THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS

LEADERSHIP FOR GREATER PURPOSE

RETROSPECTIVES ON LABOR AND EMPLOYMENT LAW

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OUR SPEAKERS:

Moderator – Cynthia E. Nance, University of Arkansas, School of Law. Professor Nance is Dean Emeritus and the Nathan G. Gordon Professor of Law. She is the 8th Circuit Member of the ABA Standing Committee on the Federal Judiciary since 2016, represents the ABA Labor and Employment Law Section in the House of Delegates and serves on the Arkansas Advisory Committee to the US Civil Rights Commission.

Ted St. Antoine – James E. and Sarah A. Degan Professor of Law Emeritus, University of Michigan Law School, Ann Arbor, MI. In addition to serving as Dean of the Law School from 1971 to 1978, Professor St. Antoine has been a labor for arbitrator for over 40 years and is the editor of the National Academy of Arbitrators' "The Common Law of the Workplace: The Views of Arbitrators."

Chai R. Feldblum – Morgan Lewis, Washington, DC. Ms. Feldblum served as a Commissioner of the EEOC from 2010 to 2019, when she pioneered work in covering LGBT people under existing sex discrimination laws and served as the lead drafter and negotiator the Americans Disabilities Act of 1990 and of ADA Amendments Act of 2008.

Peter J. Hurtgen – Curley Hurtgen & Johnsrud, LLP, Menlo Park, CA. Mr. Hurtgen has served as a Member of the NLRB, NLRB Chairman, and as Director of the FMCS. In his role as FMCS Director, he was involved in mediating settlements in numerous nationally significant negotiations and tried the landmark case of *Faragher vs. Boca Raton*.

RETROSPECTIVES ON LABOR AND EMPLOYMENT LAW

Table of Contents

UNION DEMOCRACY AND CIVIL RIGHTS IN THE LATE 1950S AND EARLY 1960S IN D.C. – HOFFA, THE KENNEDYS, MEANY, REUTHER

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PART ONE: UNION DEMOCRACY

1. Background.

A major public opinion poll reported that in the late 1950s the American people believed that the most serious domestic problem confronting the country was "union democracy"! Ironically, this was just on the eve of the 1960s – with the civil rights revolution and the war on poverty. Such a widespread view had to be a result of the highly publicized investigations of internal union affairs by the Kefauver and McClellan committees. A very aggressive Robert Kennedy served as chief counsel of the latter committee.

2. James R. Hoffa.

(a) Hoffa was elected president of the Teamsters International in 1957. A suit to challenge the election was settled by the creation of a Board of Monitors by the D.C. federal district court to oversee Hoffa's administration. I joined the staff of the Monitors in mid-1958.

(b) One of the Monitors' first steps was to have Price Waterhouse conduct the first full audit of Teamsters Headquarters. Not a penny was out of order. Hoffa himself lived modestly, owning a simple house in Detroit. But in a late evening meeting that lasted well after midnight, Hoffa so enraged the old union lawyer who chaired the Monitors that he concluded Hoffa had to go. The chair thereafter consulted regularly with Robert Kennedy about how to "get Hoffa."

(c) Management lawyers who dealt with Hoffa told me that he was a fierce negotiator on behalf of his people. But once a contract was signed, he was equally fierce in insisting that union members live up to it. I consider Hoffa a tragic figure. He could have been a great labor leader. Edward Bennett Williams, the famous trial lawyer who was Hoffa's principal counsel, said, "If only Jimmy had done what I told him. But he thought the world was a jungle and he needed to work with the mob to survive." That of course was his undoing – in every way.

(d) I had a unique personal encounter with Hoffa. My wife and I went to a play at D.C.'s Arena Stage and Hoffa was there with his daughter. He brought the daughter over to introduce her to us. He said to her, "Mr. St. Antoine probably doesn't think very much of me. But when you grow up, I want you to be like him." She became a lawyer and eventually a judge.

3. John F. Kennedy and the Landrum-Griffin Act.

(a) As a result of the Kefauver and McClellan hearings, Senator Kennedy and Republican Senator Irving Ives of New York put together a modest bipartisan proposal, the Kennedy-Ives bill. It would primarily have been a union reporting and disclosure measure with some regulation of union trusteeships. Subsequently, a title was added to provide a "Bill of Rights" for union members. One leading management lawyer told me the thinking was this would reduce the power of union bosses. He admitted ruefully that it turned out to have been easier to deal with the union heads than with the newly involved memberships. In any event, the unions sought to get some Taft-Hartley amendments as a kind of trade-off for the Bill of Rights. Specifically, they wanted the right to picket at a "common situs" like a construction locale. That was a strategic mistake. The unions never got their common situs picketing rights – previously supported by both Democratic and Republican administrations. Instead, in what became the Landrum-Griffin Act, Taft-Hartley was amended to toughen the bans on secondary boycotts.

(b) Labor relations was at the center of American interest. During the Landrum-Griffin debates, Congress received more mail than on any other subject in history. One key Landrum-Griffin vote had a higher total cast in the House than on any other issue in history.

(c) By the Landrum-Griffin summer of 1959, I had become the third member of a three-person law firm headed by the General Counsel of the AFL-CIO, J. Albert Woll. Al had created a little club of some dozen and a half of the top union lawyers in D.C. They met every couple of months at the Hay-Adams Hotel for dinner and a talk by some leading figure in the labor field. John Kennedy, then the floor manager in the Senate for the Kennedy-Ives/Landrum-Griffin bill, was one such speaker. For some reason, Al did not wish to sit next to Kennedy and pushed me into that chair. I was in for a couple of revelations.

(d) In the eyes of many D.C. insiders, Kennedy was an intellectual lightweight, riding on the wave of publicity generated by his rich father. Kennedy of course was not a lawyer. Yet for 30 minutes or so, without any notes, he held forth on the intricacies of Landrum-Griffin before this group of savvy experts. He then answered their questions for another 20 minutes or so. He was never at a loss. It was a bravura performance. I will not assert that Kenney was a profound legal thinker. But at the very least he was one extraordinarily quick and able study.

(e) The other revelation was more personal. Here in front of me was this large, imposing presence. In one sense he radiated vitality and self-assurance. And yet, in a way I simply could not identify, he came across as a *fragile* physical specimen – not weak or frail, but *fragile.* Now, I may have been affected by the fact that during the preceding week his office had called ours a couple of times to warn that the Senator would not have the usual big steak and mashed potatoes but something light as a main course – and little or nothing to drink. In addition, my wife and I had got to know the doctor who put Kennedy in the famous rocking chair to help

his back. On one occasion she slipped and alluded obliquely to something "more serious." We now know Kennedy suffered from Addison's disease, and might not have survived a second term.

PART TWO: CIVIL RIGHTS

1. Background.

The original bill that ultimately became the Civil Rights Act of 1964 did not contain a fair employment practices (FEP) provision. In drafting it, the Kennedy administration focused on voting rights, access to public accommodations, and public school desegregation. An FEP proposal was considered too controversial and likely to doom the entire package. The often-fraught relationship of organized labor and the civil rights movement is a well-known story. Before Title VII of the 1964 CRA was enacted, African Americans were excluded from most railroad unions and their numbers were sharply limited in the skilled construction trades.

2. Position of Organized Labor

(a) Two very different men, Walter Reuther and George Meany, presidents respectively of the United Auto Workers and the AFL-CIO, played key roles in shaping the official positon of the American labor movement in support of what became Title VII of the CRA. Discrimination in employment by either management or labor unions was prohibited.

(b) Reuther had long been a champion of black workers' civil rights, including job rights. He was even a member of the NAACP's board of directors. He and other civil rights leaders saw President Kennedy at the White House and Reuther made an "impassioned plea" for an FEP title.

(c) Meany was a cautious, crafty politician, struggling to hold together a highly divergent coalition of labor adherents. He set out on his own to convey to the White House the urgent need for an FEP provision. As Meany reported to us lawyers, President Kennedy responded: "George, I didn't think we needed one. I thought you could keep your troops in line." Instead of the sermon Reuther would then have delivered, Meany's riposte was typically hard-nosed: "Mr. President, that's exactly the problem. I *can't* keep the troops in line. I need a law I can *blame!*" More formally, Meany said essentially the same thing later before the Senate Labor Committee.

3. The Disparate Impact Theory

Distinguished authorities have criticized the federal courts for limiting the sweep of the 1964 CRA as enacted. In what is surely the most significant judicial gloss on Title VII, however, the Supreme Court came out most favorably for victims of racial discrimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the U.S. Supreme Court enunciated the famous "disparate impact" theory of discrimination. A violation can be established not only by proving *intentional* discrimination but also by showing the *use* of any job qualification that has a disproportionately adverse effect on a protected group and that cannot be justified by business necessity.

4. Affirmative Action.

Approving result but not rationale in *Weber*, 443 U.S. 193 (1979) (private affirmative action legal under Title VII); query stiffer treatment of public action under equal protection.

Labor Unions and Title VII: A Bit Player at the Creation Looks Back

Theodore J. St. Antoine

During the debates over what became Title VII (Equal Employment Opportunity) of the Civil Rights Act of 1964,[1] I was the junior partner of the then General Counsel of the AFL-CIO, J. Albert Woll. There were only three of us in the firm. The middle partner, Robert C. Mayer, handled the business affairs of the Federation and our other union clients. Bob was also the son-in-law of George Meany, president of the AFL-CIO, which gave us a unique access to Meany's thinking. The Federation had only one in-house lawyer, Associate General Counsel Thomas Everett Harris. Tom was an aristocratic Southerner and a brilliant lawyer who had clerked for Justice Harlan Fiske Stone on the U.S. Supreme Court. He and I were the labor law technicians, and we briefed and occasionally argued the court and administrative cases in which the Federation became involved, usually in an amicus capacity.

The often-fraught relationship of organized labor and the civil rights movement is a well-known story.[2] Before Title VII, African Americans were openly excluded from membership in most railroad unions, and their numbers were sharply limited in the skilled construction trades, even though all those unions eventually had the legal obligation to provide "fair representation" of any minorities who did manage to get jobs within the unions' jurisdiction.[3] Given the mores and culture of that time, it was probably inevitable that many if not most rank-and-file union workers placed their perceived economic self-interest above any concerns about promoting racial equality. Yet the story is more complicated than that of white workers simply taking advantage of discrimination against black workers, and the other side of the story needs to be remembered. Union leadership took a more principled position, and ultimately the official policy of the AFL-CIO was to support passage of the Civil Rights Act, including the prohibition of discrimination in employment by both employers and unions.

