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En-Gendering Economic Inequality

Michele E. Gilman

University of Baltimore School of Law, mgilman@ubalt.edu

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EN-GENDERING ECONOMIC INEQUALITY

MICHELE E. GILMAN

Abstract

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

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

President Obama calls economic inequality the “defining challenge of our time.” President Barack Obama, Remarks on Economic Inequality at the White House (Dec. 4, 2014) (transcript available at https://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/M7QY-D4ML]).


Federal Reserve Chair Janet Yellen asks whether growing economic inequality “is compatible with values rooted in our nation’s history, among them the high value Americans have traditionally placed on equality of opportunity.” Pedro Nicolaci Da Costa, Janet Yellen Decrees Widening Income Inequality, WALL ST. J., Oct. 17, 2014, http://www.wsj.com/articles/feds-yellen-says-extreme-inequality-could-be-un-american-1413549684 [https://perma.cc/XBB6-EARX].


In short, economic inequality is firmly on the public agenda, as experts, policymakers, and presidential candidates debate its causes, consequences, and cures. Less attention is focused on the reality that not all groups experience inequality similarly. To the contrary, economic inequality falls most harshly on minorities and women. On the racial wealth and income gap, see Rakesh Kochhar & Richard Fry, Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession, PEW RES. CTR. (Dec. 12, 2014), http://www.
intersection of economic inequality with gender, as shaped and reinforced by law, is the focus of this Article.

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


not only individual financial struggles, but it also harms the economy through “lower productivity, lower efficiency, lower growth, [and] more instability.”

By contrast, nations with greater economic equality have more economic growth. Our growing economic divergence is also linked to social dysfunctions, ranging from high rates of infant mortality, to crime, and substance abuse; educational failures; and lower life expectancy—all of which impose their own costs.

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

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

For instance, the government establishes the playing field regarding unionization, increased globalization and outsourcing of jobs, technological advances that have replaced traditional middle-income jobs, a rise in part-time work with few benefits, the decline of unionization, a less progressive tax system, and the rise of super-salaries for super-managers that bear no relation to increased productivity.
corporate governance, and competition laws, all of which relate to economic inequality. Political scientists Jacob Hacker and Paul Pierson similarly elucidate, “[g]overnment rules make the market, and they powerfully shape how, and in whose interests, it operates.” As legal scholar Martha McCluskey notes, government’s role in economic inequality is an observation with a “long and articulate history,” but one that is muted by economic rhetoric that treats the market and state as separable.

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

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

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20 Id. at 57–58.

21 *Hacker & Pierson, supra* note 8, at 44; see also *David Brady, Rich Democracies, Poor* People: *How Politics Explain Poverty* 6 (2009) (a sociologist explains that “the distribution of resources in states and markets is inherently political”); *Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America* 251–52 (2014).


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


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

26 For a discussion of how the Supreme Court has reinforced economic inequality in the areas of education, redistribution, corporate law, and the political process, see *Gilman, supra* note 12.
doctrine where gender and class intersect. It imports core insights from feminist economic theory into legal analysis to help understand the harm to women wrought by the mainstream, neoclassical economic models based on efficiency and individual self-interest to which the Court majority adheres. The thesis is that the Supreme Court either overtly or implicitly applies neoclassical economic assumptions in its decision-making, thereby perpetuating economic inequality on the basis of gender.

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

27 Laura T. Kessler, *Getting Class*, 56 Buff. L. Rev. 915 (2008) (Kessler discusses the inattention of feminist legal theory to class: “By placing economically privileged, white, heterosexual women at the center of the analysis, such theories and strategies discount the experiences of many women and men.”).
29 Harris v. Quinn, 134 S. Ct. 2618 (2014).
I. Economic Inequality and Gender

A. The Rise of Economic Inequality

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

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

33 See Piketty, supra note 6, at 294; Stiglitz, supra note 12, at 11; Bartels, supra note 24, at 8–9; Levy & Temin, supra note 32, at 2 (holding that between 1980 and 2005, business sector productivity increased by 67.4%, yet median weekly earnings of full-time workers rose only 14%).
34 See Stiglitz, supra note 12, at 11.
35 Id. at 11; Page & Jacobs, supra note 32, at 7.
39 See Ctr. for Am. Progress, supra note 8, at 104 (95% of post-recession income gains went to the top 1% of households). The causes of wage stagnation result from intentional policy choices including, “the abandonment of full employment as a main objective of economic policymaking, declining union density, various labor market policies and business practices, policies that have allowed CEOs and finance executives to capture ever larger shares of economic growth, and globalization policies.” Mishel, supra note 38.
1% grew 138% between 1979 and 2013, the bottom 90% saw only a 15% increase.\textsuperscript{40} To be sure, unemployment is falling as the United States emerges from the recession, yet wage growth for most workers remains weak, with the average hourly pay dropping.\textsuperscript{41}

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{41} \textit{Id.} at 6.
\item \textsuperscript{42} Piketty, \textit{supra} note 6, at 20–22. He recommends a progressive global tax on capital. \textit{Id.} at 471, 515.
\item \textsuperscript{45} Geier, et al., \textit{supra} note 44.
\end{enumerate}
\end{footnotesize}
differently is critical to informing the democratic deliberations that Piketty hopes will be capable of bringing about change.”\(^{46}\) This Article is part of a larger feminist project to bring gender into the discussion of economic inequality and vice versa.

**B. Gender and Economic Inequality**

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

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

\(^{46}\) Perrons, *supra* note 44, at 671.


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


53 See Ctr. for Am. Progress, supra note 8, at 132; Mary Gregory, Gender and Economic Inequality, in The Oxford Handbook of Economic Inequality 284, 288 (Brian Nolan, Wiemer Salverda & Timothy M. Smeeding eds., 2011).


55 Ctr. for Am. Progress, supra note 8, at 72, 134; Randy Albelda, Gender Impacts of the “Great Recession” in the United States, in Women & Austerity: The Economic Crisis and the Future for Gender Equality 82, 83 (Maria Karamessini & Jill Rubery eds., 2013) [hereinafter Albelda, Gender Impacts].

