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Winter 2019

## **Sex, Trump, and Constitutional Change**

Elizabeth Schneider

Helen Hershkoff

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# SEX, TRUMP, AND CONSTITUTIONAL CHANGE

*Helen Hershkoff & Elizabeth M. Schneider\**

That President Trump ignores, defies, and might destroy the norms long taken for granted in America's democracy is a view expressed by scholars,<sup>1</sup> politicians,<sup>2</sup> journalists,<sup>3</sup> and many everyday Americans.<sup>4</sup> An obvious example of Trump's deviant

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\* Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law. Elizabeth M. Schneider is the Rose L. Hoffer Professor of Law at Brooklyn Law School. They thank NYU Law students Nicholas Baer, Juan Bedoya, Katrina Feldkamp, Paul Leroux, Allyson Scher, Emily Several, Samuel Vitello, and Eric Wang and Brooklyn Law student Bailee Brown for research assistance; Gretchen Feltes for library support; and Ian Brydon for administrative assistance. Hershkoff's research was supported by the D'Agostino Faculty Research Fund, and Schneider's research was supported by the Brooklyn Law School Faculty Fund. The authors thank Sylvia A. Law and Stephen Loffredo for comments on an earlier draft, and Jill Hasday, Distinguished McKnight University Professor and Centennial Professor of Law at the University of Minnesota, for organizing this Symposium and for inviting them to contribute.

1. See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2192 (2018) (pointing to various of Trump's campaign promises as evidence of norm-violation); see also W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 826 (2018) (arguing that "the breakdown of institutional norms . . . has consistently undermined the Trump Administration's policy agenda in the courts"); Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> (observing that Trump is "a norm-busting president without parallel").

2. See Press Release, Mark R. Warner, Va. Senator, U.S. Senate, Pelosi, Schumer, Schiff, Warner Write Letter to Rosenstein, Wray Demanding They Withstand Pressure to Violate DOJ and FBI Norms (June 28, 2018), <https://www.warner.senate.gov/public/index.cfm/2018/6/pelosi-schumer-schiff-warner-write-letter-to-rosenstein-wray-demanding-they-withstand-pressure-to-violate-doj-and-fbi-norms> (discussing pressure on Justice Department officials to violate norms that the President disfavors).

3. See Emily Bazelon, *How Do We Contend with Trump's Defiance of "Norms"?*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html> (stating that "Trump defies norms"); see also John Moody, *Trump Thinks Words Don't Matter. He's Wrong*, FOX NEWS (Jan. 12, 2018), <http://www.foxnews.com/opinion/2018/01/12/trump-thinks-words-dont-matter-hes-wrong.html> (stating that Trump "has rejected the norms of American political life").

4. See Lyla Blake Ward, Letter to the Editor, *Trump's Ignoring Norms Does Matter*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/opinion/letters/trump->

conduct is his perverse use of the “bully pulpit” to express vulgar and degrading statements about women,<sup>5</sup> showing more of the bully than of the pulpit.<sup>6</sup> That these utterances, made as a candidate and while in the White House, violate equality and dignity norms at the core of constitutional aspiration is an understatement.<sup>7</sup> Their egocentric quality has triggered questions about the President’s psychological stability.<sup>8</sup> They also have elicited strong negative reaction in the form of global public demonstrations<sup>9</sup> and have jumpstarted the political campaigns of

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presidential-norms.html (responding to an op-ed and questioning the view that norms do not matter).

5. We are mindful of the limitations of the word women to describe the diversity of women. See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 315 (1992) (“This, then, is the project of a postmodern feminist jurisprudence: to problematize and reconstruct the many vocabularies within which the law creates ‘woman.’”). See generally Matthew A. Ritter, *The Penile Code: The Gendered Nature of the Language of Law*, 2 N.Y. CITY L. REV. 1 (1992). Generally, we use sex to refer to a biological fact about a person. We use gender in the performative sense and regard it as more fluid and less biologically determined than sex. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

6. See Jeff Shesol, *Trump Abandons the Bully Pulpit*, NEW YORKER (Aug. 24, 2017) (“The bully has, in truth, largely abandoned the pulpit.”); see also Margaret Talbot, *The Future of Women Under President Trump*, NEW YORKER (Dec. 19 & Dec. 26, 2016) (“Trump won the Presidency despite a well-documented penchant for the vulgar belittlement of women . . .”).

7. See Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 191 (2018) (“Candidate Trump indulged in racism, misogyny, Islamophobia, and mockery of the disabled in ways that are extraordinary in contemporary American politics.”).

8. See Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93, 93 (2018) (referring to Trump as “self-obsessed and aggressive to the point of psychopathy”); Stephen B. Presser, *Evaluating President Obama’s Appointments of Judges from a Conservative Perspective: What Did the Election of Donald Trump Mean for Popular Sovereignty?*, 60 HOW. L.J. 663, 674 (2017) (quoting Professor Sanford Levinson of Texas Law School that President Trump is “a raving narcissist that some describe as a sociopath”). Admittedly Professors Greene and Levinson would place themselves in the liberal academic camp. From a medical perspective, see Jason Lemon, *Trump “Is Mentally Ill,” Doctor and Former Vermont Governor Howard Dean Says*, NEWSWEEK (Sept. 2, 2018), <https://www.newsweek.com/trump-mentally-ill-former-vermont-governor-says-1101539> (stating the President’s “narcissism overcomes his ability to know, A, what’s good for the country, and B, what’s good for him”); Carlos Lozada, *Is Trump Mentally Ill? Or Is America? Psychiatrists Weigh in*, WASH. POST (Sept. 22, 2017), <https://www.washingtonpost.com/reviewing-BANDY-X.LEE,THE-DANGEROUS-CASE-OF-DONALD-TRUMP:27-PSYCHIATRISTS-AND-MENTAL-EXPERTS-ASSESS-A-PRESIDENT-2017;ALLEN-FRANCES,TWILIGHT-OF-AMERICAN-SANITY:A-PSYCHIATRIST-ANALYZES-THE-AGE-OF-TRUMP-2017;and-KURT-ANDERSEN,FANTASYLAND-2017>).

9. See Barbara Stark, *Mr. Trump’s Contribution to Women’s Human Rights*, 24 ILSA J. INT’L & COMP. L. 317, 317 (2018) (“The day after Donald Trump’s inauguration, women and their supporters marched across the United States (and around the world), in

women—Democratic, Republican, and Democratic Socialist—to run for state or federal office.<sup>10</sup> On a parallel track—but fueled by Trump’s election<sup>11</sup>—women have mobilized about sexual harassment through the social media campaign called #MeToo,<sup>12</sup> and companies and government offices have felt compelled to clean house.<sup>13</sup> In highly publicized incidents, CEOs and

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what was probably the largest single day of protest in American history.”); see also Maurcen Johnson, *Trickle-Down Bullying and the Truly Great American Response: Can Responsible Rhetoric in Judicial Advocacy and Decision-Making Help Heal the Divisiveness of the Trump Presidency?*, 25 AM. U. J. GENDER SOC. POL’Y & L. 445, 450 (2017) (“No one could have predicted that so many different groups and their allies would come together in enormous numbers to demand equality for all.”).

10. See *The Backfire Effect: Women Could Be the Undoing of Donald Trump*, ECONOMIST (Feb. 17, 2018) (“Amid the rancour of American politics, the large number of first-time women candidates the Democrats will field is unequivocally positive.”); Rebecca Nelson, *Trump Has Spurred Hundreds of Women to Run for Office. Guess What? Some Are Republican*, WASH. POST MAGAZINE (May 29, 2018); Michelle Goldberg, *The Millennial Socialists Are Coming*, N.Y. TIMES (June 30, 2018) (discussing first-time Democratic Socialists running for office). Globally, the United States ranks 93 out of 181 for women in the national legislature. See HEIDI HARTMANN, INST. FOR WOMEN’S POLICY RESEARCH, *THE ECONOMIC STATUS OF WOMEN IN THE U.S.: WHAT HAS CHANGED IN THE LAST 20 – 40 YEARS* (2018), [https://iwpr.org/wp-content/uploads/2018/04/GAO-Research-Presentation-March-2018\\_Heidi-Hartmann.pdf](https://iwpr.org/wp-content/uploads/2018/04/GAO-Research-Presentation-March-2018_Heidi-Hartmann.pdf). Women who run for office face unique barriers. See Maggie Astor, *Women in Politics Often Must Run a Gantlet of Vile Intimidation*, N.Y. TIMES, Aug. 26, 2018, at A1 (illustrating problem with example of 2016 female candidate for California congressional seat who received tens of thousands of messages via the Internet suggesting she be gang-raped and then have her head bashed in).

11. See Alex Shephard, *Is Donald Trump’s #MeToo Immunity Coming to an End?*, NEW REPUBLIC (Dec. 2017), <https://newrepublic.com/minutes/146199/donald-trumps-metoo-immunity-coming-end> (“One of the ironies of this moment is that Trump’s election played a crucial role in instigating the flood of sexual misconduct allegations that have rocked workplaces across the country.”).

12. “Me Too” was coined in 2006 by Tarana Burke, a Black feminist who heads Just Be Inc., a non-profit organization that provides services and assistance to persons who have been sexually harassed or sexually assaulted. See Elizabeth Wagmeister, *How Me Too Founder Tarana Burke Wants to Shift the Movement’s Narrative*, VARIETY (Apr. 10, 2018), <https://variety.com/2018/biz/news/tarana-burke-me-too-founder-sexual-violence-1202748012/> (discussing the origins of the MeToo movement); Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017) (same). Initial credit, however, was given to Alyssa Milano, a white actress. See Angela Onwuachi-Willig, *What About #Us Too?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105 (2018). On the surge in “#MeToo” tweets post-Trump, see Jonah Engel Bromwich, *“The Silence Breakers” Named Time’s Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017) (discussing the #MeToo movement, involving tweets by millions of women who were sexually assaulted or harassed in the workplace).

13. Even within the White House, one staffer resigned because of allegations of sexual misconduct. See Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018). But see Danny Westneat, *Why Is Trump off the Hook in MeToo Movement? Because We Let Him Off*, SEATTLE TIMES (Nov. 17, 2017), <https://www.seattletimes.com/seattle-news/politics/why-is-trump-off-the-hook-in-metoo-movement-because-we-let-him-off/> (reporting that a dozen women

government officials have resigned,<sup>14</sup> been fired,<sup>15</sup> been investigated by the FBI,<sup>16</sup> or face criminal prosecution because of sexual misdeeds<sup>17</sup>—and the list grows longer.<sup>18</sup> The establishment of Time’s Up—founded by female farmworkers and celebrities committed to using status and wealth on behalf of gender issues—signals further development of a growing “resistance” in civil society that strategically combines social opprobrium with civil litigation,<sup>19</sup> and steadily is expanding from women who are white professional elites to women of color, women in low-wage jobs, gender non-conforming women, and trans persons.<sup>20</sup>

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have accused Trump of sexual misconduct, but Trump “can tweet away in the White House without much of a care about women”).

14. E.g., Sheryl Gay Stolberg, Yamiche Alcindor & Nicholas Fandos, *Al Franken to Resign from Senate amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html>.

15. E.g., Tom Huddleston Jr., *Roger Ailes Resigns: A Timeline of His Downfall*, FORTUNE (July 21, 2016), <http://fortune.com/2016/07/21/roger-ailes-resigned-scandal-timeline>.

16. See Peggy Orenstein, *We Can’t Just Let Boys Be Boys*, N.Y. TIMES, Sept. 30, 2018, at 4 (discussing FBI investigation of sexual assault allegations that surfaced during the Senate confirmation hearing of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States). For criticisms of the investigation, see Robert Barnes & Emily Guskin, *More Americans Disapprove of Kavanaugh’s Confirmation than Support It, New Poll Shows*, WASH. POST (Oct. 12, 2018), [https://www.washingtonpost.com/politics/more-americans-disapprove-of-kavanaughs-confirmation-than-support-it-new-poll-shows/2018/10/12/18dbf872-cd93-11e8-a3e644daa3d35ede\\_story.html?utm\\_term=.b2f347c56a83](https://www.washingtonpost.com/politics/more-americans-disapprove-of-kavanaughs-confirmation-than-support-it-new-poll-shows/2018/10/12/18dbf872-cd93-11e8-a3e644daa3d35ede_story.html?utm_term=.b2f347c56a83) (reporting that “half of Americans do not think the Senate did enough to investigate allegations that Kavanaugh committed sexual misconduct in high school and college”).

17. E.g., Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN (Sept. 26, 2018), <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html> (reporting that the sentencing judge called sexual assault a “serious crime”); Merrit Kennedy, *New Charges Filed Against Harvey Weinstein Involving a Third Woman*, NPR (July 2, 2018) (rape charges against Hollywood executive). On the radiating effects of the Weinstein scandal, see Rochelle Dornatt, *Thank You Harvey Weinstein*, 29 *Hastings Women’s L.J.* 3 (2018) (“I do not know exactly what the trigger was to make all those women come forward and confront their bully, but it is liberating to see it happen.”).

18. See 252 *Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> (last updated Oct. 8, 2018).

19. Compare Josh Blackman, *The Legal Resistance*, 9 *FAULKNER L. REV.* 45, 46 (2017) (discussing the role of civil litigation to resist policies of the Trump Administration, and focusing on court actions to challenge immigration policies). See also Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <http://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

20. See Molly Lambert, *Lisa Borders Is Ready for the Next Phase of Gender Parity*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/magazine/lisa-borders-is-ready-for-the-next-phase-of-gender-parity.html> (recounting the establishment of Time’s

Trump campaigned for the White House on a platform of disruption,<sup>21</sup> urging America's return to a golden time when white men of privilege ruled home and country.<sup>22</sup> In the greatest of ironies—proof-positive of the law of unintended consequences<sup>23</sup>—the President's best legacy may end up as a change-agent of gender norms. At least at the level of discourse, there's no question that what Americans talk about when they talk about women has changed since Trump became President.<sup>24</sup> Features of gender relations that for decades have been suppressed or side stepped are now front and center.<sup>25</sup> It is not simply that Trump's coarse and violent language has spotlighted

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Up); see also Rachel Abrams, *Delivering a Message to McDonald's*, N.Y. TIMES, Sept. 19, 2018, at B1 (reporting that McDonald's employees organized the first strike "in more than 100 years" to protest sexual harassment); Riki Wilchins, *Trans Men Are Leading the Resistance*, ADVOCATE (Mar. 2, 2017), <https://www.advocate.com/commentary/2017/3/02/trans-men-are-leading-resistance>; see also Sandra M. Gilbert, *In the Labyrinth of #MeToo*, 87.3 AM. SCHOLAR 14 (2018) ("Fortunately, #MeToo is broadening its scope to tell tales of people's livelihoods . . . that expand our understanding of . . . sexual harassment."). See generally Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 1031, 1050 (2013) ("[R]esistance conceived through single-axis frameworks can never transform conditions of intersectional violence and harm, and failure to depart from single-axis analysis produces reforms that contribute to and collaborate with those conditions).

21. Chris Cillizza, *Trump Promised Disruption. That's Exactly What He's Delivering*, WASH. POST (Jan. 29, 2017), [http://wapo.st/2jKWesV?tid=ss\\_mail&utm\\_term=.2eca5f30ccd1](http://wapo.st/2jKWesV?tid=ss_mail&utm_term=.2eca5f30ccd1).

22. See Jim VandeHei, *Donald Trump, a 1990s Man*, AXIOS (Feb. 26, 2018), <https://www.axios.com/donald-trump-worldview-past-success-1950s-china-4e778596-522c-43f8-9fdb-3235c0568427.html> (ascribing a "Mad Men" mentality to the President).

23. See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

24. Cf. RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1981).

25. See Suzannah Lessard, *Kennedy's Woman Problem, Women's Kennedy Problem*, WASH. MONTHLY 10 (Dec. 1979), <http://www.unz.com/print/WashingtonMonthly-1979dec-00010> ("Philandering, like heavy drinking, traditionally has been one of those activities that the boys in the press keep mum about when reporting on the boys on the Hill, or the boy in the White House, or any boy for that matter."). Compare Joan McCarter, *The Senate's Quietest Rock Star Has Some Very Tough Questions for Trump's Supreme Court Nominee*, DAILY KOS (Aug. 10, 2018), <https://www.dailykos.com/stories/2018/8/10/1787278/-The-Senate-s-quietest-rock-star-has-some-very-tough-questions-for-Trump-s-SCOTUS-nominee?detail=emaildksp> (reporting that Senator Mazie Hirono (D-Haw.) planned to ask President Trump's judicial nominees this pair of questions: "Since you became a legal adult, have you ever made unwanted requests for sexual favors or committed any verbal or physical harassment or assault of a sexual nature?"; "Have you ever faced discipline or entered into a settlement related to this kind of conduct?").

his own misogyny and the persistence of sex-role stereotyping.<sup>26</sup> Even more, he has lifted the curtain on the “dirty secret”<sup>27</sup> about women and work: that the workplace too often is a gendered arena in which countless women are targets of physical abuse, sexual exploitation, psychological domination, and reduced opportunity simply because they are women and typically due to the misconduct of men,<sup>28</sup> who often, but not always, are in superior employment positions.<sup>29</sup> Energized by the Administration’s extreme positions, women have refused to draw that curtain closed.<sup>30</sup> Each woman may be differently situated in the workplace, but as a person who is not a man each shares what Professor Kathryn Abrams described twenty years ago as “a continuing history of being subject to exclusion and devaluation.”<sup>31</sup>

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26. E.g., Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests “Second Amendment People” Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html>.

