

EN-GENDERING ECONOMIC INEQUALITY

MICHELE E. GILMAN*

Abstract

We live in an era of growing economic inequality. Luminaries ranging from the President to the Pope to economist Thomas Piketty in his bestselling book Capital in the Twenty-First Century have raised alarms about the disparity between the haves and the have-nots. Overlooked, however, in these important discussions is the reality that economic inequality is not a uniform experience; rather, its effects fall more harshly on women and minorities. With regard to gender, American women have higher rates of poverty and get paid less than comparable men, and their workplace participation rates are falling. Yet economic inequality is neither inevitable nor intractable. Given that the government creates the rules of the market, it is essential to analyze the government's role in perpetuating economic inequality.

This Article specifically examines the role of the Supreme Court in contributing to gender-based economic inequality. The thesis is that the Supreme Court applies oversimplified economic assumptions about the market in its decision-making, thereby perpetuating economic inequality on the basis of gender. Applying insights of feminist economic theory, the Article analyzes recent Supreme Court jurisprudence about women workers, including Wal-Mart v. Dukes (denying class certification to female employees who were paid and promoted less than men), Burwell v. Hobby Lobby Stores, Inc. (granting business owners the right to deny contraception coverage to female employees on religious grounds), and Harris v. Quinn (limiting the ability of home health care workers to unionize and thereby improve their working conditions). In these cases, the Court elevates its narrow view of efficiency over more comprehensive understandings, devalues care work, upholds harmful power imbalances, and ignores the intersectional reality of the lives of low-wage women workers. The Article concludes that the Court is eroding collective efforts by women to improve their working conditions and economic standing. It suggests advocacy strategies for reforming law to obtain economic justice for women and their families.

INTRODUCTION

President Obama calls economic inequality the “defining challenge of our time.”¹ Pope Francis decries “trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world.”² Federal Reserve Chair Janet Yellen asks whether growing economic inequality “is compatible with values rooted in our nation’s history, among them the high value Americans have traditionally placed on equality of opportunity.”³ Corporate America is also sounding the alarm, concerned that falling incomes will hurt profits and hinder economic growth.⁴ In short, economic inequality is firmly on the public agenda, as experts, policymakers, and presidential candidates debate its causes, consequences, and cures. Less attention is focused on the reality that not all groups experience inequality similarly. To the contrary, economic inequality falls most harshly on minorities and women.⁵ The

* Venable Professor of Law, University of Baltimore School of Law. Director, Civil Advocacy Clinic; Co-Director, Center on Applied Feminism. B.A., Duke University; J.D., University of Michigan Law School. Thanks to participants at the AALS Workshop on Next Generation Issues on Sex, Gender, and the Law, as well as at the Workshop on Vulnerability at the Intersection of the Changing Firm and the Changing Family at Emory Law School for their insights. I am also grateful for comments from Dan Hatcher, Margaret Johnson, and Barbara White.

1 President Barack Obama, Remarks on Economic Inequality at the White House (Dec. 4, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility> [<https://perma.cc/M7QY-D4ML>]).

2 Zachary A. Goldfarb & Michelle Boorstein, *Pope Francis Denounces “Trickle-Down” Economic Theories in Sharp Criticism of Inequality*, WASH. POST, Nov. 26, 2013, http://www.washingtonpost.com/business/economy/pope-francis-denounces-trickle-down-economic-theories-in-critique-of-inequality/2013/11/26/e17ffe4e-56b6-11e3-8304-caf30787c0a9_story.html [<https://perma.cc/83PJ-R54Y>].

3 Pedro Nicolaci Da Costa, *Janet Yellen Decries Widening Income Inequality*, WALL ST. J., Oct. 17, 2014, <http://www.wsj.com/articles/feds-yellen-says-extreme-inequality-could-be-un-american-1413549684> [<https://perma.cc/XBB6-EARX>].

4 See *Business Leaders Worry About Income Inequality And Revolution*, FORBES (Sept. 9, 2014), <http://www.forbes.com/sites/eriksherman/2014/09/09/business-leaders-worry-about-income-inequality-and-revolution/> [<https://perma.cc/5DY6-UAXP>]; *How Increasing Income Inequality is Dampening U.S. Economic Growth, and Possible Ways to Change the Tide*, STANDARD & POOR’S GLOBAL CREDIT PORTAL (Aug. 5, 2014), https://www.globalcreditportal.com/ratingsdirect/renderArticle.do?articleId=1351366&SetArtId=255732&from=CM&nsl_code=LIME&sourceObjectId=8741033&sourceRevId=1&fee_ind=N&exp_date=20240804-19:41:13;%20 <http://time.com/3083100/income-inequality/> [<https://perma.cc/X7SF-7C29>].

5 On the racial wealth and income gap, see Rakesh Kochhar & Richard Fry, *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/2014/12/12/wealth-inequality-has-widened-along-racial-ethnic-lines-since-end-of-great-recession/>.

intersection of economic inequality with gender, as shaped and reinforced by law, is the focus of this Article.

Currently, the top 1% of households earns one-fifth of the nation's income.⁶ Wealth inequality is even greater, as the top 1% of the distribution owns approximately 42% of the nation's wealth.⁷ Meanwhile, a majority of Americans face stagnant wages, reduced social mobility, and higher job insecurity.⁸ The middle class is shrinking,⁹ while at the bottom of the economic barrel, nearly 15% of the population lives below the poverty line,¹⁰ where they struggle to meet basic needs such as food and housing.¹¹ Economic inequality causes

pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ [https://perma.cc/NWJ5-8V84]; Thomas Shapiro, Tatjana Meschede & Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS & SOC. POL'Y (Feb. 2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> [https://perma.cc/5MB8-D9PK]. On gender and economic inequality, see Part I.B. *infra*.

6 See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 296 (2014).

7 See Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat'l Bureau of Econ. Research, Working Paper No. 20645, 2014). The richest 0.1% holds 22% of the wealth; this group has driven the growth of wealth inequality. *Id.* at 22. For an explanation of the data, trends, and measurement of economic inequality, see Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET POL'Y & PRIORITIES (Feb. 20, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov.pdf> [https://perma.cc/DY7X-4LS9].

8 See CTR. FOR AM. PROGRESS, *REPORT OF THE COMMISSION ON INCLUSIVE PROSPERITY* 10 (Jan. 2015) (workers face stagnant wages despite corporate growth); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 2, 4 (2011).

9 See Keith Miller & David Madland, *As Income Inequality Rises, America's Middle Class Shrinks*, CTR. FOR AM. PROGRESS (Dec. 18, 2014), <https://www.americanprogress.org/issues/economy/news/2014/12/18/101790/as-income-inequality-rises-americas-middle-class-shrinks/> [https://perma.cc/7SJB-BF9N] (“As income inequality has steadily grown in the United States, the actual size of America's middle class has shrunk.”); *17 Things We Learned About Income Inequality in 2014*, ATLANTIC (Dec. 23, 2014), http://www.theatlantic.com/business/archive/2014/12/17-things-we-learned-about-income-inequality-in-2014/383917/?single_page=true [https://perma.cc/27MT-M7N7] (“More of the middle class is migrating to the lower class due to stagnant incomes and the increased cost of living . . .”).

10 CARMEN DEHAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2013* 12 (2014).

11 One study found that even under a conservative measure, 1.17 million children are in families living in extreme poverty, meaning they earn less than \$2.00 a day. H. Luke Shaefer & Kathryn Edin, *The Rise of Extreme Poverty in the United States*, PATHWAYS 28, 29 (Summer 2014), http://web.stanford.edu/group/scspi/_media/pdf/pathways/summer_2014/Pathways_Summer_2014_SShaeferEdi.pdf [https://perma.cc/2MY5-PCR8].

not only individual financial struggles, but it also harms the economy through “lower productivity, lower efficiency, lower growth, [and] more instability.”¹² By contrast, nations with greater economic equality have more economic growth.¹³ Our growing economic divergence is also linked to social dysfunctions, ranging from high rates of infant mortality, to crime, and substance abuse; educational failures; and lower life expectancy—all of which impose their own costs.¹⁴

Gender both generates economic inequality and magnifies its effects. For instance, women’s workplace participation is falling, thereby impacting family incomes.¹⁵ Women get paid less than men for the same work.¹⁶ Women are disproportionately poor and more likely to work in low-wage jobs with few benefits or employee protections.¹⁷ These trends are drags on the economy and limit household wealth and opportunities. However, this lamentable state of affairs is neither inevitable, nor impossible to reverse.

An important insight in understanding economic inequality is that it is rooted in market trends that arise within the context of state action and inaction.¹⁸ As Nobel Prize winning economist Joseph Stiglitz explains, inequality is not solely the result of market forces; rather, “government policies have been central to the creation of inequality in the United States.”¹⁹ For instance, the government establishes the playing field regarding unionization,

12 JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 117 (2012). See also Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 398–401 (2014) (on the effects of economic inequality).

13 CTR. FOR AM. PROGRESS, *supra* note 8, at 45 (noting that research by the International Monetary Fund shows that “higher levels of net income inequality . . . are negatively correlated with growth in gross domestic product per person”).

14 KATE PICKETT & RICHARD WILKINSON, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 70, 81, 108–13, 134–37 (2009); see also CTR. FOR AM. PROGRESS, *supra* note 8, at 47–49 (discussing shorter life expectancies resulting from economic inequality).

15 See *infra* Part I.B.

16 *Id.*

17 *Id.*

18 Government in/action is intertwined with all the major contributors to economic inequality, including increased globalization and outsourcing of jobs, CTR. FOR AM. PROGRESS, *supra* note 8, at 11; technological advances that have replaced traditional middle-income jobs, *id.* at 11; a rise in part-time work with few benefits, *id.* at 11; the decline of unionization, *id.* at 12, 34; a less progressive tax system, *id.* at 37; and the rise of super-salaries for super-managers that bear no relation to increased productivity, *id.* at 12, 35–36.

19 STIGLITZ, *supra* note 12, at 6.

corporate governance, and competition laws, all of which relate to economic inequality.²⁰ Political scientists Jacob Hacker and Paul Pierson similarly elucidate, “[g]overnment rules make the market, and they powerfully shape how, and in whose interests, it operates.”²¹ As legal scholar Martha McCluskey notes, government’s role in economic inequality is an observation with a “long and articulate history,” but one that is muted by economic rhetoric that treats the market and state as separable.²²

Current public policies favor the top 1% at the expense of the 99%. Wealthy and corporate interests have an outsized role in shaping the public agenda, due to the role of money in political campaigns and lobbying.²³ Substantial evidence shows that Congress is responsive to the concerns of wealthy Americans, while dismissing those of the bottom 90%.²⁴ The Supreme Court has solidified these political trends in decisions such as *Citizens United v. Federal Election Commission*.²⁵

Less noticed, but equally problematic, the Supreme Court also contributes to gender-based economic inequality.²⁶ Thus, this Article examines the Supreme Court’s recent

20 *Id.* at 57–58.

21 HACKER & PIERSON, *supra* note 8, at 44; *see also* DAVID BRADY, RICH DEMOCRACIES, POOR PEOPLE: HOW POLITICS EXPLAIN POVERTY 6 (2009) (a sociologist explains that “the distribution of resources in states and markets is inherently political”); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 251–52 (2014).

22 Martha T. McCluskey, *Deconstructing the State-Market Divide: The Rhetoric of Regulation from Workers’ Compensation to the World Trade Organization*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY 147, 148 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

23 *See* Gilman, *supra* note 12, at 400–01, 434–35 (summarizing research on influence of money in politics); GILENS, *supra* note 21, at 239–47 (Gilens states that “the role of money in politics is complex,” but clearly a factor in shaping policy and electoral outcomes).

24 *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY 5, 254–65 (2004); GILENS, *supra* note 21, at 70, 77–85. *See also* Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 125 (2007) (explaining how economic inequality was a factor in constitutional design).

25 *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that political spending is a form of political speech under the First Amendment and therefore the government may not restrict corporate or union spending on “electioneering communications” to support or oppose individual candidates in elections). *See also* Gilman, *supra* note 12, at 437–41 (discussing connection between *Citizens United* and economic inequality).

26 For a discussion of how the Supreme Court has reinforced economic inequality in the areas of education, redistribution, corporate law, and the political process, *see* Gilman, *supra* note 12.

doctrine where gender and class intersect.²⁷ It imports core insights from feminist economic theory into legal analysis to help understand the harm to women wrought by the mainstream, neoclassical economic models based on efficiency and individual self-interest to which the Court majority adheres. The thesis is that the Supreme Court either overtly or implicitly applies neoclassical economic assumptions in its decision-making, thereby perpetuating economic inequality on the basis of gender.

Part I describes the current patterns of income and wealth inequality and explains how gender interplays with these trends. It also sets forth basic principles of feminist economic theory, which reveal how the market and assumptions about the market shape inequitable outcomes. In Parts II to IV, the Article focuses on three recent Supreme Court cases that limit the rights of women in the low-wage workforce. Each case bears out the observations of feminist economists. These cases are significant not only due to the sheer numbers of women workers impacted, but also because the workplace dynamics exemplify the chasm between the economic fortunes of the top 1% and everyone else. In *Wal-Mart v. Dukes*²⁸ (discussed in Part II), the Court made it difficult, if not impossible, to challenge discriminatory pay and promotion policies that arise from discretionary personnel policies, which dominate the modern workplace. In *Harris v. Quinn*²⁹ (discussed in Part III), the Court limited the ability of home health care workers to unionize and thereby improve their working conditions. In *Burwell v. Hobby Lobby Stores, Inc.*³⁰ (discussed in Part IV), the Court granted business owners the right to deny contraception coverage to female employees on religious grounds. Reflecting on these cases, this Article concludes that the Court overturns or interprets legislation designed to correct for market imperfections in favor of corporate preferences.³¹ In so doing, the Court fails to acknowledge its own hand in fostering economic and gender inequality. At the same time, the Court reinforces gender-based stereotypes about women workers that have long limited their economic opportunity. The Court's benign view of the market and its biased view of women create a potent combination that results in further entrenchment of economic inequality for women.

27 Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915 (2008) (Kessler discusses the inattention of feminist legal theory to class: "By placing economically privileged, white, heterosexual women at the center of the analysis, such theories and strategies discount the experiences of many women and men.").

28 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

29 *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

30 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

31 See Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 267 (Linda C. McClain & Joanne L. Grossman eds., 2012).

I. Economic Inequality and Gender

A. The Rise of Economic Inequality

The data on economic inequality is sobering and irrefutable. We currently have greater economic inequality than the Roaring Twenties, when income was concentrated in the hands of wealthy industrialists.³² After World War II, the nation enjoyed several decades of shared growth with stable income distributions, resulting from government policies such as the GI bill, which sent veterans to college, a progressive tax system, and a strong labor movement.³³ However, since the late 1970s, the top 1% has been pulling away from the rest of the country.³⁴ Thirty years ago, the top 1% earned 12% of the nation's income; today their share is 21%.³⁵ Wealth inequality is even starker, as a household in the top 1% holds 225 times the wealth of the average American household.³⁶

If the pie were growing for all Americans, this divergence might not be a concern. However, the bottom 90% is working harder with less to show for it.³⁷ Wages have been stagnant for the bottom 70% of income earners since the 1970s.³⁸ Meanwhile, the largest share of the nation's economic growth has gone to the top 1%.³⁹ While the wages of the top

32 BENJAMIN I. PAGE & LAWRENCE R. JACOBS, *CLASS WAR?* 7 (2009); *see also* Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 13106, 2007), <http://www.nber.org/papers/w13106> [<https://perma.cc/7TRY-LQ6W>] (describing the increase in income inequality from 1980 to 2005); Stone et al., *supra* note 7, at 11.

33 *See* PİKETTY, *supra* note 6, at 294; STIGLITZ, *supra* note 12, at 11; BARTELS, *supra* note 24, at 8–9; Levy & Temin, *supra* note 32, at 2 (holding that between 1980 and 2005, business sector productivity increased by 67.4%, yet median weekly earnings of full-time workers rose only 14%).

34 *See* STIGLITZ, *supra* note 12, at 11.

35 *Id.* at 11; PAGE & JACOBS, *supra* note 32, at 7.

36 *See* STIGLITZ, *supra* note 12, at 2.

37 *See* TIMOTHY NOAH, *THE GREAT DIVERGENCE* 176 (2012); BARTELS, *supra* note 24, at 17–18.

38 Lawrence Mishel, *Causes of Wage Stagnation*, *ECON. POL'Y INST.* 1 (Jan. 6, 2015), <http://www.epi.org/publication/causes-of-wage-stagnation/> [<https://perma.cc/9AY7-KD8X>].

39 *See* CTR. FOR AM. PROGRESS, *supra* note 8, at 104 (95% of post-recession income gains went to the top 1% of households). The causes of wage stagnation result from intentional policy choices including, “the abandonment of full employment as a main objective of economic policymaking, declining union density, various labor market policies and business practices, policies that have allowed CEOs and finance executives to capture ever larger shares of economic growth, and globalization policies.” Mishel, *supra* note 38.

1% grew 138% between 1979 and 2013, the bottom 90% saw only a 15% increase.⁴⁰ To be sure, unemployment is falling as the United States emerges from the recession, yet wage growth for most workers remains weak, with the average hourly pay dropping.⁴¹

In the book *Capital in the Twenty-First Century*, economist Thomas Piketty surveyed tax, income, and wealth data for numerous countries going back over two hundred years and concluded that economic inequality will continue to rise unless government takes affirmative redistributive steps.⁴² Piketty's book was a surprise bestseller that brought increased attention to the issue of economic inequality due to its accessible recounting and synthesis of economic history and data from the United States, Europe, and other developed nations.⁴³ In response to the book's overwhelming attention and impact, feminist economists pointed out that economic inequality impacts some groups more harshly.⁴⁴ Indeed, inequality is more extreme for women and minorities.

