OVERCOMING THE EQUAL PAY ACT AND TITLE VII:

WHY FEDERAL SEX-BASED EMPLOYMENT DISCRIMINATION LAWS SHOULD BE REPLACED WITH A SYSTEM FOR ACCREDITING EMPLOYERS FOR THEIR ANTIDISCRIMINATORY EMPLOYMENT PRACTICES

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INTRODUCTION

The Equal Pay Act[1] (Act) and Title VII of the Civil Rights Act of 1964[2] (Title VII) are federal sex-based employment discrimination laws that regulate private employers. The Act, which was created in 1963 as an amendment to the Fair Labor Standards Act (FLSA),[3] prohibits employers from providing sex-based variances in wages for male and female employees working comparable jobs.[4] Title VII disallows employers from not hiring prospective employees and from discharging or discriminating against current employees, when any of these employment decisions is undertaken because of the race, color, religion, national origin, *or the sex* of the employees.[5]

The Act and Title VII are on their deathbeds. The ailments afflicting these laws are many in number, among them being inefficiencies, excessive costs, bureaucratic red tape, and obsolescence. Recognizing the problematic state of these laws, several commentators have concluded that the Act and Title VII—

1. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2006)).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2006)).

3. Cnty. of Washington, Or. v. Gunther, 452 U.S. 161, 184 (1981) (Rehnquist, J., dissenting); Mark Esposito, Note, *Massachusetts Pay Equity and Its Limits*, 87 B.U.L. REV. 911, 914 (2007); *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219 (2006)).

4. 29 U.S.C. § 206(d)(1) (2006).

5. 42 U.S.C. § 2000e-2(a)(1) (2006).

or at least that part of Title VII that lists sex as a protected class—should be repealed.[6] Given the various and incurable illnesses affecting these laws, these commentators are correct: repealing the Act and Title VII is the correct and inexorable conclusion. But the simple repeal of the federal sex-based employment discrimination laws cannot be the end of the matter because a sudden rupture from the current federal landscape and the appearance of absolute deregulation strikes this author as being politically infeasible.

Therefore, while the Act and Title VII's provisions relating to sex discrimination should be repealed, they should not be replaced by a purely deregulated market. Rather, they should be superseded by a national accreditation system that certifies employers for utilizing antidiscriminatory employment practices. The model for this new system that will replace the now-buried Act and Title VII should take its inspiration from the system the American Bar Association (ABA) has created for accrediting law schools, a system that ensures compliance in a self-regulatory regime.

Part I of this note describes the operation and scope of both the Act and Title VII and shows that, despite some differences of detail, the Act and Title VII were enacted to promote pay equity between the sexes and equal employment opportunities for women. Part II illustrates how the laws fail to further the goals that Congress intended they should further, and even frustrate those very goals by imposing significant hardships on employers and employees alike. Part II then argues that both the Act and Title VII are problematic and irredeemably flawed, and that the only recourse left to Congress is to repeal the Act and remove "sex" from among the classes that Title VII purports to protect.

But because it is unlikely that Congress will ever entrust antidiscrimination regulation to the unadorned operation of market forces, Part III of this note suggests that a system of accreditation would successfully fill the gap left by the departure of the Act and Title VII from the national landscape. In doing so, Part III describes how accreditation works, shows how the ABA has developed an efficacious and much-lauded accreditation system for accrediting law schools, and delineates the contours of a proposed national scheme to accredit employers for their antidiscrimination business practices.

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6. Richard Epstein argued for the repeal of Title VII in a well-known 1992 book. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS, 282 (1992) [hereinafter EPSTEIN, FORBIDDEN GROUNDS]; *see also* Richard H. McAdams, *Richard Epstein and Discrimination Law*, 44 TULSA L. REV. 839, 839-40 (2009) (examining Richard Epstein's critique of employment discrimination laws). At times, Judge Posner seems hostile to the antidiscrimination laws but does not seem to have argued for their repeal. *See also* Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989) [hereinafter Posner, *Economic Analysis*]; Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 521 (1987) [hereinafter Posner, *Efficiency and Efficacy*] (focusing on employment discrimination on racial grounds).

I. THE EQUAL PAY ACT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PURPORT TO PROMOTE PAY EQUITY BETWEEN THE SEXES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR WOMEN

Subject to several exceptions, the Act mandates that employers provide equal pay for equal work on a sex-blind basis.[7] Title VII prohibits more kinds of employment discrimination than the Act,[8] but it is in other ways a more narrow anti-discrimination statute.[9] Although the original intent of including "sex" as a protected class in Title VII was not to fix any perceived problem of gender discrimination in the work place,[10] it is now well established that the function of Title VII—as of the Act—is to further gender equity in the workplace.[11] However, the federal sex-based employment discrimination laws are unfavorable to both employers and their female employees. Employers alleged to have violated Title VII by committing sex discrimination in benefits may not defend themselves by arguing that the cost of such benefits is greater with respect to one sex than the other.[12] And female employees who believe they have been discriminated against in such a way that violates either the Act or Title VII will have their restitution checked by bureaucratic and evidentiary challenges.[13]

A. The Equal Pay Act requires that employees be paid equally for equal work, regardless of sex

According to the Act, an employer may not provide different wages to male and female employees working comparable jobs when such inequitable pay is based on the sex of the affected employees.[14] The Act was enacted as an amendment to the FLSA,[15] which provides, among other things, that workers

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7. 29 U.S.C. § 206(d)(1) (2006).

8. 42 U.S.C. § 2000e-2(a)(1) (2006).

9. *See* 42 U.S.C. § 2000e(b) (defining "employer" in such a way as to remove businesses with less than fifteen employees from the purview of Title VII).

10. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 278; *see also* Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 206 (2009).

11. *See* Leah Shams-Molkara, *Crossing the Great Sexual Divide: Transsexuals Seeking Redress Under Title VII of the Civil Rights Act of 1964*, 81 ST. JOHN'S L. REV. 399, 404 (2007) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring).

12. 29 C.F.R. § 1604.9(e) (2010); *see* Int'l Union, UAW v. Johnson Controls, 499 U.S. 187, 210 (1991); City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

13. *See* Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 202-04 (2009).

14. 29 U.S.C. § 206(d)(1) (2006).

15. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (2006)); Cnty. of Washington, Or. v. Gunther, 452 U.S. 161, 184 (1981) (Rehnquist, J., dissenting); Esposito, *supra* note 3, at 914.

must be paid a minimum wage and be provided overtime pay for work done in excess of a certain hour threshold.[16] The Act added one more fair labor standard to the FLSA—namely, that an employee must receive equal pay for equal work, regardless of the employee's sex.[17] If the employer fails to abide by this sex-blind standard, it has violated the FLSA.[18]

There are four statutorily recognized exceptions to the employment practices that the Act prohibits. An employer may lawfully differentiate between a male and female employee engaging in equal work if the pay differential is the result of (1) a seniority system, (2) a merit system, (3) a system that "measures earnings by quantity or quality of production," or (4) "any factor other than sex."[19] Most courts hold that these exceptions are affirmative defenses for employers;[20] employers sued for violating the FLSA by engaging in Act-prohibited employment practices may not shield themselves from judicial scrutiny by relying on the exceptions, but rather must prove one or more of the exceptions after the employee has made out a prima facie case that the alleged pay inequity is because of that employee's sex.[21]

A violation of the Act is a violation of the FLSA's minimum wage or unpaid overtime laws.[22] Accordingly, the remedies available are governed by the FLSA,[23] which empowers federal district courts to enjoin "any withholding of payment of minimum wages or overtime compensation."[24] Thus, the main remedy for a violation of the Act is recovery of "unpaid minimum wages."[25]

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16. Fair Labor Standards Act, 29 U.S.C. §§ 206-207 (2006); H.R. REP. NO. 88-309, at 1-2 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 688.

17. H.R. REP. NO. 88-309, at 1-2 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 688; Juliene James, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873, 1880 (2004).

18. 29 U.S.C. § 206(d)(3) (2006) ("[A]ny amounts owing to any employee . . . in violation of [the Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]."); H.R. REP. NO. 88-309, at 1-2 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 688.

19. 29 U.S.C. § 206(d)(1) (2006).

20. Ruben Bolivar Pagán, Note, *Defending the "Acceptable Business Reason" Requirement of the Equal Pay Act: A Response to the Challenges of* Wernsing v. Department of Human Services, 33 IOWA J. CORP. L. 1007, 1009 (2008). Concerning the fourth exception—"any factor other than sex"—there is a circuit split as to whether the court must determine the legitimacy of the employer's claimed gender-neutral payment practice. The Second, Ninth, and Eleventh Circuits require the employer to state an "acceptable business reason" (*i.e.*, prove that the "factor other than sex" served a legitimate business purpose), and the Seventh and Eighth Circuits have rejected such a requirement. *Id.* at 1009-10.

21. *Id.* at 1009; Jillian M. Collins & Natalie I. DeBoer, *Employment-Related Crimes*, 47 AM. CRIM. L. REV. 401, 415 n.99 (2010).

22. 29 U.S.C. § 206(d)(3) (2006).

23. Franklin G. Shuler, Jr., *Employment Discrimination and Other Employment-Related Claims After* Burke*: When Are Amounts Received Taxable?*, 9 LAB. LAW. 189, 201 (1993).

24. 29 U.S.C. § 217 (2006).

25. 29 U.S.C. § 216(b); *see* Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. LAW. 155, 164 (1999).

The successful plaintiff must ultimately subtract from recovery of backpay the money she has earned in a substitute job, since the employee has a duty to mitigate damages.[26] This fact, in addition to the fact that the FLSA does not authorize plaintiffs to receive compensatory or punitive damages,[27] limits the remedies available through successful Act claims.[28]

B. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion

Title VII makes it an unlawful employment practice for employers to make certain employment decisions on the basis of the race, color, religion, sex, or national origin of an employee (prospective or current): fail or refuse to hire a prospective employee, discharge a current employee, or discriminate against an employee with respect to "compensation, terms, conditions, or privileges of employment."[29] Unlike the Act, Title VII was not enacted as an amendment to a preexisting law, but as part of the Civil Rights Act of 1964, a seminal but controversial civil rights statute.[30] Title VII also created the Equal Employment Opportunity Commission (EEOC) as the chief governmental agency to enforce the provisions of Title VII.[31]

The broader purpose of the Civil Rights Act of 1964 was to preempt state Jim Crow legislation and outlaw racial discrimination in a variety of contexts.[32] Given this, the designation of sex as a protected class under Title VII was not inevitable.[33] Indeed, there is no evidence that either President Kennedy or

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26. Jennifer Baugh, Note, *Punitive Damages and the Anti-Retaliation Penalties Provision of the Fair Labor Standards Act*, 89 IOWA L. REV. 1717, 1747 (2004); Posner, *Economic Analysis*, *supra* note 6, at 1328.

27. Carolyn F. Kolks, Case Note, United States v. Burke–*Does It Definitively Resolve the Analytical Confusion Created by the Section 104(a)(2) Personal Injury Exclusion?*, 46 Ark. L. Rev. 657, 683-84 (1994); *see, e.g.*, Hybki v. Alexander & Alexander, Inc., 536 F. Supp. 483, 484-85 (W.D. Mo. 1982); Forsberg v. Pac. Nw. Bell Tel. Co., 623 F. Supp. 117, 126 (D. Or. 1985), *aff'd*, 840 F.2d 1409 (9th Cir. 1988).

28. Posner, *Economic Analysis*, *supra* note 6, at 1328.

29. 42 U.S.C. § 2000e-2(a)(1) (2006). It is also an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a)(2).

30. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1981 to 2000h-6).