27. Anita F. Hill, *Sexual Harrassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445, 1446 (1992).

28. The media and social media have begun to report incidents of younger men accusing older women in powerful positions of sexual harassment. See, e.g., Aaron Feis, *Asia Argento Accused of Paying Hush Money to Silence Sexual Assault Allegations*, PAGE SIX (Aug. 19, 2018), <https://pagesix.com/2018/08/19/asia-argento-accused-of-paying-hush-money-to-silence-sexual-assault-allegations> (reporting harassment involving famous older female actress and younger male actor); Zoe Greenberg, *What Happens to #MeToo When a Feminist Is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html> (reporting sexual harassment involving philosophy professor and graduate student); see also Rebecca K. Lee, *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World*, 71 STAN. L. REV. ONLINE 110 (2018) (describing incidents of sexual harassment within organizations run by women).

29. See Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 (2018) (“[H]arassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality.”); see also Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y REV. 57, 61 (2018) (“[W]omen across a wide range of employment settings face obstacles that inhibit their advancement at work through policies and practices not reached by traditional antidiscrimination laws.”); Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 99 (2018) (arguing that harassment should not be equated with “romantic or sexual desire,” but rather involves the perpetrator wanting to prove “masculinity”).

30. See Hilary Weaver & Katy Rich, *Galvanized by #MeToo and a Year of Trump, the Women’s March Returns to the Streets*, VANITY FAIR (Jan. 20, 2018), <https://www.vanityfair.com/style/2018/01/womens-march-2018>.

31. Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 881–82 (1997). See generally CATHARINE A. MACKINNON, *SEXUAL HARRASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

The theme of this Symposium is the Constitution in the age of Trump. Across fields, commentators have questioned whether America's constitutional regime is adequate to meet current concerns.<sup>32</sup> President Trump's toxic attitudes about women make us ask: Does it remain appropriate for the Constitution to omit all mention of women from the text,<sup>33</sup> or to limit women's constitutional possibility to the rights and liberties deemed significant by the male (and white) Founding Fathers?<sup>34</sup> To be sure, before Trump entered the White House, the Court's interpretation of the federal Constitution with respect to sex discrimination had slowly begun to shift from a formal approach that compares essentialized men with essentialized women, to one that more broadly probes why social practices and legal requirements accommodate the needs of some persons (usually male) and not those of others (usually female),<sup>35</sup> and, further, that interrogates a unitary vision of men and women as white, elite, and conformist.<sup>36</sup> But the interpretive movement was not all forward. During this period the Court also impeded women's

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32. E.g., Stephen M. Griffin, *Trump, Trust, and the Future of the Constitutional Order*, 77 MD. L. REV. 161, 179 (2017) (“[T]he future of the constitutional order is likely to depend on political elites growing more comfortable with the notion of reforming the Constitution . . . .”); Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 665 (2017) (“By consistently announcing extreme immigration policy measures that test constitutional limits, the Trump administration may ultimately force the Supreme Court to squarely reconsider the plenary power doctrine.”).

33. The twentieth-century amendment extending the franchise refers to sex. See U.S. CONST. AMDT. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”). See also Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 735 (2002) (“The U.S. Constitution is the only major written constitution that includes a bill of rights but lacks a provision explicitly declaring the equality of the sexes.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953 (2002) (“The modern law of sex discrimination is built on the understanding that there is no constitutional history of relevance to the question of women's citizenship.”).

34. See Ruth Rubio-Marín & Wen-Chen Chang, *Sites of Constitutional Struggle for Women's Equality*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 301, 302 (Mark Tushnet et al. eds., 2013) (explaining that late recognition of women's equality meant that rights “universalized the male condition”).

35. E.g., Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 1006 (2018) (discussing pregnancy accommodation as a “bridge issue”).

36. Admittedly, most of intersectional analysis is still confined to the media and to academic circles, and not the courts. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139; see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290 (1991) (emphasizing the inadequacy of the sameness/difference model for women of color).



advancement by making it more difficult for Congress to create and enforce social and economic rights that are critical to meaningful and not merely formal equality.<sup>37</sup>

Looking forward, many commentators expect President Trump's policy agenda to harm women across multiple dimensions, contributing to a loss of physical autonomy, decreased financial status, and increased social vulnerability. In addition, these approaches will disproportionately worsen the lives of women of color, of women whose sexual identity does not conform to a male/female divide, and of women who are poor or in low-wage jobs.<sup>38</sup> Nevertheless, it is anticipated that the Constitution likely will provide women with neither a sword nor a shield against mounting gendered inequality; to the contrary, the Trump Court more than likely will raise the Constitution as a cudgel against women.<sup>39</sup> Many of Trump's deregulatory initiatives that impact women will be impervious to constitutional challenge because of the weak standard of rationality review that the Supreme Court applies to social and economic regulation.<sup>40</sup> Nor is it likely that the Constitution will be applied to support affirmative claims against the government; unlike the constitutions of the states or of most industrialized liberal democracies, the Constitution does not explicitly provide for the health, education, housing, or employment of its citizens,<sup>41</sup> and it

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37. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003) (describing and criticizing the Court's enforcement model of the Section 5 power of the Fourteenth Amendment); see also William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 *MICH. L. REV.* 2062, 2403 (2002) ("[T]he Supreme Court now stands as an impediment to legislative efforts to protect women and minorities against private violence.").

38. See *infra* Part II.

39. See Robin Abcarian, *For Trump, #MeToo Is #SoWhat? Yet Again, His Attitude and Hires Show Deep Antipathy Toward Women*, *L.A. TIMES* (July 10, 2018), <http://www.latimes.com/local/abcarian/la-me-abcarian-womens-rights-20180710-story.html> ("President Trump wants a Supreme Court that will overturn *Roe vs. Wade*.").

40. See generally Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 *U. PA. L. REV.* 1277 (1993). Challenges under the Administrative Procedure Act, federal statutes, and state law remain viable.

41. See *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989). Every state has its own constitution, and courts in some states have declared and enforced state constitutional rights to specific items of assistance to the needy, such as emergency housing. See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 *PENN. ST. L. REV.* 923 (2011); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131 (1999). On "positive" rights in constitutions abroad, see, e.g., Lorraine E. Weinrib, *The Postwar Paradigm and American*

has not been interpreted to hold the government accountable for economic inequality, whether gendered or racialized, that government action does not directly cause.<sup>42</sup> Although the Due Process Clause so far protects women's reproductive choices, the Court's First Amendment jurisprudence could further jeopardize women's liberty interests and cut more deeply against a federal right to reproductive choice.<sup>43</sup> Moreover, for some Justices, respect for gender equality has been viewed as tantamount to taking "sides in the culture wars" and not as a principle of constitutional merit.<sup>44</sup>

Part I of this Article contextualizes women's current resistance to the Trump Administration's policies, discussing how women's absence from the Constitution coincides with their economic and social inferiority, especially since the economic meltdown of the early twenty-first century. The problems identified in this Part were an entrenched feature of American life before Trump became President but elected officials frequently overlooked or pushed them to the side.

Part II turns to the Trump Administration's policy agenda, which has privileged financial elites, cut back worker protections, and sought to dismantle health and welfare protection, including those that bear on women's reproductive choice. Looking at an illustrative sample of the President's policies, we examine their anticipated impact on women and show that they are likely to exacerbate gendered trends of social and economic disadvantage.

Part III takes an unusual turn, at least for a symposium that is focused on constitutional law. We look not at the Supreme Court, but at the lower federal courts, and explore not the Constitution and the substantive law of gender equality, but the

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*Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 89–91 (Sujit Choudhry ed., 2006) (discussing positive constitutional rights as an aspect of "inherent human dignity").

42. See Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J.L. & GENDER 569, 573 (2014) (referring to "the perception that the Constitution addresses state action while economic inequality is mainly produced by (what is regarded as) private action").

43. *E.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (invalidating requirement that licensed clinics disseminate notice of existence of publicly-funded family-planning services).

44. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting) (criticizing the Court's recognition of marriage equality, and asking, "If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?").

Federal Rules of Civil Procedure. These rules involve basic litigation devices such as arbitration agreements, motions to dismiss, summary judgment, and class certification. Our focus on procedure should not be regarded as “a technical affair” or off the mark for those interested in gender equality.<sup>45</sup> Constitutional scholars, studying the Civil Rights Movement and the campaign for marriage equality, have argued that popular mobilization can motivate and legitimate the progressive reordering of constitutional doctrine.<sup>46</sup> Procedural rules—long regarded as critical to rights and liberty<sup>47</sup>—provide a pathway through which social movements translate constitutional aspirations into constitutional doctrine. Civil procedure plays this role by shaping, channeling, and encouraging—or discouraging—the flow of information to and from the court and ultimately to the public.<sup>48</sup> Activism in resistance to President Trump’s policies concerning women offer interpretive resources that are critical to the reframing of constitutional narrative.<sup>49</sup> As we show, there is a danger that information about women’s experiences will be filtered from public knowledge through procedural decisions that seem distant from constitutional struggles. In our view, anyone seriously interested in the transformative power of women’s mobilization must take account of procedural rulings that

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45. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 27 (Stewart Macaulay ed., 2012) (noting the view that “all procedure ... is a technical affair”). We leave to the side—despite its importance—the question of who creates the rules, and the demographic profile of the rule makers. See Brooke D. Coleman, #SoWhiteMale: Federal Civil Rulemaking, 113 NW. U.L. REV. 407 (2018) (urging greater attention to diversity in appointments to the Civil Rules Committee); see also Melissa Heelan Stanzone, #So White Male: Civil Rules Group’s Makeup Limits Its Work, 86 U.S.L.W. 1712 (2018) (reporting that of the 136 members of the Advisory Committee on Civil Rules appointed in its 82-year history, 116 have been men).

46. See generally Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018) (“Within US legal scholarship, it is the moment of social movement.”).

47. See *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) (“The history of liberty has largely been the history of the observance of procedural safeguards.”).

48. We define social movement as allied with Bruce Ackerman’s conception of a “revolution on a human scale”: “a self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in one or another area of social life,” to which we underscore the affirmative duty of providing a constructive alternative. Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2283 (1999).

49. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323 (2006) (arguing that “constitutional culture channels social movement conflict to produce enforceable constitutional understandings”).

potentially blunt the communicative force of a social movement and thereby diminish its legal and political potential.<sup>50</sup>

This Article certainly is not the first to associate the application of federal procedural rules with gendered effects.<sup>51</sup> Some would argue that these judicial trends are evidence of stealth activism—not by liberal judges seeking to adapt the Constitution to current concerns, but by conservative judges cutting back on equality-favoring laws enacted by earlier political coalitions.<sup>52</sup> Others might equate them with an unspoken assumption that “women’s issues” are not worth the federal courts’ time and trouble—consistent, for example, with the exclusion of domestic-relation cases from federal jurisdiction.<sup>53</sup> Our contribution is to examine the linkage between adjudicative procedure and the potential impact of social mobilization on constitutional culture. We raise the question whether procedural decisions, by failing to engage with the facts of women’s experiences, inadvertently undermine what Elizabeth Winkler has referred to as women’s “epistemological authority,” and so diminish or block women’s contribution to legal discourse.<sup>54</sup>

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50. One federal judge has described the judiciary’s application of procedure as “kabuki rituals in which the plaintiffs, and plaintiffs alone, regularly lose long before trial.” Judge Nancy Gertner (Ret.), *The “Lower” Federal Courts: Judging in a Time of Trump*, 93 IND. L.J. 83, 86 (2018).

51. We build upon feminist procedural scholarship that earlier identified the ways in which federal procedure and jurisdiction systematically disadvantage or ignore women. See, e.g., Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2196 (1993) (“Teaching about the federal courts has not insulated me from having to ask about the relationship between law and women and thus has not shielded me from whatever taint comes with being ‘visible on women’s issues.’”); Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1193 (1993) (observing “how the Federal Rules of Civil Procedure themselves contribute to the ideology that women are absent from the federal courts”). See also Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 50 (2000) (“A relation between women and complaints is part of the larger struggle of women’s liberation.”).

52. Cf. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993).

53. See, e.g., Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994) (discussing the exclusion of family law disputes from federal diversity jurisdiction); Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991) (discussing the marginalization of women in the federal courts and focusing on the exclusion of domestic-relation cases from federal diversity jurisdiction).

54. Elizabeth Winkler, *Denying Women’s Ability to Know*, NEW PUB. (Oct. 8, 2018), <https://newrepublic.com/article/151614/denying-womens-ability-know>.

Part IV is normative and prescriptive. Trump's presidency has triggered a national conversation about women;<sup>55</sup> his policies are likely to impede women's advances, and his appointments to the Supreme Court are allied with his vision. Even before the current crisis, some commentators urged a renewed effort at amending the Constitution to give women an explicit place in its text and to commit the nation to a substantive conception of equality and liberty.<sup>56</sup> In our view, the Constitution is sufficiently capacious to remedy structural forms of gender inequality and to recognize the sorts of social and economic claims that are now typical of contemporary constitutions. But we have little optimism that the Supreme Court will embrace this approach without a constitutional amendment. In these times, mobilizing to ensure that the Constitution will protect persons regardless of gender is critically important, to be combined with grassroots mobilization, participation in state and local elections, and pursuing enforcement actions in agencies and state and federal courts. Procedure can support or subvert substantive goals, but in the end the substantive law of gender equality could itself benefit from repair. In this Part we sketch out the ways in which an equal rights amendment could expand women's constitutional possibilities and improve America overall.<sup>57</sup> We then briefly conclude.

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55. See, e.g., Jill Filipovic, *Stormy Daniels, Feminist Hero*, N.Y. TIMES, Aug. 26, 2018, at 2 (discussing pornographic film star who has accused the President of extra-marital infidelity and other misconduct, and stating "the country is . . . watching her dogged refusal to be quiet and her unflagging insistence that she isn't the one who should be embarrassed").

56. See, e.g., MacKinnon, *supra* note 42, at 569 (arguing that the Constitution and statutes have "gone about as far as they will or can to produce equality of the sexes in life").

57. The current version of the Equal Rights Amendment provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Congress passed the Equal Rights Amendment on March 22, 1972, and its adoption required approval by legislatures of 38 of the 50 states. On May 30, 2018, Illinois became the 37th state to ratify the ERA. See EQUAL RTS. AMEND., <https://www.equalrightsamendment.org> (last visited Nov. 1, 2018); Ned Oliver, *Only One More State Needs to Ratify the Equal Rights Amendment. Will It Be Virginia?*, VA. MERCURY (July 25, 2018); see also Bettina Hager, *A New Urgency to Ratify the Equal Rights Amendment*, HILL (July 13, 2018) (reporting 94% of persons polled support the amendment, but 80% believed the Constitution already includes a provision protecting the equal rights of women). Our argument is not tethered to the language of the existing ERA.

## I. GENDER INEQUALITY AT THE TIME OF THE 2016 ELECTION

The 2016 Presidential election focused extraordinary attention on the fact that Hillary Clinton, the Democratic Party candidate, is a woman—a first for a major party in American history.<sup>58</sup> Trump, as a candidate, notoriously claimed that his opponent did not look presidential (code for not male).<sup>59</sup> Some commentators have tried to explain Trump’s victory as the result of the status anxiety of white male voters about women’s changed position in American society.<sup>60</sup> To be sure, American society has changed a lot in the last two decades. Half of the workforce is now female;<sup>61</sup> a higher percentage of women have college degrees than men.<sup>62</sup> Trump proved adept at using a faux-populist rhetoric that resonated with men who felt marginalized in an economy negatively impacted by decades of deregulation, attacks on unions, and out-sourcing.<sup>63</sup> Candidate Trump made no effort during his campaign to connect with the group that has been especially hard hit—women, and especially women of color, who continue to be relegated to low-wage, part-time, no-benefit jobs with reduced opportunities for advancement or asset formation. In this Part, we offer a snapshot of women’s social and economic position in the wake of the 2007 meltdown and in the lead-up to the 2016 presidential election.<sup>64</sup>

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58. Victoria Woodhull was the first female presidential candidate, running on the Equal Rights Party against Ulysses S. Grant in 1872, but she did not campaign because she was in prison. See JoEllen Lind, *The Clinton/Palin Phenomenon and Young Women Voters*, 30 *HAMLIN J. PUB. L. & POL’Y* 513, 517 (2009) (discussing Woodhull’s candidacy); Susan E. Gallagher, *Privacy and Conformity: Rethinking “the Right Most Valued by Civilized Men,”* 33 *TOURO L. REV.* 159, 168 (2017) (discussing reasons for Woodhull’s imprisonment).

59. See Jessica Lussenhop, *Presidential Debate 2016: Four Ways Gender Played a Role*, *BBC NEWS* (Sept. 27, 2016), <https://www.bbc.com/news/election-us-2016-37481754>.

60. See Ben Hecht, *Reflections on the 2016 Election*, *HUFFPOST* (Nov. 18, 2016), [https://www.huffingtonpost.com/ben-hecht/reflections-on-the-2016-e\\_b\\_13057038.html](https://www.huffingtonpost.com/ben-hecht/reflections-on-the-2016-e_b_13057038.html).

61. Labor force participation has converged over time, with men’s labor force participation declining to 69.1% and women’s increasing to 57.0% by 2016. See Hartmann, *supra* note 10.

62. See Hecht, *supra* note 60.

63. See *Male Voters: Sometimes It’s Hard*, *ECONOMIST* 22 (July 21, 2018) (explaining that male voters for Trump are retaining their allegiance to the Republican Party because of a perceived “status threat” from women). See also John Hudak, *A Reality Check on 2016’s Economically Marginalized*, *BROOKINGS* (Nov. 16, 2016), <https://www.brookings.edu/blog/fixgov/2016/11/16/economic-marginalization-reality-check> (unpacking categories of economic marginalization).

