Columbia Journal of Gender & Law

2025 | Issue 45.2

Columbia Journal *of* Gender & Law

Issue 45.2

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The *Columbia Journal of Gender and Law* (*CJGL*) is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

Columbia Journal of Gender and Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027

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Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10. Individual issues may be purchased for $20, subject to availability.
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Table of

Contents

RECENTERING WOMEN IN JUDICIAL DECISIONS ON REPRODUCTIVE PRACTICES: U.S. AND ISRAELI CASE STUDIES

SHARON BASSAN*

Abstract

In the dynamic landscape of legal academia, narrative analysis emerges as an essential avenue of study. Narratives shape laws, policies, and societal norms, urging parties and observers to recognize the profound influence of stories in legal discourse. Yet, the role of storytelling, particularly within the nuanced sphere of court rulings, has been undertreated by legal scholars. This Article explores how storytelling converges with legal, ethical, and feminist perspectives in court, where narratives wield transformative power, offering a critical reading of the rhetoric and narrative structure in two court cases that address the constitutionality of restricted access to reproductive practices. The first, a ruling from the Supreme Court of Israel, Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements*, establishes the eligibility of same-sex couples and single men for domestic surrogacy services after years of ineligibility. The second,* Dobbs v. Jackson Women's Health Organization*, holds that the right to abortion is no longer considered a fundamental right guaranteed by the Fourteenth Amendment of the U.S. Constitution. This Article contends that the narratives underpinning legal proceedings are not mere rhetorical devices but wield ethical and practical significance, shaping society's implicit image of women, their societal role, and the opportunities they are afforded. Through this analysis, this Article uncovers the underlying values, assumptions, and narratives that courts rely on and, perhaps more significantly, dismiss. Findings reveal tensions between women's rights and competing interests—those of single men who rely on a woman's body to achieve parenthood (in the Israeli case) and those of fetuses (in the* Dobbs *case). In both contexts, legal narratives centering these other figures are used to systematically downplay women's interests, restrict their opportunities, and minimize their autonomy. This Article advocates for centering women in the legal narrative when discussing reproductive practices performed on women's bodies. The failure to do so, it argues, causes far-reaching*

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harm to women's experiences and life opportunities. Lessons from both cases are relevant to ongoing and future advocacy fights and the women whose well-being depends on their outcomes.

INTRODUCTION

I. Narrative Analysis of Court Rulings

Narratives and rhetoric shape our understanding of reality.[1] They serve overlapping but distinct functions. Rhetoric, Michel Foucault suggests, is not merely the art of persuasion but a structuring force that organizes discourse and, in doing so, shapes the world itself.[2] By defining systems of thought, categorizing knowledge, and establishing authority, rhetoric underpins the very framework wherein meaning and power operate.[3] Narrative, by contrast, provides coherence and significance to the categorization of knowledge by constructing meaningful relationships between events.[4] Narratives help shape understandings of reality, convey significance, and give meaning to certain statements.[5] Narratives influence public opinion by presenting a coherent and emotionally compelling framing of data and events that resonates or clashes with a recipient's personal values and aspirations, influencing how information is perceived—negative and condemnable, or positive and acceptable.[6] Together, rhetoric and narrative construct the way people make sense of the world and

1 *See* Shulamit Almog, *From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 1, 4 (2002).

2 *See, e.g.*, MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 228 (A. M. Sheridan Smith trans., 1972) [hereinafter FOUCAULT, ARCHAEOLOGY]; MICHEL FOUCAULT, WRONG-DOING, TRUTH-TELLING: THE FUNCTION OF AVOWAL IN JUSTICE (Fabienne Brion & Bernard E. Harcourt eds., Stephen W. Sawyer trans., 2014) (1981); *see also* Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 690 (1999) (discussing Foucault's influence on narrative theory and its application in legal discourse).

3 *See* Kronman, *supra* note 2 at 690 ("A fundamental premise of Foucault's work is that 'words' shape 'things,' that our ways of speaking, our habits of expression and the modes of thought they express, constitute the order of things, that they determine the organization of the world by establishing and validating its division into various disciplines, authorities, jurisdictions and the like.").

4 *See* Catherine Kohler Riessman, *Analysis of Personal Narratives*, *in* HANDBOOK OF INTERVIEW RESEARCH: CONTEXT & METHOD 695, 696 (Jaber F. Gubrium & James A. Holstein eds., 2002).

5 *See* MEMORY, IDENTITY, COMMUNITY: THE IDEA OF NARRATIVE IN THE HUMAN SCIENCES 343 (Lewis P. Hinchman & Sandra K. Hinchman eds., 1997); Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 22 (Peter Brooks & Paul Gewirtz eds., 1996).

6 *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

their experiences, create conventions that define what they think, know, and believe, and, eventually, what they may allow or forbid in their societies.[7]

A. Narrative and Public Opinion

Different disciplines offer perspectives on narrative's ability to influence societal norms. Communication scholars focus on the persuasive power of narratives and the role of media in shaping public opinion.[8] Their research explores how narratives are disseminated through mass media, social networks, and other communication channels.[9] Having analyzed narratives in terms of their structure, characters, plotlines, and framing devices, communication research examines how narratives affect audience attitudes, beliefs, and behaviors and interact with other forms of persuasion, such as arguments and evidence.[10] In marketing, products and services are situated within narratives that resonate with consumers' values and aspirations.[11] By crafting a captivating narrative, marketers can mold public opinion and sway consumer behavior, prompting individuals to perceive a brand as an essential component of their own personal narrative.[12] In politics, narratives are a tool for political messaging and persuasion.[13] Politicians use narratives to construct perspectives of people within their environment and alter relationships between social

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7 *See* Margaret. J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1882 (1987) ("Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and the shape (for us) of reality itself."); RICHARD DELGADO, THE LAW UNBOUND!: A RICHARD DELGADO READER 5 (Adrien Katherine Wing & Jean Stefancic eds., 2016) ("Narrative habits, patterns of seeing, shape what we see and that to which we aspire.").

8 *See* ALISTER MISKIMMON, BEN O'LOUGHLIN & LAURA ROSELLE, STRATEGIC NARRATIVES: COMMUNICATION POWER AND THE NEW WORLD ORDER 7 (2013).

9 *See id.* at 7.

10 *See* Kurt Braddock & James Price Dillard, *Meta-Analytic Evidence for the Persuasive Effect of Narratives on Beliefs, Attitudes, Intentions, and Behaviors*, 83 COMMC'N MONOGRAPHS 446, 446 (2016).

11 *See* João Ricardo de Oliveira Júnior et al., *A Story to Sell: The Influence of Storytelling on Consumers' Purchasing Behavior*, 40 PSYCH. & MKTG. 239, 239 (2022).

12 *See, e.g.*, Patrícia Dias & Rita Cavalheiro, *The Role of Storytelling in the Creation of Brand Love: The PANDORA Case*, 29 J. BRAND MGMT. 58, 58 (2022).

13 *See* Peppi Talonpoika, *Storytelling and Politics: Uses of Personal Narratives in Contemporary Public Communication* (2023) (M.A. thesis, University of Padova), https://thesis.unipd.it/retrieve/4dba98a1-ce4e-476d-b45b-a8aebe76c142/ Talonpoika%20Peppi.pdf [https://perma.cc/KTZ9-SMF7].

groups and individuals.[14] Narratives create influence through the value they communicate, not necessarily because they tell the truth.[15]

The role of narratives in law is similarly influential. Since legal activities depend on the ability to identify plots, manipulate stories, and process them, narratives can shape the way that citizens perceive their laws and establish their expectations of legal systems.[16] Courtrooms are a site of struggle between competing narratives of the same events presented to influence the judge or jury.[17] Legal advocates must use rhetoric to construct arguments, promote their interpretation of events and precedent, and shape perceptions that could lead to a meaningful alternative narrative.[18] Putting facts into coherent form and presenting them persuasively makes a "case." Lawyers have long recognized that rhetoric matters for the court to reach a final narrative and determinative outcome.[19] They use rhetorical strategies within their arguments in court to affect the audience and the court's ruling.[20] Within the restrictions of evidence rules and the risk of defamation, for example, lawyers

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14 *See* Josefin Graef, Raquel da Silva & Nicolas Lemay-Hebert, *Narrative, Political Violence, and Social Change*, 43 STUD. CONFLICT & TERRORISM 431, 431 (2018).

15 *See* Francesca Polletta & Jessica Callahan, *Deep Stories, Nostalgia Narratives, and Fake News: Storytelling in the Trump Era*, 5 AM. J. CULTURAL SOCIO. 392, 392–93 (2017).

16 *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 (1985) ("Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority . . . [and also] limit the stories we can tell."); Almog, *supra* note 1, at 10.

17 *See* Almog, *supra* note 1, at 12.

18 *See* Kristin M. Langellier, *Personal Narrative*, *in* ENCYCLOPEDIA OF LIFE WRITING: AUTOBIOGRAPHICAL & BIOGRAPHICAL FORMS 699, 699–701 (Margaretta Jolly ed., 2001); Jonathan Yovel, *Narrative Justice*, 18 BAR-ILAN L. STUD. 283, 284 (2002).

19 *See* ANTHONY G. AMSTERDAM & JEROME S. BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAY WE UNDERSTAND THE LAW—AND OURSELVES 110 (2000) ("[T]he law is awash in storytelling . . . This endless telling and retelling, casting and recasting is essential to the conduct of the law. It is how law's actors comprehend whatever series of events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it.").

20 *See id.*

can manipulate an argument as they see fit.[21] They weave compelling stories to not only influence the court but also to resonate with broader audiences.[22]

Legal opinions are shaped by precedent and legal reasoning, but they also construct authoritative narratives that are influenced by—and can influence—broader cultural and societal understandings.[23] A ruling's narrative constructs a meaningful sequence of events and experiences, sending a message of validation. The language in legal opinions aims to reflect the meaning of the law, and the ruling's narratives shape the behavior of people following the case. Accordingly, the narratives within courtrooms hold ethical and pragmatic weight. When rhetoric is credited and relied upon by the court's ruling, the court incorporates a chosen narrative. Court rulings create official and implicit narratives connecting arguments, whether adopting one of the parties' narratives or creating a new one, in a coherent and purposeful way to make sense of a case's legal issues and its implications.[24] The ruling's narrative is constitutive of an implicit "reality" in that it physically shapes public perceptions and therefore has symbolic power, lending ethical and pragmatic significance in shaping the public discourse.[25] The use of functional narratives and rhetoric in the adversarial environment of the court is similar to that used in the policy-

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21 *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 53 U. CHI. L. REV. 684, 687–88 (1985).

22 *See* JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 802 (1973) ("From the beginning you know where the lawyer wants to come out, and every word points that way . . . But the judge is bound to keep an open mind, to keep his reader in suspense as long as he can, if he is to express fairly the process of his decision. There is a difference between an opinion that reaches a conclusion and one that is aimed there . . . [I]f it is to express the process by which the original intention is worked out, the judicial narrative must keep the reader in a sort of suspense or open-mindedness, during which he is exposed one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judgment. Very few opinions do this.").

23 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring segregation in schools unconstitutional in response to growing support for the Civil Rights Movement); Miranda v. Arizona, 384 U.S. 436, 467 (1966) (reshaping police procedures in response to growing concerns of abuse); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (striking down a federal statute barring corporate expenditures for election communications, allowing companies to exert influence over politics with limited government insight).

24 *See generally* Bernard S. Jackson, *Narrative Theories and Legal Discourse Narrative*, *in* NARRATIVE IN CULTURE: THE USES OF STORYTELLING IN THE SCIENCES, PHILOSOPHY, AND LITERATURE 23, 23–51 (1990).

25 *See* Vivien Lowndes, *Narrative and Storytelling*, *in* EVIDENCE-BASED POLICYMAKING IN THE SOCIAL SCIENCES: METHODS THAT MATTER 103, 103 (Gerry Stoker & Mark Evans eds., 2016).

making process where narratives are essential to creating specific norms.[26] Since narratives impose meaning, law relies on them to make sense of legal ideas.[27] During the legislative process, rhetoric used in public debates translates into competing implicit narratives that influence the chosen policy.[28] Each narrative competes for the right to influence the chosen policy during the legislative process,[29] and legislators rely on those narratives to justify the legitimacy of their chosen paths.[30]

B. Narrative Analysis Methodology and Contribution

Beyond their legal determinations, judicial decisions are also stories about conflicts embedded in and reflecting upon social and cultural narratives. Recognizing that, narrative research analysis is particularly valuable in understanding the broader implications of court rulings. Narrative analysis of court rulings pays attention to the details of a ruling's language, the perspectives of the judges, and the position of a ruling in relation to legal precedents and societal context.[31] Centering court rulings in this research uncovers the interplay between legal reasoning, social dynamics, and individual experiences.[32] Court rulings not only reflect the personal values of individual judges but also illuminate the social and cultural contexts in which a ruling takes place. Awareness of the social values underlying courtroom narratives leads to a more context-sensitive analysis of how courts implement public policies. Moreover, by employing narrative analysis specifically to

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26 *See generally* Andreas von Arnauld, *Norms and Narrative*, 18 GERMAN L.J. 309, 313 (2017); Elizabeth A. Shanahan et al., *Narrative Policy Framework: The Influence of Media Policy Narratives on Public Opinion*, 39 POL. & POL'Y 373 (2011) (presenting quantitative research that explores what elements of policy narratives are most persuasive).

27 *See* Lowndes, *supra* note 25, at 103.

28 *See, e.g.*, Sharon Bassan, *Donations for Sale - Rhetorical Methods in the Service of Compensated Egg Recruitment in Israel*, 20 GEO. J. GENDER & L. 1, 8–18 (2018) [hereinafter Bassan, *Donations*].

29 *See* Brooks, *supra* note 5, at 6; Shaul R. Shenhav, *Political Narratives and Political Reality*, 27 INT'L POL. SCI. REV. 245, 249 (2006); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 242 (2012).

30 *See, e.g.*, Ronald N. Jacobs & Sarah Sobieraj, *Narrative and Legitimacy: U.S. Congressional Debates About the Nonprofit Sector*, 25 SOCIO. THEORY 1 (2007) (explaining the basic narrative structures that informed congressional debates about nonprofit tax legislation).

31 *See* FLORA DI DONATO, THE ANALYSIS OF LEGAL CASES: A NARRATIVE APPROACH 28 (2019) ("Within the narrative analysis of legal cases, the notion of context gives due consideration to the broader context where the story of the client originates.").

32 *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 896 (2013).

court rulings, researchers can explore a ruling's meanings and implications through the consideration of the time and place of the ruling, as well as the broader legal and cultural landscape that influenced its development. Narratives, therefore, allow understanding and comparison of individual experiences within historical contexts.[33]

Narrative research analysis allows for a comprehensive exploration of a narrative's content—how the events and arguments presented in the ruling are ordered and connected, the structure of arguments— and identification of the overarching plot and themes that emerge.[34] It focuses on the details of storytelling, including how stories are constructed, the incorporation of images and explanations, and the position of the narrator in relation to the story events and audience.[35] In narrative analysis, common thematic elements are identified across cases, taking into account the context of narration and imposing meaningful patterns on seemingly random or unconnected events and circumstances.[36] By examining a narrative structure, researchers can also assess the coherence, consistency, and persuasive power of arguments.[37]

Court decisions can offer valuable insights into underlying or hidden social conventions in several ways. First, judges' opinions often establish legal precedents that reflect prevailing social norms and conventions.[38] Critical reading of the rhetoric in legal cases is essential to expose and explore the values, assumptions, and implicit narratives credited and relied upon by courts—as well as those that are dismissed. Narrative analysis of court cases allows researchers to uncover the meanings embedded within a court ruling, the motivations that underpin a court's decision-making process, and how different elements contribute to the overall narrative.[39] The analysis clarifies how social conventions transform over time

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33 *See* Elliot G. Mishler, *Validation in Inquiry-Guided Research: The Role of Exemplars in Narrative Studies*, 60 HARV. EDUC. REV. 415, 427 (1990).

34 *See* Donald E. Polkinghorne, *Narrative Configuration in Qualitative Analysis*, 8 INT'L J. QUALITATIVE STUD. EDUC. 5, 12 (1995).

35 *See* Riessman, *supra* note 4, at 696 ("[N]arrative analysis takes as its object of investigation the story itself.").

36 *See id.* at 696–97.

37 *See id.*

38 *See* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 786 (1966).

39 *See, e.g.*, LYNN BUTLER-KISBER, QUALITATIVE INQUIRY: THEMATIC, NARRATIVE AND ARTS-INFORMED PERSPECTIVES 73 (2010); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997);

and how legal systems can adapt to better reflect evolving values. For example, landmark cases related to civil rights, gender equality, or discrimination reveal the evolving social conventions and norms over time.[40] By examining the reasoning and arguments presented in these narratives, we can gain a deeper understanding of the social conventions that shape legal frameworks and guide their interpretation and of the societal values and beliefs that influence legal outcomes.

Second, since narratives have the power to impact the way social identities are formed, "including those addressing law-related issues, such as race, community, gender, and the practice of law,"[41] a more nuanced critical analysis of court rulings' uses of narrative is required. Unpacking narratives used in court exposes how legal structures that privilege certain groups while marginalizing others are formed.[42] Analysis of the language, tone, and framing used in court opinions can reveal hidden social conventions, biases, power dynamics, and prejudices held by judges, lawyers, and witnesses.[43] For instance, narratives related to criminal trials often indicate how societal biases affect the treatment of defendants based on their race, socioeconomic status, or other identity categories.[44] By examining how courts construct narratives through their rulings and how these narratives shape the development of the law and its impact on society, narrative analysis may challenge prevailing norms that perpetuate injustice.[45]

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

40 *See, e.g.*, Geoffrey R. Stone, *The Road to* Roe*,* 43 LITIGATION 43 (2016); Nicholas Short, *The Story of "the Court": A Narrative Analysis of* Planned Parenthood v. Casey, 34 HASTINGS CONST. L.Q. 477 (2007); Paul Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J.L. & PUB. POL'Y 7 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397 (1987).

41 *See* Almog, *supra* note 1, at 3.

42 *See id.*

43 *See, e.g.*, Douglas Rice, Jesse H. Rhodes & Tatishe Nteta, *Racial Bias in Legal Language*, 6 RSCH. & POL. 1 (2019) (showing that, in legal opinions, African American names are more frequently associated with unpleasant or negative concepts, while European American names are more frequently associated with pleasant or positive concepts).

44 *See id.*

45 *See id.*

Finally, consistent narrative inquiry can document social change and progress.[46] A historical-cultural context related to larger societal narratives and struggles often underlies social narratives.[47] Court narratives often reflect power dynamics within society.[48] Narrative analysis emphasizes the multiplicity, fluidity, and reflexivity of understanding social life and can make sense of complex phenomena such as hybrid social movements.[49] Contextual analysis of narratives could be relevant to ongoing and future advocacy. Foucault describes discourse as a specific way of engaging with the world and relating to it.[50] He understands discourse as a "strategic situation" that determines the distribution of power between actors, both enabling and constraining them by shaping their field of opportunities and limiting their freedom.[51] Narrative approaches can challenge traditional models of knowledge by recognizing multiple truths constructed by socially and historically situated individuals about a dynamic world.[52] The understanding of hidden or underlying societal norms and power dynamics is invaluable to understanding how change occurs and how individual lives are connected to social structures.[53] The realistic analysis suggested here and the

46 *See* Cover, *supra* note 6, at 10 ("Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.").

47 *See* Riessman, *supra* note 4, at 706; *see also* Susan E. Bell, *Becoming a Political Woman: The Reconstruction and Interpretation of Experience Through Stories*, *in* GENDER AND DISCOURSE: THE POWER OF TALK 97–123 (Alexandra Dundas Todd & Sue Fisher eds., 1988).

48 *See* God'sgift Uwen, *Objection Overruled: Language Dynamics and Power Relations in Courtroom Interactions*, 54 LANGUAGE MATTERS 21, 37 (2023) ("The asymmetry and gradation in the allocation of social power . . . are determined by social roles and power relations exercised through regulated language in the courtroom context.").

49 *See Narrative Analysis: The Constructionist Approach*, *in* THE SAGE HANDBOOK OF QUALITATIVE DATA ANALYSIS 203–16 (Uwe Flick et al. eds., 2014).

50 *See* FOUCAULT, ARCHAEOLOGY, *supra* note 2 at 231; Peter H. Feindt & Angela Oels, *Does Discourse Matter? Discourse Analysis in Environmental Policy Making*, 7 J. ENV'T POL'Y & PLAN. 161, 164 (2005).

51 *See* FOUCAULT, ARCHAEOLOGY, *supra* note 2 at 165.

52 *See* Ruard Ganzevoort, *Narrative Approaches*, *in* THE WILEY BLACKWELL COMPANION TO PRACTICAL THEOLOGY 214, 214 (Bonnie J. Miller-McLemore ed., 2011); *see also* Cover, *supra* note 6, at 6–7 ("The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding—patterns that constitute the dynamic between precept and material universe—are radically uncontrolled. They are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence.").

53 For the use of narrative to understand the dynamics of social movements, see generally Francesca Polletta & Pang Ching Bobby Chen, *Narrative and Social Movements*, *in* THE OXFORD HANDBOOK OF CULTURAL

implicit narratives that this analysis exposes will enable more thoughtful framing in future cases challenging existing social conventions. The hope is that an awareness of the implicit narratives used in the courtroom will help lawyers, activists, and policymakers strategize accordingly.

C. Narrative Analysis in the Context of Reproductive Practices

Following a current, global culture war is the divergent framing of reproductive practices by various policymakers, citizens, and courts. Understanding reproductive technologies without language and context is incomplete because those can help or hinder our understanding of the Assisted Reproductive Technology ("ART") that protects or harms those who use it. As a result, analyzing the court rulings that create narratives about reproductive practices is especially important to understand a central point of tension in contemporary society. Through the imposition of certain narratives, courts play a significant role in shaping not only the discourse around pregnancy and reproduction but also the image of women, who bear the implications following narrative manipulations.[54] For example, using rhetoric that conceptualizes women as market actors, rather than language depicting women as a vulnerable population in need of protection, fundamentally determines how cases about commercialized assisted reproduction are decided.[55] Framing gamete donors as donors or genetic parents; framing a gestational surrogate as a surrogate or a mother; or framing an embryo as an embryo, a fertilized egg, a blastocyst, a "potential life," or an "unborn human being" can all lead to different legal conclusions.[56] This Article therefore combines the legal, ethical, and feminist lenses of reproductive practices with a narrative analysis.

SOCIOLOGY (Jeffrey C. Alexander et al. eds., 2012); Francesca Polletta, *Contending Stories: Narrative in Social Movements*, 21 QUALITATIVE SOCIO. 419 (1998).

54 *See* Laurie Penny, *The Criminalization of Women's Bodies Is All About Conservative Male Power*, NEW REPUBLIC (May 17, 2019), https://newrepublic.com/article/153942/criminalization-womens-bodies-conservative-male-power [https://perma.cc/4EF6-3ZAW]; Shulamit Almog & Sharon Bassan, *The Politics of Pro and Non-Reproduction Policies in Israel*, 14 J. HEALTH & BIOMEDICAL L. 27, 80 (2018).

55 *See, e.g.*, Sharon Bassan, *Different but Same: A Call for a Joint Pro-Active Regulation of Cross-Border Eggs and Surrogacy Markets*, 28 HEALTH MATRIX 323, 348 (2018) [hereinafter Bassan, *Different but Same*].

56 *See* Susan Crockin et al., *The Supreme Court Overturns Right to Abortion, Raising Questions and Uncertainties for ART Patients and Providers*, SOC'Y FOR ASSISTED REPROD. TECH. (July 21, 2022), https://www.asrm.org/news-and-events/asrm-news/legally-speaking/the-supreme-court-overturns-right-to-abortion-raising-questions-and-uncertainties-for-art-patients-and-providers/ [https://perma.cc/H2PK-9K7A].

The narratives surrounding reproductive practices also have profound implications for the LGBTQ+ community, particularly in the context of access to ART and the legal recognition of familial structures.[57] Rhetoric that centers on traditional heteronormative notions of the family can marginalize LGBTQ+ individuals and couples seeking to build families through ART.[58] For instance, framing surrogates as "substitute mothers" or emphasizing genetic ties as the foundation of parenthood risks excluding or invalidating the familial bonds of non-biological parents, particularly same-sex parents.[59] Moreover, legal narratives that fail to explicitly recognize the diverse needs and experiences of LGBTQ+ people can perpetuate systemic inequities, reinforcing legal barriers based on physiological rather than social criteria.[60] Understanding and challenging these implicit biases within reproductive narratives is critical for advancing both social and legal equity for LGBTQ+ families.

Contextual narrative analysis is relevant to ongoing and future advocacy in the area of reproductive technologies. Reproductive rights cases often reveal the profound influence of legal framing on shaping public opinion, judicial outcomes, and future policy directions.[61] This Article offers a critical point of view on the rhetoric and narratives that lead to final rulings in two specific cases, which, despite arising from vastly different cultural and political contexts, share striking commonalities. The first, a Supreme Court ruling from Israel, establishes the eligibility of same-sex couples and single men for domestic surrogacy services after years of ineligibility.[62] The second, *Dobbs v. Jackson*

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57 *See* KIMBERLY D. RICHMAN, COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW 19 (2009) (examining how family law has evolved to accommodate LGBTQ+ parenting).

58 *See* Rose Vacanti Gilory, *The Law of Assisted Reproductive Technologies: Imposing Heteronormative Family Structures onto Queer Families*, 31 TUL. J.L. & SEXUALITY 27 (2022).

59 *See* ELLY TEMAN, BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF 22 n.88 (2010); *see also* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 970 (2010).

60 *See, e.g.*, Margaret Besse et al., *Experiences with Achieving Pregnancy and Giving Birth Among Transgender Men: A Narrative Literature Review*, 93 YALE J. BIOLOGY & MED. 517 (2020) (examining studies on the pregnancy and birth experiences of transgender men).

61 *See, e.g.*, Holly J. McCammon & Cathryn Beeson-Lynch, *Fighting Words: Pro-Choice Cause Lawyering, Legal-Framing Innovations, and Hostile Political-Legal Contexts*, 46 LAW & SOC. INQUIRY 599, 599 (2021); *see also* Holly J. McCammon, *A War of Words Over Abortion: The Legal-Framing Contest Over the Undue Burden Standard*, 43 JUST. SYS. J. 623, 623 (2022).

62 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements L. 5756-1996 (2020) (Isr.) [hereinafter *Arad-Pinkas II*].

Women's Health Organization,[63] is used as a reference point to further understand the effect of narratives on women's life opportunities. Both cases involve reproductive practices performed on women's bodies amidst politically charged debates, and both confront constitutional questions around access to these practices. Yet, the cases diverge in their underlying objectives and outcomes. While *Arad-Pinkas II* expands access to surrogacy in Israel, affirming the rights of those seeking to become parents, *Dobbs* empowers U.S. states to impose restrictions on abortion, curbing reproductive autonomy.[64] Together, these cases offer a compelling lens to examine how courts navigate the intersection of reproductive justice and broader societal narratives. This Article analyzes how each court's narrative choices dramatically affect women's life opportunities.

In order to understand the Israeli court's ruling, Part II reviews how two competing sets of values—liberal and conservative—shaped Israeli discourse surrounding reproductive practices, particularly surrogacy.[65] In light of the Israeli socio-political context and its ideological conflict, Part III analyzes the rhetoric and narratives used in the court's ruling on gay eligibility for domestic surrogacy and their implications.[66] Beyond telling the story about the fight for gay eligibility for domestic surrogacy in Israel, Part IV of the Article builds upon the analysis to offer a comparative evaluation of the use of narratives and rhetoric in *Dobbs*.[67] Finally, the Article concludes by portraying the implicit narratives the courts impose on the women behind these rulings and recognizing that official and implicit narratives have direct effects on court rulings and the power dynamic between parties. When discussing reproductive practices, activists, lawyers, and courts would benefit from considering who is most impacted by the narratives they create and recentering women when issuing rulings relevant to women's bodies, autonomy, and opportunities.[68]

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63 597 U.S. 215 (2022).

64 *See Dobbs*, 597 U.S. at 232 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

65 *See* discussion *infra* Part II.

66 *See* discussion *infra* Part III.

67 *See* discussion *infra* Part IV.

68 *See* discussion *infra* Conclusion. This Article is the third piece of a series of articles that illustrate the interaction between sociopolitical forces and regulatory changes in the fields of law and reproductive practice. The first article addresses narrative changes in the pro- and non-natalist reproductive practices. *See* Almog & Bassan, *supra* note 54. The second article addresses rhetorical tools that shape the discourse around reimbursed egg donation. *See* Bassan, *Donations*, *supra* note 28.

II. The Development of the Discourse Surrounding Reproductive Practices in Israel

Israel defines itself, as stated in its basic laws, as a democratic and Jewish state.[69] Accordingly, it is influenced by two sets of ideologies: On one hand, inspired by democratic and liberal values, Israel recognizes autonomous choice, bodily autonomy, and other human rights as foundational principles of its legal system.[70] On the other hand, various references to Israel's unique status as a Jewish state generate a clear pro-natalist, and therefore more conservative, vision.[71] The Law of Agreements to Carry Embryos of 1996 (hereinafter "The Surrogacy Act") simultaneously expresses both very liberal and very conservative values regarding surrogacy.[72] It is the first piece of legislation in the world to regulate commercial surrogacy and largely represents a liberal, pro-natalist vision compatible with democratic as well as Jewish religious values.[73] However, until the Israeli Supreme Court's ruling established the eligibility of same-sex couples and single men for domestic surrogacy services, the law also reflected a conservative view of the normative family, as it excluded single women and men.[74]

Two generations of discourse surrounding reproductive practices in Israel reflect a longstanding tension between these two approaches.[75] Influenced by different cultural sources, the first generation arose following the enactment of the National Health Insurance Law (1994) and the Surrogacy Act (1996), reflecting the pro-natalist narrative as a liberal,

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69 Basic Law: Human Dignity and Liberty, 5752-1992, SH 1391 (1992) (Isr.).

70 *See id.* §§ 1, 1a, 4, 5; *but see* § 312-21, Penal Law, 5737-1977, SH 864 (1977) 226 (Isr.) (criminalizing abortion except when it is approved by a special committee under certain circumstances); *see also* Almog & Bassan, *supra* note 54, at 28 ("[T]he vast majority of requests to approve abortions . . . are positively answered.").

71 *See* Almog & Bassan, *supra* note 54, at 34–36; Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women's Rights and State and Community Interests*, 18 U. PA. J.L. & SOC. CHANGE 169, 184–86 (2015) (describing the origins and rationale of Israeli pro-natalist viewpoints).

72 The Law of Agreements to Carry Embryos, 5756-1996, SH 176 (1996) (Isr.).

73 *See* Almog & Bassan, *supra* note 54, at 34 (describing Judaism's pro-natalist stance across cultural sources, including religious scripts, philosophical and political thought, and historic events).

74 *See id.* at 58.

75 *See id.* at 27 (describing the two generations); Maayan Sudai, *Governance Feminism in Israel: Surrogacy as a Case Study*, 9 MAASEI MISHPAT 55 (2018) (outlining the feminist approaches).

positive, nationally-supported value.[76] In the second generation, subtle resistance has undermined the hegemonic pro-natalist narrative in favor of alternative, more nuanced narratives about reproduction.[77] The second-generation discourse has emerged in the last twenty years, after the first generation's impact was analyzed and regulatory initiatives were implemented according to lessons learned.[78]

Continuous cultural exposure to religious scripts, philosophical and political discussion, and historic events has entrenched a pro-natalist reproduction narrative in Israel, which elucidates the enthusiastic acceptance of natalist practices.[79] In particular, there are four intersecting attributes of (in)fertility that shape Israeli reproductive policy.[80] The first is a traditional pro-family discourse leading towards a convention of giving birth to "at least" two children.[81] The second is a genetic-based discourse that compels genetic, rather than social, parenthood.[82] The third can be considered a collective national discourse propelled by a sense of political and demographic threats to Israel related to the conflict with neighboring Arab countries and the memory of the six million annihilated Jews in the Holocaust.[83] Finally, a liberal discourse assumes a right to happiness via the experience of parenthood and the realization of one's self.[84] All these components make the Israeli state

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76 *See* Almog & Bassan, *supra* note 54, at 29.

77 *See id.*

78 *See id.*

79 *See id.* at 34.

80 *See* Sigal Gooldin, *Cultural Competence and Ethical Incompetence: Notes from a Study of the New Reproductive Technologies in Israel*, 8 DIVERSITY HEALTH & CARE 45, 49 (2011) (explaining traditional, pro-family, national, and liberal discourse present in Israel).

81 *See id.* (describing pro-family discourse as a normative compulsion to have multiple children).

82 *See id.* (analyzing prevalence of pro-natal discourse as measured by above-average total fertility rate in Israel); Daphna Birenbaum-Carmeli, *Genetic Relatedness and Family Formation in Israel: Lay Perceptions in the Light of State Policy*, 29 NEW GENETICS & SOC'Y 73, 73 (2010) ("Israel's reproductive policy stands out in the discrepancy it creates between genetic and non-genetic modes of kinship. Whereas fertility treatments receive almost unrestricted state funding, adoption entails severe applicant screening and long years of waiting, or else, if conducted abroad, high private expenditure and intricate bureaucracy.").

83 *See* Gooldin, *supra* note 80, at 49 (linking national discourse to historically negative events involving Jewish populations globally).

84 *See id.* (describing the liberal discourse focusing largely on the emotional side of parenthood).

a fertility superpower where the state actively encourages and supports child-rearing and reproductive practices.[85]

It is therefore not surprising that ART treatments are embraced by potential recipients and that the percentage of people treated for fertility in Israel is among the highest in the world.[86] Israel is the only country where in vitro fertilization (IVF) is almost entirely state-subsidized.[87] Neither marital status, sexual orientation, nor the number of children from previous relationships affects eligibility for public funding of IVF.[88] Amid high demand for IVF, the number of IVF treatments per capita has increased over the years, and lawmakers have continuously expanded the criteria for entitlement to publicly funded treatments.[89] It is in this environment that discussion regarding the passage of the Surrogacy Act, which regulates surrogacy arrangements via direct state oversight, took place.[90] The Surrogacy Act requires a statutory committee to review applications and contracts to ensure that

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85 *See* Almog & Bassan, *supra* note 54, at 27; Daniel Sperling, *Commanding the "Be Fruitful and Multiply" Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 363, 365–66 (2010) (citing Israel's religion, culture, politics, public policy, and law encouraging fertility and high birthrates); Dina Kraft, *Where Families Are Prized, Help Is Free*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html [https://perma.cc/R95B-M7XG] (referencing Israel as the world capital of in vitro fertilization and the home to the busiest fertilization clinics); Alon Tal, *Israel's Looming Demographic Crisis*, N.Y. TIMES (July 25, 2016), https://www.nytimes.com/2016/07/23/opinion/israels-looming-demographic-crisis.html [https://perma.cc/LK26-8LMD] (noting Israel's highest developed-world birthrate stemming from reproduction motivated by patriotic duty and Holocaust losses).

86 *See* Almog & Bassan, *supra* note 54, at 39; Daphna Birenbaum-Carmeli & Martha Dirnfeld, *In Vitro Fertilisation Policy in Israel and Women's Perspectives: The More the Better?*, 16 REPROD. HEALTH MATTERS 182 (2008); *see also* COMM. FOR PROMOTION OF WOMEN'S STATUS, Comm. Discussion, 1st Knesset No. 44 (Sept. 16, 2003) (Isr.) [on file with *Columbia Journal of Gender & Law*]; Carmel Shalev, *Reproductive and Genetic Technologies in Israel*, *in* ISRAELI BIOETHICS 140, 163 (Gil Segal & Efrat Ram-TikTin eds., 2015); Gooldin, *supra* note 80, at 48; Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 81 (2006).

87 *See* Almog & Bassan, *supra* note 54, at 39; SUSAN KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 232 (2000); *see also* Daphna Birenbaum-Carmeli, *"Cheaper than a Newcomer": On the Social Production of IVF Policy in Israel*, 26 SOCIO. HEALTH & ILLNESS 897, 907 (2004).

88 *See* Almog & Bassan, *supra* note 54, at 39.

89 *See id.*; Daphna Birenbaum-Carmeli, *Contextualizing a Medical Breakthrough: An Overview of the Case of IVF*, 24 HEALTH CARE WOMEN INT'L 591, 593 (2003) (mentioning that, in Israel, IVF was implemented before having undergone full clinical testing procedures); *see also* Kraft, *supra* note 85 ("1,657 in vitro fertilization procedures per million people per year were performed in Israel.").

90 *See* Rhona Shuz, *The Developing Right to Parenthood in Israeli Law*, INT'L SURV. FAM. L. 197, 206 (2013) ("Israel was the first country in the world to regulate surrogacy by legislation.").

the rights of the newborn and the parties are not undermined, to verify that the parties have entered the contract freely, and to confirm the parties' compatibility.[91] If surrogacy is approved, the intended mother's egg retrieval (if applicable) and artificial insemination are publicly funded.[92] Payment to gestational surrogates is capped and usually amounts to 140,000–165,000 NIS ($41,000–$48,000).[93] However, miscellaneous related expenses are also covered by the intended parents (reaching a total amount of about 220,000 NIS or $64,000).[94]

A review of the socio-political context is therefore necessary to understand the Israeli Supreme Court's decision in *Arad-Pinkas II* about surrogacy in Israel. The next section reviews the development of the discourse surrounding surrogacy regulation and the way it reflects the tensions between liberal and conservative values and feminist approaches. It shows that this development engendered several types of tensions: first, between conservative Jewish and liberal values; second, between liberal and radical feminist approaches; and third, between the policy goals of women's organizations and those of gay men involved in the LGBTQ+ movement.

A. The First Generation of Discourse (1994–2006): Feminist Tensions

Commercial surrogacy is a controversial practice because it commodifies the creation of future life in an alternative way to the natural process, thereby regulating women's bodies.[95] In traditional surrogacy, the surrogate provides both an egg and a womb.[96] Now,

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91 § 4(a)(6) Law on Agreements for the Carrying of Fetuses, 57754-1996, SH 176 (1996) (Isr.).

92 *See* Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM 151, 155 (2006).

93 *See* Daphna Birenbaum-Carmeli & Piero Montebruno, *Incidence of Surrogacy in the USA and Israel and Implications on Women's Health: A Quantitative Comparison*, 36 J. ASSISTED REPROD. & GENETICS 2459, 2460 (2019); Etty Dekel, Sec'y, Surrogacy Comm. Ministry of Health, Address at Webinar of the Aguda: The Association for LGBTZ Equality in Israel (July 27, 2022) (Isr.). *See also* Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* THE TANNER LECTURES ON HUMAN VALUES 89, 96–103 (Mark Matheson ed., 2000); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 198 (1983); Allen Verhey, *Commodification, Commercialization, and Embodiment*, 7 WOMEN'S HEALTH ISSUES 132 (1997).

94 *See* Dekel, *supra* note 93.

95 *See* Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFFS. 132, 160–64 (1992).

96 *See* Brian Clowes & Marisa Cantu, *The Ethics of Surrogacy*, HUM. LIFE INT'L (June 5, 2023), https://www.hli.org/resources/surrogacy-ethical-issues/ [https://perma.cc/V7MT-SXCC].

following the advancement of reproductive technology, women can opt for gestational surrogacy, which enables the transportation of a fertilized egg into the surrogate's uterus. Now, women can carry a child unrelated to their own genetic material, "conceived" by the gametes of other people. This process can utilize the genetic material of one or of both intended parents, if of opposite sex.[97] Many arguments about the intrinsic value of reproductive goods—surrogacy services or eggs purchased as commodities in the economic market—have to do with their impact on women's bodies and life opportunities and, consequentially, on the character of society as a whole.[98] The discourse has been focused on questions such as where, when, and how the influence of these reproductive markets should be limited.[99]

Across feminist scholarship, the way in which the body is conceptualized is deeply embedded in political ideologies and theoretical presuppositions that have important implications for social policy.[100] In the Israeli context, Maayan Sudai, a legal feminist scholar, analyzes the period prior to and contemporaneous with the enactment of the Surrogacy Act, during the first generation of discourse.[101] She shows the tension between liberal and radical feminist approaches in the policymaking sphere.[102] Sudai addresses the Aloni Commission, an expert body whose mandate was "to examine the legal, social, ethical, and religious issues raised by reproductive practices."[103] She shows that the 1991 report of the Aloni Commission manifests the spirit of liberal feminism.[104] Liberal feminists saw in surrogacy a path for self-fulfillment of surrogates that could give women an opportunity to

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97 *See id.*

98 *See* Bassan, *Donations*, supra note 28, at 10.

99 *See* Lisa Herzog, *Markets*, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 30, 2021), https://plato.stanford.edu/entries/markets/ [https://perma.cc/LWW7-RM5G]; *see also* Sandel, *supra* note 93 (claiming that the cost-benefit parameter transforms market transactions from private capitalistic acts between autonomous individuals into a public concern of all citizens, even those that do not take part in the market mechanism); *compare with* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 331 (1974).

100 *See, e.g.*, CAROL WOLKOWITZ, BODIES AT WORK (2006).

101 *See* Sudai, *supra* note 75.

102 *See id.* at 57.

103 MIN. JUST., REP. NO. 177-410, *The Report of the Public-Professional Commission in the Matter of In Vitro Fertilization* (1994) (Isr.) [https://perma.cc/WFY7-CLQE] [hereinafter ALONI REP.].

104 *See* Sudai, *supra* note 75, at 64.

exercise their freedom of choice, bodily autonomy, and reproductive rights, as well as the potential to elevate the economic value of motherhood and their place in society.[105]

Given this liberal approach, the radical feminist approach faced an ideological conflict: they aimed to avoid moral legitimacy for surrogacy.[106] The radical feminist approach takes pride in "going to the root" of women's oppression.[107] Radical feminism around the world originally identified surrogacy as a violation of human dignity and the dehumanization of the surrogate and women in general as a result of the commercialization of their bodies. Surrogacy was analogized to other extreme ethical issues—such as human trafficking, prostitution, and slavery—as violating human dignity.[108] Radical feminists in Israel therefore saw surrogacy as an extreme exploitation of women in economic distress, nullifying the ideal of free autonomous decision.[109] Critics across disciplines claim that, since the human body deserves an entirely separate sphere of valuation based on its intrinsic value, it is degrading to assign a monetary value to body parts or functions as if they belong in markets with other commercialized goods.[110] This line of argument, which I term the intrinsic-value-based argument, is critical of the market itself as well as any form of commercialized reproductive services. Intrinsic-value-based arguments imply that commercializing surrogacy services may contradict the public good or pose other moral hazards requiring regulation to abolish the practice.[111] Thus, proponents of the intrinsic-value theory seek to abolish the surrogacy market entirely, or at least minimize it.

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105 The Aloni Report emphasized these values thanks to the Secretary General of the Aloni Commission, Dr. Carmel Shalev, whose book *Birth Power* encouraged individual contract freedom. *See* ALONI REP., *supra* note 103; *see* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989) (portraying a liberal feminist approach).

106 *See* Sudai, *supra* note 75, at 66.

107 Rebecca Whisnant, *Our Blood: Andrea Dworkin on Race, Privilege, and Women's Common Condition*, 58 WOMEN'S STUD. INT'L F. 68, 69 (2016).

108 *See, e.g.*, D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 147–48 (2005); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM (1993); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010).

109 *See* WEISBERG, *supra* note 108, at 148.

110 *See generally* Sandel, *supra* note 93, at 72; WALZER, *supra* note 93, at 9; Verhey, *supra* note 93, at 132–33 (1997).

111 *See id.*

However, Israel's cultural embrace of natalist practices and the supportive liberal feminist approach taken by the Aloni Commission made complete delegitimization unattainable.[112] Surrogacy was a *fait accompli*. Israeli radical feminists—who had initially opposed surrogacy entirely—refocused their ideological fight on influencing the design of the contractual surrogacy relationship.[113] While it might have been easier to call on the opposition to abolish the practice, they instead took the pragmatic approach in order to be at the center of the decision-making process.[114]

This strategic refocusing of their advocacy efforts enabled radical feminists to have a seat at the negotiating table, despite their inability to stop the legislative process.[115] Informed by the politics of patriarchal domination, this pragmatic approach shifted from the margins to the center of discussion, calling for responsible balancing.[116] In an effort to improve the status and rights of the surrogate woman under the agreement, they recognized power disparities and worked to install institutional mechanisms to protect women from impoverishment and to empower them.[117] Women's organizations articulated the problematic nature of surrogacy through the prism of the unequal power dynamic between the surrogate mother and the intended parents, as well as economic and social factors involved in the process, to shape the contractual-regulatory relationship.[118] They addressed issues such as whether consent to become a surrogate is freely given, bargaining and status gaps between the surrogate mother and the intended couple, and surrogates' emotional alienation from the babies growing in their womb.[119] Practically, radical feminists' efforts contributed to reducing the required number of medical experts or religious members of the approving committee and, instead, made sure that considerations of social welfare, women, and ethics would be part of the deliberations.[120] Additionally, they demanded that the committee's

112 *See* Sudai, *supra* note 75, at 66.

113 *See id.* at 64–67.

114 *See id.*

115 *See* Sudai, *supra* note 75, at 66.

116 *See* Daphne Barak-Erez, *Introduction* to LEGAL FEMINISM IN THEORY AND PRACTICE (Daphne Barak-Erez, ed., Idit Shorer, trans., Resling Publ'g 2005) (arguing that legal institutions must take into consideration opposing values as well); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 20 (1984).

117 *See id.*

118 *See id.* at 64.

119 *See id.* at 66.

120 *See id.* at 65.

eventual agreement be approved by the court, and they lobbied to ensure surrogates' rights to make decisions regarding their bodies during pregnancy and to terminate their contracts at will.[121] They also insisted that surrogates be represented by legal advocates throughout the process and that a midwife represent the surrogates.[122]

Eventually, even though most discussions at the time—both in committee and following debates in the Knesset (the Israeli parliament)—were primarily concerned with the appropriate level of access to reproductive practices by intended parents, the proposal of the Surrogacy Act actually walked back some of the Commission's liberal arguments.[123] The initial policymaking promoted the pro-natalist Israeli narrative of reproduction. In the spirit of liberal feminism, the Aloni Commission embraced liberal values, which concluded that access to fertility treatments should be universal, reasoning that individuals have rights to "privacy and intimacy in their personal lives" regardless of factors such as marital status.[124] The Commission thus recommended that there be minimal state intervention in access to reproductive care.[125] But then-Minister of Health Efraim Sneh's political-pragmatic approach eventually required greater consideration of conservative positions, and eligibility was restricted to heterosexual couples,[126] leaving individuals and same-sex couples ineligible to use domestic surrogacy services.[127] This was thanks to the swing votes that Orthodox Jewish political parties have in Israeli Parliament, which strictly adhere to

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121 Although these organizations avoid drawing an explicit link between at-will termination and abortion, their discussion likely implies abortion since gestational surrogates are genetically unrelated to the embryo and authorities routinely approve abortion applications (approximately 98.9% of abortion applications were approved in 2014). *See Applications for Pregnancy Termination in 2014,* ISRAELI CENT. BUREAU OF STAT., https://www.cbs.gov.il/en/Statistics/Pages/Generators/Time-Series-DataBank.aspx?level_1=4 [https://perma.cc/S8GX-TR63]. However, this theory has never been tested in court.

122 *See* Sudai, *supra* note 75, at 65.

123 *See id.* at 64.

124 *See* ALONI REP., *supra* note 103, at 18 (explaining the proposal for universal fertility treatments regardless of marital status).

125 *See* Sudai, *supra* note 75, at 64.

126 § 1 Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) (Isr.) ("A man and woman *who are a couple*, who are connecting with a surrogate mother for the purpose of having a child.") (emphasis added).

127 *See* Sudai, *supra* note 75, at 64.

Jewish law and traditions (*Haredi*).[128] The desire to balance the Aloni Commission's liberal approach against conservative pushback resulted in a conservative, arguably homophobic approach, which suppressed both liberal and radical feminist approaches.[129]

Accessibility to surrogacy services continued to be a bargaining chip between these competing parties. LGBTQ+ activists successfully fought the eligibility issue through legal actions and political lobbying.[130] Adi Moreno, an Israeli sociologist and activist, strategically reviews petitions submitted to the Israeli Supreme Court in order to advance equal family rights and eligibilities.[131] According to her research, based on the individual right to equality, during the first generation of discourse, LGBTQ+ activists achieved access to state-funded sperm donations and fertility treatments for lesbian couples and single women; legal recognition and marital rights in Israel for officially married same-sex couples who married outside of Israel; the registration of parenthood for same-sex partners as legal guardians of each other's children, acknowledging "second-parent adoption" and granting a "parenthood decree"; and legal recognition for same-sex couples and parenting rights for non-genetic parents as legal parents for their partners' genetic children.[132] The Surrogacy Act remained the last law to grant heterosexual couples exclusive access to a reproductive resource in order to create a family. In a previous Israeli Supreme Court case, the court addressed the equal right to assisted reproduction.[133] Although the court had ruled

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128 *See* Waldman, *supra* note 86, at 83–84 (explaining the political influence of religious parties on public policy); Shuz, *supra* note 90, at 220 ("Accordingly, it is to be expected that the religious parties will vote against any new law, which expressly allows access to ART to single parents and same-sex couples. Indeed, the difficulty in passing legislation without the support of these parties is one of the reasons for the fact that many issues relating to ART, such as sperm donation, have been regulated by secondary legislation and administrative guidelines.").

129 *See* Sudai, *supra* note 75, at 64.

130 *See* Carmel Shalev et al., *Transnational Surrogacy and the Earthquake in Nepal: A Case Study from Israel*, *in* BABIES FOR SALE?: TRANSNATIONAL SURROGACY, HUMAN RIGHTS AND THE POLITICS OF REPRODUCTION 49, 51–52 (Miranda Davies ed., 2017) [hereinafter Shalev et al., *Transitional Surrogacy*].

131 *See* Adi Moreno, Crossing Borders: Remaking Gay Fatherhood in the Global Market 18 (2016) (Ph.D. thesis, University of Manchester) (ProQuest), https://pure.manchester.ac.uk/ws/portalfiles/portal/54583857/FULL_TEXT.PDF [https://perma.cc/WPL7-HXKS].

132 *See id.*

133 *See* HCJ 2458/01 New Family v. Approvals Comm. for Surrogate Motherhood Agreements, Ministry of Health, 57(1) PD 419 (2001) (Isr.) [hereinafter *New Family*] (holding that denying a single mother's legal access to surrogacy services is egregious discrimination).

that the law was discriminatory and violated the principle of equality, the legal structure kept unmarried women and men ineligible, emphasizing religious-orthodox values.[134]

B. The Second Generation of Discourse (2006–Present): LGBTQ+ Perspectives

After analyzing the first generation's impact and implementing regulatory initiatives according to the lessons learned, initiatives for legal regulation of reproductive practices in the last twenty years followed the rising use of practices involving the bodies of other women, such as egg donation and surrogacy, beyond traditional IVF treatments performed on infertile patients themselves.[135] Alongside an increasing social acceptance of these reproductive practices, the second-generation discourse added new voices and critical points of view regarding women's reproductive roles and the normative heterosexual family.[136] Gay men's fight for eligibility for domestic surrogacy is therefore inherently connected to this discourse.

In 2010, for example, Israel amended its laws to allow reimbursement for egg donation from women not undergoing fertility services, expanding an existing practice that had

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134 *See New Family*, 57(1) PD at 460; *Arad-Pinkas II*, ¶ 38.

135 *See* Almog & *Bassan*, *supra* note 54, at 57–58.

136 A prominent trend in the second generation of discourse is the shift from advocates' and scholars' focus on the legality of surrogacy to their focus on the regulation of surrogacy, in light of its ongoing practices. *See id.* at 58. This shift allows for a more complex picture of women's interests to emerge, where risks to women's health are noticed. *See id.* at 59. Feminists have voiced concerns about the extensive use of reproductive technology to deal with infertility. *See id.* at 62. However, while the second-generation criticism offers an opportunity to raise alternative expressions that reflect women's diverse identities and interests, it has not changed the hegemonic pro-natalist reproductive narrative. *See id.* at 79; *see also, e.g.*, COMM. FOR PROMOTION OF WOMEN'S STATUS, *Surrogacy in Israel - The Current Situation and Proposal for Change*, Comm. Discussion, 18th Knesset No. 142 14–17, 19 (May 30, 2012) (Isr.), https://main.knesset.gov.il/Activity/Committees/Women/Pages/CommitteeAgenda.aspx?tab=3&ItemID=470358 [https://perma.cc/BEL5-L2DK] ("The health risk to a woman by getting pregnant and giving birth is significantly higher than by donating a kidney . . . Women take this risk with the purpose of bringing a child into the world . . . People say organ donation is irrelevant because organ donation poses a health risk and pregnancy does not. I say pregnancy is a health hazard, but we see the goal before our eyes and we say, this risk is worth it, which is a legitimate decision . . . I will tell you frankly, the only difference is that this concerns women, whose bodies it is legitimate to exploit in exchange of payment.") (statement of Efrat Levy-Lahad, the head of the Genetics Department at Shaare Zedek Medical Center); *id.* at 19 ("We all sit here with rose colored glasses and see an amazing, wonderful picture. There are many surrogacy services like that, but this is not the whole picture. I suggest that we take off the glasses . . . We took upon ourselves a heavy responsibility. They have mentioned here before that we do not do experiments on human beings—this is a supreme lab. We perform experiments all right, and we neither follow up nor monitor.").

allowed only uncompensated donation from women undergoing egg recruitment for themselves.[137] In the same year, a professional-public commission led by Dr. Mor Yosef was established to address legislative regulation of reproduction and birth-related issues in Israel, attempting to balance the interests of intended parents with those of future children and surrogates.[138] A resulting report of the Mor Yosef Commission in 2012 reiterated the liberal tone set by the Aloni Commission, saying that reproduction is an intimate matter that requires great latitude in terms of individual autonomy.[139] In line with the more culturally palatable pro-natalist narrative, the report supported expanding eligibility for commercial surrogacy services to single women with medical problems that prevent pregnancy; in the spirit of more conservative views, it also supported expanding eligibility to single men only for altruistic surrogacy, without compensation.[140] (The minority position advocated for restricting commercial options entirely, allowing only altruistic surrogacy.)[141]

Cross-border surrogacy considerations appeared throughout both generations of the discourse since 2005.[142] While domestic surrogacy has been a viable option for some, citizens whose right to reproduction (as they perceived it) could not be fulfilled within Israel—in particular, Israeli gay men—turned to cross-border markets.[143] By 2009, the number of children resulting from cross-border surrogacy was slightly higher than the number of children born in domestic surrogacy in Israel.[144] Consequentially, parents who would have been ineligible for surrogacy in Israel returned with children from cross-border

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137 Egg Donation Law 5770-2010, 2242 SH 520 (Isr.).

138 *See* MIN. HEALTH, THE REPORT OF THE PUBLIC COMMITTEE TO ADDRESS THE LEGISLATIVE REGULATION OF REPRODUCTION AND BIRTH IN ISRAEL 4 (2010) (Isr.) [https://perma.cc/BH2C-A25Q] [hereinafter MOR YOSEF REP.].

139 *See* ALONI REP., *supra* note 103, at 12 (discussing private decisions regarding reproduction with sociological and ethical considerations).

140 *See* MOR YOSEF REP., *supra* note 138, at 4 (detailing the specifics and regulations around the process of reproductive assistance in Israel).

141 *See* Moreno, *supra* note 131, at 155 ("[T]he committee was well aware that most surrogacy practices by Israeli citizens take place overseas.").

142 *See id.* at 20, 149 (explaining that, by 2010, surrogacy was already a customary practice among Israeli citizens either within the state or across borders). A group of same-sex couples petitioned the court, demanding equal access to domestic surrogacy. *See New Family*, 57(1) PD at 419.

143 *See* Almog & Bassan, *supra* note 54, at 58.

144 *See id.* at 22.

surrogacy and posed a registration problem for the Israeli authorities.[145] To overcome the new concern, the state issued a series of administrative regulations, defining paternity for children born through cross-border surrogacy and granting them citizenship rights.[146] Following the Mor Yosef Commission, an amendment to the Surrogacy Act passed first call in 2014, proposing to equalize access to domestic surrogacy services for same-sex couples and single intended parents (men and women alike); additionally, the bill addressed the challenges of cross-border surrogacy transactions.[147] The bill passed in the Knesset at the first reading in 2014, but the legislative process remained incomplete because the general election resulted in a change of government administration and respective political priorities.[148] In March 2015, this version of the bill was removed. Access to domestic surrogacy services was not expanded, and the implications of cross-border surrogacy remained unaddressed.

In April 2015, six to seven hundred Israelis and twenty-five newborns gestated by Indian surrogates in Kathmandu were caught in an earthquake in Nepal.[149] Increased media coverage of the earthquake attracted public attention and opened yet another public discussion about surrogacy.[150] This time, the discussion surrounded same-sex couples traveling across borders because they were ineligible for domestic surrogacy services.[151] The implications of the cross-border market have been discussed in various

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145 *See id.* at 58.

146 *See* Moreno, *supra* note 131, at 20.

147 § 9 Draft Bill Amending the Law of Agreements to Carry Embryos (No. 2), 2014, HH 916 (Isr.).

148 Press Release, Knesset, Surrogacy Law Approved on First Reading (Oct. 27, 2014), https://main.knesset.gov.il/news/pressreleases/pages/press271014-hkhk.aspx [https://perma.cc/GKU5-U36S?type=standard].

149 *See* Jonah Mandel, *Israel to Airlift 25 Babies From Nepal Born to Surrogates*, UNION CATH. ASIAN NEWS (Apr. 27, 2015), https://www.ucanews.com/news/israel-to-airlift-25-babies-from-nepal-born-to-surrogates/73456 [https://perma.cc/6N5S-2PF6]; Debra Kamin, *Israel Evacuates Surrogate Babies From Nepal but Leaves the Mothers Behind*, TIME (Apr. 28, 2015), https://time.com/3838319/israel-nepal-surrogates/ [https://perma.cc/AU9X-PAC9].

150 *See* Mandel, *supra* note 149; Kamin, *supra* note 149.

151 *See*, *e.g.*, COMM. FOR INTERIOR & ENV'T AFF., Comm. Discussion, 19th Knesset no. 198, at 26 (Jan. 26, 2014) (Isr.) [hereinafter COMM. ENV'T AFF.] [https://perma.cc/C8VG-Z4P5] (discussing policy discourse regarding surrogacy) ("Every person has a right to raise a family and have children, even same sex couples.") (statement of MK Nitzan Horovitz). *See also* SPECIAL COMM. FOR APP. GOV'T INFO. ACCESSIBILITY & PRINCIPLES PUB. TRANSPARENCY, Comm. Discussion, 20th Knesset no. 25, at 5 (Feb. 23, 2016) (Isr.) [https://perma.cc/MY9K-4BWQ] ("Gay couples, LGBT couples, all deserve a family, the right to parenthood.") (statement of Iddo Vulkan). Especially interesting are the words of Heidi Moses, an ultra-Orthodox woman and member

contexts and Knesset committees.[152] These discussions incorporated the voices of many stakeholders, including surrogacy agencies, women's organizations, and others, reflecting the aforementioned tension between the hegemonic pro-natalist narrative, conservative views, and the second-generation criticism about the implications of current practices.[153]

Among other arguments, the 2015 incident raised concerns regarding the inadequate protections for foreign surrogates in cross-border transactions with Israeli intended parents.[154] Theoretically, evidence of unethical practices connected with surrogacy services in low-income countries such as Nepal could have led to a discussion about preventive measures for commercial surrogacy, or at least its cross-border version.[155] Alternatively, it could have led to a clear differentiation between domestic surrogacy services in Israel and foreign services. Such differentiation could have implied that it would be better for both surrogates and same-sex couples to perform these procedures in Israel, legally, under the protective measures of the Surrogacy Act, to be followed by a condemnation only of foreign practices.

In reality, the reaction was mixed. Newborns and their families abroad won strong public support in a time of crisis, and the Israeli government was cooperative in providing aid.[156] The emphasized narrative was of same-sex couples' need to rely on surrogacy services in foreign countries and the fact that this practice involved burdensome consequences for them which do not apply to opposite-sex intended parents who go through the process

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director in the LGBT association, at the Committee for Public Inquiries, regarding the access to surrogacy services. *See id.* ("As someone who comes from the ultra-Orthodox world, I have learned that there is a commandment to 'be fruitful and multiply and fill the earth.' We must see that this mitqua will take place and we stop with the burden on the gay community and on gay men in particular.").

152 *See supra* note 151.

153 *See* Almog & Bassan, *supra* note 54, at 58.

154 *See, e.g.*, Guy Ezra & Rabbi Neuwirth, *The Surrogacy Industry Is No Different Than Slave Trade*, SRUGIM NEWS (Apr. 27, 2015), [https://perma.cc/YTK4-A7KM] (raising concerns about the "immoral exploitation of women of socio-economic status who sell their bodies into slavery for money").

155 For questionable practices in poorer countries, see, e.g., Sharon Bassan, *Can Human Rights Protect Surrogate Women in the Cross-Border Market?*, *in* WOMEN'S HUMAN RIGHTS AND THE ELIMINATION OF DISCRIMINATION (Maarit Jänterä-Jareborg & Hélène Tigroudja eds., 2016) [hereinafter Bassan, *Cross-Border Market*].

