MAKING TITLE VII LAW AND POLICY: THE SUPREME COURT'S SEXUAL HARASSMENT JURISPRUDENCE

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INTRODUCTION

What is the proper role and function of the federal courts in this country's separation-of-powers governmental structure? The separation-of-powers doctrine, popularized prior to this nation's founding by Baron de Montesquieu,[1] rests on the principle that state power should be fragmented and dispersed among governmental branches. As set forth in the United States Constitution, "[a]ll legislative Powers . . . shall be vested in a Congress of the United States,"[2] the "executive Power shall be vested in a President,"[3] and the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[4] Concerned with "the distribution of powers *among* the three coequal Branches,"[5] "the separation of powers 'left to each [Branch] power to exercise, in some

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1. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION 202 (David W. Carrithers ed., 1977); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 46 (2002); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1764 (1996); Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 87 CAL. L. REV. 786, 787 (1999).
2. U.S. CONST. art. I, § 1.
3. U.S. CONST. art. II, § 1.
4. U.S. CONST. art. III, § 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." *Id.* § 2.
5. Touby v. United States, 500 U.S. 160, 168 (1991).

respects, functions in their nature executive, legislative and judicial.'"[6] Under this principle, "legislatures rather than courts should make law."[7]

The federal judiciary interprets, applies, and gives operational meaning to statutes enacted by Congress and signed into law by the President.[8] In performing his or her constitutional role and function when considering litigated disputes involving adversarial parties' contested readings of statutory provisions, how should judges decide cases and on what basis or bases? For some, the answers to these questions are found in the axiom (indeed, the mantra) that judges only interpret and do not and should not make law.[9] Those who subscribe to this "make-no-law" position believe that the courts, separate from and subordinate to the legislature,[10] should identify and implement the legislative mandate and go no further. On that view, a court "should only declare what the law is, and should not make law or 'substitute [its] own policy preferences through the creation and application of public values canons for

6. Mistretta v. United States, 488 U.S. 361, 386 (1989) (quoting Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)).

7. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1861 (1998) (footnote omitted).

8. *See* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 10-12 (2000).

9. *See* Stephen B. Presser, *The Scalias Court*, LEGAL AFF. (Sept./Oct. 2004), at 27 ("[I]t is not the job of courts to make law . . ."); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L L. REV. & ECON. 263, 263 (1992) ("While courts do not make law, there is no actual law until the courts interpret the received statutory commands."); *George Bush makes his case*, GREENVILLE NEWS, Sept. 5, 2004, at 20 (explaining that President George W. Bush "plans to appoint judges who will interpret the law, not make it from the bench"); Press Release, Remarks of Sen. Orrin G. Hatch before the Federalist Society (Jan. 27, 1998) (on file with FDCHeMedia, Inc.) (discussing President Ronald Reagan's emphasis on the "importance of selecting judges who interpret the law, not make the law"); Robert S. Greenberger, *Rehnquist Blasts Sentencing Curbs*, WALL ST. J., Jan. 2, 2004, at A4 (discussing the United States House of Representatives Republican Working Group on Judicial Accountability, "whose mission is to identify judges who, in the group's view, make law rather than faithfully interpret the Constitution"); Randall Kennedy, *The case for borking*, AM. PROSPECT (Jul. 2, 2001), *available at* http://www.prospect.org/web/page/ww?name=Daily+Prospect§ion=root (last visited Jan. 12, 2005) ("When senators ask a nominee whether he or she believes that the proper role of a judge is to interpret rather than make law . . . they are imposing a litmus test."); Dahlia Lithwick, *Activist Judges? What's in a Name?*, SEATTLE POST-INTELLIGENCER, Aug. 18, 2004, at B7 (discussing the "fiction that liberal judges 'make' law, and conservative judges 'interpret'").

10. *See* Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair, in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 115, 116 (Sanford Levinson & Steven Mailloux eds., 1988); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO L.J. 281, 281-82 (1989).

the preferences of Congress as articulated in the words and history of the statute.'"[11]

Others reject the notion that judges merely find and announce law, but do not make law.[12] As stated recently by Aharon Barak, the president of the Supreme Court of Israel: "I reject the contention that the judge merely states the law and does not create it. It is a fictitious and even a childish approach."[13] Another prominent jurist, Judge Richard Posner, has remarked that "judges make up much of the law that they are purporting to be merely applying," and that "while the judiciary is institutionally and procedurally distinct from the other branches of government, it shares lawmaking power with the legislative branch."[14] Given the realities of gaps in statutory text and legislators' inability to anticipate all of the issues and scenarios that may arise after the enactment of legislation,[15] courts necessarily and inevitably engage in legislative-like

11. Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURVEY AM. L. 379, 387 (2004) (quoting Daniel B. Rodriguez, *The Presumptions of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 744 (1992)).

12. One analyst has argued that "though Congress legislates, the executive issues orders and regulations, and the courts make decrees and interpret the laws. All three branches issue imperatives, and it settles nothing to characterize judicial interpretations and decrees as 'legislation.' That is merely an exercise in conclusory labeling." David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 458 (1994).

13. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 23 (2002) (footnote omitted). Barak explained:

> I suspect that most supreme court judges believe that, in addition to stating the law, they sometimes create law. Regarding the common law, this is certainly true: no common law system is the same today as it was fifty years ago, and judges are responsible for these changes. This change involves creation. The same is true of the interpretation of a legal text. The meaning of the law before and after a judicial decision is not the same. Before the ruling, there were, in hard cases, several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed; new law has been created.

Id.

14. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (2003). *See also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naïve . . . as to be unaware that judges in a real sense 'make' law."); Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787, 801 (1983) ("Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make."); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1318 (1995) ("[T]hat judges do not make law" is "an erroneous paradigm about judging"); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315 (1997) ("[C]ourts *do* make laws (or, if you prefer, rules) that govern us . . .").

