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# Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era

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## Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era

DEBORAH DINNER\*

*Why does U.S. legal culture tolerate unprecedented economic inequality even as it valorizes social equality along identity lines? This Article takes a significant step toward answering this question by examining the relationship between U.S. employment-discrimination law and neoliberalism. It shows that the rise of anti-discrimination ideals in the late twentieth century was intertwined with the deregulation of labor and with cutbacks in the welfare state. The Article argues that even “best practices” to prevent employment discrimination are insufficient to realize a labor market responsive to the needs of low-income workers for adequate wages, safe work conditions, and work hours and schedules that allow for fulfilling family and civic lives.*

*The legal scholarship on employment discrimination and the humanities scholarship on neoliberalism are ordinarily siloed. Placing these two literatures in conversation shows that the ideals underpinning Title VII of the Civil Rights Act of 1964 overlap with the major tenets of neoliberalism. Both affirm individual freedom, efficient markets, and judicially enforced negative rights.*

*The conceptual convergence between Title VII and neoliberalism enabled employers, business trade associations, courts, and even liberal scholars to interpret the statute in ways that expanded managerial freedom and undermined workers’ economic security and control over the terms of their jobs. Drawing on novel historical research, this Article illustrates how this happened. In the early 1970s, employers litigated under Title VII to invalidate state laws regulating the hours and conditions of women’s work. Today, legal scholars commonly extol the end of these labor standards as marking the genesis of a contemporary prohibition on sex-role stereotypes. In actuality, the erosion of state protective labor laws represented the defeat of working-class feminists’ more capacious vision for sex equality. Through the 1970s and 1980s, furthermore, scholars argued that Title VII promoted efficient labor markets. This normative justification, however, had the unintended effect of foreclosing claims under the statute that sought not merely opportunity but also the transformation of labor-market structures.*

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*Failure to understand how neoliberalism and Title VII jurisprudence intersected historically leaves us blind to the ways in which employment-discrimination law may legitimate economic inequality. This has important consequences for contemporary legal theory. Dominant antidiscrimination theories—centered on antistereotyping and efficiency—reinforce the existing terms of the employment relationship and do not serve the needs of working-class women and men. This Article reveals the limits of antidiscrimination theory to remediate class-based subordination.*

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#### INTRODUCTION

This Article brings new insight to bear on a puzzle in American legal and political culture: why has economic inequality grown, even as the nation has taken significant strides toward social equality? In the late twentieth century, the antidiscrimination ideal gained legitimacy at the same time that economic inequality rose to an apex unmatched in American history. Both the political Left and Right subscribe to ideals

of formal equality, meritocracy, and individual freedom. Most Americans abhor discrimination on the basis of race and sex, at least in the abstract.<sup>1</sup> Yet the United States has among the largest disparities in income and wealth of all developed countries.<sup>2</sup> Sociologists and political theorists link these disparities to the ascendance of neoliberal policies, including the deregulation of capital and labor markets and a retrenchment in the welfare state.<sup>3</sup> In sum, while our legal and political culture aspires to end discrimination on the basis of identity categories, we also tolerate deepening subordination on the basis of class. This Article analyzes a more specific formulation of the larger puzzle: what is the socio-legal function of employment discrimination law in the neoliberal age?

To answer this question, we must begin by exploring a corresponding scholarly dilemma. Voluminous bodies of scholarship examine antidiscrimination law, on one hand, and neoliberalism, on the other. Antidiscrimination scholarship celebrates Title VII for containing the promise of sex and race equality, even if the statute has not yet fully realized that aspiration. Title VII, the scholarship argues, has the capacity to help dismantle a socio-legal system that enforces ideas about race and sex difference. Scholarship in the humanities, meanwhile, decries neoliberalism as the constellation of ideologies, laws, and policies that has entrenched economic inequality. Neoliberalism, this literature argues, has functioned as a "mode[] of governance"<sup>4</sup> to deregulate capital and labor markets, privatize former state functions, and cut welfare entitlements. These two literatures on antidiscrimination law and neoliberalism,

1. Even formal equality for gays, lesbians, and transgender individuals, however, remains politically contested. *See, e.g.*, Jonathan Capehart, *Don't Expect Gay Rights To Stay Under GOP's Radar for Long*, WASH. POST (Jan. 8, 2016), [https://www.washingtonpost.com/opinions/dont-expect-gay-rights-to-stay-under-the-gops-radar-for-long/2016/01/08/0a95e8a0-b576-11e5-9388-466021d971de\\_story.html](https://www.washingtonpost.com/opinions/dont-expect-gay-rights-to-stay-under-the-gops-radar-for-long/2016/01/08/0a95e8a0-b576-11e5-9388-466021d971de_story.html) [<https://perma.cc/YS9D-P7AH>] (describing pressures within the GOP for presidential candidates to vocalize support for religious liberty over gay rights); Chris Johnson, *DNC Chair Expects 2016 Platform To Include Equality Act*, WASH. BLADE (Sept. 28, 2015, 2:02 PM), <http://www.washingtonblade.com/2015/09/28/dnc-chair-expects-2016-platform-to-include-equality-act/> [<https://perma.cc/8V5M-8W8E>] (describing probable Democratic Party support for adding sexual orientation to the Civil Rights Act of 1964 and Fair Housing Act). Likewise, the Right has not always supported formal equality. Instead, over the course of several decades' conflict and accommodation, conservatives came to embrace equality while also contributing to a narrowing of its meaning. The defeat of the Equal Rights Amendment, coupled with the achievement of formal equality under the Fourteenth Amendment, provides a case in point. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (examining how social-movement mobilization and countermobilization shaped the meaning of constitutional sex equality).

2. ORG. FOR ECON. CO-OPERATION AND DEV., CRISIS SQUEEZES INCOME AND PUTS PRESSURE ON INEQUALITY AND POVERTY 4 fig.4 (2013), <http://www.oecd.org/els/soc/OECD2013-Inequality-and-Poverty-8p.pdf> [<https://perma.cc/FK84-9QCG>] (showing that the United States has the fourth highest level of income inequality among thirty-four Organisation for Economic Co-operation and Development (OECD) nations).

3. *See, e.g.*, WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 28 (2015); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 7–13 (2005).

4. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 83 (2014).

however, are siloed from each other.<sup>5</sup> The failure to put them in conversation hinders scholars' capacity to analyze the historical relationship between sex-discrimination law and neoliberalism and as well as the normative consequences of this relationship for gender and class inequities today. This Article is among the first to recognize that antidiscrimination may function as a "master legal frame"<sup>6</sup> to legitimate neoliberalism.

The Article analyzes how employment-discrimination law advanced neoliberalism in the late twentieth century and explains why this history matters.<sup>7</sup> It uses historical examples to illuminate unexamined shortcomings in contemporary legal scholarship and doctrine.<sup>8</sup> The Article begins in Part I by reviewing dual scholarly narratives: Title VII's importance to sex equality and neoliberalism's impact on class inequities. Analyzing these narratives side-by-side offers new insight into the values that underpin both Title VII and neoliberalism. These values include the ideal of efficient markets, the notion that the fundamental subject of law is the individual rather than the collective, and the primacy of negative rights enforced by the judiciary. The Article thus points to conceptual overlap between employment discrimination law and neoliberalism.

Part II considers how the historical implementation of Title VII via legal institutions, doctrine, and thought helped to catalyze and entrench a neoliberal labor market. To examine this dynamic, the Article focuses on legal contests in the late twentieth century about the meaning of sex equality in employment. I make two historical claims. The first argument is that Title VII came to eclipse labor protection as the leading framework for understanding legal sex equality. I argue, more provocatively, that the rise of the antidiscrimination ideal and the decline of the protective ideal were not merely coincidental; rather, the deployment of Title VII played a causal role

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5. Recent scholarship has begun to examine the neoliberal dimensions of multiple legal fields. See, e.g., Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25 (2014); Amy Kapczynski, *Intellectual Property's Leviathan*, 77 L. & CONTEMP. PROBS. 131 (2014). To date, however, no one has followed this line of inquiry into employment law.

6. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and the Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1727 (2006) (arguing that in the late 1960s the women's movement shifted its legal framing from protection to equality).

7. This Article is among the first to critique the neoliberal dimensions of antidiscrimination doctrine and theory. I draw on earlier work highlighting the failure of antidiscrimination law to challenge structural inequality and exploitation within the employment relationship. See Tucker Culbertson & Jack Jackson, *Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique*, in FEMINIST AND QUEER LEGAL THEORY 135, 145–51 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009) (critiquing theories of sexual harassment advanced by Janet Halley and Vicki Schultz that fail to challenge the exploitation of workers within neoliberal capitalism); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1736 (2012) (arguing that antidiscrimination laws based on identity are inadequate to remediate structural disadvantage that arises from social roles and functions).

8. The purpose of this Article is not to examine comprehensively the historical process by which feminism and neoliberalism intertwined. I analyze these dynamics in broader scope and greater detail elsewhere. See DEBORAH DINNER, *CONTESTED LABOR: SOCIAL REPRODUCTION, WORK, AND LAW IN THE NEOLIBERAL AGE, 1965–2010* (forthcoming 2018).

in the decline of labor protection. Second, I argue that while inherently limited in its capacity to promote economic equality along class lines, Title VII once held more capacious meaning. Trends in scholarship and in doctrine through the 1970s, however, interpreted Title VII according to neoliberal principles and thereby narrowed its scope. I conclude that neoliberalism left its imprint on Title VII both in the design and the implementation of the statute.

Rather than providing a comprehensive historical narrative, I analyze two illustrative moments that were pivotal to constructing the meaning of sex equality. The first was the end of maternalist labor laws in the early 1970s. I challenge the scholarship that celebrates these laws' demise as the genesis of contemporary sex equality doctrine. Instead, I highlight labor feminists' understanding that sex equality required state action to mitigate capitalism's excesses. These feminists, who used unions to fight for women's rights, argued for protective labor standards as well as equal employment opportunity.<sup>9</sup> As the concept of antistereotyping came to replace that of labor protection, this ideal got lost. As a result, antidiscrimination law protected women's rights to equal employment opportunity in a labor market characterized by the absence of protective regulation.

The second turning point was the framing of Title VII as an efficiency-promoting statute. This impulse manifested in the scholarship on race discrimination, which sought to ground the normative justification for Title VII in part on market values. But doing so made disparate-impact liability appear increasingly problematic and thereby foreclosed gender-discrimination claims that sought not merely to increase opportunity but rather to transform labor-market structures.

In Part III, the Article analyzes the consequences of this history for contemporary understandings of equality. Today, the Equal Employment Opportunity Commission (EEOC) and scholars advocate institutional "best practices" to prevent discrimination. Such best practices involve prohibitions on gender and racial stereotypes and reinforce the idea that employment-discrimination law promotes efficient labor markets. I argue, however, that these best practices are incapable of redressing the structural inequalities facing low-income workers. The dominance of antistereotyping theory relinquishes challenges to the fundamental terms of the employment relationship and gives up claims that the state has a responsibility to regulate those terms. In addition, efficiency continues to act as a prominent rationale cabining the scope of employment-discrimination law. As a consequence, antidiscrimination doctrine and theory limit the kinds of disparate-impact litigation that would not only promote gender inclusion within the workplace but also redistribute power between employers and workers. I show that the failure to recognize the imbrication of employment discrimination law with neoliberalism obscures the interests of working-class women in debate about work-family conflict and legitimates class inequalities.

By opening a new window into the history of sex-discrimination law, this Article raises a host of important questions about the limitations of contemporary anti-discrimination theory. It is a common observation that current legal doctrines and institutions have not realized full inclusion and equal opportunity for women and racial and sexual minorities. Antidiscrimination law's limits, however, run deeper. Employers, business trade associations, courts, and scholars have in specific

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9. DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT* 4 (2004).

instances deployed Title VII in ways that legitimated the status quo distribution of power between workers and employers as well as a minimal welfare state. I conclude by calling for greater attention to class as well as to sex to promote a labor market that offers adequate income as well as benefits and schedules that enable low-income workers to realize economic security, to gain greater control over the terms of their jobs, and to maintain fulfilling lives outside of work.

#### I. THE PUZZLE OF EMPLOYMENT DISCRIMINATION LAW IN THE NEOLIBERAL AGE

To understand Title VII and neoliberalism as normatively related rather than oppositional might be viewed as heretical. Almost without exception, the literature celebrates Title VII's aspiration to disrupt gender and race hierarchies even as it recognizes the statute's limitations in realizing this goal. Conversely, political theorists and historians lament that neoliberal governance has deepened economic inequality; legal scholars are beginning to join this chorus. Yet Title VII shares ideological underpinnings with the primary tenets of neoliberalism—an insight the scholarship has not yet recognized.

##### A. Title VII: A Celebration

The dominant narrative lauds Title VII for enabling the women's movement's efforts to combat employer practices and state laws that coerced the sexes into fixed gender roles. In campaigning for administrative rules that would "take seriously" the statute's prohibition on sex discrimination, feminist activists challenged essentialist understandings of women's nature, capacities, and interests. In litigating under Title VII, they combatted the gendered assumptions underpinning sex segregation in the labor market.<sup>10</sup>

Antidiscrimination scholars argue that Title VII's potential to topple gender hierarchy lies in its prohibition on sex-role stereotyping.<sup>11</sup> The antistereotyping principle takes aim at the family-wage system: the cultural ideologies, institutional practices, and laws that reinforced the model of a family comprised of a male breadwinner and dependent female caregivers.<sup>12</sup> This principle suggests that laws and employer practices that reinforce the assumption that men are primarily workers and women are primarily caregivers violate the Equal Protection Clause of the Fourteenth Amendment and Title VII, respectively.<sup>13</sup> Antistereotyping theory, therefore, offers the promise of ending state action and employer practices that coerce men and

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10. See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1012–13 (2015).

11. See *infra* notes 240–42, 248–56, and accompanying text.

12. See ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 7, 42–44, 166 (2001). The family-wage system was grounded in separate-spheres ideology, which emerged in the mid-nineteenth century in response to the social disruption caused by industrialization. The idea that women would preserve domestic, nonmarket values and virtues in the home offered a salve against competitive capitalism. See NANCY F. COTT, THE BONDS OF WOMANHOOD, at xi, xiv–xxiii (2d ed. 1997) (describing the historiography on “separate spheres”).

13. See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83 (2010); Schultz, *supra* note 10, at 1000–01.

women into rigid gender roles. It bears the hope that people will more freely express identities in the workplace and realize a more humane balance between work and family. Both men and women should have greater choice and opportunity regarding whether and how to engage the rewards as well as the burdens of paid labor in the market and unpaid caregiving labor in the home.

Antistereotyping theory affirms the individualism at the core of legal liberalism. The prohibition on unlawful stereotyping targets the gap between an individual’s true capacities and identity and the capacities attributed to her by a sex-respecting rule. The scholarship identifying the harms of stereotyping stresses this point. Anita Bernstein argues that “stereotyping is wrong to the extent that it functions to deprive individuals of their freedom without good cause.”<sup>14</sup> Meredith Render explains that courts strike down certain gender stereotypes not because of the generalization itself, but rather because of a determination that the generalization is unfair.<sup>15</sup> When law embodies gender stereotypes, it regulates behaviors in ways that make certain gender rules appear natural and fixed.<sup>16</sup> This dynamic produces “social rules” that limit individual autonomy.<sup>17</sup>

If sex segregation and the constraint on individual flourishing represents the classic injuries under Title VII, then “openness” emerges as a key trope in the scholarship valorizing the statute’s remedial hope. Legal scholar Vicki Schultz celebrates the transformation in the American workplace wrought by Title VII, with reference to her daughter’s “inherit[ance of] a world that is . . . more open”<sup>18</sup> than that experienced by her mother or grandmother.<sup>19</sup> Historian Nancy MacLean subtitles her important narrative about grassroots mobilization by women and people of color to enforce Title VII’s antidiscrimination mandate, *The Opening of the American Workplace*.<sup>20</sup> The dominant narrative suggests that Title VII opens the labor market to women seeking economic opportunity and social freedom.

Access to greater job opportunity in turn offers women enhanced material security and economic independence. Ending sex segregation enables working-class women to move from a pink-collar ghetto to better paid industrial jobs.<sup>21</sup> It fosters professional women’s entrance into the ranks of higher management. As equal competitors in the labor market, women can assume the role of primary breadwinners rather than marginal workers. The enhanced economic autonomy makes them less dependent on

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14. Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 659 (2013). Stereotypes, Bernstein explains, serve as a technology for spreading prejudice. *Id.* at 677. They enable the human brain to classify information about people and the world around them and then to index these classifications in the memory. This cognitive process in turn enables the brain to draw inferences about the stereotyped individual more quickly than one does ordinary negative generalizations. *See id.* at 677.

15. Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 162–63 (2010).

16. *Id.* at 163–69.

17. *Id.* at 169–72.

18. Schultz, *supra* note 10, at 1007.

19. *Id.* at 1006–07.

20. NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006).

21. *See* SHARON H. MASTRACCI, *BREAKING OUT OF THE PINK-COLLAR GHETTO* 66 (2004).



men and affords them greater freedom in choosing whether to enter or exit marriage.<sup>22</sup>

The celebration of Title VII is not uniform and several critical voices explore the limitations of the statute in realizing sex equality. With few exceptions,<sup>23</sup> however, the critical strain of scholarship on Title VII locates its limitations either in judicial interpretation<sup>24</sup> or the statute's implementation within workplaces.<sup>25</sup> Scholars stop short of arguing robustly that Title VII itself may function within American legal culture to legitimate economic inequalities that disproportionately burden low-income women workers.

### B. Neoliberalism: A Lament

Neoliberalism is neither a coherent set of political policies nor a well-defined set of philosophical ideals.<sup>26</sup> It is “not conceptually neat.”<sup>27</sup> Rather, David Harvey, one of neoliberalism's most prominent critics, argues that a fundamental premise organizes this practice: “that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”<sup>28</sup> Social, political, and legal actors mobilize this premise “defensively” to preserve market relations, “affirmatively” to support the rollout of market policies, and “ideologically” to legitimate legal systems.<sup>29</sup>

The defining feature of neoliberalism is the hegemony of the free-market ideal, which constitutes the “common sense” of our era.<sup>30</sup> The free-market ideal underpins deregulatory economic policies and also sets forth a theory of the societal good. Neoliberalism stands for the proposition that the aggregate (not the collective) welfare is best realized through market transactions.<sup>31</sup> Individual contracting in the

22. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 71 (1988).

23. See, e.g., Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1098–99 (2009) (arguing that employment discrimination law has proven ineffectual in challenging the taken-for-granted workplace norms that produce gender inequality).

24. See, e.g., Schultz, *supra* note 10, at 1066–68 (examining the “lack of interest” defense and pregnancy-discrimination cases and concluding that the courts failed to interpret Title VII broadly as a robust prohibition on sex stereotyping).

25. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–80 (2001) (arguing that courts are ill suited to address more subtle, nuanced, and contextually variable discriminatory practices, today, than the explicit sex and race-based bias and animus of the past).

26. Blalock, *supra* note 4, at 84.

27. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 2 (2014).

28. HARVEY, *supra* note 3, at 2.

29. Grewal & Purdy, *supra* note 27, at 5.

30. HARVEY, *supra* note 3, at 3. The definition of hegemony is that the perspectives and attitudes of the elite classes become the cultural consensus of the broader society. See generally 1 ANTONIO GRAMSCI, *PRISON NOTEBOOKS* (Joseph A. Buttigieg ed., Joseph A Buttigieg & Antonio Callari trans., Columbia University Press 1992) (1975) (describing the common assumptions and beliefs that organize society).

31. HARVEY, *supra* note 3, at 3.

market, moreover, is the site of individual expression and private choice.<sup>32</sup> If one takes both these conclusions as true—that the market facilitates wealth maximization and personal freedom—then neoliberalism not only maximizes wealth but also promotes “the most decent society.”<sup>33</sup>

Neoliberalism, as political theorist Wendy Brown demonstrates, remodels all spheres of society on the model of the market.<sup>34</sup> Neoliberalism represents a “political rationality” that produces the “economization” of social life.<sup>35</sup> The citizen is conceived of as *homo oeconomicus*, an individual whose value to the polity is measured by the extent to which she or he can maximize his or her human capital.<sup>36</sup> Neoliberal ideologies thereby transform citizens from democratic subjects and actors into individual wealth maximizers.<sup>37</sup>

Neoliberalism’s celebration of individual agency in the market relates closely to its second premise: the assault on collectivity and solidarity as democratic ideals. The ideal of the freely contracting consumer-citizen is in tension with social-justice projects, which require the subordination of individual interests in service of collective goods. Neoliberalism’s tendency is thus to sever social movements that celebrate individual difference and expression, in both labor and consumer markets, from mobilization to realize nonmarket values. Accordingly, neoliberalism “split[s] off libertarianism, identity politics, multiculturalism, and eventually narcissistic consumerism” from social mobilization for labor power, state protection, and socioeconomic security.<sup>38</sup> In particular, neoliberalism opposes the collective organization of workers through unions that hold the power to circumscribe freedom and flexibility of capital.<sup>39</sup>

The third tenet of neoliberalism is the ideological commitment to a minimal state and to rollbacks in social services.<sup>40</sup> Neoliberalism’s intellectual architect, Friedrich Hayek, believed that the market was so complex that it lay beyond the reach of human understanding.<sup>41</sup> Accordingly, Hayek argued, government should not intervene in the market because politicians and administrators would be unable to predict the consequences of their interventions.<sup>42</sup> David Grewal and Jedediah Purdy write that a

32. *Id.* at 64.

