

Articles

Bartender Rescue: Sex Discrimination, Nepotism, and the Legacy of *Goesaert v. Cleary*

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ABSTRACT

In 1948, the United States Supreme Court in *Goesaert v. Cleary* upheld the constitutionality of a Michigan statute which prohibited women from serving as bartenders. It was one of a series of decisions which employed highly deferential rational basis scrutiny to uphold laws that discriminated based on sex. Those decisions came to constitute an “anti-canon” of highly criticized cases, and they were eventually overruled in a series of decisions by the Burger Court, which adopted a more intensive judicial scrutiny for gender discrimination. The change was famously the result of concerted legal mobilization led by then-Professor Ruth Bader Ginsburg and other lawyers and activists.

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There is extensive literature addressing and analyzing the legal and social trajectory of *Goesaert*. This Article contributes to this literature by focusing on two underappreciated aspects of *Goesaert* and its legacy. One factor is nepotism: the Michigan statute, and similar laws in other states, permitted spouses or daughters of male bar owners to serve as bartenders. This arguably made *Goesaert* at least a closer case, since the exception diluted the charge of sex discrimination. Nepotism in employment allowed some women to work in jobs otherwise reserved for men, and the practice has long had a fraught relationship with the promotion of gender equity in employment.

The other factor is the practical effect of *Goesaert*. By the mid-1970s, the Supreme Court was expressly repudiating the doctrinal analysis of that decision. But well before that, other legal and societal developments had undermined the holding of *Goesaert* and allowed women to serve as bartenders. This development came about prior to the rise of *Goesaert* to anti-canonical status through, among other things, the passage of Title VII of the 1964 Civil Rights Act, and state court cases relying on state antidiscrimination laws.

Thus, the legacy of *Goesaert* is a richer and more complicated one, and sheds light on a decision that demands greater attention than a rote citation to a now discarded precedent.

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I. INTRODUCTION—WOMEN BEHIND THE BAR

In 1948, the United States Supreme Court in *Goesaert v. Cleary* upheld a Michigan statute which prohibited women from serving as bartenders, rejecting a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.¹ The result was that Valentine and Margaret Goesaert, and over 20 other bar owners or barmaids, who sued as plaintiffs, were unable to work as bartenders in Michigan.² *Goesaert* was among a series of decisions that employed highly deferential rational basis scrutiny to uphold laws that discriminated based on sex. Those decisions came to constitute an “anticanon” of highly criticized cases, and they were eventually overruled by the Burger Court, which adopted a more intensive judicial scrutiny for gender discrimination.³ The change was famously the result of concerted legal mobilization led by then-Professor Ruth Bader Ginsburg and other lawyers and activists. Also significant were the persistent advocacy by women bartenders who refused to let the issue fade into obscurity and who demanded recognition of their rights.

There is extensive literature addressing and analyzing the social and legal trajectory of *Goesaert v. Cleary*. This Article contributes to this literature by focusing on two underappreciated dimensions of *Goesaert* and its legacy. First, the practical effect: although by the mid-1970s the Supreme Court was expressly repudiated *Goesaert*’s doctrinal framework, its holding had already been eroded by earlier developments, including the passage of Title VII of the 1964 Civil Rights Act and state anti-discrimination laws.⁴ Well before that, however other legal and societal developments had undermined the holding of *Goesaert* and allowed women to serve as bartenders. These shifts came about before the descent, as some see it, of *Goesaert* to anti-canonical status. Today, women constitute 60.5% of all bartenders.⁵ Still, this Article is left wondering if the women bartenders of the 1940s would be satisfied with the state of women’s bartending today.

1. See 335 U.S. 464, 466–67 (1948).

2. See Amy Holtman French, *Mixing It Up: Michigan Barmaids Fight for Civil Rights*, 40 MICH. HIST. REV. 27, 36 (2014), <https://perma.cc/C45W-7CWJ>. We intentionally use gendered terms like “barmaids” since it would be anachronistic not to do so.

3. E.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) [hereinafter Greene, *The Anticanon*].

4. See *infra* Section II.D.

5. See Vukasin Petrovic, *Bartender Demographics and Statistics in the US—2025*, OYSTERLINK, <https://perma.cc/Q4QM-UB4R> (last visited May 8, 2025).

Second, the role of nepotism: the Michigan statute and similar laws in different states permitted wives or daughters of male bar owners to serve as bartenders, arguably diluting the sex discrimination claim and making *Goesaert* at least a more nuanced case to analyze. While nepotism in employment granted women limited access to otherwise restricted jobs, the practice has long had a fraught relationship with the promotion of gender equity. Simply put, does nepotism function as a gateway or a gatekeeper in the broader struggle for gender equity in employment?

Thus, *Goesaert's* legacy is more nuanced and consequential than contemporary scholarship often acknowledges. Far from being a merely discarded precedent, the decision warrants deeper engagement for its illumination of broader societal debates particularly regarding the role of women in the workplace, gender norms on postwar United States, and the cultural significance of female labor in spaces like bars and beyond. *Goesaert* demands and inspires conversations about the role of women behind bars, women's roles in society, and the job market in general.

This Article proceeds as follows: Part II addresses the *Goesaert* litigation and the eventual overruling of that case both doctrinally and socially outside courtrooms. Part III revisits the exception for spouses and children of male bar owners, and how that could or should have affected the *Goesaert* decision and its aftermath. Part IV considers whether *Goesaert* deserves its frequent placement in the "anti-canon" of wrongly decided Supreme Court decisions. Lastly, Part V concludes this Article by examining the status of women bartenders today.

II. THE SOCIETAL AND DOCTRINAL BACKGROUND TO AND THE IMPACT OF *GOESAERT V. CLEARY*

A. *Goesaert Was Decided at a Time When Society Was Unsure About Liquor, and Even More Unsure About Women Serving It*

Before addressing *Goesaert* and its aftermath, this section reviews the decision through the lens of history, case law, legislation, and public opinion. Central to that review is the sale of liquor in bars. As liquor consumption and serving laws developed, one question continued: Where do women fit in? From a *New York Times* article in 1936, the president of the International Barmen's Association made his view clear: "Liquor alone can cause enough trouble, why add women When you put a pretty miss behind the bar, you invite trouble."⁶ History reveals he wasn't alone in this thinking.

6. Elizabeth Natter, *Goesaert v. Cleary: A History* 4 (May 11, 1984), <https://perma.cc/9Q56-NMTH> (unpublished manuscript) (on file with authors) (alteration in original).

Today, in a world where alcohol consumption is woven into everyday life, it's easy to forget that just over 100 years ago Prohibition was in full swing. Before Prohibition, courts around the United States debated whether women should even be allowed inside the bar, much less serving drinks. For example, in 1905, Flint, Michigan, enacted an ordinance that banned women from going to liquor-selling businesses.⁷ The ordinance was challenged in 1908, but the Michigan Supreme Court in *People v. Case* upheld the statute, reasoning that discrimination against women concerning purchasing and drinking liquor in public was warranted to “prevent injury to public morality.”⁸ Ultimately, the ratification of the 18th Amendment banned the consumption of alcohol for everyone, at least for a little while.⁹

Prohibition began in 1920 when the 18th Amendment banned the manufacture, transportation, and sale of intoxicating liquors.¹⁰ After its ratification, not only did people want to drink, but they also wanted the jobs and revenues that the legalization of the liquor industry would create. Thus, Democrat presidential candidate Franklin D. Roosevelt's platform called for Prohibition's repeal, which likely supported his prominent win over incumbent President Herbert Hoover.¹¹ Echoing the Supreme Court, state legislatures subsequently passed laws which purportedly “protected” women by limiting or regulating their employment opportunities and in other ways.¹² The Amendment was ratified in December of 1933.¹³

B. *The Road to Goesaert: Changing Views on Women's Protective Legislation*

In *Goesaert*, decided by the Supreme Court 15 years after Prohibition had ended, plaintiffs had relied on the Equal Protection Clause of the 14th Amendment, which promised all persons “equal protection of the laws.”¹⁴ By the time *Goesaert* was decided, the Supreme Court and lower courts had decided many cases challenging sex discrimination under the Equal Protection Clause, and the challenge lost

7. See French, *supra* note 2, at 31.

8. 116 N.W. 558, 560 (Mich. 1908).

9. See French, *supra* note 2, at 31.

10. See U.S. CONST. amend. XVIII.

11. See Mark Lawrence Schrad, *Constitutional Blemishes: American Alcohol Prohibition and Repeal as Policy Punctuation*, 35 POL'Y STUD. J. 437, 452–54 (2007), <https://perma.cc/9HBE-XT9T> (discussing the Democratic Party's support for the repeal of Prohibition during the 1932 Presidential campaign).

12. NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s–1990s*, at 103–40 (2015) (discussing legislative and judicial response in the post-*Muller* era); see also *Muller v. Oregon*, 208 U.S. 412 (1908).

13. See WOLOCH, *supra* note 12.

14. U.S. CONST. amend. XIV; see *Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948).

in almost all instances. Prominent examples include multiple cases in the late nineteenth century, where the Supreme Court held that the 14th Amendment was not violated by denying a woman the right to practice law,¹⁵ or by denying a woman the right to vote.¹⁶

Many of the challenges were to so-called women's protective legislation, which forbade or limited women's participation in the workforce.¹⁷ The leading instance at the outset of the twentieth century was *Muller v. Oregon*.¹⁸ There, the Supreme Court in 1908 upheld an Oregon law limiting the workday for female wage earners to ten hours. The *Muller* Court reasoned that women were inherently different and inferior workers and thus in need of protection.¹⁹

Muller allowed states to enact extensive protective labor legislation without violating the Due Process Clause. Echoing the Supreme Court, state legislatures similarly felt they needed to "protect" women and "prevent injury to public morality."²⁰ Thus, legislation was often based on a "protection" argument, which the Court explicitly upheld in *Muller*.²¹ Ultimately, the legislatures and courts worked together to impose what they viewed as protection, but what many later would view as oppression.

Protective labor laws effectively discriminated against women in a variety of settings, including the liquor industry. Further, the local bar unions continued advocating for legislation to keep women from behind the bar.²² The bar unions' main concerns were job and economic security, but they gained widespread support based on morals arguments and individual's desires not to mix women and alcohol.²³ In 1936, the Bartender's Union Journal revealed that the union was taking private action and supporting legislative proposals, such as a bill introduced in the Ohio legislature which proposed to prohibit women from being bartenders. Although the bill never passed, it was not unanimously rejected. In 1939, the Ohio House passed a bill to ban women from bars entirely but the bill was voted down by the Senate.²⁴

15. See *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873).

16. See *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

17. See generally WOLOCH, *supra* note 12.

18. See generally 208 U.S. 412 (1908).

19. See *id.* at 422 (referring to legislation to "protect" women).

20. French, *supra* note 2, at 28; Natter, *supra* note 6, at 3-4.

21. For a discussion of the *Muller* litigation and its impact, see WOLOCH, *supra* note 12, at 54-79.

22. See Natter, *supra* note 6, at 6-8.

23. See *id.* at 2.

24. See *id.* at 6-8.

The reasons for keeping women from serving behind the bar varied.²⁵ The judiciary generally upheld statutes prohibiting women from working as bartenders to protect women from moral and social concerns.²⁶ Those advocating for such legislation were often members of local bartenders and even waitressing unions. Barmen feared that women's emergence in the field would discredit the profession and the pay.²⁷ During this time, bartender's salaries were considerably higher than the woman's usual position in a restaurant, waitress.²⁸ And for many of the women that held these jobs as waitresses, they too sought a separate "female sphere" in the work world and focused their efforts on feminizing waitressing.²⁹

During this time, several revealing articles were published by the *New York Times*, illustrating the stereotypes of approved female employment that appear to have driven concerns surrounding women behind the bar. In a 1936 article, critics argued that liquor was already problematic enough; thus, the "age-old tendency" of women to flirt, only invited trouble.³⁰ A 1945 article argued that women were not as good of conversationalists and that this and their flirting ultimately affected service.³¹ According to a 1946 article, others were still upset that women were even allowed as patrons in the bar, stating that women had "invaded man's last refuge, the bar, to be tolerated and accepted as patrons" but not as bartenders.³²

However, women began to work as bartenders due to the labor shortages of World War II. From 1940 to 1944, the *New York Times* mentioned no anti-barmaid activity.³³ Nevertheless, when men returned from war, they wanted their jobs back.³⁴ In Michigan, the Bartenders' Union was an active organization dedicated to supporting the bartending profession.³⁵ After the war ended, a major concern for the Bartender's Union was getting women out of the field, so the Union could regain

25. See, e.g., JILL ELAINE HASDAY, WE THE MEN: HOW FORGETTING WOMEN'S STRUGGLES FOR EQUALITY PERPETUATES INEQUALITY 83 (2025) (excluding female bartenders was said to promote public morality and protect mens' jobs); French, *supra* note 2, at 34–35 (exclusion said to promote mens' wages and professionalize the bartender occupation).

26. See HASDAY, *supra* note 25, at 83.

27. See Natter, *supra* note 6, at 8.

28. See *id.* at 10.

29. French, *supra* note 2, at 39; see *id.* at 38–40.

30. Natter, *supra* note 6, at 4 (quoting *Bartenders Urge Ban on Barmaids*, N.Y. TIMES, Oct. 13, 1936, at A29).

31. See *id.* at 11.

32. See French, *supra* note 2, at 35.

33. See Natter, *supra* note 6, at 10.

34. See WOLOCH, *supra* note 12, at 175; see also French, *supra* note 2, at 33.

35. See French, *supra* note 2, at 28.

economic superiority and professionalize the occupation.³⁶ In 1945, after extensive lobbying by the Bartenders' Union, Michigan legislators amended the Bartending Act, effectively prohibiting women from bartending unless their husbands or fathers owned the establishment.³⁷

The Bartending Act was initially challenged by a group of Detroit women bartenders in the case of *Fitzpatrick v. Liquor Control Commission*.³⁸ There, the Michigan Supreme Court, which ultimately upheld the law, stated that keeping women from acting as bartenders “would be conducive of good morals—either those of women themselves or the morals of the customers in such places.”³⁹ The statute would soon be rechallenged by the plaintiffs in *Goesaert*; this time, this issue would make its way up to the Supreme Court.

C. *Goesaert in the Federal Courts*

In *Goesaert*, separate actions were filed in federal court by Valentine Goesaert and Gertrude Nadoski, seeking an injunction against the enforcement of the law.⁴⁰ At the time, when injunctive relief was sought against a state-wide statute, a three-judge district court was convened to decide the case, with a direct appeal to the Supreme Court available.⁴¹

The statute was first upheld by a divided three-judge district court.⁴² Employing lenient rational basis scrutiny, the majority had little problem reaching that result. It held that the near total prohibition of female bartenders was not an “unreasonable and arbitrary classification.”⁴³ The

36. *See id.* at 34.

37. *See id.* at 28.

38. *See* 25 N.W.2d 118, 127 (Mich. 1946); Natter, *supra* note 6, at 26.

39. *Fitzpatrick*, 25 N.W.2d at 127.

40. *See* *Goesaert v. Cleary*, 74 F. Supp. 735, 736 (E.D. Mich. 1947).

41. Congress instituted this process in 1908, in reaction to a then controversial Supreme Court decision, *Ex parte Young*, 209 U.S. 123 (1908), which permitted suit in federal court to challenge the constitutionality of Progressive Era state legislation, despite assertions of sovereign immunity. The three judges (rather than one) and the direct appeal to the Supreme Court was based on the perceived importance of such cases, and a desire to see that the Supreme Court could promptly any appeal. Congress largely repealed the applicable jurisdictional statutes in 1976, leaving them intact to hear only redistricting cases and other specialized litigation. For a history of the three-judge court statute from 1908 to 1976, see Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 118–44 (2008).

42. *See* *Goesaert*, 74 F. Supp. at 739–40.

43. *Id.* at 737 (quoting *Radice v. New York*, 264 U.S. 292, 296 (1924)). Both the three-judge district court, 74 F. Supp. at 738–39, and the Supreme Court, 335 U.S. 464, 466 (1948), briefly discussed whether the Twenty-First Amendment had any effect on the outcome of the suit, and concluded that it did not. This was the correct resolution, since while the Amendment implicated state regulation of alcohol for Commerce Clause purposes, it does not impact whether such regulation may violate equal protection or due process guarantees. *See* John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination in*

state legislature, it continued, may have been “of the opinion that a grave social problem existed because of the presence of female bartenders in places where liquor was served in the larger cities of Michigan.”⁴⁴ An asserted discrimination between female bartenders (largely prohibited) and waitresses who handled liquor (allowed) was rejected, since the legislature “may have reasoned that a graver responsibility attaches to the bartender who has control of the liquor supply than to the waitress who merely receives prepared orders from the bartender for service at a table.”⁴⁵

U.S. District Judge Frank A. Picard dissented. While acknowledging that the legislature had considerable discretion in enacting laws, and that some level of rational basis scrutiny was in order, he nonetheless argued that the law was an example of “unjust discrimination against persons similarly situated in the same business.”⁴⁶ He argued that there was little evidence demonstrating that social disorder had been or would be the result of women serving as bartenders.⁴⁷ Focusing on the “proviso,” as he labeled it,⁴⁸ for wives or daughters of male bar owners did not save the statute. He argued it was arbitrary and illogical to assume that public safety would be advanced by women bartenders answering to a father, as opposed to those answering to a mother who owned the bar.⁴⁹ Other states with statutes excluding women as bartenders, he further observed, did not have such an exception.⁵⁰ Indeed, most of his dissent focused on the incongruity, as he saw it, of the exception, which suggests that even he might have upheld the statute if there were no exception. Still, the seeds of a serious Equal Protection Clause analysis are found in Picard’s dissent.

