel to and from court on public transportation, the Frankford elevated.

Joseph V. Pinto Sr.

Joseph V. Pinto Sr. (1933-2004) was known mainly for his defense of automobile manufacturers in products liability cases, an area of the law that rapidly expanded during his years of practice. He represented Ford Motor Company, Mazda, Porsche, Subaru and The Jeep Corporation, among others. A quiet, unassuming man, his signature characteristic was meticulous preparation and attention to detail. He was active in the administration of his law firm and in the training of its trial lawyers. He was an adjunct professor in the trial advocacy program at Temple University School of Law. Also, he was a Fellow of the American College of Trial Lawyers.

Samuel M. Rabinowitz

Samuel M. Rabinowitz (1933-2006) specialized in trust and estate law and was a leader in his community. He was a fellow of the American College of Trust and Estate Counsel. He served as chair of the Tax and Estate Section of the Philadelphia Bar Association and taught Pennsylvania Bar Institute courses on trust and estate law. He served on the board of Albert Einstein Medical Center.

H. Thomas Felix II

H. Thomas Felix II (1934-2006) specialized in labor law, representing management, including the City of Philadelphia in labor contract negotiations with municipal employees and the Commonwealth of Pennsylvania in negotiations with the state police. He also represented hospitals in their labor negotiations with hospital workers. He taught labor law at Temple University School of Law and at Rutgers University's Center for Management Development. He was a fellow of the College of Labor and Employment Lawyers. He co-authored two books on labor-management law and wrote numerous articles on related subjects.

Arthur G. Raynes

Arthur G. Raynes (1934-2006) was a civil trial lawyer who mainly represented plaintiffs. He achieved a major success for his clients whose children were deformed by the use of the drug Thalidomide. His whimsical, lighthearted personality often seemed in contrast to his effectiveness as a trial lawyer. But he was effective. He handled many major cases, including the claims of oil riggers who died in a helicopter crash off the coast of Scotland, and his participation in the settlement of the claims against John E. duPont for the murder of Olympic wrestler David Schultz. He served as Chancellor of the Philadelphia Bar Association in 1990.

William E. Zeiter

William E. Zeiter (1935-1994) was considered a brilliant and creative lawyer who used his vast knowledge of state laws and their history to make law fair and accessible. After the adoption of the new Pennsylvania Constitution in 1968, Zeiter led a project to update, organize and codify Pennsylvania's statutes. He worked at Morgan, Lewis & Bockius for thirty-five years.

John J. Mackiewicz

John J. Mackiewicz (1935-2001) was a senior partner at Woodcock Washburn Kurtz Mackiewicz & Norris. A patent lawyer for more than thirty-five years, he previously worked as a chemical engineer and later a patent lawyer for General Electric. He served as president of the Philadelphia Intellectual Property Law Association.

David S. Shrager

David S. Shrager (1935-2005) was a civil trial lawyer who primarily represented personal injury plaintiffs and frequently served as lead counsel in mass tort litigation. He held leadership positions in both the Philadelphia and Pennsylvania Bar Associations. He was appointed a Judge Pro Tem in the Court of Common Pleas of Philadelphia and served as president of the Association of Trial Lawyers of America.

M. Patricia Carroll

M. Patricia Carroll (1937-2000) took an active role in aiding lawyers who suffered from addictive diseases. She was the founding director of Lawyers Concerned for Lawyers of Pennsylvania. A civil litigation attorney, she practiced law with her husband, John Rogers Carroll, for twenty years.

Herbert B. Newberg

Herbert B. Newberg (1937-1992) developed a class action law practice and obtained a national reputation as one of the leading class action experts in the country. He authored the book Newberg on Class Action, which remains the bible in the class action field.

Theodore W. Flowers

Theodore W. Flowers (1939-1982) was a feisty trial lawyer. He excelled in the defense of personal injury cases and then went on to develop a specialization in commercial litigation.

He volunteered to handle civil rights cases in the Jackson, Mississippi, office of the Lawyers' Committee for Civil Rights Under Law. He lectured on trial advocacy and class action procedures. Despite his young age, Flowers held several leadership positions in the Philadelphia Bar Association and was recognized as a rising star. He was elected to the Board of Governors shortly before his career was abruptly ended by inoperable cancer.

Raymond R. Rafferty Jr.

Raymond R. Rafferty Jr. (1939-1999) was instrumental in bringing the concept of venture capital to the Philadelphia area. In addition to being well known as an attorney and a venture capitalist, he was the publisher of The Legal Intelligencer during a period of dramatic growth, including the launch of PaLAWnet, Pennsylvania's online legal information network.

Edwin "Ned" D. Wolf

Edwin "Ned" D. Wolf (1940-1976) spent his all-too-short career as an advocate for public interest involvement. In 1969 he became the executive director of the Philadelphia Lawyers' Committee for Civil Rights Under Law, which he founded with the assistance of Bernard Segal and Jerome Shestack. In 1974, Wolf mobilized support for the creation of the Public Interest Law Center of Philadelphia, which provides representation to those otherwise unable to afford it.

Stephen T. Saltz

Stephen T. Saltz (1941-2006) was a civil trial lawyer whose trademark was relentless tenacity on behalf of his clients. He began his legal career as a member of the Defender

Association of Philadelphia and then moved to the City Solicitor's Office where his advocacy skills led to his being given general supervision of all major trials. After 14 years in the public sector, he went into the private practice of law representing mainly personal injury plaintiffs. He held leadership positions in the Philadelphia Bar Association, the most significant of which were on the Board of Governors and the State Civil Committee. He was appointed a Judge Pro Tem of the Court of Common Pleas of Philadelphia. Also, he was active in many charitable organizations, including St. Christopher's Hospital for Children.

Andrew C. Hecker

Andrew C. Hecker (1943-1994) founded Hecker Brown Sherry and Johnson, where he served as senior partner. He chaired the American Bar Association's Tort and Insurance Practice Section and, the year before he died, was largely responsible for raising the necessary funds to satisfy The Philadelphia Boys Choir's mortgage.

Samuel E. Klein

Samuel E. Klein (1947-2002) specialized in the defense of defamation actions against newspapers and other publishers, including radio and television broadcasters. He was recognized as an expert on the application of the First Amendment's right of freedom of the press. He handled defamation matters at all stages, before and after publication, at trial and on appeal. He represented Philadelphia's major newspapers and their reporters. He also taught communications law at Temple University. Unfortunately, his career was cut short by a fatal heart attack at the age of 55 years.

Rotan E. Lee

Rotan E. Lee (1949-2006) was a charismatic corporate finance lawyer who held significant municipal positions in Philadelphia. A tall, outspoken man, he served as president of the Board of Education and chairman of the Philadelphia Gas Commission. He was a director of several other organizations including the Public Interest Law Center, the Philadelphia Orchestra Association and Mellon Bank. He also wrote newspaper columns and hosted a radio talk show. His career was cut short by a heart attack at age 57.