The initial bill proposed by the Kennedy administration would have concentrated on voting rights, access to public accommodations, and public school desegregation.[4] A fair employment practices (FEP) provision was considered too controversial and likely to doom the entire package. Two very different men, Walter Reuther and George Meany, played the key roles in shaping organized labor's response and helping to secure the addition of the Title VII that was finally adopted. Reuther, president of the United Automobile Workers and head of the AFL-CIO's Industrial Union Department (largely the former CIO unions before the merger), had long been a champion of black workers' civil rights, including equal job rights, and was a member of the NAACP's board of directors. He was an eloquent speaker and a charismatic, sometimes imperious leader who on occasion could strain the patience even of his natural allies. On June 13, 1963, he and other labor leaders met with President Kennedy, and Reuther made an "impassioned plea" for the inclusion of an FEP title in the administration's civil rights bill.[5] About a week later, Reuther joined a group of top civil rights leaders to see the president at the White House to reiterate the demand.[6] Reuther also participated in the March on Washington in August 1963, becoming the sole white union speaker when Martin Luther King delivered his famous "I Have a Dream" oration.[7]

In personality, AFL-CIO President George Meany and Walter Reuther were almost polar opposites. Reuther resonated to abstract principles and noble causes. Meany, who hailed from the Plumbers Union in New York City, was a cautious, crafty politician, struggling to hold together a

highly divergent coalition of labor adherents. In contrast to Reuther's vaulting, evangelical speaking style, Meany's oral presentations were clear, methodical, down-to-earth. Yet Meany could also be moved by the plight of black workers. Although he would not have the AFL-CIO endorse the March on Washington, he set out on his own to convey the message to the White House that an FEP provision was essential, including coverage of labor unions. As reported through my partner, Bob Mayer, President Kennedy responded: "George, I didn't think we needed one. I thought you could keep your troops in line." At this point Reuther might have delivered a sermon on the evils of racial discrimination. Meany's riposte was characteristically hard-nosed and lacking in self-righteousness: "Mr. President, that's exactly the problem. I *can't* keep the troops in line. I need a law I can *blame!"* More formally, Meany told the Senate Labor and Public Welfare Committee in July 1963: "We need the power of the federal government to do what we are not fully able to do [by ourselves]."[8]

It can be argued whether the Meany or Reuther style was ultimately more effective. It is certainly true that at least for some significant listeners, Reuther's moralistic hectoring could wear thin over time. When the March on Washington leaders met afterward with President Kennedy, Martin Luther King modestly sought to divert attention from his own great speech by asking the president whether he had heard Reuther's excellent address. Kennedy replied dryly, "Oh, I've heard him plenty of times."[9] Numerous persons who found Reuther more congenial philosophically wound up fonder of Meany personally. How might that affect persuasiveness? What is most important in the long run, however, is that these two men, Meany and Reuther, in their diverse ways, united in getting the labor movement officially to back the cause of an equal employment opportunity title. It is still debatable just how critical union support was. At least one reasonably disinterested observer, Professor Nelson Lichtenstein, then at the University of Virginia, declared flatly: "The trade union movement, both the AFL-CIO and the UAW, was primarily responsible for the addition of FEPC, now rechristened the Equal Employment Opportunity Commission (EEOC), to the original Kennedy bill."[19] But Herbert Hill, former labor secretary of the NAACP, has bitterly attacked this view, insisting that it exaggerated the position of organized labor as a progressive social force and overlooked massive union efforts to marginalize the effects of Title VII as finally enacted.[11]

The AFL-CIO's leadership endorsement of an FEP or EEO provision did not end the matter, however, in the eyes of much of the rank-and-file. Senator Lister Hill of Alabama was an ardent segregationist but an economic populist. He somehow obtained the addresses of about seventy thousand local unions affiliated with nationals belonging to the AFL-CIO. He wrote them, warning that passage of the civil rights bill would destroy one of their most prized possessions, seniority. Seniority reflects time with a particular employer or in a particular job or department. It can determine priority in layoffs, recalls, promotions, and fringe benefits like vacations. In many locations, especially in the South, black workers were deprived of access to the better job lines and the seniority attached to them. As a result of Hill's intervention, AFL-CIO headquarters was inundated with outraged cries from local memberships, protesting this threat to their precious seniority rights. I was assigned to draft the Federation's response.

My thoughts were as follows, although the exact wording was the result of refinement by several hands:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes or to prefer Negroes for future vacancies, or, once Negroes are hired to give them special seniority rights at the expense of the white workers hired earlier.

That language was later adopted, after extensive negotiations by AFL-CIO representatives and the legislation's sponsors, by Senators Joseph S. Clark (Democrat of Pennsylvania) and Clifford P. Case (Republican of New Jersey), in an "Interpretive Memorandum" on Title VII, for which they were the "bipartisan captains" in the Senate.[12] The Justice Department submitted a rebuttal to the arguments of Senator Lister Hill to the same effect.[13]

Once the 1964 Civil Rights Act was safely passed and Title VII became law, civil rights groups understandably downplayed this particular legislative history and insisted that the "current perpetuation" of past discrimination in seniority constituted a *present* violation of the statute. As one African American lawyer friend put it to me: "Ted, *I* was not part of whatever compromise may have been struck in getting Title VII enacted, and as a good advocate I am going to push the statutory language as far as I think it should go." As it turned out, that was quite a way. Until the U.S. Supreme Court resolved the issue, six courts of appeals in more than thirty cases held that seniority systems that perpetuated the effects of pre-Act discrimination did violate Title VII.[14] Two other courts of appeals were in accord in dicta.[15] In *International Brotherhood of Teamsters v. United States*,[16] however, a 7-2 Supreme Court majority ruled that § 703(h) of Title VII (and the legislative history previously cited) immunized bona fide seniority systems from liability under the CRA. Naturally, I believe the majority got it right. Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin...[17]

Civil rights proponents protested, not unreasonably, that the inevitable tendency of the seniority cases was to lock a whole generation of African American workers into the less desirable jobs to which pre—Title VII discrimination had confined them. Even if they somehow managed to move into the higher-level jobs that were now theoretically available to them, they would wind up at the very bottom of the seniority ladder for those positions or departments. They would thus risk being the first laid off and the last recalled in the event of any economic downturn, as well as losing other benefit priorities. Those were indeed the regrettable facts.

But labor leaders wishing to support Title VII also faced some harsh realities. The rank-and-file were up in arms over what they perceived (correctly, as it first developed) to be a serious threat to their valuable seniority. Union officials must face elections, and the 1960s were a time of flux, when numerous incumbents were voted out of office. The Kennedy administration was initially

opposed to an FEP or EEO title, with the Justice Department calling labor-liberal efforts to add one "a disaster."[18] Under all those circumstances, it seems entirely sensible for Title VII supporters among the labor leadership to feel they had to mollify their memberships by preserving seniority rights as they did. In effect, postponing for a generation the full promise of Title VII's nondiscrimination strictures may well have been the price that had to be paid to get an EEO title. By its very nature, of course, a bona fide seniority plan can hold back only about one generation when it is set in the context of a law prohibiting discrimination in hiring, promotions, and other terms and conditions of employment.

Retired federal District Judge Nancy Gertner has asserted: "Federal judges from the trial court to the Supreme Court have interpreted the [Civil Rights] Act virtually, although not entirely, out of existence."[19] Judge Gertner places much emphasis on the actual experience of discrimination plaintiffs compared to other plaintiffs in the litigation process, from summary judgment through trial through appeal. In what is surely the single most important judicial gloss on Title VII, however, the Supreme Court came out most favorably for alleged victims of discrimination. In *Griggs v. Duke Power Co.,*[20] Chief Justice Burger spoke for a unanimous Court in holding that the statute was violated not only by *intentional* discrimination but also by the *use* of any job qualification—such as a high school education or passing a general intelligence test—that disproportionately disqualifies a particular protected group and is not shown to be significantly related to successful job performance.

Griggs thus introduced the now famous "disparate impact" theory of discrimination, as distinguished from the more conventional "disparate treatment" or intentional theory. Subsequently, the Court acknowledged: "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII "[21] The Court went on to state that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another, and cannot be justified by business necessity....Proof of discriminatory motive...is not required under a disparate-impact theory.'[22]

For someone like me, who was concededly only a bit player in this great undertaking but who nonetheless had a ringside seat at it, it is significant that I cannot ever recall during the endless discussions of Title VII any explicit reference to something like the "disparate impact" theory. Moreover, despite the *Griggs* Court's tussle with the legislative history, I find nothing there that clearly and positively supports disparate impact.[23] Chief Justice Burger invoked a striking image when he said: "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox."[24] But the artistry cannot conceal the conclusory, unproven nature of the proposition. Section 703(h), the one provision expressly dealing with testing, states in pertinent part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[25]

Chief Justice Burger found comfort in the word "used" in the sentence dealing with ability tests; it does not appear in the part of the same section dealing with seniority and merit systems. That

can be scored as a good debater's point. But in the absence of any further explanation of its significance in the legislative history, one has to wonder about how much weight to attach to that single generalized word. Would Congress have been that indirect or circumspect in promulgating a whole new theory of discrimination?

How necessary was the disparate impact theory, anyway? Section 8(a)(3) of the National Labor Relations Act prohibits "discrimination...to encourage or discourage membership in any labor organization."[26] In *NLRB v. Brown*, the Supreme Court concluded that "Congress clearly intended the employer's purpose in discriminating to be controlling."[27] But then the Court immediately added:

> [W]hen an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3). This principle, we have said, is "but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."[28]

As I see it, most if not all of what the Court accomplished in *Griggs* through enunciating the new disparate impact theory under Title VII could have been achieved less controversially by an application of the commonsense principle that persons may be held to have intended the natural consequences of their actions.[29] Does anyone have any serious doubts about what Duke Power was up to when it instituted new job qualifications on the very day Title VII went into effect? At most, disparate treatment analysis would seem to permit a challenged party one free pass on a claim of business necessity as a defense. Once that defense was overcome and the consequences known, any *continuation* of the practice could appropriately be regarded as an intentional violation.