64. For an overview of social and economic conditions since the 2008 financial meltdown, see INST. FOR WOMEN’S POLICY RESEARCH, *THE ECONOMIC STATUS OF*

## A. EMPLOYMENT AND THE GENDER WAGE GAP

In 2007, the United States economy experienced a significant downturn;<sup>65</sup> it took women longer than men to recover from its effects, which came on top of their earlier cumulative disadvantages in the workplace and financial sector.<sup>66</sup> On the eve of the Trump Administration, women's work force participation was high (although lower than in 2014),<sup>67</sup> but women's wages, earnings, and benefits lagged behind those of men. In 2016, women who worked full time, year-round in all career fields made an average of \$41,554, 80% of the male equivalent of \$51,640.<sup>68</sup> That means every week a man took home on average \$170 more than a woman did.<sup>69</sup> Women of color faced a particularly steep earnings gap.<sup>70</sup> Overall, even accounting for occupation, industry, hours worked, and education, a substantial pay gap remained

WOMEN IN THE STATES (2018), [https://iwpr.org/wp-content/uploads/2018/03/R532-National-Fact-Sheet\\_Final.pdf](https://iwpr.org/wp-content/uploads/2018/03/R532-National-Fact-Sheet_Final.pdf).

65. See Maria Cancian & Sheldon Danziger, *Changing Poverty and Changing Antipoverty Policies*, in *CHANGING POVERTY, CHANGING POLICIES 1* (Maria Cancian & Sheldon Danziger eds., 2009) (reporting that "the severe economic downturn that began in late 2007 reduced employment and earnings and raised the official poverty rate").

66. The effects of the recession on women's labor force participation lasted nine months longer than they did for men, ending around October 2010. See Hartmann, *supra* note 10. For the concept of cumulative disadvantage, see Carroll L. Estes, *Women's Rights, Women's Status, Women's Resistance in the Age of Trump*, 41 *GENERATIONS* 36, 37–38 (2017).

67. See *Women in the Labor Force: A Databook*, BUREAU LAB. STAT. (April 2017), <https://www.bls.gov/opub/reports/womens-databook/2016/home.htm> (reporting that women's labor force participation in 2015 was 56.7%, down from 57.0% in 2014).

68. AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 6* (Spring ed. 2018) [hereinafter AAUW].

69. ARIANE HEGEWISCH & EMMA WILLIAMS-BARON, INST. FOR WOMEN'S POLICY RESEARCH, *THE GENDER WAGE GAP: 2017 EARNINGS DIFFERENCES BY RACE AND ETHNICITY 1* (2018), [https://iwpr.org/wp-content/uploads/2018/03/C464\\_Gender-Wage-Gap-2.pdf](https://iwpr.org/wp-content/uploads/2018/03/C464_Gender-Wage-Gap-2.pdf). A recent projection found that if college-educated millennials experience earnings growth at rates similar to the cohort that preceded them, college-educated millennial women will make \$1,066,721 less between ages 25 and 60 than college-educated millennial men. See Jeff Hayes & Heidi Hartmann, *Wage Gap Will Cost Millennial Women \$1 Million Over Their Careers*, INST. FOR WOMEN'S POL'Y RES. (Apr. 10, 2018), <https://iwpr.org/publications/wage-gap-cost-millennial-women-1-million-over-careers/>.

70. Compared to the average white man working full-time, year-round, the average Latina makes 54%, the average American Indian or Alaska Native woman makes 60%, the average Native Hawaiian or Pacific Islander woman makes 60%, the average African-American woman makes 65%, the average white woman makes 77%, and the average Asian-American woman makes 87%. ASHA DUMONTHIER ET AL., INST. FOR WOMEN'S POLICY RESEARCH, *THE STATUS OF BLACK WOMEN IN THE UNITED STATES 27 tbl. 2.3* (2017), <https://iwpr.org/wp-content/uploads/2017/06/The-Status-of-Black-Women-6.26.17.pdf>.

between women and men.<sup>71</sup> As the Institute for Women's Policy Research reported in April 2018: "Women's median earnings are lower than men's in nearly all occupations, whether they work in occupations predominantly done by women, occupations predominantly done by men, or occupations with more even mix of men and women."<sup>72</sup> Indeed, to the extent the gender wage gap remained stable, it was largely because most male salaries were stagnant.<sup>73</sup>

A key factor in the gender wage gap relates to the kinds of jobs that women on average hold.<sup>74</sup> Women are more likely than men to work in hourly jobs,<sup>75</sup> more than twice as likely to work in part time jobs,<sup>76</sup> and more than eight times as likely to work in occupations with poverty level wages.<sup>77</sup> Black women during this period had high rates of labor force participation—62.2%—but their 2014 median annual earnings of \$34,000 for full-time, year round jobs was lower than that of most other gender/race combinations, in part because more than a quarter of employed Black women worked in service occupations, which had the lowest income of any occupational group.<sup>78</sup>

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71. AAUW, *supra* note 68.

72. Hegewisch & Williams-Baron, *supra* note 69. An earnings gap exists between women based on their education; between 1985 and 2017, earnings generally remained flat for less educated, low-wage workers between 1985 and 2017. See Pamela J. Loprest & Demetra Smith Nightingale, *Six Ways the Changing Nature of Work Challenges the Safety Net*, URB. INST. (July 23, 2018), <https://www.urban.org/urban-wire/six-ways-changing-nature-work-challenges-safety-net>. From 1981 to 2007, the earnings gap between female college graduates and female high school graduates increased from 28% to 49%. CTR. FOR CMTY. CHANGE & OLDER WOMEN'S ECON. SEC. TASK FORCE, EXPANDING SOCIAL SECURITY BENEFITS FOR FINANCIALLY VULNERABLE POPULATIONS 13 (2013) [hereinafter CTR. FOR CMTY. CHANGE], [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/cccfinalweb10\\_29.pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/cccfinalweb10_29.pdf).

73. See *20 Facts About U.S. Inequality that Everyone Should Know*, STAN. CTR. POVERTY & INEQ. (2011), <https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know>.

74. See *The Gender Gap*, ECONOMIST, Oct. 7, 2017, at 61 ("The gender pay gap would shrink if men moved into female-dominated jobs and vice versa.").

75. Sunny Frothingham & Shilpa Phadke, *100 Days, 100 Ways the Trump Administration Is Harming Women and Families*, CTR. FOR AM. PROGRESS (Apr. 25, 2017), <https://www.americanprogress.org/issues/women/reports/2017/04/25/430969/100-days-100-ways-trump-administration-harming-women-families/>.

76. JOAN ENTMACHER ET AL., NAT'L ACAD. OF SOC. INS., OVERCOMING BARRIERS TO RETIREMENT SECURITY FOR WOMEN: THE ROLE OF SOCIAL SECURITY (2016), [https://www.nasi.org/sites/default/files/research/SS\\_Brief\\_49.pdf](https://www.nasi.org/sites/default/files/research/SS_Brief_49.pdf).

77. Hegewisch & Williams-Baron, *supra* note 69.

78. DUMONTHIER ET AL., *supra* note 70.



All of this translated into a gender wage gap of 20%, meaning a female worker earned 80 cents on every dollar paid to a male worker. Looking only at Black women, the average gender gap was a difference annually of \$21,698, or 63 cents for every dollar paid to a white, non-Hispanic man;<sup>79</sup> Latinas received 54 cents for every dollar paid.<sup>80</sup> Significantly, the trend was somewhat different for women who were members of public sector unions. Women, indeed women of color, comprise the majority and more than half of union-represented workers. Women in full-time, year-round public sector unionized jobs earned 83 cents on the dollar paid to male workers, or a gender wage gap of 17%. In addition, women in public sector unionized jobs had greater access to health insurance than non-unionized women workers.<sup>81</sup> For this reason, the 2007 economic meltdown, which caused states and cities to cut public sector jobs, had severe effects on women, and especially on women of color.<sup>82</sup>

Job type translated into other forms of gendered inequality. One measure of the quality of a job is the nature of benefits that accompany the wages paid.<sup>83</sup> In the United States, workers in the bottom 25% of the wage distribution have lower access to benefits such as health insurance, retirement benefits, paid sick leave and

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79. NAT'L P'SHIP FOR WOMEN & FAMILIES, BLACK WOMEN AND THE WAGE GAP 1, 3 (2018). Closing that gap would significantly improve quality of life and expand opportunity, translating year-round into: "[t]wo and a half years of child care; [n]early 2.5 additional years of tuition and fees for a four-year public university, or the full cost of tuition and fees for a two-year community college; 159 more weeks of food . . . ; [m]ore than 14 additional months of mortgage and utilities payments; or [t]wenty-two more months of rent." *Id.* at 3 (footnotes omitted).

80. NAT'L P'SHIP FOR WOMEN & FAMILIES, LATINAS AND THE WAGE GAP 1 (2018).

81. KAYLA PATRICK, NAT'L WOMEN'S LAW CTR., PUBLIC SECTOR UNIONS PROMOTE ECONOMIC SECURITY AND EQUALITY FOR WOMEN 2 (2018).

82. See DAVID COOPER, MARY GABLE & ALGERNON AUSTIN, ECON. POLICY INST., BRIEFING PAPER NO. 339, THE PUBLIC-SECTOR JOBS CRISIS 13 (2012) ("The high concentration of women and African Americans working in the public sector, and the greater wage equity many experience there, make cuts to state and local government especially painful for both groups.").

83. See Eileen Appelbaum et al., *Introduction and Overview*, in LOW-WAGE WORK IN THE WEALTHY WORLD 3 (Jérôme Gautié & John Schmitt eds., 2010):

Most analyses of the key determinants of job quality focus on: compensation, including benefits or social entitlements (such as health insurance, pension, paid vacation, parental leave, paid sick days, and other nonwage compensation); contractual status, in particular whether the job is permanent or temporary (one of the fundamental determinants of job security); training and career opportunities; task discretion and other aspects of job design, such as work pace; health and safety conditions; and work schedules including the scope for finding a balance between work and family life.

paid vacation than those in the top 25%. Part-time workers are twice as likely to have an irregular work schedule or on-call shifts, making it difficult to count on stable earnings, creating challenges to work-life balance, and raising barriers to payment for overtime.<sup>84</sup>

Where did candidate Trump stand on the issue of low wages and the gender wage gap? He argued that wages are “too high” in the United States, and urged that the federal minimum wage—which provides a critical floor for women’s wages—be rolled back.<sup>85</sup> He consistently focused on declines in traditionally male-dominated industries, such as coal mining and steel work, without mentioning comparable declines in traditionally female-dominated industries, such as service and retail.<sup>86</sup> And his rhetoric manipulated status anxiety and prejudice about women and people of color to divert attention from the pressing economic problems that have not been fixed since the economic meltdown.<sup>87</sup>

#### B. INCOME INEQUALITY, GENDERED HOMEWORK, AND ASSET FORMATION

The gender wage gap also reflected the effects of societal expectations about women’s work inside the home as an uncompensated caregiver, whether for children or the elderly or disabled.<sup>88</sup> The United States is the only industrialized country without a national paid family leave policy.<sup>89</sup> Even unpaid leave under the Family Medical Leave Act is available to only 60% of

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84. See Loprest & Nightingale, *supra* note 72; Frothingham & Phadke, *supra* note 75.

85. See Maggie Haberman, *Donald Trump Insists that Wages Are “Too High,”* N.Y. TIMES (Nov. 11, 2015), <https://www.nytimes.com/politics/first-draft/2015/11/11/donald-trump-insists-that-wages-are-too-high/> (reporting candidate Trump’s comments about the minimum wage). The candidate back-pedaled on this position. See Bryce Covert, *Donald Trump Takes 3 Different Positions on the Minimum Wage in Less than 30 Seconds*, THINKPROGRESS (July 27, 2016), <https://thinkprogress.org/donald-trump-takes-3-different-positions-on-the-minimum-wage-in-less-than-30-seconds-d88c8d8648ba/>.

86. See generally Derek Thompson, *The Silent Crisis of Retail Employment*, ATLANTIC (Apr. 18, 2017), <https://www.theatlantic.com/business/archive/2017/04/the-silent-crisis-of-retail-employment/523428/>.

87. See Tom Jacobs, *Research Finds that Racism, Sexism, and Status Fears Drove Trump Voters*, PAC. STANDARD (Apr. 24, 2018), <https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters>.

88. See generally Dianne Avery & Martha T. McCluskey, *When Caring Is Work: Home, Health, and the Invisible Workforce Introduction*, 61 BUFF. L. REV. 253 (2013).

89. See *State Family and Medical Leave Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>.

workers.<sup>90</sup> A 2013 report found that there were roughly 65.7 million people providing unpaid caregiver services to disabled and elderly Americans, of whom 66% were women.<sup>91</sup> Because of these unpaid domestic responsibilities, working women tend to work fewer hours for wage labor than men, and are more likely to take time out of the workforce.<sup>92</sup> Over the course of a lifetime, caring for a disabled or elderly individual can result in an average of 4.6 years out of the labor market during peak working years.<sup>93</sup> The gendered privatization of “care” work contributed to the gendered wage gap which snowballed into a gendered asset gap: women owned 32 cents on the dollar compared with men.<sup>94</sup> The wealth gap for women of color was severe. According to a 2015 study, while the median wealth of a single white man between ages 18 and 64 was \$28,900 and the median wealth for a single white woman between ages 18 and 64 was \$15,640, that figure was just \$200 for Black women and \$100 for Hispanic women.<sup>95</sup>

Candidate Trump conspicuously did not speak about child care or acknowledge the work-related barriers that home-care responsibilities create for women — instead, he assigned that chore to First Daughter Ivanka Trump as the spokesperson on childcare.<sup>96</sup> The campaign’s initial proposal depended on tax deductions, and was widely criticized as being of little use to low-wage families that have insufficient income to benefit from this regulatory approach.<sup>97</sup>

90. See Sarah E. Crippen, Ashleigh M. Leitch & Joel P. Schroeder, *What L&E Attorneys Need to Know About the Trump Administration*, 64-JUL. FED. LAW. 46, 47 (2017) (quoting statistic).

91. CTR. FOR CMTY. CHANGE, *supra* note 72, at 9.

92. AAUW, *supra* note 68, at 18–19. Twenty-seven percent of employed mothers of children under age 3 work part-time, compared with just 6% of employed fathers of children under age 3. ENTMACHER ET AL., *supra* note 76, at 7.

93. CTR. FOR CMTY. CHANGE, *supra* note 72, at 9.

94. Robert Reich & Heather McCulloch, *Wealth, Not Just Wages, Is the Way to Measure Women's Equality*, L.A. TIMES (Aug. 25, 2017), <http://www.latimes.com/opinion/op-cd/la-oc-reich-mcculloch-womens-wealth-gap-20170825-story.html#>.

95. MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH INSIGHTS FOR GRANTMAKERS 6 (2015), [http://www.mariko-chang.com/AFN\\_Women\\_and\\_Wealth\\_Brief\\_2015.pdf](http://www.mariko-chang.com/AFN_Women_and_Wealth_Brief_2015.pdf).

96. See Patricia Garcia, *The Problem with Ivanka Trump's Proposed Childcare Plan*, VOGUE (March 14, 2017), <https://www.vogue.com/article/ivanka-trump-childcare-plan> (discussing Ivanka Trump's role as a spokesperson about affordable childcare).

97. See Danielle Paquette & Damian Paletta, *Trump Changes Course on Child-Care Benefit After Criticism He Would Mainly Help Well-Off Families*, WASH. POST (Apr. 25, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/04/25/trump-changes-course>

## C. RATES OF POVERTY AND SAFETY NET PROGRAMS

During this period, poverty rates tended to be higher among female- than male-headed families, which contributed to a greater overall need for public assistance, even when women worked or had significant work histories.<sup>98</sup> About 42% of U.S. mothers were the primary breadwinners for their families.<sup>99</sup> Twenty-six percent of all families were headed by a single mother, and almost two-fifths of these families lived in poverty.<sup>100</sup> Women who spent at least ten years as a single mother were more likely to experience poverty when they became seniors.<sup>101</sup>

Despite the need for public support to fill income gaps, the safety net provided only limited assistance. For example, although the lack of safe, affordable housing has been found by the World Health Organization to put women and children at risk for both violent victimization and depression,<sup>102</sup> only one in five eligible renter households received any government assistance.<sup>103</sup> Child care assistance reached only one in six eligible children.<sup>104</sup> Food support programs likewise did not cover all nutritional needs. The Supplemental Nutrition Assistance Program (SNAP), known colloquially as food stamps, fell short in 99% of U.S. counties of what it costs a low-income individual or family to buy food.<sup>105</sup> WIC, a food assistance program targeted for pregnant and lactating women, as well as infants and children, served only about four-fifths of those who were eligible because of underfunding.<sup>106</sup> More women than men attended post-secondary education, but

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-on-childcare-benefit-after-criticism-he-would-mainly-help-well-off-families/?utm\_term=.963f3ddb8e90.

98. AJAY CHAUDRY ET AL., U.S. DEPT. OF HEALTH & HUM. SERVS., POVERTY IN THE UNITED STATES: 50-YEAR TRENDS AND SAFETY NET IMPACTS (March 2016), at 23–24.

99. AAUW, *supra* note 68, at 5.

100. ENTMACHER ET AL., *supra* note 76, at 7–8.

101. *Id.* at 7. See generally Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1 (2018) (discussing impact of tax and other laws on asset formation by differently arranged adults and children).

102. Am. Psychological Ass'n, WOMEN & SOCIOECONOMIC STATUS (2018), <http://www.apa.org/pi/ses/resources/publications/factsheet-women.pdf>.