Stefan Presser

Stefan Presser (1953-2005) was a public interest lawyer who pursued his goals with a passion and brought about many changes in public policies affecting individual rights. Throughout most of his career, he served as the legal director of ACLU of Pennsylvania, a nonprofit civil rights organization. He initiated landmark litigation that brought about significant changes in many areas, including police search and seizure practices, foster care programs and death penalty cases. He taught and supervised a Death Penalty Litigation Clinic at Temple University School of Law. His career was cut short by cancer at age 52.

Kenwyn M. Dougherty

Kenwyn M. Dougherty (1955-2005) was a medical malpractice defense lawyer who, despite a diagnosis of cancer at the beginning of her law practice, persevered to become a highly successful trial lawyer and, at the same time, raised a family of three children. She was elected a fellow of the American College of Trial Lawyers. She held leadership positions in the Pennsylvania Defense Institute. After only twenty years of the practice of law, her cancer resurfaced and ended her life.

1101 Market Street, 11th Floor • Philadelphia, PA 19107 • Phone: (215) 238-6300 • Fax: (215) 238-1159

CAWP CENTER FOR AMERICAN WOMEN AND POLITICS
RESEARCH + EDUCATION = CHANGE

State Fact Sheet – Pennsylvania

U.S. Congress (Total Seats: 2 U.S. Senators, 18 U.S. Representatives)

Allyson Schwartz (D)	U.S. Representative	2005-2015
Kathy Dahlkemper (D)	U.S. Representative	2009-2011
Melissa Hart (R)	U.S. Representative	2001-2007
Marjorie Margolies-Mezvinsky (D)	U.S. Representative	1993-1995
Kathryn Elizabeth Granahan (D)[1]	U.S. Representative	1955-1963
Vera Daerr Buchanan (D)[2]	U.S. Representative	1951-1957
Veronica Grace Boland (D)[3]	U.S. Representative	1941-1943

1. Granahan concurrently won a special election to fill a vacancy caused by the death of her husband and a regular election.
2. Buchanan won a special election to fill a vacancy caused by the death of her husband; she was subsequently re-elected.
3. Boland won a special election to fill a vacancy caused by the death of her husband.

Statewide Elective Executives (Total Positions: 5)

Kathleen Kane (D)	Attorney General	2013-2016
Linda L. Kelly (R)	Attorney General	2011-2013
Robin Wiessmann (D)	State Treasurer	2007-2009
Catherine Baker Knoll (D)	Lieutenant Governor	2003-2008
Barbara H. Hafer (D)[1]	State Treasurer	1997-2005
Barbara H. Hafer (R)	Auditor General	1989-1997
Catherine Baker Knoll (D)	State Treasurer	1989-1997
Grace McCalmont (D)	State Treasurer	1961-1964; 1969-1976
Grace McCalmont (D)	Auditor General	1965-1968
Genevieve Blatt (D)	Secretary of Internal Affairs	1955-1967

1. Hafer was elected as a Republican, and changed to a Democrat in 5/2004.

State Legislature

Year	State Rank	Senate		Total Women/ Total Senate	House		Total Women/ Total House	Total Women/ Total Legis.	% Total Women
		D	R		D	R			
2016	40	4	5	9/50	15	23	38/203	47/253	18.6
2015	39	4	5	9/50	16	23	39/203	48/253	19.0
2014	38	4	4	8/50	16	21	37/203	45/253	17.8
2013	38	5	3	8/50	16	21	37/203	45/253	17.8
2012	42	5	5	10/50	14	19	33/203	43/253	17.0
2011	42	5	6	11/50	14	19	33/203	44/253	17.4
2010	46	4	6	10/50	11	18	29/203	39/253	15.4
2009	46	4	6	10/50	11	16	27/203	37/253	14.6
2008	44	5	5	10/50	11	16	27/203	37/253	14.6
2007	44	5	5	10/50	11	16	27/203	37/253	14.6
2006	47	5	4	9/50	9	16	25/203	34/253	13.4
2005	46	5	4	9/50	9	16	25/203	34/253	13.4
2004	45	5	3	8/50	10	18	28/203	36/253	14.2
2003	45	5	3	8/50	10	17	27/203	35/253	13.8
2002	44	5	3	8/50	12	15	27/203	35/253	13.8
2001	44	4	3	7/50	12	15	27/203	34/253	13.4
2000	45	4	3	7/50	12	13	25/203	32/253	12.6
1999	45	4	3	7/50	12	13	25/203	32/253	12.6
1998	46	3	3	6/50	12	13	25/203	31/253	12.3
1997	46	3	3	6/50	12	13	25/203	31/253	12.3
1996	45	3	1	4/50	12	14	26/203	30/253	11.9
1995	44	3	1	4/50	12	14	26/203	30/253	11.9
1994	46	3	1	4/50	14	10	24/203	28/253	11.1
1993	46	3	1	4/50	11	10	21/203	25/253	9.9
1992	44	3	1	4/50	9	11	20/203	24/253	9.5
1991	44	3	1	4/50	9	11	20/203	24/253	9.5
1990	46	2	0	2/50	7	8	15/203	17/253	6.7
1989	46	2	0	2/50	7	8	15/203	17/253	6.7
1988	45	2	0	2/50	6	9	15/203	17/253	6.7
1987	46	2	0	2/50	5	9	14/203	16/253	6.3
1986	48	2	0	2/50	3	8	11/203	13/253	5.1

1985	48	2	0	2/50	3	8	11/203	13/253	5.1
1984	48	1	0	1/50	2	7	9/203	10/253	4.0
1983	48	1	0	1/50	2	7	9/203	10/253	4.0
1981	45	1	0	1/50	2	9	11/203	12/253	4.7
1979	43	-	-	1/50	-	-	10/203	11/253	4.3
1977	43	-	-	1/50	-	-	10/203	11/253	4.3
1975	43	-	-	1/50	-	-	8/203	9/253	3.6

Women's Suffrage

On June 4, 1919, the United States Senate approved the 19th amendment to the Constitution, which states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." On August 18, 1920, Tennessee became the needed 36th state to ratify the amendment.

Youngest parader in New York City suffragist parade
http://www.loc.gov/pictures/item/97500068/

Historical Background

This triumph was the result of centuries of struggle, culminating in the late 19th century in a burst of public activism and civil disobedience that not only secured voting rights for women, but also helped define new possibilities for women's participation in the public sphere.

Early Suffrage Rights and Fights

Early in the history of the United States, women in New Jersey could legally vote, provided they met property requirements. However, this changed in 1807 when the State Assembly passed a law limiting suffrage to free white males. There would not be another law explicitly giving the vote to women until 1869, when the Wyoming territory granted women over 21 years of age the right to vote in all elections.