By essentializing economic inequality, Piketty and other economists ignore how "income distribution emanates from at least a tripartite structuring of labor and capital—by race, gender and class."⁴⁵ This criticism of course, is not aimed at Piketty alone. Since the 1990s, feminist economists have challenged mainstream economics for ignoring the role of gender in the marketplace, which dooms any project for shared prosperity. As Professor Diane Perrons states, recognizing how social groups "experience wealth and poverty

40 See LAWRENCE MISHEL, ELISE GOULD & JOSH BIVENS, ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS 5 (2015), <http://www.epi.org/publication/charting-wage-stagnation/> [<https://perma.cc/T3RZ-VCUS>].

41 *Id.* at 6.

42 PIKETTY, *supra* note 6, at 20–22. He recommends a progressive global tax on capital. *Id.* at 471, 515.

43 For representative descriptions of the Pikettymania phenomenon, see Jia Lynn Yang, *Here's an Unlikely Bestseller: A 700-Page Book on 21st Century Economics*, WASH. POST, WONKBLOG (Apr. 22, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/22/heres-an-unlikely-bestseller-a-700-page-book-on-21st-century-economics/> [<https://perma.cc/YVY2-3TNR>] (stating that the book sold out on Amazon.com and sold 80,000 copies in two months); Megan McArdle, *Piketty's Capital: An Economist's Inequality Ideas Are All the Rage*, BUS. WEEK (May 29, 2014), <http://www.businessweek.com/articles/2014-05-29/pikettrys-capital-economists-inequality-ideas-are-all-the-rage> [<https://perma.cc/73U9-PP9Y>].

44 See Diane Perrons, *Gendering Inequality: A Note on Piketty's Capital in the Twenty-First Century*, 65 BRIT. J. SOC. 667 (2014) (explaining that "inequality is experienced differently depending not only on class, but also on other aspects of identity including gender"); Kathleen Geier, et al., *How Gender Changes Piketty's Capital in the Twenty-First Century*, NATION, CURVE BLOG (Aug. 6, 2014), <http://www.thenation.com/blog/180895/how-gender-changes-pikettrys-capital-twenty-first-century> [<https://perma.cc/E3BS-XLPQ>] (a group of economists debates Piketty's book from a gender perspective).

45 Geier, et al., *supra* note 44.

differently is critical to informing the democratic deliberations that Piketty hopes will be capable of bringing about change.”⁴⁶ This Article is part of a larger feminist project to bring gender into the discussion of economic inequality and vice versa.

B. Gender and Economic Inequality

Gender and economic inequality are interrelated. Countries with greater gender equality also have greater economic growth.⁴⁷ In the United States, the post-war period from the 1950s to the 1970s was not only a time of overall economic growth, but also a time of increased gender equality, as women gained access to education, the workplace, reproductive justice, and protections against violence, among other advances. However, economic growth, for most Americans, and the progression of gender equity have stalled. There are four key trends in gender and economic equality: (1) women’s employment is essential to the economy, but declining; (2) women get paid less than comparably qualified men for equal work,⁴⁸ (3) women are more likely than men to live in poverty, and (4) the economic realities of women vary sharply by class, even more so than those of men. Overall, despite advances in women’s political and civil citizenship, “[women] earn less than men, end up in occupational ghettos, bump up against glass ceilings, and find themselves, in relation to men, as poor as ever.”⁴⁹

First, due to wage stagnation in the United States, the contributions of women workers

46 Perrons, *supra* note 44, at 671.

47 See Naila Kabeer & Luisa Natali, *Gender Equality and Economic Growth: Is There a Win-Win?*, INST. DEV. STUD. 21, 34 (Feb. 2013), <https://www.ids.ac.uk/files/dmfile/Wp417.pdf> [<https://perma.cc/3WPD-VXWE>]; THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT 3–6 (2012), <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> [<https://perma.cc/W3GL-7DGD>]; Katrin Elborgh-Woytek, et al., *Women, Work and the Economy: Macroeconomic Gains from Gender Equity*, INT’L MONETARY FUND (Sept. 2013), <http://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf> [<https://perma.cc/L8JD-HDH3>]; Jonathan Woetzel et al., *How Advancing Women’s Equality Can Add \$12 Trillion to Global Growth*, MCKINSEY GLOBAL INST. (Sept. 2015), <http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth> [<https://perma.cc/US2X-UF42>].

48 At the current pace, this divide will not be erased until 2058. See INST. FOR WOMEN’S POL’Y RESEARCH, THE STATUS OF WOMEN IN THE STATES 2015: EMPLOYMENT AND EARNINGS 7 (2015), <http://statusofwomendata.org/app/uploads/2015/02/EE-CHAPTER-FINAL.pdf> [<https://perma.cc/82LK-KG2N>].

49 Michael B. Katz, Mark J. Stern & Jamie J. Fader, *Women and the Paradox of Inequality in the Twentieth-Century*, 39 J. Soc. Hist. 65 (2005)

are increasingly essential to their households' well-being.⁵⁰ Women's entrance into the workforce in the latter half of twentieth century was a profound social and economic development.⁵¹ Still, the United States is unique among developed countries in that the participation of working-age women in the labor force has been declining,⁵² from a high of 73% in 1999 to 69% today.⁵³ This decline persists despite the fact that women's wages have been rising compared to men's over the last three decades.⁵⁴ One cause is a lack of family-friendly public policies, such as paid parental leave, affordable childcare, or flexibility for part-time workers.⁵⁵ The United States is the only developed nation that does not guarantee paid parental leave.⁵⁶ In fact, economists Francine Blau and Lawrence Kahn have estimated that if the United States had gender-friendly policies similar to those in European countries, women's labor market participation would be as much as 7% higher.⁵⁷

50 See NOAH, *supra* note 37, at 53; HACKER & PIERSON, *supra* note 8, at 22; Susan Harkness, *The Contribution of Women's Employment and Earnings to Household Income Inequality: A Cross-Country Analysis* 19 (June 2010) (unpublished manuscript) (on file with the University of Bath), <http://www.lisdatacenter.org/conference/papers/harkness.pdf> [<https://perma.cc/RKG2-AY6A>] (without women's earnings, income inequality would increase in the United States by forty-nine percent).

51 See Katz et al., *supra* note 49, at 67–68; JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 196 (2014).

52 See CTR. FOR AM. PROGRESS, *supra* note 8, at 72; BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATABOOK 1* (2014), <http://www.bls.gov/cps/wlf-databook-2013.pdf> [<https://perma.cc/RQP5-H5TD>]; Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why is the US Falling Behind?* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 18702, 2013) (noting that in the United States, federal law gives women only twelve weeks unpaid leave) [hereinafter Blau & Kahn, *Female Labor Supply*].

53 See CTR. FOR AM. PROGRESS, *supra* note 8, at 132; Mary Gregory, *Gender and Economic Inequality*, in *THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY* 284, 288 (Brian Nolan, Wiemer Salverda & Timothy M. Smeeding eds., 2011).

54 See Patricia Cohen, *Among the Poor; Women Feel Inequality More Deeply*, N.Y. TIMES: UPSHOT (Aug. 18, 2014), http://www.nytimes.com/2014/08/19/upshot/among-the-poor-women-feel-inequality-more-deeply.html?_r=0&abt=0002&abg=0 [<https://perma.cc/D53X-8GCP>].

55 CTR. FOR AM. PROGRESS, *supra* note 8, at 72, 134; Randy Albelda, *Gender Impacts of the "Great Recession" in the United States*, in *WOMEN & AUSTERITY: THE ECONOMIC CRISIS AND THE FUTURE FOR GENDER EQUALITY* 82, 83 (Maria Karamessini & Jill Rubery eds., 2013) [hereinafter Albelda, *Gender Impacts*].

56 See Elaine McCrate, *Employer-oriented Schedule Flexibility, Gender and Family Care*, in *HANDBOOK OF RESEARCH ON GENDER AND ECONOMIC LIFE* [hereinafter *HANDBOOK ON GENDER*] 273 (Deborah M. Figart & Tonia L. Warnecke eds., 2013) (the United States lacks "even the most rudimentary forms of flexibility such as paid vacation days or sick leave").

57 Blau & Kahn, *Female Labor Supply*, *supra* note 52, at 1, 7. Men fared worse than women in terms of job loss during the economic recession from 2007–2009, but fared better in the post-recession economy with larger

Second, the gender gap in pay—women make about seventy-eight cents to every dollar earned by men⁵⁸—adversely impacts households and the national economy. While the gap shrank from approximately 60% in 1978 to around 78% today,⁵⁹ it has been stubbornly hard to erase—particularly for women of color—with little improvement since 1990.⁶⁰ As a result, “the economic fortunes of families typically remain disproportionately dependent on what dads earn, even when the moms work, too.”⁶¹ One cause of the gender gap is family status, meaning the employment interruptions that women experience due to childbearing and caregiving.⁶²

Occupational segregation also contributes to the gender gap. In 2010, 49% of men and 41.1% of women worked in an occupation where at least 75% of other workers were of the same gender.⁶³ Occupations dominated by women, such as administrative support, are lower paid than comparable occupations held by men, such as construction or transportation.⁶⁴ As women move into a formerly male profession, pay in that profession

job growth. See Albelda, *Gender Impacts*, *supra* note 55, at 82–88.

58 See DeNavas-Walt & Proctor, *supra* note 10, at 7; see also AM. ASS’N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: 2015 EDITION 3 (2015), http://www.aauw.org/files/2015/02/The-Simple-Truth_Spring-2015.pdf [<https://perma.cc/EA3F-FM6V>].

59 See Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?* 21 ACAD. MGMT. PERSP. 7, 9 (2007) [hereinafter Blau & Kahn, *Have Women Gone*]; Gregory, *supra* note 53, at 296. The gap is larger for older women than for younger women; it is 95% for women ages 16–24 and 75% for women ages 55–64. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, REP. NO. 1031, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2010 9 (2011), http://www.bls.gov/opub/reports/womens-earnings/archive/womensearnings_2010.pdf [<https://perma.cc/GY6K-HNBA>]; see also AM. ASS’N OF UNIV. WOMEN, *supra* note 58, at 11.

60 See Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. REL. REV. 45 (2007).

61 NOAH, *supra* note 37, at 49.

62 Gregory, *supra* note 53, at 293; Blau & Kahn, *Have Women Gone*, *supra* note 59, at 10; JOHN ICELAND, POVERTY IN AMERICA: A HANDBOOK 101 (3d ed. 2013).

63 See Ariane Hegewisch & Hannah Liepmann, *Occupational Segregation and the Gender Wage Gap in the US*, in HANDBOOK ON GENDER, *supra* note 56, at 200. While occupational segregation declined significantly during the 1970s and 1980s due to legal reforms and enforcement, further progress has not only slowed, but reversed. *Id.* See also ICELAND, *supra* note 62, at 100 (“women’s work is typically accorded both lower status and lower earnings than occupations with high concentrations of men”).

64 U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, REP. NO. 1034, WOMEN IN THE LABOR FORCE: A DATABOOK 55–68 (2011), <http://www.bls.gov/cps/wlf-databook-2011.pdf> [<https://perma.cc/8FCL-7UBV>]. Men earn more than women even in female-dominated occupations, such as elementary school teachers. *Id.*

declines.⁶⁵ Discrimination is an additional factor, as “women still earn less than similar men even when all measured characteristics are taken into account.”⁶⁶ Affirmative evidence of discrimination includes “a well-documented ‘wage premium’ for married men that is not evident in the pay of married women; a wage penalty for mothers, but not fathers; and a penalty for women’s leaves based on the expectation that [women] will take longer and more frequent leaves than [men] typically do.”⁶⁷

There is a paradox that women have advanced quickly in the American workplace, but face a larger gender gap than in other developed nations.⁶⁸ Women’s depressed earnings mean they have fewer financial assets, less savings for retirement or emergencies, and higher poverty rates.⁶⁹ By contrast, some estimate that closing the gender gap would increase the United States’ gross domestic product by 5%,⁷⁰ and halve the poverty rate.⁷¹

Third, women are disproportionately represented in the low-wage labor market,⁷² and

at 59–67 (Table 18); *Cf.* Vivien Labaton, *Five Myths About the Gender Pay Gap*, WASH. POST (July 25, 2014) (occupational segregation is only partly to blame for the gap because “the pay gap is widest in some of the highest-paying fields,” such as medicine and law).

65 Asaf Levanon & Paula England, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data*, 88 SOC. FORCES 865 (2009).

66 Blau & Kahn, *Have Women Gone*, *supra* note 59, at 12. They estimate discrimination to account for about forty-one percent of the gap. *Id.*

67 KATHERINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 60 (6th ed. 2013). While the gap is sometimes attributed to women’s alleged preferences for working less, the reality is that women who worked full-time and year-round during at least 12 of 15 consecutive years still earn only 64% of similarly situated men. *See* Stephen J. Rose & Heidi I. Hartmann, *Still a Man’s Labor Market: The Long-Term Earnings Gap*, INST. FOR WOMEN’S POL’Y RES. 10 (2004).

68 *See* Gregory, *supra* note 53, at 296.

69 *See* Hegewisch & Liepmann, *supra* note 63, at 200.

70 Elborgh-Woytek, et al., *supra* note 47, at 4.

71 Heidi Hartmann, Jeffrey Hayes & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy*, INST. FOR WOMEN’S POL’Y RES. 1, 4 (2014), <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy> [<https://perma.cc/5U4Q-LJGW>].

72 Low-income is defined by researchers and policymakers as having “family income below 200 percent of the poverty line.” Randy Albelda, *Low-wage Mothers on the Edge in the US*, in *HANDBOOK ON GENDER*, *supra* note 56, at 257, 259 [hereinafter Albelda, *Low-wage Mothers*].

more likely than men to be poor.⁷³ Nearly six in ten adults who live in poverty are women.⁷⁴ This disparity results from the lower employment and wage levels of women⁷⁵ as well as women's higher likelihood of heading single parent families.⁷⁶ Minimum wage workers are more likely to be women.

Single mothers are in a particularly precarious position; their poverty rate was 39.6% compared to 7.6% for families with children headed by a married couple.⁷⁷ Single mothers face the "triple whammy" of earning less than men; earning less than other women; and serving in the dual role of caregiver and breadwinner.⁷⁸ 40% of single mothers are employed in low-wage work,⁷⁹ and 12% of single mothers who work full-time, year-round nevertheless live in poverty.⁸⁰ For our poorest women, welfare was reformed in 1996 to require recipients to work, but the low-wage workplace has changed little to support their efforts, offering measly wages, few benefits, and a lack of scheduling flexibility.⁸¹ Meanwhile, the social safety net catches fewer and fewer eligible families.⁸²

73 JOAN ENTMACHER, ET AL., *INSECURE & UNEQUAL: POVERTY AND INCOME AMONG WOMEN AND FAMILIES 2000–2013* 1 (2014), http://www.nwlc.org/sites/default/files/pdfs/final_2014_nwlc_poverty_report.pdf [<https://perma.cc/8FGF-EXWS>]. See also Gregory, *supra* note 53, at 285 (Women "remain underrepresented in prestige professions and 'top jobs'; they typically receive lower pay; and they feature disproportionately among the low-paid. Equality of outcomes in the labor market has not been achieved."); Albelda, *Gender Impacts*, *supra* note 55, at 83 (examining the "large share of female-headed households that disproportionately fill the bottom ranks").

74 Poverty rates are significantly higher for families headed by Black, Hispanic, and Native American single mothers. See ENTMACHER, ET AL., *supra* note 73, at 3. For these women of color, it is harder to obtain employment, their jobs are more likely to be low-paid, and their wages are depressed by both race and gender discrimination. See Marlene Kim, *Race and Ethnicity in the Workplace*, in *HANDBOOK ON GENDER*, *supra* note 56, at 218, 219–26. For instance, the author's study showed that "black women were underpaid 9 percent because of their race, 15 percent because of their gender, and 3 percent because of the intersection of both gender and race." *Id.* at 231.

75 See *supra* notes 50 to 67 and accompanying text.

76 See ICELAND, *supra* note 62, at 99–100.

77 See ENTMACHER, ET AL., *supra* note 73, at 4.

78 Albelda, *Low-wage Mothers*, *supra* note 72, at 257, 258.

79 *Id.* at 257, 264.

80 See ENTMACHER, ET AL., *supra* note 73, at 4.

81 See Albelda, *Low-wage Mothers*, *supra* note 72, at 257, 263, 267–68.

82 See Shaefer & Edin, *supra* note 11, at 29–30.

Working poor women struggle to procure affordable childcare while enduring low pay, irregular and part-time hours, and lack of benefits.⁸³ Often these women work as childcare providers for more affluent women, while unable to afford childcare for their own children.⁸⁴ The United States' low levels of governmental support for paid childcare "exacerbates the inequality among women through the privatization of care costs."⁸⁵ Due to societal gender norms, women provide the majority of unpaid household labor,⁸⁶ and women's care responsibilities subject them to discrimination in the workplace, where the ideal worker is defined by a male norm.⁸⁷ Employers treat low-wage women workers as "unencumbered," subjecting them to variable and unpredictable work hours, and placing women in a bind when it comes to caring for their own children.⁸⁸

Fourth, the life experiences of women vary sharply by class, mirroring the overall pulling away of the top 1%.⁸⁹ One stark difference is that women in the top 1% live on average 10 years longer than those in the bottom 1%.⁹⁰ Moreover, the life expectancies of women in the bottom 40% are shrinking rather than improving.⁹¹

Although women are living comfortably at the top, it is worth noting that even in the top 1%, women still lag behind men. In fact, the gender wage gap is actually largest for

83 See Albelda, *Gender Impacts*, *supra* note 55, at 84; CTR. FOR AM. PROGRESS, *supra* note 8, at 133.

84 See Albelda, *Gender Impacts*, *supra* note 55, at 84.

85 *Id.*

86 See Nelson, *Gender and Caring*, in HANDBOOK ON GENDER, *supra* note 56, at 64.

87 See Heather Boushey, *The Role of the Government in US Work-family Conflict*, in HANDBOOK ON GENDER, *supra* note 56, at 307, 309.