156 *See* Kamin, *supra* note 149 (discussing the evacuation and portraying the need for domestic accessibility of surrogates).

in Israel.[157] In the policy realm, the incident reignited the call for expanded access to better-monitored domestic surrogacy and the right to create alternative same-sex families because every person, same-sex couples included, has a right to have a family and raise children.[158] Socially, a side effect of a narrative portraying such a broad view of the right to parenthood was the legitimization of the use of cross-border commercial surrogacy, particularly when this right was restricted by domestic legislation.[159] However, expanding eligibility to domestic surrogacy was in tension with classical arguments, which highlight the implications of involving an additional number of assisting female third parties—such as egg donors and surrogates—who undergo medical treatments and face increased risks due to expanded eligibility for domestic surrogacy services.

Despite their similar experience of gender- and sexuality-based oppression, experiences around the world suggest that a feminist-gay alliance is uncertain in an area so charged with issues of women's autonomy and bodily integrity.[160] Feminists and LGBTQ+ activists often protect different, even conflicting, interests when it comes to surrogacy. Reproductive practices are gendered and inherently linked with power relations.[161] The feminist view centers its analysis almost exclusively on the experience of the female surrogate, whether it supports women's participation in commercial surrogacy (e.g., liberal feminism) or objects to it and to the oppression of women within the process (e.g., radical feminism).[162]

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157 *See* Sigrid Vertommen, *Surrogacy at the Fertility Frontier: Rethinking Surrogacy in Israel/Palestine as an (Anti)Colonial Episteme*, 14 HIST. PRESENT 108, 120 (2024) (discussing the Israeli media's framing of couples pursuing surrogacy as "reproductive exiles").

158 *See, e.g.*, COMM. ENV'T AFF., *supra* note 151; SPECIAL COMM. FOR APP. GOV. INFO. ACCESSIBILITY & PRINCIPLES PUB. TRANSPARENCY, *supra* note 151.

159 *See* Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study*, 44 LAW & SOC. INQUIRY 1141, 1151–52 (2019).

160 *See* Connor Cory, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. ON POVERTY L. & POL'Y 133, 137 (2015); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 129 (2009) ("[T]he coalition was a curious one: feminists and civil liberties groups seldom ally with traditional religious organizations—particularly on issues relating to the regulation of reproductive choices.").

161 *See* Marcia C. Inhorn & Daphna Birenbaum-Carmeli, *Assisted Reproductive Technologies and Culture Change,* 37 ANN. REV. ANTHROPOL. 177, 180 (2008) (describing power relations and differences in ART procedures for men and women); Shalev & Gooldin, supra note 92, at 167–68 (noting the existence of power relations between men and women, Jews and Arabs, and others).

162 *See, e.g.*, Julie Shapiro*, For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1348 (2014) ("[M]y first concern is with the effect of surrogacy on the surrogate herself. I am accordingly less concerned with the intended parents.").

Gay men's surrogacy eligibility depends on surrogates' bodies, especially in Israel, which presents substantial barriers for gay men to adopt children.[163] Ideologically, it can be challenging for feminists to align with the reality of such practices for the benefit of white gay male couples who often enjoy higher earning capacities and fewer societal barriers than many other segments of the LGBTQ+ community.[164]

On the other hand, both feminist and LGBTQ+ ideologies are concerned with structures of power that sustain gender- or sexuality-based oppression and wish to provide an updated and more cohesive framework for traditional views.[165] Members of both communities in Israel have shared some common understandings around surrogacy as an opportunity to disrupt cultural norms and gender roles, like the concept of the traditional family.[166] Therefore, many stakeholders, feminist and LGBTQ+ organizations included, supported both equal access for single men and same-sex couples while also supporting proper medical standards and minimization of medical risks.[167] Moreover, activists called for a

163 Moreno, *supra* note 131, at 120.

164 Cory, *supra* note 160, at 137.

165 *See, e.g.*, Martha Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 407 (2005) ("Feminism, as a discipline, is focused on the significance of gender and the societal inequalities resulting from values and assumptions based on gender.").

166 Although racism tends to affect reproductive justice, it is beyond the scope of this Article concerning the Israeli case. Domestic surrogacy in Israel is open only to Israeli citizens. § 5(a)(1) Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) ("The Approval Committee may, after considering all the data arising from the opinion, documents and statements made before it, approve the agreement for the carrying of embryos, or approve it with conditions, if it is satisfied that all of the following have been met: (1) The mother of the carrier and the intended parents are residents of Israel"). Surrogates are also Israeli citizens. *Id*. As a result, the Israeli case concerns whether queer couples, who are predominantly white, can access the services of Israeli surrogates, who are also primarily white. For literature on other reproductive technologies and race-related issues such as Sephardi and Ashkenazi or Arab and Jew issues in Israel, see, e.g., Himmat Zu'bi, *Palestinian Fertility in the Israeli Sphere: Palestinian Women in Israel Undergoing IVF Treatments*, *in* BIOETHICS AND BIOPOLITICS IN ISRAEL: SOCIO-LEGAL, POLITICAL, AND EMPIRICAL ANALYSIS 160 (2018); Gala Rexer, *Borderlands of Reproduction: Bodies, Borders, and Assisted Reproductive Technologies in Israel/Palestine*, 44 ETHNIC & RACIAL STUD. 1549 (2021); Naomi Gershoni & Corinne Low, *The Power of Time: The Impact of Free IVF on Women's Human Capital Investments*, EUR. ECON. REV. 133 (2021); Almog & Bassan, *supra* note 54, at 27.

167 *See* Moreno, *supra* note 131, at 89. Throughout the resistance to gay-rights activists' efforts to gain eligibility through legal action and political lobbying, they were also conscious about the inappropriateness of harmful practices. For example, in a parliamentary debate over a crisis that emerged in 2014 due to Thailand's new anti-surrogacy regulation, the representative of an organization for gay parents said: "We need to find a solution to regulating surrogacy in Israel with equality for men, regardless of their sexual orientation, and we need to regulate surrogacy abroad. Because we also, although not everybody thinks so, are in favor of the

change in the public discourse that is more compatible with radical-practical feminism, perhaps in acknowledgment that an expansion of surrogacy access would be a matter of time.[168] They emphasized the need for protective regulation to advance Israeli surrogates' interests, such as informed consent and medical standards, rather than discussing "old school" arguments about poor surrogates' profit-making ability.[169] Although the feminist critique of surrogacy may have been opposed to widened commercial surrogacy, it did not object to the idea of equal accessibility and non-discriminatory criteria to restrict the market.[170] When they called to restrict commercial surrogacy, they were willing to accept such restrictions on an equal basis.[171]

Similarly, many members of the LGBTQ+ community have been sensitive to surrogates' rights and interests and have consistently tried to minimize exploitative practices. For example, an Israeli initiative called "Responsible Surrogacy" is meant to expose potential consumers of cross-border surrogacy to information about the questionable aspects of the procedure, with the hope that it will drive consumers to demand agreements that incorporate ethical considerations.[172] The motivation for this project stems from an understanding—originating from same-sex couples—that the moral responsibility lies with the intended parents and that their stance may change the procedure in favor of all involved.[173] Such a change can help parents who use surrogate services be more transparent with their children about the process through which they came into the world. But at the political level, other than a minor agreement between an LGBTQ+ organization and a feminist coalition objecting to a normative family, there were no meaningful, effective alliances between the organizations, and finding a common ideological ground for collaboration was not easy.

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woman surrogate [being able to] do it with consent, in a country in which it is regulated, that she will not be poor, that she will have other choices and will want to do it." COMM. ENV. AFF., *supra* note 151, at 26.

168 *See, e.g.*, Carmel Shalev et al., *Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A Call for Action*, 5 ISR. J. HEALTH POL'Y RSCH. 1, 9–10 (2016) [hereinafter Shalev et al., *Ethics and Regulation*].

169 *See* Zafran & Hacker, *supra* note 159, at 1153.

170 *See* detailed position paper regarding the proposed law on embryo transfer agreements, Oct. 26, 2014 [on file with *Columbia Journal of Gender and Law*].

171 *See, e.g.*, Shalev et al., *Ethics and Regulation*, *supra* note 168, at 3, 10.

172 *See Responsible Surrogacy*, FACEBOOK, https://www.facebook.com/rsurrogacy/ [https://perma.cc/FL3R-5Z88].

173 *See id.*

Ultimately, the 2015 earthquake incident did not affect eligibility for domestic surrogacy in Israel. Same-sex couples (as well as single individuals at the time) remained ineligible for domestic surrogacy. Meanwhile, cross-border surrogacy earned legitimacy despite maintaining dubious practices with respect to surrogates and despite awareness of foreign surrogates' vulnerabilities.[174] From the judicial regulatory perspective regarding cross-border surrogacy, the interests of the Israeli intended parents dominated the perceptions of the public and private actors concerned. 100% entry and citizenship approval has been granted by the state for babies born from cross-border surrogacy with at least one Israeli genetic parent.[175] Other interests, including those of foreign surrogates or the children born through surrogacy, were marginalized.[176] This trend was contrary to what was happening at the time in the world; more and more countries had begun to close their doors to foreign intended parents (e.g., India, Nepal, Thailand), moving the market to fewer destination countries with permissive regulation.[177] The clear beneficiaries of the Nepal incident in Israel were surrogacy agencies, whose industry was unsupervised and booming, further commercializing cross-border surrogacy.[178]

III. The Women Behind *Arad-Pinkas*

Feminist perspectives that have influenced the legal framework of surrogacy in Israel highlight the tension between respecting women's autonomy, safeguarding their best interests, and accommodating conservative views, which limit accessibility to domestic surrogacy services to heterosexual couples. It is in this social environment that later on in 2015, a same-sex couple, Etai and Yoav Arad-Pinkas, petitioned the Israeli Supreme Court against the Committee on the Surrogacy Law.[179] Their petition asked the court to expand the definition of "prospective parents," those eligible for domestic surrogacy arrangements in Israel, to include same-sex couples and single men, with or without a genetic relationship

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174 *See* Vertommen, *supra* note 157, at 108.

175 *See* Zafran & Hacker, *supra* note 159, at 1159.

176 *See id.* at 1151 (showing that in the judicial regulatory perspective regarding cross-border surrogacy, the interests of the Israeli intended parents dominate the perceptions of the public and private actors concerned, and that all other interests, including those of the surrogates and the children born through surrogacy, are marginalized).

177 *See* Bassan, *Different but Same*, *supra* note 55, at 334.

178 *See* Shalev et al., *Transnational Surrogacy*, *supra* note 130, at 62–63.

179 *Arad-Pinkas II*.

to the newborn.[180] A partial ruling immediately rejected the proposition that those who are not genetically related to the newborn at all should be eligible as intended parents.[181] However, the claim regarding domestic services for single men and same-sex couples with a genetic relationship to the newborn remained pending.[182] The court returned authority to the legislature to decide how to incorporate the ruling.[183] Because the government indicated that a proposed bill would change the law accordingly, the court suspended its decision to provide the legislature time to address the issue; only in July 2018 was the bill brought up for second and third readings in the Knesset.[184] The amended law expanded the definition of "designated parents" only to single women, leaving single men and same-sex couples ineligible.[185] In this case, the swing-vote power that Haredi parties enjoyed again enabled political pressure, and, as a result, Netanyahu's promise to support the bill was not kept.[186] The new law was perceived as discriminatory, leading to a wave of high-profile social and political protests by the LGBTQ+ community that summer.[187] The protests included an economic strike supported by leaders in different business sectors and peaked in a mass demonstration of 80,000 participants in Rabin Square, Tel Aviv.[188]

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180 *Id.*

181 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements L. 5756-1996 (2017) (Isr.) [hereinafter *Arad-Pinkas I*].

182 *Arad-Pinkas II*, ¶ 1.

183 *Arad-Pinkas II*, ¶ 38.

184 *Surrogacy Agreements Law (Approval of Agreement and Status of the Newborn) (Amendment No. 2)*, KNESSET NAT'L LEGIS. DATABASE (2018), https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2019559 [https://perma.cc/2ZP9-HFMN] [hereinafter "Surrogacy Agreements Law"].

185 *See* Shalev et al., *Transitional Surrogacy*, *supra* note 130.

186 *See* Jonathan Lis & Chaim Levinson, *Netanyahu Votes Against Surrogacy Births for Gay Men Despite Voicing Support*, HAARETZ (July 18, 2018), https://www.haaretz.com/israel-news/2018-07-18/ty-article/netanyahu-votes-against-surrogacy-births-for-gay-men-despite-voicing-support/0 [https://perma.cc/H6ZX-FFNZ].

187 *See* Bauman Bar Rivnai, *This Is How a Protest Is Created: Behind the Scenes of the LGBT Protest Bauman Bar Rivnai*, GLOBES (July 7, 2018), https://www.globes.co.il/news/article.aspx?did=1001247044 [https://perma.cc/67JN-FKYX].

188 *See Thousands to Join Day-Long Strike Sunday by LGBT Community over Surrogacy Law*, TIMES OF ISR. (July 21, 2018), https://www.timesofisrael.com/israel-gears-up-for-strike-protests-by-lgbt-community-over-new-surrogacy-law/ [https://perma.cc/6ZRP-HLU3].

The eligibility discussion remained open until the court issued another partial ruling on February 27, 2020, in which it established the eligibility of same-sex couples and single men for domestic surrogacy services.[189] That ruling is the subject of the following analysis. This Part analyzes the rhetoric and narratives, official and implicit, formed by the court's decision and how they depict the image of women involved.[190] The following critical reading of the narratives used will position the ruling and its consequences in the context of the previously discussed political and cultural setting. Four arguments in the ruling worked together to create a narrative around same-sex eligibility for domestic surrogacy: (1) emphasis on the centrality of family regardless of sexual orientation; (2) the effectiveness of current regulation safeguarding surrogates' health in the process that would persist in any size of the market; (3) the lack of future shortage in surrogates in the face of increased demand; and (4) the agency and autonomy of women to decide to enter the market. The arguments illustrate the way rhetoric translates to implicit narratives and conceptualizations that serve the pro-natalist national value and what they may imply regarding women's rights and life opportunities.

A. Framing and Past Meanings: An Equal Right to a Family and Risks for Women's Bodies

The *Arad-Pinkas* case arose out of equality concerns, sparking a debate about whether the option to use surrogacy applies only to patients with medical fertility problems or includes non-medical social needs of fertile same-sex couples and single men.[191] Against the appellants' argument for the centrality of family regardless of sexual orientation, the state argued that the need to use surrogacy for procreation must be considered in light of the need to prevent the commercialization of women's bodies and to protect the surrogates from the medical, economic, and emotional risks involved.[192]

The court framed the discussion according to the original purpose of the Surrogacy Act.[193] The Aloni Commission, whose advocacy preceded the enactment of the Surrogacy

189 *See Arad-Pinkas II*.

190 *See* discussion *infra* Part III.

191 *See Arad-Pinkas II*, ¶¶ 4–7.

192 *See Arad-Pinkas II*, ¶ 5.

193 *See Arad-Pinkas II*, ¶¶ 17–25.

Act, never intended to withhold from single men and women the right to become parents.[194] But the later Mor Yosef Commission's report mentioned that the Israeli legislature originally saw surrogacy as a solution for bringing children to a specific "end group": a heterosexual couple who was denied the possibility of having children due to a physiological issue preventing the woman from carrying a pregnancy or when, because of the pregnancy, a woman may risk her life.[195]

In the name of equality, the *Arad-Pinkas* court determined that gender and sexual orientation did not change a person's aspiration or right to have a family, which is the principle underlying the Surrogacy Act:

> I find it difficult to find a relevant reason for distinguishing between single women and single men in all matters concerning the exercise of the right to become a parent . . . It is clear that the principle of equality also prevails over the gender difference between women and men, and it seems to me, without setting any concrete rules on the matter, that restricting access to medical techniques for procreation to one gender and not another raises questions.[196]

The court further asserted that "[t]he sweeping exclusion of the group of homosexual men from the application of the surrogacy arrangement is seen as 'suspected' discrimination, which attributes an inferior status to this group, and thus constitutes an additional, severe, and humiliating violation of human dignity based on gender or sexual orientation."[197] Alternative options to establish a family suggested by the state, such as joint parenthood and adoption, did not satisfy the request for equality because they were available to women as well.[198]

But note that the quest to determine the Surrogacy Act's original purpose resulted in differences between the partial ruling of 2017 and that issued in 2020. The first ruling

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194 *See* ALONI REP., *supra* note 103, at 18 (explaining the proposal for universal fertility treatments regardless of marital status).

195 MOR YOSEF REP., *supra* note 140, at 56 (stating that surrogacy, which is carried out using a woman's body, involves medical, emotional, and ethical implications for her and for her family).

196 *Arad-Pinkas II*, ¶ 10 (citing *Arad-Pinkas I*, ¶ 49).

197 *Arad-Pinkas II*, ¶ 19.

198 *See id.*

concluded that the Act "intended to regulate the surrogacy procedure in Israel in order to fulfill the right to become a parent, while guaranteeing the dignity and integrity of the surrogate and regulating the status of the newborn and his relationship to the intended parents."[199] In the later ruling, the court reframed the purpose of the Surrogacy Act as fulfilling a specific aspect, "the right to parentage under genetic relationship to one of the intended parents."[200] The second part concerning surrogates ("while guaranteeing the dignity and integrity of the surrogate and regulating the status of the newborn and his relationship to the intended parents")[201] is absent from the court's reframing, unless referring to Arad-Pinkas I. "Missing voice" rhetoric is the result of the intentional or unintentional exclusion of an interested group, but its power is the unbalanced weight or intensity given to alternate narratives.[202] Justice Hayut clearly confirms that the final ruling revolves "around men who, without egg donation, are unable to fulfill their right to parenthood, either as individuals or within their family unit as same-sex couples."[203]

The court thus determined that gender and sexual orientation do not change a person's aspiration or right to have a family.[204] According to the court, denying surrogacy services to men because their need is social, rather than medical, ignores the social importance of family, particularly with respect to genetic parenting. Between the harms caused by the increased use of surrogacy and the harms of violating the right to parenthood of ineligible intended parents, the court concluded that the harm to the right to parenthood is far greater than the potential harm of increasing the demand for surrogacy arrangements.[205] It is not that surrogate women are not mentioned later on in this ruling, but rather that they are not included in the formal framing of the discussion.[206]

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199 *Arad-Pinkas I*, ¶ 38.

200 *Arad-Pinkas II*, ¶ 24.

201 *Arad-Pinkas I*, ¶ 38.

202 *See* Bassan, *Donations*, *supra* note 28, at 43.

203 *Arad-Pinkas II*, ¶ 17.

204 *See id.* ¶ 15.

205 *Id.* ¶ 31.

206 *Id.* ¶ 17.

B. Women's Exposure to Medical Risks and Oversight

Several factors inform a woman's decision to become a surrogate, but exposure to medical risks merits particular attention. The court acknowledged that surrogacy procedures involve medical risks for surrogate women.[207] The medical harms surrogate women expose themselves to are not negligible. Carrying someone else's pregnancy requires a woman to undergo nine months of monitored pregnancy to safeguard the well-being of the fetus and the surrogate.[208] Monitoring includes repeated medical examinations, and surrogacy ultimately ends in labor, which has its own set of difficulties and risks.[209] Pregnancy-related medical problems include, for example, anemia, ectopic pregnancy, gestational diabetes, high blood pressure, severe and persistent nausea and vomiting during pregnancy, vaginal bleeding, infections, preterm labor, miscarriage, depression, and further complications that may occur during childbirth.[210] A pregnant woman is likely to experience body aches, breast changes, constipation, dizziness, fatigue and sleep problems, heartburn and indigestion, hemorrhoids, itching, leg cramps, morning sickness, nasal problems, numb or tingling hands, stretch marks and skin changes, swelling, urinary frequency and leaking, and varicose veins.[211] C-sections involve additional pain and risks.[212] Emotional harms might also be involved.[213] Expanding the number of surrogacy arrangements exposes more women to such health risks.[214]

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207 *Id.* ¶ 30.

208 *See* Julie Bindel, *Outsourcing Pregnancy: A Visit to India's Surrogacy Clinics*, GUARDIAN (Apr. 1, 2016), https://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel [https://perma.cc/K85W-VYA8].

209 *See id.*

210 For other medical risks and followed restrictions, see Bassan, *Different but Same*, *supra* note 55, at 329; Francesca Laguardia, *Pain that Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, J.L. & BIOSCIENCES 1, 10–16 (2022).

211 *See* Nicole Knight, *American Motherhood—A Taking*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 171, 181 (2022).

212 *See C-section*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/c-section/about/pac-20393655 [https://perma.cc/ZJ65-PGGX].

213 *See* Katherine Bright & Gisela Becker, *Maternal Emotional Health Before and After Birth Matters*, *in* LATE PRETERM INFANTS: A GUIDE FOR NURSES, MIDWIVES, CLINICIANS AND ALLIED HEALTH PROFESSIONALS 17–36 (Shahirose Sadrudin Premji ed., 2019).

214 *See Arad-Pinkas II*, ¶ 27 (Handel, J., concurring) (noting that expanding eligibility would disadvantage two groups of women: those suffering from a medical problem that prevents them from carrying pregnancy

The court acknowledged that expanding the circle of potential beneficiaries will inevitably increase the number of women exposed to risks.[215] However, given that risk concerns have already been legitimized for surrogates that carry for eligible populations, the court relied on the effectiveness of the existing legal mechanism to protect surrogates, to ensure that they are indeed fit for the procedure, and that their rights are preserved.[216] There is a logic behind this decision. Looser eligibility rules for surrogacy will increase demand, but the risk to an individual surrogate is not related to the number of arrangements in the market. Any medical procedure must provide appropriate standards to protect the patient.[217] Once surrogacy is accepted as safe for one woman under existing legal safeguards, these safeguards should be sufficient in future procedures for any amount of women who are autonomously consenting to take the risk. The exposure of additional women should not make the risk assessment different. The narrative used in the court's ruling implies that the legal safeguards in the current mechanism are considered trustworthy for the number of surrogates that meet the current demand.[218] In this case, they should suffice for any extent of demand, regardless of the scope of the practice.

However, from a policy perspective, an assessment of costs and benefits should take into consideration the number of women involved, not only the fact that the individual risk is the same. The Mor Yosef Commission report raised a concern of a potentially lower standard of governmental oversight in light of the growing number of surrogacy arrangements.[219] According to this argument, a significant expansion of the surrogacy market would inevitably compromise adherence to the necessary conditions for protecting surrogates and may lead to a reduction in oversight requirements.[220] If the court were to accept that increased demand would erode oversight capacities, it would have had to admit that the extended market is not equally protective as what is offered currently. Instead, the court suggests that the safeguards are not lessened by the expanded exposure, in line

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and those who may be incentivized to bear the risks involved in surrogacy and serve as surrogates if the rising demand would also raise the price).

215 [216] *See id.*

216 *See Arad-Pinkas II*, ¶ 30.

217 *See Patient's Bill of Rights*, ISR. MIN. OF HEALTH (JUNE 15, 2023), https://www.gov.il/en/pages/patient-rights-page [https://perma.cc/9Q34-CMLP].

218 *See Arad-Pinkas II*, ¶ 30.

219 *See* MOR YOSEF REP., *supra* note 138, at 52.

220 *See Arad-Pinkas II*, ¶ 29.

with the appellants' request at the expense of compromised oversight and potential risk for women.

C. Supply and Demand for Childbearing: Does It Matter How Many Women It Takes to Make a Baby?

Relying on the Mor Yosef Commission report, the state raised a second concern that increasing demand will increase the number of surrogacy applications and create a "shortage" of domestic surrogates.[221] Rising demand may lead to competition between intended parents, increase the contract price (since surrogacy prices in Israel are not fixed but vary to some extent) arguably to its natural price, and impose an economic obstacle for some, including currently eligible intended parents, to exercise their right.[222] This situation will undoubtedly increase the inequality between potential intended parents with financial means and those who, due to the high price, will be prevented from the opportunity to bring a child into the world.[223]

Interestingly, although the practice of surrogacy is monitored by the state and is not truly a "free market," the rhetoric chosen was a common market rhetoric. "There will be a *shortage of surrogates* and this will lead to a rise in prices that will prevent women who do not have the means to use this arrangement."[224] "Expanding the arrangement for men will deepen the *existing shortage* and ultimately make it more difficult for women suffering from a medical problem to use surrogacy."[225] The use of market rhetoric such as "shortage in surrogates" functions in two ways. First, it positions surrogates as a resource, an object in "rising demand," rather than an economic agent, a party to the transaction, and a full

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221 *See* MOR YOSEF REP., *supra* note 138, at 57.

222 *See id.* at 61–62. The Commission stated that an expansion of the existing law, to include individuals who do not normally suffer from medical fertility issues and whose population greatly outweighs the population of women with medical infertility issues, would necessarily come at the expense of the women whom the law sought to address in the first place. *See id.* A possible solution to the problem would be to increase the supply of female surrogates—that is, to allow additional female populations beyond those listed in the law to serve as surrogates in order to respond to an anticipated rise in demand. However, the Commission recognized that increasing the supply of women would be a problematic solution that may harm the surrogate women themselves. *See id.* The Commission therefore recommended expanding eligibility only to some of the populations. *See id.* However, the criteria to become a surrogate have expanded since then.

223 *See Arad-Pinkas II*, ¶ 26.

224 *Id.* ¶ 26 (emphasis added).

225 *Id.* ¶ 28 **(**Fogelman, J., concurring) (emphasis added**)**.

person. Second, terms such as "shortage," "supply," and "demand" construct an implicit narrative that justifies increased and accessible use of women's bodies to fulfill the strong Israeli narrative about reproduction.[226] The focus on shortage diverts the discussion from the number of women impacted by the expansion to the number of intended parents who may or may not find a solution to their problem. The term "shortage"—which involves an economic term ("scarcity")— diverts the discourse on fertility and reproduction into a consumer discourse, where trading in eggs, wombs, and embryos aims at producing babies.[227] Market rhetoric functioned in the same way in a former discourse in Israel concerning reimbursed egg donation in 2010, allowing payment to egg donors who were not undergoing fertility treatments.[228] Labeling the situation as an "egg shortage" implies a sphere where a solution could be found—the market. It highlights the need to expand access to sources in light of an existing shortage, encouraging action to reduce the shortage by allowing payment in exchange for eggs.[229]

To address the potential shortage, the court looked at the applications submitted for status approval of children born via cross-border surrogacy and at the applications to register children following cross-border industry.[230] 65% of the latter were submitted by heterosexual couples,[231] meaning only 35% of cross-border arrangements were submitted by same-sex couples or singles. The court estimated that not all foreign procedures would

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226 *See* Janice G. Raymond, *Reproductive Technologies, Radical Feminism, and Socialist Liberalism*, 2 J. INT'L FEMINIST ANALYSIS 133 (1989) (noting the push of the narrative for the need of technology in direct continuity with medical and technological progenitors who present these technologies as fulfilling desperate needs of infertile women).

227 Whether commodification is harmful is a contended issue in areas beyond surrogacy. *See* Lauren Jade Martin, *They Don't Just Take a Random Egg: Egg Selection in the United States*, *in* SELECTIVE REPRODUCTION IN THE 21ST CENTURY 151, 167 (Ayo Wahlberg & Tine M. Gammeltoft eds., 2018).

228 *See* Bassan, *supra* note 28, at 25.

229 *See id.*

230 *See Arad-Pinkas I*, ¶ 26 (referencing the statistical information provided by the statutory committee that reviews applications); ISR. MIN. OF HEALTH, THE NUMBER OF APPLICATIONS SUBMITTED TO THE FETUS CARRIAGE AGREEMENTS APPROVAL BOARD AND THE NUMBERS OF BIRTHS, 1996-2017 (2017), https://www.health.gov.il/DocLib/pon_tofes29.pdf). *See also* ORIANA ALMASI, THE KNESSET RESEARCH AND INFORMATION CENTER SURROGACY PROCEDURES IN ISRAEL AND ABROAD AND THE COMPONENT OF COST FUNDED BY THE STATE (2018), [on file with *Columbia Journal of Gender and Law*] (noting that from 2005–2017, 1,513 applications were submitted to family courts to acknowledge kinship for children born through cross-border surrogacy: 50% (740) of the applications were from heterosexual couples; 25% (366) were from same-sex couples; and 27% (407) were from single applicants, who may or may not be part of a same-sex couple).

231 *See Arad-Pinkas II*, ¶ 26.

be pursued domestically, meaning that future applications to pursue domestic surrogacy would not amount to the entire 35%.[232]

By the time of the 2020 ruling, a change in the criteria to become a surrogate expanded the pool of potential surrogates.[233] Additional categories of women were approved to serve as surrogates: the maximum age of surrogates increased from thirty-eight to thirty-nine; the number of previous births for surrogates allowed prior to embarking on a surrogacy procedure increased from three to four; and married women were allowed to become surrogates.[234] Justice Hayut relied on surrogacy agents testifying that waiting periods to find a surrogate have been shortened since the change (to between two and four months), assumed that the number of interested women must have gone up, and that a shortage in surrogates is unlikely.[235] The implied assumption is that since so far there has not been a shortage, and since surrogate supply has increased, then an estimated less-than-35% increase in demand for domestic surrogacy is unlikely to create a shortage.[236]

The reliance on financially interested stakeholders is surprising, and the narrative perhaps implies that the court indeed sees no problem with exposing more women to the risks involved in the practice and instead trusts the mechanism regulating the practice. However, this calculation is incomplete because assessing the number of women exposed to risks by the market should not only take into account the number of surrogates who deliver the babies to be registered. The number of women actually exposed to risks is far greater than the number of women who gave birth to these children.[237] A surrogate-focused narrative would consider the additional women exposed to risks due to clinical preparation for embryo transfer in several cycles of unsuccessful treatments (including repeated clinic visits and intake of medications), as well as those who miscarried and those who invested

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232 *See id.* ¶¶ 26–27.

233 See *Carrying Agreements Law (Approval of Agreement and Status of the Newborn) (Amendment No. 2), 5778-2018*, KNESSET (last visited Feb. 25, 2025), https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2019559 [on file with *Columbia Journal of Gender and Law*].

234 *See* Surrogacy Agreements Law, *supra* note 184.

235 *See Arad-Pinkas II*, ¶ 26.

236 *See id.* ¶ 30. *But see id.* ¶ 7 (Hendel, J., concurring) (mentioning that increasing the pool of potential surrogates could raise concerns that their consent is not free).

237 The number of women engaged in surrogacy procedures (and exposed to risks) is substantially higher than depicted by the number of deliveries. *See* Birenbaum-Carmeli & Montebruno, *supra* note 93, at 2466.

time, money, and emotion without successful outcomes.[238] Even if the demand increases by less than 35%, adding more people to the domestic demand curve for surrogates will inevitably increase the number of women exposed to medical risks, which is larger than the number of applications to approve cross-border procedures after successful procedures and deliveries.

D. Women and the Scope of Autonomy: Into and Within the Market

According to the court's ruling, both surrogates' autonomy and the equal access granted to same-sex couples outweigh the concerns associated with expanding the number of women exposed to risk.[239] A narrative of commercial surrogacy as a legitimate social interaction reflects an underlying liberal assumption that modern surrogate women (in Israel) make their own decisions regarding their bodies and childbearing and that minimal safeguards ensure consent of all approved surrogates.[240] If a woman is autonomous, she should be allowed to choose to enter a surrogacy transaction. This narrative is necessary to legitimize the approach to commercial surrogacy in the Surrogacy Act and assumptively underlies the Court's reasoning, but this is only one narrative out of several available. According to some feminist approaches, for example, autonomy cannot be assured in commercial surrogacy because of social perceptions that affect women when they decide, as well as the inability to anticipate the adverse consequences of surrogacy.[241] Therefore, a higher payment may incentivize people with particular vulnerabilities and pressure women into entering the agreement for the economic benefit.[242] The court raised this concern.[243] If the market is harmful or entering it is questionable, there is a concern that increased demand for surrogate women will be a tempting factor for women unsuitable for the process, who

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238 *See id.* at 2467.

239 *See Arad-Pinkas II*, ¶ 32.

240 *See* Almog & Bassan, *supra* note 54, at 80.

241 For the duality of discourse surrounding reproductive subjects, see Bassan, *Donations*, *supra* note 28, at 30. Reproductive technologies that involve assisting parties leave great room for women's autonomy when it comes to their decision to commodify their reproductive capacity. They may reflect a policy according to which reproduction is something that can be commodified, but at the same time it amplifies the concern for exploitation. *See* Bassan, *Cross-Border Market*, *supra* note 155, at 611.

242 *See* Courtney Crosby, *Keeping Up with Gestational Carrier Agreements: Considerations Regarding the Regulation of Surrogacy*, 17 RUTGERS J.L. & PUB. POL'Y 357, 383 (2020).

243 *See Arad-Pinkas II*, ¶ 3 (Hendel, J., concurring).

did not previously consider becoming surrogates, to enter it.[244] Alternatively, if the court determines, as it did in this case, that surrogacy is considered a well-regulated, women-protecting process, there should not be a concern that women may enter the market.[245] Attracting women to enter a normalized, legitimized, and protected market should be encouraged, in particular for women who could benefit from it. In such a case, the ruling should allow surrogates to benefit from rising demand as part of their autonomous decision and market powers.

Clearly, the ruling takes an approach of surrogates as autonomous agents who can make decisions about their bodies and take risks as part of their rights.[246] But between the two options—limiting the market out of concerns for women's autonomous decision making, and allowing surrogates to exercise autonomy while profiting from rising demand—the ruling strikes a balance by permitting autonomous choice but restricting the economic opportunities the practice could offer surrogates. Instead of a narrative that allows surrogates to enjoy their market advantage in light of rising demand, the court's concern is based on the implications that a shortage would have on the "consumers" in the market, rather than on the welfare of surrogates—the service providers.[247] Justice Hayut suggested either setting a maximum price control in favor of intended parents, which would disturb the natural supply-and-demand curves and cap the price paid for surrogacy services, or enabling altruistic surrogacy,[248] which would essentially limit the possibilities that the market offers surrogates. This is a peculiar approach in light of the faith the court puts in surrogates' autonomy within the market and in the market regulation. While women's autonomy justifies their participation in the market and contribution to reproductive roles, the ruling implies that the scope of women's autonomy ends when they might benefit from market dynamics.

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244 *See* MOR YOSEF REP., *supra* note 138, §§ 5.1, 5.3. While acknowledging concerns regarding surrogacy, the Commission refrained from addressing all women as 'exploited' or vulnerable. *See id.* Instead, in light of the findings from the Approval Committee for Embryo Carrying Agreements, the Commission assumed that only a few women are capable of undergoing surrogacy procedures without the practice causing them or their children real harm that might justify a complete abolishment of the process. *See id.* The report alerted that increasing the number of women surrogates might relax the scrutiny involved in involving women who are unsuitable for the practice and might end up exploited or hurt. *See id.* The solution of an assisting woman was therefore conceptualized as an "end solution." *See id.*

245 *See Arad-Pinkas II*, ¶ 30 (President Hayut).

246 *See id.* ¶ 29 (President Hayut).

247 *See id.* ¶ 3 (Hendel, J., concurring).

248 *See id.* ¶ 30 (President Hayut).

If the market properly protects women and an expanded market is accepted, the ruling should follow market principles: efficiency and supply-and-demand curves should allow women to gain from the rising demand and the price set by the market. Rather than manipulate it, the market mechanism should work to the benefit of intended parents and surrogates both. One group's equal opportunity should not come at the expense of another group, and both parties should equally benefit from the chosen mechanism. The perception of women as autonomous agents should necessarily be followed by recognition of their right to leverage the market mechanism so that where their services are in increased demand, prices could go up. Both a liberal feminist and a radical feminist, seeing women as agents who can autonomously choose whether to become a surrogate or not,[249] should support a solution in which surrogacy could be an opportunity for women to gain leverage given rising demand. It is understandable that the court suggests capping the price to assist the appellants and other intended parents who might find higher prices out of reach, but the fact remains: when surrogates could benefit from rising demand, the ruling does not rely on the narrative of autonomous agents and bounds their autonomous decision-making powers and the market rationale by capping the price they could earn. Instead, if the court wanted a more constrained market, it could have encouraged regulating surrogacy agencies and brokers who may tamper with surrogates' autonomy and profit.

The middle ground would support restricting criteria to limit the expansion of such a delicate market on a non-discriminatory basis. In order to decrease the number of women exposed to risk or to efficiently monitor the process, regulation would establish a narrower, inclusive, and non-discriminatory eligibility criterion for domestic surrogacy services, which would apply to all and limit the number of transactions. Naturally, with this option, controversy could arise regarding the relevant restricting criteria and how to prioritize conflicting interests.

The inconsistent approach to surrogates' autonomy exposed in the narrative in the Israeli Supreme Court's ruling reveals an underlying social assumption regarding the legitimacy and harmfulness of the surrogacy market. The implicit narrative both reflects and reinforces values and common understandings behind the two-edged discourse about surrogacy in Israeli society.[250] On the one end, where surrogacy services are founded upon the vision of reproduction as a positive value that is nationally supported, the court ruling reaffirms the hegemony of the pro-natalist reproductive narrative, the dominant narrative

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249 *See* Sudai, *supra* note 75, at 64.

250 *See* Laguardia, *supra* note 210, at 3.

in Israel.[251] The expansion of the reproduction narrative further widens the already wide availability of reproductive services. On the other hand, it undermines the traditional narrative by offering an updated version, which is sensitive to the diverse meanings that reproductive practices have for different individuals, same-sex couples in particular. Under this framing, the denial of the family model to same-sex couples and single men contradicts the state's Jewish, liberal, and democratic character; does not promote a proper purpose; and does not pass the proportionality tests.[252]

On July 11, 2021, the court finalized its ruling, stating that the term "designated parents" in the Surrogacy Act should be interpreted as referring to heterosexual spouses, same-sex couples, single women, and single men.[253] The legislature was ordered to correct the law to allow same-sex couples and single men access to domestic surrogacy.[254] On December 27, 2021, a director general's circular applied the ruling.[255] The circular changed the previous definition of "intended parents" to a couple or a single *man or woman* with at least one genetic connection to the offspring.[256] It mentions general conditions for eligible intended parents and carrying mothers (surrogates), as well as conditions and procedures for approving the agreements.[257] Although it expands eligible intended parents to individual men or women (and not only couples), it does not, and as an administrative document cannot, restrict the general population's use of surrogacy services in a non-discriminatory way, the suggested restriction in this Article. But at the same time, it does not cap the amount paid to the surrogate. The circular is not a piece of legislation but rather the current policy of the executive branch, the Ministry of Health. It avoids the need to rely on the majority needed in the Knesset for actual legislation, on the one hand.[258] On the other hand, this is a softer legal norm, and each elected government could change it according to its

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251 *See* Almog & Bassan, *supra* note 54, at 78.

252 *See Arad-Pinkas II*, ¶ 18 (President Hayut).

253 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements L. 5756-1996 (2021) (Isr.) [hereinafter *Arad-Pinkas III*].

254 *See* Director General's Circular 7/2021, Law of Agreements to Carry Embryos, 5756-1996 – Guidelines for Application, (2021) (Isr.).

255 *See id.*

256 *Id.* § 2.1.

257 *Id.*

258 *See* Kristopher Kam, *Not Just Parliamentary "Cowboys and Indians": Ministerial Responsibility and Bureaucratic Drift*, 13 GOVERNANCE 365 (2000).

policies. As of May 2023, four babies were born in Israel to gay men, and thirty-two more procedures are ongoing.[259] The wind in the current Israeli government is blowing in more conservative ways and may affect this enabling policy.[260]

IV. The Women Behind *Dobbs*

In June 2022, the United States Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, a challenge to a 2018 Mississippi state law that prohibited abortion after the fifteen-week point in a pregnancy, except in the event that the pregnancy would endanger the mother's life, on the rationale that at this point the fetus begins to "take human form."[261]

The rhetorical framework of the *Dobbs* decision brings forward the wider discussion about abortion in the United States. The *Dobbs* case, just like the Israeli case, was deeply embedded in the context of one of its country's biggest sociopolitical controversies.[262] The complex development of the American legal right to abortion has been thoroughly explored by others and therefore remains beyond the scope of this Article.[263] Instead, this Part reviews the tension that methodological choices create in the Court, the role rhetoric and narrative play within these choices, and the implications the implicit narratives behind the Court's reasoning have on women's rights and life opportunities. The focus of any

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259 *See White-Blue Surrogacy for Gay Couples*, N12 (May 23, 2023), [https://perma.cc/JBH7-FYCQ]. This number has undoubtedly grown since 2023, but formal statistics are unavailable.

260 *See, e.g.*, Raffi Berg, *Israel's Most Right-Wing Government Agreed Under Benjamin Netanyahu* (Dec. 22, 2022), https://www.bbc.com/news/world-middle-east-63942616 [https://perma.cc/QWV2-Z9GJ].

261 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

262 *See, e.g.*, Martin Durham, *Abortion and the Politics of Morality in the USA*, 47 PARLIAMENTARY AFFS. 2, 47 (1994); Anshal Tiger et al., *From Marginalization to Empowerment: A Historical Perspective on Advancing Women's Protection and Combating Gender-Based Violence*, INT'L J. RSCH. PUBL'N & REVS. 1867 (2024); Diane Jackson & Jennifer Hoewe, *Congressional Discussions of Abortion: Moral Framing in Context*, 10 PARTISAN RHETORIC & POLARIZATION 89 (2025); Zheng Yuan, *The United States Abortion Controversy in the Context of Institutional Rivalry: The Interweaving of Justice, Politics, and Policy*, 3RD INT'L CONF. ON ART, DESIGN, & SOC. SCI. 157 (2024), https://www.ewadirect.com/proceedings/chr/article/view/15624/pdf [https://perma.cc/PLQ2-X9J5]; Hongkun Wei, *The Debate on Abortion Rights in the United States at the End of the 20th Century*, 9 SAUDI J. HUMANS. & SOC. SCIS. 275 (2024).

263 *See, e.g.*, Barbara Baird & Erica Millar, *Abortion at the Edges: Politics, Practices, Performances*, 80 WOMEN'S STUD. INT'L F. (2020); Linda J. Beckman, *Abortion in the United States: The Continuing Controversy*, 27 FEMINISM & PSYCH. 101 (2017); David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

forthcoming analysis is not meant to object to or support one argument or another, but rather to show that the way arguments are framed is inherently political and, as such, has immense implications for women's rights and life opportunities that must be taken into consideration.

A. Framing and Past Meanings: Included/Excluded Narratives

The majority opinion in *Dobbs* centers its ruling around the question of whether the United States Constitution confers an individual right to obtain an abortion or whether states have the authority to regulate abortion as they wish.[264] In answering this question, the majority took an originalist approach to interpreting the Constitution.[265] Originalism is a theory of constitutional interpretation that holds that the Constitution should be read in its historical context, in accordance with the intentions of the Framers who drafted and ratified it.[266] Thus, originalists seek to discern and uphold the intentions of the original Framers, rather than subjecting the Constitution to evolving interpretations based on changing societal norms or the personal views of judges, arguing that this historical approach promotes stability and predictability in the law.[267] In the majority opinion, Justice Alito declares there is no federal right to abortion because it is not mentioned in the Constitution.[268] Therefore, according to the Court, the "Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[269]

Through an originalist perspective, the Court determines that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or our Nation's history."[270] The majority opinion points out that historically, until the latter part of the twentieth century, there was no legal theory, federal law, or court ruling

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264 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

265 *See* Cohen et al., *supra* note 263, at 41; Malinda L. Seymore, *Originalism: Erasing Women from the Body Politic,* 10 ADOPTION & CULTURE 214, 214 (2023) [hereinafter Seymore, *Originalism*].

266 *See generally* MADIBA K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK (2024).

267 *See id.*

268 *Dobbs*, 597 U.S. at 231.

269 *Id.* at 217–18.

270 *Id.* at 221.

suggesting a constitutional right to abortion.[271] "On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until *Roe*'s decision in 1973," and until a few years before *Roe*, no federal or state court had recognized such a right.[272]

However, the Court's narrative can be challenged on several grounds. First, there are, of course, other historical traditions that would support competing interests. To name a few, the Catholic Church has been tolerant of abortion to save the life of the mother, at a minimum, since medieval times.[273] In the wake of the *Dobbs* decision, historians have pointed to evidence that several U.S. states tolerated termination of pregnancies as early as the Antebellum period.[274] According to legal scholar Michele Goodwin, criminalizing abortion was an "economic and political strategy led by male obstetricians who sought to monopolize reproductive healthcare and 'squeeze' [out] skilled midwives" who "'frequently cause[d] abortion openly and without disguise.'"[275] The *Dobbs* Court could have incorporated this narrative when weighing to what extent "a right to abortion is (not deeply) rooted in the Nation's history and traditions."[276] The determination that there was no support in American law for a constitutional right to obtain an abortion can be seen as cherry-picking the factual ground beyond the mere interpretation of the law.[277]

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271 *See id.* at 216.

272 *Id.* at 250.

273 *See* ANNE STENSVOLD, A HISTORY OF PREGNANCY IN CHRISTIANITY: FROM ORIGINAL SIN TO CONTEMPORARY ABORTION DEBATES 154 (2015); Olivia Campbell, *Abortion Remedies from a Medieval Catholic Nun(!),* JSTOR DAILY (Oct. 13, 2021), https://daily.jstor.org/abortion-remedies-medieval-catholic-nun/ [https://perma.cc/8MRD-TJWC].

274 *See* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 214 (2022) ("In *Dobbs*, the majority claims to canvass history to inform its understanding of the debate involving substantive due process within the reproductive context. Yet, the Court neglects the U.S. Antebellum and Reconstruction histories.") [hereinafter Goodwin, *Involuntary Reproductive Servitude*]; *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today [https://perma.cc/ET9B-CHU3].

275 Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 214, 216 (quoting HORATIO R. STORER, WHY NOT? A BOOK FOR EVERY WOMAN 85 (1868)); *see also* Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973*, in THE REPRODUCTIVE RIGHTS READER 82 (Nancy Ehrenreich ed., 2008)).

276 *Dobbs*, 597 U.S. at 231.

277 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 214.

Second, the majority's decision frames the discussion as a question of state sovereignty rather than of women's agency.[278] The Mississippi law indeed restricted abortion, but it also restricted women's health rights, their autonomous rights over their bodies, their right to make plans concerning their families and their lives, and many other rights that could and should have been the focus of discussion. The *Dobbs* case could have been framed as a discussion about access to health care,[279] health care disparities that might increase between subpopulations,[280] whether a fetus is a person,[281] or the scope of women's right to make autonomous decisions over their bodies and life opportunities.[282] These concerns are all affected by the law and could have become the center of the legal analysis. But women in general, or their right to make decisions over their own bodies and life options, were seldom mentioned in the majority ruling. If the issue before the Court is framed in a way that leaves out anything not mentioned in the original wording or meaning of the Constitution, it is easy for the Court to exclude women from the ruling.[283] It is hard to weigh something that is absent from available consideration. Obviously, marginalizing certain arguments in the discussion discourages their narratives and helps to promote the chosen, centered perspectives.

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278 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

279 *See, e.g.*, Women's Health Protection Act, H.R.3755, 117th Cong., § 2(a)(1) (2021) ("Abortion services are essential to health care and access to those services is central to people's ability to participate equally in the economic and social life of the United States. Abortion access allows people who are pregnant to make their own decisions about their pregnancies, their families, and their lives.").

280 *The Disproportionate Harm of Abortion Bans: Spotlight on* Dobbs v. Jackson Women's Health, CTR. FOR REPROD. RTS. (Nov. 29, 2021), https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-disproportionate-harm/ [https://perma.cc/2Z94-63P5].

281 The Court briefly touches on this issue, but only to dismiss the amicus argument that laws prohibiting abortion were passed in bad faith. *Dobbs*, 597 U.S. at 254–55 ("There is ample evidence that the passage of these [state abortion prohibition] laws was instead spurred by a sincere belief that abortion kills a human being . . . One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion opponents.").

282 *See* Gary J. Simson & Rosalind Simson, *Rescuing* Roe, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 313, 348 (2022) (arguing that the protected right underlying abortion is the right to autonomy rather than the right to privacy); Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, 84 NW. L. REV. 480, 510 (2010) (arguing that laws that prohibit abortion violate the Thirteenth Amendment).

283 *See Dobbs*, 597 U.S. at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("If the ratifiers did not understand something as central to freedom, then neither can we.").

Moreover, the Court relied on a previous ruling that had stated that the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women.[284] It therefore ruled that laws regulating or prohibiting abortion are subject to the same standard of review as other health and safety measures, rather than subject to the heightened scrutiny that a discrimination claim would require.[285] In other words, the Court determined that preventing abortion does not constitute discriminatory bias against women. However, while suggesting that abortion is not exclusively a women's issue and thereby implying some equivalent considerations for men, men's reproductive roles and potential competing interests are also not being explored in the ruling.[286] Often, men's roles in human reproduction or arguments that men have a competing interest are rarely discussed in laws about abortion, even though they should be. , they are part of the practice and their interests might not align with those of women.[287] The failure to account for men's role in reproduction, rhetorically and socio-politically, allows jurists and legislators (who are mostly men) the privilege of appearing non-political and objective about decisions that may directly benefit them.[288]

Originalist interpretation has a very clear implication for women's role in the narrative, as well as for their depiction in it: it results in a backward-looking political ruling that perpetuates, reinforces, and obscures an ancient power dynamic with severe

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284 *Dobbs*, 597 U.S. at 236 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993)). *But see* Laguardia, *supra* note 210, at 7 (noting that although the right to an abortion is in part based on the same rights of substantive due process and bodily integrity that have been acknowledged by the Supreme Court, historically the burdens of motherhood have not been similarly treated); Koppelman, *supra* note 282, at 510 ("Sexism is as pervasive in the anti-abortion world view as racism was in the Southern peonage system. Just as southern whites typically assumed that blacks were lazy and irresponsible, anti-abortion arguments in contemporary America typically belittle women's capacity for moral agency, often supposing that women who abort simply don't and can't understand what they are doing.").

285 *See Dobbs*, 597 U.S. at 237.

286 *See id.* at 373 (Breyer, Sotomayor & Kagan, JJ., dissenting) (claiming that the majority is not unaware of the connection between abortion and women's health, or that regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures).

287 *See* Peggy Phelan, *The* Dobbs *Decision: Abortion, Adoption, and the Supreme Court*, 10 ADOPTION & CULTURE 171, 172 (2022) ("Since men's roles in human reproduction are so rarely discussed in laws about abortion, we have tended to ignore the fact that the men making these decisions are also parties to them."). *See also id.* at 176 ("While jurists in *Roe* and *Casey* found that pregnancy impinges on a women's [sic] liberty in a way it does not impinge on men's, they argued that the Fourteenth Amendment made it unconstitutional for her to be compelled to continue a pre-viability pregnancy she did not want."); Penny, *supra* note 54.

288 *See* Phelan, *supra* note 287, at 172.

implications for women's rights and life opportunities.[289] Any ruling based on this method of interpretation automatically excludes under-recognized populations and rights at the time of framing the constitution and obscures the different liberty issues between men and women. With an originalist method of interpretation, the implicit narrative in the Court's ruling is basically written before any claim even reaches the court. The Fourteenth Amendment was written 151 years ago. Because women had no political say at the time of the American Founding, originalism will always be regressive as applied to issues affecting their rights and bodies.[290] This narrative implies that stakeholders, like women, that are not mentioned in the Constitution are not *and will never be* protected by it as a subcategory unless the Court specifically recognizes a case as gender-based discrimination in violation of the Equal Protection Clause.

The dissenting opinion is well aware of the importance of the way the majority frames "the tale."[291] Justices Breyer, Sotomayor, and Kagan point out the inevitable bias behind the majority opinion:

> [O]f course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.[292]

The dissent points out that when the Fourteenth Amendment was ratified in 1868, women had no legal representation and could not vote.[293] Particularly, it elucidates the rights of those the Founders excluded at the time of the adoption of the Constitution, such as women's rights to vote, own property, maintain custody of their own children, earn wages, and exercise bodily autonomy and reproductive decision making.[294] Recognizing this fundamental limitation, the dissenting opinion therefore employs a different methodological toolset, looking instead at the way the right to abortion is woven into other

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289 *See* Mary Anne Case, *The Ladies? Forget About Them: A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2013).

290 *See* Seymore, *Originalism*, *supra* note 265 at 214.

291 *Dobbs*, 597 U.S. at 364 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("To hear the majority tell the tale, *Roe* and *Casey* are aberrations.").

292 *Id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting).

293 *Id.* at 373 (Breyer, Sotomayor & Kagan, JJ., dissenting).

294 *See id.*

settled freedoms involving bodily integrity, familial relationships, and procreation, such as the right to purchase and use contraception and the rights of same-sex intimacy and marriage.[295] Centering women, the dissenting Justices argue that prohibiting abortion is the equivalent of "coerced pregnancy" (with rhetoric similar to those who characterize coerced pregnancies as involuntary servitude in violation of the Thirteenth Amendment)[296] and find it absurd that the majority overlooks the clear implications for "a woman's rights to equality and freedom"[297] and her bodily autonomy.[298] They also consider the women who will be denied abortion access and the inevitable future ramifications this ruling will have on their lives,[299] especially given that the fundamental legal and social rationales behind previous rulings mean that *Dobbs*' holding threatens additional constitutional rights.[300] Their analysis shows that centering women in the narrative could enable establishing "the right of individuals—yes, including women—to make their own choices and chart their own futures"[301]—but sadly, this only occurs in the dissent.

B. Women's Exposure to Medical Risks Versus Potential Life

The *Dobbs* Court frames the discourse by focusing on states' authority to regulate abortion, arguing that these regulations must be left to the political process, not the courts.[302] According to the majority, if the Constitution does not protect the right of women to have abortions, the states may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social

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295 *See id.* (Breyer, Sotomayor & Kagan, JJ., dissenting).

296 *See infra* Part IV.D.

297 *Dobbs*, 597 U.S. at 370.

298 *See id.* at 359 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("*Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.").

299 *See id.* at 408 n.27 (Breyer, Sotomayor & Kagan, JJ., dissenting) (discussing the disproportionate effect of the majority's decision on poor women, using evidence from Mississippi's healthcare system as an example).

300 *See id.* at 363 (Breyer, Sotomayor & Kagan, JJ., dissenting).

301 *Id.* at 365 (Breyer, Sotomayor & Kagan, JJ., dissenting).

302 *See id.* at 292. *See also id.* at 274 ("The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.").

and economic beliefs for the judgment of legislative bodies."[303] The Court maintained that determining what values a state should support when deciding whether to allow or prohibit a reproductive practice is a political endeavor, beyond the authority of the court. The majority opinion mentions that *Roe* and *Casey*, which each struck a balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life,"[304] were criticized because it amounted to "surrender to political pressure."[305] It seems that the Court likes the idea of interpreting the law without interfering with political endeavors because it allows the jurists to present the Court as impartial and objective.[306] The majority opinion in *Dobbs* returns the decision regarding abortion regulations back to the states' legislative bodies, which are in charge of such political decisions.[307]

However, despite using rhetoric about abstaining from the political discourse about abortions, the ruling is political, and the narrative implies several political assumptions. Because Mississippi's Gestational Age Act uses a charged term, "unborn human being,"[308] effectively, the *Dobbs* Court considers the legitimacy of protecting "potential life" as a rational basis for legislation. The Court does not stop there. It goes further and incorporates different historical references to address "the child": "[S]ome manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication 'unlawfully to destroy the child' would be guilty of murder if the woman died."[309] Admittedly, it makes sense that the court focused on the petitioners' claims.[310] Typically, courts address only the narrow question before them. That said, accepting "potential life" as the starting point is in itself a

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303 *Id.* at 300 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963)).

304 Roe v. Wade, 410 U.S. 113, 150 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

305 *Dobbs*, 597 U.S. at 291.

306 *See, e.g.*, *Dobbs*, slip op. at 1–3 (Kavanaugh, J., concurring) (positioning the pro-life versus pro-choice conflict at the beginning of his opinion but claiming that the Court is ideologically neutral).

307 *See id.* at 217 ("[T]he people of the various States may evaluate those interests differently.").

308 Gestational Age Act, MISS. CODE ANN. § 41-41-191(4)(b) (2018) ("Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.").

309 *Dobbs*, 597 U.S. at 245.

310 In an adversarial system, this may raise additional questions about who should raise women's interests when an appeal concerns competing interests between the state and men and does not involve women. Given that women's health and life opportunities may be impacted by the decision on the merits, are there legal

political and not a legal question.[311] It is unclear if the determination of whether an unborn child has a "right" to life before birth is an ethical, political, or legal determination.[312] Given that the narrative of the ruling would not extend beyond the original wording of the Constitution, it is unclear whether the Constitution explicitly holds "unborn human being[s]" to be "persons" as protected under the Fourteenth Amendment (the topic of this claim).[313] The *Dobbs* opinion should have further addressed the question of which entities hold rights or are protected by the Constitution. By not doing so, the ruling reaffirms a political rather than a legal narrative—the exact territory the originalist approach aims to avoid. Because the unborn fetus was treated as "potential life," a balancing of competing interests never took place.

Francesca Laguardia sheds light on the narrative choices that are left out of courts' rulings, whether strategically or instinctively, including women's pain and physical burdens from judicial rulings on abortion.[314] According to Laguardia, describing the pain of carrying a pregnancy to term as an unwanted "burden" or "risk" frames the physical trauma many women experience as a mere unpleasantness, aligning with the interests of ideologies that privilege the fetus over the well-being of the mother.[315] This systemic exclusion of women's pain could be explained by the inclination of pro-life and pro-choice lawyers and activists to downplay the actual physical implications of pregnancy.[316] Abortion opponents "portray

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mechanisms that the Court could and should operate under in order to include what is lost when women are not (or cannot be) at the center of the inquiry (such as intervenors or amici making these arguments)?

311 *See* Dov Fox, *The State's Interest in Potential Life*, 43 J.L., MED., & ETHICS 345, 354 (2015).

312 *See* Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1687 (1978) (showing that the status of a fetus as a legal person varies by jurisdiction and is influenced by political, cultural, and religious views).

313 *See, e.g.*, Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185 (2010).

314 *See* Laguardia, *supra* note 210, at 3–4.

315 *See id.* at 2 (arguing that obscuring these details both reinforces and results from a general lack of empathy for women's physical burdens and the refusal to acknowledge that women might have interests of their own). *See also* Almog & Bassan, *supra* note 54, at 47, 18–24 (discussing that downplaying women's exposure to risk is comparable to similar sociopolitical development regarding egg donation, such as in the discussion concerning regulation amendments to the Israeli Egg Donation Act, in which medical risks were deemphasized by decision-makers and functionally promoted the constitutive narrative of procreation).

316 *See* Laguardia, *supra* note 210, at 31.

the fetus's interests as vastly overwhelming the interests of the pregnant person,"[317] and in doing so they objectify and reduce the pregnant woman to a supportive organ to the pregnancy. Pro-choice activists and lawyers often aim to portray a unique right of women, independent of the fetus, rather than talking about competing interests between the woman and the fetus, avoiding the discussion of the fetus's personhood.[318] Their narrative therefore avoids competition and closes the door to a balancing of interests between the pregnant woman and the fetus.

While a right to life is discussed in the *Dobbs* ruling, health rights are not, including the protection of maternal health and safety or the elimination of particularly gruesome or barbaric medical procedures.[319] In *Dobbs*, the pregnant woman is simply not part of the discussion. Both opinions (majority and dissenting) accuse each other of being one-sided: the majority blames the dissenting for ignoring arguments supporting the restriction of abortion,[320] and the dissenting opinion blames the majority for ignoring the interests of women.[321] But the focus on the right to abortion as part of the Constitution, in particular when combined with an originalist approach of interpretation, has driven the discussion away from women's agency and from their bodies, where the potential life is to be carried,

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317 *Id.*

318 *See, e.g.*, *id.*; Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding a law that bans a specific abortion method, even though the law does not contain an exception for cases that endanger a woman's health); Stenberg v. Carhart, 530 U.S. 914 (2000) (ruling that a state cannot pass an anti-abortion law that does not include an exception for the health of the mother).

319 *See* Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs*, But Now They're on Abortion's Legal Front Lines,* NPR (July 3, 2022), https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines [https://perma.cc/46WD-7CTP]; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270 (2022) (reviewing *Roe*'s balancing of the rights of the mother with the interests of the state based on the trimester).

320 *See Dobbs*, 597 U.S. at 263 ("According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'").

321 *See id.* at 370 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's)."); *id.* at 405 (criticizing the majority ruling for revealing "how little it knows or cares about women's lives or about the suffering its decision will cause" and lacking discussion of the possibility for incorporating alternative narratives).

and the medical procedure being performed.[322] It would have been preferable for the Court to craft a narrative that objectifies women rather than completely ignoring them—that is to say, even reducing women to merely "a uterus," disregarding their entire personhood, is more responsible than omitting any concern about them, even health concerns about the well-being of their uteruses.

If the Court's narrative balanced the discussion about potential life with the implications on women's right to health and bodily integrity, restricted access to abortion would potentially be harder to justify. Competing narratives indicate that abortion will be favorable only if medical risks and morbidity are considered. According to the Centers for Disease Control, carrying a pregnancy to term is thirty-three times riskier than having an abortion, at a rate of 20.1 maternal deaths per 100,000 live births compared to 0.6 maternal deaths per 100,000 abortions.[323] Findings of the Turnaway Study, the largest study to examine women's experiences with abortion and unwanted pregnancy in the United States, show that many common claims about the detrimental effects on women's health of having an abortion are unsupported by evidence.[324] Women who have an abortion are not more likely than those denied the procedure to have depression, anxiety, or suicidal ideation.[325] 95% of women report that having an abortion was the right decision for them over five years after the procedure.[326] Amanda Jean Stevenson, a sociologist who studies the impacts of and responses to abortion and family planning policy, notes that in a hypothetical total abortion ban, in the first year of such a ban, estimated pregnancy-related deaths would increase from 675 to 724 (forty-nine additional deaths, representing a 7% increase), and in subsequent years to 815 (140 additional deaths, representing a 21% increase).[327] Estimated

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322 *See* Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, 92 MISS. L.J. 271 (2023) (arguing that *Dobbs* disregarded the extensive discussions surrounding contentious medical assertions, viewing abortion as a matter of politics rather than medical expertise, and enabled legislative bodies to regulate abortion without considering its medical aspects).