56 See Elaine McCrate, Employer-oriented Schedule Flexibility, Gender and Family Care, in Handbook of Research on Gender and Economic Life [hereinafter HANDBOOK ON GENDER] 273 (Deborah M. Figart & Tonia L. Warnecke eds., 2013) (the United States lacks “even the most rudimentary forms of flexibility such as paid vacation days or sick leave”).

57 Blau & Kahn, Female Labor Supply, supra note 52, at 1, 7. Men fared worse than women in terms of job loss during the economic recession from 2007–2009, but fared better in the post-recession economy with larger
Second, the gender gap in pay—women make about seventy-eight cents to every dollar earned by men—adversely impacts households and the national economy. While the gap shrank from approximately 60% in 1978 to around 78% today, it has been stubbornly hard to erase—particularly for women of color—with little improvement since 1990. As a result, “the economic fortunes of families typically remain disproportionately dependent on what dads earn, even when the moms work, too.” One cause of the gender gap is family status, meaning the employment interruptions that women experience due to childbearing and caregiving.

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

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61 Noah, supra note 37, at 49.


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

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

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

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

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66 Blau & Kahn, Have Women Gone, supra note 59, at 12. They estimate discrimination to account for about forty-one percent of the gap. Id.
67 Katherine T. Bartlett, Deborah L. Rhode & Joanna L. Grossman, Gender and the Law: Theory, Doctrine, Commentary 60 (6th ed. 2013). While the gap is sometimes attributed to women’s alleged preferences for working less, the reality is that women who worked full-time and year-round during at least 12 of 15 consecutive years still earn only 64% of similarly situated men. See Stephen J. Rose & Heidi I. Hartmann, Still a Man’s Labor Market: The Long-Term Earnings Gap, Inst. For Women’s Pol’y Res. 10 (2004).
68 See Gregory, supra note 53, at 296.
69 See Hegewisch & Liepmann, supra note 63, at 200.
72 Low-income is defined by researchers and policymakers as having “family income below 200 percent of the poverty line.” Randy Albelda, Low-wage Mothers on the Edge in the US, in HANDBOOK ON GENDER, supra note 56, at 257, 259 [hereinafter Albelda, Low-wage Mothers].
more likely than men to be poor.\textsuperscript{73} Nearly six in ten adults who live in poverty are women.\textsuperscript{74} This disparity results from the lower employment and wage levels of women\textsuperscript{75} as well as women’s higher likelihood of heading single parent families.\textsuperscript{76} Minimum wage workers are more likely to be women.

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

\textsuperscript{73} Joan Entmacher, et al., Insecure & Unequal: Poverty and Income among Women and Families 2000–2013 1 (2014), http://www.nwlc.org/sites/default/files/pdfs/final_2014_nwlc_poverty_report.pdf [https://perma.cc/8FGF-EXWS]. See also Gregory, supra note 53, at 285 (Women “remain underrepresented in prestige professions and ‘top jobs’; they typically receive lower pay; and they feature disproportionately among the low-paid. Equality of outcomes in the labor market has not been achieved.”); Albelda, Gender Impacts, supra note 55, at 83 (examining the “large share of female-headed households that disproportionately fill the bottom ranks”).

\textsuperscript{74} Poverty rates are significantly higher for families headed by Black, Hispanic, and Native American single mothers. See Entmacher, et al., supra note 73, at 3. For these women of color, it is harder to obtain employment, their jobs are more likely to be low-paid, and their wages are depressed by both race and gender discrimination. See Marlene Kim, Race and Ethnicity in the Workplace, in Handbook on Gender, supra note 56, at 218, 219–26. For instance, the author’s study showed that “black women were underpaid 9 percent because of their race, 15 percent because of their gender, and 3 percent because of the intersection of both gender and race.” Id. at 231.

\textsuperscript{75} See supra notes 50 to 67 and accompanying text.

\textsuperscript{76} See Iceland, supra note 62, at 99–100.

\textsuperscript{77} See Entmacher, et al., supra note 73, at 4.

\textsuperscript{78} Albelda, Low-wage Mothers, supra note 72, at 257, 258.

\textsuperscript{79} Id. at 257, 264.

\textsuperscript{80} See Entmacher, et al., supra note 73, at 4.

\textsuperscript{81} See Albelda, Low-wage Mothers, supra note 72, at 257, 263, 267–68.

\textsuperscript{82} See Shaefer & Edin, supra note 11, at 29–30.
Working poor women struggle to procure affordable childcare while enduring low pay, irregular and part-time hours, and lack of benefits.83 Often these women work as childcare providers for more affluent women, while unable to afford childcare for their own children.84 The United States’ low levels of governmental support for paid childcare “exacerbates the inequality among women through the privatization of care costs.”85 Due to societal gender norms, women provide the majority of unpaid household labor,86 and women’s care responsibilities subject them to discrimination in the workplace, where the ideal worker is defined by a male norm.87 Employers treat low-wage women workers as “unencumbered,” subjecting them to variable and unpredictable work hours, and placing women in a bind when it comes to caring for their own children.88

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

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

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83 See Albelda, Gender Impacts, supra note 55, at 84; CTR. FOR AM. PROGRESS, supra note 8, at 133.
84 See Albelda, Gender Impacts, supra note 55, at 84.
85 Id.
86 See Nelson, Gender and Caring, in HANDBOOK ON GENDER, supra note 56, at 64.
88 See McCrate, supra note 56, at 279.
women at the top of the income scale. The rise of overall economic inequality in the United States is due in part to a class of multi-million dollar earning supermanagers. They are mostly male. In 2012, executive officer positions at Fortune 500 companies were only 14% female, while 25% of these companies had no female executives at all. Among the superrich, women constitute only forty-two of the four hundred richest Americans, and of these women, thirty-eight accrued their wealth by inheriting from their fathers and husbands. In short, “[t]he glass ceiling is still there” at the top.

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

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

94 See Perrons, supra note 44, at 672.

95 Carbone & Cahn, supra note 51, at 64.

96 Noah, supra note 37, at 49.


98 Gregory, supra note 53, at 285.

99 Boushey, supra note 87, at 307.
“includ[e] stagnating male median wages, reduced men’s labour force participation, a reduction in the percentage of men with employment-based benefits, a decline in male breadwinners, and growth in men’s share in low-wage and part-time work.”

