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## How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy

Jo Freeman\*

The Civil Rights Act of 1964 was a milestone of federal legislation. Like much major legislation, it had "incubated" for decades but was birthed in turmoil. On June 19, 1963, after the civil rights movement of the fifties and early sixties had focused national attention on racial injustice, President John F. Kennedy sent a draft omnibus civil rights bill to the Congress.<sup>1</sup> On February 8, 1964, while the bill was being debated on the House floor, Rep. Howard W. Smith of Virginia, Chairman of the Rules Committee and staunch opponent of all civil rights legislation, rose up and offered a one-word amendment to Title VII, which prohibited employment discrimination. He proposed to add "sex" to the bill in order "to prevent discrimination against another minority group, the women . . ."<sup>2</sup> This stimulated several hours of humorous debate, later enshrined as "Ladies Day in the House,"<sup>3</sup> before the amendment was passed by a teller vote of 168 to 133.

In only a few hours, Congress initiated a major innovation in public policy, one which rippled throughout the country for several years. Prior to the amendment's passage, only two states—Hawaii and Wisconsin—had laws which prohibited sex discrimination in employment. Within four years, fifteen states and the District of Columbia did so, and, within ten years, all but a few states included "sex" among the prohibited discriminations in their fair employment practices laws.<sup>4</sup> Although the agency created by the Act to enforce Title VII, the Equal Employment Opportunities

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1. See Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964*, at 5-34 (1990).

2. 110 Cong. Rec. 2577 (1964).

3. See Caroline Bird with Sara Welles Briller, *Born Female: The High Cost of Keeping Women Down* (rev. ed. 1973).

4. Women's Bureau, U.S. Dep't of Labor, Bulletin 297, *1975 Handbook on Women Workers*, at 324-25 (1975).

Commission (EEOC), viewed the sex amendment as a "fluke," "conceived out of wedlock," and tried to ignore its existence,<sup>5</sup> fully one-third of the complaints filed with the EEOC in the first year charged discrimination on the basis of sex.<sup>6</sup> The EEOC's apathy stimulated the formation of the National Organization for Women (NOW), whose initial goal was to pressure the agency to enforce the law. NOW also provided lawyers for women who wanted to take their sex discrimination complaints to court.<sup>7</sup> As a consequence, the federal courts voided state protective laws on the grounds that they were in conflict with the federal prohibition against sex discrimination.<sup>8</sup> These laws—which limited the hours women could work and the weights they could lift, and which often prohibited night work and entry into some occupations considered too dangerous for women—had been actively sought during the first half of the twentieth century by an earlier generation of women activists.<sup>9</sup>

The popular interpretation of the addition of "sex" to Title VII is that "it was the result of a deliberate ploy by foes of the bill to scuttle it."<sup>10</sup> Even a political scientist as well read in the Congressional Record as Gary Orfield accepted the interpretation that "[b]itter opponents of the job discrimination title . . . decided to try to load up the bill with objectionable features that might split the coalition supporting it."<sup>11</sup> This view, appealing though it seems, ignores several factors apparent to anyone who has tried to influence a congressional vote: 1) The potential beneficiaries of the amendment—women—had experienced lobbyists on the Hill and were not uninterested in the bill; 2) most Southerners had conceded defeat and gone home by Wednesday;<sup>12</sup> the vote occurred on a Saturday, which is not Members' favorite day to be in Washington; 3) the number of Members voting on the amendment—301—was larger than any other counted vote that day (the others ranged from 178 to 240); 4) other amendments which might "clut-

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5. Jo Freeman, *The Politics of Women's Liberation: A Case Study of An Emerging Social Movement and Its Relation to the Policy Process* 54 (1975).

6. Equal Employment Opportunity Commission, *Fifth Annual Report* 30 (1971).

7. Marguerite Rawalt, *The Reminiscences of Marguerite Rawalt*, in the Columbia University Oral History Research Center, 454-59 (1980).

8. Freeman, *supra* note 5, at 186-87.

9. Susan Lehrer, *Origins of Protective Labor Legislation for Women: 1909-1925*, at 3 (1987).

10. Charles Whalen and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 234 (1985).

11. Gary Orfield, *Congressional Power: Congress and Social Change* 299 (1975).

12. Whalen and Whalen, *supra* note 10, at 110-11.

ter up" the bill, including "sex" amendments to other titles, were voted down.

Before offering an alternative explanation which takes these factors into account, it is necessary to place the "sex" amendment into historical context. While the prohibition of employment discrimination on the basis of sex was not a widely debated, thoroughly researched policy proposal, neither was it an "accidental breakthrough."<sup>13</sup>

### The National Woman's Party and the Equal Rights Amendment

The National Woman's Party (NWP) had been lobbying for the Equal Rights Amendment (ERA) since it was first introduced into Congress in 1923. The NWP was originally founded by the militant branch of the Suffrage Movement in 1916. Once the nineteenth amendment to the Constitution was ratified, the NWP, under the leadership of Alice Paul, reorganized itself to focus attention on the eradication of legal discrimination against women through another constitutional amendment.<sup>14</sup> Concentrated in Washington and funded more by legacies and wealthy benefactors than a large membership, the NWP found this strategy suitable to its particular strengths as well as its feminist ideology.<sup>15</sup> The ERA was strongly opposed by the newly created Women's Bureau in the Department of Labor and virtually every other women's organization, particularly the League of Women Voters, the National Consumer's League, and the Women's Trade Union League. Their opposition was based on the one fact about the ERA on which everyone could agree: that it would abolish protective labor legislation for women.

The National Woman's Party and the Women's Bureau coalition<sup>16</sup> fought each other to a standstill throughout the 1920s and

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13. Orfield, *supra* note 11, at 299.

14. J. Stanley Lemons, *The Woman Citizen: Social Feminism in the 1920s* 49 (1973).

15. The NWP's primary benefactor was Alva Belmont, who bought for it a historic Capitol Hill mansion to use as a national headquarters. When that mansion was condemned to make way for the Supreme Court building, the NWP bought still another historic home. NWP remains headquartered in the aptly named Belmont House to this day. For more on the NWP's finances, see Susan D. Becker, *The Origins of the Equal Rights Amendment: American Feminism Between the Wars* 38-42 (1981).