88 See McCrate, *supra* note 56, at 279.

89 See Albelda, *Gender Impacts*, *supra* note 55, at 84. Lisa Pruitt explains that geography is also a powerful determinant of one's class and gender experience, stating, "the culture wars are now largely being fought—at least rhetorically—across the rural-urban divide." Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U.L. REV. 767, 772 (2011). See also generally Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421 (2007).

90 Raj Chetty et al., *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 J. AM. MED. ASSOC. 1750 (2016).

91 See Josh Zumbrun, *The Richer You Are the Older You'll Get*, WALL ST. J., Apr. 18, 2014, <http://blogs.wsj.com/economics/2014/04/18/the-richer-you-are-the-older-youll-get/> [<https://perma.cc/L4ZV-H5UT>].

women at the top of the income scale.⁹² The rise of overall economic inequality in the United States is due in part to a class of multi-million dollar earning supermanagers.⁹³ They are mostly male.⁹⁴ In 2012, executive officer positions at Fortune 500 companies were only 14% female, while 25% of these companies had no female executives at all.⁹⁵ Among the superrich, women constitute only forty-two of the four hundred richest Americans, and of these women, thirty-eight accrued their wealth by inheriting from their fathers and husbands.⁹⁶ In short, “[t]he glass ceiling is still there” at the top.⁹⁷

All these trends are “economically inefficient and socially inequitable.”⁹⁸ They result from public policies that are stuck in “an early twentieth-century mindset about who works and who cares, one that no longer reflects the ways that American families work and live.”⁹⁹ The lower tier of the economy is starting to look more and more like a gendered economy, where women are paid less and segmented into traditionally female occupations. This spells bad times ahead for both men and women. Indeed, due to stagnation in the labor market, women’s workplace disadvantages are spreading to low-wage men. These disadvantages

92 See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 3 (Inst. for the Study of Labor Discussion Paper No. 9656, 2016), <http://ftp.iza.org/dp9656.pdf> [<https://perma.cc/ZQD5-QBYK>]. Relatedly, the pay gap for women in management-related occupations is seventy-four cents to every dollar earned by a similarly situated man. See RANDY ALBELDA, ROBERT DRAGO & STEVEN SHULMAN, *UNEQUAL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION* (3d ed. 2010).

93 See PIKETTY, *supra* note 6, at 298–303. The rise of the super wealthy has serious consequences for society; it extends beyond “private luxury [to] public power.” David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 640 (2014). As Grewal explains, the superrich “can buy media corporations and private military contractors; they can sway individual elections and determine electoral trends.” *Id.* at 640 (footnotes omitted). Through philanthropy, they can spend at levels rivaling governments “and thus reorient humanitarian, cultural, and scientific agendas to their personal priorities.” *Id.* “They can coopt state functions . . . through privatizations, special bailouts, and preferential treatment of various kinds, which socializes risk while privatizing profit.” *Id.*

94 See Perrons, *supra* note 44, at 672.

95 CARBONE & CAHN, *supra* note 51, at 64.

96 NOAH, *supra* note 37, at 49.

97 See Fatih Guvenen, Greg Kaplan & Jae Song, *The Glass Ceiling and the Paper Floor: Gender Differences Among Top Earners, 1981–2012* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 20560, 2014), https://fguvenendotcom.files.wordpress.com/2014/04/gks_top_earners_2014_wpsep2014.pdf [<https://perma.cc/34EX-NFCZ>]. “[T]he shares of females in the top percentiles were below 15% for the top 0.1 percent, and below 20% for the second 0.9 percent.” *Id.* at 13.

98 Gregory, *supra* note 53, at 285.

99 Boushey, *supra* note 87, at 307.

“includ[e] stagnating male median wages, reduced men’s labour force participation, a reduction in the percentage of men with employment-based benefits, a decline in male breadwinners, and growth in men’s share in low-wage and part-time work.”¹⁰⁰ In short, gender-based economic inequality is bad for everyone.

C. Feminist Economic Theory

The insights of feminist economic theory are helpful in expanding feminist legal analysis beyond gender to incorporate the relationship between gender, class and law. The field of feminist economics¹⁰¹ is a response to mainstream, or neoclassical, economics and its animating model that individuals are rational actors who seek to maximize their economic self-interest.¹⁰² This maximization occurs in markets “in which perfect competition prevails. In these markets, goods are exchanged for goods, with money serving only as a neutral intermediary in the exchange.”¹⁰³ In this view, the outcome of transactions is efficient if one party is better off and no party is worse off—efficiency is the goal.¹⁰⁴ “The market

100 Albelda, *Gender Impacts*, *supra* note 55, at 98. Notably, among men, only those with college educations have seen their wages increase over the past four decades. ICELAND, *supra* note 62, at 102.

101 On the history of the feminist economics movement, which began in the early 1990s, see Marianne A. Ferber & Julie A. Nelson, *Beyond Economic Man, Ten Years Later*, in FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN [hereinafter FEMINIST ECONOMICS] 2–11 (Marianne A. Ferber & Julie A. Nelson eds., 2003). “Feminist economics emerged from dissatisfaction with the mainstream model for all the elements of economic life left out and rendered invisible, particularly traditionally female responsibilities for housework, childcare, and broader care of the family and community.” Marilyn Power, *A Social Provisioning Approach to Gender and Economic Life*, in HANDBOOK ON GENDER, *supra* note 56, at 7, 9. Feminist economics is one of several heterodox economics movements critical of inadequacies within neoclassical economics. See Robert Ashford, *Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues*, 41 SAN DIEGO L. REV. 133, 137–38 (2004) (listing various schools of thought); Kenneth M. Casebeer & Charles J. Whalen, *Taking Interdependence and Production More Seriously: Toward Mutual Rationality and a More Useful Law and Economics*, 66 U. MIAMI L. REV. 141, 142 (2001) (listing core critiques of heterodox economists).

102 See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW 2* (9th ed. 2014) (Describing economics as “the science of rational choice in a world—our world—in which resources are limited in relation to human wants. The task of economics, so understood, is to explore the implications of assuming that human beings are rational maximizers of their ends in life, their satisfactions—equivalently, their ‘self-interest’ . . .”).

103 Charles R.P. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 541 (1998).

104 See *Introduction*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 22, at xiv. Note that the term “neoclassical economics” includes many strands and theories; this Article summarizes its foundational precepts. See Tony Lawson, *What is this “School” Called Neoclassical Economics?* CAMBRIDGE J. ECON. 1 (2013) (the term neoclassical is “employed to denote a range of substantive theories and policy stances”).

becomes the instrument of allocation, and individual self-interested economic decisions collectively achieve an optimal societal equilibrium.”¹⁰⁵ The law and economics movement applies these principles both to explain and improve law.¹⁰⁶ In its decisions impacting working class women, the Supreme Court clings to neoclassical economic assumptions, as incorporated into law through the law and economics movement and its emphasis on using law to promote economic efficiency.¹⁰⁷

Feminist economists assert that the neoclassical economic “models . . . often marginalized women’s experience, assumed away discrimination or differentials of power, or assumed that any observed differences were the outcome of ‘essential’ differences between men and women, and therefore were natural, inevitable, and even desirable.”¹⁰⁸ Rather than

105 Pouncy, *supra* note 103, at 541.

106 As with neoclassical economics, the law and economics movement has an “array of literatures, submovements, and schools of thought.” Anita Bernstein, *Whatever Happened to Law and Economics?* 64 MD. L. REV. 303, 305 (2005). Still, its major precepts hinge on rational choice, efficiency and/or wealth maximization, and faith in markets. *Id.* at 308–18. For background on how the law and economics movement gained a foothold within the legal academy despite considerable critique, see Thomas O. McGarity, *A Movement, a Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 STAN. L. & POL’Y REV. 51, 61–62 (2010); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 139–47, 272–78 (2003). For the history of law and economics and its antecedents, see generally Herbert Hovenkamp, *Law and Economics in the United States: A Brief Historical Survey*, 19 CAMBRIDGE J. ECON. 331–52 (1995).

107 See *Introduction*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 22, at xiii–xv. A small group of feminist legal theorists have critiqued law and economics along the same lines as feminist economists. See Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 ANN. REV. L. & SOC. SCI. 285, 286 (“if adopting law and economics methodology means restricting one’s work to efficiency analysis and income redistribution, then the value of economics is substantially limited”); Barbara Ann White, *Economic Efficiency, Economic Efficiency and the Parameters of Fairness: A Marriage of Marketplace Morals and the Ethic of Care*, 15 CORNELL J.L. & PUB. POL’Y 1, 11–12 (2005) [hereinafter White, *Economic Efficiency*] (discussing the tension between law and economics scholars and feminist scholars and proposing that both groups can learn from the other). For a robust critique of neoclassical economic theory from a feminist perspective, see Neil H. Buchanan, *Playing with Fire: Feminist Legal Theorists and the Tools of Economics*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 22, at 61–93.

108 Power, *supra* note 101, at 8. See also Paula England, *Separative and Soluble Selves: Dichotomous Thinking in Economics*, in FEMINIST ECONOMICS, *supra* note 101, at 33, 43 (summarizing principles of neoclassical economics); Drucilla K. Barker, *Feminist Economics as a Theory and Method*, in HANDBOOK ON GENDER, *supra* note 56, at 18, 19–20 (same); *Preface*, in FEMINIST ECONOMICS, *supra* note 101, at vii (feminist economics is a response to “biases which give market relations pride of place over family and social relations, emphasize heroic individualism while ignoring interdependence, and define rationality so narrowly . . . leave the discipline impoverished”).

“speaking truth to power,” neoclassical economics “accommodates and naturalizes it.”¹⁰⁹ By contrast, feminist economists stress the interdependence of social structures and human relationships.¹¹⁰ Expanding economic inquiry to this “more complex, holistic” view¹¹¹ allows us to see how economic life both shapes and is influenced by gender norms.¹¹² It focuses less on formal models, and more on how actual people live their lives.¹¹³ It recognizes that gender matters to economic outcomes, given that “women still bear a disproportionate bulk of the burdens of poverty [and] social and economic exclusion”¹¹⁴

Feminist economists study a wide range of issues and apply a variety of approaches, and this summary necessarily simplifies much complex thought.¹¹⁵ There are at least four overarching methodological commitments within the field, each of which is tied to a critique or failure of mainstream economic thought.¹¹⁶ First, feminist economists include domestic and care work within the study of economic systems.¹¹⁷ Domestic and care work is central to women’s lives,¹¹⁸ yet traditional economics excludes care work from its analysis, as well as from standard measures of productivity, such as the Gross National Product.¹¹⁹ These

109 Barker, *supra* note 108, at 25.

110 Deborah M. Figart & Tonia L. Warnecke, *Introduction*, in HANDBOOK ON GENDER, *supra* note 56, at 1 (“the economy is embedded in society”); Barker, *supra* note 108, at 19 (“Feminist economists have been critical of the assumption of self-interested individualism and the lack of any interactions, except those organized according to the principles of self-interested contractual exchange, because these assumptions excluded considerations of the dependent children, the elderly, and the infirm.”). *See also* Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar’s Survey and (Re)view*, 10 UCLA WOMEN’S L.J. 39, 48 (1999) [hereinafter White, *Feminist Foundations*] (describing the centrality of the ethic of care to feminist thought in which “concern for others is of paramount importance”).

111 Power, *supra* note 101, at 14.

112 Figart & Warnecke, *supra* note 110, at 1.

113 Barker, *supra* note 108, at 20.

114 *Id.* at 18.

115 *See* Power, *supra* note 101, at 11; Barker, *supra* note 108, at 23; Myra H. Strober, *The Application of Mainstream Economics Constructs to Education: A Feminist Analysis*, in FEMINIST ECONOMICS, *supra* note 101, at 135, 137.

116 Power, *supra* note 101, at 11.

117 *Id.* at 11; England & Folbre, *Contracting for Care*, in FEMINIST ECONOMICS, *supra* note 101, at 61, 63.

118 *Id.* at 63.

119 *See* Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, in FEMINISM CONFRONTS HOMO

exclusions serve to keep women “in their place.”¹²⁰ Feminist economists contend that care work, usually unpaid or low-paid, has immense value for society, even as its workers are often degraded and devalued.¹²¹ In this vein, feminist economists recognize “understandings of motivation that do not fall under narrow or tautological notions of self-interest,”¹²² such as moral obligation and emotional connection.¹²³ This mix of motivations makes caring labor valuable for society, but also depresses care work wages. Feminist economists also highlight that women’s wages suffer as a result of their care work obligations and that women continue to assume most household care responsibilities even if they work outside the home.¹²⁴

Second, feminist economists maintain that economic success should be measured in terms of human well-being—or the “ability to lead a life one values”—and not simply by efficiency or profit-maximization norms.¹²⁵ Moreover, even if transactions operate efficiently, outcomes can be unfair when the bargaining positions of actors are skewed

ECONOMICUS, *supra* note 22, at 423, 424. Many feminist economists respond to the work of Nobel Prize winning economist Gary Becker, who theorized about families, namely that division of labor within families based on gender furthers utility and that male heads of household are altruistic, thereby coordinating family behavior. For a summary of Becker and his school of New Home Economics, see Philomena Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007) (arguing that feminists should use Becker’s theories to enhance feminist goals).

120 MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* 245 (1988). Waring’s groundbreaking work has led to new methods of accounting for women’s well-being and the benefits of household work. See Terje Langeland, *Women Unaccounted for in Global Economy Proves Waring Influence*, BLOOMBERG (June 18, 2003), <http://www.bloomberg.com/news/articles/2013-06-18/women-unaccounted-for-in-global-economy-proves-waring-influence> [<https://perma.cc/FQV8-DLD7>]. There is a debate within feminism about the commodification of household labor. See generally Katharine B. Silbaugh, *Commodification and Women’s Household Labor*, in *FEMINISM CONFRONTS HOMO ECONOMICUS*, *supra* note 22, at 338–72.

121 See *infra* Part IV.A.

122 Power, *supra* note 101, at 10. Legal scholar Barbara Ann White makes a similar reflection with regard to the law and economics movement, stating, “neoclassical law and economics views law as merely serving to facilitate the economic efficiency of the market and insists that an economy should be evaluated by its aggregated national wealth,” thus “ignoring any notice of the number of poor or the standard of living among the many.” White, *Feminist Foundations*, *supra* note 110, at 67.

123 England & Folbre, *supra* note 117, at 62–63.

124 See Nelson, *supra* note 86, at 62, 64–66.

125 Power, *supra* note 101, at 12.

at the start. Thus, ethics should be part of economic analysis.¹²⁶ This perspective shifts from a focus on efficiency to encompass a range of values, such as caring, quality of life, responsibilities to community, and economic justice.¹²⁷ Nancy Folbre and Julie Nelson write that neoclassical economics is based on stereotypically male norms of autonomy and individual accomplishment, whereas women are traditionally associated with social and physical connection.¹²⁸ As a result, “[n]eglecting the ‘connected’ aspects of human life . . . is a form of gender bias, in that aspects of human life traditionally associated with femininity are being irrationally downplayed.”¹²⁹

A third feminist economic principle is that human agency is essential to assessing economic events.¹³⁰ Accordingly, “questions of power, and unequal access to power, are part of the analysis from the beginning.”¹³¹ In this analysis, the study of processes is just as important as the evaluation of outcomes.¹³² Feminist economists analyze power dynamics within the household, within the workplace, and within the public sphere.¹³³ For instance, within the household, feminist economists have explored how people who remain outside the market are vulnerable to abuse by their more powerful partners, and also face potential economic catastrophe when a marriage dissolves.¹³⁴ As to the marketplace, most economics texts view the sale of labor as an exchange benefitting both parties. “No mention is made of the fact that the employer has power over the employee, or of the particular power

126 *Id.* at 13. *See also* White, *Economic Efficiency*, *supra* note 107, at 15–17 (describing the feminist ethic of care). White states that the ethic of care is “an alternative moral philosophy that is needs-based and guides community decisions according to differences among individuals.” *Id.* at 16.

127 Power, *supra* note 101, at 9. *See also* White, *Feminist Foundations*, *supra* note 110, at 66–67 (“the economic well-being of a society should be the distribution of income, and that a measure of an economically stable economy is one which maximizes the number of individuals who can earn a ‘decent wage’”).

128 Nancy Folbre & Julie A. Nelson, *For Love or Money—or Both?*, 14 J. ECON. PERSP. 123, 131 (2000).

129 *Id.*

130 Power, *supra* note 101, at 12.

131 *Id.* at 12. Paula England discusses how people can be both autonomous and interconnected, contrary to assumed dichotomies within neoclassical economics. *See* England, *supra* note 108, at 35–40.

132 Power, *supra* note 101, at 12.

133 *See e.g.*, Bina Agarwal, “Bargaining” and Gender Relations: Within and Beyond the Household, 3 FEMINIST ECON. 1 (1997) (discussing bargaining models within families, the market, communities and the state).

134 *See* Geoff Schneider & Jean Shackelford, *Economics Standards and Lists: Proposed Antidotes for Feminist Economics*, 7 FEMINIST ECON. 77, 83 (2001) (citing the work of Barbara Bergmann).

inequities in the exchange that reinforce the employer's power."¹³⁵ Feminist analysis also provides a richer description of how businesses actually act, as opposed to how models predict they will act.¹³⁶ With regard to the state, feminists note government's potential to correct for market imperfections, but also to be captured by powerful interests and to reinforce gender inequality.

