

Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident

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INTRODUCTION

Reading court opinions or academic literature, one is left with a near-uniform picture of how Congress came to prohibit sex discrimination in employment: as a joke, offered to sabotage the entire Civil Rights Act of 1964. In the words of one district court: “[T]he late amendment that added ‘sex’ to one portion of the proposed civil rights law came from a powerful Congressman from Virginia who may have been attempting to derail the proposed law.”¹ A sex discrimination hornbook puts it this way: “The amendment adding sex was introduced just two days before approval of Title

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1. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

VII by Representative Howard Smith of Virginia. . . . [who] was accused by some of wishing to sabotage its passage."² Another employment law scholar tells a similar version of the legislative history: "It is difficult to capture in the dry text the mocking condescension with which Congressman Smith of Virginia offered the amendment"³

Several scholars have demonstrated that this story is actually untrue.⁴ "Sex" was added to the list of prohibited classifications in Title VII after calculated lobbying from women's groups, and with the support of most female members of the House of Representatives. Despite this documented history, courts and scholars continue to retell the same stock story, stating that the sex provision has no legislative history, and that this absence is explained by the fact that the provision's sponsor was engaged in a parliamentary ploy that happened to become law.⁵ Clearly, the stock story has staying power.

The question thus looms: How did the accident theory rise to the level of conventional wisdom? Surprisingly, this has remained an unanswered puzzle in the annals of sex discrimination law. This Comment attempts to fill the void. It looks at how the stock story of the sex provision's legislative history developed and how that story has been used by courts. I find that the stock story became popular in the years immediately after Title VII was passed, and that proponents of women's rights actively tried to contradict it. The fight over the telling of the legislative history took place in part to set the record straight and in part to get the Equal Employment Opportunity Commission (EEOC) to take sex discrimination seriously. Despite the initial battle over the telling of the legislative history, ultimately the stock story won out. A major reason seems to be that this account was retold in the sources courts initially drew on in interpreting the novel statute. These sources included early law review articles about Title VII, which courts cited and repeated to the point that the stock story became conventional judicial wisdom. The sources also featured the pages of the Congressional Record, which included statements by opponents of the amendment who questioned the motives of its sponsor. At the same time, context likely influenced why judges found these sources to be plausible. The federal bench was largely male, and there was no agreed-upon explanation of

2. CLAIRE SHERMAN THOMAS, *SEX DISCRIMINATION IN A NUTSHELL* 217 (2d ed. 1991).

3. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, in *FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW: INTERDISCIPLINARY READERS IN LAW* 338, 338 (John J. Donohue III ed., 1997).

4. See CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 176-79 (1988); 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).

5. For discussion of the fact that courts continue to cite the joke story, see Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 *WM. & MARY J. WOMEN & L.* 137 (1997).

sex discrimination from which judges could draw.⁶ Not until several decades after Title VII's passage did a few historians debunk this account.

Part I of this Comment discusses the history of how "sex" was added to Title VII. This discussion draws on the work of other scholars and summarizes their research into women's groups' behind-the-scenes lobbying efforts to include sex as a prohibited classification. It also describes the House's floor debate about the sex provision.

Part II discusses the history of how the stock story developed. This section includes original historical research and provides a window into the first years in which Title VII was in effect that has, until now, been unexplored. I find that the stock story developed, in part, because top officials at the EEOC regularly described the sex provision as an historical accident, introduced either as a joke or as part of an effort to kill the civil rights bill. This account was repeated in turn by news organizations. The accident account did not go unchallenged. Women's advocates actively tried to prove the inaccuracy of that story. For a period of time, the legislative history of the sex provision was a major EEOC controversy.

Part III examines how courts treated the question of legislative history in the early sex discrimination cases. Over time, courts repeated different iterations of the myth. Some courts described the sex provision as accidentally inserted into the Civil Rights Act. Other courts suggested that the sponsor of the sex provision knew what he was doing, but that he proposed the amendment to the Civil Rights Act either as a joke or in hopes that the provision was so toxic that the overall legislative package would never become law. Ultimately, this Part aims to answer the question of why courts came to repeat the myth. In developing this explanation, I focus on both the sources judges relied upon in consulting the sex provision's legislative history, and how the stock story shaped judges' reasoning.

Part IV explores the varied and malleable uses to which the stock story was put. This section illustrates the many different ways the stock story has been told, and the various roles it has played in judicial reasoning. Indeed, the stock story has been used in different cases to reach both liberal and conservative results. To illustrate this malleability, this Part describes one particular judge's use of the stock story: former Chief Justice William Rehnquist.

Part V concludes by situating this story within the debate over the use of legislative history in statutory interpretation. Given that the legislative history of the sex provision has been socially constructed, with courts, agencies, and political actors building off each other, this Part questions whether the debate

6. For a discussion of the lack of a popular sex discrimination narrative, see Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY AND THE LAW* (Austin Sarat & Thomas R. Kearns eds., 1999).

over legislative history appropriately focuses on judicial use of legislative materials. It concludes by exploring the implications of the social construction of legislative history.

I. THE LEGISLATIVE HISTORY: HOW SEX DISCRIMINATION BECAME UNLAWFUL

The bill that became the Civil Rights Act of 1964 was considered and debated by the House Judiciary Committee for twenty-two days and by the House Rules Committee for seven days before it landed on the floor for debate.⁷ On the ninth day of floor debate, Representative Howard W. Smith—a Virginia Democrat who, it should be noted, opposed the civil rights bill—proposed an amendment to add “sex” to the list of prohibited classifications in Title VII.⁸

When Smith introduced the sex amendment on February 8, 1964, he said it was necessary to “prevent discrimination against another minority group, the women,” and that “it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation.”⁹ He then went on to read a letter, which he said he had recently received from a “lady [who] has a real grievance.”¹⁰ The letter complained that women currently outnumber men, that Congress and the President have made the situation worse by engaging in wars that further the imbalance, and that the imbalance prevents women from obtaining their “‘right’ to happiness.”¹¹ Smith’s comments evoked laughter, though he insisted that he was serious.

Representative Emmanuel Celler, the Democratic floor manager in support of the civil rights bill, spoke next. “I can say as a result of 49 years of experience—and I celebrate my 50th wedding anniversary next year—that women, indeed, are not in the minority in my house . . . I usually have the last two words, and those words are, ‘Yes, dear.’”¹² Celler then explained why he opposed the amendment, citing the “biological differences between the sexes.”¹³

A number of female members then rose in favor of the amendment. Historian Carl I. Brauer says that the mood of the debate shifted at this point, from one of lightheartedness to one of seriousness.¹⁴ “I feel as a white woman when this bill has passed this House and the Senate and has been signed by the

7. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 11 (1968).

8. *Id.* at 10.

9. *Id.* at 3213.

10. *Id.*

11. *Id.* at 3214.

12. *Id.*

13. *Id.* at 3214-15.

14. Brauer, *supra* note 4, at 49.

President that white women will be the last at the hiring gate,” said Representative Martha W. Griffiths, Democrat of Michigan. Representative Katharine Price Collier St. George, Republican of New York, joined Griffiths in favor of the amendment. “Why should women be denied equality of opportunity? Why should women be denied equal pay for equal work? That is all we are asking.”¹⁵ In total, eleven of the twelve female House members spoke in support of the amendment.¹⁶

Edith Green, Democrat of Oregon, argued against the amendment. She said she believed in women’s rights, and described her support for the Equal Pay Act of 1963. Nonetheless, she said, the civil rights bill should pass as it was. “For every discrimination that has been made against a woman in this country, there has been 10 times as much discrimination against the Negro,”¹⁷ she said. She then questioned the motives of the amendment’s sponsors: “[The amendment] will clutter up the bill and it may—very well—be used to help destroy this section of the bill by some of the very people who today support it.”¹⁸ Another prominent woman was also on record opposing the Smith amendment. Rep. Celler read into the record a letter from the Assistant Secretary of Labor, Esther Peterson, which stated that the President’s Commission on the Status of Women had concluded that sex discrimination should be treated in a policy separate from race discrimination.¹⁹

Smith then regained the floor. This time his tone was more serious.²⁰ He argued that white women would be at a disadvantage if Title VII passed without the sex amendment. An employer choosing between a white and black female candidate would be in the position, according to Smith, of saying, “[w]ell, now, if I hire the colored woman I will not be in any trouble, but if I do not hire the colored woman and hire the white woman, then the [EEOC] is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit.”²¹

15. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 7, at 3221.

16. HARRISON, *supra* note 4, at 178-79.

17. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 7, at 3222.

18. *Id.*

19. *Id.* at 3214-15.

20. Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 462 (1981).

21. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 7, at 3226. While Smith’s statement reveals a concern for opportunities for white women, his reasoning makes little logical sense. In the hypothetical that Smith offers, adding “sex” to Title VII does not change the employer’s exposure to liability. Without the sex amendment, the employer would be in violation of Title VII if it rejected a black woman because of her race. With the sex amendment, the employer would also face the possibility of a lawsuit: rejecting a black woman in favor of a white woman because of the white woman’s race constitutes unlawful discrimination based on race. Contrary to Smith’s logic, black women have an advantage with or without the sex amendment.

The amendment was then put to a vote. One hundred and sixty-eight members voted in favor. One hundred and thirty-three voted against.²² It passed.