16. This term is adopted from Cynthia Harrison, *Prelude to Feminism: Women's Organizations, the Federal Government, and the Rise of the Women's Movement, 1942-1968* (Ph.D. Dissertation, Dep't of History, Columbia University, 1982) [hereinafter Harrison Dissertation]; Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues, 1945-1968*, at 8 (1988) [hereinafter Harrison, *On Account of Sex*]. However, she wrote about the period 1945-1968, when the coalition was pri-

1930s. But by the 1940s, the NWP was gaining the upper hand. House and Senate subcommittees were reporting it favorably, the Republican Party endorsed the ERA in its 1940 platform, and the Democratic Party followed suit in 1944. The Senate voted on the ERA for the first time on July 19, 1946, after three days of debate. Although the tally, 38 to 35, was well below the two-thirds required for a constitutional amendment,<sup>17</sup> expectations of favorable action in the next Congress were high because "there has been a subtle change in the public attitude toward [the ERA]."<sup>18</sup> During World War II, state protective labor laws were waived by state legislatures and labor boards in order that women could work in the war industries while "WACS, WAVES, SPARS and women Marines took over strenuous jobs, some of them on front-line assignments."<sup>19</sup>

The Women's Bureau coalition decided to change tactics from mere opposition to a "more positive" approach. It had always agreed with the NWP that women faced discrimination in the job market, particularly in pay, but had argued that this and the discriminatory laws which truly hurt women were better dealt with through "specific bills for specific ills" rather than the broad sweep of a constitutional amendment.<sup>20</sup> In its new incarnation as the National Committee to Defeat the UnEqual Rights Amendment (NCDURA), the Women's Bureau coalition proposed an Equal Pay Act.<sup>21</sup> The idea of equal pay for equal work had been around since at least 1868.<sup>22</sup> Two states had passed equal pay laws; but until 1945 there was no attempt to pass such a law on the federal level. Even with the backing of the NCDURA, a federal equal pay act was not successful, either as an anti-ERA measure or in its own right, because of fears that it would encourage women to stay in the work force and take jobs away from returning soldiers.<sup>23</sup>

Their next tactic, by the renamed National Committee on the Status of Women, was to propose a "Status Bill" which declared

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marily composed of labor and liberal organizations that the Women's Bureau called upon to oppose the ERA. In the 1920s, the Bureau played more of a supportive role than a leadership role for a coalition composed almost entirely of women's organizations, joined together in the Women's Joint Congressional Committee. Sophonisba P. Breckinridge, *Women in the Twentieth Century* 259-61 (1933, reprinted 1972).

17. 92 Cong. Rec. 9405 (1946); Thomas C. Pardo, *The National Woman's Party Papers, 1913-1974: A Guide to the Microfilm Edition* 127-34, (1979).

18. 25 Cong. Dig. 290 (1946).

19. *Id.*

20. Harrison, *On Account of Sex*, *supra* note 16, at 39.

21. *Id.*

22. Women's Bureau, U.S. Dep't of Labor, *Action for Equal Pay* (1966).

23. Harrison, *On Account of Sex*, *supra* note 16, at 39.

the policy of the United States to be that "in law and its administration no distinctions on the basis of sex shall be made except such as are reasonably justified by differences in physical structure, biological, or social function."<sup>24</sup> Instead of enforcement provisions, it would have created a Commission on the Legal Status of Women to study sex discrimination.<sup>25</sup>

In January 1950 the ERA was debated on the Senate floor once again. When the Status Bill was overwhelmingly rejected, 19 to 65, Sen. Carl Hayden (D., Ariz.) proposed an amendment to the ERA which read "The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex." ERA proponents were caught by surprise, and many Senators, whose support for the ERA had been on the record but never very strong, took advantage of the opportunity to vote for both the rider and the Amendment. The Hayden rider passed 51 to 31 and the ERA, thus vitiated, passed 63 to 19.<sup>26</sup> This strategy was repeated when the ERA once again came to the Senate floor in July of 1953. This time the rider passed by 58 to 25 and the ERA passed by 73 to 11.<sup>27</sup>

The ERA never had a chance in the House. Rep. Emanuel Celler (D., N.Y.) had been Chair of the Judiciary Committee since 1949. He was a crusty liberal from Brooklyn who shared labor's antipathy to the ERA. No hearings were held on the ERA during his chairmanship until 1971—after a successful discharge petition by Rep. Martha Griffiths (D., Mich.) in 1970.<sup>28</sup> Between Celler in the House and Hayden in the Senate, opponents of the ERA successfully bottled it up. The NWP continued to walk the halls of Congress every year and faithfully collect endorsements from members of both houses well above the two-thirds needed for passage. But there was no serious interest in the amendment apart

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24. *Id.* at 27.

25. *Id.* at 26-29.

26. 96 Cong. Rec. 872-73 (1950); 6 Cong. Q. Almanac 539 (1950).

27. 99 Cong. Rec. 8973-74 (1953); 9 Cong. Q. Almanac 386 (1950).

28. During floor debate, compelled by the discharge petition, on the ERA in August, opponents objected to the Amendment's being voted on without "full and thorough hearings in committee" which had just been scheduled for September. No hearings were held that year, because the ERA was passed by the House by 352 to 15. 116 Cong. Rec. 27,999-28,037 (1970). During debate by the Senate in October, riders were added to exempt women from the draft and permit prayer in public schools. 116 Cong. Rec. 35,050, 35,448-75, 35,621-28, 35,748, 35,934-37, 35,943-66, 36,265-78, 36,299-313, 36,448-51, 36,478-506, 36,862-66 (1970). These additions killed the ERA until the next Congress. Hearings were held in the House in March and April of 1971, and the House passed the ERA in October. The Senate passed it in its undiluted form in March of 1972.

from the NWP and the few other women's organizations who had endorsed it in the preceding decades. Even these could do little more than pass resolutions. The NWP was a small, exclusive organization, whose aging members refused to relinquish leadership of the struggle to anyone else—even when it could no longer publish its journal *Equal Rights*.<sup>29</sup> Consequently, it could still get the ERA introduced into Congress, but it could not get it passed.<sup>30</sup>

In 1961 President Kennedy appointed Esther Peterson as Assistant Secretary of Labor and Director of the Women's Bureau. Two of the most important items on her agenda were passage of the Equal Pay Act and derailment of the ERA. To accomplish the first, she organized a concerted lobbying campaign which drew upon the expertise and contacts Peterson had developed as a lobbyist for the AFL-CIO. The campaign for the Equal Pay Act took two years of solid work, during which there were three sets of hearings, two in the House and one in the Senate. The final bill was narrower than Peterson and Equal Pay Act advocates had wanted and only covered sixty-one percent of the female labor force. But by the time President Kennedy signed the Equal Pay Act into law on June 10, 1963, both Houses had heard ample testimony on the problems faced by women in the labor force.<sup>31</sup>

One of Peterson's first recommendations to the new President was the creation of a national commission on women—a component of the 1947 Status Bill—which she argued would end “the present troublesome and futile agitation over the ERA,”<sup>32</sup> but which she also hoped would provide an alternative program of action to improve women's status.<sup>33</sup> To avoid the NWP lobbyists, the President's Commission on the Status of Women was created by Executive Order 10,980 on December 14, 1961. Eleanor Roosevelt was named the chair, and among the members was only one ERA supporter. This was Marguerite Rawalt, a lawyer with the Internal Revenue Service and a former President of the National Federation of Business and Professional Women (BPW). The final

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29. Leila J. Rupp and Verta Taylor, *Survival in the Doldrums: The American Women's Rights Movement, 1945 to the 1960s* 74-5 (1987).