31. *Id.* at § 705(a), 78 Stat. at 258 (codified at 42 U.S.C. § 2000e-4(a)); *see* EEOC v. Synchro-Start Prods., Inc., 29 F. Supp.2d 911, 913 (N.D. Ill. 1999).

32. Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1526 (11th Cir. 1992); Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1095 (2005); Danita L. Davis, Note, *Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier Than Hailing a Taxi*, 37 VAL. U. L. REV. 929, 972 (2003); *see* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 279.

33. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 278; Shams-Molkara, *supra* note 11, at 404 (discussing the "last minute inclusion of 'sex'" in Title VII).

Congress intended to include women as protected individuals for the purposes of Title VII.[34] The original bill submitted to Congress by the Kennedy Administration did not include sex as a protected class,[35] nor was there any substantive debate about the merits of doing so.[36] The proscription of sex discrimination was "almost an afterthought."[37]

The inclusion of "sex" within Title VII's enumerated categories was the happenstance result of political posturing gone awry. Two days before the bill that was to become the Civil Rights Act of 1964 was to move to the Senate, a vocal opponent of the bill in the House of Representatives proposed that sex discrimination constitute an additional unlawful employment practice, hoping that such a proposal would be so hard to swallow as to prevent the legislation from being enacted.[38] But the dearth of any tangible evidence of legislative intent to proscribe sex discrimination has not stopped federal courts from taking it upon themselves to find that Congress intended Title VII "to strike at the entire spectrum of disparate treatment of men and women" in the workplace.[39]

There are a few limited exceptions or defenses to Title VII's general prohibition of sex discrimination in the workplace.[40] First, an employer may make sex-based employment decisions "in those certain instances where . . . sex . . . is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise."[41] Courts and the EEOC interpret this exception extremely narrowly.[42] The second exception is the Bennett Amendment, inserted into the original 1964 bill, which provides that otherwise unlawful sex-based wage discrimination may be rendered lawful if Act authorizes it.[43] The Supreme Court has interpreted the

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34. Barnard & Rapp, *supra* note 10, at 205.

35. *Id.* at 205-06; Justin Kerner, *Labor Pains: The Seventh Circuit Distorts the Pregnancy Discrimination Act to Bar Discrimination Based on In Vitro Fertilization*, 24 WIS. J.L., GENDER & SOC'Y 117, 120 (2009).

36. Barnard & Rapp, *supra* note 10, at 205-06; Shams-Molkara, *supra* note 11, at 404.

37. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 278.

38. Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975); EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 278; Barnard & Rapp, *supra* note 10, at 206.

39. Shams-Molkara, *supra* note 11, at 404 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J. concurring).

40. *See* 42 U.S.C. § 2000e-2(e), (h) (2006).

41. 42 U.S.C. § 2000e-2(e).

42. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 283-84, 287; Jillian B. Berman, Comment, *Defining the "Essence of the Business": An Analysis of Title VII's Privacy BFOQ After* Johnson Controls, 67 U. CHI. L. REV. 749, 750 (2000); Debra A. Stegura, *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification:* Fernandez v. Wynn Oil Co., 57 S. CAL. L. REV. 335, 340 (1984); *see* 29 C.F.R. § 1604.2(a) (2010) (stating that exceptions should be narrowly interpreted). Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

43. 42 U.S.C. § 2000e-2(h); EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 315; *see* Cheryl A. Beckett, *A Factor By Any Other Name: The Religious Employer's Defense to*

Bennett Amendment to incorporate the Act's four affirmative defenses into Title VII.[44]

As mentioned above, it is unlawful for employers to discriminate against women regarding the "terms, conditions, or privileges of employment."[45] While this phrase has no precise definition in Title VII, the EEOC has promulgated regulations providing that such a term includes fringe benefits—medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; and leave. [46] The Supreme Court has concurred in the EEOC's position.[47] A neutral reading of the BFOQ exception would seem to allow employers to differentiate the amount or variety of fringe benefits based on sex if the cost of such benefits is greater with respect to one sex than the other.[48] For example, if female employees' health care benefits or retirement benefits cost more to the employer than the corresponding benefits of its male employees, the practice of establishing different fringe benefit packages for men and women is arguably "reasonably necessary" to the operation of the employer's business—and therefore a BFOQ. Further, the Bennett Amendment would seem to allow an employer to argue that giving male and female employees different fringe benefit packages when the costs of such benefits are greater for one sex than for the other is a differentiation "based on any factor other than sex"—the factor of two different price tags.[49] But both interpretations of these exceptions have failed in court.[50] In addition, the EEOC has taken the explicit position that employers charged with sex discrimination in benefits under Title VII may not defend themselves by arguing that the cost of such benefits is greater with respect to one sex than the other.[51]

The Pregnancy Discrimination Act of 1978 (PDA)[52] is another example of how the federal sex-based employment discrimination laws have turned purely cost-based, gender-neutral employment decisions into workplace sex discrimination. Before the PDA, an employer's failure to cover the medical costs of pregnancy as part of an employee benefits program did not constitute

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44. Cnty. of Washington, Or. v. Gunther, 452 U.S. 161, 176 (1981); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 830-31 (2010).

45. 42 U.S.C. § 2000e-2(a)(1).

46. 29 C.F.R. § 1604.9(a)-(b) (2010); *see* Barnard & Rapp, *supra* note 10, at 215.

47. Donna L. Mack, *Former Employees' Right to Relief Under the Americans with Disabilities Act*, 74 WASH. L. REV. 425, 442 n.129 (1999) (citing Ariz. Governing Comm. For Tax Deferred Annuity v. Norris, 463 U.S. 1073, 1079 (1983)).

48. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 288.

49. *See id.* at 315-16.

50. *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (holding that employer's requirement that female employees make larger contributions to employer's pension fund than male employees violated Title VII).

51. 29 C.F.R. § 1604.9(e) (2010).

52. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

sex discrimination so long as there was no medical risk covered for men that was not covered for women and so long as the total compensation package for male and female employees was equal.[53] The PDA, however, amended Title VII by making "on the basis of sex" include "on the basis of pregnancy, childbirth, or related medical conditions."[54] In other words, "pregnancy discrimination" is a form of sex discrimination, and an employer who fails to include the medical costs of pregnancy and pregnancy-related conditions in an employee health benefits plan or to classify pregnancy as a disability is guilty of a Title VII-prohibited employment practice.[55]

Unlike the remedies available under the Act, Title VII's remedies are mostly equitable in nature and are subject to the discretion of the court.[56] But like claims brought under the Act, the most common form of relief for Title VII claims is backpay,[57] although the statute also authorizes reinstatement and "any other equitable relief as the court deems appropriate."[58] Before 1991, backpay, reinstatement, and equitable relief were the only available remedies, as the statute did not authorize punitive or compensatory damages.[59] But since the enactment of the Civil Rights Act of 1991,[60] compensatory and punitive damages are also allowed to a limited extent in Title VII claims.[61] Such claims need to allege intentional discrimination, and, if the plaintiff seeks punitive damages, she needs to prove that her employer discriminated "with malice or with reckless indifference to the federally protected rights."[62] In short, "[p]laintiffs who seek punitive damages in employment discrimination cases face a formidable burden."[63]

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53. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 340; *see* Gen. Elec. v. Gilbert, 429 U.S. 125, 136-37 (1976).

54. 42 U.S.C. § 2000e(k) (2006) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."); *see generally* Mary DeLano, Note, *The Conflict Between State Guaranteed Pregnancy Benefits and the Pregnancy Discrimination Act: A Statutory Analysis*, 74 GEO. L.J. 1743, 1743 (1986).

55. Posner, *Economic Analysis*, *supra* note 6, at 1313.

56. 42 U.S.C. § 2000e-5(g)(1); Tim Canney, *Tax Gross-Ups: A Practical Guide to Arguing and Calculating Awards for Adverse Tax Consequences in Discrimination Suits*, 59 CATH. U. L. REV. 1111, 1114 (2010); *see* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 847-48 (2001).

57. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533-34 (1999).

58. 42 U.S.C. § 2000e-5(g).

59. *Kolstad*, 527 U.S. at 533-34.

60. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

61. 42 U.S.C. § 1981a(b)(1)-(3) (2006); *Kolstad*, 527 U.S. at 534.

62. 42 U.S.C. § 1981a(b)(1); *see also Kolstad*, 527 U.S. at 534-35.

63. Lawrence v. CNF Transp., Inc., 340 F.3d 486, 495 (8th Cir. 2003) (citing Webner v. Titan Dist. Inc., 267 F.3d 828, 837 (8th Cir. 2001)).

C. While aiming to accomplish the same end of equal pay and employment opportunities for men and women, the Equal Pay Act and Title VII of the Civil Rights Act of 1964 differ in terms of their coverage, scope, and operation

However fortuitous or unplanned the origins of Title VII's inclusion of sex discrimination within its scope may have been,[64] the purpose of both sex-based antidiscrimination laws today is to collapse wage inequities based on sex and create employment opportunities for women equal to those already available to men.[65] Yet, while it is clear that the two sex-based antidiscrimination laws were intended to operate in harmony to protect purported victims of sex discrimination in the workplace, federal courts have not arrived at a consensus as to how this harmonization is to proceed.[66] While both the Act and Title VII are federal sex-based antidiscrimination laws, and while both promote gender equity with the powerful hand of government intervention, they are two distinct claims with important differences in coverage and scope.

The Act is in part broader and in part narrower than Title VII. On the one hand, more employment relationships fall within the Act's province because the definition of "employer" contained in the Act is broader than the definition contained in Title VII.[67] The Act's definition of "employer" is contained in the FLSA, of which the Act is a part.[68] While extremely tautological, the FLSA's overly-broad definition of employer ("any person acting directly or indirectly in the interest of an employer in relation to an employee"[69]) allows the inference that persons or entities will be considered "employers" subject to Act claims if they employ two individuals of the opposite sex who are engaged in comparable jobs—the discriminated plaintiff and the employee whose wages are compared to the plaintiff's.[70] Title VII, on the other hand, defines

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64. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 278; Barnard & Rapp, *supra* note 10, at 206; Shams-Molkara, *supra* note 11, at 404.

65. H.R. REP. NO. 88-309, AT 1-3 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 687-88; Barry Goldstein & Patrick O. Patterson, Ricci v. DeStefano: *Does It Herald an "Evil Day," or Does It Lack "Staying Power"?*, 40 U. MEM. L. REV. 705, 707-08 (2010) [hereinafter Goldstein, Ricci v. DeStefano]; *see also* Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 80-81 (2010).

66. *See* B. Tobias Isbell, *Gender Inequality and Wage Differentials Between the Sexes: Is It Inevitable or Is There an Answer?*, 50 WASH. U. J. URB. & CONTEMP. L. 369, 382-85 (1996); Amy M. Sneirson, Case Comment, *One of These Things Is Not Like the Other: Proving Liability Under the Equal Pay Act and Title VII*, 72 WASH. U. L.Q. 783, 787-94 (1996).

67. *Compare* 29 U.S.C. § 203(d) (2006) *with* 42 U.S.C. § 2000e(b) (2006).

68. See 29 U.S.C. §§ 203(d) & 206(d).

69. 29 U.S.C. § 203(d); 29 C.F.R. § 1620.8 (2010).