One can safely say that even the present conservative Supreme Court would be reluctant to back away from the unanimous decision in *Griggs.* Moreover, in the Civil Rights Act of 1991, Congress confirmed the existence of disparate-impact violations by spelling out their manner of proof in a new § 703(k).[39] Nonetheless, in a concurring opinion in *Ricci v. DeStefano,* Justice Scalia warned that the Court's disposition of that case "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII...consistent with the Constitution's guarantee of equal protection?"[31] Justice Scalia elaborated his position:

> [T]itle VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory.[32]

Professor Richard Primus suggests a means of defending disparate impact analysis.[33] He starts by spelling out what he calls the *Ricci* premise: the City of New Haven's suspension of a written job test because of its disproportionately adverse effect on African American firefighters "would constitute disparate treatment under Title VII unless suspending the test were justified by Title VII's provisions regarding disparate impact."[34] Primus concedes that if the emphasis is placed on the race conscious action of a *public* employer (subject to constitutional limitations) in

implementing a disparate impact remedy, which is how Justice Scalia sees it, disparate impact doctrine is likely to be in "fatal" conflict with equal protection's requirement of racial neutrality.[35]

Primus insists, however, that there are two other ways of viewing the situation. First, there is an *institutional* difference between the roles of public employers and courts.[36] Courts are authorized to remedy racial discrimination and they cannot assess any kind of discrimination claim without knowing the race of the parties. Public employers are precluded from such race-conscious decision making. Second, the attention may focus on the *visible victims.*[37] In *Ricci,* Primus points out, New Haven's decision "disadvantaged determinate and visible innocent third parties—that is, the white firefighters," while "[m]ost disparate impact remedies avoid creating such victims."[38] Primus concludes that the constitutionality of disparate impact doctrine may turn on the particular lens through which the Court subsequently views such equal protection claims—and the skill of advocates in bringing the right case before the Court.[39] My own conclusion is that the *Griggs* Court could have avoided these problems by a more generous and realistic reading of Congress's actual design—to prohibit intentional discrimination in all its manifestations.

The problem of disparate impact pales by comparison with the problem of "affirmative action"—conceptually, ethically, and sociologically. Affirmative action—racial or other preferences among human groups—to achieve some seemingly desirable or compelling public interest is well covered by other contributors to this volume.[4o] I will therefore limit myself to a few brief personal observations. The first and most obvious is that the primary, abiding theme of both the text and the legislative history of Title VII is color-blindness (or equivalent blindness regarding gender and other protected categories). The Clark-Case Memorandum filed by the senators who were in effect floor managers for the EEO provision is replete with such references. It is a model of the "plain meaning" approach to language:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [now 703] are those which are based on any five of forbidden criteria: race, color, religion, sex, and national origin 41

Congress, like the rest of us promoting equal employment opportunity, was very naive—or else we all affected naïveté. It was as if the magic wand of one federal statute could erase three hundred years of bondage, degradation, and exclusion. At least by hindsight, we know it did not work.

Justice Brennan showed more sophistication when he wrote for the Court in the *Weber* case:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[42]

In *Weber,* a 5-2 Court upheld the legality of a union-employer affirmative action plan that reserved 50 percent of the openings in a plant's craft training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force.[43]

Yet however much one might wish to applaud the result in *Weber* on the basis of policy, it contained a very serious analytical flaw. Justice Brennan never came to grips with the meaning of the critical word, "discriminate."

The Clark-Case Memorandum equated "discriminate" with "distinguish" on certain specified grounds. That reading, if straightforwardly applied, would have been fatal to the *Weber* approach. But there is another way to interpret "discriminate." One of the great federal judges, Henry Friendly, had this to say: "Although '[i]n common parlance, the word (to discriminate) means to distinguish or differentiate,'...it more often means, both in common and particularly in legal parlance, to distinguish or differentiate *without sufficient reason."*[44] That could have opened the door to a more capacious interpretation than a strictly literal reading. Once Justice Brennan had accomplished that, his reliance on the spirit rather than the letter of the law, and his use of somewhat strained but favorable portions of legislative history, would have seemed more acceptable.

Another aspect of *Weber* has always seemed anomalous to me as someone who is not a constitutional specialist. Justice Brennan emphasized it right at the outset of his analysis: "Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."[45] The implication is that equal protection would have been a more stringent standard for a valid affirmative action plan. Indeed, subsequent decisions invalidating the plans of governmental bodies appear to bear that out.[46] Yet it is Title VII that defines the prohibited conduct so explicitly as "to discriminate...because of...race."[47] Section 1 of the Fourteenth Amendment does not even mention race and speaks very broadly: "[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws."[48] If one emphasizes the text, "equal protection" is surely the more flexible test. And a philosopher whose mind was uncluttered by vacillating judicial pronouncements might well conclude that a state is not denying equal protection when it treats differently—and preferentially—groups of persons who are in fact differently—and unequally—situated.[49] Those unequal situations could be the result of hurricanes, earthquakes, plagues, or physical or mental disabilities. Why not generations of racial discrimination?

I hardly expect a return to such a pristine concept at this relatively advanced stage in the development of equal protection theory. But the more we recognize that the equal treatment of *unequals* may *not* be the best way to ensure the "equal protection of the laws," the more we may be ready to extend such established doctrines as "compelling state interest" as a qualification on the prohibition of racial distinctions.

A half-century ago, many of us, those in the civil rights movement and union supporters alike, shared Martin Luther King's "dream." The "dream" was a dream of genuine integration—the existence of all races in our society on a plane of equality. We felt Title VII was our vehicle. Yet fifty years after the passage of Title VII, the median household income of blacks is $33,321 while that of whites is $57,009, or 71 percent more 59 The unemployment rate of blacks is 12.5 percent, or double that of whites at 6.2 percent.[51] We may have come a long way in certain respects since 1964. But to fulfill that dream, we still have a very long way to go.

About the Author

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Notes

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

2. *See generally* WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 281-430 (1977); Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record,* in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 263 (Herbert Hill & James E. Jones Jr. eds., 1993); Bayard Rustin, *The Blacks and the Unions,* HARPER'S MAG., May 1971, at 73.

3. *See, e.g.,* Steele v. Louisville & Nashville R.R Co., 323 U.S.192 (1944) (under Railway Labor Act); Syres v. Oil Workers Int'l Union, Local No. 23, 223 F.2d 739 (5th Cir. 1955) (under National Labor Relations Act), *rev'd per curiam,* 350 U.S. 892 (1955); *cf.* Oliphant v. Bhd. of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958) (denial of union membership not prohibited), *cert. denied,* 359 U.S. 935 (1959).

4. H.R. 7152, 88th Cong. (1963); CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL, RIGHTS ACT 1-2 (1985); BUR. NAT'L AFF., THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY (1964).

5. NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 382 (1995). *See also* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972, at 82-83 (1990).

6. LICHTENSTEIN, *supra* note 5, at 382.

7. *Id.* at 386-87.

8. GRAHAM, *supra* note 5, at 83. *See also Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States,* 88th Cong. 1791 (1963) (statement of George Meany, President, AFL-CIO) ("[W]e need a Federal law to help us do what we want to do-mop up those areas of discrimination which still persist in our own ranks.").

9. LICHTENSTEIN, *supra* note 5, at 387.

10. *Id. at* 387-88.

11. *Compare* Herbert Hill, *Lichtenstein's Fictions: Meany, Reuther and the 1964 Civil Rights Act, 7* NEW POLITICS 82-107 (Summer 1998), *and* Herbert Hill, *Lichtenstein's Fictions Revisited: Race and the New Labor History, 7* NEW POLITICS 148 (Winter 1999), *with* Nelson Lichtenstein, *Walter Reuther in Black and White: A Rejoinder to Herbert Hill, 7* NEW POLITICS 133 (Winter 1999). *See also* Rustin, *supra* note 2, at 76.

12. 110 CONG. REC. 7212, 7213 (1964). *See also id.* at 7217 (Sen. Clark remarking, "Seniority rights are in no way affected by the bill.").

13. *Id.* at 7207 (1964) ("Title VII would have no effect on seniority rights existing at the time it takes effect."). *See also id.* at 5423, 6549 (remarks of Sen. Humphrey).

14. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 378-79 (1977) (Marshall, J., dissenting).

15. *Id. at* 379.

16. 431 U.S. 324 (1977). *See also* American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), where a .5-4 Court held that § 703(h) applied to post-Title VII seniority plans as well as pre-Title VII plans. The dissenters argued that § 703(h) was designed only to protect seniority rights vested at the time Title VII was passed. They would have distinguished between the subsequent application of a preexisting seniority plan and the post-Act adoption of a new plan. The majority declared that § 703(h) evinces no such distinction and that the key is always whether there is an "intention to discriminate" in establishing a seniority plan.

17. 42 U.S.C. § 2000e-2(h) (2012).

18. ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 365 (1978).

19. Nancy Gertner, *The Court's Repeal of Johnson/Kennedy Administration's "Signature" Achievement,* in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50 (2014).

20. 401 U.S. 424 (1971). Disparate impact theory also applies to gender discrimination. Dothard v. Rawlinson, 433 U.S. 321 (1977).

21. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

22. *Id.*

23. For contrasting scholarly analyses, see Michael Evan Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7* INDUS. REL. L.J. 429, 497-503, 588-98 (1985) (Congress meant to prohibit only intentional discrimination, but a person can be held to intend the natural consequences of one's actions); George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination,* 73 VA. L. REV.

1297, 1303-11 (1987) (Congress recognized the problem of "pretextual discrimination" but left its solution to the federal courts).

24. *Griggs*, 401 U.S. at 431.

25. 42 U.S.C. § 2000e-2(h) (2012).

26. 29 U.S.C. § 158(a)(3) (2012).

27. 380 U.S. 278, 287 (1965).

28. *Id* (quoting Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954)). *See also* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227 (1963).

29. I can think of at least one possible exception. Nepotism was rampant in the skilled construction trades in pre Title VII days. Jobs were often passed down from father to son. In certain instances, this was truly not a pretextual situation; the actual intent was not to discriminate "because of race" but to discriminate against *everybody* outside the family. Such activity lends itself much more readily to a disparate impact analysis than to a disparate treatment analysis.

30. 42 U.S.C. § 2000e-2(k) (2012).

31. 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

32. *Id.*

33. Richard Primus, *The Future of Disparate Impact,* 108 MICH. L. REV. 1341 (2010).

34. *Id.* at 1343-44 (citing *Ricci, 557 U.S.* at 580).

35. *Id.* at 1344.

36. *Id* at 1344-45, 1364-69.

37. *Id.* at 1345, 1369-74.

38. *Id. at* 1345.

39. *Id.* at 1385-87.

40. *See, e.g.,* Samuel Bagenstos, *On Class-Not-Race, in A* NATION OF WIDENING OPPORTUNITIES?; Vicki Schultz, *Reimagining Affirmative Action, in* A NATION OF WIDENING OPPORTUNITIES?, *supra;* Patrick Shin, Devon Carbado & Mitu Gulati, *The Diversity Feedback Loop, in A* NATION OF WIDENING OPPORTUNITIES?, *supra.*

41. 110 CONG. REC. 7213 (1964). Even an employer who had discriminated in the past could not "prefer Negroes for future vacancies." *Id.*

42. United Steelworkers v. Weber, 443 U.S. 193, 204 (1979) (citation omitted).

43. *Id.* at 197.