30. The Senate did briefly consider the ERA one more time, on July 2, 1960, and just as quickly voted to add the Hayden rider and recommit it to Committee. 106 Cong. Rec. 15,683, 15,686 (1960).

31. Harrison, *On Account of Sex*, *supra* note 16, at 89-105.

32. Catherine East, *The First Stage: ERA in Washington 1961-1972*, *Women's Political Times*, Sept. 1982, at 7. See also Pauli Murray, *Song in a Weary Throat: An American Pilgrimage* 348-49 (1987).

33. Esther Peterson, *The Reminiscences of Esther Peterson*, in the Columbia University Oral History Research Center, 288; Harrison Dissertation, *supra* note 16, at 378.

report and recommendations of the Commission, *American Women*, were issued amid much publicity on October 11, 1963, with recommendations in the areas of education, social security, child care, public and private employment, and protective labor legislation. It quickly became something of a Government Printing Office best-seller. Over 83,000 copies were distributed within a year, and a private publisher put out a commercial version with an Epilogue by Margaret Mead.<sup>34</sup>

### Fair Employment Practices Proposals

The roots of Title VII can be traced to the Unemployment Relief Act of 1933, which provided "[t]hat in employing citizens for the purposes of this Act no discrimination shall be made on account of race, color, or creed."<sup>35</sup> Most laws passed in the New Deal affecting employment contained similar provisions, or they were "read into" the Acts by Executive regulations.<sup>36</sup> However, these were little more than statements of good intentions, as there were no enforcement mechanisms. Their ineffectiveness was highlighted by the systematic exclusion of blacks from the new jobs created by the mushrooming defense industries prior to World War II.<sup>37</sup> Even before the United States entered the war, black leaders pressed President Roosevelt to sign an Executive Order with teeth in it that would ban discrimination in these industries. Faced with a threatened march on Washington, Roosevelt did so on June 25, 1941. Executive Order 8802 established the Fair Employment Practices (FEP) Committee with the modest powers to investigate complaints of discrimination and take "appropriate steps."<sup>38</sup> Although its authority was extended to all federal contractors by Executive Order 9346 in 1943, its enforcement power was limited to negotiation and moral suasion. It expired in June, 1946.<sup>39</sup>

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34. President's Commission on the Status of Women, *American Women: The Report of the President's Commission on the Status of Women and Other Publications of the Commission* (Margaret Mead and Frances Balgley Kaplan eds. 1965) [hereinafter *American Women*].

35. Unemployment Relief Act, Ch. 17, 48 Stat. 22, 23 (1933).

36. Equal Employment Opportunity Comm'n, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 1-3 (n.d.) [hereinafter *EEOC, Legislative History*].

37. *Id.* at 1-2.

38. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

39. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943). Paul Burstein, *Discrimination, Jobs and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal* 8 (1985); *EEOC, Legislative History*, *supra* note 36, at 1-3; Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972*, at 10-12 (1990).

Presidents Truman, Eisenhower, and Kennedy each established FEP committees by Executive Order, though under different names and with different foci.<sup>40</sup> The Kennedy Committee on Equal Employment Opportunity differed from its predecessors in that it required affirmative action to eliminate discrimination and had the power to terminate the contracts of noncomplying employers as well as to recommend suits to the Justice Department.<sup>41</sup> Its scope was broadened to include virtually all programs and businesses receiving federal money.<sup>42</sup> Nonetheless the "most effective method of achieving compliance . . . was . . . cooperation."<sup>43</sup>

The first FEP bill was introduced in 1943.<sup>44</sup> Over the next twenty years, many more were introduced into every Congress, but only three ever reached the floor; the rest were bottled up in committee. The Senate debated FEP bills in 1946 and 1950, but they were filibustered to death when proponents could not muster the necessary two-thirds vote for cloture. These were also the first two years in which the ERA was debated on the floor of the Senate, which may explain why provisions to prohibit sex discrimination in employment were proposed to the House those same two years.<sup>45</sup> Early in 1946 Rep. Clare E. Hoffman (R., Mich.) introduced H.R. 5216, which included sex, ancestry, and union membership as protected classes. It was committed to the Labor Committee where it died.<sup>46</sup> On February 22, 1950, Rep. Dwight L. Rogers (D., Fla.) offered a floor amendment to add "sex" to the FEP bill then being debated "so the women of the country will have equal rights with men."<sup>47</sup> No one spoke against it and it

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40. Richard Nathan, *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training* 87-89 (1969). EEOC, *Legislative History*, *supra* note 36, at 4-5 (referring to Exec. Orders 10,308, 10,479, 10,925, 11,114). Exec. Order 11,308 is at 16 Fed. Reg. 4899 (1953); Exec. Order 10,479 is at 18 Fed. Reg. 4899 (1953); Exec. Order 10,925 is at 26 Fed. Reg. 1977 (1961); Exec. Order 11,114 is at 28 Fed. Reg. 6485 (1963).

41. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). According to Graham, the use of the phrase "affirmative action" was not viewed as a major departure from prior practices, but as a referent for "a more aggressive strategy for seeking out minority applicants . . ." Graham, *supra* note 39, at 33.

42. Exec. Order No. 11,114, 28 Fed. Reg. 6485 (1963).

43. EEOC, *Legislative History*, *supra* note 36, at 4.

44. *Id.* at 7.

45. Although I have found no definitive evidence explaining the coincidence of dates, it is too striking to go unnoted. The most likely explanation is that 1946 and 1950 were two years in which the NWP was particularly active. Nonetheless, it should be noted that the Senate debated the ERA on July 9, 1946, long after Hoffman introduced his bill. It passed the ERA, with the Hayden rider, on January 25, 1950, one month before Rogers made his amendment. 92 Cong. Rec. 8433 (1946).

46. 92 Cong. Rec. 313 (1946).

47. 96 Cong. Rec. 2247 (1950).

passed by a voice vote.<sup>48</sup> The amended bill passed the House by 240 to 177 the following day, but the Senate defeated it. This was the first time either house of Congress voted to equate race and sex discrimination.<sup>49</sup>

Such an equation was standard policy for the NWP. Its conservative members were *not* pro-civil rights. Most would have preferred no government regulation of employment. But the aging organization did not wish to see any group given rights that were not also given equally to women, and it had no compunctions about taking advantage of any opportunity that came along to advance its cause.<sup>50</sup> Throughout the fifties it lobbied to have sex discrimination included in the jurisdiction of the President's Committee on Government Contracts (Eisenhower's FEPC), but it was turned down on the grounds that the addition would make enforcement difficult.<sup>51</sup> It was more successful in 1956, albeit temporarily, in persuading the House to include sex discrimination in the jurisdiction of the proposed Civil Rights Commission. Once again the mechanism was a floor amendment — introduced by Rep. Gordon McDonough (R., Cal.) at the request of his campaign chair, who was an NWP member. When McDonough's wife expressed opposition, NWP representative Amelia Walker asked Rep. Howard W. Smith (D., Va.) to introduce it instead.<sup>52</sup> Smith consented, but McDonough announced his intentions to introduce the amendment to the House as soon as House debate began on July 17, 1956. Smith voiced his approval of the amendment, stating that "if this iniquitous piece of legislation is to be adopted, we certainly ought to try to do whatever good with it that we can."<sup>53</sup>

McDonough was pressured by NAACP lobbyist Clarence

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48. *Id.*

49. EEOC, *Legislative History*, *supra* note 36, at 7-8.

50. Rupp and Taylor, *supra* note 29, at 153-65, have an extensive discussion of the attitude of the NWP and other women's organizations towards racial issues. Individual members' views varied from extremely racist to integrationist, but by and large the organizations reflected the tenor of their time and place. Alice Paul herself was quite monolithic; she would support any person, group, or idea that would advance the ERA and dismissed as irrelevant anyone or anything that didn't.