70. *See* Ana M. Perez-Arrieta, Note, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context*, 31 J.C & U.L. 393, 397 n.36 (2005) ("[I]f a plaintiff's

"employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees" and thereby removes very small businesses from liability under Title VII.[71]

While it applies to a smaller class of potential employers, Title VII does prohibit a much broader range of discriminatory employment practices than the Act. The Act, again, is a pay equity statute ensconced within the federal minimum wage requirements of the FLSA.[72] And being concerned wholly with equity of pay between the sexes, the Act only mandates that employers compensate their male and female employees at the same wage rate when they engage in equal work.[73] Title VII, on the other hand, prohibits sex-based employment discrimination in all of its variants, including terms, conditions, and privileges of employment, and hiring, promoting, and firing practices.[74] Further, Title VII actually covers employment discrimination that is based on such extra-sex categories as race, religion, and national origin.[75]

Once an employee believes that she has been discriminated against in such a way that violates either the Act or Title VII, the path to her restitution under the law is congested with various bureaucratic and evidentiary hurdles. First, she must comply with the EEOC's filing and conciliation requirements.[76] The EEOC will begin to investigate any alleged violation of Title VII or the Act only after an employee files an administrative complaint.[77] If the investigation reveals evidence of unlawful discrimination, the EEOC may choose to file suit, in which case the employee may intervene.[78] If the EEOC decides not to bring charges against the employer or to drop charges after suit has been filed, or if the investigation has not been completed within 180 days after the employee filed her charge, the employee may proceed with her case on her own.[79]

Even if she complies with the EEOC administrative requirements, the employee seeking restitution for sex-based employment discrimination under the Act or Title VII is not out of the bureaucratic woods. Her second major hurdle is actually proving her claim of sex-based employment discrimination, which she may have to do by comparing her compensation to that of a similarly

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employer has less than fifteen employees, the plaintiff can bring a claim only under the Equal Pay Act").

71. 42 U.S.C. § 2000e(b) (2006).

72. Esposito, *supra* note 3, at 914.

73. 29 U.S.C. § 206(d)(1) (2006).

74. 42 U.S.C. § 2000e-2(a) (2006); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1526 (11th Cir. 1992).

75. 42. U.S.C. § 2000e-2(a); *Miranda*, 975 F.2d at 1526.

76. *See* Perez-Arrieta, *supra* note 70, at 397 n.36 (citing Cnty. of Wash. v. Gunther, 452 U.S. 161, 175 n.14 (1981)). Strictly speaking, the Act does not require a plaintiff to have previously filed a complaint with the EEOC. 29 U.S.C. § 216(b) (2006). Nevertheless, "because there is significant overlap between the Equal Pay Act and Title VII for situations that implicate both statutes, the EEOC recommends that parties file charges under both laws within the timeline." McCormick, *supra* note 13, at 203 n.55.

77. 42 U.S.C. § 2000e-5(b); *see* McCormick, *supra* note 13, at 202-03.

78. 42 U.S.C. § 2000e-5(f)(1); McCormick, *supra* note 13, at 203-04.

79. 42 U.S.C. § 2000e-5(f)(1); McCormick, *supra* note 13, at 204.

situated male employee.[80] When comparing male and female employees' different compensation packages, the two sex-based antidiscrimination laws require different degrees of job similarity as the basis for comparison. The Act's battle cry is "equal pay for equal work," which courts have indulgently interpreted to mean equal pay for "substantially equal" work.[81] Title VII, on the other hand, is silent on what the standard of job comparison should be, although courts have interpreted the standard to be even more relaxed than the Act's already relaxed "substantially equal" standard.[82] Title VII does, however, require plaintiffs to prove that the employer intended to discriminate, whereas the Act is a strict liability statute.[83]

II. CONGRESS SHOULD REPEAL THE EQUAL PAY ACT AND AMEND TITLE VII SO AS TO ELIMINATE SEX AS A PROTECTED CLASS

Broadly speaking, there are two reasons why Congress should repeal the federal sex-based antidiscrimination laws. First, the laws do not further Congress's goals of creating pay equity and equal employment opportunities for women.[84] The indices that traditionally have been pointed to as evidence of ubiquitous sex discrimination—the so-called gender wage gap and sex-based occupational segregation—are exaggerated and can be explained by non-discriminatory factors.[85] Second, even if the laws could be said to further Congress's goals, the costs of doing so outweigh the benefits.[86] While the scholarly literature contains no lack of proposals to keep intact and improve the

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80. Morrison Torrey, *Thirty Years*, 22 WOMEN'S RTS. L. REP. 147, 154 (2001) (explaining the requirement for Act claims). The Title VII plaintiff may also face this burden of proof. Ernest F. Lidge, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839-49 (2002) (describing the circuit split for Title VII claims).

81. *E.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992); *see* Lawrence v. CNF Transp., Inc., 340 F.3d 486, 492 (8th Cir. 2003) ("Whether two jobs are substantially equal 'requires a practical judgment on the basis of all the facts and circumstances of a particular case,' including factors such as level of experience, training, education, ability, effort, and responsibility.").

82. *E.g.*, *Miranda*, 975 F.2d at 1526; *see* Peter Avery, *The Diluted Equal Pay Act: How Was it Broken? How Can it Be Fixed?*, 56 RUTGERS L. REV. 849, 851 n.11 (2004).

83. *Miranda*, 975 F.2d at 1526; Avery, *supra* note 82, at 851. The element of intent is required only for Title VII cases brought under a disparate treatment theory of sex discrimination. Courts have also permitted plaintiffs to sue under a disparate impact theory, wherein the plaintiff must prove that a facially nondiscriminatory employment practice has a disproportionately exclusionary—though not intentional—effect on women. While disparate impact litigation has been successfully used by plaintiffs challenging their employers' race-based discriminatory employment practices, it "has not been very important in the area of sex discrimination." Posner, *Economic Analysis*, *supra* note 6, at 1328; *see* McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 140 F.3d 288, 298 (1st Cir. 1998).

84. *See infra* Part II.A.

85. *See infra* Part II.A.

86. *See infra* Part II.B.

Act and Title VII,[87] these proposals must be rejected as either inadequate or problematic in themselves.[88] The only salutary proposal, and indeed the inexorable one, is to repeal the Act and amend Title VII so as to remove "sex" as a protected category in the federal employment discrimination laws.

A. Neither the Equal Pay Act nor Title VII of the Civil Rights Act of 1964 actually create pay equity or equal employment opportunities for women

The purpose of the Act and Title VII is to advance gender equity in the workplace by breaking down sex-based wage inequities and promoting employment opportunities for women equal to those already available to men.[89] Historically, the so-called gender wage gap has been used to assess whether the antidiscrimination laws have been furthering gender equal opportunities.[90] Congress even looked to this statistic in justifying the Act.[91] The gender wage gap evidences sex-based wage discrimination only to the extent to which it cannot be explained in terms of sex-neutral factors.[92] Thus, if whatever gender disparity in wages that does exist is not the product of sex discrimination, but rather the consequence of some other innocuous, non-discriminatory cause, the purpose of the Act and Title VII is seriously undermined.[93] If the gender wage gap, inasmuch as it even exists outside of scholarly constructs, is largely attributable to a factor other than sex discrimination, there is no reason why sex should be a class protected by federal antidiscrimination laws.

In fact, the purpose of both federal sex-based employment discrimination laws *is* undermined because extraordinarily little of the gender wage gap can be attributed to sex discrimination. When human capital factors are taken into account, all but 1.4 pennies per dollar of female employees' wages can legitimately be credited to employer sex discrimination.[94] Nor can systematic and pervasive sex discrimination be imputed to the differences in occupational trends between men and women.[95] Scholars who have suggested this explanation have grossly underestimated the concept of personal choice,

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87. *See, e.g.*, McCormick, *supra* note 13, at 195; David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1172 (1989).

88. *See infra* Part II.C.

89. Goldstein, Ricci v. DeStefano, *supra* note 65, at 707-08; Ngov, *supra* note 65, at 80-81; *see* H.R. REP. NO. 88-309, at 1-2 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 687.

90. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C.L. REV. 707, 714-17 (2000) [hereinafter Selmi, *Family Leave*]; *see* LINDA LEVINE, CONG. RESEARCH SERV., THE GENDER WAGE GAP AND PAY EQUITY: IS COMPARABLE WORTH THE NEXT STEP? 2 (2003), *available at* http://www.policyalmanac.org/economic/archive/pay_equity.pdf.

91. *See* Pagán, *supra* note 20, at 1009.

92. *See* Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth*, 21 RUTGERS L.J. 269, 348 (1990) [hereinafter Seidenfeld, *Jurisprudential Perspectives*].

93. *See id.* at 347-48.

94. *See infra* Part II.A.i.

95. *See infra* Part II.A.ii.

postulating an elaborate and unsubstantiated theory that envisions female employees' choices as socially constructed by patriarchical ideals.[96] The more sensible reason women have been disproportionately represented in lower-paying sectors of the economy is that the average woman demands more work flexibility to accommodate her lifestyle choices.[97]

i. Most of the gender wage gap can be accounted for by non-discriminatory factors

In 2008, full-time female employees earned on about 80 percent of the wages of their male counterparts.[98] Eighty percent is only the average number, and twenty cents on the dollar only the average gender wage gap, since the real wage gap in median weekly earnings fluctuates depending on the age group of the men and women in the survey population.[99] Thus, women aged 35 years and older earn 75 percent of what their male counterparts earn;[100] women aged 25 to 34 years earn 89 percent of men;[101] and women aged 16 to 24 years earn nine cents on the dollar less than their male counterparts.[102] The gap also varies depending on the particular occupation being analyzed. Thus, while female physicians and surgeons earn 60.8 percent of what male physicians and surgeons earn, female engineering managers earn 104.9 percent, and female food preparation and food service workers 108.6 percent, of similarly situated men.[103]

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96. *See infra* Part II.A.ii.

97. *See infra* Part II.A.ii.

98. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008 1 (2009), *available at* http://www.bls.gov/cps/cpswom2008.pdf [hereinafter BLS]. Different studies report different average wage gaps, so 20 percent should not be thought of as the universal gender pay gap, if such a thing existed. *See* INST. FOR WOMEN'S POL'Y RESEARCH, THE GENDER WAGE GAP [IN] 2009 1 (2010), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2009 (reporting that the women earned 77.0 percent of what men earned in 2009, 77.1 percent in 2008, and 77.8 percent in 2007); JENNIFER CHEESEMAN DAY & JEFFREY ROSENTHAL, U.S. CENSUS BUREAU, DETAILED OCCUPATIONS AND MEDIAN EARNINGS [IN] 2008 8 (2008), *available at* http://www.census.gov/hhes/www/ioindex/acs08_detailedoccupations.pdf (reporting that "full-time, year-round civilian employed" women earned 77.6 percent of men's earnings); CONSAD RESEARCH CORP., AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN 4-5 (2009), *available at* http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf (reporting a gap of only 19.8 cents on the dollar). This note uses the 20 percent figure because it is within the range of most of the other reported numbers and because it was compiled by an independent federal statistical agency tasked with measuring labor market activity and working conditions.

99. *See* BLS, *supra* note 98, at 1.

100. *Id.*

101. *Id.*

102. *Id.*

103. DAY & ROSENTHAL, *supra* note 98, at 7.

While an average of 20 percent wage discrepancy is certainly significant, it would be a mistake to jump on this number as proof of the persistence of sex discrimination in the workplace,[104] because there is evidence to suggest that "much of the gap can be explained through human capital factors."[105] Human capital is the potential—measured in terms of accumulated or acquired knowledge, experience, and skill-sets—to produce economic value through labor.[106] Due to the existing imbalance of division of labor in the family, women have on average less human capital (*i.e.*, less labor market experience and marketable skills) than men.[107] In other words, because the average woman spends more time out of the workforce than men, she invests a correspondingly less amount of time in her human capital—in developing work competence and skills that would increase her future earnings potential.[108] This means that a

104. *See, e.g.*, Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 836 (2010) ("Women too often encounter the argument that pay disparity is the outcome of market forces, not sex discrimination); Carol Hymowtiz, *On Diversity, America Isn't Putting Its Money Where Its Mouth Is*, WALL ST. J., Feb. 25, 2008, at B1 (concluding that wage discrepancy is proof of sex discrimination).