15. H.L.A Hart has noted that the "unenvisaged case" will arise given the reality that "human legislators can have no . . . knowledge of all the possible combinations of circumstances which the future may bring." H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994). "When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between

gap-filling,[16] and make, in a real and practical sense, law and policy. "Quasi-legislative judicial gap-filling"[17] and the creation and formulation of new rules and standards not expressly found in statutory text have been and will continue to be critical aspects of judges' resolutions of, and answers to, statutory questions.[18]

This article focuses on judicial lawmaking and policy-making in an important area of antidiscrimination law—the statutory prohibition of workplace sexual harassment found in Title VII of the Civil Rights Act of 1964.[19] More specifically, my purpose here is to highlight the ways in which the United States Supreme Court's interpretation and application of Title VII's ban on sex discrimination[20] are contrary to, and fly in the face of the judges-should-make-no-law axiom. As discussed herein, Title VII sexual harassment law "has been judge-made law"[21] and "is a judicial rather than a legislative creation."[22] While it is undoubtedly true that the Congress that enacted Title VII in 1964 did not conceive of or intend to regulate and prohibit conduct later categorized (and now labeled) as sexual harassment,[23] the Court has issued a number of decisions holding that the statute does proscribe and provide remedies for such misconduct.[24] In doing so, the Court created a fundamental public value opposing workplace harassment, and yes, made law via an extrapolative analysis of Title VII's text and goals.[25] Judicial lawmaking and policymaking

the competing interests in the way that best satisfies us." *Id*. *See also* FREDERICH A. HAYEK, LAW, LEGISLATION, LIBERTY: RULES AND ORDER 119 (1973) (explaining that judges will formulate new rules in "new situations in which the established rules are not adequate").

16. *See* Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 38 (2000) (noting Richard Posner's agreement with H.L.A. Hart "that judicial gap-filling looks a great deal like legislation").

17. Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 501 (2003).

18. On judicial gap-filling, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (positing that the judge "legislates only between gaps" and "fills the open spaces in the law"); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987) ("The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden . . . . [Such statutes] are susceptible of diverse interpretation [and] inspire litigation . . .").

19. *See* 42 U.S.C. § 2000e (2000).

20. *See infra* notes 69-168 and accompanying text.

21. Catherine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 813 (2002).

22. Margaret Thornton, *Sexual Harassment Losing Sight of Sex Discrimination*, 26 MELB. U. L. REV. 422, 425 (2002).

23. *See infra* notes 163-68 and accompanying text.

24. *See infra* notes 65-168 and accompanying text.

25. *See infra* notes 65-168 and accompanying text.

in this important area of antidiscrimination law are discussed in the pages that follow.

I. MAKING AND MOVING THE LAW

Title VII's Sex Discrimination Ban

In 1964, the United States Congress was considering not only the proposed Civil Rights Act, H.R. 7152, but also an additional provision of Title VII, making it unlawful for an employer to discriminate against individuals on the basis of race, color, religion, or national origin.[26] Concerned that the bill would actually be enacted by Congress, Representative Howard Smith presented a floor amendment adding the word "sex" to the list of characteristics subject to the no-discrimination requirement,[27] attempting to ensure that the bill would be "as full of booby traps as a dog is full of fleas."[28] When the House clerk announced Smith's amendment, stating that "after the word 'religion,' insert 'sex,' . . . . [t]he House erupted in shock as the full import of the amendment sank in."[29] Although the amendment was only debated on the House floor for two hours,[30] and was opposed by the House Judiciary Committee's chairman, Emmanuel Cellar (who otherwise supported the passage of the Civil Rights Act),[31] Smith's attempted "poison pill strategy backfired"[32] and

26. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-16 (1985).

27. On the legislation-defeating motivation of the "sex" amendment, *see* WHALEN & WHALEN, *supra* note 26, at 116 ("Smith counted on the amendment passing and making H.R. 7152 so controversial that eventually it would be voted down either in the House or Senate."); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997) ("The statute's prohibition on gender discrimination was a last minute addition . . . proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill."); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination.").

28. WHALEN & WHALEN, *supra* note 26, at 115-16 (quoting Rep. Howard Smith).

29. WHALEN & WHALEN, *supra* note 26, at 115.

30. Neither hearings were held nor testimony taken regarding the sex discrimination amendment. *See* Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151, 155 (1997); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

31. "The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986).

32. Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid*

the amendment was adopted by a vote of 168-133.[33] In the United States Senate, the Civil Rights Act was subject to the longest debate in the nation's history before it was ultimately signed into law by President Lyndon B. Johnson on July 2, 1964.[34]

Is Sexual Harassment Sex Discrimination?

Title VII's ban on sex discrimination[35] was a last-minute addition to the 1964 Civil Rights Act, and given its provenance, there is no legislative history to which we can turn for assistance when questions arise as to what is and what is not discrimination "because of sex." One such question coming to the courts for resolution in the 1970s was whether the statutory proscription of sex discrimination included and made unlawful the centuries-old phenomena and problem of sexual harassment.[36] Answering this query in the negative in *Corne v. Bausch & Lomb, Inc.*,[37] the court concluded that a supervisor's alleged harassment was "nothing more than a personal proclivity, peculiarity, or mannerism" engaged in to satisfy his "personal urge" and not for the purpose of benefiting his employer.[38] The court warned that a ruling that sexual harassment was actionable under Title VII "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another," a result which could only be avoided by hiring "asexual" workers.[39] Another federal district court held in T*omkins v.*

Analysis, 2 NEV. L.J. 86, 90 (2002).

33. *See* WHALEN & WHALEN, *supra* note 26, at 117. "Clearly, Cellar spurned the amendment for the same reason that Smith advocated it: the measure was widely believed to be certain to kill the entire bill." Belcove-Shalin, *supra* note 32, at 89-90.

34. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964).

35. *See* 42 U.S.C. § 2000e-2(a)(1) (making it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

36. As I have noted elsewhere, "[a]s early as the 1620s, female indentured servants arriving in America from Europe often were sexually abused by their 'masters,' and domestic servants were also the victims of sexual harassment." Turner, *supra* note 30, at 154 (citing KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600-1993 (1994)). *See also* STEPHEN J. MOREWITZ, SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY 9 (1996) (in the early 1900s "girls and women who resided in urban communities confronted sexual harassment despite Victorian prohibitions against sexual behaviors").

37. 390 F. Supp. 161 (D. Ariz. 1975).

38. *Id.* at 163.

39. *Id.* at 163-64. *See also* Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (stating that because the "attraction of males to females and females to males is a natural sex phenomenon and . . . plays at least a subtle part in most personnel decisions . . . it would seem wise for the Courts to refrain from delving into these matters"), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

Public Service Electric & Gas Co., that sexual harassment was not sex discrimination under Title VII, as the statute seeks to "make careers open to talents irrespective of race or sex" and is "not intended to provide a federal tort remedy" for sex-based conduct at the office.[40] In so holding, the court reasoned that a supervisor's abuse of employees for his own personal reasons "is not . . . sex discrimination within the meaning of Title VII even when the purpose is sexual."[41]

It is certainly true that the 1964 Congress did not intend to provide a Title VII remedy for workplace sexual harassment, as was urged by the court in *Tomkins*. As noted by Ellen Paul:

> Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term 'sexual harassment' did not come into currency until the late 1970s. They were fashioning a *civil rights* law—that is, one addressing impediments to individuals as a result of discriminatory acts—not a law proscribing just any kind of oppressive act that one person might commit against another.[42]

Another analyst, Richard Epstein, has argued that "[c]ases of harassment were instances of employee frolic and detour, and hence were

40. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (holding that an employee's claim that her employment was conditioned on submitting to a supervisor's sexual advances stated a cause of action for sex discrimination under Title VII).

