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Betty Dukes worked as a Wal-Mart employee in Pittsburg, California since 1994.[1] She started as a cashier, but eventually received a promotion to customer service manager.[2] Despite years of service and positive performance reviews, the employment relationship soured when Wal-Mart disciplined Dukes for violating company policy.[3] When filing her claim, she argued her employer failed to punish its male employees for similar infractions and that she was paid less than two male greeters in the Pittsburg store.[4]

Edith Arana also worked for Wal-Mart in Duarte, California, from 1995 until 2001.[5] She sought management training on multiple occasions, but her manager brushed off her requests.[6] She concluded she was denied opportunity for advancement because of her sex.[7]

Similarly, Christine Kwaposki worked for another retail chain, Sam's Club.[8] She asserted that a male manager frequently yelled at female employees, but did not exhibit the same behavior towards males.[9] At one point, the manager allegedly told Kwaposki to "'doll up,' to wear some makeup, and to dress a little better."[10]

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1. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).
2. *Id.* at 2547–48.
3. *Id.* at 2548.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

These three women were named plaintiffs to one of the most expansive class action suits ever presented to the U.S. Supreme Court.[11] They also brought a decades-old issue back to the forefront of American media: sex discrimination in the workplace.

Wal-Mart Stores, Inc. v. Dukes, decided in June 2011, occurred nearly half a century after the passage of the Civil Rights of Act of 1964. Title VII of the Act prohibits an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment" because of sex.[12] Title VII thus became extremely significant for female employees; without it, the plaintiffs in *Dukes* would not have had an actionable claim. But Title VII did not eradicate discrimination. If it had, then *Dukes* and similar cases would be nonexistent. Like many federal laws before it, the statute was left open to interpretation, which in turn transformed the employment arena for years to come. How did sex discrimination in the workplace become a salient issue in American society? How did Congress and the courts interact to determine social policies in the labor force?

Answering these questions requires analysis of a critical time period in workplace sex discrimination, starting with the passage of the Civil Rights Act of 1964 to the more recent Civil Rights Act of 1991. The research reveals a steep increase in women's workforce participation, the rise of the second feminist movement, and landmark Supreme Court decisions on workplace gender equality. Although grassroots organizations heightened public awareness of the gender equality issue, it was mainly the interplay between Congress and the judicial system that determined antidiscrimination policies. The government ratified Title VII and left it open to judicial interpretation, intervening only when the courts strayed too far from the legislature's original intent. Aside from the Congressional overrides, the judiciary had free reign to delineate the contours of Title VII sex discrimination, and thus the two institutions worked together to reshape the employment landscape.

I.BEGINNING TO CLOSE THE GENDER GAP IN THE WORKFORCE

Prior to the Civil Rights Act of 1964, women had no legal recourse for sex discrimination at work. The lack of protection stemmed from traditional notions of masculinity and femininity, where men were glorified as breadwinners while women were expected to stay at home in order to

11. *Dukes*, 131 S. Ct. at 2548.
12. 42 U.S.C.A. § 2000e-2(a)(1) (2012).

"preserve [their] maternal functions and 'the well-being of the race.'"[13] The assumption of female domesticity persisted as a social norm well into the twentieth century, and it was believed that any deviance from this norm would likely disrupt family cohesion.[14] Essentially, the protection of the family justified the suppression of women's labor participation.[15]

Post-World War II America witnessed a dramatic rise in the participation rate of women in the job market.[16] In 1948, approximately thirty-five percent of women ages 25-54 were part of the labor force.[17] By 1960, their numbers increased to nearly forty-three percent.[18] The mere passage of Title VII, despite its heated legislative history, was a testament to the demographic shifts in the American workplace.[19] Martha Griffiths and Katharine St. George were two female congressional representatives who fought for the inclusion of "sex" within Title VII.[20] Together with like-minded congressmen and the influence of the National Women's Party (NWP), they initiated the first step in reducing workplace gender inequality.[21]

The NWP, largely associated with its advocacy of the Equal Rights Amendment (ERA), was one of the first groups of the second-wave feminist movement.[22] Former members of the suffrage movement created the NWP to continue the pursuit of equality for women in all spheres of American society.[23] The organization was predominantly comprised of middle- and upper-class white females, and thus was not particularly concerned with racial minority rights.[24] However, given that the early version of the ERA failed to pass, the NWP viewed Title VII as another "opportunity to advance their goals under the political cover of well-supported legislation."[25]

Shortly after Congress enacted Title VII, it also established the Equal Employment Opportunities Commission (EEOC) to help interpret and enforce the statute.[26] However, given that the prohibition on sex

13. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. OF WOMEN & L. 137, 146 (1997) (citing Muller v. Oregon, 208 U.S. 412, 422 (1908)).

14. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1324 (2012).

15. *Id*.

16. Abraham Mosisa & Steven Hipple, *Trends in Labor Force Participation in the United States*, 129 MONTHLY LAB. REV. 35, 42 (2006).

17. *Id*. at 36.

18. *Id*.

19. Franklin, *supra* note 14, at 1326.

20. Franklin, *supra* note 14, at 1360.

21. Franklin, *supra* note 14, at 1360; Bird, *supra* note 13, at 147.

22. Bird, *supra* note 13, at 147.

23. Bird, *supra* note 13, at 147.

24. Bird, *supra* note 13, at 147.

25. Bird, *supra* note 13, at 149.

26. Franklin, *supra* note 14, at 1329.

discrimination was new ground, no one at the EEOC in its early years had much experience with the issue.[27] Many of the legal claims that poured in after Title VII's implementation baffled the agency.[28] As one female lawyer put it, the agency "was responsible for deciding these questions," but "no one really knew how to resolve them."[29]

Originally, the EEOC appeared hostile to the sex discrimination provision.[30] In answering one of its first questions regarding sex inequality, the EEOC deemed that "the practice of dividing job advertisements into male and female columns did not qualify as sex discrimination because culture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women."[31] This position on sex-segregated advertising signaled that the agency interpreted the sex provision of Title VII narrowly, much to the dismay of feminists nationwide.[32]