105. Lawrence M. Spizman, *The Economist's Role in Equal Pay Act Litigation*, 11 J. LEGAL ECON., Winter 2001-2002, at 73; *see* COUNCIL OF ECONOMIC ADVISERS, EXPLAINING TRENDS IN THE GENDER WAGE GAP (1998), *available at* http://clinton4.nara.gov/WH/EOP/CEA/html/gendergap.html [hereinafter COUNCIL OF ECONOMIC ADVISERS]; Cindy Zoghi, *Bureau of Labor Statistics, Measuring Labor Composition: A Comparison of Alternate Methodologies* (2007), http://www.bls.gov/bls/fesacp1121407.pdf.

106. Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, BERKELEY J. EMP. & LAB. L. 111, 139-41 (2006); *see* Nicole S. Dandridge, *Racial Etiquette and Social Capital: Challenges Facing Black Entrepreneurs*, 32 W. NEW ENG. L. REV. 471, 480 (2010).

107. Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSPECTIVES, Autumn 2000, at 80; *see* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 270; Kathryn Branch, *Are Women Worth As Much As Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 126-27 (1994); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2166-67 (1994); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2328 (1994); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1837 n.4 (1998) (citing Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 392-402 (1994).

108. Posner, *Economic Analysis*, *supra* note 6, at 1315; *see* CONSAD RESEARCH CORP., supra note 98, at 1; EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 270; Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 GEO. L.J. 75, 77-78 (1993) [hereinafter Epstein, *Reflections*]; Julie Hixson-Lambson, Comment, *Consigning Women to the Immediate Orbit of a Man: How Missouri's Relocation Law Substitutes Judicial Paternalism for Parental Judgment by Forcing Parents to Live Near One Another*, 54 ST. LOUIS U.L.J. 1365, 1408 n.328 (2010) (citing ALLISON CLARKE-STEWART & CORNELIA BRENTANO, DIVORCE: CAUSES AND CONSEQUENCES 200-02 (2006)); Denise Venable, *The Wage Gap Myth*, NAT'L CENTER FOR POLICY ANALYSIS, 1 (Apr. 12, 2002), *available at* http://www.ncpa.org/pdfs/ba392.pdf.

working woman's expected lifetime earnings on average will be lower than a working man's lifetime earnings.[109]

Operating within this human capital model, the gender wage gap of twenty cents on the dollar can be broken up into its constituent parts. Research, including official government research, shows that 29 percent of the wage gap is explained by industry, occupation, and union status of employees.[110] An additional 33 percent of the gap is accounted for by the differing levels of human capital among male and female employees.[111] Finally, since women are far more likely than men to work part time,[112] another 31 percent of the gender wage gap can be explained after the weekly median earnings of women and men are adjusted for hourly earnings.[113] As a result of this analysis, only about 7 percent of the 20-cent wage gap cannot be accounted for.[114] Thus, only about 1.4 cents[115] of the average difference in male and female employees' wages can *possibly* be explained by sex discrimination—that is, by a factor other the perfectly legitimate ones hitherto discussed.[116] But if there is little evidence of wage disparity, how can the Act and Title VII be creating wage parity? And if

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109. *See* Julia J. DiPasquale, *Social Security Reform: Keeping Elderly Women Out of Poverty*, 4 NAT'L ACAD. ELDER L. ATT'YS J. 183, 188 (2008); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2061 (1996).

110. Blau & Kahn, *supra* note 107, at 82; *see* BLS, *supra* note 98, at 2; Judith Fields & Edward N. Wolff, *Interindustry Wage Differentials and the Gender Wage Gap*, 49 INDUS. & LAB. REL. REV. 105, 116 (1995); Lorraine Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673, 698-99 (2002); Spizman, *supra* note 105, at 77.

111. Blau & Kahn, *supra* note 107, at 82; *see* BLS, *supra* note 98, at 2; Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1796-97 (1986); Spizman, *supra* note 105, at 77; Reuben E. Slesinger, *Educational Attainment by Race and Sex*, 146 PITTSBURGH LEGAL J., September 1998, at 7.

112. BLS, *supra* note 98, at 3; CONSAD RESEARCH CORP., *supra* note 98, at 1; *see* Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1089-90 (1992); *id.* at 1089 n.35 (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, 38 EMPLOYMENT AND EARNINGS, January 1991, at 26, 43-44).

113. Spizman, *supra* note 105, at 75. To take just one statistic, in 1999, women who worked part time actually earned 115 percent of their male counterparts. *Id.* at 74 (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HIGHLIGHT OF WOMEN'S EARNINGS IN 2000 32-33 (2001), *available at* http:// www.bls.gov/cps/cpswom2000.pdf); *see* Howard J. Wall, *The Gender Wage Gap and Wage Discrimination: Illusion or Reality?*, REG'L ECONOMIST, Oct. 2000, *available at* http://www.stlouisfed.org/publications/re/articles/?id=480.

114. 100% less (29% + 33% + 31%) = 7%.

115. $0.20 x 7% = $0.014.

116. The CONSAD Research Corp., in its report to the U.S. Department of Labor, has found that the adjusted gender wage gap is somewhere in the range of 4.8 percent and 7.1 percent. CONSAD RESEARCH CORP., *supra* note 98, at 1. But since the researchers did not adjust the raw wage gap for the differing levels of educational attainment for men and women—albeit recognizing such a difference as legitimate—the adjusted wage gap would likely fall further if this difference was accounted for. *See id.* at 1-2, 6-11.

wage parity already exists, can it really be said that the federal sex-based employment antidiscrimination laws are needed to create it?

In addition, not only is it improper and without a sound evidentiary basis to state that the Act and Title VII are currently operating to create wage parity between the sexes, but there is no evidence that these laws have *ever* done so. It is true that the unadjusted gender gap was about twice as wide (roughly 42 percent), immediately before the enactment of the Act and Title VII.[117] It is also true that, beginning in the mid-to late-1970s, the gap began appreciably to narrow.[118] It was about 38 percent in 1979.[119] By 1990, the ratio of women's to men's wage levels surpassed 70 percent, and the ratio was above 75 percent in 1997.[120] Just three years ago, in 2008, it was 80 percent.[121] Nevertheless, the most that can be proved from these figures is that there exists a correlation between the effective dates of the Act and Title VII and the thinning of the gender gap; there is no evidence that it was the antidiscrimination laws that caused this upward trend in women's wages, and it is improper for scholars to make unsupported, conclusory statements to this effect.[122]

Indeed, the available evidence suggests that this trend would have occurred even in the absence of the Act and Title VII. It has already been suggested that half of the increase in female workers' average wages can be attributed not to the success of the laws but to an overall decrease in the real wages of male workers in that period.[123] Further, women's employment opportunities and wage levels began the admittedly slow process of approaching men's levels when women began to enter the work force in substantial numbers, which is a phenomenon that began during World War II.[124] From 1940 to 1960, the demand for female labor ascended to such an

117. COUNCIL OF ECONOMIC ADVISERS, *supra* note 105.

118. *Id.* ; Blau & Kahn, *supra* note 107, at 75-76.

119. BLS, *supra* note 98, at 1 (reporting that in 1979 women earned about 62 percent as much as men did).

120. COUNCIL OF ECONOMIC ADVISERS, *supra* note 105.

121. BLS, *supra* note 98, at 1.

122. *See, e.g.*, Barnard & Rapp, *supra* note 10, at 204-05 (citing postwar rise in women's wages before making unwarranted logical conclusion that such rise is due to Title VII); Allan Carlson, *Rise and Fall of the American Family Wage*, 4 U. ST. THOMAS L.J. 556, 567-68 (2007) (same).

123. Thomas N. Hutchinson, Note, *The Fair Pay Act of 1994*, 29 IND. L. REV. 621, 621-22 (1996) (describing how Representative Eleanor Holmes Norton, who introduced the Fair Pay Act of 1994 into Congress, used this statistic to show the ineffectiveness of the Act and Title VII); *see* Selmi, *Family Leave*, *supra* note 90, at 715-16.

124. Posner, *Economic Analysis*, *supra* note 6, at 1322 (citing VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 12 (1988)); *see* Zoe Savitsky, *Inertia and Change: Findings of the Shriver Report and Next Steps*, 25 BERKELEY J. GENDER L. & JUST. 172, 176 (2010) ("Since World War II, women have been a growing presence in the United States workforce."); Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 433 (2007) ("The most notable trend for American families over the past half century has been the mass entrance of women into the paid labor market."); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*,

extent that the supply could not keep up,[125] which in turn elevated female workers' wages.[126] But World War II's much-lauded "Rosie the Riveter" phenomenon preceded the Act and Title VII by nearly two decades.[127] The federal sex-based employment discriminations could not have caused this rise in wages.

ii. Occupational disparities between men and women are the result of worker preferences, not sex discrimination

Not everyone accepts the validity of the explanations that the human capital theory seems to give.[128] As mentioned above, a significant portion (up to 29 percent) of the gender wage gap can be explained by the differing industries and occupations between men and women.[129] In general, women have been disproportionately represented in lower-paying sectors of the economy, with the result that their earnings have been lower than their male counterparts.[130] There are many scholars who would argue that the very fact that men and women tend to occupy separate and unequal positions in the workforce is itself evidence of sex discrimination.[131] This is the so-called problem of "sex

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103 YALE L.J. 595, 600 (1993) ("One fact that seems undeniable is that the gender gap has been narrowing, moving towards elimination over the past century.").

125. Robert J. Franklin, Note, *Jefferson's Daughters: America's Ambiguity Towards Equal Pay for Women*, 11 S. CAL. REV. L. & WOMEN'S STUD. 233, 241 (2001); *see* Posner, *Economic Analysis*, *supra* note 6, at 1322.

126. Posner, *Economic Analysis*, *supra* note 6, at 1322.

127. *See id.* at 1322; *see also* Jessica Lynn Mok O'Neill, Comment, *If You Love Me Dear, Please Sign Here: Will the "Love Contract" Play a Role in Protecting Employers from Sexual Harassment Liability?*, 40 J. MARSHALL L. REV. 311, 314 (2006).

128. *See, e.g.*, Selmi, *Family Leave*, *supra* note 90, at 718-34; Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1893-98 (2000) [hereinafter Schultz, *Life's Work*]; Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1212-13 (1988).

129. Blau & Kahn, *supra* note 107, at 82; *see* BLS, *supra* note 98, at 2 (describing how earnings vary for men and women by industry); Schmall, *supra* note 110, at 698-99; Spizman, *supra* note 105, at 77; Fields & Wolff, *supra* note 110, at 116.

130. CONSAD RESEARCH CORP., *supra* note 98, at 6 ("Because women have disproportionately worked in occupations with relatively low wages . . . the average and median earnings of women in general has been much lower than the average and median earnings of men in general."); Savitsky, *supra* note 124, at 176; McCaffery, *supra* note 124, at 600; Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 396-97 (1992); Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 15 (1990). It is unclear, however, whether this historical reality will be a future reality, since women are currently entering the traditionally male-dominated, higher-paying professions at a degree unprecedented in American history. *See* COUNCIL OF ECONOMIC ADVISERS, OPPORTUNITIES AND GENDER PAY EQUITY IN NEW ECONOMY OCCUPATIONS 2 (2000), *available at* http://clinton4.nara.gov/media/pdf/pay_equity_paper_final.pdf; Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 23-24, 26-27 (2010).

