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MORE THAN A CONGRESSIONAL JOKE: A FRESH LOOK AT THE LEGISLATIVE HISTORY OF SEX DISCRIMINATION OF THE 1964 CIVIL RIGHTS ACT

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INTRODUCTION

The Civil Rights Act of 1964 (Act) represents one of the most significant milestones of the twentieth century.¹ Title VII of the Act prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin."² The Equal Employment Opportunity Commission (EEOC) was subsequently created to define and enforce the Title VII provisions.³

Conventional wisdom holds that Congress added a sex discrimination provision to Title VII as little more than a "joke"⁴ or a political ploy. Many authors dismiss the legislative history of the sex discrimination prohibition as aberrant congressional behavior, which is largely to be ignored. The following passage illustrates the usual cursory analysis:

The statute's prohibition on gender discrimination was a last minute addition, made through an amendment on the floor of the House of Representatives. The amendment, adding "sex" to Title VII's list of prohibited bases for discrimination, was proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill.⁵

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1. 42 U.S.C. § 2000e (1988).

2. 42 U.S.C. § 2000e-2(a)(1)(1988).

3. 42 U.S.C. § 2000e-4 (1988); Kerry A. Colson, *Harris v. Forklift Systems, Inc.: The Supreme Court Moves One Step Closer to Establishing A Workable Definition for Hostile Work Environment Sexual Harassment Claims*, 30 NEW ENG. L. REV. 441, 447 n.41 (1996) ("The Equal Employment Opportunity Commission (EEOC) is a bipartisan commission that Congress created to administer and enforce discrimination claims under Title VII").

4. *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) ("This Court - like all Title VII enthusiasts - is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House . . .") (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INT'L & COMP. L. REV. 431, 441-42 (1966)), *aff'd*, 805 F.2d 611 (6th Cir. 1986).

5. Deborah Epstein, *Can A "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO L.J. 399, 409 n.62

The above interpretation is so prevalent that it is almost uniformly followed at the district, appellate, and supreme court levels. Among legal commentators, the conclusion that Congress amended sex discrimination to Title VII's list of prohibited discriminatory bases as a joke is so widespread that it has become "the standard interpretation of the statutes's history."⁶

Such authors and commentators are wrong. The prevailing conclusions misconstrue the complete story behind the battle to add "sex" in Title VII. The following discussion will show that Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women. Part I reviews the prevailing treatment of legislative history of sex discrimination. Part I will show that judges and other legal scholars often give no credence to the legislative history of sex discrimination. When the legislative history of Title VII is examined, it is usually employed to restrict expansion of sex discrimination protections. Part II scrutinizes the history of sex discrimination, and reveals that the sex discrimination provision was the result of complex political struggles involving racial issues, presidential politics, and competing factions of the women's rights movement. Part III outlines debates in the House of Representatives concerning the addition of sex to Title VII of the Act. This part will show that feminists who strongly supported the inclusion of sex as a protected class spoke out in favor of the provision and secured its passage into law.

(1996); see also Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, 1283-84 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking "us boys" attempt to defeat Title VII's prohibition on racial discrimination. Sex was added as a prohibited ground of discrimination when this attempted *reductio ad absurdum* failed and the law passed anyway").

6. Vicki Schultz & Stephen Peterson, *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, 1085 n.31 (1992).

I. PREVAILING TREATMENT OF THE LEGISLATIVE HISTORY OF SEX DISCRIMINATION BY THE JUDICIARY AND ACADEMIA

A. *Dismissal of the Legislative History of Sex Discrimination as a Mere Political Ploy*

The practice of reducing the legislative history of sex discrimination to a level of insignificance reaches back through thirty years of scholarship. In part because organizations charged with enforcing sex discrimination protections viewed these protections with skepticism,⁷ commentators proclaimed the legislative history as unimportant.⁸ Later publications dismissed the debates in a similar manner.⁹ The modern treatment of the Title VII sex amendment is divided into two camps: treating legislative history as a joke and denying its existence altogether.

7. The treatment of the "sex" provision in Title VII by the EEOC, the agency charged with enforcing the scheme, was less than laudatory of the amendment during the years soon after its inception. The subject of sex discrimination invoked little more than boredom or hostility from the Commission. CYNTHIA ELLEN HARRISON, *PRELUDE TO FEMINISM: WOMEN'S ORGANIZATIONS, THE FEDERAL GOVERNMENT, AND THE RISE OF THE WOMEN'S MOVEMENT 1942 TO 1968* 497 (1982) (Ph.D. dissertation, Columbia University). EEOC Executive Director M. Thompson Powers made clear that "the commission is very much aware of the importance of not becoming the 'sex commission.'" *Id.* His successor, Herman Edelsberg, also informed the press that "no man should be required to have a male secretary." *Id.*; CAROLINE BIRD, *BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN* 14 (1970). Journalists of the time also entered the fray. *The New Republic*, the *Wall Street Journal*, and the *New York Times* all berated the new provision. Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 884 (1967) (asking, "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?"); HARRISON, *supra*, at 499-500; BIRD, *supra*, at 15-16. These comments are typical of the attitude towards the amendment soon after its inception, and most likely constitute the origins of the sex discrimination myth that lives on in the present.

8. See, e.g., Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 311 (1968) ("In the context of that debate and of the prevailing Congressional sentiment when the amendment was offered, it is abundantly clear that a principal motive in introducing it was to prevent passage of the basic legislation being considered by Congress, rather than solicitude for women's employment rights.") (footnotes omitted); Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act*, 31 BROOK. L. REV. 62, 79 (1964) (labelling the sex amendment a mere "orphan"); See also Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791 (1965) [hereinafter *Classification on the Basis of Sex*].

9. E.g., ARTHUR B. SMITH, JR., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 327 (1978); Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971).

Commentators espouse the "joke" theory for a variety of reasons. The most common reason is that the tale provides an interesting sidenote for discussion of larger Title VII issues.¹⁰ Other commentators use the myth to highlight the fragility of women's rights and weave the event into an overall struggle for equality.¹¹

Still others conclude that little or no useful legislative history exists at all.¹² These commentators frequently use the supposed nonexistence of legislative history as an interesting aside, often relegating it to a footnote.¹³ Commentators also employ this presumption as an analytical stepping stone to address the broad remedial goals of Title VII¹⁴ that emerge in later Congressional debates and jurisprudence.¹⁵ The Supreme Court ascribes to this theory and concludes that the limited legislative history provides little guidance for interpreting Title VII. In *Meritor Savings Bank v. Vinson*,¹⁶ an important sexual harassment decision, the Court noted:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the

10. E.g., Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision In Sight*, 47 RUTGERS L. REV. 461, 481 (1995); Ruth C. Vance, *Workers Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?* 11 HOFSTRA LAB. L.J. 141, 147 (1993); Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 367 (1995); Sally A. Piefer, Comment, *Sexual Harassment From the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 88-89 (1993).