51. Rupp and Taylor, *supra* note 29, at 176; Pardo, *supra* note 23, at 161-62. A letter of September 3, 1956, to Helen Rogers Reid from National Woman's Party Congressional Chairman (Alice Paul) documents one attempt to pressure a member of the President's Committee on Government Contracts to resume her efforts to add sex discrimination to the Committee's jurisdiction. National Woman's Party Papers, 1913-1974 (microfilmed and distributed by the Microfilm Corporation of America 1979) on reel 102 [hereinafter NWP Papers].

52. A letter of July 20, 1956, from NWP Congressional Chairman (Alice Paul) to Mary Sinclair Crawford, who initiated the idea, details the approach to McDonough. NWP Papers, *supra* note 51, on reel 102.

53. 102 Cong. Rec. 13,124-25 (1956).

Mitchell to change his mind. When he refused, the opposition organized.<sup>54</sup> No sooner did the clerk read the one-word amendment two days later, than Rep. Celler tried to turn the issue into an ERA debate. Although the proposed Commission's sole authority was to investigate, "sex" was not germane, he said, because "distinctions based on sex have never been considered within the purview of [the] prohibition[s] of the Fourteenth Amendment[]." <sup>55</sup> Four Democratic Congresswomen agreed that adding "sex" would "destroy the real purpose of this bill and will lead to its defeat."<sup>56</sup> Nonetheless, after eloquent pleas by Reps. McDonough, Katherine St. George (R., N.Y.), chief House sponsor of the ERA, and Smith, the House voted in favor by 115 to 83.<sup>57</sup> The bill was passed by the House, but, by prior arrangement among the leadership, it was sent to the Senate too late to become law.<sup>58</sup> It was reintroduced and passed in the next Congress as part of the 1957 Civil Rights Act—without the sex amendment. The NWP thought the debate over the McDonough amendment was "a great help to our case," but the request for a "sex" amendment was not renewed.<sup>59</sup>

## Title VII

Although few people really took seriously the NWP's efforts to equate sex and race discrimination, ERA opponents were of two minds. They acknowledged that women experienced discrimination in employment and argued that specific anti-discrimination measures would be preferable to the ERA. But opponents also believed, as the President's Commission on the Status of Women concluded in 1963, that "discrimination based on sex . . . involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable."<sup>60</sup> However, apart from the Equal Pay Act, they had no program to deal with sex discrimination.

The NWP had a simple program—the ERA. It saw in the civil rights acts an opportunity to educate Congress on the need for the ERA. Even before the Commission's report was released, the NWP was lobbying to have "sex" added to the latest Civil Rights

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54. Alice Paul, *Conversations with Alice Paul: Woman Suffrage and the ERA* (interviewed by Amelia Fry, November 1972, May 1973) in *Suffragists Oral History Project*, Bancroft Library, University of California (Berkeley) 617-18.

55. 102 Cong. Rec. 13,557 (1956).

56. *Id.* at 13,552.

57. *Id.* at 13,552-57. The four Democratic Congresswomen were Edna Kelly (N.Y.), Edith Green (Ore.), Lenore Sullivan (Mo.) and Coya Knutson (Minn.).

58. *Spitballs in the House*, 68 Time, July 30, 1956, at 9.

59. Paul, *supra* note 54, at 618.

60. *American Women*, *supra* note 34, at 49.

Act. It was alerted to this possibility on July 9, 1963, when President Kennedy, at the recommendation of Esther Peterson, called together over 300 representatives of women's organizations to "discuss those aspects of the nation's civil rights program in which women and women's organizations can play a special role."<sup>61</sup> The NWP was included among those invited, but NWP President Emma Guffy Miller sent Nina Horton Avery in her place. Avery cornered Kennedy as he left to ask him to meet with the NWP to discuss the ERA, then she departed herself. She reported that the word "sex" did not appear in the bill so there was no reason to stay. The NWP did not participate in the National Women's Committee on Civil Rights that was organized that evening.<sup>62</sup>

During the next few months, both the civil rights bill and the nation experienced several dramatic and emotional shocks. Civil rights supporters marched on Washington on August 28, 1963, where they heard Dr. Martin Luther King, Jr., give his famous "I have a dream" speech. Afterwards President Kennedy met with march leaders to discourage them from trying to strengthen Title VII and other portions of the bill because doing so would kill necessary Republican support. Two weeks later, four children were killed when a black church was bombed in Birmingham, Alabama. Liberal Democrats responded by strengthening the civil rights bill, which was then in the subcommittee of the House Judiciary Committee. A major change was made in Kennedy's weak employment measure, which only covered government contractors and relied on persuasion rather than force of law.<sup>63</sup> The new Title VII created an Equal Employment Opportunity Commission, which had the power to investigate and, after a hearing, to order violators to "cease and desist." Its scope was broadened to include all employers with over twenty-five employees. The Republicans, who thought they had a deal worked out with the Justice Department, felt betrayed, and it took the combined political skills of President Kennedy and Chair Celler of the Judiciary Committee to hammer out a compromise. The EEOC survived, but its "cease and desist" powers did not; the EEOC was left with only the power to investigate and conciliate. The bill was sent to the Rules Committee the day before Kennedy was assassinated.<sup>64</sup>

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61. Peterson, *supra* note 33, at 300.

62. See NWP Papers, *supra* note 51, on reel 108 for the following: telegram of July 1, 1963, from John F. Kennedy to Emma Guffy Miller; letter of July 13, 1963, from Nina Horton Avery to Emma Guffy Miller; Nina Horton Avery, *Report on White House Conference on Civil Rights with Women's Organizations* (Jul. 9, 1963).

63. Loevy, *supra* note 1, at 65.

64. *Id.* at 62-75; Whalen and Whalen, *supra* note 10, at 27-28, 34-35, 59.