While some states explicitly prohibited women from voting, in 1872 New York did not, opening the door for Susan B. Anthony and a small group of suffragists to register and vote. They were arrested three weeks later on a charge of "criminal voting." Anthony was found guilty and fined $100 plus court costs.

Early Activism and Organizations

The first large gathering of those fighting for women's rights occurred in 1848 in Seneca Falls, New York. One outcome of the Seneca Falls Convention was the drafting and signing of the Declaration of Sentiments, modeled on the Declaration of Independence that called for civil, social, political, and religious rights for women. Many of the signers of the Declaration, including Lucretia Mott and Elizabeth Cady Stanton, would go on to become the leaders of a generation of suffrage activists.

In the decades that followed the Seneca Falls Convention, formal groups were established to lead American women in their bid for voting and other rights. Well-known organizations include the National Woman Suffrage Association and the American Woman Suffrage Association, which

would eventually unify to form the National American Woman Suffrage Association. These groups lobbied for local and state voting rights in addition to working at the national level.

The Congressional Union was formed in 1913 to accelerate and intensify the fight with more radical protest methods as had been done in Britain. The National Women's Party, formed in 1916, was an outgrowth of this organization.

Suffragist Strategies

In addition to organizing formal suffrage groups and rallying at conventions and meetings, supporters of universal suffrage employed a number of other strategies. Suffrage activists exercised their First Amendment rights to "peaceably assemble" and "petition for a government redress of grievances" first using traditional strategies, including lobbying lawmakers, and then implementing more radical -- for the time -- tactics such as public picketing and refusing bail after arrest.

Individuals and groups published periodicals such as *The Revolution*, which focused on women's rights but also covered politics and the labor movement. Activists campaigned in ways that were considered "unladylike," such as marching in parades and giving street corner speeches. One radical strategy that had not been tried previously was regular picketing of the White House. Protesters carried banners naming President Wilson as an opponent of suffrage. The resulting arrests only served to bring more attention to the suffrage movement. The fight for suffrage rights escalated when the United States entered World War I in April 1917 and many women moved into the workforce.

Anti-Suffrage Activism

Both women and men worked to oppose universal suffrage. Some argued that women wielded enough power within the home that there was no need for power in society. State and national groups such as the New York State Association Opposed to Woman Suffrage and Association Opposed to Woman's Suffrage were formed to actively resist suffrage rights for women. These groups were often opposed to any role for women outside the home, fearing the downfall of the family as well as a decrease in women's work in communities and their ability to influence societal reforms.

A Continuing Legacy

Although women's right to vote was secured by Constitutional amendment in 1920, the legacy of the suffragists continues to the present day. In fighting for the right to vote, women formed national political organizations, developed new strategies for protest, and brought women into the public sphere in new and more visible ways. These advances were not limited to their work for enfranchisement, but also laid the groundwork for civic action that has been emulated by those working for other civil rights causes.

Suggestions for Teachers

Select items that reflect different strategies used in the fight for equal suffrage. Study the items opposing suffrage and compare strategies. If time allows, brainstorm or research to identify other strategies used in the struggle for suffrage.

Use the anti-suffrage items to identify and study the arguments made by those opposed to suffrage.

Study the maps to form a picture of which states and territories enfranchised women and which did not. Speculate about why there were differences in rights in different states and areas, and then look for evidence to support the hypothesis.

Study the political cartoons and select one for further analysis. What do you think was the cartoonist's opinion of women's suffrage? Who do you think was the audience for the cartoon? What methods does the cartoonist use to persuade the audience? If time allows, search the Library's collections for another political cartoon about suffrage, identify the cartoonist's opinion about women's suffrage, and compare the methods each cartoon uses to make its point.

Examine several items reflecting the consequences for the suffragists' actions. What can you discover about the treatment of suffragists from these items? Ask students to think about what causes they'd be willing to fight for, knowing there might be harsh consequences.

Additional Resources

By Popular Demand: "Votes for Women" Suffrage Pictures, 1850-1920

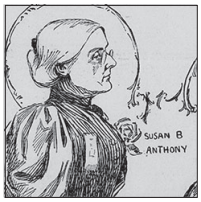
http://www.loc.gov/rr/print/list/076_vfw.html

Miller NAWSA Suffrage Scrapbooks, 1897-1911

http://memory.loc.gov/ammem/collections/suffrage/millerscrapbooks/

Women of Protest: Photographs from the Records of the National Woman's Party

http://www.collection/women-of-protest/about-this-collection/



Topics in Chronicling America - The Nineteenth Amendment

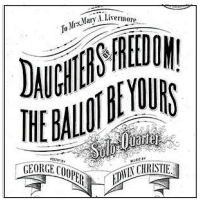
http://www.loc.gov/rr/news/topics/nineteenth.html

Primary Sources with Citations


THE FIRST CONVENTION
EVER CALLED TO DISCUSS THE
Civil and Political Rights of Women,
SENECA FALLS, N. Y., JULY 19, 20, 1848.
WOMAN'S RIGHTS CONVENTION.
A Convention to discuss the social, civil, and religious condition and rights of woman will be held in the Wesleyan Chapel, at Seneca Falls, N. Y., on Wednesday and Thursday, the 19th and 20th of July current; commencing at 10 o'clock A. M. During

"The first convention ever called to discuss the civil and political rights of women, Senecca Falls, N.Y., July 19, 20, 1848. Woman's rights convention." Pamphlet. 18--. From Library of Congress, *National American Woman Suffrage Association Collection*.
http://www.loc.gov/item/sm1871.02334

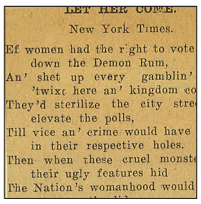
"Youngest parader in New York City suffragist parade." Photograph. American Press Association, May 6, 1912. From Library of Congress Prints and Photographs Division.
http://www.loc.gov/pictures/item/97500068/



Christie, Edwin, composer. "Daughters of Freedom." Sheet music. Boston: Ditson & Co., 1871. From Library of Congress, *Music for the Nation: American Sheet Music*.
http://www.loc.gov/item/sm1871.02334

Christie, Edwin, composer. "Daughters of Freedom." Sound file. Recorded at the Library of Congress, September 23, 1998. From Library of Congress, *Music for the Nation: American Sheet Music, 1870-1885*.
http://www.loc.gov/item/sm1871.7102334

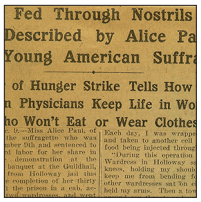
"Votes for Women Broadside. Women's Political Union." Broadside. New York City, New York, January 28, 1911. From Library of Congress, *Miller NAWSA Suffrage Scrapbooks, 1897-1911*.
http://www.loc.gov/item/rbcmiller002522