131. *See, e.g.*, I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1184 (1991); Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3

segregation" of occupations: because of sex discrimination, women are forced into low-status and low-paying jobs.[132] According to the theory advanced by these scholars, the portion of the gender wage gap that is explained by the different industries and occupations in which men and women work should be taken as evidence tending to explain that a significant part of the existing wage gap is due to illegal sex discrimination.[133] The gender wage gap is the result not of women's historically low levels of human capital but rather the product of discriminatory segregation of the sexes in the workplace.[134]

Under the theory of sex segregation of occupations, women have no real choice in the matter of where they work, because they are being "channeled, or crowded, into certain professions and jobs."[135] In fact, according to commentators sympathetic with these ideas, of the very notion of "choice" is inappropriate in discussing the federal sex-based antidiscrimination laws because it tends to mask capitalist societies' powerful patriarchical ideals that subject women to male dominance.[136] Patriarchal norms have endowed certain jobs with certain gender qualities; generally, the higher paying and more

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KAN. J.L. & PUB. POL'Y 26, *passim* (1994); Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 420 (2011); Mason, *supra* note 130, at 396-97.

132. Isbell, *supra* note 66, at 374 ("[T]he major reason for wage disparity [is] sex segregation of occupations."); Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 362 (1995). Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 487, 507 (2006) (describing this phenomenon of the so-called "pink collar ghetto").

133. *See, e.g.*, Miriam A. Cherry, *How To Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 541-43 (2005); Maxine N. Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1399 (1988); 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, 1840 (1990) [hereinafter Schultz, *Telling Stories*].

134. *See, e.g.*, Mason, *supra* note 130, at 396-97; Schultz, *Life's Work, supra* note 128, at 1894-95; Selmi, *Family Leave*, *supra* note 90, at 736.

135. Selmi, *Family Leave*, *supra* note 90, at 740.

136. *See* Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1932-34 (1994) (quoting Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation By Sex*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 208 (Zillah R. Eisenstein ed., 1979)) [hereinafter Crain, *Feminism and Unionism*] (arguing that men subjugate women through "heterosexual marriage, female domestic work, [and] occupational segregation by sex in the labor market"); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 363 (2004) ("While many women 'choose' to forego careers to spend time with their children, these 'choices' are often ordered by necessity, societal expectations, and lack of opportunities."); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-23 (1989) [hereinafter Joan C. Williams, *Deconstructing Gender*]; Joan C. Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1472-79 (2001) [hereinafter Joan C. Williams, *Difference*] (showing that choices and preferences are constrained by externalities).

prestigious work is "men's work," and the converse is "women's work."[137] In other words, the concept of "choice" in the context of employment is value-laden and conceals the "gendered-ness" of work, thereby "legitimiz[ing] historically developed preferences that feminists perceive as patriarchal" and thus necessarily discriminatory.[138] In short, while the human capital theory posits that women voluntarily choose occupations that match their preferences for flexible hours and more leave,[139] sex segregation theory declares that this "choice" is really determined by a discriminatory and patriarchical ideology.[140]

Admitting the sensibleness of the sex segregation argument would cast doubt on the conclusion that the Act and Title VII have no meaningful function to perform.[141] But the argument's abstract problematization of choice and its conclusory dictum that personal choice is socially constructed fail to impress. Why need we create a convoluted and improbable feminist account of how women are subjected to men, how men conspire to masculinize well-compensated jobs and feminize the poorly-compensated ones, and how women are being forced into the latter jobs through the prevailing patriarchal ideology,[142] when an entirely more realistic and plausible explanation remains—namely, that female workers, just like everyone else, do make decisions voluntarily, in accordance with their choices and preferences, and free from theoretical masculine constraints? Studies and observation show that the average woman often does place more importance on caring for children, parents, and spouses, than on their careers, and that she understandably demands work flexibility to accommodate these lifestyle choices.[143] And if female workers do value work flexibility, it follows that they would be willing to choose the typically low-wage and part-time jobs that offered such

137. Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 473-75 (2004); *see* Schultz, *Telling Stories*, *supra* note 133, at 1824-32.

138. Seidenfeld, *Jurisprudential Perspectives*, *supra* note 92, at 367.

139. Posner, *Economic Analysis*, *supra* note 6, at 1315; *see* CONSAD RESEARCH CORP., *supra* note 98, at 1; EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 270; Epstein, *Reflections*, *supra* note 108, at 77-78; Venable, *supra* note 108, at 1.

140. Crain, *Feminism and Unionism*, *supra* note 136, at 1932-34; *see* McGinley, *supra* note 136, at 363; Joan C. Williams, *Deconstructing Gender*, *supra* note 136, at 822-23; Joan C. Williams, *Difference*, *supra* note 136, at 1472-79.

141. Strictly speaking, this need not be true, since it could be the case that the Act and Title VII are fundamentally incapable of addressing the problem of sex segregation. *See* Isbell, *supra* note 66, at 372.

142. *See* Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 768 (1990) (criticizing these arguments purporting to show ideological determination).

143. Venable, *supra* note 108, at 1; Rebecca White, *I Do Know How She Does It (But Sometimes I Wish I Don't)*, 11 WM. & MARY J. WOMEN & L. 209, 219-20 (2005); Spizman, *supra* note 105, at 73-74.

flexibility—thereby accounting for a large part of the labor market and job disparities between the sexes.[144]

B. The Equal Pay Act and Title VII of the Civil Rights Act of 1964 impose significant burdens on employers and employees alike

While many areas of employment law have economic justifications, some commentators note that the antidiscrimination laws are rights-based, and, being rights-based, are impregnable to the onslaught of economic analysis.[145] But the immunity of rights-based laws from economic analysis should be questioned. While there is obviously an important focus on rights in antidiscrimination law—for example, the idea that every individual, regardless of sex, should have the right to equal opportunity in the workplace—why must we assume that antidiscrimination laws are immune from economic scrutiny? Indeed, lawmakers saw Title VII as a promoter of economic efficiency in that it would create a business atmosphere where the most meritorious employee was hired, which preference for excellence would inject skills into the labor market and increase national productivity.[146] But even if the antidiscrimination laws could only be justified on the basis of rights or principles of fairness, then an understanding of the economics of the Act and Title VII will nevertheless be useful to grasping the effects of these laws.

Both the Act and Title VII flatly prohibit sex-based discrimination in the workplace; if an employer covered by the antidiscrimination laws makes an employment decision based solely on the sex of an employee, the employer is in violation of either the Act or Title VII, if not both.[147] But this flat prohibition ignores the character of the discriminatory employment practice being perpetrated, which may be efficient or inefficient from an economic perspective.[148] Characterizing sex discrimination in this way is essential

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144. *See* CONSAD RESEARCH CORP., *supra* note 98, at 2; Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 210 (1992); Venable, *supra* note 108, at 2.

145. *See, e.g.*, McCormick, *supra* note 13, at 199; Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1798 n.124 (2008) [hereinafter Eric A. Posner, *Human Welfare*] ("There is . . . a basic tension between the method of economic analysis and rights-based approaches."); Kent Roach & Lorne Sossin, *Access to Justice and Beyond*, 60 U. TORONTO L.J. 373, 388-89 (2010) (contrasting economic analysis with a "normative rights-based commitment").

146. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 163 (quoting 110 CONG. REC. 7247 (1964)); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (noting that discrimination "denies society the benefits of wide participation in political, economic, and cultural life").

147. 29 U.S.C. § 206(d)(1) (2006); 42 U.S.C. § 2000e-2(a)(1) (2006).

148. *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1426-30 (1986) (exploring whether race discrimination in employment is efficient); Posner, *Economic Analysis*, *supra* note 6, at 1317-21; Posner, *Efficiency and Efficacy*, *supra* note 6, at 516; J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1407-08 (2003) ("The distinction between efficient and inefficient rules has fascinated many economically oriented commentators.").

because market forces should correct inefficient forms of sex discrimination, thereby precluding the need for nonmarket correction in the form of legal prohibitions.[149] And the prohibition of efficient forms of sex discrimination increases the cost for employers to utilize labor,[150] which makes employers more reluctant to hire and causes an overall tightening of the job market[151]—effects which are good for neither the employer nor the employee.

i. Since market forces cause inefficient forms of sex discrimination to disappear on their own accord, Title VII of the Civil Rights Act of 1964 and the Equal Pay Act are in part redundant and needlessly burdensome to employers

Discriminatory labor practices are inefficient when they "rely[] on characteristics that are unrelated to a firm's productivity concerns," ultimately causing the firms that utilize such practices to "be priced out of the market by nondiscriminating firms that have lower production costs."[152] An example of an inefficient kind of sex discrimination is sexual harassment:[153] because a firm with rampant sexual harassment will experience more disruptions, lower morale, and lower productivity, employers that permit sexual harassment to occur to their employees will be at a competitive business disadvantage and will have an incentive to rectify that type of sex discrimination.[154] Sexual harassment, like other forms of inefficient sex discrimination, is therefore "largely self-correcting."[155]

As a result, the Act and Title VII are at least in part redundant, and the useless burdens these laws create for the labor market as a whole are made even more unpalatable and harder to swallow. Of course, the idea that inefficient forms of sex discrimination will wither away through market forces and the attrition of businesses with relatively lower levels of productivity has been challenged.[156] The simplest, yet most compelling, argument raised in challenge

149. *See* GARY BECKER, THE ECONOMICS OF DISCRIMINATION 44 (2d ed. 1971); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 109-10 (1962); Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1622-23 (2004); Posner, *Economic Analysis*, *supra* note 6, at 1318-19, 1321; *see also* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1317-19 (2003) [hereinafter Selmi, *Price of Discrimination*] (concluding that "animus-based discrimination has been driven from the market").

150. *See infra* Part II.B.i.

151. *See infra* Part II.B.i-ii.

152. Selmi, *Price of Discrimination*, *supra* note 149, at 1317 (citing BECKER, *supra* note 149, at 44); *see* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1279-80 (1995) [hereinafter Selmi, *Testing for Equality*].

153. Sexual harassment is discrimination on the basis of sex violative of Title VII. 29 C.F.R. § 1604.11(a) (2010).

154. *See* Posner, *Economic Analysis*, *supra* note 6, at 1318-19, 1321.

155. Posner, *Economic Analysis*, *supra* note 6, at 1321.

156. *See, e.g.*, Drew S. Days III, *Reality*, 31 SAN DIEGO L. REV. 169, 170-71 (1994); Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary*

may be summarized as follows: if sex discrimination is supposed to be corrected by unaided market forces, why is it that such discrimination still exists in the labor market?[157] But while initially compelling, the argument is ultimately unsound. First, it has already been shown that claims of the labor market being pervaded with endemic sex discrimination are overblown, given that only a miniscule amount of the unadjusted wage gap can conceivably be attributed to sex discrimination and much of the labor market and job disparities between the sexes can be explained by worker preference.[158] Second, the economic account of market forces causing inefficient types of sex discrimination to disappear envisions sex discrimination being eroded over time. [159] Therefore, this economic account does not fail if some minimal amount of sex discrimination still happens to exist at present.[160]

In addition, people who argue that sex discrimination does saturate the labor market generally look to the unadjusted gender wage gap to ground their argument.[161] But if we operate within the assumption that the unadjusted gap points unambiguously to rampant sex discrimination, then we must conclude that just as the gender wage gap has been slowly but steadily narrowing over the last century, so has sex discrimination.[162] And this inference suggests that certain discriminatory employment practices are in fact being eliminated through market forces. Finally, those who argue that the persistence of sex discrimination disproves the idea that market forces will independently eliminate sex discrimination fail to recognize the difference between efficient and inefficient forms of sex discrimination—the existence of some amount of sex discrimination is actually to be expected because the market will correct

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of Discrimination Law, 35 BUFF. L. REV. 85, 98 n.41 (1986) (noting that market forces have been prevented "from cleansing the market of this imperfection" and that "therefore legal intervention is required").