Behind the scenes, however, the maneuvering for the amendment had been more involved. The National Woman's Party (NWP)—an organization that was committed to the overarching goal of passing the Equal Rights Amendment (ERA)²³—had begun pushing for a sex provision in 1963. That was when, in response to the House Judiciary Committee's approval of a civil rights bill that did not protect against sex discrimination, the NWP passed a resolution bemoaning that the proposed legislation "would not even give protection against discrimination . . . to a *White Woman*."²⁴

On December 10, 1963, members of the NWP wrote letters to Smith urging that he add "sex" to a pending civil rights bill.²⁵ Smith was chosen to propose the amendment for several reasons. He was a powerful Southerner and chair of the Rules Committee. He had a friendship with NWP leader Alice Paul. He had a nearly twenty-year record of supporting the Equal Rights Amendment.²⁶ And he was thought to be able to attract Southern support.²⁷

On January 9, 1964, during Rules Committee hearings on the civil rights bill, Smith asked Celler why the proposed legislation did not also ban sex discrimination. Celler did not answer the question, prompting Smith to say, "I think I will offer an amendment. The National Women's [sic] Party were serious about it."²⁸ Several weeks later, Smith was interviewed on *Meet the Press* by Elisabeth May Craig, a journalist who was a member of the NWP. Craig posed the question: "It was brought out before your Committee that the bill does not provide that women shall have equal rights. Would you try to get them for us in the bill?" Smith responded, "Well, maybe I would." "An amendment on the floor?" Craig asked. "I might do that," Smith responded.²⁹ The NWP's Alice Paul followed up by writing both Craig and Smith to express her appreciation.³⁰

Meanwhile, the Johnson Administration was bothered that the amendment came from Smith, an opponent of the civil rights bill. The administration was also worried that too many amendments would bog down the overall

22. *Id.* at 3228.

23. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 206 (1990).

24. HARRISON, *supra* note 4, at 176.

25. Brauer, *supra* note 4, at 41-42.

26. *Id.* at 42.

27. JO FREEMAN, *WE WILL BE HEARD: WOMEN'S STRUGGLES FOR POLITICAL POWER IN THE UNITED STATES* 180 (2008).

28. *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 125 (1964). This account is provided in Brauer, *supra* note 4, at 43-44.

29. This interview is recounted in Brauer, *supra* note 4, at 44, and HARRISON, *supra* note 4, at 177.

30. Brauer, *supra* note 4, at 44.

legislation.³¹ It appears that Green's opposition to the sex provision came after the Johnson administration persuaded her to oppose the amendment.³² Peterson had similarly been asked to write in opposition.³³

Nonetheless, the sex amendment ultimately passed the vote on the House floor. Shortly thereafter, the House rejected an amendment that would have restricted the sex ban to discrimination based "solely" on sex.³⁴ Next, the House approved the overall bill. Of all the men who spoke in favor of the sex amendment, only one voted in favor of the civil rights legislation.³⁵

Once in the Senate, proponents of the sex amendment still had an uphill battle. Senate Minority Leader Everett Dirksen, Republican of Illinois, spoke against the sex provision.³⁶ But the NWP continued to advocate for the provision's passage.³⁷ The group enlisted the support of one of the two female members of the Senate, Margaret Chase Smith, Republican of Maine.³⁸ Assistant Labor Secretary Peterson, at this stage, began to lobby in favor of the amendment, apparently believing that the sex provision no longer threatened the overall civil rights bill.³⁹ And Johnson, who wanted to avoid a conference committee on the legislation,⁴⁰ tried to persuade the Senate to accept the House bill with as few further amendments as possible.⁴¹ In other words, at the Senate stage, civil rights proponents no longer believed that the sex provision made passing the Act more difficult. Instead, they believed that its removal would complicate the chances of passage. On June 17, 1964, the Senate approved the civil rights legislation, with sex included as one of the prohibited classifications in Title VII.⁴² On July 2, instead of going through Committee, and after one hour of debate, the House adopted the Senate's version of the bill.⁴³ Johnson signed the legislation that same day.⁴⁴

31. *Id.* at 46.

32. *Id.*

33. *Id.*

34. 110 CONG. REC. 2728, 13825 (1964).

35. HARRISON, *supra* note 4, at 179.

36. *Id.* at 181; Brauer, *supra* note 4, at 54.

37. HARRISON, *supra* note 4, at 181.

38. *Id.*

39. Brauer, *supra* note 4, at 52.

40. HARRISON, *supra* note 4, at 180.

41. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 24 (1999).

42. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 7, at 11.

43. *Id.*

44. *Id.*

II. ORIGINS OF A MYTH: WHERE THE ACCIDENT STORY CAME FROM, AND THE BATTLE OVER ITS TELLING

In all the drama over the passage of the Civil Rights Act, the sex discrimination provision received relatively little notice. The largest and most public battle involved race, and the bill was widely understood as a showdown between segregationists and anti-segregationists. As a result, little attention was paid to the sex discrimination ban until a year later, when Title VII went into effect and the EEOC opened its doors with the mission of enforcing the new civil rights law. Despite the high expectations of Alice Paul and the NWP, the first generation of leaders at the EEOC had little interest in enforcing Title VII's ban on sex discrimination.

It was during this period that the stock story first spread. While it is impossible to identify the first time it was uttered, EEOC officials played a major role in disseminating it. In public fora, top EEOC officials described the sex discrimination ban as a parliamentary fluke perpetuated on the country by a racist Congressman. Sometimes such comments were made in defense of EEOC policy positions, and sometimes they were made in discussions about how to interpret the new statute.⁴⁵ For instance, a *New York Times* article reported on remarks made by Franklin D. Roosevelt, Jr., the chair of the EEOC, speaking at a conference of the National Council of Women: "[T]he provision in the law covering women was inserted at the last minute because 'Howard Smith, certainly no friend of equal opportunity,' wanted to create 'ridicule and confusion.'" Roosevelt continued: "Because of the last-minute introduction of the provision covering women, it has no legislative history, was preceded by no hearings in Congress, and 'involves a number of very serious problems' of interpretation, implementation, and jurisdiction."⁴⁶ Herman Edelsberg, the Executive Director of the EEOC, told a labor conference that the sex provision in Title VII was a "fluke" and "conceived out of wedlock,"⁴⁷ and also that sex discrimination "doesn't carry the same moral overtones as race—and there are few women's protest organizations."⁴⁸ Richard K. Berg, another top EEOC official, argued that the particular legislative history surrounding the sex provision made the sex discrimination ban an "orphan" within the larger statute.⁴⁹ Berg also publicly fretted over how Title VII affected the "bunny

45. While this Comment is original in describing the efforts of women's groups to counter the stock story, other scholars have documented the early EEOC's dismissive stance on the sex provision. See, e.g., GRAHAM, *supra* note 23, at 205-32; HARRISON, *supra* note 4, at 187-204.

46. Edith Evans Asbury, *Protest Proposed on Women's Jobs*, N.Y. TIMES, Oct. 13, 1965.

47. 61 Lab. Rel. Rep. (BNA) 253-255 (Apr. 26, 1966) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 1).

48. Letter from Bessie Margolin, Assoc. Solicitor, U.S. Dept. of Labor, to Marguerite Rawalt (May 26, 1966) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 11).

49. Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 79 (1964).

problem”—that is, whether a Playboy club would be required to hire male applicants for “bunny” positions. “The bunny question is interesting because everybody considers the answer to be obvious,” he said at a public event, adding that the obvious answer would be that the man could not get the job.⁵⁰

When women’s rights advocates criticized the EEOC, officials defended themselves with similar logic. They said that because the sex discrimination provision was such a fluke, they had no choice but to enforce it slowly and with caution. One official defended the agency to a reporter by saying that the EEOC was doing the job of enforcing the sex discrimination ban “despite an inadequate legislative history on the subject.”⁵¹

Moreover, official EEOC publications repeated a version of the stock story. In December 1965, the EEOC issued its first Guidelines on Discrimination Because of Sex. In the introductory section, the EEOC proclaimed that the rules were particularly hard to draft because of a lack of legislative history. “The Commission has proceeded with caution in interpreting the scope and application [of the sex discrimination ban]. . . . We are mindful that there is little legislative history to serve as a guide to the intent of Congress in this area.”⁵² The Guidelines then expressed concern for the effects that the provision might have. “An overly literal interpretation of the prohibition might disrupt longstanding employment practices. . . . These guidelines are an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers.”⁵³ The tone of the guidelines bordered on regret. “[W]here the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker.”⁵⁴

The popular press also played a role in cementing the stock story. For one, the media provided an audience for remarks by Roosevelt, Berg, and Edelsberg. But the media also repeated the stock story. In an article announcing that Title VII was about to go into effect, the *New York Times* reported the joke theory: “Although the [EEOC] will be concerned primarily with racial discrimination, the word ‘sex,’ which was inserted in the law—some said with tongue in cheek—by Representative Howard W. Smith, Democrat of Virginia, is expected to create some problems for the agency.”⁵⁵ The story then described how Roosevelt responded to a question about the sex provision at a news

50. John Herbers, *For Instance, Can She Pitch for Mets?*, N.Y. TIMES, Aug. 20, 1965, at 1.

51. UPI, *Woman Solon Criticizes Agency on Bias*, SAN ANTONIO TEX. LIGHT, June 21, 1966 (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16).

52. Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926, 14,927 (Dec. 2, 1965) [hereinafter Guidelines].

53. *Id.* at 14,927.