New York Times.
Ef women had the r'ght to vote
down the Demon Rum,
An' shet up every gamblin'
'twixt here an' kingdom co
They'd sterilize the city stre
elevate the polls,
Till vice an' crime would have
in their respective holes.
Then when these cruel monste
their ugly features hid
The Nation's womanhood would

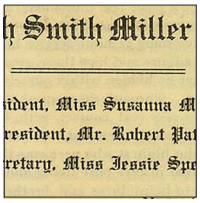
"Let Her Come." *New York Times*, n.d. From Library of Congress, *Miller NAWSA Suffrage Scrapbooks, 1897-1911*.
http://www.loc.gov/item/rbcmiller001994

Knobe, Bertha Damaris. "Votes for Women: An Object-Lesson by Bertha Damaris Knobe." Map. *Harper's Weekly*, April 25, 1908. From Library of Congress, *Miller NAWSA Suffrage Scrapbooks, 1897-1911*.
http://www.loc.gov/item/rbcmiller001165

Harris & Ewing, photographer. "WOMAN SUFFRAGE JAIL CELL." Photograph. Between 1916 and 1918. From Library of Congress, *Harris & Ewing Collection*.
http://www.loc.gov/pictures/item/hec2008006996/



"Alice Paul Describes Force Feeding." London, England: December 1909. From Library of Congress, *Miller NAWSA Suffrage Scrapbooks, 1897-1911*.
http://www.loc.gov/item/rbcmiller003904



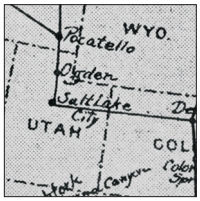
Miller, Elizabeth Smith. "Elizabeth Smith Miller Study Class Outline of Work for 1909." Leaflet. [Geneva, NY]: Geneva Political Equality Club, 1909. From Library of Congress, *Miller NAWSA Suffrage Scrapbooks, 1897-1911*.
http://www.loc.gov/item/rbcmiller001209

Gustin, E. W. "Election Day!" Cartoon. c1909. From Library of Congress Prints and Photographs Division.
http://www.loc.gov/pictures/item/97500226/

Harris & Ewing, photographer. "National Anti-Suffrage Association." Photograph. 1911? From Library of Congress Prints and Photographs Division.
http://www.loc.gov/pictures/item/97500067/

Tulsa Daily World (OK). "Discriminating Against Mother." Nov. 3, 1918. From Library of Congress, *Chronicling America: Historic American Newspapers*.
http://chroniclingamerica.loc.gov/lccn/sn85042344/1918-11-03/ed-1/seq-31/

Mayer, Henry, artist. "The Awakening." Illustration. *Puck*: volume 77, no. 1981, February 20, 1915, pages 14-15. From Library of Congress Prints and Photographs Division.
http://loc.gov/pictures/item/98502844/



[Map of] Route of Envoys Sent from East by the Congressional Union for Women's Suffrage, to Appeal to Voting Women of the West. Map. April 1916. From Library of Congress, *Records of the National Woman's Party*.
http://www.loc.gov/item/mnwp000270

"Part of the Vast Billboard Campaign of the Woman's Party." Photograph. 1916. From Library of Congress, *Records of the National Woman's Party*.
http://www.loc.gov/item/mnwp000345

Harris & Ewing, photographer. "WOMAN SUFFRAGE. BONFIRE ON SIDEWALK BEFORE WHITE HOUSE." Photograph. 1918. From Library of Congress, *Harris & Ewing Collection*.
http://loc.gov/pictures/item/hec2008008277/

Bushnell. ["The Sky is Now Her Limit."] Cartoon. *New York Times Current History.* New York: New York Times Co., October 1920, Page 142. From Library of Congress Prints and Photographs Division.
http://loc.gov/pictures/item/2002716769/

LIBRARY OF CONGRESS

IN CUSTODIA LEGIS
LAW LIBRARIANS
OF CONGRESS



Print Subscribe Share/Save

Women in History: Lawyers and Judges

March 6, 2015 by Kelly Buchanan

In celebration of Women's History Month (http://womenshistorymonth.gov/about.html) and International Women's Day (http://www.un.org/en/events/womensday/) (March 8) we thought we'd try something a bit different for the blog. We asked the foreign law specialists, analysts, and interns at the Law Library of Congress to provide responses to a series of questions related to the history of women's rights in various countries. Margaret also contributed information on the U.S. We particularly wanted to highlight some of the important milestones and people around the world in three areas: women's suffrage (http://www.ipu.org/wmn-e/suffrage.htm) , political participation (http://www.ipu.org/wmn-e/classif.htm) , and involvement in the legal profession (http://iub.edu/%7Eemsoc/Publications/Michelson_Lawyer_Feminization.pdf) .

Today, in our third and final post of the series, we discover who the first women lawyers and judges were in different countries. In the two previous posts, we looked at women's voting rights (//blogs.loc.gov/law/2015/03/women-in-history-voting-rights/?loclr=bloglaw) and representation in national legislatures (//blogs.loc.gov/law/2015/03/women-in-history-elected-representatives/?loclr=bloglaw) .

(//www.loc.gov/pictures/item/2011660530/)

"Woman are too sentimental for jury duty" –Anti-Suffrage argument / Kenneth Russell Chamberlain, 1891-1984, artist (published by Puck Publishing Corporation, Jan. 23, 1915). Library of Congress Prints and Photographs Division, //hdl.loc.gov/loc.pnp/cph.3b49101.

QUESTIONS: When did a woman first graduate from law school? When were women first admitted to the practice of law? When was the first female judge appointed? How many of the current judges of the highest court are women?

ARGENTINA *(by Graciela Rodriguez-Ferrand (//www.loc.gov/search/?fa=contributor%3Arodriguez-ferrand%2C+graciela&in=partof%3Alaw+library+of+congress)):* Maria Angélica Barredas (http://bibliotecadigital.uca.edu.ar/repositorio/revistas/matriculacion-primera-abogada-argentina.pdf) was the first woman admitted to practice law (http://www.derecho.uba.ar/publicaciones/rev_academia/revistas/20/las-mujeres-abogadas-en-la-historia-y-en-la-facultad-de-derecho-

de-la-universidad-de-buenos-aires.pdf%20) in Argentina in 1910. Margarita Argas (http://es.wikipedia.org/wiki/Margarita_Arg%C3%BAas) was the first woman to be appointed judge of the Supreme Court in Argentina in 1970 during the military government (http://www.britannica.com/EBchecked/topic/33657/Argentina/33089/Military-government-1966-73) . Currently, Elena Highton de Nolasco is the only woman member of the seven-member Supreme Court (http://www.csjn.gov.ar/autoridades.html) , after the death in 2014 of Carmen Argibay (http://www.ultimahora.com/fallece-carmen-argibay-primera-juez-corte-suprema-argentina-democracia-n793788.html) , who was the first woman appointed to the Supreme Court under a democratic government.