44. NLRB v. Miranda Fuel Co., 326 F.2d 172, 181 (2d Cir. 1963) (Friendly, J., dissenting) (emphasis added).

45. *Weber,* 443 U.S. at 200.

46. *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Parents Involved in Cmty. Schs, v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). *But cf.* Grutter v. Bollinger, 539 U.S. 306 (2003) (5-4 decision upholding consideration of race and other factors to ensure diversity in higher education as a compelling state interest). Nonetheless, purpose or intent is required for an equal protection violation, while Title VII may also be violated without intent under a disparate impact analysis. Washington v. Davis, 426 U.S. 229 (1976).

47. 42 U.S.C. § 2000e-2(a)(1).

48. U.S. CONST. amend. XIV, § 1. *See also* the Slaughter-House Cases, 83 U.S. 36, 81 (1873) (expressing "doubt" that the provision would ever apply beyond state action dealing with race).

49. *See, e.g.,* Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?, in A* MATTER OF PRINCIPLE 293 (1985); Thomas Nagel, *John Rawls and Affirmative Action,* 39 J. BLACKS IN HIGHER EDUC. 82 (2003).

50. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 5 (2013), *available at* http://www.census.gov/prod/2013pubs/p60-245.pdf.

51. News Release, U.S. Dep't of Labor, The Employment Situation—November 2013, USDL-13-2315, at Table A-2 (Dec. 6, 2013), *available at:* http://www.b1s.gov/newsrelease/archives/empsit_12062013.pdf.

A STRUCTURAL VIEW OF THE PROGRESS OF LGBT RIGHTS AND DISABILITY RIGHTS

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1. Framework of Change.

Set out framework for three elements that must work together in a synergistic fashion to result in social change.

(a) Law – text of a statute; administrative regulation, etc. (often as interpreted by a court).

(b) Policies in practice – policies that are in play in various structures (e.g., workplaces), either as a result of compliance with a law or adopted voluntarily.

(c) Cultural norms – background social beliefs regarding an issue.

2. Disability Rights.

(a) Passage of the Americans with Disabilities Act of 1990.

(b) Weakening of the ADA by the courts regarding definition of disability.

(c) Passage of the ADA Amendments Act of 2008.

(d) Cultural change lagging behind legal change.

3. LGBT Rights.

(a) Early state and local laws and voluntary employer policies.

(b) The LGBT exception crafted by the EEOC and the courts to Title VII; continual re-introduction of a federal LGBT rights bill.

(c) Back to the future: waiting for the Supreme Court to rule this term in the three LGBT cases regarding Title VII.

LAW, POLICIES IN PRACTICE AND SOCIAL NORMS: COVERAGE OF TRANSGENDER DISCRIMINATION UNDER SEX DISCRIMINATION LAW*

Chai R. Feldblum**

Table of Contents

I. INTRODUCTION

To achieve any lasting change in social justice, three variables must operate in a synergistic fashion: law, policies in practice, and social norms.

In this context, "law" means the words of the law developed by Congress, the President, and the courts, and their equivalents at the state and local levels. Law thus includes the text of the statute as written and enacted by a legislature, the text of regulations and guidance that are issued by an agency implementing the law, and finally the text of judicial decisions interpreting either the statute or administrative regulations and guidance. In other words – a lot of *words*.

"Policies in practice" refers to whether and how the text of a statute, a regulation or guidance, or a court decision has been *absorbed* into the workings of an entity that is regulated by the law. Simply having a law in place, written and implemented by a legislature, agency and court, will not guarantee effective policies in practice. For that, one needs entities governed by the law to truly absorb the law into the very sinews of their organizations. For example, if employers do not fully understand a law, then they will not comply with it very well. Similarly, if employers are antagonistic about a law, for whatever reason, they will be less likely to follow it.

Finally, "social norms" are the normative assumptions or beliefs behind a social justice goal. This is about how important the general population feels and thinks about the social goal that the law seeks to achieve. Social norms are about changing hearts and minds – not something we usually associate with law. Yet, social norms affect and are affected by the law and policies in practice.

Law schools have historically focused mainly on one segment of the first variable – law as described in judicial opinions. However, to develop effective social justice advocates, law schools must educate students about all three variables — and about how they interact with each other.

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* An abbreviated version of this essay is set to appear in GENDER IDENTITY IN THE WORKPLACE: A PRACTICAL GUIDE (forthcoming).

** Commissioner Feldblum delivered the 28th I. Goodman Cohen Lecture at Wayne State University School of Law on September 28th, 2012. Commissioner Feldblum's remarks focused on the role that law, policies in practices, and social norms play in the achievement of social justice. The article that follows incorporates and expands upon those themes.

This Article explores the intersection of these variables by considering the development of coverage for transgender persons under Title VII, including the role played by the Equal Employment Opportunity Commission ("EEOC" or "the Commission") in its 2012 decision in *Macy v. Department of Justice*.[1] Several factors have operated together to achieve the social justice goal of prohibiting the use of gender in employment decisions -- the use of the term "sex" in Title VII, as created by Congress and as interpreted by the agencies and the courts; the policies put into practice to advance women's workforce participation; and changes in social norms, both with regard to women and to transgender people.

* * *

The Commission issued thousands of decisions in 2012, the vast majority of which were issued by the Office of Federal Operations, pursuant to power delegated to it by the Commission. The Office of Federal Operations decides what cases should receive extra review and be voted on by the Commission, based on the issues in question. In 2012, the Commission reviewed and voted on only 13 cases, including the *Macy* case.[2]

The Commission's ruling in *Macy* was straightforward: complaints of discrimination on the basis of transgender status should be processed under Title VII of the Civil Rights Act of 1964 and through the federal sector equal employment opportunity complaint process as claims of sex discrimination.[3]

The legal reasoning in *Macy* was also straightforward. Title VII of the Civil Rights Act of 1964 (as amended in 1972 to apply to the federal government) prohibits employment discrimination on the basis of "sex."[4] This means that an employer cannot take sex into account when hiring, unless hiring a person of a particular sex is a "bona fide occupational qualification" (BFOQ).[5] If an employer is willing to hire a person when that person is a man, but is not willing to hire that same person if she has transitioned and is now a woman, then that employer has taken sex into account in violation of the statute.[6]

In *Macy*, legal logic has come full circle. But the opinion's legal logic had to be preceded by changes in cultural logic. In this essay, I briefly lay out how social norms hindered courts from applying the plain meaning of the word "sex" in Title VII following passage of the law because of the role women were expected to play in the family and how those legal developments subsequently hindered protection for transgender individuals. I then argue that changes in social norms have helped bring the plain words of the statute back to life.

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1. Mia Macy v. Eric Holder, Attorney General, Department of Justice, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).
2. *Id.*
3. *Id.* at 11.
4. 42 U.S.C. § 2000e-16(a).
5. *See, e.g.*, 29 C.F.R. § 1604.2.
6. *Macy*, *supra* note 1, at 10.

II. THE BEGINNING: THE STATUTE CAN'T POSSIBLY MEAN WHAT IT SAYS

Courts and commentators created the myth that there was not much legislative debate about adding sex to Title VII of the Civil Rights Act of 1964. They also created the myth, which unfortunately has had significant staying power, that Congressman Howard Smith proposed the term "sex" to the bill *solely* to kill the bill.

Both of these myths have been thoroughly discredited by historians and legal scholars.[7] While Congressman Smith was perfectly happy to have the Civil Rights Act be defeated, he was not with the idea that black men would have more rights than white women in employment. Moreover, there was plenty of legislative and social history on prohibiting discrimination based on sex — not on the Title VII amendment, but rather, going back further in debates on the Equal Rights Amendment, which both Congressman Smith and the Republican Party platform had endorsed.

Courts created and perpetuated these myths because taking the word "sex" on its face would have required major changes in how both society and the workplace operated. Indeed, while the EEOC initially balked at the plain meaning of the term "sex" as well, the agency ultimately took the lead throughout the 1970s in trying to give the plain meaning of the statute its due.

In *Phillips v. Martin Marietta Corp.*,[8] one of the earliest Title VII cases to reach the Supreme Court, the Fifth Circuit simply announced that there wasn't much legislative history for it to use in deciding whether refusing female applicants with pre-school age children for a training program,

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7. *See, e.g.*, CYNTHIA ELLEN HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988); *see also* Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. J. 163, 165-72 (1991); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14-25 (1995); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765 (2002); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).
The myth that there is little legislative history to inform our understanding of the addition of sex to Title VII appears to have been started by (or at least, heavily supported by) Harvard Law School students, who announced in a 1971 overview of sex discrimination law that there was no legislative history or prior consideration given to the addition of sex, and that it was simply a ploy to undermine passage of the law. As the students opined: "The addition of sex as a forbidden basis of discrimination in employment was offered as a floor amendment to Title VII in the House, without any prior legislative hearings or debate. The original proponent of the measure was a southern congressman who voted against the Act, and whose strategy was allegedly to "clutter up" Title VII so that it would never pass at all. The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America." That was the entire analysis proffered by the students and their only citation (footnote 3) was to a statement by Congresswoman Edith Green (D-OR), the only woman Member to speak against the amendment. Congresswoman Green's arguments were very similar to the ones that she and other progressive legislators had advanced against the Equal Rights Amendment over the years. See 110 Cong. Rec. 2581 (1964) (statement of Rep. Green). Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARVARD L. REV. 1307 (2012)

8. Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

while male applicants with similar-age age children were accepted, violated Title VII. Mrs. Phillips ran afoul of this rule and filed a charge with the EEOC. The Commission investigated and concluded there was reasonable cause to believe the rule violated the statute by discriminating on the basis of sex.[9]

However, since these events occurred prior to 1972, when EEOC did not yet have authority to bring litigation, Mrs. Phillips filed a class action suit on her own. But EEOC attorneys David Cashdan and Philip Sklover, under the leadership of Daniel Steiner and Russell Specter, then General Counsel and Assistant General Counsel at the EEOC respectively, participated as amicus curiae in her case.[10] Phillips lost on summary judgment in the district court and on appeal to the Fifth Circuit Court of Appeals, but following a Supreme Court decision, won the right to bring her claim under Title VII.[11]

The Fifth Circuit noted the EEOC's position that "where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act."[12] That sounds like a pretty straightforward application of the words of the statute to me. One might assume that having young children could have an impact on job performance and that employers might want to hire only employees who have children above a certain age. However, if an employer has a neutral criterion, such as requiring that an employee's children must be above a certain age, presumably it must apply that criterion equally to both women and men in order not to violate Title VII. That was the EEOC's position.