103. Loprest & Nightingale, *supra* note 72.

104. Frothingham & Phadke, *supra* note 75.

105. Loprest & Nightingale, *supra* note 72.

106. WIC is the acronym for the Supplemental Nutrition Program for Women and Infant Children, codified at 42 U.S.C. §§ 1771–93. See Martha Burk, *Trump's Starvation Budget*, MS. MAG. BLOG (June 14, 2017), <http://msmagazine.com/blog/2017/06/14/trumps-starvation-budget/>.

they depended on loans to pay tuition. Although more women than men received Pell Grants,<sup>107</sup> grants covered just 29% of the average cost of tuition, fees, room, and board at a public four-year college, the lowest level in four decades.<sup>108</sup>

During old age, greater rates of poverty among women relative to men increased women's dependency on Social Security benefits as their source of income.<sup>109</sup> More than a quarter of elderly women—27%—depended on Social Security as 90 percent or more of their income,<sup>110</sup> compared with 21% of men.<sup>111</sup> At the same time, women received on average a Social Security payment that was 77% that of men, and 38% of retired female workers (versus 18% of men) received payments that placed them below the poverty line, i.e., below \$950 a month.<sup>112</sup> Women also were more likely to have disabilities and poor women had a higher rate of dependence on benefits through the Supplemental Security Insurance program.<sup>113</sup>

President Dwight D. Eisenhower emphasized in 1954 the secure position of particular social welfare programs in American political life:

Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history. There is a tiny splinter group, of course, that believes you can do these things. Among them are . . . Texas oil millionaires, and an occasional political or business man . . . Their number is negligible and they are stupid.<sup>114</sup>

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107. Frothingham & Phadke, *supra* note 75.

108. Spiros Protosaltis & Sharon Parrott, *Pell Grants – a Key Tool for Expanding College Access and Economic Opportunity – Need Strengthening, Not Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (July 27, 2017), <https://www.cbpp.org/research/federal-budget/pell-grants-a-key-tool-for-expanding-college-access-and-economic-opportunity>.

109. Sixteen percent of unmarried senior women and 4.4% of married senior women lived in poverty, compared with 11.8% of unmarried senior men and 4.2% of married senior men. Hispanic seniors are the most likely to be poor (18.7%), followed by Black seniors (17.3%), Asian American seniors (11.7%), and finally white seniors (6.7%). CTR. FOR CMTY. CHANGE, *supra* note 72, at 13, 20 fig. 8.

110. ENTMACHER ET AL., *supra* note 76, at 3.

111. *Id.*

112. *Id.* at 4.

113. Estes, *supra* note 66; Frothingham & Phadke, *supra* note 75.

114. Letter from Dwight D. Eisenhower to Edgar Newton Eisenhower (Nov. 8, 1954), in *The Presidential Papers of Dwight David Eisenhower*, EISENHOWER MEMORIAL, <http://web.archive.org/web/20051124190902/http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/1147.cfm>.

In keeping with this script, the Trump campaign promised not to cut Social Security, Medicare, or Medicaid. However, the campaign concurrently announced plans to block-grant Medicaid, which would reduce benefits provided by states under the existing program. The campaign called for the elimination of the Department of Education.<sup>115</sup> And during campaign rallies, Trump talked about the need to “roll back the number of people on food stamps,” seriously misstating the program’s enrollment figures.<sup>116</sup>

#### D. HEALTH STATUS, HEALTH CARE, AND HEALTH INSURANCE

Overall, during this period women were expected to live longer than men, but life expectancy rates varied by socioeconomic status.<sup>117</sup> However, across socioeconomic status, women generally needed more health care than men.<sup>118</sup> Lack of health care is associated with adverse physical and mental effects, including obesity, depression, and death or impairment from treatable conditions, such as cancer, heart disease, addiction, and

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115. *Trump-O-Meter: Tracking Trump’s Campaign Promises*, POLITIFACT, <https://www.politifact.com/truth-o-meter/promises/trumpometer/browse/> (last visited Nov. 4, 2018).

116. See Jordyn Phelps, *Trump Says “Seriously Overweight” Protester Upset Over Talk of Food Stamps*, ABC NEWS (Nov. 18, 2015), <https://abcnews.go.com/Politics/trump-overweight-protester-upset-talk-food-stamps/story?id=35293941>.

117. A woman at age 65 is expected to live another 20.3 years; a man, 17.8 years. However, there is a wide age-expectancy gap between rich and poor women. In 1970, there was a 4.7 year difference between the life expectancy of a 50-year old woman in the top 10% of earners and one in the bottom 10% of earners. By 2000, that difference had expanded to 13 years. Sabrina Tavernise, *Disparity in Life Spans of the Rich and the Poor Is Growing*, N.Y. TIMES (Feb. 12, 2016), <https://nyti.ms/1RwgE6h>.

118. Women accounted for 60% of outpatient visits and 60% of ER visits. Women were 70% more likely than men to have had an inpatient hospital stay, and 40% more likely to have had mental health care needs. Sixty-two percent of insurance plans on the individual market prior to enactment of the Affordable Care Act did not cover maternity care. See Frothingham & Phadke, *supra* note 75.

pregnancy.<sup>119</sup> Prior to the election (in 2014), 16% of nonelderly Black women lacked health insurance.<sup>120</sup>

Over a lifetime, a woman's access to health care impacts reproductive choice which affects economic and social status in multiple ways. Disparities in access to contraception lead to unplanned pregnancies that can dramatically alter a woman's life plans (the most commonly cited reason to seek contraceptive services is inability to afford a baby's care).<sup>121</sup> Black women also experienced the highest rates of unintended pregnancies, which were attributed in part to disparities in access to contraceptive care and counseling.<sup>122</sup> Women with incomes below the poverty level experienced unplanned pregnancy at five times the rate of those living at 200% of poverty.<sup>123</sup> In 2014, 49% of women who obtained abortions had income below the poverty level.<sup>124</sup> This means that abortion restrictions disproportionately impacted poor women who already suffered multiple and cumulative disadvantage.<sup>125</sup> Infants born to Black mothers had a mortality rate twice that of white infants during the first year of life, even in

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119. Low-income women who have no insurance have the lowest rates of mammography screening among women ages 40-64, and women of lower socio-economic status with breast cancer are 11% more likely to die. Obesity, risk of becoming obese, and staying obese through young adulthood are all strongly correlated with poverty among women. Women with HIV have disproportionately lower income than men with HIV, and poverty is the most significant indicator of whether heterosexuals "living in the inner city" will develop the AIDS virus. Women of lower socio-economic status report more depressive symptoms during pregnancy and at 2 and 3 months postpartum. Insecure employment is linked to higher levels of chronic stress, and lower employment rank is a strong predictor of depression. Low-income women are also more likely to develop problems with drinking and drug addiction. Am. Psychological Ass'n, *supra* note 102.

120. Black women's average annual heart disease mortality rate was the highest among the largest racial and ethnic groups of women. Black women had the second highest rate of lung cancer mortality among the largest racial and ethnic groups of women. Black women had an incidence of AIDS five times that of any other racial and ethnic group of women, and 40% of Black women experienced intimate partner violence, compared with 31.5% of all women. See DUMONTHIER ET AL., *supra* note 70, at xix.

121. Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, GUTTMACHER POLICY REV., Winter 2013, at 8, [https://www.guttmacher.org/sites/default/files/article\\_files/gpr160108.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr160108.pdf).

122. *Id.* at 2.

123. *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states#8-12a>.

124. JENNA JERMAN ET AL., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 (2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/characteristics-us-abortion-patients-2014.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf).

125. *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Feb. 2018), <https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws>.

cases in which the Black mother had an educational advantage over the white mother.<sup>126</sup> Moreover, relative to white women, Black women were three to four times more likely to die during pregnancy or childbirth.<sup>127</sup>

Trump's campaign offered a full-throttle assault on public-supported health care services. He called for the end to the Affordable Care Act, calling it a "total disaster,"<sup>128</sup> and announced that he would never support "socialized medicine," yet promised that under his health plan the government would take care of "everybody."<sup>129</sup> He stated he is "pro-life" and that he would nominate Justices to the Supreme Court of the United States who would overturn *Roe v. Wade*.<sup>130</sup> And he urged the dismantlement of veterans' health care and its replacement with a market-based plan.<sup>131</sup> What was most salient about the campaign's health proposals was its utter disregard for the importance of health care to women—proposing to end the Affordable Care Act without any reasonable substitute ensuring care and coverage for women's health conditions.<sup>132</sup>

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126. See *The Decline in Mortality Among Black Babies Has Stopped*, ECONOMIST (July 15, 2017), <https://www.economist.com/united-states/2017/07/15/the-decline-in-mortality-among-black-babies-has-stopped>.

127. NAT'L P'SHIP FOR WOMEN & FAMILIES, BLACK WOMEN'S MATERNAL HEALTH: A MULTIFACETED APPROACH TO ADDRESSING PERSISTENT AND DIRE HEALTH DISPARITIES 1 (2018), <http://www.nationalpartnership.org/research-library/maternal-health/black-womens-maternal-health-issue-brief.pdf>.

128. Sy Mukherjee, *Donald Trump Says Obamacare Is a "Total Disaster." Here's the Truth*, FORTUNE (Oct. 10, 2016), <http://fortune.com/2016/10/10/donald-trump-obamacare-debate/>.

129. Avik Roy, *The Most Important Thing About Donald Trump's Health Reform Plan Is That Trump Didn't Write It*, FORBES (Mar. 3, 2016), <https://www.forbes.com/sites/theapothecary/2016/03/03/the-most-important-thing-about-donald-trumps-health-reform-plan-is-that-donald-didnt-write-it/#fce7fbc5c662>; see also John Merline, *Trump Was For Socialized Medicine Before He Was, Sort Of, Against It*, INV.'S BUS. DAILY (Aug. 7, 2015), <https://www.investors.com/politics/commentary/trump-praises-single-payer-health-care-in-debate/>.

130. *Roe v. Wade*, 410 U.S. 113 (1973). See Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

131. *Promises About Veterans on Trump-O-Meter*, POLITIFACT, <https://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/veterans/>.

132. Caroline Rosenzweig, Usha Ranji & Alina Salganicoff, *Health and the 2016 Election: Implications for Women*, KAISER FAM. FOUND. (Oct. 12, 2016), <https://www.kff.org/womens-health-policy/perspective/health-and-the-2016-election-implications-for-women/>.



## II. TRUMP'S POLICY AGENDA AND GENDERED INEQUALITY

In the previous Part, we described the gendered (and racialized) nature of economic marginalization as it existed on the eve of the 2016 presidential election—marginalization that resulted from social and economic arrangements structured by law, maintained by the government, and enforced through courts and social norms.<sup>133</sup> Every indication is that the Trump Administration, unconstrained, will further exacerbate women's unequal status. Certainly the messages in the early months of the Administration were not favorable. To consider a few examples: The Council on Women and Girls, established by the Obama Administration to coordinate work across agencies, did not announce any initiatives during the Trump Presidency other than to remove from the White House website a 2014 report on sexual violence;<sup>134</sup> the President's appointments have been predominantly male (and white);<sup>135</sup> and the Centers for Disease Control and Prevention banned from budget documents the words vulnerable, diversity, and fetus—which one commentator said amounts to “a license to discriminate.”<sup>136</sup>

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133. See generally DAVID GARLAND, *THE WELFARE STATE: A VERY SHORT INTRODUCTION* 13 (2016) (“[F]ar from being natural or spontaneous, free-market economic arrangements had to be forcibly established by government action that overturned customary laws, set aside traditional safeguards, and abolished long-standing rights of common.”); see also ANDREA FLYNN, ROOSEVELT INST., *JUSTICE DOESN'T TRICKLE DOWN: HOW RACIALIZED AND GENDERED RULES ARE HOLDING WOMEN BACK* 4 (2017) (stating that gendered and racialized disparities and inequities “are not the result of individual ambition or aptitudes, as conservatives often suggest, but rather an outgrowth of . . . policies, institutions, and practices”).

134. See Tara Palmeri, *White House Council for Women and Girls Goes Dark Under Trump*, POLITICO (June 30, 2017), <https://www.politico.com/story/2017/06/30/donald-trump-white-house-council-for-women-and-girls-239979>; Alanna Vagianos, *Sexual Assault Report Drops from White House Site, Remains on Obama Archive*, HUFFPOST (Aug. 30, 2017), [https://www.huffingtonpost.com/entry/white-house-quietly-removes-sexual-assault-rpport-from-website\\_us\\_59a6c322c4b084581a14ab59](https://www.huffingtonpost.com/entry/white-house-quietly-removes-sexual-assault-rpport-from-website_us_59a6c322c4b084581a14ab59).

135. “The White House has named twice as many men as women to administration positions. This gender skew is both broad and deep: In no department do female appointees outnumber male appointees, and in some cases men outnumber women four or five to one. Moreover, men significantly outnumber women in low-level positions as well as in high-level ones, with Trump's Cabinet currently composed of 19 men and five women.” Annie Lowrey & Steven Johnson, *The Very Male Trump Administration*, ATLANTIC (Mar. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/03/the-very-male-trump-administration/556568>.

136. Sabrina Siddiqui, *How Has Donald Trump's First Year Affected Women?*, GUARDIAN (Jan. 18, 2018), <https://www.theguardian.com/us-news/2018/jan/18/how-has-donald-trumps-first-year-affected-women>; see also Lena H. Sun & Juliet Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, WASH. POST (Dec. 15, 2017),

In this Part, we survey some of the Administration's key policy efforts. We are selective, illustrative, and do not claim to be comprehensive in our description of Trump's policies as they affect women. The President's major initiative so far has been tax revision<sup>137</sup>—which he touted as a lifeline to working families.<sup>138</sup> For those working families that depend on women's work, the statute in fact could cut that line.<sup>139</sup> The statute repealed the individual mandate of the Affordable Care Act, making it easier for insurance carriers to withhold or increase the cost of coverage for preexisting conditions or maternity care;<sup>140</sup> and, it redesigned tax brackets and deductions, making corporate tax cuts permanent, but sun set individual tax cuts in 2025, making it likely that over time budget deficits will be invoked to reduce services that low-income families headed by women need.<sup>141</sup> The Administration's other initiatives, apart from a relentless assault on the Affordable Care Act, have been either less visible to the public or less obvious in their effects on gender equality, but the trend does not favor women.<sup>142</sup> As examples, we focus on the Administration's position on overtime workplace rules, employment discrimination, and funding for safety net programs.

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[https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-c1cf-11e7-89e8-edec16379010\\_story.html](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-c1cf-11e7-89e8-edec16379010_story.html).

137. See Individual Tax Reform and Alternative Minimum Tax, Pub. L. 115-97, 131 Stat. 2054 (2017).

138. See Ben Chu, *Would Donald Trump's Tax Plan Really Help Ordinary Working Americans and Boost US Growth?*, INDEPENDENT (Dec. 4, 2017), <https://www.independent.co.uk/news/donald-trump-tax-plan-us-economy-growth-help-blue-collar-working-americans-a8091501.html>.

139. Maya Rhodan, *Meet the Winners and Losers of the GOP Tax Reform Bill*, TIME (Nov. 2, 2017), <http://time.com/5007611/trump-tax-plan-republican-reform/> (discussing growth of national debt and phase out of estate tax).

140. See Sy Mukherjee, *The GOP Tax Bill Repeals Obamacare's Individual Mandate. Here's What That Means for You*, FORTUNE (Dec. 20, 2017), <http://fortune.com/2017/12/20/tax-bill-individual-mandate-obamacare/>.

141. See Erik Sherman, *CBO: Senate Tax Bill Is Even Worse for Low-Income People than Thought*, FORBES (Nov. 27, 2017), <https://www.forbes.com/sites/eriksherman/2017/11/27/cbo-senate-tax-bill-is-even-worse-for-low-incomes-than-before/#47fe6b1f503c> ("By 2027, everyone making less than \$75,000 would provide a net savings to the government, whether through higher taxes, lower amounts spent on services, or both.").

142. See Siddiqui, *supra* note 136 ("A year since women marched across the world in protest of Trump, many view his presidency as 'the worst we've ever seen for women[.]'"); Burk, *supra* note 106 (describing the Administration's proposed budget and stating, "there's no doubt its main target—programs benefiting women, kids and the poor—will remain in the crosshairs"); Frothingham & Phadke, *supra* note 75 ("It has only been 100 days, and millions of women are already feeling the negative impacts of the Trump administration and its misguided agenda.").

We then turn to the Administration's efforts to eliminate affordable health care, which we see as a way to entrench gender stereotypes and to erode a democratic "commons" that is integral to a liberal constitutional order.<sup>143</sup>

#### A. WAGES AND EMPLOYMENT DISCRIMINATION

Shortly after winning the Republican nomination to be the presidential candidate, Trump was asked how his leadership would affect the direction of his political party. The Washington Post reported: "'Five, 10 years from now – different party,' Trump predicted. 'You're going to have a workers' party.'"<sup>144</sup> Rhetoric aside, that prediction invites skepticism.<sup>145</sup> The Trump Administration's policies on wages and discrimination not only run counter to workers' interests, but also entrench gender stereotypes and widen the gender wage gap.<sup>146</sup> We offer two examples.

*Wages:* The Trump Administration's attitude toward wage equity can be summed up in its decision to block a requirement that companies with one hundred or more employees confidentially report pay rates by gender, race, ethnicity, and job category. EEO-1 is a survey document that the Equal Employment Opportunity Commission has required employers to complete for the last fifty years. The data that EEO-1 generates provide a basis for the EEOC's policy development and also are a resource for litigants in employment discrimination suits and

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143. Compare Richard A. Epstein, *The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism*, 85 U. CHI. L. REV. 403 (2018), with Tom Ginsburg, Aziz Z. Huq & Mila Versteg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239 (2018).