157. Selmi, *Testing for Equality*, *supra* note 152, at 1280 (citing Donohue, *supra* note 148, at 1411). The most common, and most unpersuasive, form this argument takes is the personal anecdote. *See* Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1518 (1996) ("Real world stories of the lives of people who regularly suffer the indignities of invidious discrimination belie the benign reassurances of the free marketeers that market forces will bring about the gradual 'withering away' of invidious race and sex discrimination."); *see, e.g.*, Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49-55 (1991); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1333-48 (1991); Schultz, *Telling Stories*, *supra* note 133, at 1799-1815.

158. *See supra* Part II.A.

159. *See* Selmi, *Price of Discrimination*, *supra* note 149, at 1317 (citing BECKER, *supra* note 149, at 44).

160. *See id.* (citing BECKER, *supra* note 149, at 44).

161. *See, e.g.*, Rabin-Margalioth, *supra* note 104, at 836; Hymowitz, *supra* note 104, at B1.

162. *See* COUNCIL OF ECONOMIC ADVISORS, *supra* note 105 (showing that the gender wage gap has been declining since the late 1970s).

only inefficient forms of sex discrimination and leave the efficient forms intact.[163]

ii. The prohibition of efficient forms of sex discrimination under both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 harms employers and employees alike

While the Act and Title VII are largely redundant with respect to inefficient kinds of sex discrimination, things are significantly worse for employers implementing efficient forms of sex discrimination, on whom the Act and Title VII simply impose a deadweight economic loss.[164] In the case of efficient discrimination, the employer must not only bear the administrative and litigation costs associated with the Act and Title VII, but also forgo an opportunity to utilize an efficient and value-adding, albeit sex-based, employment practice.[165] For example, it would be economically rational for an employer to make sex-based employment decisions that merely reflect the misogynistic tastes of its customers or employees.[166] Similarly, it would also be a rational business practice if an employer who has beliefs about the average characteristics of female employees in a particular type of job decides to discriminate against a prospective female employee rather than take on the added information costs of distinguishing the particular prospective female employee from the average female employee.[167]

> [R]ather than determining the specific expected tenure of a particular female applicant, the firm may simply assume that women are more likely, on average, to experience breaks in their service than are men, and that these breaks in service are costly to the firm. Because statistical discrimination stems from inadequate information rather than bias, it . . . may be more efficient than the acquisition of better information.[168]

Yet such employment practices are not permissible under the inexorable sex-blind logic of the Act and Title VII.[169]

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163. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2416-17 (1994).

164. Posner, *Economic Analysis*, *supra* note 6, at 1321; *see* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 76-77; *see also* Selmi, *Testing for Equality*, *supra* note 152, at 1289-90. *But see* Donohue, *supra* note 148 at 1426.

165. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 76-77; Posner, *Economic Analysis*, *supra* note 6, at 1321; Selmi, *Testing for Equality*, *supra* note 152, at 1289-90. *But see* Donohue, *supra* note 148 at 1426.

166. Selmi, *Testing for Equality*, *supra* note 152, at 1289; Posner, *Economic Analysis*, *supra* note 6, at 1319.

167. Posner, *Economic Analysis*, *supra* note 6, at 1320.

168. Selmi, *Testing for Equality*, *supra* note 152, at 1290.

169. 29 U.S.C. § 206(d)(1) (2006); 42 U.S.C. § 2000e-2(a)(1) (2006); 29 C.F.R. § 1604.2(a)(iii) (2010).

It is in this realm of efficient sex discrimination that economic arguments come into the greatest conflict with the rights argument: just because it may be economically efficient to discriminate in some way does not make it "right" or palatable.[170] This is certainly true, as is the reality that even an excellent economic argument will not disturb a firmly held, single-minded belief that the antidiscrimination laws are solely justified by rights arguments.[171] Nevertheless, the fact that the Act and Title VII impose economic losses on employers and are, at least in some respects, redundant should be seen as yet another reason to question the necessity of these laws.

In addition, the appeal to equal opportunity or some other right that the antidiscrimination laws are said to advance ignores the detrimental impact such laws have on *employees*, some of whom are supposed to be beneficiaries of these laws. Since the Act and Title VII outlaw some efficient employment practices and impose administrative and litigation costs on employers, they reduce the efficiency with which employers can use labor, which results in lower average wages for all employees.[172] Further, regulation produces compliance costs, which will reduce the number of firms that can enter the marketplace and even push low-margin firms entirely out business, resulting in a decrease in the aggregate number of employment opportunities.[173] The resultant tightening of the job market will especially hurt the more marginalized employees, whom the antidiscrimination laws are designed to protect.[174]

As mentioned above, it is a violation of Title VII for an employer to award male and female employees different benefits when the differentiation is based on sex.[175] The employer's cost is irrelevant in determining whether a violation has occurred.[176] Because women on average have substantially longer life

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170. *See* McCormick, *supra* note 13, at 199 (describing the tension between these two kinds of arguments).

171. *See* Roach & Sossin, *supra* note 145, at 388-89 (contrasting economic analysis with a "normative rights-based commitment"); McCormick, *supra* note 13, at 199; Eric A. Posner, *Human Welfare*, *supra* note 145, at 1798 n.124 ("There is . . . a basic tension between the method of economic analysis and rights-based approaches.").

172. Posner, *Economic Analysis*, *supra* note 6, at 1329; *see* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 73-74.

173. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 73; *see* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints With Economic Analysis of Law*, 96 CAL. L. REV. 323, 370-71 (2008); *see also* Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After* Hicks, 23 CAP. U. L. REV. 241, 259 (1994).

174. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 73; Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 694-95 (2001).

175. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (holding that it is a violation of Title VII to take into account the sex of an employee in determining contribution levels for pension plans).

176. 29 C.F.R. § 1604.9(e) (2010) ("It shall not be a defense under title VIII [sic] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.").

expectancies than men,[177] for each dollar that an employer contributes to its female employees' pension plans, the expected return is, on average, greater than every dollar contributed to its male employees' plans.[178] Yet, if employers were to implement the profitable and economically efficient practice of adjusting pension plan contribution amounts such that the present value of the plans at retirement was equal for both men and women—taking into account the dissimilar life expectancies for men and women—such employers would be discriminating in terms of "compensation, terms, conditions, or privileges of employment" on the basis of sex.[179]

In other words, Title VII requires employers to give female employees greater fringe benefits than male employees.[180] It is not just that this result is irrational or undesirable in itself, but such a legal rule creates negative consequences as well. While women will rationally be more drawn to positions with greater pension benefits, employers will be reluctant to hire them, since they will on average draw larger pensions due to their longevity.[181] And since women on average draw more from the company's pension pool than men, the addition of one female employee will reduce the expected pensions of other workers in the firm, which might plausibly lead to some employee tensions.[182]

The same type of argument can be applied to employer health plans, inasmuch as women on average consume more health care services over their

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177. Jiaquan Xu et al., *Deaths: Final Data for 2007*, NATIONAL VITAL STATISTICS REPORTS, May 20, 2010, at 6, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_19.pdf (showing that women live on average five years longer than men, 80.4 versus 75.4 years).

178. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 315-16; Pamela S. Anderson, *Gender-Based Determination of Retirement Benefits:* Arizona v. Norris, 19 TULSA L.J. 755, 776 (1984); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits:* Manhart *Revisited*, 49 U. CHI. L. REV. 489, 490 (1982).

179. Ariz. Governing Comm. For Tax Deferred Annuity v. Norris, 463 U.S. 1073, 1083 (1983); *Manhart*, 435 U.S. at 711 (1978) (holding that Title VII prohibits an employer from charging female employees more money for the same pension plan on the presumption that, as a class, the plan will subsidize women to a greater extent than men); *see* 42 U.S.C. § 2000e-2(a)(1) (2006); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Makes Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 827 (2009).

180. Posner, *Economic Analysis*, *supra* note 6, at 1333; Craig Joseph Robichaux, Note, Norris v. Arizona: *A Move Toward Unisex Insurance*, 45 LA. L. REV. 149, 158 (1984); s*ee* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 315; *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 1, 255 (1983).

181. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 325. While "the fact that female employees generally have higher turnover rates than male employees may, to some extent, offset the cost to the employer associated with extra female longevity," Sydney J. Key, *Sex-Based Pension Plans in Perspective:* City of Los Angeles, Department of Water and Power v. Manhart, 2 HARV. WOMEN'S L.J. 1, 18 (1979), the net result is a wash because the employers will simply "avoid hiring women for jobs for which they value longevity." Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519, 599-600 (2001).

182. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 325.

lifetimes than do men.[183] This is true even if the costs of pregnancy and pregnancy-related conditions are removed from the analysis.[184] Yet it is illegal sex-based employment discrimination for an employer to consider such factors in creating an employee health benefits plan.[185] Just as with pension benefits, "the law compels the employer to ignore a real difference in the average cost of male and female employees."[186] And when pregnancy is accounted for, the inefficiencies only grow apace.[187]

C. Proposals to keep intact and improve, rather than repeal, the federal sex-based employment discrimination laws are inadequate.

As a result of the foregoing discussion of the problems of the federal sex-based antidiscrimination laws, it is not unreasonable to argue for changes in this area of the law. In an effort to improve what it considered to be problems with the laws, Congress has modified and amended both the Act and Title VII numerous times.[188] The most recent Congressional action was the passage of the Lilly Ledbetter Fair Pay Act of 2009.[189] For all the attention Ms. Ledbetter's plight received on the 2008 Presidential campaign trail,[190] the

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183. ALINA SALGANICOFF ET AL., WOMEN AND HEALTH CARE: A NATIONAL PROFILE: KEY FINDINGS FROM THE KAISER WOMEN'S HEALTH SURVEY 1 (July 2005), *available at* http://www.kff.org/womenshealth/upload/women-and-health-care-a-national-profile-key-findings-from-the-kaiser-women-s-health-survey.pdf; Vicki Lawrence MacDougall, *Medical Gender Bias and Managed Care*, 27 OKLA. CITY U.L. REV. 781, 865 (2002) (citing Terri D. Keville, *The Invisible Woman: Gender Bias in Medical Research*, 15 WOMEN'S RIGHTS L. REP. 127, 127 (1994).

184. Robert Pear, *Women Buying Health Insurance Pay a Penalty*, N.Y. TIMES, Oct. 30, 2008, at A23 ("Insurers say they have a sound reason for charging different premiums [for men and women]: Women ages 19 to 55 tend to cost more than men because they typically use more health care, especially in the childbearing years. But women still pay more than men for insurance that does not cover maternity care."); News Release, Centers for Disease Control and Prevention, New Study Profiles Women's Use of Health Care (July 26, 2001), http://www.cdc.gov/nchs/pressroom/01news/newstudy.htm.

185. 42 U.S.C. § 2000e-2(a)(1) (2006); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

186. Posner, *Economic Analysis*, *supra* note 6, at 1332.

187. The PDA says that an employer who fails to include the medical costs of pregnancy and pregnancy-related conditions in an employee health benefits plan or to classify pregnancy as a disability is guilty of a Title VII-prohibited employment practice. 42 U.S.C. § 2000e(k) (2006).

188. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

189. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at scattered sections of 29 and 42 U.S.C.) (reversing the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.* that a new statute of limitations was not triggered with each individual paycheck a plaintiff receives after the initial limitations period has lapsed. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007)).

190. *See, e.g.*, Megan Coluccio, Comment, *Fait Accompli?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*,

Ledbetter Act merely modified the trigger for the statute of limitations but otherwise left the problematic legal scheme in place.[191] In short, the Ledbetter Act simply restored the legal landscape to where it was immediately prior to the *Ledbetter* decision.[192]

Being more the result of campaign rhetoric than a legitimate modification of the Act and Title VII, the Ledbetter Act represents one side of the debate on how to improve the sex-based employment discrimination laws. This side of the debate seeks a very minor change in the law that leaves employees and employers in the same problematic regulatory scheme they are currently in. In the same vein, one scholar sees the EEOC's byzantine enforcement mechanism as a bureaucratic hurdle for plaintiffs, and proposes creating a new federal agency that would take "a more direct role in enforcement and regulation."[193] Another scholar advocates the creation of a new Cabinet-level advisory group that would be responsible for coordinating the enforcement of equal economic opportunity laws.[194] But it is unclear how an alternative or additional enforcement agency would solve the problems inherent the Act and Title VII, inasmuch as the new agencies would only be enforcing the same problematic laws. A radical, substantive change is needed.