In direct opposition to the EEOC's decision, Betty Friedan, Pauli Murray, and other feminists founded the National Organization for Women (NOW).[33] These activists realized that an organization representing women's interests in the same way the National Association for the Advancement of Colored People (NAACP) represented interests of people of color, especially African Americans, was necessary to combat the strong influence employers had on Title VII interpretation.[34] Unlike the NWP, NOW embraced women of color and those from lower socioeconomic statuses.[35] Indeed, Pauli Murray herself was an African-American lawyer who sought both racial and gender equality.[36] Rather than ignore the struggle for minority rights, NOW acknowledged that race was generally regarded as a more serious social problem, yet sought to convince Americans that sex discrimination was just as serious.[37]

NOW's emergence heralded the feminist crusade that swept across the country. The movement's rapid popularity among women was also due in part to a powerful tool that first-wave feminists lacked: the invention of the television.[38] "Because women constitute[d] the largest share of television viewers, they . . . emerged as an especially coveted demographic. As

27. Franklin, *supra* note 14, at 1335.
28. Franklin, *supra* note 14, at 1335.
29. Franklin, *supra* note 14, at 1335.
30. Franklin, *supra* note 14, at 1361.
31. Franklin, *supra* note 14, at 1340.
32. Franklin, *supra* note 14, at 1342.
33. Franklin, *supra* note 14, at 1342.
34. Franklin, *supra* note 14, at 1341.
35. Franklin, *supra* note 14, at 1342.
36. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2129 (2002).
37. Franklin, *supra* note 14, at 1342.
38. S. Craig Watkins & Rana A. Emerson, *Feminist Media Criticism and Feminist Media Practices*, 571 ANNALS AM. ACAD. POL. & SCI. 151, 154 (2000).

feminist values and beliefs [became] more broadly disseminated, the televisual representations of women [became] more varied, too."[39] Additionally, mass media coverage allowed feminist protests to be more accessible to the public. According to Carol Hanisch, a feminist who joined in protesting Miss America in 1968, "The protest of the Miss America Pageant in Atlantic City in September told the nation that a new feminist movement is afoot in the land. Due to the tremendous coverage in the mass media, millions of Americans now know there is a Women's Liberation Movement."[40] Combined with the widespread circulation of Betty Freidan's "The Feminist Mystique" and Simone de Beauvoir's "The Second Sex," television and mass media in general helped disseminate the feminist agenda and introduce depictions of women other than the "happy homemaker."[41]

As this women's movement developed, many activists became more vocal in their disapproval of employment practices premised on women's traditional duties in the home.[42] The old notions of domesticity created a fierce backlash in the 1960s as women tried to carve out their space in the workforce.[43] In 1967, NOW observed that stereotyped conceptions of motherhood were "still [being] used to justify barring women from equal professional and economic participation and advance, and demanded an end to discrimination based on maternity."[44] For instance, defenders of discriminatory policies frequently cited pregnancy and the maternal responsibilities that followed as rationale for "grounding" stewardesses when they became pregnant.[45] Stewardesses responded to this justification by marching in NOW's monumental Women's Strike for Equality in the summer of 1970, holding signs that read "Storks Fly, Why Can't Mothers?," "We Want Our Babies and Our Wings," and "Mothers Are Still FAA Qualified."[46] It was not until after the controversial decision in *General Electric Co. v. Gilbert* that discrimination because of pregnancy would be considered a violation of Title VII.[47]

Aside from NOW, the American Civil Liberties Union (ACLU) also began to champion women's rights.[48] Since its inception in 1920, the

39. Watkins & Emerson, *supra* note 38, at 154.

40. Carol Hanisch, *What Can Be Learned: Critique of the Miss America Protest* (Nov. 15, 2012), http://library.duke.edu/digitalcollections/media/jpg/missamerica/pdf/maddc01012.pdf#pagemode=thumbs.

41. Watkins & Emerson, *supra* note 38, at 154.

42. Franklin, *supra* note 14, at 1360.

43. Franklin, *supra* note 14, at 1360.

44. Franklin, *supra* note 14, at 1360 (internal quotation marks omitted).

45. Franklin, *supra* note 14, at 1360.

46. Franklin, *supra* note 14, at 1361.

47. Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 963 (2013).

48. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 164 (2002).

ACLU had broadly promoted the advancement of all civil liberties.[49] By 1970, however, the organization's Board of Directors "declared women's rights to be their top legal and legislative priority."[50] It then created the Women's Rights Project (WRP), which was "based on the concept that sexual equality would be most effectively realized by systematic litigation in the courts that redressed discrimination against women."[51] In a shrewd move, the ACLU chose then-Columbia Law School Professor, Ruth Bader Ginsburg, to head the WRP.[52] Ginsburg's tenure and later ascent to the U.S. Circuit Court and eventually the Supreme Court marked a successful period of cause lawyering for the feminist movement.

By 1970, it became clear that women were a permanent and integral part of the labor force. Approximately fifty percent of women between the ages of twenty-five to fifty-four were employed.[53] The gradual influx of female participators in the labor force "gave them social visibility, and at the same time, facilitated their activities as public actors. Women's public activities appeared *ipso facto* to be a form of resistance, independent of the content of their enunciations."[54] At the same time, gender segregation in job occupations persisted. The Bureau of Labor Statistics reports that women filled 99.1% of secretary and typist positions and 98.8% of registered nurse positions in 1969.[55] In contrast, only 0.1% of engineers and 2.9% of lawyers and judges were women.[56] Hence, although women entered the work force at an unprecedented rate, they were still confined to jobs that had been customarily associated with their sex.