In short, gender-based economic inequality is bad for everyone.

C. Feminist Economic Theory

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

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


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


104 See Introduction, in Feminism Confronts Homo Economicus, supra note 22, at xiv. Note that the term “neoclassical economics” includes many strands and theories; this Article summarizes its foundational precepts. See Tony Lawson, What is this “School” Called Neoclassical Economics? Cambridge J. Econ. 1 (2013) (the term neoclassical is “employed to denote a range of substantive theories and policy stances”).
becomes the instrument of allocation, and individual self-interested economic decisions collectively achieve an optimal societal equilibrium.” 105 The law and economics movement applies these principles both to explain and improve law. 106 In its decisions impacting working class women, the Supreme Court clings to neoclassical economic assumptions, as incorporated into law through the law and economics movement and its emphasis on using law to promote economic efficiency. 107

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

105  Pouncy, supra note 103, at 541.


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

108  Power, supra note 101, at 8. See also Paula England, Separative and Soluble Selves: Dichotomous Thinking in Economics, in FEMINIST ECONOMICS, supra note 101, at 33, 43 (summarizing principles of neoclassical economics); Drucilla K. Barker, Feminist Economics as a Theory and Method, in HANDBOOK ON GENDER, supra note 56, at 18, 19–20 (same); Preface, in FEMINIST ECONOMICS, supra note 101, at vii (feminist economics is a response to “biases which give market relations pride of place over family and social relations, emphasize heroic individualism while ignoring interdependence, and define rationality so narrowly . . . leave the discipline impoverished”).
“speaking truth to power,” neoclassical economics “accommodates and naturalizes it.”¹⁰⁹ By contrast, feminist economists stress the interdependence of social structures and human relationships.¹¹⁰ Expanding economic inquiry to this “more complex, holistic” view¹¹¹ allows us to see how economic life both shapes and is influenced by gender norms.¹¹² It focuses less on formal models, and more on how actual people live their lives.¹¹³ It recognizes that gender matters to economic outcomes, given that “women still bear a disproportionate bulk of the burdens of poverty [and] social and economic exclusion . . . .”¹¹⁴

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

¹⁰⁹ Barker, supra note 108, at 25.
¹¹⁰ Deborah M. Figart & Tonia L. Warnecke, Introduction, in HANDBOOK ON GENDER, supra note 56, at 1 (“the economy is embedded in society”); Barker, supra note 108, at 19 (“Feminist economists have been critical of the assumption of self-interested individualism and the lack of any interactions, except those organized according to the principles of self-interested contractual exchange, because these assumptions excluded considerations of the dependent children, the elderly, and the infirm.”). See also Barbara Ann White, Feminist Foundations for the Law of Business: One Law and Economics Scholar’s Survey and (Re)view, 10 UCLA WOMEN’S L.J. 39, 48 (1999) [hereinafter White, Feminist Foundations] (describing the centrality of the ethic of care to feminist thought in which “concern for others is of paramount importance”).
¹¹¹ Power, supra note 101, at 14.
¹¹² Figart & Warnecke, supra note 110, at 1.
¹¹³ Barker, supra note 108, at 20.
¹¹⁴ Id. at 18.
¹¹⁵ See Power, supra note 101, at 11; Barker, supra note 108, at 23; Myra H. Strober, The Application of Mainstream Economics Constructs to Education: A Feminist Analysis, in FEMINIST ECONOMICS, supra note 101, at 135, 137.
¹¹⁶ Power, supra note 101, at 11.
¹¹⁷ Id. at 11; England & Folbre, Contracting for Care, in FEMINIST ECONOMICS, supra note 101, at 61, 63.
¹¹⁸ Id. at 63.
¹¹⁹ See Ann Laquer Estin, Can Families Be Efficient? A Feminist Appraisal, in FEMINISM CONFRONT HOMO
exclusions serve to keep women “in their place.” Feminist economists contend that care work, usually unpaid or low-paid, has immense value for society, even as its workers are often degraded and devalued. In this vein, feminist economists recognize “understandings of motivation that do not fall under narrow or tautological notions of self-interest,” such as moral obligation and emotional connection. This mix of motivations makes caring labor valuable for society, but also depresses care work wages. Feminist economists also highlight that women’s wages suffer as a result of their care work obligations and that women continue to assume most household care responsibilities even if they work outside the home.

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

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


121 See infra Part IV.A.

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


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

125 Power, supra note 101, at 12.
at the start. Thus, ethics should be part of economic analysis. This perspective shifts from a focus on efficiency to encompass a range of values, such as caring, quality of life, responsibilities to community, and economic justice. Nancy Folbre and Julie Nelson write that neoclassical economics is based on stereotypically male norms of autonomy and individual accomplishment, whereas women are traditionally associated with social and physical connection. As a result, “[n]eglecting the ‘connected’ aspects of human life . . . is a form of gender bias, in that aspects of human life traditionally associated with femininity are being irrationally downplayed.”

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

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

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

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

129  Id.

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

131  Power, supra note 101, at 12.

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

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

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

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

135 Id.
139 Charusheela, supra note 138, at 32–33.
141 Barker, supra note 108, at 27.
law and economics viewpoint, government regulation hinders efficient outcomes generated by the market, “thus obviating the need for laws that redistribute rights and resources in an egalitarian manner.”

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

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

A. The Economics of Discrimination

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


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


145 See Selmi, Sex Discrimination, supra note 145, at 26–42 (summarizing results of empirical studies
have shown that female orchestra candidates are more likely to be selected if they audition behind a screen, where gender is invisible to selectors. Similarly, studies have shown that employers are 50% more likely to select resumes with racially identifiable white names over identical resumes with stereotypically Black names. Likewise, statistical studies reveal managerial preferences for employees who share the same race as the manager. The gender pay gap is yet another indication and result of discrimination. Studies establish that even after controlling for a variety of variables that contribute to the pay gap—such as personal preference, individual qualifications, occupation, and industry—a remaining gap is attributable to discrimination.