As a result of Kennedy's death, passage of a civil rights bill became a priority with Congress and the new Administration. This emphasis was fully backed by public opinion. A December Newsweek poll showed that sixty-two percent of the people supported civil rights,<sup>65</sup> and a National Opinion Research Center survey showed eighty-three percent in favor of equal employment opportunity for blacks.<sup>66</sup> The momentum thwarted the plans of Rep. Smith to use his power as chair of the House Rules Committee to stop or at least delay the civil rights bill.<sup>67</sup> Instead he subjected "this nefarious bill"<sup>68</sup> to ten days of intense scrutiny at hearings in January, 1964.<sup>69</sup> It was during these hearings that the idea of adding "sex" to the prohibited discriminations was publicly proposed by Smith and other members of the Rules Committee.<sup>70</sup> Although Alice Paul considered such actions to be "sideshows"<sup>71</sup> to the ERA, the NWP had been soliciting support for it for several weeks, and its National Council had passed a formal resolution on December 16, 1963, asking that the civil rights bill be amended.<sup>72</sup> The prospects did not look good. None of the national women's organizations would help, and Rep. Catherine May (R., Wash.) could not find one among the forty Congressional allies she queried who would support a sex amendment.<sup>73</sup>

After numerous requests, the NWP finally received assurances from Reps. Smith, Katherine St. George, and Martha Griffiths that they would introduce an amendment on the floor. Although both St. George and Smith argued that because they op-

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65. See Whalen and Whalen, *supra* note 10, at 89-90.

66. See Burstein, *supra* note 39, at 46.

67. Patricia G. Zelman, *Women, Work, and National Policy: The Kennedy-Johnson Years 60-61* (1980).

68. Whalen and Whalen, *supra* note 10, at 91.

69. Paul, *supra* note 54, at 615, 622, 624; NWP Papers, *supra* note 51, on reel 108.

70. Loevy, *supra* note 1, at 100.

71. NWP Papers, *supra* note 51, on reel 108.

72. *Id.* See also Caruthers Gholson Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 Val. U.L. Rev. 326 (1971).

73. Zelman, *supra* note 67, at 60-61; *Civil Rights: Hearings on H.R. 7152 before the House Comm. on Rules*, 88th Cong., 2d Sess. 125, 366, 558 (1964) [hereinafter *Civil Rights*]; Loevy, *supra* note 1, at 96-100; Paul, *supra* note 54, at 615, 622, 624. The resolution is in NWP Papers, *supra* note 51, on reel 108. Portions are cited by Caruthers Gholson Berger, *supra* note 72, at 332; Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J.S. Hist. 37, 43 (1983); and Rupp and Taylor, *supra* note 29, at 176. Reel 108 also contains a four-page, single-spaced, unsigned "running report of c.r. bill progress," apparently written in late February, 1964. The author was probably Caruthers Gholson Berger, who was an attorney in the Labor Department and a member of the National Council of the NWP.

posed the bill, any amendment they introduced would be suspect, Griffiths felt that Smith's sponsorship would insure at least a hundred Southern votes.<sup>74</sup> The three Representatives agreed that Smith would do the honors, and the others would back him up. They decided to concentrate their efforts on Title VII.<sup>75</sup>

On January 9, as the hearings on H.R. 7152 began, Reps. Smith and Celler exchanged their views:

*Smith:* I have just had a letter this morning, which I was going to bring to your attention later, from the National Women's [sic] Party. They want to know why you did not include sex in this bill. Why did you not?

....

*Celler:* Do you want to put it in, Mr. Chairman?

*Smith:* I think I will offer an amendment. The National Women's [sic] Party were [sic] serious about it.<sup>76</sup>

On January 21, Rep. Colmer (D., Miss.) brought the issue up again.

One more thing, and I do this by request more or less. . . . There is nothing in here about sex, is there, although we got quite a bit of publicity a while back because that question was raised. There is no provision in here about the discrimination against women because of their sex in all this consideration, is there?<sup>77</sup>

On January 26, Rep. Smith appeared on "Meet the Press," where May Craig, White House reporter for the Portland, Maine, Press Herald and an NWP member, asked him if he would put equal rights for women in Title VII from the floor. "I might do that," he said.<sup>78</sup> On January 30, before the Rules Committee voted 11 to 4 to send the civil rights bill to the House floor, one Member moved that the Rules Committee give specific clearance to an amendment to bar discrimination on the basis of sex. This was voted down, 8 to 7.<sup>79</sup> Two days later, at President Johnson's weekly press confer-

74. Bird, *supra* note 3, at 7.

75. "[R]unning report of c.r. bill progress," NWP Papers, *supra* note 51, on reel 108. This report states that the NWP also asked St. George and Julia Hansen (D., Wash.) to introduce a "sex" amendment before asking Smith, but were turned down. St. George said she opposed the entire bill (though she voted for it in the end) and Hansen would not violate an agreement among the Democratic leadership that there be no amendments. Only Griffiths was enthusiastic about a "sex" amendment. See also Paul, *supra* note 54, at 623-25, which credits Smith with limiting attempts to add "sex" to the bill of Title VII, even though the NWP would have preferred a general amendment to all of the Titles.

76. *Civil Rights*, *supra* note 73, at 125 (statements of Howard W. Smith, Chairman, and Emanuel Celler).

77. *Id.* at 366 (statement of William M. Colmer).

78. Bird, *supra* note 3, at 3-4.

79. The vote is reported in 20 Cong. Q. Almanac 344 (1964), but there is no record of which way each Rules Committee member voted on this proposal. Rep.

ence, a reporter asked if the President would support a ban on sex discrimination in the civil rights bill. Johnson, who had recently been campaigning for more women in government, gave a noncommittal answer.<sup>80</sup>

Although the three Representatives no doubt solicited support from other members of Congress, not all were working with them. On the fifth and sixth days of debate, Rep. John Dowdy (D., Tex.) offered his own amendments to add "sex" to Titles II, III, IV and V of the bill. A staunch opponent of civil rights who no doubt knew of Smith's plans from the Rules Committee hearings, he had not been recruited by the NWP.<sup>81</sup> All of his amendments were overwhelmingly defeated, as were all but 34 of the 124 floor amendments made to the civil rights bill.<sup>82</sup> The House leadership of the civil rights bill, Republican Bill McCulloch (Ohio) and Democrat Emanuel Celler, had agreed with opponents that debate on the bill and floor amendments would not be cut off. But they had agreed between themselves "that if a proposed amendment did no violence to the bill or to the principles which underlay it, they would be flexible to preserve harmony . . . . However, if substantive changes were sought, they would be intractable."<sup>83</sup> Although one could argue that increasing the scope of the bill did it no violence, it was this agreement that House members whom Catherine May and others approached were unwilling to violate.<sup>84</sup>

But violate it many did. On Saturday, February 8, 1964, Rep. Smith moved to add "sex" to Title VII. Unlike his 1956 speech, this time he played it for laughs, setting up a mocking and jocular tone which led to the two hour debate being dubbed "Ladies Day"

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Katherine St. George (R., NY) was a member of the Rules Committee at that time and is the most likely person to have made the motion.

