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Horizontal Jurisprudence and Sex Discrimination

by

JEAN WEGMAN BURNS*

Some of the most highly charged issues today involve questions of sex discrimination in the workplace. Debates over these issues are not confined to scholarly legal journals but occur in bars, on factory floors, in the popular press, on talk radio, and at the proverbial office water cooler. Views are strongly held and emotionally defended. All too often, reason is displaced by rhetoric, and discussions turn into polemics, name-calling, and argument by epithet. Voices are raised, but views are rarely

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1. One can even debate whether the proper term is gender discrimination or sex discrimination. See Leslie Bender, Sex Discrimination or Gender Inequality, 57 FORDHAM L. REV 941, 946 (1989) (arguing that sex and gender should be distinguished); Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 9-18 (1995) (asserting that treating sex and gender as interchangeable has led to confusion in law); Richard A. Epstein, Gender is for Nouns, 41 DEPAUL L. REV 981, 982 (1992) (maintaining that the use of "gender" instead of "sex" carries the substantive message that differences between women and men are social phenomena, not biologically based); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. PA. L. REV 1, 5 (1995) (arguing that there is no principled way to distinguish sex from gender); Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV 797, 800 (1989) (asserting that sex and gender are different). Even Justice Scalia has entered into this debate. See J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting) (suggesting that "sex discrimination" is the proper term because it refers to physical distinctions between the sexes whereas "gender" refers to the cultural aspect of being feminine or masculine). Because I do not consider this to be a critical issue for purposes of this Article, I will use the terms interchangeably.

2. See Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 3 (1988) (noting that “feminism” can be “a dirty word” that generates substantial hostility); Anita Bernstein, Law, Culture, and Harassment, 142 U. PA. L. REV 1227, 1308 (1994) (observing that, even within feminist circles, there is name calling); Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 HARV L. REV 926, 947-48 (1990) (characterizing feminist writers as “poobahs” who are “either a bunch of bumbleheads or a barreled up of bad writers,” and their work as “polysyllabic sludge” and “jargon and gibberish”); Cathleen Decker, Affirmative Action: Why Battle Erupted, L.A. TIMES, Feb. 19, 1995, at
changed. If anything, the intensity of the debate appears to be increasing, as workers feel less secure in their jobs and consequently less willing to make accommodations for those whom they view as potential workplace competitors.  

A number of factors contribute to the complexity of the debate on sex discrimination in employment. First, the issues are not bipolar in the sense that one votes either "for" or "against" gender equality. Instead, there are myriad views, falling along a continuum and merging into one another. People can agree that the overall goal of equality in the workplace is worth pursuing but advance widely different ideas regarding how to achieve that goal. Indeed, this disparity of views is probably nowhere  

A1 (quoting a California politician as equating racial and gender preferences with the Nazi attempt to destroy the Jews).  

3. See Katharine T. Bartlett, Tradition, Change, and the Idea of Progress in Feminist Legal Thought, 1995 Wis. L. Rev. 303, 303-04 (noting the current backlash against feminism); Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U. Colo. L. Rev. 975, 999 (1993) (observing that judicial decisions regarding sexual equality can spark resentment and a powerful backlash); Richard Delgado, Rodrigo's Sixth Chronicle: Intersections, Essentials, and the Dilemma of Social Reform, 68 N.Y.U. L. Rev. 639, 656-57 (1993) (noting that the feminist movement has created backlash against black women); Beth L. Green & Nancy F. Russo, Work and Family Roles: Selected Issues, in Psychology of Women 685, 688 (1993) ("Evidence suggests that as the proportion of women increases in a traditionally male field, the attitudes of males toward women change from neutral to resistant. . . . [S]ome researchers suggest that lack of job security underlies men's negative responses to 'new women' in blue-collar occupations."); Gillian K. Hadfield, Rational Woman: A Test for Sex-Based Harassment, 83 Cal. L. Rev. 1151, 1152 (1995) (describing sexual harassment cases as "a lightning rod for sharply divergent views" and an "unusually fervent public debate" about the place of women in the workplace); Margaret J. Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1704 (1990) (stating that progress on women's issues frequently leads to a backlash); Thomas B. Edsall, Understanding Oklahoma, Wash. Post, Apr. 30, 1995, at C1 ("[A]ffirmative action and sexual harassment policies have helped create for many men a sense of private siege . . . ."); Jonathan Freedman, Civil Right—The Graying of a '60s Dream, L.A. Times, July 3, 1994, at M5 ("In the economic decline of the 1990s, blue-collar whites feel like an endangered species and sullenly resent concessions for minorities and women."); Lower the Volume, Newsday, Dec. 18, 1994, at A47 ("People are angry—angry and scared. . . . The influx of women and minorities as competitors in the work force has unsettled—and unemployed—a lot of white males.").  

A recent example of the fear of unearned preferential treatment is found in California's Proposition 209, passed by voters in November 1996. Seeking to end affirmative action by the state, Proposition 209 provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31. The Ninth Circuit has held Proposition 209 to be constitutional. Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1448 (9th Cir. 1997). Cathleen Decker notes that much of the increasing concern about affirmative action can be linked to economic worry and feelings of economic vulnerability. See Decker, supra note 2.  

4. The fear of being taken as extremist leads many women, including working women, to deny that they are feminists. See Marion Crain, Between Feminism and Unionism: Working
greater than in the feminist community, where there are numerous overlapping, sometimes conflicting, theories and proposals. Second, issues of gender equality in the workplace affect vastly more people than many other legal issues. If I don't own any stock, I may not care about the particulars of the securities laws. Similarly, if I'm not running a lending institution, I likely will be uninterested in the priority rules for secured creditors. In contrast, rules regarding gender and the workplace affect both women and men, professionals and blue collar workers, employers and existing and prospective employees, and family members who are dependent, wholly or partially, on a worker's income. In addition, the vast variety of workplaces, employers, and employees produces an infinite number of factual variations. Each workplace presents a unique set of


circumstances and problems, problems that may vary from one department to another. Moreover, employees vary not just in sex, but also in employment rank, race, education, economic class, age, temperament, and background. As a result, the discrimination and harassment problems faced by one employee at one workplace may be vastly different from those encountered by another employee at another firm.

While the complexity of the issues makes finding concrete plans of action difficult, both scholars and lay people increasingly agree on one matter: Title VII of the Civil Rights Act, with its one-size-fits-all rules, has not cured the problem of gender inequality in the workplace. Jobs continue to be highly segregated by gender, and harassment remains a serious problem.

Even more fundamentally, there is no agreement on the underlying premises of Title VII: that gender equality in employment is a worthwhile and achievable goal. After two decades with Title VII, a fair number of people remain unconvinced that sexual equality in employment can ever be successfully achieved through law. Some contend that government interference in private employment matters is doomed to failure and that Title VII should be repealed insofar as it applies to sex. At the other end of the spectrum are those commentators who argue that society needs more government action, that, by itself, Title VII can never solve the problem of sexual inequality in the workplace. They seek legislation or other action to change underlying structures in society and the work-

7. 42 U.S.C. § 2000e (1994). Title VII prohibits an “employer,” defined as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person,” from discriminating in “compensation, terms, conditions, or privileges of employment, because of [an] individual’s race, color, religion, sex, or national origin.” Id. at §§ 2000e(b) and 2000e-2(a).

8. See infra notes 59-61 and accompanying text.

9. See, e.g., Richard A. Epstein, The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake, 108 HARV. L. REV. 1085, 1087 (1995) (arguing that all civil rights laws regulating private employment should be repealed); Posner, supra note 6, at 1321-24 (predicting that sex discrimination will decline without need for federal laws); Jennifer Roback, Beyond Equality, 82 GEO. L.J. 121, 132 (1993) (contending that “the pursuit of equality of incomes is a flawed social goal”). See also infra text accompanying notes 77-81.
place. In between are those scholars who believe Title VII is a largely adequate solution but needs modification to be more effective.

Moreover, even among those people who believe sexual equality is a goal worth pursuing, there is little agreement or discussion—beyond suggestions for changing Title VII’s elements or burdens of proof—regarding how to make concrete progress on the issues. Instead, scholars frequently debate such theoretical matters as whether there is an “essential” woman, whether women speak with a distinct female voice, and whether women have a “false consciousness” in the sense of identifying with their oppressors, internalizing their views, and appearing content with their own subordination. See MACKINNON, supra note 10, at 137; Kathryn Abrams, Ideology and Women’s Choices, 24 GA. L. REV. 761, 761 (1990); Delgado, supra note 3, at 653; Mari J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 63 S. CAL. L. REV. 1763, 1777 (1990).

10. See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED 32-45 (1987) (arguing that sex equality cannot be achieved through enforcement of antidiscrimination laws); Gillian K. Hadfield, Households At Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89, 98-102 (1993) (arguing that Title VII cannot reach the structural problems that women face); Williams, supra note 1, at 835 (arguing that there need to be structural changes in the workplace to accommodate women).

11. See authorities cited infra notes 71-76. See also Abrams, Title VII, supra note 5, at 2535-38 (arguing for increased enforcement of Title VII); Hadfield, supra note 3, at 1157 (suggesting a new test for sexual harassment under Title VII); Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?, 31 HOU. L. REV. 1517, 1528-46 (1995) (describing four flaws in the current application of Title VII); Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 HASTINGS L.J. 471 (1990) (arguing that courts should treat sexual stereotyping as discriminatory per se); Rhode, supra note 5, at 1193-95, 1202 (asserting that Title VII focuses too much on the employer’s intent and that the law also suffers by leaving untouched an employer’s inaction); Mark Seidenfeld, Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth, 21 RUTGERS L.J. 269 (1990) (advocating use of a comparable worth approach).

12. See, e.g., ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 3, 76 (1988) (arguing that many feminist theorists, consciously or unconsciously, have assumed an essential woman who is white and middle-class); Abrams, Title VII, supra note 5, at 2485 (summarizing anti-essentialist critiques in feminist theory); Cain, supra note 5, at 838-41 (noting that post-modern feminists reject the notion of an “essential woman”); Lucinda M. Finley, Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson For Sex and Gender Discrimination, 12 GA. ST. U. L. REV. 1089, 1092-1103 (1996) (giving examples of judicial decisions reflecting sexual essentialism); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 590-615 (1990) (arguing that experiences of black women show there is no “essential woman”); Kenneth L. Karst, Woman’s Constitution, 1984 DUKE L.J. 447, 481-85 (suggesting that they are some characteristics that are basic to most women); Linda C. McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1182-88 (1992) (describing debate); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 4 (1988) (suggesting there is a “true nature” of women).
whether women are better off stressing their similarities to or their differences from men.\textsuperscript{14} Largely absent is any proposal for translating theory into concrete advances in the workplace.\textsuperscript{15}

In this Article, I argue that Title VII's failure to produce more concrete advances or even agreement about whether gender equality is desirable is due, in large part, to the vertical nature of the statute, in both its development and testing. Title VII was vertically developed in that when Congress added sex in Title VII, Congress was acting in a top-down fashion, without seeking input from those who would be subject to its rules.\textsuperscript{16} Exacerbating the developmental flaws is the fact that Title VII is also tested in a largely vertical way. Although the federal circuit and district courts can and do consider each other's decisions, the ultimate interpreter of Title VII is the Supreme Court. As the sole court on its level, the Supreme Court functions vertically in that it alone ultimately decides each issue of statutory interpretation.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{13} Compare CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-4 (1982) (arguing that women have a different voice and ethic than men), Freedman, supra note 4, at 965-66 (suggesting that women have distinct perspectives), Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1319-20, 1331 (1987) (suggesting there is a female voice), Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. MIAMI L. REV. 29, 44-46 (1987) (asserting that women lawyers deal with disputes differently than men), Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 580-613 (1986) (predicting that feminine perspective in judiciary will change constitutional interpretations), and West, supra note 12, at 13-42 (arguing that women have a different moral voice than men), with Sandra D. O'Connor, Portia's Progress, 66 N.Y.U. L. REV. 1546, 1557 (1991) (stating that to ask "whether women attorneys speak with a 'different voice' than men is a question that is both dangerous and unanswerable"), Rhode, supra note 5, at 1190 (contending that discussions of a woman's "different voice" offer a simplified view of women), Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, 70 TEX. L. REV. 109, 140-47 (1991) (criticizing different-voice feminism), and Williams, supra note 1, at 802-21 (criticizing different-voice theory). See also McClain, supra note 12, at 1188-1203 (describing debate).
\item \textsuperscript{14} See infra notes 91-99 and accompanying text.
\item \textsuperscript{15} See Bartlett, supra note 3, at 325 (noting that there is a significant gap between insight and practice); Becker, supra note 3, at 990 (observing that we do not know what equality between the sexes might look like or how to get there); Delgado, supra note 3, at 658 ("You need more than theory to explain what's wrong; you also need to explain what we ought to be doing."); Epstein, supra note 9, at 1085-86 (noting that there's strong disagreement about whether and how to pursue affirmative action); Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 751 (1994) (discussing the disagreement among feminists about strategy and tactics); Margaret J. Radin, Affirmative Action Rhetoric, in REASSESSING CIVIL RIGHTS 131-49 (Ellen F. Paul et al. eds., 1991) (observing the difficulty in moving from goal of equality in employment to practical problem of making progress on issue).
\item \textsuperscript{16} See infra notes 49-51 and accompanying text.
\item \textsuperscript{17} See infra notes 39-41 and accompanying text.
\end{itemize}
Superficially such vertical movement seems natural and proper with respect to important social, if not moral, issues. We tend to see progress as putting one step in front of the other, as forward movement. Furthermore, civil libertarians have long viewed the federal government as properly taking the lead in civil rights. All too often, when left to themselves, private parties and states have proven slow to change. Thus, some scholars regard any call to rely on state or local action as a coded invitation to roll back the clock on civil rights. Yet, given the inability of Title VII to solve gender issues, the time has come to look beyond the borders of employment law and to consider the jurisprudential approach of other legal disciplines. In particular, Title VII’s vertical jurisprudence needs to be supplemented with a horizontal approach to rulemaking and rule-testing.

By horizontal rulemaking, I mean the involvement of many voices, whether in the form of drafting committees or courts, in the creation of standards. It is bottom-up in structure, with those who will be subject to the rules participating in the drafting stage. By horizontal rule-testing, I mean the interpretation of rules by numerous, equally sovereign tribunals, who build upon and learn from one another’s successes and failures. With both rule-development and rule-testing, a horizontal approach typically begins with different, conflicting ideas, and then, through a cross-fertilization process, a gradual movement toward the better-working

18. See infra note 198 and accompanying text.
19. See Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1130, 1231-33 (1986) (arguing that state courts tend to be less receptive to federal constitutional claims than federal courts); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1121-22 (1977) (arguing that federal judges are better interpreters of federal constitutional rights than state judges).
20. Erwin Chemerinsky has been quoted as saying:
   States’ rights arguments have been used throughout American history as a guise by conservatives to achieve their objectives in a rhetorically appealing manner. They used it in the 1830s as a justification for slavery, in the 1860s to argue against Reconstruction, in the early part of this century to argue against national labor standards, in the middle of the century to defend racial segregation, and now, late in this century, are using it to eliminate federal programs and policies with which they disagree. Richard C. Reuben, The New Federalism, A.B.A. J., Apr. 1995, at 76, 81 (quoting Erwin Chemerinsky).
21. I limit my discussion in this Article to sex discrimination for the simple reason that women, although they differ in their views, comprise over 50% of the population. While not all adult women work outside the home, sex discrimination in employment will still affect most of them. See supra note 6 and accompanying text. I leave for another day the question of whether a horizontal strategy would be helpful in dealing with issues of race, ethnicity, or age discrimination, i.e., issues in which a smaller group is seeking change.
strategies. Philosophically, it is Hegelian in structure, with a clash of ideas and approaches on the beginning, lower level leading to a synthesis that embodies a consensual and superior result. That result, in turn, is tested and questioned, and over time modified as more ideas emerge, situations change, or experiments are tried.

In law, examples of horizontal jurisprudence can be found in the Uniform Commercial Code, state common and statutory law, and negotiated agency regulations. Each of these is instructive in demonstrating somewhat different aspects of a horizontal approach to law development or testing. Taken together, they show the concrete benefits a horizontal jurisprudence offers.

At first blush, gender issues in the workplace seem light years apart from the UCC, state common and statutory law, and administrative regulations. In some respects, they are. Yet the very attributes that make employment issues so intractable—the multitude of potential solutions and the effect of the issues on so many people in so many different settings—make a horizontal approach particularly suitable. This is not to say that the UCC, the common law, or the experiences of administrative agencies can or should be transplanted wholesale into the area of employment law. Most particularly, I am not recommending abandoning Title VII or enacting a uniform state law of employment discrimination. Nor am I advancing a political argument for states’ rights.

What I advocate is supplementing—not supplanting—Title VII with a horizontal approach. Unlike the UCC and administrative experiences, the adoption of a horizontal approach to employment issues will result in less centralized, less uniform strategies for resolving gender issues in the workplace. It will encourage different employers and employees to develop and try different strategies to deal with the specific problems they face at their workplace. Some strategies will succeed, others will fail. Still others will change over time. Gradually firms and employees can learn from one another’s successes and failures and move toward real progress on these complex issues.

Adding a horizontal approach to employment issues will also allow for preventive action, something that Title VII largely ignores. While an employer may set up management training programs to avoid Title VII liability, the federal law is basically reactive in providing an aggrieved

worker a right to litigate after a dispute arises.23 In contrast, a horizontal approach encourages proactive dialogue aimed at dispute avoidance. Furthermore, rather than a litigation format pitting an individual employee against an employer, a horizontal approach encourages group work and an airing of a variety of views, a strategy that will benefit both employees and employers.24 A horizontal approach is also fully consistent with much current feminist theory in that it is an inclusive, bottom-up style of problem solving that focuses on specific situations.25

Part I of this Article gives a brief overview and examples of vertical and horizontal jurisprudence. Part II describes the largely vertical development and testing of Title VII, and outlines the confused case law and theoretical disputes spawned by this vertical jurisprudence. Part III describes three examples of horizontal jurisprudence: the Uniform Commercial Code, state common and statutory law, and negotiated administrative regulations. While each of these legal areas has different strengths and weaknesses, together they demonstrate the key aspects of a horizontal approach. Finally, Part IV shows how specific aspects of a horizontal jurisprudence can be applied to issues of gender equality in the workplace in order to make concrete progress on these issues.

I. Horizontal Versus Vertical Legal Development

In the simplest sense, there are two extremes for effecting legal change: the vertical, monarchy approach and the horizontal, town-meeting approach.26 These two styles affect both the development and testing of rules.

In a purely vertical system, rule-development is strictly a top-down enterprise. The vertical lawmaker may be the wise platonic philosopher

23. See infra notes 104-11 and accompanying text.
24. See infra notes 239-42 and accompanying text.
25. See infra notes 243-47 and accompanying text.
king or the irrational tyrannizing despot. In either case, the lawmaker issues rules without the prior advice or consent of her subjects, limited only by the monarch's desire to avoid overthrow or beheading. In addition, the purely vertical lawmaker is also free to act without considering what other lawmakers, be they monarchs or democracies, have done in similar situations. Unfettered by either advice from her subjects or the views of other rule makers, the vertical lawmaker has complete freedom to create whatever rule she wants for a given problem.

The monarch is also a prime example of a vertical rule-tester in that the monarch is the final arbiter of questions regarding the scope, interpretation, and application of any given law. As in her establishment of rules, the monarch issues such legal interpretations without any need to consider what other tribunals in other jurisdictions are doing with similar issues.

At the other jurisprudential extreme is the purely horizontal approach to law development and testing. With respect to the development of rules, the horizontal approach differs in two key respects from the vertical. First, with horizontal rulemaking, ideas percolate up from the bottom, with the governed having a significant voice in the development of rules. The most obvious example is a town meeting, where an issue is thoroughly aired, each person is given an opportunity to be heard, and the participants are equal in voting status. Second, in horizontal rulemak-

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27. See Cooter, supra note 26, at 1644 (suggesting that, in modern times, only communist dictatorships practiced central, vertical planning as a total system).
28. See id. at 1645 (noting that in a vertical, centralized system, "[i]nformation and motivation move along a one-way street from top to bottom").
29. In corporate management, a vertical structure has been described as one where the CEO sits "atop the hierarchy" and "looks down on order, symmetry, and uniformity," while the "front-line managers look up at a phalanx of controllers whose demands soak up most of their energy and time." Ghoshal & Bartlett, supra note 26, at 87. See also Byrne, supra note 26 (describing a vertical corporate structure as one in which "[t]he critical decision-making power resides at the top").
30. See Andrew F. Popper, An Administrative Law Perspective on Consensual Decision-making, 35 ADMIN. L. REV. 255, 256 (1983) ("At a base level, a consensual system involves decisionmaking by those most affected by the outcome or result of the matter at hand . . . .")
31. Historically, the town meeting, with decisions made by the citizens themselves, as opposed to their representatives, was the ideal of the antifederalists. The federalists, on the other hand, saw the key to good government to be getting good representatives for the people and then keeping these representatives "above the fray" and removed from citizen pressures. See Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 35-45 (1985).
32. For descriptions of the procedures used in typical town meetings, see CLARENCE M. WEBSTER, TOWN MEETING COUNTRY 48-49, 228-35 (1945); James K. Hosmer, Samuel Adams, Man of the Town-Meeting, in JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 10, 56-59 (Herbert B. Adams ed., 1884). The town meeting worked best
ing, often there are multiple, equally sovereign rule makers that not only experiment with various approaches to a problem but also endeavor to learn from and build upon the experiences of others. For instance, going back to the town-meeting example, while each town is free to make its own rules, each is also likely to seek to learn about the successes and failures of other towns. Thus, a horizontal approach typically involves a cross-fertilization of ideas and strategies. As different plans are tried, discarded, or improved upon, better solution(s) gradually emerge. Thereafter, these “solutions” are tested, critiqued, and modified as yet more ideas emerge.

Just as rules can be developed horizontally, so too can there be horizontal rule-testing. This occurs in its purest form when there are different, sovereign tribunals that have an opportunity to review a given issue and these tribunals actively seek to learn from the approaches taken in other jurisdictions. In ruling on any given legal question, each tribunal is free to adopt, modify, or flatly reject the solutions of other tribunals. In this way, horizontal rule-testing, like horizontal rule-development, encourages a cross-fertilization of ideas and an experimentation with various approaches. Over time, a consensus is likely to form around better-functioning approaches, which, in turn, will be subject to challenge, reexamination, and change.