Plaintiffs then filed a direct appeal in the Supreme Court.⁵¹ The Court upheld the law in a 6-3 decision. The relatively short majority

Law: A Study in Judicial Perspective, 46 N.Y.U. L. REV. 676, 682 n.14 (1971), <https://perma.cc/7ZX8-P6UQ>. We do not further discuss the Twenty-First Amendment issue in the balance of this Article.

44. *Goesaert*, 74 F. Supp. at 738–39.

45. *Id.* at 739. The majority added the legislature “may have determined that the presence of female waitresses does not constitute a serious social problem where a male bartender is in charge of the premises.” *Id.*

46. *Id.* at 741 (Picard, J., dissenting).

47. *See id.* at 742.

48. *Id.* at 741.

49. *See id.* at 743.

50. *See id.* Picard cited laws from Denver, New Jersey, California and Florida, which had been the subject of legal challenges. The Denver and Florida laws did not have an exception, while the others did. *See id.* at 743–44.

51. The three-judge court statute provided for a direct appeal, an exception to the discretionary certiorari process which, then and now, governs most cases where losing parties in the lower federal and state courts seek review by the Supreme Court. These direct appeals are also referred to as mandatory, since per the statute and the Court’s

opinion by Justice Felix Frankfurter seemed to have even fewer problems than the court below in rejecting the challenge. “Beguiling as the subject is,” he awkwardly (to our twenty-first century sensibilities) stated, the challenge “need not detain us long.”⁵² The Court held that under rational basis scrutiny, the statute appeared to be “allowable legislative judgment” because women behind the bar could give rise to “moral and social problems.”⁵³ He also stated that “Michigan could, beyond question, forbid all women from working behind a bar,” and they could do so “despite the vast changes in the social and legal position of women.”⁵⁴ He conceded that “Michigan cannot play favorites among women without rhyme or reason,” but the nepotism exception posed no such problem: “Michigan evidently believe[d]” that “ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight.”⁵⁵ It was improper, he continued, to accept the argument that “the real impulse behind this legislation was an unchivalrous desire of make bartenders to try to monopolize the calling.”⁵⁶

traditions, the Court was under an obligation to decide the case on the merits. But the Court has different options to fulfill that obligation. One is to note probable jurisdiction, order briefing and oral argument, and then issue an explanatory decision on the merits, similar to when a writ of certiorari is granted. The other option is to summarily dispose of the case in the papers associated with the initial appeal, either by a summarily affirming the decision below, or dismissing it for a lack of jurisdiction or another reason. Especially given that the Court ultimately affirmed the three-judge court decision in an opinion, it is unclear why the Court did not simply summarily affirm and reach the same result. Historically, most dispositions by the Court of such appeals were summary affirmances or other dismissals not on the merits. See Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976*, 72 CASE W. RES. L. REV. 909, 951 (2022) (stating that between 1954 and 1976, only 23% of such appeals were resolved by an explanatory decision). Here, the Court noted probable jurisdiction, see 68 S. Ct. 1340 (1948), with no further explanation, which was the common practice when it set such a mandatory appeal for briefing and oral argument. In the extant literature on *Goesaert*, we are unaware of any discussion of this point. Our speculation for the Court giving full review is based on (1) the decision below being 2-1, and historically the presence of a dissent in a three-judge district court decision was a signal of the importance of the case and was likely to trigger a fuller review, see *id.* at 945; (2) as the dissent emphasized, Michigan was not alone in passing such laws; and (3) *Goesaert* was the “first major effort by women to invoke the equal protection guarantee before the Supreme Court,” see Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 455 (1978), and perhaps some members of the Court felt the argument at least deserved plenary review.

52. *Goesaert*, 335 U.S. at 465. Compare *id.*, with HASDAY, *supra* note 25, at 84 (opining that Frankfurter “strained for erudite jocularity”).

53. *Goesaert*, 335 U.S. at 466.

54. *Id.* at 465–66.

55. *Id.* at 466.

56. *Id.* at 467. A year earlier the Court had decided *Kotch v. Board of River Port Pilot Comm’rs*, 330 U.S. 552 (1947), which rejected an Equal Protection challenge to the nepotistic system in Louisiana which limited the appointment of river pilots to the relatives and friends of the current pilots. Justice Hugo Black wrote for the 5-4 majority

The relatively brief dissent by Justice Wiley Rutledge, joined by Justices William O. Douglas and Frank Murphy, also seemed content with applying rational basis review, and essentially said nothing about the statute barring female bartenders as such.⁵⁷ Rather, it focused exclusively on the exception for spouses and daughters of male owners, which it asserted “arbitrarily discriminates between male and female” bar owners.⁵⁸ That distinction undermines “the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids.”⁵⁹ These arguments were similar to those advanced by the dissent below, though Justice Rutledge didn’t cite Judge Picard’s opinion.

D. Doctrinal and Statutory Developments Post-Goesaert

In response to *Goesaert*, many states passed similar legislation, banning women from working as bartenders. Prior to *Goesaert*, there were 17 states that prohibited women from bartending.⁶⁰ After *Goesaert*, that number grew to 26 by 1960.⁶¹

In *Goesaert*, the Court had hypothesized a state interest in protecting the morals of women as the “rational” basis for sex classification. Thus, many state courts, hearing challenges under state law, upheld statutes that supposedly aimed to do just that: protect

while Justice Rutledge wrote the dissent. Despite its arguable relevance, the majority made only passing reference to *Kotch*, see *Goesaert*, 335 U.S. at 467, while the dissent cited, but didn’t discuss, the dissenting opinion in *Kotch*. See 330 U.S. at 468 n.3 (Rutledge, J., dissenting). That said, perhaps the majority of the Court having upheld a nepotism system a year earlier placed in a better jurisprudential light the Michigan statute which similarly, to some observers, carved out an exception for wives and daughters to serve as bartenders.

57. In 2017, Justice Ruth Bader Ginsburg, during a reenactment of the oral argument in the Supreme Court of *Goesaert*, commented that “no justice contested the legitimacy of a total ban on women bartenders.” Andrew Hamm, *Women Behind the Bar (And Bench): Ginsburg Presides over Re-Enactment of Goesaert v. Cleary*, SCOTUSBLOG (May 3, 2017) (quoting Ginsburg from oral argument), <https://perma.cc/4MYZ-KJ62>. Instead, as one writer paraphrased, “the [three] dissenters would have struck down the law because it made an irrational exception for certain women. A total ban, they believed, would have been more rational.” *Id.*; see also WOLOCH, *supra* note 12, at 177 (noting narrowness of the *Goesaert* dissent).

58. *Goesaert*, 335 U.S. at 468.

59. *Id.*

60. See Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 92, 94 (2007) (citing Dorothy Sue Cobble, “Drawing the Line”: *The Construction of a Gendered Work Force in the Food Service Industry*, in WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR 216 (Ava Baron ed., 1991)).

61. See *id.*; see also HASDAY, *supra* note 25, at 84 (discussing passage of similar bartender laws in the wake of *Goesaert*).

women. Contemporaneous with *Goesaert*, the Minnesota Supreme Court, in a 4-3 decision, denied women bartender's request to continue their work, stating that there was a factual difference between the ability of men and women to function as bartenders.⁶² Similarly, in the 1950s the highest courts of Illinois,⁶³ New Jersey,⁶⁴ and Idaho⁶⁵ upheld women bartender prohibitions, all citing *Goesaert* and arguing that there were differences between men and women that affect their eligibility to bartend.

Despite the unsuccessful litigation, women bartenders in Michigan and in other states did not back down.⁶⁶ They continued efforts inside and outside the courtroom to counter legislation like that upheld in *Goesaert*. In 1955, their efforts paid off, and the prohibition on women bartenders was repealed in Michigan.⁶⁷ As a result, the number of women behind the bar began to grow. In 1940, women made up only around 3% of all bartenders, but that percentage grew to 11% by 1960.⁶⁸ As the prohibitions began to be repealed and women's presence behind the bar grew, the law began to catch up.⁶⁹

In 1964, another legal avenue for women to challenge these prohibitions emerged, under Title VII of the Civil Rights Act. The Act prohibited discrimination on many grounds, including race and sex.⁷⁰

62. See *Anderson v. City of St. Paul*, 32 N.W.2d 538, 545 (Minn. 1948). The majority cited the three-judge district court decision in *Goesaert*. See *id.* at 542. The three dissenters cited the Picard opinion in the three-judge district court. See *id.* at 552 (Loring, C.J., dissenting).