BRAZIL *(by Eduardo Soares (///blogs.loc.gov/law/2014/01/an-interview-with-eduardo-soares-foreign-law-specialist/?loclr=bloglaw)):* The first woman to graduate from law school in Brazil was Myrthes Gomes de Campos (http://www.tjrj.jus.br/web/guest/institucional/museu/curiosidades/no-bau/myrthes-gomes-campos) , who finished law school in 1898. However, it was not until 1906 that Campos was admitted to the Institute of Brazilian Lawyers (*Instituto dos Advogados do Brasil*), the equivalent at that time to the Brazilian Bar Association (http://www.oab.org.br/) , and then authorized to start practicing law. In Brazil, trial judges are not appointed; they are required to take an exam. The first woman to become a judge in the country was Thereza Grisólia Tang (http://www.ufrgs.br/caar/?p=1063) , who in 1954 took the exam and passed, and became the substitute judge of the 12th circuit of the state of Santa Catarina. Currently, 2 of the 10 ministers (http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120056) of the Federal Supreme Court (*Supremo Tribunal Federal*) are women: Minister Cármen Lúcia, and Minister Rosa Weber.

CHINA *(by Laney Zhang (///blogs.loc.gov/law/author/lzha/?loclr=bloglaw)):* The history of legal education (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128151) and the legal profession in the early years of the PRC could be the subject of a book. Technically, however, the legal profession was not formally established until 1979-1980, but women have never been excluded from law schools, legal practice, or judgeship throughout the history of the PRC. In fact, there were women law graduates and lawyers even prior to the founding of the PRC in 1949. For example, the first Minister of Justice of the PRC, Ms. Liang Shi

(//www.loc.gov/pictures/item/hec2013005796/)
National Association Women Lawyers see President Hoover through four representatives, asking for United States Plenipotentiaries to the Hague to vote for a World Code of equality between men and women. Left to right, front row: Mrs. Olive Stott Gabriel, President, Mrs. James Garfield Riley, Dean Washington College of Law, Miss Laura Berrien, and Mrs. Bernita Shelton Matthews, Vice President of the Association [State, War and Navy Building, Washington, D.C. (Harris & Ewing, Apr. 2, 1930). Library of Congress Prints and Photographs Division, //hdl.loc.gov/loc.pnp/hec.35760.

(http://www.womenofchina.cn/womenofchina/html1/people/history/15/3105-1.htm) , graduated from law school and started practicing law in the 1920-30s before she was appointed as a minister in 1949. In the current Supreme People's Court, 3 of the 16 court leaders (http://www.court.gov.cn/jigou-fayuanlingdao.html) are women.

EGYPT *(by George Sadek (///blogs.loc.gov/law/2011/06/an-interview-with-george-sadek-senior-legal-information-analyst/?loclr=bloglaw)):* The first woman lawyer in Egypt was Naima Ilyas al-Ayyubi (http://weekly.ahram.org.eg/2004/672/chrncls.htm) , who graduated with a law degree from Cairo University (http://cu.edu.eg/Home) in 1933. In 2003, Tahani al-Gebali (http://www.egyptindependent.com/news/qa-tahani-al-gebali-say-no-constitutional-amendments) became the first woman to hold a judicial position (http://jurist.org/paperchase/2010/03/egypt-constitutional-court-allows-women.php) in Egypt when she was appointed by former President Hosni Mubarak to be the Vice President of the Supreme Constitutional Court (http://hccourt.gov.eg/) ; a position that she held until 2012. She remained the only female judge in Egypt until 2007, when the Supreme Judicial Council selected 31 women (http://www.wluml.org/node/6002) to serve as judges in the country.

FRANCE *(by Nicolas Boring (//blogs.loc.gov/law/2013/10/an-interview-with-nicolas-boring-foreign-law-specialist/?loclr=bloglaw)):* It appears that the first woman to graduate from a French university with a law degree was actually from Romania: Sarmisa Bilcesco (http://www.uja.fr/Jeanne-Chauvin-eternelle-deuxieme-authentique-pionniere_a821.html) , who first registered in 1884. She obtained her licentiate in 1887 and a doctorate in 1890. She then returned to Romania, where she was admitted to the bar, thus becoming Europe's first woman attorney. The first women to be admitted to the bar in France were Olga Petit (http://www.uja.fr/6-Decembre-1900-il-y-a-110-ans-Olga-Petit-etait-la-premiere-femme-a-preter-serment_a809.html) and Jeanne Chauvin, who were respectively sworn in on December 6 and 19, 1900. It would not be until 1946 that women could become judges (http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/justice-les-femmes-sont-elles-des-juges-comme-les-autres-25-02-2012-1435061_56.php) in France. However, the proportion of women among French judges has risen very quickly over recent years: women represent 57% of the French judiciary, and recent graduating classes from the *Ecole nationale de la magistrature* (National Judges' School (//blogs.loc.gov/law/2011/01/the-french-national-school-for-the-judiciary/?loclr=bloglaw)) have been composed of up to 80% women.

GERMANY *(by Wendy Zeldin (//www.loc.gov/search/?fa=contributor%3Azeldin%2C+wendy&in=partof%3Alaw+library+of+congress)):* Women were admitted to universities in Germany, depending on the state, between 1900 and 1909; in 1913, among 9,003 law students in the German empire (//lccn.loc.gov/2009499628) , there were 51 women. However, until the passage of the Law on the Admission of Women to the Offices and Professions of Justice (http://alex.onb.ac.at/cgi-content/alex?aid=dra&datum=1922&page=603%20) [*Gesetz über die Zulassung der Frauen zu den Ämtern und Berufen der Rechtspflege*], on July 11, 1922, women graduates were not permitted to take the state examination necessary for the practice of law in Germany. Germany's first woman judge was Maria Hagemeyer (http://www.spiegel.de/spiegel/print/d-13491790.html) , who became a judge of the district court of Bonn in 1927. In 1933, however, all judges were dismissed (http://www.zeit.de/1987/29/jung-und-anmutig) by the Nazi regime. Gisela Niemeyer (http://www.germanlawjournal.com/index.php?pageID=11&artID=35) was the first woman to be appointed as a justice of the Federal Constitutional Court, in 1977; Jutta Limbach (http://www.germanlawjournal.com/index.php?pageID=11&artID=161) was its first female president in 1994. There are currently five women among the 16 justices of the Federal Constitutional Court (http://www.bundesverfassungsgericht.de/EN/Richter/richter_node.html;jsessionid=7289B1EDAE59488E0C677EDCAC9926EB.2_cid394) (*Bundesverfassunggericht*).

(//www.loc.gov/pictures/item/ggb2006006665/) Florence E. Allen (Bain News Service, undated). Library of Congress Prints and Photographs Division, //hdl.loc.gov/loc.pnp/ggbain.31252.