Fourth, (and here economists have borrowed from feminist legal theory and the foundational insights of Kimberlé Crenshaw¹³⁷), economic analysis should include intersectional understandings of how class, race, ethnicity, gender, sexual orientation, and other identities interact.¹³⁸ The intersection of these forms of oppression generates a specific life experience, and as a result, efforts to enhance equality must take into account these multiple dimensions.¹³⁹ "Without a vision that is sensitive to the different but interactive effects of race and gender on economic outcomes, we would not see the differences in patterns of discrimination nor be impelled to ask how we might explain them."¹⁴⁰ This also means that feminist theorists need to be aware of their own privilege and to interrogate their own values and ideology.¹⁴¹

These principles provide a tool for assessing and reforming law, which of course, helps to shape the economy. Unfortunately, the Supreme Court opinions studied here are a depressing rejection of these feminist economic ideals. In the conservative Court majority's

135 *Id.*

136 Julie A. Nelson, *Separative and Soluble Firms: Androcentric Bias and Business Ethics*, in FEMINIST ECONOMICS, *supra* note 101, at 81, 96 (describing businesses as "entities that involve real, living people who form complex economic (and social) relationships").

137 Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L.F. 139 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

138 Power, *supra* note 101, at 13. *See also* S. Charusheela, *Intersectionality*, in HANDBOOK ON GENDER, *supra* note 56, at 32, 32–43.

139 Charusheela, *supra* note 138, at 32–33.

140 Lisa Saunders & William Darity Jr., *Feminist Theory and Racial Based Economic Inequality*, in FEMINIST ECONOMICS, *supra* note 101, at 101, 109. An example of this sort of analysis is in Gary Dymksi et al., *Race, Gender, Power, and the US Subprime Mortgage and Foreclosure Crisis: A Meso Analysis*, 19 FEMINIST ECON. 124 (2013) (describing how banking strategies underlying the foreclosure crisis were shaped by and reinforced patterns of racial and gender inequality).

141 Barker, *supra* note 108, at 27.

law and economics viewpoint, government regulation hinders efficient outcomes generated by the market, “thus obviating the need for laws that redistribute rights and resources in an egalitarian manner.”¹⁴² Not surprisingly, the Court’s narrow view of the economy leads to results that are bleak for women workers.¹⁴³ As explained below, the Court’s opinions devalue the contributions of care workers, elevate profits over the needs of workers, reinforce power structures that oppress women and limit their economic security, and apply harmful gender, race, and class stereotypes about women workers. The three decisions analyzed below are the Court’s leading, most recent opinions regarding women’s roles within the low-wage workforce. Collectively, they impact millions of women, including women who were not parties to the actual cases. In each case, the workers lost by a close 5-4 decision. The analysis below does not focus on the substantive law implicated by the decisions, but rather, examines the underlying economic and gender assumptions of the majority and the dissents.

II. *Wal-Mart v. Dukes* and Modern-Day Discrimination

A. The Economics of Discrimination

Over fifty years after Congress passed Title VII and outlawed employment discrimination on the basis of race, color, religion, sex, or national origin,¹⁴⁴ such discrimination still exists. Evidence of discrimination arises from continued high rates of employment discrimination complaints,¹⁴⁵ as well as studies by labor economists.¹⁴⁶ For instance, blind audit studies

142 See *Introduction, in FEMINISM CONFRONTS HOMO ECONOMICUS*, *supra* note 22, at xiv; Terence Dougherty, *Economic Rhetoric, Economic Individualism, and the Law and Economics School, in FEMINISM CONFRONTS HOMO ECONOMICUS*, *supra* note 22, at 3.

143 These outcomes are consistent with a general pro-business tilt of the Roberts Court. See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (stating that the “Roberts Court is much friendlier to business” than its preceding courts).

144 Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e.

145 See *Charge Statistics FY 1997 Through FY 2015*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/3WGL-P4NT>] (showing over 88,000 discrimination claims filed in 2014). While success rates in litigation are low, this is not due to a lack of merit. See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–83, 1288 (2012). See also Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1, 4–24 (2005) [hereinafter Selmi, *Sex Discrimination*] (describing major class action employment discrimination lawsuits, most of which resulted in settlements).

146 See Selmi, *Sex Discrimination*, *supra* note 145, at 26–42 (summarizing results of empirical studies

have shown that female orchestra candidates are more likely to be selected if they audition behind a screen, where gender is invisible to selectors.¹⁴⁷ Similarly, studies have shown that employers are 50% more likely to select resumes with racially identifiable white names over identical resumes with stereotypically Black names.¹⁴⁸ Likewise, statistical studies reveal managerial preferences for employees who share the same race as the manager.¹⁴⁹ The gender pay gap is yet another indication and result of discrimination.¹⁵⁰ Studies establish that even after controlling for a variety of variables that contribute to the pay gap—such as personal preference, individual qualifications, occupation, and industry—a remaining gap is attributable to discrimination.¹⁵¹

Discrimination has both individual and societal harms. It is unfair and dignity-stripping to reward or punish workers on the basis of innate traits that are irrelevant to job performance. Discrimination can result in psychological injuries ranging from depression

and their limitations); John J. Donohue III, *The Law and Economics of Antidiscrimination Law* 38–46 (Nat'l Bureau of Econ. Research, Working Paper No. 11631, 2005), <http://www.nber.org/papers/w11631.pdf> [<https://perma.cc/WY7V-89ZA>] (same).

147 Claudia Goldin & Ceclilia Rouse, *Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

148 Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991–1013 (2004). See also Devah Pager, *Race, Ethnicity, and Inequality in the U.S. Labor Market: Critical Issues in the New Millennium: The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 112 (2007) (“[e]ach study comes to the same basic conclusion—that race matters in hiring decisions”).

149 Laura Guliano, David I. Levine & Jonathan Leonard, *Manager Race and the Race of New Hires*, 27 J. LAB. ECON. 1, 37 (2008), <http://www.irle.berkeley.edu/workingpapers/150-07.pdf> [<https://perma.cc/95ZW-MLGS>].

150 See, e.g., JUDY GOLDBERG DEY & CATHERINE HILL, *BEHIND THE PAY GAP* 3 (2007), <http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> [<https://perma.cc/Y6GK-H3MN>]; Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP. 75, 82 (2000).

151 See Cheryl Travis et al., *Tracking the Gender Pay Gap: A Case Study*, 33 PSYCHOL. WOMEN Q. 410, 410–11 (2009) (citing studies); Gowri Ramachandran, *Pay Transparency*, 116 PA. ST. L. REV. 1043, 1050–51 (2012) (describing studies of the race and gender pay gap that controlled for multiple factors and concluded that discrimination was a factor). There is also a gender gap in management; women are 49% of the non-managerial workforce, but only 40% of managers. U.S. GOV'T ACCOUNTABILITY OFFICE, *WOMEN IN MANAGEMENT: ANALYSIS OF FEMALE MANAGERS' REPRESENTATION, CHARACTERISTICS, AND PAY* 6 (2010), <http://www.gao.gov/new.items/d10892r.pdf> [<https://perma.cc/NDU8-WX3Y>].

to post-traumatic stress disorder.¹⁵² Moreover, discrimination results in under-utilization of human capital and skills.¹⁵³ Not surprisingly, discrimination has economic consequences. Studies show that businesses with greater gender diversity, and that utilize equal pay and promotion practices have higher revenues, profitability, and market share due to greater employee loyalty and productivity.¹⁵⁴ The converse is true as well. Moreover, four in ten mothers are primary breadwinners for their families.¹⁵⁵ Thus, wages that are depressed due to discrimination result in less income for families to spend on goods and services. Class actions are one effective means for combating discrimination. Class actions are important because they are not only efficient, but they also allow plaintiffs to uncover evidence of systemic practices and to aggregate low-value claims that they otherwise could not afford to bring.¹⁵⁶ However, the Supreme Court limited the availability of this tool in *Wal-Mart v. Dukes*.

152 See Wizdom Powell Hammond, Marion Gillen & Irene H. Yen, *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBS. 19 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2867471/> [<https://perma.cc/SKF4-LYLM>] (“Exposure to workplace discrimination has . . . been found to harm mental health from diminished psychological well-being, increased risk of psychological distress, and pronounced depressive symptoms.”); JANE GOODMAN-DELAHUNTY & WILLIAM E. FOOTE, EVALUATION FOR WORKPLACE DISCRIMINATION AND HARASSMENT 81 (2010) (describing psychological impacts of discrimination).

153 Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. L. REV. 1, 9 (2004) (“Not only does discrimination lower human capital, it also negatively influences the strategic choices of discriminated-against groups.”). See also *id.* at 13 (describing harms of discrimination).

154 See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 426 (2008).

155 See Catherine Rampell, *U.S. Women on the Rise as Family Breadwinner*, N.Y. TIMES, May 29, 2013, at B1 (reporting on results of a Pew Research Center analysis of Census and polling data).

156 See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 36–37 (2011); Roger W. Reinsch & Sonia Goltz, *You Can't Get There From Here: Implications of the Walmart v. Dukes Decision for Addressing Second-Generation Discrimination*, 9 NW. J. L. & SOC. POL'Y 264, 267 (2014); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1634 (2007) (“These claims require for their success that workplace decisions be evaluated in the aggregate.”).

The Court has also limited the availability of class actions in other cases. In *AT&T Mobility LLC v. Concepcion*, Justice Scalia authored a 5-4 majority opinion that allows corporations and employers to use arbitration clauses to shield themselves from class actions. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). On the impact of that case, see Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

B. Background of the Case

In 2001, a proposed class of over 1.5 million current and past female employees filed a complaint against Wal-Mart alleging that Wal-Mart paid them less than men, despite women's overall better performance and greater seniority, and provided women with fewer opportunities for promotion to management.¹⁵⁷ Wal-Mart is the largest private employer in the United States, with approximately 3,400 stores and more than one million employees.¹⁵⁸ The plaintiffs alleged that Wal-Mart's policy of giving its mostly male managerial workforce discretion over pay and promotion decisions allowed biases against women to infect the decision-making process in ways that disparately impacted women.¹⁵⁹ Moreover, given that Wal-Mart was aware of the effect of its subjective discretion policy but did nothing to restrict it, women were subject to disparate treatment.¹⁶⁰

In their motion for class certification, the plaintiffs provided statistical data showing that women filled 65% of the hourly jobs at Wal-Mart, but constituted only 33% of management, with diminishing numbers farther up the ranks.¹⁶¹ In certifying the plaintiffs as a class, the district court found that there was sufficient evidence to suggest that this gender disparity resulted from Wal-Mart's company-wide, subjective selection process, combined with its failure to post promotional opportunities.¹⁶² With regard to pay, the district court found "largely uncontested descriptive statistics" that women were paid less than men "in every region, that pay disparities exist in most job categories, [and] that the salary gap widens over time."¹⁶³ This disparity resulted within a "common feature of subjectivity" in setting pay across all stores.¹⁶⁴

157 Plaintiff's Third Amended Complaint, *Dukes v. Wal-Mart Stores, Inc.* 222 F.R.D. 137 (N.D. Cal 2004) (No. C-01-2252). The motion for class certification covered all women employed by Wal-Mart at any time since December 26, 1998. *See id.* at 141–42.

158 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

159 *Id.* at 2548.

160 *Id.* at 2548. Disparate treatment claims cover allegations that an employer treats some people differently on a prohibited basis; disparate impact involves employment practices that are facially neutral, but whose effects fall more harshly on a protected group. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 111 (2003).

161 *Dukes v. Wal-Mart Stores, Inc.* 222 F.R.D. 137, 146 (N.D. Cal 2004).

162 *Id.* at 148–49.

163 *Id.* at 155.

164 *Id.* at 148.

The plaintiffs also provided anecdotal evidence of gender bias through affidavits from 121 class members.¹⁶⁵ The district court cited comments by managers such as “[m]en are here to make a career and women aren’t. Retail is for housewives who just need to earn extra money,” and “[w]e need you in toys . . . you’re a girl, why do you want to be in Hardware.”¹⁶⁶

The district court further found that Wal-Mart’s uniform, centrally controlled corporate culture—called the Wal-Mart Way—may reinforce gender stereotypes through training programs, daily and weekly meetings in which company culture was discussed, promotions from within existing ranks, movement of store-level managers across stores and districts, and technological monitoring of all management decisions by the Home Office.¹⁶⁷ The district court accepted the social framework testimony of the plaintiffs’ expert, who explained how managerial discretion over pay and promotions, exercised within Wal-Mart’s uniform corporate culture, fostered gender stereotyping, in which managers would “‘seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.’”¹⁶⁸ The Ninth Circuit, in a rehearing en banc, upheld the district court’s class certification decision.¹⁶⁹ The Supreme Court subsequently reversed both lower courts.

C. The Majority Opinion

Writing for the majority, Justice Scalia held that the plaintiffs did not satisfy the commonality requirement for class certification under Federal Rule of Civil Procedure 23 because they could not show that Wal-Mart was motivated by the same reason for each employment outcome.¹⁷⁰ Justice Scalia stated that there was no “common answer to the crucial question *why was I disfavored*.”¹⁷¹ In the Court’s view, a policy of subjective discretion is not a uniform employment practice that provides the necessary commonality for class certification.¹⁷² Rather, subjective promotion and pay practices are a “very common

165 *Id.* at 165.

166 *Id.* at 165–66.

167 *Wal-Mart*, 222 F.R.D. at 151–54.

168 *Id.* at 153–54 (quoting declaration of Dr. William Bielby).

169 *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010).

170 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554–56 (2011).

171 *Id.* at 2552.

172 *Id.* at 2554.

and presumptively reasonable way of doing business”¹⁷³ Moreover, such subjective personnel practices could not constitute an official employer policy, because “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”¹⁷⁴ Under the Court’s evidentiary standard for establishing commonality, employees must provide “significant proof” that their employer “operated under a general policy of discrimination”¹⁷⁵ Subjective personnel policies apparently can no longer satisfy this new standard.¹⁷⁶

The opinion reflects many of the failings identified by feminist economists. The majority surfaced two economic assumptions about discrimination: first, discrimination is aberrant and arises only when a bad actor intentionally acts upon bias; and second, the market ensures that discrimination is too inefficient to be widespread. Both of these assumptions reflect dated thinking about how discrimination operates. In addition, the majority devalued the care work obligations of women.

D. The Court’s Market Assumptions

Whereas the majority searched in vain for a corporate policy of discrimination, the dissent, authored by Justice Ginsburg (and joined by Justices Breyer, Sotomayor, and Kagan), applied a more nuanced understanding of discrimination.¹⁷⁷ Justice Scalia expressed incredulity that supervisors would choose to discriminate, stating with no supporting evidence that “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”¹⁷⁸

173 *Id.* at 2554.

174 *Id.* at 2555.

175 *Id.* at 2553 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, n.15) (internal quotations omitted). The Court also rejected plaintiff’s statistical evidence, *id.* at 2555, and the testimony about social framework, *id.* at 2553–54.

176 Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012) (predicting that although the case was decided on procedural grounds, it portends changes in substantive Title VII law that will harm employees).

177 *Wal-Mart v. Dukes*, 131 S. Ct. at 2561.

178 *Id.* at 2554.

He is not alone: “Many individuals resist recognizing the existence of pervasively unfair group-based outcomes, as doing so would challenge the widely held and deep-seated belief that the world is just and that outcomes are based on personal control, meritocracies, and fairness.”¹⁷⁹ The Court majority—and indeed the general public—remains wedded to the American myth of meritocracy, in which a free market rewards the deserving based on hard work and skill.¹⁸⁰ This belief system has deep psychological roots that make people reluctant to attribute bad outcomes to discrimination.¹⁸¹ The meritocracy myth misses the huge impact of non-merit factors on individual success, such as inheritance (or the class position from which one starts out in life), educational opportunities, and discrimination.¹⁸² Nevertheless, the myth and its economic underpinnings animate much of the majority’s viewpoints about discrimination. This viewpoint reinforces, rather than balances, existing power dynamics in favor of business owners.

By contrast, Justice Ginsburg did not ascribe to or require an “evil” motive on the part of employers to find discrimination.¹⁸³ Rather, she understands that discrimination can be unintentional. As she stated, “The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.”¹⁸⁴ Justice Ginsburg was referring to the process of cognitive, or unconscious, bias. As she stated, “The risk of discrimination is heightened when . . . managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.”¹⁸⁵

179 Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 841 (2009).

180 Eyer, *supra* note 145, at 1304; STEPHEN J. & ROBERT K. MILLER, JR., *THE MERITOCRACY MYTH* 1–9 (2d ed. 2009). See also Deborah Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1852–60 (1996) (describing competing theoretical models regarding the root causes of economic inequality—economic individualism versus a structural system of inequality).

181 Eyer, *supra* note 145, at 1299. This psychological phenomenon arises from the tension between American ideology about meritocracy and attributions of discriminatory conduct, which creates a “threat to many individuals’ core beliefs.” *Id.* at 1303, 1308.

182 STEPHEN J. MCNAMEE & ROBERT K. MILLER, *THE MERITOCRACY MYTH* 243–44 (2009).

183 Justice Ginsburg faced gender discrimination in her own professional life, which likely shaped her view of how it operates. See Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN’S L.J. 97, 103–07 (2000–2001).

184 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2564 (2011).

185 *Id.* at 2564.

In the early years after Title VII was passed, employment discrimination was often blatant and motivated by racial and/or gender animus.¹⁸⁶ While overt discrimination still exists,¹⁸⁷ scholars now recognize “second generation” discrimination, which is more complex and subtle and fueled by unconscious bias.¹⁸⁸ Psychologists have shown that unconscious bias arises from natural and normal cognitive shortcuts that all people use to simplify and process information.¹⁸⁹ These cognitive shortcuts contribute to stereotypes, which in turn “cause discrimination by biasing how we process information about other people.”¹⁹⁰ Although biases may operate without conscious intent to “favor or disfavor members of particular groups,” they can nevertheless “bias a decision maker’s judgment long before the ‘moment of decision’ [when the employment decision in question is made], as a decision maker attends to relevant data and interprets, encodes, stores, and retrieves it from memory.”¹⁹¹ In other words, employers expect members of certain groups to behave in certain ways, and they over-attribute information that confirms their expectations, while disregarding information that contradicts expectations.¹⁹²

Stereotyping is particularly likely to occur when evaluative criteria are subjective because biases can flourish without restraint.¹⁹³ Indeed, extensive research establishes that

186 See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 459, 459–60 (2001); Green, *supra* note 160, at 91, 95–96; Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

187 See Selmi, *Sex Discrimination*, *supra* note 145, at 4 (asserting that overt workplace discrimination still persists).