144. Katrina vanden Heuvel, *Trump's Policies Offer Plutocracy on Steroids, Not Economic Populism*, WASH. POST (Jan. 9, 2018), [https://www.washingtonpost.com/opinions/trumps-policies-offer-plutocracy-on-steroids-not-economic-populism/2018/01/09/0bc83768-f495-11e7-a9c3-ab18cc41436a\\_story.html?utm\\_term=.12ce25ba78cd](https://www.washingtonpost.com/opinions/trumps-policies-offer-plutocracy-on-steroids-not-economic-populism/2018/01/09/0bc83768-f495-11e7-a9c3-ab18cc41436a_story.html?utm_term=.12ce25ba78cd). See also David A. Graham, *A Trumpist Workers' Party Manifesto*, ATLANTIC (May 26, 2016), <https://www.theatlantic.com/politics/archive/2016/05/trump-workers-party/484469/> ("Abandoning the low-tax, small-government orthodoxy of the GOP, its nominee says he envisions the Republican Party of the future as a "workers" party.").

145. See Robert Kuttner, *Trump, the Globalist Plutocrat*, AM. PROSPECT (Jan. 30, 2018), <http://prospect.org/article/trump-globalist-plutocrat> (discussing the President's address at the World Economic Forum and stating that "[s]trip the racism from his nationalist appeal and . . . [i]t's camouflage for his service to the global billionaire class from which he comes").

146. Cf. Andrea Flynn, *The Supreme Court's War on Women Is Also a War on Workers*, WASH. POST (July 23, 2018), <https://www.washingtonpost.com/news/post-everything/wp/2018/07/23/the-supreme-courts-war-on-women-is-also-a-war-on-workers/>.

researchers.<sup>147</sup> During the Obama Administration, the EEOC revised the form, effective 2018, with the specific goal of identifying pay disparities.<sup>148</sup> As then-EEOC Chair Jenny Yang announced, “[collecting pay data is] a significant step forward to address pay inequality in the workplace.”<sup>149</sup> However, in August 2017, without prior notice to the public,<sup>150</sup> the Office of Management and Budget announced an “immediate stay” of the revised rule, explaining that in its view “some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.”<sup>151</sup>

While stifling efforts to make gender pay disparities more transparent, the Trump Administration also made it more difficult for women to receive overtime for hours worked beyond the ordinary work day. The issue is important because female wages traditionally have been lower, given barriers to their receiving overtime payment under the Fair Labor Standards

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147. See ROBERT W. SIKKEL, *EEO-1 REPORTS: WHAT DO THEY REALLY TELL US* (2003), <http://apps.americanbar.org/labor/1el-aba-annual/papers/2003/sikkel.pdf>. See also Julie A. Kmec & Sheryl L. Skaggs, *The “State” of Equal Employment Opportunity Law and Managerial Gender Diversity*, 61 SOC. PROBS. 530 (2014) (examining state mandates in the context of EEO-1 data).

148. In February 2016 the EEOC issued revisions to EEO-1 followed by a 60-day comment period and held public hearings in March 2016. The EEOC modified the form in response to comments, which was then followed by a further comment period at the OMB, which received more than 1,000 comments. The OMB approved the revised form on Sept. 29, 2016. See Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (Feb. 1, 2016).

149. *Remarks of Chair Jenny R. Yang at the White House Equal Pay Event*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Jan. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/chair-remarks-1-19-2016.cfm>.

150. The abrupt action triggered a Freedom of Information Law suit by the ACLU to uncover the basis for the decision. See Lenora M. Lapidus, *Who Was Behind the Move to Halt Reporting Rules on Equal Pay?*, ACLU (Sept. 22, 2017), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-was-behind-move-halt-reporting-rules-equal-pay> (“The decision, reached behind closed doors, without public input, and lacking any evidentiary support, stands in sharp contrast to the rigorous, multi-year deliberative process that led to the EEOC’s adoption of the new EEO-1.”).

151. Memorandum from Neomi Rao, Admin., Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Victoria Lipnic, Acting Chair, Equal Emp’t Opportunity Comm’n (Aug. 29, 2017); see also *What You Should Know: Statement of Acting Chair Victoria A. Lipnic About OMB Decision on EEO-1 Pay Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm> (last visited Nov. 6, 2018).

Act.<sup>152</sup> During the Obama Administration, the President directed the U.S. Department of Labor to “modernize and streamline” then-existing regulations implementing statutory requirements.<sup>153</sup> In response, the Department published a final rule, effective December 1, 2016, raising the overtime threshold, thereby extending overtime coverage to previously excluded wage laborers.<sup>154</sup> Half of the newly eligible workers would have been female—3.2 million women, many of them single mothers and women of color.<sup>155</sup> The Trump Administration announced its intention to withdraw the regulations, which later were challenged by a group of states and business groups. Ten days before the regulations were to take effect, a Texas district court issued a nationwide preliminary injunction,<sup>156</sup> and on August 31, 2017 that injunction became permanent.<sup>157</sup> So far, the Trump Administration has not published new rules.<sup>158</sup>

The Trump Administration also pushed to eliminate Department of Labor regulations protecting billions in tip income, regulations that largely benefited women who work in the restaurant and hospitality industry. In 2011, the Department of Labor published regulations that allow restaurants to pool tips,

152. See Celine McNicholas, Heidi Shierholz & Marni von Wilpert, *Workers' Health Safety, and Pay Are Among the Casualties of Trump's War on Regulations*, ECON. POL'Y INST. (Jan. 29, 2018), <https://www.cpi.org/publication/deregulation-year-in-review/>.

153. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014).

154. See 29 C.F.R. § 541.600; see also *Final Rule: Overtime*, U.S. DEP'T LAB. WAGE & HOUR DIVISION, <https://www.dol.gov/whd/overtime/final2016/>.

155. HEIDI HARTMANN ET AL., INST. FOR WOMEN'S POLICY RESEARCH & MOMSRISING, *HOW THE NEW OVERTIME RULE WILL HELP WOMEN & FAMILIES 2* (2015), [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Women%20and%20Overtime%20\(Final\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Women%20and%20Overtime%20(Final).pdf).

156. See *Nevada v. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). In a later proceeding, the court denied the motion of the AFL-CIO to intervene, finding the motion was not timely and that the government defendants adequately represented the interests of the union, notwithstanding statements of the incoming Secretary of Labor that the department “‘may’ amend or repeal the Final Rule.” See *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3780085, at \*3 (E.D. Tex. Aug. 31, 2017).

157. *Nevada v. Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

158. On July 26, 2017, the Department of Labor published a Request for Information, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. *Overtime Pay: Request for Information*, U.S. DEP'T LAB. WAGE & HOUR DIVISION, <http://www.dol.gov/whd/overtime/rfi2016.htm>. See Stephen Miller, *Overtime Rule Changes Are Coming, but Will They Be in Time?*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 24 2018), <https://www.shrm.org/rcsourcessandtools/hr-topics/compensation/pages/overtime-rule-changes-coming.aspx> (“If the DOL doesn't finalize a new rule before the 2020 elections, all bets are off[.]”).

but require them to share the tips only with workers who customarily receive tips—the employer could not retain the tips.<sup>159</sup> The Trump Department of Labor recommended that the tip rule be revised to enable tips to be shared with workers who do not ordinarily receive tips, such as dishwashers—but did not bar the employer from retaining the tips.<sup>160</sup> The Economic Policy Institute estimated that under the revised rule, employers would likely pocket \$5.8 billion of their workers' tips each year, and that 80% would be diverted from women, each of whom would lose around \$1000 a year.<sup>161</sup> To compound the injury, the Department of Labor altered the methodology used in its analysis of the roll-back's effect, and in public discussion omitted any mention of the adverse impact of the proposal.<sup>162</sup> In the end, the Trump Administration did not succeed in changing the tip rule.<sup>163</sup>

*Employment Discrimination:* Gender stereotypes are acknowledged to reflect not only entrenched notions about the appropriate social roles of men and women, but also social norms about the meaning of manhood and womanhood.<sup>164</sup> For this reason, discrimination against those whose genders do not conform to the conventional male/female divide should be

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159. 76 Fed. Reg. 18831 (Apr. 5, 2011), updating regulations issued under the Fair Labor Standards Act; Final Rule.

160. See Ben Penn, *Labor Department Proposes Killing Obama Tip Pooling Rule*, BLOOMBERG LAW (Dec. 4, 2017), <https://www.bna.com/labor-department-proposes-n73014472723>.

161. Heidi Shierholz, David Cooper, Julia Wolfe & Ben Zipperer, *Women Would Lose \$4.6 Billion in Earned Tips if the Administration's "Tip Stealing" Rule Is Finalized*, ECON. POL'Y INST. (Jan. 17, 2018), <https://www.epi.org/publication/women-would-lose-4-6-billion-in-earned-tips-if-the-administrations-tip-stealing-rule-is-finalized-overall-tipped-workers-would-lose-5-8-billion/>.

162. See Whitney Filloon, *Tip-Pooling Will Cost Workers Billions, According to Hidden Labor Department Data*, EATER (Feb. 1, 2016), <https://www.eater.com/2018/2/1/16959342/tipping-tip-pooling-dol-data-hidden-cost-workers-billions>.

163. See Paul Ausick, *Tipped Workers Will Get to Keep Their Tips*, 24/7 WALL ST (Mar. 22, 2018), <https://247wallst.com/energy-business/2018/03/22/tipped-workers-will-get-to-keep-their-tips/> (reporting that the omnibus budget bill contained the following language: "An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.").

164. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 232 (1988) ("[H]eterosexism reinforces the social meaning of gender by affirming a sex-differentiated, patriarchal conception of marriage."); see also Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996) (discussing ways in which men are harmed by gender stereotypes).

considered a form of discrimination on the basis of sex.<sup>165</sup> Nevertheless, the Trump Administration has taken the position that anti-discrimination laws do not encompass non-conforming gender. The Department of Justice in October 2017 released a guidance announcing that in all future litigation it would argue that “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”<sup>166</sup> Earlier, the United States had appeared amicus curiae in the Second Circuit Court of Appeals arguing that Title VII did not cover sexual orientation,<sup>167</sup> a position which a divided appeals court, en banc, rejected, finding instead that “an employee’s sex is necessarily a motivating factor in discrimination based on sexual orientation”:

Looking first to the text of Title VII, the most natural reading of the statute’s prohibition on discrimination “because of . . . sex” is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer’s opposition to romantic association between particular sexes—is discrimination based on the employee’s own sex.<sup>168</sup>

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165. Some commentary sees stereotype theory as a problematic basis for Title VII liability. See, e.g., Drew Culler, *The Price of Price Waterhouse: How Title VII Reduces the Lives of LGBT Americans to Sex and Gender Stereotypes*, 25 AM. U. J. GENDER SOC. POL’Y & L. 509, 511 (2017) (“Since sexual orientation is not expressly included among Title VII’s other protected classes, courts have tried to fit a square peg in a round hole by likening sexual orientation to sex or sex stereotypes.”); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014) (discussing gender stereotyping under Title VII as applied to homosexuals in the workplace).

166. Memorandum from the Attorney General on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 to United States Attorneys and Heads of Department Components (Oct. 4, 2017), <https://www.documentcloud.org/documents/4067437-Sessions-memo-reversing-gender-identity-civil.html>.

167. Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775); see also Daniel Wiessner, *States Ask SCOTUS to Rule that Title VII Does Not Ban Transgender Bias*, REUTERS LEGAL (Aug. 28, 2018).

168. *Zarda*, 883 F.3d at 112–13.

The Justice Department's action followed the President's earlier initiative, announced in a tweet, that the Armed Services would ban transgendered persons, reversing President Obama's 2016 decision to permit transgendered persons to serve.<sup>169</sup> These were only initial salvos in the effort to deprive trans persons of legal existence. Other agencies have withdrawn Obama-era protections for those with non-conforming gender identity, and have made a frontal assault to treat gender as biologically determined and fixed throughout a person's lifetime.<sup>170</sup>

At the same time, the Attorney General, pursuant to an Executive Order,<sup>171</sup> issued a guidance on religious liberty, stating that "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming."<sup>172</sup> Although we recognize the

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169. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472?lang=en> ("After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military."); see Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security on *Military Service by Transgender Individuals* (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>. For a discussion of the ways in which gender and class converge with respect to trans persons, see Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 53 (2009); see also Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 358 (2009) ("Trans people are disproportionately poor because of employment discrimination, family rejection, [and] troubles accessing school, medical care, and social services.").

170. See Erica L. Green, Katie Benner & Robert Pear, *Trump Administration Eyes Defining Transgender Out of Existence*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> ("The Trump administration is considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth, the most drastic move yet in a governmentwide effort to roll back recognition and protections of transgender people under federal civil rights law.").

171. Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 9, 2017), <https://www.federalregister.gov/documents/2017/05/09/2017-09574/promoting-free-speech-and-religious-liberty>.

172. Memorandum from the Attorney General on Federal Law Protections for Religious Liberty to All Executive Departments and Agencies 1 (Oct. 6, 2017), [https://www.justice.gov/opa/press-release/file/1001891/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery); see also Memorandum from the Attorney General on Implementation of Memorandum on Federal Law Protections for Religious Liberty to All Component Heads and United States Attorneys (Oct. 6, 2017), [https://www.justice.gov/opa/press-release/file/1001886/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/press-release/file/1001886/download?utm_medium=email&utm_source=govdelivery).



importance of faith,<sup>173</sup> legitimate concerns may be raised as to whether the Administration potentially has tilted the scale in favor of those who would invoke religion to exclude pregnant women from the workplace,<sup>174</sup> to deny health coverage for contraception,<sup>175</sup> and to discriminate across-the-board against gender-non-conforming persons.<sup>176</sup>

#### B. FUNDING AND OTHER CUTS TO FOOD AND EDUCATION PROGRAMS

The Trump Administration also has used a variety of techniques to rescind regulatory protections and to reduce access to safety net programs, both of which would adversely affect women. We provide two examples.

*Food Assistance:* The Trump Administration's 2019 budget would radically reconfigure the Supplemental Nutrition Assistance Program, colloquially known as SNAP or food stamps. SNAP currently is structured to enhance the purchasing power of eligible households to purchase groceries and a few food-related items in approved grocery stores. The program depends on a market mechanism that works to boost the agricultural sector of the economy, improves nutrition for participating households, and assists local economies.<sup>177</sup> To be sure, SNAP benefits are not sufficient in many locales to meet all food needs.<sup>178</sup> However, the program historically has been proved effective in ameliorating

173. See Katrina Rose Myers, *Little Sisters' Sorrow: Conversations About Contraception and Reproductive Justice*, 24 WM. & MARY J. WOMEN & L. 337, 339 (2018) (discussing how reproductive justice advocates might "accommodate the Sisters' religious exercise, while ensuring that all women receive full health coverage").

174. For an analysis that precedes the Attorney General's action, see Jessica L. Waters & Leandra N. Carrasco, *Untangling the Reproductive Rights and Religious Liberty Knot*, 26 YALE J.L. & FEMINISM 217 (2014).

175. See Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139 (2006).

176. See Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 1 (2015).

177. See U.S. DEP'T OF AGRIC., MEASURING THE EFFECT OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) PARTICIPATION ON FOOD SECURITY (2013), <https://ns-prod.azureedge.net/sites/default/files/Measuring2013Sum.pdf> (finding that participation in SNAP improved food security for all groups).

178. The average benefit is \$1.40 per meal per person. See *Chart Book: SNAP Helps Struggling Families Put Food on the Table*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 14, 2018), <https://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table>.

poverty-caused hunger.<sup>179</sup> In 2015, more than half of the recipients were women (57%) and three-quarters of households in the program included a child.<sup>180</sup> The Trump Administration has proposed to revamp SNAP into a modified commodities distribution program—dressed up in the language of “harvest boxes”<sup>181</sup>—that would include no fresh foods, only pantry staples like cereal, peanut butter, and canned fruit.<sup>182</sup> Moreover, the proposal attaches work conditions to SNAP participation.<sup>183</sup> The Trump proposal has been called “insulting,”<sup>184</sup> “paternalistic,”<sup>185</sup> and likely to “cause hunger to soar”<sup>186</sup>—and its adverse effects would be borne by women and children who make up the majority of the program’s participants. In response, the Administration defended the proposal as a cost saving device—but its cost estimates did not include shipping door-to-door for all recipients or the health deficits from a lack of fresh fruit and vegetables.<sup>187</sup> Moreover, in calculating costs, the Administration simply ignored the positive effects of SNAP on the communities in which poor women live; the program bolsters retail store sales and improves

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179. See U.S. DEP’T OF AGRIC., REACHING THOSE IN NEED: HOW EFFECTIVE IS THE FOOD STAMP PROGRAM? (Jan. 12, 2018), <https://fns-prod.azureedge.net/sites/default/files/ops/howefsum.pdf> (reporting data); see also SNAP MATTERS: HOW FOOD STAMPS AFFECT HEALTH AND WELL-BEING 68 (Judith Bartfeld, Craig Gundersen, Anthony M. Smeeding & James P. Ziliak eds., 2016) (stating that data show that SNAP is “the most effective antipoverty program among the nonelderly”).

180. U.S. DEP’T OF AGRIC., REPORT NO. SNAP-16-CHAR, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2015, at xvi (2016).

181. Sasha Abramsky, “America’s Harvest Box” Captures the Trumpian Attitude Toward Poverty, NEW YORKER (Feb. 14, 2018), <https://www.newyorker.com/business/currency/americas-harvest-box-captures-the-trumpian-attitude-toward-poverty>.