33. Grewal & Purdy, *supra* note 27, at 6.

34. See BROWN, *supra* note 3, at 17. Harvey argues that neoliberalism represented an ideology that big business imposed on the state to serve its own interests. HARVEY, *supra* note 3, at 13–15. Brown, however, contests this view. She argues that the free-market ideal is not merely a disguise for particular business interests. BROWN, *supra* note 3, at 64; see also Terry Flew, *Michel Foucault’s The Birth of Biopolitics and Contemporary Neo-liberalism Debates*, 108 *THESES ELEVEN* 44, 46–47 (2012) (observing that there are two dominant theoretical interpretations of neoliberalism as a historical force in the second half of the twentieth century: a Marxist interpretation and an interpretation that synthesizes Marxism with Michel Foucault’s theory of governmentality).

35. BROWN, *supra* note 3, at 61–62.

36. *Id.* at 33–34.

37. *Id.* at 109.

38. HARVEY, *supra* note 3, at 41.

39. *Id.* at 75–76.

40. *Id.* at 76.

41. Blalock, *supra* note 4, at 85–86.

42. Blalock, *supra* note 4, at 86.

sense of pessimism regarding even the *capacity* for state action to discipline the market pervades neoliberal political culture.<sup>43</sup> Taken to its logical conclusion, the neoliberal state would have almost no responsibility toward the socioeconomic security of its citizenry, beyond what is necessary to enable market function and quell external political threats and internal social unrest that undermines market function.<sup>44</sup>

In his famous 1978–1979 lectures at the Collège de France, Michel Foucault observed that in the 1970s “the market . . . bec[a]me a new limit on the state even as it began to saturate and construe the state with its distinctive form of reason.”<sup>45</sup> As political theorist Corinne Blalock argues, neoliberalism ideologically forecloses the very possibility of state economic regulation in service of the public good.<sup>46</sup> The liberalism exemplified by the New Deal in the United States and social democracy in Europe sets constraints on the market, construing a primary function of governance to be mitigation of the harshest effects of capitalism. By contrast, neoliberalism envisions the purpose of the state as promoting economic growth by enabling free markets and competition.<sup>47</sup>

The ideologies of the minimal welfare state and the free market transform the state’s response to inequality. These ideologies shift the basis of legitimacy for state action from democratic authority to an assessment of whether a proposed law would enable individual agency in the market.<sup>48</sup> Furthermore, neoliberalism’s conceptualization of the market undermines the demand for a state responsive to economic inequality. In contrast to classical economic liberalism, which focuses on mechanisms of exchange in the marketplace, neoliberalism focuses on market competition. As Wendy Brown explains, “equivalence is both the premise and the norm of exchange, while inequality is the premise and outcome of competition.”<sup>49</sup> In constructing justice as the realization of each individual’s capacity to exercise free choice in the market, neoliberalism limits state responsibility for redressing economic inequality.<sup>50</sup> As Grewal and Purdy caution, however, it would be too simplistic to label neoliberalism “antiregulatory.”<sup>51</sup> The central inquiry should be which forms of regulation neoliberalism has enabled and which it has foreclosed, and in whose interests.

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43. Grewal & Purdy, *supra* note 27, at 6.

44. HARVEY, *supra* note 3, at 153 (“The only fear [the upper classes] have is of political movements that threaten them with expropriation or revolutionary violence. . . . [T]hey can hope that the sophisticated military apparatus they now possess . . . will protect their wealth and power . . .”); *see also id.* at 152–82.

45. BROWN, *supra* note 3, at 58.

46. *See* Blalock, *supra* note 4, at 85–86.

47. HARVEY, *supra* note 3, at 64–65; *see* Flew, *supra* note 34, at 57–58.

48. Grewal & Purdy, *supra* note 27, at 3–4.

49. BROWN, *supra* note 3, at 64.

50. Blalock, *supra* note 4, at 93.

51. Grewal & Purdy, *supra* note 27, at 12–14. Contradictions exist between the ideal of a minimal state and the practice of neoliberalism. Harvey identifies several: that between the prohibition on state intervention in markets and active state policies that facilitate corporate power; that between individual freedom and the authoritarian discipline necessary to impose market discipline; and that between the aspiration toward the integrity of finance and the speculative activities of the financial sector. HARVEY, *supra* note 3, at 79–80. Grewal and Purdy additionally highlight those contradictions elucidated by the German sociologist Wolfgang Streeck. Grewal & Purdy, *supra* note 27, at 20–21. A tension exists in what Streeck calls

*C. Putting Together the Puzzle Pieces*

The passage of Title VII did not presuppose neoliberalism; neoliberal policies were not a precondition for the emergence of employment discrimination law. The enactment of Title VII represented the fulfillment of multiple political movements and aspirations—most significantly, the movement for civil rights for African Americans.<sup>52</sup> Nonetheless, the potential existed for Title VII to facilitate neoliberalism. Because Title VII and neoliberalism are both rooted in the American liberal tradition, they share common, animating values.<sup>53</sup> These values include individualism, efficiency, and negative rights.

First, employment-discrimination law shares with neoliberalism an emphasis on individual self-determination and flourishing. Neoliberalism defines inequality as a problem of artificial constraints on individual agency.<sup>54</sup> Employment-discrimination theory, and the antistereotyping principle in particular, similarly focus on injury to individual potential.<sup>55</sup> This focus sidesteps questions of structural disadvantage. Neoliberal philosophies suggest that the purpose of government is to promote freedom of opportunity rather than to create more just economic structures. Employment-discrimination law likewise promotes inclusion of those excluded from labor-market opportunity,<sup>56</sup> but falls short of reconceptualizing the fundamental terms of the employment relationship. The metaphor of “opening” signals opportunity and access, but not transformation.

Second, the hegemony of the market ideal is evident in both neoliberal ideology and scholarly and judicial interpretations of Title VII. Efficiency has emerged as a rationale both justifying and limiting interpretations of sex discrimination. Although

“democratic capitalism” between policies that encourage mass political participation and those that foster liberty of capital. Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 *NEW LEFT REV.* 5, 7–8 (2011). If a state capitulates too far in the direction of democratic claims for redistribution, it will upset economic elites; if it compensates the owners of capital in amounts that outrage the public, then it risks populist unrest. *See id.*

52. MACLEAN, *supra* note 20, at 51–75 (describing the social movement mobilization and counter-mobilization leading to the passage of the Civil Rights Act of 1964).

53. However, Wendy Brown argues that neoliberalism represents a fundamental departure from traditional liberalism. *See* WENDY BROWN, *EDGEWORK* 38–39, 44–46 (2005) (arguing that the current erosion of democratic institutions signals a historical disjuncture). Despite the discontinuities of neoliberal political culture with the past, however, neoliberal ideals emerged from the wellspring of liberal thought.

54. *See supra* text accompanying notes 38–39.

55. *See infra* text accompanying notes 231–35, 238–52.

56. Certainly, Title VII promotes the inclusion of previously excluded *groups* (e.g., racial minorities and women) and not individuals universally. But the disparate-treatment theory of liability, at the core of the statute, operationalizes this inclusion largely via an analysis of discrimination against *individuals*. Compare *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (setting forth a burden-shifting framework by which a plaintiff may prove an individual case of disparate-treatment liability), with *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (discussing the government’s burden in proving a “pattern or practice” under section 707(a) of Title VII). Moreover, the inclusion of those individuals within excluded groups who can meet the demands posed by existing labor-market structures falls far short of transforming those structures.

not all scholars argue that efficiency provides the normative underpinning for employment discrimination law, it is a predominant rationale within the case law.<sup>57</sup> The judicial construction of Title VII as a statute meant to promote market rationality<sup>58</sup> helps to explain why courts routinely foreclose certain kinds of disparate-impact claims under Title VII.

Third, Title VII doctrine, as it has evolved in the crucible of particular legal and political contexts, has functioned at specific moments to legitimate neoliberalism's assault on the welfare state. Neoliberal ideology affirms the ideal of a minimal state, even as it aggrandizes some elements of the state while weakening others.<sup>59</sup> The enactment of Title VII reinforced the courts' role as engines of state building, but it has also undermined the ideal of positive entitlements to social welfare as guaranteed by legislatures and administrative agencies.<sup>60</sup>

To say that neoliberalism and antidiscrimination law share values is not to argue that Title VII necessarily served neoliberal purposes. Such an argument would ignore historical contingency. The shared liberal values, however, did create the necessary condition for the historical *possibility* that Title VII would be construed and used in a manner that comported with neoliberal purposes. The overlap in the principles underpinning antidiscrimination law and neoliberalism enabled employers, courts, and scholars to frame Title VII to advance free-market ideologies, even though it did not *predetermine* that this would happen. Metaphorically speaking, the chemical compounds existed for a reaction to take place, but external events were necessary to catalyze the reaction.

Understanding how Title VII and neoliberalism intertwined historically requires empirical analysis into the dynamic political and institutional contexts in which employment-discrimination law evolved. A host of questions require further investigation: How did legal institutions facilitate or block the convergence between anti-discrimination doctrine and neoliberal policies? In what ways did employers and business trade associations deploy Title VII? Did their actions facilitate or frustrate social movement mobilization to enforce Title VII? This Article initiates an inquiry into these questions and ultimately suggests that answering them should be critical to future research agendas in legal history, feminist theory, and employment law.

## II. NEOLIBERAL SEX EQUALITY: HISTORICAL REFLECTIONS

The influential political theorist Nancy Fraser argues that feminism in the late twentieth century entered into a "romance" with neoliberalism.<sup>61</sup> Feminists turned away from critiques of political economy and toward analyses of culture, she argues, at precisely the moment neoliberal theories of governance took hold.<sup>62</sup> Fraser speculates this could possibly be a tragic historical irony. Yet she queries whether "some

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57. *See infra* text accompanying notes 267–68.

58. *See infra* text accompanying notes 273–74.

59. *See supra* text accompanying notes 46–49.

60. *See infra* Part II.A.2.

61. Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 *NEW LEFT REV.* 97, 99, 108–09 (2009).

62. *Id.* at 108–09.

perverse, subterranean elective affinity” existed between neoliberalism and feminism.<sup>63</sup> Feminists, for example, valorized workforce participation as a site of social equality. This ideal provided moral legitimacy for capitalist transformations that drew women into the labor market, made long hours pervasive, and reduced the real value of wages.<sup>64</sup> Furthermore, feminists relinquished their earlier commitment to deconstructing ideological boundaries between production in the market and social reproduction, or the caregiving and other forms of labor needed to reproduce the next generation.<sup>65</sup> Fraser’s claim is startling and provocative.<sup>66</sup> Is it historically accurate?

We do not yet have the historical knowledge that would enable us to understand fully the process by which feminist mobilization and antifeminist counter-mobilization yielded neoliberal conceptions of sex equality. Part of the problem is that many historians portray feminist and antifeminist activism as limited to the “culture wars.”<sup>67</sup> According to this historical narrative, feminists fought to destabilize conventional gender roles, while social conservatives fought to reinforce them. That is only half the story, however. Labor feminists and grassroots community activists fought not only for equal employment opportunity and sexual liberation but also for affirmative state regulation that would produce a more just employment relationship.<sup>68</sup> The most vocal and powerful opponents of this strain of feminist activism were not social conservatives but rather employers and business trade associations.<sup>69</sup>

Legal scholarship is similarly limited by a focus on gender roles as opposed to broader capitalist structures. The legal literature depicts the battle over sex equality to have been fought on the terrain of sex-role stereotypes and antidiscrimination law rather than on that of economic justice and labor law. The legal scholarship emphasizes the development of an antistereotyping principle, which challenged state laws and employer practices that reinforced the male-breadwinner, female-caregiver dyad.<sup>70</sup> Ruth Bader Ginsburg emerges as the primary heroine of this story, and her

63. *Id.* at 108.

64. *Id.* at 110–11.

65. *See id.* at 104–05 (discussing how socialist-feminists “uncovered the deep-structural connections between women’s responsibility for the lion’s share of unpaid caregiving” and androcentrism).

66. Fraser also argued that politicians appropriated feminists’ critique of patriarchal welfare systems to end federal entitlement to public assistance. *Id.* at 111. This Article, however, does not take up her argument regarding welfare.

67. *See, e.g.,* DANIEL T. RODGERS, *AGE OF FRACTURE* 174 (2011).

68. *See* KATHERINE TURK, *EQUALITY ON TRIAL* 9 (2016) (“Beyond opening full economic citizenship to laboring women, [working-class women] sought to use Title VII to reset the terms of economic citizenship from laboring women’s perspective.”); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *HARV. C.R.-C.L. L. REV.* 415 (2011) (analyzing feminists’ pursuit of redistributive claims related to pregnancy, childcare, and family leave).

69. *See* DINNER, *supra* note 8.

70. Franklin, *supra* note 13, at 88. The ideals that animated the antistereotyping principle had a longer liberal genealogy. They first found expression in John Stuart Mill’s foundational 1869 essay, *The Subjection of Women*. *Id.* at 93. Mill argued that the enforcement of women’s dependence within the family rested on specious biological determinism. *Id.* at 95. Early twentieth century social thought elaborated on the distinction Mill drew between individual capacity and the social norms that regulated behavior. In the mid-twentieth century, social scientists

achievements as counsel to the ACLU (American Civil Liberties Union) Women's Rights Project constitute its central drama.<sup>71</sup> The legal and social history, in turn, yields a specific normative commitment within contemporary feminist legal theory—one that celebrates the potential of the antistereotyping principle.<sup>72</sup>

But the prevailing narrative is only a partial history, and its lack of attention to the full range of feminist activism has narrowed the scope of feminist legal theory today. Part II.A shows that labor feminists understood sex equality to require not only equal employment opportunity but also the expansion of labor protections. Yet employers deployed Title VII in ways that undermined protective standards and, over the course of the 1970s, employment-discrimination law came to serve business's interests in a deregulated labor market. In addition, as Part II.B discusses, scholars and courts resorted to market logic as the normative basis for Title VII. They defined the statute's primary function to be the promotion of efficient labor markets, thereby narrowing the capacity for Title VII jurisprudence to make workplace structures more hospitable to employees' performance of reproductive labor outside of work.

#### A. *The Erosion of Maternalist State Labor Standards*

The historical and legal literature heralds the end of maternalist labor laws as the dawn of a new era of sex equality.<sup>73</sup> The scholarship chronicles the challenges that

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applied the idea of the stereotype to analyze gender roles. Joanne Meyerowitz, *A History of "Gender,"* 113 AM. HIST. REV. 1346, 1353–54 (2008). They distinguished between biological sex difference and the cultural values, social practices, and institutional structures that comprised gender. *Id.* at 1354. Feminists in the late 1960s and early 1970s used these theories to contest the idea that an inherent connection existed between the fact of a woman's sex and motherhood. *Id.* at 1354–55.

71. Ginsburg was influenced by both the broader women's movement and her experiences in Sweden, where state policy encouraged both women's workforce participation and men's responsibility for familial caregiving. *See* Franklin, *supra* note 13, at 97–114. Ginsburg viewed the legal regulation of pregnancy as the paradigm case of unconstitutional sex stereotyping. Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1100 (2009); *see also id.* at 1099–106. Ginsburg's litigation strategy ultimately made significant dents in a constitutional and legal regime that channeled women into a dependent, maternal role. Yet the Supreme Court and lower federal courts resisted applying the principle to the legal regulation of pregnancy. Franklin, *supra* note 13, at 157–63.

72. *See* Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449–53 (2000) (arguing that the fulfillment of the antistereotyping principle will take the law in "interesting and radical directions").

73. *But see* TURK, *supra* note 68, at 16, 22–25 (arguing that in the late 1960s the EEOC crafted industry-specific solutions to the conflict between Title VII and state protective laws which accommodated labor feminists' claims to "equality with protection"). The dominant scholarly treatment of the end of maternalist labor laws starkly contrasts with the literature on the relationship between labor and the civil rights movement. That literature takes seriously the question of whether antidiscrimination law undermined labor organization. *See, e.g.,* PAUL FRYMER, *BLACK AND BLUE* 2–3, 5–7 (2008) (arguing that the creation of a new, distinct legal regime to redress race discrimination "institutionalized the labor-race divide" because even as

individual plaintiffs posed to sex-based state labor laws that excluded women from higher-paying, industrial jobs.<sup>74</sup> This celebratory narrative stems from the literature's focus on the development of an antistereotyping principle: if the legal regulation of women on the basis of gender stereotypes constitutes the primary injury, then the elimination of such laws represents the fulfillment of feminist activism. Nancy MacLean presents the most powerful argument that "Title VII cut the Gordian knot" that had divided the women's rights movement into advocates of the Equal Rights Amendment (ERA) and advocates of protective laws.<sup>75</sup> MacLean argues that because Title VII "promis[ed] substantive fairness," women no longer had to choose between security and equal employment opportunity.<sup>76</sup> The legal literature likewise tends to dismiss the "protectionist" frame within the movement as anachronistic.<sup>77</sup>

This narrative has three shortcomings, all of which limit its capacity to recognize and to explain how feminist advocacy and neoliberalism intertwined. First, because the narrative represents advocates for maternalist labor laws as marginal figures who embraced outdated gender stereotypes, it downplays these feminists' argument that legal protections for workers collectively (and not just individualist anti-discrimination claims) were necessary for a just labor market. The narrative likewise ignores labor feminists' struggle to universalize protective labor laws. Second, the prevailing narrative overlooks the way in which employers used Title VII as a de-regulatory tool to advance managerial prerogatives. Third, and relatedly, this narrative fails to recognize the limited capacity of employment-discrimination law to advance the economic security and social welfare of working-class women in a minimal welfare state.

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courts promoted civil rights, they drained the financial resources of unions defending anti-discrimination lawsuits); NELSON LICHTENSTEIN, *STATE OF THE UNION 191–92* (rev. and expanded ed. 2013) (arguing that the passage of Title VII reinforced a shift from concern with economic inequality, capitalism, and the democratization of the workplace to emphasizing legislation and statecraft that remedied the racial, and later the gender, divide *within* capitalism); REUEL SCHILLER, *FORGING RIVALS 7–9* (2015) (examining a tension within postwar liberalism between commitments to economic and racial egalitarianism and contrasting labor law's grounding in principles of majoritarianism and private ordering with employment discrimination law's grounding in principles of countermajoritarianism).

Comparing the triumphant narrative about Title VII and sex equality with the more skeptical narrative about Title VII, race, and labor reveals two gaps in the literature. The juxtaposition highlights the absence of gender in the literature on the ambivalent consequences of antidiscrimination law for the labor movement. This literature focuses almost exclusively on race. Women make only cameo appearances in these accounts. Conversely the literature on feminist advocacy and Title VII largely ignores the labor movement. As a consequence, this literature takes insufficient account of the consequences the evisceration of the maternalist labor regime posed for unions and for labor regulation.

74. See MACLEAN *supra* note 20, at 117–54 (describing the mobilization of working-class women to enforce Title VII's promise of equal employment opportunity for women); ROBERT O. SELF, *ALL IN THE FAMILY 103–33* (2012).

75. MACLEAN, *supra* note 20, at 118.

76. *Id.*

77. See, e.g., Schultz, *supra* note 10, at 1024–25.



### 1. Business Groups' Defeat of the Voluntary-Overtime Law

The passage of Title VII reinvigorated a longstanding debate within the women's movement about maternalist labor standards.<sup>78</sup> A half century earlier, in the Progressive Era, social-feminist advocates and their allies had argued for the importance of labor protection. They used gender ideologies to circumvent the freedom of contract doctrines deployed by *Lochner*-era courts.<sup>79</sup> They argued that specific laws were needed to protect working mothers from exploitation because of women's particular vulnerability as nonunionized, low-wage workers as well as their social role as mothers.<sup>80</sup> Advocates for maternalist labor standards hoped, furthermore, that laws regulating women's labor might one day yield universal state labor standards. Advocates hoped to win protective laws for women first and then to use these to legitimate the idea of labor protections and, subsequently, obtain the extension of such laws to men.<sup>81</sup>

Through the 1920s and 1930s, maternalist labor laws became a major point of contention between social feminists and ERA advocates. Social feminists argued that maternalist labor laws regulating the hours and conditions of women's work were especially important given the system of federalism in the United States. The Fair Labor Standards Act (FLSA) of 1938 largely excluded working-class women, overwhelmingly employed in service-sector jobs understood to be located within *intra*- rather than *interstate* commerce.<sup>82</sup> The National Woman's Party, the major advocacy

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78. In December 1965, the EEOC issued guidelines stating that Title VII did not preempt state labor regulations that had the purpose and effect of "protecting women against exploitation and hazard." 29 C.F.R. § 1604.1(c) (1966). Some feminists reacted angrily to the agency's sanctioning of laws that blocked women's equal employment opportunity. Frustration with the EEOC's perceived reluctance to enforce the sex provision of Title VII led to the formation of the National Organization for Women (NOW) in June 1966. RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 74–75 (2000). National Councils of Catholic, Negro, and Jewish Women wrote to EEOC Chairman, Franklin Roosevelt Jr., and Acting Chairman, Luther Holcomb, defending the guidelines. Letter from Dorothy I. Height, Nat'l President, Nat'l Council of Negro Women, Inc., to Luther Holcomb, Acting Chairman, Equal Emp't Opportunity Comm'n (July 28, 1966) (on file with author); Letter from Olya Margolin, Wash. Representative, Nat'l Council of Jewish Women, to Franklin D. Roosevelt Jr., Chairman, Equal Emp't Opportunity Comm'n (July 30, 1965) (on file with author) (writing on behalf of multiple organizations including the National Council of Catholic Women, the National Council of Jewish Women, and the National Council of Negro Women).