11. See Susan Estrich, *Sex at Work*, 43 STAN L. REV. 813, 816-17 (1991); MacKinnon, *supra* note 5, at 1283-84.

12. E.g., Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 286 (1994); Michael J. Levy, Note, *Sex, Promotions, and Title VII: Why Sexual Favoritism is Not Sexual Discrimination*, 45 HASTINGS L. J. 667, 668 n.4 (1994); Tracy L. Bach, Note, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1281 (1993); Thomas D. Brown, Recent Development, *When Counseling is Not Enough: The Ninth Circuit Requires Employers to Discipline Sexual Harassers—Intlekofer v. Turnage*, 973 F.2d 733 (9th Cir. 1992), 71 WASH. U. L.Q. 901, 919 n.3 (1993) (noting that "[t]here is no legislative history to guide courts in determining what is 'sex' discrimination").

13. E.g., Epstein, *supra* note 5, at 409 n.62.

14. See *infra* note 24.

15. See, e.g., Lisa Wehren, Note, *Same Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Makes a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 91-92 (1995) (concluding that 1964 legislative history provides "little guidance" before one examines later congressional and judicial activity).

16. 477 U.S. 57 (1986).

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".¹⁷

Lower courts have followed suit, reciting the conventional wisdom as seen in the above quote, with some frequency.¹⁸

These interpretations are relatively benign omissions, used as footnotes or preliminary discussion before addressing wider Title VII or feminist concepts. Other commentators, however, highlight the limited legislative history to restrict expansion of sexual protections in employment. These discussions transcend innocu-

17. *Id.* at 63-64 (citations omitted); *see also* *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity"). The Court also stated:

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[.]

County of Washington v. Gunther, 452 U.S. 161, 190 n.4 (1981) (Rehnquist, J., dissenting).

18. *See, e.g.*, *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991); *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 902 (7th Cir. 1989) (en banc) (Posner, J., dissenting), *rev'd*, 499 U.S. 187 (1991); *American Fed'n of State County and Mun. Employees v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985); *International Union v. Westinghouse Elec. Co.*, 631 F.2d 1094, 1101 (3d Cir. 1980); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 n.17 (D.C. Cir. 1973); *Swage v. Inn Philadelphia*, No. 1996 U.S. Dist. LEXIS 8795, at *6 (E.D. Pa. June 21, 1996); *Tamer v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 168 n.4 (E.D. Pa. 1995); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784, 787 (N.D. Iowa 1975); *Bradford v. Peoples Natural Gas Co., Inc.*, 60 F.R.D. 432 (W.D. Pa. 1972). *But see* *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (concluding that '[w]hat little legislative history that exists in the area of sex discrimination has convinced the courts that "Congress had intended to strike out at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"' (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971)); *Diaz v. Pan Am. Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) stating:

The amendment . . . was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, 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.

Id.

ous anecdotal analysis and affirmatively misapply the available legislative material.

B. Affirmative Misuse: A Tool to Restrict the Expansion of Sexual Protections

Commentators have also applied the legislative history to reach a certain conclusion. Most of these discussions, however, not only inaccurately recount the congressional debate, but also misinterpret the intentions of Congress to reach a prescribed end. Commentators conclude that because the legislative history of sex discrimination is allegedly so brief and unhelpful, Title VII only provides protection for the most traditional of sexually discriminating activity. As a result, courts deny sex discrimination protections to individuals whose circumstances challenge the frontiers of sex discrimination law.¹⁹

Some commentators have considered whether sex discrimination deserves less congressional attention than race because of the sex amendment's dubious origin.²⁰ Discussions about sex discrimination ultimately conclude that gender has been a less invidious category of discrimination than race.²¹ This debate also surfaces in a historical perspective, arguably revealing cultural attitudes towards sex discrimination in America at a given time.²²

The most harmful, and most common, misuse of the legislative history is found in judicial efforts to restrict coverage of the ban on sex discrimination.²³ Judges have applied such

19. This Article does not address what substantive limits should be placed on the protections of sex discrimination. Rather, I offer that the basis upon which many restrictive interpretations rest, the alleged ambiguous legislative history of Congress, is an improper one.

20. Schultz & Peterson, *supra* note 6, at 1181 (concluding that such inference is possible); cf. Michael D. Moberly, *Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases*, 24 N.M. L. REV. 89, 103-04 (1994) (arguing that age discrimination cannot be less "pernicious" than sex discrimination because sex was included as a mere "last-minute legislative ploy" to Title VII).

21. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 278-279 (1992) (examining legislative history in part and concluding, "[w]hatever the source and extent of sexual inequality in this country, women were never slaves, and they have never been subjected to invidious discrimination in public accommodations").

22. Beverly H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. J. 43, 48 (1993) ("The reason for the absence of legislative history [of sex discrimination in Title VII] provides a telling insight into the attitudes of many Americans toward gender discrimination").

23. It is not the sole ground on which protections are denied, but rather a significant argument, coupled with other assertions, that spells the demise of a particular protection on the basis of sex. See, e.g., Kelly Ann Cahill, *Hooters: Should There be an Assumption*

restrictions in spite of later congressional and judicial conduct affirming the broad remedial goals of Title VII.²⁴ Judges have used legislative history to restrain uniformly-accepted doctrine and to restrict expansions of sex discrimination law beyond established frontiers.