188 See Green *supra* note 160, at 96–99; Krieger, *supra* note 186, at 1186–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 326 (2000) (noting that “I and others suspect that most employment discrimination originates in the cognitive processes”); Sturm, *supra* note 186, at 468–74. An emerging field of economics called behavioral economics studies how cognitive bias and other psychological phenomena impact decision-making in ways ignored by neoclassical economics. See THE BEHAVIORAL ECONOMICS GUIDE 2015 (Alain Samson ed., 2015), <http://www.behavioraleconomics.com/the-behavioral-economics-guide-2015/> [<https://perma.cc/HUQ8-7WZJ>].

189 See Krieger, *supra* note 186, at 1187, 1199; Lee, *supra* note 186, at 482.

190 Krieger, *supra* note 186, at 1199.

191 *Id.* at 1187–88.

192 *Id.* at 1198.

193 See Lee, *supra* note 186, at 484, 487–88; Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1444 (2008); Barbara F. Reskin & Debra B. McBrier,

subjective, discretionary personnel practices contribute to pay disparities.¹⁹⁴ Despite these modern understandings of discrimination, Justice Scalia was wedded to old-fashioned notions that focus solely on an employer's state of mind rather than on how unconscious bias interacts with organizational structures to allow unchecked stereotypes to determine employment outcomes.¹⁹⁵ In so doing, he left undisturbed existing power relationships.

Justice Scalia's statement that managers will normally render sex-neutral decisions rests on a belief that the market generally cures discrimination, which, when it happens, is the result of deviant outliers. In this law and economics viewpoint, discrimination is inefficient, and therefore, the market will punish and eliminate bad actors that discriminate.¹⁹⁶ Law and economics scholars posit that competition for consumers and workers either has or will drive out discrimination, as will employers' increasing experience with women workers and resulting knowledge about their abilities and performance.¹⁹⁷ However, as Lesley Wexler has thoroughly explained in the context of the *Wal-Mart* case, there are many reasons why these neoclassical economic assumptions falter in the context of Wal-Mart. She explains how Wal-Mart can be ruthless in its pursuit of profits through low prices and high volume sales, yet still fail to implement nondiscriminatory pay and promotion practices.¹⁹⁸

Wexler highlights three key factors. First, workers have limited leverage at Wal-Mart because Wal-Mart is not concerned about worker quality or exit costs, and because workers lack comparative information about pay.¹⁹⁹ Second, Wal-Mart has limited market competition for workers; indeed, it is bigger than its next six competitors and thus drives

Why Not Ascription? Organizations' Employment of Male and Female Managers, 65 AM. SOC. REV. 210, 214 (2000). Scholars note that employers can take concrete measures to counteract stereotypes and bias. See Lee, *supra* note 186, at 486. In other words, cognitive bias is not insurmountable.

194 See Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 256 (2012).

195 As Professor Michael Selmi commented, "[t]he irony in the Court's position should be apparent: it can see discrimination only in its most blatant forms but everything we know about discrimination suggests that contemporary discrimination looks very different." Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 992 (2014) [hereinafter Selmi, *Evolution*].

196 See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 34 (1992).

197 Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 112–13 (2011).

198 *Id.* at 99–101

199 *Id.* at 114–16.

down market wages.²⁰⁰ Third, as for customers, they have little influence on Wal-Mart's employment practices due to their lack of knowledge, indifference, or shared beliefs in the governing stereotypes.²⁰¹ For all these reasons, Wexler concludes, "highly rational and efficient companies need not always sacrifice the bottom line in order to maintain a preference for discrimination."²⁰²

Wal-Mart may have an official policy against discrimination (although it was actually late to the game, enacting a policy against harassment only in the mid-1990s),²⁰³ but the Court majority is either hopelessly naïve or purely disingenuous to conclude, as it did, that this policy determines Wal-Mart's practices.²⁰⁴ All major employers have similar policies, as that is the state of the law. However, there is no evidence that official corporate statements prevent discrimination.²⁰⁵ Overall, the Court places its faith in the market to "cure" discrimination, and in so doing, it discounts other values, such as women's desire to be treated fairly without the burdens of gender stereotyping.

E. Devaluation of Care Work

The majority also failed to recognize how many women at Wal-Mart fell victim to caregiver discrimination, also known as family responsibility discrimination.²⁰⁶ This stereotype holds that because women are—and should be—the primary caretakers for their children, they are less likely to prioritize work and to therefore succeed in the workplace.²⁰⁷

200 *Id.* at 117.

201 *Id.* at 118–19.

202 *Id.* at 121.

203 Wexler, *supra* note 197, at 110–11.

204 *See Selmi, Evolution, supra* note 195, at 991. *See also Moss, supra* note 153, at 20–23 (noting that most employers have boilerplate anti-discrimination policies, which can be purely symbolic shams, but that courts nevertheless accept them as evidence of non-discrimination).

205 *See Moss, supra* note 153, at 23 ("The worse discriminators therefore have the greatest incentive to adopt the best-sounding EEO policies.").

206 *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–94 (2003) ("designing workplaces around men's traditional bodies and life patterns discriminates against women and male caregivers."); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008).

207 *See* Williams & Bornstein, *supra* note 206, at 1326.

The record in the *Wal-Mart* case was laden with examples of statements reflecting this bias, such as a male manager who stated that “women should be home barefoot and pregnant”; a female employee who was told to resign and “find a husband to settle down with and have children”; and a supervisor who asked for the resignation of the only female store manager in her district because she “needed to be home raising [her] daughter” instead of managing a store.²⁰⁸ Justice Ginsburg acknowledged the pervasiveness of this stereotype, explaining that Wal-Mart’s policy of requiring relocation as a condition for promotions created a risk that “managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.”²⁰⁹ This could lead management to pass over women willing to move, or to enforce a policy that harms women who cannot relocate as members of dual-earner families, with no concomitant productivity benefit.²¹⁰ Ginsburg sees that supposedly “natural” or “inevitable” market outcomes that disadvantage women are actually the result of stereotyped thinking put into action. She thus argues that society needs to support care work rather than punish women for their care obligations.

F. Impact

The immediate impact of the *Wal-Mart* decision was that the 1.5 million plaintiffs did not get the relief they were seeking. Instead, they had to go back to the drawing board to redesign their lawsuit, and they did so, filing a series of smaller class action complaints limited by geographical region, although there has been little success to date due to court denials of class certification and statute of limitations bars.²¹¹

208 The National Women’s Law Center collected these examples, which were taken from the Joint Appendix submitted to the Supreme Court by the litigants in *Wal-Mart v. Dukes*. *Wal-Mart v. Dukes—Why the Supreme Court Should Stand With Working Women*, NAT’L WOMEN’S L. CTR. (Mar. 1, 2011), <http://www.nwlc.org/resource/wal-mart-v-dukes-why-supreme-court-should-stand-working-women> [https://perma.cc/HP23-VUWU].

209 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011).

210 See Wexler, *supra* note 197, at 109–10; Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759, 765–66 (2013). The record showed that there were other stereotypes at play at Wal-Mart as well, including the stereotype that women are not their families’ primary breadwinners and that therefore, higher-paying positions should go to men, and the assumption that men and women prefer and are better at gender-defined roles. See Brief Amici Curiae of the American Civil Liberties Union and National Women’s Law Center, et al., In Support of Respondents, at 16–24, *Wal-Mart Stores, Inc., v. Dukes* (2011) (No. 10-277), 2011 WL 805231.

211 See Scott Flaherty, *3 Years After Dukes, Employees Struggle in Wal-Mart Cases*, LAW 360 (July 17, 2014), <http://www.law360.com/articles/558047/3-years-after-dukes-employees-struggle-in-wal-mart-cases> [https://perma.cc/RJ9W-6KJN].

One investigative study found that in the aftermath of the decision, “[j]ury verdicts have been overturned, settlements thrown out, and class actions rejected or decertified, in many instances undoing years of litigation. The rulings have come in every part of the country, in lawsuits involving all types of companies.”²¹² The study found that fewer employment discrimination class action cases are being filed, and settlement amounts have plummeted from \$346 million for the biggest ten cases in 2010 to \$45 million in 2012.²¹³ In short, *Wal-Mart v. Dukes* has tipped the litigation balance strongly in favor of employers over employees.²¹⁴ The case has clearly impacted the availability of large class actions challenging employment practices.

The case has also left employment discrimination law in flux, particularly as applied to second generation claims challenging subjective employment practices.²¹⁵ These forms of discrimination operate “less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement.”²¹⁶ The majority’s ruling means that discretionary employment practices cannot provide the basis for a common claim in a class action lawsuit.²¹⁷ The result may be an increase of gender-based pay disparities in the workplace, due to the Court’s presumption that subjective personnel practices are reasonable.²¹⁸ In fact, employers may now have a perverse incentive to maintain subjective practices without centralized oversight as a way of evading Title VII liability. And, given Wal-Mart’s dominant status in the marketplace, other employers may be encouraged to

212 Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PROPUBLICA (Sept. 27, 2013), <http://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case> [https://perma.cc/7QS7-96FM].

213 *Id.*

214 See Malveaux, *supra* note 156, at 35, 52; Katherine E. Lamm, *Work on Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153 (2015) (surveying impact of the case on future class actions and making recommendations to litigators). Cf. Elizabeth Tippett, *Robbing A Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433 (2012) (arguing that the case’s effect will be less dramatic than some predict).

215 See Zimmer, *supra* note 176, at 460; Eisenberg, *supra* note 194, at 157; Malveaux, *supra* note 156, at 44; Selmi, *Evolution*, *supra* note 195, at 941.

216 Melissa Hart, *Learning From Wal-Mart*, 10 EMP. RTS. & EMP. POL’Y J. 355, 376 (2006).

217 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553, 2556 (2011).

218 Eisenberg, *supra* note 194, at 257.

follow their model.²¹⁹ For all these reasons, scholars have been looking for other Title VII theories, alternate employment statutes, and other statutory models to frame claims, as well as non-litigation alternatives, such as structural reform of workplace practices and employer compliance programs.²²⁰

III. *Burwell v. Hobby Lobby Stores, Inc.*

A. The Economics of Contraception

Decades of research establish that contraception access directly fosters women's economic well-being by helping women control the size of their families and the timing of childrearing.²²¹ In turn, this control allows women to make educational and employment decisions that benefit themselves and the broader society.²²² The Supreme Court has previously acknowledged the importance of reproductive autonomy, stating in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."²²³

219 *Id.*

220 *See, e.g.*, Eisenberg, *supra* note 194, at 262–70 (advocating for bringing discrimination claims under the Equal Pay Act); Tristin K. Green, *Civil Rights Lemonade: Title VII, Gender, and Working Options for Working Families*, 10 STAN. J. C.R. & C.L. 191, 213–15 (2014) (advocating for the need to expand working options for families); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1635–44 (2007) (advocating for employer-based compliance practices); Reinsch & Goltz, *supra* note 156, at 289–300 (advocating for a fraud on the market approach taken from securities cases); Sturm, *supra* note 186, at 522–37 (advocating for a regulatory approach involving multiple intermediaries).

221 Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, GUTTMACHER INST. 3 (Mar. 2013), <http://www.guttmacher.org/pubs/social-economic-benefits.pdf> [<https://perma.cc/N9YZ-CUJ4>] [hereinafter Sonfield et al., *Social and Economic Benefits*]. Indeed, in a major survey, 77% of women who used birth control reported that it allowed them to better care for themselves and their families, while large majorities also reported that birth control allowed them to support themselves financially (71%), stay in school (64%), and help them obtain and maintain employment (64%). *See* Colleen Connell, Lorie Chaiten, & Richard Muniz, *Religious Refusals Under the Affordable Care Act: Contraception as Essential Health Care*, 15 DEPAUL J. HEALTH CARE L. 1, 5 (2013).

222 Connell, et al., *supra* note 221, at 5.

223 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). Unfortunately, *Casey* has failed to protect women's reproductive choices because the courts have given little teeth to the undue burden standard. *See* Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 144–45, 156 (2013). As a result, states have enacted many abortion restrictions, such as waiting periods and onerous licensing regimes, which in turn put abortion out of reach for many

Notably, since the Supreme Court established contraception as a fundamental right in 1965, the percentage of women participating in the workforce has more than doubled to around 60% of women.²²⁴ Moreover, access to contraception has contributed to approximately one-third of women's wage gains since the mid-twentieth century.²²⁵ The advent of available birth control has also lead to dramatic increases in the numbers of women in college and in formerly male-dominated professions such as medicine, dentistry, law, and business.²²⁶ Contraception also supports women's health and that of their children. It can limit the health risks involved in pregnancy,²²⁷ which are compounded for unintended or narrowly-spaced pregnancies.²²⁸

For all these reasons, over 99% of sexually active American women between fifteen and forty-four have used birth control.²²⁹ Nevertheless, about half of all annual pregnancies are unintended, amounting to 2.8 million births, and of these, about half result from the 14% of women using no form of contraception.²³⁰ One contributing factor to unintended

women. *Id.* at 157–58. As this Article was going to press, the Supreme Court struck down Texas abortion regulations requiring that abortion facilities meet the standards for ambulatory surgical centers and that doctors performing abortions have admitting privileges at nearby hospitals; these requirements dramatically reduced the availability of abortion services in Texas. *Whole Woman's Health v. Hellerstedt*, 579 U.S. __ (2016). The ruling was 5-3 (Justice Scalia's seat remains open as of the date of the decision). This decision—along with its future application to numerous similar regulations around the country—will improve the economic security of millions of women given the links between reproductive health access and economic stability. See Michele Gilman, *How Limiting Women's Access to Birth Control and Abortions Hurts the Economy*, HUFFINGTON POST (Apr. 28, 2016), http://www.huffingtonpost.com/the-conversation-us/how-limiting-womens-access_b_9796032.html [<https://perma.cc/6WC8-FSXT>].

224 *Connell et al.*, *supra* note 221, at 6.

225 *Id.*; see Sonfield et al., *Social and Economic Benefits*, *supra* note 221, at 14.

226 *Connell et al.*, *supra* note 221, at 5–6; Sonfield, et al., *Social and Economic Benefits*, *supra* note 221, at 7–8, 11.

227 *Connell et al.*, *supra* note 221, at 1 (“out of every 100,000 births in the United States, 12.7 women die as a result of pregnancy-related complications”).

228 *Id.* at 4. In addition, “women experiencing unintended pregnancy are at increased risk for depression, anxiety, and other mental health conditions. Furthermore, unintended pregnancy increases a woman's risk of experiencing domestic violence and marital strain.” *Id.* at 5.

229 Kimberly Daniels, Williams Mosher & Jo Jones, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT'L HEALTH STAT. REP. (2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf> [<https://perma.cc/NLX9-XJX7>].

230 *Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST. (May 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf [<https://perma.cc/62RR-YU22>].

pregnancy is the cost of birth control, particularly for the most effective, long-lasting forms.²³¹ For instance, the cost of an IUD equals a month's full-time pay for a minimum wage worker.²³² Thus, it turns out that only one-fourth of women who request an IUD go through with insertion after they find out the cost, which can exceed \$1,000 for the device and medical procedure. Overall, almost one-third of women report that they would change their contraceptive method if cost were not a factor.²³³ These costs are significant, given that the average American woman wants two children, and thus she will need contraception for at least three decades of her life.²³⁴ The cost barrier is compounded for low-income women, who have five times the unintended pregnancy rate of women with incomes above 200% the poverty line.²³⁵ Unfortunately, publicly funded family planning meets only 54% of the need.²³⁶ Not surprisingly, health insurance makes a difference, and women with coverage are much more likely to use contraceptive care.²³⁷

B. Background of the Case

The myriad of health and economic benefits associated with contraceptive access

231 Gina M. Secura et al., *The Contraceptive CHOICE Project: Reducing Barriers to Long-Acting Reversible Contraception*, 203 AM. J. OBSTETRICS & GYNECOLOGY 115 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2910826/> [<https://perma.cc/BM8J-TBCL>]. “Reasons for lack of use [of long-acting forms of contraception] include women’s knowledge of and attitudes towards the methods, practice patterns among providers, and high initial up-front cost associated with these methods.” *Id.* at 116.

232 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2800 n.22 (2014). *See also* David Eisenberg, Colleen McNicholas & Jeffrey F. Peipert, *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH S59, S60 (2013), [http://www.jahonline.org/article/S1054-139X\(13\)00054-2/fulltext](http://www.jahonline.org/article/S1054-139X(13)00054-2/fulltext) [<https://perma.cc/Q6WZ-42CV>] (“The total bill for a patient to initiate a LARC method generally exceeds \$1000.”).

233 *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting) (summarizing research); Su-Ying Liang et al., *Women’s Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 CONTRACEPTION 528, 531 (2011).

234 GUTTMACHER INST., FULFILLING THE PROMISE: PUBLIC POLICY AND U.S. FAMILY PLANNING CLINICS 10 (2000), <https://www.guttmacher.org/pubs/fulfill.pdf> [<https://perma.cc/Q6SN-HKN2>].

235 Sonfield et al., *Social and Economic Benefits*, *supra* note 221, at 4; Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 441 (2014).