54. *Id.*

55. John Herbers, *Bans on Job Bias Effective Today*, N.Y. TIMES, July 2, 1965, at 32.

conference. "What about sex?" he said, laughing. "Don't get me started. I'm all for it."⁵⁶

Other news organizations repeated the joke theory. The *Los Angeles Times* put it this way: "[A]t the last minute in a parliamentary maneuver by Southern opponents of the civil rights law, the word 'sex' was put in the measure."⁵⁷ A union newspaper offered the sabotage theory for why the amendment was proposed. "Smith, who was defeated in his campaign for re-election in 1966, was a bitter opponent of the Civil Rights Bill. He apparently reasoned that such an amendment could well kill the bill entirely. So, he introduced it, but the amendment passed and so did Title VII . . ."⁵⁸ In the pages of the *New Republic*, the legislative history of the amendment was mocked and used as part of an argument not to enforce the ban on sex discrimination. "Why should a mischievous joke perpetrated on the floor of the House of Representatives be treated by a responsible administrative body [the EEOC] with this kind of seriousness?"⁵⁹ A *Washington Post* editorial said that "Congress adopted the 'sex' amendment to some degree in a spirit of levity."⁶⁰

All of this occurred in the context of anxiety—in retrospect, much of it amusing—about how Title VII might rewrite gender roles. One *New York Times* editorial described the sex discrimination ban as a problem "that may be bigger than any of us." The editorial fretted that Title VII would "demand[] a wholesale rewriting of the language" such that "[e]verything has to be neutered. Housemaid becomes a dirty word; it is, of course, discriminatory. Handyman must disappear from the language . . . No more milkman, iceman, serviceman, foreman or pressman." Not only that, but "[t]he Rockettes may become bi-sexual, and a pity, too."⁶¹ Another *New York Times* story typified the view that certain jobs were for women, and others were for men. The story reported that businessmen "have imagined all kinds of possibilities, such as women applying for jobs as truck drivers and men applying to be clerks in a women's clothing store."⁶² A story in a Wisconsin newspaper pondered the "morality" and "logic" of prohibiting sex discrimination. Reporting on a clergy economic education workshop, the newspaper recounted:

A clergyman questioned the morality of strict adherence to the law under all circumstances. This example was offered: A man and a woman work for a firm. The woman, who is single, has a little more

56. *Id.*

57. Harry Bernstein, *Protective Laws for Women Seen at Stake: Debate Grows over Job Discrimination Due to Sex*, L.A. TIMES, Mar. 7, 1966, at A1.

58. *The Rocky Road to Sex Equality, or Woman's Civil Rights Today*, MISS. TEAMSTER, Apr. 28, 1967 (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16).

59. *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10.

60. Editorial, *No Laughing Matter*, WASH. POST, Oct. 12, 1965, at A16.

61. Editorial, *De-Sexing the Job Market*, N.Y. TIMES, Aug. 21, 1965, at 20.

62. Herbers, *supra* note 55.

seniority than the man, who is the father of five children. The company has a lay-off. Does the law require that the man be laid off first?⁶³

In national politics, some attention had been paid to women's issues, but women's advocates were deeply divided. In one camp was the President's Commission on the Status of Women (PCSW), established by President Kennedy in 1961 and dominated by Assistant Secretary of Labor Esther Peterson.⁶⁴ The PCSW was a driving force behind the Equal Pay Act in 1963, a compromise effort to ensure that women were equally compensated, exemplifying the PCSW's approach of "specific bills for specific ills."⁶⁵ In the other camp were ERA feminists (organized through the NWP) who sought complete legal recognition of women's rights.⁶⁶ The PCSW often worked against the NWP agenda, and lobbied against the ERA.⁶⁷ It also initially opposed adding "sex" to Title VII out of concern that the amendment would undermine the entire civil rights bill and also threaten protective state labor laws for women.⁶⁸

Meanwhile, the NWP and other women's advocates waged something of a public relations battle, challenging what was becoming the standard account of the sex provision's legislative history.⁶⁹ In response to a *Washington Post* editorial mocking the sex discrimination ban as a joke, the NWP fired off a rebuttal letter to the editor of the newspaper:

The insinuation that Congress extended protection against employment discriminations to women workers as a joke is an insult to the United States Congress Our organization was one of a number of organizations and persons who favored this amendment and urged its passage. . . . Women workers have just as much right to support themselves, their little children, and their elderly parents as do other American citizens.⁷⁰

The organization then sent a copy of the letter to Roosevelt, urging that "[w]e would be very grateful if you would use your influence to clarify the misconceptions that this editorial will inspire."⁷¹

63. Paul R. La Rocque, *Sex Bias Law Raises Moral, Logic Issues*, MILWAUKEE, WIS. J., June 10, 1966 (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16).

64. See GRAHAM, *supra* note 23, at 207; HARRISON, *supra* note 4, at 109-65.

65. GRAHAM, *supra* note 23, at 207; HARRISON, *supra* note 4, at 104-09.

66. For a discussion of the two camps of women's advocates, see HARRISON, *supra* note 4, at 109-37.

67. *Id.* at 120.

68. GRAHAM, *supra* note 23, at 206-07.

69. Indeed, the National Organization for Women (NOW) was formed in part out of frustration with the EEOC's dismissive attitude toward sex discrimination. See HARRISON, *supra* note 4, at 192-95.

70. Letter to the Editor of the *Washington Post*, undated (on file with the National Woman's Party papers).

71. Letter from Ruth Gage-Colby, Member, Nat'l Council, Nat'l Woman's Party, to Franklin D. Roosevelt, Jr., Chairman, Equal Employment Opportunity Comm'n (Nov. 6, 1965) (on file with the National Woman's Party papers).

Indeed, women's groups saw the stock story as an attempt to ridicule the significance and mandate of the law. The National Organization for Women (NOW) wrote to the Commissioners of the EEOC, noting that legislative history was being used to undermine the prohibition on sex discrimination: "Too often the unequal status of women is treated lightly, and the Title VII provisions against sex discrimination are dismissed as a fluke and a nuisance. We strongly urge the Equal Employment Opportunity Commission to lead the country away from this atmosphere of disregard . . ." ⁷² The NWP also observed a link between opponents of the law and the joke account. In letters to participants in an upcoming bar association conference, a member of the organization's national council addressed the prevalence of the joke theory. She said that opponents of women's rights "allege that this provision, which was so urgently needed to protect working women, was passed as a joke," and "the misinformation . . . has been disseminated deliberately by persons hostile to the principles of justice and equality." ⁷³

Representative Martha Griffiths, who had spoken in favor of Smith's sex amendment in 1964, returned to the House floor in 1966 to criticize scathingly the EEOC's use of the provision's legislative history as a rationale for its lax enforcement. She highlighted, in particular, EEOC officials' description of the sex provision as being a "fluke" and as part of an effort to sink the civil rights bill. "I reject that slur on Congress," Griffiths said. ⁷⁴ She then offered an argument for why the provision was not, in fact, happenstance. The year before Title VII was passed, Congress had enacted the Equal Pay Act of 1963 "and was thoroughly familiar with the fact that job discrimination is imposed on women and inflicts severe consequences on their earning capacity." ⁷⁵ She pointed to congressional debate over the Equal Rights Amendment. Griffiths also argued that complaints about the legislative history were actually complaints about the sex provision itself:

72. Letter from Kathryn F. Clarenbach, Chairman of the Bd., Nat'l Org. for Women & Betty Friedan, President, Nat'l Org. for Women, to Comm'rs of the Equal Employment Opportunity Comm'n (Nov. 11, 1966) (on file with the National Woman's Party papers).

73. Letter from Ruth Cage-Colby, Member of the Nat'l Council, Nat'l Woman's Party, to Anne Draper, Research Dep't, Am. Fed'n of Labor & Cong. of Indus. Orgs. (Nov. 6 1965) (on file with the National Woman's Party papers).

At the NWP, some of the efforts to set the record straight related to organizational pride. In communications with members, the NWP eagerly described its role in winning the prohibition against sex discrimination. One such communication, apparently sent sometime in 1965, describes the organization's outreach to "other woman's organizations, fair-minded members of Congress, and the many advocates of equal rights," as well as petitions that were gathered, as well as the question posed by May Craig (a "friend of the National Woman's Party") to Howard Smith urging him to offer the sex discrimination ban as a floor amendment, and floor statements made by female members of Congress. Another letter to the organization's membership stressed the National Woman's Party's "heroic campaign" to add sex to the list of prohibited classifications. Letter from Mary A. Birkhead, Nat'l Chairman, Nat'l Woman's Party & Emma Guffey Miller, Nat'l President, Nat'l Woman's Party, to members of the Nat'l Woman's Party and Friends (Sept. 1, 1965) (on file with the National Woman's Party papers).

74. 112 CONG. REC. 13,693 (1966).

75. *Id.*

It is my firm belief that the EEOC's difficulties with interpretation and lack of legislative history are internal to those officials who wish the sex provision would go away. It is quite evident that some of the EEOC officials simply refuse, or cannot accept, the fact that sex discrimination in employment is as immoral and as prevalent as discrimination because of race. Once these gentlemen face up to the moral issue and the facts of women's employment, they will not have very much trouble with the lack of legislative history.⁷⁶

During the summer of 1966, the EEOC explicitly addressed the legislative history controversy. Speaking at a conference on the status of women, Herman Edelsberg, Executive Director of the EEOC, described "a flurry of debate over the origin of the sex discrimination provision of Title VII."⁷⁷ As a consequence, he sometimes "felt like the bird in the shuttlecock game, caught between those who thought its legislative paternity was somewhat dubious and those who thought the bill had sprung full blown from the brow of the wisest legislators."⁷⁸ Edelsberg then announced, apparently joking, that "we have done some research in our agency, and we find it didn't spring from Congressman Howard Smith's brow; it all began with Adam's rib."⁷⁹

Meanwhile, women's advocates continued to press the EEOC to revise the agency's 1965 Guidelines on Discrimination Because of Sex.⁸⁰ In May 1967, the EEOC held hearings on the sex discrimination ban. As the hearings unfolded, women's advocates challenged the accident theory both to assert the legitimacy and importance of banning sex discrimination and to offer legal rationales for their positions on the issues.