In short, in both rule-development and rule-testing, a horizontal jurisprudence is dialectic and Hegelian in nature. Ideas clash and merge, and gradually better-working strategies emerge. These better-working strategies are then themselves subject to critique and challenge and changed as needed.


33. In describing horizontal networks within corporations, Ram Charan states: “Over time, the free flow of information allows networks to become self-correcting. New information inspires debate, triggers action . . . .” Charan, supra note 26, at 114. See also Bahrami, supra note 26, at 169 (observing that participatory management styles “are more adaptable to changing objectives and environments than rigidly structured bureaucratic organizations”); Ghoshal & Bartlett, supra note 26, at 89 (noting that in any horizontal management approach, “[m]istakes will be made, but if a person is essentially right, the mistakes he or she makes are not nearly as serious in the long run as the mistakes management will make if it is dictatorial and undertakes to tell those under its authority how they must do their jobs’’ (quoting William L. McKnight, former head of 3M)).

34. See HEGEL, supra note 22.
In this country, most current public and private lawmaking schemes fall somewhere between the purely vertical and purely horizontal models. In the private sector, a sole proprietor is a vertical rule developer, limited only by laws and the need to compete for workers and customers. In the public arena, a Presidential executive order represents a largely vertical rule-development. The President who wishes to be re-elected will certainly consider the views of the electorate but is not required to follow the will of the majority in issuing such an order.

With respect to law-testing, the Supreme Court is probably the most obvious example of a vertical tribunal in our government. (Some would argue that the Court at times acts as a vertical law maker.) The justices, unelected and with life tenure, are largely immune from citizen pressure. They may bring their life experiences and common sense to bear on is-

35. See Cooter, supra note 26, at 1646 (stating that “[m]any scholars have detected a movement in modern history from decentralized [horizontal] to centralized [vertical] law”).

36. A slightly less vertical private rule maker is the board of directors of a large, publicly held corporation. Board members consult with one another and then make decisions on behalf of the corporation. Directors typically act with little direct input from shareholders but do so with the knowledge that the shareholders can remove or not reelect them. See William T. Allen, The Evolution of Corporate Boards, 16 CORP. BOARD 1 (1995).

37. Congress describes Presidential executive orders as: “directives or actions by the President . . . [which] may have the force and effect of law . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.” HOUSE COMM. ON GOV’T OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957). See also DANIEL R. MANDELMAN ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS (3d ed. 1990) (noting that although the executive order “is not authorized [or] even acknowledged in the United States Constitution” the practice of issuing such orders has “existed from the earliest days of the Republic at the federal level”); Cooter, supra note 26, at 1645 (stating that “the paradigm for centralized [vertical] lawmaking is a decree, in which government officials formulate the state’s goal, embody the goal in a rule, and force people to conform to it”).

38. Although the President does not have to determine the will of the majority of citizens before issuing an executive order, he is not free to act arbitrarily. See Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (holding that the President’s power to issue an executive order “must stem either from an act of Congress or from the Constitution itself”) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).

39. See infra notes 41 & 68 and accompanying text. See also THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 137 (1989) (reporting, as a general matter, that while a third of all Americans hold positive attitudes toward the Supreme Court, approximately the same number view the Court unfavorably).
sues, and, to varying degrees, they may consider the views of one another, other courts, legislators, scholars, and the public.\textsuperscript{40} However, apart from the briefs and arguments of the individual parties, the justices are largely insulated from lobbying by the groups likely to be affected by a ruling.\textsuperscript{41} Furthermore, as the sole court on its level, the Supreme Court

\textsuperscript{40} In some areas the legal standard requires the Court to consider public standards. \textit{See} e.g., \textit{Gregg v. Georgia}, 428 U.S. 153, 173 (1976) (stating that "an assessment of contemporary [public] values concerning the infliction of a challenged sanction" is relevant in determining whether the punishment violates the Eighth Amendment); \textit{Miller v. California}, 413 U.S. 15, 24 (1973) (holding that material is obscene if "the average person, applying contemporary community standards" would find that the work appeals to prurient interests and describes sexual conduct in a patently offensive way). \textit{See also} Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (stating, in ruling on legality of abortion restriction, that the Court must consider "the fact that for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their place in society, in reliance on the availability of abortion in the event that contraception should fail"); \textit{Marshall}, \textit{supra} note 39, at 31-32, 36-54 (describing instances in which the Supreme Court directly mentioned public opinion).

Some commentators contend that, by and large, Supreme Court rulings are reflective of the prevailing societal view. \textit{See} \textit{Marshall}, \textit{supra} note 39, at 78; \textit{Gerald N. Rosenberg}, \textit{The Hollow Hope} 13 (1991); Becker, \textit{supra} note 3, at 988 (suggesting that the justices' concern for public opinion deters them from taking bold steps); William N. Eskridge, Jr., \textit{Public Law from the Bottom Up}, 97 W. Va. L. Rev. 141, 165-66 (1994) (arguing that the Supreme Court is very interested in how its decisions will be received by society and that the inconsistency in Supreme Court decisions is reflective of changes in public opinion); Wojciech Sadurski, \textit{Conventional Morality and Judicial Standards}, 73 Va. L. Rev. 339, 340 (1987) (contending that all courts, including the Supreme Court, follow public moods, although sometimes with delays). Undoubtedly there is a good deal of truth in this view. The justices are part of society and inevitably are influenced by it. Moreover, they have a vested interest in having the public respect the Court as an institution, something that will obviously occur more often when Court decisions are in line with overall public opinion. Nonetheless, the Supreme Court will inevitably be an imperfect mirror of societal views. It has only nine members, most of whom are white, older males who come from the upper or middle classes. Moreover, their contact with the public is extremely limited.

\textsuperscript{41} Justice Antonin Scalia was recently quoted as saying: "I don't know what the most profoundly held beliefs of the American people are. I don't go to the neighborhood pub and raise a glass with Joe Six-pack." A.B.A. J., June 1996, at 16. \textit{See also} Graham v. Collins, 506 U.S. 461, 482 n.4 (1993) ("[L]awyers attempting to thrust egalitarian or humanitarian reforms on a reluctant society prefer to use the courts because lifetime-appointed federal judges are somewhat more insulated from the ebb and flow of political power and public opinion than legislators or executives.") (Thomas, J., concurring, quoting \textit{Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment} (1973)); \textit{Payne v. Tennessee}, 501 U.S. 808, 868 (1991) (arguing that the Supreme Court ought not consider public opinion in making its decisions) (Stevens, J., dissenting); \textit{Marshall}, \textit{supra} note 39, at 19 ("[T]he Supreme Court is quite insulated from mass public opinion; justices sit for life . . . and reversing Court decisions is seldom simple."); Jack M. Beermann, \textit{A Critical Approach to Section 1983 with Special Attention to Sources of Law}, 42 Stan. L. Rev. 51, 83 (1989) (arguing that Supreme Court justices often have a distorted view of the "real world"); Raoul Berger, \textit{Lawrence Church on the Scope of Judicial Review and the Original Intention}, 70 N.C. L. Rev. 113,
is free to issue legal interpretations with no horizontal, cross-fertilization from other tribunals.

On the other hand, examples of horizontal rule-development and testing are also found in the public and private sectors. In the private sector, companies can, and have incentive to, engage in horizontal rule-development by allowing workers to be included in making decisions. Or, horizontal development may occur among firms within an industry. For instance, one company may implement a new program and, if it succeeds, other firms may copy or enlarge upon it. Thus, some U.S. automobile manufacturers have experimented with the Japanese group approach to car assembly. Similarly, some airlines are mimicking

42. Analysts of management styles have noted the advantages of a horizontal, bottom-up structure in business. See Bahrami, supra note 26, at 169 (noting that allowing employees to have "a meaningful voice in the decisionmaking process not only leads to more accuracy in the work process, selection of better alternatives, and more willingness to change, but also gives a sense of belonging, achievement, growth, and recognition that is necessary for satisfaction, motivation, commitment, and higher long-term productivity improvement"); Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 HARV. L. REV. 1379, 1493 (1993) ("[S]tudies confirm that an increased workers' role in workplace decisionmaking tends to enhance workers' sense of responsibility and commitment to the decisions they help make and to enterprise goals more generally . . . .") (citation omitted); Byrne, supra note 26 (observing that a horizontal structure can avoid costly delays from disagreements and misunderstandings); Ghoshal & Bartlett, supra note 26, at 89, 93 (arguing that horizontal organizational structures, in which employees have input, are more efficient and responsive to market changes than vertical structures); Dorothy Leonard-Barton et al., How to Integrate Work and Deepen Expertise, HARV. BUS. REV., Sept.-Oct. 1994, at 121, 125 (noting that a horizontal management style empowers employees and "engenders a tremendous sense of project ownership and spurs team members to make remarkable achievements"); Dallas Gatewood, Working Managers Take in the View from Below, NEWSWEEK, Mar. 12, 1995, at 5 (describing movement toward peer and subordinate reviews of management); Wolfgang Muchau, People: Renschler Cuts Loose, FIN. TIMES, Jan. 8, 1996, at 11 (describing change in management style at Mercedes-Benz US from a top-down hierarchy to a horizontal organization structure); Kevin G. Salwen, Reich, Ivy League Thinker, Tries to Sell Ideas on Labor to Washington, WALL ST. J., May 5, 1993, at A24 (reporting that many management experts recommend that workers be part of decisionmaking and assembled into horizontal teams); Jeffrey A. Tannenbaum, Role Model, WALL ST. J., May 23, 1996, at R22 (stating that, within franchises, "'[h]ugely successful product ideas tend to come from the franchisees, rather than from down from the top of the chains. . . . The reason is simple: Franchisees . . . are much closer to the consumer pulse than are most officials at chains' headquarters.'" (quoting Andrew C. Selden, a franchising lawyer, and Dennis W. Hitzeman, a franchisee)). See also Cooter, supra note 26, at 1646 (arguing that a decentralized, horizontal approach is important for efficiency as economies and technologies become more advanced and complex).

43. See David J. Woolf, Note, The Legality of Employee Participation in Unionized Firms: The Saturn Experience and Beyond, 27 COLUM. J. L. & SOC. PROBS. 557, 602 (1994) (noting a need for U.S. automakers to be aware of Japanese management methods); Joseph B. White et al., Long Road Ahead: American Auto Makers Need Major Overhaul to Match the Japanese,
Southwest Airline's discount approach. In the public sector, federal and state legislatures act as horizontal lawmakers to the extent the legislators are subject to constituent pressure, permit interested parties to be heard on issues, debate issues, and share insights.

As will be discussed more fully in Part III, a horizontal testing of laws occurs among the state courts as each develops its common law. In


44. See Stanley Ziemba, Nimble Discount Airline Outpacing Wannabes, CHI. TRIB., July 3, 1995, at 1B (describing airlines that are imitating Southwest).

45. With respect to state legislatures, see infra Part III.B. The extent to which elected representatives actually respond to constituent pressure is debatable. Compare Becker, supra note 3, at 989 (observing that although legislators are mostly male, they are subject to direct pressure from female constituents), Eskridge, supra note 40, at 169-79 (arguing that, as a descriptive proposition, U.S. political bodies are responsive to societal pressures), and Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 900, 906 (1987) (asserting that the influence of special interest groups has been overstated); with W. Lawrence Church, History and the Constitutional Role of Courts, 1990 WIS. L. REV. 1071, 1093 (noting that members of Congress "seem to be achieving [a] sort of lifetime tenure" and "appear to be becoming less accountable to the voters," as well as being "practically immune to challenge"), Cooter, supra note 26, at 1644-45 (characterizing the U.S. environmental laws as examples of centralized, vertical lawmaking in that federal officials impose a system of quotas on business in a top-down fashion), and Michael A. Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567, 1579-83 (1988) (describing the influence of special interest groups on Congress). See also Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 229-33 (1986) (describing interest group theory of legislation); Fred H. Miller, The Future of Uniform State Legislation in the Private Law Area, 79 MINN. L. REV. 861, 864 (1995) ("The workings of Congress often produce an amalgamation of independent provisions derived from proposals of various groups, rather than synthesized legislation that is compatible with other laws or circumstances.").

46. A more cynical view of the likelihood of shared insights in Congress is given by William D. Warren, who describes a typical federal congressional hearing: "[R]epresentatives of interest groups making speeches to [a] subcommittee, whose members might or might not [be] in attendance. Roles [are] played; voices [are] raised. But no one . . . listen[s] because everyone [understands] that the real work [is] . . . done in private." William D. Warren, UCC Drafting: Method and Message, 26 LOY. L.A. L. REV. 811, 815 (1993). Fred Miller similarly states: "Most legislatures, including Congress, are politically focused, reactive groups. . . . Most legislators rarely formulate, draft, or extensively study the legislation themselves. . . . Most would . . . agree that when congressional staff drafts legislation largely on its own or pursuant to inadequate advice, the result is a technical nightmare . . . ." Miller, supra note 45, at 863-64. See also Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 858-59 (1992) (noting that legislators inevitably depend on staff members to review proposed legislation and read committee reports); Carlyle C. Ring, Jr., The UCC Process—Consensus and Balance, 28 LOY. L.A. L. REV. 287, 304-06 (1994) (observing that often Congress does not act until a crisis arises, legislative drafting is done by inexperienced staff members, laws are shaped by special interest groups, the hearing process is used for making statements rather than for sorting out facts, and the congressional process can be slow and result in stalemate).

47. See infra Part III.B.
issuing such decisions, the judiciary of each state is free to consider, and
then accept or reject, rulings from courts in other states on similar issues.
For instance, state judiciaries have looked to and built upon the rulings of
other state courts in areas as diverse as tort liability, fiduciary duty, and
choice of law doctrine. 48

II. Title VII: A Study in Vertical Jurisprudence

Title VII’s prohibition on sex discrimination in employment is a
prime example of vertical jurisprudence. This provision had virtually no
horizontal development and receives only limited horizontal testing.

With respect to law development, the inclusion of sex in Title VII
came about as “something of an accident” 49 with Congress adding sex to
the Title VII bill at the last moment. Moreover, Congress did so without
the benefit of hearings, studies of current business practices, testimony,
or prior legislation. 50 Neither business leaders nor labor representatives
presented evidence or even opinions on the issue. Thus, Title VII’s ap-
plication to sex discrimination was not a synthesis of or a considered de-
velopment from current business practices. Instead, the inclusion of sex
in Title VII was an almost completely vertical act by Congress and came
like the proverbial bolt from the blue. 51 Indeed, there is substantial evi-

48. See, e.g., Herbert v. Saffell, 877 F.2d 267, 274 (4th Cir. 1989) (looking to the com-
mon law of other states to determine a realtor’s duty to buyers in Maryland); Davis v. United
States, 716 F.2d 418, 426-27 (7th Cir. 1983) (looking to the law of other states to construe an
Illinois statute’s reference to “willful and malicious” acts). But see generally Michael H. Got-
tesman, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 GEO.
L.J. 1 (1991) (arguing there is too much disparity among the choice of law theories of the vari-
sous states). See also infra Part III.B.


50. See John J. Donohue, III, Prohibiting Sex Discrimination in the Workplace: An Eco-
nomic Perspective, 56 U. CHI. L. REV. 1337, 1338 (1989). Congress also had little in the way
of state laws to use as guidance in this area. As of 1964, 28 states had antidiscrimination laws,
but only two states’ laws prohibited sex discrimination. See 110 CONG. REC. 7214 (1964); Jo
Freeman, How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy, 9
LAW & INEQ. J. 163, 163 (1991). See also Henry H. Drummonds, The Sister Sovereign States:
Preemption and the Second Twentieth Century Revolution in Law of the American Workplace, 62
FORDHAM L. REV. 469, 496-503 (1993) (discussing state antidiscrimination laws); Susan M.
Mathews, Title VII and Sexual Harassment: Beyond Damages Control, 3 YALE J.L. &
FEMINISM 299, 302-04 (1991) (describing current state antidiscrimination laws, state worker
compensation laws, and state tort doctrine and concluding that none is an adequate remedy for
sexual harassment).

51. See Estrich, supra note 49, at 816. The first administrator of the Equal Employment
Opportunity Commission put it more bluntly and less politely when he said that the amendment
adding sex to Title VII was a “fluke” that was “conceived out of wedlock.” ROSENBERG, supra
note 40, at 252 (quoting the first administrator). This is not to say that, in making Title VII
dence that the Congressman who added sex to the bill did so simply in the hope that the inclusion would lead to the wholesale defeat of Title VII. 52

Not only was the inclusion of sex in Title VII made in a vertical, top-down fashion, the testing of the law is also largely vertical in structure. Title VII cases are brought predominantly in the federal courts, limiting interpretation of the act to the district and circuit courts. 53 While there is certainly some cross-fertilization among the federal judges as they consider case law from other circuits and districts, the relatively small number of federal circuits limits the amount of horizontal law-testing that is possible. Additionally, the final arbiter of any Title VII issue is the Supreme Court, which, as discussed earlier, acts as an almost purely vertical law-tester, having few contacts with the populace and no equally sovereign tribunals to which to look for ideas. 54 Instead, the view of any five justices establishes the official interpretation of Title VII, an interpretation that can be changed only by congressional action or another Supreme Court decision.

The testing of Title VII is further limited by the overwhelming predominance of middle- to upper-class white men in the federal judiciary. 55

applicable to gender, Congress was oblivious to societal trends, particularly the women's movement. Obviously the women's movement and the entry of more women into the workplace were critical to the inclusion of sex in Title VII. See Franke, supra note 1, at 15-24 (discussing the history of the women's movement that influenced Congress); Freeman, supra note 50, at 172-79 (describing legislative lobbying by women's groups prior to Title VII's passage). All laws, are, to a greater or lesser degree, reflective of societal view. However, the key words are: "to a greater or lesser degree." The influence of society on Congress' inclusion of sex in Title VII was on the "lesser" end of the spectrum.

52. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 278 (1992); ROSENBERG, supra note 40, at 252; Becker, supra note 3, at 1010; Estrich, supra note 49, at 816-17; Franke, supra note 1, at 14; Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1283-84 (1991). But see Freeman, supra note 50, at 164 (expressing skepticism of this proposition).

53. Prior to 1990, most courts believed that federal courts had exclusive jurisdiction over Title VII cases. See Roy L. Brooks, A Roadmap Through Title VII's Procedural and Remedial Labyrinth, 24 SW. U. L. REV. 511, 517 n.42 (1995) (discussing cases). However, in Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990), the Supreme Court held that federal courts share concurrent jurisdiction with state courts with respect to Title VII cases. See id. at 821. However, most plaintiffs continue to bring their Title VII suits in federal court. See Neuborne, supra note 19, at 1125-30 (noting that plaintiffs believe that federal courts provide a more hospitable forum for employment discrimination claims than do state administrative agencies or courts). See also Developments in the Law—Employment Discrimination, 109 HARV. L. REV. 1568, 1575 (1996) [hereinafter Developments] ("The federal courts, in particular, have assumed a greater role than the EEOC in shaping employment discrimination policy.").

54. See supra notes 40-41 and accompanying text.

55. See ROSENBERG, supra note 40, at 219 n.33 (reporting that "by the 1980s, women comprised less than 8 percent of both the federal and state judiciaries"); Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. CHI. 121
The result is that even if a federal judge does consider the case law from other federal courts, the cross-fertilization is usually limited to one white, middle-class male considering what another white, middle-class male has to say on the matter. While male judges may have varying professional backgrounds and political philosophies, one thing is certain: none has been a woman in the workplace.66

The result of Title VII’s vertical jurisprudence is abundantly evident. Among all groups—women and men, employers and employees, liberals and conservatives, lawyers and lay people—there is a disappointment with the law’s handling of sex discrimination claims.57 While there is no doubt


56. See ROSENBERG, supra note 40, at 219-22 (noting that “[t]here is a great deal of evidence that the courts, composed overwhelmingly of men, have had great difficulty taking sex discrimination claims seriously” and giving examples of modern instances of sex bias in court opinions) (footnote omitted); Kathrym Abrams, Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein, 41 DEPAUL L. REV. 1021, 1033 (1992) (observing that, because most are white males, judges inevitably have trouble determining how a “reasonable woman” would assess a situation); Becker, supra note 3, at 988 (stating that male judges inevitably look at the world from a male viewpoint and with greater awareness of the needs of men rather than women); Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 148 (discussing the problem that courts have dealing with claims of black women); Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1062 (1996) (stating that “[c]ourts have developed an ideological framework that draws upon and perpetuates traditional gender role stereotypes); Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10, 45-46 (1987) (noting that no judge can be impartial in the sense of being unaffected by one’s own perspectives and experiences); Deborah L. Rhode, The “No-Problem” Problem: Feminist Challenges and Cultural Change, 100 YALE L.J. 1731, 1769 (1991) (reporting that often courts look for a simple causal explanation for a complex employment pattern and use broad generalizations to characterize all women). See also Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 36-38 (1991) (discussing the difficulty courts have in understanding battered-women cases).

57. The disappointment with Title VII comes from both the critics and the supporters of the law. On one side, Richard Epstein, who advocates repealing Title VII with respect to sex, dismisses the federal employment laws as examples of a “fatal conceit” of those who believe an economy can be managed from the center. See Richard A. Epstein, The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss, 41 DEPAUL L. REV. 1041, 1054-55 (1992). See also Epstein, supra note 9, at 1085-86 (noting that there is strong disagreement about whether and how to pursue affirmative action). On the other hand, proponents of Title VII also admit it has fallen far short of producing gender equality in employment.
that the inclusion of sex in Title VII has benefited women (and some men),\textsuperscript{58} no one is fully satisfied with the results. As a statistical matter, there is no question that the law has failed to bring about gender equality or to eliminate sexual harassment in the workplace.\textsuperscript{59} Studies show that

\textit{See, e.g.,} Kathean T. Bartlett, \textit{Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality}, 92 Mich. L. Rev. 2541, 2542 (1994) (stating that despite the progress made under Title VII, the Civil Rights Act has never kept up with the expectations of scholars and has proven an inadequate tool to address certain issues); Franke, \textit{supra} note 1, at 87 (asserting that “the cutting edge of the Title VII blade has shown itself to be something less than razor-sharp in eradicating workplace sex discrimination”); Paetzold & Gely, \textit{supra} note 11, at 1548-49 (observing that Title VII has not been successful in eliminating sex discrimination in promotions).