41. *Tomkins*, 422 F. Supp. at 556. Like the *Corne* court, see *supra* note 37 and accompanying text, the district court in *Tomkins* expressed concern that recognizing a Title VII cause of action for sexual harassment would let loose a flood of litigation:

> If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

Id. at 557. In reversing the district court, the Third Circuit opined that the recognition of the sexual harassment claim "must not be thwarted by concern for judicial economy." Tomkins, 568 F.2d at 1049 (1977).

42. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990). *See also* Michael C. Dorf, *Foreword: The Limits of Socratic* Dialogue, 112 HARV. L. REV. 4, 23 (1998) ("[T]he Congress that enacted Title VII was arguably not even concerned about male-on-female sexual harassment."). *See also* John Cloud, *Sex and the Law*, TIME, Mar. 23, 1998, at 49 (quoting Professor Eugene Volokh: "In 1964 . . . if you told a member of Congress, 'If you vote to bar discrimination based on sex, you will prohibit employees from putting pictures of their wives in bikinis on their desks,' most legislators would have said, 'Wait a minute, where does it say that?'").

outside the scope of employment. No support for their inclusion is found in the legislative history of Title VII, which was silent on the subject."[43] Under this intentionalist interpretive approach,[44] Title VII's application is limited to "the actual intent and understanding of [the] statute as held by the legislators who enacted the law."[45] Any legislative intent to prohibit sexual harassment must be found in the statutory text and/or in legislative history; if the text and history do not contain and evince such intent, the views of the 1964 Congress govern, and courts are bound by the law as enacted, and therefore cannot deviate from or add to it.[46] On that view, Title VII did not and does not prohibit sexual harassment.

The position initially taken by some courts, that sexual harassment was not prohibited by Title VII, was a contested one.[47] The organization Working Women United held a "Speak-Out On Sexual Harassment" in May 1975 and pointed out the ways in which workplace sexual harassment adversely impacted female employees.[48] In her 1976 book, *The Harassed Worker*, Carroll Brodsky defined sexual harassment as conduct involving "repeated and persisted attempts . . . to torment, wear down, frustrate, or get a reaction from another. It is treatment that persistently provokes, pressures, frightens, intimidates, or otherwise discomforts another person."[49] Thereafter, Catherine MacKinnon further developed the argument that workplace sexual harassment constitutes sex discrimination in employment.[50] Defining sexual harassment as "the un-

43. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 357 (1992) (footnote omitted).

44. On intentionalism in statutory interpretation, see REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 88 (1975); James N. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 888-89 (1930); Turner, *supra* note 11, at 389-90; e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Misssed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 253-54 (1999) ("Intentionalist method is based on a respect for the constitutional role of the legislature as lawmaker.").

45. *See* Turner, *supra* note 11, at 389.

46. *Id.* at 389-90.

47. *See* Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL'Y 57, 64-68 (2000).

48. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 n.2, 1698-99 (1998) (discussing the workplace dynamics of sexual harassment and how Working Women United "clearly conceptualized harassment in terms of sexual advances").

49. CARROLL BRODSKY, THE HARASSED WORKER 2 (1976).

50. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 7 (1979). The influence of MacKinnon's book on the development of sexual harassment law and policy has been noted by a number of commentators. *See, e.g.*, LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 229-30 (1998); RICHARD A. POSNER, SEX AND REASON 32 (1992); JEFFREY TOOBIN, A VAST CONSPIRACY: THE REAL

wanted imposition of sexual requirements in the context of a relationship of unequal power,"[51] MacKinnon wrote: "Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent."[52]

The sexual-harassment-is-sex-discrimination view gained a number of important adherents in the decades following the enactment of Title VII. A federal district court's 1976 decision concluded that a male supervisor's alleged retaliation against a female employee who refused his sexual advances "created an artificial barrier to employment which was placed before one gender and not the other . . . ."[53] Employing a textualist interpretive analysis,[54] the court reasoned that the "plain meaning of the term 'sex discrimination' as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason."[55] In a case decided the following year, the United States Court of Appeals for the District of Columbia Circuit recognized the sexual harassment cause of action where a male supervisor allegedly sought sexual favors from the female plaintiff, stating, "[i]t is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job."[56] And in 1980, the Equal Employment Opportunity Commission (EEOC), the federal agency administering and enforcing Title VII, weighed in with its sexual harassment guidelines:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an

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STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT 172-73 (1999).

51. MACKINNON, *supra* note 50, at 1.

52. *Id*.

53. Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976).

54. *See infra* note 74 and accompanying text.

55. *Williams*, 413 F. Supp. at 658.

56. Barnes v. Costle, 561 F.2d 983, 989-90 (D.C. Cir. 1977) (footnotes omitted).

individual's work performance or creating an intimidating, hostile, or offensive working environment.[57]

Subsequent to the EEOC's issuance of its guidelines, two federal courts of appeals recognized the sexual harassment cause of action. *Bundy v. Jackson*[58] held that actionable sexual harassment can occur even though an employee did not experience a deprivation of tangible benefits of employment.[59] Thus, the court wrote, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance 'seriously.'"[60] Similarly, in *Henson v. City of Dundee*[61] the court concluded that a hostile work environment,[62] violative of Title VII, could be created even where a plaintiff-employee had not suffered a tangible job detriment.[63] The court determined that sexual harassment directed at and imposed upon an employee because of that individual's sex constitutes unlawful disparate treatment, and "[t]here is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment."[64]

The Supreme Court Makes Sexual Harassment Law

In September 1974, Mechelle Vinson met Sidney Taylor, a bank branch manager, and inquired about job opportunities with the bank. Given an application by Taylor, Vinson completed and returned the document to the bank the following day, and she was hired and began working under the direct supervision of Taylor. Vinson worked at the bank until she went on an indefinite sick leave in September 1978; shortly thereafter, she was discharged for excessive use of that leave.[65]

Vinson filed a federal court action alleging that she had been subjected to unlawful sexual harassment. She contended that Taylor invited