323 KATHERINE KORTSMIT ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, ABORTION SURVEILLANCE — UNITED STATES, 2020 (2022), https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf [https://perma.cc/P2UH-G8UL]; Laguardia, *supra* note 210, at 29 (noting broad acknowledgement that the risk of death is greater in childbirth than in abortion, and the mortality rates of each are often recited).

324 *See* DIANA GREENE FOSTER, THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION 20 (2020).

325 *See id.* at 11.

326 *Id.* at 212.

327 Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2023 (2021).

pregnancy-related deaths would increase for all races and ethnicities examined, but non-Hispanic Black people would experience the greatest increase in deaths (a 33% increase in subsequent years).[328] According to Stevenson, denying all wanted or induced abortions in the United States would increase pregnancy-related mortality substantially, even if the rate of unsafe abortion did not increase.[329]

A narrative may include or exclude people or ideas, and the choice of whom to include reflects and affects who will benefit and what is to be gained from the Court's ruling.[330] It is clear how a discourse that omits competing interests inevitably leads to a certain implicit narrative that results in an unbalanced picture of the interested bodies in the discussion. If the Court's narrative accounts for the "unborn human being," it should at least also account for the body that carries it.

C. Supply and Demand for Childbearing: Domestic Supply of Infants

To address women's options in a reality where abortion is restricted, the *Dobbs* Court provides a footnote in its opinion, citing a Center for Disease Control study documenting the shortage of "domestic supply" for adoption: "[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the 'domestic supply' of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent."[331] The narrative that equates adoption (terminating parental rights) and abortion (terminating pregnancy) implies "the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted"[332] can be "saved" by other people seeking to adopt. Thus, outlawing abortion seems to solve the shortage of adoptable children.[333]

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328 *Id.*

329 *See id.*

330 *See* Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1572 (1990).

331 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 n.46 (2022).

332 *Id.*

333 *See* Phelan, *supra* note 287, at 178. This narrative led many white couples to hold signs proclaiming "We will adopt your baby" during protests after the decision was announced. *See* Jessaca Leinaweaver, *What Is Adopted in* Dobbs*?*, 10 ADOPTION & CULTURE 166, 166 (2022).

It is doubtful that this raw calculation has a hold in reality. There is no mathematical equation that converts abortions into adoptions.[334] It is difficult to know exactly how many "waiting" parents there are across private, public, and international adoption agencies, or how many babies are available. According to the Guttmacher Institute, 930,160 abortions were provided in clinical settings around the United States in 2020.[335] Some of these abortions were done because the fetus was not viable, so it would be misleading to convert these numbers into simple calculations of the "domestic supply" of adoptable children.[336] Moreover, for pregnant women, adoption and abortion are not interchangeable; therefore, banning abortions would not necessarily result in more children for adoption.[337] The Turnaway Study found that among abortion seekers, adoption is infrequently considered or chosen.[338] 91% of people who continued pregnancies against their will did not give the baby up for adoption.[339] The narrative of adoption as an alternative to abortion is not empirically supported.[340]

The *Dobbs* case therefore baselessly implies that, first, proceeding with an unwanted pregnancy is of negligible impact as long as the mother does not have to raise the child. This suggests that families, kinship, and parenthood are all exchangeable.[341] Second, that a pregnancy of fifteen weeks is not different, emotionally or physically, from a pregnancy

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334 *See* Ashley McGuire, *Cultivating a Pro-Adoption Culture*, INST. FOR FAMILY STUD.: BLOG (June 17, 2019), https://ifstudies.org/blog/cultivating-a-pro-adoption-culture [https://perma.cc/BM3Y-7MFX] ("There are no reliable figures that quantify the number of couples waiting to adopt. Some estimate it to be in the millions. Other estimates say that for every baby placed in adoption, there are 36 couples waiting to adopt.").

335 *Guttmacher Institute Releases 2020 Abortion Provider Census with Important Data on US Abortion Landscape Before the Fall of* Roe, GUTTMACHER INST. (Dec. 1, 2022), https://www.guttmacher.org/news-release/2022/guttmacher-institute-releases-2020-abortion-provider-census-important-data-us [https://perma.cc/GX9Z-KDDZ].

336 *See* FOSTER, *supra* note 324, at 37.

337 *See id.* 175–76.

338 *See id.* at 176.

339 Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 141 (2017).

340 *See* Phelan, *supra* note 287, at 181 ("While some adoption agencies anticipate a slight uptick in the number of people seeking to place unwanted children who might have been aborted otherwise, most recognize that the *Dobbs* decision will not meaningfully increase the 'domestic supply' of infants.").

341 *See* Malinda L. Seymore, *Social Costs of* Dobbs *' Pro-Adoption Agenda*, 57 U.C. DAVIS L. REV. 503, 574 (2023) [hereinafter Seymore, *Social Costs*].

of nine months.[342] Third, that there is little difference between choosing to give birth willingly and being forced to do so.[343] Cynthia Callahan, who explores the role of adoptive kinship in articulating racial and national identities in late nineteenth- and twentieth-century American literature, observes, "To privilege adoption as the optimal alternative to abortion is to substitute one form of disempowerment for another. As a practice, adoption is rooted in pain and loss, even when the outcome is joyful. It is not always joyful. Every family formed through adoption is possible because another family has been broken in some way."[344] Suggesting adoption for women who want to terminate their pregnancies perpetuates the oversimplified depictions of adoption and fails to recognize the complex realities for all those involved.[345] It trivializes the trauma associated with adoption for birthmothers, relinquished children, and adoptive families.

According to Callahan, in an era marked by pervasive consumerism, the process of adoption mirrors a transactional market.[346] Prospective parents engage in a selection process where they evaluate each potential child they encounter. Many potential adoptive parents are reluctant to consider children who do not meet certain criteria, reinforcing the influence of socially constructed preferences in adoption practices. These tendencies are documented in academic research. For instance, a study revealed that 51% of white women expressed a preference for adopting a child of their own race, 60% preferred children under the age of two, and 54% indicated a preference for adopting a non-disabled child.[347] In contrast,

342 *See* Phelan, *supra* note 287, at 180.

343 *See* Seymore, *Originalism*, *supra* note 265, at 2; Erin Chenard, *Maine Voices: Surrogacy Process Throws* Dobbs *Ruling into Sharp Relief*, PRESS HERALD (July 19, 2022), https://www.pressherald.com/2022/07/19/maine-voices-surrogacy-process-throws-dobbs-ruling-into-sharp-relief/ [https://perma.cc/EG7M-9QP3] ("Pregnancy happens inside an existing person. It's not theoretical. Giving birth is unavoidably messy, painful and life-changing. If one has not chosen it, and is not accorded recourse, safety, or respect from beginning to child, it ceases to be a gift and becomes exploitation. No one should ever, ever have the value of a pregnancy placed above their own.").

344 Cynthia Callahan, *Adoption, Abortion, and Ambivalence: Processing the* Dobbs *Decision*, ADOPTION & CULTURE 237, 241 (2022).

345 *See id.* at 239.

346 *See id.*

347 Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 ADVANCE DATA 8–9 (1999). The study utilizes data from the National Survey of Family Growth across four survey years—1973, 1982, 1988, and 1995—each based on multi-stage probability samples of civilian, noninstitutionalized women in the United States aged 15–44, ensuring nationally representative estimates. *Id.* Data collection methods and survey design varied across survey years. *Id.* The total sample sizes for these years were 9,797 in 1973, 7,969 in 1982, 8,450 in 1988, and 10,847 in 1995, with the latter including

only 37% of overall respondents were open to adopting a child over the age of twelve, and merely 33% were willing to adopt a child with severe disabilities.[348] These findings highlight the prevailing biases in adoptive-parent preferences.[349] If the first child does not meet a prospective parent's specific criteria, they politely decline and proceed to the next option, ultimately finding the child they deem acceptable. Callahan associates customer choice with adoption and concludes that in the era of consumerism, commercialized adoption validates the adoptive family, seemingly equating the bond formed through adoption with the "chosen baby" to the societal expectation of biological connection.[350]

In this world of supply and demand, the "adoption as alternative" narrative exacerbates an implicit narrative according to which babies are commodified and women are objectified as producers of a scarce resource.[351] This implicit narrative, reinforced in the *Dobbs* opinion, works against contemporary liberal values that emphasize the importance of individual autonomy, equality, and the rejection of any form of dehumanization or commodification, because it objectifies and reduces women to property, valued only for its economic outcomes.[352] This narrative diverts the focus from the child and their best interests, redirecting it toward the desires of prospective adoptive parents, with children being positioned as means to fulfill those desires.[353]

Commodifying narratives also implicate racial disparities. As demand for children to adopt outstripped the supply of white infants, transracial adoptions today represent a significant share of adoptions—21% to about 24% of adoptions between 2000 and

1,553 Hispanic women, 6,483 non-Hispanic white women, 2,446 non-Hispanic Black women, and 365 women of other races. *Id.* However, while the study provides nationally representative findings for U.S. women aged 15–44, its adoption-related conclusions apply specifically to never-married women aged 18–44, resulting in sample sizes of 9,662 in 1973, 4,623 in 1982, 5,280 in 1988, and 6,833 in 1995. *Id.* Adoption is rare among never-married women and those aged 15–17, leading to a number too small for separate statistical analysis. *Id.* Some subgroup analyses, such as adoption preferences by race, may also be affected by small sample sizes, limiting statistical reliability. *Id.*

348 *Id.*

349 *See* Phelan, *supra* note 287, at 178.

350 *See* Callahan, *supra* note 344, at 239.

351 *See* Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (May 10, 2022), https://slate.com/news-and-politics/2022/05/the-alarming-implications-of-alitos-domestic-supply-of-infants-footnote.html [https://perma.cc/JKP3-F3BW].

352 *See id.*

353 *See* Seymore, *Social Costs*, *supra* note 341, at 504.

2012.[354] As a response to consumers' preferences in this market, adoption agencies have historically exhibited a preference for certain racial backgrounds, often resulting in Black babies being offered at discounted rates to encourage their adoption.[355] Adoption agencies may charge as much as $50,000 to adopt a healthy white infant and as little as $4,000 to adopt a Black infant.[356] Additionally, within this industry, there is interdependence between abortion, adoption, and poverty. Today, poverty is a major factor in the decision to abort.[357] Data collected by Gretchen Sisson indicates that people who relinquish their infants for adoption these days are in their twenties, a majority are already parenting children, and a significant majority earn less than $10,000 a year.[358] The data suggest that low-income relinquishing parents may not have initially planned on putting the baby up for adoption at all, with about one-third reaching out to adoption agencies close to their delivery date.[359] The reality post-*Dobbs* is that the "adoption as alternative" narrative may result in state policies incentivizing low-income populations to give their children to adoption agencies by silencing the abortion option in the adoption decision-making process.[360] If Black babies cost less to adopt than other children, market rationale would encourage babies from this specific subpopulation to satisfy the market. The "adoption as alternative" narrative may imply that, from a commercial point of view, denying access to abortion and forcing

354 Elisha Marr, *U.S. Transracial Adoption Trends in the 21st Century*, 20 ADOPTION Q. 222, 234 (2017).

355 *See* Michele Bratcher Goodwin, *Baby Markets*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 6 (Michele Bratcher Goodwin ed., 2010) (pointing out that the usual justification for a two-tiered fee structure based on race is that it is easier to place white children and more difficult to place Black children, but reasoning that if the fees are based on the amount of work it takes to place a child, rather than any intrinsic value of a child, Black children should cost more, not less) [hereinafter Goodwin, *Baby Markets*]; Salendria Mabrey, *Human Discount: Why Do Black Children Cost Less to Adopt?*, FOSTER CARE NEWSL. (Sept. 1, 2016), http://foster-care-newsletter.com/human-discount-black-children-cost-less-adopt/ [https://perma.cc/A92W-HMBF]; NPR Morning Edition, *Six Words: "Black Babies Cost Less To Adopt"*, NPR (June 27, 2013), https://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt [https://perma.cc/7PZG-W7BK].

356 Goodwin, *Baby Markets*, *supra* note 355, at 6.

357 *See* Sally Haslanger, *The Adoption "Alternative"*, 10 ADOPTION & CULTURE 278, 281 (2022).

358 *See* Gretchen Sisson, *Who Are the Women Who Relinquish Infants for Adoption? Domestic Adoption and Contemporary Birth Motherhood in the United States*, 54 PERSPS. ON SEXUAL & REPROD. HEALTH 46, 49 (2022).

359 *See id.* at 50.

360 *See* Seymore, *Social Costs*, *supra* note 341, at 504 (outlining many of the potentially coercive tactics that have been employed by adoption professionals to persuade birth parents to relinquish their constitutionally-protected parental rights, including high-tech targeting of potential birth parents, the use of crisis pregnancy centers to steer pregnant persons to adoption, manipulating the emotional stress of pregnancy to procure consent, and taking advantage of the duress of circumstances of poverty).

pregnancy of low-income Black women would result in more children available in the adoption market.[361]

D. Women and the Scope of Autonomy and Political Change

The *Dobbs* majority briefly addresses the argument, raised in *Roe*, that limiting abortion access fundamentally limits women's ability to manage their work and relationships.[362] The majority proposes a counterargument, pointing out that today there is more social tolerance of pregnancy outside of marriage, more legally granted protections in the workplace for pregnant women, greater access to comprehensive healthcare that covers the medical expenses associated with pregnancy, and more laws facilitating putting children up for adoption.[363] But by focusing on the increased support for and alternatives to raising a child, the majority's reasoning does not account for one essential choice women may want available to them: the decision not to continue the pregnancy at all.

The implications of *Dobbs* on access to abortion for women who do not wish to become parents do not follow directly from the framing of the legal question. However, focusing on whether the state is allowed to regulate pregnancies eliminates the human factor (the women) from the narrative and overlooks the real consequences of unwanted pregnancy and forced labor for them. Andrew Koppelman argues that abortion restrictions have the potential to compel motherhood and strip individuals of their autonomy and "control over one's reproductive capacities."[364] According to him, laws that prohibit abortion violate the Thirteenth Amendment's guarantee of equality because forcing women to be mothers makes them into a servant caste, a group that, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves.[365]

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361 *See* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1426 (2006) ("Some agencies, guided by the laws of supply and demand, charge lower fees for African American children, higher fees for children who are only half African American, and the highest fees for all other [non-African American] children . . . Under this framework, the same fee applies to adoptions of Caucasian, Latino, Asian American, or Native American children or any combination thereof.").

362 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 258 (2022) ("Without the availability of abortion, [defenders of *Roe*] maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.").

363 *See id.* at 258–59.

364 Koppelman, *supra* note 282, at 508.

365 *See id.* at 483.

Women forced to carry an unwanted pregnancy to term after being denied a wanted abortion have greater odds of living below the Federal Poverty Level ("FPL").[366] They are more likely to experience serious complications from the end of pregnancy, including eclampsia and death; more likely to suffer anxiety and loss of self-esteem in the short term after being denied abortion; more likely to experience poor physical health for years after the pregnancy, including chronic pain and gestational hypertension; and more likely to stay tethered to abusive partners.[367] Existing children, and those born of unwanted pregnancy, may also suffer negative repercussions of abortion denial.[368]

Restricted access to abortion harkens back to a historical past where women lacked autonomy.[369] Koppelman specifically highlights how these restrictions disproportionately affect Black women of childbearing age, asserting that the resulting consequences bear a chilling resemblance to elements of slavery.[370] Black women's bodies were historically controlled in the United States according to slave masters' economic stakes.[371] The legal background surrounding the Fourteenth Amendment's "substantive due process" protections for family liberty and autonomy is rooted in the historical context of slavery and the struggle for equal rights. During the era of slavery, slaves were not afforded equal rights and were treated as property.[372] Black people, including former slaves, were often

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366 *See* FOSTER, *supra* note 324, at 38.

367 *See id.* at 127.

368 *See* Amalia Londoño Tobón et al., *The End of* Roe v. Wade*: Implications for Women's Mental Health and Care*, 14 FRONTIERS PSYCHIATRY 4 (2023).

369 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274; Goodwin, *Baby Markets*, *supra* note 355 (asserting that adoption as currently practiced in the United States is a racialized market, analogizing to slave markets).

370 Koppelman, *supra* note 282, at 508 (1990) (arguing that some abortion restrictions have the potential to compel motherhood and strip individuals of their autonomy and "control over one's reproductive capacities," and arguing that these restrictions' disproportionate effect on Black women of childbearing age echoes elements of slavery); *see also* Goodwin*, Involuntary Reproductive Servitude*, *supra* note 274, at 197. The amendment protects a woman's right to abortion because compelled pregnancy is a form of servitude. *See* Derrick Bell, *Racial Realism*, *in* THE DERRICK BELL READER 75 (Richard Delgado & Jean Stefancic eds., 2005).

371 *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 4 (2014).

372 *See* MICHELE GOODWIN, POLICING THE WOMB 47 (2020) (reviewing widespread practices of chattel slavery in the 17th, 18th, and 19th centuries in the United States, when most Black women suffered cruel treatment, including physical bondage, food deprivation, physical torture, reproductive coercion and terror, sexual assault, rape, forced reproduction, and stripping away from offspring) [hereinafter GOODWIN, POLICING THE WOMB].

subjected to oppressive practices that violated their family rights and autonomy.[373] White masters could impregnate slave women, including those married, and steal their babies in order to serve their interests, and the state allowed the violation of slaves' rights through the sale of slaves, disrupting marital bonds, and forcibly separating parents from their children.[374] Post-slavery American society continued to introduce oppressive practices that shaped racial disparities regarding reproductive rights. Practices such as forced sterilization, coercive birth control policies, and the criminalization of Black pregnancies and motherhood continued the tyrannical control over Black women's reproductive rights and bodily autonomy.[375]

The Fourteenth Amendment Due Process Clause has been interpreted by the Supreme Court to include a right to privacy,[376] protections for family autonomy,[377] and a parental right to control the upbringing of their children.[378] The Amendment was originally intended to protect former slaves from historical abuses by their state legislatures and to prevent the state from infringing upon family liberty and autonomy.[379] However, these narratives are central to the ongoing public policy debate on the consequences of abortion and should be central to courts adjudicating the legal issue of abortion bans and forced labor as well. But the *Dobbs* Court declined to uphold the idea of substantive due process rights: "While individuals are certainly free *to think* and *to say* what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to*

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373 *See id.* at 98.

374 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 207.

375 *See* GOODWIN, POLICING THE WOMB, *supra* note 372; *Impediments to Reproductive Justice: The Criminal Legal System and American Carceral State*, 137 HARV. L. REV. 2320 (2024).

376 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right to marital privacy); Roe v. Wade, 410 U.S. 113 (1973) (establishing the right to choose abortion under the Due Process Clause).

377 *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that family autonomy is a fundamental right under the Due Process Clause); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (holding that procreative rights are a fundamental liberty).

378 *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing the right of parents to control the upbringing and education of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (reaffirming the parental right in the context of school choice); Troxel v. Granville, 530 U.S. 57 (2000) (reaffirming the parental right in the context of grandparent visitation rights).

379 *See generally* Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); *see also* Phelan, *supra* note 287, at 180.

act in accordance with those thoughts."[380] License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty," as referred to by the Court.[381] "Ordered liberty sets limits and defines the boundary between competing interests."[382] To which the dissenting justices answered, ". . . a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare."[383] Specifically, the failure of the majority of the Justices to acknowledge the individual interests of pregnant women downgrades women's experiences, overrides the autonomy of the pregnant woman, and perpetuates stereotypical and subordinated roles for women.[384]

The only context in which the majority opinion acknowledges women's autonomy is in the political sphere, regarding women's electoral or political power. The Court invites "women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office," because "women are not without electoral or political power."[385] Is this lip service or something more? It is not easy for women to enact change through the political system. First, women have more barriers than men to gain political power. Whether as a reason or a result, men far outnumber women in the legislative and judicial branches of the U.S. government,[386] and it is unquestionable who this power dynamic serves (men) and who bears its cost (women). Even if women tried to enter the political sphere, as Justice Alito suggests, men are the primary arbiters of this sphere. As modern politics looks today, the political officials who have to respond to the Court's decisions like *Dobbs* are largely men,[387] who may not

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380 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 255–56 (2022).

381 *Id.* at 256.

382 *Id.*

383 *Id.* at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting).

384 *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 358 (1992) ("[T]he objective of abortion-restrictive regulation is to force women to assume the role and perform the work that has traditionally defined their secondary social status.").

385 *Id.* at 289.

386 *See* Phelan, *supra* note 287, at 172.

387 *See* Phelan, *supra* note 287, at 172.

always be aware and sensitive to the burdens and implications of "technical" restrictions on women's life opportunities.[388]

Moreover, experience with the Equal Rights Amendment, originally endorsed by both major parties, corroborates the difficulty of amending the Constitution, as only four decisions of the Supreme Court have been reversed by constitutional amendment.[389] Only very few amendments have been ratified throughout the years. For example, the Nineteenth Amendment was ratified in 1920 and granted women the right to vote.[390] The Supreme Court had previously held that the Equal Protection Clause did not guarantee women the right to vote, but the Nineteenth Amendment overruled that decision and established women's suffrage as a constitutional right.[391] However, significant cooperation of political officials is required to overturn Supreme Court decisions through constitutional amendment.[392] Another example of a Supreme Court decision being reversed by a constitutional amendment related to the Equal Protection Clause is the Twenty-Sixth Amendment.[393] This Amendment, ratified in 1971, lowered the voting age from twenty-one to eighteen.[394] In the case of *Oregon v. Mitchell*, the Supreme Court had upheld a law allowing states to set a higher voting age for state elections, but the Twenty-Sixth Amendment overruled that decision and established eighteen as the minimum voting age for all elections.[395]

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388 *See* Kathleen Parker, *The Abortion Fight Has Pushed GOP Women Out of South Carolina's Senate*, WASH. POST (June 28, 2024), https://www.washingtonpost.com/opinions/2024/06/28/abortion-south-carolina-republican-women/ [https://perma.cc/GGN6-MDAW]. But note that this issue is not one-dimensional. *See* Leigh Ann Caldwell et al., *Republicans Struggle Over What It Means To Be "Pro-Life" Post* Dobbs, WASH. POST (Sept. 14, 2022), https://www.washingtonpost.com/politics/2022/09/14/republicans-struggle-over-what-it-means-be-pro-life-post-dobbs/ [https://perma.cc/83QY-WTXA].

389 *See generally* Chisholm v. Georgia, 2 U.S. 419 (1793); Dred Scott v. Sandford, 60 U.S. 393 (1857); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (aff'd on rehearing, 158 U.S. 601 (1895)); Oregon v. Mitchell, 400 U.S. 112 (1970).

390 U.S. CONST. amend. XIX.

391 *See* Minor v. Happersett, 88 U.S. 162 (1875); *see also* Michele Goodwin, *Challenging the Rhetorical Gag and Trap: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. L. REV. 1417, 1419 (2018).

392 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 46 (1980).

393 U.S. CONST. amend. XXVI; Oregon v. Mitchell, 400 U.S. 112 (1970).

394 U.S. CONST. amend. XXVI.

395 *Mitchell*, 400 U.S. at 118; U.S. CONST. amend. XXVI.

The majority in *Dobbs* pretended to take a constitutionally neutral stance, but its ruling was nakedly political. The choice to avoid certain issues is political and affects the legal result.[396] The so-called neutral position avoids taking accountability for the ruling's implications, and those may be severe.[397] Since *Dobbs*, abortion bans and restrictions have led to dramatic increases in patients forced to cross state lines to permissive states and foreign countries for care.[398] This will pile additional hurdles to abortion in terms of costs, risks of detection, and the risk of criminalization of women who seek abortion.[399] Additional costs and stakeholders' rights affected by forced childbearing and childrearing should have been considered as legitimate interests. Goodwin emphasizes the additional cost for women without financial means:

> Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives.[400]

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396 *See generally* Risa Kaufman et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States,* 30 SEXUAL & REPROD. HEALTH MATTERS 22 (2022) (highlighting how restrictive abortion laws disproportionately affect low-income women, women of color, and those residing in rural areas, and how the *Dobbs* ruling has hindered women's ability to make informed decisions about their reproductive health); HUM. RTS. WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER DOBBS (2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/B477-BLAP].

397 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022) ("We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.").

398 *See generally New Data Show that Interstate Travel for Abortion Care in the United States Has Doubled Since 2020*, GUTTMACHER INST. (Dec. 7, 2023), https://www.guttmacher.org/news-release/2023/new-data-show-interstate-travel-abortion-care-united-states-has-doubled-2020 [https://perma.cc/YLR5-PSPG].

399 *See generally* Katrina Kimport & Maryani Palupy Rasidjan, *Exploring the Emotional Costs of Abortion Travel in the United States Due to Legal Restriction*, 120 CONTRACEPTION 1 (2023).

400 *Dobbs*, 597 U.S. at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting). *See also* Jolie McCullough & Neelam Bohra, *As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind*, TEX. TRIB. (Sept. 3, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-out-of-state-people-of-color/ [https://perma.cc/G728-W3QR].

The Court in *Dobbs* emphasized that its decision "concerns the constitutional right to abortion and no other right" and that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[401] However, the choice not to interfere with the freedom of state legislatures to regulate will not release the Court from dealing with these and other related political issues in the future, when it will be required to address potential appeals challenging these interests, as the dissenting opinion suggests.[402] But in the future, the narratives reaffirmed in this ruling might further fuel social rejection of women's rights and interests in general, and the rights of pregnant women in particular.[403] Following President Donald Trump's victory in the 2024 election, there was a significant increase in Google searches for "birth control," particularly in states with restrictive abortion laws, potentially due to fear of increased abortion restrictions.[404] The language of Supreme Court opinions carries substantial legal coercive power and authority. Missing or poorly framed judicial narratives can, and, in this case, have already become, part of the social discourse.[405] The post-*Dobbs* period is an opportunity to incorporate new narratives, arguments, and strategies supporting women's rights as well as access to reproductive and medical procedures.[406] These narratives may gain social and political power that becomes the foundation for further political strategy and action.

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401 *Dobbs*, 597 U.S. at 295.

402 *See id.* at 35 (Breyer, Sotomayor & Kagan, JJ., dissenting).

403 *See generally* Adam Grybowski, *A Shift in Perception After SCOTUS* Dobbs *Decision*, PRINCETON SCH. OF PUB. & INT'L AFFS. (Sept. 22, 2022), https://spia.princeton.edu/news/shift-perception-after-scotus-dobbs-decision [https://perma.cc/HEQ9-KN6G]; Chris Jackson et al., *Has the* Dobbs *Decision Made the Public More Divided on Abortion?*, IPSOS (June 22, 2023), https://www.ipsos.com/en-us/has-dobbs-decision-made-public-more-divided-abortion [https://perma.cc/LRT4-7U69].

404 *See* Laura Ungar, *Birth Control and Abortion Pill Requests Have Surged Since Trump Won the Election*, ASSOC. PRESS (Nov. 13, 2024), https://apnews.com/article/abortion-trump-birth-control-plan-b-iud-347022a5655828da4d59a7f3e571c01d [https://perma.cc/3T9H-789G].

405 *See* Laguardia, *supra* note 210, at 4.

406 *See also* David S. Cohen et al., *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 12–13 (2022) ("For instance, religious liberty challenges to state abortion bans, regardless of their present success in the courts, could redefine the conversation around abortion's religious and moral value. Focusing on the Thirteenth Amendment could highlight racial injustice and racial disparities in accessing reproductive healthcare, rebutting the recent antiabortion narrative that abortion bans promote racial equality.").

CONCLUSION

Both cases examined in this Article shed light on the power of framing to construct public opinion, reach a legal result, and affect future regulation. Similar narratives and balancing of interests are constructed by the parties in these two cases regarding reproductive practices that are performed on women's bodies against a politically charged background. Both cases address the constitutionality of restricted access to these reproductive practices and eventually side with the petitioners. Each case is embedded in a very different domestic political and cultural discourse, and their results are seemingly divergent: *Arad-Pinkas* expanded access to surrogacy services, while *Dobbs* allowed restrictions on abortion. However, both cases promoted a pro-natalist approach to reproductive issues and implicitly encouraged more pregnancies.

In both cases, the interests of women are downplayed or even ignored as the courts choose to prioritize pro-birth interests.[407] The Israeli case balances potential harms to surrogate women with the right of gay couples to create a family, but it is so focused on providing a solution to the appellants that it minimizes concerns about women's bodies.[408] The methodological choices and strategic historical narrative presented in *Dobbs* leave the impact that the practice performed on women's bodies has on women's lives and the impact of their rights over their bodies undiscussed, outside the frame of the discussion.[409] Abortion discussions are therefore disconnected from the agent and the body where the potential life is carried.[410] Each ruling not only has an impact on women's bodies and health but also creates a ripple effect on other reproductive practices. For example, if the procedure women are seeking would be considered illegal where they live, it will lead to extraterritorial effects. Ineligibility for domestic surrogacy in Israel and some abortion services in parts of the United States will cause oppressed groups to seek out reproductive services across the borders of their countries or states, if they can afford it.[411]

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407 *See supra* Parts III.B and IV.B.

408 *See supra* Part III.B.

409 *See supra* Part IV.B.

410 *See* Laguardia, *supra* note 210, at 4 ("[A]bstraction is one of the ways that law may 'without justification submerge the perspectives of women and other marginalized groups,' thereby protecting their continued subordination; and it is one reason feminist legal scholars emphasize the need to increase awareness of the actual experiences of those affected by legal principles.").

411 *See* Christine Vestal, *Privacy, Stigma May Keep Workers from Using Abortion Travel Benefits*, STATELINE (Oct. 3, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/10/03/privacy-stigma-may-keep-workers-from-using-abortion-travel-benefits [https://perma.cc/ENZ7-R2GH].

There is a big difference between the cases in women's autonomous decisions about the respective practices: wanting to avoid pregnancy in the case of abortion or the wish to become pregnant as surrogates. The implicit judicial narratives about the women who are subject to these practices consistently downplay their interests. The woman portrayed in these two rulings is autonomous enough to choose to commodify her uterus but not to enjoy the rising price in the market; empowered enough to use her electoral or political capital to affect the legislative process but not to autonomously make decisions about her body and reproductive capacities. Narrative analysis exposes how the concept of autonomy was used to serve the rulings' chosen hegemonic narratives. In the Israeli case, the autonomous decision of women who want to be surrogates aligns with that of intended parents who want to use surrogacy services as well as with the national narrative and market principles. The court relies on women's autonomy when they want to be part of the market and provide surrogacy services.[412] Both arguments regarding surrogates' autonomy and equal accessibility to same-sex couples outweigh the considerations about the harms involved in expanding their exposure to physical risk.[413] However, according to the implicit narrative, their autonomy is unwelcome when they can leverage rising demand in the market, and the court suggested capping the price. In the name of autonomy over their bodies, they can practice surrogacy, but the ruling suggests that they will not have the autonomy to decide at what price. In *Dobbs*, the Court welcomed women's autonomy to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.[414] In the name of autonomy, women can use their electoral power, but men can use the same electoral power to enact decisions over women's bodies. In both cases, women are only granted partial autonomy, which reflects only partial aspects of their full personhood. The Israeli case might encourage bodily autonomy by loosening restrictions on how and for whom women can become surrogates, while the *Dobbs* case discourages bodily autonomy, and in both cases, the women whose bodies and lives were most affected by the decision were not given a voice.

This Article advocates for the importance of narrative framing and the severe ramifications of what is undertreated or left outside the scope of the judicial discussion. The work of a good legal advocate is to frame the discussion in the way that will best serve their clients' interests. Narrative analysis reveals that in high court decisions, official and implicit narratives have a direct effect on the ruling and the power dynamic between the parties. Framing the case and the arguments is of major importance to the final ruling and

412 *See supra* Part III.D.

413 *See Arad-Pinkas II*.

414 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022).

its implications, as it allows the parties to distinguish appealing and unappealing narratives and instrumentally focus on the narrative that would best serve different interests according to the clients. The importance of narratives could and should therefore be carefully considered by the court when discussing reproductive practices, as well as the distribution of their burdens on women's bodies and health systems. Understanding the importance of constructing the legal narrative around women when their bodies and interests are at stake could be relevant to ongoing and future advocacy struggles. Often, the real fight is over the narrative itself.

POT WITHOUT PATRIARCHY: GENDER EQUITY IN THE ADULT-USE CANNABIS INDUSTRY AND THE FEMINIST COOPERATIVE MODEL

NICOLE KOONCE*

Abstract

Many states that have legalized recreational cannabis in the last decade have done so with social equity in mind. So-called "cannabis social equity" programs in those states primarily aim to rectify the harms of discriminatory enforcement of cannabis laws before legalization, but they also pursue a broad vision of diversity in cannabis business ownership as the industry rapidly grows. As more data on cannabis industry demographics becomes available, states' equity programs have received widespread criticism for their failure to realize their racial equity and restorative justice goals. There has been far less discussion of the persistent gender disparities in the cannabis industry, though. Despite states' equity efforts, the nascency of the industry, and the fact that women are starting and leading businesses in other sectors at higher rates than ever before, women are not pulling ahead in cannabis. This Note seeks to contribute to the holistic, intersectional project of cannabis equity by exploring cannabis's gender problem—including its causes and potential state-level policy solutions within constitutional limits on gender-based affirmative action. It argues that women's participation and leadership in the cannabis industry are essential in light of the hidden costs of the War on Drugs on women and women's historic exclusion from, or exploitation by, other "vice" industries like gambling and tobacco. This Note ultimately advocates for an increased regulatory focus on support for co-op businesses, as their democratic, collective structure renders them uniquely well-suited to achieving gender equity in cannabis while prioritizing community and resisting corporate capture.

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* J.D., 2025, Columbia Law School; B.A. 2020, Rice University. I want to extend my sincerest thanks to Professor David Pozen for his invaluable guidance and feedback as my advisor for this Note. I am also incredibly grateful for the entire editorial staff of the *Columbia Journal of Gender & Law* for their diligent and thoughtful work in seeing this Note through to publication.

INTRODUCTION

As little as thirteen years ago, the existence of a legal recreational cannabis industry in the United States was nothing more than a pipe dream for drug policy reformers[1] and would-be lawful cannabis entrepreneurs and consumers. Today, that industry not only exists but thrives.[2] Nearly half of all states have legalized recreational ("adult-use") cannabis,[3] and the economic outlook of the industry is undeniably bright: estimates of its worth by 2030 are as high as $71 billion—double what it is now[4]—making it one of the fastest-growing industries in the country.[5] Crucially, many of the states contributing to that rapid growth have recognized the need to prioritize social and racial justice in structuring their cannabis markets in the shadow of the War on Drugs.[6] So-called "cannabis social equity" programs in those states, implemented at both the state and local levels, vary widely in scope and approach, but they broadly reach towards connected goals of

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1 *See, e.g.*, Paul Armentano, *Colorado: State Democratic Party Announces Support for Marijuana Regulation Measure*, NORML: BLOG (Apr. 17, 2012), https://norml.org/blog/2012/04/17/colorado-state-democrats-officially-support-marijuana-regulation-initiative/ [https://perma.cc/3BQ9-7B3V] (stating that Colorado's 2012 ballot measure to legalize recreational cannabis was "backed by a broad coalition of drug law reform organizations, including NORML, the American Civil Liberties Union of Colorado, SAFER, Sensible Colorado, Law Enforcement Against Prohibition (LEAP), Students for Sensible Drug Policy (SSDP), the Drug Policy Alliance, and the Marijuana Policy Project").

2 *See, e.g.*, Tatyana Hopkins, *Road to 2030: Federal Legislative Solutions to Social Equity in a Booming Cannabis Industry*, CONG. BLACK CAUCUS FOUND., https://www.cbcfinc.org/capstones/economic-opportunity/road-to-2030-federal-legislative-solutions-to-social-equity-in-a-booming-cannabis-industry/ [https://perma.cc/26GE-9642] ("[E]ven in the face of federal prohibition, the cannabis market continues to explode. In 2022, the legal U.S. cannabis market was worth an estimated $29 billion across state medical and recreational sales.").

3 Will Yakowicz, *Where Is Cannabis Legal? A Guide to All 50 States*, FORBES (Jan. 4, 2025), https://www.forbes.com/sites/willyakowicz/2025/01/03/where-is-cannabis-legal-a-guide-to-all-50-states/ [https://perma.cc/S6ZX-GWTT].

4 Oliver Barnes, *Cannabis Companies Proliferate on List of Fastest-Growing American Businesses*, FIN. TIMES (Apr. 28, 2023), https://www.ft.com/content/1b2e8e3e-27c8-404b-b90d-cb89352b8b9f [https://perma.cc/4W7X-PTUC].

5 *See* Justin Pace, *The "Free Market" for Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy*, 24 LEWIS & CLARK L. REV. 1219, 1257 (2020).

6 *See* Ignacio Diaz Pascual, *America's War on Drugs – 50 Years Later*, LEADERSHIP CONF. ON CIV. & HUM. RTS.: BLOG (June 29, 2021), https://civilrights.org/blog/americas-war-on-drugs-50-years-later/ [https://perma.cc/83R8-LUSQ] (arguing that the War on Drugs was "brazenly" racially and politically motivated, given that since President Nixon's 1971 declaration announcing that drug abuse was "public enemy number one," the War has resulted in a 500% rise in the number of people convicted of drug-related crimes, the majority of whom are Black and Brown).

promoting diversity in cannabis business ownership and allowing communities harmed by discriminatory enforcement of cannabis prohibition to now share in the economic benefits of legalization.[7]

The somewhat limited data on the success of those efforts towards achieving equity in the industry, however, suggests that their promise has not translated to significant results.[8] A 2022 report on diversity, equity, and inclusion in the cannabis industry found that women and non-white executives make up just 23% and 12% of executives in the industry, respectively, with rates of business ownership for those groups hovering around similar numbers.[9] And perhaps even more concerning, the data suggests that those figures are stagnant, if not declining in the long term.[10] There is a rich body of literature dedicated to understanding how state social equity programs and other policy measures can support racial justice efforts in adult-use cannabis[11]—and rightfully so. But there is a gap in the literature on cannabis equity addressing the other major ownership disparity in gender. This Note will discuss that gender disparity, address its far-reaching roots and consequences, and analyze the legality and practicality of potential policy solutions, including more widespread adoption of a cooperative business model in the industry.

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7 *See, e.g.*, *About the Program*, CITY OF L.A. DEP'T OF CANNABIS REGUL., https://cannabis.lacity.gov/social-equity/about-program/about-program [https://perma.cc/EXV9-WHUS] (stating the mission of the Los Angeles cannabis social equity program: "to promote equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities, and to address the disproportionate impacts of the War on Drugs in those communities").

8 *See, e.g.*, Katharine Neill Harris & William Martin, *Persistent Inequities in Cannabis Policy*, 60 JUDGE'S J. 9, 10–12 (2021) (citing "persistent disparities in . . . access to the marijuana industry and its profits" and noting that "[e]ven when policymakers try to address racial disparities, effort does not guarantee success").

9 CASSACHIA ET AL., MJBIZDAILY, DIVERSITY, EQUITY & INCLUSION IN THE CANNABIS INDUSTRY 4–5 (2022), https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBiz_Diversity_Equity_Inclusion_Cannabis_Industry_Report.pdf [https://perma.cc/UXP4-QYRS].

10 *See* JENEL STELTON-HOLTMEIER, MARIJUANA BUS. DAILY, WOMEN & MINORITIES IN THE CANNABIS INDUSTRY 5 (2021), https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBizDaily-Women-and-Minorities-in-Cannabis-Report.pdf [https://perma.cc/5P6K-X2QP] (reporting that the percentage of women executives in the cannabis industry has declined from 36% in 2015 to 22% in 2021).

11 *See, e.g.*, Matthew Swinburn & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 276 (2020); Harris & Martin, *supra* note 8; Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. (2020).

Part I of this Note provides a background on existing cannabis social equity programs and common barriers to entry in the cannabis industry for small businesses, especially those owned by women. It summarizes the precarious legal landscape created by the system of "cannabis federalism" and its consequences for cannabis businesses, details existing data on women holding executive and ownership positions in the industry as compared with other business sectors, and explores puzzles that those statistics pose. Part II discusses economic, social, and historical considerations that justify efforts to elevate women in the cannabis industry today. In particular, Part II explores the extensive ties between historically male control of vice industries and harmful social stigmas surrounding women and substance use, ultimately suggesting that adult-use cannabis presents an ideal opportunity to build the first feminist vice industry because of the nature of the substance and the present cultural and economic moment. Finally, Part III evaluates some of the biggest legal and practical challenges to meeting gender equity goals in cannabis, including constitutional limits on preferencing women-owned businesses in states' social equity schemes and the threat of corporate consolidation of small businesses, especially in the face of future federal legislation lifting prohibitions on cannabis. Part III presents the benefits of the cooperative business model as an alternative to traditional business organization. It argues that such a model is uniquely well-suited to cannabis equity goals, including gender equity, and thus should be more heavily promoted and prioritized through state cannabis regulation.

Nothing in this Note is intended to suggest that states should not continue to center racial justice as foundational in their cannabis policies in response to the indisputably racialized aims and impacts of the War on Drugs.[12] Rather, my hope is that adding gender to the cannabis equity conversation will contribute to holistic and multidimensional understandings of equity,[13] offer new perspectives on longstanding debates about gender disparities in business and entrepreneurship in other sectors, and prompt productive discussion of how this brand-new industry presents a unique opportunity to address the historical exclusion of women from controlling ownership of vices. Additionally, by focusing on gender *equity*

12 *See*, *e.g.*, André Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 455 (2022) ("[T]he War on Drugs originated with animus against people of color: specifically, with the intent to demonize people of color and to propagate fear within the entire American body politic while assuring disproportionate punishment towards communities of color.").

13 *See* Ryan Stoa, *Emerging Issues in Cannabis Law: 2022 and Beyond*, 46 SETON HALL LEG. J. 469, 481 (2022) ("To some, equity means righting the wrongs of the past; for cannabis, this means correcting the harms inflicted by the war on drugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits. A broad understanding of equity surely incorporates both, and a holistic approach to equity in cannabis will require a multidimensional and evolving understanding of what equity means and, perhaps more importantly, what equity requires.").

rather than equality, this Note recognizes that any discussion of a classification as broad as gender demands attention to intersectionality.[14] Ultimately, this Note is committed to the larger goal of seeing that the legalization and inevitable commercialization of cannabis proceed as equitably and ethically as possible. It focuses on intersectional considerations of gender in the industry under the theory that those considerations must play a part in the achievement of that goal.

I. The "Grass" Ceiling of the Adult-Use Cannabis Industry

There is widespread national recognition that pursuing social equity in the legal cannabis industry is especially critical in the shadow of the War on Drugs.[15] Many equity efforts target future diversity and inclusion in the industry, including by increasing representation of women-owned businesses. However, existing data on cannabis business ownership and control indicates that despite those efforts, neither minority- nor women-owned businesses are achieving anywhere close to an equitable market share.[16] Part I summarizes states' cannabis social equity efforts and some major challenges they face, reviews some of the existing data on women-owned cannabis businesses, and explores why women-owned businesses may experience unique and compounding barriers to entry in the industry.

A. Common Features and Failures of States' Approaches to Social Equity in Cannabis

States seeking to tackle inequities using, and related to, their adult-use cannabis markets have a wide array of policy options at their disposal. Forward-facing efforts directed at the diversity of new cannabis business owners, often involving licensing and funding decisions, are the most relevant for fostering gender equity in the industry. But it is important to note first that policy measures rooted in retrospective principles of restorative justice are far more wide-reaching in terms of scale. For example, upon legalization, states can implement mechanisms for sealing or expunging past cannabis offenses—either

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14 *See* Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 B.U. L. REV. 1003, 1009 (2021) ("While equality generally focuses on ensuring that everyone has access to the same resources, we consider equity as accounting for different starting points and the unique needs of different populations as a result of long-standing systemic and legislated barriers to opportunities to access those resources.").

15 *See, e.g.*, Swinburn & Hoke, *supra* note 11, at 236 ("State governments have recognized the disjointed relationship between the financial opportunity of legalized marijuana and the damages of the war on drugs.").

16 *See generally* CASSACHIA ET AL., *supra* note 9.

through a court petition process or, ideally, automatically—or their governors can simply issue sweeping pardons to individuals with cannabis-related convictions on their records.[17] Indeed, "[i]n terms of directly helping the most people who have been harmed by cannabis prohibition, expunging records is the most impactful, far-reaching measure."[18] States can also commit to investing a percentage of the tax revenue generated by their adult-use cannabis markets into communities disproportionately harmed by past enforcement of cannabis prohibition.[19] Although the impact of those funds has yet to be fully determined due to their nascency, directing tax revenue toward initiatives like economic development, violence prevention, and job creation in the targeted communities can foster deep, lasting improvements.[20]

On the other hand, states can use their regulatory frameworks for their new adult-use cannabis markets to foster diversity and inclusion in the ownership, leadership, and employment demographics of new cannabis businesses. Social equity-focused states often design their cannabis regimes around two primary goals: first, creating and protecting space for smaller businesses to prevent the rise of "Big Marijuana," and second, increasing minority representation in the industry early on.[21] The latter category of interventions is often implemented directly through "social equity programs," in which states preferentially award cannabis-related licenses and, in some cases, the associated funding and various support services to social equity applicants.[22] Each program defines those applicants using distinct criteria, but business owners usually qualify for some version of social equity status according to their residency in the state or in certain geographic areas impacted disproportionately by cannabis prohibition;[23] income thresholds; past cannabis convictions;

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17 *See* Kilmer et al., *supra* note 14, at 1011–12.

18 *Id.* at 1026.

19 *See, e.g.*, Swinburn & Hoke, *supra* note 11, at 276 (describing the Restore, Reinvest, and Renew ("R3") Program in Illinois and the Marijuana Regulation Fund in Massachusetts, each funded by marijuana tax revenue).

20 *See id.* at 277.

21 *See id.*

22 *See id.* at 255–76.

23 Residency criteria have recently been the subject of litigation. Several plaintiffs have challenged states' use of residence-based qualification for social equity status, claiming that they hinder interstate commerce and unconstitutionally prioritize in-state businesses in violation of the Dormant Commerce Clause. *See* Andrew Kline & Thomas Tobin, *Cannabis and the Dormant Commerce Clause*, PERKINS COIE (Mar. 27, 2022), https://www.perkinscoie.com/en/news-insights/cannabis-and-the-dormant-commerce-clause.html [https://perma.cc/

or their identity as a minority,[24] woman, veteran, person with disabilities, or LGBT individual. Some states have also allocated funding to support qualifying businesses through direct grants or low-interest loans,[25] and have offered training and startup support services or incentivized larger businesses to provide those services to social equity applicants.[26]

Nevertheless, cannabis social equity efforts have largely fallen short of their diversity objectives, including those related to women, due to a number of internal failures and external challenges.[27] Fundamentally, preferential licensing cannot overcome the high costs of starting a new cannabis business when not coupled with funding.[28] As further explained below, cannabis entrepreneurs are effectively excluded from using traditional banking services because of the continued federal prohibition on the drug.[29] Moreover, entrepreneurs may be heavily disadvantaged when existing medical marijuana businesses

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FY2Y-UBS9] (summarizing the application of the Dormant Commerce Clause to the cannabis industry and providing an overview of recent litigation in the area).

24 States must be careful to meet constitutional standards on affirmative action in giving preferential treatment to some businesses over others on the basis of race. In *Pharmacann Ohio, LLC v. Williams*, Ohio's effort to diversify its medical marijuana industry by setting aside 15% of its licenses for members of "economically disadvantaged groups" defined by race was struck down in an equal protection challenge as an improper racial quota. No. 17-CV-010962, 2018 WL 7500067, at *7 (Ohio Com. Pl. Nov. 15, 2018). The court ruled that discrimination in drug crime enforcement did not equate to past discrimination in the medical marijuana industry. *Id.*

25 *See, e.g.*, Stoa, *supra* note 13, at 486 (describing California's allocation of $23 million "to be disbursed directly to low-income and minority licensees in the form of low-interest or no-interest loans and grants").

26 *See, e.g.*, *id.* at 485 (describing the program in Massachusetts that "provides training and technical assistance to would-be licensees to understand the regulatory process and move through it effectively"); N.Y. STATE OFF. OF CANNABIS MGMT., NEW YORK SOCIAL AND ECONOMIC EQUITY PLAN 14 [hereinafter N.Y. EQUITY PLAN] ("States have either crafted their own direct support frameworks or have incentivized non-government entities to develop frameworks to support less-resourced operators.").

27 *See* Stoa, *supra* note 13, at 484 ("Early trends of representation show that White men predominately own legal cannabis businesses."); Amanda Chicago Lewis, *Legalized Pot Was Supposed to Build Black Wealth in Los Angeles. It Failed.*, NEW REPUBLIC (Apr. 4, 2022), https://newrepublic.com/article/165654/los-angeles-legal-marijuana-build-black-wealth-failed [https://perma.cc/ZN93-Y6QH] ("So far, marijuana legalization has been less a revolution and more a grim continuation of a deeply American form of inequality, in which prosperity and social mobility are technically possible but utterly unlikely.").

28 *See* Swinburn & Hoke, *supra* note 11, at 256 ("One estimate indicated that the average startup cost (application fees, licensing fees, etc.) for a retail location in the recreational market is $312,000 and $500,000 for a cannabis processing business. These startup estimates do not include the capital requirement placed on marijuana businesses by the state, funds the business must have on hand to prove financial viability.").

29 *See infra* Part I.B.

are able to enter a state's newly created recreational market and get a first-mover head start on sales.[30] Allowing, or even mandating, that cannabis businesses be vertically integrated—meaning that they control all stages of cultivation, processing, and selling "from seed to sale"—can also effectively limit access to the market to only the most well-resourced and capitalized businesses.[31] Too much local control in the implementation of a social equity plan can be detrimental, too. In Massachusetts, for example, state law requiring local "host community agreements" between towns and cannabis businesses implemented without sufficient state-level oversight resulted in corruption and the exclusion of many groups from the licensing process.[32] Even the difficulty and cost of navigating a state's complex regulatory scheme in itself can place a heavy burden on entrepreneurs trying to break into the industry.[33]

Sometimes a state's strategic timeline for rolling out a small number of social equity licenses before others works sharply to its disadvantage. Following legalization in New York, the state's Office of Cannabis Management developed a seemingly comprehensive "social and economic equity plan,"[34] but its delay in actually issuing those social equity licenses and getting dispensaries off the ground allowed the illicit, unlicensed market to thrive and compete in the meantime.[35] Unfortunately, those delays and dynamics have

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30 *See* SHALEEN TITLE, BIGGER IS NOT BETTER: PREVENTING MONOPOLIES IN THE NATIONAL CANNABIS MARKET 5 (2022) ("When states pass recreational legalization laws, existing medical marijuana businesses often lobby or create public relations campaigns seeking a head start on sales, which will always disadvantage and can effectively exclude new entrants to the industry."); Edward W. De Barbieri, *Excluding Disadvantaged Businesses*, 28 GEO. MASON L. REV. 901, 944 (2021) ("Since states that permit recreational cannabis frequently began by permitting use for medical reasons, first movers have a significant advantage over upstarts, including those owned by marginalized individuals.").

31 N.Y. EQUITY PLAN, *supra* note 26, at 15.

32 *See* Natalie Fertig, *Local Rule Is Undermining Massachusetts' Attempt to Create Equity in the Cannabis Industry*, POLITICO (Mar. 6, 2020), https://www.politico.com/news/2020/03/06/local-rule-is-undermining-massachusetts-attempt-to-create-equity-in-the-cannabis-industry-122655 [https://perma.cc/N2SP-8HKU] (describing applicants' and state officials' opinions that Massachusetts' host community agreements program was "sabotaging the licensing process and putting the entire diversity program at risk").

33 *See, e.g.*, De Barbieri, *supra* note 30, at 911 ("In the recreational cannabis market, it appears to hold true that the cost of complying with regulation alone tends to favor existing businesses rather than newcomers."); Stoa, *supra* note 11, at 480 ("Small businesses are being pushed out of the industry (or back onto the illicit market) due to the unrealistic regulatory hoops they are required to jump through.").

34 *See generally* N.Y. EQUITY PLAN, *supra* note 26.

35 *See* Michael Hill, *After Troubled Start, New York Is Shaking Up Its Legal Marijuana Market With New Competitors*, ASSOC. PRESS (Oct. 12, 2023) https://apnews.com/article/new-york-legal-marijuana-cannabis-

been commonplace. In Los Angeles, for example, one of the first places "to legalize weed with social equity in mind,"[36] 1,629 people became verified as social equity applicants in the first five years of the program, but in that time only thirty-five retailers actually opened.[37] Delays in program implementation harm those businesses seeking to operate legally because they must compete with a booming illicit market where sellers can offer lower prices without having to comply with states' regulatory fees or pay taxes.[38] Often, the heavy competition produced by such limited licensing in a new cannabis market's critical first few years invites lawsuits from "excluded" businesses, which further "delay the implementation of social equity programs and increase costs to prospective licensees."[39] These failures give established medical marijuana companies and the wealthiest new recreational firms a competitive advantage while leaving behind the small businesses that social equity programs promise to support, including those that are women- and minority-owned.

B. Barriers to Entry Beyond Licensing: Cannabis Federalism and Access to Capital

Prioritizing equity applicants in licensing, even when done successfully, can only go so far. There is arguably no greater barrier for small businesses—especially those that are women-owned[40]—seeking to break into adult-use cannabis than access to funding.[41]

493fb260a17c53733dbe39d703268349 [https://perma.cc/B445-XAHX] (explaining that a new issuance of licenses in New York was "expected to boost the number of legal dispensaries in a market now dominated by black-market sellers who simply own retail stores without a license"); *Investor for $200 Million New York Cannabis Fund Finally Found*, MARIJUANA BUS. DAILY (July 3, 2023), https://mjbizdaily.com/investor-for-200-million-new-york-cannabis-fund-finally-found/ [https://perma.cc/R2Z8-8X54] ("Meanwhile, as many as 1,400 illegal cannabis sellers, ranging from bodegas to smoke-shops to weed trucks and audacious illegal dispensaries, operate in New York City alone.").

36 Lewis, *supra* note 27.

37 *Id.*

38 *See id.* ("[T]he legal cannabis market is never, in fact, the entire cannabis market. Today, even in the state with the strongest legal industry, Colorado, an estimated 30 percent of weed is still grown and sold illicitly, which means licenses businesses are competing not only with one another, but also with people who don't pay taxes or install wheelchair-accessible entrances—and don't have to pass those extra costs on to consumers.").

39 MINORITY CANNABIS BUS. ASS'N, MBCA NATIONAL CANNABIS EQUITY REPORT 3 (2022).

40 *See* Part I.C, *infra*.

41 *See* CASSACHIA ET AL., *supra* note 9, at 25 ("In this year's diversity survey, cannabis business owners and professionals overwhelmingly said access to capital remains their biggest challenge.").

However, the unusual balance of state and federal authority in the current system of "cannabis federalism" severely constrains states' ability to address the problem.[42] At the federal level, the Controlled Substances Act ("CSA") still classifies marijuana as a Schedule I drug—the same class that contains heroin, LSD, and other substances with "no currently accepted medical use and a high potential for abuse."[43] Nevertheless, state-level cannabis legalization has proceeded under the protection of the constitutional "anticommandeering" doctrine, which shields states from an obligation to enforce federal laws like the CSA,[44] and under the safe harbor of executive guidance beginning in the Obama administration that instructs federal prosecutors to refrain from enforcing the CSA's marijuana provisions when individuals act in compliance with state laws.[45]

Although "many are willing to declare that, at least for practical purposes, the marijuana federalism battle has been won by the states,"[46] legalization has still taken place "under

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42 *See* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RSRV. L. REV. 597, 599 (2015) ("Whether for medical or recreational use, state legalization of marijuana conflicts with the federal ban. This tension has been called 'one of the most important federalism disputes in a generation.'"); *see also* DAVID POZEN, THE CONSTITUTION AND THE WAR ON DRUGS 49 (2023) (describing the "current constitutional equilibrium" as "precarious" and noting that "[t]he more states do to support their marijuana companies and consumers, the more their policies will not just deviate from but will actively subvert the federal prohibition").

43 21 U.S.C. § 812. This classification has been an ongoing subject of debate, and in May 2024, the Biden administration's Department of Justice published a notice of proposed rulemaking (NPRM) to reclassify marijuana under the Controlled Substances Act from Schedule I to Schedule III. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (May 21, 2024). That reclassification is further supported by U.S. Food and Drug Administration findings that marijuana meets three criteria for Schedule III: lower potential for abuse, currently accepted medical use, and a risk of only low or moderate physical dependence on people who use it. *See* Katherine Dillinger, *Marijuana Meets Criteria for Reclassification as a Lower-Risk Drug, FDA Scientific Review Finds*, CNN HEALTH (Jan. 12, 2024), https://www.cnn.com/2024/01/12/health/marijuana-rescheduling-fda-review/index.html [https://perma.cc/4JE3-K7TP].

44 *See* POZEN, *supra* note 42, at 49 (explaining that in two foundational cases, *New York v. United States* and *Printz v. United States*, the Supreme Court established that "Congress may not compel states to adopt particular laws or administer federal laws"; in doing so, it inadvertently "created some breathing room for drug reformers" because "th[e] doctrine seemed to imply that Congress couldn't force [states with legalized marijuana] to recriminalize pot or to devote resources to enforce the federal prohibition").

45 *See* Nicole Huberfield, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 903 (2021) ("During the Obama Administration, the Cole and Ogden Memoranda instructed U.S. Attorneys to refrain from prosecuting individuals in compliance with state laws that legalize and regulate cannabis, creating a sort of safe harbor."); *see also* Lewis, *supra* note 27 (describing the compromise struck between the federal government and states with legalized cannabis, such that "[i]f the states created 'strong and effective regulatory and enforcement systems' and did their best to keep out 'criminal enterprises,' the DEA would lay off").

46 Andersen Hill, *supra* note 42, at 599.

an umbrella of federal illegality."[47] The impact of that precarious dynamic is especially visible in banking, where the federal government has substantial indirect law-enforcement power.[48] Beyond the CSA, the Money Laundering Control Act,[49] the Bank Secrecy Act,[50] the USA PATRIOT Act,[51] and Federal Reserve regulations[52] pose significant threats to banks doing business with cannabis companies.[53] Despite some incremental progress toward facilitating "marijuana banking," federal guidance and enforcement of both criminal and civil laws could change at any time, leaving financial institutions vulnerable to significant consequences for past practices.[54] As a result, cannabis entrepreneurs face considerable challenges from financial institutions' extreme reluctance to provide services to businesses touching any part of the industry.[55]

Given that "[b]anks are the traditional backbone of small business financing" but are unwilling to lend to cannabis businesses, hopeful entrepreneurs are confronted with a pervasive lack of capital.[56] With the option of securing traditional loans off the table,

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47 Huberfield, *supra* note 45, at 903.

48 Andersen Hill, *supra* note 42, at 600–01 ("The banking drought extends beyond businesses that directly handle marijuana . . . When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law.").

49 18 U.S.C. §§ 1956–57.

50 31 U.S.C. §§ 5311–26.

51 Pub. L. No. 107-56, 115 Stat. 272 (2001).

52 *See* Andersen Hill, *supra* note 42, at 625–26 (citing Federal Reserve regulations requiring member banks to meet certain "safety and soundness" requirements by monitoring "[c]ompliance with applicable laws and regulations" and explaining that "[t]he Federal Reserve regularly examines state member banks" for "risk management practices and compliance with the Bank Secrecy Act").

53 *See* Pace, *supra* note 5, at 1236 ("Federal laws impinging on marijuana businesses' ability to access the financial system go far beyond the CSA. The Money Laundering Control Act, the Bank Secrecy Act, and the PATRIOT Act all make it more difficult for marijuana businesses to obtain banking services, as do the federal deposit and share insurance scheme and Federal Reserve regulations.").

54 *See* Andersen Hill, *supra* note 42, at 631.

55 *See id.* at 600–01 ("When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law. Lack of banking services stands as a formidable barrier to growth of the state-legal marijuana industry. Without access to banking services, marijuana businesses must conduct transactions in cash and spend an inordinate amount of time and resources on cash management. . . . [L]ack of banking services equates to a lack of capital for the marijuana industry.").

56 *Id.* at 601.

cannabis business owners are forced to resort to private sources of funding, either through their own wealth and personal networks or through securing private venture capital investments.[57] That in itself presents a massive equity problem and particularly leaves women of color with little hope for securing the funding necessary to start a cannabis business.[58]

Even states that have promised to allocate funding to social equity applicants have so far failed to meaningfully overcome this barrier. For example, a year after New York legalized adult-use cannabis in 2021, it ambitiously pledged a $200 million public-private fund to support social equity licensees in securing real estate and opening up retail locations.[59] But it took an additional year for the state to find a private investor to cover the $150 million portion of the fund not coming from tax revenue[60]—a critical gap for social equity businesses hoping to be the first movers in the state's new adult-use market. Many have also raised concerns that the investment deal the state finally achieved with the private equity firm Chicago Atlantic Group is "lopsided" and "undermines [New York's] commitment to social equity goals while guaranteeing substantial returns to its partner."[61] In its two-and-

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57 *See id.* ("The state-legal marijuana industry must instead 'rely on short-term loans from individuals, usually with higher interest rates.'"); Lewis, *supra* note 27 ("State-licensed businesses rely mostly on private capital"); Harris & Martin, *supra* note 8, at 11 ("'The vast majority of U.S. marijuana companies are privately owned and self-funded by the founders.' Friends and family can chip in to help, 'but only a small percentage of cannabis companies . . . will manage to secure funding from private equity/venture capital firms or angel investors . . .'").