Discrimination has both individual and societal harms. It is unfair and dignity-stripping to reward or punish workers on the basis of innate traits that are irrelevant to job performance. Discrimination can result in psychological injuries ranging from depression and their limitations); John J. Donohue III, *The Law and Economics of Antidiscrimination Law* 38–46 (Nat’l Bureau of Econ. Research, Working Paper No. 11631, 2005), http://www.nber.org/papers/w11631.pdf [https://perma.cc/WY7V-89ZA] (same).


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


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

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

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

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


\textsuperscript{159} Id. at 2548.

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

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

\textsuperscript{162} Id. at 148–49.

\textsuperscript{163} Id. at 155.

\textsuperscript{164} Id. at 148.
The plaintiffs also provided anecdotal evidence of gender bias through affidavits from 121 class members. The district court cited comments by managers such as “[m]en are here to make a career and women aren’t. Retail is for housewives who just need to earn extra money,” and “[w]e need you in toys . . . you’re a girl, why do you want to be in Hardware.”

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

C. The Majority Opinion

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

Moreover, such subjective personnel practices could not constitute an official employer policy, because “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”

Under the Court’s evidentiary standard for establishing commonality, employees must provide “significant proof” that their employer “operated under a general policy of discrimination . . . .” Subjective personnel policies apparently can no longer satisfy this new standard.

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

D. The Court’s Market Assumptions

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

173 Id. at 2554.
174 Id. at 2555.
175 Id. at 2553 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 159, n.15) (internal quotations omitted). The Court also rejected plaintiff’s statistical evidence, id. at 2555, and the testimony about social framework, id. at 2553–54.
176 Michael J. Zimmer, Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes, 16 LEWIS & CLARK L. REV. 409 (2012) (predicting that although the case was decided on procedural grounds, it portends changes in substantive Title VII law that will harm employees).
177 Wal-Mart v. Dukes, 131 S. Ct. at 2561.
178 Id. at 2554.
He is not alone: “Many individuals resist recognizing the existence of pervasively unfair group-based outcomes, as doing so would challenge the widely held and deep-seated belief that the world is just and that outcomes are based on personal control, meritocracies, and fairness.”\textsuperscript{179} The Court majority—and indeed the general public—remains wedded to the American myth of meritocracy, in which a free market rewards the deserving based on hard work and skill.\textsuperscript{180} This belief system has deep psychological roots that make people reluctant to attribute bad outcomes to discrimination.\textsuperscript{181} The meritocracy myth misses the huge impact of non-merit factors on individual success, such as inheritance (or the class position from which one starts out in life), educational opportunities, and discrimination.\textsuperscript{182} Nevertheless, the myth and its economic underpinnings animate much of the majority’s viewpoints about discrimination. This viewpoint reinforces, rather than balances, existing power dynamics in favor of business owners.

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


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


\textsuperscript{185} \textit{Id.} at 2564.
In the early years after Title VII was passed, employment discrimination was often blatant and motivated by racial and/or gender animus.\textsuperscript{186} While overt discrimination still exists,\textsuperscript{187} scholars now recognize “second generation” discrimination, which is more complex and subtle and fueled by unconscious bias.\textsuperscript{188} Psychologists have shown that unconscious bias arises from natural and normal cognitive shortcuts that all people use to simplify and process information.\textsuperscript{189} These cognitive shortcuts contribute to stereotypes, which in turn “cause discrimination by biasing how we process information about other people.”\textsuperscript{190} Although biases may operate without conscious intent to “favor or disfavor members of particular groups,” they can nevertheless “bias a decision maker’s judgment long before the ‘moment of decision’ [when the employment decision in question is made], as a decision maker attends to relevant data and interprets, encodes, stores, and retrieves it from memory.”\textsuperscript{191} In other words, employers expect members of certain groups to behave in certain ways, and they over-attribute information that confirms their expectations, while disregarding information that contradicts expectations.\textsuperscript{192}

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


\textsuperscript{189} See Krieger, supra note 186, at 1187, 1199; Lee, supra note 186, at 482.

\textsuperscript{190} Krieger, supra note 186, at 1199.

\textsuperscript{191} Id. at 1187–88.

\textsuperscript{192} Id. at 1198.

\textsuperscript{193} See Lee, supra note 186, at 484, 487–88; Tristin K. Green & Alexandra Kalev, \textit{Discrimination-Reducing Measures at the Relational Level}, 59 \textit{Hastings L.J.} 1435, 1444 (2008); Barbara F. Reskin & Debra B. McBrier,
subjective, discretionary personnel practices contribute to pay disparities.\textsuperscript{194} Despite these modern understandings of discrimination, Justice Scalia was wedded to old-fashioned notions that focus solely on an employer’s state of mind rather than on how unconscious bias interacts with organizational structures to allow unchecked stereotypes to determine employment outcomes.\textsuperscript{195} In so doing, he left undisturbed existing power relationships.

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

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


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


\textsuperscript{198} \textit{Id.} at 99–101.

\textsuperscript{199} \textit{Id.} at 114–16.
down market wages.\textsuperscript{200} Third, as for customers, they have little influence on Wal-Mart’s employment practices due to their lack of knowledge, indifference, or shared beliefs in the governing stereotypes.\textsuperscript{201} For all these reasons, Wexler concludes, “highly rational and efficient companies need not always sacrifice the bottom line in order to maintain a preference for discrimination.” \textsuperscript{202}