GREECE *(by Theresa Papademetriou (//www.loc.gov/search/?fa=contributor%3Apapademetriou%2C+theresa&in=partof%3Alaw+library+of+congress)):* The first woman (http://www.segth.gr/?page_id=310) admitted to practice law in Greece was Efharis Petridou, who became a member of the Athens Bar Association in 1925. Women were not able to become judges until 1955. Currently in the Greek Supreme Court (http://www.areiospagos.gr/) (*Areios Pagos*), 24 judges are women and 44 are men. The first woman (http://ekathimerini.com/4dcgi/_w_articles_wsite1_1_12/07/2011_398063) to be elected as president of the Court was Rena Asimakopoulou in 2011. She held the position until 2013.

INDONESIA *(by Kelly Buchanan):* In the 1950s, five women (http://www.academia.edu/7788312/GENDERING_THE_ISLAMIC_JUDICIARY_Female_Judges_in_the_Religious_Courts_of_Indonesia) became the first female judges in Indonesia's lower civil courts. Women were also hearing cases in the Islamic courts as early as the 1960s, and formal appointments have been made since the passage of Law No. 7 of 1989 (http://hukum.unsrat.ac.id/uu/uu_7_89.htm) on the Religious Judicature. Since the mid-1990s, nearly all of the district religious courts have had female judges. The first woman (http://www.hukumonline.com/berita/baca/lt4d145b5284d4d/srikandisrikandi-di-kursi-agung) appointed to the Indonesian Supreme Court (https://www.mahkamahagung.go.id/p2news.asp?jid=9&bid=3970) (the final court of appeal) was Sri Widoyati Wiratmo Soekito in 1968. The Constitutional Court was established in 2003. Maria Farida Indrati (http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=10) was the first woman to be appointed as a Constitutional Court justice in 2008 and is currently the only woman on the nine-member Court.

ISRAEL *(by Ruth Levush (//blogs.loc.gov/law/author/rlev/?loclr=bloglaw)):* A small number of women were active in pursuing legal education in the Jewish community in Palestine during the British Mandate. Although Rosa Ginossar (http://jwa.org/encyclopedia/article/ginossar-rosa) (1890-1979) was actually the second woman admitted to the bar, a few weeks after Freda Slutzkin (http://trove.nla.gov.au/ndp/del/article/16685218) , she was "reportedly the first – and for years, the only – woman to actually practice law in Mandatory Palestine." Ginossar immigrated to Israel in 1908 and later received her law diploma from the University of Paris on October 19, 1913. In 1922, she returned to Palestine, where her request to take the examination for foreign lawyers and be admitted to the Palestine bar was initially rejected. She later petitioned to the High Court of Justice and was granted permission in a ground-breaking decision rendered by the Court on February 15, 1930. She received her bar license on July 26, 1930. Miriam Ben-Porat (http://www.britannica.com/EBchecked/topic/1888529/Miriam-Ben-Porat) became the first female justice of the Supreme Court in 1976. She served as deputy president of the Supreme Court, from 1983 to 1988, when she retired from the court. The current president of the Supreme Court is Miriam Naor (http://mfa.gov.il/MFA/AboutIsrael/State/Personalities/Pages/Miriam-Naor.aspx) and there are 4 other women out of the total of 17 justices of the Court (http://elyon1.court.gov.il/heb/cv/fe_html_out/menus/mnu_judges/mnu_jdgs_in_court_403.htm) .

JAPAN *(by Sayuri Umeda (//blogs.loc.gov/law/2011/02/an-interview-with-sayuri-umeda-foreign-law-specialist/?loclr=bloglaw)):* In 1929, Meiji University (http://www.meiji.ac.jp/cip/english/graduate/lawschool/index.html) became the first school to make it possible for female students to study law. In 1940, the first three women were admitted to the bar, following a 1936 revision of the relevant law: Masako Nakata (http://article.wn.com/view/2002/10/16/masako_nakata_japans_1st_female_lawyer_dies_at_nbsp91/) , who later became the director of the Japan Federation of Bar Associations (http://www.nichibenren.or.jp/en/) ; Yoshiko Sanfuchi, who became the first female judge in 1949; and Ai Kume (http://www.dissentmagazine.org/blog/the-only-woman-in-the-room-beate-sirota-gordon-1923-2012) , who was one of the founding members and the first chairperson of the Japan Women's Bar Association (http://www.j-wba.com/) established in 1950 and later a delegate to the United Nations. Currently, 3 of the 15 members (http://www.courts.go.jp/english/about/justice/index.html) of the Supreme Court of Japan are women.

MEXICO *(by Gustavo Guerra (//www.loc.gov/search/?fa=contributor%3Aguerra%2C+gustavo&in=partof%3Alaw+library+of+congress)):* María Asunción Sandoval de Zarco (http://www.uca.edu.mx/planteles/celaya/articulos/derecho.php) was the first woman to graduate from law school in Mexico in 1898. Luz María Perdomo Juvera was the first female federal judge (https://www.scjn.gob.mx/conocelacorte/ministra/del-voto-al-ejercicio-del-poder.pdf) appointed in 1974. Currently, 2 of the 10 Mexican Supreme Court justices (https://www.scjn.gob.mx/conocelacorte/Paginas/ConoceLaCorte.aspx) (there is one vacancy) are women: Olga María del Carmen Sánchez Cordero de García Villegas (https://www.scjn.gob.mx/conocelacorte/paginas/cv_olga.aspx) and Margarita Beatriz Luna Ramos (https://www.scjn.gob.mx/conocelacorte/Paginas/cv_luna.aspx) .

NEW ZEALAND *(by Kelly Buchanan):* Ethel Benjamin (http://www.teara.govt.nz/en/biographies/2b18/benjamin-ethel-rebecca) became New Zealand's first woman lawyer when she was admitted as a barrister and solicitor of the Supreme Court of New Zealand in May 1897. She was formally awarded a bachelor of laws degree in July 1897. Her admission to the bar followed the passage of the Female Law Practitioners Act, 1896 (http://www.nzlii.org/nz/legis/hist_act/tflpa189660v1896n11394/) . The first woman judge was Dame Augusta Wallace

(//www.loc.gov/pictures/item/hec2013003955/)
Admitted to Supreme Court practice at 22, Washington, D.C. Oct. 5. Proving that beauty can be combined with brains, Mrs. Henry Moore of Memphis, Tenn., was admitted to practice before the United States Supreme Court today, the youngest woman to ever receive this honor. Mrs. Moore is shown with Emery J. Woodall, (right) Washington Attorney, who presented her to the court and […] the admittance, and Henry Moore, husband of […] who also admitted to practice before the tribunal (Harris & Ewing, Oct. 5, 1936). Library of Congress Prints and Photographs Division, //hdl.loc.gov/loc.pnp/hec.33918.