58 *See, e.g.*, Lewis, *supra* note 27 ("State-licensed businesses rely mostly on private capital, something Black people often don't have access to; in the nearly 160 years after the Emancipation Proclamation, Black families have gone from collectively controlling 0.5 percent of the nation's wealth to controlling less than 2 percent."); CASSACHIA ET AL., *supra* note 9, at 25 ("Capital is a common challenge for many young cannabis businesses, no matter the race, ethnicity or gender of the owner. . . . The difference for non-white and female owners is access to funding. Most financial institutions continue to be run by white men, and their business networks often reflect those in positions of leadership. The top 100 venture-capital backers . . . disproportionately gave money to businesses started by white men."); Harris & Martin, *supra* note 8, at 11 ("Lack of access to capital and systemic economic racism dramatically winnow out the wannabes from the weed field.").

59 *See* N.Y. EQUITY PLAN, *supra* note 26, at 30 ("With little to no start-up capital, participating CAURD licensees receive a turn-key cannabis dispensary in an optimum retail location. The licensee pays back the Fund's investment over time. This approach is intended to provide participating CAURD licensees with the best possible opportunity to succeed, overcome the unjust treatment of the past, and create generational wealth.").

60 *See* Rosalind Adams, *How Private Equity Trumped Social Equity in State Cannabis Deal*, CITY (Apr. 24, 2024), https://www.thecity.nyc/2024/04/24/cannabis-fund-social-equity-dispensary/ [https://perma.cc/QA59-7BF4].

61 *Id.*

a-half years of operation, the fund has financed only twenty-one of the 150 social equity dispensaries it initially set out to, while its managers have earned $1.7 million.[62]

C. Women's Ownership and Leadership in the Cannabis Industry: Trends and Intersecting Challenges

These institutional design flaws of social equity programs and across-the-board external challenges to entrepreneurship in the industry have affected all kinds of "disadvantaged" cannabis businesses.[63] It is clear that women-owned businesses are included in that category at least to some degree, as rates of majority ownership and executive leadership by women in cannabis lag significantly behind such rates in comparable business sectors in the United States.[64] In 2022, women made up 23% of executives in the cannabis industry, below the national average of 29%.[65] And the average rate of majority ownership by women in cannabis businesses is similar at 22%, though it varies widely from state to state, dropping as low as 11% in Massachusetts.[66] Importantly, and of concern for any policy initiatives targeted at long-term equity, these numbers do not appear to be growing over time. Instead, they have "remained stagnant or declined in the past five years."[67]

It is true that small businesses in the United States in general have a gender equity problem.[68] But the national outlook outside of the cannabis sector appears to be trending

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62 *See* Rosalind Adams, *New York's Cannabis Fund Became a Disaster. Its Managers Earned $1.7 Million Nonetheless.*, CITY (Oct. 24, 2024), https://www.thecity.nyc/2024/10/24/new-york-cannabis-fund-managers-payout-chris-webber-bill-thompson/ [https://perma.cc/U58W-YRBP].

63 *See generally* CASSACHIA ET AL., *supra* note 9 (describing ineffective state social equity programs designed for minority cannabis entrepreneurs and other impediments that entrepreneurs in the cannabis industry face, including difficulty finding real estate, bureaucratic red tape, competition with established cannabis companies, and limited access to capital).

64 *Id.* at 5.

65 *Id.*

66 *Id.*

67 *Id.* at 4.

68 *See, e.g.*, MAJORITY STAFF OF S. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, 118TH CONG., WOMEN'S SMALL BUSINESS OWNERSHIP AND ENTREPRENEURSHIP REPORT 3 (2023), https://www.sbc.senate.gov/public/_cache/files/b/9/b99ffab8-b62a-48e1-95ba-b14c5451880b/D779F6653743546214AD6E09EAED29F7.women-entrepreneurship-report.pdf [https://perma.cc/U5QH-PUUS] ("Women, particularly those from minority communities continue to face persistent barriers to entrepreneurial success . . . . ") [hereinafter SMALL BUSINESS REPORT]; *see also* Andrew W. Hait, *Number of Women-Owned Employer Firms Increased 0.6% from 2017 to*

much sharper upwards. The Senate Committee on Small Business and Entrepreneurship reported that 2023 was the third year in a row that women have created about half of all new businesses—a marked increase from the sub-30% before the pandemic.[69] The number of Black-women-owned businesses increased by an impressive 18% in the three years from 2017 to 2020.[70] Further illuminating progress, the growth rate of businesses majority owned, operated, and controlled by one or more women between 2014 and 2019 increased the most in the utilities, construction, and information industries—all historically male-dominated.[71] Women in other sectors also fare nearly 20% better than women in the cannabis industry with regard to executive leadership representation, having grown steadily in recent years to occupying around 31% of executive positions.[72]

The nascency of the entire adult-use cannabis industry would naturally lead to the opposite prediction: that women would be much more well represented in cannabis than in industries that have many decades—if not centuries—of male domination to overcome. But some of the entrepreneurship challenges unique to the cannabis industry may be especially hard-hitting for women. For instance, the need to rely on private and venture capital poses a formidable obstacle to women entrepreneurs.[73] The world of venture capital today is definitively a man's game on all sides: women-founded companies receive less than *3%* of all venture capital investments, and women make up less than 15% of check-writers within venture capital firms.[74] This problem is amplified for women of color. Of that already small

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2018, U.S. CENSUS BUREAU (Mar. 29, 2021), https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html [https://perma.cc/7GUX-2B5D] (finding that "[a]verage annual earnings of employees of women-owned firms lag behind the national earnings average of the workers of all firms" and "[t]he lack of sex parity was also visible in average annual sales, shipments or revenue").

69 SMALL BUSINESS REPORT, *supra* note 68, at 3.

70 *Id.*

71 Dana Kanze et al., *Evidence That Investors Penalize Female Founders for Lack of Industry Fit*, 6 SCI. ADVANCES 1, 1 (2020).

72 Chris Gilligan, *States With the Highest Percentage of Female Top Executives*, U.S. NEWS & WORLD REP. (Mar. 6, 2023), https://www.usnews.com/news/best-states/articles/2023-03-06/states-with-the-highest-percentage-of-women-in-business-leadership-roles [https://perma.cc/FF95-7PJZ].

73 *See generally* Isabelle Solal & Kaisa Snellman, *For Female Founders, Fundraising Only From Female VCs Comes at a Cost,* HARV. BUS. REV. (Feb. 1, 2023), https://hbr.org/2023/02/for-female-founders-only-fundraising-from-female-vcs-comes-at-a-cost [https://perma.cc/RF9K-H92E].

74 *Id.*

number of female venture capital partners, only about one-third of them are non-white[75] and businesses owned by Black women in 2022 received less than *1%* of venture capital investments.[76] When one Atlanta-based venture capital firm tried to remedy this disparity by implementing a program that specifically invests in and awards grants to businesses run by Black women, it was struck down in the Eleventh Circuit for violating a Reconstruction-era law meant to protect against racial bias in private contracting.[77] And federal efforts to help small women-owned businesses access capital, like the Small Business Association's business development and loan programs,[78] are unavailable to women in the cannabis industry because of federal prohibition.[79]

Women also experience a more significant degree of stigma associated with their involvement in recreational cannabis than men do,[80] likely dampening their willingness to start or join cannabis business ventures. Although cultural perceptions of recreational cannabis use have undoubtedly come a long way in the decade since Colorado became the first state to legalize it in 2012, "sweeping claims of normalization are oversimplified because social and cultural tolerance towards cannabis varies on a number of factors"[81] and those claims "may be symptomatic of unchecked social privileges or social distance from cannabis users."[82] Cannabis use is widely conceptualized as a masculine activity and "[f]emale marijuana users are often stigmatized as their use is seen as a threat to the social and moral status quo."[83] One recent survey found that more than one in four American women use cannabis at least once a month, but the majority of those women keep their

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75 SMALL BUSINESS REPORT, *supra* note 68, at 7.

76 *See* Nate Raymond, *US Appeals Court Blocks Venture Capital Fund's Grant Program for Black Women*, REUTERS (Oct. 2, 2023), https://www.reuters.com/legal/us-appeals-court-blocks-venture-capital-funds-grant-program-black-women-2023-09-30/ [https://perma.cc/6RWS-DKFB].

77 *See id.*; Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023).

78 *See, e.g.,* SMALL BUSINESS REPORT, *supra* note 68.

79 *See* discussion *infra* Part I.B.

80 *See* Matt Reid, *A Qualitative Review of Cannabis Stigmas at the Twilight of Prohibition*, 2 J. CANNABIS RSCH. 1, 7 (2020).

81 *Id.* at 3.

82 *Id.* at 10.

83 Amir Mostaghim, *Why Everybody Can't Get Stoned: The Role of Gender and Ethnicity in Mediating the Differentiated Normalisation of Marijuana Use* 38 (2019) (Ph.D. dissertation, University of Guelph).

cannabis use a secret from people in their lives.[84] For women of color, intersecting stigmas between race and gender persist.[85] Women with children experience the added fear of being labeled negligent mothers if they use cannabis.[86] So, legalization may gradually promote normalization, but privileged groups like white men have disproportionately benefited from that normalization, while women and racial minorities continue to face double standards and social backlash for their participation—even when it is lawful.

Social perceptions of cannabis as a "man's industry" and funding challenges for women entrepreneurs overlap. One recent study found that "[f]emale-led ventures catering to male-dominated industries receive significantly less funding at significantly lower valuations than female-led ventures catering to female-dominated industries" while the opposite is not true for male-led ventures, in what the authors call a "lack of fit" effect that works against female founders.[87] Moreover, and particularly problematic for women cannabis entrepreneurs, it is venture funding allocations that "are particularly vulnerable to this gender bias that underlies the lack of fit phenomenon."[88] Again, because of the unavailability of bank loans in the industry,[89] venture funding is often a cannabis entrepreneur's best hope of success.

In addition to industry-specific challenges that may be especially adverse to women, like raising private funds and overcoming social stigma, the cannabis gender disparity is presumably also due in some part to obstacles that have impeded women's equitable participation in business and entrepreneurship for decades. Childcare challenges, for example, remain pervasive.[90] Childcare is unaffordable, defined by the Department of

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84 Javier Hasse, *37% of American Women Consume Cannabis, But Most Keep It a Secret from Parents, Children and Coworkers, Study Says*, FORBES (Mar. 8, 2023), https://www.forbes.com/sites/javierhasse/2023/03/08/37-of-american-women-consume-cannabis-but-most-keep-it-a-secret-from-parents-children-and-coworkers-study-says/?sh=8746df32814a [https://perma.cc/P87W-A2LV].

85 *See* Reid, *supra*, note 80, at 6–7 (offering the related point that "recurring moral panics related to drugs are often accompanied by ideologically constructing minority groups as responsible for drug-related social problems . . . [which] is why sociologist Crag Reinarman calls drugs 'richly functional scapegoats' for social fears rooted in racism, xenophobia, classism, ageism, and more").

86 *See id.*

87 Kanze et al., *supra* note 71, at 1.

88 *Id.*

89 *See generally* Andersen Hill, *supra* note 42.

90 *See generally* ALLIE SCHNEIDER & HAILEY GIBBS, CTR. FOR AM. PROGRESS, DATA DASHBOARD: AN OVERVIEW OF CHILD CARE AND EARLY LEARNING IN THE UNITED STATES (2023), https://www.americanprogress.org/article/

Health and Human Services as exceeding 7% of family income, in thirty-six states and Washington, D.C.[91] In households headed by a divorced parent or parents of color, childcare costs on average more than one-quarter of household income and can be as high as 60%.[92] Recent survey and Census Bureau data show that women continue to "bear the brunt of child care responsibilities."[93] Women who cannot afford childcare are unable to participate fully in the workforce,[94] much less start their own businesses—of any kind. Moreover, research has demonstrated that women are more risk-averse than men concerning financial decision making, and "[t]his perception echoes strongly in entrepreneurship, which has historically been considered the domain of bold, aggressive, risk-taking men."[95] In a circular fashion, these stereotypes impact women's perceptions of their own entrepreneurial abilities, and in turn lower their involvement in entrepreneurial activities.[96]

II. Gender's Place in the Cannabis Equity Conversation

The gender gap in cannabis business ownership and control should concern policymakers and the public as a fundamental issue of fairness and discrimination. But

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data-dashboard-an-overview-of-child-care-and-early-learning-in-the-united-states/ [https://perma.cc/6KRG-SHET].

91 *See* SMALL BUSINESS REPORT, *supra* note 68, at 8.

92 *Id.* at 7.

93 Julia Haines, *Gender Reveals: Data Shows Disparities in Child Care Roles*, U.S. NEWS & WORLD REP. (May 11, 2023), https://www.usnews.com/news/health-news/articles/2023-05-11/gender-reveals-data-shows-disparities-in-child-care-roles [https://perma.cc/X38Z-P5MZ].

94 *See* LEILA SCHOCHET, CTR. FOR AM. PROGRESS, THE CHILDCARE CRISIS IS KEEPING WOMEN OUT OF THE WORKFORCE (Mar. 28, 2019), https://www.americanprogress.org/article/child-care-crisis-keeping-women-workforce [https://perma.cc/9RXC-CQ57] ("Child care challenges have become a barrier to work, especially for mothers, who disproportionately take on unpaid caregiving responsibilities when their family cannot afford child care.").

95 Patrick Reichert et al., *Gender and Entrepreneurial Propensity: Risk-Taking and Prosocial Preferences in Labour Market Entry Decisions*, 17 SOC. ENTER. J. 111, 112 (2021); *see also* Maria Bastida et al., *Female Entrepreneurship: Can Cooperatives Contribute to Overcoming the Gender Gap? A Spanish First Step to Equality*, 12 SUSTAINABILITY 1, 3 (2020) ("The entrepreneurship literature has suggested that women have a greater fear of failure than men, so they behave more conservatively when they undertake a business venture.").

96 *See* Nan Langowitz & Maria Minniti, *The Entrepreneurial Propensity of Women*, 31 ENTREPRENEURSHIP THEORY & PRAC. 341, 341 (2007) (concluding that "women tend to perceive themselves and the entrepreneurial environment in a less favorable light than men across all countries in [the] sample and regardless of entrepreneurial motivation" and "perceptual variables may be significant universal factors influencing entrepreneurial behavior").

that gap is also a troubling manifestation of the exploitative and exclusionary historical relationship between women and the "vice" industries that came before cannabis, as well as the broader societal and legal refusal to acknowledge women's pursuit of pleasurable activities including responsible substance use. Part II argues that the cannabis industry presents the ideal opportunity to change course. It suggests that cannabis could be the first truly feminist vice industry because of its nascency, the existing attention to equity in the field, the nature of the substance, and the present cultural attitudes towards cannabis.

A. An Opportunity for Women's Economic and Cultural Empowerment

From a basic economic perspective, supporting women-owned cannabis businesses is a worthwhile pursuit in and of itself. Research suggests that women generally fare better in women-owned businesses with respect to hiring, retention, and promotion[97]—and businesses themselves do better too. One review of investment and revenue data found that startups founded and cofounded by women perform better over time, despite garnering less funding in investments.[98] In the cannabis industry specifically, women's representation at the highest level is associated with higher retail sales.[99] This means that executive-level gender diversity in cannabis could generate greater tax revenue for those states that invest that revenue into communities disproportionately harmed by the War on Drugs. It is also well-documented that women make up a significant majority of both consumer purchasing and healthcare decisions nationwide,[100] and that women's consumption of cannabis is on the rise,[101] so obtaining women's business is central to the developing industry. Naturally, women business owners and executives know how to market to other women, and women

97 *See* Pat Roberson-Saunders et al., *Do Women Fare Better in Female-Owned Businesses?*, 19 J. DEV. ENTREPRENEURSHIP 1, 1 (2014) ("[A]t each step in the [human resource management] process, female business owners in this study fulfill expectations by hiring, promoting and retaining significantly more women than male business owner counterparts.").

98 *See* Katie Abouzahr et al., *Why Women-Owned Startups Are a Better Bet*, BOS. CONSULTING GRP. (June 6, 2018), https://www.bcg.com/publications/2018/why-women-owned-startups-are-better-bet [https://perma.cc/99R7-LMXV] (reporting that startups founded and cofounded by women generated 10% more in cumulative revenue over a five-year period).

99 *See* Casey Camors et al., *The Cannabis Industry Within the USA: The Influence of Gender on Cannabis Policy and Sales*, 11 SUSTAINABILITY ACCT. MGMT. & POL'Y J. 1095, 1095 (2020).

100 *See id.* ("[W]omen make up about 85 per cent of all consumer purchasing decisions and 85 per cent of healthcare decisions.").

101 *See Exploring Cannabis Consumer Trends & Demographics in 2021*, HEADSET (Jan. 31, 2022), https://www.headset.io/industry-reports/exploring-cannabis-consumer-trends-demographics-in-2021 [https://perma.cc/R9QA-3CLJ] ("[S]ales to Female customers [are] rising slightly faster than sales to Male customers. When

are nearly twice as likely to consciously shop from women-owned businesses than are men.[102] On a macro-scale, female labor market participation in the United States lags behind levels seen in other developed countries, and catching up could give the American economy an estimated $1 trillion boost over the next decade.[103] Most fundamentally, women's economic empowerment is central to women's rights and gender equality, and the rapidly growing cannabis industry is fertile ground for that empowerment.

From a social and cultural perspective, the elevation of women in the adult-use cannabis industry presents an opportunity to erode the harmful stereotypes and stigma surrounding women's cannabis consumption—and even substance use more broadly. As explained further below, the entire realm of "intoxicating leisure," including cannabis consumption and the exercise of agency and control within vice industries, has historically excluded women.[104] Elevating outspoken and public-facing women in cannabis could therefore make a powerful social statement. Further, because social perceptions impact women's own affinity for risk-taking in particular industries, as well as funders' "industry fit" biases,[105] chipping away at the gender stereotypes surrounding cannabis use can in itself support the economic goal of uplifting female founders—if the cannabis industry is no longer seen as male-dominated, the "fit" of women entrepreneurs to receive the funding necessary to break into the industry will be less likely subject to negative bias.[106]

B. Women and the War on Drugs

The intentional prioritization of women of color in the cannabis industry finds support in principles of restorative justice.[107] The War on Drugs has undeniably operated as a

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comparing Q1 2020 to Q4 2021, sales to Female customers increased by 55% while sales to Male customers increased by 49%.") [hereinafter *Cannabis Trends*].

102 *See* Danielle Commisso, *How Brand Values and Women-Owned Businesses Influence Women's Consumer Choices*, CIVIC SCI. (Mar. 23, 2023), https://civicscience.com/how-brand-values-and-women-owned-businesses-influence-womens-consumer-choices/ [https://perma.cc/G3SZ-7P4Q].

103 *See* SMALL BUSINESS REPORT, *supra* note 68, at 4.

104 *See infra* Part II.C.

105 *See* Kanze et al., *supra* note 71.

106 *See id.*

107 *See generally* Jasmin Mize, *Reefer Reparations*, 3 SOC. JUST. & EQUITY L.J. 1, 1 (2020); *see also* Magaly Ordoñez, *Are Cannabis Social Equity Programs Truly Equitable?*, UNIV. OF MINN.: THE GENDER POL'Y REP. (Feb. 13, 2024), https://genderpolicyreport.umn.edu/are-cannabis-social-equity-programs-truly-equitable/

project in racial subordination,[108] but its codification as a war on *men* minimizes the harm and suffering it has pervasively, but more often indirectly,[109] inflicted on women of color: "the roll call of female causalities of the war on drugs is both hidden and long."[110]

Black and Latina women, in particular, experience highly gendered and sexualized policing in large part due to drug policies.[111] Black women are more likely than any other group to be subject to searches of their bodies and personal effects by Customs and Border Protection agents—nine times more likely than white women to be X-rayed after being patted down, and two-to-three times more likely to be strip-searched—despite being half as likely to be found with illicit substances.[112] Those statistics are just the tip of the iceberg. Invasive police searches ostensibly conducted to locate weapons or drugs are frequently "part of a pattern of sexual harassment and intimidation" of female suspects, and police violence often takes gendered forms like extortion for sexual favors under the threat of a drug arrest.[113] In many ways, the drug war has "serve[d] as the backdrop against which broken windows policing and the policing of prostitution, poverty, and motherhood are superimposed."[114]

Beyond the mass incarceration of African American men, the drug war has also enabled the state to tear apart Black families by targeting Black mothers and pregnant women using

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[https://perma.cc/NBP9-DHU4] ("Cannabis social equity provisions can be seen as a form of racial reparations, by transferring wealth to those most ravaged by racial capitalism and over-policing.").

108 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Graham Boyd, *The Drug War Is the New Jim Crow*, ACLU (July 31, 2001), https://www.aclu.org/documents/drug-war-new-jim-crow [https://perma.cc/5KTP-U8HE].

109 The indirect consequences of the drug war on women should not obscure the direct harms of increased incarceration that fell on women as well as men: between 1986 and 1996, women experienced an 888% increase in incarceration for drug-related offenses. *See* Garrett Halydier, *We(ed) Hold These Truths to Be Self-Evident: All Things Cannabis Are Inequitable*, 19 U. MASS. L. REV. 39, 71 (2024).

110 Andrea Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color*, LONGREADS (Aug. 3, 2017), https://longreads.com/2017/08/03/the-war-on-drugs-is-a-war-on-women-of-color/ [https://perma.cc/BL6C-D9Q9].

111 *See id.*

112 *See id.*

113 *Id.*

114 *Id.*

the child welfare system.[115] Black mothers have regularly lost custody of their children because they are disproportionately targeted for drug screening while pregnant and they face a higher likelihood of being reported to the child welfare system after delivery, even though "women of all races use substances during pregnancy at similar rates."[116] Similarly, at one point, 70% of all pregnant women prosecuted for the crime of "fetal abuse," largely under the pretense of drug use, were Black.[117] Before the 1980s, those kinds of prosecutions of women for drug use during pregnancy did not exist.[118] In essence, "[d]rug use was just one mechanism of punishing [Black women] for their pregnancies" as the "the War on Drugs turned a public health issue of drug use during pregnancy into a crime."[119]

Women have also been systematically denied the support of public assistance programs, including housing, employment, and education, because of policies associated with the War on Drugs.[120] Many housing authorities, landlords, and managers participating in subsidized housing programs implemented policies to evict tenants or terminate housing benefits based solely on unsupported allegations regarding drug use on the premises,[121] and because women of color disproportionately depend on the government for public housing programs, they are particularly impacted by those policies and practices.[122] Housing policies that broadly excluded *any* family members with criminal records, as opposed to examining individual tenants' records, similarly resulted in evictions and housing denials for the people who most needed those programs, including women with children.[123] Cannabis social equity

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115 *See generally* Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 SOC. POL. 258 (2020).

116 *Id.* at 263.

117 Bernida Reagan, *The War on Drugs: A War Against Women*, 6 BERKELEY WOMEN'S L.J. 203, 206 (1991).

118 *See* Dorothy E. Roberts & Colette Ngana, *Killing the Black Body: The Urgency of Reproductive Justice,* 10 INT'L J. ETHICAL LEADERSHIP 95, 98 (2022) ("[S]tarting from the late 1980s, early 1990s, that was when I began to notice the prosecutions of women for being pregnant and using drugs . . . They weren't being punished for drug use. They were being punished for being pregnant and using drugs.").

119 *Id.* at 98.

120 Lenora M. Lapidus, *The War on Drugs = A War on Women and Families*, ACLU (June 8, 2011), https://www.aclu.org/news/smart-justice/war-drugs-war-women-and-families [https://perma.cc/2HQP-9FA9].

121 *See* Reagan, *supra* note 117, at 207–08.

122 *See* Lapidus, *supra* note 120.

123 *See id.*

programs built around prioritizing candidates with marijuana-related convictions therefore may not capture the full story of drug war-related harms that have fallen on women.

C. Patriarchy, Historical Control of Vice, and the Disregard of Women's Pleasure

Patriarchal control and the exploitation of women have historically been central to the success of other "vice" industries. While an exploration of the complex relationship between patriarchy and the sex work or pornography industries is beyond the scope of this Note, the historically male control of commercial industries like gambling, tobacco, and alcohol offers relevant background for the cannabis industry. Because women have long been on the periphery of, or exploited by, the sale of such commercial vices, it is crucial that they are given the opportunity to participate as business owners and operators with agency in the recreational cannabis market, which, as a nascent industry, is uniquely unburdened by those histories.

First, the gambling industry is undoubtedly "checkered with notions of male dominance and control in almost every aspect of its foundation, development, and operation."[124] Women in Las Vegas casinos have long been placed in highly sexualized roles designed to attract male clientele, often with the implication of access to those women.[125] Courts have rejected discrimination challenges to casino dress code policies that require their female employees to wear short skirts and dresses, high heels, and specific hair and makeup styles, finding that those policies "further legitimate business interests and do not impose unequal burdens on men and women."[126] Appearance-based hiring practices in casinos create a hierarchy among women employees according to race, gender identity, and age.[127] And these establishments exploit women's labor by using "model" contracts rather traditional employee agreements, so they can be more selective and "dictate virtually every aspect of how the female employees look and dress."[128] Though women in the industry have made

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124 Abigail K. Stanley, *The Feminizing of the Nevada Gaming Industry – Conditions and Consequences*, 11 UNLV GAMING L.J. 207, 230 (2020).

125 *See id.* at 218.

126 *Id.* at 214–15.

127 *See id.* at 216.

128 *Id.*

significant progress towards reform in recent years through developments like the #MeToo movement,[129] the gambling industry remains far from an equitable or a feminist one.[130]

On the other side of the same coin, the tobacco industry has a long history of using predatory marketing tactics to attract women customers at the expense of their health.[131] In the early twentieth century, tobacco companies contributed to and capitalized on the evolving perception of women's tobacco use from heavily stigmatized and associated with prostitution[132] to sociable and stylish. Lucky Strike's notorious 1925 campaign, "Reach for Lucky instead of a sweet," capitalized on the era's obsession with women's slimness as a symbol of fashion.[133] In 1929, Great American Tobacco hired women to smoke cigarettes as they marched in protest against women's inequality.[134] In the 1960s, Phillip Morris launched a woman-specific cigarette brand, Virginia Slims, co-opting the women's liberation movement with the slogan "you've come a long way, baby" to promote it.[135] Even today, the tobacco and vaping industries continue these long-standing exploitative tactics, leveraging social media to market smoking products as symbols of style and empowerment

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129 *See id.* at 226–28 (describing industry changes after #MeToo such as managers "cracking down on sexual harassment" and "[f]emale employees and activists . . . continu[ing] to actively seek protection in a variety of ways, including seeking the creation of and membership in unions").

130 *See, e.g.*, *id.* at 208 (describing challenges to women in the gaming industry like "rampant discrimination, exploitation, sexual abuse and harassment, hostile working environments, and low job security" as ongoing); *see also* Toni Repetti & Shekinah L. Hoffman, *Glass Ceilings & Leaky Pipelines: Gender Disparity in the Casino Industry*, 22 UNLV GAMING RSCH. & REV. J. 38, 39 ("Despite a growing industry and a strong female customer base, this representation is not reflected in gaming leadership.").

131 *See, e.g.*, Amanda Amos & Margaretha Haglund, *From Social Taboo to "Torch of Freedom": The Marketing of Cigarettes to Women*, 9 TOBACCO CONTROL 3, 3 (2000) (explaining the way that "the tobacco industry capitali[z]ed on changing social attitudes towards women by promoting smoking as a symbol of emancipation, a 'torch of freedom'").

132 *See id.* ("[I]n the 19th century women smokers were viewed as fallen women, with smoking the occupational symbol of prostitution . . . So widespread was the social stigma attached to women smoking that as late as 1908 a woman in New York was arrested for smoking a cigarette in public, and in 1921 a bill was proposed in the US Congress to ban women from smoking in the District of Columbia.").

133 *Id.* at 4.

134 *See id.*

135 CAMPAIGN FOR TOBACCO-FREE KIDS, A LIFETIME OF DAMAGE: HOW BIG TOBACCO'S PREDATORY MARKETING HARMS THE HEALTH OF WOMEN AND GIRLS (2021), https://assets.tobaccofreekids.org/press_office/2021/womens-report.pdf [https://perma.cc/BKK4-5TPX].

through female influencers.[136] In contrast to both gambling and tobacco, the emerging legal recreational cannabis market presents a unique opportunity for women to take control of their role in the industry, rather than be exploited by industry forces.

The history of women's relationship with the alcohol industry—and critically, its regulation—offers a different perspective, highlighting women's resilience in the face of challenging circumstances. In the late nineteenth and early twentieth centuries, the Women's Temperance Movement aimed to improve the lives of women enduring hardship from drunk, violent husbands and fathers by advocating for Prohibition.[137] To achieve their goals, the women of the Temperance Movement successfully linked the legal regulation of alcohol to the movement for women's liberation.[138] They ultimately used political advocacy for Prohibition as a tool for empowerment, as "[t]he Prohibition Amendment reduced the power of men in relation to women in the home by abolishing spaces of toxic masculinity like the saloon and by reducing the political power of the corporate liquor industry."[139] The temperance movement is therefore recognized by some scholars "not [as] a call for repression but rather a demand for liberation."[140] Conversely, women outside of the Temperance Movement during Prohibition found another kind of liberation in their newfound abilities to *participate* in drinking culture—many even becoming successful entrepreneurs by running their own speakeasies.[141] And notably, over a decade later, women played a key role in the repeal of Prohibition, after it had served as a "relatively successful

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136 *See* Gabriela F. Gil et al., *How Tobacco Advertising Woos Women*, THINK GLOB. HEALTH (May 30, 2021), https://www.thinkglobalhealth.org/article/how-tobacco-advertising-woos-women [https://perma.cc/GM23-NHAC].

137 *See* Tara Isabella Burton, *The Feminist History of Prohibition*, JSTOR DAILY (Jan. 6, 2016), https://daily.jstor.org/feminist-history-prohibition/ [https://perma.cc/SA5T-XWCD] (describing the goals of the temperance movement as including "improving the lives of women whose drunken husbands were driven to abuse"); *see also* JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 126 (2024) ("[T]he injuries that women sustained because of men's excessive drinking habits . . . included harassment and violence on the streets, as well as domestic violence at the hands of drunken husbands.").

138 *See* SUK, *supra* note 137, at 138.

139 *Id.* at 124.

140 Burton, *supra* note 137.

141 *See* Jennifer González, *Broads and Bootlegging: A Brief History of Women During the Prohibition Era*, LIBR. OF CONG.: IN CUSTODIA LEGIS (Sept. 18, 2024), https://blogs.loc.gov/law/2024/09/broads-and-bootlegging-a-brief-history-of-women-during-the-prohibition-era/ [https://perma.cc/8L9Q-LZWQ].

resetting tool" from the perspective of women's societal status.[142] Against a very different backdrop, women in cannabis can similarly harness the influence and power of a popular vice to shape the future of cannabis culture and policy.

More broadly, women who use illicit substances have always been regarded as a threat to the social order.[143] Even considering *licit* substance use, like alcohol (beyond the health risks of drinking during pregnancy), some media representations suggest that "'good' mothers would never be tempted by alcohol."[144] On the other hand, recent popular culture trends like the "wine mom" persona have served as tools for some women and mothers to assert agency and a sense of liberated motherhood with regard to drinking.[145] However, these trends have also been commodified by businesses selling products that "announce a mother's membership in a group that aligns with white, middle class values,"[146] and the lack of diversity in representation in these movements may reinforce social understandings of *which* mothers can and cannot consume alcohol responsibly.[147]

Moreover, American courts have rarely been receptive to arguments centered on pleasure for anyone.[148] Yet their treatment (or lack thereof) of women's pleasure and their tendency to medicalize everything pertaining to women's bodies stands out. For example, in its path to decriminalizing abortion and extramarital contraception, the Supreme Court focused on the potential medical harms of pregnancy without any mention of the individual

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142 SUK, *supra* note 137, at 149. For the Woman's Christian Temperance Union, "one goal of Prohibition was to reduce the excessive power of the liquor industry, because it induced toxic male behavior that imposed hardships or disempowered women. The movement for Prohibition—if not the actual legal regime of Prohibition—achieved that." *Id.*

143 *See, e.g.*, Fiona S. Martin, *Engaging with Motherhood and Parenthood: A Commentary on the Social Science Drugs Literature*, 68 INT'L J. DRUG POL'Y 147, 147 (2019) ("Being a mother comes with normative expectations that are widely considered incompatible with illicit drug use . . . .").

144 Kelly D. Harding et al., *#sendwine: An Analysis of Motherhood, Alcohol Use and #winemom Culture on Instagram*, 15 SUBSTANCE ABUSE: RSCH. & TREATMENT 1, 1–2 (2021).

145 *See id.* at 2 ("Alcohol consumption may also be used to establish and communicate the ability to maintain agency while fulfilling the performance of the mother role.").

146 *Id.*

147 *See id.* at 4 ("Analysis of the images presented on Instagram revealed that who can be a 'wine mom' is tied to race, class, gender and sexuality.").

148 *See* Susan Reid, *Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure*, 37 VT. L. REV. 47, 47 (2012) ("Despite the American emphasis on 'Life, Liberty, and the Pursuit of Happiness,' you will rarely see a court acknowledge that seeking pleasure can be an important part of pursuing happiness.").

interest in having sex without conceiving and carrying a fetus to term.[149] Even more striking, courts considering the criminalization of "obscene devices"—namely, sex toys—as late as 1999 and 2000 "focused solely on the individual's interest in using the devices for some kind of medically legitimate treatment, despite ample evidence that the specific devices at issue were intended for recreational use."[150]

Cannabis use, of course, is distinct from extramarital sexual behavior, but it, too, was initially legalized with a medical justification.[151] Now, the existence of legal, recreational cannabis presents a symbolic opportunity for women to establish leadership in an industry that, for some, represents the pursuit of relaxation and the enjoyment of a recreational substance for no medical purpose at all. A more diverse representation of women in the industry—as opposed to the overwhelmingly white, middle-class #winemom[152]—can ensure that these symbolic social gains do not merely benefit the women who already enjoy the privilege of "acceptable" substance use.

D. Adult-Use Cannabis as the First Feminist Vice Industry

Apart from social and political gains women made through their activism around Prohibition, the history of American vice industries—and of pleasure-seeking activity more broadly—demonstrates that women have not had the luxury to control the forms of intoxicating leisure that men have long blissfully enjoyed. Women of color have been even further excluded.[153] Rather than being empowered participants, women have consistently been exploited by, or excluded from, that entire realm.

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149 *See id.* at 63 (noting that these key decisions (*Eisenstadt, Roe*, and *Carey*) "deal directly with non-procreative sexual behavior").

150 *Id.* at 87 (citing *State v. Hughes*, 792 P.2d 1023, 1027 (Kan. 1990); *State v. Brenan*, 772 So.2d 64, 67 (La. 2000)) (explaining that "the courts also relied on the fact that vibrators were originally developed for medical purposes and on the existence of FDA regulations concerning 'powered vaginal muscle stimulators' and 'genital vibrators' for the treatment of sexual dysfunction").

151 *See About Cannabis Policy*, ALCOHOL POL'Y INFO. SYS., https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy [https://perma.cc/PDC6-Q5N2] ("In 1978, New Mexico was the first State to recognize [cannabis'] legitimate medical use. In 1996, California became the first State to legalize the use of medical marijuana.").

152 *See* Harding et al., *supra* note 144, at 4 ("[A]lmost all of the women in the #winemom posts were white, young and cisgendered.").

153 *See supra* Part II C.

On a more philosophical level, and somewhat counterintuitively, it seems anti-feminist that only men have been able to control the commercialization of "bad things" (or good, depending on one's standpoint). Adult-use cannabis has the potential to be the first vice industry to counteract that inequity from its inception. The industry, still in its infancy, is nearly a blank slate in terms of gender balance, unlike more established male-dominated industries that have developed gender imbalances over time—for example, due to physical job demands in fields like construction or manufacturing,[154] or because of gender gaps in educational attainment in STEM fields.[155] Now is the opportune time to push the cannabis industry to fulfill its potential to support women. As discussed in Part I, there is already widespread attention to equity in the field; women's ownership and leadership in other business sectors are making substantial gains, and cannabis is among the fastest-growing industries in the United States, with women themselves growing as a consumer base.[156]

Cannabis, unlike popular vices before it, may also be an especially suitable intoxicating product to level the gender playing field from a social standpoint. While the prohibition of a substance could be protective of women to the extent that it causes violence (as with alcohol), decades of evidence indicate that cannabis is a comparatively pacifying—or at the very least, non-threatening—force.[157] As early as the 1960s and early 1970s, a series of research studies conducted by expert committees in the United States and abroad found that cannabis is objectively more benign than alcohol;[158] even President Nixon's National Commission on Marihuana and Drug Abuse concluded that "neither the marihuana user

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154 *See* ROSE KHATTAR, CTR. FOR AM. PROGRESS, EXPANDING WOMEN'S ACCESS TO MALE-DOMINATED JOBS (2024), https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/expanding-womens-access-to-male-dominated-jobs/ [https://perma.cc/JGU6-MRCZ] ("Men are overrepresented in infrastructure-related jobs, such as those in the manufacturing and construction industries.").

155 *See id.* ("Women constitute just 22 percent of engineering graduates, slightly higher than rates seen in the 1990s, suggesting that there has been slow progress over the past few decades to close gender gaps in STEM educational attainment.").

156 *See Cannabis Trends*, *supra* note 101 ("[O]ver the previous two years, sales to both Female and Male customers have grown, with sales to Female customers rising slightly faster than sales to Male customers.").

157 *See, e.g.*, POZEN, *supra* note 42, at 51–52 (describing studies from the 1960s that largely "agreed that marijuana does not produce physical dependency, does not lead to lethal overdose, and poses little threat to most adults," which "debunked the rationales for marijuana prohibition that the government had touted for decades" like claiming that the drug "induces violent conduct directly").

158 *Id.* Of course, heavy cannabis use is not entirely risk free: "Although moderate cannabis use is usually unproblematic, daily and near-daily use can pose multiple health risks." Kilmer et al., *supra* note 14, at 1008.

nor the drug itself can be said to constitute a danger to public safety."[159] In the wake of these findings, the government's rationale for prohibiting the drug pointed in the opposite direction of a fear of violence: "[T]he Nixon administration described marijuana as the source of stupefying lethargy and passivity, an 'amotivational syndrome' that threatened capitalist production."[160]

Indeed, the intoxicating effects of cannabis may be ideally situated to erode harmful gender norms surrounding substance use precisely because of those "stupefying" tendencies. Traditional masculinity tends to celebrate substance use and the aggression, bravado, or competitiveness that often accompanies it.[161] However, male cannabis users—like all cannabis users—assume *less* aggressive mannerisms in social interactions after consuming the substance, thereby subverting those gender expectations.[162] Cannabis use may therefore "represent an alternative and gentler way of 'doing masculinity.'"[163] In one study in Canada, adolescent boys described cannabis as a "happy drug" that facilitated their emotional openness and ability to talk honestly—a characterization that sharply contrasts with the well-known intoxicating effects of alcohol, which the same boys reported resulted in aggressive behavior and fights.[164] Conversely, female cannabis users can "resist dominant feminine ideals . . . by engaging in cannabis-use activities traditionally identified as more masculine."[165] This cannabis-specific disruption of traditional gender associations with substance use benefits men and women alike and positions cannabis as a uniquely stereotype-defying drug.

III. A Way Forward through Cannabis Cooperatives

As discussed in Part I, cannabis social equity programs vary considerably in their goals and approaches to both racial and gender equity but have generally been unsuccessful

159 POZEN, *supra* note 42, at 51.

160 *Id.* at 52.

161 *See, e.g.*, Russell Lemle & Marc E. Mishkind, *Alcohol and Masculinity*, 6 J. SUBSTANCE ABUSE TREATMENT 213, 216 (1989) (explaining the status of alcohol as a long-time symbol of masculinity and connected to male aggression).

162 *See* Mostaghim, *supra* note 83, at 27.

163 Natalie Hemsing & Lorraine Greaves, *Gender Norms, Roles and Relations and Cannabis-Use Patterns: A Scoping Review*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 947, 961 (2020).

164 *Id.*

165 *Id.*

in elevating women-owned businesses.[166] And as discussed in Part II, there are a variety of compelling justifications for elevating women in the cannabis industry as it grows, in hopes of creating the first vice industry with feminist values at its foundation. This Part first presents two of the biggest challenges to legislating with women-owned cannabis businesses in mind: constitutional limits on gender-based affirmative action and the growing threat of unchecked corporate takeover of small cannabis businesses, especially in the case of federal legalization. It then contemplates how a cooperative business model could contribute to gender equity in the industry and argues that policy initiatives providing incentives to create cooperative businesses and offering protections for those businesses are a promising and practical way forward for gender equity in cannabis and beyond.

A. The Limits of Traditional Solutions: Women-Centered Policymaking and Capitalist Business Organization

1. Constitutional Limits on Gender-Based Affirmative Action

Existing cannabis social-equity programs are an obvious place to turn for more meaningful and effective inclusion of women-owned businesses in the industry. Some social-equity programs aim to include the women and families affected by the War on Drugs by granting priority license eligibility to businesses majority-owned or controlled by individuals who have a parent, child, sibling, or spouse with a past cannabis-related offense.[167] But in New York, for example, "qualif[ication] based on a conviction is weighted higher than one based on a family member," which "brings up some tricky issues for women seeking licenses."[168] Other qualifications for social equity programs are more general—

166 *See supra* Part I.

167 *See, e.g.*, *Social Equity Licensee Eligibility Criteria*, COLO. OFF. OF ECON. DEV. & INT'L TRADE, https://oedit.colorado.gov/cannabis-business-office [https://perma.cc/89MS-J6EG] (describing one means of eligibility for a social equity "accelerator" license in Colorado as being: "[a]pplicant or [a]pplicant's parent, legal guardian, sibling, spouse, child, or minor in their guardianship was arrested for a marijuana offense, convicted of a marijuana offense, or was subject to civil asset forfeiture related to a marijuana investigation") [hereinafter *Social Equity Criteria*].

168 Mona Zhang, *Why New York's Cannabis Equity Program Is Stranding Women Entrepreneurs*, POLITICO (Mar. 12, 2023), https://www.politico.com/news/2023/03/12/new-yorks-cannabis-equity-women-entrepreneurs-00085236 [https://perma.cc/PZF9-5EB5] (citing Damion Fagon, the chief equity officer of New York's Office of Cannabis Management).

targeting residency in certain areas[169] or income levels below a certain threshold[170]—or more specific—targeting individual past convictions or arrests without including the family members of those affected.[171] And some programs combine these criteria to offer multiple paths towards social equity licensing.[172] Overall, though, most cannabis regulatory schemes do not explicitly offer women-owned businesses a path to prioritized social equity status simply by nature of their ownership without meeting some additional criteria.

Past evidence of success in local governments' efforts to preference women-owned businesses in their award of government contracts[173] suggests that more explicit and widespread inclusion of "women-owned businesses" as a criterion for priority licensing in cannabis could similarly work to achieve gender equity goals. But that kind of concrete gender preferencing and broad inclusion of *all* women-owned businesses may draw constitutional challenges,[174] and the Supreme Court's Equal Protection jurisprudence

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169 *See, e.g.*, *Social Equity Criteria*, *supra* note 167 (describing a means of eligibility for a social equity license in Colorado: "resided for at least 15 years between 1980 and 2010 in a census tract designated by the Colorado Office of Economic Development and International Trade as an Opportunity Zone or designated as a 'Disproportionate Impacted Area'").

170 *See, e.g.*, *id.* (describing a means of eligibility for a social equity license in Colorado: "household income in a year prior to application did not exceed 50% of the state median income as measured by the number of people who reside in the [a]pplicant's household").

171 *See, e.g.*, *Equity Project State Briefing: Michigan*, MINORITY CANNABIS BUS. ASS'N, https://minoritycannabis.org/equitymap/michigan/ [https://perma.cc/UMZ5-N24L] (listing "conviction of a marijuana-related offense" as one criterion to qualify for Michigan's social equity program, with no provision for applicants who have family members with convictions).

172 *See, e.g.*, *Social Equity Criteria*, *supra* note 167 (stating that an applicant must meet one of three possible criteria).

173 *See* DEP'T OF JUST., THE COMPELLING INTEREST TO REMEDY THE EFFECTS OF DISCRIMINATION IN FEDERAL CONTRACTING: A SURVEY OF RECENT EVIDENCE 19 (2022), https://www.justice.gov/crt/page/file/1463921/download [https://perma.cc/XK73-JMK6] (explaining that local governments' use of preferential policies in favor of minority- and women-owned businesses successfully ameliorates the effects of public and private discrimination, and detailing one study on the L.A. County Metropolitan Transportation Authority that found that on contracts with goals encouraging the utilization of minority- and women-owned businesses, those businesses earned ninety-six cents on the dollar, as opposed to only fifty-three cents on the dollar without that explicit preferencing) [hereinafter DOJ, COMPELLING INTEREST].

174 Many scholars have begun to consider how the Supreme Court's overturning of affirmative action precedent will impact the racial components of social equity programs. At the very least, state social equity laws can avoid triggering equal protection challenges by "concentrat[ing] relief to those individuals who were actually arrested, convicted and/or incarcerated (and the immediate families they were separated from) in a completely race-neutral manner." Khurshid Khoja, Opinion, *How to Save Marijuana Social Equity Programs*

indicates that such preferencing in cannabis likely would not survive judicial review under the federal Constitution.

It is unclear which standard of review a court would apply to a gender-based affirmative action policy in a cannabis regulatory scheme.[175] Although it is a well-settled principle of constitutional law that Equal Protection challenges to statutory classifications made on the basis of gender generally warrant intermediate judicial scrutiny,[176] federal appeals courts have technically split over whether strict or intermediate scrutiny is the appropriate standard of review for gender-based affirmative action programs, particularly in the adjacent realm of employment, ever since the Supreme Court's 1989 ruling in *Richmond v. Croson*.[177] Though *Croson* concerned a racial classification, the Court's unequivocal statement of the need for strict scrutiny's exacting factual requirements in the affirmative action context "to determine whether the problem the state seeks to remedy actually exists"[178] led the Sixth Circuit to later interpret the case to require strict scrutiny review for even gender-based affirmative action programs.[179] And further entangling the line between the two standards of review, some courts applying intermediate scrutiny to gender-based affirmative action programs have essentially maintained that "the *Croson*-style factual predicate [i]s applicable

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from the Supreme Court's Affirmative Action Ruling, MARIJUANA MOMENT (June 30, 2023), https://www.marijuanamoment.net/how-to-save-marijuana-social-equity-programs-from-the-supreme-courts-affirmative-action-ruling-op-ed/ [https://perma.cc/B4M7-Y6WB]. But limiting qualification for social equity status to applicants who can demonstrate specific past instances of cannabis-related justice involvement would fail to meaningfully achieve gender equity goals, as discussed in Part II.

175 *See* Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 J. GENDER SOC. POL'Y & L. 797, 799 (2013) (describing how "federal appeals courts have developed a tripartite split over the appropriate level of scrutiny for gender-based affirmative action programs" which includes strict scrutiny, intermediate scrutiny, and a version of intermediate scrutiny with a heightened factual predicate).

176 The Supreme Court settled on intermediate scrutiny as the appropriate standard of review for statutes that differentiate on the basis of sex in *Craig v. Boren*. "As stated by the Court, for a statute that differentiates on the basis of gender to be sustained, it 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.'" *Id.* at 803 (2013) (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). The Court further clarified in *United States v. Virginia* that intermediate scrutiny requires an "exceedingly persuasive justification" for applying a classification based on gender. 518 U.S. 515, 531 (1996).

177 Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Quereshi, *supra* note 175, at 799.

178 Quereshi, *supra* note 175, at 812.

179 Brunet v. City of Columbus, 1 F.3d 390, 403 (6th Cir. 1993) (affirming the district court's holding that "[g]ender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause").

to the intermediate standard."[180] Producing similar confusion, some courts have used a single strict scrutiny standard for affirmative action programs that contain both gender and racial components, without separating their analyses of those classifications.[181]

United States v. Virginia arguably clarified that intermediate scrutiny applies to all gender-based classifications, even those made through affirmative action policies.[182] And more recent examples of judicial review of policies preferencing women-owned businesses also lend support to that rule. For example, in *Vitolo v. Guzman*, the Sixth Circuit applied intermediate scrutiny to the Small Business Association's Restaurant Revitalization Fund ("RRF") targeted at COVID relief, which included a priority applicant period for restaurants that were majority-owned by women (among other "socially and economically disadvantaged" categories).[183] But despite these indications towards intermediate scrutiny, the Supreme Court technically has yet to resolve this ambiguity, as it has never reviewed a gender-based affirmative action law under the Equal Protection Clause.

Assuming a court would apply the more forgiving intermediate scrutiny standard, it would still require a statute making a sex-based classification to be "substantially related" to an "important governmental objective."[184] Cannabis social equity programs granting all women-owned businesses eligibility for priority status will likely struggle to meet both prongs as that test has been applied thus far. Using the recent restaurant industry COVID-relief case discussed above, *Vitolo*, the Sixth Circuit struck down the RRF's prioritization of women-owned businesses in part because "[t]he government's statistics were insufficient to show actual evidence of discrimination, and the RRF prioritized *all* women-owned restaurants, not just those who were economically disadvantaged."[185] Conversely, where courts have upheld those kinds of broad, benign sex-based classifications, they have

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180 Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from* Croson, 59 U. CHI. L. REV. 1563, 1577 (1992); *see also* Quereshi, *supra* note 175, at 815 ("[T]he Fourth, Eleventh, and D.C. Circuits, after *Croson*, have maintained the characterization of the scrutiny applied to gender-based affirmative action programs as 'intermediate'; however, in application, each circuit has required a factual predicate equivalent to that required by the Supreme Court in *Croson*.").

181 *See* Quereshi, *supra* note 175, at 814 (referring to *Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), and *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2022)).

182 *See* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people.") (internal citations omitted).

183 Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021); DOJ, COMPELLING INTEREST, *supra* note 173, at 14.

184 *Virginia*, 518 U.S. 515 (1996).

185 DOJ, COMPELLING INTEREST, *supra* note 173, at 15 (citing *Vitolo*, 999 F.3d at 365).

emphasized their findings of historical discrimination within the particular "economic sphere" or department that is the focus of the program.[186]

This reasoning is instructive for cannabis laws. Courts requiring "actual evidence of discrimination" in the same industry or field will be fundamentally unable to find *past* instances of gender discrimination in the nascent legal cannabis industry.[187] And offering broad societal and vice industry discrimination against women, or examples of current statistical disparities between men and women in the industry as justification, would fare no better; to prove an important governmental objective sufficient to withstand intermediate scrutiny, "general claims of societal discrimination are not enough"[188] and "the mere recitation of a benign, compensatory purpose is not an automatic shield" against that requirement.[189] The Tenth Circuit's approach to intermediate scrutiny review offers a slightly more hopeful picture, as it upheld a Denver construction and professional design program preferencing women and racial minorities after only requiring the city to "introduce evidence which raised the *inference* of discriminatory exclusion in the local construction industry" and "link[] its spending to that discrimination."[190] And the court held that such an inference "can arise from statistical disparities."[191] Still, the multifaceted barriers that women seeking to break into the cannabis industry[192] face may not amount to *discrimination* in a court's eyes.

Overall, courts would need to both apply "true" intermediate scrutiny and substantially loosen that standard's requirements to suit a brand-new industry without historical discrimination if a cannabis law preferencing women-owned businesses were to withstand constitutional scrutiny. The current Supreme Court's hostility towards race-based affirmative action[193] does not lend confidence to the likelihood of its adaptability in the

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186 *See, e.g.*, Danskine v. Mia. Dade Fire Dep't, 253 F.3d 1288, 1296 (11th Cir. 2001) (finding past discrimination against women to be "in the economic sphere at which the affirmative action program is directed").

187 Kilmer et al., *supra* note 14, at 1012 ("[N]ormally preference programs must be specifically designed to redress past discrimination within that industry. Yet, no matter how severe the disparate impacts of cannabis *prohibition* were, they did not arise because of disparate treatment within the modern legal cannabis industry.").

188 *Vitolo*, 999 F.3d at 364 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 727–29 (1982)).

189 *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

190 Quereshi, *supra* note 175, at 817–18 (citing Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950, 970 (10th Cir. 2003)) (emphasis added).

191 *Concrete Works*, 321 F.3d at 971.

192 *See supra* Part I.

193 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that achieving student-body diversity is not a "compelling interest" sufficient to withstand strict scrutiny review).

realm of gender. Although the most recent *Students for Fair Admissions* ("*SFFA*") cases concerned race-based affirmative action programs in the college admissions context, the Court's holding indicates the triumph of a formal equality approach to Equal Protection that will likely hamper diversity measures for other traditionally legally marginalized groups.[194]

2. Protecting Against Corporate Consolidation and the Growth of "Big Marijuana"

Aside from the constitutional limits on social equity laws, another threat to the survival of small cannabis businesses and states' equity efforts in general looms large: corporatization. If—or perhaps, when[195]—the federal government entirely de-schedules cannabis from the CSA, it will force a dramatic shift from dozens of intrastate cannabis markets to one national market. A similar result could even occur with proposed federal legislation that would open access to traditional banking services for cannabis businesses, even without fully amending the CSA.[196] If Congress enables that shift to occur without adequately protecting existing state cannabis equity laws and preventing market consolidation through antitrust measures, it will inevitably "advantage the wealthiest, most privileged actors" and foster the survival-of-the-fittest pattern of big industry.[197] Companies that already have

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194 *Id.*; *see also* Jeannie Suk Gersen, *What Would Sandra Day O'Connor Have Thought About Affirmative Action for Men?*, NEW YORKER (Dec. 8, 2023), https://www.newyorker.com/news/daily-comment/what-would-sandra-day-oconnor-have-thought-about-affirmative-action-for-men [https://perma.cc/5C4F-2K2M] (explaining that, at least in the college admissions context, *SFFA* "made it more likely that a court would hold that a public-college- or university-admissions process which considers applicants' gender as a factor violates Title IX and the Fourteenth Amendment").

195 Most scholars believe that some federal action on cannabis is inevitable. *See, e.g.*, Tamar Todd, *How to Federally Legalize Cannabis Without Violating the Constitution or Undermining Equity and Justice*, PARABOLA CTR., https://www.parabolacenter.com/img/interstate.pdf [https://perma.cc/T6NU-WTCD] (stating that "[i]nevitably, the federal prohibition on cannabis will end" and noting that "popular support for cannabis legalization has steadily increased over the past several decades, and is currently one of a small handful of bipartisan issues that majorities of Americans support, in every state, and across political lines").

196 *See, e.g.*, SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021) (prohibiting "a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business").

197 TITLE, *supra* note 30, at 4; *see also* Philip Ewing, *Growing Up: Vertical Integration in the Cannabis Industry*, 38 DRUG ENF'T & POL'Y CTR, STUDENT PAPER SERIES 1 (2021) ("Despite the best efforts of U.S. Attorney General William Barr, who launched multiple antitrust investigations into cannabis industry deals in 2019, and the black swan event of the COVID-19 pandemic, mergers and acquisitions activity in the cannabis industry has not stopped in 2020 (though it is slower than in recent years), continuing to contribute to the growth of large cannabis companies.").

expertise and supply chains for related products—for example, in tobacco, alcohol, and pharmaceuticals—could easily and rapidly grow their national market share in cannabis if given the opportunity through a lift on federal prohibition.[198] That threat is particularly concerning in the cannabis industry, as "[p]ublic health concerns take a back seat when the alcohol and tobacco industries seek to maximize profits by maximizing consumption" and "similar dynamics helped fuel the nation's opioid epidemic when some pharmaceutical companies aggressively marketed certain products."[199] Advocates urge the inclusion of policy components in federal cannabis legalization legislation that would proactively address the issue of corporate monopolization,[200] but Congress's adherence to those proposals would require a significant departure from its usual loyalty to corporate lobbyists and the interests of big businesses.[201]

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198 *See* Luke Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 529 (2015) (explaining that tobacco companies are the most likely to move into the cannabis industry if the "legal conflicts get worked out" because "they have the farmers, supply chains, and industry expertise to create a strongly branded product" and cannabis would also provide "a strong new revenue source to supplement the slowly declining cigarette market"); *see also* ANH-THU NGUYEN, DEMOCRACY AT WORK INST., ENSURING CANNABIS EQUITY THROUGH SHARED OWNERSHIP 4 (2021), https://democracy.institute.coop/cannabis-equity-shared-ownership [https://perma.cc/47LN-3C4D] (noting that many established tobacco, alcohol, and pharmaceutical corporations have already made substantial investments in marijuana companies).

199 TITLE, *supra* note 30, at 5; *see also* Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69 (2020) (analyzing the emerging cannabis industry in the historical context of the tobacco industry).

200 *See* Todd, *supra* note 195 (advocating for three specific policy components in federal cannabis legalization legislation: explicitly allowing existing state cannabis laws to operate as designed and without disruption (rather than preempting them); allowing bona-fide social equity businesses, small businesses, and worker-owned businesses to engage in interstate commerce; and limiting large corporations in the market through restrictions on size and ownership, anti-monopoly provisions, and limitations on tax deductions and credits).

201 *See* TITLE, *supra* note 30, at 3 (noting that large companies are already "expanding, consolidating, and lobbying for licensing rules to create or maintain oligopolies"); *see also* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/YPV4-6ZUW] (reporting that "[c]orporations now spend about $2.6 billion a year on reported lobbying expenditures" and describing how "[t]he self-reinforcing quality of corporate lobbying has increasingly come to overwhelm every other potentially countervailing force").

B. The Case for the Cooperative Business Model in the Adult-Use Cannabis Industry

The disappointing results of states' social equity efforts thus far in achieving gender equity, the constitutional limits on expanding and solidifying those efforts, and the very real threat that large corporations will subsume newer small businesses collectively paint a bleak picture for the future of cannabis as a revolutionary, feminist vice industry. On a fundamental level, some legal scholars question the compatibility of corporate profit-maximization goals with principles of social equity or genuine commitment to social responsibility.[202] A more promising path forward, for a true community- and equity-focused cannabis industry, may lie in the promotion and protection of a different structure of business organization altogether: the cooperative.

1. The Cooperative Structure and its Contribution to Gender Equity

The idea of cooperation is not new—there is a rich history of cooperative efforts that dates back centuries. Cooperatives, or co-ops, range globally from small-scale mutual aid groups to multi-million-dollar businesses, but co-ops of all types and sizes are connected by a set of core, shared principles: open membership; democratic member control; member economic participation; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for community.[203] Structurally, co-ops are most simply understood as "companies owned by the people who use their services"[204] in which the members become the equivalent of shareholders, thereby "collectively retain[ing]

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202 *See, e.g.*, Deborah Doane, *The Myth of CSR*, 3 STAN. SOC. INNOVATION REV. 23 (2005) (exploring the rise of the corporate social responsibility ("CSR") movement "premised on the notion that companies can 'do well' and 'do good' at the same time"; finding, among other issues with that premise, that "ultimately, trade-offs must be made between the financial health of the company and ethical outcome, and when they are made, profit undoubtedly wins over principles"); Katharina Pistor, *Green Markets Won't Save Us*, PROJECT SYNDICATE (Mar. 16, 2021), https://www.project-syndicate.org/commentary/green-markets-esg-investments-risky-bet-on-climate-change-by-katharina-pistor-2021-03 [https://perma.cc/FV5X-F8MR] (arguing, in the context of climate change and the COVID-19 pandemic, that "governments in advanced economies have decided to double down on private property rights and markets" but that markets are unreliable guides for navigating such complex issues).

203 *See Cooperative Identity, Values & Principles,* INT'L COOP. ALL., https://ica.coop/en/cooperatives/cooperative-identity [https://perma.cc/7X9A-PV6C].

204 JESSICA GORDON NEMBHARD, COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE 3 (2014).

the equity in the enterprise."[205] And co-ops can take a variety of forms depending on the relationship between their member-owners and their purpose—the three major categories are producer, consumer, and worker co-ops.[206]

Though the cooperative structure is undoubtedly a departure from capitalist norms of business organization, "[c]ooperation works within existing governmental structures" and is not fundamentally at odds with the idea of individual freedom.[207] There is widespread, bipartisan support for cooperation in the United States.[208] President Reagan touted employee ownership as "a path that befits a free people," and conservative media outlets like the *American Conservative* "speak favorably about cooperative businesses and how they can save communities."[209] Furthermore, co-ops can already be found in the mainstream of American commerce: well-known companies like Land O' Lakes, Sunkist, Ocean Spray, REI, and Ace Hardware all operate cooperatively.[210] Research has shown that co-ops in the United States are more likely to survive their first six to ten years than traditional small businesses.[211] The major differences between publicly traded (as well as private, equity-backed)[212] companies and cooperative enterprises ultimately "mean that the member decision makers have a greater stake in the outcomes and care about the long-term sustainability of the enterprise, the welfare of its members, and their environment, rather than the immediate or short-term value of the corporation."[213] The deep and longstanding

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205 BERNARD HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 65 (2023).