182. See Erica Hunzinger et al., *Trump Administration Wants To Decide What Food SNAP Recipients Will Get*, NPR (Feb. 12, 2018), <https://www.npr.org/sections/thesalt/2018/02/12/585130274/trump-administration-wants-to-decide-what-food-snap-recipients-will-get>.

183. See GREGORY ACS, LAURA WHEATON & ELAINE WAXMAN, URB. INST., ASSESSING CHANGES TO SNAP WORK REQUIREMENTS IN THE 2018 FARM BILL (2018).

184. Sidney Fussell, *Trump’s Insulting Food Stamps Plan Is Nothing Like Blue Apron*, GIZMODO (Feb. 13, 2018), <https://gizmodo.com/trumps-insulting-food-stamps-plan-is-nothing-like-blue-1822968283>.

185. Miles Howard, *You Can’t Eat That: Trump’s Paternalistic Approach to Food Assistance*, WBUR (Feb. 14, 2018), <http://www.wbur.org/cognoscenti/2018/02/14/food-stamps-miles-howard>.

186. Dan Lesser, *President Trump’s “Harvest Box” Plan Will Cause Hunger to Soar*, SHRIVER CTR. (Mar. 9, 2018), <https://theshriverbrief.org/president-trumps-harvest-box-plan-will-cause-hunger-to-soar-2811eb2f93d8>.

187. See Helena Bottemiller Evich, *Trump Pitches Plan to Replace Food Stamps with Food Boxes*, POLITICO (Feb. 12, 2018), <https://www.politico.com/story/2018/02/12/food-stamps-trump-administration-343245>.

nutrition for non-SNAP recipients, because participating grocery stores stock healthier foods.<sup>188</sup> So far, the business community, advocates, and government officials have responded negatively to the “harvest box” proposal,<sup>189</sup> and the Administration has acknowledged that the plan has virtually “no chance” of being implemented.<sup>190</sup> But what the proposal does signal is the Administration’s desire to reduce benefits for the poor—adversely affecting many women—and to impose work restrictions that would exacerbate the existing adverse gendered pattern of employment.

*Education:* Women relative to men disproportionately rely on loans to finance higher education; however, women generally earn less than men after graduation, and their default rates are higher.<sup>191</sup> The scale of the problem is deep and pervasive.<sup>192</sup> With 44 million borrowers and \$1.3 trillion in outstanding loans, women hold two-thirds of that debt,<sup>193</sup> and Black women carry the most student debt.<sup>194</sup> Some loans are made directly by the federal government; other loans are made by private creditors. Federal loans issued before 2010 through the Federal Family Education Loan Program are administered by private entities known as

188. Phil Lempert, *USDA’s America’s Harvest Box Is A Terrible Idea For All*, FORBES (Feb. 23, 2018), <https://www.forbes.com/sites/phillempert/2018/02/23/ag-secretary-sonny-perdue-its-time-to-think-and-ask-others-about-snap-before-you-say-anything/#36c169ab485a> (reporting that 13 to 30% of local grocery store sales come from SNAP recipients).

189. See Elizabeth Crawford, *Proposed Changes to SNAP Benefits Could Halve How Much Recipients Spend at Participating Retailers*, FOOD (Feb. 13, 2018), <https://www.foodnavigator-usa.com/Article/2018/02/13/Proposed-changes-to-SNAP-benefits-could-halve-how-much-recipients-spend-at-participating-retailers#>.

190. Glenn Thrush, *Trump’s “Harvest Box” Isn’t Viable in SNAP Overhaul, Officials Say*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/us/harvest-box-snap-food-stamps.html>; see also Matthew Diller & Susan Welber, *Why Congress May Shut Down Trump’s War on the Poor*, CNN (Sept. 7, 2018) (reporting “pushback” in Congress on work requirements, but noting that a “new War on the Poor” has begun).

191. Amy Martyn, *Women Bear Disproportionate Burden of Student Debt Crisis, Report Finds*, CONSUMER AFF. (June 6, 2018), <https://www.consumeraffairs.com/news/women-bear-disproportionate-burden-of-student-debt-crisis-report-finds-060618.html>.

192. Judith Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse than We Thought*, BROOKINGS (Jan. 11, 2018) (reporting that cumulative default rates continue to rise, and that 40% of borrowers may default by 2023).

193. See AM. ASS’N OF UNIV. WOMEN, *DEEPER IN DEBT: WOMEN AND STUDENT LOANS* (May 2017), [https://www.aauw.org/files/2017/05/DeeperInDebt\\_ExecutiveSummary-nsa.pdf](https://www.aauw.org/files/2017/05/DeeperInDebt_ExecutiveSummary-nsa.pdf).

194. Paula Rogo, *Study Finds that Black Women Graduate with the Most Student Loan Debt*, ESSENCE (July 11, 2018), <https://www.essence.com/news/study-black-women-most-student-loan-debt/>.

guaranty agencies, and during the Obama Administration these agencies were barred from imposing collection fees on debtors who respond to a default notice within 60 days and enter into and abide by a repayment agreement.<sup>195</sup> The Department of Education in March 2017 rescinded the no-fee rule,<sup>196</sup> a change that negatively impacts almost seven million debtors.<sup>197</sup>

At the same time, the Trump Department of Education has taken steps to protect for-profit proprietary schools against claims by students for misrepresentation and contractual breach.<sup>198</sup> For-profit schools overall have lower student enrollment than other colleges and universities, but they disproportionately recruit, attract, and enroll women, people of color, and persons with limited income. Their higher tuition, inferior academic programs, and lower placement rate thus disproportionately affect women of color, who graduate with higher levels of debt.<sup>199</sup> Among its rollbacks, the Education Secretary rescinded an Obama Administration rule that would have forgiven loans of debtors who were enrolled at schools that violated state requirements or misrepresented job and other metrics to students.<sup>200</sup> Indeed, the Administration put the fox in charge of the hen house, appointing

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195. Kaitlin Mulhere, *The Feds Just Rolled Back a Rule Protecting You from Overzealous Student Debt Collectors*, MONEY (Mar. 17, 2017), <http://time.com/money/4705199/student-debt-default-collection-fees/>.

196. LYNN B. MAHAFFIE, ACTING ASSISTANT SEC'Y, OFFICE OF POSTSECONDARY EDUC., GEN-17-02, DEAR COLLEAGUE LETTER: WITHDRAWAL OF DEAR COLLEAGUE LETTER (DCL) 15-14 (Mar. 16, 2017), <https://ifap.ed.gov/dpclletters/attachments/GEN1702.pdf>.

197. Danielle Douglas-Gabriel, *Trump Administration Rolls Back Protections for People in Default on Student Loans*, WASH. POST (Mar. 17, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/03/17/trump-administration-rolls-back-protections-for-people-in-default-on-student-loans/?utm\\_term=.dc223534e86a](https://www.washingtonpost.com/news/grade-point/wp/2017/03/17/trump-administration-rolls-back-protections-for-people-in-default-on-student-loans/?utm_term=.dc223534e86a).

198. See Patricia Cohen, *For-Profit Schools, an Obama Target, See New Day Under Trump*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/business/for-profit-education-trump-devos.html>.

199. *Women's Student Debt Crisis in the United States*, AAUW, <https://www.aauw.org/research/dceper-in-debt/> (last updated May 2018).

200. See Laura Meckler & Danielle Douglas-Gabriel, *Trump Administration Moves to Make It Harder for Defrauded Students to Erase Debt*, CHI. TRIB. (July 25, 2018), <http://www.chicagotribune.com/news/nationworld/ct-devos-student-debt-20180725-story.html>. Eighteen states and the District of Columbia challenged the Department's decision, which the district court in the District of Columbia enjoined as arbitrary and capricious. See *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018).

a former for-profit college official to head the Department of Education's anti-fraud initiative.<sup>201</sup>

### C. REDUCING ACCESS TO HEALTH CARE AND IMPEDING REPRODUCTIVE CHOICE

The politically polarized disputes about health care, funding for reproductive services, and abortion are complex, deep seated, and predate the Trump Administration.<sup>202</sup> What is clear is that the Affordable Care Act provided Trump as a candidate and as President with a large target for attack. Trump's opposition to President Obama's signature legislative achievement was loud and visceral. He quickly announced a plan to repeal the statute, replace the statute, eliminate the statute, or let the statute "crash & burn."<sup>203</sup>

The Affordable Care Act facilitates the ability of women to obtain health insurance by lowering the costs of coverage.<sup>204</sup> The statute also improves the range and quality of care, recognizing the need for preventive care, including mammograms, "well-women" visits, breastfeeding support, and contraception.<sup>205</sup> Moreover, it explicitly bars the denial of coverage because of preexisting "woman's" conditions such as breast cancer or pregnancy.<sup>206</sup> The Administration has tried to weaken or damage

201. See Michael Stratford, *Trump and DeVos Fuel a For-Profit College Comeback*, POLITICO (Aug. 31, 2017), <https://www.politico.com/story/2017/08/31/devos-trump-for-profit-college-education-242193>.

202. For one perspective, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 373 (2007).

203. David A. Graham, "As I Have Always Said": *Trump's Ever-Changing Positions on Health Care*, ATLANTIC (July 28, 2017), <https://www.theatlantic.com/politics/archive/2017/07/as-i-have-always-said-trumps-ever-changing-position-on-health-care/535293/>.

204. See Jamila Taylor, *How Women Would Be Hurt by ACA Repeal and Defunding of Planned Parenthood*, CTR. FOR AM. PROGRESS (Jan. 18, 2017), <https://www.americanprogress.org/issues/women/news/2017/01/18/296705/how-women-would-be-hurt-by-aca-repeal-and-defunding-of-planned-parenthood/> (reporting that 9.5 million previously uninsured women gained coverage through the ACA).

205. See Joseph Denker et al., *Health Care Access: Access After Health Care Reform*, 18 GEO. J. GENDER & L. 599, 617–32 (2017) (discussing ACA provisions pertinent to women).

206. See Munira Z. Gunja et al., *How the Affordable Care Act Has Helped Women Gain Insurance and Improved Their Ability to Get Health Care: Findings from the Commonwealth Fund Biennial Health Insurance Survey, 2016*, COMMONWEALTH FUND (Aug. 10, 2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/how-affordable-care-act-has-helped-women-gain-insurance-and-reporting>:

To insurers, women's gender was, in effect, a preexisting condition that signaled the potential for higher health care use and higher costs. That is why in most

the statute in a number of ways. Significantly, the Administration declined to defend the statute against challenges brought by Texas and other states;<sup>207</sup> the President insisted that tax reform, by eliminating the individual mandate, effectively repealed the statute;<sup>208</sup> and agency regulations extended an exemption for religiously-motivated employers to withhold contraception from workplace coverage.<sup>209</sup>

The President's actions and attitudes leave many women vulnerable to inadequate health care because of financial barriers, preexisting medical conditions, and restrictions on contraception and necessary preventive screenings. Moreover, the assault on the Affordable Care Act is only one feature of a broader agenda that undermines women's autonomy by removing access to reproductive choice and basic health care. The President has proposed defunding Planned Parenthood<sup>210</sup> and making budget cuts to the WIC program;<sup>211</sup> the White House opposed a global

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states insurers selling plans in the individual market charged young women higher premiums than young men—to protect themselves from this greater risk. The U.S. Government Accountability Office found in 2013 that in 38 states, individual-market plans with the lowest premiums charged a nonsmoking 30-year-old single woman a higher premium than they charged her male counterpart.

207. See Amy Goldstein, *Trump Administration Won't Defend Obamacare in Case Brought by Texas and Other GOP States*, TEX. TRIB. (June 8, 2018), <https://www.texastribunc.org/2018/06/08/trump-administration-wont-defend-obamacare-case-brought-texas-and-othel/>; see also Nate Raymond, *Four U.S. Cities Sue Over Trump's "Sabotage" of Obamacare*, REUTERS (Aug. 2, 2018) (quoting from complaint).

208. See Brian Bennett, "We have essentially repealed Obamacare," *Trump Says After Tax Bill Passes*, L.A. TIMES (Dec. 20, 2017), <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-trump-sees-an-end-to-obamacare-in-the-1513794883-htmlstory.html>.

209. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).

210. See Julie Rovner, *What Does Trump's Proposal to Cut Planned Parenthood Funds Mean?*, NPR (May 18, 2018), <https://www.npr.org/sections/health-shots/2018/05/18/612445385/what-does-trumps-proposal-to-cut-planned-parenthood-funds-mean>. Planned Parenthood serves 41% of all Title X patients. Seventy-eight percent of Title X patients have incomes below 150% of the federal poverty level. Twenty-one percent of Title X patients identify as Black or African American and 32% identify as Hispanic or Latino. *Title X: The Nation's Program for Affordable Birth Control and Reproductive Health Care*, PLANNED PARENTHOOD, [https://www.plannedparenthood.org/issues/health-care-equity/title-x?\\_ga=2.204435540.537288164.1531663434-2127331114.1530327070](https://www.plannedparenthood.org/issues/health-care-equity/title-x?_ga=2.204435540.537288164.1531663434-2127331114.1530327070).

211. See *Washington Update: Trump FY 2019 Budget Requests Funding for WIC to "Serve All Projected Participants"*, NAT'L WIC ASS'N (Feb. 12, 2018), <https://www.nwica.org/blog/washington-update-trump-fy-2019-budget-requests-funding-for-wic-to-serve-all-projected-participants#.W2IOcLgPCM8> (reporting proposed budget

resolution in favor of breast feeding of infants;<sup>212</sup> and the Administration has imposed work requirements on Medicaid recipients that do little to improve employability and seem calculated to block eligible persons from benefits and services that they need to survive.<sup>213</sup> These actions, as commentators have emphasized, already have harmed or “will directly harm millions of poor Americans”—especially, women and women of color—and, “in the worst cases, the results include mass-scale preventable deaths.”<sup>214</sup> They threaten to dismantle the public health infrastructure, and to withhold critical medicines by making them unaffordable.<sup>215</sup> Above all, as discussed later, President Trump has made plain his opposition to reproductive rights and has succeeded in his goal of appointing Justices to the Supreme Court who apparently do not accept the precedential integrity of *Roe v. Wade*.<sup>216</sup>

### III. FEDERAL COURTS, FEDERAL PROCEDURE, AND GENDER NORMS

So far we have shown that even before Trump’s election, certain structural features of the American economy—authorized, maintained, and enforced through law—placed women in subordinate social and economic positions. Trump’s

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cuts for the evaluation and monitoring of breastfeeding programs consistent with the Administration’s “broader attempts to limit funding for scientific research”).

212. See Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html?login=email&auth=login-email>.

213. See Robert Pear, *Advisers Sound an Alarm After Thousands Are Dropped from Medicaid*, N.Y. TIMES, Sept. 15, 2018, at A15 (reporting that work requirements resulted in the loss of benefits for 4,350 low-income people in Arkansas).

214. Michelle Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1275 (2018).

215. See Lauric Garrett, *Trump’s Battle Against Breastfeeding Is a Small Part of a Wider War*, FOREIGN POL’Y (July 16, 2018), <https://foreignpolicy.com/2018/07/16/trumps-battle-against-breastfeeding-is-a-small-part-of-a-bigger-war/> (“With escalating drug prices and growing vaccine paranoia, American populism is taking down the edifice of global public health.”).

216. See Tucker Higgins, *In Leaked Email, Supreme Court Nominee Brett Kavanaugh Challenged Roe v. Wade Precedent, and Said “Court Can Always Overrule,”* CNBC (Sept. 6, 2018), <https://www.cnbc.com/2018/09/06/scotus-nom-brett-kavanaugh-challenged-roe-v-wade-precedent-said-court-can-always-overrule.html>; see also Jon Swaine, *The Anti-Abortion Conservative Quietly Guiding Trump’s Supreme Court Pick*, GUARDIAN (July 6, 2018), <https://www.theguardian.com/law/2018/jul/06/leonard-leo-supreme-court-replacement-trump-justice-nomination-abortion> (referring to efforts to “create the court’s first dependable conservative majority in half a century” that will “outlaw abortion”).

policies can be expected to exacerbate these effects. Our question in this part is whether and how a growing women's resistance will affect legal doctrine involving equality, liberty, and dignity. Given that focus, one might expect the discussion to turn to the Supreme Court and to theories of constitutional interpretation. Instead, we shift attention to the lower federal courts and to the ways in which the rules of civil procedure, traditionally the guardian of rights and liberties, shape, channel, and—in our view—potentially obstruct dialogue between “social movements” and Article III courts in ways that are subversive of constitutional aspiration.

Our starting point treats civil litigation as a public good that contributes to a common base of knowledge<sup>217</sup> and constructs a shared narrative framework for what members of a polity “take for granted” or what “goes without saying.”<sup>218</sup> In this sense, judicial decisions potentially ratify, entrench, interrogate, or reorient existing norms.<sup>219</sup> As we show, the procedural decisions of federal courts—enforcing confidentiality agreements, dismissing discrimination complaints before discovery, characterizing degrading working conditions as not evidence of sexual harassment, and refusing to acknowledge the collective nature of gendered workplace conditions—have sent false signals to the public about women's issues. These practices, unabated, potentially could blunt the transformative significance of the social movement of which #MeToo and Time's Up are a part by blocking or distorting the information they otherwise would contribute to constitutional culture.

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217. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 541–42 (2011) (discussing information effects of litigation).

218. For example, Professor Charles L. Black, Jr. described it as “common knowledge” that racial segregation was intended to discriminate against African Americans and to render them politically and socially powerless. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (“Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.”); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD L. REV. 317, 363 (1987) (discussing Black's view of “common knowledge” as cultural fact).