63. See *Henson v. City of Chicago*, 114 N.E.2d 778, 783 (Ill. 1953).

64. See *Guill v. Mayor of Hoboken*, 122 A.2d 881, 886-67 (N.J. 1956).

65. See *State v. Burke*, 312 P.2d 806, 807 (Idaho 1957).

66. See *Avery & Crain*, *supra* note 60, at 94.

67. See *id.* at 94-95.

68. See *id.* at 93; French, *supra* note 2, at 47.

69. See *Avery & Crain*, *supra* note 60, at 97.

70. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1327-28 (2012) (observing that the Congressional debates over the addition of the "sex" provision to Title VII referenced the Michigan statute in *Goesaert* as the type of law that would be prohibited). While combatting race discrimination was the driving force behind Title VII, there were some synergies between the overlapping campaigns against race and sex discrimination in employment and other matters. See WOLOCH, *supra* note 12, at 179 (pointing out that the dissenting justices in *Goesaert* cited *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), which held that Missouri violated the Equal Protection Clause by excluding blacks from state-run law schools, but acknowledging that "[l]ittle linked the two campaigns in 1948, beyond a footnote in the *Goesaert* dissent"); see also SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 3-8 (2011) (detailing how the feminist legal strategies of the 1960s and 1970s emulated earlier strategies of the civil rights movement); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233-34 (1965), <https://perma.cc/5EGS-QJG3> (drawing parallels between antifeminism and racism).

However, on its own, Title VII had relatively little effect. Congress empowered the Equal Employment Opportunity Commission (EEOC) to enforce the statute but failed to give it the appropriate means and resources to do so.⁷¹ As a result, the EEOC was hesitant to overrule state protective legislation.⁷²

In 1965, the EEOC published its official guidelines on sex discrimination. In the opinion, the EEOC expressed that they did not believe that Congress intended to disturb legitimate protective legislation of the states, so long as they had the intent and effect of protecting women against exploitation.⁷³ Further, the EEOC did clarify that when the clear effect of the law was to discriminate against women, as opposed to protect, it would be invalidated under the Act.⁷⁴ In practice, the EEOC originally had difficulty understanding its role, stating that it could not rewrite state laws and did not believe it had the authority to overrule state protective legislation otherwise.⁷⁵

Despite the relative passivity of the EEOC, challenges in the state courts by women bartenders, before and after the passage of Title VII, began to bear fruit. One of the first cases⁷⁶ that began to shift the tide was *Sail'er Inn, Inc. v. Kirby*.⁷⁷ There, the California Supreme Court in a wide-ranging unanimous opinion invalidated a statute which prohibited women bartenders, unless they were married to or co-owners with their bar-owner husbands.⁷⁸ The Court held that the statute violated a provision of the state constitution which prohibited sex discrimination in employment,⁷⁹ and that Title VII preempted and superseded the state law.⁸⁰ Additionally, the Court discussed at length the arguments for applying strict scrutiny to sex-based classifications, as a matter of equal protection,⁸¹ though it is not entirely clear that the Court found it

71. See James C. Oldham, *Sex Discrimination and State Protective Laws*, 44 DENV. L.J. 344, 348 (1967), <https://perma.cc/668Y-T5NK>.

72. See *id.*

73. See *id.* at 349–50.

74. See *id.*

75. See *id.* at 350. For a contemporaneous account echoing these concerns, see Murray & Eastwood, *supra* note 70, at 248–49.

76. Though not *the* first. In 1970, the New Jersey Supreme Court, departing from its decision in 1956, see *supra* note 64, held that a local ordinance which excluded women from bartending, while not violating equal protection, went beyond the localities' police powers. See Paterson Tavern & Grill Owners Ass'n, Inc. v. Borough of Hawthorne, 270 A.2d 628, 633 (N.J. 1970). The Court noted that *Goesaert* had been subject to criticism and declined to follow it. See *id.* at 630–31; Johnston & Knapp, *supra* note 43, at 685.

77. See generally 485 P.2d 529 (Cal. 1971).

78. See *id.* at 534.

79. See *id.* at 533–34.

80. See *id.* at 536–38.

81. See *id.* at 538–42.

necessary to fully embrace strict scrutiny when it concluded that the statute's classifications were "invidious and wholly arbitrary."⁸²

The *Sail'er Inn* decision also addressed *Goesaert*. It began by opining that the dissent in the Supreme Court had the better argument, and continued with the observation that while it had not been overruled, it had been subject to then-recent academic criticism and had not been followed by several lower court decisions.⁸³ The Court ultimately found it unnecessary to reach a conclusion on the "continuing validity of *Goesaert*" because, it said, the exception in the California statute was narrower (as it allowed women bar owners to serve liquor) than the statutory exception in Michigan.⁸⁴

Sail'er Inn was decided on May 27, 1971. The United States Supreme Court finally began its own doctrinal change in constitutional sex discrimination cases that same year, on November 22, 1971, in the revolutionary unanimous case of *Reed v. Reed*.⁸⁵ There, the Court held that an Idaho statute giving men preference over women in administering estates violated the Equal Protection Clause.⁸⁶ As Ruth Bader Ginsburg put it, not long after *Reed* was decided, the decision "attracted front page attention; it marked the first solid break from the Supreme Court's consistent rejection of women's complaints of unconstitutional gender-based discrimination."⁸⁷ The Court was unclear about the standard of

82. *Id.* at 543. See also MAYERI, *supra* note 70, at 60 (describing how *Sail'er Inn* "was the first time a court accepted the parallel between race and sex as a matter of legal doctrine, accompanied by a sustained focus on the similarities between racial and sex-based legal subjugation").

83. See *Sail'er Inn*, 485 P.2d at 542–43 (citing, among other sources, Oldham, *supra* note 71, at 373–74).

84. *Id.* at 543. Two authors contemporaneously argued that *Sail'er Inn* should "be recognized as a challenge to the Supreme Court," because the California court only "made a ritual attempt to distinguish *Goesaert*, [and] the main thrust of the *Sail'er Inn* opinion is irreconcilable with the sexist assumptions underlying that case." Johnston & Knapp, *supra* note 43, at 690–91 (footnote omitted). A better argument than focusing on the exact contours of the respective nepotism exceptions would have been that *Goesaert* only dealt with the floor of federal constitutional law, and California constitutional law could have gone above that floor regarding the rights of female workers. Granted, 1971 was only at the beginning of the judicial federalism revolution, and it was only later in the decade before state courts began to depart from a lock-step analysis in interpreting the rights provisions of state constitutions in a manner different from how the U.S. Supreme Court interpreted analogous provisions of the federal constitution. See ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 138 (2d ed. 2023) (tracing the beginning of the New Judicial Federalism to the early 1970s).

85. See generally 404 U.S. 71 (1971).

86. See *id.* at 77.

87. Ginsburg, *supra* note 51, at 457. Ginsburg refers to *Muller*, *Goesaert* and *Hoyt v. Florida* as the trilogy of decisions by the Supreme Court which maintained a "tradition" of narrowly interpreting the Due Process and Equal Protection Clauses regarding sex discrimination. *Id.* at 454–57; see *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding state exclusion of women from serving as jurors).

review; it nominally appeared to apply rational basis scrutiny but held that the Idaho statute was not reasonable, and that the legislation was not substantially related to the object of legislation.⁸⁸ *Reed* was surprising in a number of ways. It was decided by the conservative Burger Court, and the opinion was authored by Chief Justice Warren Burger, appointed by President Richard Nixon to replace Earl Warren.

Starting with *Reed*, the Burger Court decided a series of cases which addressed and applied higher levels of judicial scrutiny in gender equity cases.⁸⁹ Five years after *Reed*, the cases,⁹⁰ while not always models of clarity or consistency on the test or its application, culminated in *Craig v. Boren*,⁹¹ where the Court held that intermediate scrutiny⁹²

88. See *Reed*, 404 U.S. at 76.

89. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding unconstitutional state practice making children of father wards of the state due to his not marrying the deceased mother); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding unconstitutional federal law requiring women, but not men, in the military to prove actual spousal dependency to claim a spousal allowance); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (rejecting a constitutional challenge to state law granting property tax exemptions solely to women); *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (rejecting a constitutional challenge to state disability insurance system which excluded coverage for pregnancy-related disabilities); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (holding gender discrimination in jury selection to be unconstitutional, when women were excluded unless they affirmatively opted in); *Schlesinger v. Ballard*, 419 U.S. 498, 508–10 (1975) (rejecting a constitutional challenge to federal law that afforded women in the military more time than men to gain promotion before facing discharge); *Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975) (holding that the Social Security Act provision entitling only widows, not widowers, to certain survivor benefits was unconstitutional); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (holding unconstitutional state law entitling male children to child support through age 21 but to female children only through age 18).