The development of sexual harassment jurisprudence, a doctrine now well-embedded in American law, was in part rejected because of misapplication of the 1964 congressional debates. In *Corne v. Bausch & Lomb*,²⁵ two female plaintiffs claimed that the relentless sexual advances of their supervisors forced them to resign from their positions.²⁶ The court's examination of the legislative history of sex discrimination was a significant factor in rejecting plaintiff's sexual harassment claims. Judge Frey noted that sex discrimination was a last minute addition to Title VII and contained no intent to include sexual harassment.²⁷ The court concluded that nothing in the Civil Rights Act could reasonably reach sexual advances "where such complained of acts or conduct had no relationship to the nature of the employment."²⁸ Thus, Judge Frey, in part on a misexamination of the legislative history, held that it was "ludicrous" to assume that Title VII protected individuals from sexual harassment.²⁹

Modern, unsettled doctrines have suffered as well from this type of analysis. For example, misreadings of the legislative history have thwarted attempts to expand sex discrimination to

of the Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?, 48 VAND. L. REV. 1107, 1142 (1995) (noting the alleged lack of legislative history of sex discrimination as one argument of many concluding that an assumption of risk defense to sexual harassment claims does not violate the goals of Title VII).

24. Congress affirmed its opposition to sex discrimination in 1972. "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. REP. NO. 238, at 2 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2141. The Supreme Court has articulated similar goals. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (stating that Title VII prohibits "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin").

25. 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977).

26. *Id.* at 161.

27. *Id.* at 163.

28. *Id.*

29. *Id.*; see also *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), rev'd, 568 F.2d 1044 (3d Cir. 1977); cf. *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (arguing that while "[i]t is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability . . . [I]t would seem wise for the Courts to refrain from delving into these matters"), rev'd, 600 F.2d 211 (9th Cir. 1979).

protect transsexuals and to prohibit same-sex sexual harassment. In *Ulane v. Eastern Airlines, Inc.*,³⁰ plaintiff Karen Ulane alleged that her discharge violated Title VII on the grounds that she was discriminated against as a transsexual.³¹ After noting that a statute should be interpreted according to its "common meaning,"³² the court reasoned, "The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."³³

Judge Wood, writing for a unanimous appellate bench, then applied the common meaning concept to transsexuals and homosexuals, stating that, "Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation."³⁴ The court in *Ulane* concluded that such coverage would exceed even the intended broad remedial scope of Title VII³⁵ and rejected the plaintiff's claim.³⁶

Courts have examined same-sex sexual harassment claims on similar grounds.³⁷ For example, in *Hopkins v. Baltimore Gas &*

30. 742 F.2d 1081 (7th Cir. 1984).

31. *Id.* at 1082.

32. *Id.* at 1085. The "plain meaning" rule states that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979).

33. *Ulane*, 742 F.2d at 1085; cf. *International Union v. Johnson Controls Inc.*, 886 F.2d 871, 902 (7th Cir. 1989) (Posner, J., dissenting) ("There is no useful legislative history concerning the [bona fide occupational qualification] defense, and—no doubt because the prohibition of sex discrimination was added to Title VII at the last minute—no reference at all to the application of the defense to sex discrimination. A narrow reading is, nevertheless, inevitable") (emphasis added), *rev'd* 499 U.S. 187 (1991).

34. *Ulane*, 742 F.2d at 1085. But see *infra* note 82 and accompanying text.

35. *Ulane*, 742 F.2d at 1086 ("Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress").

36. *Id.* The court also rejected plaintiff's claims on the ground that repeated attempts to introduce legislation prohibiting discrimination against homosexuals have failed. See, e.g., *Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 97th Cong., 2d Sess. 1-2 (1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, author of the bill).

37. But see *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 n.3 (C.D. Ill. 1995) (noting the dearth of legislative history, yet affirming same sex sexual harassment as a viable cause of action).

Electric Co.,³⁸ the court scrutinized the legislative history and concluded:

In the context of Title VII's legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting the passage of the [Civil Rights] Act. Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex," stand only as "inert language, lifeless words," and, perhaps, even "playthings with which to reconstruct the Act."³⁹

Although the *Hopkins* court ultimately affirmed plaintiff's claim, it interpreted the legislative history of Title VII as a significant restricting force. In *Goluszek v. H.P. Smith*,⁴⁰ Judge Ann Williams rejected a same-sex sexual harassment claim on the grounds that such activity "was not the type of conduct Congress intended to sanction when it enacted Title VII."⁴¹ Judge Williams further concluded from the legislative history that Congress was concerned only with prohibiting discrimination against a discrete and vulnerable group such as women.⁴²

The misinterpretation of the legislative history of sex discrimination is pervasive. Commentators have repeatedly rejected the debate as anecdotal, vague, or nonexistent. Those commentators that do examine the legislative history, usually members of the judiciary, conclude that Congress enacted the amendment as a last-minute political ploy. As a result, judges have used the legislative history of Title VII to restrict the concept of sex discrimination to its most traditional notions. These traditional interpretations of the legislative history directly contradict the conclusion supported by what actually occurred during the congressional debates concerning the sex amendment to Title VII and what occurred behind the scenes in Congress. Ample evidence supports the conclusion that Congress enacted the sex discrimination ban to advance the cause of women's rights.

38. 77 F.3d 745 (4th Cir. 1996).

39. *Id.* at 749 (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959)).

40. 697 F. Supp. 1452 (N.D. Ill. 1988).

41. *Id.* at 1456.

42. *Id.*

II. THE HISTORY OF THE SEX DISCRIMINATION AMENDMENT

A. *Pre-History: Setting the Stage for Political Action*

The movement for protection from discrimination on the basis of sex finds its roots almost one-hundred years before enactment of the Act. Even as society took great strides in favor of racial equality, women, whose plight of discrimination commentators see as being intertwined with blacks,⁴³ were less successful in obtaining effective protections. The Supreme Court, during this period, repeatedly rejected extending protections to women based on the Constitution. The Fourteenth Amendment did not confer the right to vote.⁴⁴ Instead, the whims of state judiciaries determined women's voting rights.⁴⁵ Courts also denied women the right to practice law.⁴⁶

Later courts began to acknowledge disparity of gender treatment, but still utilized traditional sex roles to aid their decisions. In *Muller v. Oregon*,⁴⁷ the Court upheld an Oregon statute providing a ten hour maximum workday for women in order to equalize their bargaining position with men.⁴⁸ The Court also concluded that this law was necessary to preserve women's maternal functions and "the well-being of the race."⁴⁹

43. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMA* 1075 (1962); Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 727-28 (1935). See also ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 181 (1964) (describing the similarity between racial bigotry and sexual prejudice). But see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601-03 (1990) (examining the unique discriminatory issues of black women).

44. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (stating that the privileges and immunities clause applied to women but that the clause did not grant the right to vote). In fact, few places in the world permitted women to vote during this period. Only Australia, Sweden, New Zealand, and the frontier territories of Wyoming, Colorado, Utah, Idaho granted the right. See BIRD, *supra* note 7, at 21.