219. See, e.g., Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2010) (rejecting the reflectionist thesis of constitutional interpretation and arguing that courts can provide or withhold adjudicative space from competing arguments that reframe social practices).



## A. COURTS AS INFORMATION GENERATORS

Federal judges play an educative role in American politics; like all judges, as Judge Frank H. Easterbrook succinctly put it, they directly or indirectly “influence conduct.”<sup>220</sup> Some examples of judicial influence are obvious: courts impose judgments that deter behavior, they sentence the convicted and offer lessons about punishment and rehabilitation, and they write decisions that justify imposing liability for actions or leaving the injured without remedy. Social movements potentially disrupt or support these judicial messages, offering information that questions or reframes doctrinal narratives or overcomes professional biases.<sup>221</sup> Outside the courthouse, social media can amplify a group’s political message and encourage legal engagement, translating injuries into claims.<sup>222</sup> Within the courthouse, rules of civil procedure—crucial to determining who wins and who loses—constitute the micro-pathways through which claimants communicate information about social problems, individual situations, and public attitudes. As Professor Karl N. Llewellyn famously said, “[P]rocedural regulations are the door, and the only door, to make real what is laid down by substantive law.”<sup>223</sup> The rules authorize such activities as the filing of a complaint, access to the discovery process, and public trials. The availability of these procedures does not mean that the opportunities they provide are available to all litigants. Rather, courts have discretion in how they apply procedural rules, and these procedural decisions significantly impact the flow of information to and from the court, as well as the credibility and salience of a mobilized group.<sup>224</sup> To the extent that common law development

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220. Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COLO. L. REV. 773, 774 (1990). See generally Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

221. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1556 (2017). Social movements also can be engines of conservative goals. See DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

222. See Stacy B. Steinberg, #*Advocacy: Social Media Activism’s Power to Transform Law*, 105 KY. L.J. 413 (2017) (describing relation between activism and social media); see also Jessica Campisi & Saeed Ahmed, *Anita Hill on #MeToo: “I Didn’t Have a Hashtag,”* CNN (June 11, 2018), <https://www.cnn.com/2018/06/11/us/anita-hill-hashtag-metoo-trnd/index.html>.

223. LLEWELLYN, *supra* note 45, at 19.

224. See Scott L. Cummings, *Law and Social Movements: An Interdisciplinary Analysis*, in *HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES* 233, 263 (Conny Roggeband & Bert Klandermans eds., 2017) (“[T]he idea that law is relatively ineffective

has been likened to a chain novel,<sup>225</sup> rules of procedure may block a social movement's new or revised chapter from entering the system or from becoming a part of the collective record.<sup>226</sup>

## B. PROCEDURAL RULES AND WOMEN'S EXPERIENCE

In this Part, we examine how the federal judiciary's application of procedural rules involving arbitration, motions to dismiss, summary judgment, and class actions has slowly but persistently removed various of women's experiences from the judicial record. We look primarily at district court and, in some instances, appellate court decisions. Common law decisions typically rely on facts drawn from the parties and from information obtained through the discovery process; as we show, federal courts increasingly have relied on their own unstated assumptions about women's experiences—assumptions that, in some cases, may camouflage impermissible stereotypes about gender roles.<sup>227</sup> In this sense, the judiciary's use of procedure has been “jurispathic,” in the sense of blocking women from contributing to public knowledge and from influencing constitutional understanding.<sup>228</sup>

### 1. Arbitration and Confidentiality Agreements

Current activism has made public the widespread use and judicial endorsement of two kinds of contractual agreements that

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in shaping opinion in positive ways is . . . empirically contested.”). The literature largely has focused on the role of the Supreme Court. *See, e.g.*, James W. Stoutenborough, Donald P. Haider-Markel & Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419 (2006) (finding a conditional effect of Court decisions on public opinion that supports the legitimization hypothesis and structural effects model). For an application of this view with respect to court-involved educational reform, see William H. Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 YALE L.J. 763, 779 (1984) (“Courts can help a minority group if it is not too minor.”).

225. *See* RONALD DWORKIN, *LAW'S EMPIRE* 228–38 (1986).

226. Eskridge, *supra* note 37, at 2065 (arguing that identity-based social movements “brought constitutional litigation that required the Court to apply old constitutional texts and precedents to new circumstances, not just in a single case, but in a string of cases that ran like a chain novel whose audience shifted in the course of narration”).

227. *Cf.* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 83 (2018) (describing sexual harassment as “gender policing” and reporting that many cases about sexual harassment are “[s]cant on facts”); *see generally* Jason R. Bent, *P-Values, Priors, and Procedure in Antidiscrimination Law*, 63 BUFF. L. REV. 85 (2015) (defining priors as “unstated assumptions” about the world).

228. *See* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 39 (1983) (discussing the jurispathic role of courts).

suppress information about workplace conditions and hide women's exposure to sexual misconduct: mandatory arbitration clauses and confidentiality agreements.<sup>229</sup> Trump, both before and after he entered the White House, was no stranger to these provisions, which he used to silence employees—including government employees—and sex partners.<sup>230</sup> These devices were no secret among lawyers, academics, and the courts, and they were criticized—as Professor Minna Kotkin extensively has explained—for making gender discrimination invisible, “lending credence to claims that discrimination in the workplace largely has been eradicated.”<sup>231</sup> Arbitration clauses that contract around federal statutes, or bar the use of class-wide remedies, compound the problem by putting circles of private life outside public protection and threatening to make the workplace a law-free zone.<sup>232</sup>

The autonomy argument in favor of contractual solutions is that they enable the participants to engage in a form of self-governance. No doubt there are important privacy interests at stake in employment discrimination suits and especially those that allege sexual harassment and other forms of predatory conduct.<sup>233</sup> Women subject to such abuse may prefer not to expose

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229. See *Shut Out by the Small Print*, *ECONOMIST*, Jan. 27, 2018, at 10 (reporting that more than half of non-unionized private employees are subject to mandatory-arbitration agreements, and that in the early 1990s, only 2% were covered).

230. Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, *NEW YORKER* (March 30, 2018), <https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement> (discussing Trump's use of nondisclosure agreements with sex partners); *Let's Not Make a Deal*, *ECONOMIST*, Mar. 24, 2018, at 22 (discussing Trump's draft non-disclosure agreement for federal employees, and observing that the contracts “are probably both unenforceable and unconstitutional”).

231. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 *N.C. L. REV.* 927, 927 (2006).

232. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052 (2015); see also Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 *U. ILL. L. REV.* 371.

233. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *HARV. L. REV.* 427, 465 (1991) (“A legal system that does not recognize the right to keep private matters private raises images of an Orwellian society in which Big Brother knows all.”). In other contexts, courts have been able to balance the privacy interests associated with the disclosure of ethical violations with the public's context-specific need to know the information. See, e.g., *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51 (D.C. Cir. 2018) (records of alleged ethical violations of assistant U.S. Attorney, although related to criminal case, was not automatically exempt from FOIA disclosure as law-enforcement records).

themselves to public scrutiny.<sup>234</sup> Pragmatically, some argue that wrongdoers are likely not to settle a sexual harassment claim without a secrecy clause, which would push women into unreceptive courthouses or cause them to retreat into silence. But the costs to society of such mechanisms are high: the public has a distorted sense of the incidence of the problem, predators are left on the loose to prey on other workers, and financial stakeholders—whether shareholders, equity holders, taxpayers, or insurance rate payers—foot the bill for the initial settlement and recidivist settlements.<sup>235</sup>

For centuries, women have been relegated to private spaces within the family, excluded from political participation, and exiled from the protection of public law. Professor Reva Siegel has shown that legal reform paradoxically may preserve status quo norms by transforming them “into a more contemporary, and less controversial, social idiom.”<sup>236</sup> Thus, she explained, the rule of chastisement, which protected the husband’s prerogative to use corporal punishment on his wife, persisted for many years in the new form of spousal battery, protected by the shield of marital privacy. Although the rationale and rhetoric have changed, the use of secret arbitral tribunals and confidentiality agreements creates a similar subordinating dynamic: withholding public regulatory protections from women who are relegated to a separate, private sphere in which the rules of the dominant gender govern.<sup>237</sup> Dominance comes not only from the social status accorded maleness, but also from the economic status typically enjoyed by the harasser—described by Professor Rachel Arnow-

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234. See Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018) (reporting statement of plaintiff’s lawyer that confidentiality for some clients is “alluring” and that they do not want details of their experience exposed through Google).

235. A proposed “intermediate reform” seeks to harvest the benefits of these agreements while limiting the “shielding of serial offenders.” See Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN L. REV. ONLINE 76, 78 (2018).

236. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

237. Cf. Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 TEX. J. WOMEN & L. 1, 7 (2000) (“Women have reason to be concerned about process, because they historically have been excluded from the public realm, which designs the procedural systems that govern their lives.”).

Richman as a “top dog,” protected contractually from the at-will regime that most workers endure.<sup>238</sup>

#MeToo has mobilized public attention on the role of arbitration and confidentiality agreements in shielding sexual harassers from view. It further spotlighted the fact that the Article III courts were no exceptions from this practice. By design or omission the federal courts likewise had wrapped judicial sexual misconduct in a cloak of confidentiality. In particular, the employment agreements of judicial clerks and other court personnel contained confidentiality provisions that could be understood to bar or at least to discourage victims from reporting inappropriate behavior; inappropriate behavior was not defined explicitly to include sexual misconduct; and information about the judiciary’s Employment Dispute Resolution Plan was not publicized, was difficult to locate, and restricted the filing of a complaint to a 30-day limitations period. Moreover, the judiciary did not segregate sexual misconduct complaints from aggregate data about workplace complaints against judges.<sup>239</sup>

The public conversation about sexual harassment, confidentiality, and the federal courts shifted when former judicial clerks made public in 2017 that Judge Alex Kozinski of the Ninth Circuit Court of Appeals allegedly subjected female (and sometimes male) clerks to coarse humor, lewd suggestions, and pornographic photos.<sup>240</sup> Rather than defend against the

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238. Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 92 (2018) (calling for the adoption of a “proportionate discipline protocol” for low-level workers accused of sexual harassment).

239. See REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018). For a retired judge’s views of the judiciary’s process and proposals to reform it, see Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88 (2018).

240. Heidi Bond, who clerked for Judge Kozinski from 2006 to 2007, alleged that the judge “called her into his office several times and pulled up pornography on his computer, asking if she thought it was photoshopped or if it aroused her sexually.” Matt Zaposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763c2b8-d913-11e7-a841-2066faf731cf\\_story.html?utm\\_term=.fbfc81376c5b](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763c2b8-d913-11e7-a841-2066faf731cf_story.html?utm_term=.fbfc81376c5b). Bond is one of six women—all former clerks or externs—who alleged that Judge Kozinski acted in sexually inappropriate ways towards them. *Id.* Nine more women came forward, including a law student, clerk, lawyer, law professor, and a former U.S. Court of Federal Claims judge. See Matt Zaposky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), <https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed->

charges in an internal proceeding, Judge Kozinski abruptly resigned.<sup>241</sup> In response to Judge Kozinski's resignation, the Chief Justice of the Supreme Court of the United States set up a Working Group to assess the sufficiency of safeguards within the Article III courts to protect court employees and judicial clerks from inappropriate conduct.<sup>242</sup> The report acknowledged that confidentiality provisions in employment agreements may have created disincentives for reporting inappropriate conduct; it recognized that judicial clerks and court personnel are in a subordinate position relative to life tenured judges that further discourages women from pressing their concerns; and it criticized the 30-day period for filing charges as too short.<sup>243</sup> The report's recommendations and reforms are important and commendable.<sup>244</sup> However, until this point, procedural rules made it seem as if all was well for women within the judicial workplace—a narrative that erased women's actual experiences from the public record.

## 2. Pretrial Claim Termination Under Federal Rule 12(b)(6)

Long before #MeToo, some judges and academics (including one of these authors) drew attention to the effect of "*Twiqbal*" on civil rights lawsuits involving gender discrimination and other claims that affect women's position in the workplace.<sup>245</sup> *Twiqbal* is the short hand name for the Supreme Court's pair of cases that radically shifted the standard for assessing the sufficiency of a claim under Federal Rule 12(b)(6).<sup>246</sup> Jettisoning the long-

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them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c\_story.html?noredirect=on&utm\_term=.cab11eb9cc48.

241. See Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

242. REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, *supra* note 239. The Federal Judiciary Workplace Conduct Working Group was formed on January 12, 2018, with the goal of ensuring "an exemplary workplace for every judge and every court employee." *Id.* at 1. The Working Group, chaired by the Director of the Administrative Office of the United States Courts, was comprised of eight federal judges and court administrators. *Id.* at 1–2.

243. *Id.* at 20–40.

244. See James C. Duff, *The Federal Judiciary Workplace Conduct Working Group*, 57 NO. 4 JUDGES' J. 8 (Fall 2018) (discussing reforms).

245. Elizabeth M. Schneider & Hon. Nancy Gertner, "*Only Procedural*": *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 776 (2012/2013) (discussing the substantive implications of motions to dismiss on gender claims).

246. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

accepted standard of notice pleading,<sup>247</sup> the Court directed the district courts to dismiss a complaint that does not plausibly state a claim, and to make that assessment prior to discovery, informed by “judicial experience and common sense.”<sup>248</sup> Although the empirical evidence on overall case effects remains contested,<sup>249</sup> there is a growing consensus that the plausibility standard has produced a higher rate of pretrial dismissal of civil rights claims.<sup>250</sup> Concerns of efficiency and fairness may argue for early termination of lawsuits that are so preposterous as to have a near-zero likelihood of success.<sup>251</sup> However, there is no evidence that women’s complaints are more likely than others to be filed for their nuisance value or an easy settlement.<sup>252</sup> Indeed, the number of discrimination case-filings had decreased significantly even prior to *Twiqbal*, suggesting that litigators make rational decisions

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247. See *Conley v. Gibson*, 355 U.S. 41 (1957).

248. *Ashcroft*, 556 U.S. at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) (Newman, J.)).

249. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013). The Federal Judicial Center’s 2011 report showed that in 2010, claims were dismissed in whole or in part in 70% of employment discrimination cases and 75% of all cases examined, excluding prisoner and pro se cases, and that in 2006, 67.4% of employment discrimination cases and 65.9% of all cases examined were dismissed. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), [http://www.uscourts.gov/sites/default/files/motioniqbal\\_1.pdf](http://www.uscourts.gov/sites/default/files/motioniqbal_1.pdf).

250. See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017); see also Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329 (2014) (reporting higher rates of dismissal of Rule 12(b)(6) claims, and especially by white male judges appointed by Republican Presidents); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) (examining rates of dismissal before and after *Twombly* and *Iqbal* and finding that the rates of dismissal involving constitutional civil rights claims increased from *Conley* (50%) to *Twombly* (55%) and *Iqbal* (60%)); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) (based on a subset from full years 2006 and 2010, finding in 2010 66% of civil rights cases were dismissed, 52% of employment discrimination cases, and 41% of contract claims).

251. Compare Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014) (ascribing social value to meritless cases), with Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 81 (2007) (arguing that litigation should be allowed to go forward, at least in antitrust suits, “only when the likelihood of a positive case is high enough to justify . . . the enormous costs of discovery”).

252. For a discussion of the gap between perception and reality on this topic, see Kotkin, *supra* note 231, at 931.

about the likelihood of a successful suit before undertaking the costs of representation.<sup>253</sup>

*Twiqbal* requires the district court to accept the truth of the facts that are alleged in the complaint, but to ignore allegations that are merely conclusory or legal conclusions in disguise.<sup>254</sup> Given the porous boundary between law and fact, the standard gives the judge a great deal of discretion when deciding the motion.<sup>255</sup> Dismissing the complaint significantly affects the flow and quality of information about women's experiences—to the plaintiff, to the court, and to the public—in two inter-related ways. First, dismissal cuts off plaintiff's access to facts specific to the events at issue in the lawsuit, called adjudicative facts (the "who-what-where-when-and-what" of the complaint).<sup>256</sup> Second,

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253. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009) (reporting case filing data).

254. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 830 (2010) (stating *Twiqbal* test).

255. In some of these decisions, the court credits the woman's factual allegations, in the sense of accepting them to be true, but declines to find the illicit conduct sufficiently pervasive or severe to warrant sanction under Title VII. We offer three examples to illustrate judicial inferences that, in our view, rely upon unstated but questionable forms of common sense:

Example 1: Plaintiff alleged that her employer called her "Is," which she and her co-workers understood to mean "ignorant slut." Other employees kept notepads with plaintiff's proper name and "Is" written on them. The court acknowledged that the name-calling was directed at plaintiff because of her gender, but that the complaint did not plausibly state a claim for sexual harassment because the conduct was "not so severe or pervasive as to have altered the conditions of her employment." *Walters v. MedBest Med. Mgmt., Inc.*, No. 5:14-CV-0572 (LEK/ATB), 2015 WL 860759, at \*7 (N.D.N.Y. Feb. 27, 2015).

Example 2: Plaintiff, a deputy sheriff jailor, alleged that she was compelled to watch live sex in the workplace—a female visitor masturbating in front of a male inmate's cell—while her male co-workers called out offensive statements. The court held that the complaint did not show that comments were made "because of" plaintiff's gender and that a Title VII claim was not plausibly alleged. *Kleehammer v. Monroe Cty.*, 743 F. Supp. 2d 175, 184 (W.D.N.Y. 2010).

Example 3: Plaintiff, an administrative specialist, alleged that the managing director stated at the office holiday party that "you won't sit on my lap and keep me warm" and "you are too young for me," and further that on another occasion an associate director "made inappropriate comments and grabbed her arm," and afterwards explained that he was joking. Plaintiff reported the incident to her supervisor who did not make a written report. Later the associate director was asked to resign. The court reasoned that although a single incident of rape would create an abusive work environment, the incident with the associate director—the only one credited as "described in detail"—did not rise to the requisite severity. *Milne v. Navigant Consulting*, No. 08 Civ. 8964 (NRB), 2009 WL 4437412 (S.D.N.Y. 2009).