58. Supporters of Title VII cite a number of beneficial results of the federal law, including: lowering entry barriers to certain jobs, see Paetzold & Gely, \textit{supra} note 11, at 1526-27; establishing a nationally uniform set of rules, see Donohue, \textit{supra} note 50, at 1347 (arguing that, by applying to all companies, Title VII precludes free-riding by one firm on advances made by another); Drummonds, \textit{supra} note 50, at 524-25 (noting that, in treating all employers alike, the uniform requirements of Title VII have a fairness component and also prevent states from trying to attract business by having different rules); hastening firms to take steps that, in the long run, would come about through market forces, see Donohue, \textit{supra} note 50, at 1348; increasing women’s self esteem, see \textit{id.} at 1349-51, 1354 (predicting that Title VII may increase self-esteem among working women, thereby increasing market efficiency, and may additionally increase self-esteem of women outside the paid workforce); Cass R. Sunstein, \textit{The Anticaste Principle}, 92 Mich. L. Rev. 2410, 2418, 2430 (1994) (stating that discrimination may lead women to invest less in education and training and to have less self-respect); encouraging women to work together on various issues, see Elizabeth M. Schneider, \textit{The Dialectic of Rights and Politics: Perspectives from the Women’s Movement}, 61 N.Y.U. L. Rev. 589, 613-29, 640-41 (1986) (arguing that legal advocacy can help women by airing problems, encouraging women to mobilize, increasing self-esteem, and testing different theories). \textit{But see ROSENBERG, supra} note 3, at 997 (suggesting that judicial decisions on matters like sexual equality can sap strength of women’s movement and mobilize opposition).

The strides women have made in employment during the last decades are not due solely to Title VII; other contributing factors include birth control, economic conditions, and better education. \textit{See} Claire Etahou, \textit{Women in the Middle and Later Years}, in PSYCHOLOGY OF WOMEN 213, 230 (Margaret W. Matlin ed., 2d ed. 1993) (noting increased number of jobs available, rising divorce rate, lessened household demands, and fewer children); Greene, \textit{supra} note 4, at 1263 (observing that there have been changes in the social matrix, such as birth control, universal education, and expansion of the work force); Posner, \textit{supra} note 6, at 1321-24 (noting that because the number of women in the workplace was increasing before the passage of civil rights laws, it is difficult to assess the impact of sex discrimination laws).

59. \textit{See} MacKinnon, \textit{supra} note 52, at 1285 (contending that the law has not proven particularly helpful to women). \textit{See also} Sunstein, \textit{supra} note 58, at 2426.

\[\text{It is not clear how much difference the law has made. The relative labor-market status of women has not changed much in the aftermath of judicial decisions. The difference between the earnings of women and of men was greater in 1980 than it was in 1955. . . . Women continue to face occupational segregation in the workforce, and the result is that women disproportionately occupy low-paying positions traditionally identified as female.}\]
many jobs continue to be segregated along gender lines, that even in those areas in which women and men hold similar jobs, women often receive lower pay and fewer promotions, and that sexual harassment remains prevalent. While some people conclude from this that there needs to be more Title VII enforcement (and perhaps additional legislation), other people, including some women, feel the entire "women's movement" has been a misguided failure that has excluded mainstream women and their everyday concerns. Other women feel the law has minimized the em-

Id. The statistics are collected in ROSENBERG, supra note 40, at 207-11; Crain, supra note 4, at 1913-14; Etaugh, supra note 58, at 231-32; Franke, supra note 1, at 87-88; Green & Russo, supra note 3, at 687-93; Sharon M. Oster, Is There a Policy Problem?: The Gender Wage Gap, 82 GEO. L.J. 109, 110 (1993); Paetzold & Gely, supra note 11, at 1519; Deborah L. Rhode, Occupational Inequality, 1988 DUKE L.J. 1207, 1208-10. Rhode concludes that, at the current rate, it will take 75-100 years to arrive at a sex-balanced workplace. See id. at 1210. See also Cynthia F. Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 FORDHAM L. REV. 291, 317-30 (1995) (giving statistics for women in law firms); Jane Friesen, Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation, 82 GEO. L.J. 31, 33-52 (1993) (discussing explanations for wage gap); Hadfield, supra note 10, at 91-95 (explaining theories of why women earn less than men); George Rutherglen, The Theory of Comparable Worth as a Remedy for Discrimination, 82 GEO. L.J. 135, 142 (1993) (noting that studies show that sex segregation in employment is more widespread and severe than racial discrimination). But see Richard A. Epstein, Some Reflections on the Gender Gap in Employment, 82 GEO. L.J. 75, 77-82 (1993) (questioning some of Friesen's data and conclusions). With respect to the role of pregnancy in creating and exacerbating the wage gap, see Samuel Issacharoff & Elyse Rosenblum, Women and the Workplace: Accommodating the Demands of Pregnancy, 94 COLUM. L. REV. 2154, 2160-71 (1994).

61. See Beverly H. Earle & Gerald A. Madek, An International Perspective on Sexual Harassment Law, 12 LAW & INEQ. J. 43, 44 (1993) (giving statistics on sexual harassment); Deborah Epstein, Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech, 84 GEO. L. J. 399, 403-04 (1996) (noting that sexual harassment has been called the most widespread problem faced by working women and giving statistics); Estrich, supra note 49, at 821-22 (giving statistics on sexual harassment); Hadfield, supra note 3, at 1171-72 (describing harm flowing from harassment and fear of harassment); Paul N. Monnin, Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412, 48 VAND. L. REV. 1155, 1158 (1995) (observing that "research indicates that sexual harassment remains a vastly under reported form of employment discrimination despite the fact that the incidence of sexual misconduct in the workplace is quite high"); Mary F. Radford, By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases, 72 N.C. L. REV. 499, 520 (1994) (giving statistics and noting that studies "make it difficult, if not impossible, to dispute . . . [that] sexual harassment . . . is a widespread, costly problem" in the U.S. workplace); Rhode, supra note 4, at 1195-96 (noting that sexual harassment remains pervasive).

62. Thus, some working women eschew the label "feminist." See supra note 4. Some commentators cite as a weakness in the feminist movement its lack of attention to the problems of women in lower economic classes. See Crain, supra note 4, at 1925-26; Kris Kissman, Brushing Off the Blue Collar Woman? Has the Women's Movement Ignored the Needs of Working Women?, 15 HUMAN RTS. Q. 36, 39 (1987); Richard Epstein accuses radical feminists of
ployment gains they have made. More than a few men feel threatened that they have been or could be the victims of an employer who bends over backwards to avoid a sex discrimination claim. Even among feminists there are a myriad of different theories and approaches.

Emotions run high, conversations quickly turn into angry exchanges, and all too often, people simply avoid the topic altogether, much as they have been taught to do with religion and politics at a social affair.

Even supporters of Title VII admit that the judicial application of the law to sex-related claims has been woefully inadequate. Courts appear able to deal effectively with only the most blatant instances of sexual discrimination or harassment. The more subtle cases have produced an array of ambiguous standards and frequently inconsistent rulings.

hubris in believing that they can transform the behavior and preferences of “ordinary men and women.” Epstein, supra note 52, at 271. Apparently, Epstein suffers from the hubris of believing that he knows who is an “ordinary” man or woman and what he or she prefers.

63. See sources cited supra note 3.

64. For authorities describing the various feminist theories, see supra note 5. See also Becker, supra note 3, at 1011 (“There is no consensus of the meaning of sex discrimination ... Nor is there any consensus about what [a world with perfect sexual equality] would look like or how to get there.”); David Cole, Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory, 8 HARV. WOMEN’S L.J. 59, 79 n.82 (1985) (“The term ‘feminism’ encompasses a wide range of political and personal stances.”); Harris, supra note 15, at 751 (noting that there is a disagreement among feminists about strategy and tactics); Issacharoff & Rosenblum, supra note 60, at 2178, 2192-99 (discussing division among feminists with respect to issue of pregnancy and employment); Daniel R. Ortiz, Feminism and the Family, 18 HARV. J.L. & PUB. POL’Y 523, 523 (1995) (noting that feminism “encompasses many sometimes conflicting movements”); Elizabeth M. Schneider, Feminist Jurisprudence, 1 COLUM. J. GENDER & L. 5, 6-7 (1991) (“There are many different feminist perspectives. Feminist theory is not unitary; there is no ... one politically correct feminist theory.”).

65. See supra note 59 and accompanying text. Because the law defines “employer” as a person who has “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year,” a fair number of employers remain outside the reach of the law. 42 U.S.C.A. § 2000e(b). See Walters v. Metropolitan Educ. Enter., Inc., 117 S. Ct. 660, 661-662 (1996) (holding that “employee” includes all workers with whom firm had employment relationship on day in question, regardless of whether employee worked or was compensated on given day); Developments, supra note 53, at 1647-62 (discussing temporary workers).

66. See Abrams, Title VII, supra note 5, at 2492-2526 (describing the difficulty courts have in dealing with complex cases, such as discrimination against a subgroup of women or discrimination involving members of the same subgroup); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1202 (1989) (noting “difficulties courts have in understanding how sexual harassment affects working women”); Karst, supra note 12, at 465-67 (observing that, absent intentional exclusion of women from a position, courts have difficulty dealing with sex discrimination cases); Rhode, supra note 4, at 1196 (asserting that the current federal laws miss all but the most egregious discrimination). With respect to gender biases of judges, see sources cited supra note 56.

67. See Radford, supra note 11, at 502 (noting that there are a “myriad” of unanswered questions in the area of sexual harassment in which lower courts have gone different ways); De-
ver, given the absence of legislative history regarding Title VII's application to sex, judicial decisions frequently smack of law-making with little input from those subject to the resulting rules.\textsuperscript{68}

Probably nowhere has Title VII spawned more confusion and debate than in claims of sexual harassment.\textsuperscript{69} Although the act itself says nothing about sexual harassment, in 1986 the Supreme Court ruled that Title VII prohibits sexual harassment as a form of discrimination.\textsuperscript{70} Rather than clarifying matters, this and subsequent Supreme Court decisions regarding sexual harassment have led to a plethora of unanswered questions. These questions include: the proper role and definition of consent (or, to use the judicially created word, "welcomeness");\textsuperscript{71} the level of severity or perva-

\textsuperscript{68} See Estrich, supra note 49, at 817 (describing legislative background); Franke, supra note 1, at 14-15 (noting that, given the lack of legislative history with respect to the inclusion of sex in Title VII, "many judges faced with interpreting the meaning and scope of the sex discrimination protections... believed they were writing on a blank slate"); Freedman, supra note 4, at 963-64 (arguing that, in dealing with issue of sexual equality, justices make normative-based decisions that reflect their personal views). See also Developments, supra note 53, at 1574 (observing that the Civil Rights Act of 1991, which amended Title VII, "created almost as many ambiguities as it clarified"). Title VII is certainly not the only area of the law in which the Supreme Court has been accused of lawmaking. See Beermann, supra note 41, at 52-53 (arguing that the Supreme Court's interpretations of the 1871 civil rights act, 42 U.S.C. § 1983 (1982), are really just the justices' personal views on the issues).

\textsuperscript{69} Various aspects of sexual harassment contribute to its confusing and complex nature. See Estrich, supra note 49, at 819-22 (observing that our society is still permeated by a gender double standard and that many people fear that small offenses will elicit lawsuits); Hadfield, supra note 3, at 1151 (noting that inquiry into sexual harassment is "laden with subjective value judgments" and that the individual harassment lawsuit often becomes "a microcosm for the larger social debate about what behavior is acceptable in the workplace"); Radford, supra note 61, at 521 (noting that men and women have significantly different perceptions of sexual harassment).


\textsuperscript{71} The concepts of welcomeness and unwelcomeness were introduced into the sexual harassment lexicon in \textit{Meritor}, where the Supreme Court said that the gravamen of the offense is that the sexual advances were "unwelcome." Meritor, 477 U.S. at 68. Courts require that the plaintiff prove unwelcomeness as part of her prima facie case. See Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1361 (7th Cir. 1994). The decision on this issue is obviously factual and often has an "eye-of-the-beholder" quality. See, e.g., Carr v. Allison Gas Turbine Div. of Gen. Motors, 32 F.3d 1007, 1010-11 (11th Cir. 1994) (reversing the district court's finding of welcomeness based on plaintiff's crude behavior and language). Scholars have criticized the propriety of including unwel-
siveness the plaintiff must show,\textsuperscript{72} whether a reasonable person or even a reasonable woman test is workable;\textsuperscript{73} the appropriateness of admitting un-welcomeness as an element of the offense. \textit{See} Estrich, \textit{supra} note 49, at 826-30 (arguing that un-welcomeness is an unnecessary element that improperly shifts the focus to the victim and penalizes both the quiet woman who does not loudly voice her displeasure “like a man” and the assertive woman who may not be believed if she says she was offended by lewd behavior); Franke, \textit{supra} note 1, at 92-93 (noting that sexual harassment claims have been barred when the woman working in a male-dominated workplace acted like “one of the boys”); Mathews, \textit{supra} note 50, at 314 (asserting that the element of consent leads to questions such as whether silence may be construed as consent and whether some objections by a plaintiff can be disregarded because of her past conduct); Radford, \textit{supra} note 61, at 513-20, 531-32 (collecting cases and contending that the burden should be on the harasser to show affirmative evidence of welcome-ness). \textit{But see} Epstein, \textit{supra} note 52, at 354 (arguing that consent must be an element in a sexual harassment case in order to distinguish consent from coercion).

\textsuperscript{72} In \textit{Meritor}, the Supreme Court held that, to be actionable, the sexual harassment must be sufficiently severe and pervasive to alter the employment and create an abusive working condition. \textit{See Meritor, 477 U.S. at 65-66. Accord} Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it unreasonably interferes with an employee's work performance [and] . . . [t]he effect on the employee’s psychological well-being.”). Here again, decisions are highly fact-specific and vary with the eye of the beholding court. \textit{See}, e.g., Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996) (holding that a supervisor’s comments were sufficient to support a finding of hostile environment); McKenzie v. Illinois Dept. of Transp., 92 F.3d 473, 480 (7th Cir. 1996) (holding that three sexual comments over three months did not constitute sexual harassment); Creamer v. Laidlaw Transit, Inc., 86 F.3d 167, 169 (10th Cir. 1996) (holding there was no showing of hostile environment where co-worker kissed plaintiff, made inappropriate touches, lifted her by the waist, and pinned her against a pool table); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430-31 (7th Cir. 1995) (holding that numerous sexual comments over seven months were not sufficient to show hostile environment); Spain v. Gallegos, 26 F.3d 439, 447-48 (3d Cir. 1994) (holding that a rumor that plaintiff was having affair with her boss was sufficient to show hostile environment); Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991) (refusing to follow Seventh and Sixth Circuit decisions regarding whether conduct was sufficiently severe to constitute hostile environment).

Like the unwelcomeness requirement, the pervasiveness inquiry has also come under criticism from scholars. For instance, Susan Estrich argues that the pervasiveness requirement was added out of a fear of too many lawsuits and that it is unfair to women because it allows behavior to escape liability if the employer can show it is widespread in society. \textit{See} Estrich, \textit{supra} note 49, at 833-45. Furthermore, in judging what is tolerable in “society at large,” the court looks at a society that has been shaped by men. \textit{See id.} In addition, Estrich notes that, in the hostile environment case, the requirement that the pervasive and hostile nature of the workplace be shown objectively, i.e., with respect to all women at the workplace, is at odds with the unwelcomeness requirement, which focuses on the particular complaining woman and that even if a workplace is objectively hostile, an employer can escape liability by arguing that the particular complaining woman welcomed it. \textit{See id. See also} Abrams, \textit{supra} note 66, at 1202-07 (noting that because men control the workplace, their view of sexual harassment is typically considered “normal,” even though the man’s view may be different from the woman's); Bernstein, \textit{supra} note 2, at 1259 (observing that the U.S. view of sexual harassment as a discrete, individual tort places the plaintiff in a difficult position in that an occurrence cannot be both a tort and a routine condition of work); Epstein, \textit{supra} note 61, at 416-17 (arguing that courts have given too narrow an interpretation to hostile environment); Hadfield, \textit{supra} note 3, at 1166-67 (contending that the
evidence of the woman's past behavior; the circumstances under which an employer may be held liable for harassment by a supervisor, co-worker, or non-employee, and the applicability of the act to same-sex harassment.

Pervasiveness inquiry is unworkable because it requires a normative judgment in each case about the level of acceptable behavior.

73. Some lower courts use a "reasonable person" test while others use a "reasonable woman" standard to judge whether the harassing behavior is sufficiently severe and pervasive to alter the employment setting and to create a hostile environment. Compare Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996) (holding that the district court properly used a reasonable person test), and DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) (same), with Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (approving the use of a reasonable woman standard). Both approaches have spawned a number of critics. See Abrams, supra note 56, at 1031-33, 1036 (noting that the "reasonable woman" test glosses over the diversity among women and typically is employed by white male judges who lack any direct access to how a "reasonable woman" thinks); Anita Bernstein, Treating Sexual Harassment With Respect, 111 HARV. L. REV. 445, 471-82 (1997) (arguing that neither a reasonable person nor a reasonable woman test is workable); Estrich, supra note 49, at 845-46 (observing that judges often create the "reasonable woman" out of air or use, as a standard, other women at the workplace who have silently put up with the conduct and that, as a result, it often takes a "real man" to be a "reasonable woman"); Hadfield, supra note 3, at 1179 (advocating a variation of the rational woman test). See generally Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177 (1990) (arguing that a "reasonableness" standard cannot work because it obscures the diversity among women); Frank S. Ravitch, Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees, 36 B.C. L. REV. 257 (1995) (arguing that a standard based on "reasonableness" is unsatisfactory because it does not protect the employee who is known to be more sensitive).

74. See, e.g., Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962-63 (8th Cir. 1992) (reversing the district court's finding that a woman who posed nude in magazine could not be offended by employer's sexual advances). Susan Estrich notes that, given the double standard for gender in society, such credibility issues tend to work against women. While a man with an active sex life is typically viewed as normal, a woman who is equally sexually active is likely to be seen as promiscuous. See Estrich, supra note 49, at 848-49. See also Abrams, supra note 66, at 1209 (arguing that a court should focus on the response of the woman and not the intent of the man and ask whether the man's conduct was likely to create a feeling of subordination and devaluation); Bernstein, supra note 2, at 1273-75 (observing that by concentrating on the fault of the defendant, Title VII litigation places the plaintiff in the role of victim, and consequently the plaintiff is often called upon to show she is without fault); Kelly A. Cahill, Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?, 48 VAND. L. REV. 1107, 1144-52 (1995) (arguing that an assumption of the risk defense should be permitted in Title VII hostile environment cases); Ellen E. Schultz and Junda Woo, The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases, WALL ST. J., Sept. 19, 1994, at A1 (reporting that after the passage of the Civil Rights Act of 1991, which allows plaintiffs in discrimination and harassment suits to recover punitive damages and emotional-distress awards, defense lawyers are increasingly asking about plaintiffs' sex lives and other personal matters).

75. In Meritor, the Supreme Court held that, in hostile environment cases, an employer is not automatically liable for the actions of its employees. See Meritor, 477 U.S. at 72. Lower
However, the disputes regarding Title VII's application to sex go much deeper than how the law should be interpreted on particular gender issues. It is the depth of disagreement that distinguishes this debate from others. While scholars often argue about whether a particular form of speech is protected by the First Amendment or whether a particular trade

courts have held that, absent quid pro quo harassment or harassment by a proprietor, partner, or corporate officer, an employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to rectify the situation. See, e.g., Andrade v. Mayfair Management, Inc., 88 F.3d 258, 262 (4th Cir. 1996); Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106 (3d Cir. 1994). Therefore, in numerous cases, liability turns on factual inquiries into what the employer knew, how promptly it acted, and the reasonableness of its actions. See Farpella-Crosby v. Horizon Health Care, 97 F.3d. 803, 807 (5th Cir. 1996); Knox v. Indiana, 93 F.3d 1327, 1355 (7th Cir. 1996); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995); Spain v. Gallegos, 26 F.3d 439, 450 (3d Cir. 1994); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) ("[O]nce the plaintiff . . . proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment."). See also Glen A. Staszewski, Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment, 48 VAND. L. REV. 1057, 1071-96 (1995) (collecting cases).

Here too, commentators have debated the issue. Compare Estrich, supra note 49, at 853-55 (arguing that in all Title VII cases, including hostile environment cases, there should be strict liability for the employer because the harassing employee is necessarily using the authority of his office in the conduct and the pervasiveness element shows the employer knew or should have known of the conduct), and David B. Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors, 81 CORNELL L. REV. 66, 131-49 (describing cases and criticizing the courts' failure to impose vicarious liability on a uniform basis on employers in cases involving sexual harassment by supervisors), with Epstein, supra note 52, at 363-64 (arguing that strict liability ought be applied against the employer only if it received notice and refused to act, because the harasser acts for himself and not on behalf of the firm).

76. Just prior to this Article going to print, the Supreme Court held that Title VII does apply to same-sex harassment. See Oncale v. Sundowner Offshore Serv., Inc., No. 96-568, 1998 WL 88039, at *5 (U.S. Mar. 4, 1998). Previously, the Fifth Circuit had held that same-sex harassment was not actionable under Title VII. See Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994). The Fourth Circuit had held that same-sex harassment was actionable if the harasser was homosexual. See Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 141 (4th Cir. 1996). Where the harasser and target were both heterosexual, the Fourth Circuit had held that the same sex harassment was not actionable. See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996), cert. denied, 117 S. Ct. 72 (1996). The Sixth Circuit had held that same-sex harassment was actionable, at least where the harasser was homosexual. See Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997). See Carolyn Grose, Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII, 7 YALE J.L. & FEMINISM 375, 388-97 (1995) (collecting cases and arguing that Title VII should apply to all same-sex harassment, regardless of sexual orientation of parties); Steven S. Locke, The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII, 27 RUTGERS L.J. 383, 406-08 (1995) (arguing that Title VII should apply to harassment of gays and lesbians). See also Franke, supra note 1, at 32-35 (describing Title VII cases involving transendered persons); Levit, supra note 56, at 1063-67 (discussing problems men have in bringing sexual harassment suits against other men or against women).
restraint violates the antitrust laws, rarely does anyone question the underlying goals of free speech or of a competitive marketplace. What is remarkable about Title VII debates is that after twenty years of legislation and adjudication, there are still sharp disagreements among scholars and lay people about such basic questions as: whether gender equality in employment is a desirable or achievable goal; whether Title VII is more beneficial than harmful for women; whether sexual harassment can successfully be subject to legislation and adjudication, and, if so, what constitutes sexual harassment.