45. Cf. *Bickett v. Knight*, 85 S.E. 418 (N.C. 1915) (women not qualified to vote), and *In re Carragher*, 128 N.W. 352 (Iowa 1910) (same), and *Gougar v. Timberlake*, 46 N.E. 339 (Ind. 1897) (same), with NEV. CONST. art. II, § 1 (constitutional right to vote), and *Scown v. Czarnecki*, 106 N.E. 276 (Ill. 1914) (statute granting women's suffrage upheld).

46. *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

47. 208 U.S. 412 (1908).

48. *Id.* at 412.

49. *Id.* at 422.

The absence of effective protection for women helped spark the suffrage movement.⁵⁰ After much struggle, the women's suffrage movement scored a major victory with the ratification of the Nineteenth Amendment, which affirmed women's right to vote.⁵¹ Although the Nineteenth Amendment represented the culmination of the suffrage movement,⁵² in practice it achieved very little beyond the right to vote.⁵³ The piecemeal protections granted by the Constitution, combined with the stereotypical attitudes that members of the judiciary held, left women with enormous ground to cover in order to achieve effective protection from discrimination on the basis of sex. Out of these limited successes arose the organization that would become a major player in adding the sex amendment to Title VII: The National Woman's Party(NWP).

B. 1920-1960: The Political Forces Take Shape

Out of the remains of the suffrage movement, women's groups furthered the cause of equality. At the forefront of the equality movement was the NWP. Originally founded during the suffrage movement in 1916, the NWP supported ratification of the Nineteenth Amendment.⁵⁴ After suffrage, the NWP focused on one primary goal: passage of the Equal Rights Amendment (ERA).⁵⁵

The NWP was not a "typical" women's organization. Most NWP members came from middle or upper class backgrounds.⁵⁶ Almost no women from the working class joined and the party admitted no male members.⁵⁷ Unlike other feminist movements, which drew their strength from large membership, legacies and

50. See generally ELEANOR FLEXNER, *CENTURY OF STRUGGLE* (1959) (providing comprehensive history of suffrage movement); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* (1965).

51. U.S. CONST. amend. XIX.

52. *Classification on the Basis of Sex*, *supra* note 8, at 778.

53. *State v. Mittle*, 113 S.E. 335, 337 (S.C. 1922) (stating that the Nineteenth Amendment only prohibited sex discrimination "in legislation prescribing the qualifications of suffrage" and did not confer upon women the right to vote).

54. Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. J. 163, 165 (1991).

55. *Id.*

56. 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, 39 (1983).

57. *Id.*

wealthy benefactors funded the NWP.⁵⁸ As a result, the NWP did not sympathize with the working class, or non-white women.⁵⁹

Other feminist groups who feared the ERA's blanket effects opposed the amendment. Labor groups fought passage of the ERA because they feared it would abolish protective legislation for working women.⁶⁰ Anti-ERA organizations blocked the NWP's persistent lobbying for twenty years.⁶¹ During the 1940's, however, "subtle change[s] in the public attitude toward [the ERA]"⁶² and favorable statements in Congress raised hopes for its passage.⁶³ Support for the ERA peaked in 1950 when it passed through the Senate.⁶⁴ Stiff opposition in the House, however, halted the bill.⁶⁵ Over time, support for the Bill eventually waned. Serious interest remained only in the few women's organizations who had supported the ERA for decades.⁶⁶ The NWP introduced the ERA in Congress, but lacked the influence to get it passed.⁶⁷ The Kennedy administration presented a fresh opportunity to salvage the ERA. President Kennedy, who endorsed the ERA during his campaign, created the President's Commission on the Status of Women (PCSW) to address the divisive ERA question.⁶⁸ The aged NWP leadership lobbied the newly created Commission, hoping the Commission would support the amendment. Instead, the PCSW forged a compromise, concluding that "a constitutional amendment need not now be sought in order to establish this principle [of equality]."⁶⁹

The Commission's rejection of the ERA angered and frustrated the NWP.⁷⁰ The adverse decision amounted to "the

58. Freeman, *supra* note 54, at 165. See also SUSAN D. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS* 38-42 (1981). The NWP's primary benefactor provided a historic Capitol Hill mansion for a national headquarters. Freeman, *supra* note 54, at 165 n.15. When the mansion was condemned to make way for a new supreme court building, the benefactor purchased another equally lavish house. *Id.*

59. See *infra* note 73.

60. Freeman, *supra* note 54, at 165.

61. *Id.* at 165-66.

62. 25 CONG. DIG. 290 (1946).

63. In 1940 the Republican party endorsed the ERA in its party platform. The Democrats followed four years later. Freeman, *supra* note 54, at 166.

64. *Id.* at 167.

65. *Id.*

66. *Id.* at 167-68.

67. *Id.* at 168.

68. Brauer, *supra* note 56, at 40.

69. PATRICIA G. ZELMAN, *WOMEN, WORK, AND NATIONAL POLICY: THE KENNEDY-JOHNSON YEARS* 34 (1982).

70. Brauer, *supra* note 56, at 41.

most prestigious national panel ever to report on the status of women" rejecting the NWP's primary objective of the previous forty years.⁷¹ The NWP was in a bind. The aged party found their proposal rejected by a prestigious federal commission on women and attacked by other feminist groups who believed that the ERA would strip hard fought protections away from female labor. The NWP needed a fresh opportunity with which to revitalize their battered Amendment. The growing civil rights movement, with a connection between the rights of women and the rights of blacks,⁷² provided such an opportunity.

C. The National Woman's Party Takes Action: The Forces Behind the Sex Discrimination Amendment

Although the NWP was not particularly concerned with the rights of minorities,⁷³ it viewed the Civil Rights movement as an opportunity to advance their goals under the political cover of well-supported legislation.⁷⁴ As a result, the NWP created the idea of adding sex as a protected class to the pending Civil Rights Bill.

Making use of their extensive political connections, the NWP approached Congressman Howard W. Smith of Virginia, a conservative southern Democrat and a strong opponent of Civil Rights.⁷⁵ Smith, the powerful Chairman of the House Rules Committee⁷⁶ and a long-standing member of Congress,⁷⁷ possessed close ties to the NWP.⁷⁸ The NWP was certainly aware of Smith's opposition to the Civil Rights Bill. Accordingly, the NWP framed its request for the amendment in terms that would benefit his agenda. On December 10, 1963, the NWP wrote to Smith, stating that, "[t]his single word 'sex' would divert some of the high

71. *Id.*

72. *Id.* at 39. See *supra* note 43.