79. See VIVIEN HART, *BOUND BY OUR CONSTITUTION* 63–129 (1994).

80. *Id.* at 84–86, 90–106.

81. See *id.* at 63–129; see also Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 199 n.15 (1991) (arguing that social feminists sought first to win sex-specific protective labor laws and then to use these as a wedge to expand protective standards to men).

82. See Fair Labor Standards Act of 1938, ch. 676, § 2(a), 52 Stat. 1060 (codified at 29 U.S.C. § 202(a) (2012)); Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 644–47 (1994) (discussing constructions of interstate commerce at the time of the FLSA's passage).

organization for the ERA, however, came to view sex-specific labor standards as inconsistent with the principle of sex equality under law. ERA advocates argued that maternalist protections denied women job opportunities and reinforced gender roles that relegated women to the domestic sphere.<sup>83</sup>

In the late 1960s, the debate over maternalist labor standards produced a “tug of war” between Detroit’s “two top women in labor union circles.”<sup>84</sup> Caroline Davis, Chair of the Women’s Department of the United Auto Workers (UAW), fought to repeal Michigan’s sex-specific hours’ law.<sup>85</sup> In the postwar period, as women’s incomes became increasingly essential to familial economic security, the UAW’s female membership began to smart under the constraints of the maternalist labor regime.<sup>86</sup> Davis was willing to risk some labor protection in exchange for greater employment opportunity. Myra Wolfgang, a leader in the Hotel Employees and Restaurant Employees Union (HERE),<sup>87</sup> strenuously opposed the repeal. Wolfgang and other labor feminist activists feared that the erosion of maternalist labor standards would benefit “highly skilled or favorably situated women” while harming “those with the least skill and bargaining power.”<sup>88</sup> They warned that eliminating maternalist labor standards would wash away a regulatory floor that represented the labor movement’s best hope to augment legal oversight of the employment relationship.<sup>89</sup> The literature dismisses Wolfgang and others like her as horribly outdated—women who embraced a protectionist paradigm rooted in gender stereotypes.<sup>90</sup> Wolfgang, however, argued that labor protections were necessary not because of

83. See Zimmerman, *supra* note 81, at 197–200.

84. Ruth Carlton, *Women’s Work—How Many Hours?*, DETROIT NEWS, Oct. 19, 1967, at 1D (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers); see Helen Fogel, *Judge Tells Women To Prove that Overtime Is Harmful*, DETROIT FREE PRESS, Jan. 19, 1969 (same); Colleen O’Brien, *Angry Women Charge Secret Repeal of Law Protecting Workers*, DETROIT FREE PRESS, Oct. 18, 1967 (same).

85. Carlton, *supra* note 84; Fogel, *supra* note 84.

86. On working-class women’s frustration with maternalist labor laws, see Katherine Turk, “*With Wages So Low How Can a Girl Keep Herself?*”: *Protective Labor Legislation and Working Women’s Expectations*, 27 J. POL’Y HIST. 250 (2015).

87. COBBLE, *supra* note 9, at 2.

88. KESSLER-HARRIS, *supra* note 12, at 263 (quoting National Consumers’ League letterhead (January 1967) (on file in Folder 657, Box 529, Esther Peterson Collection, Schlesinger Library, Radcliffe College)); Memorandum from Katherine Pollak Ellickson, Chairman, Comm. on Labor Standards, Nat’l Consumers League (Mar. 1, 1967).

89. Letter from Dorothy I. Height, Nat’l President, Nat’l Council of Negro Women, Inc., to Luther Holcomb, Acting Chairman, Equal Emp’t Opportunity Comm’n 2 (July 7, 1966), (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers) (“[T]here is some misunderstanding of the importance of maintaining present State labor standards for women until such time as the laws are reexamined and improved to provide good labor standards for all workers . . . .”); Letter From Dorothy I. Height, *supra* note 78 (same).

90. But see COBBLE, *supra* note 9 (recovering the political vision of labor feminists, from the New Deal through the 1960s); TURK, *supra* note 68 (arguing that working-class women advocated an interpretation of Title VII that acknowledged the gendered division of labor and departed from a narrow, sameness model).

biological sex differences but because of the “second shift”<sup>91</sup> that working-class women performed in the home.<sup>92</sup>

The divide between Davis and Wolfgang arose because the UAW and HERE were differently situated under law and within the labor market.<sup>93</sup> The UAW enjoyed coverage under the FLSA and, therefore, following the repeal of Michigan’s hours law the UAW’s female membership would receive premium pay for overtime work.<sup>94</sup> By contrast, many workers in the hotel and restaurant industries—unionized and not—lacked coverage under the FLSA because they were understood to work in *intrastate* commerce.<sup>95</sup> In addition, UAW women could rely on strong bargaining agreements to protect them from involuntary overtime.<sup>96</sup> Seventy percent of Michigan’s women workers were not unionized, however, and many of these workers labored in the low-income clerical, retail, and service sectors.<sup>97</sup> Lastly, the male-dominated auto industry promised well-paying jobs, which employers restricted to men on the basis of state protective laws.<sup>98</sup> By contrast, the elimination of state-based protective laws did not offer the same opportunity to women workers in highly feminized sectors of the labor market, where few masculinized jobs existed.<sup>99</sup>

Within a year of their contest over the elimination of the women’s hours law, Davis and Wolfgang—formerly bitter enemies—had joined forces. To the surprise of almost all observers, the UAW and HERE forged a united front in a campaign for

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91. On women’s performance of a second shift in the home, see ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (rev. ed. 2012).

92. The hours law, Wolfgang believed, took account of the sociological difference between men and women’s roles within the family. O’Brien, *supra* note 84.

93. The political science and legal literature characterizes the debate about maternalist labor standards as one between advocates of “equal” and “special” treatment for women. *E.g.*, MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 51–54 (3d ed. 2013). *See generally* LISE VOGEL, *MOTHERS ON THE JOB* (1993) (characterizing debates within feminism about the legal regulation of pregnancy, from the Progressive Era through the 1980s). But this is an ahistorical characterization, which treats debate over advocacy strategies as emerging wholly from ideological disagreement rather than from material conditions and constraints on political action. The debate arose not from advocates’ disparate views on gender roles but rather because of the disparate locations of working-class women within their families, the labor market, and the law.

94. *See* JOHN BARNARD, *AMERICAN VANGUARD* 150–52 (2004).

95. *See* Mettler, *supra* note 82, at 644–47. Amendments to the Fair Labor Standards Act in 1966 extended coverage to hotel and restaurant employees employed by businesses doing greater than \$250,000 per year in business. Susan Kocin, *Basic Provisions of the 1966 FLSA Amendments*, *MONTHLY LAB. REV.*, Mar. 1967, at 1, 3. Yet the amendments retained exemptions for these employees pertaining to overtime pay. *Id.*

96. *See, e.g.*, Jeff R. Crump & Christopher D. Merrett, *Scales of Struggle: Economic Restructuring in the U.S. Midwest*, 88 *ANNALS ASS’N AM. GEOGRAPHERS* 496, 504–05 (1998) (describing the UAW’s economic and political power in the period between 1960 and 1970).

97. Carlton, *supra* note 84.

98. *See* BARNARD, *supra* note 94 at 454–56 (describing the gender and racial composition of the UAW and differentials in wages).

99. *See* Carlton, *supra* note 84 (“With this protective legislation thrown out, nothing is to stop the employer from working women 11 hours a day.”); *see also* O’Brien, *supra* note 84 (“I’m concerned about the majority of women who won’t have protection after Nov. 2.”).

legislation that would result in more humane work hours for men as well as women.<sup>100</sup> They advocated a universal, voluntary-overtime law that would enable all nonprofessional workers—male and female—to reject a request for overtime without employer retaliation.<sup>101</sup> Labor feminists and their unions interpreted the emerging principle of sex equality under law as an impetus to extend protective labor standards from women to men. Just as maternalism had acted as a wedge to crack Lochnerism, now sex equality might serve as a lever to expand protections for labor. Labor feminists sought to implement Title VII’s guarantees to equal treatment under law within a regime of robust labor regulation rather than within a neoliberal, deregulated labor market.

The campaign for universal state protective laws posed a new way out of an old and painful strategic dilemma: whether to prioritize equal employment opportunity or protection for workers. A universal hours law would offer protection to male and female workers not then covered by federal or state labor laws. Unlike sex-based hours laws, however, employers could not use a universal hours law as a justification to exclude women from job opportunities. The fight for the expansion of protective labor legislation—not the fight to strike down sex-based protective laws, as the common wisdom dictates—obviated the choice between protection and opportunity. The struggle held out the hope of fusing two strands within American liberalism: a commitment to labor protection forged in the Progressive Era and the New Era and a newer, Civil Rights–Era commitment to antidiscrimination.

Employers, however, fought hard to construct a sex-equality regime that vitiated rather than universalized sex-specific labor standards. In Michigan, the Big Three automobile companies welcomed some feminists’ challenge to maternalist labor standards.<sup>102</sup> Protective laws gummed up the wheels of production. Employers had long opposed them.<sup>103</sup> Their repeal would offer enhanced flexibility and control over the production process, including the freedom to make female employees work long and erratic hours. After Michigan repealed its sex-based maximum hours law, women reported having to work as long as seventy or eighty or more hours per week.<sup>104</sup>

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100. Press Release, United Auto Workers, Coalition Spurs Senate Action on Voluntary Overtime Bill (Dec. 9, 1970) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers).

101. *Id.*

102. Memorandum from Stephen I. Schlossberg & Bernard F. Ashe, Gen. Counsel, United Auto Workers, to Leonard Woodcock and Ernie Moran, Int’l Vice President and Admin. Assistant, United Auto Workers (May 23, 1968) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers); *see also* Letter from Duane D. Daggett, Manager, Labor Relations Dep’t, Ill. State Chamber of Commerce, to Lillian Hatcher, United Auto Workers of Am. (June 14, 1967); Letter from Duane D. Daggett, Manager, Labor Relations Dep’t, Ill. State Chamber of Commerce, to Stephen Schlossberg, Gen. Counsel, United Auto Workers (June 14, 1967) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers); Letter from Barbara DeCaire to Caroline Davis, Dir., UAW Women’s Dep’t (Sept. 29, 1965) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers).

103. SUSAN LEHRER, ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925, at 237 (1987).

104. *See Hostess Cake and Title VII, WORKERS’ POWER*, Oct. 9–22, 1970, at 4 (“Prior to

By contrast with their support for repeal of maternalist labor standards, employers vociferously opposed universal protective laws. They warned that a voluntary-overtime law would have “dire consequences on production schedules.”<sup>105</sup> The argument that protective laws threatened productivity held increasing sway over politicians in Michigan and across the nation, as the United States transitioned from a period of relative affluence to one of greater scarcity. In 1971, the last of the legislative proposals for voluntary overtime in Michigan was met with defeat.<sup>106</sup> An additional five states considered but rejected voluntary-overtime legislation over the course of the 1970s.<sup>107</sup>

The loss of the campaign for voluntary-overtime laws had long-lasting consequences. In Michigan, the Big Three auto companies had defeated legislation that would have given nonprofessional workers of different sexes, in the words of union activists, “leisure time to be with their families, for living and relaxing, . . . [and time] to perform their duties as citizens.”<sup>108</sup> The lack of state-imposed hours limits made reconciling work with family and civic life a private, and increasingly difficult, individual responsibility.

## 2. Employers’ Use of Title VII as a Deregulatory Tool

As the vision for voluntary overtime withered on the vine, employers turned to Title VII as a mechanism to deregulate the employment relationship. Historian Katherine Turk has shown how employers in the hotel industry used courts’ narrow interpretations of sex equality to their own advantage. These employers leveled wages between male and female hotel workers while simultaneously deskilling and degrading the work of housemaids.<sup>109</sup> A similar dynamic was at work in employers’ response to the conflict between Title VII and maternalist labor standards. Whereas feminists had sought to use sex equality as a legal principle that might augment and

the ruling, women at the Hostess plant were on three shifts per day, of eight hours each. However, after the ruling, the plant moved to two shifts, and *the women have worked an average of 67 hours per week.*” (emphasis in original); Letter from Emily Rosdolsky, United Auto Workers, to Walter Reuther, President, United Auto Workers 2 (Mar. 3, 1969) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers) (describing the conditions of some women working “as many as 69 hours a week” while others worked “12 hours a day, seven days a week”).

105. *Big Three Read from Same Script in Opposing Limits on Overtime*, MICH. AFL-CIO NEWS, Mar. 26, 1969 (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers).

106. The UAW testified on behalf of the last maximum hours bill considered by the state legislature in June 1971. See Testimony of Int’l Union, UAW, Relative to Legislation Regulating Maximum Compulsory Hours of Work, to Comm. on Labor, Mich. House of Representatives (June 7, 1971) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers).

107. See Brad Knickerbocker, *More Workers Balking at Compulsory Overtime*, CHRISTIAN SCI. MONITOR, Mar. 22, 1978, at 7.

108. Dorothy Haener, Int’l Representative, Int’l Union, UAW, Statement at Public Hearing to the Mich. Occupational Standards Comm’n 7 (Aug. 19, 1968) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women’s Department Papers).

109. TURK, *supra* note 68, at 142–50.

universalize protective labor laws, employers wielded sex discrimination as a de-regulatory tool to invalidate state labor laws that regulated women’s minimum wage, work hours, and other conditions of work. Antidiscrimination law became a mechanism to liberate employers from state labor regulations that undermined managerial prerogatives.

The tension between maternalist labor standards and Title VII trapped employers between a rock and a hard place. If they complied with state labor laws, employers risked violating federal employment discrimination law. Conversely, if they complied with federal law, then they risked prosecution under state law. Employers began to embrace the sex equality provision of Title VII, in part as a way out of the legal uncertainty they faced.

Yet employers also deployed Title VII strategically, using antidiscrimination ideals to eliminate protective labor statutes and thereby acquire greater managerial freedom. In 1973, Homemakers, Inc., a Los Angeles based employer of home health aides, filed a lawsuit under Title VII of the Civil Rights Act of 1964.<sup>110</sup> Homemakers alleged that a California law requiring overtime pay for female employees violated Title VII’s antidiscrimination mandate.<sup>111</sup> But there was a catch. Homemakers employed an almost wholly female workforce.<sup>112</sup> There was little risk that the company would face liability for paying women workers more than their male counterparts. And no law prevented Homemakers from complying with both the state and federal statutes, by giving the same overtime pay offered to women to any men it hired.<sup>113</sup> The lawsuit was, therefore, a thinly veiled effort to reduce the wages that Homemakers was legally required to pay its employees.

The *Homemakers* lawsuit exemplified employers’ use of Title VII to invalidate sex-based state labor laws across the country. Caterpillar Tractor and Illinois Bell Telephone litigated a successful challenge to a state maximum hours law for women.<sup>114</sup> General Electric Co. litigated in Kentucky to win the right to give women workers overtime assignments.<sup>115</sup>

Employers’ use of Title VII as a deregulatory tool had an analogue in the civil rights context. Sophia Lee shows that conservatives in the 1970s used civil rights ideals to build the right-to-work movement.<sup>116</sup> They appealed to African Americans to support the movement by pointing to racism within unions and the broader labor movement. Right-to-work advocates focused particular attention on “union shop” rules that imposed mandatory collective-bargaining fees on all employees, regardless of whether any individual worker actually belonged to the union. Therefore, these advocates argued, “union shop” rules effectively coerced African Americans into

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110. *Homemakers, Inc., of L.A. v. Div. of Indus. Welfare*, 356 F. Supp. 1111, 1111–12 (N.D. Cal. 1973), *aff’d*, 509 F.2d 20 (9th Cir. 1974).

111. *Id.* at 1112.

112. *See generally* EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA* 6–8 (2012) (describing the racial and gender composition of the home-care industry).

113. *See Homemakers*, 356 F. Supp. at 1112 (“Defendants urge that extension of the benefits to male employees may be granted pursuant to ‘Equal Pay’ laws . . .”).

114. NANCY WOLOCH, *A CLASS BY HERSELF* 214–15 (2015).

115. *Id.* at 215.

116. *See* SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 227–29 (2014).

funding the same unions that discriminated against them.<sup>117</sup> In addition, employers used allegations of race discrimination to block the certification of unions by the National Labor Relations Board.<sup>118</sup> In these ways, right-to-work activists and employers used concepts of race equality under both statutory and constitutional law to undermine labor organization.

The advocacy strategies of employers comported with broader political shifts. In the early 1970s, conservative strategists turned to formal equality as a means to push back against the gains of both the civil rights and women's movements and attracted a broader political base to the Republican Party. As explicit racism became less politically palatable, strategists marginalized white supremacists who had joined the Republican Party en masse after the passage of the Civil Rights Act.<sup>119</sup> At the same time, these Republican strategists strove to redefine civil rights as "equality of opportunity" not "equality of results."<sup>120</sup> They fashioned a "color-blind" conception of race equality to appeal to white voters. The turn away from explicit racism also created the political space necessary to attract some higher-income minorities to the Republican Party.<sup>121</sup> Political strategists thus joined antiunion activists, business-side employment lawyers, and the National Labor Relations Board in reformulating civil rights in ways that substituted formal conceptions of race equality for substantive ones. Similarly, employers' efforts to institutionalize sex-discrimination law in ways that would invalidate protective labor laws undermined labor feminists' substantive visions for sex equality and, instead, substituted formalist interpretations. Employers' use of litigation under Title VII to promote managerial liberty in structuring the workplace thus formed part of a broader neoliberal appropriation of civil rights ideals.

Employers' lawsuits challenging sex-based state labor laws under Title VII raised the question of what remedy a court should impose when the federal statute preempted a state law. Most courts reasoned that invalidation of the state law was the only option. The district court in *Homemakers* recognized that the company's lawsuit was self-serving.<sup>122</sup> Yet the court saw no option but to strike down the minimum wage law. Extending the state overtime law to men, the court reasoned, would usurp the legislative function.<sup>123</sup> The Ninth Circuit affirmed.<sup>124</sup>

The courts, however, did not have to interpret Title VII in ways that eroded state protective laws. When faced with the conflict between sex-based state labor standards and Title VII, the courts had another remedial option other than striking down the state law. They might have required employers to comply with both federal and state law by extending the benefit or restriction that the state law conferred on women to men. Extending rather than invalidating sex-based state labor laws would have

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117. *Id.* at 229–31.

118. *See id.* at 181–82, 212.

119. MACLEAN, *supra* note 20, at 205.

120. *Id.* at 204.

121. *See* MACLEAN, *supra* note 20, at 203–08.

122. *See Homemakers, Inc., of L.A. v. Div. of Indus. Welfare*, 356 F. Supp. 1111, 1113 (N.D. Cal. 1973) (acknowledging that "this Court may question the motives of plaintiff and sympathize with its women employees"), *aff'd*, 509 F.2d 20 (9th Cir. 1974).

123. *Id.* at 1112–13.

124. 509 F.2d at 23.

realized the half-century old aspiration of social feminists and union activists to use maternalist labor laws as a wedge to realize universal protections. The pressing dilemma was whether the courts rather than state legislatures could properly bring this ideal to fruition.

Support for the extension remedy came from male plaintiffs, some legal scholars, and the EEOC. For example, Michael Burns sued his employer, an aerospace firm called the Rohr Corporation, arguing that Title VII required the company to extend to men the rest periods guaranteed female workers under California law.<sup>125</sup> Professor Leo Kanowitz, an authority on sex discrimination, argued that the extension remedy was the most appropriate.<sup>126</sup> The Supreme Court was responsible for the fact that state protective labor standards were limited to women, as it had struck down sex-neutral laws during the *Lochner* era and had upheld only maternalist regulations. Therefore, Kanowitz argued, the courts should compensate for its earlier jurisprudence—now discredited—by ordering the extension of maternalist laws to men.<sup>127</sup> In April 1972, the EEOC issued guidelines interpreting Title VII to require employers to extend sex-based minimum wage and premium pay laws from women to men. The guidelines stated that Title VII similarly required employers to extend other sex-based protective laws regulating work conditions, unless “business necessity” precluded them from doing so.<sup>128</sup>

When the state of California appealed the Ninth Circuit’s decision in *Homemakers* to the Supreme Court, U.S. Solicitor General Robert Bork likewise took a position in favor of the extension remedy.<sup>129</sup> Bork submitted a brief in favor of the Court’s grant of California’s petition for certiorari.<sup>130</sup> In the brief, he argued that the extension remedy would not involve federal courts in an inappropriate usurpation of the state’s legislative function. A court would not itself be rewriting state minimum-wage laws to include men. Rather, Title VII would be doing the work of extending the benefits or restrictions under state law from women to men.<sup>131</sup> The Supreme Court, however, denied certiorari and missed the chance to rule on whether extension or preemption was the appropriate remedy.<sup>132</sup>

In the end, Title VII litigation in the federal courts served as a powerful arrow in employers’ quiver. As in *Homemakers*, the *Burns* court held that extending a sex-

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125. *Burns v. Rohr Corp.*, 346 F. Supp. 994, 996 (S.D. Cal. 1972).