At one extreme are those commentators (principally Richard Posner and Richard Epstein) who dispute the basic premise that sexual equality in employment is a desirable and achievable goal. They argue that sex discrimination is rational and efficient for some firms (for instance, those that wish to minimize costs of internal worker conflict or those that wish to present a particular image) and also a natural result of voluntary selection of jobs by women and men. To the extent the law has had an effect, they say, it has made women as a group worse off by encouraging firms to hire fewer women or to shift women to gender-stratified jobs.

77. See Epstein, supra note 52, at 59-63, 76-77 (arguing that there will always be some discrimination because it is efficient for some firms in that, by selecting a homogeneous work force, the firm reduces variations in tastes and reduces costs of settling conflicts among coworkers and costs of enforcing informal work rules); Posner, supra note 6, at 1319-21 (asserting that some discrimination in employment will be efficient for some firms and, that, therefore, we should not expect (or want) to eradicate all differential treatment). See also Sunstein, supra note 58, at 2416-17 (predicting that free market will not eliminate all race or sex discrimination because some is economically rational). To the extent discrimination is not economically rational, the argument goes, natural market forces will lead to less sex discrimination. See Epstein, supra note 52, at 41-43; Posner, supra note 6, at 1322-23. See also Kingsley R. Browne, Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap, 37 Ariz. L. Rev. 971, 1064-83 (1995) (contending that biological differences in temperament account for much of the phenomena of the glass ceiling, gender-stratified jobs, and gender wage gap).

78. See Epstein, supra note 52, at 368-69, 270-72 (arguing that women and men prefer different jobs and that women who want children are likely to invest less in work skills and are likely to gravitate to particular jobs); Browne, supra note 77, at 1022-31, 1086-88 (asserting that biologically based differences in women’s temperaments, priorities, and definitions of success cause them to voluntarily select different jobs from men); Epstein, supra note 60, at 77-78 (stating that women voluntarily select certain jobs); Epstein, supra note 1, at 1042 (arguing that biological differences between women and men account for part of the voluntary selection of different jobs by each sex); Roback, supra note 9, at 122 (asserting that personal choice plays significant role in gender gap).

79. See Epstein, supra note 52, at 36, 73 (arguing that the victim of discrimination is better off if she can obtain a job by selling her labor at a lower price for a “trial” period and that antidiscrimination laws hurt employees by raising firm costs and leading to loss of some jobs);
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In addition, it has demoralized women through the implicit message that they cannot succeed in the workplace on the basis of their merits. Epstein concludes that the best solution is the repeal of Title VII insofar as it relates to sex.

While numerous scholars have challenged the Posner/Epstein arguments, these views are important in highlighting the depth of the debate regarding Title VII's application to sex discrimination. Moreover, among the many supporters of Title VII (who far outnumber those seeking its repeal), there is no consensus regarding how to improve the law or achieve sexual equality in the workplace.

Even with sexual harassment, which everyone seemingly agrees is improper and distorts the competitive workplace, there continues to be

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Posner, supra note 6, at 1326-29 (stating that the federal Equal Pay Act, 29 U.S.C. § 206(d) (1994), may cause a firm to hire fewer women because the act requires equal pay).

80. See Epstein, supra note 1, at 1045-46 (arguing that this demoralizing effect on women must be regarded as one cost of the laws). The critics of Title VII also point to the cost of enforcement as a disadvantage of the federal law. See EPSTEIN, supra note 52, at 367; Posner, supra note 6, at 1325.

81. See Epstein, supra note 9, at 1087 (arguing that all civil rights laws regulating private employment should be repealed). See also Roback, supra note 9, at 133 (opposing more government intervention).

82. See Abrams, supra note 56, at 1022-28 (criticizing Epstein's argument that biological differences account for almost all employment differences); Donohue, supra note 50, at 1348 (arguing that even if market will eventually correct for sexual discrimination, market forces take time to operate and Title VII will speed up the process); Friesen, supra note 60, at 37-50 (arguing that available statistics do not support "choice" theory); Paetzold & Gely, supra note 11, at 1547-48 (observing that women who appear to choose less demanding jobs may be locked out of better positions); Rhode, supra note 60, at 1211-16 (asserting that the voluntary selection theory exaggerates the truth and, in any case, cannot account for all employment discrimination); Sunstein, supra note 58, at 2420 (arguing that choices made without a full awareness of available opportunities should be considered unfree and non-autonomous). See generally Marion Crain, Rationalizing Inequality: An Antifeminist Defense of the "Free" Market, 61 GEO. WASH. L. REV. 556 (1993) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)) (criticizing Epstein's theories regarding sex discrimination); David A. Strauss, Biology, Difference, and Gender Discrimination, 41 DEPAUL L. REV. 1007 (1992) (disputing Epstein's claims based on biological differences between sexes).

83. See, e.g., authorities cited supra notes 11 and 71-76. Feminists are often better at critiquing the status quo than finding constructive solutions. See Bartlett, supra note 3, at 334 ("Feminists are good at pointing out the contradictions between society's stated norms and its practices and how existing patterns of gender subordination are sustained . . . . As to the reconciliations needed to reduce or resolve the contradictions and to upset existing patterns of subordination, however, the feminist project flounders."); Cheryl B. Preston, This Old House: A Blueprint For Constructive Feminism, 83 GEO. L.J. 2271, 2324 (1995) ("Feminism is best developed in its role as a critic. Feminist literature abounds on what is wrong with the law.").

84. Sexual harassment is economically costly in causing absenteeism, poor job performance, worker turnover, and diminished self-esteem. See Bernstein, supra note 2, at 1260-62;
debates over core issues. Again, Posner and Epstein stake out an extreme position: Title VII need not be construed to cover harassment because the problem will go away naturally with time as more women enter the job market. 85 Once again, their writings have been vigorously criticized by other scholars. 86 Yet, here too, among those scholars who believe that sexual harassment is properly considered a Title VII violation, there are myriad views regarding how best to apply the law to claims of harassment. 87

In large part, the verticality of Title VII is responsible for these fundamental philosophical disputes and for the law's failure to bring about more concrete results in the workplace. By acting without meaningful debates or studies of particular gender-in-employment problems, Congress handed the courts, employers, and the public a statute with ambiguous scope and application and lacking clear doctrinal underpinnings. 88

In particular, Congress left open the crucial question of what equality means with respect to the sexes. 89 If courts apply to gender the same "equality" approach that underlies the law's ban on racial discrimination, then employers are prohibited from discriminating against one sex, despite similar qualifications, just as they are barred from treating otherwise

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Hadfield, supra note 3, at 1169-70. See also Levit, supra note 56, at 1064-65 (noting that men who are sexually harassed face the same problems).

85. See Posner, supra note 6, at 1323. Richard Epstein suggests handling harassment under state-law tort doctrine instead of Title VII. See Epstein, supra note 52, at 350-66. Posner and Epstein similarly argue that sex discrimination in hiring and promotion will naturally diminish due to natural market forces. See supra note 77.

86. See Donohue, supra note 50, at 1348-49 (contending that Title VII may speed up market processes and also elevate women's self-esteem and improve current job satisfaction); Mathews, supra note 50, at 303-04 (arguing that state tort doctrine is an inadequate remedy for sexual harassment); Sunstein, supra note 58, at 2414-15 (stating that a free market cannot remedy sex and race discrimination).

87. See authorities cited supra notes 71-76 and accompanying text. See also Epstein et al., supra note 60, at 374 (noting that women of different ages have differing views on sexual harassment).

88. See Abrams, Title VII, supra note 5, at 2497-98 (observing that part of the confusion in the case law under Title VII stems from the lack of any solid theoretical underpinning in the cases granting relief).

89. See Freedman, supra note 4, at 922 (noting that, with respect to sex discrimination under Title VII, the Supreme Court "has been unable to agree on the nature of sex differences, their relationship to legitimate goals, and the correct standards for deciding [these] cases"); Julia C. Lamber, And Promises to Keep: The Future in Employment Discrimination, 68 IND. L.J. 857, 858 (1993) ("Congress has never defined what it meant by discrimination nor articulated its vision of equality . . . ."); George Rutherglen, Discrimination and its Discontents, 81 VA. L. REV. 117, 127 (1995) (observing that much confusion arises from Title VII's failure to define discrimination).
equal black and white men differently. The obvious problem is that the sexes differ in ways (such as pregnancy) that the races do not. Thus, an equality approach will protect only those women who are seen as equal to men in meeting the specified job qualifications. Yet, those qualifications

90. See Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373, 1374 (1986) (stating that the traditional notion of equality is Aristotelian: "like persons alike, and unlike persons unlike"); Cass R. Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 SUP. CT. REP. 127, 129 ("To require equality is in essence to require that those similarly situated be treated similarly."). Numerous commentators have discussed the application of the equality theory to sex discrimination and the "sameness/difference" debate within feminism. See Abrams, Title VII, supra note 5, at 2479-80, 2482-83, 2518 (discussing equality theory and observing that Title VII was enacted and originally litigated under an equality-based account of discrimination); Franke, supra note 1, at 10-13 (reviewing early sex discrimination cases in which courts asked whether the sexual differences of women justified the particular differing treatment); Levit, supra note 56, at 1042-44 (describing equality theory); MacKinnon, supra note 52, at 1286-92 (describing early use of equality theory in sex cases); Carrie Menkel-Meadow, Mainstreaming Feminist Legal Theory, 23 PAC. L.J. 1493, 1497-1522 (1992) (describing debate); Rhode, supra note 60, at 1225 (discussing equality theory and its weaknesses in gender cases); Turnier et al., supra note 5, at 1294-95 (describing equality theory and noting that in early cases feminists "patterned their efforts after those of the [NAACP], which had relied on the rights-oriented liberal jurisprudence"). See generally Laura W. Stein, Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality, 77 MINN. L. REV. 1153 (1993) (arguing that feminists should transform the equality doctrine rather than abandon it).

In reviewing Supreme Court cases, Kenneth Karst found that when a woman's case fits into the traditional direct-discrimination mold of race cases, the Court has less trouble with finding discrimination. However, the Court has much more trouble with indirect sex discrimination, such as state laws favoring veterans, and often demands a showing of intentional discrimination, a burden that is almost impossible for the woman to carry. See Karst, supra note 12, at 465-70.

91. See Abrams, supra note 56, at 1029 (noting that in the sex discrimination cases, the equality theory does not deny all biological differences but denies their relevance to a number of institutional settings); Becker, supra note 3, at 983 ("[Society is] deeply committed to maintaining difference between the sexes, no matter how artificial. [W]e might be able to imagine a world in which the races are equal. We cannot imagine a world in which the sexes are equal."); Minow, supra note 56, at 40 (observing that by stressing equality, women run the risk of justifying different treatment in areas where women are different from men). Those who wish to eliminate or limit Title VII's application to sex emphasize the biological differences between the sexes. See Epstein, supra note 52, at 280-81 (arguing that the systematic differences between the sexes matter in a way that differences between races do not); Browne, supra note 77, at 1017-31 (asserting that there are biologically based temperamental differences in men and women that lead to different preferences and priorities).

92. For instance, an employer may view women as being less aggressive, less committed to a long-term careers, less available for travel or relocation, or just less of a "fit" with the firm. See Becker, supra note 3, at 979 (noting that even when the equality approach is successful, "it only helps those women who are most like men"); Case, supra note 1, at 31-32 (observing that the movement toward equal opportunity for women may have benefited chiefly those women who most closely resemble men). Some commentators argue that this is the proper result. See Browne, supra note 77, at 1074-81, 1093-96 (contending that biologically based temperamental differences between the sexes account for much of the gender wage gap and gender-stratified jobs and that, in fairness, only those women willing to work "like men" deserve the higher
likely assume a male norm, and leave unaided the woman who, by temperament or family situation, does not fit the "ideal" mold.

On the other hand, if courts use a "difference" approach that requires firms to accommodate the differences between the sexes, employers may be reluctant to hire women because of the added cost of accommodating such differences as pregnancy. Or, firms may use perceived paying jobs; Epstein, supra note 60, at 88 (arguing that an employer is right to ask whether an applicant will be a good "fit" with the firm).

The equality theory also leaves untouched the institutional biases against women, such as lack of pregnancy leave, day care, and flexible hours. While the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (1994), provides some protection for women during childbirth and recovery, it only covers firms with more than 50 workers and only guarantees unpaid leave. See Crain, supra note 4, at 1921 (observing that the act helps upper- and middle-class women who can afford to take unpaid leave); Issacharoff & Rosenblum, supra note 60, at 2189-92 (describing the potential adverse effects of the law, including the possibility that it may provide an incentive to employers to discriminate in hiring against women). But see Browne, supra note 77, at 1071, 1089-90 (arguing that day care and maternity leave are unlikely to make significant differences in the overall position of women in the workplace because most women choose to invest more time with children than men do).

Numerous scholars have commented on the unspoken assumption that the normal or ideal worker is male. See Abrams, Sex Wars, supra note 5, at 315 n.44 (arguing that our conceptual framework assumes men are the norm); Crain, supra note 4, at 1921 (arguing that Title VII accepts the white male occupational pattern as the neutral, universal norm and rewards only those few women whose occupational tracks resemble those of white men); Levit, supra note 56, at 1042 ("Equal treatment theory view[s] men as the benchmark, the norm."). Minow, supra note 56, at 38-40 (observing that the unstated norm in employment is the white male); Rhode, supra note 60, at 1222-23 (noting that generally women work in places designed by and for men, with advancement criteria created by men).

Here too, numerous scholars have addressed this problem. See, Abrams, Gender Discrimination, supra note 66, at 1187-89; Crain, supra note 4, at 1921; Littleton, supra note 13, at 1280 n.2; Minow, supra note 56, at 41; Rhode, supra note 60, at 1222-26. See also Sunstein, supra note 58, at 2429 (arguing that, rather than using the equality approach, courts should ask whether practice contributes to maintenance of second-class citizenship or lower-caste status for women).

See Abrams, supra note 56, at 1030 (describing the difference theory); Franke, supra note 1, at 30 ("[T]he Difference Feminists argue that inequality is the result of a failure to recognize factually and normatively significant differences between the sexes and criticize the liberal model for demanding that all people assimilate to a male norm cloaked in neutral clothing."); Levit, supra note 56, at 1044-47 (describing difference theory). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994), is based on the difference theory in that it requires accommodation of pregnancy. However, the decisions under this law have also been confusing and conflicting. See Issacharoff & Rosenblum, supra note 60, at 2179-89 (discussing Pregnancy Discrimination Act).

Deborah Rhode notes that the early laws limiting the hours that women could work were the result of feminists who embraced the sex-based differences between men and women. While at the time this made sense, this approach also "protected" women out of the best jobs and helped perpetuate sex-based disadvantages. Rhode, supra note 56, at 1737-41. See also Issacharoff & Rosenblum, supra note 60, at 2171-76 (discussing the paradox of protective legislation that, on the one hand, protects women from oppressive conditions, but, on the other hand, hurts women by raising the cost of hiring them and treats them like idiots or minors).
sexual differences to justify the lack of women in certain jobs. Ideologically, granting “different” treatment to women can create a backlash: men may feel they are not being treated equally, and women may feel that the “special” treatment is stigmatizing and belittling of their achievements.

a history of protective legislation, see BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW 80-130 (2d ed. 1996). A current example of protective legislation is the male-only draft. See Karst, supra note 12, at 449-50 (characterizing the Supreme Court’s decision upholding the male-only military draft as an example of the Court’s “protection” of women). See also Levit, supra note 56, at 1059-60 (noting that a male-only draft perpetuates stereotype of men as aggressors).

Scholars have discussed the additional cost an employer may incur due to worker pregnancy. See Issacharoff & Rosenblum, supra note 60, at 2168, 2192-99 (observing that the treatment of pregnancy is a particularly difficult problem because some risk-averse employers will discriminate against all women based on the assumption that many women will leave the workplace following child birth and such discrimination is especially unfair to those women who do not intend to leave work); Minow, supra note 56, at 19 (describing dilemma of needing “special” treatment for pregnancy but wanting to avoid backlash and reactivating negative stereotypes); Rutherglen, supra note 89, at 141 (noting that the “dispute over pregnancy under Title VII illustrates the distortions caused by trying to assimilate sex to race”). But see EPSTEIN, supra note 52, at 280-81 (arguing that treating pregnancy differently from other conditions is not discrimination at all).

97. For instance, the argument can be made that given their psychological differences women voluntarily avoid certain positions. For commentators asserting this position, see sources cited supra note 98. Probably no judicial decision has come under more fire than EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1327 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988), where the court accepted Sears’ argument that the underrepresentation of women in big-commission jobs was due to a voluntary avoidance of these jobs by women. For criticisms of this decision, see Abrams, Title VII, supra note 5, at 2484; Rhode, supra note 56, at 1768-70, 1784-87; Williams, supra note 1, at 813-20. But see EPSTEIN, supra note 52, at 385-91 (defending the Sears decision).

98. See Issacharoff & Rosenblum, supra note 60, at 2177 (noting that protective laws for women seem “to violate two separate equality principles: equality of opportunity and equality of actual treatment”); Rhode, supra note 56, at 1737, 1767 (observing that most people believe in a “just” world where people get what they deserve and deserve what they get and noting that resentment arises over any suggestion of “special treatment” for a woman’s family responsibilities). See also Richard Delgado & Jean Stefancic, The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox, 36 WM. & MARY L. REV. 547, 562-64 (1995) (noting that, in the racial context, many whites felt that blacks were unjustly asking for special, not merely equal, treatment).

99. See Abrams, supra note 56, at 1030-34 (noting the dangers of stigmatizing and limiting women that come from generalizing about women under a difference theory); Epstein, supra note 57, at 1045-46 (arguing that laws that treat women as a protected class imply that women cannot succeed in the workplace on their own merit and are thereby demoralizing for women); Harris, supra note 12, at 613 (arguing that we need to avoid treating all women as victims); Radin, supra note 15, at 136-38 (describing how being seen as a recipient of affirmative action can be a badge of inferiority); Rhode, supra note 4, at 1184 (noting that some feminists argue that even those government programs that seem to help women, such as welfare, can also be seen as detrimentally stigmatizing women).
Furthermore, whichever approach a court uses, Title VII's one-size-fits-all rules engender an assumption that there is a fairly consistent pattern of discrimination against a relatively generic woman by an equally generic employer. As a result, all too often courts gloss over diversity among women and the tremendous variety of employment situations and discrimination they face. However, the obvious truth is that women of

100. See Abrams, Title VII, supra note 5, at 2482 (noting that, in early feminist work, the use of a single generic woman was partly strategic in that it highlighted women's exclusion, streamlined the message, and downplayed complexity and contradiction within the women's movement); Minow, supra note 56, at 64 (observing that people are attracted to simplified stereotypes because they help us organize and categorize experience). Under an equality approach, the generic woman tends to be basically interchangeable with the generic man. A difference approach may lead to an equally stereotypical and unrealistic portrayal of women: as moral, sensitive, nurturing, and peacemaking creatures. See Levit, supra note 56, at 1045 (observing that the difference theory pictures women as caring, relationship-seeking, collaborative, sensitive, empathetic, and nurturing); Rhode, supra note 56, at 1786-87 (arguing that not only is the difference theory not supported by empirical studies but additionally it reinforces stereotypes and fails to address variations of culture, class, race, age, ethnicity, and sexual orientation); Williams, supra note 1, at 802-07 (noting that the difference theory uses a stereotype similar to the 18th century view of women as moral, nurturing, contextual thinkers).

Regardless of the approach, the generic woman tends to be white, educated, middle-class, and heterosexual. See Speelman, supra note 12, at 76 (asserting that too many feminist theorists focus on the experiences of white, middle-class women, thereby obscuring the experiences of other women); Abrams, Title VII, supra note 5, at 2482 (noting the great variety in women's experiences as opposed to the Title VII case law that tends to assume women are white, heterosexual and middle-class); Crain, supra note 4, at 1905, 1906 (arguing that feminist concerns have been directed too much to the interests of white, upper- and middle-class women and have failed to look at the problems of working class women); Crenshaw, supra note 56, at 144-45 (observing that courts tend to assume that women are white); Harris, supra note 12, at 595-96 (contending that much feminist theory ignores black women). A blatant example of the tendency to overlook black women is found in Epstein, supra note 52, at 279, where he states that "women were never slaves." See generally Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009 (1995) (discussing effect of assuming a white norm on employees of color).

101. Underneath the heated rhetoric, both critics of Title VII and feminists are beginning to come together on the danger of stereotyping. There is an increased awareness on all sides that there is no generic woman, no generic employer, and no one prototype employment situation. See Abrams, Title VII, supra note 5, at 2481 (noting that Title VII needs to respond to the complexity of women and the variety of forms of discrimination); Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 847 (1990) (arguing that feminists need to avoid slipping into "white solipsism"); Becker, supra note 3, at 980 (stating that "it is desirable to treat people as individuals rather than assuming that all women act one way or have one set of needs and all men act another way or have a different set of needs"); Case, supra note 1, at 36-41, 50 (describing different forms of sexual stereotyping and noting that it can harm effeminate men as well as women); Epstein et al., supra note 60, at 408-09 (noting that women of different ages have significantly different views of sex discrimination in employment); Greene, supra note 4, at 1261 (observing that we cannot assume sameness among the experiences of all women given differing race, class, and other demographic features); Harris, supra note 12, at 610-12 (arguing that we need to acknowledge the broad diversity among women); Levit, supra note 56, at 1050,
color may face discrimination that is quite different from that experienced by white women; young women may encounter situations different from those experienced by older women; a factory worker may have problems different from those encountered by a professional woman; an assertive woman may face situations far different from those experienced by an introverted woman. Similarly, just as their experiences vary, so too women inevitably vary in how they view sex discrimination in employment and in the "solutions" they support.