73. Brauer, *supra* note 56, at 42 (citing personal interviews with NWP members). The NWP once issued a resolution lamenting the lack of "protection against discrimination because of "race, color, religion or national origin," to a White Woman, a Woman of the Christian Religion, or a Woman of United States Origin." HARRISON, *supra* note 7, at 472; See also Letter from Emma Guffey Miller, President, *National Woman's Party*, to Congressman Howard W. Smith (Jan. 6, 1963) (on file with author) (attaching copy of resolution).

74. Brauer, *supra* note 56, at 42.

75. BIRD, *supra* note 7, at 1 ("[Congressman Smith] was a Virginia gentleman who had been defending the Southern Way of Life in Congress for nearly a third of a century").

76. Kanowitz, *supra* note 8, at 310.

77. BIRD, *supra* note 7, at 1.

78. Brauer, *supra* note 56, at 42.

pressure, which is being used to force this Bill through without proper attention to all the effects of it."⁷⁹

Smith appeared hesitant at first, but he eventually warmed to the idea of adding the 'sex' amendment.⁸⁰ In a rare appearance on "Meet the Press", a televised interview program, Elizabeth May Craig, a well-known journalist, feminist, and prominent member of the NWP, questioned Smith.⁸¹ After Ms. Craig questioned him on the issue, Smith hinted that he might offer an Amendment in the Civil Rights Bill prohibiting sex discrimination in employment.⁸² NWP members wrote to Smith and expressed their appreciation.⁸³

III. THE CONGRESSIONAL DEBATE

A. *Smith's Initial Offering: Sink the Entire Bill by Adding a Controversial Measure*

On February 8, 1964, merely two days before the bill moved from the House to the Senate, Congressman Smith offered an amendment to ban sex discrimination.⁸⁴ The amendment shocked the House as members realized its significance.⁸⁵ Smith's

79. Brauer, *supra* note 56, at 41-42 (citing letter from NWP member to Congressman Smith).

80. Letter from Congressman Howard W. Smith to Emma Guffrey Miller, President, *National Woman's Party* (Jan. 10, 1964) (on file with author).

81. BIRD, *supra* note 7, at 4; Brauer, *supra* note 56, at 44.

82. The actual conversation follows:

Elizabeth May Craig: Judge, 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?

Congressman Smith: Would you like me to?

Craig: Yes, sir.

Smith: Well, maybe I would. I am always strong for women, you know.

Craig: An amendment on the floor?

Smith: I might do that.

Brauer, *supra* note 56, at 44.

83. *Id.*

84. 110 CONG. REC. 2577 (1964).

85. CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT 115* (1985). Such an amendment would seem especially unexpected to House members because of Smith's long opposition to the Civil Rights Bill. *Id.* at 116. At this point it is possible that Smith's devious intention was not yet evident to many members at large. Others may have expressed shock because they did realize his motive to sink the entire bill. BIRD, *supra* note 7, at 1 ("[Congressman Smith] proposed an amendment that sounded like a joke even while the clerk was reading it aloud").

proposed amendment would expand coverage from seven million blacks to include twenty-one million women of all colors.⁸⁶ The amendment would provide all women job rights that were equal to men for the first time in history.⁸⁷

Smith waited until the ruckus died down, then commented:

Mr. Chairman this amendment is offered to . . . include within our desire to prevent discrimination against another minority group, the women, but a very essential minority group, in the absence of which the majority group would not be here today.

Now, I am very serious about this amendment. It has been offered several times before, but it was offered at inappropriate places in the bill. Now, this is the appropriate place for this amendment to come in. I do not think it can do any harm to this legislation; maybe it can do some good. I think it will do some good for the minority sex.⁸⁸

Smith did not appear serious. Prior to offering the amendment, he consistently fought the Civil Rights Bill and other related matters that increased government intervention or offered protection to minority groups.⁸⁹ Smith was well known as a master of using procedural devices to thwart unfavorable bills.⁹⁰ Further, he hinted that he might use similar tactics here. Smith warned Congressman Emmanuel Celler, a civil rights supporter, that the Civil Rights Bill "was as full of booby traps as a dog is full of fleas."⁹¹ Given his consistent past behavior, Smith's move was apparently not intended to protect women from discrimina-

86. BIRD, *supra* note 7, at 3.

87. WHALEN & WHALEN, *supra* note 85, at 115-116.

88. 110 CONG. REC. 2577 (1964).

89. See generally BRUCE JONATHAN DIERENFIELD, CONGRESSMAN HOWARD W. SMITH: A POLITICAL BIOGRAPHY (1981) (Ph.D. dissertation, University of Virginia) (stating that "[w]hen the mood of the country, in the late fifties, began to favor expanded federal aid programs and civil rights legislation, Smith, a reactionary member . . . used all of the parliamentary wizardry at his command to prevent their enactment into law.").

90. For example, in the 1940's, Smith used his "parliamentary wizardry" to fight the establishment of the Fair Employment Practices Commission, which forbade employment discrimination on the basis of race, ancestry, religion, and color in firms with over fifty employees. DIERENFIELD, *supra* note 89, at 191. His legislative maneuvering on the issue led one Congressman to characterize Smith's efforts as "a travesty on parliamentary law and procedure." *Id.* at 192. Smith's delaying kept the bill off the floor for five hours. *Id.* When the House finally adjourned at 3:19 a.m., the original measure was so watered-down that it lacked any influence. *Id.* The Senate refused to act on the measure and the bill ultimately died. *Id.*

91. WHALEN & WHALEN, *supra* note 85, at 116.

tion. Rather, it was a last ditch effort to sink the Civil Rights Bill.⁹²

As if Smith's consistent record did not color his motives enough, his later conduct further confirms his dubious intentions. Smith read from a letter that he allegedly⁹³ received from a lady who had heard about his amendment.⁹⁴ She complained that Smith should remedy the numerical imbalance between the sexes: females outnumbered males by 2,661,000 according to the 1960 Census Poll.⁹⁵ She urged that "this is a grave injustice to womankind."⁹⁶

The satire increased as Smith read on:

Just why the Creator would set up such an imbalance of spinsters, shutting off the "right" of every female to have a husband of her own, is, of course, known only to nature . . .

Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their "right" to a nice husband and family?⁹⁷

Audience members burst into laughter.⁹⁸ The pandemonium was so loud that Smith had to stop many times to settle everyone.⁹⁹ Smith then wrapped up his opening soliloquy by saying:

I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing. I just hope that the committee will accept it. Now, what harm can you do this bill that was so perfect yesterday and is so imperfect today—what harm will this do to the condition of the bill?¹⁰⁰

92. But see 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, 454 (1981) (concluding that Congressman Smith added sex to Title VII for serious reasons).

93. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1337-38 (1989).

94. 110 CONG. REC. 2577 (1964); Letter from Leila G. Whitney, to Congressman Howard W. Smith (Jan. 26, 1964) (copy on file with author).

95. 110 CONG. REC. 2577 (1964)

96. *Id.*

97. *Id.*

98. BIRD, *supra* note 7, at 5. Representative Martha Griffiths later commented on the raucous behavior. "I presume that if there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it." 110 CONG. REC. 2578 (1964).

99. BIRD, *supra* note 7, at 5.

100. 110 CONG. REC. 2577 (1964).

Smith's opening salvo is consistent with prevailing doctrinal wisdom: he offered the amendment to sink the entire Civil Rights Bill by increasing its controversy.¹⁰¹ However, the Congressional debate did not end at this point. Further discussion shows that more forces were at work in the debate than a failed effort to scuttle the bill.

B. Congressional Liberal Response: Fight the Amendment to Save the Bill

Someone had to act. Congressman Smith's speech sparked chaos in the House. Smith was a master at manipulating procedural rules to stop unfavorable legislation.¹⁰² His sex amendment could have easily triggered another triumphant victory for civil rights foes.

The responsibility of stopping Smith rested on Emmanuel Celler, a liberal Congressman from New York and floor manager of the debate.¹⁰³ Celler was the Democratic leader of a bipartisan coalition to pass the bill,¹⁰⁴ and also a staunch opponent of the equal rights legislation.¹⁰⁵ When Celler rose in opposition to the amendment,¹⁰⁶ Smith responded "Oh, no," in an expression of mock horror.¹⁰⁷ Celler attempted to turn the tide against the amendment.

The noise in the House was still so loud when Celler began speaking that he approached the subject lightly to appease the crowd.¹⁰⁸ Celler quipped that although he usually has the last words in his household, they are usually, "Yes, dear."¹⁰⁹

Celler then addressed the substance of his argument. He noted that Assistant Secretary of Labor Esther Peterson, also in charge of the Women's Bureau,¹¹⁰ opposed the addition of sex to

101. *But see infra* note 140 and accompanying text.

102. BIRD, *supra* note 7, at 5; *see supra* notes 89-90.

103. *Id.*

104. *Id.*

105. Emmanuel Celler persistently fought the Equal Rights Amendment. HARRISON, *supra* note 7, at 97. As chair of House Judiciary Committee, he repeatedly refused to let the measure reach the house floor. *Id.* His objections to the ERA or any other equality based measure rested "on an unshakable belief that women required protection." *Id.*

106. 110 CONG. REC. 2577 (1964).

107. *Id.*; WHALEN & WHALEN, *supra* note 85, at 116.

108. BIRD, *supra* note 7, at 5.

109. 110 CONG. REC. 2577 (1964) (making a humorous attempt to say that in his household women are not the minority).

110. Relations between Esther Peterson and the National Woman's Party, the primary champion of the Equal Rights Amendment, were frequently strained at best. *See* HARRISON, *supra* note 7, at 359.

the Civil Rights Bill.¹¹¹ Peterson's position was supported by the PCSW's conclusion that sex discrimination "involves problems sufficiently different from discrimination based on other factors listed to make separate treatment preferable."¹¹² In using this argument himself, Celler, typical of his diplomatic nature,¹¹³ did not reject sex discrimination on substantive grounds.

Celler also asserted that serious repercussions would result from the adoption of the sex amendment. Celler argued that the amendment would nullify many state laws that protect women from detrimental conditions such as military service and alimony.¹¹⁴ Celler also stated that the plight of women was insufficiently analogous to the plight of blacks because women have managed "real and genuine progress" such as the Equal Pay Act of 1963 and the Fair Labor Standards Act of 1938.¹¹⁵ Responding to an exchange between Smith and himself, Celler concluded as follows:

I think the amendment seems illogical, ill timed, ill placed, and improper I say, wait, indeed, until more returns are in before we attempt to do anything like this on this bill. In any event, it should not be done piecemeal, it should be done generally and universally.¹¹⁶

Celler's statements implicitly represent two political forces that sought to influence the addition of sex to the Civil Rights Bill. First, he represented liberals whose primary concern was

111. 110 CONG. REC. 2577 (1964).

112. *Id.*

113. HARRISON, *supra* note 7, at 97 ("Celler tended to couch his convictions in unctuously courtly language").

114. *Id.* Celler stated:

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

You know the biological differences between the sexes. In many States we have laws favorable to women. Are you going to strike those laws down? This is the entering wedge, an amendment of this sort. The list of the foreseeable consequences, I will say to the committee, is unlimited.

110 CONG. REC. 2577-78 (1964).

115. 110 CONG. REC. 2578 (1964).

116. *Id.*

the passage of racial, not sexual protections. Some members of Congress feared that the additional sex protections would render the bill unpalatable to wavering members of Congress. Further, many women's groups that supported reform gave racial discrimination a higher priority.¹¹⁷ Some of these women's groups supported protections for women, but were willing to wait until the more critical battle of race discrimination had been won.¹¹⁸ Finally, Celler did not wish to endanger protections already favoring women.¹¹⁹

Celler and his allies did not explicitly oppose the sex amendment on substantive grounds. Some members of Congress favored sex protections, however, not until a later date when they would not jeopardize racial protections. When the bill passed, their desire for a later enactment became unnecessary.

C. Zealous Feminists Strike Back: Support the Ban on Sex Discrimination Here and Now

Various female Congresswomen who spoke during the debate represented a third group influencing the sex amendment.¹²⁰ They hoped to take Smith's ploy and turn it to their advantage. These Congresswomen revitalized the debate and played a critical role in securing the amendment's ultimate passage.