In 1970, the first National Conference on Women and the Law took place.[57] Feminists in the legal profession organized the forum, which brought together female law students and lawyers from around the country to participate in workshops and presentations in every area of law.[58] Most importantly, the Conference proved instrumental in furthering feminist jurisprudence, which arose as women began entering law schools in large numbers by the late 1960s.[59] Students would take the lessons of the Conference home with them, along with an expanded professional network of other progressive women.[60] This would later produce not only new

49. Campbell, *supra* note 48, at 163.
50. Campbell, *supra* note 48, at 164.
51. Campbell, *supra* note 48, at 164, 166.
52. Campbell, *supra* note 48, at 164.
53. Mosisa & Hipple, *supra* note 16, at 36.
54. Miyera Suarez, *Gender and the Law: The Social Science Perspective*, 7 AM. U. J. GENDER SOC. POL'Y & L. 307, 309 (1999).
55. Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 596 (1997).
56. *Id*.
57. Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past Into the Future*, 2 VA. J. SOC. POL'Y & L. 1, 2 (1994).
58. *Id*.
59. *Id*. at 3.
60. *Id*.

feminist scholarship, but also ideas on how to better advocate for women in the court system.

Congress reaffirmed its dedication to equal rights in the workplace by ratifying the Equal Employment Opportunity Act of 1972 (EEOA).[61] The legislature's attitude towards sex equality differed sharply from 1964, when the addition of "sex" to Title VII appeared little more than an afterthought.[62] In explaining the reasoning for the legislation, the House Committee Report on the 1972 Amendments stated: "discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable."[63] The debates on the House floor also reflected a renewed commitment to Title VII's promise for equal rights at work.[64] Since Congress knew employers would not heed a toothless organization, the Act granted the EEOC the authority to bring enforcement litigation in federal court and extended Title VII's coverage to public employers.[65]

The history of the women's movement in the 1960s and early 1970s sheds light on how social organizations and public mobilization influenced the courts' Title VII interpretation. However, these groups had no way of directly policing employers to ensure compliance with Title VII. Employers continued to resist gender desegregation in the workplace by heavily relying on conventional sex roles and the maintenance of the traditional family structure.[66] Furthermore, Title VII's text—like most statutory texts—was inherently vague. What did "because of sex" mean exactly? Did "sex discrimination" include pregnancy? What about sexual harassment? And although it was understood that intentional discrimination was forbidden, what about facially neutral practices that had discriminatory results? In order to elicit answers in their favor, feminists turned to the court system to advance sex equality in the workplace.

II.THE CASES THAT CHANGED THE LANDSCAPE IN EMPLOYMENT DISCRIMINATION

The arrival of Title VII opened the door to many sex discrimination claims and judicial interpretations. Although the House of Representatives approved the 1964 Civil Rights Bill by a vote of 290 to 130, and it passed with little challenge in the Senate, the legal battles had only begun.[67] Leaving the language of the statute ambiguous was not atypical of Congress; rather, it suggests that the legislature may have adopted a "defensive" strategy in order to preserve their political coalitions and

61. Franklin, *supra* note 14, at 1346.
62. Franklin, *supra* note 14, at 1346.
63. Franklin, *supra* note 14, at 1346.
64. Franklin, *supra* note 14, at 1347.
65. Franklin, *supra* note 14, at 1346.
66. Franklin, *supra* note 14, at 1347.
67. Bird, *supra* note 13, at 160.

personal statuses.[68] When a controversial issue reaches the forefront of American politics, lawmakers may deflect making precise decisions and instead leave the problem to the courts.[69] Federal judges, unlike politicians, are appointed for life, and thus do not face the same political risks that other political actors do when they take strong stands on polemical subjects.[70] Thus, the transfer of Title VII from a partisan to a nonpartisan sector allows for the continuation of policymaking without the peril of political accountability.[71]

For instance, Mark Graber's description of the Sherman Antitrust Act of 1890 and its consequent judicial interpretation illustrates this political strategy.[72] In the years following the Reconstruction era, politicians realized the economic and political necessity of some centralized effort to curb the power of trusts and monopolies.[73] However, party moderates were unable or unwilling to agree on the extent to which the national government could regulate industry monopolies, and thus drafted and passed the Sherman Act with vague language.[74] Rather than specify guidelines, "Sherman and other senators insisted that such a task must be left open for the courts to determine in each particular case."[75]

The same approach taken in the Sherman Act's ratification can also be seen in the passage of Title VII. The statute did not define "sex" or "discrimination," and the legislative history reveals that Congress "did not reach any consensus about their post-enactment viability."[76] During the floor debates, opponents of the sex amendment argued that such a provision would undermine protective labor legislation.[77] Advocates agreed with this reasoning to some extent: the inclusion of "sex" in Title VII *would* outlaw protective labor legislation because most of it only protected men's rights in better paying jobs.[78] Still other proponents insisted that protective labor legislation could coexist with Title VII, due to an important distinction between "differentiation" and "discrimination."[79] Realizing that the statute risked not passing if the language was made more specific, Congress approved the statute without providing any insight into its terminology.[80] Although many lamented its ambiguity, in hindsight,

68. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35, 40 (1993).
69. *Id.* at 42.
70. Graber, *supra* note 68, at 41.
71. Graber, *supra* note 68, at 43.
72. Graber, *supra* note 68, at 45.
73. Graber, *supra* note 68, at 51.
74. Graber, *supra* note 68, at 45.
75. Graber, *supra* note 68, at 52 (internal citations omitted).
76. Franklin, *supra* note 14, at 1330.
77. Franklin, *supra* note 14, at 1330.
78. Franklin, *supra* note 14, at 1330.
79. Franklin, *supra* note 14, at 1330.
80. Franklin, *supra* note 14, at 1332.

congressional uncertainty "reminds us that there was no consensus in the mid-1960s about which forms of regulation qualified as discrimination 'because of sex.'"[81] Instead, that type of determination "required normative judgments about how far the law should go" in encouraging sex equality in the workplace, a responsibility Congress ultimately left to the two other branches.[82]