206 *See* GORDON NEMBHARD, *supra* note 204, at 3.

207 HARCOURT, *supra* note 205, at 12.

208 *See id.* at 15 ("Polling data show broad support for worker cooperatives across the political spectrum. A survey conducted by Data for Progress in 2021 found that nearly 79 percent of Democrats and 66 percent of Republicans support 'transition where small businesses become worker cooperatives.' There is as well broad bipartisan support for programs that assist states in establishing or expanding worker cooperatives.").

209 *Id.* at 15–16.

210 *Id.* at 16.

211 *See id.*; *see also* GORDON NEMBHARD, *supra* note 204, at 14 (citing research that has found "that worker cooperatives and employee-owned firms have survival rates that equal or surpass those of conventional firms").

212 *See* HARCOURT, *supra* note 205, at 64 ("Today, with the rise of private equity and hedge funds, wealthy investors have found ingenious ways to mimic the publicly traded corporation without having to abide by all the regulations surrounding reporting, publicity, and public offerings. Functionally, though, they operate in the same way, insofar as investors can move their capital relatively easily and typically do not play a role in managing the enterprise, and the entities can raise capital from third parties.").

213 *Id.* at 68.

history of the African American cooperative tradition in the United States exemplifies the potential of cooperative enterprises to empower and strengthen communities.[214]

Cooperative policies have achieved success in the realm of workplace gender equality,[215] and research has shown that women have a propensity to start or join co-ops to avoid many of the gendered challenges of traditional hierarchical businesses.[216] For example, in one study on all-women collectives in England and Wales, many women reported joining collectives for relief from discrimination they had faced in seeking jobs or working in traditional organizations—discrimination based on their age and family commitments, non-continuous and part-time employment profiles, or non-conformity to heterosexual femininity.[217] Those women also valued their ability to have autonomy and control over their work in organizations in which men did not dominate.[218] Other studies on worker cooperatives in Spain and in the United States have documented that women in cooperatives have higher salaries and greater job security than those in private companies,[219] and in Argentina, women in worker-recovered businesses[220] have increased access to leadership positions, more control over their time, and equal pay.[221] Those positive results may be due in part to women's ability to use their collective strength in co-ops to organize for better pay and working conditions.[222]

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214 For a comprehensive historical analysis on this topic, *see* GORDON NEMBHARD, *supra* note 204, at 25 ("Many of the great African American thinkers, movers, and shakers were also leaders in the Black cooperative movement.").

215 *See* Katherine Sobering, *Producing and Reducing Gender Inequality in a Worker-Recovered Cooperative*, 57 SOCIO. Q. 129, 129 (2016).

216 *See* Sarah Oerton, *Exploring Women Workers' Motives for Employment in Cooperative and Collective Organizations*, 3 J. GENDER STUD. 289 (1994).

217 *See id.* at 294.

218 *See id.* at 295.

219 *See* Sobering, *supra* note 213, at 132.

220 *See id.* at 133 ("Worker-recovered businesses are companies that were converted from privately owned businesses into worker-controlled enterprises during times of crisis.").

221 *See id.* at 132.

222 *See Cooperatives and Women*: *Promoting Self-Empowerment*, OFF. BLOG OF THE INT'L YEAR OF COOPS. (Apr. 18, 2012), https://uncoopsyear.wordpress.com/2012/04/18/cooperatives-and-women-promoting-self-empowerment/ [https://perma.cc/6PZA-B596] (describing women domestic workers in the United States who "have used cooperatives as a means of organizing themselves to ensure fair wages and reduce exploitation").

There is also a positive association between co-ops and women's entrepreneurial activity.[223] As discussed in Part I, *supra*, entrepreneurship literature suggests that women are more risk-averse than men. But women may perceive cooperative business ventures as less risky than traditional ones, given that co-ops fundamentally operate by sharing startup costs and profits among their members.[224] Co-ops are by no means a perfect solution to gender gaps in entrepreneurship and workplace equality,[225] but generally, because they "pay special attention to collective needs and social problems, they are especially sensitive to issues related to gender equality and the adoption of socially responsible behaviour."[226] Their democratic structure gives women an equal voice in governance and an equal share of assets, untethered to the proportion of shares they hold or their ability to work their way up a gendered leadership ladder.[227] As a normative matter, the egalitarian relationships fostered by cooperative business structures fit much more closely with feminist values and the goal of rectifying past exploitation in other vice industries than traditional hierarchical structures.

2. A Vision for Cannabis Cooperatives

Cooperative business organization could lend itself particularly well to the realization of cannabis equity goals. First, co-ops offer a promising defense against the threats of corporate consolidation and corporate abuse of social equity licensing schemes,[228] as they "are naturally resistant to consolidation or to being sold to the highest bidder after getting a license."[229] Critically, co-ops are not beholden to corporate legal principles of shareholder

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223 *See* Bastida et. al, *supra* note 95, at 12 (highlighting that the study's findings "emphasize the need for responsive policies and [programs] that promote the cooperative model since it promotes female employment and women's entrepreneurial activity even in periods of economic austerity.").

224 *See id.* at 3.

225 Sobering, *supra* note 215, at 132 ("Research on gender in collectivist organizations suggests that women are better off than they are working in traditional firms, but are still underrepresented, have lower status, and participate less in decision making in comparison to men.").

226 Bastida et. al, *supra* note 95, at 4.

227 GORDON NEMBHARD, *supra* note 204, at 170.

228 *See* Orenstein, *supra* note 197, at 4 (exploring how large corporate entities have exploited social equity programs by, for example, "manipulating partnerships with equity-eligible persons to improve positioning for competitive licensure").

229 Kyle Sosebee, *What is a Cannabis Co-op?*, THE EMERALD MEDIA GRP. (Aug. 14, 2020), https://theemeraldmagazine.com/what-is-a-cannabis-co-op/ [https://perma.cc/Q2L2-ZBNG]; GORDON NEMBHARD,

profit maximization but instead function on a model that prioritizes the well-being and livelihoods of their members.[230]

Co-ops also achieve some of the community-investment, restorative-justice goals of social equity laws through the very nature of their structure and operation. They stabilize their communities by creating jobs with increased benefits and wages,[231] stimulating local economic activity, and encouraging civic participation.[232] Because the profits from cooperative enterprises flow directly to their members, those funds remain in the local economy,[233] allowing capital to accumulate locally. Co-ops offer a much-needed economic alternative for people of color, low-income communities, and undocumented immigrants who may face discrimination or exploitation in the traditional business sector.[234] Beyond just providing otherwise inaccessible employment opportunities, co-ops can empower marginalized individuals by giving them ownership over their labor and resources and power to direct how they are used.[235] Of course, cooperation does not erase the funding challenges inherent in starting a new cannabis business; similar to traditional business owners, cooperative organizers continue to cite funding as a key barrier to breaking into the industry.[236] But through their resource-pooling structure—"aggregat[ing] the market power of people who on their own could achieve little or nothing"[237]—they offer a significantly more feasible means of entrepreneurship for groups of people without access to extensive, private sources of capital. This benefit is particularly significant for women entrepreneurs

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supra note 202, at 12–13 ("Cooperatives address issues such as community control in the face of transnational corporate consolidation and expansion").

230 *See* HARCOURT, *supra* note 205, at 10 ("The logics of profit detach the shareholder from any real investment in the lives of all those who are associated with the enterprise.").

231 Employee-owners have 33% higher median income from wages and 53% higher job tenure than average employees. *Ensuring Equity through Shared Ownership*, *supra* note 198, at 8.

232 GORDON NEMBHARD, *supra* note 204, at 14.

233 NGUYEN, *supra* note 198, at 8.

234 Alexander Lekhtman, *Bringing the Worker Co-Op Revolution to Legal Weed*, FILTER MAG. (Nov. 13, 2019), https://filtermag.org/cannnabis-worker-co-op/ [https://perma.cc/GA6P-ST3C].

235 *Id.*

236 *Id.*

237 GORDON NEMBHARD, *supra* note 204, at 13.

of color, since, as discussed in Part I.C., *supra*, the world of private funding remains deeply discriminatory in favor of white men.

Some cooperative organizers and advocates have already contemplated broader adoption of the cooperative business model in the cannabis industry.[238] Massachusetts, for example, includes a licensing category for "Craft Marijuana Cooperatives" in its cannabis regulatory scheme, which is intended to allow local farmers to cultivate cannabis on their own farms and split costs for things like production, packaging, and marketing.[239] New York and California's cannabis programs both include space for cooperative licensing.[240] But progress, as with other social equity businesses, has been slow, and the few existing co-ops are already increasingly struggling to compete with bigger consolidated operations.[241] Overall, co-op cannabis businesses that are licensed and operational are few and far between.[242] Although they offer great potential in securing steadier, more quality-controlled supplies of cannabis, more consistent marketing at larger scales, and lower operation costs, cannabis cooperatives have struggled to compete with larger corporate operations that are "stacking" small-grow licenses and offering lower prices to consumers.[243]

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238 *See, e.g.*, *Making Cannabis Cooperative: Community Ownership and Racial Justice in the Cannabis Industry*, U.S. FED'N OF WORKER COOPS. (Oct. 25, 2024) (YouTube), https://www.usworker.coop/blog/making-cannabis-cooperative-community-ownership-and-racial-justice-in-the-cannabis-industry/ [https://perma.cc/AMA9-YDY5] (discussing "cooperative-building projects to create community-based and economically-just cannabis markets at local and statewide levels").

239 *See* Shira Schoenberg, *Craft Marijuana Cooperatives, Made Up of Local Farmers, Struggle to Start Up*, MASSLIVE (Aug. 12, 2019), https://www.masslive.com/news/2019/08/craft-marijuana-cooperatives-made-up-of-local-farmers-struggle-to-start-up.html [https://perma.cc/8T3J-2URB].

240 *See* Sosebee, *supra* note 229; Adult-Use Cooperative License, N.Y. CANNABIS LAW § 70 (2021).

241 *See* Lekhtman, *supra* note 234.

242 *See, e.g.*, Zach Huffman, *Mass Cannabis Regulators May Reconsider Craft Cooperative Licenses*, TALKING JOINTS MEMO (July 18, 2023), https://talkingjointsmemo.com/mass-cannabis-regulators-may-reconsider-craft-cooperative-licenses/ [https://perma.cc/7PBB-M8WW] (noting that no craft cooperative cannabis businesses in Massachusetts have received final approval or commenced operation despite the issue of four provisional licenses).

243 *See* Bart Schaneman, *Smaller California Marijuana Farmers Form Co-Ops to Save on Costs, Compete with Large Growers*, MARIJUANA BUS. DAILY (Dec. 17, 2021), https://mjbizdaily.com/smaller-california-marijuana-farmers-form-co-ops-save-costs-compete-large-growers/ [https://perma.cc/GA46-K3WR].

Importantly, the existence and success of co-ops in other related sectors—and the legal structure to support them[244]—suggests that they could feasibly achieve greater prevalence in the cannabis industry if state cannabis regulations sufficiently prioritized them. Cannabis cultivation is essentially agriculture, and farming and food production co-ops have been around in the United States since the early nineteenth century.[245] On the retail side, cooperative retail enterprises are already some of the most common examples of consumer co-ops,[246] giving cooperative cannabis dispensaries plenty of business models to learn from. A growing trend of "cooperative conversions"—co-ops created by retiring business owners who sell their businesses to their employees rather than close the doors—especially in the farming and food production sectors, could also serve as a relevant model for worker-owned cannabis businesses.[247] In other words, the legal infrastructure and established business methods for cooperation in both food production and retail already exist;[248] strengthening that infrastructure and prioritizing the model's more widespread adoption in cannabis is a matter of awareness, advocacy, and will.

C. Ideas for Policymaking in Support of Cannabis Cooperatives

The most straightforward and immediately feasible policy options to support cannabis co-ops—and, by extension, women in cannabis—are those that work within existing state social equity programs. States can work to better tailor their cannabis licensing categories to suit the specific structural and regulatory needs of cooperative businesses, and they can create carveouts to policies meant to limit the market control of large corporations to allow co-ops to better compete. For example, bans on vertical integration—preventing

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244 *See* U.S. DEP'T OF AG. & RURAL DEV., UNDERSTANDING COOPERATIVES: LEGAL FOUNDATIONS OF A COOPERATIVE 1 (1995), https://www.rd.usda.gov/sites/default/files/CIR45-9.pdf [https://perma.cc/UA6M-MPLJ] (explaining in summary that "[c]ooperatives, like other private businesses, are organized according to a State statute" and some "cooperatives are organized under a Gender Not-for-Profit Corporation statute") [hereinafter DOA, UNDERSTANDING COOPERATIVES].

245 *See* LYNN PITMAN, CTR. FOR COOPS., HISTORY OF COOPERATIVES IN THE UNITED STATES: AN OVERVIEW (2018), https://resources.uwcc.wisc.edu/History_of_Cooperatives.pdf [https://perma.cc/W3D3-WPJG] ("The first recorded dairy and cheese cooperatives were organized in 1810, and cooperatives for other agricultural commodities followed.").

246 GORDON NEMBHARD, *supra* note 204, at 3.

247 NGUYEN, *supra* note 198, at 8–9.

248 *See, e.g.*, DOA, UNDERSTANDING COOPERATIVES, *supra* note 244; *The Cooperative Model of Grocery Store Ownership*, ILL. INST. FOR RURAL AFFS. (Dec. 2014), https://www.ruralgrocery.org/learn/rural-grocery-toolkit/step2-resources/The-Cooperative-Model-of-Grocery-Store-Ownership.pdf [https://perma.cc/AKW5-RFS2]

cannabis businesses from operating at every stage of the supply chain—generally function as a check on the largest, most well-capitalized businesses.[249] But allowing an exception for co-ops would amplify their social and economic impact, as well as incentivize cooperation *among* co-ops to work together at different points in the cannabis supply chain.[250] For the reasons discussed in Part III.B.i., *supra*, these types of cooperative-friendly policies have the potential to increase women's representation in the industry, especially for women of color, because co-ops may alleviate some of the challenges that disproportionately affect women and minority entrepreneurs, like the individual burden of startup costs and securing private capital, as well as hierarchical business structures that tend to push women away.

Successful cooperative-friendly policies outside of cannabis, and even outside the United States, could serve as instructive models for effectively integrating equity concerns in the development of states' cannabis cooperative policies. Several European countries use tax exemptions to incentivize cooperative enterprises, and many have also created "social cooperatives" to integrate socially disadvantaged groups into the workforce.[251] Italy, for example, requires that 30% of workers in co-ops have physical or learning disabilities, have or have a history of treatment for mental illness or substance abuse, or have formerly been imprisoned.[252] Creating this kind of "social cooperative" category within cannabis licensing frameworks could be another opportunity for states to intentionally include women-centered businesses (in this case, cooperative ones), particularly those with members who have overlapping social equity characteristics like connections to cannabis-related convictions or residency in economically disadvantaged areas. Italy also implemented an asset forfeiture plan wherein it channeled property and funds seized from mafia-related criminal activity to social co-ops in disadvantaged communities, especially those that suffered the most from organized crime.[253] States could adapt such a model to

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249 *See* Ewing, *supra* note 197, at 11 (explaining that vertical integration is good—and possible—only for big businesses because of the "prohibitively expensive" cost of starting a cannabis business that "has to control every aspect of cultivation, post-production, and retail sale").

250 *See* DOA, UNDERSTANDING COOPERATIVES, *supra* note 244, at 12 (recommending an exception to a vertical integration ban for "a second level distribution and/or multi-stakeholder cooperative made up of cooperative business members working elsewhere in the value chain (cultivation, processing, or retail)").

251 *See id.* at 9.

252 *See id.*

253 *See id.* at 10.

redirect forfeited assets from drug trafficking to cooperative cannabis entrepreneurs in the form of zero-interest loan funds and grants.[254]

The so-called "Cleveland Model" offers a way to unite private business resources with cooperative, social equity initiatives.[255] It earned its name from a partnership between the City of Cleveland, the Cleveland Clinic, the Cleveland Foundation, Case Western Reserve University, and University Hospital, which came together as "anchor institutions"[256] providing a guarantee to purchase products and services from local co-ops in the area.[257] In doing so, the anchor institutions help create employment and wealth in their local communities and provide solutions for some of the co-ops' biggest challenges, like start-up financing and growth.[258] The nature of Cleveland's anchors as city government and educational institutions also allows them to lend technical expertise to co-ops in local economics, service delivery, customer support, and business management.[259] Other cities and their own nonprofit institution mainstays could follow suit. While most large nonprofit businesses likely will not directly purchase cannabis products, they could still provide financial and technical support to cannabis co-ops in their communities. Some organizers focused on building cannabis co-ops in New York cited the need for this kind of increased community involvement—in the form of business incubators, free attorney services, and funding—to help co-ops remain resistant to selling their businesses to big corporations.[260] Taking inspiration from this model, existing women-run or women's empowerment-focused nonprofits with the necessary resources could partner and collaborate specifically with women-led cannabis co-ops.

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254 *See id.*

255 *See* Democracy Collaborative, *The Cleveland Model: How the Evergreen Cooperatives Build Community Wealth*, YOUTUBE (Sept. 23, 2014), https://www.youtube.com/watch?v=s_kLye_6VBc [https://perma.cc/PHZ6-TENY].

256 These are all large, nonprofit entities that are "anchored" to the city, unlikely to move away, and serve as the city's economic powerhouses. *See id.*

257 *See Worker-Owned Cooperatives—The Cleveland Model*, URB. SUSTAINABILITY DIRS. NETWORK, https://sustainableconsumption.usdn.org/initiatives-list/worker-owned-cooperatives-the-cleveland-model [https://perma.cc/WX43-WHCE].

258 *See id.*

259 *See id.*

260 *See* Lekhtman, *supra* note 234.

At a most basic level, policymakers and cannabis equity activists should work to advance the general visibility of co-ops, spread public knowledge about their benefits, and create policy support systems that encourage the development of worker-owned businesses of all kinds. City and state governments can offer tax deductions for investments in co-ops, fund local "incubators" that offer technical assistance for co-ops, and center cooperative policy as a key job creation and economic development tool, since its potential goes far deeper and wider than the cannabis industry in terms of both social and gender equity.[261] The same basic legal tools that lawyers regularly wield to turn assets into capital could just as easily be used for cooperation,[262] and a success story of cannabis co-ops could lay the groundwork for equity, support for women workers, and community-centered justice in businesses far beyond cannabis.

CONCLUSION

As the cannabis industry rapidly grows and big businesses seek to take advantage of a market ripe for monopolization, it is more important than ever to not lose sight of social equity in cannabis regulatory schemes and support for diverse entrepreneurs. Race and restorative justice in response to the War on Drugs must be central to that vision of social equity, but gender, too, must be a key component of holistic cannabis equity efforts. Despite the industry's nascency, women—and especially women of color—have so far fared worse in adult-use cannabis with respect to small business ownership and executive leadership than they do in other business sectors, and data indicates that they are losing rather than gaining control as the industry expands. That gap in representation is particularly troubling considering the historical exclusion of women from other vice industries, the continued impacts of the War on Drugs on women of color, and the potential for women's leadership in cannabis to erode harmful social stereotypes surrounding women and substance use. Prioritizing a cooperative, worker-owned business model—which can secure women's democratic participation, ease entrepreneurship-related gender imbalances, and offer more workplace flexibility with less hierarchy—comports with feminist values. A cooperative model also avoids the practical and constitutional challenges associated with gender-based affirmative action for traditional, private, women-owned businesses as part of states' regulatory schemes. The vision for a truly equitable, feminist vice industry is a radical one,

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261 *See* Noah Franklin et al., *Worker Cooperatives in New York City: A Model for Addressing Income Inequality*, 16 REG'L LAB. REV. 10, 14–16 (2014).

262 *See* HARCOURT, *supra* note 205, at 72.(

and solutions based in cooperation, outside of the dominant corporate mainstream, may be the best vehicle to bring it into fruition.

AN ANTITRUST APPROACH TO SEX EQUALITY

BAILEY K. SANDERS*

Abstract

This Article argues that antitrust law can and should promote gender equality by prioritizing key consumer markets, namely markets for products and services complementary to women's labor force participation. These products and services include those that facilitate efficient outsourcing of home production (e.g., childcare, infant formula, and labor-saving household technologies) and those that reduce or eliminate the burdens of biological reproduction (e.g., maternity care, contraception, and abortion care). Drawing on economics, sociology, and feminist literatures, this Article develops a theoretical approach to antitrust law that takes into account the complementarities between these key markets and women's labor force participation and also links consumer harm to worker harm. Importantly, this Article argues that using antitrust law to promote sex equality requires neither deviation from the conventional consumer welfare standard nor an equity-efficiency tradeoff. On the contrary, prioritizing these key consumer markets is conducive to the simultaneous pursuit of efficiency, sex equality, and constitutional equal protection principles.

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INTRODUCTION

Since the 1970s, American antitrust jurisprudence has focused on maximizing economic efficiency and, more specifically, maximizing consumer welfare.[1] Efforts to broaden the scope of antitrust law to include social and/or political goals such as equality have generally been dismissed as misguided, on the assumption that using antitrust law to pursue such "noneconomic" goals requires sacrificing economic efficiency[2] to the detriment of consumers and the larger economy. In this Article, I will argue that this is a false assumption, at least when it comes to gender equality. I will show that the consumer welfare standard is an effective and natural vehicle for promoting gender equality, as measured by women's labor market participation. I also show that antitrust law and constitutional sex equality doctrine reinforce each other and that Fourteenth Amendment equality values demand rigorous antitrust enforcement.[3]

A half century has passed since the Supreme Court repudiated state action that directs women to the role of unpaid caregiver in the family and home while preserving the breadwinner role for men.[4] Despite this, women still face significant challenges when it comes to accessing the labor market on equal terms with men.[5] Of the many reasons for this, two stand out. First, although constitutional sex equality jurisprudence calls for a world without prescribed gender roles in the private-family and public-economic spheres, those gender roles retain considerable force in practice.[6] Working mothers still routinely shoulder a disproportionate share of the family and caregiving work of the home, making

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1 *See, e.g.*, Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 1 (1982) ("The view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.").

2 *See*, *e.g.*, Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967) (arguing that "the introduction of goals other than consumer welfare into antitrust is destructive of antitrust as law").

3 Scholars have previously argued that First Amendment values demand antitrust enforcement. *See, e.g.*, Barak Richman, *Religious Freedom Through Market Freedom: The Sherman Act and the Marketplace for Religion*, 60 WM. & MARY L. REV. 1523, 1525 (2019). To my knowledge, however, I am the first to show the link between antitrust and Fourteenth Amendment sex equality doctrine.

4 *See* Stanton v. Stanton, 421 U.S. 7, 15 (1975).

5 *See infra* Part I.

6 *See, e.g.*, Julie Suk, *Gender Inequality and the Infrastructure of Social Reproduction*, LAW & POL. ECON. PROJECT: LPE BLOG (Apr. 16, 2018), https://lpeproject.org/blog/gender-inequality-and-the-infrastructure-of-social-reproduction/ [https://perma.cc/BT97-NHJ6].

it difficult for women to perform as ideal workers and exacerbating stereotypes that paint motherhood as incompatible with market work.[7] Second, women face certain health challenges that men do not—pregnancy, childbirth, and the recovery from childbirth being the most salient—which can make it harder to participate in paid work, particularly in institutions designed around male bodies.[8]

While antitrust law has not traditionally been viewed as a tool for ameliorating gender inequality,[9] this is a significant oversight. A deep and diverse literature makes clear that one of the ways in which women overcome gendered barriers to market work is to rely upon consumer markets that support their labor force participation.[10] That is, certain consumer markets are complementary to women's labor force participation because women use the products and/or services produced to overcome gender-based barriers impeding their full access to the labor market.[11] Two broad sets of markets are particularly important: first, those that allow for the outsourcing of home production tasks that typically fall to women; and second, those that supply products and services that allow for greater control over or reduce the burdens of biological reproduction. Key examples of the former include childcare services, infant formula, and labor-saving household technologies; key examples of the latter include maternity care, contraception, and abortion care.[12] Numerous studies show that when more women and their families can afford these products and services, more women are able to participate in the labor market—and for longer periods and at higher pay.[13]

Unfortunately for female consumers, however, many of the key markets upon which they rely to support their labor force participation are in poor health.[14] Both the childcare and maternity care markets, for example, are characterized by high prices and low output—

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7 *See, e.g.*, *id.*

8 In this Article, I use the term "women" while recognizing that the capacity for pregnancy is not exclusive to women; this group also includes some men and nonbinary people.

9 *See infra* Part II.A.

10 *See infra* Part II.

11 *See infra* Part II.B.

12 *See infra* Part II.B.

13 *See infra* Part II.

14 *See infra* Part II.C.

indeed, a great many American consumers live in childcare and maternity-care "deserts."[15] The infant-formula market, for instance, is characterized by excessive concentration, making it susceptible to supply-chain disruptions.[16] Meanwhile, certain hospital mergers pose a serious threat to the provision of reproductive services like abortion care, contraception, and in vitro fertilization.[17] The markets for abortion care and contraception are also characterized by excessive and punitive regulations aimed at eliminating those markets entirely.[18]

Antitrust enforcers at the federal and state levels should be deeply concerned by these market troubles.[19] Not only is there clear evidence that consumers are being harmed,[20] but these market inefficiencies also undermine women's ability to participate in the labor market and, more broadly, undermine gender equality.[21] While the state may not pass legislation aiming to push women away from market work and towards the home,[22] the

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15 *See* Rachel Treisman, *Millions of Americans Are Losing Access to Maternal Care. Here's What Can Be Done*, NPR (Oct. 12, 2022), https://www.npr.org/2022/10/12/1128335563/maternity-care-deserts-march-of-dimes-report [https://perma.cc/C9MC-WQ23] (reporting that 36% of counties nationwide constitute maternity-care deserts, meaning they have no obstetric hospitals or birth centers and no obstetric providers); RASHEED MALIK ET AL., CTR. FOR AM. PROGRESS, AMERICA'S CHILDCARE DESERTS IN 2018 (2018), https://www.americanprogress.org/article/americas-child-care-deserts-2018/ [https://perma.cc/LE8K-K6S8] (showing that approximately half of the country has too few licensed childcare options).

16 *See* LINA M. KHAN ET AL., FED. TRADE COMM'N, MARKET FACTORS RELEVANT TO INFANT FORMULA SUPPLY DISRUPTIONS (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/infant-formula-report.pdf [https://perma.cc/AJD5-E6H5].

17 *See* Caitlin Durand, *Who Blesses This Merger? Antitrust's Role in Maintaining Access to Reproductive Health Care in the Wake of Catholic Hospital Mergers*, 61 B.C. L. REV. 2595, 2601–23 (2020) (examining the impact of Catholic hospital mergers on access to reproductive healthcare in the United States).

18 *See infra* Part II.

19 In the United States, antitrust enforcement takes place at the federal, state, and individual levels. 15 U.S.C. §§ 4, 15, 15c. In this Article, the term "antitrust enforcers" refers to both federal and state authorities possessing the ability to challenge anticompetitive conduct under state and/or federal law. Although individual suits brought by consumers and firms also play an important role in protecting market competition, this Article primarily directs its focus at antitrust enforcers. Future work should dig more deeply into how advocacy organizations and grassroots organizers can incorporate an antitrust approach to sex equality into their larger strategic initiatives.

20 *See infra* Part II.C.

21 *See infra* Parts II–IV.

22 The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits laws that steer men and women into traditional gender roles. *See* Stanton v. Stanton, 421 U.S. 7, 15 (1975)

same outcome may result if families are unable to find affordable childcare or purchase the necessary labor-saving household technologies that many families rely on.[23] Similarly, while the state cannot tell women they should choose motherhood over career,[24] women's ability to structure their family and career goals may be impeded if they are unable to purchase key healthcare services.[25] In other words, market-based frictions can push women into the home just as easily as discriminatory state action.[26]

Yet while constitutional protections cannot ward against such market-based frictions, antitrust law, with its focus on promoting low prices and high output, can. Put simply, because women rely on certain consumer markets to support their labor force participation, protecting and promoting competition in these markets will not only result in greater consumer welfare (because more women are able to purchase the necessary products and services when they are competitively priced and abundant) but also greater gender equality in the labor market (because more women will be able to use these products and services to support their labor force participation).[27]

Given this, I argue that antitrust enforcers should adopt what I term an "Antitrust Approach to Sex Equality." An Antitrust Approach to Sex Equality acknowledges the link between certain consumer markets and women's labor force participation and accordingly prioritizes the competitive functioning of those markets. It calls not only for active antitrust enforcement in the markets key to women's labor force participation but also for full-throated competition advocacy on behalf of women consumers and workers—advocacy that targets legislators and the public alike. In doing so, an Antitrust Approach to Sex Equality not only seeks to safeguard the competitive functioning of these markets but also to promote a more optimal allocation of talent within the nation by reducing the gendered labor market frictions that push women out of the workforce. Put differently, an Antitrust Approach to Sex Equality allows enforcers to pursue efficiency and equality simultaneously.

("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . .").

23 *See infra* Part II.B.

24 *Id.*

25 *Id.*

26 *See infra* Parts II.B–II.C, IV.

27 *See* discussion *infra* Part II.B (detailing how certain consumer products and services are complementary to women's labor force participation).

Importantly, by developing an Antitrust Approach to Sex Equality, this Article provides advocates for gender equality with another tool to add to their toolbox. While other areas of law, such as Title VII's prohibition of sex discrimination in the workplace, can advance gender equality more directly,[28] it is nonetheless imperative that society use every tool at its disposal to promote a more equal society. And although some feminist scholars have critiqued market-based approaches to gender equality as a cooptation of feminist ideas,[29] we should strive to ensure that the fruits of market competition flow to all citizens, male and female alike. An Antitrust Approach to Sex Equality therefore contributes to the fight for greater gender equality by identifying anticompetitive market frictions with gendered effects as particularly worthy targets of antitrust enforcement.

This Article is organized as follows. In Part I, I provide a stylized overview of the history of women's labor force participation in the United States, showing that while much progress has been made, more work remains to be done. In Part II, I show why antitrust law—and in particular, the consumer welfare paradigm—is a natural vehicle for promoting greater gender equality. Part II.A provides a brief overview of the long-running debate concerning the "legitimate" goals of antitrust law and the common assumption that pursuing equity goals requires sacrificing economic efficiency goals. Part II.B shows why there is no tradeoff between the pursuit of efficiency and equity when it comes to promoting women's labor force participation. Because women rely upon certain key consumer markets to overcome gendered barriers to the labor market, antitrust enforcers can focus on promoting consumer welfare in these markets while knowing they will also achieve positive—and equality-promoting—spillover effects in labor markets. Indeed, as Part II.C makes clear, by adopting an Antitrust Approach to Sex Equality, antitrust enforcers can make a real difference in our nation's march towards greater gender equality. Currently, many of the markets women rely upon to support their labor force participation are functioning poorly and overdue for procompetitive interventions.[30] By working to improve the competitive functioning of these markets, antitrust enforcers can reduce the market "frictions" that push women away from the labor market. Part III therefore outlines how enforcers can implement an Antitrust Approach to Sex Equality by engaging in both antitrust enforcement

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28 42 U.S.C. § 2000e-2(a)(1). While Title VII protections directly advance gender equality by prohibiting discriminatory conduct, the antitrust laws can only be used to promote gender equality indirectly (i.e., by harnessing market competition in support of gender equality goals).

29 *See, e.g.*, Maria Stratigaki, *The Cooptation of Gender Concepts in EU Policies: The Case of "Reconciliation of Work and Family"*, 11 SOC. POL. 30, 31 (2004) (arguing that the shift in meanings of gender equality concepts in the context of economic policies represents a cooptation of feminist potential).

30 *See infra* Part II.C.

and competition advocacy. Finally, Part IV concludes by demonstrating the important but (until now) overlooked synergy between antitrust law and the goals of sex equality doctrine.

I. Gendered Barriers to Market Participation

For much of American history, women's ability to pursue market work was severely limited.[31] This was particularly true in the late nineteenth and early twentieth centuries, a time in which the "separate spheres tradition," or a "dyadic structuring of sex roles in which men are expected to perform as breadwinners and women are expected to perform as economically dependent caregivers," dominated American society and thought.[32] Perhaps the most infamous encapsulation of this belief system can be found in Justice Bradley's 1869 concurring opinion in *Bradwell v. Illinois*, the case in which the Supreme Court held that the state of Illinois could prohibit women from practicing law.[33] According to Justice Bradley, the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[34]

Beginning in the 1970s, however, women's rights activists began a litigation campaign challenging laws that reflected a "separate spheres" mentality and seeking to establish

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31 Part I provides a brief and stylized overview of women's labor force participation in the United States. As Alice Kessler-Harris has noted, "[t]he diversity of women's experience as wage workers" in American history has been considerable. ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES ix (1982). To recount it in detail is beyond the goals of this Article. Yet an enduring theme across race and class has been that of women's exclusion.

32 Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 779 (2010). It is important to note that the public spheres tradition is a particular class and racial construct. "Since the era of slavery, the dominant view of Black women has been that they should be workers, a view that contributed to their devaluation as mothers with caregiving needs at home." Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination,* ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 19, 2019), https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/ [https://perma.cc/T9VR-B5TB]. Compared with other women in the United States, Black women have always participated in the labor market at much higher rates, primarily in low-wage agricultural or domestic service positions. *See* KESSLER-HARRIS, *supra* note 31, at viii.

33 Bradwell v. Illinois, 83 U.S. 130, 139 (1873).

34 *Id.* at 142.

a heightened level of constitutional scrutiny for sex-based classifications.[35] Over the course of several key cases,[36] the Supreme Court developed a constitutional jurisprudence that prohibited sex-based distinctions "supported by no more substantial justification than 'archaic and overbroad' generalizations" about men and women's proper roles in society.[37] This constitutional jurisprudence was paralleled by the development of a similar jurisprudence under Title VII, the key federal law prohibiting employment discrimination based on sex,[38] such that in 1989 the Court declared:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[39]

The dismantling of discriminatory laws based on sex-role stereotypes, along with concomitant changes in public attitudes,[40] led to a major weakening of the separate spheres tradition and a dramatic increase in women's labor force participation. Women's total labor force participation rose from 34% in 1950 to 60% in 2000,[41] and, as of 2023, the labor force participation rate for "prime-age" women was 77%, a new high-water mark.[42] Women

35 *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 119–32 (2010) (detailing how Ruth Bader Ginsburg's litigation campaign challenging the constitutionality of sex-based discrimination was animated by an anti-stereotyping theory of sex discrimination).

36 *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding unconstitutional a rule that servicemen but not servicewomen had the automatic right to claim their spouses as dependents); Weinberger v. Wiesenfeld, 420 U.S. 636, 636 (1975) (holding unconstitutional a federal law that provided widows, but not widowers, with social security benefits based on their spouse's past contributions); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (holding unconstitutional a rule automatically awarding survivors' benefits to women but not to men).

37 *Califano*, 430 U.S. at 206–07.

38 42 U.S.C. § 2000e-2 (a)(1) (prohibiting employer discrimination based on sex).

39 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

40 *See* Kelsey D. Meagher & Xiaoling Shu, *Trends in U.S. Gender Attitudes, 1977 to 2018: Gender and Educational Disparities*, 5 SOCIUS 1, 2 (2019) (showing how attitudes about gender equality and women's role in society have transformed over four decades).

41 Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, 125 MONTHLY LAB. REV. 15, 15 (2002), https://www.bls.gov/opub/mlr/2002/05/art2full.pdf [https://perma.cc/MFS5-W6WM].

42 BETH ALMEIDA & ISABELA SALAS-BETSCH, CTR. FOR AM. PROGRESS, FACT SHEET: STATE OF WOMEN IN THE LABOR MARKET IN 2023 (2023), https://www.americanprogress.org/article/fact-sheet-the-state-of-women-in-

also made important strides in high-skilled professions. For instance, while women only accounted for 7.1% of physicians in 1970,[43] they now account for 37%.[44] Similarly, while women accounted for only 3% of lawyers between 1950 and 1970, that number rose to 38% in 2022.[45] And in both professions, there are more women in the pipeline than ever before: women accounted for 54% of medical students and 55% of law students in 2022.[46]

Yet despite the great strides society has made toward enabling women's participation in the labor market, the fight is far from over. The growth in women's overall labor force participation began slowing in the 1990s and early 2000s before beginning a decline that accelerated in the wake of the 2007–2009 recession—with women's participation hitting a pre-pandemic low of 56.7% in 2015.[47] Moreover, the American workforce is characterized by high levels of occupational segregation; positions that pay higher wages—such as physicians, lawyers, architects, and financial analysts—are disproportionately filled by white men, while lower-paid positions—such as fast food workers, childcare workers, and

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the-labor-market-in-2023/ [https://perma.cc/6HLL-ENJH] [hereinafter *Fact Sheet*]; s*ee also* U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK (2022), https://www.bls.gov/opub/reports/womens-databook/2021/home.htm [https://perma.cc/F9ZS-ZEHH] [hereinafter *Labor Databook*].

43 Phillip R. Kletke et al., *The Growing Proportion of Female Physicians: Implications for US Physician Supply*, 80 AM. J. PUB. HEALTH 300, 300 (1990).

44 Hailey Mensik, *Women Making Up More of Physician Workforce*, HEALTHCAREDIVE (Jan. 18, 2023), https://www.healthcaredive.com/news/AAMC-us-physician-workforce-women-specialties/640621/ [https://perma.cc/T5DL-TQHD]; Linda Searing, *The Big Number: Women Now Outnumber Men in Medical Schools*, WASH. POST (Dec. 23, 2019), https://www.washingtonpost.com/health/the-big-number-women-now-outnumber-men-in-medical-schools/2019/12/20/8b9eddea-2277-11ea-bed5-880264cc91a9_story.html [https://perma.cc/VWP4-5S22] (noting that women account for 60% of doctors under thirty-five); *see also* Patrick Boyle, *Nation's Physician Workforce Evolves: More Women, a Bit Older, and Toward Different Specialties*, AM. ASS'N OF MED. COLLS., (Feb. 2, 2021), https://www.aamc.org/news-insights/nation-s-physician-workforce-evolves-more-women-bit-older-and-toward-different-specialties [https://perma.cc/WC6D-WRAD].

45 Jaline S. Fenwick, *See Her, Hear Her: The Historical Evolution of Women in Law and Advocacy for the Path Ahead*, A.B.A., (Nov. 15, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/see-her-hear-her-historical-evolution-women-in-law/?login [https://perma.cc/7H48-UUV3].

46 Press Release, Am. Ass'n of Med. Colls., Diversity Increases at Medical Schools in 2022 (Dec. 13, 2022), https://www.aamc.org/news-insights/press-releases/diversity-increases-medical-schools-2022 [https://perma.cc/6TEN-6MH5]; *Law School Rankings by Female Enrollment* (2022), ENJURIS, https://www.enjuris.com/students/law-school-women-enrollment-2022 [https://perma.cc/JM6B-VJQ8].

47 *Labor Databook*, *supra* note 42.

cashiers—are disproportionately filled by women, particularly women of color.[48] And even though the gender wage gap has narrowed over time, male workers continue to outearn female workers in every age group, and studies show that while women's earnings plateau midcareer, men's continue to climb.[49]

Even these encouraging statistics regarding women's representation in law and medicine require an important caveat: although increasing numbers of young women set high career goals for themselves, far fewer find themselves able to reach the highest rungs of their chosen field. For instance, although entering law firm associate classes have been comprised of approximately 45% women for several decades now,[50] women are still severely underrepresented as one moves up the law firm ladder.[51] Only about 22% of equity partners and 32% of non-equity partners were women in 2022, and they constituted only 12% of managing partners, 28% of governing committee members, and 27% of practice group leaders.[52] Moreover, only *2%* of law firms in 2022 said their highest-paid attorney is female.[53] Nor is this leaky pipeline unique to law. It exists across a wide range of fields and professions, including business, the sciences, and medicine.[54] Thus, while the doors of the

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48 *See* MARINA ZHAVORONKOVA ET AL., CTR. FOR AM. PROGRESS, OCCUPATIONAL SEGREGATION IN AMERICA (2022), https://www.americanprogress.org/article/occupational-segregation-in-america/ [https://perma.cc/K8QJ-QWAM].

49 *See Fact Sheet*, *supra* note 42.

50 A.B.A., FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2011 1–2, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf [https://perma.cc/9CG6-BMYH].

51 *See* ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 17 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf [https://perma.cc/VU2Q-RLCF].

52 A.B.A., ABA PROFILE OF THE LEGAL PROFESSION 2022 62 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/MMV3-S9AU].

53 *Id.*

54 *See generally* MARC GOULDEN ET AL., STAYING COMPETITIVE: PATCHING AMERICA'S LEAKY PIPELINE IN THE SCIENCES 1 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women_and_sciences.pdf [https://perma.cc/EPC4-T3VK]; Jacob Clark Blickenstaff, *Women and Science Careers: Leaky Pipeline or Gender Filter?*, 17 GENDER & EDUC. 369 (2005); Souha R. Ezzedeen et al., *The Glass Ceiling and Executive Careers: Still an Issue for Pre-Career Women*, 42 J. CAREER DEV. 355 (2015); S.M. van Anders, *Why the Academic Pipeline Leaks: Fewer Men than Women Perceive Barriers to Becoming Professors*, 51 SEX ROLES 512 (2004).

workplace have been thrown open to women, and while many have entered,[55] there is still considerable work to do.

II. Theorizing the Gender-Antitrust Link

When most people think about the various tools available for promoting gender equality, antitrust does not generally make the cut. In fact, many have argued that antitrust has absolutely nothing to say about social or political values and is instead solely focused on promoting economic efficiency.[56] Yet, this is a false dichotomy. Once one recognizes the link between certain consumer markets and women's ability to participate in the labor force, it becomes clear that antitrust enforcers[57] can pursue efficiency and equity simultaneously.

Part II.A first provides a brief overview of the long-running debate regarding the proper goals of antitrust law. Although many have argued that antitrust law cannot be used to promote social goals without sacrificing its focus on economic efficiency,[58] this is not true. Part II.B delineates a novel theoretical framework that connects the competitive functioning of key consumer markets to women's ability to participate in the labor market. Because women rely upon certain consumer markets to support their labor force participation,[59] the prioritization of consumer welfare in those markets creates positive—and equality-promoting—spillover effects in the labor market. Part II.C shows that many of the key markets women rely upon to support their labor market participation are in dire straits, thereby presenting an opportunity for antitrust enforcers to make a real difference in our nation's quest for greater gender equality.

A. Antitrust's (Contested) Goals

Our nation's antitrust laws make it illegal for individuals and businesses to act in ways that harm competition. At the federal level, the primary antitrust statutes are the Sherman

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55 *See* Megan Brenan, *Record-High 56% of U.S. Women Prefer Working to Homemaking*, GALLUP (Oct. 24, 2019), https://news.gallup.com/poll/267737/record-high-women-prefer-working-homemaking.aspx [https://perma.cc/5K5B-J3BN].

56 *See* discussion *infra* Part II.A.

57 Although I approach this Article from an enforcement perspective, private plaintiffs can play an equally important role.

58 *See* discussion *infra* Part II.A.

59 *See* discussion *infra* Part II.B.

Act (1890), the Clayton Act (1914), and the Federal Trade Commission (FTC) Act (1914). The Sherman Act prohibits restraints of trade[60] and attempts to monopolize,[61] while Sections 2[62] and 3[63] of the Clayton Act prohibit price discrimination, tying, or exclusive dealing arrangements that substantially lessen competition or create a monopoly. Section 7 of the Clayton Act prohibits mergers or other combinations that could reasonably be expected to reduce competition or create a monopoly.[64] The FTC Act, in turn, prohibits unfair methods of competition[65] and also authorizes the Commission to conduct studies that allow enforcers to gain a deeper understanding of market trends and businesses' practices.[66] In addition, every state (and the District of Columbia) has some kind of antitrust law,[67] which generally allows state attorneys to file civil or criminal suits and permits private suits for damages and injunctions.[68] State attorneys general can also file federal antitrust suits because their states and their political subdivisions are "persons" for those purposes.[69]

Although it is widely accepted that the antitrust laws are meant to protect and encourage competition,[70] the intellectual history of antitrust law is characterized by a fierce debate over whether antitrust law can also be used to promote other important social goals. [71] On the one hand are those who adhere to the Chicago School of Law and Economics,

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60 15 U.S.C. § 1.

61 *Id.* § 2.

62 *Id.* § 13.

63 *Id.* § 14.

64 *Id.* § 18.

65 15 U.S.C. § 45(a).

66 *Id.* § 45(b).

67 State statutes are reprinted in 6 TRADE REG. REP. (CCH) ¶¶ 30,201.03–35,585 (2016).

68 *See* A.B.A. SECTION OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 812–13 (5th ed. 2002).

69 *See* Georgia v. Pa. R.R., 324 U.S. 439, 447 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act …"); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) ("The city was a person [and] was [i]njured in its property … by being led to pay more than the worth of the pipe.").

70 Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013).

71 *See, e.g.*, Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency*, *What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977) ("Whether antitrust policy promotes, or should promote, social goals other than efficiency and competitive markets . . . lies at the root of so much controversy in antitrust.").

which emphasizes microeconomics, efficiency, and the "consumer welfare standard."[72] This is the dominant paradigm in American antitrust law today,[73] ascending, at least in part, due to the intellectual works of Robert Bork, who argued that "the introduction of goals other than consumer welfare into antitrust is destructive of antitrust as law."[74] Thus, under a consumer welfare standard, antitrust policy is singularly focused on "encourag[ing] markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."[75] The "distribution of . . . wealth or the accomplishment of noneconomic goals," in contrast, "are [viewed as] the proper subject of *other* laws and not within the competence of judges deciding antitrust cases."[76]

Others, however, have argued that the antitrust umbrella is large enough to encompass both economic and social/political goals. Robert Pitofsky, while acknowledging the important role of economics in antitrust, has argued that it is "bad history, bad policy, and bad law" to completely exclude certain political values from the interpretation of antitrust law.[77] Doing so might result, among other things, in an "economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."[78] More recently, others have argued that making any one economic value the singular lodestar of antitrust is problematic and that antitrust should instead "be [about the] promotion and protection of a system that provides the society's best mixture of

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72 *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 215 (1985).

73 *See* Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1020 (1986) (noting that "[n]o one, including myself, can escape [the Chicago School's] influence on antitrust analysis").

74 Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978) ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.") [hereinafter BORK, PARADOX].

75 Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 102 (2019). Although antitrust law also ostensibly cares about the promotion of higher quality products, it often relegates quality and nonprice considerations to a secondary position. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST BULL. 83 (1993); E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. PITT. L. REV. 771 (1984); Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545 (2002).

76 BORK, PARADOX *supra* note 74, at 427 (emphasis added).

77 Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

78 *Id.*

competition and cooperation, given its culture, history, technology, and political situation at a given period of time."[79] Still other scholars, particularly Eleanor Fox, have argued that fairness goals can be desirable in an antitrust framework and that, indeed, "some goals are more important than efficiency."[80]

Notably, those who argue that antitrust has nothing to say about political or social goals often assume that any attempt to integrate noneconomic considerations into antitrust law would lead to legal chaos. Judge Richard Posner, for instance, suggested that if courts were to rely on noneconomic considerations, "they would be completely at sea and might also shipwreck the economy," whereas a focus on economic efficiency enables judges to develop antitrust rules that are "reasonably objective."[81] Similarly, Judge Frank Easterbrook argued that "Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income . . . [but] judges have no metric, and we ought not attribute to Congress a decision to grant judges a political power that lacks any semblance of 'legal' criteria."[82]

In other words, because a focus on consumer welfare and "objective economic criteria" is seen as fundamentally orthogonal to the pursuit of any social goals, it is assumed that accounting for social goals must necessarily require the alteration (or adulteration) of the consumer welfare standard. But this assumption only holds true if one accepts the premise that economic efficiency is not an inherently suitable vehicle for pursuing (at least some) social goals. And, as Section II.B. discusses, this is very much a faulty premise.

B. Complementary Consumer Markets and Women's Labor Force Participation

Antitrust law does not have to choose between promoting economic welfare and promoting gender equality.[83] In fact, an antitrust regime premised on maximizing consumer

79 ALBERT A. FOER, *The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S.*, *in* HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 494, 495 (Phillip Marsden ed., 2007).

80 Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT'L L.J. 579, 593 (2000).

81 Richard A. Posner, *Legal Formalism, Legal Realism, and Interpretations of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 211 (1987).

82 Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1704 (1986).

83 It should be noted that the European and Canadian antitrust communities began exploring the intersection of antitrust and gender several years ago. In 2018, the Organization for Economic Co-operation and Development

welfare is eminently suited to promoting greater gender equality in our nation,[84] particularly if we operationalize "gender equality" in terms of women's ability to participate in the labor market (i.e., the public sphere).[85] To see why this is so requires recognizing (1) the link between competition in consumer markets and competition in labor markets and (2) the important ways in which women in particular rely upon consumer markets to overcome the social and biological barriers to their labor force participation.

First, we must step back from a myopic focus on consumer markets, standing alone, and think more broadly about the linkages between competition in consumer markets and competition in labor markets.[86] That the fortunes of labor rise with those of product markets

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(OECD) hosted a global forum examining the intersection of gender and competition and considered whether a gender lens might help deliver a more objective competition policy by identifying additional relevant features of the market, including gender differences in consumer and firm behavior. *See* Org. for Econ. Coop. & Dev. [OECD], *Gender and Competition Executive Summary* (Aug. 11, 2020), https://one.oecd.org/document/DAF/COMP/GF(2018)19/en/pdf [https://perma.cc/7KYN-ZTY8] (detailing key findings from the Global Forum in 2018). Two years later, with support from the Canadian government, the OECD launched the Gender Inclusive Competition Policy Project, which focuses on developing new evidence to guide a gender-conscious antitrust policy. *See* Org. for Econ. Coop. & Dev., *Gender Inclusive Competition Policy and the OECD Gender Toolkit* (Sept. 2, 2023), https://www.oecd.org/competition/gender-inclusive-competition-policy.htm [https://perma.cc/TQU6-8DLA].

84 In the past few years, the topic of labor market competition has gained increasing salience in antitrust circles. At the heart of this movement is the belief that many American workers are being harmed by the anticompetitive machinations of their employers and that vigorous antitrust enforcement in labor markets is imperative. Eric Posner, for instance, has argued that labor monopsony—a situation that occurs when a lack of competition in the labor market enables employers to suppress the wages of their workers—is a major driver of economic inequality. *See* ERIC POSNER, HOW ANTITRUST FAILED WORKERS 3, 13 (2019). Similarly, Ioana Marinescu and Herbert Hovenkamp have argued that the antitrust law against anticompetitive mergers affecting employment markets is underenforced, possibly by a significant amount, and that this has likely contributed to the decline in the labor share of gross domestic product (GDP), as well as the unlawful suppression of wages. *See* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032 (2019). But this new focus on labor markets has focused on how anticompetitive harms originating *within* labor markets harm workers. I focus on how anticompetitive conduct and market inefficiencies in *consumer* markets impact workers.

85 Although labor force participation is by no means the only relevant measure of gender equality, it is a natural measure to consider within the context of antitrust law and its focus on market competition.

86 In this Article, I focus on the ways in which anticompetitive behavior in consumer markets impacts the competitive functioning of labor markets. However, the relationship most certainly works in both directions. Consider, for instance, recent reporting finding that Catholic healthcare systems often impose clauses in their employment contracts that prohibit doctors from working at clinics providing abortion care. Under the right facts (e.g., the Catholic hospital has scooped most of the local providers), restrictive employment clauses can prevent local abortion clinics from securing sufficient numbers of staff. This leads to consumer harm if the

is not a novel idea.[87] As others have noted, the demand for labor is strongly linked to product market activity.[88] Anticompetitive behaviors by producers that result in less output can mean not only higher prices but also fewer jobs in those sectors.[89] Far less attention, however, has been paid to the ways in which anticompetitive behavior in product markets *complementary* to individuals' labor force participation harms workers.[90] A complementary product market produces products or services that help to lower the costs of participating in the labor market in one way or another. If certain consumer markets produce products and services that make it easier (or possible) for an individual to participate in the labor market, an increase in price or a decrease in output does not just mean that some consumers are not able to purchase the product; it also means that they can no longer use that product to support their labor force participation. Anticompetitive behavior in key product markets can therefore act as a labor market "friction" that impedes labor force participation.[91] And the workers impacted by such frictions will not be limited to those who happen to work for the producers of a particular product but will instead be found throughout the national economy, across industries.

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clinics are therefore forced to reduce output or shut down. *See* Mara Gordon, *For Doctors Who Want to Provide Abortions, Employment Contracts Tie Their Hands*, NPR (Nov. 26, 2018), https://www.npr.org/sections/health-shots/2018/11/26/668347657/for-doctors-who-want-to-provide-abortions-employment-contracts-often-tie-their-h [https://perma.cc/27TH-M2AQ].

87 *See, e.g.*, Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 521 (2023).

88 *See, e.g.*, *id.*

89 *See id.*

90 Estefania Santacreu-Vasut and Chris Pike have previously argued that procompetitive interventions in markets producing products and services that are complementary to women's labor force participation—specifically, financial markets, infrastructure markets, and markets supplying substitutes for services traditionally provided by women in the home—can help reduce gender inequality. *See* Estefania Santacreu-Vasut & Chris Pike, *Competition Policy and Gender*, LAW & ECON. 1, 2 (2019). While I agree that financial markets and infrastructure markets produce products and services that are complementary to labor force participation, it is not clear that anticompetitive behavior in such markets falls disproportionately upon women, at least in the present-day United States. Santacreu-Vasut and Pike point to sex-based legal restrictions concerning property rights or inheritance rules, restrictions that are now prohibited in the United States. *See id.* Moreover, Santacreu-Vasut and Pike make no mention of the markets providing reproductive healthcare services, markets that are undeniably complementary to women's labor force participation. *See id.*

91 Economists have recognized that certain market-based barriers (i.e., frictions) can impede efficient labor market functioning. *See generally* Stanislav Rabinovich & Ronald Wolthoff, *Misallocation Inefficiency in Partially Directed Search*, 206 J. ECON. THEORY 1 (2022) (finding that market frictions harm workers' abilities to find the right jobs). But as of yet there is little recognition that anticompetitive behavior in product markets can act as a labor market friction.

Next, we must recognize that there are gendered dimensions to this consumer-labor market linkage. Although the Supreme Court's sex equality decisions have had a powerful impact on society,[92] they only speak to state actions. Certain social and biological forces continue to push women towards the home and away from market work. First, gender-based stereotypes about women's proper role as mothers first and workers second, along with the uneven distribution of caregiving burdens, make it particularly challenging for working mothers to balance family and paid work.[93] Second, while the workplace doors have been thrown open to women, workplace institutions (and legislatures) have been slow to account for the different bodily experiences of men and women.[94] And while legislative protections and state-sponsored support are one important way in which society can ameliorate such gendered barriers,[95] market-based solutions also have an important role to play. Indeed, a deep and diverse literature has shown that one of the key ways in which women overcome gendered barriers to market work is to rely upon certain products and services that reduce the costs of participating in the labor market.[96] These products and services can be organized into two broad groupings: those that allow for the outsourcing of home production tasks that typically fall to women and those that supply products and services that allow for greater control over, and which either reduce or eliminate, the burdens of biological reproduction.[97] The following Sections draw upon economic, sociological, and feminist literatures to demonstrate the important role the markets for these products play in supporting women's labor force participation.

1. Markets Supporting Home Production

The first set of markets that disproportionately impact women's labor force participation are those that allow for the outsourcing of the home production tasks that have traditionally

92 *See* discussion *supra* Part I.

93 *See* Suk, *supra* note 6.

94 For instance, the United States continues to remain an outlier by failing to provide paid maternity leave to mothers. *See* MOLLY WESTON WILLIAMSON, CTR. FOR AM. PROGRESS, THE STATE OF PAID FAMILY AND MEDICAL LEAVE IN THE U.S. IN 2023 (2023), https://www.americanprogress.org/article/the-state-of-unpaid-family-and-medical-leave-in-the-u-s-in-2023/ [https://perma.cc/B7HN-LCZJ].

95 For example, I have previously advocated for parental leave for federal law clerks, noting that failing to provide such leave fosters gender inequality in the legal profession. *See* Bailey Sanders, *On the Basis of Childbirth: How the Federal Clerkship's Lack of Parental Leave Fosters Gender Inequality,* 30 UCLA J. GENDER & L. 1, 15 (2023).

96 *See* discussion *infra* Parts II.A–II.B.

97 *See* discussion *infra* Parts II.A–II.B.

been viewed as women's responsibilities: the care and raising of children, cooking and cleaning, and the care of the elderly, disabled, or sick.[98] Although feminists had hoped that women's mass entrance into the paid labor market over the second half of the twentieth century would be balanced by a similar entrance of men into the unpaid labor market of household production, this has not been the case. Women in the United States—and other developed countries—continue to bear the lion's share of caregiving and household work.[99] This has been referred to as the "stalled,"[100] "incomplete,"[101] "unfinished,"[102] and "uneven"[103] revolution in women's roles.[104] Because society continues to view the caregiving and household management tasks of the home sphere as primarily women's responsibilities,[105] many working women face what Arlie Hochschild termed the "second shift"—several hours of household and childcare duties following a day's work outside the home, hours that exceed those expended by their husbands.[106] This is true even among couples that profess egalitarian attitudes towards the division of household and caregiving

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98 Research has consistently shown that women do the lion's share of unpaid labor in the home. *See, e.g.*, Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1209 (2000).

99 *See, e.g.*, Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of the Household Labor*, 79 SOC. FORCES 191, 206–07 (2000); Suzanne M. Bianchi et al., *Housework: Who Did, Does, or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 57 (2012); Mylène Lachance-Grzela & Geneviève Bouchard, *Why Do Women Do the Lion's Share of Housework? A Decade of Research*, 63 SEX ROLES 767, 768 (2010); Sara Moreno-Colom, *The Gendered Division of Housework Time: Analysis of Time Use by Type and Daily Frequency of Household Tasks*, 26 TIME & SOC'Y 4, 5 (2017).

100 ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME xv (1989).

101 GØSTA ESPING-ANDERSEN, THE INCOMPLETE REVOLUTION: ADAPTING TO WOMEN'S NEW ROLES 50 (2009).

102 KATHLEEN GERSON, THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY 214 (2010).

103 Paula England, *The Gender Revolution: Uneven and Stalled*, 24 GENDER & SOC'Y 149, 149 (2010).

104 This is not necessarily true for women in same-sex relationships. *See* Gerrit Bauer, *Gender Roles, Comparative Advantages and the Life Course: The Division of Labor in Same-Sex and Different-Sex Couples*, 32 EUR. J. POPULATION 99, 107 (2016).

105 *See, e.g.*, Maria Godoy, *Out of the Binder, Into the Kitchen: Working Women and Cooking*, NPR (Oct. 18, 2012) https://www.npr.org/sections/thesalt/2012/10/17/163091281/out-of-the-binder-into-the-kitchen-working-women-andcooking [https://perma.cc/4XRP-3BE4].

106 HOCHSCHILD, *supra* note 100, at 3–4.

duties[107] and in couples where the wife is in a particularly time-consuming and intense profession like law or business.[108] And this gender gap only widens after couples establish a family, as the enormous labor costs involved in raising a child generally fall more heavily upon the woman's shoulders.[109]

Not surprisingly, maintaining a full-time job while also carrying the majority of the household and caregiving load makes it difficult for women to pursue both work and family. This uneven distribution of labor can lead women to decrease their working hours,[110]

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107 As one female professional explained: "Most of my friends at work have very, I think, equal marriages and the husband takes his responsibility for the kids as seriously and doesn't think it's the woman's job. Yet in the end, it's always the woman who bears the burden." MARY BLAIR LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 68 (2005). Another female professional noted: "It's up to me to find someone to replace the cleaning lady, to hire the babysitters when it's the nanny's night off. I make the doctor and dentist appointments. I fill out the school forms. I check for homework in the stuff they bring home . . . I do all the letter writing and present sending to my family and to [my husband's] family." *Id.* at 69.

108 Sylvia Hewlett, for instance, found that 55% of high-achieving women assume primary responsibility for meal preparation, while only 9% of their husbands/partners take primary responsibility for this task. SYLVIA ANN HEWLETT, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN 106 (2002). Similarly, 56% of women reported taking primary responsibility for laundry, compared to only 10% of men. *Id.*

109 *See, e.g.*, Lucia Ciciolla & Suniya S. Luthar, *Invisible Household Labor and Ramifications for Adjustment: Mothers as Captains of Households*, 81 SEX ROLES 467, 469, 480 (2019) (finding that there were several "invisible" aspects of household management for which mothers felt disproportionately solely responsible); Shira Offer & Barbara Schneider, *Revisiting the Gender Gap in Time-Use Patterns: Multitasking and Well-Being Among Mothers and Fathers in Dual-Earner Families*, 76 AM. SOCIO. REV. 809, 821 (2011) (finding that mothers spend an average of ten more hours multitasking household tasks compared to fathers); Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 708–09 (1999) (finding that the birth of a first child substantially increased women's housework hours but had no effect on men's hours).