90. The Court's ability to change gender equity doctrine in a relatively short period of time "was substantially aided by the operation of the obligatory jurisdiction." Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1005 (1985). No less than all of the decisions cited in note 89 *supra*, came to the Court not on discretionary writs of certiorari, but by mandatory, direct appeals under jurisdictional statutes as they existed at the time. Thus, in an echo of the procedural posture of *Goesaert*, see *supra* note 51, the *Frontiero*, *Weinberger*, *Geduldig*, and *Schlesinger* decisions were appeals from three-judge district courts, and *Reed*, *Kahn*, *Taylor* and *Stanton* were appeals from state supreme courts. While the Court could in theory have summarily disposed of some or all of these decisions, see *supra* note 51, the obligatory nature of these direct appeals in effect forced the hand of the Court to confront this emerging body of law, see Michael E. Solimine, *Transforming Constitutional Doctrine Through Mandatory Appeals from Three-Judge District Courts: The Warren and Burger Courts and Their Contemporary Lessons*, 86 U. PITT. L. REV. 405, 433–35 (2024).

91. See generally 429 U.S. 190 (1976).

92. See *id.* at 197 (sex-based state action "must serve important governmental objectives and must be substantially related to achievement of those objectives").

was the appropriate judicial standard to gauge the legality of state action discriminated based on sex.⁹³

Reed was also an initial victory in a legal mobilization campaign led by the American Civil Liberties Union (ACLU) and other interest groups to utilize the Supreme Court and other courts to challenge federal and state laws which allowed sex discrimination in employment and other matters.⁹⁴ The ACLU and affiliated groups filed numerous lawsuits and amicus curiae briefs as part of that effort.⁹⁵ A key figure in the campaign, as has been much chronicled, was then-Rutgers (and later Columbia) law professor Ginsburg, who served as counsel for the plaintiffs in *Reed*, and later argued or briefed Supreme Court cases as the Director of the Women's Rights Project of the ACLU.⁹⁶ In particular, Ginsburg filed a widely-considered influential amicus curiae brief for the plaintiffs in *Craig v. Boren*.⁹⁷

This Article emphasizes a particular aspect of that campaign: how to deal with the prior decisions that upheld official sex discrimination, not least of which was *Goesaert*. Ginsburg and other activists were explicit in confronting the doctrinal impact of *Goesaert* and other cases by arguing for an adoption of strict scrutiny for judicial review of sex discrimination.⁹⁸ That goal was not achieved, but *Goesaert* had a slow

93. For a discussion of the early Burger Court's gender equity decisions, see MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 162–91 (2016); Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 132 (Vincent Blasi ed., 1983); Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 304–08 (1991).

94. Other parties not formally involved in the litigation campaign no doubt played their own roles. For example, after the passage of Title VII, and before *Reed*, various law review articles and other sources argued that for employment matters, “the Supreme Court [should] readily revise the formulations of the *Muller* and *Goesaert* decisions, if presented with an appropriate case.” Oldham, *supra* note 71, at 373 (footnotes omitted).

95. See Leslie Friedman Goldstein, *Supreme Court Agenda Setting in Gender Equity Cases, 1970–1994*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONAL INTERPRETATIONS* 178, 178–98 (Howard Gilman & Cornell Clayton eds., 1999). See generally Karen O'Connor & Lee Epstein, *Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134 (1983), <https://perma.cc/W4X5-KEMJ>.

96. See Linda Kerber, *Before Frontiers There Was Reed: Ruth Bader Ginsburg and the Constitutional Transformation of the Twentieth Century* in *THE LEGACY OF RUTH BADER GINSBURG* 30–41 (Scott Dodson ed., 2d ed. 2022). See generally Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251 (2009).

97. See Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on Supreme Court Opinion Content*, 49 LAW & SOC'Y REV. 917, 918 (2015).

98. See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 17–18 (1975). At oral argument in *Reed*, Allen Derr, the Idaho attorney for the plaintiff, answered the first question posed to him by Justice William O. Douglas about *Goesaert* (recall that Douglas dissented in that case) by stating “[t]hat case was decided, Your

doctrinal demise,⁹⁹ culminating in *Craig*, which relegated to a footnote its statement that it now “disapproved” of the mere rational basis test of that decision.¹⁰⁰ In turn, that decision as a matter of the Equal Protection Clause “no longer obtains.”¹⁰¹

III. THE NEPOTISM EXCEPTION

The prohibition on women bartenders challenged in *Goesaert* included an exception for children and wives of male bar owners, allowing a male bar owner to employ his wife or daughter as a bartender.¹⁰² The majority opinion upheld the statute in its entirety, while the dissenters focused on the nepotism exception.¹⁰³ The dissenters argued that the statute violated the Equal Protection Clause because the nepotism exception arbitrarily discriminated between male and female bar owners.¹⁰⁴ Some of the similar statutes in other states had some form of a nepotism exception.¹⁰⁵ Given that the exception was addressed in *Goesaert*, it is perhaps surprising that the subsequent debate over that decision, in the scholarly literature, had relatively little to say about the exception.

When Michigan’s prohibitory statute passed, it was likely necessary to include the nepotism exception to avoid strong opposition to the act by male tavern owners.¹⁰⁶ Although this Article is unaware of any data on how many wives or daughters tended bar in their husbands’ or fathers’ bars, census data from the time indicates that it was very common to have unpaid family members working in drinking establishments. In 1939, there were 235,594 reported drinking establishments in the United

honor, on a premise that we feel is no longer tenable”—namely, its use of a rational basis test. Allen Derr, *Advocate Memoir: Litigating the Landmark Case Reed v. Reed (1971)*, 50 J. SUP. CT. HIST. 154, 164 & n.30 (2025). Similarly, an amicus curiae brief in *Reed* emphasized what it called the unreasonableness of the classification at issue in *Goesaert*, and that the decision had not been followed in *Sail’er Inn* and other cases. See Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Nat’l Fed’n of Bus. & Pro. Woman’s Clubs, Inc., *Reed v. Reed*, 404 U.S. 71 (1971), at 17–18, 23–24 (on file with authors).

99. None of the early Burger Court cases, *see supra* note 89, cited or distinguished *Goesaert*, until *Craig*. Perhaps curiously, the Court earlier in *Kahn v. Shevin* cited *Sail’er Inn*, albeit for the proposition that women earned less than men. *See Kahn v. Shevin*, 416 U.S. 351, 353 n.6 (1974).

100. *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

101. *Id.*

102. For convenience, this provision will be referred to as the “nepotism exception.”

103. *See Goesaert v. Cleary*, 335 U.S. 464, 468 (1948).

104. *See id.*

105. *See Goesaert v. Cleary*, 74 F. Supp. 735, 743 (Picard, J., dissenting) (referring to California statute and City of Hoboken, N.J. law).

106. *See Natter, supra* note 6, at 23–24.

States, and 93,776 unpaid family members working at those establishments.¹⁰⁷ When *Goesaert* was decided in 1948, the practice appeared to decline just slightly. In 1948, there were 152,433 reporting drinking places, and 87,498 unpaid family members working in drinking places.¹⁰⁸ Thus, it is evident that it was commonplace for bar owners to employ family members who would work for free.¹⁰⁹

Today, it seems, the term “nepotism” has a largely negative connotation.¹¹⁰ The term generally means favoritism shown to nephews and other relatives by giving them positions because of their relationship rather than on their merits.¹¹¹ However, historically, the practice was quite common. In the United States alone, “nepotistic practices developed in both private and public enterprise.”¹¹² Consider, as only one high-profile example of an apparently common practice, before federal law prohibited it, presidents such as John Quincy Adams and John F. Kennedy also used their power to appoint family members into positions of power before federal law prohibited it.¹¹³

A gradual turn against nepotistic hiring practices began in the twentieth century, driven by concerns with perceived fairness and both a desire to embrace meritocracy in the public and private sectors.¹¹⁴ Due to the heightened job insecurity during the Depression and the New Deal, many institutions instituted rules against nepotism.¹¹⁵ Then, between 1955 to 1963 another surge of such rules was seen. In 1955, 7% of American firms had such rules and by 1963 that number had jumped to 28%.¹¹⁶ In general, these institutions sought to avoid any charges of favoritism.¹¹⁷

107. See ADAM BELLOW, IN PRAISE OF NEPOTISM: A NATURAL HISTORY 478 (2003).

108. See *id.*

109. See HASDAY, *supra* note 25, at 178 (pointing out that the Michigan statute in *Goesaert* had “no requirement that the male owner pay his female relative”). That said, we are unaware of any source that explores when male bar owners may have voluntarily paid female relatives in such circumstances.