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

\section*{E. Devaluation of Care Work}

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

\begin{footnotesize}
\begin{enumerate}
\item[200] \textit{Id.} at 117.
\item[201] \textit{Id.} at 118–19.
\item[202] \textit{Id.} at 121.
\item[203] Wexler, \textit{supra} note 197, at 110–11.
\item[204] See Selmi, \textit{Evolution, supra} note 195, at 991. \textit{See also} Moss, \textit{supra} note 153, at 20–23 (noting that most employers have boilerplate anti-discrimination policies, which can be purely symbolic shams, but that courts nevertheless accept them as evidence of non-discrimination).
\item[205] See Moss, \textit{supra} note 153, at 23 (“The worse discriminators therefore have the greatest incentive to adopt the best-sounding EEO polices.”).
\item[207] See Williams & Bornstein, \textit{supra} note 206, at 1326.
\end{enumerate}
\end{footnotesize}
The record in the *Wal-Mart* case was laden with examples of statements reflecting this bias, such as a male manager who stated that “women should be home barefoot and pregnant”; a female employee who was told to resign and “find a husband to settle down with and have children”; and a supervisor who asked for the resignation of the only female store manager in her district because she “needed to be home raising [her] daughter” instead of managing a store.\(^{208}\) Justice Ginsburg acknowledged the pervasiveness of this stereotype, explaining that Wal-Mart’s policy of requiring relocation as a condition for promotions created a risk that “managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.”\(^{209}\) This could lead management to pass over women willing to move, or to enforce a policy that harms women who cannot relocate as members of dual-earner families, with no concomitant productivity benefit.\(^{210}\) Ginsburg sees that supposedly “natural” or “inevitable” market outcomes that disadvantage women are actually the result of stereotyped thinking put into action. She thus argues that society needs to support care work rather than punish women for their care obligations.

**F. Impact**

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


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

One investigative study found that in the aftermath of the decision, “[j]ury verdicts have been overturned, settlements thrown out, and class actions rejected or decertified, in many instances undoing years of litigation. The rulings have come in every part of the country, in lawsuits involving all types of companies.” The study found that fewer employment discrimination class action cases are being filed, and settlement amounts have plummeted from $346 million for the biggest ten cases in 2010 to $45 million in 2012. In short, \textit{Wal-Mart v. Dukes} has tipped the litigation balance strongly in favor of employers over employees. The case has clearly impacted the availability of large class actions challenging employment practices.

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

\begin{itemize}
\item \textsuperscript{213} Id.
\item \textsuperscript{215} See Zimmer, supra note 176, at 460; Eisenberg, supra note 194, at 157; Malveaux, supra note 156, at 44; Selmi, \textit{Evolution}, supra note 195, at 941.
\item \textsuperscript{217} Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553, 2556 (2011).
\item \textsuperscript{218} Eisenberg, supra note 194, at 257.
\end{itemize}
follow their model.\textsuperscript{219} For all these reasons, scholars have been looking for other Title VII theories, alternate employment statutes, and other statutory models to frame claims, as well as non-litigation alternatives, such as structural reform of workplace practices and employer compliance programs.\textsuperscript{220}

\section*{III. Burwell v. Hobby Lobby Stores, Inc.}

\subsection*{A. The Economics of Contraception}

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

\footnotesize
\begin{itemize}
\item \textsuperscript{219} Id.
\item \textsuperscript{221} Adam Sonfield et al., \textit{The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children}, GUTTMACHER INST. 3 (Mar. 2013), http://www.guttmacher.org/pubs/social-economic-benefits.pdf [https://perma.cc/N9YZ-CUJ4] [hereinafter Sonfield et al., \textit{Social and Economic Benefits}]. Indeed, in a major survey, 77% of women who used birth control reported that it allowed them to better care for themselves and their families, while large majorities also reported that birth control allowed them to support themselves financially (71%), stay in school (64%), and help them obtain and maintain employment (64%). See Colleen Connell, Lorie Chaiten, & Richard Muniz, \textit{Religious Refusals Under the Affordable Care Act: Contraception as Essential Health Care}, 15 DePaul J. Health Care L. 1, 5 (2013).
\item \textsuperscript{222} Connell, et al., \textit{supra} note 221, at 5.
\item \textsuperscript{223} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992). Unfortunately, \textit{Casey} has failed to protect women’s reproductive choices because the courts have given little teeth to the undue burden standard. See Linda J. Wharton & Kathryn Kolbert, \textit{Preserving Roe v. Wade . . . When You Win Only Half the Loaf}, 24 STAN. L. & POL’Y REV. 143, 144–45, 156 (2013). As a result, states have enacted many abortion restrictions, such as waiting periods and onerous licensing regimes, which in turn put abortion out of reach for many people.
\end{itemize}
Notably, since the Supreme Court established contraception as a fundamental right in 1965, the percentage of women participating in the workforce has more than doubled to around 60% of women.\(^{224}\) Moreover, access to contraception has contributed to approximately one-third of women’s wage gains since the mid-twentieth century.\(^{225}\) The advent of available birth control has also lead to dramatic increases in the numbers of women in college and in formerly male-dominated professions such as medicine, dentistry, law, and business.\(^{226}\) Contraception also supports women’s health and that of their children. It can limit the health risks involved in pregnancy,\(^{227}\) which are compounded for unintended or narrowly-spaced pregnancies.\(^{228}\)

For all these reasons, over 99% of sexually active American women between fifteen and forty-four have used birth control.\(^{229}\) Nevertheless, about half of all annual pregnancies are unintended, amounting to 2.8 million births, and of these, about half result from the 14% of women using no form of contraception.\(^{230}\) One contributing factor to unintended women. \textit{Id.} at 157–58. As this Article was going to press, the Supreme Court struck down Texas abortion regulations requiring that abortion facilities meet the standards for ambulatory surgical centers and that doctors performing abortions have admitting privileges at nearby hospitals; these requirements dramatically reduced the availability of abortion services in Texas. Whole Woman’s Health v. Hellerstedt, 579 U.S. __ (2016). The ruling was 5-3 (Justice Scalia’s seat remains open as of the date of the decision). This decision—along with its future application to numerous similar regulations around the country—will improve the economic security of millions of women given the links between reproductive health access and economic stability. See Michele Gilman, \textit{How Limiting Women’s Access to Birth Control and Abortions Hurts the Economy}, HUFFINGTON POST (Apr. 28, 2016), http://www.huffingtonpost.com/the-conversation-us/how-limiting-womens-acces_b_9796032.html [https://perma.cc/6WC8-FSXT].

\(^{224}\) Connell et al., \textit{supra} note 221, at 6.

\(^{225}\) \textit{Id.; see} Sonfield et al., \textit{Social and Economic Benefits}, \textit{supra} note 221, at 14.