76. *Id.* at 13,694. Other parts of Griffiths's speech show her concern that complaints about the sex provision's legislative history were linked to a lack of commitment to the substance of the provision. "[Officials of the EEOC] started out by casting disrespect and ridicule on the law. At the White House Conference on Equal Opportunity in August 1965 they focused their attention on such silly issues as whether the law now requires 'Playboy' clubs to hire male 'bunnies,'" she said. Further,

This emphasis on odd or hypothetical cases has fostered public ridicule which undermines the effectiveness of the law, and disregards the real problems of sex discrimination in employment. By emphasizing the difficulties of applying the law in these odd cases, the impression is created that compliance with the law is unnecessary and that its enforcement can and will be delayed indefinitely or wholly overlooked.

Id. at 13,689.

77. Herman Edelsberg, Executive Dir., Equal Employment Opportunity Comm'n, Remarks at the Third National Conference of Commissions on the Status of Women 1 (June 29, 1966) (on file with the National Woman's Party papers).

78. *Id.*

79. *Id.* In his remarks, Edelsberg went on to acknowledge that "[s]ex discrimination is real," as evidenced by the wage gap between men and women. *Id.* Edelsberg said the legislative history indicated that "differentials in wages would be remedied." *Id.* at 2. But he said that the legislative history didn't answer the questions of whether airlines could limit flight attendant jobs to women; whether airlines could limit flight attendant jobs to "young and pretty women"; whether there can be sex-based differentials in retirement and pension plans; or "what to do about the woman who becomes pregnant on the job." *Id.* at 1-2.

80. Guidelines, *supra* note 52.

In particular, women's activists opposed the Guidelines' position on job advertising.⁸¹ The Guidelines allowed newspapers and other publications to print classified advertising in separate "Male," "Female," and "Male and Female" columns.⁸² Under typical "Female" headings, employers advertised positions for file clerks, typists, secretaries and "Girl Fridays." Typical "Male" postings sought applicants for higher paying accounting, auditing, engineering, management, and production positions.⁸³

The other major controversy that resulted from the Guidelines was how Title VII would affect the hundreds of so-called protective laws for women that were part of state labor codes.⁸⁴ The Guidelines deflected the issue, outlining a case-by-case approach to determining whether employers could defend themselves against charges of discrimination by saying that they were required to follow state protective laws.⁸⁵ The protective laws in place at the time included rules governing maximum hours of work, maximum weight lifting, and limitations on hazardous work.⁸⁶ The role of state protective laws was more controversial among proponents of women's rights than the issue of classified advertising (which was near-universally opposed). Self-described women's advocates disagreed about whether Title VII should preempt the laws which limited, for instance, how many hours women could work, but not men. Some

81. See, e.g., Martha W. Griffiths, Congresswoman, Statement to Equal Employment Opportunity Comm'n at Public Hearings (May 3, 1967) (on file with the National Woman's Party papers). However, the newspaper industry spoke in favor of allowing separate "Male" and "Female" headings in classified advertisement sections. See Stanford Smith, Gen. Manager, Am. Newspaper Publishers Ass'n, Statement before the Equal Employment Opportunity Comm'n at Hearings on "Job Opportunities Advertising" 4 (May 2, 1967) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 11) (arguing that the "basic historical philosophy behind classified help wanted advertising is convenience for readers to find the jobs for which they are qualified," and that the "reason for the separate headings is that almost all jobs of all types are primarily of interest to one sex or the other" so that "[r]eaders know where to look").

82. Guidelines, *supra* note 52. At the same time, the Guidelines disallowed help wanted advertisements themselves to indicate a preference based on sex unless sex was a bona fide occupational qualification (BFOQ) for the position. *Id.* Similar guidelines on discrimination because of race banned any race-based classification on jobs advertising. HARRISON, *supra* note 4, at 188. The EEOC issued different advertising guidelines for race and sex discrimination despite the fact that both forms of discrimination are prohibited by the same statutory text: "It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be . . . published any notice or advertisement related to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin," except in cases falling under the BFOQ exception. 42 U.S.C. § 2000e-3(b) (2000).

83. See GRAHAM, *supra* note 23, at 214.

84. For a brief summary of the types of protective laws that were contained in state labor codes, see *id.* at 213.

85. In writing the Guidelines, the EEOC said it did not believe "that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard." Guidelines, *supra* note 52. Under the Guidelines, the EEOC would consider allowing state protective laws to serve as employer defenses except "in cases where the clear effect of a law . . . is not to protect women but to subject them to discrimination." *Id.*

86. FREEMAN, *supra* note 27, at 172.

feminists saw the laws as paternalistic barriers to women's advancement. Others saw the laws as genuinely protective.⁸⁷

Throughout the EEOC hearings, the legislative history of the sex amendment took center stage, with women's rights groups rejecting the accident theory of the amendment's legislative history. Marguerite Rawalt, NOW's Legal Counsel, criticized the use of the stock story, saying that "[t]hose who are not in sympathy with the enforcement of Title VII as to Sex discrimination[] are heard to say that there is no legislative history to establish the intent of Congress, pointing to the fact that the word 'sex' was added by floor amendment in the House, without Committee recommendation therefore."⁸⁸ Stephen Schlossberg, General Counsel of the United Auto Workers said:

Cocktail party conversation with respect to the Civil Rights Acts provisions against sex discrimination is familiar to everyone. It usually goes something like this: "The sex thing was thrown in by reactionaries to kill any chance for a [fair employment practice commission] There is no legislative history on the sex thing so it really doesn't mean anything." . . . We reject out of hand this kind of unenlightened comment. The point is that Congress *did* bar employment discrimination on sex grounds, and that bar should be vigorously enforced by the Commission.⁸⁹

The hearings revealed that the legislative history was not only important for symbolic reasons. The plain language of Title VII left major policy questions unresolved, including the question of whether the anti-discrimination provision preempted state protective laws. At the EEOC hearings and beyond, supporters and opponents of the protective laws debated the meaning of the legislative history. For the most part, unions and religiously-based women's organizations argued that Title VII should not be read to overturn the protective laws.⁹⁰ NOW and Representative Griffiths took the opposite position. Both sides marshaled Title VII's legislative history to support their case.

87. See *infra* notes 90-93 and accompanying text.

88. Marguerite Rawalt, Legal Counsel, Nat'l Org. for Women, Statement to Equal Employment Opportunity Comm'n at Public Hearings (May 2, 1967) (on file with the National Woman's Party papers). Following the hearing, NOW urged its members to write to the EEOC and petition for a change in the commission's allowance of "Help Wanted Female" and "Male" advertising columns and continuation of state protective laws. Letter from Betty Friedan, President, Nat'l Org. for Women, to NOW members (May 18, 1967) (on file with the National Woman's Party papers).

89. Stephen Schlossberg, UAW Gen. Counsel, Statement of United Auto Workers to Equal Employment Opportunity Comm'n, in *DAILY LAB. REP.*, May 2, 1967, at E1 (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 11).

90. The exception to the pattern of unions supporting protective laws was the UAW. The UAW argued that the laws were anachronistic and provided opportunities for employers to discriminate against women. Schlossberg, *supra* note 89.

For statements of union support for the protective laws before the EEOC, see Mary Callahan, Chairman, Int'l Union of Elec., Radio, and Mach. Workers, AFL-CIO, Statement before the Equal Employment Opportunity Comm'n (May 3, 1967) (on file with Catherine East papers, Arthur and

In urging that state protective laws should not be overturned by Title VII, Olya Margolin, speaking on behalf of women's groups, unions, and civil organizations, argued that the protective laws benefit women, and that the legislative history did not reveal congressional intent to overturn the state regulations. "Even though the legislative history of the 'sex' amendment is rather meager and the intent of Congress was not clearly defined during the debate in the House, it is the judgment of a number of competent observers that Congress never intended interference with this protective legislation for women,"⁹¹ her statement said.⁹² NOW, meanwhile, contended that the legislative history proved that Congress *did* intend to overturn state protective laws. "We would point out that the effect of the amendment on protective labor laws was questioned, put in issue, during the debate on the floor before the entire voting body," Rawalt said at the EEOC hearing. "I would also say that when an entire legislative body, after hearing discussion, nevertheless voted approval of the amendment, there could be no more direct and forceful expression of intent. The amendment was adopted despite the debated effect and dire predictions of its effect on state laws."⁹³

Elizabeth Schlesinger Library, Box 11); and Dorothy I. Height, President, Nat'l Council of Negro Women, Statement before the Equal Employment Opportunity Comm'n (May 3, 1967) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 11). See also AFL-CIO, Policy Resolution, Women Workers (1965) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16) ("The AFL-CIO continues to afford general support to state labor standards legislation for women workers and believes that appropriate safeguards under such laws are not inconsistent with equality of employment opportunities for women."); Amalgamated Clothing Workers of America, Resolution on Women Workers (1966) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16) ("[Title VII] can be an important source of additional protection for women workers. Unfortunately, however, the opponents of state protective legislation have perverted the intention of Congress in enacting the Civil Rights Act in a concerted attempt to overthrow or undermine the state regulations safeguarding women.").

91. Letter from Olya Margolin, Washington Rep., Nat'l Council of Jewish Women, to Franklin D. Roosevelt, Jr., Chairman, Equal Employment Opportunity Comm'n (July 30, 1965) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16). This letter was written on behalf of the Young Women's Christian Association, American Association of University Women, National Consumers League, American Nurses Association, National Council of Catholic Women, United Church Women, National Federation of Settlements and Neighborhoods Centers, Americans for Democratic Action, American Civil Liberties Union, National Council of Jewish Women, National Council of Negro Women, International Union of Electrical Radio and Machine Workers, Amalgamated Meat Cutters, and Butcher Workmen of North America.