110. See Michael E. Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563, 563 (2002); Joan Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75, 75 (1982), <https://perma.cc/S89R-L5EJ>. There are dissents from this apparently majority view. See generally BELLOW, *supra* note 107.

111. See *Nepotism*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1518 (1981).

112. Wexler, *supra* note 110, at 76.

113. See Solimine, *supra* note 110, at 563.

114. See Wexler, *supra* note 110, at 77.

115. See BELLOW, *supra* note 107, at 455, 458.

116. See Katherine Edwards, “Anti-Nepotism” Policies at the University of Washington in the Depression—(Part Two), GREAT DEPRESSION PROJ. WASH. STATE (2009), <https://perma.cc/NN94-YSSH>.

117. See *id.*

Many institutions went even further than implementing anti-nepotism policies and began to adopt explicit no-spouse rules.¹¹⁸ In practice, this meant that if an institution employed a man, it would not employ his wife. These statutes intended to force “married women whose husbands [were] employed or employable . . . to make way for persons in families where there [were] no ‘breadwinners’ . . . in a move to spread employment.”¹¹⁹ During this time, many believed that it was greedy for married women to take away jobs from unemployed men. Further, many supporters of anti-nepotism policies asserted that women’s employment was the largest contributor to the economic issues of the period.¹²⁰ Ultimately, the crisis of the Depression allowed employers to get away with such no-spouse statutes at the time.¹²¹

Before the Civil Rights Act of 1964, challenges against nepotism were brought under the Fourteenth Amendment’s Equal Protection Clause.¹²² However, the Supreme Court held that if employers could show that their practices were justified by “business necessity,” the State could not interfere.¹²³ In *Goesaert*, the Court explicitly held that the Michigan statute did not violate the Equal Protection Clause, thus not even considering whether it was justified by “business necessity.”¹²⁴ The *Goesaert* Court opined that Michigan did not “play favorites among women without rhyme or reasons.”¹²⁵ Thus, it appeared that Michigan could reasonably assume that supervision of a woman bartender by a male relative would reduce the “hazards that may confront a barmaid without such protecting oversight.”¹²⁶

The Civil Rights Act provided new ammunition against nepotism exceptions. Still, under federal law, nepotism was only objectionable when the practice resulted in a pattern of discrimination based on a protected class.¹²⁷ Although nepotism on its face does not appear like discrimination on the basis of sex, when an employer bypasses qualified

118. *See id.*

119. *Id.* (citing *Olympia*, SEATTLE POST INTELLIGENCER (1937)) (alteration in original).

120. *See id.*

121. *See id.*

122. *See* BELLOW, *supra* note 107, at 457.

123. *See, e.g.*, *Kotch v. Bd. of River Port Pilot Comm’rs for Port of New Orleans*, 330 U.S. 552 (1947) (explaining how exclusionary practice of issuing new licenses only to relatives was a legitimate business necessity in the pilot industry because sons of pilots grew up in an environment where unique knowledge about the industry was transmitted naturally).

124. *See Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948).

125. *Id.* at 466.

126. *Id.*

127. *See* BELLOW, *supra* note 107, at 457; Timothy D. Chandler et al., *Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules*, 39 SAN DIEGO L. REV. 31, 63–68 (2002); Wexler, *supra* note 110, at 97–124.

candidates from diverse backgrounds to employ a less qualified family member, that practice may be challenged under the Act. Further, the goal of anti-nepotism statutes and the Civil Rights Act were the same: people should be hired and promoted based on merit.

Despite the legal remedies available, nepotistic hiring remains prevalent in some sectors of the economy. We make such claims with appropriate hesitancy, since some scholars have recently emphasized that “[d]espite its ubiquitous presence, research on nepotism remains fragmented and scattered.”¹²⁸ Nonetheless, by some measures, nepotism in the workplace is alive and well today. According to a recent survey, 71% of respondents believed that entering professions such as medicine, accounting, or law is easier if one has a parent or guardian in a similar field.¹²⁹ Further, 45% of respondents with work experience secured it through personal connections.¹³⁰ Lastly, the practice has remained a tool for paving the way of male relatives in particular. Accordingly, government data shows that by age 30, approximately 22% of American sons work for the same employer as their fathers, a statistic too high to reflect mere chance.¹³¹

Returning to the nepotism exception in the Michigan statute in *Goesaert*, in *Sail’er Inn*, the plaintiffs challenged a statute that contained a similar exception.¹³² However, contrary to the result in *Goesaert*, the *Sail’er Inn* plaintiff’s claim was a success. In addressing the nepotism exception, the *Sail’er Inn* Court highlighted an argument from the dissenters in *Goesaert*—that the exception allowed a male owner who is never present to employ his wife or daughter. In contrast, a female owner may not employ her daughter under the nepotism exception, even if a man is always a present.¹³³ Thus, the *Sail’er Inn* Court ultimately held that the statute was arbitrarily discriminatory and thus invalid under the 1964 Civil Rights Act, and violative of the California Constitution.¹³⁴

In some respects, women could have viewed the nepotism exception in *Goesaert* and *Sail’er Inn* as beneficial to women’s progress in the bartending industry. In effect, the statutes allowed some women to be actual bartenders, naturally increasing the presence of women behind the

128. Pauline Schilpzand, Constantin Lagios & Simon Lloyd D. Restubog, *Family First: An Integrative Conceptual Review of Nepotism in Organizations*, 64 HUMAN RES. MGMT. 157, 157 (2025), <https://perma.cc/DK85-A4TU>. See also Karen L. Vinton, *Nepotism: An Interdisciplinary Model*, 11 FAM. BUS. REV. 297, 297 (1998) (“One of the least-studied and most poorly understood human resource practices is nepotism.”).

129. See Ivana Radevska, *How to Deal with Nepotism in the Workplace?*, SHORTLISTER, <https://perma.cc/JAW6-5C8B> (last visited Apr. 20, 2025).

130. See *id.*

131. See *id.*

132. See *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 531 (Cal. 1971).

133. See *id.* at 542.

134. See *id.* at 538, 542.

bar. Despite that view, the general belief that individuals should be hired based on merit led to an increase of anti-nepotism and no-spouse statutes, making women's emergence in the workforce even harder.

The charitable view of the nepotism exception is that it provided opportunities for female employment in an industry that was otherwise not congenial to their presence. A more realistic view is that the underlying statute was simply a job protection measure for men, and the exception was meant to help male bar owners (and bartenders) have easily available (and apparently frequently unpaid) female employees for those positions. Thus, the sex-specificity of the exception can be seen as another advantage to male bar owners, making the discrimination worse, not better.¹³⁵

Perhaps an all-or-nothing critique of the exception is inappropriate. One can argue that, in general, nepotistic hiring is to be discouraged if not forbidden, because of the overriding norm of meritocracy. Another view is that nepotism had its birth and indeed its continued practice, insofar as it is ascertained, in sectors with relatively small, family-owned businesses.¹³⁶ Many bars, both historically and today, would likely be considered such small businesses.

The varying perspectives on the cause and effect of the exception in bartender statutes is an example of the arguably fraught relationship between nepotism and feminism.¹³⁷ Consider the arguments that anti-nepotism and anti-spousal rules are likely to have a positive impact on the employment opportunities of wives and children seeking employment where their husbands or parents work. The contrary argument is that such rules are likely to limit merit-based employment and limit the number of women who would otherwise be hired.¹³⁸ With regard to this Article, to the extent such exceptions led to more women being hired as bartenders, then it would seem to ameliorate the negative impact of the statutes proper (albeit couched as "protective" legislation) on female employment opportunities. This does not necessarily mean that *Goesaert* was rightly decided (this Article dissents) or that the nepotism exceptions were sound as a matter of law or policy (this Article is skeptical). Instead, it

135. See HASDAY, *supra* note 25, at 178.

136. See Peter Jaskiewicz et al., *Is Nepotism Good or Bad? Types of Nepotism and Implications for Knowledge Management*, 26 FAM. BUS. REV. 121, 122 (2013), <https://perma.cc/F4AQ-QGQ9>.

137. See BELLOW, *supra* note 107, at 459.

138. See *id.* at 459–60; Wexler, *supra* note 110, at 140 (arguing that anti-nepotism rules, as applied to spouses, "in light of their potential discriminatory impact on women," should be "recast . . . to address the legitimate goal of preventing the hiring of or promotion of unqualified spouses"); James W. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 LOY. L. REV. 561, 618 n.381 (2001) (collecting various work opining on these issues).

illustrates the sometimes complicated and ambivalent relationship between nepotism and sex discrimination law in general.