Title VII's effectiveness is further limited by its reactive, litigation orientation. Other than lawsuit avoidance, Title VII does nothing to encourage the proactive resolution of problems before they grow into full-blown disputes. Instead, Title VII waits for a chance to punish a done

1073-74 (observing that sexual stereotyping can also harm men); MacKinnon, supra note 52, at 1292-93 (discussing harm of stereotyping); Minow, supra note 56, at 58-62 (noting that women need to consider various and conflicting viewpoints); Radford, supra note 11, at 486-503 (describing problem of stereotyping); Rhode, supra note 4, at 1182, 1185 (observing that differences in factors such as race, ethnicity, class, and sexual orientation preclude the existence of a "generic woman"). Richard Epstein, a critic of Title VII insofar as it applies to sex, echoes the same view as these feminist writers in warning that it is wrong to assume that all employers act alike or that all employees have the same preferences. See Epstein, supra note 52, at 44.

102. Additionally, there will be differences among women of color and the experiences they face. See Harris, supra note 12, at 584-95 (observing that not only is there no unitary woman, there are also differences among women of color and, over time, within any given woman).

103. See Cain, supra note 5, at 839, 841-42 (observing that a single feminist approach is unlikely to emerge given the diversity of women and their varying experiences). Increasingly, feminists have sought ways to accommodate the variety among women and their experiences. See Abrams, Title VII, supra note 5, at 2482-91 (noting that, increasingly, feminist theory emphasizes diversity among women); Littleton, supra note 13, at 1312-14 (proposing "acceptance" approach as alternative to equality and difference approaches); Martha Minow, Introduction: Finding Our Paradoxes, Affirming Our Beyond, 24 Harv. C.R.-C.L. L. Rev. 1, 2-4 (1989) (describing the "first-wave" feminists as seeking the same rights as men, the "second-wave" feminists as recognizing the differences between the sexes, and the "third-wave" feminists as rejecting the preoccupation with the sameness-difference debate); Radin, supra note 3, at 1718 (advocating a middle ground between equality theory and difference theory); Rhode, supra note 56, at 1789-90 (same).

104. A number of commentators have remarked on the limited benefits that litigation produces. See Marshall, supra note 39, at 155 (concluding from empirical study that "[b]y themselves, Supreme Court decisions seldom greatly influence American public opinion either over the short term or the long term"); Rosenberg, supra note 40, at 212, 214-18 (noting that even though women have won a number of lawsuits, "there is little evidence that these Court victories have much changed the position of women in American society" and concluding that judicial decisions will be ineffective in bringing about gender equality in the workplace absent changes in cultural beliefs and practices); Abrams, supra note 56, at 1039 (advocating an increased emphasis on non-litigation strategies with respect to issues of sex discrimination in the workplace); Jane E. Larson, Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?, 87 NW. U. L. Rev. 1252, 1254-55 (1993) (observing that one reason women are increasingly moving away from the "big case" approach of the past is because they recognize that they remain outsiders to power in political bodies and centers of economic
deed. Additionally, the lawsuit that Title VII provides the aggrieved worker is hardly cost-free. Not only does litigation involve substantial time and money, it often exacts significant psychic costs on the plaintiff, the employer, and co-workers. Typically it places a woman in the role of victim and requires that she individually assert some act of discrimination committed by a usually male employer. On the other side, the litigation thrusts the employer into the role of wrongdoer, who was at best insensitive and, at worst, intentionally discriminatory. Not surprisingly, even if the plaintiff succeeds in her litigation battle, she (and possibly others) may lose the employment war. The winner-take-all litigation format may well leave such deep resentment, that continued employment at the firm is not feasible for the plaintiff, or it may severely

power). But see Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 CORNELL L. REV. 1331, 1343-44 (1995) (arguing that even when litigation is lost, society may benefit by having dispute aired and by spurring people into action).

105. My colleague David Dominguez suggested to me this concise way of describing Title VII.


106. See Rhode, supra note 4, at 1196 (discussing one discrimination lawsuit in which there were 74 court days and 73 witnesses, and another which generated five million dollars in legal fees). For a description of Title VII's procedural labyrinth, see Brooks, supra note 53, at 512-50. The confusion within the federal judiciary on Title VII procedural issues is set forth in Developments, supra note 53, at 1579-1601.

107. See ROSENBERG, supra note 40, at 223-24 (noting that an important barrier to sex discrimination litigation is the reluctance of women who have suffered discrimination to be plaintiffs); Crain, supra note 4, at 1920 (noting that discrimination laws place economic and psychological burdens on women by requiring them to identify themselves as individual victims).

108. See Harris, supra note 15, at 768 (arguing that we need to get away from seeing oppression as an all-or-nothing concept, in which one is either a victim or an oppressor, because in reality the same group can be oppressed and privileged at the same time); Karst, supra note 12, at 488 (observing that discrimination lawsuits in the U.S. inevitably focus on intent and consequently look to the goodness or evil of the parties); Levit, supra note 56, at 1080 (arguing that "[i]nstead of constructing an argument of blame, we must ask what is a responsible approach for the future in the sense of justice, fairness, and rational ethics"). See also Delgado & Stefancic, supra note 98, at 562-64 (noting that, in context of race relations, the "fault" question increased the resistance to change).

109. See Abrams, supra note 66, at 1196 ("[L]itigation imposes enormous costs, in hostility and in ostracization, on the women involved. Lingering resentments... can penalize women
strain relations among co-workers who find themselves in opposing camps in the lawsuit. Furthermore, the successful plaintiff may well find the judicial remedy she receives does not make her whole financially.

To summarize, Title VII's vertical development and testing has resulted in a law: (1) whose fundamental premises are disputed by both scholars and lay people, (2) whose ultimate interpreter is a single tribunal largely immune from hearing from the voices of rank and file workers and employers, (3) whose doctrinal underpinnings are ambiguous at best (and, more likely, nonexistent), and (4) whose judicial interpretation has resulted in a confusing and conflicting body of case law that all too often smacks of law-making. Not surprisingly, Title VII's application to sex seems to create as much discord as it settles.

III. Horizontal Legal Development and Testing

The Uniform Commercial Code and state common and statutory law present long-standing examples of horizontal jurisprudence. Negotiated regulations for administrative agencies show a more recent implementation of a horizontal approach to the development of rules. Moreover, all three examples are instructive in that each demonstrates different aspects of horizontal jurisprudence that could be utilized with issues of gender in the workplace.

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110. See Abrams, supra note 66, at 1196, 1215-16 (noting that a lawsuit often disrupts the plaintiff's relationship with co-workers and that isolated lawsuits, even if successful, may not bring significant changes in the workplace).

111. The Civil Rights Act of 1991 places a cap on awards of compensatory and punitive damages. 42 U.S.C. § 1981a(b)(3) (1994). Moreover, even with the expanded damages that the 1991 amendments to Title VII allow, 42 U.S.C. § 2000e-5(k) (1994), the likelihood of small damage awards may make it difficult for some women to get attorneys to take their cases. See Bernstein, supra note 2, at 1267. For a description of the remedies currently available under Title VII, see Brooks, supra note 53, at 520-26. See also Susan K. Grebeldinger, The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay, 1996 U. ILL. L. REV. 319, 328, 334-42 (arguing that the typical remedy of reinstatement is often inadequate and impractical).
A. The Uniform Commercial Code

Probably no law in this century has had a more horizontal development than the Uniform Commercial Code. In developing the Code, the drafters used a town-meeting, consensual approach. With both the original Code and with subsequent amendments, the drafting committees, made up of academics and practitioners, met regularly with and sought advice directly from representatives of the affected parties. Drafting meetings were public, with all affected interests encouraged to participate. As a result, literally scores of people attended drafting meetings. In


113. See Ring, supra note 46, at 294 (reporting that the drafting committee for Article 4A was composed of three law professors, one judge, and six practicing attorneys who represented different types of clients and that the committee sought extensive input from advisors knowledgeable in various aspects of funds transfers). See also Scott, supra note 112, at 1805, 1807 (noting that "real lawyers" tend to hold sway over academics).

114. See Patchel, supra note 112, at 98 (noting that the UCC was "the first uniform laws project to make extensive use of consultation with interested groups at the drafting stage"); Ring, supra note 46, at 294-95 (reporting that, in drafting Article 4A, 23 observers, representing financial institutions and users of wire transfers, regularly attended drafting committee meetings and "brought a great deal of practicality and reality to the discussions of the drafting committee"); James Steven Rogers, Policy Perspectives on Revised U.C.C. Article 8, 43 UCLA L. REV. 1431, 1543-44 (1996) (observing that, with revised Article 8, the committee "made special efforts to reach out to groups with interests in the matters covered . . . in order to learn the problems and needs of the securities business," so the final draft was "the product of many years of work, involving a large group of knowledgeable lawyers and business people from all sectors of the securities industry, as well as representatives from all of the securities regulatory agencies and central banking authorities . . . and dedicated generalist lawyers").

115. See Ring, supra note 46, at 296 (describing the UCC drafting meetings as "fully open" with "meaningful dialogue occur[ring] . . . [where] each participant is . . . given an opportunity to voice opinions and concerns" and noting that, with Article 4A, there were a total of 16 drafting meetings and 57 days of debate, and that 50 or more people attended each drafting meeting); Rogers, supra note 114, at 1543 (reporting that, for the revisions of Article 8, there were "at
addition, after the publication of a proposed section, experts in the field sent in "a flood of written commentary," which the drafting committee then used in preparing new drafts that were also published and subject to comment.\footnote{Wiseman, supra note 112, at 467.}

As Zipporah Wiseman states, the original Code was "the result of a sometimes painful twenty-year period of compromise among a broad range of participants."\footnote{Warren, supra note 46, at 814 (noting that sometimes a hundred people attend drafting meetings).} William Warren similarly describes the more recent drafting sessions for Article 4A as allowing many people, who knew a "great deal about the subject" but who had "diverse and conflicting interests" to "sit around a table and talk to each other about the prob-

least nine three-day Drafting Committee meetings, all of which were attended by a large group of advisors and observers," as well as discussions of preliminary drafts with various consulting groups, state and local bar associations, and continuing legal education programs); Warren, supra note 46, at 814 (noting that sometimes a hundred people attend drafting meetings).

While the UCC drafting sessions are open to all groups, commentators note that the process is not immune from all interest-group pressure. See Corinne Cooper, The Madonnas Play Tag of War with the Whores or Who is Saving the UCC?, 26 LOY. L.A. L. REV. 563, 568 (1993); A. Brooke Overby, Modeling UCC Drafting, 29 LOY. L.A. L. REV. 645, 679 (1996); Patchel, supra note 112, at 120-25; Edward L. Rubin, Thinking Like A Lawyer, Acting Like A Lobbyist: Some Notes on the Process of Revising Articles 3 and 4, 26 LOY. L.A. L. REV. 743, 748-59 (1993); Schwartz & Scott, supra note 112, at 615-24. But see Peter A. Alces & David Frisch, On The UCC Revision Process: A Reply to Dean Scott, 37 WM. & MARY L. REV. 1217, 1238 (1995) (arguing that the influence of interest groups has been overstated); Donald J. Rapson, Who Is Looking Out For the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin’s Observations, 28 LOY. L.A. L. REV. 249, 263-65 (1994) (same); Miller, supra note 112, at 871-73 (same); Scott, supra note 112, at 1809 (noting that industry influence does not necessarily imply that the final product will be biased).

116. Warren, supra note 46, at 814. See also Ring, supra note 46, at 294 (noting that, in the drafting of Article 4A, the committee received numerous telephone calls and hundreds of commenting letters from experts in fund transfers). See generally Lawrence Susskind & Gerald McMahon, The Theory and Practice of Negotiated Rulemaking, 3 YALE J. ON REG. 133, 150 (1985) (discussing the importance in successful negotiated rulemaking of circulating for review written summaries of agreements reached at meetings and drafts of proposed rules).

117. See Ring, supra note 46, at 297 (noting that drafts are prepared and widely circulated in advance of each meeting, so that if someone cannot attend, that person can nonetheless call or write to the committee reporter).

Indeed, many commentators believe that one attempt to amend Articles 3 and 4 failed precisely because too many decisions were made by the drafting committee \textit{without} sufficient opportunity for interested parties to be heard. See, e.g., Carl Felsenfeld, Strange Bedfellows for Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law, 42 ALA. L. REV. 723, 728-29 (1991); Miller, supra note 112, at 408-09; Overby, supra note 115, at 680-81; Patchel, supra note 112, at 108; Warren, supra note 46, at 813. Similarly, some scholars contend that significant amendments were necessary to Article 2A because the original drafting process lacked full participation of interested groups and the article was promulgated with insufficient comments and testing. See Neil B. Cohen & Barry L. Zaretsky, Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?, 26 LOY. L.A. L. REV. 551, 554-55 (1993); Ring, supra note 46, at 290.
lems to be solved." In the beginning, differences among the major groups "seemed intractable" as people "seemed to enjoy bashing each other." However, as the participants spent more time together and came to know and respect one another, "differences were narrowed and a reasonable degree of consensus achieved." This eventual consensus among the interested parties was, in turn, reflected in the speedy and virtually unanimous adoption of Article 4A by the states.

Moreover, using such a participatory approach insured the drafting committee would not impose theoretically based rules top down on the business community. Instead, industry participation focused discussions and eventual solutions on concrete problems in commercial transactions. Equally important, inclusion of interested parties in the drafting

119. Warren, supra note 46, at 814-15. Never before, Warren says, had so many people knowledgeable about the issues spent so much time together. Id. See also Felsenfeld, supra note 117, at 763 (noting that Article 4A "is a carefully honed set of compromises among implementers of funds transfers . . . and the users of those transfers"); Ring, supra note 46, at 296 observing that in the UCC drafting process, participants are encouraged to become intimately familiar with the concerns of one another and to work together in formulating revisions and that, consequently, the drafting process becomes an "in-depth and lengthy dialogue among the various interested participants"); Rogers, supra note 114, at 1543 (observing that the revised Article 8 "is the product of a process that . . . functioned well to bring together the specialized information of experts in securities clearance and settlement and the practical wisdom of generalist lawyers").

120. Warren, supra note 46, at 815.

121. Id. at 815. Carlyle Ring similarly notes that although debate can be heated, over time, appreciation grows for the perspectives of others and suggestions evolve that accommodate the concerns of each party. Ring describes the final Article 4A as a real, not forced, accommodation and one that is "relative perfection" in the eyes of any one group in that the code provides, "on balance, substantial improvements in the law while avoiding any major disruption and confrontation with legitimate concerns of any particular participant." Ring, supra note 46, at 290, 296.

122. See Miller, supra note 45, at 869-70; Warren, supra note 46, at 816. For instance, Article 4A was promulgated in 1989 and available for legislative enactment in 1990. By June 1, 1994, 49 states had adopted it. See Ring, supra note 46, at 298. See also Warren, supra note 46, at 815 (noting that 40 states enacted Article 4A within the first three years). Similarly, the newly revised Article 8 was available for adoption in 1994, and over half the states had adopted it before the second year of legislative activity. See Rogers, supra note 114, at 1432. See also infra note 129 and accompanying text.

123. See authorities cited supra note 114. In part the drafting style for the UCC reflected Karl Llewellyn's philosophy of legal realism: a belief that law ought to be "close to facts" in the sense that legal rules are developed and assessed against a background of the everyday transactions they govern. See Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 624 (1975). See Wiseman, supra note 112, at 501 (observing that Llewellyn's legal realism was based on the recognition that "law changes more readily through asserted continuities [with the past rather] than avowed departures"). See also John L. Gedid, U.C.C. Methodology: Taking A Realistic Look at the Code, 29 WM. & MARY L. REV. 341, 359, 363 (1988). For discussions of the legal realism philosophy, see generally
stage also gave the Code legitimacy in the business community. The result is a law successfully used for over 30 years and regarded as "one of the major legal artifacts of the twentieth century."

The UCC also offers vivid proof that a horizontal, consensual approach does not necessarily lead simply to ratifying the status quo. Although some parts of the Code codified existing practices, in other areas the Code marked a vast improvement on procedures then in use. For

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124. There are, to be sure, other reasons for the UCC's success. Unlike other laws that are enacted piecemeal, the drafters of the UCC dealt with large sections of commercial law at one time. In addition, politics were largely kept out of the drafting. See Overby, supra note 115, at 675 (arguing that unlike other lawmaking bodies, the sponsors of the UCC are unique in remaining largely politically unaccountable to any constituent body). But see authorities cited supra note 115. Some would argue that the Code deals with dry, unemotional money matters on which gaining consensus is relatively easy. See infra note 138 and accompanying text.

Moreover, there is, to be sure, litigation under the UCC and some sections work better than others. For instance, the newly revised Articles 3 and 4 have been criticized by some commentators, while supported by others. Compare Rubin, supra note 115, at 749-59 (criticizing some provisions), with Overby, supra note 115, at 695-710 (arguing that the basic structure of the Articles is sound). See generally Frederick K. Beutel, The Proposed Uniform Commercial Code Should Not Be Adopted, 61 YALE L.J. 334 (1952) (criticizing original UCC); Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 VA. L. REV. 1887 (1994) (arguing that Article 9 unfairly favors secured over unsecured creditors). Yet, the Code has undergone a relatively small number of amendments, and the business community successfully operates under its rules. However, Gerald McLaughlin speculates that, in the future, the UCC may play a diminishing role as international trade increases and noncommercial interests, such as the environment, become more significant. See Gerald T. McLaughlin, The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age, 26 LOY. L.A. L. REV. 691, 701-02 (1993).

125. Grant Gilmore, Philosophy of Law, 22 AM. J. COMP. L. 812, 815 (1974) (book review). Admittedly Gilmore was one of the Code's chief architects and, therefore, likely somewhat biased. A more recent scholar characterized the Code as "the most successful codification in American law." Wiseman, supra note 112, at 466. See also 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1 (3d ed. 1988) (characterizing the UCC as "the most spectacular success story in the history of American law"); Overby, supra note 115, at 653 ("The UCC unquestionably is the [National Conference of Commissioners on Uniform State Laws]'s biggest success story."); Larry E. Ribstein & Bruce H. Kobayashi, An Economic Analysis of Uniform State Laws, 25 J. LEG. STUD. 131, 150 (1996) (noting that the UCC has been highly successful and efficient unlike some other uniform laws); Schwartz & Scott, supra note 112, at 637 ("The UCC is the most influential and widely adopted uniform law."). But see authorities cited infra note 141 with respect to consumer issues.

126. In describing the early work on the Code, Soia Mentschikoff explained that drafters never asked: "What are we going to do to change the existing law?" but, instead, posed the question: "How shall we resolve these problems?" If the eventual solution was the same as or a modification of existing law, that was fine. But, if the solution was wholly different from existing law, that was fine too. As Mentschikoff quipped: "Knowledge about the law can be a great hindrance when you're trying to decide on a sensible approach." Soia Mentschikoff, Reflections of a Drafter, 43 OHIO ST. L.J. 537, 540-42 (1982). See also Bane, supra note 112, at
example, Article 9 "had almost no precedent in terms of an integrated statute," and pulled together statutory bundles that had existed in discrete, overlapping, even inconsistent forms and coordinated them into a working code. Similarly, at the time Article 4A was conceived, "there was no law or significant regulation of wholesale wire transfers anywhere in the world." Yet within a few years after 4A was promulgated, forty-nine states enacted it, the Federal Reserve System incorporated it into the federal wire-transfer regulations, private fund-transfer systems integrated it into their rules, and the United Nations Committee embraced it. Indeed, various foreign governments, impressed with the UCC's success, have considered adopting similar laws.

As well as being horizontally developed, the Code is also a perfect example of a law that is tested horizontally. Courts in over fifty jurisdictions interpret and fill in gaps in the Code. With no formal or informal system for refereeing among the sovereign state courts, each jurisdiction is free to try its own approach to solving any given problem. At the
same time, there is an inevitable and exceedingly helpful cross-
fertilization among the various state courts as they observe and learn from
the decisions of other jurisdictions. Thus, when one jurisdiction adopts
an interpretation that eventually leads to a morass, other states can see the
mistake and adopt a different interpretation. Over time, a consensus
typically forms around one or two "better" solutions, and eventually a
drafting committee (again using a horizontal, participatory approach) pro-
poses amendments to the Code.

Despite its success, the UCC does suffer from some obvious weak-
nesses. First, the town-meeting approach to drafting takes years to pro-
duce a final product. Second, at times the need for uniformity among
the states can lead to a lowest-common-denominator solution to a problem
instead of a bold initiative. Third, the UCC involves strictly commer-
referring social change, so that any equilibrium in the law was only temporary); Kamp, supra
note 112, at 336, 345-46, 388 (observing that the UCC drafters wanted flexible rules that would
be re-examined and changed as needed); Wiseman, supra note 112, at 493 (stating that Llewel-
ynn believed law constantly needs to be examined to see how it fits with the society it purports to
serve). See generally Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the
(suggesting that Llewellyn's belief that courts should use "immanent business norms" to decide
cases is not necessarily what business people want).

133. See, e.g., Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. App. 1977) (discussing three approaches courts have used in determining effect of insufficient notice of sale on
suit to recover deficiency judgment). Robert Cooter observes that judicial interpretation of the
UCC is akin to common law evolution. See Cooter, supra note 26, at 1652. See also infra Part
III.B.

134. See, e.g., Knesz v. Central Jersey Bank & Trust Co., 806 A.2d 806, 813 (N.J. 1984)
declining to follow decisions of other state courts interpreting U.C.C. § 3-419(3)).

135. Amendments to the Code are made only after a period of such testing in the courts and
use of the Code in the marketplace. In that way the UCC drafting committee can assess the
Code's performance in light of actual business transactions and make any needed adjustments.
For instance, under the 1990 revisions to Article 3, a negotiable instrument may include a
variable interest rate. See U.C.C. § 3-104(a) (1994). The prior version required payment of a
"sum certain." U.C.C. § 3-106 (1978). For a description of the revision process, see Overby,
supra note 115, at 653-54; Rogers, supra note 114, at 1443-47.