The Supreme Court made its first normative judgment about workplace gender norms in the 1971 case, *Phillips v. Martin Marietta Corporation.*[83] The plaintiff, Ida Phillips, responded to a job listing Martin Marietta sent out to attract factory assembly workers.[84] The company rejected Phillips's application on the grounds that it did not hire women with school-aged children.[85] Phillips then commenced an action under Title VII alleging that she had been denied employment because of her sex.[86] The Supreme Court overturned the Fifth Circuit, finding that the employer failed to prove that its policy of not hiring women with school-aged children but hiring men with same-aged children was a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[87] Thus, while the lower courts accepted Martin Marietta's unqualified explanation that mothers with small children had conflicting family obligations, the Supreme Court set a new standard by requiring actual evidence that such characteristics negatively impacted the business enterprise.[88]

The decision in *Martin Marietta* appears to be a feminist victory only at a superficial level. Realistically, it left the door open for lower courts to reinterpret the bona fide occupational qualification ("BFOQ") affirmative defense in ways favorable to discriminating employers.[89] As long as employers could substantiate their argument that their sex discriminating policies were a BFOQ, then such policies could be upheld as valid even under Title VII.[90] The *per curiam* opinion stated that "the existence of . . . conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man" could provide a successful basis for the BFOQ.[91] Thus, what the Court gave, it then took away: it suggested

81. Franklin, *supra* note 14, at 1332-33.
82. Franklin, *supra* note 14, at 1332-33.
83. Franklin, *supra* note 14, at 1356.
84. Franklin, *supra* note 14, at 1356.
85. Franklin, *supra* note 14, at 1356.
86. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971).
87. *Id.* at 544.
88. *Id*.
89. Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 207 (2007).
90. *Id*. at 206.
91. *Martin Marietta*, 400 U.S. at 544.

that family obligations, which traditionally impacted women more than men, could still justify sex discrimination in the workplace.[92]

In the same year, however, the Court held that disparate impact claims could be brought under Title VII, a notable triumph for minority employees, though that triumph did not specifically belong to women.[93] Willie S. Griggs, an African-American male, along with other African-African employees, worked for Duke Power Company in its lowest paying division, the Labor department.[94] In 1965, a year after the Civil Rights Act became official, the company "abandoned its policy of restricting Negroes to the Labor Department" and instead "required a completion of high school [as a] prerequisite to transfer from Labor to any other department."[95] The company also added a further requirement for new employees to "register satisfactory scores on two professionally prepared aptitude tests."[96] Griggs and his fellow African American coworkers brought suit against Dukes Power Company for racial discrimination under Title VII, asserting that both requirements disqualified African Americans at a substantially higher rate than white applicants.[97]

In nullifying the company's policy, the Court first looked to Congress's purpose in enacting Title VII.[98] It determined that, "under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[99] Furthermore, if an employment practice which operates to exclude African Americans "cannot be shown to be related to job performance, the practice is prohibited."[100] The facts revealed that neither the high school completion requirement nor the general aptitude tests bore a demonstrable relationship to successful job performance.[101] Since both conditions negatively affected African Americans—a minority group who traditionally received inferior education in segregated schools—the Court unanimously struck down the company's policy as a violation of Title VII.[102]

Griggs was an important victory for minority groups. The "business necessity" standard imposed upon employers set a substantial barrier to discriminatory practices, since employers could no longer implement an artificial policy that "operate[d] invidiously to discriminate on the basis of

92. Franklin, *supra* note 14, at 1356.
93. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
94. *Id.* at 426.
95. *Id*. at 427.
96. *Id.*
97. *Id.* at 426.
98. *Id.* at 429.
99. *Id.* at 430.
100. *Id*. at 431.
101. *Id.*
102. *Id*. at 432.

racial or other impermissible classification."[103] However, failure of an employer's "business necessity" defense did not automatically render good news for female plaintiffs. In *Dothard v. Rawlinson*, a female applicant was rejected for a position as a correctional counselor because she failed to meet the minimum 120-pound weight requirement of an Alabama statute.[104] Rawlinson, the appellee, filed a sex discrimination claim against the Alabama Board of Corrections for unlawful sex discrimination.[105]

Dothard was the first case where the Supreme Court decided and approved an employer's bona fide occupational qualification defense, despite holding that the business necessity defense failed.[106] The appellants argued the weight and height requirements were job related because the minimums were necessary in order to be effective correctional counselors.[107] However, in finding Alabama's weight and height requirement would exclude 41.13% of women ages eighteen to seventy-nine yet only less than one percent of males,[108] the Court rejected the employer's business necessity defense because "the defendants did not provide appropriate evidentiary support for what 'amount of strength' a guard needed to perform effectively or what height or weight would ensure that a guard possessed the requisite strength."[109] The majority criticized the appellant for failing to offer statistical analysis or evidence in order to justify the statutory standards.[110]

The Court did not stop there, however. Given that twenty percent of male prisoners were spread throughout the penitentiaries' facilities,[111] the majority found that "a woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood."[112] Additionally, the probability that "inmates would assault a woman because she was a woman would pose a threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[113] It was suggested that, "if the job-related quality that appellant identified is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly."[114] The Court thus gave

103. Gary A. Moore & Michael K Braswell, *"Quotas" and the Codification of the Disparate Impact Theory: What Did Griggs Really Say and Not Say?*, 55 ALB. L. REV. 459, 463 (1991).
104. Dothard v. Rawlinson, 433 U.S. 321, 323 (1977).
105. *Id.*
106. Yiyang Wu, *Scaling the Wall and Running the Mile: The Role of Physical-Selection Procedures in the Disparate Impact Narrative*, 160 U. PA. L. REV. 1195, 1208 (2012).
107. *Id.* at 331.
108. *Dothard*, 433 U.S. at 329-30.
109. Wu, *supra* note 106, at 1208.
110. Wu, *supra* note 106, at 1208.
111. *Dothard*, 433 U.S. at 335.
112. *Id.*
113. *Id.* at 336.
114. Wu, *supra* note 106, at 1208 (quoting *Dothard*, 433 U.S. at 332).