57. 29 C.F.R. § 1604.11(a) (2004).
58. 641 F.2d 934 (D.C. Cir. 1981).
59. *Id*. at 938-39, 948.
60. *Id*. at 945.
61. 682 F.2d 897 (11th Cir. 1982).
62. *See infra* note 83 and accompanying text.
63. *Henson*, 682 F.2d at 901.
64. *Id*. at 902.
65. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom.,* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

her to dinner and then asked her to go to a motel to have sex. Vinson declined Taylor's request; in response, Taylor informed her that she was indebted to him because he was responsible for her employment. Testifying that she acceded to Taylor's invitation because she feared losing her job, Vinson went to the motel and engaged in sexual intercourse with Taylor.[66] Vinson further testified that Taylor forced her to have sex with him at the bank during and after working hours and that he assaulted and raped her. Vinson also testified that she and Taylor had sexual intercourse on 40 or 50 occasions, that Taylor fondled her breasts and buttocks in the presence of other employees, entered the women's restroom when she was there alone, and exposed himself to her.[67] Taylor denied all of Vinson's allegations, as did the bank. In addition, the bank argued that any sexual advances on the part of Taylor were not known to and were done without the consent and approval of the bank, and that no complaints of harassment had been presented to it by Vinson or any other employee.[68]

Did Title VII prohibit and provide a remedy for the sexual harassment suffered by Vinson? In *Meritor Savings Bank, FSB v. Vinson*,[69] the Supreme Court answered that question in the affirmative, holding that "a claim of 'hostile environment' sex discrimination is actionable under Title VII" and remanded the case to the district court for further proceedings.[70] Writing for the Court, then-Justice (now Chief Justice) Rehnquist began with this apparently unchallenged proposition: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[71] Notwithstanding that concession, the bank argued that no actionable discrimination could or should be found where the harassment affected purely psychological aspects of the work environment, but did not result in tangible losses of an economic character.[72] On that point, the bank's brief to the Court urged that "the holding that an offensive work environment created by sexual advances and other unwelcomed conduct of a sexual nature is an unlawful employment practice under Title VII . . .

66. *Meritor,* 477 U.S. at 60.

67. *See id.* "She also testified that Taylor touched and fondled other women employees of the bank or made suggestive remarks in their presence." *Id*. (footnote omitted).

68. *Id*. at 39.

69. 477 U.S. 57 (1986).

70. *Id*. at 73.

71. *Id*. at 64.

72. *See id*.

does not . . . find support in the statute, any legislative history of the statute, or interpretive case law from this Court."[73]

The Court was not persuaded. Employing a textualist interpretive analysis—the text of the statute "is the law, and it is the text that must be observed"[74]—Justice Rehnquist reasoned that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[75] Going beyond the text of the statute, Rehnquist noted, relied on, and deferred to the EEOC's informative, but not controlling, sexual harassment guidelines,[76] concluding that the

73. Brief of Petitioner at 30, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979); *see also* Petitioner's Reply Brief at 4, *Meritor* (No. 84-1979) (noting that the appeals court decision in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) "finds no explicit support in the language of the statute, nor is there any hint in the legislative history of Title VII that the Congress intended such a novel and unprecedented interpretation of Title VII").

74. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997). The textualist looks not to abstract legislative intentions, but to the plain meaning of the pertinent statutory text, and asks, "given the ordinary meaning of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?" WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994). Given the "chameleonic quality" and imprecision of the English language and the multiple meanings of words, some have questioned whether plain meaning can always be discerned. *See* JEFFREY A. SEGAL & HAROLD J. SAPETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 34 (1993).

75. *Meritor,* 477 U.S. at 64 (internal citations omitted).

76. *See id*. at 65 (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) ("[T]hese Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . .'").

In quoting *Skidmore*, the Court did not follow the separate and distinct two-step deferential approach set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *Chevron* deferential analysis asks, first, "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. (Interestingly, this query was stated differently in *National Railroad Passenger Corp. v. Boston & Maine Corp*., 503 U.S. 407, 417 (1992), where the Court asked whether "the agency interpretation is not in conflict with the plain language of the statute," an inquiry arguably narrower than the query regarding Congressional intent). If Congressional intent is not clear, the second step of the *Chevron* analysis calls upon a court to ask "whether the agency's answer is based on a permissible construction of the statute," and the court "does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843. Where the agency's statutory construction is permissible, the courts must defer to the agency's position. *See id*. at 843-44.

For an excellent analysis of issues relative to judicial deference to the EEOC, see generally Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995).

EEOC's position "fully support[s] the view that harassment leading to noneconomic injury can violate Title VII."[77] Justice Rehnquist approvingly referred to the EEOC's declaration, grounded in and building upon judicial decisions recognizing claims for nonsexual forms of hostile environment,[78] that both *quid pro quo*[79] and hostile environment sexual harassment violate the statute.[80] "Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited."[81]

Justice Rehnquist thus agreed "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[82] He then quoted from a 1982 Fourth Circuit decision:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[83]

Harassment will be actionable where it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[84]

Having enunciated the standard governing Title VII hostile environment claims, Justice Rehnquist turned to the issue of the importance and significance of a plaintiff's voluntary participation in the alleged harassment. "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will,

77. *Meritor*, 477 U.S. at 65.

78. *See id.* at 65-66 (citing and discussing federal courts of appeals decisions recognizing Title VII hostile environment claims involving racial, religious, and national origin harassment).

79. *See id.* at 65. In cases of *quid pro quo* harassment, referred to as "play-or-pay" or "put-out-or-get-out" harassment, an employee is faced with the choice of complying with a harasser's sexual demands or suffering an adverse and tangible employment action "constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). For discussions of this type of sexual harassment, see MACKINNON, *supra* note 50, at 32; STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 175 (1998).

80. *Meritor*, 477 U.S. at 65.

81. *Id.* at 66.

82. *Id.*

83. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (4th Cir. 1982)).