The Fifth Circuit then presented the company's position, which – to a modern ear – might appear to be a somewhat stretched and creative view of the plain language of Title VII: that "before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman."[13]

One might expect the court to have then turned to the plain words of the statute to see which party's argument was correct. Instead, the Fifth Circuit observed that "neither litigant is able to present substantive support for its theory," although each "cite[s] selected sections from the congressional history of the bill."[14] The court then summarily concluded that "a perusal of the record in Congress will reveal that the word 'sex' was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress. [15]

Perhaps there was no "helpful discussion" in the legislative debates that the Fifth Circuit panel could find. However, there was actually a fair amount of debate about the meaning of prohibiting

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9. *Id*. at 2.
10. *Id*. at 1.
11. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
12. *Phillips*, 411 F.2d at 3.
13. *Id*.
14. *Id*.
15. Id.

discrimination (or mandating equality) on the basis of sex, including a fair amount of hysteria.[16] Although the rhetoric used at the time might strike us as excessive today, the reality is that women and men played very different roles in work and family in 1964. Moreover, it was commonly understood that one of the ways to ensure that these very different roles could continue was to ensure that employers would be permitted to apply sex stereotyping in the workplace.[17] Taking the prohibition against sex discrimination on its face, therefore, could have wreaked havoc. Presumed Congressional intent thus became the means to both manage and constrain that potential "havoc."

The useful result, at least for the courts, can be seen in the *Phillips* case. The Fifth Circuit was forced to acknowledge that "[w]here an employer... differentiates between men with pre-school age children, on the one hand, and women with pre[-]school age children, on the other, there is arguably an apparent discrimination founded upon sex."[18] However, since the EEOC had argued that the employer could not, under the statute, justify this differential treatment under the "bona fide employment disqualification" provision, the court explained that it was left with no choice but to conclude that the rule did not discriminate based on sex in the first place.[19]

The Supreme Court, in its opinion in *Phillips*, rescued the nation from the EEOC's plain reading of text. In an unsigned and brief *per curiam* opinion, the Court simply stated that Title VII prohibited having "one hiring policy for women and another for men[,] each having preschool-age children."[20] But the Court then ensured many more years of litigation and lengthy law review articles (espousing new and complicated theories of "sex-plus" discrimination) by stating that "[t]he existence of conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man" could form the basis of a BFOQ defense.[21]

In his concurrence, Justice Marshall rejected the possibility of a BFOQ defense for such a rule, quoting the EEOC's Guidelines of Discrimination on the Basis of Sex: "Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'"[22] Justice Marshall sensibly noted that an employer "could require that all of his employees, both men and women, meet minimum performance standards" and could "try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with."[23]

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16. See, e.g., Franklin, *Traditional Concept*, *supra* note 7 (statement of Rep. Celler, quoting 110 Cong. Rec. 2577) ("What would become of traditional family relationships? ... Would fathers rank equally with mothers in the right of custody to children? What would become of the crimes of rape and statutory rape? ... Would the many State and local provisions regulating working conditions and hours of employment for women be struck down?"); *see generally*, *supra* note 7.

17. *See, e.g.*, Franklin, *supra* note 7; *see also* Case, *supra* note 7.

18. *Phillips*, 411 F.2d at 4.

19. *Id*. ("The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.").

20. *Phillips*, 400 U.S. at 544.

21. *Id*.

22. *Id*. at 545 (quoting 29 C.F.R. §1604.1(a)(i)-(ii)).

Using the historical account by Professor Cynthia Harrison, Professor Cary Franklin recounts how the EEOC had to go through its own evolution before interpreting the sex discrimination provision of Title VII in the straightforward manner later endorsed by Justice Marshall. When first presented with the natural implications of the plain meaning of the statute, the majority of the EEOC had recoiled:

> In September of 1965, the EEOC announced . . . that the practice of dividing job advertisements into male and female columns did not qualify as sex discrimination because "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women." Thus, the EEOC concluded, segregating ads by sex simply helped applicants and employers find what they were looking for.[24]

The EEOC's decision did not go over well with the budding feminist movement. Indeed, the National Organization for Women (NOW) was founded in 1966 precisely because advocates felt that the EEOC was ignoring women's claims of sex discrimination.[25] Ultimately, the EEOC became one of the fiercest advocates for the position that the statute does not permit taking sex stereotypes into account, including as a basis for a BFOQ justification.

Employment rules requiring married women to leave a job or banning women who have children below a certain age from applying for a job may seem anachronistic now, but they were the weight of controversy for almost two decades. As employers began losing the battle of convincing courts that, although they had taken sex into account, a sexual stereotype nonetheless served as a legitimate BFOQ,[26] employers redoubled their efforts to cabin the reach of what the statute meant in prohibiting discrimination "because of sex."

This Article cannot do justice to the effort to create this new "traditional" understanding of the term "sex" in Title VII. Suffice it to say that a significant victory for such cabining was achieved with the Supreme Court's opinion in General Electric Co. v. Gilbert, [27] in which the Court decided that pregnancy discrimination did not constitute sex discrimination and that the "traditional" understanding of sex discrimination were practices that divided men and women into two groups and not anything else.[28] Although Congress overturned the *Gilbert* decision itself through the passage of the Pregnancy Discrimination Act in 1978,[29] the Supreme Court's pronouncements

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23. *Id*. at 544-45.
24. Franklin, *supra* note 7, at 1340 (citing HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972 **(**1992**) (**quoting Franklin D. Roosevelt, Jr,)).
25. *See* NATIONAL ORGANIZATION OF WOMEN, THE FOUNDING OF NOW (2006), *available at* http://www.now.org/history/the_founding.html.
26. See, *e.g.*, Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).
27. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).
28. *Id*. at 145.
29. Pub. L. No. 95–555, § 995, 92 Stat 2076 (1978).

regarding the "traditional" understanding of sex discrimination continued to impact the reasoning of lower courts.[30]

By the time transgender individuals started bringing cases under Title VII, two myths were well entrenched: first, that there was little legislative history regarding the sex discrimination provision, and second, that Congress' sole intent had been to ensure that men and women were not classified differently. Moreover, the emphasis on legislative intent was so strong that the Fifth Circuit in a 1975 *en banc* decision overturning a panel decision applying the plain meaning of "sex" in a hair grooming case, stated that, "[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question."[31]

There was a minor chord in Supreme Court jurisprudence sounding in sex stereotyping theory, reflected in its 1978 decision in *Water & Power v. Manhart*.[32] While the Supreme Court in the case of *Price Waterhouse v. Hopkins* would ultimately resurrect this approach, the primary message throughout the 1970s and 1980s was that Title VII should be interpreted solely to enact the presumed Congressional intent that employers not divide men and women into separate categories.

Given this context, it is of little surprise that courts found it easy to rule that transgender individuals who experienced discrimination because of their gender identity could not avail themselves of Title VII's antidiscrimination sex protection. Indeed, the EEOC played a role in enabling the courts to reach this conclusion. While the words of the statute carried sufficient weight to generate one positive district court ruling and one dissent in an appellate decision, these represented the minority chord during this time.

In the early years of the EEOC, the Commission issued its findings of cause and no cause in written decisions. The confidentiality requirements of Title VII mandated that charging parties and employers not be identified by name, but courts in judicial decisions often adopted the legal reasoning used by the Commission.

The first written Commission decision involving a transgender person concerned a music grammar school teacher who started employment with a school system in 1957 as a man and was fired in 1971 after transitioning to being a woman. In August 1972, the teacher filed a charge with the EEOC claiming the school board had discriminated against her on the basis of sex. Two years later, in September 1974, the EEOC issued its decision finding no cause to believe that discrimination had occurred on the basis of sex. The Commission explained its reasoning as follows:

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30. *See* Franklin, *supra* note 7, at 1358-1377.
31. Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1971).
32. Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (The Court noted that "[b]efore the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid." However, the Court explained, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." According to the Court, in "forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

> There is no . . . evidence of record which would lead us to conclude that Charging Party has alleged a case of discrimination because of sex, rather than a case of possible discrimination because of having undergone a particular operation. Although the operation in question was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase "discrimination because of sex," in accordance with its plain meaning, to connote discrimination because of gender.[33]

The EEOC issued the charging party a "right to sue" letter, which enabled her to continue her case in federal court. Her case became one of the first in which a district court found that discrimination based on transgender status would receive no protection under Title VII. The Commission's decision was appended by the defendant in the case as an exhibit to the court. In an unpublished opinion in 1975, *Grossman v. Bernards Township Board of Education*,[34] the district judge essentially tracked the reasoning of the Commission directly. The court observed that Grossman "was discharged by the defendant school board *not* because of her status as a female, but rather because of her *change* in sex from the male to the female gender."[35] The court also noted that there was no indication that Grossman had been fired "because of any stereotypical concepts about the ability of females to perform certain tasks."[36] After pointing out the "scarcity of legislative history" and its "reluctan[ce] to ascribe any import to the term 'sex' other than its plain meaning," the court summarily held that Title VII does not protect against discrimination based on a change in sex.[37] The court observed that the EEOC's determination, while not binding on the court, was also that the school board's action did not constitute discrimination on the basis of sex. Without opinion, the Third Circuit affirmed the dismissal of Grossman's lawsuit.

In the first case to receive a full appellate decision, *Holloway v. Arthur Anderson & Co.*,[38] a transgender woman asked her company to change her personnel records to reflect her female name. The company did so and then fired her. As the Ninth Circuit in *Holloway* stated: "the sole issue before us is whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."[39]

A majority of the Ninth Circuit panel found it simple to affirm the district court's grant of summary judgment for the employer. The majority noted the now familiar myth that "[t]here is a dearth of legislative history" regarding the sex provision in Title VII and that "[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."[40]

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33. EEOC Decisions (CCH) ¶6499 (Sept. 24, 1974).
34. Grossman v. Bernards Twp. Bd. of Educ., 11 FEP 1196, 1975 WL 302 (D.N.J. 1975).
35. *Id*. at 4 (emphasis in original).
36. *Id*.
37. *Id*.
38. Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).
39. *Id*. at 661.
40. *Id*. at 662.

Those traditional notions were very clear: **"**The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."[41] Anything beyond such an anti-classification prohibition would, as far as the panel majority was concerned, have to wait for Congress to act.