136. See Cohen & Zaretsky, supra note 117, at 558 (noting that one problem with the UCC
is the time it takes to correct or update the law); Felsenfeld, supra note 117, at 763 ("Article 4A
is the product of some three and one-half years of work."); Rogers, supra note 114, at 1432,
1446-47 (reporting that revisions to Article 8 took six years); Edward Rubin, Efficiency, Equity
and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REV. 551, 551 (1991) (noting that
revisions to Articles 3 and 4 took twelve years); Wiseman, supra note 112, at 467 (observing
that the original Code was the result of 20 years of work).

137. See Danzig, supra note 123, at 623, 628-29 (noting that the legal realism basis of the
UCC and the drafters' desire for wide-spread adoption can result in reaffirming "the predomi-
nant morals of the marketplace" and focusing too much on the "is" and losing sight of the
"ought"); Overby, supra note 115, at 684, 704-09 (stating that the need for uniform acceptance
by states accounts for some UCC drafting decisions); Schwartz & Scott, supra note 112, at 615-
cial dealings between private parties and issues that seem less complex, less political, and certainly less emotionally charged than discrimination issues.\textsuperscript{138} Often UCC issues boil down to questions of money and of which party will insure against a particular type of loss,\textsuperscript{139} making those issues amenable to “yes” or “no” answers. Either the first secured lender prevails or the second; either the bank absorbs the loss for a forged drawer’s signature or the customer does. Moreover, in many instances the Code’s rules apply to merchants of equal bargaining strength, who are involved in multiple business transactions and frequent negotiations, and who often play opposite roles in different transactions.\textsuperscript{140} A buyer today may be a seller tomorrow; the bank that acts as a depository bank in one checking transaction may be the payor bank in the next. Thus, over time a party is likely to encounter both the advantage and disadvantage of any given rule. In contrast, the UCC drafters were unable to reach agreement on certain high-voltage issues, notably consumer matters.\textsuperscript{141} These limi-

\textsuperscript{28} (arguing that UCC drafting can be influenced by interest groups who are likely to support the status quo or incremental changes); Warren, \textit{supra} note 46, at 816-19 (recognizing that a limitation of the UCC approach to rulemaking is that “great ideas” and “bold initiatives” can be lost).

\textsuperscript{138} \textit{See} Overby, \textit{supra} note 115, at 654, 675 (arguing that politics are largely kept out of UCC drafting). Other commentators argue that, although some drafters saw the UCC as regulating a non-political body of law, the Code actually does involve moral and ethical questions. \textit{See} Danzig, \textit{supra} note 123, at 628-29; Wiseman, \textit{supra} note 112, at 468, 505-06. \textit{See also} Patchel, \textit{supra} note 112, at 92 (asserting that the UCC drafters’ lack of political accountability is one of it drawbacks).

\textsuperscript{139} \textit{See} Donald J. Rapson, \textit{Loss Allocation in Forgery and Fraud Cases: Significant Changes Under Revised Articles 3 and 4}, 42 ALA. L. REV. 435, 435 (1991) (“The guiding principle and rationale for the loss allocation rules of... Articles 3 and 4 was said to be that loss should be imposed upon the party best able... to avoid the loss.”).

\textsuperscript{140} \textit{See} Danzig, \textit{supra} note 123, at 622-23.

Commercial law... deals with a subcommunity (‘merchants’), whose members occupy a status position distinct from society at large, whose disputes are often resolved by informal negotiation or in private forums, whose relationships tend to continue over time rather than ending with the culmination of single transactions, and whose primary rules derive from a sense of fairness widespread—if imprecisely defined—within the commercial community.

\textit{Id.}

\textsuperscript{141} \textit{See} Cohen & Zaretsky, \textit{supra} note 117, at 559 (noting that even when consumers express their views at drafting meetings, the ultimate decision is made by commercial lawyers who may not be sensitive to consumer issues); Gail K. Hillebrand, \textit{Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective}, 42 ALA. L. REV. 679, 699-719 (1991) (describing areas in which consumers need more protection); Miller, \textit{supra} note 112, at 412-14 (observing that consumer issues were deleted from the final versions of Articles 3 and 4 because, \textit{inter alia}, different states had already developed different laws on these topics and, therefore, finding a uniform approach was difficult); Patchel, \textit{supra} note 112, at 124 (suggesting that the uniform laws process may be unable to accommodate consumer interests because of the desire on the part of the drafters for state enactment); Ribstein & Kobayashi, \textit{supra} note 125, at 143 (noting that drafting process for uniform laws may be biased toward business rather than
tations of the UCC lead to consideration of other examples of horizontal jurisprudence.

B. State Common and Statutory Law

State common and statutory law present other examples in which horizontal jurisprudence is evident, but with instructive differences from the UCC. State common law develops horizontally in that its rules tend to reflect and change with the social mores of the times. This horizontal development of state common law is obviously more limited than that of the UCC in that judges cannot consult with all affected groups in the participatory fashion of the UCC drafting committee. Instead, in making the decisions that form the common law, judges hear only specific cases brought by a relatively small subset of the public.\textsuperscript{142} Moreover, state judges, like their federal counterparts, are likely to come predominantly from white, male, middle-class, well-educated backgrounds and thereby represent a rather narrow slice of societal experiences and perspectives.\textsuperscript{143}

\textsuperscript{142} In particular, judges are limited to hearing directly from those challenging some rule and those seeking to uphold it. \textit{See ROSENBERG, supra} note 40, at 11-18 (noting that courts are limited by the type of cases brought, standing doctrines, precedent, available remedies, the judge's expertise in a subject area, and a general reluctance of many judges to make significant changes); Cooter, \textit{supra} note 26, at 1693 (observing that while a judicial decision may be general in scope, litigants typically have little regard for the social costs that inefficient rules impose on others); Gillian K. Hadfield, \textit{Bias in the Evolution of Legal Rules}, 80 GEO. L.J. 583, 589-92, 605-08 (1992) (noting that because a judge is limited to hearing litigated cases, courts never hear cases involving parties who comply with an existing rule or cases involving parties who cease disputed activity, and, in addition, evidence rules and doctrines of standing and mootness further restrict the information a judge has about a rule’s effect).

\textsuperscript{143} \textit{See} Becker, \textit{supra} note 55, at 455 (reporting that, as of 1991, women comprised only 2.8% of state trial judges, 5.5% of state intermediate appellate court judges, and 5.89% of state supreme court justices); Resnik, \textit{supra} note 55, at 1686, 1705 (noting that there is gender bias in state courts as well as federal courts and that women are estimated to be about 8% of all state court judges). \textit{See also} Carl A. Auerbach, \textit{A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law}, 75 MINN. L. REV. 539, 557 (1991) (stating that along with existing societal standards, judges do and should use their own criteria of justice in developing the common law); Richard A. Posner, \textit{Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights}, 59 U. CHI. L. REV. 433, 449 (1992) (noting that judges inevitably use their own political and personal values in deciding cases); Sadurski, \textit{supra} note 40, at 340, 344-50 (arguing that judges inevitably
Yet, society, above and beyond the individual litigants, certainly has an indirect effect on the common law in that as it evolves and changes, the common law inevitably reflects the social mores and conditions of the time. Indeed, the capacity for such growth and modification as societal needs evolve is a major hallmark and benefit of the common law system.

To be sure, there is unlikely to be a single, monolithic societal view on many issues, and the precedential basis of common law impedes change. However, state judges, who often are elected and who should and do look at societal values in deciding cases, but at times the values deemed to be societal may be the views of the particular judge.

44. Many jurisprudence scholars have noted that the common law and judicial interpretations of statutes reflect the overall interests of society. As Guido Calabresi states:

> Judges are, after all, either elected or appointed and ratified by elected officials. Their manner of selection suggests that they can both discern and respond to the popular will. . . . In seeking to apply [a common law] framework to new circumstances, each judge inevitably brings to the task some sense of the majority that selected him or her and some sense of what is right for the country.


45. Some scholars argue that the common law is economically efficient because competition among litigants causes an unconscious evolution toward efficiency. See John C. Goodman, An Economic Theory of the Evolution of Common Law, 7 J. LEGAL STUD. 393 (1978); William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. LEGAL STUD. 235, 261 (1979); Posner, supra note 144, at 185. See also Cooter, supra note 26, at 1690-94 (arguing that common law is efficient because the underlying social norms are efficient). But see Ramona L. Paetzold & Steven L. Willborn, The Efficiency of the Common Law Reconsidered, 14 GEO. MASON U. L. REV. 157, 165-75 (1991) (arguing that the common law process is not efficient).

46. It is, of course, a simplification to say that the common law reflects societal values because there is no single “society” with a single, consistent set of values and mores. Different people have differing views and any one individual is likely to have some conflicting and inconsistent views. See Epstein, supra note 1, at 984 (noting that there is no monolithic “society” with a single set of beliefs).

47. As Grant Gilmore pointed out, growth in the number of courts and in the number of published opinions can lead to confused decisions or decisions in which courts only take small,
dealing with a greater number of cases than their federal counterparts, are nonetheless going to sense and respond—even if slowly—to the general, consensus view of the populace. Thus, the state common law moved from treating wives as chattel to considering them as full-fledged adults entitled to sue for, among other things, lack of consortium. Similarly, cautious steps as opposed to making "bold and daring" innovations. See Gilmore, supra note 123, at 1041-45. Indeed, one of the purposes of the UCC was to supplement the common law, which was seen as inefficient due to its reliance on individual cases. See Kamp, supra note 112, at 334-35. See also Becker, supra note 3, at 998 (arguing that "a system bound by precedent... and tradition is antithetical to change"); Minow, supra note 56, at 54-55 (noting that typically the status quo is assumed to be natural and desirable and that changes to it need special justifications); Preston, supra note 83, at 2307-09 (noting that because many of the early legal decisions are founded on an individual judge's sense of the proper outcome, stare decisis can perpetuate the male-bias in the law). But see Bartlett, supra note 3, at 307-08 (noting that precedent leaves room for evolution and change); Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 INT'L REV. L. & ECON. 215, 217 (1994) (noting that, rather than viewing custom as static and efficient, one can see it as dynamic in that customs can "disappear without being repealed and... change without being amended").

148. See Stephen P. Croley, The Majoritarian Difficulty: Elective Judicialities and the Rule of Law, 62 U. CHI. L. REV. 689, 725 (1995) (noting that in only twelve states are most judges not elected); Mark C. Weber, Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases, 21 HASTINGS CONST. L.Q. 215, 225 (1994) (citing statistics showing that 41 states use elections for choosing or retaining judges and arguing that elected state judges are more responsive to the will of the people than federal judges). See also Abrams, supra note 144, at 1425-30 (arguing that elected state judges are less detached from public than non-elected federal judges). But see Croley, supra, at 726-42 (arguing that having elected judges may be risky in that those judges may be too responsive to public sentiment).

149. Commentators have debated whether federal judges are superior in quality to state judges. Compare Neuborne, supra note 19, at 1121-22, and Burt Neuborne, Parity Revisited: The Uses of a Judicial Forum of Excellence, 44 DEPAUL L. REV. 797, 799 (1995) (arguing that with respect to constitutional issues, federal judges are more competent and perform at a higher level than state judges), with Ann Althouse, Tapping the State Court Resource, 44 VAND. L. REV. 953, 958-61 (1991) (arguing that state courts should be assumed to be on parity with federal courts because, inter alia, there are 15 times as many state judges as federal judges; the quality of state judges, like federal judges, varies from one jurisdiction to another and over time; many state judges have taken the lead in developing doctrines on individual rights), and Resnik, supra note 55, at 1700 (arguing that federal courts should not be assumed to be preferable on women's issues over state courts). See also Akhil Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499, 1509 (1990) (describing debate over whether state courts should be considered on par with federal courts); Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 239-80 (1988) (describing the debate and concluding that it is unsolvable).

150. See supra note 144. In some areas, such as the application of a "reasonable person" test, a judge is necessarily required to consider community standards. See Sadurski, supra note 40, at 352 (noting that all courts must consider societal values in applying standards such as reasonable care, unconscionability, common sense, prudence, and reasonableness).

151. This example is suggested by Mosk, supra note 144, at 35.
the common law of torts responded to increased industrialization and distant sellers by eliminating requirements of privity.\textsuperscript{152}

State common law is also horizontally developed in the sense that courts in fifty sovereign jurisdictions formulate the rules. Through published opinions, there is a horizontal, cross-fertilization among jurisdictions as the courts in one state learn from and build upon the successes and failures in other states.\textsuperscript{153}

In the same way, state \textit{statutory} law is also a form of horizontal lawmaking. Not only do state legislators listen to and consult with their constituents, but state legislators also act horizontally in the formulation of laws insofar as they observe what has or has not worked in other jurisdictions.\textsuperscript{154} Thus, we see a cross-fertilization of ideas on topics as diverse as welfare rights, tobacco regulation, and criminal law.\textsuperscript{155}

\textbf{152.} See \textit{MacPherson v. Buick Motor Co.}, 111 N.E. 1050, 1053 (N.Y. 1916); \textit{RESTATEMENT (SECOND) OF TORTS} \S 402B (1986). See also Drummonds, \textit{supra} note 50, at 519 (noting that states, rather than the federal government, pioneered the use of criminal law in cases involving workplace safety violations); Weber, \textit{supra} note 148, at 229 ("Tort law is a field in which [state] experimentation has been particularly fruitful.").

\textbf{153.} See Martin H. Redish, \textit{Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights}, 36 UCLA L. REV. 329, 332 (1988) (discussing the advantage of having both federal and state courts rule on the same issue and noting that "[o]ne of the main advantages of an organic, interactive federal system is that the different political units within that system may benefit from . . . each other's wisdom and experience").

\textbf{154.} As Justice Brandeis noted: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting). Justice Holmes similarly referred to "the making of social experiments . . . in the insulated chambers afforded by the several states." \textit{Truax v. Corrigan}, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). See \textit{Church}, \textit{supra} note 45, at 1084 ("Domination by the national government . . . limits opportunities for small-scale experimentation by states to determine which of various . . . programs may work best."); Drummonds, \textit{supra} note 50, at 519 (giving examples of areas in which state laws were the models for later federal action); Ribstein & Kobayashi, \textit{supra} note 125, at 187 (noting that "the best solution" for the problem of inefficient and inconsistent state laws "may be more competition among the states rather than more uniform laws" and that "one should be skeptical about the production of law by any rulemaking elite"). See also \textit{Becker}, \textit{supra} note 3, at 1010 (arguing that errors are easier to correct in a legislative arena than in the courts); David A. Skeel, Jr., \textit{Rethinking the Line Between Corporate Law and Corporate Bankruptcy}, 72 TEX. L. REV. 471, 515-17 (1994) (observing that, in the area of corporate law, Congress often fails to adjust existing laws to keep pace with legal and economic developments whereas states are likely to act more quickly).

There is some horizontal jurisprudence in federal legislation in that Congress can learn from state legislation and from legal initiatives in other countries. For instance, in attempting to find an effective approach to health care in the U.S., commentators cite the results in other countries. See, \textit{e.g.}, Richard A. Schieber et al., \textit{U.S. Health Expenditure Performance: An International Comparison and Data Update}, 4 HEALTH CARE FIN. REV. 1 (1992). Similarly,
Moreover, the multi-jurisdictional nature of state common and statutory law also leads to horizontal law-testing. Just as these laws are developed by fifty sovereign jurisdictions who learn from one another, so too are they interpreted, modified, and updated by fifty equally sovereign tribunals, each of whom can consult and build upon opinions of other state courts.

However, the horizontal testing of state common and statutory law is somewhat different from that associated with the UCC. In most instances of UCC interpretation, each state court is dealing with identical or near-identical statutory language. In contrast, state common law is likely to be less precise than the UCC rules and is likely to vary more from one jurisdiction to another, making the decisions of other jurisdictions less helpful. So too, given the likely variance in the wording of state statutes, the cross-fertilization in the interpretation of statutory law likely will be less than that associated with the UCC or even common law. Yet, the non-uniform nature of state common and statutory law is also an advantage. First, without the need for uniformity, judges can mold state common and statutory law to fit new situations much faster and more easily than a committee can draft amendments to the UCC. Second, given each


155. For instance, a gun buy-back program or an anti-smoking ordinance that succeeds in one community may be copied by others. See, e.g., Michael J. Sniffen, Arrest Rate for Juveniles Dropped in '95, BOSTON GLOBE, Aug. 9, 1996, at A3 (noting that programs in various states and cities for gun confiscations, gun buy-backs, and bounty programs have been important in reducing the arrest rate of young people for violent crimes). With respect to anti-smoking laws, see Eskridge, supra note 40, at 160-61 (noting that regulation of cigarette smoking is an example of a "bottom up" movement that originated with the people who then pressed for government action); Peter D. Jacobson et al., The Politics of Antismoking Legislation, 18 J. Health Pol'y & L. 787, 788 (1993) (noting that, as of 1970, only fourteen states restricted smoking in public places, but, by 1993, 45 states and the District of Columbia restricted smoking in some manner and that over 480 counties or cities enacted anti-smoking ordinances, some of which are more stringent than the corresponding state law).

156. See Glimore, supra note 123, at 1045-46 (observing that courts are limited to the extent that state legislatures write highly technical and detailed laws, as opposed to broad statutes that allow judges more leeway to change the rules as conditions change).

157. See Cooter, supra note 26, at 1655 (noting that, to the extent common law is based on custom, change can occur with more flexibility than with statutes). With respect to judicial interpretation of statutes, see William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1017-61 (1989) (arguing that public values affect statutory interpretations made by judges); Sadurski, supra note 40, at 344-50 (noting that courts inevitably reflect more recent societal views when interpreting laws, and therefore a court may, through its statu-
state’s sovereignty, each has leeway to use innovative approaches to solving a problem, as opposed to settling for a modest solution that will appeal to other jurisdictions.\(^{158}\)

This is not to say that state statutory or common law is a more ideal form of jurisprudence than the UCC. The common law is limited by its precedential basis and by the number and types of cases that are litigated.\(^ {159}\) With state legislation, although constituents may be heard, the legislator (or, more likely, the aide) who drafts the bill may not be familiar with the details of the industry or practice to be regulated.\(^ {160}\) Moreover, the final law enacted may represent less a societal consensus on an issue than simply raw political power on one side.\(^ {161}\)

Despite these weaknesses, state common and statutory law, like the UCC, show that real progress can be achieved through a horizontal jurisprudence that is open to experimentation, variation, and cross-fertilization.

C. Negotiated Administrative Regulations

A relatively recent development—negotiated regulations in federal agencies—offers yet other insights into the implementation of a horizontal jurisprudence.\(^ {162}\) With negotiated regulations, the administrative agency

\(^{158}\) See Ribstein & Kobayashi, supra note 125, at 140-41 (observing that decentralized lawmaking, as in state common law, normally will produce more innovative, experimental, and numerous solutions to a problem than a uniform law does and suggesting that uniform law proposals might appeal to the least innovative legislators). However, the precedent-based nature of common law may serve as a deterrent to innovation. See supra note 147.

\(^{159}\) See supra notes 142 and 147.

\(^{160}\) See supra note 46.

\(^{161}\) See Fitts, supra note 45, at 1579-84 (noting that state laws may be superior to federal laws in that there is more experimentation and judicial interpretation between states, but that federal lawmaking may have the advantage of reducing the influence of business groups over consumer groups); Sunstein, supra note 31, at 29 (observing that legislation today seems to be a “series of accommodations among competing elites”).

does not simply issue regulations in a top-down fashion on the affected parties. Rather, the agency announces its intention to develop rules in a particular area and, much like UCC drafting, invites all interested parties to participate. Typically, the agency then decides which parties will participate and conducts initial organizational meetings to set procedural ground rules. Thereafter, the various participants (usually numbering twenty to twenty-five) and the agency representatives begin face-to-face discussions. As with UCC drafting, the agency publishes the resulting proposals, solicits comments, and works with the participants to modify the final draft to reflect the concerns raised by the comments.

However, while horizontal in nature, negotiated regulations differ from the UCC and common law in several key respects. First, they are a relatively new phenomenon and therefore lack the proven track record of UCC drafting and common law development. Second, the resulting agency regulations are not horizontally tested to any large degree. Rather, as with Title VII, the testing and interpretation of the regulations is left largely to the federal judiciary.

At the same time, insofar as the development of rules is concerned, the experience with negotiated regulations has been highly successful. Participating parties tend to focus squarely on concrete issues, consider details whose importance a more removed rule maker might not appreciate, rank their concerns, and make tradeoffs of lesser issues for conces-

163. See Overby, supra note 115, at 657-58 (noting similarity between UCC drafting and negotiated agency rulemaking).

164. See Haygood, supra note 162, at 78. Philip Harter describes the agency’s role in the negotiations as threefold. First, it “hires and pays the mediator and will frequently provide the logistical support for the negotiations.” Philip Harter, Regulatory Negotiation, 2 ADR REP. 80, 80 (1988). Second, the agency will typically “generate the data to be used in the discussions.” Id. Third, the agency will issue the final rule and “will have to act unilaterally if the negotiations fall apart.” Id. In this third role, as an interested party, the agency “occupies the seat of the 800-pound gorilla.” Id.

165. The process is described in Susskind & McMahon, supra note 116, at 142-50. See also authorities cited supra note 162.


168. See Harter, supra note 167, at 30. See also Farney, supra note 162, at A12 (“Details count for more than they would in far-off Washington. Environmentalists bargain for specific
sions on points considered critical. Furthermore, as with the UCC, the negotiations allow parties "with a long history of harsh adversarial relations" to air differences, clarify issues, and narrow the areas of dispute. Additionally, the publication and circulation of drafts has proved a reliable means of insuring that all affected parties are able to and do participate. Moreover, as with the UCC, "overarching all the other benefits...is the added legitimacy" that the resulting plan acquires.

Negotiated regulations also demonstrate that a consensual approach is not necessarily hampered by the drawbacks associated with the UCC drafting. Because negotiated regulations typically involve rather narrow issues (as opposed to revamping the entire system of secured transactions), the participants often produce a final draft within a few days or weeks, despite sometimes bitter acrimony at the start of the process.

trout streams... The timber industry knows the location of each sawmill and tries to protect its future.