84. *Id.* (alterations in original omitted) (citations omitted).

is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[85] Instead of asking whether Vinson voluntarily engaged in sexual activity and intercourse with Taylor,[86] the "correct inquiry is whether [Vinson] by her conduct indicated that the alleged sexual advances were unwelcome . . . ."[87] In answering the question of whether plaintiff's dress and personal fantasies were relevant to determining whether Taylor's conduct was or was not welcomed, Rehnquist concluded that "a complainant's sexually provocative speech or dress" may be relevant "as a matter of law in determining whether he or she found particular sexual advances unwelcome."[88]

The Court also noted but declined to issue a definitive ruling on the question of employer liability for supervisory sexual harassment.[89] After summarizing the various arguments of the parties and the amici EEOC,[90] and guided by agency law principles, Justice Rehnquist decided that (1) employers are not automatically liable for their supervisors' (their

85. *Id*. at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

86. The trial court had concluded that any intimate or sexual relationship between Vinson and Taylor "was a voluntary one by plaintiff having nothing to do with her continued employment . . . or her advancement of promotions . . ." Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980). Rejecting that view, the District of Columbia Circuit reasoned that a "victim's 'voluntary' submission to unlawful discrimination of this sort can have no bearing on the pertinent inquiry: whether Taylor made Vinson's toleration of sexual harassment a condition of her employment." Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985).

87. *Meritor*, 477 U.S. at 68.

88. *Id*. at 69. The Court thus disagreed with the District of Columbia Circuit's position that "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities," and that testimony regarding a plaintiff's dress and fantasies "had no place in this litigation." *Vinson*, 753 F.2d at 146 n.36. Rather, the Court maintained that the contention that unfair prejudice of such evidence outweighs its relevance is an argument to be made to the district court by the plaintiff. *See Meritor*, 477 U.S. at 69.

89. *See id.* at 72.

90. Vinson argued that an employer should be liable for supervisory sexual harassment committed by its agent, and that it did not matter that the employer did not know or reasonably could not have known of the asserted misconduct. *See id*. at 69-70. The bank contended that Vinson's failure to utilize an employee grievance procedure, which would have given the company notice of and an opportunity to address and cure the alleged harassment, insulated it from liability for any misconduct engaged in by Taylor. *See id*. at 70. The EEOC urged that in hostile environment cases, an employer should be shielded from harassment liability where the company has a policy expressly prohibiting sexual harassment and has in place a procedure to receive and resolve harassment complaints, and employees complaining of harassment do not utilize the complaint procedure. "In all other cases, the employer will be liable if it has actual knowledge of the harassment or if . . . the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." *Id*. at 71 (quoting Brief for United States and EEOC as Amici Curiae at 26, *Meritor* (No. 84-1979)). It is noteworthy that the EEOC's argument to the Court differed and departed from the agency's guidelines holding employers liable for the harassment of agents without regard to employer notice of the misconduct. *See id*.; 29 C.F.R. § 1604.11(d) (1985).

agents')[91] sexual harassment,[92] and (2) the absence of notice of supervisory harassment will not always insulate the employer from Title VII liability.[93] Although the bank had a policy against discrimination and a complaint procedure,[94] Rehnquist noted that the policy did not specifically refer to sexual harassment, and that under the grievance procedure, Vinson would have been required to file her complaint with her supervisor—the alleged harasser Taylor.[95] Thus, Rehnquist stated, the bank's argument that Vinson's failure to complain about Taylor's actions "should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[96]

Meritor made law in several important and interesting ways. Not limiting its analysis and decision to the 1964 Congress' intent and understanding of the meaning and scope of Title VII's sex discrimination proscription—which assuredly did not include or even consider outlawing sexual harassment—the Court focused on and took its guidance from the statutory language, Title VII's antidiscrimination purpose, and the views of the EEOC.[97] While sexual harassment is a form and subset of the sex discrimination banned by Title VII, it is not the result of the Court's enforcement of a specific congressional decision or mandate explicitly set forth in the statute's text. Rather, the Court began with a general and relatively indeterminate legislative prohibition of discrimination "because of sex." The court reasoned that sexual harassment is a species of and constituted such discrimination, formulated a hostile environment standard replete with imprecise terms (such as "sufficiently," "severe," "pervasive," "abusive," "hostile," and "unwelcome"),[98] and issued rules

91. *See* 42 U.S.C. § 2000e(b) (2000) (the term "employer" includes the employer's "agents").

92. In a concurring opinion joined by Justices Brennan, Blackmun and Stevens, Justice Marshall wrote that he would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense. *Meritor*, 477 U.S at 78 (Marshall, J., concurring in the judgment). In Marshall's view, the act of a harassing supervisor, like the act of a supervisor who unlawfully fires or denies a promotion to a black employee without employer notice, should be imputed to and considered the act of the employer. *See id.* at 75.

93. *Id.* at 72.

94. The employer's "express policy . . . is one of nondiscrimination in employment practices" and its employee manual contained a "grievance procedure whereby any employee may state a grievance and have it resolved, if not by a supervisor, then by the division head or the president." Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980).

95. *Meritor,* 477 U.S. at 73.

96. *Id*.

97. *See id.* at 63-73 (discussing the rationale the Court used to reach its decision) .

98. *See supra* note 84 and accompanying text.

governing the admissibility of certain evidence and employer liability for supervisory harassment.[99] This judicial lawmaking and policy-influenced/policy-promoting interpretation and application of Title VII is a signal and salutary development, providing a cause of action and legal protection to employees targeted by sexual harassers.

II. REFINING THE REGIME

Having established in *Meritor* that sexual harassment is a subset of the sex discrimination proscribed by Title VII, it was then necessary for the Court to provide a legal framework in which to bring such claims. Therefore, in its subsequent decisions, the Supreme Court created legal rules and fashioned analytical methodologies as it further shaped and gave content to the harassment cause of action.

The Hostile-Environment Analysis

Harris v. Forklift Systems, Inc.[100] reaffirmed the *Meritor* hostile-environment sexual harassment standard[101] in a case brought by a female manager who alleged that she was the target of the employer president's comments and unwelcomed sexual innuendos.[102] Rejecting the lower courts' conclusions that a hostile-environment complainant had to show psychological injury, the Court (per Justice O'Connor) declared that the *Meritor* standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[103] Further, the Court set out a two-prong analysis governing environmental harassment claims:

99. *Meritor*, 477 U.S. at 72.

100. 510 U.S. 17 (1993).

101. *See supra* note 84 and accompanying text.

102. The plaintiff alleged, among other things, that the president said to her, in the presence of other employees, "You're a woman, what do you know," and on another occasion told her that she was "a dumb ass woman" and suggested that he and she go to a motel to negotiate her raise. *Harris,* 510 U.S. at 19. And, again in the presence of other employees and while the plaintiff was negotiating a deal with a company customer, the president asked her, "What did you do, promise the guy . . . some [sex] Saturday night?" *Id*.

103. *Id*. at 21. *See also id*. at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). The Court has made it clear that merely offensive conduct does not give rise to a viable sexual harassment claim. *See* Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) ("No reasonable person could have believed that the single incident of alleged sexual harassment . . . violated Title VII.").