80. Cong. Q. Weekly Report, Feb. 7, 1964, at 281 (report of President Johnson's press conference of Feb. 1, 1964). See also Zelman, *supra* note 67, at ch. 3 *passim*.

81. Zelman claims that Dowdy "worked closely with Smith," but cites no source for this. Zelman, *supra* note 67, at 63. Alice Paul stated in her oral history that the NWP had no advance warning that Rep. Dowdy intended to introduce sex amendments to other sections of the civil rights bill; but they were happy that he did, even while they were dismayed that he was "howled down." Paul, *supra* note 54, at 625. Once alerted to his interest, the NWP gave him factual material to use in his arguments for the addition of "sex" to other titles. *Id.* at 629.

82. Whalen and Whalen, *supra* note 10, at 121.

83. *Id.* at 109.

84. Paul, *supra* note 54, at 625; Brauer, *supra* note 73, at 46, 48; 110 Cong. Rec. 1978-79, 2280-81, 2264-65, 2297 (1964). The amendments to Titles II and III were defeated, 43 to 115 and 26 to 112. These were both teller votes, so there is no public record of who voted for what. (The House normally formed itself into a Committee of the Whole in order to debate and amend bills during which it took no recorded votes. Once the Committee was dissolved so the House could vote on the final bill, recorded votes were taken.) Voice votes defeated the other Dowdy amendments. There was some debate on Titles II-IV, but none on adding "sex" to Title V.

in the House. Celler reacted as usual and denounced the amendment as an "entering wedge" for the ERA.<sup>85</sup> Five Congresswomen spoke in its favor, including Edna Kelly (D., N.Y.), who had opposed the 1956 amendment. Martha Griffiths said that "if there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it."<sup>86</sup> But the women were not a united front. The administration had tried, without success, to talk Griffiths out of supporting the amendment, but they did persuade Edith Green (D., Or.) to speak against it. After denouncing discrimination based on sex, she went on to say that racial discrimination caused far more suffering, and a bill aimed at helping Negroes should not be cluttered up.<sup>87</sup> She read a letter from the AAUW opposing the "sex" amendment. The bill's leaders had also obtained a letter from the Labor Department, which quoted Esther Peterson quoting the President's Commission on the disadvantages of treating sex discrimination like race. Their efforts were insufficient. The House approved the amendment by 168 to 133.<sup>88</sup>

The fact that Smith played the "sex" amendment for laughs and that all the men who spoke for it were from Southern or border states and voted against the final bill lent credence to the view that it was merely a ploy by opponents. But if that were the only—or even the primary—motive, the Title VII amendment would have met the same fate as Rep. Dowdy's "sex" amendments to the other Titles. At least some of the other attempts to "clutter up" Title VII should have passed that same day. The two Dowdy "sex" amendments on which there were counted votes earlier in the week—to Titles II and III—were rejected 43 to 115 and 26 to 112.<sup>89</sup> Shortly after "sex" was added to Title VII by a vote of 168 to 133, Dowdy moved to add "age" to the prohibited discriminations. Despite a very serious debate, in which Smith was for and Celler against the addition of age, this amendment was rejected, 94 to 123.<sup>90</sup> A motion to strike all of Title VII lost 90 to 150.<sup>91</sup> Nineteen amendments were offered that day, and fourteen

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85. Bauer, *supra* note 73, at 49.

86. *Id.*

87. EEOC, Legislative History, *supra* note 49, at 3222-23.

88. Whalen and Whalen, *supra* note 10, at 117-19; EEOC, Legislative History, *supra* note 36, at 3213-28; 110 Cong. Rec., 2577-84 (1964); Zelman, *supra* note 67, at 64-67; Brauer, *supra* note 73, at 48-51; Rupp and Taylor, *supra* note 29, at 177-78; Harrison, On Account of Sex, *supra* note 16, at 177-79; New York Times, Feb. 9, 1964, at 1, col. 1.

89. 110 Cong. Rec. 1978-79, 2280-81, 2264-65, 2297 (1964)

90. *Id.* at 2596-99.

91. *Id.* at 2599-2607. However, the House did accept an amendment to permit discrimination against atheists, rejecting the proposal 137 to 98. *Id.* at 2607-11. By

adopted (most of them technical ones by the bill's sponsor, Celler). The bill's managers clearly had between 112 and 133 Representatives who could be counted on to be present and vote down any amendment when asked. Equally clearly there were several dozen Representatives who came to the floor on a Saturday morning to vote to add "sex" to Title VII, who weren't available, or requested, to vote on any of the other amendments. The vote on the "sex" amendment was the largest counted vote that day. The overall voting pattern implies that there was a large group of Congressmen (in addition to the Congresswomen) that was serious about adding "sex" to Title VII, but only to Title VII. That is not consistent with an interpretation that the addition of "sex" was part of a plot to scuttle the bill.

Furthermore, if the bill's managers had perceived the "sex" amendment as a serious threat to Title VII, they had ample opportunity to scuttle it two days later when the entire civil rights bill was up for review before the final vote. At that time, Rep. Robert Griffin (R., Mich.) tried to amend the amendment to make it applicable only to those who certified that a spouse, if any, was unemployed "when the alleged unlawful employment practice occurred." This was defeated 15 to 96.<sup>92</sup> Four of the twenty-eight amendments to Title VII that were offered that day were adopted,<sup>93</sup> including one proposed by Rep. Frances Bolton (D., Ohio) making "sex" subject to the bona fide occupational qualification exception.<sup>94</sup> A motion for a roll call vote on the "sex" amendment was defeated, but, right before the final roll call, a separate voice vote on "sex" affirmed its addition to Title VII.<sup>95</sup> The final roll call on February 10 registered 290 to 130 in favor of the Civil Rights Act. If those who voiced their approval of the "sex" amendment had been mostly opponents of the Act, it would have been removed at that time.

After the bill went to the Senate, The National Federation of Business and Professional Women (BPW), with 150,000 members and chapters in every state, joined the campaign. Marguerite Rawalt "wrote women lawyers and BPW and Zonta members across the country, explaining the bill and Title VII, telling them whom to write, what to say."<sup>96</sup> She also asked black attorney

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voice vote two days later, the House permitted discrimination against Communists. *Id.* at 2719-29.

92. *Id.* at 2728.

93. EEOC, Legislative History, *supra* note 36, in Appendix 2 and Appendix 3.

94. 110 Cong. Rec. 2718-21 (1964).

95. *Id.* at 2804.