126. Leo Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 170–71 (1968).

127. *Id.*

128. 29 C.F.R. § 1604.2(b)(4)(ii) (2016).

129. Linda Mathews, *Court Lets Limit on Overtime Pay for Women Stand*, L.A. TIMES, Jan. 13, 1976, at B3.

130. *See* Cal. Dept. Indus. Rel. v. *Homemakers, Inc.*, of L.A., 421 U.S. 1009 (1975) (mem.), *cert. denied*, 423 U.S. 1063 (1976); *see also* Preliminary Memorandum to Harry A. Blackmun, Supreme Court Justice 8 (May 27 & 28, 1975) (on file with Library of Congress, Justice Harry A. Blackmun Papers, box 838, folder: 74-1213 *Homemakers*) (recommending that the Solicitor General, Bork, “be requested to file an amicus brief were the case to be taken”).

131. *See* Preliminary Memorandum, *supra* note 130.

132. *Homemakers*, 423 U.S. 1063 (1976).



based state labor standard to men would violate the separation of powers.<sup>133</sup> Only one federal circuit court reached a different conclusion,<sup>134</sup> and even that decision was reversed by the Arkansas Supreme Court.<sup>135</sup>

The decade following the forgotten campaign for universal labor protections witnessed the “opening of the American workplace”—to use historian Nancy MacLean’s provocative phrase.<sup>136</sup> White, male strongholds in the labor market opened to women and minorities. The relationship between management and workers was opened in new and often unbalanced ways, favoring the power of employers over workers. In a neoliberal age, freedom came to mean both individual flourishing free from discrimination and also an employment relationship free from labor regulation.<sup>137</sup>

### 3. Sex-Discrimination Law in a Minimal Welfare State

Let us return to Fraser’s provocative question about whether feminism advanced neoliberalism.<sup>138</sup> Fraser’s argument suffers from the “problems of amnesia,” as Joan Sangster and Meg Luxton argue.<sup>139</sup> Fraser’s account correctly identifies the end result—the use of feminism for neoliberal purposes—but gets the causal force wrong. As historian Lisa Duggan argues, it was advocates for neoliberal economic policies, not feminists, who promoted “the *privatization* of the costs of social reproduction, along with the care of human dependency needs.”<sup>140</sup> Katherine Turk shows

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133. *Burns v. Rohr Corp.*, 346 F. Supp. 994, 997 (S.D. Cal. 1972) (calling such extension “usurpation”).

134. *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081, 1083–84 (8th Cir. 1972) (requiring an employer to comply with both Title VII and an Arkansas state law requiring premium pay for overtime work by women by extending the premium pay to men), *aff’g* 318 F. Supp. 1368 (E.D. Ark. 1970).

135. *State v. Fairfield Cmty. Land Co.*, 538 S.W.2d 698 (Ark. 1976) (interpreting state legislative intent to extend premium pay only to women on the basis of concern for the health of female employees rather than on the basis of regulating wages and hours generally), *cert. denied sub nom.* *Ark. Dep’t of Labor v. Fairfield Cmty. Land Co.*, 429 U.S. 1004 (1976).

136. MACLEAN, *supra* note 20.

137. My causal claim, therefore, is not that the executives of the Big Three automobile companies and other employers or business trade association leaders themselves were necessarily self-consciously committed to neoliberal interests. Rather, it is that their pursuit of managerial flexibility, the erosion of labor regulation, and the reduction of substantive equality to individual freedom paved the way for a neoliberal workplace. Business interests used the anti-discrimination ideal to invalidate one political justification for state labor standards—protection of motherhood—and to delegitimize other possible justifications such as all workers’ need for family and civic time.

138. See *supra* text accompanying notes 61–66.

139. Joan Sangster & Meg Luxton, *Feminism, Co-optation and the Problems of Amnesia: A Response to Nancy Fraser*, in *SOCIALIST REGISTER 2013: THE QUESTION OF STRATEGY* 288, 296 (Leo Panitch, Greg Albo & Vivek Chibber, eds., 2012) (“Women workers cannot be blamed for promoting economic independence and ending up with the multi-earner, low-wage family; they reacted to changing economic conditions with the strategies they saw available and possible to sustain themselves and their families.”).

140. LISA DUGGAN, *THE TWILIGHT OF EQUALITY?* 14 (2003) (emphasis in original).

that interpretations of Title VII protecting the white male-breadwinner standard, rather than refashioning work to accommodate the needs of caregivers, gained primacy only through decades of conflict among working-class women, feminist advocates, unions, and employers.<sup>141</sup> While the UAW and HERE endeavored to use sex-equality ideals as a mechanism to augment state labor standards, employers used anti-discrimination law to deregulate labor standards and enhance managerial control over production.

The construction of sex equality to mean equal market opportunity rather than heightened labor protection deepened the insecurity of men as well as women. In California, employers had voluntarily extended maternalist labor standards to male workers as a matter of custom.<sup>142</sup> Eliminating the maternalist standards, therefore, threatened to lower the floor for all employees. As courts struck down sex-specific standards, labor feminists advocated legislation that would universalize rather than eliminate protective labor laws. Formed in 1971, the Union Women's Alliance to Gain Equality ("Union WAGE") campaigned for a bill that would extend the jurisdiction of the Industrial Welfare Commission, the state agency regulating the hours and conditions of women's work, to reach male employees as well.<sup>143</sup>

Business trade associations such as the California Association of Manufacturers convinced Governor Ronald Reagan to veto the bill,<sup>144</sup> in part by associating politically the very idea of labor protection with anachronistic gender stereotypes.<sup>145</sup> Labor activists managed to get a weaker version of the bill passed a second time—one that

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141. See TURK, *supra* note 68, *passim*; see also *id.* at 203–08.

142. See Assembly Comm. on Labor Relations, California's Protective Laws for Women 48–49 (Nov. 18, 1969) (unpublished staff memorandum) (on file with Harvard University, Schlesinger Library, Catherine East Papers) (attached to Letter from John Stephen Spellman, Consultant, Assembly Comm. on Labor Relations, to Catherine East, Exec. Secretary, Citizen's Advisory Council on the Status of Women, Dep't of Labor (Nov. 19, 1969)) ("[T]he alternatives are obvious—cover men as well as women, or cover neither."); Letter from Anne Draper, Amalgamated Clothing Workers of Am., AFL-CIO, to David A. Roberti, Chairman, Labor Relations Comm. (on file with San Francisco State University, Labor Archives and Research Center at the J. Paul Leonard Library, Union WAGE Records).

143. See Notes on History of Protective Legislation 2–3 (June 25, 1974) (unpublished notes from Union WAGE Workshop) (on file with San Francisco State University, Labor Archives and Research Center at the J. Paul Leonard Library, Union WAGE Records).

144. See *Homemakers, Inc., of L.A. v. Div. of Indus. Welfare*, 356 F. Supp. 1111, 1113 (N.D. Cal. 1973); Brown, Enrolled Bill Memorandum to Governor, Bill. No. AB 1710 (Dec. 11, 1972) (unpublished summary) (on file with Governor's Vetoed Bill File, California State Archives).

145. *E.g.*, Letter from C.T. Morton, Chairman of Board & Consultant, Duncanson-Harrelson Co., to Governor Ronald Reagan (Dec. 8, 1972) (on file with California State Archives, Vetoed Bill File) ("It is unnecessary to point out that since the days of Neanderthal man, the male, on average, has grown larger and physically stronger than the female . . . to the advantage of the human race."); Letter from Philip Steinberg, Reg'l Vice President, Am. Inst. of Merch. Shipping, to Governor Ronald Reagan (Nov. 22, 1972) (on file with California State Archives, Vetoed Bill File) ("If the implications arising from this ludicrous legislation were not so serious, the thought of applying special women's protective laws to women would be humorous.").

gave employers greater control over the state administrative process.<sup>146</sup> In 1974, business interests captured the regulatory process and Reagan's conservative appointees to the Industrial Welfare Commission vitiated the state's protective labor standards.<sup>147</sup> Union WAGE and other labor activists protested at public hearings, wearing shrouds and carrying placards and banners that read, "10 hour day—no way" and "Women need protective laws, men do too."<sup>148</sup> They would spend the rest of the decade locked in cyclical struggles with business groups over state labor standards.

With hindsight, the warnings of Myra Wolfgang and Union WAGE activists appear even more prescient. The end of maternalism coincided with an economic transformation that deepened its costs and made less salient its opportunities. Service employees comprised nearly sixty percent of the American workforce in 1970; that proportion reached seventy percent by 1980 and only continued to increase thereafter.<sup>149</sup> These economic changes placed increasing proportions of workers beyond the reach of federal labor law and reliant on state labor law. At the same time, the kind of well-remunerated, blue-collar industrial jobs with good benefits that the UAW workers held all but disappeared. The nation transitioned to a service economy characterized for many workers by low-income, dangerous, and contingent labor.<sup>150</sup> Unionization rates in the private sector declined dramatically. In this context, the failure to use Title VII as a mechanism to augment, rather than eviscerate, state labor standards appears all the more tragic.

In the late twentieth-century United States, the advent of sex-discrimination law helped to facilitate the neoliberal restructuring of employment.<sup>151</sup> The decline of maternalism removed a legal justification that had long legitimated state protective labor laws: support for motherhood. On a political level, the labor movement lost a

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146. See Notes on History of Protective Legislation, *supra* note 143, at 3.

147. See Deborah Dinner, *Equal by What Measure?: The Lost Struggle for Universal State Protective Labor Standards*, in MARTHA ALBERTSON FINEMAN, VULNERABILITY, EMPLOYMENT AND LABOR (forthcoming 2017) (manuscript at 31) (on file with the Indiana Law Journal) (describing how procedural requirements gave business groups a role in the administrative process and that in 1974 three of five commissioners were sympathetic to management).

148. Elaine Reed, *IWC Hears Women's Protest*, OAKLAND TRIB., Apr. 25, 1974, at 25 (on file with San Francisco State University, Labor Archives and Research Center at the J. Paul Leonard Library, Union WAGE Records).

149. Joan Smith, *The Paradox of Women's Poverty: Wage-Earning Women and Economic Transformation*, 10 SIGNS 291, 294 tbl. 1 (1984).

150. See generally DAVID WEIL, THE FISSURED WORKPLACE (2014).

151. My claim, therefore, is not that the elimination of maternalist labor standards necessarily advanced neoliberalism. It did so in the specific historical context of the 1970s United States where a feminist interest in equal employment opportunity converged with employers' interests in managerial flexibility and the maximization of production. Had employers not defeated the labor-feminist struggle to universalize state labor standards, then antidiscrimination law would have promised equal employment opportunity without advancing neoliberalism. Similarly, to argue that the end of maternalism facilitated the neoliberal market is not to argue for the normative desirability of a legal regime which reinforced gender stereotypes and the family wage system. Rather, the historical advocacy of labor feminists themselves offers an alternative ideal: equal employment opportunity coupled with universal labor protections.

foothold—labor regulations for women—from which it had hoped to reach heightened labor standards for both male and female workers. As a consequence, women gained the right to equal employment opportunity in a labor market that lacked protections for those workers who were not members of strong unions and who remained outside federal labor law. The end of maternalism relegated many working-class women, as well as men in feminized occupations, to the employment status workers had suffered in the *Lochner* era.<sup>152</sup> Classical liberal principles of individual contracting in a private market characterizes the employment status of a growing proportion of America's working class.

It was not inevitable that the rise of sex-discrimination law would herald a demise of state labor regulation. Labor feminists' campaign for universal protective standards, including voluntary-overtime laws, suggests a historical alternative: anti-discrimination law coupled with labor protection. Gender could have been the canary in the mine, illuminating the need for universal protection; instead, neoliberal uses of Title VII made antistereotyping a rationale for deregulation. It is essential to interrogate the reasons why the antidiscrimination paradigm ascended while that of labor protection declined. This Article's revisionist history of the demise of maternalist labor standards helps to explain the asymmetric achievement of labor feminists' goals. The convergence between Title VII and neoliberal governance reframed the problem of injustice in the labor market. Legal and political culture increasingly focused upon the injustice of exclusion along identity lines rather than inequality of power between capital and labor. Sex equality came to mean a free market premised on individual merit, rather than universal protections that restrained the capacity of employers to exploit the most disadvantaged male and female workers.

### *B. The Framing of Title VII as Efficiency Promoting*

Even as employers and business trade associations used employment-discrimination law as a deregulatory tool, legal scholarship and doctrine constructed Title VII as a statute that promoted efficient markets. As an antidiscrimination statute, Title VII could never perform the same functions as labor law in regulating the balance of power between employers and employees.<sup>153</sup> The statute's precise meaning, however, was not fixed in 1964 but rather consolidated over time via scholarly debates and litigation. The enactment of Title VII represented the fulfillment of multiple legal and political objectives, foremost among them the moral commitment to end racial subordination.<sup>154</sup> The idea that Title VII would promote rational labor markets provided a second justification for the statute. As free-market ideology gained

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152. For further discussion of the relationship between neoliberal and *Lochnerian* ideologies, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 789–96 (2003).

153. For a nuanced historical discussion of the contradictions between employment-practices law and labor law and of ensuing conflicts between the civil rights and labor movements, see generally SCHILLER, *supra* note 73, 146–48, 193–219.

154. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS 207–14* (new preface, 2011) (discussing the international diplomatic context that shaped the politics of the Civil Rights Act of 1964); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS 436–57* (2004) (examining how violent massive resistance to African American civil rights protests in the South catalyzed

traction in legal culture, it became an attractive discourse by which liberal scholars might frame the normative justification for a highly contested law. Neoliberal ideals shaped how scholars and judges came to understand the statute's meaning. The construction of Title VII as efficiency promoting, however, ultimately cabined doctrinal interpretations of the statute that may have catalyzed structural changes in the workplace that would have protected of workers' familial and civic lives apart from work.

### 1. The Birth of Law and Economics and "Fair Employment"

The framing of Title VII in terms of the free market dated to the statute's enactment.<sup>155</sup> Some members of Congress argued that the statute would promote a more efficient labor market. The House Judiciary Committee Report on President Kennedy's proposed civil rights bill, for example, argued that employment discrimination frustrated the nation's ability to meet the rising need "for managers, clerical workers, sales workers, craftsmen, foremen, and similar skilled occupational groups."<sup>156</sup> The Report of the House Committee on Education and Labor contained further evidence that race discrimination harmed the economy.<sup>157</sup> At its inception, some supporters of Title VII imagined that realizing black freedom would also promote market rationality; equality would maximize wealth. This framing did not acknowledge the ambiguities in the statute's meaning and, specifically, the possibility that the goals of equality and efficiency may at times conflict.

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the political will necessary to enact the Civil Rights Act of 1964); MACLEAN *supra* note 20, at 3–10 (discussing the aspiration toward racial equality that motivated the enactment of Title VII). Although it was long a commonplace observation that the "sex" provision of Title VII was a joke and not the subject of substantive, legislative debate, historical scholarship shows that the provision resulted from postwar women's rights advocacy as well as racial politics in the era and was the subject of meaningful discussion. 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) (showing how debates within competing factions of the women's movement gave rise to Title VII); 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, 41–50 (1983) (exploring the role of race in the passage of the sex provision of Title VII); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317–29 (2012) (arguing that legislators reasoned about the prohibition on employment discrimination on the basis of sex in substantive rather than dismissive ways).

155. This is perhaps not surprising given that Congress rested its power to enact Title VII on the Commerce Clause as well as Section Five of the Fourteenth Amendment. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 447 & n.22 (2000). The Supreme Court, moreover, upheld the constitutionality of Title VII on the basis of the Commerce Clause alone. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–61 (1964). The decision in *Heart of Atlanta Motel* may be understood as a foundational moment in which antidiscrimination law intertwined with market logic.

156. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 2151, quoted in Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITTSBURGH L. REV. 555, 582 (1985).

157. Caldwell, *supra* note 156, at 582.

Professor Owen Fiss’s foundational 1971 article, *A Theory of Fair Employment Laws*, examined a latent tension within the statute’s liberal goals.<sup>158</sup> Fiss distinguished between the “equal treatment” and “equal achievement” principles underpinning the prohibition on race-based employment discrimination.<sup>159</sup> He grounded the normative justification for the “equal treatment” principle—what soon came to be understood as disparate-treatment liability—on the basis of market efficiency as well as individual fairness.<sup>160</sup> The requirement that employers treat job candidates as formal equals arose, in part, because race was unrelated to job productivity.<sup>161</sup> Fiss assumed economic rationality on the part of employers: any given employer had an incentive to maximize productivity by selecting employees on the basis of merit and not on the basis of an irrelevant characteristic such as race.<sup>162</sup> Why then should the law need to mandate a color-blind workplace? Fiss concluded that market failures justified the prohibition on disparate treatment.<sup>163</sup> A few years later, Paul Brest made a similar argument to Fiss’s, suggesting that rational discrimination was exceedingly rare and, ordinarily, was a pretext for racial animus.<sup>164</sup> From the start, the leading scholarly interpretations of Title VII suggested that the purpose of disparate-treatment liability was in part to perfect markets.

The justification of disparate-treatment liability in terms of market efficiency made disparate-impact liability appear less legitimate. Fiss published *A Theory of Fair Employment* when *Griggs v. Duke Power Co.*<sup>165</sup> was pending before the U.S. Supreme Court.<sup>166</sup> The plaintiffs in *Griggs* alleged that hiring practices that disproportionately excluded African Americans from employment opportunity, regardless of discriminatory intent, violated Title VII.<sup>167</sup> Fiss argued that the equal-achievement principle rested on ambiguous normative grounds in part because it

158. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

159. *Id.* at 238–49.

160. *Id.* at 240–44. Disparate-treatment liability arises when an employer treats similarly situated job candidates or employees differently because of race, sex, or another protected characteristic. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“[L]iability depends on whether the protected trait . . . actually motivated the employer’s decision.”).

161. Fiss, *supra* note 158, at 241. The prohibition on disparate treatment stemmed from the fact that the individual had no control over his or her race. *Id.* at 241–42. Scholars have since questioned whether immutability should be a primary criterion in the analysis of whether unlawful employment discrimination has occurred. *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015).

162. Fiss, *supra* note 158, at 241, 249.

163. *Id.* at 249–51. Such failures varied: State-imposed caps on profit might undermine the incentive to make wealth-maximizing employment decisions based on merit. *Id.* Or, an employer might be distanced from the employment decision by a management bureaucracy and, accordingly, the hiring agent would not accurately transmit the employer’s economic incentives. *Id.*

164. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6–7 (1976).

165. 401 U.S. 424 (1971).

166. Fiss, *supra* note 158, at 291 n.63 (noting that certiorari had been granted in *Griggs*).

167. Brief for Petitioner at 48, *Griggs*, 401 U.S. 424 (1971) (No. 70-124) (“[W]hatever Duke’s intent, there is no question that the tests are in fact ‘used’ to discriminate against black workers.” (emphasis in original)).

imposed significant costs on employers.<sup>168</sup> Disparate-impact liability was efficient only when the challenged employment practice did not correlate with worker productivity.<sup>169</sup> But many employer practices that had a potentially unlawful disparate impact on women and minorities under Title VII nevertheless served employers' practices in job productivity.<sup>170</sup> Thus, disparate impact raised a red flag for any analysis committed to economic maximization. Fiss ultimately concluded that the law should recognize the equal-achievement principle, but that it should be limited by "a deep commitment to . . . economic efficiency" in the law.<sup>171</sup>

Fiss wrote his famous article while teaching at the University of Chicago, where the field of law and economics was then blossoming. Henry Simons, an economist and professor at the law school from the mid-1930s to mid-1940s, had laid the foundation for the law school's critical role in the field.<sup>172</sup> Simons had attracted to Chicago the charismatic economist Aaron Director, whose antitrust courses began to convince students of the importance of economic analysis of the law.<sup>173</sup> Director founded the *Journal of Law and Economics* in 1958, which he later coedited along with Ronald Coase, who joined the Chicago faculty in 1964 four years after publishing his most famous article, *The Problem of Social Cost*.<sup>174</sup> Fiss entered the debate about employment-discrimination law just as law-and-economics scholarship began to flourish. Efficiency analysis must have appeared a natural starting point for his normative analysis.

Fiss's article not only drew upon economic thought but also responded to and reshaped it. In his 1962 best-selling treatise, *Capitalism and Freedom*, University of Chicago economist Milton Friedman argued against fair-employment laws.<sup>175</sup> Like Fiss and other subsequent scholars, Friedman believed that capitalism would naturally reduce discrimination.<sup>176</sup> Yet Friedman characterized the propensity to discrim-

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168. Fiss, *supra* note 158, at 257–58. Fiss argued that the "equal achievement" principle was also normatively troublesome because it threatened individual fairness. *See id.* at 263–65.

169. *See id.* at 239 (discussing how criteria may be related to productivity but disadvantage classes based on "historic legacy").

170. *Id.*

171. *Id.* at 313.