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[104]

Writing that the hostile-environment standard "is not, and by its nature cannot be, a mathematically precise test,"[105] Justice O'Connor instructed that the hostility or abusiveness of a working environment "can be determined only by looking at all the circumstances," including but not limited to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[106] While an environment's effect and impact on a worker's psychological well-being is relevant, O'Connor stated, "psychological harm, like any other relevant factor, may be taken into account, [and] no single factor is required."[107]

Same-Sex Sexual Harassment

In *Oncale v. Sundowner Offshore Services, Inc.*,[108] the Court addressed the question whether Title VII prohibits workplace sexual harassment when the harasser and the targeted employee are of the same sex.[109] A unanimous Court, in an opinion by Justice Scalia, held that same-sex (male-on-male or female-on-female) sexual harassment violates the statute.[110] In Scalia's words: "[W]e hold today that nothing in

104. *Harris,* 510 U.S. at 21-22.

105. *Id*.

106. *Id*. at 23. Concurring, Justice Scalia opined that the terms "abusive" or "hostile" did "not seem to me a very clear standard," and that since the Court's listing of factors to be considered in making the hostility determination "neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude." *Id*. at 24 (Scalia, J., concurring). Although the Court's ruling "lets virtually unguided juries decide whether sex-related conduct" constituted unlawful sexual harassment, Scalia knew "of no alternative to the course the Court . . . has taken" and joined in Justice's O'Connor's opinion. *Id*. at 24, 25.

107. *Id*. at 23.

108. 523 U.S. 75 (1998).

109. Joseph Oncale alleged that, while working on an all-male oil rig in the Gulf of Mexico, he was subjected to humiliating sex-related conduct and physical assaults by male supervisors and a male coworker, and that one of the supervisors threatened to rape him. *Id*. at 77. When his complaints to management were unavailing, Oncale quit his job. *Id*.

110. *Id*. at 79, 82.

Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[111]

Focusing on the text of Title VII and the Court's precedents,[112] Justice Scalia saw "no justification . . . for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[113] Scalia reiterated the intentionalist argument[114] that the Congress enacting Title VII was not concerned with male-on-male harassment when it passed the statute.[115] "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[116] Title VII bans sex discrimination in terms and conditions of employment; therefore, the Justice concluded, any sexual harassment meeting this requirement is covered and prohibited.[117]

Going beyond the statutory text, Justice Scalia emphasized that the recognition of same-sex harassment claims would not "transform Title VII into a general civility code for the American workplace," as the statute outlawed, not all physical or verbal harassment, but discrimination because of sex.[118] Harassment with sexual content and connotations is not automatically discrimination, Scalia emphasized. "'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members

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111. *Id*. at 79 (alteration in original).

112. *See* 42 U.S.C. § 2000e-2(a)(1) (2000); Johnson v. Transp. Agency, 480 U.S. 616, 624-25 (1987) (considering a sex discrimination claim even though the male plaintiff complained of the adverse decision and action of a male supervisor); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (Title VII's sex-discrimination ban applies to and protects men and women); Castaneda v. Partida, 430 U.S. 482, 499 (1977) (stating that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group").

113. *Oncale,* 523 U.S. at 79.

114. *See supra* note 44 and accompanying text.

115. *See Oncale*, 523 U.S. at 79.

116. *Id*.

117. *See id*. at 79-80.

118. *Id*. Explaining that Title VII would not be expanded into a general civility code, Scalia emphasized that "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex" and "requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Id*. at 81. In his view, Title VII did not cover conduct failing to meet the objective prong of *Harris v. Forklift Systems, Inc*., (discussed *supra* notes 100-107 and accompanying text). Scalia maintained that this requirement was "sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" *Id*. at 81.

of the other sex are not exposed.'"[119] Evidentiary inferences of the requisite discrimination may be drawn where the same-sex harasser is homosexual, or the harasser's conduct evinces hostility to the presence in the workplace of others of the same-sex, or the plaintiff working in a mixed-sex employment setting presents evidence comparing the harasser's treatment of individuals of both sexes.[120] "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]*. . . because of . . . sex.'"[121] Whether such discrimination has occurred and can be shown is a matter of "[c]ommon sense, and an appropriate sensitivity to social context" which "will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[122]

The Hostile-Environment Affirmative Defense

In 1998, the Court turned to another significant sexual harassment issue, asking whether and under what circumstances employers are liable for hostile environment harassment perpetrated by supervisors.[123] Writing for the Court in *Burlington Industries, Inc. v. Ellerth*,[124] Justice Ken-

119. *Id*. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). As Oncale worked on an all-male oil rig, evidence of the comparative treatment or mistreatment of males and females was not available. Although the Supreme Court remanded the case, there was no additional or definitive judicial analysis of Oncale's claim because the parties settled. *See Sun Sets on Sundowner*, TEX. LAW, Nov. 2, 1998, at 3 ("The parties finalized a settlement Oct. 21, six days before trial was scheduled to begin.").

120. *See Oncale,* 523 U.S. at 80-81.

121. *Id*. at 81 (alteration in original).

122. *Id*. at 82. In highlighting social context, Scalia opined that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id*. at 81-82. For more on social context in this setting, see Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437 (2002) (discussing the ways in which courts have taken workplace culture, particularly in blue-collar industries, into account in analyzing harassment cases and the advantages and disadvantages of such an approach). For an interesting discussion of differences between layperson and judicial perceptions of sexual harassment, see Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002).

123. In determining employer liability for nonsupervisory and coworker sexual harassment, courts apply a negligence standard and ask whether the employer knew or should have known of the harassing conduct. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998); Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 333-34 (4th Cir. 2003) (en banc).

124. 524 U.S. 742 (1998); *see also Faragher*, 524 U.S. at 775 (addressing the same issue).

nedy discussed the difference between (1) supervisory harassment accompanied by fulfilled threats of adverse tangible employment actions against the targeted employee, and (2) offensive conduct not resulting in tangible job detriment.[125] Harassment of the first type "fall[s] within the special province of the supervisor" who "has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control" and "brings the official power of the enterprise to bear on subordinates."[126] "For these reasons," Kennedy stated, "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."[127]

With regard to the second type of harassment—offensive conduct not culminating in a tangible employment action[128]—the Court engaged in what dissenting Justice Thomas called "willful policymaking, pure and simple."[129] Concluding that Congress has directed the Court to interpret Title VII with reference to and reliance on the common law of agency,[130] and examining several principles of agency law set out in the *Restatement (Second) of Agency*, Justice Kennedy determined that "the Restatement's aided in the agency relation rule . . . appears to be the appropriate form of analysis."[131] Hesitant to settle on "a definitive explana-

125. *See Ellerth*, 524 U.S. at 753-54. On employment actions constituting tangible job detriments, see *id*. at 761-62 and *supra* notes 75-77.