169. See Harter, supra note 167, at 29-30, 50; Haygood, supra note 162, at 79 (noting that negotiated regulations have been more pragmatic, participants come away with new information and insights about the problems addressed, and negotiated rulemaking is easier and less costly in the long run than agency-imposed regulations); Susskind & McMahon, supra note 116, at 151 (observing that, with negotiated rulemaking at the EPA, many participants "felt that the negotiated outcome was far better than what they might have expected had they gone to court" and that "the wisest possible rules had emerged"); Farney, supra note 162, at A12 (noting that negotiations can lead "to a higher level of creativity" (quoting Richard Johnson, representative of the Sierra Club)). See also infra note 234 and accompanying text.

170. See Susskind & McMahon, supra note 116, at 151, 159. See also Haygood, supra note 162, at 79 (noting that negotiated regulations tend to be more pragmatic than those asserted top down by the agency and that participants obtain new information about the problems). In negotiations regarding lumber issues, the parties found the same benefits came from the dialogue. See Farney, supra note 162, at A12 ("I'm discovering the timber industry is more responsive to our needs than I ever thought... And they're discovering that I'm more sensitive to their needs than they thought." (quoting Richard Johnson, representative of the Sierra Club)).


172. Harter, supra note 167, at 30. As Harter notes, regardless of whether the horse under design "ends up being a five-legged camel or a Kentucky Derby winner," the resulting rules will have a validity beyond those developed by an agency and imposed top down on the parties. Id. See Susskind & McMahon, supra note 116, at 152 (remarking, with respect to negotiated rulemaking at the EPA, "in the eyes of the participants...negotiated rulemaking appeared to produce more legitimate outcomes at a lower cost"). See also Popper, supra note 30, at 289 (noting that unanimous consent in negotiation may well mean a "lowest common denominator result," but may also increase the likelihood of compliance and reduction of enforcement costs).

173. See e.g., New Developments, 3 BNA ALTERNATIVE DISP. RESOL. REP. 3-4 (1989) (describing successful use of negotiated rulemaking in the Department of Agriculture and noting that although participants originally thought they were "too far apart" to reach an agreement, they did so within three days). See also Charan, supra note 26, at 108 (noting, in connection with horizontal business structure, that when employees "identify real business problems, diagnose them together, and reach conclusions...they become more skillful at making trade-offs, and more trusting of one another").
Furthermore, the fact that there are multiple issues, with few having “yes” or “no” answers, has proven to be an advantage, rather than a detriment, because it allows a party to trade success on one issue for concessions on another. The regulatory experience has also shown that fears of perceived inequality of power and inexperience in negotiating are unwarranted. Even parties who seemingly lacked political and numerical power proved “[t]hey were... quite capable of holding their own in [agency] negotiations” and “exerted substantial influence over the final agreements.”

In sum, the UCC, state common and statutory law, and negotiated agency regulations present concrete examples of horizontal jurisprudence at work. No one of these experiences can or should be transplanted wholesale into the sex discrimination area. Yet, taken together, these examples point the way to a new approach to employment issues.

IV. Injecting Horizontal Jurisprudence into Employment Issues

Although gender issues in the workplace seem a far cry from the UCC, state common and statutory law, and federal administrative regulations, an infusion of horizontal jurisprudence into the employment area will nonetheless aid in finding solutions. Using a horizontal approach for employment issues does not mean the enactment of a uniform gender-in-employment law. Title VII already tries to provide one-size-fits-all rules. Adding a horizontal approach as a supplement to (rather than a replacement of) Title VII means encouraging a horizontal development and testing of a variety of strategies for dealing with issues of gender in the workplace. In particular, with respect to developing strategies, it means:

174. See Harter, supra note 167, at 50 (observing that negotiations tend to work better when there are multiple issues to trade and few “yes” or “no” answers because a party can yield on issues that have lower priority to improve its position on higher-priority issues); Susskind & McMahon, supra note 116, at 152 (noting that successful negotiated environmental rulemaking demonstrates that having “a large enough range of issues or options to allow trade-off or creative packaging” is beneficial). Thus, on several occasions, the Environmental Protection Agency has found negotiated rulemaking successful, in part precisely because the issues were polycentric in the sense of generating a large number of views and many interested groups. See Harter, supra note 167, at 40-42.

175. See Susskind & McMahon, supra note 116, at 154, 157 (observing that the perceived inequality of power and inexperience in negotiations of environmental groups did not prove detrimental to successful negotiated rulemaking at the EPA).

176. Id. at 154. See also Harter, supra note 167, at 45 (noting that there are numerous sources of power for purposes of negotiations, including a party’s ability to go to court if negotiations fail, the uncertainty of a judicial outcome, the ability to inflict costs and delays on the other side through litigation, and the ability to go to the media).
acknowledging the diversity among employers, employees, and workplace situations and focusing on specific problems in specific jobs at specific workplaces;

- involving as many people and as many different viewpoints as possible in creating strategies to deal with these problems and, in particular, encouraging the people directly affected—managers and employees, women and men, persons of all races and job categories—to participate in the planning process;

- allowing different firms and employees to devise different tactics to deal with issues;

- trying different fora, not just federal courts and Congress, to effect change and, in particular, working on prevention and in-house dispute resolution procedures as alternatives to litigation.

With respect to testing strategies, it means:

- encouraging workers and firms to learn from the successes and failures of other firms;

- revising "solutions" over time as circumstances change;

- accepting some complete or partial failures and even admitting that some problems may not be solvable at this time.

To flesh out this proposal, let me repeat that I am not proposing the repeal of Title VII or other federal civil rights laws. The vertical approach of Title VII has certain advantages: it provides a uniform set of minimum rules and protections; it may hasten firms to take steps that, in the long term, would come about through market forces; it may increase women's self-esteem and encourage more women who want to enter the workforce to do so; it may help galvanize women to work together on employment and other issues.177

My proposal is to add a horizontal jurisprudential approach as a complement to the current, largely vertical Title VII. In doing so, employees would simply acknowledge the differences among themselves, their views, and the employment situations they face, as well as acknowledging that by itself, no one-size-fits-all set of rules can solve all gender disputes in the workplace.178 Indeed, the beauty of a horizontal approach

177. See authorities cited supra note 58.

178. See supra notes 100-03 and accompanying text. See also Abrams, supra note 66, at 1192 (contending that a single comprehensive principle of antidiscrimination law is unnecessary because different analyses may be better suited to combat different instances of discrimination); Minow, supra note 103, at 64 (observing that women need to recognize that just as there is diversity among women, so too there can be no one, single feminist method); Radin, supra note 3, at 1718 (arguing that feminism should not seek to find one overarching conception or set of
is that it takes advantage of the very diversity of viewpoints and situations that makes these issues appear so intractable.\textsuperscript{179} It encourages all employees to participate in developing individualized plans to handle the particular problems presented at their workplaces. Thus, like the UCC and negotiated administrative regulations, it allows strategies to develop from the bottom up, rather than being imposed from the top down.\textsuperscript{180} Moreover, by including many voices in the drafting stage, any resulting plan is likely to be both more workable and more acceptable to employers and employees, both men and women.\textsuperscript{181}
However, while the use of a horizontal development of strategies will, like the UCC and negotiated regulatory drafting, encourage people with different views to work out plans for dealing with particular issues facing them, the result will be the opposite of a uniform code of conduct or single set of regulations. The result will be more akin to state common or statutory law in that each firm will be free, within the general contours of applicable laws, to devise its own tactics for solving the particular gender issues it faces. Thus, as with state laws, "solutions" will vary from one employer to another. Employees and managers in a small manufacturing plant in the Midwest may develop rules different from those implemented in a Wall Street brokerage house. Indeed, a large company and its employees may develop different rules for different types of work-

Levit, supra note 56, at 1107-08 ("Part of the answer may lie in feminists extending an open invitation to men to participate in dialogue. Inclusion of majority group members may diffuse misconceptions and resentment, as well as help to avoid political and social backlash."); Minow, supra note 103, at 58-60 (noting that a powerful device to expose and challenge unstated assumptions and the status quo is to look at an issue from another person's point of view and thereby see the partiality of one's own perspective); Preston, supra note 83, at 2341, 2345 (arguing that feminists need to invite everyone "to join in a non-threatening dialogue" and noting that "[f]or feminists, as any moral- and ethics-based reform movement, coming to others willing to receive as well as to teach is a laudable principle worth striving to attain"). See also Barenberg, supra note 42, at 1493 (noting that worker participation in rule-development enhances commitment to the resulting decisions); Marion Crain, Feminism, Labor, and Power, 65 S. CAL. L. REV. 1819, 1873 (1992) (noting that a more participatory, decentralized structure in labor unions gives workers a sense of self-esteem, a feeling that they can affect their own lives and a lessened sense of isolation); Ring, supra note 46, at 303 (noting, in a discussion of the UCC drafting, that to the extent interested and knowledgeable parties are shut out of the drafting process, suspicion and resentment rise, and people are forced into advocacy roles rather than being co-searchers for a solution); Stephanie N. Mehta, Executive Pay, WALL ST. J., Apr. 11, 1996, at R12 (noting that many companies find diversity plans are more successful if senior managers consult with subordinates early in the process and invite them to help establish goals).

182. Not only will a firm have to work within Title VII and the other civil rights laws, it will also have to avoid violating § 8(a)(2) of the National Labor Relation Act, which makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1973 & Supp. 1996). The act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Id. § 152(5). The purpose of § 8(a)(2) was to permit the development of collective bargaining by precluding employers from forcing employees to join management-dominated "company unions." For a discussion of § 8(a)(2), see, for example, Barenberg, supra note 42, at 1392-1430. Some commentators argue that Congress should repeal § 8(a)(2) because it discourages communication between employers and employees. See Shaun G. Clark, Note, Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2), 96 YALE L.J. 2021 (1987); Marion Crain, Images of Power in Labor Law: A Feminist Deconstruction, 33 B.C. L. REV. 481, 531 (1992).
ers. The problems faced by women and men in a firm’s factory may be substantially different from those faced by the firm’s office workers. Even within the same industry, workers at different employers may face differing situations, so the solutions devised at one firm may differ somewhat from those agreed upon at a competing company. Further, even if the problems are largely the same at the two firms, different groups of managers and employees may devise different strategies for attacking the problems.

This lack of uniformity is not a cause for alarm. One of the strengths of a horizontal jurisprudential approach is the testing by different entities of diverse approaches to solving a problem. Nor should people be dismayed because some of the “solutions” fail utterly. Inevitably, some plans will fail, but others will succeed, at least in part. With still other strategies, their success may change over time as the circumstances in a firm or industry change. As with the horizontal testing of the UCC and state common law, employers and employees can learn from and build upon their own successes and failures, as well those of other

183. Cf. Delgado, supra note 3, at 657 (noting that a small subgroup may do better dealing with problems on its own rather than aligning with a large group). Indeed, scholars note that the town-meeting approach to lawmaking works only where there are small groups. See Magleby, supra note 32, at 16.

184. Some feminists have begun looking outside the United States for possible strategies for solving U.S. employment issues. See Bernstein, supra note 2, at 1256-58, 1280-83 (noting that, rather than stressing individual fault-finding and litigation for sexual harassment, Europeans regard harassment as a collective harm to health, safety, and worker dignity and emphasize prevention and informal in-house complaint resolution procedures); Issacharoff & Rosenblum, supra note 60, at 2200-14 (looking to the European solutions for dealing with pregnancy leave). See generally Earle & Madek, supra note 61, at 69-78 (comparing sexual harassment laws of various countries); Margaret Y.K. Woo, Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State, 42 EMORY L.J. 143 (1993) (discussing Chinese laws relating to women in the workplace).

185. Deborah Rhode outlines how, historically, the arguments used by feminists have changed as their goals changed. For instance, the early feminists relied on sex-based differences as a rationale for the enactment of protective laws limiting women's work hours. As Rhode points out, whether such protective laws did more harm than good (by protecting women out of the best jobs) depends on which women are considered, which time period is analyzed, and what trade-offs one is willing to make. See Rhode, supra note 56, at 1738-41. See also Becker, supra note 3, at 991 (noting the need for experimentation is "particularly high in an area like [sexual] equality . . . in which, there is no consensus about what a world with sexual equality would look like let alone agreement on the means to get there" and that women may need a complex mixture of approaches and different mixtures at different times); Levit, supra note 56, at 1050 ("[K]nowledge, rather than consisting of objective, timeless truths, is situational and constructed from a confluence of multiple perspectives."); Radin, supra note 3, at 1704 (noting that the same problem may demand different solutions at different times).
firms. Eventually, as different firms experiment with different plans, there will be a cross-fertilization of ideas and a gradual movement toward the better-working strategies. Furthermore, while some failures are inevitable with a horizontal approach, these missteps will be easier to correct than those arising in a vertical system. Employees and firms can modify a malfunctioning program at a single plant in short order compared to the time, expense, and energy required to convince the Supreme Court or Congress to act on a Title VII issue.

186. See Bartlett, supra note 101, at 864 (noting that trial and error is central to feminist methodology); Becker, supra note 3, at 990 (arguing that "a top-down judicially-enforced approach to equality" may be inconsistent with the experimentation needed for success); Bernstein, supra note 2, at 1293, 1304 (arguing that sexual harassment problems need pluralistic solutions, innovation, flexibility, and a trial and error approach); Karst, supra note 12, at 477 (observing that an important freedom is "the freedom to make serious mistakes"); Preston, supra note 83, at 2322 ("We learn from others' successes and from their mistakes, less painfully than from our own."); Carol Sanger, Feminism and Disciplinarity: The Curl of the Petals, 27 LOY. L.A. L. REV. 225, 245 (1993) (noting that feminists continue to rethink and refine their theories); Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA WOMEN'S L.J. 1, 29 (1992) ("Finding the best answer for now means to generate as many options as possible . . . . The crucial idea . . . is that any option chosen can be provisional.").

187. The proposal for a horizontal jurisprudential approach has some similarities to pragmatism and legal realism in recognizing the contextual aspect of rules and the need to revise rules as conditions change. See Becker, supra note 3, at 990 (observing that a pragmatist "considers it unlikely that human beings can divine the best solutions to complex issues in the abstract, using top-down theories, rather than through experimentation"); Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 805-06 (1989) (describing pragmatism); Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 599, 637 (1989) (noting the similarity between feminist movement and legal realism); Radin, supra note 3, at 1707 ("Pragmatism and feminism . . . share . . . the commitment to finding knowledge in the particulars of experience[, . . . . a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, [and] narrativity of meaning."); Singer, supra note 123, at 474 (observing that the legal realist wants "to replace formalism with a pragmatic attitude toward law" and regards legal principles as "social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends"). However, Katharine Bartlett notes that feminist practical reasoning is somewhat different from legal realism in that legal realism sees rules as incapable of covering all factual situations, whereas feminist practical reasoning sees unbending rules as undesirable as well as impracticable. See Bartlett, supra note 101 at 853-58. See also Scales, supra note 90, at 1400 (describing similarities and differences between feminism and legal realism).

188. With respect to the difficulty of legislatively overriding a Supreme Court decision, see MARSHALL, supra note 39, at 167; Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177, 184-96 (1989); Philip S. Runkel, Note, The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?, 35 WM. & MARY L. REV. 1177, 1187-1200 (1994) (describing the time and negotiations necessary to enact a civil rights law overruling certain Supreme Court rulings). With respect to the Supreme Court's reluctance to overrule its own decisions, see Marshall, supra, at 181 (noting the Court is generally reluctant to overrule precedents construing statutes).
Women may also find that they can use fora or activities outside the workplace per se to develop strategies that aid them in employment situations and in their legal battles. For instance, women may find that work with labor unions, with community groups, with state and municipal legislative bodies, or utilizing extra-legal tactics (such as boycotts) yield benefits. As scholars have long recognized, law and society are inexorably intertwined, and changes in social attitudes often come before or along with successful legal change. For instance, Brown v. Board of Education, one of the hallmark civil rights cases, was part of a larger sea of change in social attitudes and economic and political forces. So

See also Becker, supra note 3 at 989-90 (noting that definite legal standards can hurt women because they can be difficult to change).

189. See Crain, supra note 181, at 1866 (arguing that an alliance between feminists and labor unions could help revitalize unions); Rhode, supra note 56, at 1779-80 (suggesting that women should work more in collective bargaining and legislative lobbying because courts may not be the ideal forum for all women's issues). See also Bernstein, supra note 2, at 1285-86 (observing that in Europe there is greater involvement by trade unions in sexual harassment complaints).

190. See, e.g., Crain, supra note 4, at 1918 (observing that many women receive significant satisfaction in working with community groups).

191. See Becker, supra note 3, at 1002-12 (arguing that women may have greater success in legislatures than in courts).

192. See Harold A. McDougall, Social Movements, Law and Implementation: A Clinical Dimension for the New Legal Process, 75 CORNELL L. REV. 83, 103-05 (1989) (describing use of extra-legal tactics in the civil rights movement, such as school strikes, sit-ins, freedom rides and boycotts); David Southwell, Jackson, NOW Push on with Mitsubishi Boycott, CHI. SUN-TIMES, July 24, 1996, at 20 (citing national boycott of Mitsubishi to urge firm to settle harassment lawsuits and increase opportunities for women and minorities). See also Linda R. Hirshman, Sex and Money: Is Law School a Dead End Street for Women?, 87 Nw. U. L. REV. 1252, 1271 (1993) (suggesting that women may be able to change hiring and admission policies at colleges and universities by tying donation money to women's issues and scholarships). With respect to the limits of societal views on judicial decisions, see authorities cited supra note 104.

193. See Abrams, Title VII, supra note 5, at 2531-37 (observing that employment discrimination must be seen as part of larger social patterns); Bartlett, supra note 57, at 2560-68 (noting that, in applying discrimination laws, courts tend to build upon, not challenge, community norms and concluding that women cannot create an effective approach to workplace problems apart from community norms); Freedman, supra note 4, at 965 (commenting that sexual patterns and differences are deeply embedded in social, economic and political structures and into a person's sense of self); Greene, supra note 4, at 1263 (noting that law "is embedded in dense social matrix and . . . legal change may depend on changes in that matrix").


195. Although commentators disagree about the significance of the Brown decision by itself, they agree that Brown must be viewed as part of a larger social mosaic. A multitude of forces were at work and contributed to the Supreme Court's decision, and much was left to be done after the decision to achieve desegregation. See Richard Kluger, Simple Justice 126-314, 748-78 (1976) (describing social, economic, and political factors leading up to the Brown decision and civil rights movement after Brown); Rosenberg, supra note 40, at 72-106, 157-74 (describing social conditions before and after Brown); Mark V. Tushnet, Making Civil
too, in addition to legal victories, women can affect their position in the job market by addressing community standards and working for bottom-up social change.\textsuperscript{196}

The suggestion that a horizontal approach be injected into employment issues will, no doubt, generate skepticism. Needless to say, there are significant differences between issues of gender equality in the workplace and commercial and common law questions. For instance, although both employment issues and the UCC involve dealings between private parties, issues of gender in the workplace are more complex and more emotionally charged than UCC issues.\textsuperscript{197} In sex discrimination cases, there are not only financial considerations, but also concerns for worker dignity, personal fulfillment, and, in some sense, morality.\textsuperscript{198} Consequently, the question of who bears the loss for check fraud is unlikely to generate the type of heated debate that arises when the issue is hiring or
promoting more women, pregnancy leave, or child care. Furthermore, especially in areas such as sexual harassment, there are strong overtones of fault-finding in employment issues that are not present in commercial law.

Moreover, unlike commercial transactions, relations between employers and employees (or potential employees) are not typically dealings between parties of equal bargaining strength. Rather, in gross generalities, the workplace can be seen as an area in which one group (usually men) has control and a vested interest in keeping the status quo, while another, far less powerful group (women) seeks changes. Unlike the development of the UCC, where most parties saw the benefit of change, managers of firms may see little reason to modify the status quo regarding employment practices. With little bargaining power, women may find themselves agreeing to codification of existing practices (which effectively

199. See supra notes 107-08 and accompanying text.

200. Fault-finding in the UCC context is limited to a few situations in which liability rests on the party best able to avoid the loss. See, e.g., U.C.C. § 3-405(b) (1994).

201. See supra note 140 and accompanying text. As Michael Fitts notes, in discussing legislative theory, true dialogue presumes a system of equals, with each person capable of having her position accepted. See Fitts, supra note 45, at 1618.

202. Not only are many work standards designed by men, see authorities cited supra note 93, but men disproportionately occupy positions of power within firms, see Abrams, supra note 66, at 1204 (observing that women tend to occupy the lower rungs of most professional hierarchies); Epstein, supra note 61, at 429-30 (noting that although women constitute almost half of the workforce, "their recent entry into many fields means that most of them hold jobs that fall in the low range of the professional hierarchy, with men occupying the vast majority of supervisory and managerial positions"); Larson, supra note 104, at 1255 (noting that women are underrepresented in political bodies and centers of economic and intellectual power); Paetzold & Gely, supra note 11, at 1526-27 (noting the difficulty women and minorities have in moving to top management positions); Radford, supra note 11, at 483-84 (noting difficulty of women in moving into positions of corporate power); Resnik, supra note 5, at 1942 (noting that women often meet their adversaries as unequals); David D. Kirkpatrick, Women Occupy Few Top Jobs, A Study Shows, WALL ST. J., Oct. 18, 1996, at B16A (reporting that women make up 10% of the officers at the largest U.S. companies and an average of just 2% of the senior executive positions); Melissa Schorr & Lisa Kalis, Corporate Boards: The Way They Still Are, 20 WORKING WOMAN 11 (1995) (reporting that, as of 1995, 40% of the Fortune 1000 corporate boards did not have any female directors and that, overall, women occupy 6.9% of the 11,790 board seats of those companies). In addition, my proposal has the drawback of requiring women to bear the initial onus of asking for change in the status quo. See Preston, supra note 83, at 2343 (noting risk of overburdening women with the primary responsibility for persuasion but also recognizing that there is no other realistic approach at present).