236 Sonfield et al., *Social and Economic Benefits*, *supra* note 221, at 30.

237 *See* Adam Sonfield, *Contraception: An Integral Component of Preventative Care for Women*, GUTTMACHER POL’Y REV. 6–7 (Spring 2010), <https://www.guttmacher.org/pubs/gpr/13/2/gpr130202.pdf> [<https://perma.cc/E9JF-9K38>].

explain why the Affordable Care Act (“ACA”) covers birth control. Under the ACA, employers with fifty or more full-time employees must offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.”²³⁸ Initial drafts of the ACA did not cover women’s preventive services, prompting Senator Barbara Mikulski to introduce the Women’s Health Amendment in order to counter gender discrimination in the health insurance market and “to guarantee women access to preventive health care screenings and care at no cost.”²³⁹ The Amendment passed, and is part of the ACA. Meanwhile (and relevant to the *Hobby Lobby* case), Congress defeated a proposed “conscience amendment” that would have allowed employers to deny certain forms of coverage based on religious beliefs.²⁴⁰

Pursuant to the ACA, employer group health plans must provide “preventive care and screenings” for women,²⁴¹ defined as the “full range” of FDA-approved contraceptive methods, as well as patient education and counseling for all women with reproductive capacity.²⁴² By prohibiting patient cost sharing, the ACA “brought with it the potential to eliminate cost as a reason for choosing one method of contraception over another, a change

238 26 U.S.C. 5000A(f)(2) (2010); 4980H(a), (c)(2) (2010).

239 Press Release, Senator Barbara A. Mikulski, Mikulski Puts Women First in Health Care Reform Debate (Nov. 30, 2009), <http://www.lb7.uscourts.gov/documents/12-384119.pdf> [<https://perma.cc/5UWE-XM4X>] [hereinafter Mikulski Press Release]. As she explained, “[w]omen are often confronted by the punitive practices of insurance companies. We face gender discrimination. We pay more and get less” *Id.* On the legislative history of the contraceptive requirements of the ACA, see generally Rose Shingledecker, Note, *No Good Deed: The Impropriety of the Religious Accommodation of Contraceptive Coverage Requirements in the Patient Protection and Affordable Care Act*, 47 IND. L. REV. 301, 301–04 (2014).

240 See, e.g., N.C. Aizenman & Rosalind S. Helderman, *Birth Control Exemption Bill, the ‘Blunt amendment,’ Killed in Senate*, WASH. POST (Mar. 1, 2012), http://www.washingtonpost.com/national/health-science/birth-control-exemption-bill-the-blunt-amendment-killed-in-senate/2012/03/01/gIQA4tXjkR_story.html [<https://perma.cc/GB4M-NA97>].

241 42 U.S.C. 300gg-13(a)(4) (2010). The ACA directs that HFRA define “preventive care and screenings.” *Id.* HFRA is a unit of HHS.

242 HHS adopted the recommendation of the Institute of Medicine (“IOM”), an independent non-profit group of medical experts created by Congress in 1980 to advise the government on medical issues. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (describing the legislative history). INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103–04 (2011). The guidelines are at 77 Fed. Reg. 8725–26 (Feb. 10, 2012). Under these guidelines, employers must provide coverage without cost sharing for “all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.” These guidelines include well-woman visits, screening for gestational diabetes, breastfeeding support and counseling, and screening and counseling for interpersonal and domestic violence. 77 Fed. Reg. 8725 (Feb. 10, 2012) (internal brackets omitted).

that could be particularly important for low-income women and women considering methods with substantial upfront costs.”²⁴³

C. The Majority Opinion

Almost immediately after passage of the ACA, litigation over the contraceptive mandate began.²⁴⁴ Over one hundred lawsuits were filed to challenge the contraceptive coverage requirement, and suits by three for-profit, closely-held corporations eventually reached the Supreme Court, which granted certiorari to resolve a circuit split on the issue.²⁴⁵ These plaintiffs contended (incorrectly) that certain forms of contraception, such as IUDs and emergency contraception, act as abortifacients,²⁴⁶ and thus complying with the contraception requirement would force them to facilitate abortions in violation of their religious beliefs. In *Hobby Lobby*, the Supreme Court agreed with the plaintiff corporations and ruled that the contraception mandate violates the Religious Freedom Restoration Act of 1993 (“RFRA”)²⁴⁷ because it substantially burdens the exercise of religion and is not the least restrictive means for the government to achieve its objective.²⁴⁸ *Hobby Lobby* is the first case in which the “Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law”²⁴⁹

The majority opinion, authored by Justice Alito and joined by Justices Roberts, Scalia, Thomas, and Kennedy (in concurrence) reasoned that corporations were “persons” who

243 Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *CONTRACEPTION* 44, 44 (2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4712914/> [<https://perma.cc/DUP5-D4HN>] [hereinafter Sonfield et al., *Impact*].

244 See Loewenthal, *supra* note 235, at 449.

245 See *id.*

246 *Hobby Lobby*, 134 S. Ct. at 2759. For an explanation of why contraceptives are not abortifacients, see Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 *CONN. L. REV.* 971, 1012–17 (2015).

247 42 U.S.C. § 2000bb-1(a)-(b) (1993).

248 *Hobby Lobby*, 134 S. Ct. at 2759. RFRA states: “The Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 USC. § 2000bb-1(a). A governmental burden is allowed only if it “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Id.* at 42 U.S.C. § 2000bb-1(b).

249 *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

can engage in the “exercise of religion.”²⁵⁰ The Court concluded that the contraception mandate substantially burdened the plaintiffs’ religious belief that life begins at conception by forcing them to either violate their religious beliefs or to face large statutory penalties if they refused to cover contraception or dropped their group health plans altogether.²⁵¹ The Court assumed for the purposes of argument that the government had a compelling interest in enacting the mandate,²⁵² but held that these governmental interests could be served with a less restrictive alternative; that is, the government could cover the contraception itself or it could adopt the same accommodation it extends to religious non-profits by requiring insurance carriers to provide this coverage separately.²⁵³ As to the latter option, however, the Court conceded that it might not comply with RFRA “for purposes of all religious claims.”²⁵⁴

D. The Court’s Market Assumptions

The case obviously presents sharp divisions among the Justices about the scope of RFRA and its protections for religious beliefs. The case also reveals major differences underlying the Justices’ assumptions about the market and its relationship to gender equality. The *Hobby Lobby* majority reinforced the primacy of corporations over the interests of employees and the general public. In so doing, the majority overturned a legislative solution intended to correct for a market imperfection that resulted from sex discrimination, i.e., a lack of accessible preventive care for all female employees. The majority opinion repeatedly emphasized the importance of the “the religious liberty of the humans who own and control those companies.”²⁵⁵ Justice Alito spun detailed and heartwarming origin stories of the plaintiffs Hobby Lobby and Conestoga Wood Specialties, as family-run companies founded by men and run today mostly by their sons.²⁵⁶ Women

250 *Id.* at 2768–70.

251 *Id.* at 2775–76.

252 *Id.* at 2780.

253 *Id.* at 2781–82. Religious non-profit organizations that oppose providing contraception coverage can opt out through a certification process, and their employees’ health insurance company must provide coverage at its own cost. 45 § C.F.R. 147.131 (2015).

254 *Hobby Lobby*, 134 S. Ct at 2782.

255 *Id.* at 2768.

256 *Id.* at 2764 (Conestoga Wood Specialties was founded by Norman Hahn and one of his sons is the president and CEO); *Id.* at 2765 (David Green founded Hobby Lobby and one of his sons started an affiliated business).

were mentioned only as co-owners of the companies via their status as wives and mothers, with no corporate responsibilities.²⁵⁷ The elaborate description of the plaintiff corporations is entirely male-oriented and once again reinforces the primacy and power of business interests over that of workers.

Indeed, the Court paid scant attention to the interests of the anonymous female employees. Hobby Lobby has 13,000 employees, many of which are women and many of whom have female dependents. As Justice Ginsburg stated in her dissent, which was joined by Justices Sotomayor, Kagan, and Breyer, the majority's decision denies "legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."²⁵⁸ In her view, the autonomous health care decisions of women, made in consultation with their doctors, outweigh the beliefs of a handful of corporate owners.²⁵⁹ At the end of the day, "[w]orking for Hobby Lobby or Conestoga . . . should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so."²⁶⁰ Moreover, Justice Ginsburg explained that the burden on the corporations in complying with the ACA is minimal, especially since for-profit corporations do not have to buy or provide contraceptives, but rather, "to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans."²⁶¹

Not only did the majority provide uplifting descriptions of the plaintiff corporations, but it also waxed rhapsodic about the virtues of for-profit corporations. Corporations often "support a wide variety of charitable causes . . . [and] further humanitarian and other altruistic objectives."²⁶² Some corporations may even "take costly pollution-control and energy-conservation measures that go beyond what the law requires . . . [and] may exceed the requirements of local law regarding working conditions and benefits." Yet while many corporations act admirably, other corporations damage the environment, discriminate

257 In fact, the Greens have a daughter who serves a vice president of art and creative, although she is not named or identified as such in the Court opinion. See Brief for Respondents at 8, *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (No. 13–354).

258 *Hobby Lobby*, 134 S. Ct. at 2790. See also *id.* at 2787 (pointing to the interests of the "thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ").

259 *Id.* at 2799.

260 *Id.* at 2804.

261 *Id.* at 2799.

262 *Id.* at 2771.

against workers, lie about the safety of their products, engage in illegal monopolies, and so forth. The majority's rosy and optimistic view of corporations is consistent with its expansion of corporate personhood into new domains.²⁶³

By comparison, the majority was clearly not impressed with the government's espoused interests in "public health" and "gender equality," which it dismissed as "very broad."²⁶⁴ The majority simply did not deem contraception as essential to women's economic equality, evidently assuming that unhappy Hobby Lobby employees can leave and get other jobs with better benefits. In other words, the market should cure this ill. The Court's dismissive attitude towards women's reproductive health is exactly why the ACA covers contraception. The ACA remedies a gap in our public health and insurance system, which has long been designed around the needs of the male norm, while using women's reproductive differences as a basis for discrimination.²⁶⁵ Prior to the ACA, there were numerous health plans that covered Viagra, a drug to help men enjoy their sex lives, while denying women contraception, a method essential for women to not only have healthy sexual lives, but also to make decisions about childrearing.²⁶⁶ Equality means more than "rooting out discriminatory treatment of similarly situated women and men"; it must "assure that implicitly male norms of the reproductive role are not unreflectively accepted as the measure of equality, thereby disadvantaging most women."²⁶⁷ The *Hobby Lobby* majority has a robust view of equality for corporations, but none for women. Denying women access to contraception tells women that their concerns and need for control over their own destinies and economic well-being do not matter and that they are second-class citizens.²⁶⁸

Justice Ginsburg rejected the majority's characterization of the government's interests,

263 See generally Elizabeth Pollman, *Reconceiving Corporate Personhood*, 4 UTAH L. REV. 1629 (2011); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2010).

264 *Hobby Lobby*, 134 S. Ct. at 2799.

265 Cornelia T. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 964 (2007).

266 *Id.* at 967.

267 *Id.* at 977.

268 *Id.* at 976. See also Douglas Nejaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2574–78 (2015) (describing the dignity harms from complicity-based conscience claims).

discussing at length the rationale underlying the ACA's preventive services coverage for women, and citing to extensive data, research, and expert recommendations. She argued that the government's interests were "concrete, specific, and demonstrated by a wealth of empirical evidence," regarding the health benefits of contraception in avoiding unintended pregnancies, reducing the risks to those for whom pregnancy can be dangerous, and treating non-pregnancy related health conditions.²⁶⁹ Notably, the only data wielded by the majority related to the amount of fines facing corporations who refuse to provide ACA coverage, which it deemed substantial. While the majority focused on fines, Justice Ginsburg noted that the corporation's proposed alternative—a tax credit for employees—does "nothing for the woman too poor to be aided by a tax credit."²⁷⁰ In so doing, she highlighted her awareness of the class differences among women and their differential access to health care. She further noted that the decision has no limiting principle: "Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work?"²⁷¹

In sum, the majority imbued corporations with personhood and painted them as beneficent actors while rejecting any legislative interference in corporate decision-making. As for gender, the majority reinforced historical patterns of gender inequality based on male norms of health needs. By contrast, the dissent, written by Justice Ginsburg, viewed the market as imperfect, and the legislative fix in the ACA as essential to meet the health and economic needs of women.

E. Impact

For the millions of women outside the scope of the *Hobby Lobby* ruling, the contraceptive coverage guaranteed in the ACA is making a substantial and beneficial impact by eliminating out-of-pocket costs. For instance, between fall 2012 and spring 2014, one study showed that the proportion of users of the pill (oral contraception) who were paying zero dollars out of pocket increased from 15% to 67%, with similar increases for women using long-term forms of contraception.²⁷² Another study showed that women saved approximately \$1.4 billion on birth control pills as a result of the ACA.²⁷³ Yet due to *Hobby Lobby*, there

269 *Hobby Lobby*, 134 S. Ct. at 2799.

270 *Id.* at 2803.

271 *Id.* (internal quotations omitted).

272 Sonfield, et al., *Impact*, *supra* note 243, at 46–47.

273 *Affordable Care Act Results in Dramatic Drop In Out-Of-Pocket Prices for Prescription, Contraceptives*

is a large cadre of women employed by closely-held corporations whose access is more limited. In July 2015, HHS issued a rule allowing closely-held corporations (as defined by federal tax law) to seek a religious accommodation that exempts them from providing contraceptive coverage and transfers that obligation to insurance companies. It is likely that some closely-held corporations will object to the accommodation, as have numerous religious non-profits, claiming that even filing the necessary paperwork infringes on their religious rights.²⁷⁴ Even with the accommodation for religious non-profits, there is a “complete dearth of information” as to whether or not insurance plans are providing this coverage for employees.²⁷⁵ In addition, a different presidential administration may rescind the executive branch accommodation and thereby deny women certain forms of contraceptive coverage.²⁷⁶

IV. *Harris v. Quinn*

A. The Economics of Caregiving

Everyone needs care at some point in life, whether during childhood, in coping with a disability, as a frail senior citizen, or some combination of these life phases.²⁷⁷ Simply put,

Penn Medicine Study Finds, PENN MED. (July 7, 2015), http://www.uphs.upenn.edu/news/News_Releases/2015/07/becker/ [<https://perma.cc/KXR9-H2AE>].

274 In *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016), the Supreme Court vacated and remanded the issue to the courts of appeals, ruling that the “parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”

275 Sonfield et al., *Impact*, *supra* note 243, at 47. Separate from the religious accommodation issue, there are still insurers who are not providing the legally required contraceptive services required by the ACA. See NAT’L WOMEN’S LAW CTR., STATE OF WOMEN’S COVERAGE: HEALTH PLAN VIOLATIONS OF THE AFFORDABLE CARE ACT (2015), <http://www.nwlc.org/sites/default/files/pdfs/stateofcoverage2015final.pdf> [<https://perma.cc/X6GN-GQPN>].

276 Another contraceptive coverage gap exists due to the Court’s decision in *Nat’l Fed’n of Indep. Bus’s. v. Sebelius*, in which the Court overturned a provision of the ACA requiring states to expand their Medicaid programs to cover Americans with income up to 138% of the federal poverty level. *Nat’l Fed’n of Indep. Bus’s. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012); 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2015). States that chose not expanding Medicaid are leaving millions of low-income women without affordable insurance. Sonfield et al., *Impact*, *supra* note 243.

277 Nancy Folbre & Erik Olin Wright, *Defining Care*, in FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES [hereinafter FOR LOVE AND MONEY] 1, 10 (Nancy Folbre ed., 2012).

everyone is vulnerable and faces times of dependency.²⁷⁸ Despite the importance of their task, domestic workers generally toil long hours for little pay and few, if any, benefits, and suffer social isolation and high rates of physical injuries.²⁷⁹ Nevertheless, due in part to the growth of Medicaid and Medicare, along with a growing senior population,²⁸⁰ care work is one of the fastest growing occupations in America, as it “cannot be offshored.”²⁸¹ According to the Department of Labor, there are two million workers providing home care to the elderly and the disabled, such as personal care aides, certified nursing assistants, and home health aides.²⁸² Ninety percent of domestic workers are women, while one-third are African-American; one-fifth are Hispanic; and one-fifth are immigrants.²⁸³ Eighty percent live below the poverty line.²⁸⁴

Domestic worker union organizing has been effective in improving pay and work conditions for care workers.²⁸⁵ It is also a rare bright spot in the overall decline of unions. Unionization campaigns for domestic workers began in the 1970s and 1980s with “roots in the welfare rights movement and the dynamic growth in hospital and health care

278 EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH CARE WORKERS IN THE SHADOW OF THE WELFARE STATE* 17 (2012); Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM*, 1, 8–9 (2008).

279 Candace Howes, Carrie Leana, & Kristin Smith, *Paid Care Work*, in *FOR LOVE AND MONEY*, *supra* note 277, at 65, 83–86, 180. They earn less money than workers with similar characteristics in other fields. *Id.* at 71–72. *See also* Janie Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 *N.C. L. REV.* 1627, 1632 (“[D]omestic workers in general remain among the most exploited and abused workers in the world.”).

280 Folbre & Wright, *supra* note 277, at 10; Nancy Folbre, *Valuing Care*, in *FOR LOVE AND MONEY*, *supra* note 277, at 92; Howes et al., *supra* note 279, at 70.

281 BORIS & KLEIN, *supra* note 278, at 6. Domestic work encompasses a variety of occupations, including child care workers and adult care workers. *See* Howes et al., *supra* note 279, at 67–69.

282 *Minimum Wage, Overtime Protections Extended to Direct Care Workers by US Labor Department*, U.S. DEP’T LAB. (Sept. 17, 2013), <http://www.dol.gov/opa/media/press/whd/WHD20131922.htm> [<https://perma.cc/E6QE-G7GV>].

283 SHEILA BAPAT, *PART OF THE FAMILY? NANNIES, HOUSEKEEPERS, CAREGIVERS AND THE BATTLE FOR DOMESTIC WORKERS’ RIGHTS* 129 (2014); Folbre & Wright, *supra* note 277, at 7.