After the Smith-Celler exchange began to languish,¹²¹ Congresswoman Martha Griffiths entered the fray. She revitalized the debate and strongly advocated the addition of the Smith amendment. First, Griffiths argued that the pervasiveness

117. The President's Commission on the Status of Women, the Women's Bureau of the Department of Labor, and the American Association of University Women all opposed the amendment. Gold, *supra* note 92, at 459.

118. Representative Green, in opposition to the amendment, highlighted this point in her debate:

I really and sincerely hope that this amendment will not be added to this bill. It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it. And I hope that no other amendment will be added to this bill on sex or age or anything else, that would jeopardize our primary purpose in any way.

110 CONG. REC 2581 (1964).

119. See *supra* note 114.

120. A bipartisan coalition of five Congresswomen spoke out in favor of the Amendment: Frances B. Bolton (R-OH), Martha W. Griffiths (D-Mich), Catharine May (R-WA), Edna F. Kelley (D-NY), and Katharine St. George (R-NY). Because of the clarity and force of her statements, I use Rep. Griffiths remarks as representative of the coalition.

121. People in the Congressional gallery, listening to the discussion between the 75-year-old Celler and the 80-yr-old Smith about the biological differences between men and women, could not help snickering. WHALEN & WHALEN, *supra* note 85, at 116-17.

of sex discrimination mandated an appropriate remedy.¹²² Second, Griffiths made the broad reach of the bill clear by posing the following questions:

Mrs. GRIFFITHS: Mr. Chairman, is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?

Mr. CELLER: This bill is all-embracing and will cover everybody in the United States.

Mrs. GRIFFITHS: It will cover every colored man and every colored woman?

Mr. CELLER: Yes, it will cover white men and white women and all Americans.¹²³

Third, Representative Griffiths argued that omitting sex discrimination from the bill would leave white women unprotected:

I rise in support of the amendment primarily because I feel as a white woman when this bill has passed . . . that white women will be last at the hiring gate.¹²⁴

Finally, Griffiths asserted that the bill at present would offer no protection to black women.¹²⁵

Griffiths and her allies revitalized the debate. The five Congresswomen who spoke in favor of the amendment represented a larger alliance committed to adding sex protections to Title VII. These legislators, most notably Martha Griffiths, sharpened the focus of the debate and highlighted the pressing issues affecting women's struggle for equality.

D. Smith and His Allies Return: Don't Leave White Women Behind

Smith and his supporters largely kept silent as they watched the split they caused amongst the normally unified liberal

122. 110 CONG. REC. 2578 (1964).

123. *Id.*

124. *Id.* Griffiths later repeated this contention in stronger language. "[A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister." 110 CONG. REC. 2580 (1964).

125. 110 CONG. REC. 2579-80 (1964).

opposition. Perhaps Smith hoped that Griffiths would be able to peel away enough support from Celler, who wanted to close Smith's trap. From Smith's perspective, letting traditional allies of women's rights do his bidding may have seemed like a very effective way to further his goals.

Smith's role in the debate, however, did not end with the introduction of his controversial measure. During the debate, four speakers in a row raised the argument initially stated by Griffiths that white women would be left behind if other groups received protection.¹²⁶ Smith rose again and expressed a similar concern:

I put a question to you in behalf of the white women of the United States. Let us assume that two women apply for the same job and both of them are equally eligible, one a white woman and one a Negro woman. The first thing that employer will look at will be the provision with regard to the records he must keep. If he does not employ that colored woman and has to make that record, that employer will say, "Well, 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 Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit."

That will happen as surely as we are here this afternoon. You all know it.¹²⁷

Smith spoke in complete seriousness. Gone from his words were the sarcastic and light-hearted tones of his opening remarks. No one laughed when he spoke. The force of his argument suggested that he was completely sincere about the plight that would befall white women if the sex amendment was not added to the bill.

Smith's supporters agreed. Four Smith allies expressed a similar concern before he spoke.¹²⁸ Immediately after, two more Smith allies associated themselves with his remarks and expressed support for the Amendment. The apparent conflict between Smith's opening statements and later commentary can be reconciled. First and foremost, it must be noted that Smith was an opponent of civil rights legislation and introduced the sex discrimination provision to scuttle the bill. If the bill was to pass,

126. 110 CONG. REC. 2583 (1964) (remarks of Reps. Tuten, Pool, Andrews, and Rivers).

127. *Id.*

128. *Id.*

however, Smith genuinely preferred a bill with a ban on sex discrimination. If the bill had granted too many rights to other interest groups, at least the bill would protect white women.¹²⁹

Remaining portions of the debate highlighted similar issues that Griffiths, Celler, and Smith raised. The debate closed and the amendment passed by a vote of 168 to 133.¹³⁰

E. Onward to Victory: The Smith Amendment Beyond the House Debate

After the debate, the sex amendment survived the House and Senate unscathed even when the amendment was deliberately brought to a vote to bring about its demise. Congressional behavior towards the sex amendment, when viewed in its entirety, clearly points to the conclusion that Congress passed the sex amendment because of strong political forces seeking to further the cause of equality for women. These political forces include the conservative NWP that convinced Smith to issue the measure, and the pro-ERA feminists who argued in the debate.

One need only look to the experience of Representative John Dowdy (D-TX) to discover the fate of sex protection without the support of feminist backers. Earlier in the debate Representative Dowdy offered similar amendments which would have added "sex" to Titles II, III, IV, and V of the bill.¹³¹ The substance of the amendments was no different than that of Smith's proposal. Dowdy, like Smith, was a staunch opponent of civil rights.¹³² Dowdy even knew of Smith's plans for his own amendment.¹³³ If the conventional wisdom is correct, then Dowdy's amendment should have succeeded similarly to Smith's, providing some humor for everyone.

Nothing could be further from the actual result. Although Dowdy's actions mirrored Smith's in many ways, he lacked the critical support of the NWP.¹³⁴ As a result, his amendments were

129. Gold, *supra* note 92, at 466 (agreeing with this conclusion).

130. 110 CONG. REC. 2584 (1964).

131. Freeman, *supra* note 54, at 176.

132. *Id.*

133. *Id.* See also ZELMAN, *supra* note 69, at 63.

134. In an interview years after the debate, Alice Paul, the leader of the NWP, stated that the NWP received no advance notice that Representative Dowdy would introduce sex amendments, although they were pleased that he did. ALICE PAUL, CONVERSATIONS WITH ALICE PAUL: WOMEN SUFFRAGE AND THE ERA (Amelia Fry, interviewer Nov. 1972, May 1973) in SUFFRAGISTS ORAL HISTORY PROJECT at 617-618, (Bancroft Library, University of California (Berkeley) ed.).