203. At the time the UCC was originally drafted, merchants recognized that the Uniform Sales Act, which was based on 19th century commerce, was woefully obsolete. See Wiseman, supra note 112, at 472-77.
treat the male perspective as the norm) or settling for relatively modest gains that then become solidified into workplace rules. 204 Additionally, by focusing on pragmatic steps to ameliorate specific problems, women may lose sight of bold ideas and initiatives. 205 Even worse, some of the small steps that are achieved may be inconsistent with the larger goals of the women's movement 206 and may disperse what power women do have. 207 Furthermore, because the public may link an issue's "importance" to its being subject to federal regulation, some women may fear that they will diminish the significance of gender-discrimination issues by relegating them to the community and individual-employer level. 208

In addition, finding an acceptable solution in the employment disputes is often highly complex. Unlike UCC issues, where frequently "yes" and "no" answers are possible, 209 there are few bipolar issues or remedies in the area of sex discrimination in the workplace. Even assuming agreement on the proposition that having more women in a specific position would be beneficial, such agreement tells us nothing about how to go about achieving this goal. 210 Similarly, while few people would defend sexual harassment, reasonable minds can differ about such issues as how to define it, the plaintiff's appropriate burden of proof, permissi-

204. See supra note 93 and accompanying text; Bartlett, supra note 57, at 2568 (warning that women need to guard against assuming that existing community norms are gender neutral); Minow, supra note 56, at 65-66 (noting that, by playing under the existing rules, women risk becoming tokens and accepting male perspectives); Preston, supra note 83, at 2343 ("Feminists must resist becoming co-opted, inordinately diluted, or transmuted into puppets of the very systems we seek to change."). See also Sunstein, supra note 31, at 45 (noting that legislative stalemates typically protect existing wealth).

205. See Radin, supra note 3, at 1708-11, 1721 (noting that a pragmatic approach may be dangerous for women in that it can lead to conservatism). An historical example is provided by Deborah Rhode who notes that the early 20th century feminist movement focused single-mindedly on getting the vote and ignored racial injustices and the broader social and economic constraints on women. However, Rhode also admits that had the women attacked the broader issues, they risked division, diluted energies, and delay in getting the vote. See Rhode, supra note 56, at 1741-42.

206. See Preston, supra note 179, at 738-39 (noting that using past practices as the starting place for reasoning can impede improvements).

207. See Fitts, supra note 45, at 1635-37 (discussing effect of dispersion of power in a legislative setting).

208. See, e.g., Resnik, supra note 55, at 1699-1700 (arguing that the refusal of federal courts to get involved in domestic issues marginalizes women and their problems). But see Becker, supra note 3, at 1011 (arguing that, by seeking relief from the Supreme Court, women have foregone experimentation on issues).

209. See supra note 139 and accompanying text.

210. See supra notes 4, 5, and 64 and accompanying text.
ble defenses, vicarious liability for the employer, and the appropriate remedy.211

Along with these critiques is the observation that promoting increased dialogue on any subject is platitudinous but often unproductive.212 As Steven Smith wryly notes, the suggestion of increased discussion on an issue is the "all-purpose elixir of our time."213 Moreover, any negotiation can deteriorate into a struggle among self-interested groups, and if some groups (for instance, the lower-paid workers) are not adequately represented, any dialogue that does occur will be incomplete and result in only a partial solution.214

Certainly, there is a good deal of legitimacy in these concerns. Women need to guard against simply ratifying the status quo or settling for inconsequential gains. They also need to be alert for "discussions" in which negotiations are ongoing, but which never produce meaningful progress or lead to strategies which target only elite professionals.215 Furthermore, no one believes that gender issues will magically disappear if workers and management just join hands and sing It's a Small World or Hakuna Matata.

211. See supra notes 71-76, 85, and 86 and accompanying text.

212. As Philip Harter observes, one must be careful not "to fall into a 'hot tub' view" that assumes that "if only we strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand." Harter, supra note 167, at 31.

213. Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409, 435 (1990). Smith is also critical of calls for solutions based in actual experience. He notes that no one wants a body of principles divorced from experience, but to be helpful, raw data must be compartmentalized into theories and rules. See id. at 424-31. However, Katharine Bartlett points out that in emphasizing contextual reasoning, feminists are not opposing all deductive approaches but are acknowledging the diversity in human experience and the value of taking into account competing or inconsistent claims. See Bartlett, supra note 101, at 855-57.

214. See Fitts, supra note 45, at 1639-40 (discussing problem of poor being left out of legislative discussions); Lucie E. White, On the "Consensus" to End Welfare: Where Are the Women's Voices?, 26 CONN. L. REV. 843, 844-51 (1994) (reporting the failure to include women, and, particularly poor women, in discussions regarding welfare reform). See also Ribstein & Kobayashi, supra note 125, at 147-50 (noting that although the UCC has been highly successful, other uniform law drafting may give undue benefit to special interest groups); Schwartz & Scott, supra note 112, at 610 (same).

Indeed, to the extent the creation of a dialogue process involves the construction of new procedural rules, elite workers and employers may gain an advantage with their ability to navigate through any new procedures. See Fitts, supra note 45, at 1620-21 (discussing the effect of more procedures in the legislative setting); Sunstein, supra note 31, at 76 (noting that in the legislative context, deliberation can slow down social change and strengthen the status quo).

215. As Philip Harter notes, human nature's tendency to procrastinate is one of the imperfections of negotiated settlements. See Harter, supra note 167, at 47.
Valid though these concerns are, they ought not be magnified to the extent of wholly excluding a horizontal approach. Without discussions within firms about specific problems, fewer changes will occur. Vertically ordered change, whether emanating from the Supreme Court or Congress, is sporadic and unpredictable, and frequently meets with resistance and backlash. By supplementing such vertical movement with non-threatening discussions in workplaces, women can concentrate on concrete issues and obtain proactive changes to defuse the specific problems they are facing. In the employment arena in particular, each employer presents a somewhat different audience, with different needs and different work arrangements. Just as UCC drafting, the common law, and negotiated regulations focus on specific factual situations, women (and men) enhance their likelihood of success by tailoring their discussions to meet particular employment arrangements. Certainly women will have to compromise on some matters, but compromise is inevitable, whether women seek the aid of Congress, the courts, or individual employers. Similarly, different results—ranging from “glowing success”

216. See authorities cited supra notes 104 and 188. See also Harter, supra note 167, at 28, 59 (noting that negotiated rulemaking is often less expensive and time consuming than seeking government action).

217. As Cheryl Preston notes, in seeking change, feminists “must be sensitive to cultural differences and nuances. They must understand the audience they are trying to reach.” Preston, supra note 83, at 2340 (footnotes omitted). See also Bernstein, supra note 2, at 1293-98 (arguing that allowing firms to write their own standards with respect to sexual harassment would likely lead to a greater commitment to those standards, rules responsive to the actual needs of the particular firm, a relative ease in changing the rules when necessary, and an actual reduction in sexual harassment and litigation); Stein, supra note 90, at 1189 (“[O]ne type of argument may be more appropriate and effective in particular fora, while other types . . . may appeal to other audiences.”).

One hopes that, as discussions progress, previously antagonistic parties will build a sense of trust toward one another. See Charan, supra note 26, at 112 (“A horizontal network must . . . share openly and simultaneously each member’s experiences, successes, and problems, soft information that can’t be captured in databases and spreadsheets and that remains hidden . . . in most traditional organizations. This is the kind of sharing that builds trust, empathy, and secure relationships.”); Ghoshal & Bartlett, supra note 26, at 93 (noting that moving to a horizontal management style requires that “top management . . . build fairness into its organization practices” to create a “trust-based environment in which people can rely on one another’s judgments and depend on one another’s commitments”); Preston, supra note 83, at 2293 (noting that to effect movement on feminist issues, there must first be a feeling of trust among all participants).

218. See Miller, supra note 45, at 873 (“Although compromise may never entirely please everyone, it best reflects consensus and dialogue.”). Martha Minow describes the practical problems that women face:

If we want to make a difference in areas of power, . . . we must take . . . established criteria as the governing rules, even if they confine what we have to say or implicate
to "acceptable compromise" to "utter failure"—are inevitable whenever people seek to change existing patterns of social behavior.

Moreover, for many employers, intra-firm negotiations will not be a new or frightening phenomenon. Just as there are often repeat dealings between merchants, a firm frequently has ongoing discussions with its employees about a host of workplace issues, ranging from safety procedures to which radio station to play. Seen this way, the employment arena is not that far removed from the prototype commercial transaction. Furthermore, although men certainly dominate management in the employment arena, women are not necessarily powerless pawns. The recent experiments with negotiated agency regulations show that parties having less power and experience can be effective advocates in negotiations. In particular, with Title VII in force, women have leverage from their right to litigate if discussions fail to eliminate discrimination or harassment at the workplace. Perhaps equally important, women possess substantial bargaining leverage arising from the ability to take their complaints to the media.

us in the patterns we seek to resist.... Yet by accepting the game as it is, we risk becoming tokens, taking our meanings and identities from those who have let us in. Martha Minnow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47, 54-55 (1988). See also Bartlett, supra note 3, at 304-08, 332-33 (noting that, to be effective, change must incorporate the past).

219. See supra notes 176-77 and accompanying text. See also Charan, supra note 26, at 107 ("[Horizontal] [n]etworks quickly surface people of exceptional competence, informal leaders whose talents have been hidden behind functional or hierarchical walls.").

220. It is wrong to assume that because employers have the power to hire and fire employees, employees lack all power. As Philip Harter notes, in any negotiations there are numerous sources of power, such as a party's ability to litigate if negotiations fail, the uncertainty of a judicial outcome, the costs and delays of litigation, and the ability to use media pressure. See Harter, supra note 167, at 45. Obviously, employees possess each of these types of power in negotiating with their employer. See Abrams, supra note 56, at 1039 (noting that non-litigation strategies, such as education programs in the workplace, may be more effective if the threat of litigation remains); Susskind & McMahon, supra note 116, at 152-53 (observing that negotiated rulemaking in administrative agencies is likely to be successful if participants realize the alternative is litigation with an uncertain outcome).

In addition, there are ways to respond to concerns that a horizontal jurisprudential approach will lead to codification of male-dominated rules or only to small advances. First, utilizing a horizontal approach does not foreclose simultaneously seeking vertical changes, either from Congress or the Supreme Court. Women can and should continue to lobby Congress and state legislatures for statutory aid on various issues and also pursue litigation to clarify existing laws. Second, there is no reason to think that a male-dominated Congress or judiciary will be any more receptive to change than individual employers. If anything, the employer who has a financial interest in maintaining a harmonious and productive workforce will likely be keenly interested in resolving workplace disputes without litigation. Third, while it is easy to talk of the need for bold ideas and initiatives, there is no single view among women as to what those bold ideas and initiatives should be. In this regard, one of the UCC's "shortcomings" points out an important jurisprudential lesson: not all problems are solvable by uniform, one-size-fits-all rules. Just as there was no consensus among the UCC drafters or the states as to how to handle certain consumer issues, so too some gender-in-employment issues may require different answers in different factual settings and at diff-

222. Even proponents of negotiated solutions in other areas admit that negotiations often are just one of a number of methods of rulemaking. See Harter, supra note 167, at 44. See also Kathryn Abrams, Law's Republicanism, 97 YALE L.J. 1591, 1598 (1988) (noting that no one institution by itself is likely to be able to effect change); Warren, supra note 46, at 821-22 (noting that Congress has been able to pass controversial consumer legislation for which there was no UCC consensus because the inability to reach consensus "does not deter Congress; for Congress . . . need not seek consensus . . . . Congress can act decisively in the face of considerable opposition").

223. With respect to the dominance of men in the federal judiciary, see sources cited supra note 55. See also ROSENBERG, supra note 40, at 212, 214-18 (noting that employment statistics show that even though women have "won" quite a number of legal cases, "there is little evidence that these Court victories have much changed the position of women in American society"); Larson, supra note 104, at 1252-53 (noting that having tried utilizing legislation and the courts in the 1960s and 1970s, women are increasingly facing up to the limits of law as a vehicle of social change); McDougall, supra note 192, at 115-18 (arguing that civil rights proponents need to stop focusing on the Supreme Court and concentrate instead on other routes to change).

224. See supra notes 106-11 and accompanying text. See also Bernstein, supra note 2, at 1276 (observing that Europeans place much more emphasis on in-firm resolution of sexual harassment problems because they are skeptical of the ability of a court to sort out the merits in any but the most simple cases); Epstein, supra note 57, at 1052 (noting that employers have an incentive to set up programs to avoid discrimination disputes).

225. See supra notes 64 and 71-75 and accompanying text. In addition, there is even dispute as to who is a woman. One can take issue with the seemingly straightforward proposition that all women possess two X chromosomes. See Franke, supra note 1, at 43-46 (describing the difficulty of deciding whether a transgendered person is male or female).

226. See supra note 141 and accompanying text.
different times.227 Furthermore, even if all women agreed upon the ultimate goals to be sought and what steps were necessary to achieve those goals, implementation of these steps will take substantial time. Until then, small changes are better than no changes at all,228 and the success or failure of the small changes may lead to a modification of the “bolder” plans.229

Here too, the recent administrative experience also helps allay some concerns. It shows that by concentrating on relatively small issues, even parties who are initially adverse to one another can make concrete progress within days or weeks.230 Even more important, it shows that having few “yes/no” issues and a multitude of options can be a strength, not a drawback, in negotiations.231

Furthermore, while encouraging dialogue may be platitudinous in the abstract, the UCC, state common and statutory law, and negotiated regulations provide concrete demonstrations that a horizontal approach can work. They also show that keeping rules closely tied to particular situations does not mean stagnation. Both the UCC and the common law have

227. Indeed, by working on specific issues at specific firms, women may avoid the very problem that consumers had with the drafting of the UCC. See Patchel, supra note 112, at 127-28 (noting that smaller, more cohesive and focused groups are typically better able to achieve success in negotiations and arguing that one reason that consumers have been unsuccessful in UCC drafting is that they are too large a group and have broad-based interests). With respect to the advantages of small-group negotiations, see also sources cited supra note 183.

228. See Bartlett, supra note 3, at 324 (suggesting that we ought not minimize the effect of small changes on women); Radin, supra note 3, at 1700-04 (arguing that there may be no general solution to all gender problems and, therefore, women need to be pragmatic and look for piecemeal, temporary solutions that may need to change over time); Resnik, supra note 5, at 1926 (arguing that feminists must “remove facades of total victory and defeat”); Schroeder, supra note 13, at 197 (“In law, we must act earnestly in accordance with our best hypotheses of justice; we cannot sit back and wait for proof, which can never come until it is too late. . . . [W]e must live with our best guesses.”); Williams, supra note 1, at 836 (asserting that feminists need to work “towards the kind of small, incremental steps that will gradually modify the wage-labor system”). See also Ring, supra note 46, at 303-04 (observing, in the context of UCC drafting, that one can pontificate at great length but it may be more beneficial to work on practical, achievable goals).


230. See supra notes 167-73 and accompanying text. See also Charan, supra note 26, at 109-12 (noting that, within firms, a horizontal network structure works best when participants focus on specific issues and set specific implementation dates).

231. See supra note 174 and accompanying text. In fact, Schwartz and Scott argue that one drawback of UCC drafting is that logrolling (the trading of one provision for another) is limited because each project deals with different issues. See Schwartz & Scott, supra note 112, at 613; Scott, supra note 112, at 1812. But see Alces & Frisch, supra note 115, at 1221 (arguing that this is an unduly pessimistic view of UCC drafting).
evolved dramatically. Negotiated regulations, while newer and less tested, similarly show successful results. Indeed, an observation about negotiated regulations is equally applicable to dialogues in the workplace: "In some respects, negotiated rulemaking efforts cannot fail. At the very least, conflicts can be clarified, data shared, and differences aired in a constructive way. Even if full consensus is not achieved, the negotiation process may still . . . [narrow] the issues in dispute." Moreover, in each instance, a horizontal jurisprudential approach has clearly contributed to the workability and societal acceptance of the legal changes.

There are also ways to protect against discussion groups that omit some workers or that never produce substantial progress. The most obvious deterrents are Title VII and other employment laws, which will remain threats to the employer who fails to develop strategies to deal successfully with issues like sexual harassment. A second deterrent to employer procrastination can be achieved by a relatively minor alteration to Title VII: the law can treat a firm's good faith, inclusive, and effective in-house discussions of gender issues as a rebuttable defense or a mitigating factor for the employer in a sex discrimination lawsuit. In assessing such a defense, the trier of fact can consider both the fullness of representation in the negotiations and the actual progress made. Obviously, in doing so, triers of fact will need to engage in case-by-case inquiries. However, the complexity of such exercises will be far less than determining whether a particular mix of crude remarks and behaviors add up to "sexual harassment."

A horizontal approach to gender disputes in the workplace will also provide a much-needed supplement to Title VII's reactive litigation focus. By discussing workplace annoyances before they grow into full-blown ad-

232. See supra notes 126-35 and 144-52 and accompanying text.
233. See supra notes 167-76 and accompanying text.
234. Susskind & McMahon, supra note 116, at 159. See also Charan, supra note 26, at 107, 112 (noting that participants in a horizontal network "begin to see the organization through multiple viewpoints"); Farney, supra note 162, at A12 ("[A]t a minimum, the private, feet-up-on-the-table talks already have created a new level of understanding among interest-group leaders more accustomed to strident rhetorical battles."); see also supra notes 119-21 and 169-73.
235. See supra notes 121-24 and 172.
236. See supra note 220 and accompanying text.
237. I am indebted to my colleague, Professor David Dominguez, for this suggesting this avenue of thought. See Harter, supra note 167, at 48-49 (observing that a general principle of negotiation is that a party will participate meaningfully in negotiations only if it views itself as better off for doing so, and in particular, negotiations will likely be more successful if the parties believe that their plan will not be ignored by an alternative decisionmaker, such as a court).
238. See supra note 72.
versarial disputes, managers and employees can act proactively to defuse the problems. Employees will benefit by resolving conflicts before they become so intolerable that continued employment becomes impracticable, regardless of the success of a lawsuit. In addition, such dialogues will allow groups of workers to air their concerns, in contrast to the Title VII lawsuit that typically pits a single employee against the firm. Especially with emotionally charged issues like sexual harassment, some women may prefer having an informal, non-confrontational means of calling attention to the insensitivity of a remark or action and insuring its cessation, as opposed to bringing a Title VII lawsuit.

From the employer's perspective a horizontal approach also has advantages. Not only does the employer potentially avoid the cost and negative publicity of a discrimination suit, the firm also has a far greater chance of retaining productive workers. Indeed, as a result of their discussions with employees, firms may choose to implement in-house dispute resolution procedures. Such in-house procedures, which would be a supplement to—not a displacement of—the Title VII remedies, could also be shaped by employees and managers to fit the particular employment situation at hand.

239. See supra notes 109 and 110 and accompanying text.
240. See supra note 181 and accompanying text. See also Rhode, supra note 5, at 1186 (reporting that cultural studies show that women make better progress working collectively rather than individually).
241. See supra notes 106-11 and accompanying text regarding Title VII litigation. See also Abrams, supra note 66, at 1217-19 (advocating use of compliance programs to deal with sexual harassment claims because such programs tend to be less emotionally charged, encourage managers to participate in the rulemaking, and provide a means of "educating" all workers); Bernstein, supra note 2, at 1272, 1294-98 (observing that victims of sexual harassment often just want a cessation of the offensive activity and possibly some disciplining of the offender, goals which are more likely to be achieved through an in-house procedure as opposed to litigation); Crain, supra note 4, at 1938 (arguing that collective action and non-litigation strategies are likely to be quicker, less costly, and more empowering than discrimination lawsuits); Radford, supra note 11, at 523-24 (noting that most victims of harassment, whether male or female, do not file formal complaints). But see Epstein, supra note 61, at 442-43 (arguing that women need lawsuits to stop sexual harassment).
242. I am not suggesting that in-house procedures or alternative dispute resolution ("ADR") is an all-purpose remedy to the problems surrounding Title VII litigation. In particular, the lack of formal procedures may hurt nonassertive women. See Margaret G. Farrell, Doing Unto Others: A Proposal for Participatory Justice in Social Security’s Representative Payment Program, 53 U. PITT. L. REV. 883, 959-60 n. 269 (1992) (noting that feminists fear that ADR's informality may subordinate women to men); Preston, supra note 83, at 2318 (noting that ADR's informality may give an advantage to those "who have traditionally been better trained to grab any opportunity for power"); Resnik, supra note 5, at 1940-43 (voicing concern about using ADR to resolve gender issues); Elizabeth M. Schneider, Gendering and Engendering Process,
Philosophically, a horizontal jurisprudential approach is wholly consistent with a number of the strong currents in feminist theory: the importance of factual settings and actual cases, as opposed to abstract principles, in yielding insights; an emphasis on collective, web-like relationships as a way of strengthening women’s positions; the recognition that there is no one “community” but multiple, overlapping communities on all sides of the gender-in-employment issues; a willingness to use a trial and error approach to problem solving; and a view of society as dynamic and continually changing, making temporary solutions acceptable and, indeed, inevitable.

Conclusion

Title VII, while aiding women in the workplace, has serious limitations. Given its vertical, top-down development and testing, its underlying goals and assumptions lack universal support from employees, employers, and the public. In addition, Title VII’s application to particular situations is haphazard and inconsistent. In order to move ahead on gender issues, a horizontal, bottom-up approach is needed to supplement Title VII’s verticality and one-size-fits-all set of rules. Employers and em-
ployees need to be encouraged to discuss the specific problems at their particular workplace. We need to allow them to experiment with different plans for addressing their specific needs. We need to give them the freedom to fail. Only by experimentation and learning from one another’s successes and failures are we likely to see real progress on these complex matters. Moreover, only by talking to one another about specific problems are we likely to move away from the bitter and angry rhetoric that currently envelopes the issues.

Just as Tolstoy recognized that “each unhappy family is unhappy in its own way,” so too each workplace has its own specific gender problems. The only way to solve these problems is to augment Title VII with workplace-specific strategies that are devised by those who will be subject to them. After twenty years of Title VII, the time has come to acknowledge that one size does not fit all, neither in sweaters nor in rules regarding sex discrimination in the workplace.