92. A similar argument about legislative history was made by officials at the U.S. Department of Labor. See Edith Cook, Assoc. Solicitor of Labor, Remarks before the Citizens' Advisory Council on the Status of Women (Oct. 13, 1964) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 16) ("The legislative history does not seem to point to any clear intent of Congress regarding the operation of such laws in the light of Title VII. . . . Congress, in Title VII, apparently intended to disturb State and local laws as little as possible.").

93. Marguerite Rawalt, Legal Counsel, Nat'l Org. for Women, Statement to Equal Employment Opportunity Comm'n at Public Hearings (May 2, 1967) (on file with the National Woman's Party papers). Representative Griffiths also argued that legislative history pointed to Title VII preempting the state protective laws. "I was one of the principal supporters of the amendment to Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination in employment. . . . When I spoke against the so-called state protective legislation (during the [T]itle [VII] floor debate) I pointed out that 'some of these arbitrary classifications passed in State statutes will be tested again' as a result of enacting the sex amendment. . . . Thus, both the legislative debate and the specific words of Sec. 708 demonstrate that

III. INSIDE THE COURTROOM: HOW LEGISLATIVE HISTORY WAS USED IN THE EARLY SEX DISCRIMINATION CASES

Thus far, we have seen that two storylines developed in the years following Title VII's enactment. On the one hand, EEOC officials described the sex provision as a parliamentary ploy or accident, a description that was repeated by news organizations. On the other hand, women's advocates challenged this account and described the sex provision as a deeply important achievement. Why did the joke/sabotage account win?

In the long run, a major reason for the persistence of the stock story is that judges repeated it in court opinions. These court opinions were then cited in later court opinions until the stock story became conventional judicial wisdom.

However, in the first years of Title VII litigation, not all courts bought into the stock story. This Part traces how judges treated the sex provision's legislative history, with a particular emphasis on the case law that developed in the first decade after Title VII went into effect. Early courts that cited the stock story relied on two main sources to support the account: two student-written law review notes⁹⁴ that argued that Congress did not intend to treat race and sex discrimination equally seriously, and Rep. Green's statements questioning Rep. Smith's motives during the House floor debate. Judges who interpreted the sex provision expansively relied on arguments about the purpose of Title VII and the provision's equal opportunity command. Moreover, although opponents of the sex provision were the ones who promoted the stock story in the news media and other public fora, judges citing to it did not always use the story to undermine Title VII's enforcement. Some judges did draw negative inferences from what is described either as a dubious or barren legislative history, treating the sex provision as an historical accident. Other judges, however, treated the legislative history as a mere observation.

Ultimately, this Part has two objectives. First, it traces how and why courts cited the stock story. In doing this, I make particular note of the sources that judges employed. Second, this Part examines how courts applied the stock story, paying careful attention to ways in which the sex provision's supposed history affected courts' reasoning.

Congress intended the principle of nondiscrimination to override the state laws which deny equality of employment opportunity." Martha W. Griffiths, Congresswoman, Statement to Equal Employment Opportunity Comm'n at Public Hearings (May 3, 1967) (on file with the National Woman's Party papers).

94. *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778 (1965); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

A. *The Stock Story in Cases That Limited the Application of the Sex Discrimination Ban*

A number of courts applied the joke/sabotage theory to interpret the sex provision narrowly. A major focus of the early Title VII cases was whether sex discrimination should be treated as seriously as race discrimination. In *Bowe v. Colgate-Palmolive Co.*,⁹⁵ women employees challenged their employer's practice of restricting women to jobs in which the maximum amount of weight to be lifted was thirty-five pounds. The district court held that the weight requirements were permissible under the bona fide occupational qualification (BFOQ) exception and were reasonably necessary for Colgate's plant operations. In reaching this conclusion, the court looked to the sex provision's legislative history and concluded it provided little interpretive value: "The sex provisions of the Act were adopted without hearings on the numerous problems and without any studies of them and without adequate information, and provide no standards or guides with respect to sex between the absolutes of no discretion and all discretion."⁹⁶ Next, the court referred to floor comments by Rep. Celler and a student-written note in the *Iowa Law Review* for the proposition that sex and race are not to be treated the same: "Sex, under the Civil Rights Act of 1964, is not equatable with race."⁹⁷ Quoting the note, the court continued:

Clearly the sex-discrimination problem is a unique area, requiring an approach which considers this factor. *Unlike the race area, there is general agreement that there are significant and meaningful biological and psychological differences between the sexes. Also unlike the racial problem, there is no clear congressional policy such as can be found in the legislative history of the thirteenth, fourteenth, and fifteenth amendments.*⁹⁸

Indeed, conservative courts often drew on the floor statements made by opponents of Rep. Smith's amendment—despite the fact that the supporters, not the opponents, assembled a democratic majority. In *Cooper v. Delta Airlines Inc.*,⁹⁹ the court held that Title VII did not prohibit an airline from discharging female flight attendants once they married. The court noted that "the addition of 'sex' to the prohibition against discrimination based on race, religion or national origin just sort of found its way into the equal employment opportunities section of the Civil Rights Bill."¹⁰⁰ The court then noted opponents' objections to the bill, citing the U.S. Department of Labor

95. 272 F. Supp. 332 (S.D. Ind. 1967).

96. *Id.* at 361.

97. *Id.* at 362.

98. *Id.* at 363.

99. 274 F. Supp. 781 (E.D. La. 1967).

100. *Id.* at 782-83.

letter, which had been read into the record by Rep. Celler.¹⁰¹ All this the court found to show an “absence of legislative intent.”¹⁰² The court then concluded that the airline’s practice was lawful because marital status was not equivalent to sex (irrespective of the fact that the marriage rule only applied to female employees of the airline).

Men also relied on Title VII. A number of men filed sex discrimination suits after they were fired for wearing long hair in violation of employer grooming regulations requiring short haircuts for men but allowing long hair for women. In a number of decisions, courts held that the regulations did not violate Title VII. These courts noted that the legislative history for the sex discrimination provision was barren, and in some cases they based their decisions on the argument that the Civil Rights Act was more concerned with race discrimination than with sex discrimination. In *Dodge v. Giant Food, Inc.*,¹⁰³ the court described the legislative history of the sex provision as “sparse,” a description that the court backed up by citing to the *Harvard Law Review* note.¹⁰⁴ In *Baker v. California Land Title Co.*,¹⁰⁵ the court noted that the sex amendment was added after the House spent significant time on the rest of the Act, finding that “the primary purpose of Title VII is to protect minorities from economic oppression.”¹⁰⁶ The court thus concluded:

While the Civil Rights Act has declared that sex is not a fair basis for permitting or withholding employment opportunities, the fact still remains that custom and tradition have always recognized and accepted differing styles of dress and grooming based upon sex. To some extent these distinct styles are the result of physiological and anatomical differences.¹⁰⁷

The court in *Boyce v. Safeway Stores*¹⁰⁸ reached a similar result, declaring, without citation, that “[a]s has been often noted, there is no meaningful legislative history indicating what Congress had in mind by this sweeping pronouncement.”¹⁰⁹

101. *Id.*

102. *Id.*

103. 488 F.2d 1333 (D.C. Cir. 1973).

104. The court explained:

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.

Id. at 1336 n.17 (citing *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, *supra* note 94, at 1167).

105. 349 F. Supp. 235 (C.D. Cal. 1972).

106. *Id.* at 238.

107. *Id.*

108. 351 F. Supp. 402 (D.D.C. 1972).

109. *Id.* at 403.

Other courts repeated the sabotage theory of the sex amendment. *Bradford v. Peoples' Natural Gas Co.*¹¹⁰ is notable for the colorful language the court used to describe the sex provision's origins. According to the court, "suave and subtle Southerners in Congress . . . put sex into the Civil Rights Act of 1964."¹¹¹ They did this "with the hope of defeating the bill."¹¹² However, the court said, "the strategy backfired and a giant step towards 'women's lib' was perhaps unintentionally taken."¹¹³ The court attributed this description to statements made on the floor of the House of Representatives.¹¹⁴

After Title VII had been in effect for five years, the *Harvard Law Review* published a student Note which stated that the sex provision was enacted after no legislative debate.¹¹⁵ A number of courts relied on this summary of the sex provision's legislative history. In one of the cases finding that different hair length rules were permissible, the court noted that the legislative history was "sparse" and cited the *Harvard* note for the proposition that Rep. Smith proposed the amendment to "clutter up" the civil rights bill.¹¹⁶ The Fifth Circuit similarly repeated the sabotage theory in allowing sex-based hair length standards, also citing the *Harvard* piece.¹¹⁷ "We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."¹¹⁸ Another court went so far as to conclude that because the sponsors of the amendment intended to sink the civil rights bill, "[i]t is therefore doubtful that many members of Congress who spoke on the original bill in 1964 had any intentions one way or another with respect to the forms of sex discrimination."¹¹⁹ That court also cited the *Harvard* note to support the sabotage theory.

In cases in which transsexuals alleged that they were the victims of sex discrimination, a number of courts cited the *Harvard* note for the proposition that there was little or no legislative history for the sex provision. *Grossman v. Bernards Township Board of Education* was typical among these cases in that it concluded that "absent[t] of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term 'sex' other than its plain

110. 60 F.R.D. 432 (W.D. Pa. 1973).

111. *Id.* at 434.