172. *See* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 91–94 (2008).

173. *Id.* at 93–96.

174. RODGERS, *supra* note 67, at 57; TELES, *supra* note 172, at 95–96. Richard Posner joined the Chicago law faculty in 1969 and published his path-breaking *Economic Analysis of the Law* four years later. TELES, *supra* note 172, at 98. Posner's prolific scholarship across multiple legal fields, stellar credentials, capacity to spark scholarly argumentation, and numerous acolytes popularized the discipline. *See* RODGERS, *supra* note 67, at 58. Soon law and economics attracted sizeable donations from the Olin Foundation, Liberty Fund, and numerous corporations, whose contributions facilitated the training of judges and law professors and the creation of professional networks. *See* TELES, *supra* note 172, at 110–15. Whereas lawyers had not previously conceived of economic maximization as highly relevant to law, ideas about costs and efficiency became central analytic tools for understanding judicial doctrine during the 1970s. RODGERS, *supra* note 67, at 56–60; TELES, *supra* note 172, at 132–34.

175. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 108–18 (40th anniversary ed. 2002).

176. *Id.* at 109 ("We have already seen how a free market separates economic efficiency

inate as merely a taste or preference; in a free society, the best way to dissuade someone of his or her poor taste was through persuasion.<sup>177</sup> Friedman argued that state coercion of nondiscriminatory employment practices unjustly interfered in freedom of contract.<sup>178</sup> Such interference was not justified by the harm posed to African Americans because, in Friedman’s view, employment discrimination constituted a “negative” rather than “positive” harm.<sup>179</sup> By arguing that principles of fairness counterweighed interests in freedom of contract, Fiss challenged Friedman’s fundamental premise that market principles should delimit the state’s response to racial inequality. In suggesting that market failures justified antidiscrimination laws, however, Fiss also refashioned economic thought to make it consistent with principles of formal equality. His article, therefore, can be understood as a critical moment in the evolution of neoliberal ideology during which antidiscrimination law was sewn into its fabric.

Fiss’s broader intellectual commitments make it particularly striking that he framed Title VII’s purpose in terms of capitalist rationality. Fiss famously argued that constitutional equal protection meant much more than the limit on government’s power to classify on the basis of race. Fiss argued that the purpose of equal protection was far broader: the Constitution promised an end to state subordination of disadvantaged classes.<sup>180</sup> In developing a group-based interpretation of equal protection, Fiss challenged the primacy of individualism in constitutional theory. Throughout his career, furthermore, Fiss evinced a “deep suspicion” of capitalism precisely because of its individualistic premises.<sup>181</sup> He critiqued law and economics for relativizing values,<sup>182</sup> and by 1989 he proclaimed that the interest in “the efficiency

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from irrelevant characteristics.”). Friedman argued that discrimination was inefficient because it imposed costs on the discriminator—not only on the victim of discrimination—by raising the price of goods the discriminator purchased or lowering the value of his labor. *Id.* at 109–10.

177. *Id.* at 110–11.

178. *Id.* at 112–13.

179. *Id.* at 112–13 (defining “positive harm” as active coercion to force someone into a contract which he would not otherwise enter and “negative harm” as the failure to enter a contract with a willing seller).

180. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–10 (2003).

181. Anthony Kronman, *Individualism and Anti-Individualism in the Work of Owen Fiss*, 58 U. MIAMI L. REV. 117, 122 (2003); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (arguing that given unequal resources “settlement[s] will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.”); Owen M. Fiss, *Capitalism and Democracy*, 13 MICH. J. INT’L L. 908, 911–19 (1992) (suggesting that capitalism is in tension with several principles of democracy); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412–13 (1986) (arguing that the First Amendment’s protection of speakers’ “autonomy” may distort public debate in capitalist and other societies that distribute power unequally).

182. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 5–8 (1986) (critiquing the reduction of value to competing preferences with equal claims for satisfaction); see also Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 5–8 (critiquing the reduction of justice to efficiency defined as preference maximization).



hypothesis” had subsided.<sup>183</sup> That Fiss was compelled in 1971 to justify the prohibition on differential treatment in terms of market rationality only shows the discursive power of the then burgeoning law-and-economics movement. *A Theory of Fair Employment* was thus illustrative not of Fiss’s broader intellectual trajectory but rather of a particular historical moment—one in which advocates of fair employment came to justify their commitment in what was then perhaps the most powerful jurisprudential school of thought within the legal academy.<sup>184</sup> The birth of “fair employment” was inextricable from that of law-and-economics scholarship, and the two would further entangle over ensuing decades.

As the idea that market rationality both justified and delimited the scope of Title VII grew increasingly popular, a corresponding blindness developed to the tension that Fiss had identified between efficiency and substantive equality. Historian Daniel Rodgers explains that microeconomic theory and law-and-economics scholarship in the 1970s yielded a conception of the market as abstracted from social relationships.<sup>185</sup> Earlier theories of the market focused on particularized social experiences. For example, Adam Smith had opened *The Wealth of Nations* with a close examination of the division of labor that organized production in an English pin factory.<sup>186</sup> David Ricardo’s theory of rent came from an analysis of the interaction between landowners and tenant farmers.<sup>187</sup> In contrast, the new market theory in the 1970s exhibited a “detachment from history and institutions and from questions of power.”<sup>188</sup> Through the 1970s and 1980s, dominant strains of legal scholarship and doctrine came to forget Fiss’s insight that abstracted maxims of economic productivity were insufficient to achieve substantive equality. In place of Fiss’s ambivalence, jurisprudence evinced an increasing skepticism of disparate-impact liability.

## 2. The Consequences of the Efficiency Frame for Disparate-Impact Doctrine

The disparate-impact doctrine met the most success in the early years after *Griggs*, in cases that challenged racial exclusion from the workplace. Disparate-impact liability helped to dismantle education and testing requirements in the South, which employers had implemented to evade Title VII’s prohibition on formal race discrimination.<sup>189</sup> As Michael Selmi explains, intent was likely present as a sociological matter, but plaintiffs could not prove disparate treatment.<sup>190</sup> Disparate-impact

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183. Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 245 (1989).

184. On the diffusion of law and economics in the wake of the Chicago School, see generally Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005) (arguing that this jurisprudential movement simultaneously lost its intellectual coherence and thrived in its expansiveness).

185. See RODGERS, *supra* note 67, at 44.

186. *Id.*

187. See *id.* at 44–45.

188. *Id.* at 76.

189. See ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE* (Stephen L. Wasby ed., 2014).

190. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 714–16 (2006).

liability, therefore, served an evidentiary function.<sup>191</sup> Scholars have noted that this narrow interpretation of the theory was more palatable to courts because it did not wholly displace intent as the rationale for liability.<sup>192</sup>

Yet early disparate-impact claims' success can also be attributed to the fact that disparate-impact liability functioned to eliminate market irrationalities in these cases. Job tests and qualifications such as those invalidated in *Griggs* were wholly unrelated to job performance. They thus excluded job applicants who would otherwise have worked at equal levels of productivity as those hired, without any additional expenditure by employers.<sup>193</sup> Even if employers did not intend to use the tests to discriminate, their use represented market-irrational practices. These early race-based disparate-impact cases, therefore, resembled disparate treatment to the extent that both forms of liability dismantled inefficient practices of race discrimination. The early trajectory of the disparate-impact doctrine promoted capitalist rationality.

From the start, the Supreme Court defined the boundaries of disparate-impact liability with reference to business's economic interests. As a hypothetical matter, the Court might have decided that the nation's commitment to racial inclusion was so great as to prohibit facially neutral practices that had the effect of excluding African Americans, regardless of the relationship between the employment practice and workplace productivity. This was never the Court's conclusion, however; the right to consideration for employment extends only insofar as one can perform the job at a minimum level of productivity. Accordingly, *Griggs* held that employers bore "the burden of showing that any given requirement [has] a manifest relationship to the employment in question."<sup>194</sup> Job tests were valid insofar as they were "demonstrably a reasonable measure of job performance."<sup>195</sup> In the next disparate-impact case to reach the Court, *Albemarle Paper Co. v. Moody*, the Court held that the defendant employer failed to meet its burden of showing that two tests purportedly measuring nonverbal intelligence and verbal facility were "job related."<sup>196</sup> In dicta, however, the Court reasoned that even were an employer to meet that burden, a plaintiff might still show that other devices that did not have disparate racial effects would similarly "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"<sup>197</sup> Even in expanding plaintiffs' rights to invalidate practices that had discriminatory effects, the Court still tethered the doctrine to workplace productivity.

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191. *See id.*

192. *See, e.g.,* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518–19 (2003) ("[T]he inquiry into the existence of a racial classification can be directed by normative judgments about motive or other substantive aspects of equal protection . . .").

193. *See* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 891 n.86 (2001) ("[D]isparate impact law should forbid the use of a hiring criterion that does not correlate with productivity so long as it disproportionately excludes members of a protected group.").

194. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

195. *Id.* at 436.

196. 422 U.S. 405 (1975). The tests were prerequisites to access the relatively skilled and higher-paid job lines previously restricted to white workers. *Id.* at 427–29.

197. *Id.* at 425 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

Though cabined by concern for employers' profit motive, disparate-impact liability still imposed costs on employers.<sup>198</sup> Validating job tests to avoid liability could be expensive. Four years after *Griggs*, Duke Power Co. had yet to complete more than ten validation studies ordered by the Court, citing their expense as a justification.<sup>199</sup> Economists estimated that the costs of a single validation study could range from \$20,000 to \$100,000.<sup>200</sup> A front-page *Wall Street Journal* article concluded that many employers were consequently retreating from job tests altogether because of the expense of validation.<sup>201</sup> Several commentators elaborated on Fiss's work, arguing that "Congress did not intend to promote the goal of increased minority employment at the expense of business efficiency."<sup>202</sup> Some argued that both legislative history and Supreme Court decisions subsequent to *Griggs* favored the "equal treatment" rather than the "equal achievement" principle and that, as a consequence, the "business necessity" defense should be interpreted leniently as requiring proof only of a valid business purpose.<sup>203</sup>

Debates about sex discrimination in the mid-1970s offer insight into how ideas about gender and about efficiency intersected in ways that limited disparate-impact liability. As Professor Deborah Widiss argues, a dilemma about how to reconcile concepts of equality with physical differences between the sexes inflected debates about both disparate-treatment and disparate-impact doctrine.<sup>204</sup> In 1972, the EEOC promulgated guidelines stating that employer sick-leave and temporary-disability policies, inadequate to protect the job security of childbearing women, may have an unlawful disparate effect on women.<sup>205</sup> In the several years that followed, lower-court decisions adopted the guidelines' reasoning in holding that the exclusion of pregnancy from otherwise comprehensive, temporary-disability insurance schemes violated Title VII.<sup>206</sup> In 1976, however, the Court in *General Electric Co. v. Gilbert* held that such a pregnancy exclusion did not constitute sex discrimination.<sup>207</sup>

As I have argued elsewhere, both the Supreme Court justices and civil rights and feminist activists understood *Gilbert* as a referendum about disparate-impact liability

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198. As Christine Jolls shows, disparate-impact liability always imposes costs on employers. Employers will have to expend more resources to employ the category of workers that the prohibited employment practice disproportionately burdens. See Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV L. REV. 642, 652–66 (2001).

199. Hal Lancaster, *Job Tests Are Dropped by Many Companies Due to Antibias Drive*, WALL. ST. J., Sept. 3, 1975, at 1.

200. James Gwartney, Ephraim Asher, Charles Haworth & Joan Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME L. REV. 633, 643 (1979).

201. Lancaster, *supra* note 199.

202. E.g., Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 107 (1974).

203. E.g., Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 918–33 (1979).

204. Deborah A. Widiss, *Griggs at Midlife*, 113 MICH. L. REV. 993, 1002, 1005 (2015) (reviewing BELTON, *supra* 189).

205. See 29 C.F.R. § 1604.10(c) (2016).

206. See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 991 n.129 (2013) (gathering cases).

207. 429 U.S. 125 (1976).

more broadly.<sup>208</sup> The majority opinion held that the plaintiffs had failed to prove that General Electric Co.’s policy had disparate effects on women because they had not produced evidence showing that the company spent less on female employees’ benefits, as a whole, than on male employees’ benefits.<sup>209</sup> The plaintiffs, by contrast, argued that *Griggs* dictated the conclusion that a policy that denied only pregnant employees benefits otherwise generally available had a disparate impact on women.<sup>210</sup> Legal historian Serena Mayeri shows that Justices Powell and Stewart at first agreed, but ultimately provided the votes that solidified the six-justice majority.<sup>211</sup> Justice Blackmun, however, fought to change language in the majority opinion that might otherwise have threatened the lawfulness of the disparate-impact doctrine.<sup>212</sup> A dissent written by Justice Brennan and joined by Justice Marshall argued that the Court should have deferred to the EEOC’s conclusion that the pregnancy exclusion had an unlawful disparate effect on women.<sup>213</sup>

The next year, plaintiffs had more success using disparate-impact liability to challenge height and weight requirements for prison-guard jobs. In *Dothard v. Rawlinson*, the majority opinion combatted efforts to weaken disparate-impact liability.<sup>214</sup> While the defendant had argued that a plaintiff needed to proffer evidence of past intentional discrimination to make a disparate-impact claim,<sup>215</sup> the majority held that disparate effects alone would suffice.<sup>216</sup> Yet, as Widiss observes, Justice Rehnquist’s concurrence devoted attention to how future defendants might defeat a discrimination challenge to height and weight requirements for jobs similarly requiring physical strength.<sup>217</sup> Once again, the Court affirmed the continued validity of disparate-impact liability while also speaking to its limits. The gender cases thus exposed the limits of the doctrine, even in its early years when the doctrine had tremendous success in combatting racially discriminatory job tests. The limits of the doctrine revealed concerns about efficiency—physical difference, more than racial stereotypes, posed a deeper dilemma for questions of workplace productivity, safety, and financial solvency.

The cases that employers and courts viewed as posing the deepest challenge to workplace productivity, however, concerned not physical sex differences but rather gendered patterns of caregiving. Beginning in the early 1980s, plaintiffs claimed that

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208. See Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 492–93 (2014).

209. *Gilbert*, 429 U.S. at 137–40.

210. See SERENA MAYERI, REASONING FROM RACE 110 (2011).

211. *Id.* at 111–12.

212. See *id.* at 113–14.

213. *Gilbert*, 429 U.S. at 155–58 (Brennan, J., dissenting).

214. 433 U.S. 321 (1977)

215. Widiss, *supra* note 204, at 1005 & n.57 (citing Brief of Appellants at 39–40, *Dothard*, 433 U.S. 321 (No. 76-422)).

216. Widiss, *supra* note 204, at 1005 & n.59 (citing *Dothard*, 433 U.S. at 329).

217. Widiss, *supra* note 204, at 1005 & n.62 (citing *Dothard*, 433 U.S. at 337–40 (Rehnquist, J., concurring)). Lower courts did not take up Rehnquist’s suggestion, however, and instead continued to strike down height and weight requirements. See, e.g., *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375 (1979) (holding that statistical differences in the height and strength of males and females could not rebut prima facie evidence of disparate impact caused by a police department’s use of height and physical abilities’ tests).

employment practices such as very short and conditional sick-leave policies and inflexible work hours failed to recognize caregiver responsibilities and, therefore, disproportionately excluded women from employment opportunities.<sup>218</sup> Such disparate-impact claims challenged the organization of the workplace according to the model of the ideal worker.

Legal scholar Catharine Albiston argues that courts were hostile to these suits precisely because they challenged “the taken-for-granted, historically determined relationship between work practices and gender norms.”<sup>219</sup> During the long industrial revolution, from the late eighteenth through the early twentieth centuries, paid work came to be understood “in opposition to motherhood.”<sup>220</sup> Productive activities associated with men’s labor moved outside the home and grew more time-disciplined during this period, while women continued to perform task-oriented labor within the home.<sup>221</sup> Courts likewise refashioned common-law doctrines of master and servant to reinforce a gendered division of labor.<sup>222</sup> Judicial opinions constructed the normative worker as a male breadwinner whose sustained and complete dedication to the workplace was enabled by the domestic labors of his wife in the home.<sup>223</sup> When female plaintiffs challenged the disparate effects of workplace time organization on women, who in the late twentieth century continued to bear disproportionate responsibility for familial caregiving, courts saw these lawsuits as illegitimate threats to managerial prerogatives.<sup>224</sup> Whether transforming such workplace time norms would *in reality* impose overwhelming costs on employers or, instead, enable a more inclusive and productive workplace, remained unanswered. Employers and courts alike understood gender-based disparate-impact claims as incompatible with workplace efficiency and as stretching the redistributive capacity of Title VII beyond congressional intent.

In this context, the 1981 case of *Abraham v. Graphic Arts International Union* was quite remarkable.<sup>225</sup> Laurie Abraham worked as an administrative assistant for the defendant union, and about a month before her anticipated due date she began what she believed was an approved maternity leave.<sup>226</sup> Several weeks later, her employer informed her of its decision to terminate her pursuant to a policy that allowed only ten days of sick leave.<sup>227</sup> In an opinion written by Judge Spottswood Robinson, a former civil rights attorney and dean of the Howard University School of Law,<sup>228</sup>

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218. See Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940 & n.54 (1985) (listing cases).

219. Albiston, *supra* note 23, at 1134.

220. *Id.* at 1108.

221. *Id.* at 1107–12.

222. *Id.* at 1113.

223. *Id.* at 1115–24.

224. See Dinner, *supra* note 68, at 485–86 (describing how courts characterize pregnancy-based disparate-impact claims as efforts to circumvent work requirements and to secure preferential treatment).

225. 660 F.2d 811 (D.C. Cir. 1981).

226. *Id.* at 813.

227. *Id.* at 813, 818–19.

228. MAYERI, *supra* note 210, at 15–16; Eric Pace, *Spottswood W. Robinson 3d, Civil Rights Lawyer, Dies at 82*, N.Y. TIMES, Oct. 13, 1998, at B11.

the court reversed the district court's grant of the defendant's motion for summary judgment.<sup>229</sup> The court reasoned that because the ten-day leave period fell "considerably short of the period generally recognized in human experience as the respite needed to bear a child" the policy "portended a drastic effect on women employees of childbearing age . . . no male would ever encounter."<sup>230</sup>

*Abraham* remained an outlier, however. Only one other federal court decision recognized that workplace norms regarding leave and work hours may have an unlawful sex-based disparate impact.<sup>231</sup> Courts rejected disparate-impact claims to these employment practices at dual stages of analysis: the inquiry into disparate impact and the inquiry into business necessity. At the initial stage, courts assimilated disparate-impact liability into a comparative analysis more appropriate to the evaluation of disparate-treatment claims. Courts reasoned that disparate-impact challenges to neutral workplace time norms constituted demands for "preferential treatment" for pregnant workers.<sup>232</sup> This reasoning, however, ignored that a successful disparate-impact suit would catalyze a remedy that required a more generous leave policy for *all* employees and not just pregnant workers.

In addition, courts broadened the business-necessity defense *sub silentio* in pregnancy-discrimination cases. The Seventh Circuit, for example, held that to prove that an absenteeism policy which disproportionately burdened pregnant employees was unlawful, plaintiffs would have to show more than "that it was not justified by compelling considerations of business need."<sup>233</sup> The plaintiffs needed to prove that the challenged policy was not necessary to the job at all. The court gave the example of a high school education requirement for a dishwasher.<sup>234</sup> The court reasoned that the purpose of disparate-impact doctrine was to address situations in which businesses "needlessly . . . excluded black or female workers."<sup>235</sup> The court thus implicitly lowered the business-necessity standard to a business-irrational standard. Disparate-impact claims challenging workplace hours and leave policies, such as that brought by Laurie Abraham, seemed beyond the scope of Title VII because they functioned as accommodation mandates. Forcing an employer to implement a more generous leave policy would impose additional costs associated with hiring female

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229. *Id.* at 820.

230. *Id.* at 819.

231. *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (holding that in the absence of a business justification, an employer policy of terminating employees who took sick leave in their first year of employment violated Title VII). For further analysis of related cases, see Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15, 41–49 (2009); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 *BERKELEY J. EMP. & LAB. L.* 1, 32–35 (2007).

232. *See, e.g.*, *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (reasoning that courts have no obligation to remedy burdens biologically unique to women and suggesting that plaintiff's disparate-impact claim represented an illegitimate demand for "preferential treatment"); *Dormeyer v. Comerica Bank-III.*, 223 F.3d 579, 584 (7th Cir. 2000) (rejecting a disparate-impact claim on the basis that Title VII as amended by the Pregnancy Discrimination Act of 1978 does not allow "for subsidizing a class of workers").

233. *Dormeyer*, 223 F.3d at 583.

234. *Id.*

235. *Id.* (quoting *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992)).

workers of childbearing age (presuming those workers utilize the leave at a higher than average rate).<sup>236</sup> Moreover, these claims limited employer control over workplace structures long understood to rest at the heart of managerial prerogatives. Of course, disparate-treatment liability similarly imposed costs in specific instances. For example, when customers held racist preferences, hiring racial minorities was more expensive for employers. There existed, however, a salient distinction between the “customer preference” cases and the kind of disparate-impact liability claim made in *Abraham*. The former imposed on employers and customers the model of a commercial realm free of irrational bias, while the latter challenged the allocation of responsibility for the costs of reproduction between employers and workers which gender ideologies had naturalized. *Abraham* was remarkable because it challenged the notion that reproduction was the private responsibility of families.