(http://my.lawsociety.org.nz/in-practice/people/obituaries/obituaries-list/dame-augusta-wallace,-1929-2008) , who was appointed to the district court bench (https://www.courtsofnz.govt.nz/district/district/the-judges/judges) in 1975. New Zealand's current chief justice is Dame Sian Elias (https://www.courtsofnz.govt.nz/about/judges/current-chief) , who was appointed to the position in 1999. There is currently one other woman judge on the six-member Supreme Court bench (https://www.courtsofnz.govt.nz/about/supreme/judges) .

NICARAGUA *(by Norma Gutiérrez (//www.loc.gov/search/?fa=contributor%3Agutierrez%2C+norma&in=partof%3Alaw+library+of+congress)):* Dr. Olga Nuñez de Saballos became the first Nicaraguan woman attorney (http://www.asamblea.gob.ni/bibliotecavirtual/Libros/68239.pdf%20) in 1945, before being elected to the National Assembly in 1957. The first woman judge was Joaquina Vega, who was appointed to the local court (http://www.poderjudicial.gob.ni/prensa/notas_prensa_detalle.asp?id_noticia=5122) of Matiguas, Matagalpa in 1948. There are currently 5 women justices (http://www.poderjudicial.gob.ni/w2013/miembros_magistrados.asp) on the sixteen-member Supreme Court of Justice, including the president, Dr. Alba Luz Ramos Vanega.

PAKISTAN *(by Tariq Ahmad (//blogs.loc.gov/law/2012/04/an-interview-with-tariq-ahmad-legal-analyst-at-the-law-library-of-congress/?loclr=bloglaw)):* In 1994, Justice Majida Rizvi (http://sachet.org.pk/home/publications/agehi_news_letter/autumn_2003/autumn_06.asp) was appointed (http://www.dawn.com/news/783182/interview-truth-and-justice) as the the first woman judge of a High Court (http://www.sindhhighcourt.gov.pk/) in Pakistan. In December 2013, Ashraf Jehan became the first female judge to be appointed (http://www.dawn.com/news/1077328) to Pakistan's Federal Shariat Court (http://www.federalshariatcourt.gov.pk/) . There are currently no women on Pakistan's Supreme Court (http://www.supremecourt.gov.pk/web/page.asp?id=126) .

RUSSIA *(by Peter Roudik (//blogs.loc.gov/law/2011/09/an-interview-with-peter-roudik-director-of-the-global-legal-research-center/?loclr=bloglaw)):* Ekaterina Fleischitz (//catalog.loc.gov/vwebv/search?searchType=7&searchId=5699&maxResultsPerPage=25&recCount=25&recPointer=0&resultPointer=0&) (1888-1968) was the first Russian female criminal defense lawyer (http://ru.m.wikipedia.org/wiki/%D0%A4%D0%BB%D0%B5%D0%B9%D1%88%D0%B8%D1%86,_%D0%95%D0%BA%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D0%B0_%D0%90%D0%B1%D1%80%D0%B0%D0%BC%D0%BE%D0%B2%D0%BD%D0%B0) . She graduated from the Sorbonne University law school (http://ecolededroitdelasorbonne.univ-paris1.fr/) in 1907 and passed the exams for the full law course of St. Petersburg University (http://law.spbu.ru/ru/Home.aspx) in 1909. On November 5, 1909, she was allowed by the court to represent a client but was later removed from the case by the Minister of Justice. In 1911, women were allowed to be admitted (http://www.kosopuzy-lawyer.ru/2013/01/zhenshhine-yuristu-100-let/) to Russian law schools; however, they could not practice law until 1917 (http://accion-positiva.ucoz.es/publ/istorija_zhenshhin/pravo_na_rabotu_v_rossii/9-1-0-74) . In the Russian Empire, women were not allowed to be judges; however, during the Soviet period, involvement of women in the judiciary became a political factor. Reportedly, in 1924, women made up 13.7% of judges in the country, and this figure increased to 18.8% in 1926 (http://elib.uraic.ru/bitstream/123456789/3531/1/sovetskaya_yustitsiya_1926_50.pdf) . Later, judgeship was considered a female profession with women in different periods making up to 80% (http://ppt.ru/news/30104) of the Soviet/Russian judiciary. Today, 3 of the 19 members (http://www.ksrf.ru/ru/Info/Judges/Pages/default.aspx) of the Constitutional Court are women.

SOUTH AFRICA *(by Hanibal Goitom (//blogs.loc.gov/law/author/hgoi/?loclr=bloglaw)):* Between 1909 and 1912, Madeline Wookey unsuccessfully challenged in court (http://ww3.lawschool.cornell.edu/AvonResources/ILS-v-Wookey-I.pdf) the Cape Law Society's refusal to admit her to practice law (http://ww3.lawschool.cornell.edu/AvonResources/Memo-Womens-exclusion-from-the-legal-profession.pdf) . Women were allowed to join the legal profession from March 1923 following the passage of the Women's Legal Practitioners Act 7 of 1923. In May of that year, Irene Antoinette Geffen (//lccn.loc.gov/30003879) became the first woman (http://www.sabar.co.za/law-journals/2002/december/2002-december-vol015-no3-pp30-31.pdf) to be admitted to the bar. In 1969, Leonora van den Heever (http://whoswho.co.za/leonora-van-den-heever-2566) became the first woman judge (http://www.sabar.co.za/law-journals/1988/october/1988-october-vol001-no2-pp21-27.pdf) in South Africa. In 1991 she became the first female judge to be permanently appointed to the appellate division of the Supreme Court. In 1995, Navanethem Pillay (http://gruber.yale.edu/womens-rights/navanethem-pillay) became the first black woman to be appointed to the Supreme Court. At present, 6 of the 23 judges (http://www.justice.gov.za/sca/judges_cv.html) on the Supreme Court of Appeal and 2 of the 10 justices (http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm) on the Constitutional Court are women.

THAILAND *(by Ployparn Ekraksasilpchai):* The first law student was Khunying Ram Phrommobon Bunyaprasop, who attended the first law school in Thailand in 1927 (B.E. 2470) and was admitted as the first woman barrister (http://www.identity.opm.go.th/identity/doc/nis04443.PDF) in 1930 (B.E. 2473). The first female judge (http://web.nso.go.th/gender/estatus.htm) , Ms. Chalorjit Jittarutta, was appointed in 1965 (B.E. 2508). The Constitutional Court consists of nine judges (http://english.constitutionalcourt.or.th/index.php?option=com_content&view=article&id=2&Itemid=2&lang=en) , none of whom are currently women.