110 *See* Sébastien Fontenay et al., *Child Penalties Across Industries: Why Job Characteristics Matter*, 30 APPLIED ECON. LETTERS 488, 490 (2023) (finding mothers tend to reduce their work hours following motherhood).

downgrade their career aspirations,[111] engage in occupational sorting,[112] or withdraw from the workforce altogether in order to manage the work-family conflict.[113]

Previous literature has suggested three main mechanisms for improving the work-family conflict for women: (1) encouraging men's greater contribution to domestic labor in the home,[114] (2) updating workplace institutions to account for women's experiences and needs,[115] and (3) increasing the ability of families to outsource their domestic labor.[116] My focus here is on the third mechanism and the studies demonstrating a positive relationship between women's ability to outsource domestic and care work and their overall labor participation.[117]

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111 *See* Brooke Conroy Bass, *Preparing for Parenthood? Gender, Aspiration, and the Reproduction of Labor Market Inequality*, 29 GENDER & SOC'Y 362, 363 (2015) (finding that women are more likely to alter or downshift their present-day career goals in anticipation of the changes and preferences that accompany new parenthood).

112 *See* Jennifer L. Hook & Beck Pettit, *Reproducing Occupational Inequality: Motherhood and Occupational Segregation*, 23 SOC. POL. 329, 331 (2016) (finding that motherhood is associated with occupational segregation among women).

113 For instance, a recent American Bar Association survey found that caretaking commitments were the number one reason why experienced female lawyers said they left their law firm. *See* LIEBENBERG & SCHARF, *supra* note 51, at 58.

114 *See* Peter McDonald, *Gender Equity in Theories of Fertility Transition*, 26 POPULATION & DEV. REV. 427, 436–37 (2000); Berna Miller Torr & Susan E. Short, *Second Births and the Second Shift: A Research Note on Gender Equity and Fertility*, 30 POPULATION & DEV. REV. 109, 123 (2004); Lynn Prince Cooke, *Gender Equity and Fertility in Italy and Spain,* 38 J. SOC. POL'Y 123, 136–37 (2008).

115 *See* Karin L. Brewster & Ronald R. Rindfuss, *Fertility and Women's Employment in Industrialized Nations*, 27 ANN. REV. SOCIO. 271, 291 (2000); Henriette Engelhardt & Alexia Prskawetz, *On the Changing Correlation Between Fertility and Female Employment Over Space and Time*, 20 EUR. J. POPULATION 35, 42 (2004).

116 *See* Tanja Van der Lippe et al., *Outsourcing of Domestic Tasks and Time-Saving Effects*, 25 J. FAM. ISSUES 216, 217 (2004); Esther de Ruijter et al., *Outsourcing the Gender Factory: Living Arrangements and Service Expenditures on Female and Male Tasks*, 84 SOC. FORCES 305, 306 (2005); Liat Raz-Yurovich, *A Transaction Cost Approach to Outsourcing by Households*, 40 POPULATION & DEV. REV. 293, 294 (2014); Liat Raz-Yurovich & Ive Marx, *Outsourcing Housework and Highly Skilled Women's Labour Force Participation—An Analysis of a Policy Intervention*, 35 EUR. SOCIO. REV. 205, 206 (2019).

117 Because I am focused on the ways in which antitrust law can promote equality, only mechanism three is relevant for the purposes of this Article. However, the other two mechanisms should, of course, be pursued. For instance, I have argued that the federal clerkship's lack of parental leave enables pregnancy discrimination, restricts women's reproductive choice, and perpetuates gender inequality within the legal profession writ large. *See* Sanders, *supra* note 95.

These studies suggest that a woman's decision and ability to enter into and/or remain in the workforce are often determined by the relative value of market participation versus non-market (home) participation. "The availability and affordability of market substitutes for the services that women produce in the household" can therefore function as a "key incentive" for women's labor market participation because it makes market participation more valuable and worthwhile.[118] For example, studies show that the increasing availability and affordability of household appliances that reduce the costs of household chores—such as refrigerators, vacuum cleaners, washers, dryers, dishwashers, and microwaves—is positively associated with women's labor force participation.[119] Similarly, studies show that access to affordable caregiving and cleaning services is also positively associated with women's labor force participation.[120] Patricia Cortés and Jessica Pan find that the increased supply of affordable and flexible substitutes for household production[121] enables women to close the gender pay gap in occupations that reward overwork, such as business and law,[122] while Liat Raz-Yurovich and Ive Marx find that the introduction of state-subsidized household outsourcing options in Belgium increased women's employment rates, particularly among highly educated women.[123] Similarly, research shows that affordable

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118 Santacreu-Vasut & Pike, *supra* note 90, at 2.

119 *See* Tiago V. de V. Cavalcanti & José Tavares, *Assessing the "Engines of Liberation": Home Appliances and Female Labor Force Participation*, 90 REV. ECON. & STAT. 81, 83 (2008) (finding that a decrease in the price of home appliances led to a significant increase in women's labor force participation); Jeremy Greenwood et al., *Engines of Liberation,* 72 REV. ECON. STUD. 109, 110 (2005) (finding that technological progress in the household sector played a major role in liberating women from the home); Taryn Dinkelman, *The Effects of Rural Electrification on Employment: New Evidence from South Africa*, 7 AM. ECON. REV. 3078, 3080 (2011) (finding that access to electricity services in South Africa had a disproportionate and positive impact on women's labor force participation).

120 Feminist scholars like Dorothy Roberts and Evelyn Nakano Glenn have rightly pointed out that it is problematic that when women outsource their home labor, most often it is another woman (and often a woman of color) who steps in to fill the gap. *See* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 3 (1992); Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 59–62 (1997). This problem, however, is not inherent to the outsourcing of domestic work but instead a function of society's devaluation, gendering, and racialization of care work.

121 Proxied by intercity variation in predicted low-skilled immigration.

122 *See* Patricia Cortés & Jessica Pan, *When Time Binds: Substitutes for Household Production, Returns to Working Long Hours, and the Skilled Gender Wage Gap*, 37 J. LAB. ECON. 351, 385 (2019).

123 *See* Raz-Yurovich & Marx, *supra* note 116, at 205.

daycare options positively impact mothers' labor force participation rates,[124] while Stefania Albanesi and Claudia Olivetti show that the development of safe and effective infant formula, allowing women to outsource at least some amount of infant feeding, played a significant role in the increase in married women's labor force participation in the United States during the twentieth century.[125]

2. Markets Supporting Reproductive Health and Control

The second set of markets that disproportionately impact women's labor force participation are those that supply products or services that allow women greater control over, and which either reduce or eliminate the burdens of, biological reproduction.[126] This group of markets includes, but is not limited to, the markets producing menstruation-related products, contraception, abortion care, fertility care, and prenatal, delivery, and postpartum healthcare services.[127] I focus on two key ways in which these products and services can enhance women's ability to participate in the paid labor market. First, all of these products and services contribute to better health outcomes for women, making it more likely that

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124 *See* Taryn M. Morrissey, *Child Care and Parent Labor Force Participation: A Review of the Research Literature*, 15 REV. ECON. HOUSEHOLD 1, 19 (2017). Researchers have also shown that drops in women's employment are tightly synchronized with the start and duration of school summer breaks; the steepest drops are among moms with young school-age children, who require substantial supervision. *See* BRENDAN M. PRICE & MELANIE WASSERMAN, STANFORD INST. FOR ECON. POL'Y RSCH., SCHOOL'S OUT: SUMMER BREAKS TIED TO WOMEN LEAVING WORK 1–2 (2023).

125 *See* Stefania Albanesi & Claudia Olivetti, *Gender Roles and Medical Progress*, Working Paper 14873, 1 (April 2009) (on file with author). Albanesi and Olivetti show that in the early 1990s, women spent more than 60% of their prime childbearing years either pregnant or nursing. *Id.* at 2. Advancements in medical knowledge, along with the introduction of infant formula, however, decreased the adverse health effects of pregnancy and reduced the time costs of raising children, thereby leading to an increase in the labor supply of young married women with children. *Id.* at 4.

126 While I included infant formula in Part II.B.1 discussing substitute products, it could easily fall within this category of markets as well. Breastfeeding is both a time-intensive and labor-intensive process and, for many women, very uncomfortable. Infant formula allows women the ability to sidestep the breastfeeding process altogether should they desire to do so.

127 It should go without saying that all of these markets are important for reasons other than their relationship with women's labor force participation. The ability to decide if, when, and how to have a child is fundamental to a free and equal society. Similarly, the ability to use feminine hygiene products is essential to a person's ability to "participate in daily life with dignity." Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPER'S BAZAAR (Oct. 9, 2017), https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/ [https://perma.cc/64GT-VVWU].

women are physically able to participate in the labor market.[128] Second, contraception and abortion care also provide women with the ability to decide if and when they wish to become pregnant and give birth, an ability that can prove essential to pursuing educational and career goals.[129] And sometimes these two mechanisms work in tandem.[130]

Let us consider the health mechanism first, starting with two basic points. First, good health increases one's ability to participate in the labor market; ill health does the opposite. Therefore, the ability to access affordable and quality medical care, when needed, can be a key determinant of an individual's ability to participate in the paid labor market. Second, it is women who conceive, carry, and give birth to the next generation. As such, compared to men, women require more health products and services during their reproductive years and routinely face health challenges that men do not.[131]

Although the list of reproductive-related health challenges women may face is quite long,[132] the most salient are those associated with pregnancy and childbirth. Pregnancy and childbirth are arduous physical processes, recovery from which requires significant rehabilitation even in the best of circumstances.[133] And when complications arise, women can experience severe maternal morbidity: unexpected outcomes of labor and delivery that

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128 *See, e.g.*, Albanesi & Olivetti, *supra* note 125, at 1 (finding that advances in maternal medicine and therefore women's health outcomes allowed for greater female labor force participation).

129 *See generally* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decision*, 4 J. POL. ECON. 730 (2002).

130 A woman may seek an abortion, for instance, both because continuing a pregnancy poses significant health risks and because she does not wish to have a child (or an additional child). Similarly, a woman may use birth control not only to avoid an untimely pregnancy, but to preserve her health.

131 *See* Gary M. Owens, *Gender Differences in Health Care Expenditures, Resource Utilization, and Quality of Care*, 14 SUPPLEMENT J. MANAGED CARE PHARMACY S2, S2 (2008); Klea D. Bertakis et al., *Gender Differences in the Utilization of Health Care Services*, 49 J. FAM. PRAC. 147, 149 (2000) (finding women had a significantly higher mean number of visits to their primary care provider); Cameron A. Mustard et al., *Sex Differences in the Use of Health Care Services*, 338 N. ENG. J. MED. 1678, 1680 (1998) (finding 22% of health care expenditures for women in the study were associated with conditions specific to sex, including pregnancy and childbirth, as compared with 3% of expenditures for men).

132 *See, e.g.*, NAT'L INST. OF ENV'T HEALTH SCIS., REPRODUCTIVE HEALTH IN FEMALES AND MALES (2020) https://www.niehs.nih.gov/sites/default/files/health/materials/reproductive_health_in_females_and_males_508.pdf [https://perma.cc/TY7J-UXDZ] (providing a non-exhaustive list of common reproductive health challenges).

133 *See, e.g.*, Mattea Romano et al., *Postpartum Period: Three Distinct But Continuous Phases*, J. PRENATAL MED. 22, 22–24 (2010) (detailing the ways in which childbirth can lead to a whole host of conditions, the severity and duration of which vary across individuals).

result in significant short- or long-term consequences to a woman's health or even death.[134] This, in turn, affects women's ability to participate in the labor force. Studies show, for instance, that women with maternal morbidity have a greater risk for presenteeism (reduced productivity and accuracy at work), absenteeism (regularly missing work), and unemployment.[135] Importantly, studies *also* show that most pregnancy and childbirth complications can be prevented or successfully treated with proper medical care.[136] Indeed, the CDC reports that more than *80%* of pregnancy-related deaths between 2017 and 2019 could have been prevented.[137]

Reproductive products and services, however, are important not only because they allow women to achieve better health outcomes than they would without them, but also because they can provide women with a significant degree of control over the reproductive process. In a world without birth control and abortion care, women face a limited set of tools for preventing pregnancy and childbirth.[138] This poses challenges to labor market participation, with the most obvious obstacle being the fact that every pregnancy requires

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134 That is, pregnancy may not be an illness, but that does not mean it cannot be harmful to a woman's health. *See* EUGENE DECLERCQ & LAURIE ZEPHYRIN, COMMONWEALTH FUND, SEVERE MATERNAL MORBIDITY IN THE UNITED STATES: A PRIMER (2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/oct/severe-maternal-morbidity-united-states-primer [https://perma.cc/J3UP-A5WK]. Indeed, as one doctor put it, "[b]eing pregnant is always more dangerous than not being pregnant." Kathleen McLaughlin, *No OB-GYNs Left in Town: What Came After Idaho's Assault on Abortion*, GUARDIAN (Aug. 22, 2023), https://www.theguardian.com/us-news/2023/aug/22/abortion-idaho-women-rights-healthcare [https://perma.cc/6HBH-E6QV].

135 *See* SO O'NEIL ET AL., COMMONWEALTH FUND, THE HIGH COSTS OF MATERNAL MORBIDITY SHOW WHY WE NEED GREATER INVESTMENT IN MATERNAL HEALTH (2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/nov/high-costs-maternal-morbidity-need-investment-maternal-health [https://perma.cc/VT4U-REJB] (considering nine maternal morbidity conditions: amniotic fluid embolism, cardiac arrest, gestational diabetes mellitus, hemorrhage, hypertensive disorders, maternal mental health conditions, renal disease, sepsis, and venous thromboembolism).

136 *See* Press Release, CDC Newsroom, Four in 5 Pregnancy-Related Deaths in the U.S. Are Preventable (Sept. 19, 2022), https://www.cdc.gov/media/releases/2022/p0919-pregnancy-related-deaths.html_[https://perma.cc/58YR-PY5H] [hereinafter CDC Newsroom] (noting that data from 2017 to 2019 showed that 80% of pregnancy-related deaths were preventable); Elizabeth A. Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 CLINICAL OBSTETRIC GYNECOLOGY 387, 388 (2018) (noting that nearly half of severe maternal morbidity events and maternal deaths are preventable).

137 *See* CDC Newsroom, *supra* note 136.

138 Oral contraception is much more effective than a diaphragm or condom. *See* Goldin & Katz, *supra* note 129, at 731.

a temporary exit from the labor market in order to recover from childbirth.[139] It also makes investing in formal education (college and postgraduate studies) and other long-term career investments more costly.[140] For example, in a world where women have no access to contraception, one can imagine that pursuing college, then law school, and then the partnership track at a law firm would require either remaining abstinent until one's late twenties or early thirties or accepting that one might become pregnant—at any time, and potentially multiple times—along the way.[141] With each pregnancy would come a necessary pause on one's studies or work following childbirth,[142] and each additional child would impose caregiving burdens that would then make resuming those studies or work more difficult.[143] In such a world, then, the costs of investing in a long-term professional career are high, necessarily depressing women's labor force participation. For some number of women, the costs would simply be too high—they will choose not to invest from the start. Others may attempt to pursue long-term careers but find themselves pushed off course along the way due to unintended pregnancies and the rising health and caregiving burdens. Others would continue to return to the labor market after each birth but will likely face decreased wages and a flatter promotion curve (relative to what they would experience if they could control reproduction).[144]

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139 Due to a lack of maternity leave (paid and unpaid), however, many American women are forced to return to work much sooner than they would like. A 2012 survey conducted for the Department of Labor found that 12% of women who took time off of work following the birth of a new child took only a week or less. *See* Sarah Kliff, *1 in 4 American Moms Return to Work Within 2 Weeks of Giving Birth – Here's What It's Like*, VOX (Aug. 22, 2015), https://www.vox.com/2015/8/21/9188343/maternity-leave-united-states [https://perma.cc/SJ8F-DA5H]. Another 11% took between one and two weeks off, meaning that nearly one in four of the women interviewed were back to work after two weeks of having a child. *Id.*

140 *See* Goldin & Katz, *supra* note 129, at 731 (arguing that access to birth control lowered the costs of long-durational professional education for women).

141 Stefania Albanesi and Claudia Olivetti calculated that the average woman born around 1900 spent 36% of her life between the ages of twenty-three and thirty-three pregnant. *See* Albanesi & Olivetti, *supra* note 125, at 2.

142 *See* Kenneth R. Troske & Alexandru Voicu, *The Effect of the Timing and Spacing of Births on the Level of Labor Market Involvement of Married Women*, 45 EMPIR. ECON. 483, 515 (2013) (finding that births reduce both participation and the level of labor market involvement of women).

143 *See id.*

144 *See generally* Elizabeth Ty Wilde et al., *The Mommy Track Divides: The Impact of Childbearing on Wages of Women on Differing Skill Levels* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16582, 2010), http://www.nber.org/papers/w16582 [https://perma.cc/K42S-3TQ7].

Thankfully, we do not live in a world where contraception and abortion care were never invented.[145] Women are no longer (or should not be) at the whims of nature when it comes to deciding how many children to have and at what time.[146] Indeed, the development of the birth control pill in the 1960s was a game changer for women.[147] Its efficacy rate exceeded all other methods available at the time by a huge margin, and it placed fertility control in the hands of women and women alone, allowing them to time conception to suit their life goals.[148] And as studies have shown, this newfound control positively impacted women's ability to participate in paid work and to achieve higher earnings. Claudia Goldin and Lawrence F. Katz, for instance, by analyzing the variation across states in the legal availability of oral contraceptives in the 1960s and the 1970s, found that access to contraception was a major factor behind the growing number of women obtaining a college education and pursuing advanced professional degrees.[149] Similarly, Martha Bailey showed that changes in contraceptive access during this time period significantly contributed to increases in young women's labor force participation and pursuit of professional

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145 We do, however, live in a world where others would seek to deny women the ability to use these technological advancements. I address this reality shortly.

146 Here I refer to the ability to choose not to have a child or additional children, as infertility certainly can and does impede many women's family-building goals.

147 In the first year following the approval of the first birth control pill, over 400,000 women saw their doctors about getting a prescription—despite the fact that the pill, when it first debuted, cost about $10 or $11 a month ($80 or more today). As *Time* magazine put it in 1966, "[n]o previous medical phenomenon has ever quite matched the headlong U.S. rush to use the oral contraceptives now universally known as "the pills." Megan Gibson, *One Factor That Kept the Women of 1960 Away from Birth Control Pills: Cost*, TIME (June 23, 2015), https://time.com/3929971/enovid-the-pill/ [https://perma.cc/BQC7-B6UD].

148 *See* Goldin & Katz, *supra* note 129, at 766–67. Today more women than ever seek to delay pregnancy while pursuing their educational and career goals. Over the last several decades, the average age at first birth among American women has increased substantially. In 1972, the year in which the Supreme Court ruled that single women have a constitutional right to use contraception, the average age of first birth among American women was twenty-one. Today, it is thirty. *See* Mike Schneider, *Motherhood Deferred: U.S. Median Age for Giving Birth Hits 30*, U.S. NEWS & WORLD REP. (May 6, 2022), https://www.usnews.com/news/us/articles/2022-05-06/motherhood-deferred-us-median-age-for-giving-birth-hits-30 [https://perma.cc/RKD8-RSSS]. Moreover, the increase has been particularly significant for women pursuing postgraduate degrees. A recent Pew study found that more than half (54%) of mothers near the end of their childbearing years with at least a master's degree had their first child in their thirties, and 20% of those women did not become mothers until they were at least thirty-five. GRETCHEN LIVINGSTON, PEW RSCH. CTR., FOR MOST HIGHLY EDUCATED WOMEN, MOTHERHOOD DOESN'T START UNTIL THE 30S (2015), https://www.pewresearch.org/fact-tank/2015/01/15/for-most-highly-educated-women-motherhood-doesnt-start-until-the-30s/ [https://perma.cc/LS63-4H48].

149 *See* Goldin & Katz, *supra* note 129, at 748–49.

occupations,[150] and Heinrich Hock found that unrestricted access to contraception during this period allowed almost 400,000 more women to obtain a B.A. by the age of thirty.[151] More recent studies have found that requiring insurance companies to cover contraception increases transitions of women into employment by 34%, with large effects for African American and Asian women.[152]

Abortion access also has been shown to have a positive relationship with women's labor force participation (and empowerment). Several studies have found that legalized abortion access prior to *Roe v. Wade*[153] increased the labor force participation rates of women, particularly single Black women.[154] More recent scholarship has found that public funding for medically necessary abortions increases the occupational mobility of women working full time,[155] while reduced access to abortion care due to gestational limits reduces the likelihood that a woman would be working for pay full time six months later.[156] And another study found that, had women been free to access abortion care in 2019 without restriction, an additional 597,000 women would have been in the workforce between 2020 and 2022.[157]

To summarize, consumer markets can impact an individual's ability to participate in the workforce because certain consumer products and services are complementary to

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150 *See* Martha Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.J. ECONOMICS 289, 317 (2006).

151 Heinrich Hock, *The Pill and College Attainment of American Women and Men* 26 (Dep't of Econ., Fla. State Univ., Working Paper, 2005), https://paa2006.populationassociation.org/papers/61745 [https://perma.cc/FK7W-AA9Q].

152 Kate Bahn et al., *Do US TRAP Laws Trap Women into Bad Jobs?*, 1 FEMINIST ECON. 44, 92 (2020).

153 410 U.S. 113 (1973).

154 *See* Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms* (Nat'l Bureau of Econ. Rsch., Working Paper No. 5406, 1996), https://www.nber.org/system/files/working_papers/w5406/w5406.pdf [https://perma.cc/LCY9-YWBV]; David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 512 (2004).

155 *See* Bahn et al., *supra* note 152, at 63.

156 *See* Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive Abortions and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 409 (2018).

157 *See* CHRISTINE CLARK ET AL., INST. FOR WOMEN'S POL'Y RSCH., UPDATED ANALYSIS OF THE COST OF ABORTION RESTRICTIONS TO STATES (2024), https://iwpr.org/wp-content/uploads/2024/01/Updated-Analysis-of-the-Cost-of-Abortion-Restrictions-to-States-1.pdf [https://perma.cc/75UE-KDND].

individuals' labor force participation (i.e., they help lower the costs of participating in the labor market in one way or another). But while both men and women rely upon certain markets to support their labor force participation, evidence shows that the ability to do so is particularly important for women. Women face certain gendered barriers to labor force participation that men do not, barriers that can be ameliorated (although perhaps not entirely eliminated) through the purchase of market-based solutions. This suggests that promoting competition in these markets (i.e., promoting consumer welfare) will lead to positive—and equality-promoting—spillover effects in the labor market. In other words, the promotion of efficiency and equality can go hand in hand.

C. The Status Quo: Multiple Market Impediments

Given the important role the above markets play in supporting women's labor force participation, one would hope that they are thriving. But in reality, many of these markets are in poor health. Some are characterized by low output and high prices,[158] while others have experienced severe supply chain disruptions due, in part, to their highly concentrated nature.[159] Still other markets have been negatively impacted by mergers and acquisitions, not to mention restrictive laws aimed at eliminating them completely.[160] The following Sections, Parts II.C.1–II.C.4, highlight some of the most pressing market problems to show that there may be opportunities for procompetitive interventions: clearly, consumer welfare is not being maximized in these markets. The specific role that antitrust might play, as well as its limitations, is discussed in Part IV.

1. Childcare Market

The American childcare market is characterized by low output and high prices. More than half of American children are living in what are called "childcare deserts," or areas where there are too few licensed slots for the number of children who need care,[161] while the average annual cost of childcare—for those families who could find it—was $10,174

158 *See infra* Parts II.C.1, C.3.

159 *See infra* Part II.C.2.

160 *See infra* Parts II.C.3–C.4.

161 *Child Care Deserts*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/series/child-care-deserts/ [https://perma.cc/M86Z-XCMZ].

in 2020.[162] That is more than 10% of the median income for the average married couple and more than a third of the median income of a single parent.[163] Combined with other household expenses, such a price tag can be—or in hard times, can become—out of reach for many families.

2. Infant Formula Market

The infant formula market is highly concentrated; three major manufacturers control over 90% of the market, and formula is produced at just nine factories.[164] When one manufacturer is taken offline for any significant amount of time, shortages can result.[165] This was the case in the summer of 2022, when Abbot Industries was forced to shut down production at a single plant.[166] The country witnessed a nationwide shortage, and parents, particularly those in rural and low-income parts of the country, were faced with empty shelves.[167] In response, the U.S. Food and Drug Administration (FDA) introduced new guidance to make it easier to import formula from other countries and help domestic manufacturers enter the market,[168] while Congress passed an emergency spending bill

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162 Nicolas Vega, *Child Care Now Costs More than $10,000 Per Year on Average—Here's Why That's a Problem,* CNBC (Feb. 21, 2022), https://www.cnbc.com/2022/02/21/average-cost-of-child-care-is-now-more-than-10000-dollars-per-year.html [https://perma.cc/SFG3-27JD].

163 *See id.*

164 *See* Mariel Padilla, *The 19th Explains: Why Baby Formula Is Still Hard to Find Months After the Shortage*, 19TH (Dec. 1, 2022), https://19thnews.org/2022/12/19th-explains-infant-formula-shortage/ [https://perma.cc/9SZT-WU7E].

165 *See* Jen Christensen, *'We Never Want to Have This Happen Again,' FDA Official Testifies About Formula Shortage*, CNN (May 11, 2023), https://www.cnn.com/2023/05/11/health/formula-hearing-hill/index.html [https://perma.cc/75V7-8YG9]; Diedre McPhillips, *A Year Later, Formula Stock Has Recovered From the Shortage, But Parents Haven't*, CNN (Feb. 17, 2023), https://www.cnn.com/2023/02/17/health/formula-shortage-one-year-later/index.html [https://perma.cc/BFT5-DBPS].

166 *See* AROHI PATHAK ET AL., CTR. FOR AM. PROGRESS, THE NATIONAL FORMULA SHORTAGE AND THE INEQUITABLE U.S. FOOD SYSTEM (2022), https://www.americanprogress.org/article/the-national-baby-formula-shortage-and-the-inequitable-u-s-food-system [https://perma.cc/VF8Q-HWFZ].

167 *See* Clarice Bajkowski, *In Rural, Low-Income Parts of the Country, How Do You Find Baby Formula When There Is Nowhere to Look?*, 19TH (May 19, 2022), https://19thnews.org/2022/05/baby-formula-shortage-low-income-rural-families-limited-access/ [https://perma.cc/8BDN-YTRX].

168 On May 16, 2022, the FDA issued guidance describing the agency's intention to temporarily exercise enforcement discretion on a case-by-case basis for certain requirements that apply to infant formula. *See* HASSAN Z. SHEIKH ET AL., CONG. RSCH. SERV., IF12123, INFANT FORMULA SHORTAGE: FDA REGULATION AND FEDERAL RESPONSE (2022), https://crsreports.congress.gov/product/pdf/IF/IF12123 [https://perma.cc/PKY3-YGW4].

to provide the FDA with more resources.[169] President Biden also invoked the Defense Production Act to expedite supplies.[170] But parents still struggled to find a sufficient supply of formula for their children.[171] Moreover, problems persist: a recent recall of hundreds of thousands of Nutramigen Hypoallergenic Infant Formula Powder, a specialty powder for infants with allergies to cow's milk, has raised concerns that another shortage might result.[172]

3. Maternity Care Market

Pregnant and postpartum women in America face a failing maternal care market. Giving birth in the United States is extremely expensive,[173] even for individuals with health insurance. One study, for instance, found that pregnant women of reproductive age (ages fifteen to twenty-nine) enrolled in large group health plans incur an average of $18,865 more in health care costs than women who do not give birth.[174] Another recent study found that the mean total of out-of-pocket spending for all modes of delivery, vaginal and cesarean, increased from $3,069 in 2008 to $4,569 in 2015.[175] But it is not just high prices facing pregnant and postpartum women. They also face an output problem. Over the past two decades, an increasing number of maternity wards have closed across the

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169 *See* H.R. 7790, 117th Cong. (2022) (enacted); TuAnh Dam, *House Passes $28M Emergency Spending Bill to Address Baby Formula Shortage*, AXIOS (May 18, 2022), https://www.axios.com/2022/05/19/house-baby-formula-shortage-emergency-spending-bill [https://perma.cc/W9P6-HLGD].

170 *See* Padilla, *supra* note 164.

171 *See id.*

172 *See* Chabeli Carrazan & Sara Luterman, *Latest Baby Formula Recall Draws Concerns from Congress and Caregivers*, 19TH (Jan. 9, 2024), https://19thnews.org/2024/01/nutramigen-baby-formula-recall-congress-caregivers/ [https://perma.cc/3KGS-PMQW].

173 *See* MATTHEW RAE ET AL., HEALTH SYS. TRACKER, HEALTH COSTS ASSOCIATED WITH PREGNANCY, CHILDBIRTH, AND POSTPARTUM CARE (2022), https://www.healthsystemtracker.org/brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/ [https://perma.cc/F56F-6K3H].

174 *Id.* This included additional health spending associated with pregnancy, delivery, and postpartum care paid by insurance (an average of $16,011) and by the woman ($2,854). *Id.*

175 Michelle H. Moniz et al., *Out-Of-Pocket Spending for Maternity Care Among Women with Employer-Based Insurance*, *2008-15*, HEALTH AFFS. 18, 20 (2020). Breaking it down by method of delivery, researchers found that the mean total out-of-pocket spending for vaginal birth increased from $2,910 to $4,314, while for cesarean birth it increased from $3,364 to $5,161. *Id.*

United States.[176] Indeed, over *400* labor and delivery units closed between 2006 and 2020, with some states—such as Pennsylvania and North Dakota—witnessing particularly high closure rates.[177] As of 2022, 36% of counties nationwide, largely in the Midwest and South, had no obstetric hospitals or birth centers and no obstetric providers.[178] Moreover, this problem is particularly acute in rural areas and among communities of color. Researchers have found, for instance, that while nearly 18 million reproductive-age women lived in rural counties in the United States in 2010, the percentage of rural counties with hospital-based obstetric services declined from 55% to 46% between 2004 and 2014, with less-populated rural communities experiencing more rapid declines.[179] In addition, the hospitals that are most deeply impacted by maternity ward closures tend to be hospitals serving Black and Latino populations.[180]

4. Contraception and Abortion Care Markets

The markets for contraception and abortion care face multiple challenges. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[181] both markets have been the target of increased efforts by conservative politicians and activists to

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176 *See Maternity Care Deserts Grow Across the US as Obstetric Units Shut Down* (PBS News television broadcast Sept. 4, 2022), https://www.pbs.org/newshour/show/maternity-care-deserts-grow-across-the-us-as-obstetric-units-shut-down [perma.cc/CQ9U-JHVY] [hereinafter *Maternity Deserts*].

177 *See id.*

178 Nicole Karlis, *Labor and Delivery Centers are Closing in Red States. What Happens to Pregnant Women Next?*, SALON (Mar. 23, 2023), https://www.salon.com/2023/03/23/labor-and-delivery-centers-are-closing-in-red-states-what-happens-to-pregnant-women-next/ [https://perma.cc/WK99-RW7Y] ("There are high fixed costs for operating maternity services, [and] obviously they have to be available 24/7 because babies come when they want to come in, so having the staff on hand and the clinical training and all of the necessary . . . equipment that is required for any kind of emergency situation has a high fixed cost … When you have a low birth volume, then you don't have a good balance of payments coming in for that."). *See also* Sarah Al-Arshani, *Maternity United Closing in Alabama: Pregnant Women Have to Travel Further for Care*, USA TODAY (Oct. 16, 2023), https://www.usatoday.com/story/news/health/2023/10/16/alabama-maternity-units-closing-pregnant-women-care/71201726007 [https://perma.cc/GFP4-SJU4] (reporting on the closing of three maternity wards in Alabama, closures which will leave women across Shelby and Monroe counties without any birthing units).

179 Katy B. Kozhimannil et al., *Association Between Loss of Hospital-Based Obstetric Services and Birth Outcomes in Rural Counties in the United States*, 319 JAMA 1239, 1240 (2018); s*ee also* Neel Shah, *Eroding Access and Quality of Childbirth Care in Rural US Counties*, 319 JAMA 1203, 1203 (2018).

180 *See Maternity Deserts*, *supra* note 176.

181 597 U.S. 215 (2022).

limit access to care. Indeed, these groups have sought to eliminate these markets entirely[182] by outright banning abortion, imposing burdensome and unnecessary regulations on abortion providers (TRAP laws),[183] and passing laws that allow certain sellers of healthcare (doctors, nurses, and pharmacists) to refuse to provide the standard of care (e.g., standard contraception services, emergency abortion care) without facing liability.[184] Because of these legislative efforts, abortion care is banned in all or almost all circumstances in thirteen states, severely restricted in eleven states, and under threat in many others,[185] while consumers' ability to purchase contraceptive services is undermined in at least eight states.[186] Such efforts have had a devastating impact on women's ability to access necessary reproductive care, particularly lower-income women and women of color.[187]

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182 The Supreme Court's overruling of *Roe* in *Dobbs* dealt a tremendous blow to women's equality by eliminating women's constitutional right to bodily autonomy and allowing states to pass laws outlawing abortion care. It must be noted, however, that conservative (and sometimes even liberal) politicians have long sought to undermine the functioning of the abortion care market through excessive and punitive regulations. Thus, even prior to *Dobbs*, women's ability to obtain and purchase abortion care, particularly lower-income women and women of color, was severely undermined. As a young woman growing up in Mississippi, I was keenly aware of the fact that my home state possessed only one abortion clinic.

183 *See What Are TRAP Laws?*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws [https://perma.cc/ZA3Q-VK37].

184 *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1504–05 (2012) (explaining how most states have passed broad "conscience" protections that allow individuals, clinics, hospitals, and healthcare systems to refuse to provide certain treatments on moral grounds); Andrea Michelson, *Contraception Is Already Restricted in Many States and It Could Be the Next Battleground. Here's What You Need to Know*, INSIDER (June 28, 2022), https://www.insider.com/will-contraception-be-banned-plan-b-iuds-roe-v-wade-overturn-2022-6 [https://perma.cc/28XA-ANSM].

185 *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/W6Q5-M9AK].

186 *See* Michelson, *supra* note 184.

187 For instance, Black, American Indian, and Alaska Native women ages 18–49 are more likely than other groups to live in states with abortion bans and restrictions. LATOYA HILL ET AL., KFF, WHAT ARE THE IMPLICATIONS OF THE *DOBBS* RULING FOR RACIAL DISPARITIES? (2024), https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities [https://perma.cc/PR4M-EHMY]. About 60% of Black women and 59% of American Indian/Alaska Native women ages 18–49 are living in states with abortion bans or restrictions compared with just over half (53%) of white, less than half of Hispanic (45%), and about three in ten Asian (28%) and Native Hawaiian or Pacific Islander (29%) women of the same age group. *Id.* Moreover, most Americans receiving abortion care in the United States pay out of pocket, irrespective of their health insurance status. *See* Ortal Wasser et al., *Catastrophic Health Expenditures for In-State and Out-of-State Abortion Care*, 7 JAMA NETWORK OPEN 1, 2 (2024). Studies have found that individuals often must take out loans, sell personal belongings, or forego essential household expenditures like food, bills, and rent to finance abortion care. *See generally* Amanda Dennis et al., *A Qualitative Exploration of Low-Income Women's*

But there is a lesser-known threat to these markets: the steady growth of Catholic hospital systems through hospital mergers.[188] Between 2001 and 2016, the number of acute care hospitals that are Catholic-owned or -affiliated grew by 22%.[189] This growth is problematic for consumers of reproductive healthcare for two reasons. First, Catholic hospitals operate according to the Ethical and Religious Directives for Catholic Healthcare ("the Directives"),[190] which generally prohibit the provision of most standard forms of reproductive healthcare: abortion,[191] sterilization[192] (vasectomies, tubal ligations, and hysterectomies), birth control,[193] emergency contraception (including in the event of sexual assault[194]), certain miscarriage treatments,[195] and many common infertility techniques.[196] A growth in the proportion of Catholic care therefore means less access to these services. Second, when a Catholic hospital acquires a secular hospital, the providers at that hospital are generally required to begin adhering to the Directives.[197] This means that the community

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Experiences Accessing Abortion in Massachusetts, 25 WOMEN'S HEALTH ISSUES 463 (2015); Samuel L. Dickman et al., *Financial Hardships Caused by Out-of-Pocket Abortion Costs in Texas*, 112 AM. J. PUB. HEALTH 758 (2018).

188 *See* TESS SOLOMON ET AL., BIGGER AND BIGGER: THE GROWTH OF CATHOLIC HEALTH SYSTEMS 3 (2020).

189 LOIS UTTLEY & CHRISTINE KHAIKIN, MERGERWATCH, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE 1 (2016), https://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf [https://perma.cc/84KC-SETG] (stating that in some states, 30% or more of all acute care hospital beds are in a Catholic facility).

190 *See* U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 14 (6th ed. 2018).

191 *Id.* at 18.

192 *Id.* at 16.

193 *Id.*

194 *Id.* at 15.

195 *Id.* at 18 (stating that in certain cases of miscarriage, termination of the pregnancy by induction or by dilation and curettage may be the appropriate form of treatment; however, Directive 46 states that such care is only allowed if "their direct purpose" is "the cure of a proportionately serious pathological condition of a pregnant woman" and care "cannot be safely postponed until the unborn child is viable").

196 U.S. CONF. OF CATH. BISHOPS, *supra* note 190, at 16–17.

197 *See Hospital Mergers: The Threat to Reproductive Health Services*, ACLU (Dec. 31, 1995), https://www.aclu.org/documents/hospital-mergers-threat-reproductive-health-services [https://perma.cc/XZ67-VCJM]; Patricia Donovan, *Hospital Mergers and Reproductive Health Care*, 28 FAM. PLAN. PERSPS. 281, 281 (1996); Jennifer Brown, *Another Colorado Hospital Stops Letting Women Get Their Tubes Tied, Renewing Questions*

sees not only a decrease in available services but also a decrease in competitors. And the departure of a competitor from the market provides greater market share to the remaining hospitals, which should allow them to increase their prices.[198]

The sad state of the markets outlined above has serious, negative implications for women's ability to participate in the labor market. Although many women rely on the products produced by these markets to support their labor force participation, they can only do so if the markets producing them do so at affordable rates and sufficient levels. If the markets providing these key products and services are not functioning efficiently or are characterized by high prices and/or diminished output, women are less likely to be able to purchase these key complementary products. Thus, women are harmed not just as consumers but also as workers.

Yet, although the state of these markets is a source of concern, it also suggests that there may be a real opportunity for antitrust enforcers to make a positive contribution to our nation's quest for greater gender equality. If antitrust enforcers turn their attention to promoting and protecting competition in these markets, then we should see an increase in both consumer welfare and gender equality as measured by women's labor force participation. Part III begins to lay out the ways in which antitrust enforcers can utilize antitrust as an equality-promoting tool.

III. Developing an Antitrust Approach to Sex Equality

Given the link between key consumer markets and women's ability to overcome gender-based barriers to labor market participation, and given the poor functioning of many

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About Reproductive Rights, COLO. SUN (Jan. 31, 2023), https://coloradosun.com/2023/01/31/durango-hospital-tubal-ligations/ [https://perma.cc/J537-2B6A]; Susan Haigh & David Crary, *Catholic Hospitals' Growth Impacts Reproductive Healthcare*, ASSOC. PRESS (July 24, 2022), https://apnews.com/article/abortion-health-religion-new-york-oregon-8994d9b5fd0040d40d19fd1e44c313d8 [https://perma.cc/E75H-SUWJ]. *See also* Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 937–47 (2017) (detailing how many secular healthcare providers and institutions have contractual commitments with Catholic healthcare entities, commitments that require the secular provider or institution to comply with a religious standard of healthcare).

198 *See* Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for the Corporate Lawyer*, 10 U. MIA. BUS. L. REV. 119, 121 (2002) (stating that "this is because (everything else equal) the greater the market share of a firm, the greater is its ability (and thus temptation) to reduce its individual output and cause a price rise in the market"). The growth of Catholic hospitals is, of course, not in and of itself a bad thing. The problem is that this growth is taking place at the cost of competitive effects and access to care. I consider the intersection between competition and religious liberty principles more in depth in a separate project. *See* Bailey K. Sanders, *The Market Limits of Free Exercise*, MICH. L. REV. (forthcoming).

of those key markets,[199] it is evident that antitrust's prioritization of consumer welfare can be wielded in the pursuit of greater gender equality. To reiterate: because women rely on certain consumer markets to support their labor force participation, protecting and promoting competition in these markets will not only result in greater consumer welfare but also greater gender equality in the labor market.[200]

Using antitrust law to promote gender equality, then, does not require a deviation from the traditional consumer welfare standard but instead requires that antitrust enforcers, when appropriate, use the tools at their disposal to protect and promote competition in certain key markets. This means engaging not only in active antitrust enforcement (i.e., bringing cases when the facts indicate the antitrust laws are being violated) but also engaging in competition advocacy (i.e., advocating for policy changes that will promote competition).

It is important to note, however, that this Article does not argue that antitrust is a panacea or that it is *the* solution to gender inequality in the labor market. Only some of the market problems described above can be solved by bringing cases under the antitrust laws, and there are other laws (such as Title VII) that advance gender equality more directly.[201] But given that our country has generally taken the position that a free market economy[202]—as opposed to the government provision of goods and services—is the right approach, ensuring that our various markets are functioning efficiently would seem to be a necessary corollary. Many of the problems discussed above are directly linked to excessive market concentration, while others may be due, at least in part, to anticompetitive behaviors.[203] Still others result from misguided and unnecessary government regulations.[204] Active antitrust enforcement can be an appropriate response to the first two, while competition advocacy can be a proper response to the third.[205]

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199 *See* discussion *supra* Part II.

200 *See* discussion *supra* Part II.

201 *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2018) (prohibiting employer discrimination based on sex).

202 *See* Roger E. Backhouse, *The Rise of Free Market Economics: Economists and the Role of the State Since 1970*, 37 HIST. POL. ECON. 355, 355 (2005).

203 *See* discussion *infra* Part II.C.

204 *See* discussion *infra* Part II.C.

205 Sometimes enforcers will be limited to applying their expertise to understanding why certain markets are functioning poorly and advising policymakers as to possible paths forward, but this does not make their work any less necessary.

A. Active Antitrust Enforcement

The first component of an Antitrust Approach to Sex Equality is to prioritize the key markets outlined in Part II by engaging in active antitrust enforcement and actively employing the various tools available to the federal and state antitrust agencies. This ought not be controversial. After all, for "over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[206] Furthermore, antitrust jurisprudence for the past several decades has been characterized by a strong focus on maximizing consumer welfare by identifying and stopping harmful anti-competitive conduct on the part of producers.[207] Focusing on the consumer markets that are of key importance to women, then, requires no deviation from core antitrust principles.[208] Indeed, by bringing the standard set of cases—Section 1 cases, Section 2 cases, merger challenges, etc.—based on theories of consumer harm, enforcers can not only benefit women as consumers but also generate positive spillover effects in the nation's labor markets.

A good example of the type of case enforcers should prioritize is the FTC's decision to charge twenty-three obstetrician-gynecologists ("OB/GYNs") in Jacksonville, Florida, with illegally conspiring to fix the fees they charged to third-party payers and with boycotting or threatening to boycott third-party payers.[209] The FTC alleged that the physicians' independent practice association ("IPA") was a sham formed to facilitate price agreements

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206 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3TRM-BM45].

207 *See* Hovenkamp, *supra* note 1, at 1 ("[T]he view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.") (citation omitted).

208 *See* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 190 (2022) (arguing that the antitrust authorities seeking to reduce inequality might target markets that are disproportionately important for low-income people, particularly the markets for food, medicine, and labor markets where pay gaps based on race or gender are large; an Antitrust Approach to Sex Equality is similarly an argument of prioritization); *Objective 3.5: Advance Environmental Justice and Tackle the Climate Crisis*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/doj-strategic-plan/objective-35-advance-environmental-justice-and-tackle-climate-crisis [https://perma.cc/52HR-WKFS] (recognizing the need to fight the effects of climate change and committing to prioritizing "enforcement actions that will reduce greenhouse emissions, achieve emission reductions and relief that mitigate the impact of past violations, and hold violators accountable for committing environmental crimes").

209 Matter of Southbank IPA, Inc., 114 F.T.C. 783 (1991) (consent order).

among its members, who constituted nearly the entire OB/GYN medical staff at one of the most highly regarded hospitals in Jacksonville.[210] Under the resulting consent order, the physicians agreed to dissolve their IPA and to refrain from price-fixing activities.[211] Another key example is the FTC's complaint against Barr Laboratories for its alleged decision to unlawfully delay the entry of Barr's generic version of Warner Chilcott's Ovcon birth control pill into the market.[212] Under the resulting settlement agreement, Barr was required to refrain from entering into anticompetitive supply agreements similar in nature to its agreement with Warner Chilcott and to refrain from entering into other agreements with branded manufacturers that unreasonably restrain competition.[213] As a result, a new lower-cost generic version of the birth control pill entered the market.[214] This represents a significant win for female consumers, as research indicates that cost continues to pose a significant barrier to contraceptive access in the United States.[215]

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210 *See id.*

211 *See id.* The FTC has brought other cases focused on protecting the market for reproductive care. In April 2002, the FTC charged physician members of an IPA that included nearly every OB/GYN with active medical staff privileges at the two acute care hospitals in Napa County, California, with price fixing and refusing to deal. Decision and Order, *Obstetrics & Gynecology Med. Corp. of Napa Valley, et al.*, FTC Docket No. C-4048 (May 14, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/05/obgyndo.pdf [https://perma.cc/MKP9-J52P]. This case also resulted in a consent order preventing such anticompetitive conduct in the future. *Id.*

212 *See* Complaint, FTC v. Warner Chilcott Holdings Co. III, No. 105-CV-02179-CKK (D.D.C. Nov. 7, 2005); Press Release, Fed. Trade Comm'n, FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry: Warner Chilcott/Barr Pact Deprives Consumers of Access to Generic Oral Contraceptive for Five Years (Nov. 7, 2005), https://www.ftc.gov/news-events/news/press-releases/2005/11/ftc-sues-stop-anticompetitive-agreement-us-drug-industry [https://perma.cc/PP7U-KVNT].

213 Press Release, Fed. Trade Comm'n, FTC Settles Charges Against Barr Laboratories, Protects Consumers from Anticompetitive Agreements in Prescription Drug Market (Nov. 29, 2007), https://www.ftc.gov/news-events/news/press-releases/2007/11/ftc-settles-charges-against-barr-laboratories-protects-consumers-anticompetitive-agreements [https://perma.cc/2PPD-4FD9].

214 *Id.*

215 *See* Kristen Lagasse Burke et al., *Unsatisfied Contraceptive Preferences Due to Cost Among Women in the United States*, CONTRACEPTION 1, 2 (2020); Katherine He et al., *Women's Contraceptive Preference-Use Mismatch*, 26 J. WOMEN'S HEALTH 692, 699 (2017); *Cost Continues to Pose Significant Barriers to Contraceptive Access*, GUTTMACHER (May 24, 2023), https://www.guttmacher.org/news-release/2023/cost-continues-pose-significant-barriers-contraceptive-access [https://perma.cc/P7B6-JXE9]; Liza Fuentes et al., *Primary and Reproductive Healthcare Access and Use Among Reproductive Aged Women and Female Family Planning Patients in 3 States*, 18 PLOS ONE 1, 9 (2023) (finding that a lack of health insurance and inability to afford care were the most common reasons women were unable to secure their desired contraceptive method).

Enforcers should continue to monitor the birth control market to ensure that companies are not engaging in different but equally harmful anticompetitive behavior, including price-fixing and other classic violations.[216] As outlined above, such anticompetitive behavior has ripple effects that extend beyond the most basic harm of artificially high prices. A recent study analyzing the impact of a price-fixing scheme in the birth control market in Chile, for example, found that the increased prices resulting from the illegal scheme led to a significant increase in unplanned pregnancies, particularly among unmarried women and women in their early twenties.[217] Thus, the harms that flow from anticompetitive behavior in this market are more than just "pocketbook" harms and can have lifelong implications for female consumers.

In addition to monitoring all of the key markets outlined above for anticompetitive practices, enforcers at the state and national levels should pay attention to mergers that might reduce competition in these key markets. This is particularly true for hospital mergers and their potential impact on various reproductive healthcare markets. Moreover, in doing so, enforcers must consider how traditional antitrust analyses may fail to capture the competitive realities of reproductive health markets and adjust their analyses accordingly. For instance, in most hospital merger analyses, enforcers and courts "cluster" general acute care ("GAC") services into one product market rather than analyzing the effects of the merger upon each market for the hundreds (or perhaps thousands) of available medical procedures.[218] Obstetric services—such as labor and delivery services, abortion care, and contraceptive care (e.g., tubal ligations)—are therefore generally lumped into the GAC

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216 Another good example is the FTC's decision to seek a preliminary injunction to stop Cytyc Corporation's acquisition of Digene Corporation, two companies that manufacture and sell products used to screen women for cervical cancer, alleging that the acquisition would substantially reduce Cytyc's only existing competition in the liquid Pap testing market. Press Release, Fed. Trade Comm'n, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), https://www.ftc.gov/news-events/news/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp [https://perma.cc/VS5X-3LWC]. At the time, Cytyc had a 93% market share of liquid-based Pap tests in the United States. *Id.* The acquisition ultimately fell through due to the FTC's opposition. *See* Nicholas Johnston, *Digene Calls Off Merger With Cytyc, Citing FTC Opposition*, WASH. POST (July 1, 2002), https://www.washingtonpost.com/archive/business/2002/07/02/digene-calls-off-merger-with-cytyc-citing-ftc-opposition/961d22c5-f35b-407a-8a10-13f482c2cabc/ [https://perma.cc/4LPB-HR86].

217 *See* Tomás Rau et al., *The Children of the Missed Pill*, 79 J. HEALTH ECON. 1, 2 (2021).

218 *See* Sean May & Monica Noether, *Unresolved Questions Relating to Market Definition in Hospital Mergers*, 59 ANTITRUST BULL. 479, 484, 486 (2014).

cluster market under the assumption that separate antitrust analyses are unnecessary when competitive conditions are similar for each.[219]

Yet there is good reason to think that the competitive conditions impacting reproductive healthcare services differ considerably from those of other GAC products. For instance, one of the reasons behind the increasing number of maternity ward closures is that they are generally a money *loser* for hospitals, in sharp contrast to other GAC services.[220] Moreover, because of the growing number of maternity care deserts in the United States, it is increasingly likely that not all of the hospitals involved in a merger (or impacted by a merger) will have maternity wards.[221] Thus, as was the case in *ProMedica v. Federal Trade Commission*, a merger that appears to be a four-to-three situation when GAC services are clustered may actually be a three-to-two situation when one isolates the obstetric services market.[222] Similarly, while standard merger analyses in the hospital context assume that the relevant payors are health insurance plans,[223] such an assumption is undermined when it comes to service lines like labor and delivery, abortion, or contraception. First, a large percentage of deliveries are paid for by Medicaid,[224] including more than two-thirds of births among Black women and American Indian or Alaska Native women.[225] Second, not all

219 *See id.*

220 *See* Caitlin Carroll et al., *Association Between Medicaid Expansion and Closure of Hospital-Based Obstetric Services*, 41 HEALTH AFFS. 531, 531 (2022) (noting that maintaining access to obstetric services is difficult because hospital-based obstetric units tend to be unprofitable due to high fixed costs and low reimbursements).

221 *See id.* (noting that hospital obstetric services have closed at a steady pace during the past decade and that only 44% of rural counties had obstetric services in 2018, down from 55% in 2004).

222 *See* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565–66 (6th Cir. 2014) (finding that although the market shares for each of Lucas County's four hospital systems were similar across a range of primary and secondary services, the same was not true for obstetric services, as only three of the hospital systems provided obstetric services).

223 *See, e.g.*, *id.* at 562 (focusing exclusively on privately insured patients).

224 Medicaid funds nearly half of all births, and the Medicaid reimbursement amount for obstetric services is low relative to those of private health plans. *See* Carroll et al., *supra* note 220, at 531.

225 AKASH PILLAI ET AL., KFF, MEDICAID EFFORTS TO ADDRESS RACIAL HEALTH DISPARITIES (2024), https://www.kff.org/medicaid/issue-brief/medicaid-efforts-to-address-racial-health-disparities [https://perma.cc/Y7JE-VEJC]. Future work should dig more deeply into the ways in which a two-stage competition model focused primarily on private insurance plans—thereby ignoring Medicaid recipients—may have contributed to the maternal healthcare crisis. It is notable that antitrust authorities place so much focus on price competition while the nation has faced untenable maternal mortality rates, particularly among women of color. *See* LATOYA HILL ET AL., KFF, RACIAL DISPARITIES IN MATERNAL AND INFANT HEALTH: CURRENT STATUS AND EFFORTS TO ADDRESS

insurance plans provide coverage for abortion or contraceptive services.[226] Moreover, some managed care plans create provider networks dominated by Catholic institutions, meaning that patients have slim pickings for in-network providers of reproductive healthcare,[227] while studies show that most consumers are not aware that certain religious hospitals will not provide particular services such as tubal ligation.[228] This is relevant given the second stage of hospital merger analyses focuses on a hospital's ability to attract patients within health plans.[229]

Notably, while reproductive rights advocates have urged antitrust enforcers to protect reproductive healthcare markets for decades,[230] doing so now is more important than ever. Red state abortion bans mean that more women in those states are being forced to

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THEM (2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/ [https://perma.cc/EK2Y-LCU3].

226 Twenty-five states have laws that prohibit insurance issuers from offering health care plans that include abortion coverage in the insurance marketplaces set up by the Affordable Care Act. *See* States Banning or Providing Insurance Coverage of Abortion Can Determine a Person's Health and Future, NAT'L WOMEN'S L. CTR. (2021), https://nwlc.org/resource/states-banning-or-providing-insurance-coverage-of-abortion-can-determine-a-persons-health-and-future/ [https://perma.cc/4X8L-U82B]. Eleven of those twenty-five states go even further and prevent all plans—including employer-sponsored plans—in the state from offering coverage of abortion as part of a comprehensive health care plan. *See id.* Moreover, Louisiana and Tennessee do not allow a woman to have insurance coverage for even life-saving abortion care. *See id.*

227 *See* Amelia Thomson-DeVeaux & Anna Maria Barry-Jester, *Insurers Can Send Patients to Religious Hospitals That Restrict Reproductive Care*, FIVETHIRTYEIGHT (Aug. 1, 2018), https://fivethirtyeight.com/features/how-insurers-can-send-patients-to-religious-hospitals-that-restrict-reproductive-care/ [https://perma.cc/LA7G-LP6K].

228 *See* Zarina J. Wong et al., *What You Don't Know Can Hurt You: Patient and Provider Perspectives on Postpartum Contraceptive Care in Illinois Catholic Hospitals*, 107 CONTRACEPTION 62, 64 (2022) (finding that patients in their study knew they were delivering in a Catholic hospital but were unaware that Catholic policies limited their health care options); Maryam Guiahi et al., *Are Women Aware of Religious Restrictions on Reproductive Health at Catholic Hospitals? A Survey of Women's Expectations and Preferences for Family Planning Care*, 90 CONTRACEPTION 429, 430 (2014) (finding that the majority of women surveyed who received care from a Catholic hospital did not anticipate differences in reproductive healthcare based on its Catholic status); Jocelyn M. Wascher et al., *Do Women Know Whether Their Hospital Is Catholic? Results From a National Survey*, 98 CONTRACEPTION 498, 501 (2018) (finding that over one-third of American women surveyed who named a Catholic hospital as their primary hospital for reproductive care are unaware it is Catholic).

229 *See* Cory Capps et al., *The Continuing Saga of Hospital Merger Enforcement*, 82 ANTITRUST L.J. 441, 444–45 (2018) (detailing the recent change in theoretical approach to hospital mergers).

230 *See generally* Jane Hochberg, *The Sacred Heart Story: Hospital Mergers and Their Effects on Reproductive Rights*, 75 OR. L. REV. 945 (1996) (scrutinizing the Sacred Heart merger and religious mergers in general and arguing for the need for public opposition to such mergers); Am. Pub. Health Ass'n, *Preserving*

undertake pregnancies they would not otherwise, while others are being forced to travel across state lines (sometimes multiple state lines) to purchase care far from home.[231] In other words, the demand for maternity care is rising in red states, while blue states face an increased demand for abortion care from out-of-state citizens. Moreover, data indicates that the demand for contraception (including sterilization) is rising among women *and* men.[232] Yet the increasing number of hospital mergers involving a religious institution that refuses to provide abortion, contraceptive, and sterilization care[233] means that even in blue states, consumers can be faced with decreased output and substandard care because of a hospital merger. Studies have found that Catholic hospital OB/GYNs are not able to

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Consumer Choice in an Era of Religious/Secular Health Industry Mergers (Position Paper), 91 AM. J. PUB. HEALTH 479 (2001).

231 Following the implementation of Florida's six-week abortion ban, women living in the southernmost tip of the state face a fourteen-hour drive to the closest abortion clinic in Charlotte, North Carolina. Lori Rozsa & Caroline Kitchener, *Florida Prepares for One of Nation's Strictest Abortion Bans to Take Effect*, WASH. POST, Apr. 30, 2024, https://www.washingtonpost.com/nation/2024/04/30/florida-abortion-ban/ [https://perma.cc/EB55-BUR5]. A patient whose pregnancy has progressed past twelve weeks will have to drive seventeen hours to southern Virginia. *Id.* The Center for American Progress calculated the typical drive time to the nearest provider of abortion care for a typical woman of reproductive age in each congressional district in 2023; the analysis found that women who earn less and experience the largest gender wage gaps have the longest travel times to the nearest abortion clinic. *See* SARA ESTAP, CTR. FOR AM. PROGRESS, ABORTION ACCESS MAPPED BY CONGRESSIONAL DISTRICT (2024), https://www.americanprogress.org/article/abortion-access-mapped-by-congressional-district/ [https://perma.cc/DWL3-JZJK].

232 *See* Virginia Langmaid, *Contraception Demand Up After* Roe *Reversal, Doctors Say*, CNN (July 6, 2022), https://www.cnn.com/2022/07/06/health/contraceptives-demand-after-roe/index.html [https://perma.cc/X879-B9GL]; Tess Vrbin & Antoinette Grajeda, *A Year Without Abortion in Arkansas: More Sterilizations and Continued Struggles in Maternal Health*, ARK. ADVOC. (June 26, 2023), https://arkansasadvocate.com/2023/06/26/a-year-without-abortion-in-arkansas-more-sterilizations-and-continued-struggles-with-maternal-health/ [https://perma.cc/9QTW-KPTC]; Michelle Crouch & Charlotte Ledger, *Sterilization Surge: Some Doctors Say Abortion Restrictions Are Driving N.C. Women to Choose Permanent Birth Control*, N.C. HEALTH NEWS (July 17, 2023), https://www.northcarolinahealthnews.org/2023/07/17/some-doctors-abortion-restrictions-driving-nc-women-sterilization/ [https://perma.cc/A6C2-H3KA].

233 *See* SOLOMON ET AL., *supra* note 188, at 3.

offer the standard of care with respect to postpartum tubal ligations,[234] ectopic pregnancy management,[235] and timely miscarriage management.[236]

It is therefore imperative that antitrust enforcers—in red and blue states—work to protect reproductive healthcare markets as much as possible by carefully analyzing the likely competitive effects of prospective hospital mergers and, if necessary, either blocking harmful mergers or requiring the merging entities to craft solutions to preserve services.[237] Note, of course, that enforcers in states where the legislature has decided to ban abortion care will likely not be focused on preserving access to abortion services. But they can and should focus on maximizing competition in the contraceptive, prenatal, and obstetric markets. Enforcers in states that seek to protect and promote women's access to abortion care, in contrast, should specifically focus on maximizing competition in their abortion care markets.

Importantly, prioritizing the markets women rely upon to support their labor force participation does not just mean bringing cases in response to discrete instances of anticompetitive behavior. An Antitrust Approach to Sex Equality also calls upon enforcers to take advantage of all the tools in their toolkit. This includes the FTC's ability to use Section 6(b) of the FTC Act to conduct studies without a specific law-enforcement purpose.[238] Such industry studies are generally taken in response to concerns about specific markets and/or market practices and not only allow the Commission to investigate the practices of particular market actors but also to better understand the particular competitive forces at work in a given market.[239] For instance, in 2021, the FTC launched a Section 6(b) study focused on determining the causes "behind ongoing supply chain disruptions and how these disruptions are causing serious and ongoing hardships for consumers and harming

234 *See* Debra B. Stulberg et al., *Tubal Ligation in Catholic Hospitals: A Qualitative Study of Ob-Gyns' Experience*, 90 CONTRACEPTION 422, 425–26 (2014).

235 *See* Angel M. Foster et al., *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, 21 WOMEN'S HEALTH ISSUES 104, 106–08 (2011).

236 *See* Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals,* 98 AM. J. PUB. HEALTH 1774, 1776–78 (2008).

237 *See, e.g.*, Durand, *supra* note 17, at 2623–29 (detailing the ways in which abortion services can be preserved following mergers involving Catholic systems).

238 15 U.S.C. § 46(b).

239 *See* Matthew Lane, *The FTC's 6(b) Study Authority: An Important Tool for Policymakers*, DISRUPTIVE COMPETITION PROJECT (Apr. 9, 2019), https://project-disco.org/competition/040919-the-ftcs-6b-study-authority-an-important-tool-for-policymakers/ [https://perma.cc/6REN-NY7A].

competition in the U.S. economy."[240] Similarly, in response to ever-rising prescription drug prices, the FTC launched a study in 2022 examining the role of pharmacy benefit managers in the prescription-drug industry in an effort to "assist policymakers in determining whether Americans would benefit from reforms to [such a] critical industry."[241]

As noted above, many of the key markets women rely upon to support their labor force participation are in dire straits.[242] While some of the causes behind these market dysfunctions are readily evident (e.g., a hospital merger that substantially lessens competition by decreasing the number of providers who can provide standard care), many are not.[243] Federal enforcers should be applying all the tools at their disposal to understand *why* these key markets are failing consumers, including Section 6(b) of the FTC Act, and using the information generated to make substantive policy recommendations. As of now, however, the FTC's track record in doing so leaves much to be desired. For instance, in response to a nationwide shortage of infant formula that left parents facing empty shelves, the FTC did not employ its Section 6(b) powers to understand what caused this specific supply chain disruption,[244] which would have allowed it to demand information from the major infant-formula manufacturers. Instead, it issued a Request for Information[245] and, two years later, quietly produced a two-year report that is best described as a literature review; it provided no information not already evident to those who have been following the infant formula market.[246] It is unclear if the FTC plans to do anything more with respect to the infant formula market.