In his dissent, Judge Goodwin found it harder than the court majority to ignore the plain meaning of the statute. He agreed that "Congress probably never contemplated that Title VII would apply to transsexuals," but nonetheless stated his "dissent from the decision that the statute affords such plaintiffs no benefit."[42] As Judge Goodwin noted: "The only issue before us is whether a transsexual whose condition has not yet become stationary can state a claim under the statute if discharged because of her undertaking to change her sex. I read from the language of the statute itself that she can."[43]

The majority approach in *Holloway* became the prevailing one, however, without much difficulty. In 1984, largely following *Holloway's* reasoning, the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.* reversed a district court ruling finding that a transgender woman had experienced unlawful discrimination under Title VII.[44] Kenneth Ulane was hired as a pilot for Eastern Air Lines in 1968, and was fired after she transitioned to be Karen Frances Ulane in 1981. Judge Grady, hearing the case in the Northern District of Illinois, denied the company's motion to dismiss because he "believed the complaint adequately alleged that the discharge was related to sex or had something to do with sex."[45] In ultimately ruling in favor of Ulane, Judge Grady noted that he "continue[d] to hold that layman's reaction to the simple word and to the facts as alleged in the complaint."[46]

Acknowledging his own preconceptions about the meaning of "sex," Judge Grady also observed that, prior to his participation in the case, he would have had "no doubt that the question of sex was a very straightforward matter of whether you are male or female."[47] However, after listening to the evidence during the trial, he concluded that "the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."[48] Judge Grady also proffered his observation that he had "not a shadow of a doubt" that Congress had not contemplated covering transgender individuals under Title VII, but that "working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way."[49]

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41. *Id*. at 663.
42. *Id*. at 664. (Goodwin, J., dissenting).
43. *Id*.
44. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).
45. Ulane v. Eastern Airlines, Inc., 581 F.Supp. 821, 822 (N.D. IL1983).
46. *Id*.
47. *Id*. at 823.
48. *Id*. at 825.
49. *Id*.

The Seventh Circuit would have none of that. In a panel decision with no dissent, the court stated, "[w]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals and that the district court's order on this count therefore must be reversed for lack of jurisdiction."[50] According to the court, its duty was to "determine what Congress *intended* when it decided to outlaw discrimination based on sex."[51]

The Seventh Circuit began its analysis by noting that "[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."[52] It then concluded that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[53]

Anything beyond this "traditional concept" of sex discrimination was dismissed by the Seventh Circuit based on "[t]he total lack of legislative history supporting the sex amendment." As the court concluded, "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."[54] And that traditional concept did not include protecting transgender individuals.[55]

III. THE MIDDLE: MAYBE THE STATUTE MEANS A BIT OF WHAT IT SAYS

In October of 1993, Harvard Law School held an event named "Celebration 40," which celebrated forty years of women students at the institution.[56] During the event, I spoke on a panel with Anne Hopkins, the plaintiff in *Price Waterhouse*,[57] a landmark Supreme Court Title VII case. Anne Hopkins introduced me to her children in the audience, informing me that she was heterosexual and not a lesbian. The statement struck me as unusual, since most individuals do not ordinarily inform me of their sexual orientation. They assume that being heterosexual is the societal default, and they disclose their sexual orientation only if it differs from the societal norm.

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50. *Ulane*, 742 F.2d at 1084.
51. *Id*. (emphasis added).
52. *Id*. at 1085.
53. *Id*.
54. *Id*.
55. *Id*. *See also,* Sommers v. Budget Marketing, 667 F.2d 748 (8th Cir. 1982) (the court concluded that there was "no genuine issue of fact as to the plaintiff's sex at the time of discharge from employment," and that there was no dispute that Sommers is "for the purposes of Title VII, . . . male because she is an anatomical male.")
56. Rajath Shourie, *Ginsburg Speaks At Law Reunion: Justice Honored By Women Grads,* THE HARVARD CRIMSON, Oct. 4, 2003, *available at* http://www.thecrimson.com/article/1993/10/4/ginsburg-speaks-at-law-reunion-pus/.
57. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

For legal purposes, however, the fact that Hopkins was not a lesbian was a key variable of the *Price Waterhouse* case. Hopkins joined Price Waterhouse's Office of Government Services in Washington, D.C. in 1977 and was proposed for partnership five years later.[58] In a statement supporting her candidacy, the partners in her office "showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out 'virtually at the partner level.'"[59] During the trial, she had an official from the State Department "describe her as 'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative,'" while another praised her "decisiveness, broadmindedness, and 'intellectual clarity.'"[60]

At the time, Price Waterhouse had 662 partners at the firm, only seven of which were women. Also, of the 88 individuals proposed for partnership that year, only one -- Anne Hopkins -- was a woman.[61] As the trial judge found, in previous years, "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers - yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations."[62]

Nonetheless, the Washington office of Price Waterhouse clearly wanted Hopkins to be a partner and put her forward as a candidate. That year, 47 of the 88 candidates were accepted for partnership, 21 were rejected, and the rest, including Hopkins, were "held" over for reconsideration to the following year.[63] What a shock that must have been to Hopkins, given her track record at the company.

Hopkins did not take action against Price Waterhouse at the time. But as the trial evidence eventually showed, the partners at Price Waterhouse had expressed concerns about her interpersonal skills. Judge Gesell, the trial judge, noted that both supporters and opponents of Hopkins "'indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.'"[64] But it is hard to unpack some of those concerns from the partners' perception of how a woman was expected to act in the workplace.. As reported in the plurality Supreme Court decision:

> One partner described her as "macho"... another suggested that she "overcompensated for being a woman"... a third advised her to take "a course at charm school". . . Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate."[65]

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58. *Id*. at 232.
59. *Id*. at 233.
60. *Id*. at 234.
61. *Id*. at 233.
62. *Id*. at 236.
63. *Price Waterhouse*, 490 U.S. at 233.
64. *Id*. at 234-35.
65. *Id*. at 235.

Although it is uncertain whether Ann Hopkins knew about those comments before suing Price Waterhouse, it is certain that Thomas Beyer, the partner who had to tell Hopkins that she was being held over for a year, advised her that "in order to improve her chances for partnership, she should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[66] Hopkins presumably gritted her teeth and soldiered on, perhaps even with more makeup. But the following year, the partners in her office refused to propose her again for partnership.[67] At that point, in 1984, Hopkins sued Price Waterhouse under Title VII of the Civil Rights Act of 1964 for sex discrimination.

By 1984, courts had consistently rejected claims by gay men and lesbians who had experienced what they claimed to be sex discrimination, as well as claims by transgender individuals. Had Ann Hopkins been a lesbian (or had been perceived as such), it is quite possible that any comments about her not being sufficiently feminine would have been mixed in with comments about her actual or presumed sexual orientation, which would have made her case practically impossible to win. So the fact that Anne Hopkins was heterosexual and not a lesbian was, indeed, a very relevant fact.

It is interesting to note in *Price Waterhouse* how little attention was paid to the gender stereotyping analysis in the case. The Supreme Court accepted the case "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives,"[68] and the Court focused primarily on those factors. The Court's ruling on that issue garnered only a plurality (Justices Brennan, Marshall, Blackmun and Stevens), with Justices White and O'Connor concurring in the judgment and writing separately on the burden of proof issue.

However, the Justices had no difficulty with the gender stereotyping analysis. The plurality's legal analysis began as follows: "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[69] This was a "simple, but momentous" statement for the Supreme Court plurality to make. The reality is that courts, including the Supreme Court, had twisted themselves into pretzels over previous decades in order to avoid the plain meaning of Title VII's prohibition on sex discrimination by equating sexual and racial discrimination. But that cognitive conflict was strikingly absent in the *Price Waterhouse* decision. Instead, the plurality observed that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,"[70] and the plurality "[took] these words to mean that gender must be irrelevant to employment decisions."[71]

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66. *Id*.
67. *Id.* at 231-232.
68. *Id*. at 232.
69. *Price Waterhouse*, 490 U.S. at 239. The Court added that it was disregarding, for purposes of its discussion, "the special context of affirmative action." *Id.* at n. 3.
70. *Id*.
71. *Id*. at 240.

As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership, the plurality observed that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[72] With regard to the "legal relevance of sex stereotyping," the plurality simply returned to the sex stereotyping analysis that had been present in its 1978 case of *Los Angeles Department of Water & Power v. Manhart,* stating, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[73]

Neither Justice White nor Justice O'Connor, concurring in the judgment and writing separately on the burden of proof question, took issue with the simple and straightforward manner in which the plurality had set forth the Title VII requirement that gender could not be taken into account in employment decisions. Indeed, Justice O'Connor observed that there "is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, '[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.'"[74]

Even Justice Kennedy, writing for the dissent, did not take issue with the concept that sex stereotyping might result in a violation of Title VII's sex discrimination prohibition. Rather, he simply emphasized that there is "no independent cause of action for sex stereotyping" under Title VII, but that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent[,]"[75] that is, whether gender has inappropriately been taken into account under the law. Hence, seventeen years after the EEOC had stated in its guidelines that employers could not refuse "to hire an individual based on stereotyped characterizations of the sexes," new life was breathed into that prohibition by the *Price Waterhouse* decision.

The fact that the Supreme Court reached a conclusion in 1989 that had been unlikely in the mid to late 1970s is not surprising. A number of important social and cultural movements related to sex flourished in the intervening years. A resurgent feminist movement, for instance, sought to inject awareness of gender and its implications into every avenue of society – political, social, sexual, etc. Academic researchers began to examine the pervasive impact of gender socialization from an early age,[76] and to question the assumption that conforming to gender stereotypes was necessarily healthy or desirable.[77] Labor-force participation by women began to steadily increase and

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72. *Id*. at 250.
73. *Id*. at 251 (quoting *Sprogis*, 444 F.2d at 1198).
74. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) (citing 110 Cong. Rec. 7218 (1964)).
75. *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting).
76. *See* Richard A. Fabes et al., *Gender Development Research in* Sex Roles*: Historical Trends and Future Directions*, 64 SEX ROLES 826 (June 2011).
77. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L.J. 1, 19-37 (October 1995).

depictions of independent working women became common themes for television programs and films.[78]

Together, these changes helped to increase societal awareness of gender roles. While the perception of sexual differences had previously been limited to physical characteristics, the idea that societal notions and conceptions were also intrinsically related to sex was gaining ground in society. These cultural shifts gradually fed into the legal understanding of "sex" in Title VII.

It took a bit of time for courts to apply the *Price Waterhouse* analysis to cases brought once again by transgender individuals under Title VII. It was not until the Supreme Court held in *Oncale v. Sundowner Offshore Services* [79] that workplace harassment can violate Title VII's prohibition against sex discrimination even when the harasser and the harassed employee are of the same sex, that courts began to take seriously that, indeed, the *words* of Title VII mattered significantly – not just Congress' intent when it enacted the 1964 Civil Rights Act.