IV. DOES *GOESAERT* BELONG IN THE ANTI-CANON?

In assessing the legacy of constitutional decisions, modern scholars frequently address whether a particular decision belongs in the accepted (properly understood) canon of rightly decided cases, or instead in the anti-canon of wrongly decided cases. From this perspective, it is not merely that a decision is now considered to be wrongly decided. Rather, it is that a case was wrong on the day it was decided,¹³⁹ or some similar highly critical formulation.¹⁴⁰

Many modern writers place *Goesaert* in the anti-canon category.¹⁴¹ Consider Jill Hasday, who asks “why aren’t some of the decisions in which the Supreme Court denied women’s claims to equal rights [including *Goesaert*] now considered anticanonical decisions?”¹⁴² Nancy Woloch, in her study of women’s protective legislation and the legal challenges thereto, labels *Goesaert* the “low point of the history of protective laws,”¹⁴³ and scorns Justice Frankfurter’s intransigence in his opinion for the majority.¹⁴⁴

139. See Jamal Greene, *(Anti)Canonizing Courts*, DAEDALUS, Summer 2014, at 157, 159 [hereinafter Greene, *(Anti)Canonizing Courts*], <https://perma.cc/33T6-JC3G>.

140. See, e.g., Greene, *The Anticanon*, *supra* note 3, at 380 (a decision in the anticanon “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute.”).

141. See, e.g., *id.* at 389.

142. Jill Elaine Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1718; see also HASDAY, *supra* note 25, at 179 (arguing that women’s rights cases are often excluded from the “Supreme Court’s worst,” and that *Muller*, *Goesaert*, *Hoyt v. Florida*, and other cases should be added to that list).

143. WOLOCH, *supra* note 12, at 177.

144. See *id.* at 177–78 (describing *Goesaert* as “a low moment in the career of Justice Frankfurter,” especially given “the disdainful and faux-jocular language of the [decision, in which he showed] the legal equivalent of a tin ear”); see also HASDAY, *supra* note 25, at 83 (reporting that Ann Davidow, the Michigan attorney who argued for the plaintiffs, later said that “Frankfurter, the big liberal, had made so light of” of the women’s constitutional challenge, treating it as “such a frivolous thing to bring before the Court”) (footnote omitted); Steven G. Calabresi & Julie T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 95 (2011) (opining that *Goesaert* was a “bad landmark opinion by Justice [] Frankfurter . . . [who] disposed of the case dismissively using extreme New Deal judicial restraint as his rationale”); Richard Chused, *Sex, Stamina, and Politics*, 52 L. & CONTEMP. PROBS., no. 1, 2022, at 98, <https://perma.cc/8A6L-VFD4> (explaining how in *Goesaert*, “[Justice] Frankfurter again eagerly car[ried] the flag of male privilege, [and] brusquely cast aside [women’s] objections”); David P. Currie, *The Constitution in the Supreme Court: 1946–1953*, 37 EMORY L.J. 249, 281 (1988) (“Most strikingly, *Goesaert v. Cleary* gave the back of the judicial hand to a challenge to the virtual exclusion of women from bartending.” (footnote omitted)); Ann Corrine Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUDS. 246, 259–60 (1979), <https://perma.cc/8BSA-CNHT> (referring to *Goesaert* as an “outrageous” decision, since it utilized an “any

What justifies labeling a decision as anticanonical, as compared to simply being (by later respects) wrong? The leading theorist of the concept, Jamal Greene, emphasizes that it is not merely that a decision where the Court, when considering “constitutional text, structure, and history; judicial and political precedent; and prudential or policy considerations did an especially poor job of navigating and synthesizing [these] traditional materials.”¹⁴⁵ Rather, Greene argues that a true anti-canon case should still be taught and considered when teaching the *canonical* cases, since the former permit “multiple sides of contemporary constitutional arguments to use the anti-canon as a rhetorical trump.”¹⁴⁶ Thus, he argues, for such cases, there should be a “consensus within the legal community that the cases are wrongly decided [but] there is disagreement . . . as to why’[;]” “traditional modes of legal analysis arguably support the results of” the cases; and “each case has come to symbolize a set of generalized ethical propositions that we have collectively renounced.”¹⁴⁷ In a similar vein, Greene has also argued that anticanonical decisions should be approached “as ordinary products of political culture rather than extraordinary products of judicial malfeasance.”¹⁴⁸

It becomes a daunting task, given this formidable array of factors and perhaps others, to decide whether a case should be relegated to the anti-canon. This Article agrees that *Goesaert* was wrongly decided, in large part because the Court in our view did not take rational basis review seriously.¹⁴⁹ As a matter of logic and experience, the Michigan

rational basis” test, when the “sole purpose and effect [of the law] was to keep [women] of a high-paying, male-dominated profession”).

In his recent biography of Felix Frankfurter, Brad Snyder argues that “[d]uring the late 1940s, Frankfurter was more sensitive to issues of race than gender.” BRAD SYNDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* 521 (2022). But Snyder continues: “Frankfurter’s opinion in *Goesaert* is indefensible on many levels: It was the product of an all-male Court, an all-male group of law clerks, and a male-dominated workforce. [It demonstrated his] gender bias.” *Id.* at 522.

145. Greene, *The Anticanon*, *supra* note 3, at 381 (footnote omitted).

146. *Id.* at 384 (footnote omitted).

147. *Id.* at 384 (footnote omitted).

148. Greene, *(Anti)Canonizing Courts*, *supra* note 139, at 157.

149. We note that neither the Court nor commentators have been clear on what rational basis review consists of. Early articulations of such review typically applied a relatively robust test of reasonableness or means-end scrutiny. See James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Perspective*, 55 S.D. L. REV. 751, 758–79 (2018); Note, *When Rational Basis Review Bit*, 138 HARV. L. REV. 1843, 1845–47 (2025). But the Court ultimately settled on an extremely deferential formulation in decisions like *Williamson v. Lee Optical of Okla., Inc.* See 348 U.S. 483, 487–89 (1955); Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1484 (2008). It is ironic that the highly deferential approach of *Goesaert* occurred when the Court was ostensibly following a less deferential approach. See McGoldrick, *supra*, at 775–79;

legislature was on extremely weak grounds to conclude that all women should be banned from the occupation of bartending. Even conceding, as then-Professor Ginsburg did, that women's protective legislation can have "mixed-motives," both genuinely meant to protect women, *and* to protect men's job from female competition,¹⁵⁰ the evidence both in Michigan and societally largely supported that latter and not the former.¹⁵¹ The weakness of the state's defense was exacerbated by the illogical nepotism exception. In short, this Article agrees with Judge Picard's dissent before the three-judge district court.¹⁵²

But in reaching that conclusion, for several reasons this Article still hesitates to banish *Goesaert* to the anti-canon. It is worth recalling that *Goesaert* was innovative in advancing an Equal Protection claim had been presented to the Court in a protective legislation context.¹⁵³ To be sure, the anti-canon is not limited to cases that were clearly wrong, under conventional legal analysis at the time of the decision.¹⁵⁴ But it is anachronistic to lament that the Court in 1948 should have immediately applied higher level scrutiny to a claim involving a law presented as protective legislation, a law that was not an outlier among the States.¹⁵⁵ Indeed, then-Professor Ginsburg pointed out in 1975 that *Goesaert*'s counsel in the Supreme Court was "[w]ary of challenging the gender differential head-on," and *Goesaert*'s lawyer "focused her Supreme Court argument on the exception for wives and daughters rather than the general exclusion."¹⁵⁶ Moreover, the nepotism exception in the law, as this Article endeavored to demonstrate, complicated the decision in

Note, *supra*, at 1848–55. This Article argues that *Goesaert* was wrongly decided under any version of the rational basis test.

150. Ginsburg, *supra* note 84, at 6 & n.31.

151. See *supra* notes 17–29 and accompanying text; see also HASDAY, *supra* note 25, at 83 ("Perhaps unsurprisingly, Michigan did permit women to work as cocktail waitresses, which was probably more dangerous—and less lucrative—than pouring drinks behind a bar." (footnote omitted)).

152. See also Calabresi & Rickert, *supra* note 144, at 95–96 (arguing *Goesaert* was wrongly decided from an originalist perspective).

153. See WOLOCH, *supra* note 12, at 178.

154. See Greene, *The Anticanon*, *supra* note 3, at 381 ("[T]he status of a decision as anticanonical does not depend on the magnitude, or even the presence, of contemporaneous analytic errors by the deciding Court."). By the same token, not every clearly wrong decision belongs in the anti-canon, lest we rob the latter category of explanatory force.

155. See Ginsburg, *supra* note 51, at 455 ("Without special sensitivity to gender as a classifying factor, the result in *Goesaert* was inevitable. By 1948, economic and social legislation was becoming a near free field for the states.").