employers an "out" through the BFOQ defense. Accordingly, the Court's decision went beyond addressing disparate impact and concluded that sex discrimination under these circumstances was legal: A person's womanhood alone could undermine the responsibility a correctional counselor was expected to undertake.[115]

In a famous dissent, Justice Marshall criticized the majority's decision and insisted that the height and weight requirements violated Title VII.[116] He found the dangerous nature of a guard's occupation irrelevant and pointed out the Court's failure to identify any evidence in the record "to support the asserted likelihood that inmates would assault a woman because she was a woman."[117] Even if the majority argued that the reasoning was "common sense," it still perpetuated romantic paternalism by taking away the woman's choice to decide for herself whether she was able to perform the job.[118] In short, the Court preserved one of the old myths about women—"that women . . . are seductive sexual objects. The effect of the decision . . . is to punish women because their very presence might provoke sexual assaults."[119] Marshall warned that "the pedestal upon which women have been placed has . . . upon closer inspection, been revealed as a cage."[120] *Dothard* remains the only gender-based disparate claim the Supreme Court has heard.[121]

Five years later, the Court also upheld an employer's disability plan that denied women benefits for disabilities arising from pregnancy.[122] Here, the policy openly discriminated against pregnant women, thus the petitioners brought a disparate treatment claim under Title VII.[123] Respondent General Electric provided nonoccupational sickness and accident benefits to its employees as part of its total compensation package.[124] Petitioners, however, did not prove that the exclusion of pregnancy benefits was mere "'pretex[t]' designed to effect an invidious discrimination against the members of one sex or the other."[125] Although only women could become pregnant, the Court found it was "significantly different from the typical covered disease or disability."[126] The majority also ignored the EEOC guideline stating that "[d]isabilities caused or contributed to by pregnancy. . . and recovery therefrom are, for all job-

115. *Dothard*, 433 U.S. at 336.
116. *Id*. at 340 (Marshall, J., concurring).
117. *Id*. at 345 (internal quotations omitted).
118. *Id*. at 345 (Marshall, J., concurring).
119. *Id*.
120. *Id*. at 345 (citing Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20 (1971)) (internal quotations omitted).
121. Wu, *supra* note 106, at 1207.
122. General Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976).
123. *Id*.
124. *Id*. at 128.
125. *Id*. at 136.
126. *Id*.

related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."[127] The Court reasoned that Congress did not grant the EEOC authority to promulgate rules or regulations, and thus judges were not bound by its guidelines.[128]

Women criticized *Gilbert* for adhering "to traditional gender norms respecting women's primary role as mothers rather than workers. Feminists argued that employers should share the costs of pregnancy-related disability, just as they did the costs of other forms of physical disability. Anything short of equal treatment would reinforce sex-role stereotypes."[129] Female activists were not the only ones outraged by the Court's ruling. In response to the controversial decision and public discontent, Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), its first official criticism of a Title VII judicial interpretation.[130] The PDA—intended to supplement the "because of sex" provision in Title VII—redefined illegal sex discrimination to include discrimination "because of or on the basis of pregnancy, childbirth, and related medical conditions."[131]

To be sure, Congress does not "overrule" prior Court decisions lightly. The legislature must "enact statutory language that supersedes or 'overrides' the decision . . . Overrides often track relatively closely the specific holding or factual application of the decision they seek to supersede."[132] This argument holds true for the relationship between the PDA and *Gilbert.* The first clause of the Act rejected the Court's formalist interpretation of sex equality, while the second clause illustrated the legislature's direct response to the fact pattern at issue in the case.[133] Overrides in general serve a critical function in the legislature's interchange with the courts. Passing overrides offers Congress "a direct means to send follow-up signals to the courts that aim to repair flawed statutes, reconcile discordant statutory constructions, and reverse errant judicial decisions."[134] Congress hence ended its legislative deference to the

127. Gilbert, 429 U.S. at 140-41 (citing 29 C.F.R. § 1604.9(b) (1975)).

128. *Id.* at 141.

129. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 423 (2011).

130. *Id.* at 431.

131. *Id.* (citing the PDA, which additionally provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs." 42 U.S.C.A. § 2000e(k) (2012). The PDA did not require all employers to have fringe benefits, but simply did not allow the exclusion of such benefits to pregnant women.)

132. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 531 (2009).

133. Dinner, *supra* note 129, at 431.

134. JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 4-5 (Stanford University Press, 1st ed. 2004).

Court when it felt the judiciary had misinterpreted the purpose behind Title VII.

That same year, another favorable decision towards feminists was handed down. The Supreme Court invalidated an employer's policy that discriminated on the basis of sex. In *City of Los Angeles Department of Water & Power v. Manhart*, plaintiffs were female employees who were required to contribute larger portions to pension funds than male employees on the grounds that women as a group live longer than men.[135] The Court acknowledged that women, a class that lives longer than men, but was equally true that not all "individuals share the characteristic that differentiates the average class representatives."[136] An individual woman may not live as long as the average man and many men outlive the average women.[137] Because Title VII made it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment because of such *individual's* race, color, religion, sex, or national origin" the statute's inherent language revealed that a true generalization about the class was inadequate reasoning to discriminate against "an individual to whom the generalization does not apply."[138]

Feminists obtained another labor victory with *Washington County v. Gunther*, which prohibited the County of Washington, Oregon from paying female guards in the female section of the county jail lower wages than it paid the male guards in the male section.[139] At issue was whether the Bennett Amendment precluded respondents' claim of intentional sex discrimination regarding depressed wages.[140] The Bennett Amendment attempted to reconcile Title VII with the Equal Pay Act, stating that "it shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages paid" as long as such differentiation was "due to a seniority system, a merit system, a system which measures earnings by quantity or quality of production; or a differential based on *any other factor other than sex*."[141] Since Washington County did not assert any of these four defenses, the Bennett Amendment did not bar respondents' claims of discriminatory under-compensation.[142]