112. *Id.* at 435.

113. *Id.*

114. *Id.* at 435 n.1.

115. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, *supra* note 94, at 1167.

116. *Bujel v. Borman Food Stores, Inc.*, 384 F. Supp. 141, 144 n.4 (E.D. Mich. 1974).

117. *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1089 n.4 (5th Cir. 1975) (en banc).

118. *Id.* at 1090.

119. *Barker v. Taft Broad. Co.*, 549 F.2d 400, 404 n.4 (6th Cir. 1977).

meaning.”¹²⁰ Therefore, the court held that transsexuals were not covered under the sex provision.

The stock story thus emerged in some of the earliest Title VII judicial opinions. Conservative courts relied on one of two main sources to support their account of the sex provision’s legislative origins: student-written law review notes and the statements made by opponents of the sex provision on the House floor. These courts often used the stock story to support narrow interpretations of Title VII’s sex discrimination ban.

B. Use of Legislative History in Cases that Interpret the Sex Discrimination Ban Expansively

While some courts, like those discussed above, relied on the stock story to constrict the reach of the sex provision, other courts read the prohibition on sex discrimination more expansively. Because a key part of the stock story was the lack of legislative history, liberal courts did not see themselves as constricted in interpreting the open-textured language of Title VII. Rather, they made note of the supposedly sparse legislative history, and then based their decisions on other considerations.

While it is unclear how much the legislative history played a role in the strategies of typical Title VII litigants, the same women’s advocates who challenged the stock story in hearings before the EEOC also challenged the account in court filings. In one of the first Title VII sex discrimination cases to reach a circuit court of appeals, NOW argued that legislative history proved that the ban on sex discrimination should be vigorously enforced.¹²¹ The case was brought by Lorena Weeks, a telephone operator for Southern Bell in Georgia, who applied for the higher-paying job of switchman (a repairman position). Weeks was told that the job was not going to be assigned to a woman, and the position was given to a man with less seniority. After the district court ruled in favor of Southern Bell, finding that sex was a BFOQ for switchmen jobs, NOW helped Weeks find local counsel and agreed to pay the legal fees.¹²²

The parties’ briefs each offered their own interpretation of the legislative history. Weeks’s lawyer embraced the sex provision’s legislative history as positive evidence that Congress intended there to be “sweeping coverage of the

120. *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975); see also *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (citing *Willingham* for the lack of legislative history, and also holding that Title VII does not prohibit discrimination against transsexuals); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (citing *Grossman* and reaching a similar conclusion).

121. Brief of Petitioner–Appellant, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (No. 25725) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library).

122. Letter from Catherine East to Caroline Bird (Sept. 10, 1979) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library, Box 7).

guarantees to equal employment.”¹²³ As support, the Weeks brief cited Rep. Griffiths’s floor statements in favor of the sex amendment.¹²⁴ The brief also cited the House Judiciary report issued before the addition of sex to Title VII that stated that the BFOQ exception was intended to be “very limited.”¹²⁵ In opposition, Southern Bell also argued that the legislative history supported its side of the case. Southern Bell cited the *Iowa Law Review* note to argue that Congress did not intend to guarantee women and blacks the same level of protection when it passed Title VII.¹²⁶ Weeks’s lawyer questioned the soundness of the *Iowa* piece, describing it as an “unsigned student note” and arguing that “[t]his student displayed his ignorance of principles of statutory construction by discerning the intent of [T]itle VII by quoting from remarks of Congressman Celler to the effect that sexual and racial differences could not be equated due to ‘meaningful psychological and biological differences.’”¹²⁷ Celler, after all, was on the losing side of the sex amendment debate—he argued against it.

In ruling against the telephone company, the Fifth Circuit agreed with Weeks that “[t]he legislative history indicates that [the BFOQ] exception was intended to be narrowly construed.”¹²⁸ The court held that in order for an employer to rely on the BFOQ exception, “an employer has the burden of proving that he had reasonable cause to believe . . . that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.”¹²⁹

Subsequent to *Weeks*, a number of liberal courts deciding early Title VII cases described the sex provision’s legislative history as barren. But unlike conservative courts, their decisions did not turn on the supposed absence of a congressional record. Instead, these courts based their decisions on broader principles of nondiscrimination. In *Diaz v. Pan American World Airways, Inc.*,¹³⁰ a case challenging the exclusion of men from flight attendant positions, the court observed “that there is little legislative history to guide our interpretation” and that the sex amendment “engendered little relevant

123. Brief of Petitioner–Appellant, *supra* note 121, at 22–23.

124. *Id.* at 23 n.8. Griffiths is quoted as saying:

Supposing a little 100-pound colored woman arrives at management’s door and asks for the job of driving a haulaway truck and he says, ‘Well, you are not qualified,’ and she says, ‘Oh, yes, I am. During the war I was the motorman on a streetcar in Detroit. For the past 15 years I have driven the schoolbus.’ Surely, Mr. Chairman, we are hiring the best drivers to drive the most precious cargo. Of course, that woman is qualified. But he has only white men drivers. Do you know that that woman is not going to have a right under this law?

Id.

125. *Id.* at 23.

126. Reply Brief on Behalf of Lorena Weeks at 12, *Weeks*, 408 F.2d 228 (No. 25725) (on file with Catherine East papers, Arthur and Elizabeth Schlesinger Library).

127. *Id.* at 13 (citing Brief for Appellees at 16–17, *Weeks*, 408 F.2d 228 (No. 25725)).

128. *Weeks*, 408 F.2d at 232.

129. *Id.* at 235.

130. 442 F.2d 385 (5th Cir. 1971).

debate.”¹³¹ But holding that “it is reasonable to assume, from a reading of the statute itself, that one of Congress’ main goals was to provide equal access to the job market for both men and women,”¹³² the court found the defendant’s practice to be unlawful. Similarly, in *Rafford v. Randle Eastern Ambulance Service, Inc.*,¹³³ the court described the sex provision’s legislative history as being “in such a confused state that it is of minimal value in its application,”¹³⁴ but then relied on Title VII’s anti-stereotyping principle to rule that different hair length requirements for men and women violated Title VII.

Liberal courts, like conservative courts, also repeated the sabotage and joke theories. But these courts reached expansive interpretations of the sex provision, basing their decisions on purposive arguments about Title VII’s ambitious goal of achieving nondiscrimination. In effect, these liberal courts treated the sex provision’s supposed legislative origins as irrelevant. In *Sale v. Waverly-Shell Rock Board of Education*,¹³⁵ the court was faced with the question of whether discrimination based on pregnancy amounted to sex discrimination. The court stated that the sex provision was added “in hopes of making Title VII totally unpalatable to the House.”¹³⁶ But, finding that “it is reasonable to assume that the purpose of Title VII as a whole is to provide a legal foundation for the principle of nondiscrimination in employment based on sex as well as other suspect classifications such as race,” the court found that it was unlawful to discriminate based on pregnancy.¹³⁷ The court in *Wetzel v. Liberty Mutual Insurance Co.* similarly stated that the sex amendment was an attempt to kill the entire bill.¹³⁸ The *Wetzel* court also stated that it was introduced in a “tongue-in-cheek” manner.¹³⁹ Nonetheless, the court found that the aim of Title VII—creating equal opportunity—meant that discrimination based on pregnancy was unlawful.

Still other courts found positive evidence in the legislative history to justify expansive interpretations of Title VII. In *Munford v. James T. Barnes & Co.*,¹⁴⁰ one of the first cases to recognize sexual harassment as a theory of sex discrimination, the court dismissed the argument that discrimination needs to be based on gender alone to be found unlawful. “On the contrary,” the court

131. *Id.* at 386.

132. *Id.*

133. 348 F. Supp. 316 (S.D. Fla. 1972).

134. *Id.* at 319 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970)).

135. 390 F. Supp. 784 (N.D. Iowa 1975).

136. *Id.* at 787 (citing remarks of Rep. Green). The decision also cited *Diaz*, the *Harvard* note, and the *Iowa* note for the proposition that the provision was passed with virtually no debate.

137. *Id.* at 788. This holding was subsequently overruled by the U.S. Supreme Court’s conclusion that discrimination based on pregnancy was not discrimination based on sex. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). The Supreme Court’s decision, in turn, was overturned when Congress passed the Pregnancy Discrimination Act in 1978. 42 U.S.C. 2000e(k) (2000).

138. 511 F.2d 199, 204 (3d Cir. 1975).

139. *Id.*

140. 441 F. Supp. 459 (E.D. Mich. 1977).

said, “it is enough that gender is a factor contributing to the discrimination in a substantial way.”¹⁴¹ As evidence, the court cited the rejection of the amendment that would have made sex discrimination unlawful only when it was based “solely” on sex.¹⁴²

In sum, the stock story was repeated by liberal as well as conservative courts. However, unlike conservative courts, the liberal courts did not use the stock story to constrict their interpretations of the sex discrimination ban.

C. Takeaways

This Part aims to answer the question of why courts repeated the stock story. While it is impossible to read the minds of the judges who heard these cases more than forty years ago, we can nonetheless draw some conclusions.