126. *Ellerth*, 524 U.S. at 762.

127. *Id*.

128. In *Ellerth*, the plaintiff alleged that she had been subjected to offensive and boorish remarks and conduct by a company vice president who was not the plaintiff's immediate supervisor. *Id*. at 747. On one occasion, while in a hotel lounge during a business trip, the vice president made remarks about the plaintiff's breasts, told her to "loosen up," and stated, "you know, Kim, I could make your life very hard or very easy at Burlington." *Id*. at 748. When the plaintiff was being considered for a promotion, the vice president told her, during a promotion interview, that she was not "loose enough" and rubbed her knee. *Id*. In calling the plaintiff to inform her that she had received the promotion, he told her, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id*. at 748. After the vice president made additional comments of a sexual nature (and her immediate supervisor spoke to her about returning customer telephone calls promptly), the plaintiff resigned. *Id*. She subsequently filed suit against the employer, alleging unlawful sexual harassment and constructive discharge. *Id*. at 749. As any threats by the vice president to retaliate against the plaintiff had not been carried out, the Court addressed the standard of employer liability applicable to what the plaintiff's federal court complaint characterized as a hostile work environment. *Id.*

129. *Id*. at 772 (Thomas, J., dissenting).

130. *See* 42 U.S.C. § 2000e(b) (2000) (indicating that employers covered by the statute include their agents).

131. *Ellerth*, 524 U.S. at 760. Kennedy considered and rejected the Restatement's principle that a master is liable for the torts of servants committed when the servants are acting within the scope of their employment. *See id*. at 756 (discussing Restatement (Second) of Agency § 219(1) (1957)). That principle did not apply, in his view, because sexual harassment is not "actuated by a purpose to serve the employer," and "[t]he general rule is that sexual harassment by a supervisor is

tion of our understanding of the standard," the Justice noted that the Court was bound by *Meritor*'s conclusion that agency principles limit an employer's vicarious liability in supervisory harassment cases, and further noted that Congress had amended Title VII subsequent to the Court's 1986 decision, but had not changed *Meritor*'s rule.[132] Kennedy then opined that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms,"[133] that "encourag[ing] employees to report harassing conduct before it becomes severe or pervasive" would serve the statute's "deterrent purpose"[134] (thereby employing a purposivist interpretive analysis),[135] and that "Title VII borrows from tort law the avoidable consequences doctrine . . . ."[136]

Accommodating agency law principles, statutory purpose and policies, and undertaking a quasi-legislative balancing of employer prevention and employee harm avoidance,[137] Justice Kennedy announced the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When

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not within the scope of employment." *Id*. at 756, 757. In addition, Kennedy set to one side the principles that the master intended the conduct, that the conduct violated the master's non-delegable duty, that the master was negligent or reckless, and that the employee used apparent authority when committing an intentional tort. *See id*. at 758-59 (discussing Restatement §§ 219(2)(a)-(d)).

132. *Id*. at 763-64. *See supra* notes 69-70 and accompanying text. See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 582 (2004) for a discussion of the significance of Congressional silence and the use of that silence as a signal of Congressional approval of judicial interpretation of a statutory provision. *See also* Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 10 (1988) ("Silence is an imperfect signal of congressional approval. Nevertheless, silence clearly communicates some information about congressional approval.").

133. *Ellerth*, 524 U.S. at 764.

134. *Id*.

135. Statutory purpose, as understood by a court, is the focus of purposivism. *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 207 (1999); Turner, *supra* note 11, at 390. For examples of the Supreme Court's identification/selection of and reliance on statutory purpose, see generally *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (indicating that the statutory purpose can be determined through the legislative history and the historical context that necessitated the enactment of the statute); *see also* United States v. Am. Trucking Ass'n, 310 U.S. 534 (1940) (instructing that legislative history is necessary where the plain meaning of the language is ambiguous); Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

136. *Ellerth*, 524 U.S. at 764 (citations omitted).

137. *See* John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1441 (2002).

> no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[138]

However, as the Court makes clear, this affirmative defense to supervisory hostile-environment harassment claims is not available where a supervisor's harassment results in employee terminations, demotions, or other tangible employment actions.[139]

Did the Court make law? Justice Thomas (joined by Justice Scalia) certainly thought so, noting that the Court "manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define."[140] Expressing his preference for a negligence standard of employer liability for supervisory harassment,[141] Thomas complained that the Court, issuing "Delphic pronouncements," "imposes a rule of vicarious employer liability, subject to a vague affirmative defense . . . . This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based."[142] Such law-creation was all the more problematic, in his view, given the Court's recognition of an affirmative defense "based solely on its divination of Title VII's *gestalt*" and the lack of guidance as to how employers could avoid vicarious liability.[143]

138. *Ellerth*, 524 U.S. at 765 (citation omitted). The exact same holding was adopted and announced in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

139. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

140. *Ellerth*, 524 U.S. at 766 (Thomas, J., dissenting).

141. Thomas argued that in cases of supervisory hostile-environment harassment, the supervisor does not act for the employer and is engaging in conduct antithetical to the employer's interest. In those situations he would only impose liability on the negligent employer who knew, or in the exercise of reasonable care should have known, of the hostile environment and took no remedial action. *See id*. at 769-70.

142. *Id*. at 771, 773.

143. *Id*. at 773 (citation omitted).

Constructive Discharge

In its most recent sexual harassment ruling, *Pennsylvania State Police v. Suders*,[144] the Court, by a vote of 8-1, held that a plaintiff who claimed that she was forced to quit her job because of hostile-environment sexual harassment[145] must show that: (1) the alleged harassment met the Court's "severe or pervasive" standard, and (2) "the abusive working environment became so intolerable that her resignation qualified as a fitting response."[146] Following *Ellerth*, the Court held that where both of the aforementioned showings are made, an employer may assert, as an affirmative defense, that it had promulgated and implemented an accessible and effective anti-harassment policy and complaint procedure, and that the plaintiff unreasonably failed to utilize that preventive or remedial procedure.[147] No such affirmative defense is available to the employer, however, where the plaintiff's resignation is a "reasonable response to an employer sanctioned adverse action officially changing her employment status or situation," such as a demotion, extreme pay reduction, or a transfer to a job with "unbearable working conditions."[148]

Justice Ginsburg's opinion for the Court focused on the question whether Title VII recognized a claim of constructive discharge.[149] Beginning in the 1930's, the National Labor Relations Board ("Board") found that constructive discharges violated the National Labor Relations Act,[150] and federal courts of appeals affirmed Board decisions holding employers liable for such employer-caused resignations.[151] "By 1964, the year Title VII was enacted, the doctrine was solidly established in

144. 124 S. Ct. 2342 (2004).