Despite these legal triumphs for women, it was not until 1986 that the Supreme Court finally heard a case regarding the contentious issue of sexual harassment in the workplace. In *Meritor Savings Bank v. Vinson*, a female bank employee brought a sexual harassment suit against her former

135. City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702, 704 (1978).
136. *Id.* at 707-08.
137. *Id.* at 708.
138. *Id*. at 708.
139. Washington County v. Gunther, 452 U.S. 161, 163–64 (1981).
140. *Id.* at 166.
141. *Id.* (emphasis added).
142. *Id.* at 181.

employer and supervisor under Title VII.[143] Mechelle Vinson contended that her supervisor and harasser, Sidney Taylor, made repeated demands upon her for sexual favors, and although she initially declined, she acquiesced for fear of losing her job.[144] Meritor eventually terminated her for taking excessive leave.[145] The Bank attempted to refute Vinson's claim by arguing that Title VII only dealt with "tangible loss of an economic character, not purely psychological aspects of the workplace environment."[146] The Court, however, did not believe the statute should be construed so narrowly. Unlike the majority in *Gilbert*, the justices relied on the EEOC guidelines, which declared that "sexual harassment" was a form of sex discrimination actionable under Title VII.[147] Accordingly, the Court held that a plaintiff could establish a sex discrimination claim by proving that such discrimination created a hostile or abusive work environment.[148]

One of the divisive issues about *Meritor* was the admission of Vinson's "sexually suggestive conduct" as evidence against the "unwelcome" provision in sexual harassment claims.[149] Vinson argued that such proof should be ruled inadmissible, analogizing sexual harassment to rape in that "evidence of prior unchastity or sexual relations with others is generally considered more prejudicial than probative."[150] The Supreme Court rebuffed this line of reasoning and instead found the testimony of "Vinson's sexually provocative speech or dress to be obviously relevant to the question of whether she found particular sexual advances unwelcome."[151] However, women sometimes use certain behavioral mechanisms to appear attractive merely because "attractiveness" can have economic consequences: "offers of employment and promotions may in many instances turn on a woman's appearance. Many women have been led to believe that success in their careers depends on an appearance of sexual receptivity."[152]

Price Waterhouse v. Hopkins, decided in 1989, illustrates feminists' dilemma in defining what it means to be an "ideal" woman in the labor force. Ann Hopkins was a senior manager employed at Price Waterhouse when she was nominated for partnership in 1982.[153] She was the only

143. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986).
144. *Vinson*, 477 U.S. at 60.
145. *Id.*
146. *Id.* at 64 (internal quotations omitted).
147. *Id.* at 65.
148. *Id.* at 66.
149. Victoria T. Bartels, *Meritor Savings Bank v. Vinson: The Supreme Court's Recognition of the Hostile Environment in Sexual Harassment Claims*, 20 AKRON L. REV. 575, 583 (1987).
150. *Id.* at 584.
151. Bartels, *supra* note 149, at 584 (internal quotations omitted).
152. Bartels, *supra* note 149, at 585.
153. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989).

woman proposed for partnership at the time out of eighty-eight candidates.[154] The partners who backed Hopkins consistently praised her for her character and her accomplishments within the firm; at the same time, she was also criticized for being too abrasive with staff members.[155] Price Waterhouse cited her unsatisfactory interpersonal skills as its justification for withholding the partnership from her.[156] The lower court found that some of these criticisms derived from the fact that she was a woman.[157] The plurality ruled that sex stereotyping might have played a part in the evaluation of Hopkins as a candidate for partnership, which meant that the district court's findings were not clearly erroneous.[158] Even if the employer's proffered reason about Hopkins's interpersonal skills was true, Price Waterhouse could avoid liability "only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken gender into account."[159]

Although a victory for Hopkins, the Supreme Court gave much leeway to the employer in its defense against a mixed motive sex discrimination claim. The plurality rejected both lower courts' holdings that "the employer must show by *clear and convincing evidence* that it would have made the same decision without the discrimination,"[160] thus granting employers a complete affirmative defense to liability. Furthermore, the Court failed to clearly define the legal doctrine of stereotyping and its contours. For example, it said that even though the case before it was strong, that fact "did not induce it to place limits on the possible ways of proving that stereotyping played a motivated role in an employment decision and expressly declined to decid[e] here which specific facts, standing alone, would or would not establish a plaintiff's case."[161] It also seemed to employ a "we'll-know-it-when-we-see-it" approach to sex stereotyping: "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at a charm school.'"[162] Although the circumstances surrounding *Price Waterhouse* led to a decision favorable to the plaintiff, lower courts were still left with no guidance on how to discern illicit sex stereotyping.[163]

154. *Hopkins*, 490 U.S. at 233.
155. *Id.* at 234.
156. *Id.* at 236.
157. *Id.* at 235. Evidence revealed that "one partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at a charm school.'" *Id.*
158. *Id*. at 255.
159. *Id*. at 258.
160. Beth L. Singletary, Note, *Price Waterhouse v. Hopkins: Clarification of the Standard of Causation, Burden of Proof, and Liability in Title VII Employment Discrimination Cases*, 41 MERCER L. REV. 1097, 1111 (1990) (emphasis added).
161. Kerri Lynn Stone, *Clarifying Sex Stereotyping*, 59 U. KAN. L. REV. 591, 607 (2011) (internal quotations omitted).
162. *Id.*
163. *Id.* at 608.