UNITED KINGDOM *(by Clare Feikert (//blogs.loc.gov/law/author/cfei/?loclr=bloglaw)):* Elizabeth Orme was the first woman to graduate (http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1685&context=scholarly_works) with a bachelor of laws (LLB) from the University of London in 1888. The first female law graduates in Scotland (http://womeninlaw.law.ed.ac.uk/documents/WilsonLecture.pdf%20) were Eveline MacLaren

(http://womeninlaw.law.ed.ac.uk/EvelineMaclaren.aspx) and Josephine Gordon Stuart (http://womeninlaw.law.ed.ac.uk/JosephineStuart.aspx) , who both obtained a bachelor of laws from the University of Edinburgh in 1909. The 1919 Sex Disqualification (Removal) Act (http://www.legislation.gov.uk/ukpga/1919/71/pdfs/ukpga_19190071_en.pdf%20) paved the way for women to become admitted into the legal profession. Women were first admitted (https://www.lawsociety.org.uk/about-us/our-history/) to the Law Society in 1922. The first four women to be admitted (http://news.bbc.co.uk/2/hi/uk_news/40448.stm) were Maud Crofts, Carrie Morrison, Mary Pickup, and Mary Sykes. Carrie Morrison was the first out of the four to finish her articles and be admitted as a lawyer in England. Margaret Kidd (http://www.oxforddnb.com/view/article/49228) was the first woman to be admitted by the Scottish bar (http://www.bbc.co.uk/scotland/history/onthisday/march/14) in 1922 and later became the first woman appointed as King's Counsel in 1948. The first appointed female judge (http://www.lawgazette.co.uk/analysis/blazing-a-trail-women-and-the-judiciary/68163.fullarticle) was Elizabeth Lane in 1962. Currently, 1 of the 12 justices (https://www.supremecourt.uk/about/biographies-of-the-justices.html) of the Supreme Court is a woman.

UNITED STATES *(by Margaret Wood (//blogs.loc.gov/law/author/mwood/?loclr=bloglaw)):* Arabella Mansfield (http://www.women.iowa.gov/about_women/HOF/iafame-mansfield.html) was the first woman admitted to the bar in 1869 in Iowa. She had not studied at a law school but rather had studied in her brother's office for two years before taking the bar examination. Curiously enough, in the same year Ada H. Kepley (http://wlh.law.stanford.edu/biography_search/biopage/?woman_lawyer_id=10499) became the first woman in the United States to graduate from law school. A year later, in 1870, Esther Morris (http://www.aoc.gov/capitol-hill/national-statuary-hall-collection/esther-hobart-morris) was appointed as a justice of the peace in Wyoming Territory – the first woman (http://news.uscourts.gov/decades-after-oconnor-role-women-judges-still-growing) in the United States appointed to a judicial position. Genevieve Cline (http://news.uscourts.gov/women-way-pavers-federal-judiciary) was the first woman (http://www.uscourts.gov/educational-resources/get-inspired/annual-observances/womens-history-month.aspx) appointed to a federal court in 1928 when President Coolidge nominated her for a seat on the U.S. Customs Court (http://www.fjc.gov/history/home.nsf/page/courts_special_cc.html) . She remained on the court (http://www.fjc.gov/servlet/nGetInfo?jid=3298&cid=999&ctype=na&instate=na) for 25 years. Florence Allen (http://www.nps.gov/romo/judge_florence_allen_biography.htm) , who had previously been a justice on the Ohio Supreme Court (http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp) , was appointed to the U.S. Court of Appeals, Sixth Circuit (http://www.ca6.uscourts.gov/internet/default.html) in 1932, making her the first woman (http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp) to be appointed as a judge to a federal appeals court. Currently, there are three women on the U.S. Supreme Court (http://www.supremecourt.gov/about/biographies.aspx) , 1/3 of that body.

Posted in: Education, Global Law, Law Library

7 Comments | Add a Comment »

7 Comments

1. ***Kitty***
   March 11, 2015 at 12:36 pm
   For more history on the journey of women in the legal profession, you can visit our website http://www.first100years.org.uk . We are running a 5 year project, which was launched in 2014, with the aim of creating an online library of 100 stories about women who have shaped the legal profession since the UK's Sex Disqualification (Removal) Act 1919 paved the way for women to become lawyers to present day.

2. ***Otto Vervaart***
   March 10, 2016 at 11:53 am
   A quick search for the Netherlands brings me to Eliszabeth Carolina van Dorp (1872-1945), affectionelly known as Lizzy. She started studying litterature and law at Leiden in 1893, with a B.Litt. in 1896 and a law degree in 1901. in 1903 she got her Ph.D. degree, see in particular Agnes van Stein, 'De dagboeken van Lizzy van Dorp (1893-1900), in: Jaarboekje Oud-Leiden 2007, 221-271, http://www.oudleiden.nl/pdf2/jaarboek2007_08_13.pdf . In 1919 she became the first Dutch woman to teach economics at a university, see also the article at http://resources.huygens.knaw.nl/bwn/BWN/lemmata/bwn4/dorp . Both she and Adolpha Eduardina Kok (1879-1929) were admitted to the bar in 1903, Van Dorp in The Hague, Kok in Rotterdam, see http://resources.huygens.knaw.nl/vrouwenlexicon/lemmata/data/Kok .
   Johanna Wilhelmina Hudig (1907-1996)was the first Dutch female judge. She got her appointment at a court for child cases in 1947, see http://resources.huygens.knaw.nl/vrouwenlexicon/lemmata/data/hudig . In 1968 A.A.L. Minkenhof became the first female judge in the Hoge Raad der Nederlanden, the Dutch Supreme Court, see P. J. van Koppen and J. ten Kate," De Hoge Raad in persoon. Benoemingen in de Hoge Raad der Nederlanden 1832-2002″ (Deventer 2003).

3. ***HM***
   April 21, 2016 at 8:19 am
   Hi! My mom was the first woman supreme court justice in Ethiopia. How can we add her? Really tough to catalog this for African women!

4. ***Kelly Buchanan***
   April 25, 2016 at 8:27 am
   How cool! If you want to provide some information about your Mom in the comments, similar to what we have in the post, people who come to this post will be able to see it. Thanks!

5. ***Norman B. Krone, Esq***
   September 23, 2016 at 11:05 am
   My mother was admitted to practice law in 1931, while still only 19 years of age. Do you have information regarding a younger female admitted in the U.S.?
   Please note that she was a law school graduate.

6. ***Tushar Vaidya***
   October 1, 2016 at 12:16 am
   I am curious why India is not listed in the set countries you provide information on.

   If nothing else, learning about the first woman to read law at Oxford University in 1892, but not being allowed to practise until 1923, would be of interest to readers of this post, is it not?

7. ***Kelly Buchanan***
   October 3, 2016 at 10:04 am
   Hi Tushar – unfortunately we couldn't cover all countries in the world in this post, although we know there must be many interesting people and stories! We appreciate our readers adding more information in the comments – please feel free to share any other details.