Other scholars have proposed that if the so-called "comparable worth" theory were to be countenanced by the Act and Title VII, either through Congressional fiat or developments in case law, the problems of these sex-based antidiscrimination laws would be ameliorated.[195] Advocates of comparable worth argue that a significant cause of the gender wage gap is the sex segregation of occupations.[196] The current antidiscrimination legal framework is not designed to remedy sex segregation. Indeed, both the Act and

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34 SEATTLE U. L. REV. 235, 247-48 (2010); Susan Reimer, *A Revolution Won With the Stroke of a Pen*, BALT. SUN, Feb. 2, 2009, at 2A.

191. *See* Lilly Ledbetter Fair Pay Act § 3.

192. Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 95 n.211 (2010).

193. McCormick, *supra* note 13, at 195, 202.

194. Rose, *supra* note 87, at 1172. Unlike McCormick, however, Rose would not dissolve the EEOC, even though he admits that "[t]he problems of the EEOC have become so pervasive and endemic that some former high-ranking officials of the Commission have expressed their doubts as to whether the continued existence of the Commission is in the public interest." *Id.*

195. *See, e.g.*, Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundations, and the Feasibility of Implementation*, 20 U. MICH. J.L. REFORM 7, 9 (1986); Robert H. Cohen, Note, *Pay Equity: A Child of the 80s Grows Up*, 63 FORDHAM L. REV. 1461, 1464 (1995); Andrea Giampetro-Meyer, *Resurrecting Comparable Worth As a Remedy for Gender-Based Wage Discrimination*, 23 SW. U. L. REV. 225, 233 (1994); Isbell, *supra* note 66, at 372-74.

196. Judith L. Andrews, Note, *State Legislation on Comparable Worth: Will It Bring Pay Equity to Academe?*, 14 J.C. & U.L. 469, 474 (1988); Hydee R. Feldstein, Comment, *Sex-Based Wage Discrimination Claims After* County of Washington v. Gunther, 81 COLUM. L. REV. 1333, 1333 (1981); Isbell, *supra* note 66, at 374; Julie Underwood O'Hara, Commentary, *An Overview of the Theory of Comparable Worth*, 22 EDUC. L. REP. 1073, 1074 (1985).

Title VII require female employees, relegated to "women's work" to find similarly situated male employees.[197] A comparable worth standard, however, would rank all jobs on supposedly "objective" factors—skills, working conditions, education, and training—with comparable salaries corresponding to comparably rated jobs.[198] Under such a system, a court would theoretically have an easy time handling an employee claiming sex-based discrimination: the court need merely determine whether the "objective" factors of a job traditionally held by women were the same as the "objective" factors of a job traditionally held by men, and, if such was the case, order the employee to receive the same salary as her male counterpart.[199] Comparable worth would solve occupational sex segregation by causing women's wages to rise to the level of men's wages, thereby attracting males to what had hitherto been "women's work."[200]

While this scheme does, at least, have the merit of offering a substantive change in the framework of the federal sex-based antidiscrimination laws, such a theory has unique problems of its own that make its adoption entirely undesirable. First, comparable worth relies on the premise, which has been shown to be dubious, that men's and women's occupational disparities are the result of widespread sex discrimination, rather than individual worker preference.[201] Second, comparable worth proponents' proud boast of "ignor[ing] present market forces and compar[ing] jobs based on objective factors"[202] is quite troubling. What factors are "objective," and who is qualified to evaluate jobs in order to compare their respective worth?[203] Notwithstanding efforts to ground comparable worth theory on objective factors,[204] the fact remains that whatever criteria are used simply cannot explain the differences in

197. *See* Isbell, *supra* note 66, at 372-73; Ernest F. Lidge III, *The Male Employee Disciplined for Sexual Harassment As Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717, 758 (2000); *see also* 29 U.S.C. § 206(d)(1) (2006); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1526 (11th Cir. 1992).

198. Cohen, *supra* note 195, at 1464; Isbell, *supra* note 66, at 372-73; Mark Seidenfeld, Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1099 (1982).

199. Isbell, *supra* note 66, at 372-73.

200. James D. Holzhauer, *The Economic Possibilities of Comparable Worth*, 53 U. CHI. L. REV. 919, 931 n.20 (1986); Isbell, *supra* note 66, at 394-95.

201. *See supra* Part II.A.

202. Isbell, *supra* note 66, at 394.

203. Clauss, *supra* note 195, at 52; *see* Am. Nurses' Ass'n v. State of Illinois, 783 F.2d 716, 720 (7th Cir. 1986) ("[T]he issue of comparable worth . . . is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution."); *see also* Judith Olans Brown, Phyllis Tropper Baumann & Elaine Millar Melnick, *Equal Pay For Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 138 (1986) ("[A] major argument espoused by opponents of comparable worth is that no objective technique exists for comparing jobs that are not identical in content.").

204. *See* Clauss, *supra* note 195, at 52.

wages between occupations or account for all the intricacies and complexities of the American economy.[205]

III. AN ANTIDISCRIMINATION ACCREDITATION SYSTEM FOR EMPLOYERS SHOULD REPLACE THE VACUUM CAUSED BY THE REPEAL OF THE FEDERAL SEX-BASED EMPLOYMENT DISCRIMINATION LAWS

Rather than adopt any of the preceding proposals, the Act should be repealed in its entirety and Title VII modified so as to exclude sex as a protected category. While some version of this argument has been advanced before now,[206] few have clarified what a world without employment discrimination laws would look like. There would certainly be more freedom of private contract and less government regulation, but the details are otherwise scarce.[207] Further, simply repealing these laws and letting the labor market take care of itself seems to be an utterly infeasible proposition.

While the vision of a world without governmental regulation in the area of sex discrimination is ultimately a good thing, a more incrementalist solution is to be favored because of the feasibility and workability of such a solution as compared to a sudden radical and complete deregulation.[208] Specifically, the Act and Title VII's proscription of sex-based employment discrimination should be replaced by an employer accreditation model similar to the model used by the ABA in law school accreditation. Under this model, employers could be accredited for antidiscrimination practices in a way that would ensure compliance and at the same time obviate the difficulties caused by the previous legal regime.

A. Private accreditation is generally an effective supervisory mechanism and a superior alternative to government regulation

Private accreditation is "the formal expression by a private body of an authoritative opinion concerning the acceptability, under objective quality standards fairly applied, of the services rendered by a particular institutional

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205. Cotton M. Lindsay & Charles A. Shanor, County of Washington v. Gunther: *Legal and Economic Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 SUP. CT. ECON. REV. 185, 202-03 (1982). *See* Posner, *Economic Analysis*, *supra* note 6, at 1330-31; Cotton M. Lindsay & Charles A. Shanor, County of Washington v. Gunther: *Economic and Legal Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 SUP. CT. ECON. REV. 185, 202-03 (1982).

206. Richard Epstein argued for the repeal of Title VII in a well-known 1992 book. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 6, at 3; *see also* McAdams, *supra* note 6, at 839. At times, Judge Posner seems hostile to the antidiscrimination laws, but does not seem to have argued for their repeal. *See* Richard A. Posner, *Economic Analysis*, *supra* note 6, at 1329; Posner, *Efficiency and Efficacy*, *supra* note 6 (addressing problems with Title VII in the context of race discrimination).

207. *See* Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 409-15 (1986).

208. *See* Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 516 (2008).

provider."[209] It is a kind of voluntary quality assurance initiative: entities that seek accreditation demonstrate to the accrediting body—and communicate to the public—that it meets the standards established by that body.[210] Entities seeking accreditation are generally entities that offer services "about which consumers have difficulty assessing quality without expert guidance" and therefore the accrediting body is composed of, and accreditation performed by, professionals in the field.[211] While accreditation-seeking entities are generally nonprofit,[212] this is not always the case. For example, the Joint Commission on Accreditation of Healthcare Organizations (Joint Commission) offers accreditation programs for various health care institutions (usually nonprofit),[213] but the Better Business Bureau issues business standards for member businesses (usually for-profit).[214]

Whatever form it takes, accreditation is recognized as an effective supervisory mechanism.[215] Most accrediting agencies rigorously enforce their accreditation standards, ensuring the compliance of the accredited members.[216] Enforcement of the accreditation standards in turn improves the quality of whatever products or services the accredited members provide.[217] Concerns are sometimes expressed that the voluntary nature of private accreditation "detracts substantially from, and potentially could eviscerate, its efficacy as an oversight mechanism."[218] But while it is true that entry into the accreditation system is voluntary,[219] within that system accreditation is actually implemented under diverse enforcement styles, including voluntary and mandatory compliance with accreditation standards.[220]

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209. Clark C. Havighurst, *Foreword: The Place of Private Accrediting Among the Instruments of Government*, 57 LAW & CONTEMP. PROBS., Autumn 1994, at 2.

210. Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate*?, 57 LAW & CONTEMP. PROBS., Autumn 1994 at 49.

211. *Id.*; *see* Havighurst, *supra* note 209, at 5.

212. Kinney, *supra* note 210, at 49.

213. Timothy Stoltzfus Jost, *Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?*, 57 LAW. & CONTEMP. PROBS., Autumn 1994, at 15.

214. Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 170 (1989).

215. *See, e.g.*, Lynn S. Branham, *Accrediting the Accreditors: A New Paradigm for Correctional Oversight*, 30 PACE L. REV. 1656, 1664 (2010).

216. *See* Jamie L. Wershbale, *Collaborative Accreditation: Securing the Future of Historically Black Colleges*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 67, 83 (2010).

217. *See* Tobi M. Murphy, Comment, *Enforcement of the HIPAA Privacy Rule: Moving from Illusory Voluntary Compliance to Continuous Compliance Through Private Accreditation*, 54 LOY. L. REV. 155, 199 (2008).

218. Branham, *supra* note 215, at 1664.

219. Kinney, *supra* note 210, at 49.

220. Murphy, *supra* note 217, at 199-200.

Assuming that a private accreditation system is in place, the decision for an entity to seek accreditation is wholly voluntary.[221] Nevertheless, the incentives to seek accreditation are there. Accreditation promotes quality assurance and enables potential customers to distinguish accredited entities from non-accredited entities in terms of quality and prestige.[222] Accreditation can also promote effective industry self-regulation.[223] In other situations, entities may face pressure from outside their industry to become accredited. For example, hospitals that are accredited by the Joint Commission are automatically eligible to participate in Medicare and other federal health care programs.[224]

B. The law school accreditation regime of the American Bar Association had great success in increasing the gender and racial diversity of law school student bodies.

Accreditation is prevalent in the area of higher education as a result of the American tradition of "discourag[ing] government from engaging in direct regulation of educational institutions."[225] However, institutions of higher education are required to be accredited before they may receive certain federal funds, including federal student loans.[226] While universities, colleges, and other institutions of higher educations are not required to participate in accreditation, they are incentivized to do so because accredited status is required to receive federal funds.[227]The Department of Education has recognized the ABA as the accreditor of American law schools.[228] Law students may not receive federal student loans unless they matriculate at a law school that has been accredited by the ABA.[229]

The vast majority of state supreme courts recognize the authority of the ABA as an accrediting agency.[230] These courts rely upon the accredited status

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221. Kinney, *supra* note 210, at 49.