I am not personally an adherent of the theory of statutory construction espoused by Justice Scalia, the author of the *Oncale* decision; my theory is more in line with that of Justice Stevens, as set forth in his opinion in *INS v. Cardoza-Fonseca*.[80] But I believe Justice Scalia's consistent focus on statutory text has had the salutary effect of forcing courts, agencies and even Congress itself to focus more carefully on the words of a statute. I cannot imagine any court today pronouncing that "[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question."

Instead, the *words* of a statute must always be the beginning point of any statutory analysis. If the statutory text is not ambiguous or if the legislative history does not provide a clear and direct reason to disregard what appears to be the plain meaning of the statute, then agencies and courts should apply the words of the statute. If Congress wants a different result, it can always enact a change in that statutory text.

Justice Scalia's analysis in *Oncale* was thus understandably brief. He noted that nothing in the language of "Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[81] He observed that, while courts had "little trouble with that principle" in cases where an employee was passed over for a job or promotion, in cases of sexual harassment, courts had taken "a bewildering variety of stances."[82]

The lower courts had struggled with that question precisely because they were trying to decide what the 1964 Congress had intended with regard to same-sex harassment. However, as Justice Scalia explained:

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78. *See The Editors Desk: Women in the Labor Force, 1970-2009*, BUREAU OF LABOR STATISTICS (Jan. 5, 2011), http://www.bls.gov/opub/ted/2011/ted_20110105.htm.
79. Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).
80. 480 U.S. 421 (1987).
81. *Id*. at 79.
82. *Id*.

> [While] male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII ... statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[83] The combination of *Price Waterhouse* and *Oncale* freed the lower courts to look once again at the plain language of Title VII in cases brought by transgender individuals under that law, as well as under other sex discrimination laws.

The first breakthrough came just one year after *Oncale* was decided, when both the Ninth Circuit and the First Circuit applied the logic of *Price Waterhouse* to find protection for transgender women who had experienced adverse discrimination because of their lack of gender conformity. In *Schwenk v. Hartford*,[84] the Ninth Circuit upheld a claim by a transgender prisoner under the Gender Motivated Violence Act. Analogizing to Title VII, the court found that "federal courts (including this one) initially adopted the approach that sex is distinct from gender, and, as a result, held that Title VII barred discrimination based on the former but not on the latter."[85] However, the court noted that "[t]he initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."[86] Under *Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[87] As such, a transgender female prisoner who experienced violence by a guard for her failure to conform to behavior expected of her genital sex (male) had a valid claim under the law.

Similarly, in *Rosa v. West Bank & Trust Co.*,[88] the First Circuit applied the logic of *Price Waterhouse*. In *Rosa*, a transgender woman filed suit against a bank that denied her a loan because she presented as a woman, rather than in a manner that comported with her male identification cards.[89] The claim was brought under the Equal Credit Opportunity Act (ECOA), which prohibits discrimination "with respect to any aspect of a credit transaction[,] on the basis of race, color, religion, national origin, sex or marital status, or age."[90] Rosa alleged that the bank's decision to deny her a loan was based on gender-stereotypes and constituted sex discrimination under *Price Waterhouse*. The district court disagreed, holding that the bank's actions were based on Rosa's choice of clothing, not her sex.[91] The First Circuit reversed, concluding that the record could show that the bank's actions were motivated by gender stereotypes such as the fact that "Rosa's attire did not accord with his male gender."[92]

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83. *Id*.
84. Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).
85. *Id*. at 1201.
86. *Id*.
87. *Id*. at 1202.
88. Rosa v. West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).
89. *Id*. at 214.
90. *Id*. at 215 (citing 15 U.S.C. § 1691(a)).
91. *Id*. at 214.
92. *Id*. at 215-16. *See generally*, Katherine M. Franke, *Rosa v. Park West Bank: Do Clothes Really Make The Man?*, 7 MICH. J. GENDER & L. 141 (2001); Katherine M. Franke, *Amicus Curiae Brief of NOW Legal Defense and Educational Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal*, 7 MICH. J. GENDER & L. 163 (2001).

A few years following the opinions in *Schwenk* and *Rosa*, the Sixth Circuit adopted a similar line of reasoning in *Smith v. City of Salem*,[93] a Title VII case. Smith, a transgender woman, brought a claim of employment discrimination alleging she had experienced discrimination "both because of [her] gender non-conforming conduct and, more generally, because of [her] identification as a transsexual."[94] The district court rejected her claim, but the Sixth Circuit reversed. Noting that *"Price Waterhouse* . . . does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual," the Sixth Circuit reasoned that "discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman."[95] Both prior to and following these federal court cases, state courts had also begun interpreting state and local sex discrimination laws to protect transgender individuals who had experienced discrimination based on gender identity.[96]

Two additional breakthroughs in federal court occurred in 2008 and 2011 respectively. In the 2008 *Schroer v. Billington* case,[97] a federal district court in the District of Columbia held that the Library of Congress violated Title VII when it withdrew a job offer to Karen Schroer after it learned that she was transitioning from male to female. Unlike other courts, the judge in *Schroer* did not rely solely on a gender stereotyping theory as set forth in *Price Waterhouse*. Rather, Judge Robertson found, just as district court Judge Grady had in *Ulane* many years earlier, that discrimination against a transsexual because he or she is transsexual is "literally" discrimination "because of... sex."[98]

In 2011, the Eleventh Circuit in *Glenn v. Brumby*[99] found that a legislative attorney who had transitioned from male to female and was fired for that reason by the State of Georgia had proven a viable equal protection claim as sex discrimination. Relying on *Price Waterhouse*, the court stated that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . [a]ccordingly, discrimination against a transgender

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93. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
94. *Id*. at 571.
95. *Id*. at 574-75.
96. State courts had also been moving in this direction. *See* Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 372–73 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by the state law prohibition against sex discrimination); Doe ex rel. Doe v. Yuntis, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 392–96 (N.Y. Sup. Ct. 1995) (holding that harassment based on the fact an employee changed his sexual status also constituted sex discrimination under the New York statute that proscribes discrimination on the basis of "sex"); Jette v. Honey Farms Mini Market, No. 95-0421, 2001 WL 1602799, at *1 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (noting the holding that "discrimination against transsexuals because of their transsexuality is discrimination based on 'sex'"); accord Rentos v. Oce-Office Sys., No. 95-7908, 1996 WL 737215, at **8–9 (S.D.N.Y. Dec. 24, 1996) (relying on Maffei to hold that plaintiff could maintain a transgender discrimination claim under New York City and State law)
97. Schroer v. Billington, 577 F.Supp.2d 293, 308 (D.D.C. 2008).
98. *Id*. at 307-08.
99. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[100]

IV. THE PRESENT: THE STATUTE MEANS WHAT IT SAYS

In 2009, President Obama made four new nominations to the EEOC, which had been languishing without a full roster of Commissioners for some time. He named Jacqueline Berrien as Chair, Patrick David Lopez as General Counsel, Victoria Lipnic, and myself as Commissioners to fill the available Republican and Democratic seats, respectively.[101] The four of us started working as recess appointees in April 2010 and were subsequently confirmed by the Senate in December 2010 to our respective terms. With a full complement of Commissioners and a General Counsel, the EEOC took to its work with gusto – finishing work on a series of regulations and actively engaging in approving amicus briefs, reviewing subpoena determinations, approving litigation requests, and voting on opinions dealing with claims of discrimination brought by federal employees.

The first opportunity the Commission had to consider and vote on the question of coverage for transgender individuals under Title VII was in October 2011. In *Pacheco v. Freedom Buick GMC Truck*,[102] a transgender woman filed a lawsuit claiming that her employer had fired her from her job as a receptionist because of her transgender status. The defendant filed a motion for summary judgment, contending that discharging a person because she is transgender is not discrimination because of sex and hence not covered under Title VII.[103]

The General Counsel, acting at the request of the Commission, filed an amicus brief with the district court that put forward two arguments. First, under the reasoning of *Price Waterhouse*, discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of ... sex" under Title VII.[104] Second, following the reasoning in *Schroer*, discrimination because an individual intends to change, is changing, or has changed his or her sex, is likewise prohibited by the plain language of Title VII.[105] Although the court chose not to accept the Commission's brief, the court did deny the defendant's motion for summary judgment and the case was ultimately settled prior to trial.[106]

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100. *Id.* at 1316-17.

101. *See The Commission*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2013), *available at* http://www.eeoc.gov/eeoc/commission.cfm.

102. *Pacheco v. Freedom Buick GMC Truck*, No. 7:10-CV-116, Docket No. 1 (W.D. Tex. Sept. 27, 2010).

103. *Id.*

104. *Pacheco*, No 7:10-CV-116 (W.D. Tex. Oct. 13, 2011) (Brief of United States Equal Employment Commission as Amicus Curiae in Opposition to Summary Judgment).

105. *Id.*

106. *See Pacheco*, No 7:10-CV-116, Docket No. 34 (W.D. Tex. Nov. 1, 2011) (Order Denying EEOC's Motion for Leave to File Brief as Amicus Curie); *see also Pacheco*, No. 7:10-CV-116, Docket No. 33 (W.D. Tex. Oct. 28, 2011) (Order Denying Defendant's Motion for Summary Judgment). The *Pacheco* trial court denied the EEOC's motion for leave to file an amicus brief because (1) the EEOC's position in its brief was inconsistent with its administrative handling of the plaintiff's EEOC charge, which the EEOC had dismissed because it was unable to conclude from its investigation that Title VII was violated, and (2) the EEOC's motion was moot because the trial court had denied the motion for summary judgment a few days earlier due to a genuine issue of material fact. The manner in which the EEOC field staff investigated and dismissed Pacheco's charge of discrimination was consistent with EEOC rulings in earlier cases, as discussed above.

Approximately five months following the Commission's approval of the amicus brief in *Pacheco*, the Office of Federal Operations (OFO) sent the Commission a draft opinion of *Macy*[107] for its approval. In any case where the OFO determines that a particular issue warrants review and a vote by the full Commission, a draft opinion is sent to the Commission. The Commission reviews and analyzes the draft and makes whatever changes it deems necessary and appropriate. If no Commissioner calls for a vote within a designated time period, the opinion is approved by unanimous consent. If a Commissioner puts an opinion "on hold" and calls for a vote, each Commissioner's vote is recorded through an electronic system. The *Macy* decision was ultimately approved (following various revisions) through the unanimous consent system.

To understand the *Macy* decision, one must understand the Commission's role in federal sector discrimination claims. In 1972, Congress granted federal employees and applicants for federal employment an additional set of remedies regarding alleged employment discrimination, beyond the right to bring a claim in federal court. Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment [in the federal government] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.[108] The law then gives the EEOC authority to enforce this non-discrimination guarantee "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to issue regulations or instructions necessary to carry out its responsibilities.[109] The EEOC has issued a set of regulations that lay out the complaint process that agencies must make available to employees and applicants.[110] This process ends with the right to appeal directly to the five-member Commission to consider the facts of a complaint and issue a remedy.[111] If the Commission rules that an agency has engaged in unlawful discrimination, the agency must comply with the remedy that the Commission orders.