To conclude, Part II has established that sex-discrimination jurisprudence under Title VII both bore the imprint of and reinforced neoliberal trends in legal culture. Litigation under the statute contributed to the erosion of maternalist labor standards. Opponents of robust labor regulation, moreover, used the antidiscrimination ideal to delegitimize the ideal of labor protection. In the particular historical context of the late twentieth-century United States, sex-discrimination law was overlaid on an increasingly flexible and contingent labor market. Even as employment discrimination came to replace labor protection as the central paradigm for understanding justice and injustice in the labor market, market logic shaped scholars and courts’ interpretation of Title VII itself. More capacious interpretations of the statute gave way to jurisprudence that affirmed the primacy of individual rights and efficient markets. In a neoliberal legal culture, labor feminists’ understanding of sex equality as requiring collective rights, the redistribution of power between employers and workers, and robust state protections receded into a quickly forgotten past.

### III. TITLE VII AND THE LEGITIMATION OF CLASS INEQUITIES

This Article’s analysis of the relationship between employment-discrimination law and neoliberalism holds more than historical interest. It raises the question of whether antidiscrimination law today may legitimate economic inequality, even as it promotes social inclusion along identity lines. As critical theorist Martha Albertson Fineman explains: “Formal equality leaves undisturbed—and may even serve to validate—existing institutional arrangements that privilege some and disadvantage others.”<sup>237</sup> Historian Thomas Borstelmann observes that after the formal elimination of sex as well as race hierarchies in the late twentieth century legitimated socio-economic hierarchies, neoliberals “could more readily claim that the inequalities remaining were the just and reasonable result of letting the natural laws of supply and demand operate and letting people rise and fall on the basis of their abilities and how hard they worked.”<sup>238</sup> Legal theorists Tucker Culbertson and Jack Jackson argue that

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236. See Jolls, *supra* note 198, at 660–65 (demonstrating that disparate-impact liability under Title VII poses costs for an employer equivalent to an accommodation mandate).

237. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 3 (2008).

238. THOMAS BORSTELMANN, *THE 1970S: A NEW GLOBAL HISTORY FROM CIVIL RIGHTS TO ECONOMIC INEQUALITY* 15 (2012).

legal reform under Title VII has “produced greater inclusion into existing workplace structures . . . [while] the structures themselves recede and are reworked in to[sic] the background presumptions of the political culture.”<sup>239</sup> Part III of this Article extends these insights by examining contemporary employment-discrimination theory and doctrine.

Even best practices to eliminate employment discrimination are insufficient to realize a labor market that realizes substantive equality for working-class women. Employment-discrimination law operates today as a means to perfect the market rather than to challenge its logic and operation. Title VII promotes individual rights to opportunity rather than collective needs for economic security. In reinforcing the primacy of judicially enforced negative rights, antidiscrimination law obscures the argument for robust social-insurance regimes and welfare entitlements. The resulting, deregulated labor market and minimal welfare state disproportionately harms working-class women. Therefore, Title VII may function in a neoliberal context to legitimate class inequities, even as it opens the market to facilitate greater inclusion of women and minorities and allows for more fluid expressions of identity in the workplace. This Article suggests that to address the needs of working-class women, feminist legal scholars should expend more resources on labor and social-welfare law rather than antidiscrimination law.

#### *A. Neoliberal Themes in Contemporary Sex Discrimination Scholarship*

Contemporary employment-discrimination scholarship bears the imprint of neoliberalism. Feminist theorists identify antistereotyping as the central principle animating legal sex-equality theory and doctrine. While the scholarship celebrates individual freedom and identity expression, it pays little attention to the class-based limitations of such theories. Market efficiency also remains a dominant theme within the employment-discrimination literature. Although many scholars reject this value, it continues to mark a rhetorical border between antidiscrimination and accommodation that cabins the scope of Title VII. The efficiency trope, furthermore, helps to construct a neoliberal understanding of the market as emptied of thick social identity and power relations.

##### 1. Antistereotyping Theory and Individualism

Contemporary legal scholarship celebrates the antistereotyping principle as the dominant theory of sex equality. Mary Anne Case observes that this principle “has governed constitutional sex discrimination cases since the early 1970s.”<sup>240</sup> Kimberly Yuracko states that the prohibition on sex stereotyping in employment “has been the most important development in sex discrimination jurisprudence since the passage of Title VII.”<sup>241</sup> The realization of an antistereotyping principle advanced several

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239. Culbertson & Jackson, *supra* note 7, at 150.

240. Case, *supra* note 72, at 1448. Case elaborates: “[O]ur constitutional standard with respect to sex is not . . . ‘anti-subordination above all,’ but rather ‘anti-stereotyping’ above all.” *Id.* at 1472.

241. Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 758 (2013).



feminist objectives: It helped to end a formal system of state-sponsored gender stratification and promoted employer evaluation of women's individual circumstances and qualifications. Women gained access to heavy industrial and professional jobs previously considered "men's work."<sup>242</sup> To a more limited extent, men gained access to the benefits afforded employees who are also caregivers in the home, such as family leave.<sup>243</sup> Most recently, antistereotyping theory has catalyzed protections for gender nonconforming men and women in the workplace and has prompted courts' recognition of discrimination against transsexuals.<sup>244</sup>

The sense of inevitability in employment-discrimination theory about the centrality of the antistereotyping principle, however, should give us pause. There is a seamlessness in the narrative about the principle's ascendance that makes it appear inexorable. The voices that disrupted that narrative, such as those of Myra Wolfgang and Union WAGE activists, are eluded. The narrative occludes contemporaneous critiques from the late 1960s and 1970s warning that a constrained political context was limiting the claims of middle-class feminists in ways harmful to working-class women.<sup>245</sup> Why have we forgotten this history? Feminist legal scholarship is not merely attentive to the benefits of antistereotyping; it often celebrates that principle exclusively and dismisses the importance of a labor-protective ideal, treating it as irredeemably tainted by maternalism.

Might the teleological account of the antistereotyping principle be so appealing precisely because it comports with broader, neoliberal trends in our legal culture? Professors Grewal and Purdy observe in passing: "The self-defining, self-exploring, identity-shifting constitutional citizen of recent Supreme Court discussions of race, gender, and sexuality . . . reflects the consumer-citizen model of neoliberal economic

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242. See generally Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (analyzing the potential for Title VII to challenge sex segregation in the workplace and the ways in which the "lack of interest" defense has limited that potential).

243. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (affirming as a valid exercise of Section Five of the Fourteenth Amendment, in a case concerning a male employee's leave to take care of his wife, the provision of the Family and Medical Leave Act that provides for damages against a state for denying leave for family care).

244. See Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 170–71, 170 nn. 62–65 (2010) (discussing cases).

245. For example, the dominant narrative celebrates the 1970 Women's Strike for Equality organized by NOW leader Betty Friedan and its demands for equal employment opportunity, abortion rights, and child care. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–96 (2003). Yet Bayard Rustin, the chief strategist for the 1963 March on Washington for Jobs and Freedom, responded to the 1970 Strike with cogent critique. Rustin argued that feminists should instead have advocated full employment, national health insurance, and universal pre-kindergarten. See MAYERI, *supra* note 210, at 44. We may not want to *blame* feminists for failing to advocate for a more robust form of social citizenship, as opposed to a narrower conception of gender equality. Yet taking Rustin's critique seriously would help us to understand the way in which a neoliberal political context limited the scope of feminist claims. A richer history, in turn, might inform a broader legal imagination today.

doctrine . . . .”<sup>246</sup> This insight deserves further examination. The rise of the antistereotyping principle may appear both historically predetermined and normatively correct precisely because it affirms individualism, the elimination of market irrationalities, and deregulation.

Since the 1970s, three definitions of unlawful sex stereotyping have emerged in legal doctrine and scholarship. The narrowest definition suggests that a stereotype is unlawful only when it represents a false generalization.<sup>247</sup> This definition suggests that the factual predicate underpinning the stereotype must be untrue for the stereotype to be unlawful.<sup>248</sup> It prohibits only irrational discrimination.<sup>249</sup> A broader definition defines unlawful sex stereotypes to mean “imperfect proxies” and “overbroad generalizations.”<sup>250</sup> This second definition thus prohibits rational discrimination as well and is the definition that the Supreme Court has adopted to interpret sex discrimination under Title VII.<sup>251</sup> In its landmark 1989 decision, *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII to proscribe prescriptive in addition

246. Grewal & Purdy, *supra* note 27, at 13; *see also* Martha T. McCluskey, *How Queer Theory Makes Neoliberalism Sexy*, in *FEMINIST AND QUEER LEGAL THEORY*, *supra* note 7, at 115 (arguing that queer theory’s celebration of autonomy, freedom, desire, and satisfaction in intimate relations converges with the valorization of liberty over equality in neoliberal legal culture).

247. *See* *United States v. Virginia*, 518 U.S. 515, 572–74 (1996) (Scalia, J., dissenting).

248. *See* Render, *supra* note 15, at 165 (describing prescriptive generalizations and constitutive rules).

249. Both rational and irrational discrimination are based on the use of “proxy traits.” Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 *GEO. MASON L. REV.* 145, 155 (2000). Irrational discrimination occurs when the discriminator believes that the trait—such as sex or race—correlates with a job qualification, when it in fact does not. *Id.* For example, an employer might irrationally believe that males are better at the mathematical skills necessary for engineering jobs. Rational discrimination occurs when the use of proxies has some foundation in fact and, as a result, their use is a cost-saving measure. *Id.* at 156.

250. *Case*, *supra* note 72, at 1466–67. *Case* argues that the Supreme Court strikes down sex-based generalizations under the law that the Court deems nonuniversal, even if the generalization is empirically accurate. By contrast, the Court upholds sex-based generalizations when a majority finds that the generalization is universal (whether or not others may agree with this determination). *See id.* at 1457–61. The Court’s holding in *United States v. Virginia* was exemplary: the majority held the exclusion of women from the Virginia Military Institute unconstitutional even if most women would be ill-suited to the school’s method of instruction. 518 U.S. at 550 (majority opinion) (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”).

251. In its 1978 decision in *City of L.A. Dep’t of Water & Power v. Manhart*, the Court held that an employer violated Title VII when it required that female employees make larger contributions to its pension fund than male employees because, on average, women live longer than men. 435 U.S. 702, 707–11 (1978). The Court acknowledged that the sex-differentiated contribution scheme was based on a “real” rather than “fictional difference[] between women and men.” *Id.* at 707. The court held, however, that Title VII protected *individuals* against discrimination based on membership in a sex-based, racial, or other protected class. *Id.* at 708. “Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Id.*

to ascriptive stereotyping.<sup>252</sup> A voluminous literature explores the precise holding of *Price Waterhouse*, and it is beyond the scope of this Article to recapitulate these debates. Instead, we may rely on the useful typology of interpretations offered by Kimberly Yuracko.<sup>253</sup> Most courts have rejected an interpretation that *Price Waterhouse* protects all forms of gender performance in the workplace,<sup>254</sup> holding instead that the case requires either *trait neutrality*<sup>255</sup> or *category neutrality*.<sup>256</sup> Despite their differences, all three definitions of unlawful stereotyping—imperfect proxy, false generalization, and the prohibition on prescriptive stereotyping—similarly conceptualize the legally cognizable injury. The injury wrought by sex discrimination is that of an artificial limitation on an individual’s capacities, choices, and gender-related forms of expression.<sup>257</sup>

A survey of the literature suggests that many scholars understand the primary function of Title VII to be the promotion of individual freedom. Mary Anne Case is one of the most influential thinkers advancing judicial doctrine on the subject of gender stereotyping. Her seminal 1995 article, *Disaggregating Gender from Sex and Sexual Orientation*, took aim at gender discrimination “in favor of or against a particular gendered trait or set of traits.”<sup>258</sup> Case’s subsequent scholarship has continued to argue for legal protection of individuals who transgress conventional gender

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252. 490 U.S. 228 255–58 (1989) (Brennan, J.) (plurality opinion) (concluding that the district court did not clearly err in finding that sex stereotyping played a part in decision to deny the plaintiff a promotion). Ascriptive stereotyping occurs when an employer classifies all individuals belonging to a social group on the basis of a stereotype applied monolithically to that group. Zachary R. Herz, *Price’s Progress: Sex Stereotyping and Its Potential for Anti-discrimination Law*, 124 YALE L.J. 396, 396 (2014). For example, an employer who refuses categorically to hire women for an executive position because of a belief that women are insufficiently competitive. Prescriptive stereotyping occurs when employers expect that members of a group *should* exhibit specific traits. For example, an employer who demands that a female employee look and act feminine. *See id.* at 398–400.

253. *See* Yuracko, *supra* note 241, at 769–86.

254. Some scholars believe *Price Waterhouse* protects all forms of gender performance in the workplace, even those that may be idiosyncratic or in flux. *See, e.g.*, Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 780–81 (2002). Most courts, however, have rejected this broad interpretation. *See* Yuracko, *supra* note 241, at 770–71.

255. If Title VII requires trait neutrality, then an employer may require an employee to exhibit, or not exhibit, a particular trait but must remain indifferent to the class of persons doing so. For example, an employer can prohibit employees from wearing dresses but must do so with respect to female and male employees alike.

256. If Title VII requires category neutrality, then employers may enforce gender stereotypes by maintaining sex-respecting behavioral codes in the workplace but must allow individuals to select the sex with which they identify. This interpretation has facilitated the claims of transsexual or transgendered persons who argue that an employer wrongly classified their gender identity in demanding conformance to normative gender codes.

257. These injuries are imposed by state action in the equal-protection context or an employment decision or practice in the Title VII context.

258. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 79 n.268 (1995). Case observed that while legal protections were building for women, as exemplified by the Court’s *Price Waterhouse* decision, men who exhibited feminine gender presentation still lacked protection. *See id.* at 2–3.

norms, regardless of whether those individuals belong to particular identity groups (such as female, male, gay, lesbian, or transgender).<sup>259</sup> Case’s project is thus to end differential legal treatment on the basis of sex as well as behaviors that are culturally coded as relating to gender.<sup>260</sup> This is a project aimed at individual freedom, as Case herself distinguishes between the antistereotyping principle and a principle that would oppose laws and institutions that subordinated women.<sup>261</sup>

In keeping with the focus on individual freedom, a number of scholars focus attention on structures that regulate identity prescriptively. Kenji Yoshino’s foundational article on “covering”<sup>262</sup> initiated a turn in legal scholarship toward examining assimilationist bias in the workplace. Devon Carbado and Mitu Gulati critique the ways in which the identity performances in the workplace that are necessary to professional success impose disproportionate costs on “outsiders.”<sup>263</sup> Tristin Green enriches the literature by examining the specific demands that workplace culture makes for assimilation related to stylized displays of competence, informal socializing, and physical and aesthetic appearances.<sup>264</sup> Zachary Kramer observes that sex discrimination has become more individualized, targeting particular persons who cannot conform to the norms of the workplace.<sup>265</sup> So too, Kramer argues, should the legal regime respond by protecting the myriad of individualized expressions of gender identity.<sup>266</sup>

Antistereotyping theory reinforces neoliberal conceptions of the archetypal legal subject, injury, and remedy. The neoliberal subject is the autonomous individual acting without constraints in the marketplace; artificial restraints on such action constitute injury; and the actor’s unfettering is an ideal remedy. By locating individual

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259. Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1336 (2014).

260. See Case, *supra* note 72, at 1473.

261. See *id.* (arguing that stereotypes “are problematic when embodied in law, even in law that does not in any articulable way subordinate women to men”). The antistereotyping project, Case argues, is not necessarily limited to formal equality, defined as limitations on facial sex classifications. It may at times require substantive equality, defined as sex-neutral regimes that are nonetheless responsive to particularized gender characteristics (for example, disability related benefits that are universal yet disproportionately protect pregnant women). *Id.* at 1474. Case argues, however, that antistereotyping may require remedies that depart from those required to realize antisubordination values. See *id.* at 1476 (arguing that separate castes, even in the absence of subordination, would violate constitutional liberty by limiting individuals to predetermined social roles).

262. Yoshino, *supra* note 254.

263. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). These costs include deeper compromises between performed identity and authentic conceptions of self as well as greater efforts expended to conform. See *id.* at 1288–90.

264. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 644–46 (2005). Courts entrench the subordinating effects of workplace culture organized around white-male norms by portraying culture as a business prerogative and nonconformity as a failure of responsibility or ability on the part of the nonconformist. *Id.* at 658–64.

265. Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014).

266. *Id.* at 952–53 (proposing an accommodation regime for gender expression).

freedom as the core function of antidiscrimination law, antistereotyping similarly frames inequality as a problem of constraint on individual agency.

The antistereotyping theory at the core of sex-discrimination law fails to challenge the fundamental terms of workplace organization. In the late 1960s and early 1970s, labor feminists insisted that social justice would require not only individual employment opportunity but also protective laws that would make workplaces more amenable to flourishing family and civic lives. Today, feminist scholarship's focus on sex discrimination stresses only half of that aspiration. By recasting individual freedom as the measure of a just labor market, antistereotyping theory may in fact legitimate existing workplace structures. The theory therefore entrenches the power imbalances between employers and employees that shape workers' family lives as well as work lives. As I discuss in Part III.B below, the limits of antistereotyping theory are especially injurious to working-class women.

## 2. Market Rationality and the Antidiscrimination/Accommodation Distinction

The early construction of Title VII as an efficiency-promoting statute continues to influence scholarship. Leading casebooks use efficiency as an organizing principle to unify disparate employment-law doctrines, and innumerable articles apply a law-and-economics analysis to the field.<sup>267</sup> John Donohue, for example, argues that Title VII's normative force derives from the fact that its prohibition on disparate treatment rewards workers for the true value of their labor.<sup>268</sup> In this view, imperfect markets trigger the coercive function of employment-discrimination law, and Title VII's purpose is to perfect markets. The efficiency frame is so pervasive that it serves as the necessary foil against which scholars must pose alternatives.<sup>269</sup>

At the same time, it is commonplace that some of the discrimination prohibited by Title VII may actually be efficient from the standpoint of employers. For example, racism among customers and coworkers may make racial preferences in hiring an efficient practice for employers.<sup>270</sup> Nevertheless, Title VII indisputably prohibits such practices; there is no business-necessity defense to such facially discriminatory treatment.<sup>271</sup> Therefore, even the disparate-treatment prong of the statute—its less

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267. For a critical observation of this trend, see Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

268. John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2591–95 (1994).

269. See, e.g., Bagenstos, *supra* note 267 (arguing that social equality and neither economic efficiency nor the need to rectify imbalances in bargaining power should unify employment-discrimination scholarship).

270. See Fiss, *supra* note 158, at 259–60; Jolls, *supra* note 198, at 686–87.

271. Customer and client preferences nonetheless continue to shape the workplace. While such preferences cannot serve as a defense to facially discriminatory treatment, they may legitimate a facially neutral policy that disproportionately burdens workers in ways that trace religious as well as ethnic differences. See Dallon F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 725–33 (2015) (gathering and analyzing cases in which courts held that requiring employers to accommodate employees' religious practices which required departure from facially neutral appearance rules would constitute an undue hardship on the employers). *But see* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033–34 (2015) (holding that failure to

contested form of liability—may be inefficient in specific instances. In this sense, the ideal of Title VII as market perfecting is a tenacious legal fiction.

The fiction of capitalist rationality persists, ironically, in part because of some scholars’ efforts to defend the normative legitimacy of Title VII. As Samuel Bagenstos explains, scholars have drawn a strategic distinction between traditional civil rights statutes and the Americans with Disabilities Act of 1990 (ADA) by framing the former as efficient.<sup>272</sup> The key article, Mark Kelman’s *Market Discrimination and Groups*, argues that the prohibition on simple discrimination (disparate treatment) gives individuals the right to impersonal, rational treatment in a capitalist labor market.<sup>273</sup> By contrast, the accommodation claims recognized by the ADA impose costs beyond those posed by Title VII’s demand for an efficient marketplace.<sup>274</sup> Kelman concludes, therefore, that accommodation is politically contestable in a way that the prohibition on simple discrimination is not because it involved claims to finite social resources.<sup>275</sup> Kelman’s account is foundational to an intellectual genealogy that locates the normative basis for Title VII in market rationality. In solidifying the justification for disparate-treatment liability, Kelman’s theory likewise makes disparate-impact liability even more suspect.

Kelman’s account of Title VII reinforces a neoliberal understanding of the market as emptied of social concerns beyond efficiency. Kelman’s definition of commercial activity excluded thick determinants of social identity and social-power relations among employees, customers, and employers alike. Kelman writes: “[T]he plaintiff seeking to block simple discrimination . . . seeks to be treated as embodied net receipts (in her role as a customer) or embodied net marginal product (in her role as worker.)”<sup>276</sup> Kelman explains away the problem of the consumer-preference exception to the efficiency of disparate-treatment liability with reference to abstracted capitalist rationality. He suggests that customers are themselves duty bound to treat service workers according to dictates of impersonal capitalism.<sup>277</sup> Similarly, Kelman dismisses the libertarian objection that Title VII compromised employers’ associational interests. His reasoning depicted the market as a wholly commercial realm

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accommodate a religious practice that contradicts a facially neutral policy may constitute disparate treatment in violation of Title VII); Debbie Kaminer, *Religious Accommodation in the American Workplace: The Consequences of the Supreme Court’s Decision in EEOC v. Abercrombie & Fitch*, 5 J.L. RELIGION & ST. 25 (2017) (suggesting that the *Abercrombie* decision has moved the doctrine from formal to substantive equality of religious employees in the workplace).

272. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 910–15 (2003).

273. Kelman, *supra* note 193, at 840. Kelman did not address disparate-impact liability under Title VII in this article. By contrast, Jolls, *supra* note 198, at 652–66, recognized that this prong of Title VII was essentially an accommodation mandate.

274. Kelman, *supra* note 193, at 840–45.

275. *Id.* at 852–55.

276. *Id.* at 892.

277. Kelman asserted that customers whose discriminatory preferences (for example, for white retail clerks or female airline stewardesses) were frustrated thereby suffered only psychic and not financial losses. See *id.* at 844. This conception of injury asserted that the only “real” losses were economic ones. *Id.* at 844.

isolated from personal identity and group formation.<sup>278</sup> Kelman thus recasts the market as unmoored from social roles and justified antidiscrimination law in purely capitalist terms. Although Kelman is a critical theorist and not aligned with law-and-economics scholars either methodologically or empirically, he similarly helps to construct an understanding of the labor market as driven purely by individual, rational choice. Kelman's theory thus helps to articulate and to solidify a neoliberal depiction of Title VII's function to perfect markets. This representation in turn delegitimated claims that the terms of the market were themselves unjust.

It is perhaps the conjunction between the efficiency frame for Title VII and neoliberalism that explains why the former is so difficult to dislodge. The framing of employment-discrimination law in market terms is not universal and has multiple critics. Michael Selmi writes, for example, "Most people would contend that our legal system proscribes discrimination because it is wrong[,] not because it is an inefficient business practice."<sup>279</sup> Robert Post likewise critiques the way in which the dominant understanding of employment-discrimination law instrumentalizes individuals.<sup>280</sup> By requiring that employers treat job candidates and employees in a manner "blind" to race and sex, the prevailing interpretation of Title VII strips individuals of their full social identities and, therefore, cabins the statute's moral import. Professor Bagenstos argues that it is not efficiency but social equality, defined as inclusion of groups excluded from market and civic participation, which justifies the prohibition on discrimination.<sup>281</sup> Nonetheless, capitalist rationality stubbornly persists as a primary justification for Title VII and thus an ideological limit on the statute's scope. In legitimating the idea that a fully rational labor market is a just labor market, the efficiency paradigm further cabins our legal culture's understanding of law's regulatory functions.

*B. "Best Practices": The Shortcomings of Neoliberal Antidiscrimination Law for Working-Class Women*

The tropes of antistereotyping and market rationality find fruition in the trend toward managerial "best practices" as a means of Title VII implementation. The best-practices concept responds to neoliberal workplace structures characterized by

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278. Kelman thus concluded that employers and business owners purportedly making associational claims were in fact asserting the right to buttress a particular sociopolitical hierarchy. *Id.* at 869. But this characterization erased any social identity from the selves that entered the realm of the market, drawing an artificial distinction between the public and private. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 30–32 (2000).

279. Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1247 (1999), cited in Bagenstos, *supra* note 272, at 850 n.74.

280. See Post, *supra* note 278, at 15 ("[I]t is no small irony that American antidiscrimination law, which springs from the noble liberal impulse to protect persons from the indignities of prejudicial mistreatment, should in the end unfold itself according to a logic that points unmistakably toward the instrumentalization of persons.").

281. See generally Bagenstos, *supra* note 267 (arguing that social equality is the underlying principle of employment-discrimination law which justifies even meaningful costs on employees).

flexible work schedules, diffuse authority, and contingent employment relationships.<sup>282</sup> It aims to enforce employment-discrimination law in this changed workplace context via managerial training and self-regulation.<sup>283</sup> The focus is on an institutional approach to regulating individualized interactions and biases as well as on using employment-discrimination law as a means to better identify talent and hire and promote meritorious workers. While best practices may promote inclusion along identity-based axes, such practices enforce managerial authority rather than redistribute power between employers and workers. By failing to challenge the fundamental terms of the employment relationship—including hours, wages, leave policies, and conditions of work—even best practices to enforce Title VII fall short of meeting the most pressing needs of working-class women.

In an influential 2001 article, Professor Susan Sturm explains that race and sex discrimination had evolved from “first generation” to “second generation” employment discrimination.<sup>284</sup> Discrimination no longer conforms to patterns of deliberate and intentional exclusion from employment opportunities, job segregation, and conscious stereotyping.<sup>285</sup> Exclusion now derives from unconscious bias, more subtle social interaction within groups, and the cumulative effects of daily ongoing decision making.<sup>286</sup> In lieu of sex-segregated “want ads” in newspapers or race-segregated seniority lines in factories, discrimination arises from complex interactions among coworkers who, despite their lack of formal authority, may have the power to marginalize nonconforming individuals in the workplace.<sup>287</sup> Given this transformed workplace, it becomes harder for courts to trace discrimination to single, adverse employment decisions made by individual actors.<sup>288</sup> Instead, Sturm argues “second-generation” discrimination stems from organizational culture.<sup>289</sup>

Although they do not describe it in these terms, Sturm and others focus on “second-generation discrimination” to describe what social theorists recognize as neoliberal trends in workplace organization.<sup>290</sup> This workplace is one characterized by a shift toward informal norms, flattened organizational hierarchies, and flexible job duties and hours. Power is diffuse rather than authoritarian. The boundaries between work and personal time collapse as work hours grow longer and more erratic. The boundaries between work and civic life erode as identity expression becomes increasingly valued in the workplace and one’s career emerges as a site of

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282. See *infra* text accompanying notes 303–14.

283. See *infra* text accompanying notes 292–98.

284. Sturm, *supra* note 25, at 460.

285. *Id.* at 465–68.

286. *Id.* at 468–74.

287. *Id.* at 468.

288. *Id.*

289. *Id.* at 468–69. Organizational culture involves patterns of work assignment, remarks on some workers’ appearance or competence, socialization among coworkers, hyperscrutiny of some workers, and underappreciation of others’ contributions. See *id.* at 468–69.

290. For discussion of such trends, see generally Enda Brophy & Greig de Peuter, *Immaterial Labor, Precarity, and Recomposition*, in *KNOWLEDGE WORKERS IN THE INFORMATION SOCIETY* 177 (Catherine McKercher & Vincent Mosco eds., 2007).



identity. As Tristin Green shows, today's workplaces use "strong cultures" as a form of social control.<sup>291</sup>

In response to the changing character of discrimination within a transformed workplace, Sturm advocated a "structural-regulatory" approach.<sup>292</sup> Sturm argued that courts appropriately performed the function of elaborating upon legal norms.<sup>293</sup> But they were ill-suited to enforce Title VII because any rule broad enough to cover the variety of forms of second-generation discrimination would be too ambiguous to guide lawful conduct.<sup>294</sup> Sturm suggested that the courts are instead assuming a new role, in which they serve as the institutions which articulate legal norms and ultimately serve as the "backstop" for their enforcement but shy away from the elaboration of detailed rules.<sup>295</sup> Instead of implementing clearly defined rules, Sturm argued that vanguard employers "have instituted internal systems for preventing and remedying problems stemming from complex workplace relationships."<sup>296</sup> These internal regulatory systems would ideally focus on transforming workplace structures by exposing problems, producing information that would catalyze action, establishing incentives to change behavior, and evaluating results.<sup>297</sup> Intermediaries including lawyers, human-resource professionals, organizational consultants, and employee groups would also help to hold employers accountable to public norms articulated by courts.<sup>298</sup>

The EEOC takes a similar internal regulatory approach in outlining "best practices" to prevent discrimination. Such practices involve top executives' embrace of equal employment opportunity values, training of human-resource managers, the fostering of an inclusive culture, early dispute resolution, and objective criteria for hiring and promotion.<sup>299</sup> Best practices are undoubtedly an important mechanism for addressing workplace structures that reproduce gendered and racialized exclusion and for promoting individual employment opportunity. At the same time, this trend represents a neoliberal response to a neoliberal workplace. The best-practices model locates the solution to inequality in employer prerogatives. The concept thereby reinforces managerial control rather than empowering workers' collective organization within the workplace.

Best practices cannot address the inequities that arise from the structure of work

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291. Green, *supra* note 264, at 635–37.

292. Sturm, *supra* note 25, at 479.

293. *Id.* at 463.

294. *Id.* at 461.

295. *Id.* at 479.

296. *Id.*

297. *Id.* at 489–90.

298. *See id.* at 522–23.

299. *Best Practices for Employers and Human Resources/EEO Professionals*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> [<https://perma.cc/DMN5-PBJK>]; *see also* Andrea R. Calem & Susan F. Wiltsie, *Gender Identity in the Workplace: Best Practices*, HUNTON & WILLIAMS (Nov. 23, 2015), <http://www.huntonlaborblog.com/2015/11/articles/employment-policies/gender-identity-in-the-workplace-best-practices> [<https://perma.cc/CNG2-TNQB>] (describing best practices for management and human resource personnel regarding policies that facilitate the expression of gender identity in the workplace).

itself rather than gender- and race-based exclusion within those structures. The most pressing employment-related dilemmas confronting many low-income women do not relate to sex discrimination. They concern low wages and poor work conditions. Working-class women face both erratic hours, which make it difficult to schedule childcare and other nonwork responsibilities, and mandatory overtime, which makes it hard to find time for family and leisure. They are channeled into part-time positions without adequate health care, disability, and family-leave benefits. They are disproportionately represented in service and healthcare sectors characterized by pay below the living wage.<sup>300</sup> Such inequities have everything to do with the gender and race of the persons who perform certain types of work but are not legally cognizable as discrimination.<sup>301</sup> The metaphor that best characterizes the dilemmas that face low-income women is not the “glass ceiling” but the “concrete floor.”<sup>302</sup>

#### 1. Work Hours and Wages: The Limits of Internal Regulation, Antistereotyping Theory, and FReD

The defeat of labor feminists’ campaigns for universal protective labor standards casts a long shadow. Though popular discussion often focuses on women’s wage gap, work hours and schedules are also pressing problems that receive less political attention. Today, working-class women (and many men, too) endure work schedules that make it difficult to earn sufficient income and to balance employment with family life.<sup>303</sup> The FLSA is inadequate to protect the needs of workers in feminized occupations within the service, retail, and information sectors for stable, predictable, and adequate work hours. Had labor feminists won voluntary-overtime laws over forty years ago, such legislation may have laid the political foundation for the kind of state regulation over work hours that is so desperately needed today.

The absence of state protective standards is particularly devastating to low-income workers because of the weakening of the organized labor movement in the late twentieth century. Unions provide a primary source of leverage for working-class employees to negotiate for improved hours, scheduling, and leave policies.<sup>304</sup>

300. Richard J. Torraco, *The Persistence of Working Poor Families in a Changing U.S. Job Market: An Integrative Review of the Literature*, 15 HUM. RESOURCE DEV. REV. 55, 60 (2016).

301. See, e.g., BORIS & KLEIN, *supra* note 112, at 8 (arguing that the “racialized feminization” of home healthcare workers devalued their labor in the market).

302. Wider Opportunities for Women, an advocacy group dedicated to promoting economic security for women, uses the term “concrete floor” to describe the barriers preventing women from entering blue-collar jobs with high wages and decent benefits. *Is Laboring for Less Women’s Work?*, WIDER OPPORTUNITIES FOR WOMEN: ECON. SECURITY BLOG (Aug. 31, 2012), <http://www.wowonline.org/blog/2012/08/31/is-laboring-for-less-womens-work/> [https://perma.cc/8EZY-RNSY]. But the problem of the “concrete floor” runs even deeper, reaching the question of how to make “women’s jobs” good jobs.

303. See LIZ WATSON & JENNIFER E. SWANBERG, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS 3–4 (2011), <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf> [https://perma.cc/8PE9-UMQV].

304. See, e.g., Jillian Crocker & Dan Clawson, *Buying Time: Gendered Patterns in Union Contracts*, 59 SOC. PROBS. 459 (2012) (comparing negotiation regarding work hours and schedules in the union contracts of nurses and firefighters).

Yet the last several decades have witnessed a precipitous decline in labor's power. At the apex of the labor movement's power in the 1960s, one-third of employees were unionized; today about seven percent of private sector workers and twelve percent of public sector workers are union members.<sup>305</sup> The labor movement's loss of influence over electoral politics helps to explain why activists lost momentum to augment state and federal labor protections.<sup>306</sup>

Working-class women today endure long hours, mandatory overtime, involuntary part-time employment, and erratic work schedules. While work hours have decreased since the 1970s for many Americans—including those past retirement age, the young, and middle-aged men—women have increased their work hours dramatically over the last several decades.<sup>307</sup> Low-wage, hourly workers, of whom nearly two-thirds are women,<sup>308</sup> bear the brunt of harmful trends in employers' hours and scheduling practices. Up to thirty percent of low-wage workers face required overtime, and fifty-eight percent of these workers report they would face backlash from their employers if they refused such work.<sup>309</sup> While male workers typically are concerned with access to overtime work, women workers are disproportionately concerned with reduction in mandatory overtime work and the ability to choose whether to perform overtime shifts.<sup>310</sup> At the other end of the spectrum, low-wage women workers also face involuntary part-time employment that deepens their economic insecurity.<sup>311</sup> More than one-quarter of these workers experience further reductions in hours and layoffs when work is slow.<sup>312</sup>

In addition to excessively rigid work hours, low-wage workers confront unpredictable and instable work schedules. Popular discourse constructing workplace "flexibility" as a positive good for higher-level, salaried workers has obscured the injuries that a flexible workforce poses for low-wage workers.<sup>313</sup> Frontline managers face corporate pressure to reconcile consumer demand with labor supply via just-in-time scheduling.<sup>314</sup> As a result, low-wage employees face very short notice regarding their work schedules. For these employees, the number of work hours per week and

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305. NEVA GOODWIN, JONATHAN HARRIS, JULIE A. NELSON, BRIAN ROACH & MARIANO TORRAS, *MACROECONOMICS IN CONTEXT* 355 (Routledge 2d ed. 2015) (2014).

306. A close examination of labor's political decline lies beyond the scope of this Article. For an overview, see generally LICHTENSTEIN, *supra* note 73, at 212–45.

307. Tyler Cowen, *More Time To Unwind, Unless You're a Woman*, N.Y. TIMES, June 5, 2016, at BU3.

308. WATSON & SWANBERG, *supra* note 303, at 14.

309. *Id.* at 6.

310. Crocker & Clawson, *supra* note 304, at 468–71.

311. The involuntary part-time employment rate for women rose from 3.6% to 7.8% between 2007 and 2012. REBECCA GLAUBER, CARSEY INST., ISSUE BRIEF NO. 64, *WANTING MORE BUT WORKING LESS: INVOLUNTARY PART-TIME EMPLOYMENT AND ECONOMIC VULNERABILITY 1* (2013), <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1198&context=carsey> [<https://perma.cc/GJN3-KQ6D>]. That year, one in four involuntary part-time workers had incomes below the poverty line. *Id.*

312. WATSON & SWANBERG, *supra* note 303, at 6.

313. Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices That Transfer Risk onto Hourly Workers*, 61 HUM. REL. 1203, 1205 (2008).

314. *See id.* at 1212–13; Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 7–8 (2015).

distribution of hours across the week fluctuate constantly.<sup>315</sup> Corporate flexibility has resulted in a fifty-one percent increase in the standard deviation of hourly-wages rates since the 1970s and a twenty-three percent increase in the standard deviation of work hours.<sup>316</sup> Meanwhile, less than half of employers provide a majority of their workers with family-friendly work schedules, and low-wage workers are the least likely to benefit from such policies.<sup>317</sup>

Antidiscrimination law is impotent to address the harmful work hours and schedules experienced by low-wage workers. These are not injustices that arise from comparative discrimination but rather derive from the structure of work itself. They are the result of economic shifts in capital, managerial strategies, and power imbalances between employers and employees. The implementation of best practices to combat employment discrimination does little to rectify such imbalances and may further increase managerial power over workers.

As Valerie Vojdik argues, the antistereotyping theory limits claims under Title VII to those of miscategorization.<sup>318</sup> An employer would violate Title VII if he denied a job to a woman with young children on the assumption that her domestic responsibilities would preclude her from performing routine overtime work.<sup>319</sup> The employee would likely win a lawsuit arguing that the employer discriminated against her on the basis of invalid sex-role stereotypes. But antidiscrimination offers no remedy to the worker—male or female—whose caregiving responsibilities do interfere with his or her capacity to perform routine overtime work.

For the same reason, one doctrine at the vanguard of antistereotyping theory—that of “family responsibilities employment discrimination” (FReD)—is inherently limited. The doctrinal innovation of FReD is that a plaintiff does not need to prove comparator evidence to establish evidence of discrimination.<sup>320</sup> Evidence of sex stereotyping, alone, can suffice to show that an employer made an adverse employment decision on the basis of sex. FReD has opened the door to hundreds of litigants challenging the “maternal wall.”<sup>321</sup> But it leaves intact the requirements of a job—be that erratic hours, overtime work, lack of family leave, or the dearth of routine accommodations for caregiving. Successful FReD cases prove that the employer wrongly presumed that an employee or job candidate would not be able to perform the job because of her family.<sup>322</sup> FReD does not catalyze labor-market structures responsive to employees’ needs for predictable and limited work hours, flexible schedules, family leave, higher wages, and healthcare benefits.

The emphasis on antidiscrimination within legal culture, moreover, legitimates

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315. See WATSON & SWANBERG, *supra* note 303, at 4; Lambert, *supra* note 313, at 1204.

316. Lambert, *supra* note 313, at 1205.

317. WATSON & SWANBERG, *supra* note 303, at 3–4.

318. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 347–49 (2005).

319. See Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1312–13 (2008) (discussing *Gallina v. Mintz*, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 123 F. App’x 558 (4th Cir. 2005)).

320. See *id.* at 1352.

321. *Id.* at 1315, 1336.

322. *Id.* at 1352–53.

existing workplace structures. Antidiscrimination doctrine frames the just labor market as one that fully includes various social identities, rather than as one that gives low-wage employees more control over their work lives. Antistereotyping theory, in particular, obscures the need for state protection of workers in its focus on unlawful assumptions about an individual's capacity to comply with institutional productivity norms. The concern with ending sex-role stereotyping implies that if we could eliminate artificial sex segregation and catalyze individual freedom we would have realized an egalitarian labor market. Antistereotyping theory reinforces workplace norms and challenges neither the terms of work nor the gendered division between productive and reproductive labor.<sup>323</sup>

## 2. Family Leave and Pregnancy Accommodation: The Limits of Disparate Treatment and Disparate-Impact Liability

While antidiscrimination law may never reach structural issues such as work hours, robust interpretations of disparate-impact liability did once have the capacity to prompt workplace transformations accommodating pregnant and caregiving workers. Title VII jurisprudence today, however, limits the redistributive interpretations of the statute. The continued influence of neoliberal thought on antidiscrimination doctrine only further highlights the need for substantive, rather than comparative, rights to pregnancy accommodation and family leave.

The narrow interpretation of Title VII is particularly harmful to low-wage female workers who disproportionately lack access to family-leave and pregnancy accommodations. Approximately forty percent of the American workforce is comprised of contingent and precarious laborers, whose nonstandard jobs fail to provide paid sick days, vacation, and family leave.<sup>324</sup> Family-leave laws have limited benefits for low-income workers, as demonstrated by extensive scholarship in law and social sciences.<sup>325</sup> The Family and Medical Leave Act (FMLA) covers only those employees who worked at least 1250 hours in the past year,<sup>326</sup> for employers that employed at least fifty workers per year.<sup>327</sup> As a result, the statute excludes about forty percent of American workers; low-wage female workers are disproportionately excluded.<sup>328</sup>

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323. My claim is not that employment-discrimination law and scholarship is itself unnecessary or harmful. Rather, the disproportionate focus on antidiscrimination law in feminist legal theory and in broader discourse about work-family conflict occludes the issues most salient to working-class women. The disproportionate attention to antidiscrimination theory thereby legitimates the structural terms of the employment relationship that contribute to economic inequality.

324. Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 1 (2016).

325. See, e.g., *id.*; O'Leary, *supra* note 231, at 45–47 (describing early efforts to provide paid leave to low-income workers).

326. 29 U.S.C. § 2611(2)(A)(ii) (2012).

327. § 2611(4)(A)(i).

328. O'Leary, *supra* note 231, at 43–44, 43 n.224; Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 339 & n.88 (2014).

Scholars have long launched the critique that low-income women cannot afford unpaid leave under the FMLA.<sup>329</sup> A recent study of California’s paid family-leave law shows that retaliatory behavior by employers prevents low-income workers from taking even paid leave.<sup>330</sup> Meanwhile, courts’ hostility to gender-based disparate-impact claims challenging leave policies limits the capacity for Title VII to catalyze employers’ provision of more robust benefits.