96. Rawalt, *supra* note 7, at 365. Rawalt had been an active proponent of the

Pauli Murray to draft a supportive memorandum since Murray "could act freely, being outside the government, and could also present an argument as a victim of both race and sex discrimination."<sup>97</sup> As a result Texas BPW members wrote President Johnson asking his support, Illinois BPW members deluged Senate Minority Leader Everett Dirksen with telegrams, and Murray's memorandum was reproduced and distributed to the President, Vice President, Attorney General and key Senators.<sup>98</sup>

The Johnson administration did not urge that the "sex" amendment be dropped by the Senate. Indeed, after the bill went to the Senate, President Johnson stated that he supported it "exactly in its present form."<sup>99</sup> Democratic leaders said they opposed removing "sex," and even Esther Peterson lobbied the Senate for its retention. When Senator Everett Dirksen (R., Ill.), whose support was necessary for Senate passage, said he wanted to remove the amendment, Sen. Margaret Chase Smith (R., Me.), at the urging of the NWP, persuaded the Republican Conference to vote against him. He finally gave up, "in order to avoid the wrath of the women."<sup>100</sup>

### Who Done It?

Both the NWP and Martha Griffiths have claimed sole credit for the addition of "sex" to Title VII (though the NWP did give

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ERA and of legislation to improve the status of women most of her life. She was a member of many organizations but her primary affiliation was the BPW, of which she had been president. Her oral history, *supra* note 7, does not explain why she and BPW apparently did little on Title VII prior to passage in the House. However, Alice Paul stated in her oral history that BPW's response to a phone request for support, the week before the vote, was that the organization could not take action without a resolution's first being passed by the national convention. Most likely this was a standard response by whomever answered the phone, since the NWP and the BPW did not have a good working relationship. Rawalt probably found out about the addition of "sex" to Title VII in the House by reading about it in the newspapers. Once alerted, she could use her considerable influence in BPW to mobilize its members without need of an authorizing resolution.

97. Rawalt, *supra* note 7, at 396.

98. Judith Paterson, *Be Somebody: A Biography of Marguerite Rawalt* 154 (1986); Murray, *supra* note 32, at 356-7; Zelman, *supra* note 67, at 70; Bird, *supra* note 3, at 13.

99. Zelman, *supra* note 67, at 70.

100. Zelman, *supra* note 67, at 70-1; Brauer, *supra* note 73, at 52-55; Murray, *supra* note 32, at 357-58; 110 Cong. Rec. 6239 (1964). See NWP Papers, *supra* note 51, on reel 109, for letter from Anita Politzer to Margaret Chase Smith, April 2, 1964; letter from Smith to Politzer, April 9; letter from E.G. Miller to Mary Kennedy, April 15, 1964; letter from Alice Paul to Mary Kennedy, undated draft citing Dirksen quote to the Baltimore Sun of May 25, 1964. Dirksen was an ERA supporter. Indeed, Alice Paul wrote Marjorie Longwell on August 4, 1956, praising Dirksen's "uncompromising support" while a member of the Senate Judiciary Committee. NWP Papers, *supra* note 51, on reel 103.

some credit to the Republican Congresswomen).<sup>101</sup> Both no doubt deserve credit, but even more credit should go to the fortuitous circumstances leading up to that fateful day. The most important of these was the civil rights movement, without which there would not have been a Civil Rights Act. Given the amount of time necessary to pass the relatively innocuous Equal Pay Act, and the compromises involved, it is highly improbable that an act prohibiting employment discrimination by sex alone would ever have passed Congress, let alone one creating a federal enforcement agency.

Nor was this vote taken in isolation, despite the claim by opponents that the "sex" amendment was hasty and ill-considered. Testimony about employment discrimination dominated the hearings held on the Equal Pay Act in a House Committee in March of 1962 and 1963 and in a Senate Committee in April of 1963. In mid-October, the Report of the President's Commission had been released with great publicity. President Johnson had made several public statements in January of 1964 about his intentions to bring more women into government. The lobbying efforts of the NWP were weak compared to those of the civil rights forces, but they were not non-existent. The NWP solicited help from other women's organizations and sent letters to many Members of Congress. A member of BPW from Texas walked into the NWP headquarters to volunteer full-time just as its campaign began. She distributed pamphlets prepared by an NWP attorney from statistics collected by the Women's Bureau with such titles as "The Discriminations Against Women Workers are Greater than Those

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101. Brauer, *supra* note 73, at 40, 51, and Berger, *supra* note 72, at 333, give the NWP sole credit. It should be noted that at the time she wrote this article, Berger had been a member of the National Council of the NWP since 1960. On April 8, 1964, Anita Politzer, Virginia Horner, and Miriam Holder sent telegrams to Margaret Chase Smith and Sen. Kenneth Keating, claiming that "sex was included chiefly through the efforts of Republican Congresswomen." NWP Papers, *supra* note 51, on reel 109. Although Griffiths was an NWP member, the two had a low opinion of each other. Griffiths said in 1969 that the NWP did not have much influence on Congress. Freeman, *supra* note 5, at 53 n.24. Paul claimed in her 1972 oral history that Griffiths (and St. George) refused the NWP's request to sponsor a "sex" amendment. Paul, *supra* note 54, at 623. Griffiths told Zelman in 1975 that "the arguments she presented on the House floor were responsible for the amendment's passage," and her biographer claims that she "is generally considered its author." Zelman, *supra* note 67, at 68-69; Emily George, R.S.M., Martha W. Griffiths, 149 (1982). However, Griffiths also told Brauer in 1979 "that prior to the floor debate she spoke of her plans only to Leonor Kretzer Sullivan and Edna Flannery Kelly, both friends and Democratic representatives." Brauer, *supra* note 73, at 47. Whether or not Griffiths persuaded the Members to change their minds on the "sex" amendment, someone had to bring them to the floor in the first place. The vote was too large, compared to the others that day, to be accounted for absent some mobilizing effort.

Against Negro and Non-White Men."<sup>102</sup>

The other experienced lobbyist was Esther Peterson. While she officially opposed the "sex" amendment and supplied material for the House floor debate, there is no evidence that she mobilized her considerable resources against it in the Senate, even though there was adequate time to do so. Indeed, in April, Peterson drafted President Johnson's answer to a letter from Texas BPW inquiring about his stand on the "sex" provision, expressing support for "equal opportunity for women" and the "present form" of the bill.<sup>103</sup>

While the initiative for adding "sex" to Title VII clearly lies with the NWP, the more important questions are who voted for it and why they did. This would be simpler to answer if there had been a roll call vote. However, there was only a teller vote. Individuals on either side passed through two tellers who counted them but did not record names. Even if all the Congresswomen, except Edith Green, voted for the "sex" amendment, that would account for only ten votes out of 168. The Southerners might have wished to undermine the civil rights bill, but many of them had concluded that passage was inevitable and had gone home. Only eighty-six Southern Democrats were present to vote against the Civil Rights Act on Monday, February 10;<sup>104</sup> it is unlikely that more than that were present to vote for "sex" on February 8. Who were the Members who came to the floor to support "sex" on Saturday and came back on Monday to support the entire Civil Rights Act?