284 Howes et al., *supra* note 279, at 74.

285 In general, unionization raises women’s pay by 12.9%. JOHN SCHMITT & NICOLE WOO, *CTR. FOR ECON. & POLICY RESEARCH, WOMEN WORKERS AND UNIONS*, 2 (2013), <http://www.cepr.net/documents/union-women-2013-12.pdf> [<https://perma.cc/8896-89FL>].

unionism.”²⁸⁶ Moreover, because care workers are in a relationship with both the state and individual consumers, unions mobilized on multiple fronts, from organizing clients and communities, to pressuring state governments, to connecting with other service workers.²⁸⁷ Victories included California’s 1992 adoption of a law that created a legal employment relationship between home care workers and the state for collective bargaining purposes.²⁸⁸ California’s law led to both reductions in the poverty rate and lower turnover for home care workers in California.²⁸⁹ Other states have also codified collective bargaining rights for publicly paid home care workers.²⁹⁰ These successes were due to “coalition politics [that] opened up a space for the self-activity and politicization of tens of thousands of low-wage women.”²⁹¹

Today, the rate of unionization for adult care workers is 13%, which is higher than the average for all workers, but lower than the rate for other health care professionals.²⁹² By 2010, over 400,000 care workers had joined unions.²⁹³ In the service sector, unionization is estimated to generate a 10.1% wage premium, amounting to about \$2.00 per hour, and unionized home care aids and home health aides earn higher salaries than their non-unionized counterparts.²⁹⁴ This is an important counterbalance to the 6% wage penalty associated with care work.²⁹⁵ Yet collective bargaining remains absent in most states and at the federal level,²⁹⁶ and the domestic worker rights movement faces ongoing pushback.²⁹⁷

286 BORIS & KLEIN, *supra* note 278, at 16.

287 *Id.* at 16–17.

288 BAPAT, *supra* note 283, at 131–32; BORIS & KLEIN, *supra* note 278, at 184–86. *See also id.* at 149–81 (describing union organizing and accomplishments in the 1980s despite Reagan era pushback).

289 BAPAT, *supra* note 283, at 132.

290 *Id.*; BORIS & KLEIN, *supra* note 278, at 214–15 (these states include Oregon, Washington, Illinois, Massachusetts, and Missouri).

291 BORIS & KLEIN, *supra* note 278, at 208–09.

292 Howes et al., *supra* note 279, at 74.

293 BORIS & KLEIN, *supra* note 278, at 5.

294 Nancy Folbre, Candace Howes & Carrie Leana, *A Care Policy and Research Agenda*, in *FOR LOVE AND MONEY*, *supra* note 277, at 197–98.

295 Howes et al., *supra* note 279, at 72.

296 BAPAT, *supra* note 283, at 134.

297 *Id.* at 180–81.

In *Harris v. Quinn*,²⁹⁸ the Supreme Court further halted this movement's progress.

B. Background of the Case

In 2003 Illinois passed a law declaring that personal assistants were public employees of the state for the purposes of coverage under the state's Public Labor Relations Act ("PLRA").²⁹⁹ This meant that personal assistants could collectively bargain for better working conditions. Personal assistants are funded by the federal Medicaid program to provide in-home caretaking services to "customers" (i.e., individuals with disabilities) whose conditions would otherwise require institutionalization.³⁰⁰ The purpose of the law was to designate a single union as the representative of personal assistants for collective bargaining purposes.³⁰¹ Under the resulting collective bargaining agreement, all personal assistants who were not union members were required to pay a "fair share" of union dues.³⁰² Pamela Harris and several other personal assistants, represented by the anti-union group the National Right to Work Legal Defense Foundation, sued the state and the union arguing that the PLRA violates their First Amendment rights by requiring them to pay a fee to a union that they do not support.³⁰³ Illinois prevailed before the district court and the Seventh Circuit.³⁰⁴ Before the Supreme Court, a 5-4 majority ruled against the state, striking down the fee requirement as violating the First Amendment's free association rights.

C. The Majority Opinion

In the decision striking down the union fee requirement, Justice Alito distinguished prior Court precedent holding that a state can require all its employees to pay union dues³⁰⁵

298 *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

299 *Id.* at 2626.

300 *Id.* at 2624.

301 *Id.* at 2626 (citing 2003 Ill. Laws 1930).

302 *Id.* at 2626.

303 *Harris v. Quinn*, 2010 WL 4736500 (N.D. Ill. Nov. 12, 2010).

304 *Id.*; *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011).

305 *Harris v. Quinn*, 134 S. Ct. at 2630–38. The case is *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977). Prior Court precedent had already established that fees paid by non-union members cannot go toward lobbying or political activity. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) and cases cited therein.

in order to prevent “non-members from free-riding on the union’s efforts” and to promote labor harmony by giving the state a single party with whom to negotiate.³⁰⁶ Justice Alito contended that these principles did not apply to the Illinois personal assistants because they were not “full-fledged” public sector employees, but rather, only “partial-public” employees.³⁰⁷ In so doing, he created a new “separate-but-unequal” category in the Court’s labor jurisprudence.³⁰⁸ Justice Alito reasoned that the personal assistants worked directly for “customers” who retained the authority to hire, supervise, and fire them.

Having distinguished controlling precedent, Justice Alito concluded that the impingement on the dissenters’ First Amendment rights, i.e., the right not to support a union, was not outweighed by any compelling state interest.³⁰⁹ Any asserted interest in labor peace was illusory given that personal assistants spend their time in private homes and thus presumably could not organize effectively enough to disrupt state operations.³¹⁰ Moreover, the unions could advocate for improvements in the welfare of personal assistants even without the union dues provision.³¹¹ As explained below, the decision and its characterization of care workers rested on gender stereotypes, inaccurate conceptions of the care work market, and class-based discrimination against low-wage workers.

D. The Court’s Market Assumptions

The *Harris* decision, one of several in recent years to weaken unions,³¹² devalues care work, and in so doing, undermines the quality of life for both care workers and care

306 *Harris*, 134 S. Ct. at 2627.

307 *Id.* at 2638.

308 See Kathleen Geier, Sarah Jaffe & Sheila Bapat, *What Do The Recent Supreme Court Decisions Mean for Women’s Economic Security*, NATION: CURVE BLOG (July 17, 2014) (comments of Kathleen Geier), <http://www.thenation.com/blog/180685/what-do-recent-supreme-court-decisions-mean-womens-economic-security> [<https://perma.cc/SWM7-8TC8>].

309 *Harris*, 134 S. Ct. at 2639–40. For a critique of the Court’s First Amendment analysis and its failure to acknowledge the First Amendment rights of unions and union members, see generally Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOYOLA L.A. L. REV. 439 (2015).

310 *Harris*, 134 S. Ct. at 2640.

311 *Id.* at 2641.

312 See Gilman, *supra* note 12, 418–20 (discussing *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012)). *But see infra* note 366 and accompanying text.

recipients—both of whom are disproportionately female.³¹³ Women live longer than men and are more likely to need care. At the same time, women dominate the paid care workforce due to gendered norms of altruism, discrimination in the job market, and social expectations.³¹⁴ The *Harris* Court’s anachronistic assumptions about the value of low-wage workers and women’s work coalesce to reinforce the invisibility of care workers.

The *Harris* decision clings to this private-public binary, even though care workers straddle the boundaries by working in the home. Women have long provided care to children, the disabled, and the elderly for no pay, based on the belief and social norm that women should provide care out of love.³¹⁵ As a result, care work is typically not considered “real” work,³¹⁶ as assuming altruism “reduces the need to worry about disparate human capital investments made within the family.”³¹⁷ Yet the economic contribution made by unpaid care workers is massive and estimated at between \$354 and \$450 billion per year.³¹⁸ Of course, our economic system neither measures nor credits unpaid care work within the family.³¹⁹ The results of women’s traditional care-taking role have been economic dependence on men and a persistent labor market disadvantage.³²⁰ Further, in taking time off to care for family members, women workers suffer a “care penalty” in lost wages and less professional advancement.³²¹ Nevertheless, the majority’s core economic assumption here is that low care prices reflect an efficient market.

By contrast, the dissenters understood why personal assistants qualify as public employees, falling comfortably within prior precedent. Among other things, the state

313 Folbre et al., *supra* note 294, at 187.

314 Paula England, Nancy Folbre & Carrie Leana, *Motivating Care*, in *FOR LOVE AND MONEY*, *supra* note 277, at 21, 36; England & Folbre, *supra* note 117, at 62.

315 BAPAT, *supra* note 283, at 18; England & Folbre, *supra* note 117, at 74–75 (“The Western intellectual tradition has traditionally assumed that women naturally provide care for others, especially dependents.”).

316 Nelson, *supra* note 86, at 62 (explaining how orthodox neoclassical economics excludes caring).

317 Silbaugh, *supra* note 120, at 338, 346.

318 Folbre, *supra* note 280, at 92, 103.

319 Nancy Folbre, *Introduction*, in *FOR LOVE AND MONEY*, *supra* note 277, at xi; Chuang, *supra* note 279, at 1634 (“Labeling housework as ‘care’ signals that work in the home is divorced from economic entitlements.”).

320 England & Folbre, *supra* note 117, at 61.

321 Suzanne Bianchi, Nancy Folbre & Douglas Wolf, *Unpaid Care Work*, in *FOR LOVE AND MONEY*, *supra* note 277, at 40, 58–59.

sets the terms of employment for the personal assistant workforce, determines and pays their wages and benefits, establishes the job's basic qualifications, describes the services a personal assistant may provide, and prescribes the terms of the employment contracts entered into between personal assistants and customers.³²² At the same time, customers have the authority to manage their own day-to-day relationships with caregivers. Personal assistants thus have two employers, each of whom controls certain aspects of their work. Unlike the majority, which squeezed care workers into the private side of the work divide, the dissent was attuned to the triangular relationship between care workers, their customers, and the state that arises due to the personalized nature of the service provided and the requirements that attach to a government-funded program.³²³ One commentator pointed out the irony that plaintiff Pamela Harris cared for her disabled son, making him his mother's boss in the Court's cramped reading of the employment relationship.³²⁴

In recognizing the permeability between public and private, Justice Kagan's dissent, joined by Justices Ginsburg, Breyer, and Sotomayor,³²⁵ reflected feminist understandings of the home and the workplace. Feminists have long attacked the artificial boundaries between public and private that legal systems and social norms historically upheld.³²⁶ In the traditional view, the public domain was the world of markets and politics, where men

322 *Harris v. Quinn*, 134 S. Ct. 2618, 2646–47 (2014).

323 Folbre et al., *supra* note 294, at 187.

324 Sarah Jaffe, *SCOTUS' Real, Demented Agenda: Why Harris and Hobby Lobby Spell Disaster for Working Women*, SALON (July 1, 2014), http://www.salon.com/2014/07/01/scotus_real_demented_agenda_why_harris_and_hobby_lobby_spell_disaster_for_working_women/ [<https://perma.cc/7QMN-4R8Y>]. She adds: "One would not assume that the patient in a hospital is the ultimate employer of the nurse who cares for them, but in this case, it seems, the patient is assumed to be the boss." *Id.* In *Long Island Care at Home, Ltd. v. Coke*, the Court upheld a regulation providing that home health care workers who work for third-party employers and who provide "companionship services" to the elderly were exempt from the wage and hour protections of the Fair Labor Standards Act. In so doing, the Court favored the interests of consumers of care over the providers of care, even though consumers benefit from a skilled, fairly paid workforce. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); see Pegg R. Smith, *Who Will Care for the Elderly? The Future of Home Care*, 61 BUFF. L. REV. 323, 331–37 (2013). The Department of Labor under President Obama passed a regulation to overturn this narrow interpretation of FLSA, 78 Fed. Reg. 60,557, and the D.C. Circuit upheld the regulation against challenge, *Home Care Ass'n of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), cert. denied 2016 WL 3461581 (2016).

325 *Harris*, 134 S. Ct. at 2644.

326 See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847 (2000).

dominated and women were excluded.³²⁷ By contrast, the private domain consisted of home and family.³²⁸ Yet as feminists pointed out, privacy within families left men free to dominate, and even abuse, women and children because of their dependence on men for social goods and a lack of state intervention into the private realm.³²⁹ Feminists recognized that state inaction in the private realm is not neutral, because the state sets the legal ground rules that permit private inequality to flourish unchecked.³³⁰ Furthermore, feminists contended that the idea of private autonomy within the home was a myth for women, who are enmeshed in family relationships.³³¹

Paid care work, such as that performed by the personal assistants in *Harris*, is motivated by both emotional connection and money.³³² It does not fit into tidy market-based assumptions about self-interest. As feminist economists have noted, care is an “activity that conspicuously violates the standard assumptions made regarding the motivation of ‘rational economic man’—dispassionate pursuit of narrow self-interest.”³³³ Regardless of motivation, “whether performed by a family member or by an employee, [care work] supports and subsidizes all other productive work.”³³⁴ The *Harris* court does not see the contributions to capital made by care workers, instead pushing them deeper into the privacy of the home where, as tradition dictates, they remain isolated.³³⁵ In other words, the *Harris* court resurrects a public–private divide that limits women’s economic independence and traps some women in poverty.

327 See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 568–69 (2006) (summarizing the public-private dichotomy).

328 *Id.* at 568–69.

329 See Higgins, *supra* note 326, at 850–51; Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996); see also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 128–29 (1989).

330 See Frances Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502, 1506 (1983); OKIN, *supra* note 329, at 111.

331 See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 186–89 (1995); Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 151–52 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

332 England et al., *supra* note 314, at 21.

333 England & Folbre, *supra* note 117, at 63.

334 BAPAT, *supra* note 283, at 17–18.

335 *Id.* at 19 (citing early feminists).

E. Devaluation of Care Workers

The Court's opinion also reflects long-held biases against domestic workers.³³⁶ As Gloria Steinem has written, "categories of work are less likely to be paid by the expertise they require—or even by the importance to the community or to the mythical free market—than by the sex, race and class of most of their workers."³³⁷ This is evident when comparing the wages paid to men and women for performing the same work. Moreover, care workers carry the stigma of handling intimate and "dirty" tasks related to bodily processes.³³⁸ The diminished valuation of care work stretches back to slavery, when Black women performed unpaid domestic work while working under conditions of extreme cruelty.³³⁹ The "profession" of home care arose during the New Deal as government funding was made available to help families dealing with illness and old age; the providers of this care were mostly African American women who had previously worked in domestic service.³⁴⁰ In other words, the undeserving poor—single mothers of color—were funneled to care for the deserving poor—children, the elderly, and the disabled.³⁴¹

At the same time, the New Deal codified prejudices against working women and people of color. Congress specifically excluded domestic workers, along with agricultural workers, from labor protections in the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act.³⁴² Most historians contend that these exclusions, which primarily impacted Black workers and women, were necessary in order to gain support from Southern congressmen, whose state economies were built on the backs of cheap labor provided by Black workers.³⁴³ While the Social Security Act has since been amended to include domestic workers,³⁴⁴ these workers remain outside the purview of the National

336 BORIS & KLEIN, *supra* note 278, at 8; BAPAT, *supra* note 283, at 20 (citing Gloria Steinem).

337 Gloria Steinem, 'Valuing Women's Work,' MOYERS & COMPANY (Mar. 30, 2012), <http://billmoyers.com/content/valuing-womens-work/> [https://perma.cc/3J8H-LBV6].

338 BORIS & KLEIN, *supra* note 278, at 8.

339 BAPAT, *supra* note 283, at 21.

340 *Id.* at 11.

341 *Id.* at 12.

342 *See id.* at 52–61 (describing statutory history).

343 *Id.* at 55.

344 Social Security was amended to cover domestic workers in 1950 (if certain earning thresholds and days of work for a single employer were met) and again in 1954 (eliminating the days worked for a single employer

Labor Relations Act, which provides employees with the rights to organize and collectively bargain to improve the conditions of employment.³⁴⁵ In 2014, the Obama Administration finally included most domestic workers within the scope of the FLSA's overtime and minimum wage protections, and the D.C. Circuit upheld the regulation against a challenge by the home health care industry.³⁴⁶ A different administration could repeal the rule.

Moreover, domestic workers are outside the purview of federal employment discrimination statutes, which generally apply only to larger employers of a defined size, and since many care workers work for small employers or are considered independent contractors, they remain uncovered.³⁴⁷ Further, there is a large “grey” market in which under-the-table work arrangements leave many care workers without legal protection.³⁴⁸ In sum, the current low status of care workers results from a history of “racialized labor markets, the location of care as welfare services, and the political and legal structures that sustain low wages and inhibit quality access.”³⁴⁹ These gaps are the reason that Illinois stepped in to protect personal assistants. Yet *Harris* overturns the decision of a democratically accountable branch that sought to correct for market imperfections and laws that undervalued care work. The Court substituted its own inaccurate market assumptions about what is best for consumers, i.e., low prices. In so doing, the Court reflects and reinforces biases about and against domestic workers.

requirement). Thus, most domestic workers are now covered. 42 U.S.C. §410(j)(3).

345 The NLRA does not include any individual employed “in the domestic service of any family or person at his home.” 29 U.S.C. §152(3).

346 See *supra* note 324 and citations therein.

347 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (West 2016) (covered employers are defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks” in the year); Family and Medical Leave Act, 29 U.S.C. §2611 (West 2016) (provides for up to twelve weeks of unpaid leave for health conditions or to care for a new child, but does not cover employers with fewer than forty employees); Americans with Disabilities Act, 42 U.S.C. §12111(5)(a) (West 2016) (prohibits employers from discriminating against disabled employees, but it applies only to employers who have “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”); Age Discrimination in Employment Act, 29 U.S.C. §630(b) (West 2016) (protects employees over forty years old, but covers only employers who have “twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”).

348 Folbre et al., *supra* note 294, at 199.

349 BORIS & KLEIN, *supra* note 278, at 223–24.

F. Impact

Domestic workers are not the only losers in this decision. The *Harris* decision harms customers and the state as well. As the dissent pointed out, in-home care programs were long plagued by workforce shortages and high turnover, due to low wages and a lack of benefits.³⁵⁰ In turn, this labor instability lowered the quality of care and pushed the disabled into more expensive institutions.³⁵¹ These are systemic problems far beyond the ability of any individual customer or worker to solve; rather, the state is the single employer with the ability to negotiate with a union representative to attack these problems. The state's involvement improves the functioning of the home health care market.