\(^{226}\) Connell et al., \textit{supra} note 221, at 5–6; Sonfield, et al., \textit{Social and Economic Benefits}, \textit{supra} note 221, at 7–8, 11.

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

\(^{228}\) \textit{Id.} at 4. In addition, “women experiencing unintended pregnancy are at increased risk for depression, anxiety, and other mental health conditions. Furthermore, unintended pregnancy increases a woman’s risk of experiencing domestic violence and marital strain.” \textit{Id.} at 5.


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

B. Background of the Case

The myriad of health and economic benefits associated with contraceptive access

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


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

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

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\item \textsuperscript{238} 26 U.S.C. 5000A(f)(2) (2010); 4980H(a), (c)(2) (2010).
\item \textsuperscript{239} Press Release, Senator Barbara A. Mikulski, Mikulski Puts Women First in Health Care Reform Debate (Nov. 30, 2009), http://www.lb7.uscourts.gov/documents/12-384119.pdf [https://perma.cc/5UWE-XM4X] [hereinafter Mikulski Press Release]. As she explained, “[w]omen are often confronted by the punitive practices of insurance companies. We face gender discrimination. We pay more and get less . . . .” \textit{Id.} On the legislative history of the contraceptive requirements of the ACA, see generally Rose Shingledecker, \textit{Note, No Good Deed: The Impropriety of the Religious Accommodation of Contraceptive Coverage Requirements in the Patient Protection and Affordable Care Act}, 47 \textit{Ind. L. Rev.} 301, 301–04 (2014).
\item \textsuperscript{241} 42 U.S.C. 300gg-13(a)(4) (2010). The ACA directs that HFRA define “preventive care and screenings.” \textit{Id.} HRFA is a unit of HHS.
\end{itemize}
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that could be particularly important for low-income women and women considering methods with substantial upfront costs.”  

C. The Majority Opinion

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

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

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

245 See *id*.


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

249 *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).
can engage in the “exercise of religion.” The Court concluded that the contraception mandate substantially burdened the plaintiffs’ religious belief that life begins at conception by forcing them to either violate their religious beliefs or to face large statutory penalties if they refused to cover contraception or dropped their group health plans altogether. The Court assumed for the purposes of argument that the government had a compelling interest in enacting the mandate, but held that these governmental interests could be served with a less restrictive alternative; that is, the government could cover the contraception itself or it could adopt the same accommodation it extends to religious non-profits by requiring insurance carriers to provide this coverage separately. As to the latter option, however, the Court conceded that it might not comply with RFRA “for purposes of all religious claims.”

D. The Court’s Market Assumptions

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

250 Id. at 2768–70.
251 Id. at 2775–76.
252 Id. at 2780.
253 Id. at 2781–82. Religious non-profit organizations that oppose providing contraception coverage can opt out through a certification process, and their employees’ health insurance company must provide coverage at its own cost. 45 § C.F.R. 147.131 (2015).
254 *Hobby Lobby*, 134 S. Ct at 2782.
255 Id. at 2768.

256 Id. at 2764 (Conestoga Wood Specialties was founded by Norman Hahn and one of his sons is the president and CEO); Id. at 2765 (David Green founded Hobby Lobby and one of his sons started an affiliated business).
were mentioned only as co-owners of the companies via their status as wives and mothers, with no corporate responsibilities.\footnote{257} The elaborate description of the plaintiff corporations is entirely male-oriented and once again reinforces the primacy and power of business interests over that of workers.

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

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

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

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

\footnote{259} Id. at 2799.

\footnote{260} Id. at 2804.

\footnote{261} Id. at 2799.

\footnote{262} Id. at 2771.
against workers, lie about the safety of their products, engage in illegal monopolies, and so forth. The majority’s rosy and optimistic view of corporations is consistent with its expansion of corporate personhood into new domains.\textsuperscript{263}

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

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

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\item \textsuperscript{264} \textit{Hobby Lobby}, 134 S. Ct. at 2799.
\item \textsuperscript{266} \textit{Id.} at 967.
\item \textsuperscript{267} \textit{Id.} at 977.
\item \textsuperscript{268} \textit{Id.} at 976. See also Douglas NeJaime & Reva Siegel, \textit{Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics}, 124 \textit{Yale L.J.} 2516, 2574–78 (2015) (describing the dignity harms from complicity-based conscience claims).
\end{enumerate}
\end{footnotesize}
discussing at length the rationale underlying the ACA’s preventive services coverage for women, and citing to extensive data, research, and expert recommendations. She argued that the government’s interests were “concrete, specific, and demonstrated by a wealth of empirical evidence,” regarding the health benefits of contraception in avoiding unintended pregnancies, reducing the risks to those for whom pregnancy can be dangerous, and treating non-pregnancy related health conditions.\(^{269}\) Notably, the only data wielded by the majority related to the amount of fines facing corporations who refuse to provide ACA coverage, which it deemed substantial. While the majority focused on fines, Justice Ginsburg noted that the corporation’s proposed alternative—a tax credit for employees—does “nothing for the woman too poor to be aided by a tax credit.”\(^{270}\) In so doing, she highlighted her awareness of the class differences among women and their differential access to health care. She further noted that the decision has no limiting principle: “Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work?”\(^{271}\)

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

E. Impact

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

\(^{269}\) *Hobby Lobby*, 134 S. Ct. at 2799.

\(^{270}\) Id. at 2803.

\(^{271}\) Id. (internal quotations omitted).


\(^{273}\) *Affordable Care Act Results in Dramatic Drop In Out-Of-Pocket Prices for Prescription, Contraceptives*
is a large cadre of women employed by closely-held corporations whose access is more limited. In July 2015, HHS issued a rule allowing closely-held corporations (as defined by federal tax law) to seek a religious accommodation that exempts them from providing contraceptive coverage and transfers that obligation to insurance companies. It is likely that some closely-held corporations will object to the accommodation, as have numerous religious non-profits, claiming that even filing the necessary paperwork infringes on their religious rights. Even with the accommodation for religious non-profits, there is a “complete dearth of information” as to whether or not insurance plans are providing this coverage for employees. In addition, a different presidential administration may rescind the executive branch accommodation and thereby deny women certain forms of contraceptive coverage.