The only evidence on who voted for "sex" on February 8 comes from Rep. Martha Griffiths, who was one of the tellers. She told an interviewer many years later that most of the votes in favor of the amendment came from Southerners and Republi-

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102. Berger, *supra* note 72, at 333; Zelman, *supra* note 67, at 45-47, 61, 138 n.17; Paul oral history, *supra* note 54, at 622, 626-27. Copies of letters to Members of Congress, the NWP pamphlets, and report by Hettie Milam Cook on H.R. 7152, *Equal Rights for Women*, are in the NWP Papers, *supra* note 51, on reel 108. Berger wrote the NWP arguments, but she could not be public about her participation because she worked for the Labor Department. Alice Paul credits her for working every night without being specific about what she did. Paul, *supra* note 54, at 628. Berger was more open about her role in a 1982 interview. Rupp and Taylor, *supra* note 29, at 177-78, 251 n.79.

103. Quoted in Zelman, *supra* note 67, at 71, 140 n.53.

104. These numbers come from Whalen and Whalen, *supra* note 10, at 111-12, 122. 120 Cong. Q. Almanac 606 (1964) says 92 Southern Democrats voted against final passage of the civil rights bill. The difference in numbers is probably due to different definitions of Southern.

cans.<sup>105</sup> The final vote on the entire civil rights bill was a roll call; the Civil Rights Act was passed by a coalition of 152 (mostly Northern) Democrats and 138 Republicans.<sup>106</sup> It appears that responsibility for the addition of "sex" to Title VII lies in the hands of the Republican Members of the House of Representatives; they are the ones who voted for both the "sex" amendment and the civil rights bill. This raises another question. Why should the Republicans, not noted for their love of federal regulation, want to do this?

The answer most likely lies in the Equal Rights Amendment, which had traditionally received much more support from Republicans than Democrats. Support for the ERA went into the Republican Party platform earlier, and stayed in longer, than in that of the Democrats. The Senate votes on the ERA in 1946, 1950, and 1953 showed that many more Republicans than Democrats supported it.<sup>107</sup> Opposition to the ERA since World War II had been largely from labor unions and their supporters, whose elected representatives were to be found primarily among Northern and liberal Democrats. Although almost everyone except the NWP thought the ERA was a dead issue, that did not deter the NWP from combing the halls of Congress every year seeking support. NWP stalwarts repeatedly asked Members to sign pledge cards and frequently compiled lists of sponsors. Their systematic lobbying educated many Congresspeople about sex discrimination and built up a network of relationships with those who were sympathetic to the NWP's concerns.<sup>108</sup>

Nor should one assume that the Southerners' only motive in voting to add "sex" to Title VII was their antagonism toward civil rights. To judge from the sponsors,<sup>109</sup> ERA sympathizers were largely Republican and Southern Democrats—i.e., people who had a distaste for government regulation and were not attuned to the concerns of organized labor. Rep. Smith spoke in favor of a "sex" amendment in 1956 and had been an ERA sponsor since 1943; when he retired in 1966, the NWP lamented the loss of "our Rock

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105. Brauer, *supra* note 73, at 51 (citing his January 11, 1979, interview with Griffiths).

106. 20 Cong. Q. Almanac 606 (1964) reported the vote as Republicans: 138 to 34; Northern Democrats: 141 to 4; Southern Democrats: 11 to 92.

107. The votes are reported in II:3 Cong. Q. 568 (July-September 1946); 6 Cong. Q. Almanac 539 (1950); 9 Cong. Q. Almanac 386 (1950).

108. Rupp and Taylor, *supra* note 29, at 191.

109. NWP Papers, *supra* note 51, contain frequent lists of sponsors. None of these lists are specifically cited because there are so many.

of Gibraltar."<sup>110</sup> Despite the humor that Smith injected into the "Ladies Day" debate, what evidence there is, does not indicate that he had proposed his amendment as a joke.<sup>111</sup>

Although the prohibition of sex discrimination in employment became law in a manner atypical of major legislation, it was not as thoughtless, or as devious, as has previously been assumed. Instead it was the product of a small but dedicated group of women, in and out of Congress, who knew how to take advantage of the momentum generated by a larger social movement to promote their own goals, and a larger group of Congressmen willing to make an affirmative statement in favor of women's rights. But it was casual. At a time when the division between "men's jobs" and "women's jobs" was still taken for granted, the implications of prohibiting discrimination in employment on the basis of sex had not been fully explored. If they had been, so revolutionary a proposal is unlikely to have passed. Even the President's Commission cautioned that "[e]xperience is needed in determining what constitutes *unjustified* discrimination in the treatment of women workers."<sup>112</sup> That is why the "sex" provision is more easily understood as a surrogate for the ERA, an issue which had been extensively discussed, if not agreed upon. Indeed, when Rep. McDonough introduced his "sex" amendment to the 1956 Civil Rights Act, he specifically linked it to the ERA and the "voluminous evidence of record in hearings . . . to show there has been discrimination because of sex."<sup>113</sup> After 40 years of effort, the NWP still had not persuaded two-thirds of Congress to support the ERA, but it had apparently persuaded a majority.

## Conclusion

In his eight case studies of policy innovation, Nelson Polsby identified two patterns into which three cases each fit (two cases did not fit any pattern). "Acute" innovation has four characteristics: low partisan conflict, minimal research, short elapsed time, and fusion of stages. "Incubated" innovations emerge slowly. Although "founded upon much research and reasoned advocacy," they are also controversial.<sup>114</sup> On first view, the addition of "sex"

110. 1 NWP Bulletin 3 (Nov.-Dec. 1966) is in NWP Papers, *supra* note 51, on reel 124.

111. Brauer, *supra* note 73, at 45. Harrison, On Account of Sex, *supra* note 16, at 295 n.20.

112. American Women, *supra* note 34, at 49 (my emphasis).

113. 102 Cong. Rec. 13,124 (1956).

114. Nelson Polsby, *Political Innovation in America: The Politics of Policy Initiation* 151-58 (1984).

to Title VII appears to fit the "acute" cluster, a classic case of "slipping an initiation in as a side issue or as a nonissue."<sup>115</sup> However, the record reveals more "incubation" than initially apparent. The NWP adherents were policy entrepreneurs. Although their primary goal was a Constitutional amendment, they were constantly looking for any opportunity to gain equality for women. They were an established presence on Capitol Hill, where they were one of those interest groups that had built "career-long alliances [with] elected officials . . . by which the preferences of one become the preoccupations of both."<sup>116</sup> Their success in committing the federal government to the prohibition of sex discrimination in employment, despite the absence of popular demand, came largely through persistence.

Persistence alone, however, does not account for this major achievement. The civil rights movement, and the various civil rights bills, opened up a window of opportunity of which the activists took advantage. The NWP and women members of Congress lacked the resources to effect major policy changes by themselves; instead they grabbed the coattails of a major social movement which did have these resources. Persistent opportunism forced the federal government to make a major public policy innovation in an area which it had not previously acknowledged as being very important.

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115. *Id.* at 159.

116. *Id.* at 164.