Even recent feminist victories in Title VII litigation highlight the inadequacy of employment discrimination absent labor protections. In the 2015 case of *Young v. United Parcel Service, Inc.*, the Supreme Court held that the failure to assign a pregnant employee to light duty so as to accommodate her partial incapacity to work could constitute discrimination in violation of the Pregnancy Discrimination Act of 1978.<sup>331</sup> A plaintiff could show that her employer’s proffered rationale for the non-accommodation was a pretext for discrimination. She could do so by producing evidence that the employer’s exclusion of pregnant workers from light-duty assignments available to other employees imposed a significant burden on pregnant women.<sup>332</sup>

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329. See, e.g., Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 3 (2005) (noting that the requirement to forego wages is the most significant barrier that prevents workers from taking leave formally available to them and that many workers who lack paid leave must resort to public assistance).

330. See Albiston & O’Connor, *supra* note 324, at 50–51.

331. 135 S. Ct. 1338 (2015). Peggy Young worked for UPS as an early morning delivery driver. *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 440 (4th Cir. 2013). When she became pregnant, Young asked for an accommodation consistent with her doctor’s recommendation of a twenty-pound lifting restriction. *Id.* UPS denied her request. *Id.* UPS, however, extended light-duty accommodations to three other classes of workers: those injured on the job, those with a permanent disability cognizable under the ADA, and those who have lost certification by the Department of Transportation. *Id.* at 441. The central issue in the case was how to interpret the relationship between the first clause of the Pregnancy Discrimination Act, which includes pregnancy within the definition of “sex” under Title VII, and the second clause requiring “same” treatment of pregnant workers “as other persons not so affected but similar in their ability or inability to work.” *Id.* at 447 (quoting 42 U.S.C. § 2000e(k) (2012)). The Supreme Court rejected both the narrow interpretation of the second clause advanced by UPS, which would have rendered it superfluous to the statutory scheme, and the broad interpretation advanced by Young, which would have required employers to accommodate pregnant women any time they provided such accommodations to other workers. 135 S. Ct. at 1349–53. Instead, the Court held that a plaintiff could prove that the failure to accommodate constituted discriminatory intent. *Id.* at 1353–54.

332. 135 S. Ct. at 1354. The majority held that a plaintiff could prove, using indirect evidence with the *McDonnell Douglas* burden-shifting framework, that the failure to accommodate constituted pregnancy discrimination. *Id.* at 1353–54. The plaintiff could show that the employer’s legitimate, nondiscriminatory rationale for failing to accommodate was a pretext for discrimination. *Id.* at 1354. Plaintiffs could create a genuine issue of material fact on this issue by showing that the employer’s policy had a significant burden on pregnant women. *Id.* The plaintiff, moreover, could show this burden via evidence that the employer accommodated a larger percentage of non-pregnant employees than pregnant employees requiring light-duty. *Id.* at 1354–55. For further discussion and critique of the doctrinal standards in *Young*, see William R. Corbett, *Young v. United Parcel Service, Inc.: McDonnell Douglas to the Rescue?*, 92 WASH. U. L. REV. 1683 (2015) (arguing that the *Young* case revived the outdated *McDonnell Douglas* burden-shifting framework that should have been replaced by the mixed-motive

*Young* was heralded as a victory for working women,<sup>333</sup> and there is good reason for this.

Yet the impact of *Young* for working-class women may be more limited than it appears. This is because for the lack of accommodation to constitute *intentional* discrimination, the employer must offer light-duty accommodations to some other group of nonpregnant workers. The only reason the Supreme Court could suggest the possibility of discriminatory intent in *Young* is because unionized UPS workers had bargained, in the first instance, for accommodation of workers injured on the job.<sup>334</sup> Most private-sector workers do not have this kind of bargaining strength. Employers of low-income, nonunionized women are disproportionately likely *not* to offer light-duty accommodations.<sup>335</sup> Without a baseline of accommodations realized via collective bargaining or statutory regulation, the disparate-treatment prong of Title VII will not offer a remedy to pregnant workers who require accommodations to perform their job duties.<sup>336</sup>

The *Young* litigation can thus be added to a growing line of cases that illustrate judicial skepticism of disparate-impact liability. The tension between disparate treatment and disparate impact—often described as a contest between individual fairness or equality of achievement under law—is also a debate about the extent to which market values should permeate employment-discrimination law. The persistent resistance to disparate-impact liability represents opposition to redistribution not only from whites to racial minorities, or men to women, but also from employers to workers. Scholars have recently argued that disparate-impact liability imposes unfair costs on employers because it invalidates employment practices—such as testing—correlated with worker productivity.<sup>337</sup> In this light, the late Supreme Court Justice

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standard set forth in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

333. See, e.g., Paul Gordon, *Peggy Young Will Get Her Day in Court*, PEOPLE FOR THE AM. WAY (Mar. 26, 2015), <http://blog.pfaw.org/content/peggy-young-will-get-her-day-court> [https://perma.cc/3YSA-S227]; Tom Spiggle, *Why Young v. UPS Is a Big Win for Pregnant Workers*, HUFFINGTON POST (Mar. 27, 2015, 1:04 PM), [http://www.huffingtonpost.com/tom-spiggle/why-young-v-ups-is-a-big\\_b\\_6956498.html](http://www.huffingtonpost.com/tom-spiggle/why-young-v-ups-is-a-big_b_6956498.html) [https://perma.cc/5ZK7-NUL2].

334. Memorandum Opinion at 5, *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586 (D. Md. Feb. 14, 2011), 2011 WL 665321, at \*2.

335. On low-wage workers' lack of pregnancy-related benefits, see O'Leary, *supra* note 231, at 35; Brigid Schulte, *New Statistics: Pregnancy Discrimination Claims Hit Low-Wage Workers Hardest*, WASH. POST: SHE THE PEOPLE (Aug. 5, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/08/05/new-statistics-pregnancy-discrimination-claims-hit-low-wage-workers-hardest/> [https://perma.cc/HG3U-A4MA].

336. Scholarly criticism of *Young* has missed this point about the relevance of unions to the factual basis for the case and has instead focused on the doctrinal consequences of the case and its implications for antistereotyping ideals. See generally Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125 (2016) (arguing that pregnancy specific accommodations have expressive harms that may reinforce stigma and discrimination); Corbett, *supra* note 332 (critiquing the resurrection of the *McDonnell Douglas* framework in *Young*); L. Camille Hébert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 AM. U. J. GENDER & SOC. POL'Y & L. 107 (2015) (arguing that a disparate-impact theory of pregnancy-related accommodation would do more than a disparate-treatment theory to help women reconcile work and family).

337. See, e.g., Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1191–92 (1999) (discussing employment tests which may also have a risk of disparate-impact liability).

Antonin Scalia’s famous suggestion that disparate-impact liability may be unconstitutional because it requires employers to engage in disparate treatment takes on a new cast.<sup>338</sup> Most have understood Scalia’s comment as an expression of hostility to antidiscrimination law that requires violation of a commitment to race- and sex-blind treatment.<sup>339</sup> But it also manifests a neoliberal impulse to limit the extent that Title VII imposes any legal mandates inconsistent with market logic.

### C. Toward a Feminist Theory of Class

Popular commentators and some legal scholars have begun to emphasize the importance of taking account of class in crafting strategies to remediate work-family conflict.<sup>340</sup> This Article has gone further to argue that the ascent of antidiscrimination doctrine as a central paradigm for justice in the labor market has facilitated the neoliberal restructuring of the labor market. Yet scholars’ failure to recognize the historical intersections between antidiscrimination law and neoliberalism has created blind spots in contemporary visions of sex equality. Despite attention to intersectionality, feminist legal theory has paid insufficient attention to class.<sup>341</sup> This Article uses history to center the dilemmas that class poses for feminist legal theory.

What would it mean to understand sex equality and the potential and limitations of sex-discrimination law from the perspective of working-class women?<sup>342</sup> It would require scholars to expand their historical narrative to include labor feminists such as Myra Wolfgang, Caroline Davis, and Union WAGE members.<sup>343</sup> It would require

338. *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring) (suggesting that disparate-impact liability and equal protection are at “war”).

339. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1363 (2010) (describing a “general reading” of the *Ricci* decision that would lead to the constitutional invalidity of disparate-impact liability because the latter would violate the principle of colorblindness understood in this reading “as the guiding value of equal protection”).

340. See, e.g., JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE* 151–86 (2010) (arguing that a culture gap along class lines obscures solutions to work-family conflict); Judith Shulevitz, *How To Fix Feminism*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/12/opinion/sunday/how-to-fix-feminism.html> (arguing for “caregiverism” involving greater state support for caregivers) [<https://perma.cc/E6YW-DADD>].

341. But see Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1 (2016) (arguing that recent Court decisions have deepened the class-based subordination of women); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 785 (2003) (arguing that identity-based conceptions of social equity “favors the interests of the most privileged members of society”); O’Leary, *supra* note 231 (assessing the class-based limitations of the federal FMLA and analogous state laws).

342. I do not recommend, here, that we should apply differential legal regimes—antistereotyping and labor protection—to different classes. Rather, I am suggesting that if forced by the constraints of the legal and political landscape to choose between sex discrimination and labor protection, feminists should take responsibility for the class-based consequences of strategic decision making. Such responsibility would not negate the important project of highlighting the way in which antifeminist opposition has narrowed the possibilities for legal and political action.

343. I am suggesting that we might recover lost strands of legal and political history to



recasting the end of maternalist labor laws in a more nuanced light—one that would reveal the tragic defeat of universal overtime laws and other protective state labor standards as well as victories against sex-role stereotyping. It would require scholars to interrogate legal and political discourses that conflate the advantages of Title VII for professional and skilled women with its benefits for all women. It would require confronting the limitations of antidiscrimination law to achieve the kinds of social and economic protections that working-class women, in particular, need and lack.<sup>344</sup>

By historicizing the development of sex-discrimination law in a neoliberal context, I do not intend to advocate a return to gender stereotypes. My argument thus departs from that of scholars, such as Julie Suk, who have questioned whether gender stereotypes are indeed bad for women.<sup>345</sup> To recognize the limits of antistereotyping theory does not necessarily involve a claim for a legal regime based on gender stereotypes. Rather, it invites us to recall that employers have used antistereotyping theory to advance a deregulatory agenda and to oppose the realization of labor protections. It invites us to recover a feminist vision that fused civil rights era commitments to antistereotyping with Progressive Era and New Deal commitments to labor protection.

Skeptics might argue that the critique of Title VII in this Article is inapposite to a theory of *sex* equality as opposed to *class* equity. Certainly, Title VII was limited by design in its capacity to advance economic justice along class lines. The purpose of the statute was not to regulate the balance of power between labor and capital. Yet this Article recovers labor feminists' view that equality for working-class women required both equal opportunity and labor regulation. Without a redistribution of power between employers and employees, working-class women and men will not be able to realize the kind of workplace supports they need for lives outside of work.

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mobilize them against teleological conceptions of sex equality. For an analysis of feminist temporal politics, see Victoria Browne, *Backlash, Repetition, Untimeliness: The Temporal Dynamics of Feminist Politics*, 28 *HYPATIA* 905 (2013), which argues that feminists can find in repeated conflicts within women's history lost legacies that can inspire contemporary resistance.

344. In suggesting the limitations of Title VII for working-class women, I do not intend to argue that only these women require labor and social protections. Rather, all women and men require workplace accommodations, stable and predictable hours, shorter workweeks, and paid leave to participate effectively in care within their families and communities. But working-class women are positioned in the labor market such that they disproportionately lack such supports. The United States provides the kinds of protections listed above via the workplace, as a matter of employer discretion, rather than via the state, as a matter of entitlement. The inability for antidiscrimination law to realize labor protections has particularly harmful consequences for low-wage workers because of the terms of their employment.

345. Suk argues that maternalistic legal regimes in Western Europe do a better job helping women to reconcile careers with family life than does the antidiscrimination regime in the United States. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 *COLUM. L. REV.* 1, 49–51, 60–63 (2010). Suk suggests a counterfactual: were Congress to untie maternity leave from sick-leave entitlements then employers and business groups might tolerate more expansive entitlements for women such as paid maternity and family leave. *Id.* at 21–24. Reasoning from this historical and comparative context, Suk argues for a relaxation on prohibition of stereotyping to allow legislation targeting women's "special" relationship with their children. *Id.* at 60–63, 68–69.

The notion that economic justice for workers is distinct from issues of sex equality is itself an historical artifact—a product of the way in which legal meaning was constructed over time.

This Article, therefore, contributes to scholarship that seeks to dismantle the divides between labor and employment-discrimination law.<sup>346</sup> These exist as largely distinct academic fields, with independent bodies of scholarship. The doctrines associated with each field are also taught in distinct courses, with employment discrimination occupying more pride of place in most law-school curriculums than labor law. The institutional and scholarly divides between labor and employment-discrimination law, however, contribute to a lack of scholarly engagement with class as a central dimension of gender justice. The construction of sex equality as a problem of discrimination—in ways that privilege antistereotyping, efficiency, and judicially enforced negative rights—legitimizes class-based inequities experienced by women and men in feminized occupations. A more capacious understanding of sex equality—rooted in collective security, workers’ organizing rights, and positive welfare entitlements—necessitates fundamental changes in the labor market, economy, and social policy. To help illuminate the path to this change, legal scholars need to produce scholarship and teach courses that integrate antidiscrimination law with labor and social-welfare law.

#### CONCLUSION: LOOKING BACKWARD TO MOVE FORWARD

This Article argues that in the late twentieth century employment-discrimination law intertwined with neoliberalism on ideological, institutional, and doctrinal levels. Title VII shares with neoliberalism fundamental ideals including individual freedom, negative rights, and efficiency. That convergence did not determine whether neoliberalism would serve neoliberal purposes, but it created the historical possibility for actors to use Title VII in ways that stripped equality of its redistributive content. Employers and state politicians used litigation under Title VII to undermine protective labor standards. Courts foreclosed plaintiffs’ claims that might have transformed employment structures to make them more supportive of social life outside of the workplace. Our nation might have realized the vision of labor feminists who advocated workers’ rights to state protection as well as to equal employment opportunity.

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346. Labor-law scholars have initiated this inquiry by exploring the role of employment-discrimination statutes in worker organizing. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 390–94 (2005) (arguing that the threat of employment-law damages can pressure firms into recognizing collective self-governance by workers); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 208–212 (2007) (arguing that unions “strategic[ally]” deploy employment law to generate negative publicity for firms and positive displays of union power that can induce employers, for example, to agree to card-check recognition procedures); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2722–34 (2008) (arguing that FLSA and Title VII can galvanize worker organizing by framing a common grievance and prompting a collective identity as well as insulate their collective action from employer interference through retaliation provisions).

Instead, U.S. legal culture largely forgot a vision of equality premised upon collective needs, positive rights, and a more equitable distribution of responsibility for social reproduction between the state, market, and family.

The Article's historical argument offers important insight into the limits of anti-discrimination theory today. Antistereotyping doctrine challenges misconceptions about who is able to perform job duties. But it poses no challenge to employment structures including work hours, leave policies, and benefits. The theory promotes individual freedom of gender expression in the workplace, but does not redress power imbalances between employers and employees. In addition, efficiency remains a leading interpretive frame in employment-discrimination law. Its dominance contributes to judicial hostility to disparate-impact claims that challenge the definition of workplace productivity and the terms of the employment relationship. These limitations of antidiscrimination jurisprudence disproportionately burden low-income women. Antidiscrimination law fails to address the problems of low wages, long and erratic hours, and dangerous workplaces.

The Article calls for a redirection of scholarly resources beyond best practices in employment-discrimination law toward theories that address the structures of the labor market and the employment relationship. There are struggles yet to be fought on the frontiers of antidiscrimination, but it may also be time to realize the incapacity for even these aspirational forms of law to realize a just workplace for low-income workers. Indeed, the focus on antidiscrimination as the core meaning of equality may legitimate class-based inequities. Taking significant steps toward a more just labor market for working-class women and men may require shifting the loci of our scholarly energies.

This Article's insights open up important new lines of inquiry in several fields. Understanding the relationship between antidiscrimination and free-market ideals enriches the history of American liberalism. Scholars might research further the ideological and institutional connections among individual freedom, state neutrality, and efficiency. To take just one discrete example: In 1922, the journalist and political commentator Walter Lippmann introduced the concept of the stereotype into American popular thought.<sup>347</sup> Fifteen years later, Lippmann wrote the first political treatise in English to argue for the superiority of the free-market system.<sup>348</sup> Lippmann's dual interests could not have been coincidental. There is not yet a comprehensive history of the concept of the stereotype. Such a study would deepen our understanding of why employment-discrimination law was susceptible to neoliberal appropriation in the late twentieth century.

Exposing the imbrication of Title VII and neoliberalism is not only a task for historians, however. This Article shows why it is an urgent project for legal theorists.

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347. See WALTER LIPPMANN, PUBLIC OPINION 79–94 (1922) (defining a stereotype as a social norm that constrains individual decisions and life choices); see also Bernstein, *supra* note 14, at 658.

348. See WALTER LIPPMANN, AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY (1937) (arguing that free markets promote social trust and cooperation among individuals); see also Dieter Plehwe, *Introduction* to THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 13 (Philip Mirowski & Dieter Plehwe eds., paperback ed. with new preface 2015).

Title VII presupposes a definition of equality rooted in market participation. Accordingly, the statute may be inherently linked to neoliberalism. Building upon this insight, feminist scholars might further excavate why Title VII cannot realize substantive conceptions of gender equality.<sup>349</sup> Employment-discrimination law reinforces a division between productive labor in the market and reproductive labor in the home.<sup>350</sup> It can help to redistribute familial and market functions between the sexes—enabling women to act as breadwinners and men to act as caregivers—but it does not revalue the caregiving role itself. By defining equality in terms of labor-market participation, employment-discrimination law may reinforce the legitimacy of neoliberal policies that make social reproduction a private responsibility.<sup>351</sup> This has disproportionate effects on women and men who perform caregiving via unpaid labor for their families as well as low-paid labor in the market.<sup>352</sup> Feminist scholars need to look beyond antidiscrimination theory to meet the needs of low-income workers whose work lives conflict with their family lives.<sup>353</sup> If we fail to recognize how

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349. Critical race theorists and disability scholars, too, have an essential role to play in reaching beyond “best practices.” African Americans and civil rights advocates have in the past advocated class-based remedies for the economic subordination experienced by racial minorities; this historical example provides a foundation for contemporary theories of racial justice not limited to antidiscrimination law. *See, e.g.*, RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) (arguing that a Thirteenth Amendment litigation strategy combatting Jim Crow as a system of economic exploitation held greater potential to help poor African Americans than the Fourteenth Amendment litigation challenging racial segregation); JONATHAN SCOTT HOLLOWAY, *CONFRONTING THE VEIL* (2002) (examining African American thinkers who approached racial problems via a class analysis). In establishing rights to accommodation, disability law poses an explicit challenge to efficiency ideals in antidiscrimination theory. *See* Bagenstos, *supra* note 272. Legal scholars have called for more expansive forms of accommodation. *See* Widiss, *supra* note 206, at 1025–34 (arguing that employers have a duty under the Pregnancy Discrimination Act to extend to pregnant workers the same accommodations offered to employees with disabilities cognizable under the ADA). But the scholarship can take the insight of disability theory further to call for a severance of the very concept of just employment from market logic.

350. Employment-discrimination law enables women to occupy the role of breadwinner as well as caregiver. But it maintains the fundamental division between market work and unremunerated care work. The ongoing division, itself, perpetuates injustice even if men and women participated in the labor market to an equal degree.

351. For further discussion of how neoliberalism reinforces a public/private divide, see DUGGAN, *supra* note 140, at 13–15.

352. The low value placed on care contributes to the lack of public support for familial caregiving and to the low wages paid market-based caregivers such as home health care and childcare workers. *See generally* MAXINE EICHNER, *THE SUPPORTIVE STATE* (2010) (arguing that caretaking should join liberty and equality as standard goods promoted by liberalism and that the state should support the family in its caretaking role); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004) (arguing for collective, public responsibility for the inevitable dependency that arises from human biology and development as well as the derivative dependency of caregivers); NANCY FOLBRE, *THE INVISIBLE HEART* (2001) (arguing that the non-payment and underpayment of caregiving means that women absorb the costs of our capitalist economy).

353. Employment-discrimination law does not itself transform low-wage, feminized jobs to make the wages more adequate to support a family, the hours more amenable to family life,

employment-discrimination law may reinforce neoliberal cutbacks in labor protection and welfare entitlements, then we risk exacerbating economic inequalities.

Last, this Article invites scholars to reconsider the meaning of both antidiscrimination and neoliberalism. The Article has revealed an underside of employment-discrimination theory that entrenches class-related privilege and disadvantages. As institutionalized in a neoliberal context, there is less to celebrate about Title VII than we have thought. Conversely, however, there also may be less to lament about neoliberalism. If neoliberalism includes a commitment to the elimination of status hierarchies and the unraveling of race and gender stereotypes, can neoliberalism be all bad? Recognizing the intersection of ideas about individual freedom in both anti-discrimination and neoliberal theory calls for a richer, less ideologically inflected understanding of neoliberalism. Perhaps, in the end, we are all neoliberals, now.<sup>354</sup>

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or the conditions safer.

354. If so, then it would suggest a historical evolution in legal theory from the moment in the late twentieth century when scholars realized that they were “all legal realists now.” See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)).