Judicial sourcing, for one, played a significant role. Put simply, the kind of sources judges traditionally rely on in analyzing statutes—law review articles and statements in the Congressional Record—supported the propositions that the sex provision was a joke, an accident, or designed to scuttle the entire bill, and thus less important than the ban on race discrimination in employment. The *Iowa Law Review* and *Harvard Law Review* notes, for their part, drew on the Congressional Record in reaching these conclusions. For instance, in concluding that the sex provision was “promoted by forces that were not primarily concerned with equality for women,” the *Iowa Law Review* note cited Rep. Green’s statement that the sex provision might clutter up the bill and was intended to defeat the entire Act.¹⁴³

To a powerful extent, then, the views of the opponents of Rep. Smith’s amendment shaped the telling of the sex provision’s legislative history. Political actors at the time the Civil Rights Act was debated were deeply skeptical of Rep. Smith’s motives. Their skepticism was reflected in the arguments they made in opposition to the addition of sex to the list of prohibited classifications. These statements influenced the authors of two student notes that turned out to be influential. The statements also directly influenced the judges who interpreted Title VII by looking to the Congressional Record.

At the same time, it seems that another reason these statements had such staying power is that they appeared plausible. Of all the men who spoke in favor of the sex amendment on the House floor, only one voted in favor of the civil rights legislation.¹⁴⁴ Smith was an ardent opponent of the Civil Rights Act, and while he felt that Title VII would be more fair to white women with the sex

141. *Id.* at 465 (citing *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977)).

142. *Id.* (citing *Barnes*, 561 F.2d at 991).

143. *Classification on the Basis of Sex and the 1964 Civil Rights Act*, *supra* note 94, at 791 & nn.90-91.

144. HARRISON, *supra* note 4, at 179.

amendment than without it, his preference was for the bill not to pass at all. Atmospheric might have also mattered. Rep. Smith's introduction of the amendment evoked laughter from other members. There was no committee report that analyzed the sex provision. And although the sex provision was pushed for by the NWP, the organization's lobbying was entirely behind the scenes. There was no women's rights march on the Mall in advance of the congressional debate.¹⁴⁵

At the same time, the individuals interpreting Title VII at the EEOC were not predisposed toward embracing the struggle for sex equality: Almost all of them were men. Only one commissioner, Eileen Hernandez, was a woman.¹⁴⁶ In the courtroom, judgeships were overwhelmingly occupied by men. In the academy, it was mostly men who edited what became influential law review articles. And in newsrooms, male reporters and editors regurgitated the stock story.

It was often forgotten that Rep. Smith was a proponent of women's rights. He had registered his support for the ERA more than twenty years before the Civil Rights Act debates. And, though not necessarily admirable, his floor remarks suggest that he cared about opportunities for white women. If a civil rights bill were to pass, he wanted it to pass with protections for white women. At the same time, the very existence of a floor debate was often ignored by courts. Judges must have been aware of the discussions on the House floor. Very often, they cited the Congressional Record—but only to point to the statements of Reps. Green and Celler questioning Rep. Smith's motivation for introducing the sex amendment. Meanwhile, judges overlooked the substantive debate in which opponents and proponents of the sex amendment offered competing reasons for why a sex provision should be adopted or rejected.

There is also a strong argument that by the time Smith introduced the sex amendment, the Civil Rights Act was considered on track to pass. Scholar Jo Freeman argues that southern members of Congress had admitted defeat and returned to their districts earlier in the week.¹⁴⁷ As a result, she argues, it wouldn't have made sense for Smith to introduce the sex amendment to kill the Civil Rights Act: Smith had already determined that the Civil Rights Act could not be killed. Freeman also argues that if civil rights proponents truly worried that the sex provision would undermine the broader bill, they could have

145. Professor Reva Siegel's work provides further insight into the role of public attitudes toward gender discrimination, and how such attitudes might have furthered the plausibility of the stock story. As Professor Siegel has argued, there is no shared national paradigm for understanding struggles for sex equality. Debates about gender, according to Siegel, do not draw from an agreed-upon history of women's treatment as second-class citizens. This contrasts, Siegel notes, to the national narrative of race discrimination—a narrative that recognizes past historical wrongs, the struggle to overcome those wrongs, and the present-day commitment to ensuring racial equality. The absence of shared understandings matters, Siegel argues, because "narratives about the genesis of social arrangements help constitute . . . commonsense intuitions" about the way the world works. Siegel, *supra* note 6, at 134.

146. GRAHAM, *supra* note 23, at 213.

147. FREEMAN, *supra* note 27, at 173.

stricken it two days after Smith offered the amendment. That was when the House reconsidered the bill before passing it out of the chamber.¹⁴⁸

Although the telling of the sex provision's legislative history was deeply contested outside the courtroom, inside the courtroom numerous judges accepted the stock story without pause. In at least one case, NOW feminists sought to undermine the acceptance of the story, and they won. But the sheer number of times courts cited, and continue to cite, the stock story shows that it rose to the level of conventional judicial wisdom.¹⁴⁹

IV. THE MALLEABILITY OF THE STOCK STORY

A number of scholars have criticized the continued use of the stock story, arguing that the story is used to undermine the anti-discrimination command of the sex provision.¹⁵⁰ However, as the discussion above makes clear, the stock story has not always been cited to that effect. In some cases courts explicitly relied on the stock story in order to constrict the application of the sex discrimination ban. In other cases, however, courts were barely troubled by the same supposed set of facts, showing a willingness to ensure equal employment opportunity.

If there is any overarching theme in the case law, it is the varied and malleable ways in which the stock story was invoked. Interestingly, it was not just different judges who gave the stock story widely divergent applications. Individual jurists did the same. To illustrate this malleability, this Part describes one particular Justice's use of the stock story: Justice William Rehnquist. As I demonstrate below, Justice Rehnquist alternately describes the legislative history as empty and reads meaning into it in order to argue that Title VII should be interpreted narrowly. Moreover, each time he cites the stock story, Rehnquist offers subtly different accounts of the sex provision's origins.

In 1976, in *General Electric Co. v. Gilbert*,¹⁵¹ Justice Rehnquist authored an opinion that held that discrimination based on pregnancy did not amount to discrimination based on sex. In writing that decision, Rehnquist briefly mentioned the legislative history of the sex provision, stating in an aside that "[t]he legislative history of Title VII's prohibition of sex discrimination is

148. *Id.*

149. For an example of how courts built off each other in discussing the stock story, see *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787 (N.D. Iowa 1975) (citing *Diaz v. Pan. Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), for the proposition that the sex amendment passed "with essentially no debate"). See also *Bujel v. Borman Food Stores, Inc.*, 384 F. Supp. 141, 144 n.4 (E.D. Mich. 1974) (citing *Boyce v. Safeway Stores*, 351 F. Supp. 402 (D.D.C. 1972), in support of a similar proposition).

150. See, e.g., Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1084-85 (1992).

151. 429 U.S. 125 (1976).

notable primarily for its brevity.”¹⁵² However, instead of relying on legislative history, most of Rehnquist’s opinion looked to the Supreme Court’s analysis in *Geduldig v. Aiello*,¹⁵³ a constitutional case that was decided after the Civil Rights Act was passed.

Five years after *Gilbert*, in *County of Washington v. Gunther*,¹⁵⁴ Rehnquist heard a case in which female jail guards alleged they were paid lower wages than male guards due to intentional discrimination. The majority opinion held that sex-based wage discrimination claims could be brought under both the Equal Pay Act and Title VII, and that they would be decided under different standards of proof unique to the two statutes. Rehnquist, in a dissenting opinion, argued that because the sex provision in Title VII “passed with virtually no consideration of the specific problem of sex-based wage discrimination,” sex-based wage discrimination claims under Title VII should be interpreted under the equal work standard of the Equal Pay Act.¹⁵⁵ He also repeated the stock story:

Indeed, Title VII was originally intended to protect the rights of Negroes. On the final day of consideration by the entire House, Representative Smith added an amendment to prohibit sex discrimination. It has been speculated that the amendment was added as an attempt to thwart passage of Title VII. The amendment was passed by the House that same day, and the entire bill was approved two days later and sent to the Senate without any consideration of the effect of the amendment on the Equal Pay Act.¹⁵⁶

Moreover, Rehnquist argued that the “attenuated” legislative history should affect the interpretive question before the Court: how Title VII interacted with the Equal Pay Act. The history, Rehnquist said, “makes it difficult to believe that Congress thereby intended to wholly abandon the carefully crafted equal work standard of the Equal Pay Act.”¹⁵⁷ Had Rehnquist’s opinion won the day, women would only be able to challenge a narrow category of discriminatory pay practices. The Equal Pay Act only prohibits disparate pay between men and women in the same position; it does not allow women to contest access to higher-ranked positions.

Rehnquist again repeated the stock story when he wrote the Court’s first sexual harassment opinion in 1986. This time, however, he did not draw any negative inferences from the story. In *Meritor Savings Bank v. Vinson*,¹⁵⁸ the court was asked to decide whether a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive

152. *Id.* at 143.

153. 417 U.S. 484 (1974).

154. 452 U.S. 161 (1981).

155. *Id.* at 189-90.

156. *Id.* at 190 n.4.

157. *Id.*

158. 477 U.S. 57 (1986).

work environment. The Court held that a hostile work environment presented an actionable theory of sex discrimination. In reaching that conclusion, Rehnquist stated that the legislative history was of no analytic help:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."¹⁵⁹

Despite Rehnquist's assertion that Congress did not offer any meaningful guidance on sex discrimination, he was presented with a record that showed the opposite: Numerous party and amicus briefs filed in the case invoked the sex provision's legislative history. Two briefs argued that the sex provision was introduced to thwart the passage of the civil rights bill.¹⁶⁰ One brief cited the floor debate in 1964 as evidence that the ban on sex discrimination should not be interpreted to allow the plaintiff relief.¹⁶¹ Rehnquist then went on to uphold what had been a highly contested, and potentially far-reaching theory of sex discrimination—sexual harassment premised on a hostile work environment.