IV. Harris v. Quinn

A. The Economics of Caregiving

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

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

275 Sonfield et al., Impact, supra note 243, at 47. Separate from the religious accommodation issue, there are still insurers who are not providing the legally required contraceptive services required by the ACA. See Nat’l Women’s Law Ctr., State of Women’s Coverage: Health Plan Violations of the Affordable Care Act (2015), http://www.nwlc.org/sites/default/files/pdfs/stateofcoverage2015final.pdf [https://perma.cc/X6GN-GQPN].


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

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


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

280  Folbre & Wright, supra note 277, at 10; Nancy Folbre, Valuing Care, in For Love and Money, supra note 277, at 92; Howes et al., supra note 279, at 70.

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


283  Sheila Bapat, Part of the Family? Nannies, Housekeepers, Caregivers and the Battle for Domestic Workers’ Rights 129 (2014); Folbre & Wright, supra note 277, at 7.

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

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

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

\textsuperscript{286} Boris & Klein, supra note 278, at 16.
\textsuperscript{287} Id. at 16–17.
\textsuperscript{288} Bapat, supra note 283, at 131–32; Boris & Klein, supra note 278, at 184–86. See also id. at 149–81 (describing union organizing and accomplishments in the 1980s despite Reagan era pushback).
\textsuperscript{289} Bapat, supra note 283, at 132.
\textsuperscript{290} Id.; Boris & Klein, supra note 278, at 214–15 (these states include Oregon, Washington, Illinois, Massachusetts, and Missouri).
\textsuperscript{291} Boris & Klein, supra note 278, at 208–09.
\textsuperscript{292} Howes et al., supra note 279, at 74.
\textsuperscript{293} Boris & Klein, supra note 278, at 5.
\textsuperscript{294} Nancy Folbre, Candace Howes & Carrie Leana, A Care Policy and Research Agenda, in For Love and Money, supra note 277, at 197–98.
\textsuperscript{295} Howes et al., supra note 279, at 72.
\textsuperscript{296} Bapat, supra note 283, at 134.
\textsuperscript{297} Id. at 180–81.
In *Harris v. Quinn*, the Supreme Court further halted this movement’s progress.

**B. Background of the Case**

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

**C. The Majority Opinion**

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

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299 *Id.* at 2626.
300 *Id.* at 2624.
301 *Id.* at 2626 (citing 2003 Ill. Laws 1930).
302 *Id.* at 2626.
304 *Id.*; *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011).
in order to prevent “non-members from free-riding on the union’s efforts” and to promote labor harmony by giving the state a single party with whom to negotiate.\textsuperscript{306} Justice Alito contended that these principles did not apply to the Illinois personal assistants because they were not “full-fledged” public sector employees, but rather, only “partial-public” employees.\textsuperscript{307} In so doing, he created a new “separate-but-unequal” category in the Court’s labor jurisprudence.\textsuperscript{308} Justice Alito reasoned that the personal assistants worked directly for “customers” who retained the authority to hire, supervise, and fire them.

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

**D. The Court’s Market Assumptions**

The *Harris* decision, one of several in recent years to weaken unions,\textsuperscript{312} devalues care work, and in so doing, undermines the quality of life for both care workers and care workers.
recipients—both of whom are disproportionately female. Women live longer than men and are more likely to need care. At the same time, women dominate the paid care workforce due to gendered norms of altruism, discrimination in the job market, and social expectations. The *Harris* Court’s anachronistic assumptions about the value of low-wage workers and women’s work coalesce to reinforce the invisibility of care workers.

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

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

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


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


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

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


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

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

323 Folbre et al., supra note 294, at 187.
324 Sarah Jaffe, SCOTUS’ Real, Demented Agenda: Why Harris and Hobby Lobby Spell Disaster for Working Women, SALON (July 1, 2014), http://www.salon.com/2014/07/01/scotus_real_demented_agenda_why_harris_and_hobby_lobby_spell_disaster_for_working_women/ [https://perma.cc/7QMN-4R8Y]. She adds: “One would not assume that the patient in a hospital is the ultimate employer of the nurse who cares for them, but in this case, it seems, the patient is assumed to be the boss.” Id. In Long Island Care at Home, Ltd. v. Coke, the Court upheld a regulation providing that home health care workers who work for third-party employers and who provide “companionship services” to the elderly were exempt from the wage and hour protections of the Fair Labor Standards Act. In so doing, the Court favored the interests of consumers of care over the providers of care, even though consumers benefit from a skilled, fairly paid workforce. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007); see Peggie R. Smith, Who Will Care for the Elderly? The Future of Home Care, 61 BUFF. L. REV. 323, 331–37 (2013). The Department of Labor under President Obama passed a regulation to overturn this narrow interpretation of FLSA, 78 Fed. Reg. 60,557, and the D.C. Circuit upheld the regulation against challenge, Home Care Ass’n of America v. Weil, 799 F.3d 1084 (D.C. Cir. 2015), cert. denied 2016 WL 3461581 (2016).
325 Harris, 134 S. Ct. at 2644.
dominated and women were excluded.\textsuperscript{327} By contrast, the private domain consisted of home and family.\textsuperscript{328} Yet as feminists pointed out, privacy within families left men free to dominate, and even abuse, women and children because of their dependence on men for social goods and a lack of state intervention into the private realm.\textsuperscript{329} Feminists recognized that state inaction in the private realm is not neutral, because the state sets the legal ground rules that permit private inequality to flourish unchecked.\textsuperscript{330} Furthermore, feminists contended that the idea of private autonomy within the home was a myth for women, who are enmeshed in family relationships.\textsuperscript{331}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{328} \textit{Id.} at 568–69.
\item \textsuperscript{329} See Higgins, \textit{supra} note 326, at 850–51; Reva B. Siegel, “\textit{The Rule of Love}”: \textit{Wife Beating as Prerogative and Privacy}, 105 Yale L.J. 2117, 2118 (1996); \textit{see also} Susan Moller Okin, \textit{Justice, Gender, and the Family} 128–29 (1989).
\item \textsuperscript{330} See Frances Olson, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 Harv. L. Rev. 1497, 1502, 1506 (1983); Okin, \textit{supra} note 329, at 111.
\item \textsuperscript{332} England et al., \textit{supra} note 314, at 21.
\item \textsuperscript{333} England & Folbre, \textit{supra} note 117, at 63.
\item \textsuperscript{334} Bapat, \textit{supra} note 283, at 17–18.
\item \textsuperscript{335} \textit{Id.} at 19 (citing early feminists).
\end{itemize}
\end{footnotesize}
E. Devaluation of Care Workers