Moreover, there is empirical evidence that collective bargaining works for domestic workers. With the benefits of collective bargaining, home care assistants in Illinois "doubled their wages in less than 10 years, obtained state-funded health insurance, and benefitted from better training and workplace safety measures."³⁵² At the same time, customers received better care, and the state got a more stable workforce and saved money.³⁵³ The irony of the majority decision, as the dissent pointed out, is that it "penalizes the State for giving disabled persons some control over their own care."³⁵⁴ *Harris* represents an endorsement of individual rights over collective action. Like *Hobby Lobby*, it rules that health care is an individual responsibility rather than a social one, despite the reality of our interconnected relationships.³⁵⁵

So, if customers, personal assistants, and the state are all harmed by the *Harris* decision, who benefits? One beneficiary is the home health care industry, which is largely for-profit. The industry is one of the top five growing franchises in the country, with the top franchises grossing over \$1 million annually with gross margins of 30–40%.³⁵⁶ Profits

350 *Harris v. Quinn*, 134 S. Ct. 2618, 2648 (2014).

351 *Id.*

352 *Id.*

353 *Id.*

354 *Id.* at 2650.

355 Jaffe, *supra* note 324.

356 See Carol Tice, *Best Franchises to Own: Why Home Healthcare is Hot*, FORBES (May 27, 2014), <http://www.forbes.com/sites/caroltice/2014/05/27/best-franchises-home-healthcare-is-hot/>; Kelly Kennedy, *Home Health Care is One of the Most Profitable Franchises*, USA TODAY (May 7, 2012), <http://usatoday30.usatoday.com/money/industries/health/story/2012-05-03/home-health-care-a-profitable-franchise/54813562/1> [<https://>

grew 9% a year from 2001 to 2009.³⁵⁷ A major study of Medicare-funded home health care found that for-profit agencies deliver lower-quality care even though operating costs were 18% higher, and thus, the authors questioned whether for-profit agencies should be allowed to remain eligible for Medicare reimbursements.³⁵⁸ A 2009 study by the National Private Duty Association found that businesses charge clients twice as much as they pay employees, prompting an employee advocate to comment that the industry simply does not have the overhead to justify such low wages.³⁵⁹ If the *Harris* majority was so concerned with rising state costs—notably, it cited to a report entitled the *The Trouble with Public Sector Unions*³⁶⁰—it might consider other sources for cost savings than the pockets of domestic workers.

The other winner in this fight is the anti-union, “right to work” movement, which is funded by conservatives such as the Koch brothers, and which spends millions to lobby state and federal governments and to bring litigation to limit union power.³⁶¹ Their policy positions benefit big business at the expense of workers and consumers.³⁶² In the end, low-paid workers are pitted against vulnerable care recipients while private industry cashes its checks. Of course, customers with means can opt out of this publicly-funded market into a private one, which offers greater quality, choice, and control.³⁶³ The middle-class is particularly squeezed, as they have fewer employer benefits and earn too much for means-

perma.cc/75JQ-NRJM].

357 See Amy Traub, *Hard Work Doesn't Pay for Home-Care Workers*, AM. PROSPECT (Mar. 22, 2012), <http://prospect.org/article/hard-work-doesnt-pay-home-care-workers> [<https://perma.cc/GLR5-TJ57>].

358 William Cabin et al., *For-Profit Medicare Home Health Agencies' Costs Appear Higher and Quality Appears Lower Compared to Nonprofit Agencies*, 33 HEALTH AFFAIRS 1460, 1460–65 (2014), <http://content.healthaffairs.org/content/33/8/1460.abstract> [<https://perma.cc/TSY9-6W35>].

359 See Kennedy, *supra* note 356.

360 *Harris v. Quinn*, 134 S. Ct. 2618, 2632 n.7 (2014).

361 See Jay Riestenberg & Mary Bottari, *Who Is Behind the National Right to Work Committee and its Anti-Union Crusade?*, PR WATCH (June 3, 2014), <http://www.prwatch.org/news/2014/06/12498/who-behind-national-right-work-committee-and-its-anti-union-crusade> [<https://perma.cc/VU5R-X6T6>] (noting that the National Right to Work Committee spent over \$33 million on lobbying between 1999 and 2013).

362 Ed Pilkington, *Wisconsin Anti-union Bill is 'Word for Word' From Rightwing Lobbyist Group*, GUARDIAN (Feb. 23, 2015), <http://www.theguardian.com/us-news/2015/feb/23/wisconsin-right-to-work-bill-scott-walker-alec> [<https://perma.cc/BJY5-RGEL>] (a right to work bill passed in Wisconsin in 2015 was taken verbatim from a model bill framed by a pro-business lobbying group called ALEC).

363 Janet Gornick et al., *The Disparate Impacts of Care Policy*, in FOR LOVE & MONEY, *supra* note 277, at 141, 178.

tested programs such as Medicaid.³⁶⁴ These income disparities splinter women by class and lessen opportunities for alliances.

The most direct impact of *Harris* is that the 20,000 personal assistants in Illinois may lose employment protections if the union, losing fees from non-members, cannot afford to negotiate effectively on their behalf. As a practical matter, it will be very difficult for the union to gather voluntary dues now that it has to go door-to-door to each individual workplace.³⁶⁵ *Harris* also portends a tough road for unions in other Supreme Court challenges, as the Court indicated a strong desire to overrule existing precedent altogether. Unions scored a reprieve, perhaps temporary, when a 4-4 Court in *Friedrichs v. California Teachers Association* split on the constitutionality of agency fees for public employee unions, thus leaving the Ninth Circuit's decision upholding agency fees intact.³⁶⁶ Low-wage workers are especially vulnerable to attacks on workers' rights, but their losses often spread to the larger workplace.³⁶⁷

In addition, *Harris* stalls the momentum of today's most vibrant pro-worker movement. As a result, it is more important than ever for domestic workers to organize outside the formal union structures. For instance, in New York, a multi-ethnic and multicultural array of groups of domestic workers and their supporters, including care work employers, advocated for enactment of the New York Domestic Worker Bill of Rights in 2010—the first in the nation—which guarantees overtime, paid rest days, and meal and rest breaks for domestic workers.³⁶⁸ Similar laws have passed in California and Hawaii, and activists have been building momentum in other states as well.³⁶⁹ Sheila Bapat writes about similar alt-labor movement strategies, such as worker centers and online organizing that operate outside the formal labor framework and thus might have greater chances for sustainable success.³⁷⁰

364 *Id.* at 142, 178.

365 *See* Jaffe, *supra* note 324.

366 *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam). There were only eight votes due to the death of Justice Scalia.

367 *See* Jaffe, *supra* note 324.

368 BAPAT, *supra* note 283, at 65–80.

369 *Id.* at 96–97 (California); 105–07 (Hawaii); 99–110 (other states). Bapat queries whether collective bargaining is “the right strategy.” *Id.* at 136–41.

370 *Id.* at 136–47; *see also* BORIS & KLEIN, *supra* note 278, at 221–22.

V. Reflections and Remedies

The core insights of feminist economics are borne out in the Supreme Court decisions impacting working class women and their families. To begin with, the Court devalues care work and reinforces gendered stereotypes about women's role in the home and market. *Harris* treats care workers as less valuable than other workers; *Wal-Mart* permits employers to make gendered assumptions about the career trajectories of workers based on women's care responsibilities; and *Hobby Lobby* limits the ability of women workers to make decisions about their family size, and thus, to control their care obligations. These decisions tell women that they should engage in care work for no pay or low pay, that women's care obligations are fair grounds for limiting professional opportunities, and that women—not society—are individually responsible for caring for dependent family members.

Moreover, these Court decisions prioritize corporate conceptions of efficiency over human well-being or other ethical values, even though there is nothing “intrinsic in the economic or legal structure of commerce that forces firms, inexorably, as if run on rails, to neglect values of care and concern in order to strive for every last dollar of profits.”³⁷¹ The *Wal-Mart* decision entrenches subjective personnel practices that harm women while insulating management; *Hobby Lobby* elevates the religious preferences of a handful of capital owners over the health needs and religious preferences of thousands of female employees; and *Harris* hands anti-union forces a win in lieu of improving the quality of care for the ill or the conditions for workers. These decisions evidence no concern with the quality of life for female workers or their families.

In addition, the Court fails to acknowledge or understand the day-to-day reality of women's lives at the intersection of class, race, and gender. For the most part, real women are absent from these Court decisions, unless they are spoken of disparagingly.³⁷² Meanwhile, corporations are imbued with sympathetic human characteristics. The Court majority suggests that no rational Wal-Mart manager would ever discriminate and that

371 Nelson, *supra* note 86, at 73.

372 For instance, the *Wal-Mart* majority goes out of its way to impugn the credibility of the three named plaintiffs, two of whom were Black, by describing their alleged wrongdoing as employees—facts which are irrelevant to a class certification decision. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547–48 (2011). Judicial attacks on the credibility of female litigants are common. See Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 732 (2005); Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, 34 JUDGE J. 5, 8 (1995).

Hobby Lobby's owners are a tight-knit family who built their business from scratch. By contrast, the dissents' authors are both women who show empathy and understanding of the social and legal barriers facing women in the low-wage workforce and how those barriers are compounded by class.

Finally, in each case, the Court strikes down collective action to uphold the status quo. *Wal-Mart* rejected the class action litigation brought by female employees; *Hobby Lobby* overturned a legislative consensus to provide women with contraception; and *Harris* similarly overturned a hard-fought law to permit collective bargaining by care workers. The conservative Court majority claims to be scornful of judicial activism,³⁷³ but eagerly strikes down legislatively-enacted worker protections in order to preserve corporate prerogatives. The Court's attack on collective action to better the lives of women is perhaps the most disturbing pattern in these cases.

These decisions reinforce gender-based economic inequality. The subjective employment practices that depress women's wages (*Wal-Mart*), the loss of contraceptive options that limit women's economic mobility (*Hobby Lobby*), and the low wages that occur without collective bargaining (*Harris*) are all factors that contribute to the gender wage gap, women's poverty, lower workforce participation rates for women, and a permanent class of low-wage workers with limited opportunities for advancement. None of the cases have outcomes that will advance women's economic mobility.

Where do we go from here? These cases—each of which was decided on a narrow 5-4 vote—demonstrate the importance of Supreme Court nominees and in turn, the importance of presidential election outcomes. The recent death of Justice Scalia has highlighted the significance of a single vote on a closely divided Court and how his replacement could affect the balance of decision-making for decades.³⁷⁴ Given that the president nominates justices,

373 See Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 196 (2015) (describing Justice Roberts during his confirmation hearings claiming that he would be an "umpire" who would call "balls and strikes") (internal quotations omitted). Cf. Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2220 (2014) ("The Court in recent years has struck down federal laws in fewer cases than has its predecessors."); Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 737-38 (2012) (concluding that "liberal Justices tend to invalidate conservative laws and conservative Justices, liberal laws").

374 Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES, Feb. 13, 2016, <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/PUC2-DDGE>].

it is clear that presidential elections matter for women's equality.³⁷⁵ Thus, feminists must play a role in explaining the link between women's work and the economy and supporting candidates who understand that connection.³⁷⁶

That is just a beginning. In a prior article about economic inequality, I detailed several strategies for the economic justice lawyering movement,³⁷⁷ all of which would contribute to the economic security of women. To begin with, progressive lawyers need to continue developing theoretical and doctrinal frameworks centered on economic fairness, recognizing that both the Court's composition and its views are fluid. Along these lines, we need to engage with other disciplines to build a social science record that reveals the connections between law, policy, and economic hardship. Accordingly, feminist legal and economic theorists should work together to continue developing theories and data that counter prevailing market narratives and explain the basis of social responsibility for vulnerability. Due to the Occupy Wall Street movement, workers' rights organizing, and the increasing acknowledgment of economic inequality by policy makers, presidential candidates, and corporate titans alike, Americans are becoming increasingly aware of economic inequality and more likely to acknowledge structural, as opposed to individual, barriers to equality. Thus, the time is right to explain how the state shapes markets and how public policies can improve market outcomes for workers.

In addition, progressive lawyers must align with workers' rights and identity-based movements, such as those focused on race and gender, to build a broad-based, intersectional economic justice movement based on shared interests. The successes of the domestic worker rights movement (*Harris v. Quinn* notwithstanding), within and outside of formal labor structures, demonstrate that effective organizing can lead to better laws. Recently, in some jurisdictions, low-wage workers have successfully advocated for paid sick leave, higher minimum wages, and fair scheduling practices. At the same time, government is not the answer to all of the market's deficiencies. Worker movements are having some success in pressuring employers directly to make changes. For instance, activism by fast-food and retail workers has led some employers, such as McDonald's, to pay wages above

375 See Adam Liptak, *How a Vacancy on the Supreme Court Affects Cases in the 2015-16 Term*, N.Y. TIMES, Apr. 15, 2016, <http://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html> [<https://perma.cc/ZH9H-9YEQ>].

376 For a review of the gender politics in the 2012 presidential election, including how feminists fought a Republican assault on women's rights and how President Obama connected economic and gender issues, see Michele Estrin Gilman, *Feminism, Democracy, and the "War on Women,"* 32 J.L. & INEQUAL. 1, 11–12 (2014).

377 Gilman, *A Court for the One Percent*, *supra* note 12, at 451–62.

the legally-required minimum (although still not a living wage).³⁷⁸ Given that women are disproportionately represented in the service industry and low-wage workforce, this movement has the potential to decrease inequality. Workers are also exploring alternative legal structures, such as worker cooperatives, to become their own managers and owners and create workplaces that value their needs.³⁷⁹ The ability to “democratize the workplace” through “allocation of governance and profit-sharing rights” is “the most empowering in terms of control over one’s working environment.”³⁸⁰

Lawyers can help grassroots movements for economic justice by educating workers about legal rights, providing assistance in strategizing and organizing, drafting proposed bills and legal documents, and thinking creatively with grassroots advocates about how to adapt existing legal structures to benefit workers and women.³⁸¹ In general, lawyers and their clients have a large toolbox to effectuate systemic change, including litigation, community organizing, legislative and administrative advocacy, civil disobedience, public education, and community education. For instance, E. Tammy Kim describes a model of community lawyering for low-wage workers in which lawyers “support community organizing through legal representation of members of external grassroots organizations.”³⁸² The lawyers provide “legal assistance to resolve discrete legal problems and attack structural injustices,” while the workers and organizers identify the spaces where law can improve

378 Melanie Hicken, *McDonald’s is Giving 90,000 Workers a Pay Raise*, CNN MONDAY (Apr. 2, 2015), <http://money.cnn.com/2015/04/01/news/companies/mcdonalds-pay-raise/> [<https://perma.cc/4893-AV6K>]. It is also possible that these employers are trying to head off more drastic government action and/or worker unrest with modest raises.

379 See Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322 (2014); Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLIN. L. REV. 255 (2010). Huertas-Noble describes a variety of community lawyering models. *Id.* at 257–61.

380 Huertas-Noble, *supra* note 379, at 264.

381 For instance, Huertas-Noble describes all the tasks lawyers perform in creating worker cooperatives, including researching legal models, counseling clients, forming legal entities, structuring entity relationships, drafting employment contracts, negotiating with lenders and investors, drafting loan documents, and the like. *Id.* at 273–74.

382 E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 220 (2009). Kim helpfully explains various models of lawyering for workers’ rights and summarizes the rich literature on community lawyering models. *Id.* at 218–21, 225. See also Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000–2001).

workers' status.³⁸³ Relatedly, Sebastian Amar and Guy Johnson describe a model in which lawyers are paired with community organizers to serve immigrant communities.³⁸⁴ After immigrant care workers identify their legal needs, the lawyers document and formalize their grievances, negotiate with employers, and file suit where necessary.³⁸⁵ These and other community lawyering models provide insights and valuable lessons for lawyers working for workers' rights.

Finally, we need to expand access to justice to ensure that the judicial system is responsive to the 99%. While this Article focuses on the Supreme Court, most Americans have contact with the judicial branch through lower-level courts and administrative agencies when they owe a debt, are part of a dissolving family, or are charged with committing a crime. Civil and criminal access to lawyers is limited, which denies people an effective voice and compounds economic inequality. Expanding access to justice is essential for achieving justice. In sum, there are multiple strategies for combating gender-based economic equality; the fight will be multidimensional, collaborative, and long-term. Understanding the Supreme Court's assumptions and reasoning with regard to women workers is a preliminary step in creating change.

CONCLUSION

Economic inequality is on the rise, with the harshest impacts falling on women and minorities. A key insight into understanding wealth and income disparities is that they are not the inevitable result of a competitive market. To the contrary, government creates the rules of the market. The Supreme Court is one of the players. In recent years, the Court has issued a series of decisions that harm women workers and their families while preserving corporate prerogatives. In these cases, the Court uncritically accepts simplified assumptions of neoclassical economics and reinforces gendered stereotypes about women's work inside and outside the home. The Court devalues care work, promotes its view of efficiency over other values, upholds severe power imbalances in the workplace, and ignores the intersectional realities of the lives of low-wage women workers. Women workers are not passive; they have courageously organized to remove barriers to economic parity. However, the Court has stricken down a range of collective action on the part of women workers to obtain the same pay and opportunities as men (*Wal-Mart*); to have

383 Kim, *supra* note 382, at 221.

384 Sebastian Amar & Guy Johnson, *Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing a Collaborative Vision of Justice*, 13 N.Y. CITY L. REV. 173, 176 (2009).

385 *Id.* at 179.

access to contraception and thereby control the size and timing of their families (*Hobby Lobby Stores*); and to collectively bargain for better working conditions (*Harris*). In the face of the Court's erosion of collective action, any social movement for economic equality must grapple with the judiciary's role in upholding unjust market outcomes and strategize around opportunities for reform. We currently have a Court for the 1%. We must advocate for a Court for all.