Looking back at these cases, numerous discrepancies emerge. Rehnquist told different accounts about how "sex" ended up in Title VII. In *Gilbert* he gave no explanation; in *Gunther* he repeated the sabotage theory; and in *Vinson* he told the "last-minute" version. Rehnquist also used the story in varying ways. In *Gilbert* and *Vinson*, Rehnquist treated the stock story as an aside. In *Gunther*, he used it to inform his legal reasoning. In addition, Rehnquist told the stock story in the context of both conservative and liberal rulings. In *Gilbert*

159. *Id.* at 63-64 (internal citations omitted).

160. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10 n.6, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162; Motion for Leave to File Amicus Brief and Brief for the Chamber of Commerce of the United States as Amicus Curiae at 5, *Vinson*, 477 U.S. 57 (No. 84-1979), 1985 WL 669770.

161. Brief of Petitioner at 14, 18, *Vinson*, 447 U.S. 57 (No. 84-1979), 1985 WL 669769 ("Congressional intent as shown by the language and history of Title VII was to remedy economic and other tangible detriment suffered as a result of job-related discrimination. . . . Legislative history relating specifically to inclusion of 'sex' as a prohibited classification indicates that concern over sex discrimination was similarly focused on tangible, economic benefits, not environmental or tort law matters."). The brief goes on to cite Rep. Smith, Rep. Ross Bass, and Rep. Celler.

In addition, three briefs cited to congressional discussions of sex discrimination when Title VII was reauthorized and amended in 1972. Reply Brief of Petitioner at 14 n.10, *Vinson*, 447 U.S. 57 (No. 84-1979), 1986 WL 728235 (arguing that the 1972 reauthorization demonstrated Congress' intent to eliminate sex discrimination); Brief of Working Woman's Institute as Amici Curiae at 40, *Vinson*, 477 U.S. 57 (No. 84-1979), 1986 WL 728236 (arguing that, although congressional debate was brief in 1964, the legislative history from 1972 shows Congressional intent to treat sex discrimination as seriously as other types of prohibited discrimination); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10 n.6, *Vinson*, 477 U.S. 57 (No. 84-1979), 1985 U.S. S. Ct. Briefs LEXIS 396 (stating that although the sex provision was introduced in an effort to sink the civil rights bill, Congress proved its seriousness about the sex discrimination ban in 1972).

and *Gunther*, Rehnquist interpreted the sex provision narrowly. In *Vinson*, he interpreted it expansively.

But just as Rehnquist did, so did the federal courts. As Part III demonstrated, the stock story was told in different ways by different courts, and put to both conservative and liberal use. Indeed, one of the principal themes that emerges across the cases is how differently the history of the sex provision is told. It seems that the malleability of the stock story is relevant. Even though the early repetition of the stock story created a kind of path dependence that prompted later courts to regurgitate it, judges did not have to rule one way or another because they believed sex was added to Title VII as an accident. That is, the stock story has not disappeared because its telling can vary widely and it can be used as a basis for reasoning in so many ways. A judge wishing to reach a particular decision in a case need not change his or her analysis due to the stock story. The stock story can be told and then discarded. It can be treated as a mere aside. Far from signifying a lack of importance, the malleability demonstrates the opposite: that the stock story has become so intertwined with the understanding of Title VII's sex discrimination ban as to appear in judicial opinions that police sex discrimination both vigorously and laxly.

V. IMPLICATIONS

This Comment has focused on the narrow question of why the stock story surrounding the sex provision developed. But it also raises larger concerns. At a time when judges and scholars have criticized the use of legislative history in interpreting statutes,¹⁶² this Comment has shown that the very question of what constitutes "legislative history" is not always clear and can be hotly contested.

Critics of legislative history argue that such history lacks reliability.¹⁶³ These critics worry that judges will overlook efforts of members of Congress and their staff to manipulate the legislative record with opportunistic statements supporting their individual views.¹⁶⁴ Critics question whether courts have the

162. For an overview of the scholarly and judicial debate on legislative history, see Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

163. These critics are also concerned that constitutional and separation of powers problems arise when judges look beyond the plain text that was agreed upon by both chambers of Congress and signed by the President. For a discussion of these two schools of criticism, see *id.*

164. See, e.g., Justice Scalia's opinion in *Blanchard v. Bergeron*, 489 U.S. 87, 89 (1989) (criticizing judicial reliance on congressional committee references, saying:

I am confident that only a small portion of the Members of Congress read either one of the committee reports in question. . . . As anybody familiar with modern-day drafting of Congressional Committee Reports is well aware, the references to the cases were inserted, at best by a committee staff member on his own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant. . . . but rather to influence judicial construction.

Bruce Fein, *Scalia's Way*, A.B.A. J., Feb. 1990, at 38, 40.

capacity to identify anything resembling collective congressional intent.¹⁶⁵ And critics also worry that the very methodology of consulting legislative history—looking not just to the text of a statute, but to the myriad documents Congress produces in debating and negotiating a bill—invites judges to read their personal philosophies into the case.¹⁶⁶

However, what these reliability concerns all have in common is their focus on the judge. At their heart, these critiques imagine a lone judge (or panel of judges) doing mischief to statutory text. This Comment raises the question of whether the scholarship is appropriately focused on the people wearing robes. As this Comment has shown, judges are not the only actors who contribute to the construction of legislative history. Agencies and political actors do the same. Witness, for example, the statements made by EEOC officials describing the sex provision as a joke, fluke, orphan, and poison pill. In this sense, legislative history is like any other history in that it is socially constructed. In the case of the sex provision of Title VII, courts, agencies, legislators and academic writers all built off each other. Like anything socially constructed, these interpretations were contested. This Comment has shown that just as EEOC officials began to tell the story of the sex provision as a joke and a poison pill, women's advocates sought to reclaim the legislative history. They wrote letters, gave speeches, and offered testimony in order to try to contradict what was becoming the everyday understanding of the amendment. The two sides therefore fought over what the legislative history consisted of and what it meant.

Understanding legislative history to be socially constructed has important implications. For one, it means that judges do not simply consult a clearly defined body of congressional materials to find the story behind a statute. This point is descriptive—this is what judges did in interpreting Title VII sex discrimination cases. The stock story that judges so frequently recited did not exist in official congressional publications. Rather, it existed in a social understanding—one that was created through the combined inputs of EEOC officials, student note writers, news reporters, and prior court decisions.

The social construction of legislative history also means that the very act of discerning legislative history is affected by social context. Social attitudes and social needs infused the way in which parties looked at the history of the sex amendment. Because early EEOC officials did not think sex discrimination was a significant problem, there was no need for them to innovate with the new law and interpret in ways that would have eliminated unique barriers women faced in the workplace. Beginning in the early 1970s and 80s, public officials began

165. For a discussion of what William N. Eskridge, Jr. calls the "historicist critique" of legislative history, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 223-24 (1994).

166. Professor Eskridge calls this approach the "formalist critique" of legislative history. *See id.* at 224-25.

to support the anti-sex discrimination norm more strongly. In 1972 alone, Congress extended Title VII to cover local, state, and federal government,¹⁶⁷ passed Title IX prohibiting sex discrimination in federally financed educational programs,¹⁶⁸ and voted out the Equal Rights Amendment. Around this time, many liberal courts began to interpret the sex provision more expansively, recognizing a need to expand equal opportunity. In this back and forth, the stock story served as a *tabula rasa*. By glossing over the actual account of the sex amendment, conservative and liberal judges could use the legislative history as they saw fit. They were able to comport their decisions with perceived social needs. The legislative history of the sex provision was thus used dynamically.¹⁶⁹

In addition, this Comment has shown that the social construction of legislative history means that what non-judicial players say matters, and that the fight over legislative history continues long after a statute passes both chambers of Congress and clears the President's desk. Parties who wish to shape the implementation of a bill will fight over the history of the bill. EEOC officials told the stock story at the same time that they tried to avoid a strong enforcement policy that would "disrupt longstanding employment practices."¹⁷⁰ Women's advocates challenged the account because they wanted sex discrimination to be taken seriously.

Finally, this Comment demonstrates that, like all social history, legislative history reflects a form of social imagination—how we wish to understand and draw on our past.¹⁷¹ EEOC officials who did not want to be bothered with the sex provision imagined the Smith amendment as an unfortunate joke. Feminists who wanted to ensure gender equality imagined it as a well-intentioned, carefully planned addition to the civil rights bill.

What the social construction of legislative history means for judges and for scholars is different. For scholars, this Comment suggests that legislative history offers a fertile field for examining the process of social change and the process of re-imagination. For judges, this Comment suggests the need for greater sensitivity to the process of judicial sourcing.

My point here is not to answer the central question of the legislative history debate—whether such history is reliable. Rather, I seek to show that the current understanding of legislative history might be reconsidered. As this Comment has shown, legislative history does not just exist in committee reports and the pages of the Congressional Record. It exists in the real world as well, where

167. Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (2000)).

168. 20 U.S.C. § 1681-88 (2000).

169. For a discussion of the role that changing social conditions have on the interpretation of statutes, see ESKRIDGE, *supra* note 165.

170. Guidelines, *supra* note 52.

171. See generally HISTORY, MEMORY AND THE LAW, *supra* note 6 (exploring how law shapes the writing of history and law's role in constituting "who we are").

agencies, courts, political actors, and academics all seek to shape and reshape its telling. As such, scholars might reconsider their approach to legislative history. Legislative history need not be thought of as a compilation of old facts. It need not be seen as a suspicious resource for lawyers and judges looking to pluck favorable quotes. Rather, legislative history can reflect the battles of a statute's birth and implementation. Legislative history can be—and often is—a focal point through which different actors across different periods of time articulate how they wish to live under the law.