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

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

336 Boris & Klein, supra note 278, at 8; Bapat, supra note 283, at 20 (citing Gloria Steinem).
338 Boris & Klein, supra note 278, at 8.
339 Bapat, supra note 283, at 21.
340 Id. at 11.
341 Id. at 12.
342 See id. at 52–61 (describing statutory history).
343 Id. at 55.
344 Social Security was amended to cover domestic workers in 1950 (if certain earning thresholds and days of work for a single employer were met) and again in 1954 (eliminating the days worked for a single employer
Labor Relations Act, which provides employees with the rights to organize and collectively bargain to improve the conditions of employment.\textsuperscript{345} In 2014, the Obama Administration finally included most domestic workers within the scope of the FLSA’s overtime and minimum wage protections, and the D.C. Circuit upheld the regulation against a challenge by the home health care industry.\textsuperscript{346} A different administration could repeal the rule.

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

\textsuperscript{345} The NLRA does not include any individual employed “in the domestic service of any family or person at his home.” 29 U.S.C. §1512(3).

\textsuperscript{346} See \textit{supra} note 324 and citations therein.

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

\textsuperscript{348} Folbre et al., \textit{supra} note 294, at 199.

\textsuperscript{349} Boris & Klein, \textit{supra} note 278, at 223–24.
F. Impact

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

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

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

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351 Id.
352 Id.
353 Id.
354 Id. at 2650.
355 Jaffe, *supra* note 324.
grew 9% a year from 2001 to 2009.\footnote{See Amy Traub, \textit{Hard Work Doesn’t Pay for Home-Care Workers}, AM. PROSPECT (Mar. 22, 2012), http://prospect.org/article/hard-work-doesnt-pay-home-care-workers [https://perma.cc/GLR5-TJ57].} A major study of Medicare-funded home health care found that for-profit agencies deliver lower-quality care even though operating costs were 18% higher, and thus, the authors questioned whether for-profit agencies should be allowed to remain eligible for Medicare reimbursements.\footnote{William Cabin et al., \textit{For-Profit Medicare Home Health Agencies’ Costs Appear Higher and Quality Appears Lower Compared to Nonprofit Agencies}, 33 HEALTH AFFAIRS 1460, 1460–65 (2014), http://content.healthaffairs.org/content/33/8/1460.abstract [https://perma.cc/TSY9-6W35].} A 2009 study by the National Private Duty Association found that businesses charge clients twice as much as they pay employees, prompting an employee advocate to comment that the industry simply does not have the overhead to justify such low wages.\footnote{See Kennedy, \textit{ supra} note 356.} If the \textit{Harris} majority was so concerned with rising state costs—notably, it cited to a report entitled the \textit{The Trouble with Public Sector Unions}\footnote{Harris v. Quinn, 134 S. Ct. 2618, 2632 n.7 (2014).}—it might consider other sources for cost savings than the pockets of domestic workers.

The other winner in this fight is the anti-union, “right to work” movement, which is funded by conservatives such as the Koch brothers, and which spends millions to lobby state and federal governments and to bring litigation to limit union power.\footnote{See Jay Riesterberg & Mary Bottari, \textit{Who Is Behind the National Right to Work Committee and its Anti-Union Crusade?}, PR WATCH (June 3, 2014), http://www.prwatch.org/news/2014/06/12498/who-behind-national-right-work-committee-and-its-anti-union-crusade [https://perma.cc/VU5R-X6T6] (noting that the National Right to Work Committee spent over $33 million on lobbying between 1999 and 2013).} Their policy positions benefit big business at the expense of workers and consumers.\footnote{Ed Pilkington, \textit{Wisconsin Anti-union Bill is ‘Word for Word’ From Rightwing Lobbyist Group}, GUARDIAN (Feb. 23, 2015), http://www.theguardian.com/us-news/2015/feb/23/wisconsin-right-to-work-bill-scott-walker-alec [https://perma.cc/BJY5-RGEL] (a right to work bill passed in Wisconsin in 2015 was taken verbatim from a model bill framed by a pro-business lobbying group called ALEC).} In the end, low-paid workers are pitted against vulnerable care recipients while private industry cashes its checks. Of course, customers with means can opt out of this publicly-funded market into a private one, which offers greater quality, choice, and control.\footnote{Janet Gornick et al., \textit{The Disparate Impacts of Care Policy}, \textit{in For Love & Money, supra} note 277, at 141, 178.} The middle-class is particularly squeezed, as they have fewer employer benefits and earn too much for means-
tested programs such as Medicaid.\(^{364}\) These income disparities splinter women by class and lessen opportunities for alliances.

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

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

\(^{364}\) *Id.* at 142, 178.

\(^{365}\) See Jaffe, *supra* note 324.

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

\(^{367}\) See Jaffe, *supra* note 324.


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

\(^{370}\) *Id.* at 136–47; *see also* Boris & Klein, *supra* note 278, at 221–22.
V. Reflections and Remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


\textsuperscript{380} Huertas-Noble, \textit{supra} note 379, at 264.

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

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

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

CONCLUSION

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

\textsuperscript{383} Kim, \textit{supra} note 382, at 221.


\textsuperscript{385} \textit{Id.} at 179.
access to contraception and thereby control the size and timing of their families (Hobby Lobby Stores); and to collectively bargain for better working conditions (Harris). In the face of the Court’s erosion of collective action, any social movement for economic equality must grapple with the judiciary’s role in upholding unjust market outcomes and strategize around opportunities for reform. We currently have a Court for the 1%. We must advocate for a Court for all.