156. Ginsburg, *supra* note 98, at 7. She drolly added that "counsel understood her audience," since Justice Frankfurter stated early in the opinion that Michigan, "beyond question," could forbid all women working as bartenders. *Id.*; see also *supra* note 43 and accompanying text.

interesting ways; its presence meant that not all women were prevented from serving as bartenders.

Professor Hasday argued that “*Goesaert’s* consequences reverberated for decades.”¹⁵⁷ It is true, as acknowledged,¹⁵⁸ that many states passed statutes barring or limiting women’s employment as bartenders. But as this Article suggests, *Goesaert* ultimately proved to have limited staying power. Subsequent cases in several state courts, and statutory developments in Congress and elsewhere, in effect overruled or displaced the decision.¹⁵⁹ Even if the U.S. Supreme Court had not replaced the lenient rational basis scrutiny for sex discrimination in its decisions in the 1970s, the pernicious effects of *Goesaert* for women bartenders would have been attenuated. The Supreme Court was not later presented with a case that enabled it to directly overrule *Goesaert*, and presumably never will. In light of these factors, this case, while wrongly decided, does not meet the deservedly high bar to be treated as anticanonical.

V. WOMEN BEHIND THE BAR TODAY—THE SUCCESSES AND SHORTCOMINGS

In a restaurant or bar today, it is common for a woman to make and serve your drink. In fact, women make up 60.5% of all bartenders today.¹⁶⁰ As women have emerged in the field, some problems have worked themselves out, while other new problems have surfaced in the background.

Perhaps surprisingly, the wage gap is not a significant problem in the bartending industry today. In 2004, on average, women bartenders earned about 80% of what men bartenders earned.¹⁶¹ By 2023, women bartenders earned 97% of what male bartenders earned.¹⁶² When comparing occupations held by men and women, women on average earn

157. HASDAY, *supra* note 25, at 84. In support of this assertion, she notes that after *Goesaert*, other states adopted statute limiting female employment in bars, and that bartender union lobbying for those laws continued as late as 1970. *Id.*

158. See *supra* notes 60–61 and accompanying text.

159. See Magdalene Zier, *Women at the Bar: “Bans on Barmaids” and Feminist Legal Strategy in the 1940s*, LIBR. CONG. BLOGS: UNFOLDING HIST. (Mar. 20, 2025), <https://perma.cc/UD7D-VW2R> (explaining the *Goesaert* case “did speed some state-level reform of the barmaid bans. The restrictions finally toppled state by state in the 1970s, following the California Supreme Court’s rejection of California’s barmaid ban in *Sail’er Inn v. Kirby*”).

160. See Petrovic, *supra* note 5.

161. See Avery & Crain, *supra* note 60, at 95.

162. See *Women Bartenders Who Worked Full-Time Made 97 Cents To the Dollar Men Earned in 2023*, NARROW THE GAP, <https://perma.cc/CN4R-62XB> (last visited May 8, 2025).

84% of what their male counterparts earn.¹⁶³ This decrease in wage gap in the bar industry is likely because a bartender's pay is largely based on tips, which are determined by guests, as opposed to a salary, which the company determines. Thus, behind the bar is one of the few places where a woman can make nearly as much as her male co-worker.

Although, as stated above, women make up 60% of all bartenders, a breakdown of this statistic reveals some interesting truths. For example, a New York survey found that nearly 60% of bartenders in fine-dining establishments were male, thus demonstrating that women bartenders are actually underrepresented in the most lucrative and high-profile positions within the industry.¹⁶⁴ Additionally, women presence in the bar industry is high due in part to "breastaurants" such as Hooters, and bars that only hire women, such as Coyote Ugly.¹⁶⁵

One aspect that has allowed women to emerge and establish themselves behind the bar is the sexualization of women bartenders in places such as Hooters and Coyote Ugly. Historically, courts banned women from acting as bartenders based on their desire to protect women from moral and social concerns. There were fears that women bartenders would flirt, distract, and otherwise cause trouble behind the bar.¹⁶⁶ Although some may believe many of these fears have come true in the current state of bartending, it is also true that the sexualization of women bartenders has undoubtedly carved a unique space for them in the profession.

On one hand, it seems that Coyote Ugly and other bars and restaurants that sexualize women are just the type of "social and moral problems" many justices in the 1900s feared. However, the practice also opens opportunities for women. As the general manager of Coyote Ugly put it, "We take care of women. We are Women."¹⁶⁷ Additionally, maybe the political actors of the 1900s would not be that surprised if they were to walk into a bar like Coyote Ugly today, considering the case of *Sail'er Inn* centered around a topless bar.¹⁶⁸ Either way, this sexualization has also resulted in new problems for women bartenders today. Ultimately, a

163. See Andrea Hsu, *It's Equal Pay Day. Women Earn 84 Cents For Every Dollar Men Make—or Even Less*, NAT'L PUB. RADIO (Mar. 12, 2024, 05:37 ET), <https://perma.cc/M28E-6UU7>.

164. See M. Carrie Allan, *'The Line Is Crossed, and It's Crossed Daily': The Struggles of Female Bartenders*, WASH. POST (Sep. 26, 2016), <https://perma.cc/QQA7-KCQT>.

165. *Id.*; see also Haley Hamilton, *If More Than Half of American Bartenders Are Women, Why Is the Craft Cocktail Industry Dominated by Men?*, MEDIUM (May 31, 2018), <https://perma.cc/D8AN-NL57>.

166. See Natter, *supra* note 6, at 4; French, *supra* note 2, at 35.

167. Hamilton, *supra* note 165.

168. See Eric Felten, *Women Behind Bars*, WALL ST. J., Apr. 25, 2009, at W6.

serious problem facing women bartenders today are unwanted sexual comments and advances from males, both customers and co-workers.¹⁶⁹

Although women have a legal right to work as bartenders today, many may feel unsafe doing so. Many women in the service industry today deal with outright assault, verbal harassment, and countless inappropriate encounters with guests or colleagues. Based on a recent survey, more than 70% of female restaurant employees have been sexually harassed, with half of them experiencing sexual harassment on a weekly basis.¹⁷⁰ Research in the area reveals that dependency on tips and the requirement to appear emotionally pleasant on the job work together to increase an employee's risk of being sexually harassed by customers.¹⁷¹ Another clear risk factor is that alcohol consumption is encouraged.¹⁷² Unfortunately, women are also subjected to harassment from their side of the bar as well, from colleagues or even supervisors.¹⁷³

Making matters worse, the service industry is known for having a "look-the-other-way" culture when it comes to issues of sexual harassment.¹⁷⁴ This mindset stops employees who experience harassment from reporting; some are fearful that if they do report, they will lose their jobs.¹⁷⁵ However, this issue in the service industry is no secret to outsiders. "Project When" suggests employers implement Standard Operating Procedures for reporting harassment, Education and training programs about workplace harassment, and access to support and treatment for victims of workplace harassment.¹⁷⁶ Thus, at this point, the industry needs more recognition and solutions from within.

In the aftermath of cases like *Reed*, it is easy to forget about the women bartenders' fight for equality in the 1900s, as seen in cases like *Goesaert*. However, the aftermath of *Goesaert* is complicated. The doctrinal implications of *Goesaert* faded, if not disappeared, over 50

169. In March 2025 the Hooters restaurant filed for Chapter 11 reorganization under the bankruptcy laws. See Alexander Gladstone & Heather Haddon, *Hooters Files for Chapter 11, To Seek Revival*, WALL ST. J. (Apr. 1, 2025), <https://perma.cc/QLK2-YLB9>. It is not clear if the filing reflects changing taste away from the "breast bars," or is simply part of a greater trend of the business challenges faced by chain restaurants. For a suggestion that it is more of the latter, see Heather Haddon, *Hooters Bets Now Is the Time for Short Shorts and Butter Sauce*, WALL ST. J. (Aug. 22, 2025, at 20:00 ET), <https://perma.cc/2TCE-N5R4>.

170. See Becky Sullivan, *Tips And 'Service With a Smile' Rules Fuel Sex Harassment in Restaurants*, NAT'L PUB. RADIO (July 22, 2021, at 06:00 ET), <https://perma.cc/MF57-UXYB>.

171. See *id.*

172. See *Harassment in the Alcohol & Service Industry*, PROJECT WHEN, <https://perma.cc/FB3F-HSF6> (last visited Dec. 23, 2025).

173. See Sullivan, *supra* note 170.

174. *Harassment in the Alcohol & Service Industry*, *supra* note 172.

175. See *id.*

176. See *id.*

years ago. Today, women can work as bartenders and earn a living comparable to that of their male counterparts. Yet, women bartenders today are subject to continuing challenges, including sexual harassment and a lack of proper procedures to investigate and regulate such conduct. The story of *Goesaert* and its legacy is not a closed book, and many chapters remain to be written.