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240 Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions [https://perma.cc/DZ8W-J2VM].

241 FED. TRADE COMM'N, COMM'N FILE NO. P221200, STATEMENT OF CHAIR LINA M. KHAN REGARDING 6(B) STUDY OF PHARMACY BENEFIT MANAGERS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf [https://perma.cc/3XRE-LVYH].

242 *See* discussion *supra* Parts II.C.1–C.4.

243 After all, firms engaging in illegal, anticompetitive behavior do not tend to broadcast it.

244 *See* Press Release, Office of Rep. Ilhan Omar, Rep. Omar Leads Letter Calling for Investigation into Baby Formula Shortage (May 20, 2022), https://omar.house.gov/media/press-releases/rep-omar-leads-letter-calling-investigation-baby-formula-shortage [https://perma.cc/9BJQ-MP8N].

245 Press Release, Fed. Trade Comm'n, Federal Trade Commission Launches Inquiry into Infant Formula Crisis (May 24, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-launches-inquiry-infant-formula-crisis [https://perma.cc/TCT7-M6NY] [hereinafter FTC Infant Formula Press Release].

246 KHAN ET AL., FED. TRADE COMM'N, *supra* note 16.

Similarly, it is striking that while it is now well recognized that the market for childcare in the United States is failing to meet the nation's needs, and although it is recognized that this failure is causing significant harm to the United States' economy in terms of lost wages,[247] there has been no discussion as to how antitrust enforcers might play a role in crafting a solution. This oversight seems particularly puzzling given President Biden's April 2023 executive order[248] outlining the need to boost the supply of high-quality childcare. Even if federal enforcers have no reason to believe anticompetitive behavior is taking place within the childcare market (something that would seem to be an open question, as is the case with any industry), they can join the fight to promote affordable childcare by studying the market and developing suggestions about how to better harness competition for the benefit of consumers. Indeed, the FTC should follow the lead of the Australian Competition and Consumer Commission[249] and conduct an inquiry into the market for childcare services to determine the level of competition in the childcare market, the potential impacts of governmental policy, and the possibility that industry practices might be stifling competition.[250]

B. Engaging in Competition Advocacy

The second component of an Antitrust Approach to Sex Equality is to engage in active competition advocacy, again with a particular eye to the markets outlined in Part II. Competition advocacy can broadly be defined as the use of enforcement agencies' "expertise in competition, economics, and consumer protection to persuade governmental actors at all levels of the political system and in all branches of government to design

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247 *See, e.g.*, SANDRA BISHOP, COUNCIL FOR A STRONG AM., $122 BILLION: THE GROWING, ANNUAL COST OF THE INFANT-TODDLER CHILD CARE CRISIS (2023), https://www.strongnation.org/articles/2038-122-billion-the-growing-annual-cost-of-the-infant-toddler-child-care-crisis [https://perma.cc/HQ3M-BZYP].

248 Exec. Order No. 14,095, 88 Fed. Reg. 24669 (Apr. 18, 2023).

249 *See* AUSTRALIAN COMPETITION & CONSUMER COMM'N, CHILDCARE INQUIRY (2023), https://www.accc.gov.au/system/files/ACCC%20Childcare%20Inquiry-final%20report%20December%202023.pdf?ref=0&download=y [https://perma.cc/J6AX-9Z3K].

250 *See* Maria Flynn, Opinion, *U.S. Child Care Crisis Is Holding Back the Workforce*, FORBES (Nov. 2, 2023), https://www.forbes.com/sites/mariaflynn/2023/11/02/us-child-care-crisis-is-holding-back-the-workforce/?sh=17f484d85bfe [https://perma.cc/G75U-3P2G] (discussing that as many as 100,000 Americans have been forced to stay home from work each month because of childcare problems and that the economic toll is $122 billion each year in lost earnings, productivity, and revenue).

policies that further competition and consumer choice."[251] In practice, it has often taken the form of letters from agency staff, formal comments, and amicus curiae briefs.[252]

Employing competition advocacy within an Antitrust Approach to Sex Equality is important for two reasons. First, although excessive governmental regulation can be directed towards any industry, history suggests it is particularly likely to occur in markets that disproportionately impact women.[253] This is because societal beliefs and stereotypes regarding women's "proper" behavior, specifically with respect to their market behavior, often lead to paternalistic or protectionist regulations that impede market competition and harm female consumers and workers.[254] Second, antitrust enforcers do not possess the necessary authority to tackle all anticompetitive distortions. Antitrust law's state action doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy and (2) actively supervised by the state.[255] Similarly, federal legislation that conflicts with federal antitrust laws is

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251 James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1091 (2005). As part of their advocacy initiatives, the Department of Justice and FTC have sought to (1) "eliminate unnecessary and costly existing government regulation," (2) "inhibit the growth of unnecessary new regulation," (3) "minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives," and (4) "ensure that regulation is properly designed to accomplish legitimate regulatory objectives." William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at "Economic Competition Day: Shared Experiences": A Culture of Competition for North America 8 (June 24, 2002), https://www.justice.gov/atr/speech/culture-competition-north-america [https://perma.cc/C77H-X3TK].

252 *See* Maureen K. Ohlhausen, Comm'r, U.S. Fed. Trade Comm'n, Address at Eleventh Annual Competition Day: An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification (Nov. 5, 2013), https://www.ftc.gov/system/files/documents/public_statements/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger/131105mkochilespeech.pdf. [https://perma.cc/JXZ7-ANX9].

253 For instance, reform movements in the nineteenth century led to the initiation of protective legislation for women, which reduced the jobs available for women, restricted the hours women could work, the type of work they could perform, and their working conditions. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525 (1923); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

254 For instance, it is almost certainly the case that gender stereotypes have stayed antitrust enforcers' hands in the past. A prime example would be state and federal antitrust agencies' failure to respond to the naked—and very public—price-fixing that took place in the egg donor industry for several years. *See* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 60 (2009).

255 *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); *see also* Parker v. Brown, 317 U.S. 341 (1943).

said to enact an "implied repeal" of the antitrust laws.[256] Thus, competition advocacy may sometimes be the only tool available to enforcers who seek to prevent consumer harm.

Consider the market for infant formula, which, as noted earlier, was characterized by a severe shortage beginning in early 2022 when a single manufacturing plant shut down.[257] In response, the FTC launched an inquiry seeking to understand the causes behind the shortage.[258] On the FTC's to-do list was to understand (1) how the pattern of mergers and acquisitions in the infant formula market might have contributed to excessive concentration in the industry and (2) how the FTC itself or state or federal agencies may have inadvertently taken steps that contributed to fragile supply chains in the market.[259] Merger analysis, of course, falls within the traditional wheelhouse of Section 7 of the Clayton Act, and thus, to the extent that the FTC finds that the market troubles stem from anticompetitive mergers, enforcement activity is a possibility.[260] But if the FTC determines that state or federal regulations are to blame, then competition advocacy may be the appropriate tool moving forward.

Consider also the market for abortion care. This market is characterized by considerable and variable state-level regulations, some of which are "demand-side" policies (e.g., mandatory ultrasound requirements and waiting periods) and some of which are "supply-

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256 *See* Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975).

257 *See* discussion *supra* Part II.D.2.

258 *See* FTC Infant Formula Press Release, *supra* note 245.

259 Although there are several potential causes behind the shortage—including lax merger enforcement—many observers argue that the federal government's widely used Special Supplemental Nutrition Program for Women, Infants, and Children (popularly known as "WIC") was at least partly to blame. Just two companies service close to 90% of the infants who receive benefits under this program, in part because of the way the program's contracting system works. Under this system, winning a state contract means that a company obtains a monopoly over all WIC participants in that state; program participants are unable to use program vouchers to purchase a different brand. *See, e.g.*, Meredith Lee & Helena Bottemiller Evich, *How the Baby Formula Shortage Links Back to a Federal Nutrition Program*, POLITICO (May 19, 2022), https://www.politico.com/news/2022/05/19/baby-formula-shortage-federal-contracts-00033581 [https://perma.cc/Y8WA-68ZK].

260 The federal antitrust authorities have made clear that it retains the authority to challenge transactions whose previous consummation was in violation of the Clayton Act. *See* Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp. (Feb. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies [https://perma.cc/76WW-6ADL].

side" policies (e.g., facility or licensing requirements and gestational age limits).[261] Both types of policies can and do impact the competitive functioning of this market.[262] While policies that impede the competitive process are in line with red states' opposition to abortion, they are assuredly *not* in line with blue states' commitment to protecting and promoting access to care. Blue state enforcers, then, should work to educate both legislators and the public alike as to the negative consequences such regulations have for women's healthcare and, subsequently, their labor force participation.

Importantly, although competition advocacy may be the only tool available to antitrust enforcers facing state or federal regulations that harm the competitive process, this does not necessarily mean it is an inferior tool. As former FTC Chairman Timothy Muris has explained, competition advocacy can sometimes be a "better or more effective" tool than enforcement, "especially when governments are making major policy changes that fundamentally will reshape the competitive landscape."[263] In 1974, for example, Lewis Engman, then chairman of the FTC, gave a speech in which he argued that burdensome federal transportation regulations were contributing to subpar economic outcomes for the nation.[264] His speech received substantial coverage in the popular press, and over the next decade, the Commission aggressively pursued competition advocacy to promote deregulation of airlines, railroads, trucking, and intercity buses. It has been estimated that deregulation during this period improved consumer welfare by more than $50 billion annually.[265] Thus,

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261 *See generally* Andrew Beauchamp, *Regulation, Imperfect Competition*, *and the U.S. Abortion Market*, 57 INT'L ECON. REV. 963 (2015).

262 *See id.* (finding that state regulations impact demand, marginal cost, and fixed costs of abortion provision). Advocates of these laws argue that they are intended to protect women's health, but it is widely accepted that regulated abortion procedures are exceedingly safe. The American College of Obstetricians and Gynecologists advocates for an end to such policies. *See* Press Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Updates Committee Opinion on Increasing Access to Abortion (Nov. 23, 2020), https://www.acog.org/news/news-releases/2020/11/acog-updates-committee-opinion-on-increasing-access-to-abortion [https://perma.cc/M7JJ-W9LV].

263 Timothy J. Murris, Chairman, U.S. Fed. Trade Comm'n, Address at the International Competition Network, Panel on Competition Advocacy and Antitrust Authorities: Creating a Culture of Competition: The Essential Role of Competition Advocacy (Sept. 28, 2002), https://www.ftc.gov/news-events/news/speeches/creating-culture-competition-essential-role-competition-advocacy [https://perma.cc/Z8PQ-2YAZ].

264 *Id.*

265 *See* Robert Crandall & Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry* 2 (Ctr. for Mkt. Procs, Working Paper, 1997), https://www.mercatus.org/sites/default/files/d7/uploadedFiles/Mercatus/Publications/MC_RSP_RP-Dregulation_970101.pdf [https://perma.cc/L9TT-MXW6].

to the extent that enforcers can convince policymakers of the ill effects of their regulatory initiatives, competition advocacy has considerable potential for improving the competitive process. An Antitrust Approach to Sex Equality therefore calls on enforcement agencies to advocate for female consumers (and workers) "at every opportunity and in every forum. In executive councils, before national and local legislatures, and through public opinion, [they] should increase [their] efforts to produce the evidence and rhetoric necessary to defend the marketplace."[266]

Finally, it is not just policymakers that enforcers should be speaking to. As Thurman Arnold observed sixty years ago, "[t]he antitrust problem must be brought to the public and not reserved for the abstract consideration of the lawyers or the economist."[267] If regulations that harm competition and consumers can only be removed through the political process, then citizens must understand how and why those regulations harm the market. And the FTC, in particular, is no stranger to the business of educating the public. According to the FTC, the Commission's consumer and business education protection program is a critical part of the agency's consumer protection mission.[268] It produces and distributes "actionable, practical, plain-language guidance on dozens of issues and reaches tens of millions of people each year through the FTC's website, the media, and partner organizations."[269] Such educational efforts should also be incorporated into its *competition* protection mission. By alerting citizens (consumers) to the significant economic costs of various governmental regulations, antitrust agencies increase the chances that such regulations can be rescinded following the next election.[270]

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266 Murris, *supra* note 263.

267 Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROBS. 5, 10 (1940).

268 *Education*, FED. TRADE COMM'N (2019), https://www.ftc.gov/reports/annual-highlights-2019/education [https://perma.cc/26GA-5KXF].

269 *Id.*

270 Notably, the FTC is not limited to press releases or speeches when it comes to educating the public; popular media can also be an effective tool. For instance, FTC Chair Lina Khan appeared on *The Daily Show* with Jon Stewart to discuss Big Tech monopolies after the government filed a complaint alleging Apple had engaged in illegal monopolization. *The Daily Show* (Comedy Central television broadcast Apr. 1, 2024), https://www.youtube.com/watch?v=oaDTiWaYfcM&t=2s&ab_channel=TheDailyShow [https://perma.cc/X3DA-6PXT]. Within one month, the interview had received 1.5 million views on YouTube. *Id.*

IV. Pursuing Equity Through Efficiency: The Synergy Between Antitrust Law and Constitutional Law

> *"The old gospel of efficiency, not equity, is dead. The two pursuits can move together, in tandem, or apart."*[271]

Calls for antitrust enforcers to begin taking equity into account (among other social values) have spurred much debate within the antitrust community, with many arguing that antitrust is a poor tool for pursuing any social goals other than efficiency.[272] Hopefully by this point readers have realized that this is a false dichotomy. By protecting and promoting competition in the markets that support women's labor force participation, the antitrust laws most certainly can contribute to greater gender equality. But in case doubt persists, this final Part IV more explicitly makes the case for why antitrust can be viewed as complementary to constitutional sex equality doctrine.

Here is my starting proposition: both the antitrust laws and constitutional sex equality doctrine work to promote greater economic efficiency. This is most apparent, of course, when it comes to the antitrust laws. Since the 1970s, American antitrust jurisprudence has focused on maximizing economic efficiencies, particularly with respect to consumer markets, but also with respect to labor markets.[273] To see why our nation's constitutional sex equality doctrine promotes economic efficiency requires us to recognize that the separate spheres tradition was not only discriminatory and contrary to democratic values but that it was also blatantly inefficient.

Under this tradition, cultural norms and laws pushed individuals to specialize in particular spheres of work—unpaid household work or paid work outside the home[274]—regardless of their innate abilities and preferences. This is clearly inefficient, for economic theory tells us that a nation's talent is maximized when individuals in society take on the tasks for which their talents and preferences make them most suited—that is, when

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271 Eleanor M. Fox, *Competition Policy at the Intersection of Equity and Efficiency: The Developed and Developing Worlds*, 63 ANTITRUST BULL. 1, 6 (2018).

272 *See, e.g.*, Timothy J. Brennan, *Should Antitrust Go Beyond "Antitrust"?*, 63 ANTITRUST BULL. 49, 52 (2018) (suggesting that using antitrust to pursue equality goals requires one to pursue a standard other than (or in addition to) economic efficiency).

273 *See* BORK, PARADOX *supra* note 74, at 91–92; Hovenkamp, *supra* note 1, at 1.

274 *See* discussion *supra* Part I.

each individual works in a position where she has a relative advantage.[275] The separate spheres framework, then, not only restricted individual choice and autonomy, but it also promoted a truly massive misallocation of talent within the nation's economy. Indeed, a recent study shows that a sizeable portion of the aggregate growth from 1960 to 2010 in the United States can be explained by the increasing presence of women (and Black men) in occupations from which they were basically banned in the past.[276] Thus, when the Supreme Court declared that sex-based distinctions "supported by no more substantial justification than 'archaic and overbroad' generalizations" about men and women's proper roles in society violate the Fourteenth Amendment,[277] it advanced not only gender equality but economic efficiency as well.

Now here is my second proposition: both constitutional sex equality doctrine and the antitrust laws seek to promote individual choice. Constitutional sex equality doctrine, with its roots in anti-stereotyping theory, rejects the separate spheres tradition of pushing individuals to specialize in particular spheres of work simply because of their sex, without regard for individual preferences and talents.[278] Antitrust law, in turn, has long been focused on maximizing consumer choice and ensuring that the market produces a sufficient number of quality products for consumers to choose among.[279] Importantly, anticompetitive behavior, excessive concentration, or unnecessary regulation in key consumer markets can result in a deprivation of choice in both the antitrust *and* constitutional sense. This point may perhaps be best made by a real-life example.

As discussed in Part II, the American childcare market is characterized by low output and high prices, making it difficult for parents to find affordable childcare. Erica Manoatl and her husband were no exception.[280] When they put their names on the waitlists for

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275 Constitutional sex equality doctrine prohibits antitrust enforcers from assuming women hold a natural advantage in home labor as opposed to market work. *See* Califano v. Goldfarb, 430 U.S. 199, 206–07 (1977).

276 *See* Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth*, 87 ECONOMETRICA 1439, 1441 (2019).

277 *Califano*, 430 U.S. at 206–07. Today, equal protection jurisprudence holds that laws that classify on the basis of sex are subject to heightened scrutiny. United States v. Virginia, 518 U.S. 515, 531–34 (1996).

278 *See* discussion *supra* Part I.

279 *See* Hovenkamp, *supra* note 1, at 2.

280 *See* Chabeli Carrazana, *Day Care Waitlists Are So Long, Moms Are Quitting Their Jobs or Choosing to Stop Having Kids*, 19TH (Mar. 30, 2023), https://19thnews.org/2023/03/day-care-waitlists-child-care-strain-parenting/ [https://perma.cc/HXG8-N6MU].

multiple childcare centers in their home city of Denver, Colorado, they thought they had plenty of time to secure a spot: Manoatl was just twelve weeks pregnant.[281] A year and a half after the birth of their daughter, however, they were still waiting for a slot to open.[282] Ultimately, Manoatl and her husband found it too difficult to manage two full-time jobs and childcare just between the two of them: Manoatl quit her job in the child advocacy and policy field and became a full-time caregiver, while her husband switched to a job that paid more.[283] Manoatl described her feelings about the situation: "In my opinion, we were not given a choice here . . . We wanted her to be in a childcare center. It's very hard for me to accept that we can't do that."[284]

Note that Manoatl's story represents a subpar outcome regardless of whether one views it through an antitrust lens (i.e., efficiency) or a sex equality lens. First, both Manoatl and her husband were harmed as consumers because output in the childcare market was too low and unable to meet demand. Second, Manoatl and her husband were also harmed as workers: Manoatl was forced to step away from a career that she loved to become a full-time, unpaid caregiver when her true preference was to remain in the workforce.[285] Her husband, in turn, was forced to take a position that likely required him to spend less time with his family. That is, Manoatl and her husband were pushed into a separate spheres dynamic they did not voluntarily choose.

Importantly, while Manoatl's situation is problematic from both an antitrust and constitutional law perspective, it is only antitrust law that has the potential to provide a solution. While there are many forces that operate to push women into an unpaid caregiving role, constitutional sex equality doctrine's protective reach only extends to *state* actions; it does not extend into the workings of the free market.[286] But antitrust law, of course, does.

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281 *See id.*

282 *See id.*

283 *See id.*

284 *Id.*

285 As Manoatl explained, it was "still rough acknowledging that [she] spent a lot of time prepping to come into this career, which [she] really love[d]," only to be pushed out of it. *Id.*

286 The same, of course, is true under the Supreme Court's doctrine regarding reproductive rights. The Supreme Court has made clear on multiple occasions that its decisions establishing constitutional rights to contraception and abortion established only negative rights to be free from government interference, not positive rights to the assistance of others. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding a Missouri statute that prohibited public employees from performing abortions in public hospitals).

Indeed, antitrust is laser-focused on "encourag[ing] markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."[287] It is therefore a natural place to turn when markets fail to meet society's needs.

To summarize, once we acknowledge the link between certain consumer markets and women's ability to participate in paid work, it becomes clear that antitrust law should be included in the list of tools society can use to promote gender equality. Nor should antitrust enforcers hesitate to take constitutional equality goals, and not just efficiency concerns, into account. As the Supreme Court itself has explained, the antitrust laws "rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing *an environment conducive to the preservation of our democratic political and social institutions*."[288] To the extent that market inefficiencies or misbehavior are impeding women's ability to not only purchase key products and services but also to participate equally in the labor force, antitrust enforcers should sit up and take notice.

CONCLUSION

It has been argued that antitrust is "not the appropriate tool for pursuing particular goals of social equality" and that gender equality as a policy goal is "best left to the constitutional and statutory institutions intended to address" it.[289] It has also been argued that those who believe antitrust should reflect other considerations—such as equality—"need to propose ways in which judges in antitrust cases should apply a standard other than . . . economic efficiency" when faced with an antitrust claim.[290] This is so, it is said, because "if individual case decisions do not change, then the effects of antitrust enforcement do not change."[291] Neither claim is true. This Article has shown that antitrust law, and more specifically, the consumer welfare standard, is a natural vehicle for promoting greater gender equality, as measured by women's labor force participation. Antitrust enforcers (and private plaintiffs) can play an important role in our nation's march towards greater gender equality simply by prioritizing the consumer markets that are complementary to women's labor force

287 Hovenkamp, *supra* note 75, at 102.

288 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (emphasis added).

289 Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 811 (2021).

290 Brennan, *supra* note 272, at 45.

291 *Id.*

participation. In doing so, they can not only secure greater consumer welfare and worker welfare, but they can help create a market environment that helps fulfill the promises of our nation's constitutional sex equality doctrine. Doing so does no violence to traditional antitrust principles, as promoting efficiency and equity can (at least in the case of gender equality) go hand in hand.

Importantly, this Article represents just one step in a larger movement to begin thinking about antitrust's role in promoting gender equality.[292] It attempts to show that there is not necessarily a tension between promoting efficiency and equality and that the consumer welfare standard can be used as a vehicle for promoting gender equality. But further work remains to be done in terms of building the theoretical, doctrinal, and empirical basis for a gender-inclusive approach to antitrust. Moreover, advocates for gender equality (and perhaps specifically access to reproductive healthcare) should think critically about how best to incorporate antitrust into their larger strategic initiatives. The fight for gender equality is far from over, and we must use every tool at our disposal to continue making forward progress.

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292 As noted earlier, both the OECD and the Canadian government have begun to explore the role of gender in antitrust law. *See* discussion *supra* note 83.

INVISIBLE LABOR, INVISIBLE RIGHTS: AN INTERSECTIONAL ANALYSIS ON THE UNITED STATES' AU PAIR PROGRAM

XUEYING (CATHY) ZENG*

Abstract

Immigrant women of color have long formed the backbone of the American domestic workforce, and in the past few decades, they have been increasingly stepping in to fill the country's deepening childcare crisis. While scholars have examined the racialized, gendered, and classed dimensions of domestic labor and the transnational "global nanny chain," far less attention has been paid to immigrant women of color who enter the United States through legal, temporary guest worker programs. This Note focuses on the United States' au pair program—a J-1 Cultural Exchange initiative—to examine the intersectional vulnerabilities faced by au pairs from the Global South and other developing countries. It argues that these au pairs are uniquely exposed to exploitation not only because of the inherent precarity of live-in domestic labor but also due to their "liminal legality": a form of legal marginalization that simultaneously grants and withholds rights, creating a precarious state of in-betweenness. Drawing on recent litigation, demographic shifts in the program, and an intersectional framework, this Note highlights how these au pairs are often excluded from effective labor protections and struggle to assert their rights within both legal and social structures. It concludes by calling for robust anti-retaliation protections and expanded access to labor organizing as essential mechanisms for empowering minority au pairs and addressing the structural harms they face.

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* J.D. 2025, Columbia Law School; B.A. 2020, Smith College. I would like to thank Professor Kate Andrias for her invaluable guidance and the editorial staff of the *Columbia Journal of Gender and Law* for their exceptionally helpful and thoughtful editing in preparing this piece for publication. All errors are my own.

INTRODUCTION

Immigrant women, especially women of color, have long served as the backbone of the American domestic work industry.[1] As the United States confronts an escalating childcare crisis, migrant women have stepped in to fill the critical gaps in care work, allowing local women to participate in the workforce and obtain affordable childcare.[2] In New York City, for instance, 94% of domestic workers are women, 78% were born outside the United States, and 83% are women of color.[3]

Scholars have extensively examined the racialized and gendered division of domestic workers,[4] exploitation of undocumented domestic workers,[5] and migrant women in the "global nanny chain."[6] Coined by sociologist Arlie Hochschild, the term "global nanny chain" refers to a transnational network of women who migrate from economically disadvantaged countries to wealthier nations to work as domestic workers, primarily as

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1 Domestic work refers to the reproductive labor performed in the private sphere, including cooking, cleaning, and caring for dependent family members. This Note focuses on childcare work conducted by au pairs, which typically involves taking care of children by cooking and cleaning for them, supervising and accompanying them, addressing their needs, and teaching them a foreign language. This Note uses the phrases "domestic work" and "childcare work" to refer to the work performed by au pairs.

2 *See* Hila Shamir, *What's the Border Got to Do with It? How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL'Y & L. 601, 602–03 (2011).

3 NAT'L DOMESTIC WORKERS ALL., DOMESTIC WORK IN AN ENGINE OF NEW YORK CITY'S ECONOMY: NEW YORK CITY DOMESTIC WORK FACTSHEET, https://domesticworkers.org/membership/chapters/we-dream-in-black-new-york-chapter/nyc-care-campaign/new-york-city-domestic-work-factsheet/#:~:text=94%25%20of%20New%20York%20City [https://perma.cc/2AZV-BZJX]. The share of women of color in domestic work is disproportionately high, with 38% being Hispanic/Latinx, 27% Black (non-Hispanic), and 18% Asian. *Id.*

4 *See, e.g.*, Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, J. WOMEN CULTURE & SOC'Y 1, 1 (1992) (highlighting the racial and gendered division of paid domestic work); MARY ROMERO, MAID IN THE U.S.A. (1992) (noting the structural inequalities affecting Latinx domestic workers and the intersection of race, class, and gender); PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE (2007) (exploring the lived experiences of immigrant domestic workers with a focus on the marginalization and exploitation of domestic workers along the lines of race and class).

5 *See, e.g.*, ROMERO, *supra* note 4 (noting the extreme hardship undocumented Latinx women face in domestic work); HONDAGNEU-SOTELO, *supra* note 4.

6 *See, e.g.*, ARLIE RUSSELL HOCHSCHILD & BARBARA EHRENREICH, GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (2000).

nannies or caregivers.[7] Unbalanced power dynamics in the household, social isolation, low wages, and fear of repatriation characterize their day-to-day lived experience.[8]

Scholars and commentators have widely documented how race, gender, class, and immigration status intersect to heighten the risks of exploitation for migrant domestic workers.[9] However, far less research has focused on immigrant women of color who enter the United States through guest worker programs with temporary legal status.[10] This Note examines the au pair program, a J-1 Cultural Exchange Program that recruits young foreign nationals, predominantly women, to live in American households and provide childcare in exchange for cultural exchange experiences. Applying an intersectional analysis to the experiences of au pairs from Latin America and other developing countries,[11] this Note argues that Latinx au pairs experience heightened vulnerabilities due to both the exploitative nature of live-in domestic work and their legally marginalized status through guest worker programs. In addition to race, gender, and national origin, this Note brings the concept of "liminal legality"[12]—a framework that captures the precarity, temporariness, and legal instability of noncitizens with limited rights—into the analysis to demonstrate how this legal status renders Latinx au pairs more susceptible to abuse while simultaneously restricting

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7 *Id.*

8 *See, e.g.*, Janet McLaughlin & Jenna Hennebry, *Pathways to Precarity: Structural Vulnerabilities and Lived Consequences for Migrant Farmworkers in Canada*, *in* PRODUCING AND NEGOTIATING NON-CITIZENSHIP 175, 175–95 (2013) (Luin Goldring & Patricia Landolt eds., 2013).

9 *See, e.g.*, Glenn, *supra* note 4; ROMERO, *supra* note 4.

10 *See, e.g.*, RHACEL SALAZAR PARREÑAS, UNFREE: MIGRANT DOMESTIC WORK IN ARAB STATES (2021) (examining an employment sponsorship system known as the *kafala* in the United Arab Emirates and arguing that the *kafala* renders migrant workers unfree because they are made subject to the arbitrary authority of their employers); LUIN GOLDRING & PATRICIA LANDOLT, PRODUCING AND NEGOTIATING NON-CITIZENSHIP (2013) (analyzing the complex dynamics through which individuals are excluded from citizenship rights and how they negotiate their precarious legal status through this exclusionary framework).

11 For convenience, this Note will use the term "minority au pairs" to refer to au pairs from the Global South and other developing countries.

12 *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 709 (2015) (noting that "the notion of liminal legality is used to describe individuals moving in and out of, and living on the edges of, legal immigration status"); Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOCIO. 999 (2006) (noting that liminal legality subjects immigrants to a state of protracted legal uncertainty, restricting their access to rights and protections while exposing them to heightened vulnerabilities and emphasizing that this condition is not a temporary phase, but a long-term reality shaped by shifting immigration policies, bureaucratic inefficiencies, and structural barriers that prevent full integration).

their ability to seek legal redress. To enhance the legal mobilization of marginalized au pairs, this Note calls for the implementation of anti-retaliation protections and expanded access to labor-organizing efforts to safeguard the rights of Latinx au pairs.

Established in 1964, the U.S. au pair program remained largely absent from scholarly discourse until the 2010s. The practice of au pairing originated in post-World War II Western Europe, where young women traveled to foreign countries and resided in local households.[13] In its early years, the program mostly comprised participants from Western Europe.[14] Perhaps because of these origins, this program has long been considered a visa pathway associated with privilege and cultural exchange, rather than a traditional labor arrangement.[15]

Beginning in the 2010s, the program faced growing scrutiny. Professor Janie Chuang notably challenged the prevailing "cultural exchange" narrative, arguing that it functioned as a disguise for a government-facilitated domestic worker program designed to provide flexible, in-home childcare for upper-middle-class American families at below-market rates.[16] Since 2014, au pairs have brought three class actions against their recruiting agencies ("au pair agencies" or "sponsors"), challenging their status as "cultural exchange agents" and alleging violations of federal and state minimum wage and hour law.[17]

Federal courts across multiple jurisdictions have ruled in favor of au pairs, recognizing them as "employees" entitled to statutory labor protections.[18] In response to these legal challenges, the Department of State proposed revisions to the program, including a raise in au pairs' weekly salary to comply with state minimum wage laws and the introduction of

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13 *See* Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 275 (2013).

14 *See id.*

15 *See id.* at 271.

16 *See id.* at 272.

17 *See* Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079–80 (D. Colo. 2016); Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322–23 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023); Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 2918896 (N.D. Cal. July 25, 2022).

18 *See, e.g.*, *Beltran*, 176 F. Supp. 3d at 1082; *Morales Posada*, 554 F. Supp. 3d at 322–23.

additional safeguards to protect them from exploitative host families, reflecting some of the key demands advocated by labor rights organizations.[19]

Although these developments address the pervasive issue of wage theft within the program, they fail to account for the unique challenges encountered by Latinx au pairs. Over the past decade, the program has undergone a significant demographic shift, with women from the Global South and developing countries replacing the previous Western European majority.[20] Countries such as Brazil, Mexico, Colombia, South Africa, and Argentina have emerged as leading sources of au pair participants, alongside traditional sending nations like Germany and France.[21]

This demographic transition has unfolded within the broader framework of the "international division of reproductive labor"—commonly referred to as the "global nanny chain"—wherein women from lower-income countries migrate to wealthier nations to perform domestic and caregiving labor.[22] In addition, domestic work itself is inherently shaped by the intersecting systems of gender, race, class, and immigration status,[23] making an intersectional approach essential to fully understanding the vulnerabilities faced by au pairs. Accordingly, this Note employs an intersectional framework to examine the experiences of Latinx au pairs, highlighting the compounded forms of marginalization they endure within the program.

While class action litigation has played a crucial role in securing wage protections for au pairs, its structural limitations have left minority au pairs' intersectional harms and grievances unaddressed, often a result of litigation strategy and cultural conditioning.[24] Au pairs exist in a gray area of legal protection—formerly covered by federal and state labor laws, yet practically constrained by their precarious legal status, limiting their access to collective bargaining protections and legal redress.[25] Consequently, even when class

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19 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

20 *See infra* note 81.

21 *See id.*

22 *See* RHACEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 28–52 (2d ed. 2015); HOCHSCHILD & EHRENREICH, *supra* note 6, at 28.

23 *See, e.g.*, ROMERO, *supra* note 4, at 27; Glenn, *supra* note 4, at 1–3.

24 *See infra* Part III.

25 *See infra* Part III.

actions secure financial settlements, systemic vulnerabilities faced by minority au pairs remain outside of legal protection.[26]

Part I of this Note provides an overview of domestic workers and guest worker programs in the United States, contextualizing the framework in which the Au Pair Program operates.[27] This section then examines the program's historical development and highlights a notable trend during the COVID-19 pandemic, wherein minority au pairs appeared more likely to remain in increasingly hostile work environments despite experiencing fewer cultural exchange opportunities.[28] Part II takes an intersectional lens to the au pair program, analyzing the mistreatment and problems faced by minority au pairs specifically.[29] This section argues that the program's classification as a guest worker program, combined with the preexisting vulnerabilities of women of color in domestic labor, exacerbates conditions of precarity, systemic exploitation, and deterrents to rights enforcement.[30] Part III focuses on the current legal landscape, noting that heightened invisibility and compounded vulnerabilities of minority au pairs diminish their ability to benefit from both top-down regulatory interventions and bottom-up grassroots advocacy.[31] Given these structural barriers, this Note contends that robust anti-retaliation protections are essential to enabling minority au pairs to engage in rights-claiming processes and participate in collective bargaining efforts, thereby fostering meaningful labor protections within the program.[32]

I. Background

A. Immigrant Domestic Workers in Context

Immigrant women from the Global South constitute a disproportionate share of the domestic workforce, a pattern deeply rooted in the gendered and racialized division of

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26 *See infra* Part III.

27 *See infra* Part I.

28 *See infra* Part I.C.

29 *See infra* Part II.

30 *See infra* Part II.

31 *See infra* Part III.

32 *See infra* Part IV.

reproductive labor.[33] Since the colonization of the Americas, domestic work has largely been relegated to poor, immigrant women of color, with a few exceptions.[34] In the nineteenth century, for instance, domestic work in the South was often associated with the stereotypical image of "black mammy."[35] In the Southwest and the West, domestic work was primarily performed by Mexican and Mexican American women, as well as Asian, African American, and Native American women, and, briefly, Asian men.[36]

Prior to the 1920s, most domestic workers lived in employers' homes, where employers enjoyed significant control over their dwellings, nutrition, privacy, and social relations.[37] Dependent upon their employers and isolated from social support, live-in domestic workers were subject to greater vulnerabilities, including sexual abuse, psychological manipulation, intrusive questioning, and demands for long hours of work.[38]

Society systematically undervalues domestic work by categorizing it as inherently "women's work."[39] Childcare, in particular, demands not only the fulfillment of children's physical needs but also the provision of emotional care—an essential yet intangible form of labor that remains difficult to quantify within traditional employment frameworks.[40]

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33 *See* Julia Wolfe et al., *Domestic Workers Chartbook*, ECON. POL'Y INST. (May 14, 2020), https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/ [https://perma.cc/Y67K-GSG6]. "Reproductive labor" refers to the activities involved in sustaining and reproducing life within households and communities. *See* Glenn, *supra* note 4, at 3. This includes tasks such as caregiving, child-rearing, household chores, cooking, cleaning, and emotional support. *See id.* Reproductive labor is often unpaid or underpaid and has historically been associated with women's roles within the family and household. *See id.* It encompasses the physical, emotional, and mental work required to maintain daily life and support the well-being and development of individuals and families. *See id.*

34 *See* HONDAGNEU-SOTELO, *supra* note 4, at 14.

35 *See* CHANEQUA WALKER-BARNES, TOO HEAVY A YOKE: BLACK WOMEN AND THE BURDEN OF STRENGTH 85–88 (2014).

36 *See id.*

37 *See* Kristi L. Graunke, *"Just Like One of the Family": Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 150 (2002).

38 *See id.*

39 *See id.* at 191.

40 *See* PARREÑAS, *supra* note 22, at 135. Emotional labor refers to the management of emotions as part of one's job responsibilities, often requiring workers to regulate their feelings and expressions to fulfill professional expectations. *See* ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN

Employers may capitalize upon family-based ideals to obtain unpaid labor, including the emotional work of offering care and building bonds with their wards.[41] In addition, employers of childcare workers often resist seeing themselves as employers. Many refer to nannies or babysitters as "part of the family," rejecting the "master-servant" relation reminiscent of outdated feudal and slave systems.[42]

Since the latter half of the twentieth century, the demographics of U.S. domestic and childcare workers have drastically shifted from African American women to immigrant women.[43] From 1950 to the end of the 1980s, the share of African American women in the domestic work industry declined from 41% to 3.5%.[44] Beginning in the 1970s, immigrant women started to constitute a disproportionate share of domestic workers.[45] In the early twentieth century, Japanese and Mexican women were commonly associated with domestic work.[46] From the 1970s, Latinx and Caribbean immigrants increasingly filled domestic positions, commonly referred to by scholars as the "international division of reproductive labor" or "global care chain."[47] As women from Western, developed countries stepped out of the private sphere and undertook roles in the public, women from the Global South migrated to "rich nations" to take care of the household.[48] Many of these migrant women were college-educated and had worked as professionals in their home countries—and some

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FEELING 7 (2012) (defining emotional labor as "the management of feeling to create a publicly observable facial and bodily display"). Emotional labor is particularly significant in care work where workers are expected not only to perform physical tasks but also to cultivate emotional bonds and provide psychological support. *See* Nancy Folbre, *Valuing Care*, *in* FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES 92 (Nancy Folbre ed., 2012) (discussing the undervaluation of emotional labor in the care economy).

41 PARREÑAS, *supra* note 22, at 142.

42 *See id.*

43 *See* HONDAGNEU-SOTELO, *supra* note 4, at 16. For reasons behind the declining shares of African American women in domestic work, see Graunke, *supra* note 37, at 143–50 (noting that mass migration of African Americans to the northern states, labor-conscious reforms of the New Deal, and social and demographic change brought by the Civil Rights movement all contributed to this demographic change).

44 Graunke, *supra* note 37, at 150.

45 *See id.* at 150–51.

46 *See id.*

47 *See* PARREÑAS, *supra* note 10, at 202.

48 *See id.*

of them, while abroad, also hired less privileged women to take care of their own children back in their home country.[49]

While this influx of Latinx women is commonly explained by the "feminization of migration,"[50] scholars have noted that many employers choose them precisely because of explicit racial, ethnic, and gendered preferences.[51] For instance, employers perceive light-skinned Latinx women as submissive and caring, representing the "Old World" where women performed unpaid domestic work as an expression of love.[52] Due to language barriers, they are unlikely to gossip about family matters.[53] As African American women gradually separated work from life and chose to "live out" from their employers' premises, immigrant women often chose to "live in" for economic and immigrant status reasons; this provides their employers with more childcare flexibility, but it also exposes the workers to greater vulnerabilities.[54] In fact, some employers actively seek out non-citizens and undocumented immigrants because of their vulnerabilities.[55]

B. Guest Worker Programs in the United States

The origin of the U.S. temporary worker program can be traced back to the Bracero Program.[56] This program brought in millions of Mexican men to work on short-term, primarily agricultural-labor contracts from 1942 to 1964 to fill labor needs in the American

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49 *See* Shamir, *supra* note 2, at 604, 614–15 (noting that migrant workers are rarely the poorest of the poor in their home countries; instead, they are mostly those who possess enough social and financial capital to finance the trip (even if by borrowing)).

50 Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 400–02 (2015).

51 *See, e.g.*, HONDAGNEU-SOTELO, *supra* note 44, at 55–57; Graunke, *supra* note 37, at 153; Kathy A. Kaufman, *Outsourcing the Hearth: The Impact of Immigration on Labor Allocation in American Families, in* IMMIGRATION RESEARCH FOR A NEW CENTURY 347, 358–63 (Nancy Foner et al. eds., 2000).

52 *See* HONDAGNEU-SOTELO, *supra* note 4, at 55–57; Graunke, *supra* note 37, at 153.

53 *See* Graunke, *supra* note 37, at 9.

54 *See id.* at 143–44, 152.

55 *See* ROMERO, *supra* note 4, at 13 (noting that employers prefer noncitizen and undocumented workers because they "are available all the time, can accommodate the employer's schedule, and are willing to undertake the wide variety of tasks connected to childcare and maintaining a household").

56 *See* BRACERO: HISTORY ARCHIVE, CTR. HIST. & NEW MEDIA (2021), https://braceroarchive.org/about [https://perma.cc/K3CN-YDN5].

Southwest.[57] Once in the United States, braceros were required to stay on their employers' farms, and the braceros' legal statuses were tethered to their employment.[58] Many farms operated in the form of debt bondage, hiring more braceros than necessary and deducting room and board during off-periods from their current or future salaries.[59] Scholars have criticized that the program was deliberately designed to deny immigrant workers essential rights and labor protections, rendering them cheaper and more vulnerable to exploitation.[60] To preserve their vulnerable status, the government granted them continued temporary status but prevented them from becoming new citizens.[61]

Guest worker programs are generally seen as legacies of the Bracero Program.[62] Workers now enter the United States via some form of lettered nonimmigrant visa defined in § 101(a)(15) of the Immigration and Nationality Act (INA).[63] The most visible visa is perhaps the H category, which consists of the "skilled" visa category, H-1B, and the "unskilled" visa categories, H-2A (for agricultural labor) and H-2B (for non-agricultural labor).[64] This scholarly emphasis on the H-2A and H-2B visa categories could be attributed to their eligibility for legal assistance from federally funded legal services offices.[65] Domestic workers' visas are generally ineligible for these public benefits.[66]

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57 *See id.*

58 GRACE CHANG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY 103 (2000).

59 *See id.*

60 *See id.* at 104.

61 *See id.* at 103–04 (citing KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS (1992)).

62 *See* CHANG, *supra* note 58, at 105.

63 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15).

64 The key distinction between the skilled and unskilled categories is that the skilled category permits guest workers to have an intent to immigrate, while most other nonimmigrant categories prohibit intent to immigrate to the United States. 8 U.S.C. § 1101(a)(15)(H). H-2A visa holders typically work in landscaping, forestry, hospitality, or as amusement park operators, while H2B visa holders typically work in food services and construction. *See* U.S. DEP'T OF LAB., INDUSTRIES WITH HIGH PREVALENCE OF H-2B WORKERS (2023), https://www.dol.gov/agencies/whd/data/charts/industries-h2b-workers [https://perma.cc/82PC-MHZJ].

65 *See* Briana Beltran, *The Hidden 'Benefits' of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 235–36 (2020).

66 *See id.*

American families first attempted to bring in guest workers as domestic workers in 1953.[67] In El Paso, Texas, a group of Anglo housewives organized the Association of Legalized Domestics, proposing to hire Mexican women to work for them.[68] According to this proposal, employees were to earn a minimum wage of $15 a week. Though the Department of Justice rejected this effort to elicit cheap household help, domestic workers now come to the United States under a variety of nonimmigrant visas depending on their employers—including the A-3 visa for a diplomat, the G-5 visa for an employee of international organizations, and the B-1 visa for visitors to the United States.[69] These visa programs have received vehement criticism in the past decades. including instances where domestic workers were trafficked, misled about job conditions, forced to work excessive hours, confined to their employers' homes, underpaid, isolated from outside contact, and subjected to psychological, physical, or sexual abuse.[70]

C. The U.S. Au Pair Program and Its Recent Demographic Shift

The U.S. au pair program originates from Western European practices in which middle-class women would travel to another country, stay with a host family, and learn cultural, language, and housekeeping skills before marriage.[71] The term "au pair" in French means "on equal terms."[72] In 1969, the European Council established the first regulation on the

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67 *See* CHANG, *supra* note 58, at 100–02.

68 *See id.*

69 *See* Beltran, *supra* note 65, at 236.

70 *See* HUM. RTS. WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), https://www.hrw.org/report/2001/06/01/hidden-home/abuse-domestic-workers-special-visas-united-states [https://perma.cc/86EJ-FE7G] (remarking that "isolation is so extreme and the culture of fear created by their employers through explicit threats and/or psychological domination is so great that the workers believe they will suffer serious harm if they leave their jobs and have no choice but to remain in and continue laboring in abusive conditions").

71 *See* Rosie Cox, *Introduction*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 3 (Rosie Cox ed., 2015).

72 Tina Davis, *Au Pair Scheme: Cultural Exchange or a Pathway to Slavery?*, 1 SLAVERY TODAY J. 1, 2 (2014).

movement of young women traveling as au pairs.[73] The early agreements European nations adopted generally reflected the program's "cultural exchange" nature.[74]

Unlike the European program, the U.S. au pair program was established by a private company, the American Institute of Foreign Studies, in 1986.[75] The first pilot au pair program consisted of approximately 1,000 Western Europeans.[76] The United States Information Agency, an agency regulating foreign cultural exchanges as a product of the Cold War, administered the two-year pilot program.[77] The legislative history has faced criticism from advocates and scholars, particularly regarding whether the program truly fostered reciprocal cultural exchange or merely introduced inexpensive child care to American households.[78] Despite these criticisms, the program has persisted, fueled by demand from host families and lobbying efforts by au pair agencies, which profit substantially from both host families and au pairs.[79]

Since the early 2010s, a significant demographic shift has occurred in the United States' au pair population.[80] In the early 2010s, the au pair population shifted from being primarily Western European to a more diverse composition—while roughly half of au pairs remained Western European, the rest came from Latin America, Africa, Eastern Europe, and Asia.[81]

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73 *See id.*

74 *See, e.g.*, Davis, *supra* note 72, at 2; Cox, *supra* note 70, at 3; Rosie Cox, *The Au Pair Body: Sex Object, Sister or Student?*, 14 EUR. J. WOMEN'S STUD. 281, 282 (2007).

75 *See* Victoria Bejarano Hurst Muirhead, *"I'd Never Let My Sister Do It": Exploitation Within the U.S. Au Pair Program*, 26 LEWIS & CLARK L. REV. 241, 246 (2022).

76 *See* Glenn Collins, *Young Foreigners to be Brought to U.S. as Childcare Workers,* N.Y. TIMES (Feb. 19, 1986), https://www.nytimes.com/1986/02/19/garden/young-foreigners-to-be-brought-to-us-as-child-care-workers.html [https://perma.cc/P3Q4-5X5E].

77 Muirhead, *supra* note 75, at 246.

78 *See id.* at 246–49.

79 *See id.*

80 *See* KIM ENGLAND & GRACE REINKE, SENDING COUNTRIES OF AU PAIRS IN THE UNITED STATES: PATTERNS AND IMPLICATIONS (2020), https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=6614 (on file with the *Columbia Journal of Gender and Law*) (noting a sizable increase of au pairs from Latin America from 2011 to 2019).

81 In 2016, Western European au pairs made up most of the au pair population (45%), with the rest primarily composed of Latin American au pairs (32.9%). ENGLAND & REINKE, *supra* note **Error! Bookmark not defined.**. There was also a sizable South African au pair population (5%). *Id.* In 2019, Latin American au pairs rose to

Scholars have argued that this demographic shift indicates that minority au pairs come in to fill the caregiving gap as part of the "global care chain."[82]

Demographic data during the COVID-19 pandemic further lends support to this theory, revealing that minority au pairs are more likely than their Western European peers to remain in the program despite a worsening work environment.[83] On June 22, 2020, the Trump administration suspended the issuance of new work visas, except for host families with medical professionals and special needs children.[84] Most au pairs who had not yet arrived were banned from entering the United States.[85] This ban left many families who relied on them for childcare scrambling to find replacements. Additionally, amid COVID-19 "stay-at-home" orders, au pairs often faced extended work hours with their host children and increased isolation.[86] Prior to the pandemic, well-intentioned families emphasized the cultural exchange component of the program, but the pandemic relegated this program to its pure childcare function.[87] Consequently, many au pairs found the challenging work environment untenable, while others resisted being reduced to mere childcare providers.[88]

The travel ban had a profound psychological impact on minority au pairs, many of whom associated it with the Trump Administration's anti-immigrant policies.[89] However,

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46.5% of the au pair population (21,551). *Id.* The percentage of Western Europeans declined to 32.7%. *Id.* Since 2020, Latin American au pairs have constituted most of the program (53.6%, 65.2%, and 52.1% in 2020, 2021, and 2022, respectively). *Id.* In contrast, the number of au pairs from Western Europe has dropped to 25.3%, 21.6%, and 31.9% over the past three years. *Id.*

82 *See* Chuang, *supra* note 16, at 278–79.

83 *See infra* notes 90–95.

84 *See* Jordan Salama, *The Great Au Pair Rush*, N.Y. TIMES (July 25, 2020), https://www.nytimes.com/2020/07/25/business/the-great-au-pair-rush.html [https://perma.cc/8C54-MQX8].

85 *See id.*

86 *See* Alyson Krueger, *This Is Not the America These Au Pairs Were Expecting*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/style/au-pairs.html [https://perma.cc/AA9T-2AAX].

87 *See id.*

88 *See id.*

89 *See* Nathaly Carolina Hernández García, *Experiences of Latin American Au Pairs in El Paso, Texas*: *Perceptions and Challenges in a Border Context* 25–27 (Dec. 1, 2021) (M.A. thesis, University of Texas at El Paso) (on file with ProQuest Dissertations & Theses, University of Texas at El Paso) (describing the Trump administration's immigration policy as "a desperate desire to . . . defend the country from the brown-skinned invaders").

statistics indicate that minority au pairs were more likely to remain in the program and fill the childcare deficit.[90] In 2020, amidst a sharp decline in total au pair numbers to 7,101 (down from the usual 15,000 to 20,000),[91] au pairs from Brazil, Colombia, Mexico, and Argentina accounted for roughly half of the au pairs (3,516). Including au pairs from South Africa, the number rises to 4,313, making up approximately 60% of the total au pair population.[92] Meanwhile, au pairs from Germany, Italy, and France, typically the top three European sending countries, dwindled to 1,224 (from 5,202 in 2019).[93] This declining trend persisted into 2021, with the proportion of non-Western-European au pairs reaching a historic high of 65.2%, while the proportion of Western European au pairs decreased to approximately 21%.[94] Following the lifting of the travel ban, however, the share of Western European au pairs rebounded to 31.9% in 2022.[95]

In an email to host families, Nancy Sterling, a spokeswoman for Au Pair in America, stated that "some au pairs, mainly from Europe, have chosen to return home due to concerns from their nuclear families or just wanting to be in their home countries during the pandemic."[96] However, she emphasized that this was not the predominant trend among all au pairs. Her statement aligns with statistical trends, indicating that while European au pairs left the program more readily, au pairs from non-European countries remained despite the reduced cultural exchange experience.

Multiple factors likely contribute to minority au pairs' reluctance to leave the program, despite the diminishing "cultural exchange" component. Subsection II.C examines these reasons. The increasing representation of minority au pairs, along with their demonstrated

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90 *See* FACTS AND FIGURES, BRIDGEUSA, https://j1visa.state.gov/basics/facts-and-figures/ [https://perma.cc/C5SB-4TWC].

91 *Id.*; *see also* Alyson Krueger, *supra* note 86 (noting that every year there are approximately 18,000 au pairs in the United States).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Gina Cherelus, *Au Pairs Caught Between Work and a Pandemic*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/04/01/well/au-pairs-caught-between-work-and-a-pandemic.html [https://perma.cc/L8XB-LG6X].

willingness to endure challenging environments, underscores the need for an intersectional analysis that centers on their lived experiences.[97]

II. An Intersectional Analysis of the Au Pair Program

> *The ceiling was very high, and the walls went all the way up to the ceiling, enclosing the room like a box in which cargo traveling a long way should be shipped. But I was not cargo. I was only an unhappy young woman living in a maid's room, and I was not even a maid. I was the young girl who watched over the children and went to school at night. How nice everyone was to me, though, saying that I should regard them as my family and make myself at home.*[98]

Through the voice of Lucy, an au pair from the West Indies, Jamaica Kincaid's autobiographical novel *Lucy* intricately captures the lived experience of a young Black woman working as an au pair.[99] The narrative reflects a sense of confusion, mirroring the self-contradictory nature of minority au pairs' experiences.[100] They are labeled as cultural exchange agents but are treated as cheap childcare laborers. They see the program as a path to professional growth but become ensnared in colonial legacies as maids.[101] They pursue the American Dream but find themselves denied equal rights and protections.

Scholars and advocates have extensively criticized the au pair program, including the widespread wage theft, lack of supervision, isolation, and the devaluation of childcare work.[102] This Section contributes to this discourse by focusing on minority au pairs,

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97 Intersectionality is a theoretical framework that acknowledges how various social identities intersect and influence each other, shaping individuals' experiences of privilege and oppression. It highlights the interconnected nature of systems of power related to race, gender, class, sexuality, and ability as a lens for understanding complex social phenomena. *See generally* KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (2017).

98 JAMAICA KINCAID, LUCY 7 (1990).

99 *Id.*

100 *See* Mirza Aguilar Pérez, *The Cosmopolitan Dilemma: Fantasy, Work, and the Experiences of Mexican Au Pairs in the USA*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 203, 204 (Rosie Cox ed., 2015).

101 *See* Sondra Cuban, *"Any Sacrifice is Worthwhile Doing": Latina Au Pairs Migrating to the United States for Opportunities*, 16 J. IMMIGRANT & REFUGEE STUD. 235, 238 (2017).

102 *See generally* Chuang, *supra* note 16; Muirhead, *supra* note 75.

highlighting the precarity they face at the intersection of domestic work and guest worker identity. Part II.A and Part II.B highlight how common vulnerabilities among immigrant women of color in domestic work render minority au pairs particularly susceptible to exploitation—a situation exacerbated by the "part of the family" rhetoric toward them.

Part II.C and Part II.D employ the framework of "liminal legal" or precarious status, concepts increasingly used in studies on temporary guest worker programs. Some minority au pairs are deceived into the program, while others face indebtedness due to agency and administrative fees.[103] This concept of "liminal legal status" becomes particularly pertinent for au pairs seeking to pursue career advancement or immigrate to the United States, often sold the American Dream by au pair agencies.[104] Disproportionately hailing from the Global South,[105] au pairs frequently find themselves trapped in cycles of precarious positions, with the uncertainty of their legal status haunting their daily lives.

A. Racialized and Gendered Images Perpetuated in the Au Pair Selection Process

While the domestic work industry has long been characterized by racial and ethnic divisions, au pair agencies have perpetuated those divisions through their selection and matching processes.[106] Agencies assign generalized features to au pairs from different nations—Mexicans are praised for being helpful, Brazilians for their endless energy and joy, Colombians for their model manners, and Venezuelans for being extroverted and smiley.[107] Through this process, minority au pairs are "produced as subjects through stereotypes," which in turn reduces a complex, heterogeneous function into a repetitive, simplistic, and homogeneous function that dehumanizes minority au pairs.[108]

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103 *See infra* Part III.C.2.

104 *See infra* Part III.C.

105 *See supra* Part I.C.2.

106 *See* Aguilar Pérez, *supra* note 100, at 209–10. This generalization is found in au pair programs across the globe. In France, for instance, host families often speak of attributes of au pairs based on their national origins—Germans are "cold" or even "depressive," while Latin Americans are "fun," "warm," and "hardworking." *See* Séverine Durin, *Ethnicity and the Au Pair Experience: Latin American Au Pairs in Marseille, France*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 155, 161–62 (Rosie Cox ed., 2015).

107 *See* Aguilar Pérez, *supra* note 100, at 203.

108 *Id.* at 209–10.

Minority au pairs are often cast as embodiments of the "Old World," where traditional notions of "family-oriented" women prevailed.[109] Host families, influenced by these perceived characteristics, seek out au pairs who fit these stereotypes.[110] Consequently, individual minority au pairs must contend with the racial and cultural stereotypes imposed upon them.[111] A Mexican au pair recounted her anger, frustration, and disbelief when her host family demanded that she cook for the family: "Not all Mexican women know how to cook."[112] Cooking is a task beyond the scope of au pairs' primary childcare responsibilities.[113]

B. Minority Au Pairs as the Racial and Cultural "Other"

The concept of "cultural exchange" within the au pair program, operating as a nonimmigrant initiative, inherently involves a process of rationalization and "othering."[114] Indeed, throughout American history, immigration regulation has often been marked by exclusionary practices based on factors such as race, nationality, and the perceived cultural differences of immigrants.[115] Scholars have criticized the concept of "cultural exchange" within the au pair program as perpetuating a process of "othering," justifying a "tendency to view the employer-domestic worker relationship in paternalistic terms."[116] In contrast to the original au pairing principles, host families often perceive themselves

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109 *See id.*

110 *See id.*

111 *See id.*

112 Mirza Aguilar-Pérez, *Child Care and Labor Deregulation Through the J1 Visa in the USA: Cultural Experiences and Temporary Work of Qualified Young Mexican People*, 21 J. INT'L MIGRATION & INTEGRATION 453, 463 (2020).

113 *See id.*

114 Caterina Rohde-Abuba, *"The Good Girl from Russia Can Do It All": Au Pairs' Perspective on Morality and Immorality in the Au Pair Relation*, 6 NORDIC J. MIGRATION RSCH. 215, 215–16 (2016).

115 In *Chae Chan Ping* and *Fong Yue Ting*—the two Supreme Court cases on the restrictive Chinese exclusion legislation targeting migrant Chinese workers—the Court upheld this legislation based on the "otherness" of the Chinese racial identity. Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) ("[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living."); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

116 Chuang, *supra* note 16, at 313.

as benefactors of minority au pairs.[117] They see their generosity as enabling au pairs from impoverished developing countries to come to the United States.[118]

There are multiple reports of exploitative host families and au pair sponsors using language with racialized, anti-immigrant undertones to command and coerce minority au pairs, including through overt threats of deportation.[119] For example, Sandra, an au pair from Colombia, stated that her host family commented in front of other people that she "[did] not know anything" and told her that "nobody [was] going to want an Au Pair who [didn't] speak proper English."[120] Caterina Rohde-Abuba's article "The Good Girl from Russia Can Do It All" highlights how host families often assigned extra work to au pairs from economically disadvantaged countries, assuming they would do anything to remain in the program.[121] In fact, to prevent au pairs from changing families, some au pair agencies even warned au pairs that they would be deported from the United States if they could not find a new family within two weeks.[122]

When faced with the possibility of increasing au pairs' weekly stipends, some host families react by threatening to leave the program.[123] Rather than acknowledging the

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117 *See* Rohde-Abuba, *supra* note 114, at 220 (noting host families' paternalistic attitudes as well as host families' misconceptions that earning income and accommodation in a middle-class home are the major benefits for au pairs, who are actually looking for language-learning opportunities and formal certificates).

118 *See id.*

119 *See* Zack Kopplin, *"They Think We Are Slaves": The U.S. Au Pair Program Is Riddled with Problems—and New Documents Show that the State Department Might Know More than It's Letting On*, POLITICO MAG. (Mar. 27, 2017), https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956/ [https://perma.cc/B9NY-MMS3] (noting that an anonymous au pair complained to the State Department that her host mother used threats of deportation to hold her in the house against her will, illegally forcing her to work long hours uncompensated).

120 *See* Hernández García, *supra* note 89, at 134–36.

121 Rohde-Abuba, *supra* note 114, at 220.

122 *See* INT'L HUM. RTS. L. CLINIC ET AL., SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM 19 (2018), https://cdmigrante.org/wp-content/uploads/2018/08/Shortchanged.pdf [https://perma.cc/UX2K-KVGD] ("Any au pair who leaves her host family is allowed only two weeks to arrange a 'rematch' with a new host family . . . When an au pair fails to rematch, she must return to the home country. . . .").

123 *See, e.g.*, Comment Letter on DOS-2023-0025-0001 Proposed Rule to Exchange Visitor Program: Au Pairs (Oct. 30, 2023), https://www.regulations.gov/comment/DOS-2023-0025-0064 [https://perma.cc/25KS-6LKX].

hardship they would face without the au pair's assistance, one family suggested they would give the job opportunity to an undocumented immigrant instead.[124] This attitude pervades globally. In a study on Latinx au pairs in France, Colombian au pair Ximena, whose brother lives in Sweden, noted that her French family sees her as "people who have nothing and come to France and open her eyes."[125]

C. Precarious Legal Status Embedded in a Guest Worker Program

Most legal scholarship examining the lives of migrant domestic workers has focused on undocumented women.[126] In recent years, scholars have paid increasing attention to immigrants in the gray areas between full citizenship and undocumented status by employing "liminal legality" and "precarity" as theoretical frameworks.[127]

The term "liminal legality" captures the institutional production of multiple categories of "less-than-full-status" non-citizenship, including authorized and unauthorized forms.[128] It is often characterized by lingering temporariness and ambiguity of a person's present or future legal status due to their lack of citizenship.[129] This legally imposed uncertainty has shaped immigrant workers' experiences of partial belonging, insecurity, and instability, and workers with "liminal" status often experience less security, fewer opportunities for mobility, and a diminished sense of independence over their day-to-day work.[130]

This Part argues that the au pair program, though not defined as a guest worker program, *de facto* functions as one by subjecting au pairs to precarious legal status. When liminal legality collides with workers' pre-existing vulnerabilities along the lines of race, gender, class, and national origin, workers are often more likely to encounter coercive

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124 *See id.*

125 Durin, *supra* note 106, at 163–64.

126 *See, e.g.*, Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U. J. GENDER & L. 407 (1997); Annie Flanagan, Note, *Reaction to: Domestic Work in the United States: Gender, Immigration, and Personhood*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 89 (2018).