"howled down" and overwhelmingly defeated.¹³⁵

The sex amendment also overcame a congressional climate that strongly disfavored amendments. Congressional leaders supporting the bill fashioned a "three-prong whip system" that kept legislators on hand to vote favorably on the bill.¹³⁶ The managers of the bill maintained as many as 133 representatives who would vote down any amendment on request.¹³⁷ Any attempt to add a sex amendment would have had to overcome a nearly overwhelming number of legislators willing to vote it down with little notice. Thus, the sex discrimination amendment could not have been added without strong multi-factional support.

Further, Smith and his supporters had ample opportunity to remove the sex amendment from the bill before its ultimate passage. The opportunity arose when the House voted on the Smith amendment a second time. Just before the vote on the final bill, Representative Williams of Mississippi called a second vote on the Smith amendment. The bill passed again.¹³⁸ If a majority voting for the Smith amendment had added the amendment as a joke and were ultimately against the bill, that same majority would have defeated it outright when it came to a full vote that same day.¹³⁹

The most compelling evidence of feminist intervention came from Congressman Smith himself. Smith, the very individual who commentators rely on to deride the amendment, explicitly acknowledged the critical help women provided in passing the provision. Smith expressed this position in a letter to Robert Stevens Miller, Jr., author of one of the early Articles examining sex discrimination:

135. *Id.* at 629. The Dowdy Amendment to Title II was rejected 43 to 115. The Amendment to Title III was rejected 26 to 112. 110 CONG. REC. 1978-79, 2280-81, 2264-65, 2297 (1964). Dowdy also attempted to add "age" as a protected class, but this Amendment was also defeated 94 to 123 after some debate. 110 CONG. REC. 2596-99 (1964).

136. WHALEN & WHALEN, *supra* note 85, at 121-22. The three-prong whip system, "spotlighted individual congressmen, demanded their accountability, and prevented them from falling into their old habits of evading amendment votes." *Id.*

137. Freeman, *supra* note 54, at 178.

138. 110 CONG. REC. 2804 (1964).

139. Gold, *supra* note 92, at 461 ("It would be absurd to believe that the Representatives who approved the Smith amendment . . . wanted to impair the very bill which they promptly approved by an overwhelming margin"). However, this is not to say that Smith's cadre had no influence at all. If Martha Griffiths or her allies offered such an amendment on their own, it would have more than likely been defeated. Griffiths did intend to sponsor a sex amendment of her own but refrained when she learned that Smith could bring as many as 100 votes to support his own measure. Freeman, *supra* note 54, at 175.

The statement that the amendment was "slipped in" the bill by me in an attempt to delay voting, is utterly untrue, as the record shows.

The amendment was a popular one. Particularly active in its adoption were the women Members of the House. It was debated fully and adopted in the House in open debate, and subsequently approved in the senate.¹⁴⁰

The House ultimately approved the Civil Rights Bill by a vote of 290 to 130.¹⁴¹

In the Senate, the sex amendment, backed by strong feminist support, met little challenge. Senator Everett Dirksen, leader of the Republican minority in the Senate, offered some resistance by raising the possibility that the drafters should delete the sex amendment.¹⁴² Dirksen, however, repeatedly failed to obtain a majority on the issue and finally gave up, claiming he did so "in order to avoid the wrath of the women."¹⁴³ Although the House version of the Civil Rights bill did not pass through the Senate unscathed, the final measure endorsed by the Senate included the sex discrimination provision.¹⁴⁴ On July 2, 1964, President Johnson signed the Civil Rights Act of 1964 into law.¹⁴⁵

As shown in the debate and afterward, feminist forces played a crucial role in the passage of the sex amendment to Title VII. Women lobbied congress for years, spoke forcefully in the House debate and secured the amendment's final passage in the Senate. Even Smith himself acknowledged the participation of women in securing the passage of the amendment. The oratory in the House, combined with congressional activity after the debate, points to the conclusion that the addition of sex discrimination provisions was a direct result of efforts of feminist groups to advance the cause of women's rights.

140. Miller, *supra* note 7, at 883 n.34 (quoting a letter dated January 4, 1966, from Congressman Howard W. Smith to the author). In the letter Smith also mentions his seriousness in sponsoring the provision. Although one may never be sure of the intent of an individual Congressman, the conduct of his colleagues who surrounded him at the time points towards a different conclusion. See *supra* notes 84-101 and accompanying text.

141. 110 CONG. REC. 2804-05 (1964).

142. Brauer, *supra* note 56, at 55.

143. *Id.* See also BIRD, *supra* note 7, at 13 (noting that "[in the Senate], a number of women were on the job defending the amendment.").

144. HARRISON, *supra* note 7, at 482.

145. *Id.* at 481-82. See also BIRD, *supra* note 7, at 14.

CONCLUSION

The addition of sex discrimination to the Civil Rights Act of 1964 represents one of the most significant advancements in the battle for equality of the sexes. The provision expanded the coverage of Title VII to millions of working women, and planted the seed for future protections such as sexual harassment provisions and the enactment of laws prohibiting discrimination on the basis of pregnancy.¹⁴⁶

The popular misreading of the legislative history of sex discrimination provisions, however, has hampered the development of sexual discrimination protections. By treating the debate as a joke or last minute addition, courts and commentators ignore its lessons and use the legislative history as little more than an interesting anecdote. Worse, some have used the legislative history as an argument for confining sex discrimination protections to only the most traditional concepts.

An examination of the history and background of the sex discrimination provision reflects the opposite contention: genuine efforts to further the cause of women's rights. Different factions took advantage of the opportunity the Civil Rights Bill offered, and strongly lobbied to add "sex" as a protected class. The NWP convinced Representative Smith to add the amendment in the House. Martha Griffiths and her allies supported the measure during debate, and lobbied for its passage when the bill entered the Senate.

The overwhelming evidence defies the conclusion that "sex" was added as a mere joke. The amendment represented the first of many steps to define the broad remedial provisions of Title VII and ensure equality in the workplace for both genders. Thus, the prohibition against sex discrimination, and the accompanying debate, represent one of the most important advancements towards the goal of equality in United States history.

146. 42 U.S.C. § 2000e(k) (1988).