The Court's decision in *Price Waterhouse* sparked enough controversy to elicit another response from Congress, which used its override power once more. The ruling "eviscerated the spirit of Title VII by allowing an employer to escape liability even when it is shown that he is guilty of discriminatory conduct."[164] Consequently, both houses of Congress passed the Civil Rights Act of 1991, which reversed five Supreme Court employment discrimination decisions, including a partial reversal of *Price Waterhouse*: if a plaintiff was successful in establishing a mixed motive claim, the employer's defense would only limit damages, not act as a complete defense to liability.[165] Additionally, the proposed law provided for "retroactive application to fact situations that occurred before the bill became law and also to cases then pending on appeal."[166] However, the bill's success was short-lived, as then-President George H. W. Bush vetoed it and Congress failed to muster enough votes to override the veto.[167] The President embraced the goal of eliminating discrimination, but reasoned that the 1990 Act created inducements for quotas.[168] Although the bill did not in fact endorse quotas, opponents were concerned that the proposed legislation provided overly complicated new procedural rules and imposed the burden of proof on employers.[169] Rather than risk costly litigation, opponents argued employers would institute quotas instead.[170]

Despite the presidential veto, legislators persisted in creating a new civil rights bill. On the first day of the next Congress, House representatives introduced the Civil Rights and Women's Equity in Employment Act of 1991, which "added two more Supreme Court cases to the list of pro-employer Court decisions the new legislation would correct."[171] The Bill passed in the House, but fell flat in the Senate.[172] Finally, both Congress and the President reached a compromise and enacted Senate Bill 1745, eventually known as the Civil Rights Act of 1991.[173] The 1991 Act partially overturned *Price Waterhouse*, stating that "'an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a

164. Nola Zevnick & Ronni Davis, Note, *Price Waterhouse Revisited: Will the Civil Rights Act of 1991 Cure the Defects*, 15 WOMEN'S RTS. L. REP. 87, 96 (1993).

165. Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924, 948 (1993).

166. *Id.*

167. *Id.*

168. *Id.* at 924–25.

169. *Id.*

170. *Id.* at 925.

171. *Id.* at 926.

172. Caryn Leslie Lilling, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA LAB. L.J. 215, 218–19 (1991).

173. Jeffrey A. Blevins & Gregory J. Schroedter, *The Civil Rights Act of 1991: Congress Revamps Employment Discrimination Law and Policy*, 80 ILL. B.J. 336, 336 (1992).

motivating factor for any employment practice, even though other practices also motivated the practice."[174] The new statute ensured no employer could escape liability if a discriminatory factor played any role in the employer's decision-making; the affirmative defense outlined in *Price Waterhouse* could only be used to limit damages.[175] In addition, the 1991 Act codified the *Griggs* model of disparate impact analysis,[176] thus reaffirming the government's commitment to reducing employment discrimination.

III. ANALYZING THE CASES AND THEIR IMPACT ON SOCIAL POLICIES

The Supreme Court, while sometimes appreciated for its non-partisan and independent nature, is also often criticized for its inability to enforce important decisions. In the context of employment discrimination, however, Title VII empowered the judicial system through the availability of damages. In cases of unlawful intentional discrimination, the statute provides that an aggrieved party may obtain back pay for up to two years preceding the filing of the charge,[177] compensatory and punitive relief,[178] and attorney's fees and costs in addition to declaratory or injunctive relief and reinstatement.[179] As more cases began to filter in after the enactment of Title VII, employers began to experience firsthand the costliness of discriminatory practices.

Over time, the practice of intentional sex discrimination dwindled. Thanks to class action litigation, "policies and practices that effectively had excluded minorities from the workforce were struck down as violative of the statute. Orders requiring the hiring or advancement of protected groups, as well as substantial back pay awards, encouraged employers to examine and reevaluate their employment and promotion criteria."[180] Between 1970 and 1979, "nearly twelve million more women entered the labor force."[181] The influx of females into the workforce in the mid-twentieth century made it economically impractical for employers to openly discriminate against women. It became more socially acceptable for women and mothers to work outside the home.[182] This dramatic increase in female workplace participation was due in large part to legal

174. Zevnick & Davis, *supra* note 164, at 99.
175. Zevnick & Davis, *supra* note 164, at 99.
176. Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation–How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 3 (1993).
177. 42 U.S.C. § 2000e-5(e)(3)(B) (2012).
178. 42 U.S.C. § 1981a(a)(1) (2012).
179. 42 U.S.C. § 2000e-5(g)(1), (k) (2012).
180. Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1304 (1990).
181. Bridge, *supra* note 55, at 591.
182. Bridge, *supra* note 55, at 591.

protections against sex discrimination in employment provided by newly enacted federal laws[183] and judicial precedent.

As the cases have illustrated, the Supreme Court attempted to clarify and enforce Title VII in various ways, but some interpretations were not always aligned with the social policies Congress intended to propagate. The aftermath of *Gilbert* and *Price Waterhouse* resulted in later government intervention, but those too had varying results. For instance, although the Civil Rights Act of 1991 toughened the standard for employer liability in mixedmotive cases, it did not define "job-related" and "business necessity" in its attempt to address disparate impact claims.[184] Following the Act's passage, "courts have developed at least four tests for 'job related' and 'business necessity.'"[185] Additionally, the Act allowed for recovery of punitive damages, but the Supreme Court effectively barred punitive damages as long as employers tried to comply with the law in good faith.[186] To make matters more confusing, the statute did not include a "good faith" exception and the Court failed to define what it exactly means.[187] Thus, the ambiguity of both Congress and the Supreme Court has continued to leave much interpretation up the lower courts instead of creating a bright-line rule.

The varying successes and failures for feminists and women's rights in the workplace can be attributed to the very nature of the American court system: adversarial legalism. According to American legal historian Robert Kagan, adversarial law has two salient characteristics. Firstly, it involves legal contestation, where "competing interests and disputants readily invoke legal rights, duties, and procedural requirements, which is backed by recourse to strong legal penalties, litigation, or judicial review."[188] In employment discrimination, the competing interests invoked minorities' statutory rights versus employers' interests of business efficiency and productivity. Ideally, the system has allowed single plaintiffs—who traditionally do not have the same monetary resources as a large-scale employer—to obtain justice due to any violation of their rights.