222. *See* Havighurst, *supra* note 209, at 2; Jennifer M. Miller, Commentary, *Liability Relating to Contracting Infectious Diseases in Hospitals*, 25 J. LEGAL MED. 211, 224 (2004).

223. *See* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 232 (1995). *But see* Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, 57 LAW. & CONTEMP. PROBS., Autumn 1994, at 212.

224. Murphy, *supra* note 217, at 199 n.286; *see* Sarah Kaput, Note and Comment, *Expanding the Scope of Fiduciary Duties to Fill a Gap in the Law: The Role of Nonprofit Hospital Directors to Ensure Patient Safety*, 38 J. HEALTH L. 95, 101 (2005).

225. Havighurst, *supra* note 209, at 7.

226. 20 U.S.C. § 1099b(j) (2006); Branham, *supra* note 215, at 1666.

227. Branham, *supra* note 215, at 1666-67.

228. *Id.* at 1667.

229. *Id.* at 1667.

230. Kathryn M. Stanchi & Jan M. Levine, Commentary, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 13 (2001). In 1998, all but three states required practicing attorneys to have graduated from an accredited law school.

of in-state law schools "to determine whether the legal education requirement for admission to the bar is satisfied."[231] As a result, in these states, graduates of unaccredited law schools cannot practice law.[232] So while courts have found accreditation to be a voluntary process,[233] law schools face gigantic incentives to apply for and receive ABA-accredited status, since unaccredited law schools are at a fierce competitive disadvantage with accredited law schools.[234]

As is fitting in its role as accreditor, "[t]he ABA's stamp of approval . . . helps uninformed applicants identify schools of a certain quality."[235] The benefits of having the ABA as a national accreditation organization for law schools are manifold. First, the very fact of its being a national accreditation organization creates efficiencies by "reliev[ing] each state of the economic burden of having to set up a bureaucratic structure in order to evaluate the quality of law schools across the county."[236] In addition, "law schools encounter fewer costs because they do not have to work to obtain the approval of admitting authorities from 50 different jurisdictions."[237] The federal government, particularly the Department of Education, "also gains from the system by not having to approve and monitor federal student loan programs at individual schools."[238] Finally, "the general public benefits from these efficiencies through cheaper legal services and a more efficient expenditure of public revenues."[239]

George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2122 (1998).

231. Stanchi & Levine, *supra* note 230, at 13.

232. Shepherd & Shepherd, *supra* note 230, at 2128; *see* Laura Rothstein, *Law Students and Lawyers With Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 541 (2008); James P. White, *The American Bar Association Law School Approval Process: A Century Plus of Public Service*, 30 WAKE FOREST L. REV. 283, 289 (1995) [hereinafter James P. White, *Approval Process*]; *see generally* Denise Rothbardt, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER RACE & JUST. 461, 461-62 (1999).

233. *See* Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 642 n.49 (1996).

234. *See* Rothbardt, *supra* note 232, at 462; Rothstein, *supra* note 232, at 541; Shepherd & Shepherd, *supra* note 230, at 2128; *see* James P. White, *Approval Process*, *supra* note 232, at 289.

235. Christopher T. Cunniffe, *The Case For the Alternative Third Year Program*, 61 ALB. L. REV. 85, 127 (1997).

236. *Id.*; *see* Henry Ramsey, Jr., Dean and Professor of Law at Howard University School of Law, The History, Organization, and Accomplishments of the American Bar Association Accreditation Process, Keynote Speech to the Deans' Workshop at the ABA's Meeting of the Section of Legal Education and Admissions to the Bar (Feb. 8, 1995), *in* 30 WAKE FOREST L. REV. 267, 268 (1995).

237. Cunniffe, *supra* note 235, at 127.

238. *Id.*

239. *Id.*

The ABA's Section on Legal Education and Admission administers the ABA accreditation system.[240] The Section publishes the ABA's Standards for Approval of Law Schools, which set forth the requirements law schools must meet in order to be accredited.[241] There are fifty-six published Standards: eleven Standards touch on the general purposes and procedures of ABA accreditation, two Standards deal with procedures for amending existing Standards or adopting new ones, and the remaining forty-three Standards are concerned with the actual administration and educational programs of accredited law schools.[242] These latter forty-three Standards are divided into six categories according to their subject matter: Organization and Administration, Educational Programs, Faculty, Admissions, Library, and Physical Plant.[243] The Standards must be approved by a Council, which consists of law school deans, a handful of judges, and a few non-academics.[244] These Standards "are the law of law schools."[245]

For the purposes of using the ABA accreditation process as a model for an antidiscrimination accreditation regime, the most important ABA Standard is Standard 211, which requires an accreditation-seeking law school to demonstrate its antidiscriminatory admissions policy to the ABA.[246] This Standard states in pertinent part:

> Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.[247]

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240. Dean R. Nils Olsen, Welcoming Comments at the 2004 James McCormick Mitchell Lecture: Who Gets In? The Quest for Diversity After Grutter (Mar. 8, 2004), *in* 52 BUFF. L. REV. 531, 541 (2004) [hereinafter Olsen, Mitchell Lecture]; *see* James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292, 295-96 (1987). The Association of American Law Schools (AALS) is another private, standard-setting organization, but not technically an accreditor. *See* Joan McLeod Heminway, *Caught In (Or On) the Web: A Review of Course Management*, 16 ALB. L.J. SCI. & TECH. 265, 274-75 (2006).

241. Stanchi & Levine, *supra* note 230, at 13.

242. Ramsey, *supra* note 236, at 272-73.

243. *Id.*

244. Stanchi & Levine, *supra* note 230, at 13.

245. *Id.*

246. Olsen, Mitchell Lecture, *supra* note 240, at 541.

247. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2011-2012 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 16, *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf [hereinafter 2011-2012 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS].

In order to be accredited by the ABA, law schools must demonstrate that they have attempted to achieve a diverse body of students.[248]

Standard 211 has had great success in increasing the gender and racial diversity of law school student bodies.[249] Minority students comprised more than 20 percent of the total J.D. enrollment in ABA-accredited law schools in the 2002-2003 academic year.[250] In 2007, minorities represented 21.6 percent of all J.D. students at such schools, and women represented just under half of the student body.[251] These positive results are not fortuitous, but represent the powerful role the ABA performs in enforcement of its Standards and oversight of its accreditation system. Implementing strategies to promote diverse student bodies is not optional for ABA-accredited law schools or for law schools seeking such approval.[252] Success in the implementation of these strategies is a condition for accredited status, and thus a condition for receiving certain federal funds and for allowing graduates access to the bar in most states.[253]

C. The American Bar Association accreditation model should be applied to sex-based discrimination in the private employment context

In the vacuum created by the repeal of the Act and the amendment to Title VII that would eliminate "sex" as a protected class, an accreditation system should be set up to accredit employers for sex-based antidiscriminatory employment practices. The contours of this accreditation system should be modeled on the ABA system for the accreditation of American law schools. Thus, just as the Department of Education has recognized the ABA as the national law school accrediting agency,[254] so the federal government—perhaps the Department of Commerce—should nominate an agency to implement and enforce a national sex-based antidiscrimination accreditation scheme for employers. Only employers accredited by the governmentally designated accrediting agency would have proper accredited status. But while the accrediting agency would have the government's imprimatur, it should, like the ABA and other private accreditors, be separate from the government and funded and supported by its members.

There are several possible ways in which the federal government could incentivize employers to seek accreditation from its designated agency and thereby ensure that employers implement sex-based antidiscriminatory business

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248. Olsen, Mitchell Lecture, *supra* note 240, at 541; *see also* Matt Krupnick, *Law Schools Must Increase Diversity*, CONTRA COSTA TIMES, Aug. 19, 2006, at F4.

249. Olsen, Mitchell Lecture, *supra* note 240, at 541.

250. *Id.*

251. News Release, Am. Bar Ass'n, Law School Enrollment Edges Upward, Minorities Show Slight Gain, Women Slight Drop, (Feb.21, 2007), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=87.

252. *See* Stanchi & Levine, *supra* note 230, at 13.

253. Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 61 (2009).

254. Branham, *supra* note 215, at 1667.

practices. For example, the federal government could divert the money and resources it previously used to enforce the Act and Title VII's proscription of sex-based employment discrimination into providing tax credits for businesses that become accredited for their antidiscriminatory practices.[255] Alternatively, the federal government could threaten to raise taxes or assess fees on those businesses that decide not to become accredited.[256] Unaccredited businesses could also be coerced into seeking and obtaining accreditation by the federal government threatening to implement burdensome regulations—similar, perhaps, to those regulations that existed under the previous federal sex-based antidiscrimination legal regime.

But even without such incentives, threats, or coercions, many employers would probably not hesitate in pursuing accreditation. Because accreditation enables potential customers to distinguish accredited entities from non-accredited entities in terms of quality and prestige,[257] accredited status could be a selling point to customers who believe that every individual, regardless of sex, should have the right to equal opportunity in the workplace. Such customers would want to support businesses they know do not discriminate against women, and businesses would therefore seek accreditation as a way to remain competitive in their industries. In addition, because accreditation can promote effective industry self-regulation,[258] businesses might be eager to become accredited and regulate themselves as a shield against the threat of outside regulatory interference.

In order to ensure the efficacy of accreditation oversight, the accrediting agency should, like the ABA, make compliance with its antidiscrimination standards mandatory. Only employers who demonstrate their commitment to fostering a nondiscriminatory atmosphere for women should obtain accredited status. The accrediting agency should perform unannounced, on-site investigations and other techniques to ensure that accredited members maintain compliance. Noncompliant members should lose their accredited status.

The details of the antidiscrimination standards can take a variety of forms. Like the ABA's Standard 212, the antidiscrimination standards may be worded broadly to give employers the flexibility to innovate and adopt their own policies, so long as through those policies the employers "demonstrate by concrete action a commitment" to providing full and equal employment opportunities for women.[259] Alternatively, the accreditor could explicitly

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255. *See* Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 170-71 (2009); Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 343 (1989).

256. *See* Babcock, *supra* note 255, at 170.

257. Miller, *supra* note 222, at 224; *see* Havighurst, *supra* note 209, at 2.

258. *See* Michael, *supra* note 223, at 232; *but see* Havighurst & Brody, *supra* note 223, at 212.

259. 2011-2012 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 247, at 16.

enumerate which discriminatory practices an employer is prohibited from engaging in.

CONCLUSION

The Act and Title VII, while differing in terms of their coverage, scope, and operation, are both supposed to promote pay equity between the sexes and equal employment opportunities for women. The Act requires that employees be paid equally for equal work, regardless of sex. Title VII prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion.

But neither the Act nor Title VII actually does what Congress intended. In fact, the very purpose of these laws are severely undermined by the fact that the traditional justifications for imposing antidiscriminatory regulation on employers are largely illusory: most of the gender wage gap can be accounted for by non-discriminatory factors, and occupational disparities between men and women are the result of worker preferences, not sex discrimination. Further, since market forces cause inefficient forms of sex discrimination to disappear on their own accord, the Act and Title VII are in part redundant and needlessly burdensome to employers. In addition, the prohibition of efficient forms of sex discrimination under both laws harms employers and employees alike.

Proposals to keep intact and improve, rather than repeal, the federal sex-based employment discrimination laws are inadequate because, by leaving employees and employers in the same problematic regulatory scheme they are currently in, these proposals do not remedy the problems. As an alternative to these proposals, this note has proposed that an antidiscrimination accreditation system for employers should replace the vacuum caused by the repeal of the federal sex-based employment discrimination laws. Private accreditation is generally an effective supervisory mechanism and a superior alternative to government regulation. Because the law school accreditation regime of the ABA had great success in increasing the gender and racial diversity of law school student bodies, it is this model that should be applied to sex-based discrimination in the private employment context.