127 *See generally* GOLDRING & LANDOLT, *supra* note 10; Menjívar, *supra* note 12.

128 GOLDRING & LANDOLT, *supra* note 10, at 14–20; *see* Chacón, *supra* note 12, at 713–18.

129 *See* Chacón, *supra* note 12, at 713–18.

130 *See generally* Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers*, 46 LAW & SOC. INQUIRY 92 (2020).

mistreatment and exploitative environments. Chilled by the consequence of losing their legal status, these workers are also less likely to assert their rights.

First, for some minority au pairs, the program operates as a form of debt bondage, like the Bracero Program. The out-of-pocket enrollment fee for an au pair typically hovers between $1,000 to $2,000.[131] However, the total administrative cost can unexpectedly soar, at times exceeding $4,000 due to visa fees, embassy review fees, immigration documentation, and travel expenses.[132] Some au pairs from countries with weaker currencies resort to borrowing money to participate in this program with the intention of repaying the debt using remittances in U.S. dollars.[133] In some cases, unscrupulous sponsors pressure au pairs' family members to sign documents vouching for them, which may contain loan agreements claiming that the au pairs have borrowed from the sponsors.[134] The Southern Poverty Law Center's report on J-1 programs notes that one loan agreement claimed that the au pairs had borrowed $7,000 from the agency and required the au pairs' family members to put up their homes as collateral in the event that they failed to return.[135]

The current structure of the au pair program binds au pairs through two layers of dependency. First, au pairs' legal statuses are sponsored by and dependent upon their au pair agencies, who restrict au pairs' mobilities to rematch with new families.[136] On paper, the rematch process should function as a safety net for when an au pair wishes to change their host families. In reality, au pairs' rights to seek a new placement or "rematch" are contingent upon their receipt of a positive recommendation from their host families.[137] In other words, host families can limit au pairs' mobilities through threats of negative reviews and verbal abuse.

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131 Salama, *supra* note 84.

132 *See id.*

133 *See* MEREDITH B. STEWART, S. POVERTY L. CTR., CULTURAL SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS 3–4 (Booth Gunter et al. eds., 2014), https://www.splcenter.org/wp-content/uploads/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf [https://perma.cc/DH2D-HPA9].

134 *See id.* at 18.

135 *See id.*

136 *See* Muirhead, *supra* note 75, at 15; Chuang, *supra* note 16, at 306.

137 *See id.*

Au pairs lack equal bargaining power within the program. In her lawsuit against her former host family, Colombian au pair Tatiana Cuenca-Vidarte contended that her family limited her mobility through the "veiled threat of deportation."[138] Aware of their control over Cuenca-Vidarte's replacement, the host family threatened her with a negative reference if she refused to "comply with their every demand, including their demands that she work in excess of the weekly 45-hours set by the contract."[139] After the host family "blocked her access to the internet and gave her negative references," three potential host families who initially expressed interest in hiring Cuenca-Vidarte later declined.[140] Cuenca-Vidarte's co-plaintiff, former au pair Sandra Peters, had a similar experience.[141] Peters stated that her host family restricted her free time, demanded she return to the house hours prior to the start of her shift, and threatened to call the program to have Peters deported.[142] Cuenca-Vidarte and Peters' lawsuit is just one example of how host families can use verbal abuse to belittle and degrade au pairs to prevent them from entering into the rematch procedure. Au pair agencies, viewing host families as repeat customers, often prioritize host family interests over those of the au pairs.[143] According to a complaint in the State Department's Freedom of Information Law library, one au pair told her agency that her host family threatened to deport her unless she did what they demanded.[144] The local coordinator assigned to the au pair refused to interfere because the au pair had "signed a contract."[145] "3,505 complaints were received by sponsors," yet no sponsors or families were ever held accountable.[146]

Au pairs experience an additional level of dependency on au pair agencies—centered around their ability to immigrate to the United States in the future. Agencies have the power to control whether an au pair can obtain a future visa.[147] Professor Chuang notes that

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138 Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *8–10 (D. Md. Sept. 30, 2022) (citations omitted).

139 *Id.*

140 *Id.*

141 *See id.*

142 *See id.*

143 *See* Kopplin, *supra* note 119.

144 *Id.*

145 *Id.*

146 *Id.*

147 *See* Chuang, *supra* note 16, at 302.

when au pairs report to leave abusive families, an au pair agency may exercise its discretion to either repatriate them or to facilitate a rematch.[148] If an agency repatriates an au pair, they can designate the au pair's program status as either "inactive" or "terminated."[149] An "inactive status indicates successful completion of the program, whereas terminated signals an au pair's failure to comply with the federal regulations, which according to ECA officials, may prevent a participant from receiving a future U.S. visa."[150] It is only on the limited occasions that there is a formally filed complaint from an au pair that the State Department will actually review an agency for misconduct and potentially intervene.[151] As of 2017, no au pair agency has been penalized for misconduct.[152]

This imbalance of power and dependency can have more severe consequences for minority au pairs. Because they are often more motivated by long-term educational or migratory goals, the threat of deportation or program termination carries greater weight.[153] In contrast, most German and Austrian au pairs characterize their program as a "gap year" or "time-out."[154] Viewing the au pair program as a carefree time abroad, many German and Austria au pairs express their motivations for participating in the au pair program as stemming from a desire to extend adolescence while still embracing an identity of an independent world explorer or "global nomad[]."[155] As a result, for these au pairs, leaving the program because of poor working conditions or threats of termination is merely a disappointing inconvenience, not a derailment of long-term aspirations.

Au pair agencies' marketing campaigns partially contribute to minority au pairs' aspirational perspectives, often leading them to remain in the program at all costs.[156] They conduct marketing campaigns in Latin American universities, promising that au pairs will gain qualifications through cultural exchange programming under the J-1 Exchange Visitor

148 *See id.* at 305–06.

149 *See id.*

150 *Id.*

151 *See id.*

152 *See* Kopplin, *supra* note 119.

153 *See* Christine Geserick, *'I Always Wanted to Go Abroad. And I Like Children': Motivations of Young People to Become Au Pairs in the USA*, 20 YOUNG 49, 61–64 (2012); Cuban, *supra* note 101, at 236–37.

154 Geserick, *supra* note 153, at 51–52.

155 *Id.* at 63.

156 *See* Cuban, *supra* note 101, at 246–47.

visa category.[157] Taking advantage of the notion of the "American Dream," or "El Sueño Americano," they paint a rosy picture that au pairs will be able to study in the United States.[158] Some university colleagues promote the program to potential au pairs, lending it more credibility.[159] Joanna Beltran, the plaintiff in the first class action against au pair agencies, told the *Washington Post* that she was sold the "American Dream."[160] Sandra Peters claimed that she incurred substantial debt to participate in the program.[161] Sondra Cuban noted that one of her au pair interviewees expressed a desire to pursue higher education, saying she "really want [sic] to study, graduate master's [sic], study something else to complement [her] bachelors [sic] or work in school."[162] For minority au pairs who are more invested in the program's ability to connect them with their education goals, their aspirational perspectives can make them more susceptible to exploitation.

Liminal legality imposes a significant psychological burden on minority au pairs. Immigrants living with uncertain legal status often shape their lives around this imposed uncertainty.[163] Viewing the au pair program as a pathway to academic advancement or as a necessary sacrifice, minority au pairs are thus more willing to endure unreasonable exploitation.[164] This may elucidate why many au pairs chose to remain in the au pair program during the pandemic, even as the program's primary function inappropriately shifted to childcare.[165] Despite their challenging circumstances, the prospect of maintaining their legal status likely outweighed the difficulties these minority au pairs faced, ultimately compelling them to stay and endure their unideal situations.

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157 *See id.*

158 *See* Hernández García, *supra* note 89, at 20–22.

159 *See* Cuban, *supra* note 101, at 246.

160 Lydia DePillis, *Au Pairs Provide Cheap Childcare. Maybe Illegally Cheap.*, WASH. POST (Mar. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/20/au-pairs-provide-cheap-childcare-maybe-illegally-cheap/ [https://perma.cc/W9Q9-2YSU].

161 *See id.*

162 *See* Cuban, *supra* note 101, at 247.

163 *See* SHANNON SCHUMACHER ET AL., UNDERSTANDING THE U.S. IMMIGRANT EXPERIENCE: THE 2023 KFF/LA TIMES SURVEY OF IMMIGRANTS (2023) ("Among likely undocumented immigrants . . . four in ten say they have avoided things such as talking to the police, applying for a job, or traveling because they didn't want to draw attention to their or a family member's immigration status.").

164 *See supra* notes 138–147.

165 *See supra* Part I.C.

D. Cycles of Liminal Legality—the Precarious Path After the Program

For many minority au pairs considering the program's educational prospects, the au pair program actually transforms into their pathway to further precarity.[166] Au pair agencies advertise two stages of educational advancement. First, they advertise the chance for au pairs to take classes and learn English while they are in the program. Second, they advertise that au pairs can also apply to American universities; if admitted, the university will be their new visa sponsor, and they can switch their visas to F-1 visas.[167] These two stages are interrelated. Au pairs who do not achieve their educational goals in the first stage are incentivized to still pursue the second stage because they do not want these two years to be sunk costs.

Scholars have noted that it can be difficult to successfully attain the educational goals as advertised by au pair agencies.[168] The program itself does not offer accredited degrees, certifications, or credited courses.[169] Au pairs usually take classes ranging from Zumba to ESL (English as a second language classes) that hardly provide them with the qualifications or professional capacities they envision.[170] In addition, host families may thwart their au pair's education, believing that her coursework deviates her attention from childcare.[171]

The United States immigration regime provides few viable means for au pairs to remain in the country legally after their program ends, despite the idealized vision of the American Dream au pair agencies promote. The J-1 visa is strictly time-limited, expiring immediately after the two-year participation period with few transition options for continued legal residency.[172] Most alternative visa categories tie an immigrant's legal status to employer sponsorship, which might provide even fewer labor protections than the au pair program

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166 *See* McLaughlin & Hennebry, *supra* note 8, at 186–87 (noting that the farmworkers hoping to immigrate to Canada in temporary guest worker programs are subject to a "vicious cycle of precarity" because of the lack of legal pathways).

167 *See* Cuban, *supra* note 101, at 241.

168 *See id.* at 247.

169 *See id.*

170 *See id.*

171 *See id*. at 244 ("However the family stalled her progress in the program due to the hours they insisted she work for them. The beginning of every quarter was a complex power negotiation between herself and her employers about which courses she could take and when and which books she really needed.").

172 Immigration and Nationality Act, 8 U.S.C. § 1182(e).

itself.[173] Some au pairs choose to apply for an F-1 student visa by applying to and enrolling in American universities, but this path has several potential hurdles.[174] Minority au pairs often underestimate the high tuition costs in the United States, having come from countries that offer tuition-free higher education.[175] Moreover, as international students, former au pairs are not eligible for federal funding or loans.[176] This issue is compounded by the fact that many au pairs already have bachelor's degrees, so many au pairs feel more inclined to attend expensive research universities instead of cheaper alternatives like community colleges. Some Ph.D. programs also deny stipends for international students or limit their enrollment altogether.

For former au pairs, getting into a degree program in the first place can be an uphill battle; affording the program without working in the shadow economy would seem practically impossible. In a study of twenty former au pairs from Latin America, only seven transitioned their visa to F-1.[177] All seven of them continued to work as nannies under the table, perhaps because the F-1 student visa forbids any form of off-campus employment and limits the hours of on-campus jobs except in rare cases of extreme hardship.[178] Working in the shadow economy, these au pairs are subject to vulnerabilities comparable to those of undocumented domestic workers. One former au pair lost her legal status because she could

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173 Some host families would apply for an EB-3 visa (Employment-Based Third Preference) for au pairs. The EB-3 visa requires employer sponsorship in almost all cases. Unlike some other employment-based Green Card categories (such as the EB-1A for extraordinary ability or EB-2 National Interest Waiver), the EB-3 does not allow self-petitioning and must be sponsored by a United States employer. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

174 *See* Cuban, *supra* note 101, at 241.

175 Major sending countries such as Brazil, Colombia, and Mexico offer free tuition; tuition in many other large sending countries such as Mexico only amounts to approximately $1,000 per year, a stark difference from the American education system. *See, e.g.*, TOP UNIVS., STUDY IN MEXICO, https://www.topuniversities.com/where-to-study/latin-america/mexico/guide [https://perma.cc/9H8R-98YV]; TIMES HIGHER EDUC., THE COST OF STUDYING AT A UNIVERSITY IN BRAZIL (Aug. 23, 2015), https://www.timeshighereducation.com/student/advice/cost-studying-university-brazil [https://perma.cc/2LDJ-S2FQ]; COLOM. EDUC. INFO, COST OF STUDY AND LIVING IN COLOMBIA, https://www.colombiaeducation.info/international-students/studying-and-living.html [https://perma.cc/4FE6-MLGZ].

176 *See* U.S. DEP'T OF EDUC., FEDERAL STUDENT AID, ELIGIBILITY FOR NON-U.S. CITIZENS, https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens [https://perma.cc/3C9Q-KP5G].

177 *See* Cuban, *supra* note 101, at 241.

178 *See id.*

no longer afford her tuition.[179] She lived with her boyfriend and worked as a nanny after overstaying her visa and becoming undocumented.[180] In this way, the U.S. immigration regime creates a cycle of precarious status.

The feelings of uncertainty surrounding one's legal status may persist for years or even decades until one obtains permanent legal residence. To avoid this uncertainty, some au pairs resort to marriage for a pathway to legal status, but marriage may lead to its own dependency issues and still trap au pairs in domestic work.[181] An au pair's ability to obtain citizenship would remain contingent on her husband's goodwill for at least five years pursuant to the family-based immigration rules; this dependent status may subject her to the risk of domestic abuse and violence.[182] The racialized and sexualized image of au pairs as exotic, domestic, and caring heightens the risk of abuse within marriage.[183] Moreover, economic independence may be difficult to obtain, as even immigrant women who have high educational attainments are often bound to domestic work in their arrival countries.[184]

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179 *See id.* at 248–49.

180 *See id.*

181 *See* Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401 (1993) (discussing how immigrant women whose legal immigration status depends on their spouses are vulnerable to domestic violence and abuses); Carin M. Bowes, *"Male" Order Brides and International Marriage Brokers: The Costly Industry That Facilitates Sex Trafficking, Prostitution, and Involuntary Servitude*, 18 CARDOZO J.L. & GENDER 1 (2011).

182 *See* Anderson, *supra* note 181.

183 Scholars have noted factors such as immigration status to citizenship, language barriers, financial dependence, and intersectionality (race, ethnicity, class, etc.) fueled domestic violence in cross-border marriages. *See generally* Muhamad Helmi Bin Md Said & Grace Emmanuel Kaka, *Domestic Violence in Cross-Border Marriages: A Systematic Review*, 24 TRAUMA VIOLENCE & ABUSE 1 (2023). Regarding the relationship between sexualized bodies and violence, scholars have noted that gendered racialization of Asian women portrays them as hypersexual and disposable bodies for white male use. *See, e.g.*, Maria Cecilia Hwang & Rhacel Salazar Parreñas, *The Gendered Racialization of Asian Women as Villainous Temptresses*, 35 GENDER & SOC'Y 567, 567–76 (2021). Regarding the sexualization of au pairs, see Cox, supra note 74, at 285.

184 *See* PEI-CHIA LAN, GLOBAL CINDERELLAS: MIGRANT DOMESTICS AND NEWLY RICH EMPLOYERS IN TAIWAN 10 (2006). ("Filipina women have dominated the global domestic labor market because of their English-language skills and relatively high levels of education. It is not unusual to find middle-class, college-educated Filipinas working overseas as maids and caretakers.").

III. Marginalization of Minority Au Pairs, Class Actions, and the Current Legal Landscape

Despite the persistent exploitation of au pairs, enforcement mechanisms remain largely ineffective.[185] This Part first explores how au pairs have increasingly turned to class action litigation as a primary means of redress.[186] This Part then explores how these lawsuits have prompted regulatory action, such as the State Department proposing new rules and a revised compensation structure.[187]

However, while these legal developments represent a step toward recognizing au pairs as local workers instead of "cultural workers" outside of the law,[188] this Note argues that they fail to address the distinct vulnerabilities of minority au pairs in two critical ways. First, by focusing primarily on wage theft, both class action lawsuits and regulatory reforms target only a symptom of the broader structural inequalities that minority au pairs face along the lines of gender, race, class, and national origin.[189] Other forms of mistreatment—ranging from debt bondage and racialized recruitment by au pair agencies to fear of retaliation by host families—often remain unaddressed.[190] Second, minority au pairs are less likely to participate in litigation due to their precarious legal standing, limited legal awareness, and the uncertainty imposed by "liminal legality." Uncertainty surrounding an au pair's legal status not only obscures her rights but also fosters hesitation in pursuing legal action. The fear of retaliation from her host family or au pair agency—heightened by weak anti-retaliation safeguards and restricted access to legal support—further deters her from coming forward.[191] Addressing these issues requires expanding au pairs' access to labor organizations and collective advocacy efforts. Existing legal frameworks governing

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185 Scholars and advocates have extensively criticized the Department of State's failure to adequately oversee the au pair program and protect au pairs from exploitation, pointing to insufficient resources, understaffing, untransparent reporting channels, and the complete delegation of adjudicative authorities to au pair agencies. *See generally* Muirhead, *supra* note 75; Kopplin, *supra* note 119; Coleman, *supra* note 50. The *Politico Magazine* report, in particular, highlights that no host families or agencies have been held accountable for their wrongdoings or failure to interfere. *See* Kopplin, *supra* note 119.

186 *See infra* Part III.A.

187 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

188 *See* Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1, 34 (2020).

189 *See infra* Part III.A.

190 *See infra* Part III.A.

191 *See infra* Part IV.

collective bargaining and workplace protections largely exclude domestic workers.[192] As the structural gaps in labor law intersect with the chilling effect of "liminal legality" on legal mobilization, many minority au pairs' grievances are left completely unresolved.

A. Federal and State Minimum Wage Law Litigation

While the au pair program defines au pairs as "cultural exchange" agents playing the roles of ambassadors, au pairs have successfully vindicated their rights as workers entitled to minimum wage standards and overtime pay in the past decade.[193] This success can be attributed to two "bottom-up" developments: (1) states' enactment of a Domestic Workers' Bill of Rights, championed by the National Domestic Workers Alliance, and (2) federal class action lawsuits filed by au pairs.[194] These class actions have allowed a group of named plaintiffs to act as private attorneys general representing a larger number of similarly situated au pairs.[195] Au pairs falling within the scope of the class action—typically those who worked in a specific state within a certain time period—can join the case by opting in.[196]

1. Au Pairs Acting as Private Attorneys General in Class Action Litigation

In 2014, Joanna Paola Beltran, a former Colombian au pair, filed a class action lawsuit in the District Court of Colorado on behalf of eleven au pairs, alleging federal and state wage violations against au pair agencies.[197] Beltran argued that the au pairs were

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192 *See infra* Part III.

193 *See* Coleman, *supra* note 50, at 431.

194 *See infra* Part III.B.

195 *See infra* Part III.B.

196 *See* Coleman, *supra* note 50, at 431. After opting in, an individual au pair will become a class member and agree to be bound by the outcome of the case. *See id.* They can benefit from the outcome without pursuing their own individual lawsuits, but they also give up their right to sue the defendant(s) separately for the same claims covered by the class action. *See id.*

197 Complaint, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983). Claims brought by the *Beltran* plaintiffs included, *inter alia*, breach of fiduciary duty and negligent misrepresentation. *Id.* Though the *Beltran* court determined that the plaintiffs had sufficiently alleged these claims at the motion to dismiss stage, *id.*, the claim regarding violations of federal and state minimum wage law—specifically, violations of the Fair Labor Standards Act (FLSA) and Massachusetts state and hour law—had the most influence in subsequent litigations. As a result, this Subsection focuses on the state and federal minimum wage law claims.

employees of the au pair agencies—who were "joint employers" liable for minimum wage law violations.[198] The au pair sponsors attempted to defend themselves by emphasizing the "cultural exchange" nature of the program and characterized themselves as merely visa sponsors.[199] Noting evidence of an employment relationship, the court ruled that the au pairs had sufficiently alleged a joint-employer relationship to survive a motion to dismiss.[200]

The court additionally found that the FLSA applied to the au pairs, citing the statute's explicit requirement that au pairs be paid "in conformance with" the FLSA's requirements "as interpreted and implemented by the Department of Labor."[201] The more complex issue was whether the preemption doctrine would bar the application of state minimum wage and overtime laws.[202]

The au pair sponsors then tried to argue that the obstacle preemption doctrine[203] barred the application of state minimum wage and overtime laws—specifically that the program's

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198 *See* Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079 (D. Colo. 2016).

199 *Id.*

200 *See id.* at 1079–80 (noting that au pair agencies recruit the au pairs, effectively dictate their wages, are statutorily obligated to ensure timely payment, exert control over their work conditions, and have the power to terminate au pairs without the consent of the host family and cause their removal from the United States).

201 *Id.* at 1080–82.

202 *See id.*

203 The preemption doctrine refers to the idea that a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict. When state law and federal law conflict, federal law preempts state law due to the Supremacy Clause of the Constitution. U.S. Const. art. VI, § 2. *See also, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992). Express preemption occurs when federal laws contain express preemption clauses. There are two types of implied preemption—field preemption and conflict preemption. Field preemption occurs when the court finds that Congress intended the federal law to occupy the entire "field" of an issue. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that field preemption occurs where a federal statutory scheme is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it," or where federal law concerns "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"); Arizona v. United States, 567 U.S. 387 (2012); De Canas v. Bica 424 U.S. 351 (1976). Conflict preemption is broken down into two categories: impossibility preemption—when it is impossible to comply with both state and federal law—and obstacle preemption—when a state law interferes with Congress' full purpose of the law. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (noting state law can interfere with federal goals by frustrating Congress' intent to adopt a uniform federal regulatory framework, conflicting with Congress' goal of setting a regulatory "ceiling" for specific products or activities, or by hindering the vindication of a federal right); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 875 (2000); Felder v. Casey, 487 U.S. 131, 153 (1988).

"regulatory framework" mandated uniform wage compensation and applying state law would disrupt this uniformity and present an obstacle to the program's goals.[204] However, the court disagreed, offering two reasons why state laws are not preempted.[205] First, even though the regulation expressly provides that the au pair program conforms with the FLSA without exception, the FLSA only provides a wage floor, not a ceiling.[206] That is, if a state sets a higher minimum wage than the FLSA mandates, employers within that state must comply with the higher state standard.[207] Second, the Court noted that the rules governing the au pair program allowed host families to deduct room and board based on actual costs rather than a uniform deduction.[208] This practice means that au pairs do not receive uniform wages.[209] Therefore, the Court found the sponsors' argument unpersuasive and allowed the case to proceed.[210]

While *Beltran v. InterExchange, Inc.* was pending, there was also a surge in movements advocating for the protection of domestic laborers, a group whose protections have historically been contested.[211] When enacted during the New Deal Era, the FLSA and the National Labor Relations Act (NLRA) both excluded live-in domestic workers from labor protections.[212] The FLSA now recognizes live-in domestic service workers as employees for the purpose of the federal minimum wage, but it still excludes them from overtime pay.[213] During the 2010s, the National Domestic Workers Alliance—an organization representing nannies, house cleaners, and home care workers—campaigned for the passage of the Domestic Workers Bill of Rights ("DWBOR").[214] As of February 2025, twelve states,

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204 *See Beltran*, 176 F. Supp. 3d at 1083–84.

205 *See id.* at 1084.

206 *See id.*

207 *See id.*

208 *See id.*

209 *See id.*

210 *See id.*

211 *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

212 *See id.* at 131.

213 *See* 29 C.F.R. § 552.3 (2025).

214 *See Domestic Worker Bill of Rights*, NAT'L DOMESTIC WORKER ALL., https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/ [https://perma.

the District of Columbia, and two major cities have now enacted different versions of the model bill.[215]

In 2014, Massachusetts passed the Massachusetts DWBOR Act, which set forth workplace protections for domestic workers.[216] Considering au pairs as "domestic workers" and their host families as "employers" within the meaning of the DWBOR Act, the Massachusetts state attorney general issued regulations requiring host families to adhere to Massachusetts wage and hour laws, which require higher hourly wages and more onerous recordkeeping requirements than the FLSA.[217] In response to these heightened labor protections, the au pair agency Cultural Care filed suit against the Massachusetts attorney general in *Capron v. Office of the Attorney General of Massachusetts* as a collateral attack on *Beltran*.[218] Notably, in *Capron*, both parties stipulated the existence of an employment relationship between the host families and the au pairs, thus acknowledging au pairs' entitlement to labor protections as employees.[219]

Similar to the *Beltran* case, the central issue in *Capron* revolved around whether the au pair program, administered by the federal State Department, preempted Massachusetts state law.[220] Cultural Care argued for preemption based on both field preemption and obstacle preemption.[221] Under the field preemption doctrine, they contended that the federal government's comprehensive regulatory framework for the program, coupled with its interest in immigration and foreign relations, demonstrated an intent to exclusively regulate au pairs.[222] Under the obstacle preemption doctrine, they argued that adhering to state law would obstruct the federal objective of establishing a uniform standard for compensation and administrative requirements within the au pair program.[223] The State

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cc/28VB-HLBR].

215 *See* NAT'L DOMESTIC WORKER ALL., *supra* note 214.

216 MASS. GEN. LAWS ch. 149, § 190 (2015).

217 940 MASS. CODE REGS. 32.00–.06.

218 *See* Capron v. Off. of the Att'y Gen. of Mass., 944 F.3d 9, 18–19 (1st Cir. 2019).

219 *See id.* at 19.

220 *See id.* at 20.

221 *See id.*

222 *See id.* at 22.

223 *See id.* at 27.

Department supported Cultural Care's position through an amicus brief, stating that any changes to the au pair program should be made "not through litigation but through rulemaking by the State Department" because Congress had vested regulatory oversight of exchange programs in the State Department, not in individual states.[224]

The First Circuit rejected both of Cultural Care's arguments. First, the court found insufficient evidence of federal intent to preempt an entire field of state employment law—a realm traditionally under local jurisdiction. The court stated, "It is hardly evident that a federal foreign affairs interest in creating a 'friendly' and 'cooperative' spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing the same work."[225] The court did not find the foreign affairs argument dispositive, nor did it see a clear federal interest in allowing au pairs to be paid less than workers in the states they resided in. Second, the First Circuit found no evidence to support the argument that following state law would disrupt the program's goals.[226] Rather, the court found that the State Department's regulations were intended to accommodate the Department of Labor's determination that au pairs are employees entitled to wage and hour protections under state employment law.[227] In response to the State Department's amicus brief, the court conceded the degree of deference it owed to the agency's interpretation but nonetheless found the regulatory history invoked by the State Department unpersuasive.[228]

After *Capron*, au pair litigation largely shifted toward state minimum wage and overtime claims—and it was successful.[229] In 2018, the *Beltran* parties reached a $65.5 million settlement.[230] Later in 2021, the First Circuit affirmed the employment relationship

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224 Brief for the United States as Amicus Curiae Supporting Petitioners at 26, Capron v. Off. of the Att'y Gen. of Mass., 944 F.3d 9 (1st Cir. 2019) (No. 17-2140) 2018 WL 4740081.

225 *Capron*, 994 F.3d at 26.

226 *See id.* at 32.

227 *See id.* at 32–33.

228 *See id.* at 42.

229 *See, e.g.*, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079–80 (D. Colo. 2016); Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023).

230 *See* Beltran v. InterExchange, Inc., No. 14-CV-03074-CMA-KMT, 2019 U.S. Dist. LEXIS 128676, at *4–14 (D. Colo. Aug. 1, 2019).

between au pairs and sponsoring agencies in a putative class action brought by au pairs.[231] And in 2022, another au pair class action in California resulted in a $1 million settlement for the au pairs.[232] Scholars have emphasized these lawsuits' significance in strengthening worker protections, despite legal challenges posed by foreign affairs and preemption doctrines.[233]

2. The Weaknesses and Limitations of Au Pair Class Action Litigation

Although the series of au pair class action litigation was largely successful, relying on litigation is insufficient to fully protect au pair interests, especially the interests of minority au pairs. While class actions allow immigrant workers to *de facto* act as private attorneys general, the procedural complexities of litigation demand significant time, resources, and emotional investment.[234] The "opt-in" mechanism allows less-resourced au pairs to participate in lawsuits without active involvement, but structural barriers—including isolation, atomization, cultural conditioning, and minority au pairs' precarious status—may prevent au pairs from actually recognizing or pursuing these claim-making opportunities. Marginalized groups facing legal, social, or political discrimination often require affirming experiences with the legal system before they can fully perceive themselves as rights-bearing individuals with legally cognizable grievances.[235]

Cultural factors may further discourage claim-making. Latinx immigrants, for instance, might be dissuaded from asserting their rights due to cultural narratives—to "bear their burdens in solitude"—that emphasize individual endurance over collective action.[236] Denoted as a form of "self-abnegation," this narrative can lead individuals to internalize suffering rather than challenge unjust conditions.[237] For example, in a study conducted by

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231 *See* Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023).

232 *See* Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 291889, at *1 (N.D. Cal. July 25, 2022).

233 *See* Sarkar, *supra* note 188, at 38.

234 *See* Coleman, *supra* note 50, at 420.

235 *See* Grace Reinke, *"We Come Here to Work:" US Au Pairs and Rights Claiming During a Case Crisis*, 44 NEW POL. SCI. 565, 580 (2022).

236 Laura M. Padilla, *Re/Forming and Influencing Public Policy, Law and Religion: Missing from the Table*, 78 DENV. U. L. REV. 1211, 1215 (2001).

237 Coleman, *supra* note 50, at 410–11.

Mirza Aguilar-Pérez, Mexican au pairs frequently attributed their hardship to bad luck or the absence of divine intervention rather than systemic inequities.[238] These factors may contribute to the reluctance of some minority au pairs to engage in claim-making processes and seek legal recourse for their grievances.

More critically, fear of retaliation may discourage minority au pairs from asserting their rights, as their employers hold significant power over their immigration status.[239] Although no specific studies have been conducted on au pairs, similar patterns are evident in other guest worker programs.[240] For example, Mayee Crispin, an organizer for H-1 nurses at St. Bernard's Hospital in Chicago, has noted that 80% of the nurses there are single Filipina women, and many refrain from union organizing out of fear that their employer will withdraw visa sponsorship.[241] Similar to minority au pairs, these women have compelling reasons to remain in the United States, such as supporting their families back home or repaying debts incurred to enter the country.[242]

Storytelling is an expressive value of class actions, but procedural and other lawyering processes may sometimes downplay the racial and intersectional dimensions of minority au pairs' experiences.[243] Professor Llezlie Coleman has noted that, in a class action, lawyers may selectively extract parts of the narrative that conform to existing legal frameworks rather than weaving the law around the client's whole story.[244] Legal frameworks, including evidentiary and procedural rules, can further restrict storytelling by filtering out certain aspects of a worker's experience as irrelevant or inadmissible.[245] For instance, a court might exclude evidence of sexual harassment in a wage-theft case, even though the worker perceives both as interconnected forms of workplace exploitation.[246]

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238 *See* Aguilar-Pérez, *supra* note 100, at 465.

239 *See supra* Part II.D.

240 *See* CHANG, *supra* note 58, at 102.

241 *Id.* at 94, 107.

242 *See id.* at 123 (noting that most of these women live in a situation much like debt bondage for at least two years).

243 *See* Coleman, *supra* note 50, at 428–29.

244 *See id*.

245 *See id.* at 429.

246 *See id.*

A closer examination of the *Beltran* class action suggests that this phenomenon played out in that case. The initial *Beltran* complaint provides extensive details on the work experiences and hardships of au pairs, highlighting the "extreme suffering" they endured when sponsoring agencies failed in their obligations to protect vulnerable host families.[247] The complaint underscored the significant barriers au pairs face in asserting their rights, stating that they are "often tucked away in homes in scattered communities . . . with limited language skills."[248]

Indeed, the primary motivation behind the lawsuit does not appear to have been wage recovery. The complaint provided a detailed account of Beltran's experience: in addition to her childcare responsibilities, she was required to perform a wide range of household tasks unrelated to childcare, such as cleaning for the entire family (two adults and two children), cooking dinner nearly every night, doing the family's laundry, making the family's beds, packing and unpacking luggage for trips, cleaning her host mother's car daily, unloading groceries, and even tending to the family's garden and approximately eight chickens by feeding, watering, and cleaning the coop.[249] Despite preparing dinner for the family almost every night, Beltran was not allowed to eat with them.[250] While she was occasionally permitted to eat leftovers, there were times when no food was saved for her, forcing Beltran to prepare her own meals separately.[251] In her interview with the *Washington Post*, Beltran emphasized her motivation for the class action, stating that the sponsor agency had sold her the idea of "learning about a new culture."[252] Instead, her host family "treated her like a maid."[253]

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247 *See* Complaint at 5, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983).

248 *Id.* at 5.

249 *See id.* at 77–81.

250 *See id.* at 80.

251 *See id.* at 80.

252 DePillis, *supra* note 160.

253 *Id.* In addition to Beltran's experience, the complaint outlines exploitation experienced by other minority au pairs as well. *See* Complaint at 81–96, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983).
For instance, originally from Bogotá, Colombia, Ivette Gonzalez joined the program through an agency called Intercambio E Tourismo LTDA, paying approximately $1,600 in fees—$1,000 as an administrative charge and $600 as a refundable deposit contingent on completing the program and returning to Colombia. *Id.* at 86. Upon arriving in the United States, she was placed with a host family that severely restricted her autonomy. *Id.* at 86–88. The family imposed a strict curfew requiring her to be home seven hours before her childcare duties began, even though she was required to start caring for the infant at four a.m. each weekday after the parents

However, as the litigation progressed, the focus narrowed to wage theft—a universal concern for all au pairs. Following the success of the *Beltran* case on its FLSA claims, subsequent class actions focused exclusively on minimum wage and overtime violations, sidelining other forms of exploitation.[254] This narrowed focus obscures what many former au pairs and advocates identify as the more pressing issues for minority au pairs—such as racial discrimination, coercion, and workplace mistreatment.

Moreover, these class action lawsuits solely target au pair agencies, leaving exploitative host families untouched.[255] In *Capron*, where host families were not directly involved as defendants, au pairs submitted an amicus brief detailing severe mistreatment, including excessive workloads beyond childcare, invasion of privacy, restricted internet access, emotional abuse, harassment, food deprivation, and even confinement.[256] Despite these egregious abuses, host families have largely escaped scrutiny because the class action lawsuits have remained focused on wage recovery rather than the direct experiences of au pairs in their host households.

B. Abuse and Human Trafficking Litigation

In 2019, the State Department noted several incidents of abuses under the au pair program—some concerning wage theft, but twenty-five incidents involving physical and verbal abuse and the withholding of identity and immigration documents.[257] A Polaris report on human trafficking identified nineteen incidents of human trafficking in domestic

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left early for work. *Id.* at 87. Living in the suburbs without access to a car, Gonzalez felt isolated and alone. *Id.* at 87. In January 2015, after a heated argument with the host mother about the curfew, Gonzalez was abruptly expelled from the home the following morning, and the host mother ordered her not to return. *Id.* at 87–88. Gonzalez remained completely unpaid for two weeks of work. *Id.* at 88. While GoAuPair, her sponsor agency, initially agreed to help her find a new family, they refused to provide food or temporary housing. *Id.* at 88. Forced to rely on friends for shelter, Gonzalez spent weeks searching for a new placement, but GoAuPair was ultimately unable to find her a host family. *Id.* at 88. With no support system, she had to borrow money from a friend to purchase a flight back to Colombia. *Id.* at 88.

254 *See* Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023); Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 291889 (N.D. Cal. July 25, 2022).

255 *See* Brief of Amici Curiae Worker Organizations in Support of Defendant-Appellees and Affirmance, Capron v. Off. of Att'y Gen. of Mass., 994 F.3d 9 (1st Cir. 2019) (No. 17-2140) 2018 WL 2016232, at *18–20.

256 *Id.* at *8–12.

257 U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT 490 (2019), https://www.state.gov/wp-content/uploads/2019/06/2019-TIP-Report-Narratives-T-ZSpecial-Case.pdf [https://perma.cc/L5BM-CRFS].

work (though some of them may be under the Summer Work Travel program).[258] Yet, prior to the first class action brought by Beltran, few au pairs had filed any complaints against exploitative host families.[259] Instead, most cases involving au pairs only concerned issues such as child custody or assaults by third parties.[260] In other words, patterns of abuse and trafficking of au pairs persisted for around three decades without a single case filed in court. After *Beltran*, more au pairs began to bring lawsuits against their employers, largely due to the efforts of labor organizations.[261] On the one hand, these recent developments underscore how community organizing has improved marginalized workers' access to justice.[262] On the other hand, the stark contrast between the previous lack of litigation and the influx of accusations highlights the challenges involved in law enforcement and legal mobilization.[263]

1. Absence of Public Prosecution

The under-prosecution of abuse and trafficking of au pairs may be attributed to two main causes. First, scholars and advocates have identified a clear failure to prosecute labor trafficking.[264] The myth that all human trafficking is sex trafficking has led to the widespread under-prosecution of labor trafficking, which in turn reinforces this misconception.[265] Second, common barriers to investigation identified by scholars are aggravated in the

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258 *See* LILLIAN AGBEYEGBE ET AL., POLARIS, HUMAN TRAFFICKING AT HOME: LABOR TRAFFICKING OF DOMESTIC WORKERS 43 (Caren Benjamin ed., 2019), https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf [https://perma.cc/4L7M-PU2V].

259 A search on Westlaw shows that prior to 2014, only labor trafficking outside the program as well as cases related to sexual assaults and sex trafficking were filed in court. The search term used is "au pair." There are 126 cases in total on Westlaw. Most cases were filed by host families against au pairs for negligent or abusive behavior.

260 *See e.g.*, McKenna v. Am. Inst. for Foreign Study Scholarship Found., No. 94-671-B, 1995 U.S. Dist. LEXIS 16609 (D.N.H. Nov. 3, 1995) (a sexual assault case); Metzer v. Metzer, 4 Pa. D. & C.5th 417 (Bucks Cnty. Ct. Cm. Pl. 2008) (a child support case).

261 *See infra* Part III.C.2.

262 *See infra* Part III.C.2.

263 *See infra* Part III.C.2.

264 *See, e.g.*, Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 492–93 (2020) (noting the fact "[t]hat labor trafficking is underprosecuted is uncontroversial" and "increasing the number of prosecutions of labor trafficking has been among the top recommendations for the United States").

265 *See id.* at 479.

au pair context.[266] Au pairing takes place in private households that are typically beyond law enforcement's reach.[267] The myth of human trafficking as sex trafficking or physical constraints makes both law enforcement and au pairs unaware that what they experience amounts to labor trafficking.[268] Exploited au pairs are often isolated in private households with limited access to support networks and language barriers.[269]

The Trump administration's anti-immigrant rhetoric and harsh policies also work to deter au pairs from reaching out for help.[270] Additionally, law enforcement often expresses skepticism towards foreign nationals' reports of trafficking, and some even view the au pair program as an unethical springboard to immigration.[271]

2. Private Civil Lawsuits Holding Families Accountable

The Trafficking Victims Prevention and Reauthorization Act (TVPRA) permits both public and private causes of action.[272] With the help of the migrant rights organization Centro de los Derechos del Migrante, former au pairs Tatiana Cuenca-Vidarte and Sandra Peters initiated a lawsuit against their sponsoring agency and host parents in 2020.[273] Upon their arrival in the United States, they were inundated with substantial program fees.[274]

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266 *See id.* at 498–524 (noting workplace exceptionalism, pervasive myths, isolation of victims, fear and distrust of law enforcement, ongoing and credible coercion, skepticism of foreign national victims, insufficient training, maladaptive law enforcement strategies, and insufficient resources as the main sources of the difficulty in prosecuting labor trafficking).

267 *See id.* at 498–502. This Note uses the term "workplace exceptionalism" to describe the phenomenon where unlawful employer conduct has been normalized. Workers rarely benefit from the protection of the criminal justice system because regulating employers and conduct associated with the workplace may seem like a purely civil matter not appropriate for law enforcement intervention.

268 *See id.* at 498–504.

269 *See id.* at 505–06.

270 *See id.*

271 *See id.* at 511.

272 *See* 18 U.S.C. § 1595(a).

273 SANDRA AND TATIANA, TWO MARYLAND AU PAIRS SUE THEIR EMPLOYERS FOR TRAFFICKING, FORCED LABOR AND UNPAID WAGES, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., https://cdmigrante.org/sandra-and-tatiana-two-maryland-au-pairs-sue-their-employers/ [https://perma.cc/Y3BM-ZRGR].

274 Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *3–4 (D. Md. Sept. 30, 2022).

Working for the Samuel family at different times in 2016 and 2018, Cuenca-Vidarte and Peters reported similar negative working conditions. On top of compelling them to exceed agreed-upon work hours and duties, the host parents restricted their access to food, restricted their movement, issued deportation threats, and constantly monitored them through a network of surveillance cameras.[275]

During the course of their litigation, however, an issue arose regarding whether the *Beltran* settlement barred their lawsuit.[276] In January 2022, the defendants sought to dismiss their complaint, arguing that the *Beltran* settlement released Peters and Cuenca-Vidarte's claims because the claims arose out of the same au pair employment.[277] A Maryland federal judge agreed, holding that the defendants were covered by the settlement.[278]

Cuenca-Vidarte and Peters then turned to the Colorado courts for help.[279] Even though the host families were not parties to the *Beltran* litigation, the Colorado district court found them within the meaning of the settlement agreement.[280] Nonetheless, the Colorado court found the two claims distinct.[281] While the *Beltran* settlement agreement barred the *Beltran* class members from bringing state, FLSA, and TVPRA claims against au pair agencies, the Colorado court permitted Cuenca-Vidarte and Peters' TVPRA claims against their *host families* to move forward.[282] *Beltran* concerned minimum wage and overtime violations, but Cuenca-Vidarte and Peters' human trafficking claims arose from the host families illegally obtaining labor through force, abuse, threats, or serious harm.[283] The court emphasized that the *Beltran* settlement agreement did not prevent *Beltran* class members from filing labor

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275 *See id.* at *4–18.

276 *See id.* at *34–39.

277 *Id.*

278 *See id.*

279 *See* Beltran v. InterExchange, Inc., No. 14-CV-03074-CMA, 2023 U.S. Dist. LEXIS 30376 (D. Colo. Feb. 23, 2023).

280 *See id.* at *21.

281 *Id.* at *47.

282 *See id.*

283 *See id.* at *41–43.

trafficking claims against their host families, and thus the plaintiffs were not precluded from their TVPRA claims.[284]

Although this case is still pending, this part of the Colorado court's ruling holds promising implications for au pairs broadly. Any former au pairs who joined one of the existing three class actions would not be prevented from pursuing additional labor trafficking claims against their host families (although au pair agencies remain released from liability). Consequently, this development offers an additional avenue for au pairs to seek justice and assert their rights in federal court.

This case also underscores the crucial role played by migrant and labor rights organizations to help au pairs realize their legal rights. Unlike claims under the FLSA, it is unlikely that au pairs will bring class action lawsuits under the TVPRA because certification of a class action requires numerosity and uniformity.[285] Au pairs are unlikely to satisfy the numerosity requirement against a single host family, given that host families typically host fewer than three au pairs per year.[286] Moreover, meeting the commonality requirement against multiple host families would be challenging, as each au pair experiences varying degrees and types of abuse from different host families.[287] Consequently, pursuing a

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284 *See id.* at *43–44.

285 *See* Coleman, *supra* note 50, at 466.

286 For an example of where a class of plaintiffs failed to meet the numerosity requirement, see *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773 (7th Cir. 2021) (holding that a proposed class of thirty-seven employees failed to meet the numerosity requirement; the court emphasized that geographic concentration of class members and the ability to recover attorneys' fees made joinder more practical). While there is no bright-line number, courts generally consider a class of forty or more to be sufficient. *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) ("[L]ess than 21 is inadequate, more than 40 adequate, with numbers between varying according to other factors.").

287 In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that commonality means that the class members "have suffered the same injury," not just that all have suffered a violation of the same provision of law. 564 U.S. 338, 350 (2011). Moreover, the common contention must be of such a nature that it is capable of class-wide resolution, "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id. See also* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011) (vacating and remanding trial court's determination that plaintiffs met Rule 23's commonality requirement because the court failed to engage in a "rigorous analysis" on this point; relying on *Dukes* and noting that "Plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief."); Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014) ("As *Dukes* and all of our subsequent caselaw have made clear, a class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number.").

TVPRA claim would likely entail significant costs for individual au pairs because they would be required to bring individual cases rather than join an existing class action lawsuit. Nonetheless, individualized TVPRA claims offer certain advantages. Unlike FLSA class actions, which demand uniformity, plaintiffs can tailor their cases to best suit their specific circumstances and shape their storytelling in an individualized manner.

IV. Other Mechanisms to Protect Au Pairs

In response to recent FLSA class action litigation, the State Department unveiled a proposal to amend the current au pair program on October 30, 2023.[288] Among the significant changes that would benefit au pairs was a new compensation system that aligns with state or local minimum wage levels, accompanied by a proposal to preempt various areas of law related to employment, wages, taxes, and other matters.[289] Additionally, the proposal introduced several measures aimed at enhancing the au pair program, including the implementation of host-family agreements to enhance transparency and align expectations between au pairs and host families, safety-oriented reporting requirements for sponsors regarding displaced au pairs in the rematching process, and host-family orientations to clarify that host families cannot restrict au pairs' access to identification documents and cell phones.[290]

However, while the State Department's attempt to initiate au pair program reform represents positive progress, it ultimately fails to adequately address many issues unique to minority au pairs. These proposed changes have yet to be formalized into rules, so this Article treats the proposals as initial steps toward crafting concrete solutions. This Section highlights shortcomings in the State Department's proposed solutions and proffers alternative options, such as defining au pairs as employees, increasing au pairs' access to justice, and formulating anti-retaliation laws and mechanisms.

A. Defining Au Pairs as Employees

The State Department's 2023 regulation proposals reaffirmed the program's identity as a "cultural exchange"[291]—rather than an employment relationship between au pairs and host

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288 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

289 *Id.* at 74077–82.

290 *Id.* at 74073–80.

291 *Id.* at 74072.

families, as recognized by district courts. In conventional terms, "employment" denotes a relationship between an employer and an employee where the employee provides labor or services to the employer in exchange for compensation with built-in legal protections.[292] A "cultural exchange," on the other hand, necessarily diverges from employment law protections as it implies reciprocity characterized by expressions of love and gratitude, blurring the boundary between work and personal life.[293]

It is often employers who characterize the au pair-host family relationship as familial.[294] Judith Rollins has observed that white employers often play the role of "benevolent mothers" as a way of confirming the inferior status of their domestic workers.[295] Similarly, Hondagneu-Sotelo has noted that maternalistic acts are prevalent among employers, reinforcing a "familial" dynamic.[296] While some au pairs may expect this, others may prefer a more professional relationship dynamic.[297] The au pair program's rhetoric of au pairs being "part of the family" only reinforces this existing practice.

This Article proposes that the government define au pairs as employees, rather than just participants in a cultural exchange. Under an employee status, minority au pairs would be able to utilize labor protections in both their home countries and the United States. Consequently, au pairs may be more likely to ask that their program grievances be addressed through employment negotiations that acknowledge their rights or possibilities for legal recourse. This shift in language creates the potential for a more equitable and empowered position for au pairs in advocating for their rights within the program.

B. Increasing Au Pairs' Access to Justice

The State Department's proposed rules attempted to reform family and au pair orientations, which include "know-your-rights" sessions.[298] These orientations are essential for informing both host families and au pairs about their rights and responsibilities. However,

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292 *See* Chuang, *supra* note 13, at 316–17.

293 *See id.* at 308–13.

294 *See infra* notes 315–318.

295 *See* JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS 156–70 (1985).

296 *See* HONDAGNEU-SOTELO, *supra* 4, at 182–88.

297 *See id.* at 217–21.

298 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74075 (proposed Oct. 30, 2023).

Professor Jennifer Gordon has observed that know-your-rights sessions led by attorneys often have limited effectiveness, particularly for immigrant workers.[299] Moreover, some au pairs have reported difficulty understanding their orientation due to language barriers.[300] Storytelling spaces and interactive communication methods, which create opportunities for dialogue and sharing personal experiences, may be more effective in facilitating and enhancing immigrant workers' understanding and ability to assert their rights.[301]

Unlike more clear-cut issues like wage theft, abuse and exploitation within the private home can manifest in subtler but nonetheless debilitating ways for au pairs. For example, an au pair who faces microaggressions such as discriminatory attitudes, assumed incompetence, and forced isolation—all commonly experienced by immigrant domestic workers—may not actually have any legally cognizable claims to redress these harms.

Ai-Jen Poo, the president of the National Domestic Workers Alliance, has called for reforms related to au pairs' "rights, respect, and recognition."[302] Even in situations where immigrant women are unable to pursue legal action or assert specific legal rights, they still have the power to demand dignity and respect from their employers.[303] It is important to move beyond a narrow scope of legal "rights" because advocacy could come in the form of raising cultural consciousness through meaningful interpersonal conversations.[304]

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299 *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 116 (2005).

300 *See* Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *11–12 (D. Md. Sept. 30, 2022).

301 *See* GORDON, *supra* note 299, at 112–22.

302 *See* Shirley Lin, *'And Ain't I a Woman?': Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV J.L. & GENDER 67, 109 (2016) (citing Ai-Jen Poo, *Dying to Work*, VILLAGE VOICE (Mar. 19, 2002), http://www.villagevoice.com/2002-03-19/specials/letters [http://perma.cc/9QW2-8TGL] (regarding domestic workers in New York City: "It's about time that we give this workforce the rights, respect, and recognition it deserves.")); Press Release, AFL-CIO, National Domestic Workers' Alliance, National Guestworkers' Alliance Announce Partnership Agreements (May 10, 2011), http://www.aflcio.org/Press-Room/Press-Releases/AFL-CIO-National-Domestic-Workers-Alliance-Nati [http://perma.cc/J2JC-7D77] ("We are proud to fight together with our union brothers and sisters to defend and expand the right to organize, win justice for immigrants, and ensure that one day the workers that makes [sic] all other work possible—cleaning and caring for children and seniors—will have rights, respect, and recognition." (quoting Barbara Young, a nanny and National Organizer with the National Domestic Workers Alliance)).

303 *See* Lin, *supra* note 302, at 110.

304 *See id.* at 110–11.

One key barrier to collective action among domestic workers is atomization. Au pairs are often placed in remote areas, although they can still communicate through platforms like Facebook.[305] Simple strategies to disperse resources among au pairs can enhance their access to justice. For instance, the State Department could include a list of organizations that offer assistance to au pairs in their orientation materials. Labor organizations can share their contact information with au pairs on Facebook and host virtual information sessions to reach au pairs in remote locations. Scholars have pointed out that when undocumented workers have fewer protections than authorized workers, it undermines working conditions for everyone in the state.[306] Similarly, when authorized workers are subjected to "liminal legality"—a state of uncertainty and potential repatriation—it jeopardizes working conditions for all categories of domestic workers, regardless of their immigration status.

C. Increasing Anti-Retaliation Protections

Improving access to justice for au pairs cannot be achieved without anti-retaliation safeguards and improving au pairs' understanding of anti-retaliation laws. Au pairs who fear retaliation, even if the possibility of it happening is only slight, may hesitate to participate in collective action. The State Department's changes sought preemption in various areas, such as employment tax and au pair placement.[307] Currently, the State Department explicitly excludes sexual harassment and retaliation laws from preemption.[308]

However, au pairs who provide live-in childcare are not protected by anti-retaliation laws.[309] Under the NLRA, the National Labor Relations Board (NLRB) generally protects the rights of workers to engage in collective bargaining and to be reinstated in cases of unfair labor practices.[310] The extent of protection varies depending on a worker's specific immigration status and occupation. For instance, the Supreme Court has held that while

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305 *See* Salama, *supra* note 84.

306 *See* Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279, 1296 (2017).

307 Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74082 (proposed Oct. 30, 2023).

308 *Id.* at 74097.

309 *See* 29 U.S.C. § 152(3) (noting the exclusion of domestic workers in family homes from the definition of "employee").

310 *See generally* 29 U.S.C. § 151 ("[P]rotecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

undocumented workers are "employees" within the definition of the NLRA, usual remedies of reinstatement and back pay do not apply when employers retaliate against undocumented immigrants for their support of unions.[311] In contrast, the NLRB protects H-1 guest workers' work authorization from being revoked during strikes.[312] However, the NLRA has categorically excluded several occupations from labor protection, such as agricultural workers and domestic workers, many of whom came to the United States through guest worker programs.[313]

State legislatures can enact statutes that protect immigrant workers, as California has done.[314] For instance, California's Division of Labor Standards Enforcement has the power to suspend or revoke business licenses if the business is found engaging in unfair immigration-related practices.[315] While the Domestic Worker Bill of Rights takes significant steps in protecting workers by expanding rights to minimum wage, implementing maximum hours and paid leave, and laying out protection against harassment, it still does not include provisions for establishing domestic workers' collective bargaining rights.[316]

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311 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that the Immigration Reform and Control Act prohibits the NLRB from awarding post-termination back pay to an undocumented worker who uses false documentation to establish work authorization without the employer's knowledge).

312 *See* WJA Realty Ltd. P'ship v. Nelson, 708 F. Supp. 1268 (S.D. Fla. 1989) (holding that an immigration regulation permitting the revocation of work authorization of employed non-immigrant workers when a strike occurs was invalid because the regulation squarely conflicted with the NLRA's grant of "employee" status to non-immigrant workers).

313 *See* 29 U.S.C. § 152(3).

314 *See* CAL. PENAL CODE § 519 (West) (prohibiting extortion by reporting an individual's immigration status).

315 *See* CAL. LAB. CODE § 1019 (West).

316 *See, e.g.*, N.Y. EXEC. LAW § 296-b; N.Y.S. DEP'T OF LAB., ABOUT THE DOMESTIC WORKERS BILL OF RIGHTS LAW, https://dol.ny.gov/system/files/documents/2021/03/about-domestic-workers-law.pdf [https://perma.cc/WQ2T-M6GV] (noting that the law directed the Commissioner of Labor to study the practicality of extending collective bargaining rights to domestic workers in New York, which means that collective bargaining rights have not yet been granted). While the original Bill of Rights did not explicitly include protections against employer retaliation, subsequent amendments to the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) have extended such protections to domestic workers. Effective December 31, 2021, amendments to the NYSHRL provided domestic workers with protections against discrimination and harassment. Similarly, starting March 12, 2022, the NYCHRL extended its protections to domestic workers, explicitly prohibiting retaliation against workers who exercise their rights.

To fully safeguard the rights of au pairs and immigrant workers to participate in labor organizations, the next stage of the campaign should prioritize advocating for foreign domestic workers' rights to collective bargaining. Reinstatement relief is perhaps one of the most crucial aspects of this reform, particularly for minority au pairs. In *WJA Realty Ltd. Partnership v. Nelson*, a Florida court recognized nonimmigrant workers as eligible to be reinstated to their nonimmigrant visa program.[317] Other courts could do the same. However, one issue scholars have noted regarding reinstatement is that reinstating a live-in domestic worker to the previous employer's home is likely undesirable to both parties and may raise issues concerning the employer's right to privacy.[318] However, the reinstatement problem does not necessarily exist in the au pair context because au pairs could be reinstated into the *program* and enter the rematch procedure more broadly. Another option is that states could allow domestic workers and employers to choose whether to reinstate the worker, with employees entitled to back pay in both scenarios.[319]

D. Alternative Solutions

Despite the State Department's proposal for changes to host family agreements, the State Department has yet to provide any enforcement mechanisms.[320] The State Department currently relies on au pair agencies to resolve disputes when conflicts arise.[321] No matter how comprehensive a host family agreement is, the lack of enforcement has a major effect on the actual deterrence of exploitative families or agencies from abusive conduct. Scholars have instead advocated for increased scrutiny and investigation of agencies and host families by the State Department.[322] This Note echoes Victoria Bejarano Muirhead's proposal urging the State Department to impose sanctions on au pair agencies, conduct independent investigations, and make public aggregated data regarding complaints.[323] The above mechanisms will most effectively hold host families and agencies accountable. Nonetheless, this Note recognizes that thorough internal investigations and oversight may

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317 *See WJA Realty*, 708 F. Supp. at 1268.

318 *See* Terry Buck, *The Constitutional Path to Domestic Worker Organizing and Collective Bargaining Rights Under New York State Private Sector Labor Law*, 46 N.Y.U. REV. L. & SOC. CHANGE 271, 303 (2022).

319 *See id.* at 304–05.

320 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071 (proposed Oct. 30, 2023).

321 *See* Kopplin, *supra* note 119.

322 *See* Chuang, *supra* note 13, at 332–37.

323 *See generally* Muirhead, *supra* note 75.

pose administrative or financial burdens. As an alternative, this Note proposes measures aimed at shifting the oversight function to the public, other au pairs, and labor organizations.

1. Transparency Reforms

One of the major vulnerabilities faced by au pairs is their lack of information about their host families, which creates a structural information imbalance and limits au pairs' mobility. Knowing that au pairs are unlikely to stay in the United States for long and that there are very few accountability mechanisms, host families can abuse their au pairs without any oversight; this lack of accountability, in turn, gives them more incentive to obstruct the au pairs' goals to advance their studies and careers in the United States. Some au pairs post about their experiences with their host families on social media, such as Facebook.[324] Unfortunately, because these posts can be scattered across various social media platforms in different languages, they may not reach a wide audience, and marginalized au pairs are less likely to access this information. If the information were centralized, however, au pairs could make more informed decisions about their host families.

One way to improve transparency and empower au pairs could be to gather anonymous comments through a centralized feedback form and share it with incoming au pairs and those in the rematch process. This approach is common among international students seeking jobs, especially when companies have different policies regarding noncompete clauses, immigration visas, and relocation benefits. Given that there are 20,000 au pairs each year, the feedback form could be designed with word limits, short answer options, or ratings to streamline the administrative process.

This solution may run into issues with bad-faith comments or invasions of host families' privacy. To enhance reliability and secure host families' personal information, State Department personnel could review and filter au pairs' feedback before it gets shared more widely. The State Department could also limit information access to au pairs alone. As au pairs already share information about their host families on various social media platforms,[325] a centralized, streamlined system that prohibits the sharing of private matters would actually provide better protections for host families' privacy than what currently exists. The attrition between host families and au pairs often stems from the difference

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324 *See, e.g.*, Catalina Duque Dazkevich, FACEBOOK (Jan. 19, 2025), (on file with the *Columbia Journal of Gender & Law*); Inès Along, FACEBOOK (Jan. 16, 2025), (on file with the *Columbia Journal of Gender & Law*).

325 *See* Dazkevich, *supra* note 324; Along, *supra* note 324.

in their expectations,[326] so providing more information to au pairs will likely better align expectations, better facilitate the transition period, and even reduce the administrative costs that arise when dissatisfied au pairs choose to rematch with other families.

2. Educational Reforms

Another area where au pairs would benefit from increased information sharing is in their educational pursuits. The current program does not provide sufficient assistance for au pairs to continue their studies in the United States and places them in precarious situations where they may easily lose their student status.[327] Although host families bear a small amount of an au pair's educational expenses, tuition costs in most programs significantly exceed this budget.[328] The State Department or au pair agencies should facilitate information sharing from au pairs who have successfully completed degree programs in the United States. This would create more realistic expectations for au pairs seeking to immigrate to the United States.

In addition, the State Department could consider establishing a program that allows au pairs who have completed two years of the program to enroll in public schools at an in-state rate in states where they have worked and resided for twelve months.

CONCLUSION

Minority au pairs represent a small demographic of non-citizen workers, but an intersectional analysis unveils their heightened vulnerability to exploitation due to factors such as race, gender, national origin, and liminal legality. The intersection of domestic work with its racialized and gendered nature adds layers of barriers for them to properly assert their rights. The lack of legal safeguards in both the U.S. immigration regime and labor law landscape perpetuates a cycle of uncertainty and instability. Proper reform for au pairs' rights necessitates a cultural and legal shift that challenges the deep-seated biases that render domestic work "unskilled" and its workers disposable.[329] Looking forward, policymakers, advocates, and scholars should continue to push for systemic reforms that dismantle the racialized and gendered devaluation of domestic labor. Strengthening

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326 *See generally* Hernández García, *supra* note 89; Chuang, *supra* note 13; Davis, *supra* note 72.

327 *See supra* Part II.

328 *See supra* Part II.

329 *See generally* CHANG, *supra* note 58 (noting that the United States treats domestic workers as disposable).

labor protections, redefining the legal status of au pairs, and elevating domestic work as a recognized and respected profession are critical steps in ensuring that minority au pairs, and all domestic workers, are no longer seen as temporary, exploitable labor but as individuals deserving of dignity, stability, and rights.