The second significant characteristic of adversarial legalism is litigant activism, a "style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and gathering of evidence are dominated by disputing parties who act primarily through lawyers."[189] This means that employment lawyers are able to forge creative avenues and expose loopholes in order to obtain a favorable

183. Bridge, *supra* note 55, at 591-92.
184. BARNES, *supra* note 134, at 13.
185. BARNES, *supra* note 134, at 14.
186. BARNES, *supra* note 134, at 14.
187. BARNES, *supra* note 134, at 14.
188. ROBERT KAGAN, THE CONCEPT OF ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 9 (Harvard University Press, 2003).
189. *Id*. at 9.

decision. The lack of bright-line rules can thus be advantageous for plaintiffs since facts in each case will differ. However, adversarial legalism is a double-edged sword. Its positive side promotes "openness to new ideas" and "an ability to challenge governmental and corporate arbitrariness,"[190] but by the same token, litigation can be too costly for plaintiffs to pursue,[191] and the lack of a clear rule translates into high levels of legal unpredictability.[192]

Given the pitfalls of the dual-sided nature of adversarial legalism, the point of this research is not to overthrow the system or to strictly rely upon the legislature, but to better understand the give-and-take between the legislature and the courts for the future of sex discrimination litigation. Though the decision in *Wal-Mart v. Dukes* was considered by some to be a defeat for women, it does not mean that women's rights in the workforce will be curbed. Since the Supreme Court's decision, the plaintiffs amended their class action and returned to federal district court.[193] Judge Charles R. Breyer rejected Wal-Mart's motion to dismiss the case and upheld the plaintiffs' right to proceed as a class.[194] However, on August 2, 2013, Judge Breyer eventually denied the plaintiffs' motion seeking certification for three regional classes consisting of 150,000 current and former Wal-Mart and Sam's Club employees.[195] The plaintiffs have since filed a petitioned with the Ninth Circuit to hear an appeal of the order.[196]

In another recent class action case, *Ellis v. Costco,* federal judge Edward M. Chen certified a class of current and former Costco employees who alleged that "the wholesale giant failed to promote women to management positions at a rate commensurate with male employees."[197] Judge Chen meticulously outlined the differences between the employees in *Ellis* versus those in *Dukes*, the most important distinguishing factor being that, "[u]nlike in *Dukes*, which the Supreme Court concluded merely identified the delegation of discretion (*i.e.*, the absence of a policy), here Plaintiffs identify specific practices and a common mode of guided discretion directed from the top levels of the company."[198] *Ellis* will

190. KAGAN, *supra* note 188, at 23.
191. KAGAN, *supra* note 188, at 104.
192. KAGAN, *supra* note 188, at 16.
193. Impact Fund, *Federal Court Gives Green Light to Dukes v. Wal-Mart Gender Discrimination Case*, Sept. 22, 2012, http://www.impactfund.org/images/photos/12Dukes%20v%20Wal-Mart%20Motion_NR922.pdf.2012 (last visited Jan. 17, 2014).
194. *Id.*
195. Impact Fund, *Wal-Mart Employees Continue Pursuit of Class Certification,* http://impactfund.org/?page_id=64 (last visited Jan. 17, 2014).
196. *Id.*
197. Impact Fund, *Ellis v. Costco*: Federal Court Certifies Class, Distinguishes *Dukes*, Sept. 26, 2012, http://www.impactlitigation.com/2012/09/26/ellis-v-costco-federal-court-certifies-class-distinguishes-dukes/ (last visited Jan. 17, 2014).
198. Ellis v. Costco, No. 04-3341 (N.D. Cal. Sept. 25, 2012).

therefore serve as significant guidance for lower courts in the post-*Dukes* era.

The beauty (and terror) of adversarial legalism is that a single case will not shatter or validate a social movement, as was shown in *Dothard*, *Gilbert*, and *Dukes*. Both successes *and* failures serve as an impetus for change. For instance, the Equal Rights Amendment, a proposed amendment to the U.S. Constitution that would guarantee equal rights for women, has been repeatedly rejected in Congress despite several attempts to pass it over the past several decades. Senator Robert Menendez (R-CA) reintroduced the bill to Congress on March 5, 2013, and it is currently referred to the Committee on the Judiciary.[199] Although sex discrimination in the labor force is only one driving factor behind the amendment, the mounting presence of women in the workplace, and even in Congress, has given them a louder voice and more political power than ever before. Thus, even though the courts did not single-handedly change societal traditions, such changes would not have been possible with the judicial system.

IV.CONCLUSION

The history of Title VII and its subsequent judicial clarifications granted women like Dukes and her fellow respondents the ability to bring lawsuits against powerful corporate employers. At the same time, the Supreme Court's ruling against the respondents speaks to the recent hostility against class action claims.[200] By discouraging class action claims for employees, unjustly treated workers "do not generally bring their claim individually . . . [P]ossible explanations for this phenomenon include the cost of litigation, fear of individual involvement in such suits, and retribution from the employer."[201] As lower courts apply the Supreme Court's precedent, either lawyers will be forced to find creative ways around class action opposition or Congress may have to step in to clarify the issue.

As we have seen, grassroots organizations, Congress, and the courts all play important roles in altering social policies within our society. In the context of sex discrimination in the workplace, the second-wave feminist movement and the historic entry of women in the labor force first called for gender equality in the employment arena. Once the legislature responded to the outcry for social justice, it turned over Title VII to judges to fine-tune its ambiguity. Injured parties then took their claims to court and set in motion a series of momentous cases that would further define sex discrimination and promote equality. When necessary, Congress would

199. S.J. Res. 10, 113th Cong. (1st Sess. 2013).
200. Rachel Tallon Pickens, *Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Class Actions*, 83 U. DET. MERCY L. REV. 71, 73 (2006).
201. *Id.* at 87.

step in and exercise its override power to correct judicial interpretations incongruent with legislative purpose. History has shown that, despite the deficiencies and inefficiencies of both the legislature and the judiciary, the interaction between these two branches of government will remain essential for instituting social policies, for better or worse.