In *Macy*, the complainant, Mia Macy, had been a police detective in Phoenix, Arizona.[112] She decided to relocate to San Francisco and applied for a position with a ballistics lab at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The application process appeared to be going well until Macy informed the hiring contractor that although she had begun the application process as a male, she would begin work as a female. Five days later, Macy was informed that, due to federal budget reductions, the position was no longer available.[113]

Believing that her transgender status had been the cause for the position being withdrawn, Macy utilized the ATF process designed to comply with EEOC's regulations under Title VII.[114] Macy spoke with an equal employment opportunity counselor and explained she felt she had been discriminated against based on sex, describing her claim of discrimination as "change in gender

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107. *Macy*, *supra* note 1.
108. 42 U.S.C. § 2000e-16(a).
109. 42 U.S.C. § 2000e-16(b).
110. 29 C.F.R. § 1614 (called the "1614 process").
111. 29 C.F.R. § 1614.110.
112. *Macy*, *supra* note 1.
113. *Id*.
114. *Id*. at 2.

(from male to female)."[115] The counselor helped her fill out the formal complaint form, where Macy checked off "sex" as the basis of the complaint, checked the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis for her complaint.[116]

The problem for Macy was that "[t]he Department of Justice ha[d] one system for adjudicating claims of sex discrimination under Title VII, and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination."[117] The latter system was similar in many respects to the former, but did not include the same remedies, including the right to appeal to the Commission for a ruling that the agency would be required to comply with, should the Commission find that discrimination occurred.[118] The ATF wanted to deal with Macy's claim of discrimination under its system created for claims based on sexual orientation and gender identity because, according to the agency, those types of claims were not within the EEOC's jurisdiction.[119]

Macy then turned to the EEOC to appeal that question of jurisdiction.[120] The legal question before the Commission was simple and straightforward: did the Commission have the authority, under Title VII, to hear a claim of discrimination based on gender identity? The answer by the Commission was equally simple and straightforward: yes, it had jurisdiction to hear such a claim because discrimination on the basis of gender identity was simply a form of discrimination based on sex.[121]

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115. *Id*.
116. *Id*.
117. *Id*.
118. *Macy*, *supra* note 1, at 2.
119. *Id*. at 4.
120. *Id*.
121. *Id*. at 5 ("This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that 'an employer may not take gender into account in making an employment decision.'") (quoting *Price Waterhouse*, 490 U.S. at 242). The question before the Commission in *Macy* was whether a claim of discrimination on the basis of gender identity could proceed under the federal government's Title VII process. The Commission did not address the question of whether the ATF had discriminated against Ms. Macy in this instance. That determination was made approximately one year later in a Final Agency Decision ("FAD") issued by the Department of Justice. The FAD stated that the ATF had "discriminated against complainant based on her transgender status, and thus her sex, when it stopped complainant's further participation in the hiring process" and ordered the Bureau to offer Ms. Macy a position as a Ballistics Forensic Technician at the Walnut Creek Lab and provide back pay with interest. Department of Justice Final Decision in the case of Mia Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, Agency Complaint No. ATF-2011-00751 *available at* http://transgenderlawcenter.org/wp-content/uploads/2013/ 07/DOJ-decision-redacted.pdf.

In one respect, the Commission's decision in *Macy* was just the Commission catching up with federal and state courts that had concluded that the gender stereotyping theory of *Price Waterhouse* included protection for transgender individuals who had been discriminated against on the basis of their transgender status. The Commission, after reviewing the cases decided by the Ninth, First, and Sixth Circuits, as well as cases decided by various district courts and state courts, concluded with the following paragraph from the Eleventh Circuit's decision in *Glenn*:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)... There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.[122]

Thus, one basis for the Commission's decision that a discrimination claim based on transgender status is a sex discrimination claim relies on *Price Waterhouse*'s theory of sex stereotyping. The Commission's decision makes clear, however, that no proof of gender stereotyping is needed beyond the fact that discrimination has occurred *because of* the person's transgender status or intent to transition.[123] As the Eleventh Circuit correctly noted, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[124]

However, the Commission's decision in *Macy* also should provide clarity by returning to the core principle that *Price Waterhouse's* gender stereotyping analysis was based on in the first place -- that Title VII prohibits employers from taking gender into account, except in the limited case of applying a bona fide occupational qualification. As the Supreme Court made clear in *Price Waterhouse*, statements expressing gender stereotypes are evidence that gender has been taken into account in violation of the act.[125]

The Commission's statement in *Macy* made it clear that it is possible for a transgender person to make out a claim based on the very simple and direct evidence that an employer has inappropriately taken gender into account in an employment decision:

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122. *Macy*, *supra* note 1, at 9 (quoting *Glenn*, 663 F.3d at 1316).

123. *Id*. at 10 (emphasis added). (?)

124. *Id*. at 9.

125. *Id*. at 10 ("Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, 'sex stereotyping' is not itself an independent cause of action. As the *Price Waterhouse* Court noted, while 'stereotyped remarks can certainly be *evidence* that gender played a part' in an adverse employment action, the central question is always whether the 'employer actually relied on [the employee's] gender in making its decision.'").

> [I]f Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman - she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.[126]

In other words, the plain meaning of the statute would be applied to determine whether sex had been taken into account in violation of the statute.

This type of analysis is a simple case of applying the sex discrimination provision of Title VII in the same manner as the other protected characteristics, such as race or religion. Indeed, as the Commission observed in *Macy*,

> In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype-although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.[127]

In a similar fashion, employers are not permitted to use sex as a basis for employment decisions, except in the application of a bona fide occupational qualification or pursuant to an appropriate affirmative action remedy.

V. CONCLUSION

Following the passage of Title VII, the EEOC – and more importantly, the courts – struggled for ways to constrain the plain meaning of the statute so that employers could continue to make decisions based on societal expectations of the role that women and men should play in the family. Various legal mechanisms were used to achieve that goal, including perpetuation of the myth that adding "sex" to the statute had been done solely to stop passage of the law and that there was little legislative history to discern Congress' intent in adopting the provision.

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126. *Macy*, *supra* note 1, at 10.
127. *Id*. at 11.

Thankfully, changes in society occurred, including the rise of a vigorous feminist movement that pushed for changes in societal expectations and practices. By the time the Supreme Court decided the *Price Waterhouse* case in 1989, the reality of women's full workforce participation had been sufficiently accepted in society that no Justice had difficulty accepting that the sex discrimination provision in the law should be read identically to the other provisions of the law. The Supreme Court thus embraced the basic requirement of Title VII's sex discrimination prohibition: that apart from a limited bona fide occupational qualification exception, employers may not take gender into account in making employment decisions.

The plain meaning of the term "sex" in Title VII has always been powerful. But it is only now that society has begun to evolve significantly in its understanding and acceptance of gender identity, that the power of the plain meaning of sex discrimination can offer transgender people important protection against discrimination.

A RETROSPECTIVE: MY JOURNEY THROUGH PRIVATE PRACTICE, THE NLRB, THE FMCS AND TRUST

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1. Retrospective.

A retrospective, by definition, seeks to analyze the past to draw lessons for the future. In the matter before us today, it is for me to draw lessons from my career to inform you of significant conclusions which might be helpful to you. This is a difficult undertaking.

A helpful allegory.

2. Quantifying My Career.

A thumbnail history from which to try to extract meaningful lessons. What have I learned from the past 53 years of lawyering that I would carry into the next 53 years? The cliff-note facts:

Approximately 200 arbitration cases
Approximately 200 collective bargaining negotiations
As a practitioner, only 25-30 NLRB or state labor board cases
60-70 employment discrimination cases; including 25 jury trials
5 years as a Member, then Chairman, of the NLRB
3 years as Director of the FMCS

3. A Traditional Labor Practice.

Into the traditional labor practice in the mid-1960s.

Learning from older lawyers who developed it from the 1950s.

In a unionized setting, the total of which contained a majority of private sector employees.

The principal goal was to reach agreement, which meant "principled compromise".

As a young lawyer I began with small bargaining units, but small or big representing one party to a marriage which the law and economic reality required to continue. Size didn't matter in building the skill and techniques of constructing a collective bargaining agreement. The process puts a premium on building trust, credibility, and fair dealing.

You and the lawyer or business agent on the other side would figure out a way to resolve issues, in bargaining or grievance negotiations.

Honesty and candor had to be present. No trickery but agreed-upon ambiguity was a useful device.

During these 10-15 formative years I handled no employment discrimination cases, nor did any other labor lawyers that I know.

Trial skills were developed in arbitration where there was almost no rules; and in NLRB hearings where the respondent's attorney had to mostly sit there and say OK.

Levels of trust, and even friendship developed between adversaries.

I was fortunate to represent many employers for 20 or more years and the adversaries in those representations were in place for almost as long.

4. The Rise of Employment Discrimination Litigation (and Lawyers).

Enter the law and practice of employment discrimination litigation.

An overwhelming change, somewhat coinciding with the reduction of the extent of union organization and the decline of traditional labor practice.

Federal District Court and appellate court practice ascending, bringing:

Federal rules of civil procedure
Evidence
Discovery
Motion practice
JURIES

5. Practice Transition.

Lawyers, like the human species in general, adapt or die. I adapted but held on to traditional labor practice also, but with increasing difficulty in time management, knowledge and skills maintenance, and billing issues (increasing litigation causes increased legal fees which clients will pay but not at that rate for traditional labor work).

1997 to the NLRB; then to FMCS in 2002

5 jury trials in the 12 months immediately prior to the NLRB appointment (I looked at the NLRB term as a sabbatical.)

Faragher v. Boca Raton – A clinical case for what the practice of employment law had become.

6. My NLRB Member/Chairman Experience.

A lost 5 years.

7. My FMCS Director Experience and Beyond.

Found myself in the role for which I had been unknowingly preparing for 40 years: Mediation

Skills and techniques necessary to the successful negotiation of a collective bargaining agreement on behalf of a party are remarkably similar to those that a mediator uses to produce an agreement.

You are an advocate in both settings but mediation is harder because you have to find ways to ring both parties along rather than just your client.

Any negotiation requires the recognition and application of leverage; how and when to use it, and convince both sides of its efficacy.

Only years of collective bargaining experience will give you the ability to find it and use it to create a collective bargaining agreement, and in some cases a litigation settlement agreement.

West Coast Ports Negotiation

CNN/NLRB litigation settlement negotiation

Return to the allegory.