145. The plaintiff, Nancy Suders, worked as a police communications operator for the Pennsylvania State Police. She contended that her supervisors engaged in a number of acts of sexual harassment, including references to sex with animals, remarks that young girls should be trained to perform oral sex on men, making obscene gestures and vulgar comments in the plaintiff's presence, and one supervisor asking her "I have a nice ass, don't I?" *Id*. at 2347-48. Later arrested by the same supervisors for allegedly stealing computer-skills tests she had previously taken, she submitted a written resignation and no charges of theft were brought against her. *See id.* at 2344. The plaintiff subsequently sued the employer and sought Title VII relief for sexual harassment and constructive discharge. *See id*. at 2349.

146. *Id*. at 2347.

147. *Id*.

148. *Id*.

149. *Id*. at 2346-47.

150. *See* 29 U.S.C. §§ 151-69 (2000).

151. *See Suders,* 124 S. Ct. at 2351.

the federal courts,"[152] Ginsburg wrote, pointing out that Title VII constructive discharge claims have been recognized by the courts of appeals as well as by the EEOC.[153] Noting the appeals courts' and EEOC's views, the Court's own labor-law precedent,[154] and statements made in *Meritor* and *Ellerth*,[155] Ginsburg determined "that Title VII encompasses employer liability for a constructive discharge."[156]

Reasoning that a hostile environment related constructive discharge can result from and be caused by an "aggravated," "worse case," "breaking point," or "last straw" sexual harassment scenario,[157] Justice Ginsburg instructed that a plaintiff has the burden of proving two prongs of a compound claim. First, the plaintiff must establish that he or she has been subjected to unwelcome and offensive conduct sufficiently severe or pervasive to alter his or her employment conditions and create an abusive work environment.[158] Second, the plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign."[159] While a constructive discharge is the same as a firing,[160] the analysis is not yet complete, as another question must be asked and considered: whether an official act of the employer underlies the termination.[161] If that question is answered in the negative, the employer who "ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force" can assert the *Ellerth* affirmative defense to a hostile-environment harass-

152. *Id*. (citation omitted).

153. *See id*. at 2351-52.

154. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984) (Federal labor law may be violated where an employer seeking to discourage employees' union activities "creates working conditions so intolerable that the employee has no option but to resign — a so-called 'constructive discharge.'").

155. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) ("Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment . . . ."); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (explaining that by enacting Title VII, Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment").

156. *Suders,* 124 S. Ct. at 2352.

157. *Id*. at 2354, 2355.

158. *See id*. at 2354; *Meritor*, 477 U.S. at 67.

159. *Suders*, 124 S. Ct. at 2354 (citations omitted). Dissenting, Justice Thomas argued that this definition of constructive discharge "does not in the least resemble actual discharge," and that under the Court's approach "it is possible to allege a constructive discharge absent any adverse employment action." *Id*. at 2358 (Thomas, J., dissenting).

160. "A constructive discharge is functionally the same as an actual termination in damages-enhancing respects." *Id*. at 2355. Therefore, a plaintiff may seek and recover backpay, front pay (in certain circumstances), and compensatory and punitive damages. *Id*. at 2354 n.8.

161. *See id*. at 2355.

ment claim, and will be given the opportunity "to establish . . . that it should not be held vicariously liable."[162]

Court-Made Sex Harassment Law and Policy

The Court's decisions discussed in the preceding sections build upon *Meritor's* recognition of the Title VII sexual harassment cause of action. Having established that the outlawed discrimination "because of sex" includes discrimination "because of and resulting from sexual harassment," the Court (and not Congress) has continued to create extra-textual rules, standards, and principles governing the litigation and judicial resolution of harassment claims. Thus, environmental harassment claims are to be evaluated under and must satisfy objective and subjective analytical prongs and a totality-of-circumstances review.[163] Given the statutory text and notwithstanding the absence of congressional directive and concern circa 1964, same-sex sexual harassment is actionable under Title VII;[164] employers have an affirmative defense for supervisory hostile environment harassment pursuant to a non-statutory scheme and policy reflecting the Court's views on and accommodation of agency law and Title VII's purpose and policies;[165] that same affirmative defense is available to employers for hostile work environments culminating in the constructive discharge of employees.[166] As can be seen, the Court, rather than Congress, has made sexual harassment law and policy.

162. *Id*. While the Court's decision resolved the issue of employer liability for constructive discharges caused by supervisory hostile-environment sexual harassment, Justice Ginsburg noted that resignation-inducing harassment "may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." *Id*. She wrote that:

> Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

Id. (citation omitted).

163. *See generally supra* notes 100-107 and accompanying text (discussing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).

164. *See generally supra* notes 108-123 and accompanying text (discussing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

165. *See generally supra* notes 124-147 and accompanying text (discussing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)).

166. *See generally supra* notes 144-162 and accompanying text (discussing Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004)).

CONCLUSION

The Supreme Court's workplace sexual harassment jurisprudence is an important exemplar of judicial journeys into areas not contemplated or intended by enacting legislatures. As it has done in other areas of Title VII law,[167] the Court has been institutionally creative and has not hesitated to effectively amend Title VII. The Court has made law. Whether the lawmaking and policymaking aspects of the Court's harassment jurisprudence violates the separations-of-power principle is a question warranting the time and attention of those who believe that courts do not and should not make law.[168] Do adherents to that view believe that the Court's sexual harassment jurisprudence is an illegitimate and unprincipled judicial encroachment into the legislative domain? If not, what is there about sexual harassment law and policy justifying a departure from or exception to the make-no-law axiom? The Court's harassment decisions provide an important and useful field on which the battle over the appropriate role and function of the courts can be waged.

167. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (creating the Title VII disparate-impact theory of discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing a proof and allocation of burden scheme for Title VII pretext cases).

168. While I agree that courts do make law, and am not troubled by the Court's record of lawmaking in deciding Title VII sexual harassment cases, I can envision other scenarios in which judicial lawmaking would be questionable and improper. I therefore make no broader claim beyond the subject matter discussed in this article and do not propose or stake out an overarching position applicable to other interpretive issues and problems.