256. The law of evidence defines adjudicative facts as "facts about the particular event which gave rise to the lawsuit and, like all adjudicative facts, they help[] explain who did



dismissal takes for granted the judge's world view of sexual relationships even when the matter is contested, stereotyped, or not supported by facts. A world view can include any fact that is not specific to the individual case. These facts can range from the assumption that March 1 always follows February 28, to the faith that markets act in rational ways, to the view that children are best raised in the comfort of a nuclear home. These facts straddle policy judgments, encompass normative assumptions, and reflect belief systems; they are first cousins to "legislative facts"<sup>257</sup> or "social facts"—"broader facts about society, the world, and institutional and human behavior."<sup>258</sup>

As to the facts specific to the case, cutting off plaintiff's access to discovery is of special importance in civil rights suits, which often turn on questions of intent, motivation, or comparative treatment—all of which are easy for defendant to conceal.<sup>259</sup> In the run of the mill case, a plaintiff in a sex discrimination case will not have access to many facts about her case because they are within defendant's exclusive custody; even private investigators will not be able to uncover such facts. As Professor Arthur R. Miller has explained:

Think about employment discrimination cases as an example. The plaintiff has been fired. One of the first rules of discharging someone is don't tell the employee why he or she is being fired. If facts must be pleaded to state a claim for discriminatory

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what, when, where, how, and with what motive and intent." KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 328 (7th ed. 2014); see also Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

257. See Davis, *supra* note 256, at 404, 402 (defining legislative facts as facts that "inform[] a court's legislative judgment on questions of law and policy," and contrasted with adjudicative facts concerning "what the parties did, what the circumstances were, what the background conditions were").

258. Kylie Burns, "In This Day and Age": *Social Facts, Common Sense and Cognition in Tort Law Judging in the United Kingdom*, 45 J.L. & SOC'Y 226, 227 (2018). The terms are to be distinguished from the facts that Congress considers when it enacts a statute, also called legislative facts. See, e.g., *Katzbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) ("To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."). Social fact in this context also differs from social-fact testimony that is specific to a case. See Annika L. Jones, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1231 (2017) (defining social fact within the framework of social framework theory).

259. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1161 (discussing the role of motive in employment discrimination suits and stating that "[m]otives can be concealed or fabricated").

discharge or failure to promote or some other nefarious practice, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct let alone a pattern of discrimination—whether it’s race, gender, age, or disability—without access to the history of the employer’s conduct regarding other employees? A look at the statistics of employment discrimination cases shows that in some parts of the nation they are not being instituted anymore.<sup>260</sup>

By terminating a gender claim at the motion to dismiss stage, the court prevents the plaintiff from moving to discovery and marshalling information needed to make out the claim—and to present information in a public space that potentially informs public opinion about workplace and other situations that affect women’s rights.<sup>261</sup> Instead, the public remains in the dark about the details of the incident; one more decision finding a woman’s claim to be implausible is added to the pile that makes it seem as if gendered misconduct did not occur.

*Twiqbal* also impacts the construction of social facts—the ways in which the public frames its understanding of events in the world<sup>262</sup>—by shaping them according to the judge’s judicial experience and common sense. To be sure, there is nothing new in a court’s looking to social facts on a Rule 12(b)(6) motion; when considering the common law demurrer, judges inevitably took account of the world as they thought it existed.<sup>263</sup> As Professor James B. Thayer stated in his 1898 treatise on evidence, “[i]n conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not

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260. Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 596–97 (2011).

261. Discovery material is not automatically available to the public, but becomes available when the parties file the material with the court. See Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006).

262. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987) (explaining that social frameworks provide “a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case,” and are different from both adjudicative facts and legislative facts).

263. See Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 288 (1944) (“Nothing is more common than reliance by a court upon judicially known facts in condemning or sustaining a pleading on demurrer.”); see also *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548–49 (1924) (Holmes, J.) (“[T]he court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law . . .”).

been proved.”<sup>264</sup> Indeed, it would be absurd for a court to jettison common-sense understandings from its legal determinations.<sup>265</sup> What is questionable, however, is the court’s reliance on self-referential common sense as a bar to certain kinds of women’s claims.<sup>266</sup>

The earliest references to experience and common sense in American reported decisions use those words unmodified by the word “judicial” — the common law judge was expected to consider what the jury thought about the world; the court was not the exclusive arbiter of social meaning.<sup>267</sup> As Judge Robert E. Keeton aptly put it: “A judge is obliged to apply not his or her own norms but the community’s norms, as developed in authoritative sources

264. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 279 (1898) (quoted in Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 949 (1955)); see *In re Asbestos Litig.*, 829 F.2d 1233, 1248 (3d Cir. 1987) (Becker, J., concurring) (“Common law courts could not fashion rules grounded in reality if they were obliged to proceed without aid of legislative facts.”).

265. See *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1327 (E.D.N.Y. 1981) (Weinstein, J.) (“The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution.”).

266. One study found that judges invoke the “common sense” gloss more than any other part of the *Twigg* test. See Colleen McNamara, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretation of Ashcroft v. Iqbal*, 105 N.W. U. L. REV. 401, 431 (2011). A different study, looking only at employment discrimination cases (including race and ethnicity as well as gender) found a higher rate of dismissal, but that lower courts were neither invoking the plausibility standard nor referring to their own experience and common sense as a basis for decision—suggesting, according to the author, “that the subjective elements of the plausibility standard, even if not being invoked explicitly, may be creeping into judicial decision-making nonetheless.” Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 286 (2011–2012). The author raised further questions:

Perhaps these findings raise more questions than they answer. Do they suggest that courts are ignoring the substance of the heightened pleading standard, yet interpreting *Twombly* and *Iqbal* as license to dismiss cases more readily? Does the nature of the standard leave judges with broad discretion to dismiss cases that do not comport with their “experience and common sense?”

*Id.* at 241.

267. *E.g.*, *Callahan v. Warne*, 40 Mo. 131, 136–37 (1867):

These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence, by reasoning in the ordinary way, according to the natural and proper relations of things, and consistently with the common sense and experience of mankind—1 Greenl. Ev., §§ 44, 48; *Smith v. Hann. & St. Jo. R. R. Co.*, 37 Mo., 292. A jury is not to be left or permitted to act or reason in any other way on such facts. Where it is plain that the jury could not find a verdict on the evidence offered without reasoning irrationally, against all ordinary common sense, and against all proper notions of justice and right, or against law, or without being influenced by undue sympathy, prejudice, gross mis-judgment or mistaken impression of the law and facts of the case, the court will declare, as a matter of law, that there is no competent evidence to be submitted to the jury.

. . . .”<sup>268</sup> Indeed, reliance on the jury’s sense of the world was the practice even in equity cases that did not invoke the civil jury right.<sup>269</sup> As many commentators have noted, *Twigbal* effectively shifts the jury’s authority to find the facts to the judge, who alone decides whether a factual allegation is to be accepted as true or ignored as conclusory or implausible.<sup>270</sup> This shift is particularly problematic in civil rights lawsuits where perspectives and frameworks may be freighted with stereotyped assumptions about gender roles and social practices.<sup>271</sup>

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268. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 38 (1988).

269. Memorandum from Allyson Scher to Professors Helen Hershkoff and Elizabeth M. Schneider on the Earliest Uses of the Terms Common Sense and Experience (on file with the authors); see, e.g., *Lee v. Beatty*, 38 Ky. 204, 212–13 (1839), discussing the chancery court’s referring “doubtful questions” to juries, and noting that the practice “is not confined to those cases where witnesses are to be introduced; but when the chancellor is perplexed with doubtful questions of fact, he may have the aid of a jury”:

The more satisfactory ascertainment of doubtful facts by extrinsic evidence, may frequently, perhaps generally, be one chief motive for summoning a jury in chancery. But the quotation from Maddock and the doctrines recognized in many adjudged cases show clearly, that this is not always the only object of the Chancellor, but that, not unfrequently, another end is to be effected by it; and that is, to satisfy the conscience of the Judge; give more confidence and satisfaction to the parties, and thus increase the chance for justice and content in a case perplexed by doubtful facts, which the common sense and experience of twelve intelligent jurors peculiarly qualify such a tribunal to decide correctly and satisfactorily.

See also *Oppenheim v. Wolf*, 3 Sand. Ch. 571, 576–77 (N.Y. Ch. 1846) (finding that “upon common sense and experience” the loss from a missing vessel “occurred within the longest usual duration of a voyage from the port of departure, to that of the ship’s destination; because a loss within that time is far more probable than that the vessel after becoming disabled, should have drifted about for any considerable period, at the mercy of the waves, without encountering some other vessel, or ultimately reaching the land”).

270. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 30 (2010) (“This process is uncomfortably close to a weighing of the evidence and an invasion of the jury’s domain, suggesting that the Court’s decisions represent a potentially significant change in the division of functions between judge and jury.”); see also Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 410 (1999) (discussing the role of the jury in making “normative judgments” in tort law and across the common law). On the distinction between lay sense and professional sense, see Dan M. Kahan, David Hoffman, Daniel Evans, Neal Devins, Eugene Lucci & Katherine Cheng, “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 434 (2016) (explaining the distinction and describing experimental results that “[d]id not furnish support . . . for the hypothesis that either the professional judgment characteristic of lawyers and judges or the experience of being a judge meaningfully counteracts identity-protective reasoning for out-of-domain judgments”).

271. See generally Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992).

As is broadly recognized, civil rights legislation aims to overcome cultural stereotypes which persist despite social reality.<sup>272</sup> Professor Vicki Schultz has explained, “Advancing workplace equality has meant taking on common sense assumptions about who ‘women’ are, what they want, and what they should do (while implicitly disputing parallel assumptions about men).”<sup>273</sup> The history of the Nineteenth Amendment, masterfully told by Professor Reva Siegel, well illustrates the role that “common sense” assumptions about women and the family played in political arguments about the franchise. In brief, at the beginning of the campaign, opponents of suffrage relied explicitly upon the “common sense” proposition that men adequately represented the interests of their wives in the public sphere. Economic activity, combined with social mobilization, altered the background assumptions that courts brought to bear on their decision making.<sup>274</sup> “[A]s women organized to contest traditional understandings of gender roles, common sense began to evolve. Discrimination based on sex came to seem unreasonable.”<sup>275</sup>

The literature for decades has warned against a mode of judicial decision making in which the court’s “unreflective ‘common sense’ ideas about ‘real’ differences between women and men outweigh actual evidence about the possibility of changing traditional sex roles and their associated behavior patterns.”<sup>276</sup> Some may argue that it is not practical to ask judges to be explicit in their decisions about implicit biases that are sub-

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272. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006) (discussing the inability of current anti-discrimination law to deal with unconscious bias, especially when coupled with flexible workplaces); see also Burns, *supra* note 258, at 227 (referring to social facts as “fertile ground for the introduction of cognitive bias into tort judging”).

273. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 999 (2015).

274. Siegel, *supra* note 33, at 997 (“It is important to observe what counts as common sense in this story: American constitutional culture followed the common law of coverture in reasoning about the family as an institution of governance in which men have authority over women and the authority to represent women in public and in private dealings with other men.”); *id.* at 1007 (“By the end of the campaign, the Nineteenth Amendment’s supporters could appeal to forms of ‘common sense’ that simply did not exist in the aftermath of the Civil War.”).

275. Post & Siegel, *supra* note 202, at 382.

276. Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 937 (1983); see also Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1233 (2010) (discussing the Court’s common sense assumption of abortion regret).

conscious and below the surface.<sup>277</sup> This concern ignores the judiciary's own acknowledgement of implicit bias and the steps it has taken to develop debiasing strategies.<sup>278</sup> Moreover, procedural rules already exist for surfacing a judge's assumptions and making them known to the parties. In theory, the district judge is not permitted to go outside the four corners of the complaint without converting the motion to that of summary judgment. However, in practice, courts exercise discretion to consider (or to ignore) information outside the pleadings<sup>279</sup>—a process formally known as “judicial notice.”<sup>280</sup> When courts take judicial notice of adjudicative facts, they are supposed to give the litigants an opportunity to be heard on the “nature of the fact to be noticed.”<sup>281</sup> The problem arises when courts take judicial notice of social facts, for no process is in place to inform and engage the parties.<sup>282</sup> Even before the Court went off course in *Twiqbal*,

277. *But see* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 227 (2018) (arguing that “the ability to control implicit bias [is] now well established”).

278. For a discussion of efforts by the National Center for State Courts, see Judge Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 No. 4 JUDGES' J. 20 (2015). *See also* A.B.A., Resolution, Adopted by the House of Delegates (Aug. 14-15, 2017) (“That the American Bar Association urges all courts to develop plans of action to make debiasing training an important part of both initial training and continuing judicial education . . .”).

279. *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1931 (1998) (reporting observations of experienced circuit judge of the number of cases in the D.C. Circuit “in which the judge either used, or declined to use, outside material in motions granted under Rules 12(b)(1), 12(c), and 12(b)(6)”).

280. Harold N. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1088–89 (1966). As Professor Harold L. Korn explained, judicial notice has a “dual aspect”:

In one aspect it refers to the determination of questions by the court; in the other, to the court's means of acquiring information pertinent to the determination. Thus, the statement that the court judicially notices certain classes of facts means both that the court determines these facts even though the case is one in which “the facts” are triable as of right by the jury, and that the court may acquire information pertinent to the determination through independent investigation outside the formal trial process.

The law on judicial notice has not acquired greater clarity since Professor Korn wrote his article.

281. FED. R. EVID. 201. Of course, given plaintiff's burden on a Rule 12(b)(6) motion, judicial notice of adjudicative facts is not likely to save an otherwise defective complaint from dismissal.

282. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 486 (1986) (stating that the Federal Rules of Evidence “do not address independent judicial investigation,” but an Advisory Committee Note “reflects [the] view that courts should be free to initiate an independent search for legislative facts and to take judicial notice of whatever they find”). Professor Kenneth Culp Davis, a strong proponent of judicial notice of legislative facts, recognized the need for a court to give the parties “an appropriate opportunity to apply

judicial notice of legislative facts was considered “willy nilly” and “haphazard”<sup>283</sup>; as Professor Kenneth Culp Davis put it, courts took “judicial notice of what the Supreme Court calls ‘common experience,’ without mentioning any facts, and directly in the face of a dissenter’s abundant and convincing evidence to the contrary.”<sup>284</sup> Critics singled out family law disputes as particularly problematic.<sup>285</sup>

Nevertheless, “best practices” regarding use of judicial notice can be gleaned from federal decisions. A model comes from Judge Jack Weinstein in a case involving whether under Federal Rule 12(b)(2) a foreign corporation was subject to personal jurisdiction in the New York forum based on the activity of its in-state subsidiaries.<sup>286</sup> Judge Weinstein set forth an approach to judicial notice of social facts that may be transferred to other threshold and merits determinations in cases involving women’s issues:

There is always a danger in the superficial sociological musings of lawyers and judges who must perforce be relatively ignorant of the realities underlying the diverse situations with which they must deal and which they must try to understand. Yet, whether we explore the economic, political or social settings to which the law must be applied explicitly, or suppress our assumptions by failing to take note of them, we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts and this effort requires judicial notice to educate the court.

A court’s power to resort to less well known and accepted sources of data to fill in the gaps of its knowledge for legislative and general evidential hypothesis purposes must be accepted

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their testing processes to the facts that influence either the findings or the decision.” Davis, *supra* note 264, at 984; *see also* Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 897 (2012) (“It is unfair and improper to resolve a dispute on grounds which the parties had no chance to contest and offer evidence and argument.”).

283. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113, 126 (1988).

284. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 9 (1986).

285. *E.g.*, Peggy C. Davis, “*There Is a Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (discussing the problems of judicial absorption of legislative facts in the context of custody disputes under the best interest standard); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 933 (1980) (discussing unstated assumptions about unmarried mothers in *Caban v. Mohammed*, 441 U.S. 380 (1979)).

286. *See* *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981); Keeton, *supra* note 268, at 15 (discussing and endorsing Judge Weinstein’s approach).

because it is essential to the judicial process. Here flexible judicial notice is required first, in interpreting [state jurisdictional statutes], and, second, in understanding the relationship of the Japanese parent to its American subsidiaries.

In view of the extensive judicial notice taken, based partly upon the court's own research, the court issued a preliminary memorandum and invited the parties to be heard on the "propriety of taking judicial notice and the tenor of the matter noticed" upon motion made within ten days. This procedure complies with the spirit of Rule 201(e) of the Federal Rules of Evidence reading as follows:

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Inviting parties to participate in such ongoing colloquy has the advantage of reducing the possibility of egregious errors by the court and increases the probability that the parties may believe they were fairly treated, even if some of them are dissatisfied with the result.<sup>287</sup>

As Judge Weinstein's approach demonstrates, it clearly is feasible to require the judge to afford notice to the parties of its intention to rely on social facts that bear on dismissal of the complaint, and to do so before dismissing the complaint and not after. The court could issue an interim order that specifies the "facts" upon which it intends to rely, and could afford the plaintiff an opportunity to amend the complaint in response and to permit limited discovery to overcome any information asymmetries that might otherwise prevent amending the complaint and bar relief.<sup>288</sup> In other contexts, courts have "excuse[d]" pleading deficiencies even under the heightened particularity standard of Federal Rule 9(b) for fraud when the deficiencies "result from the plaintiff's inability to obtain information within the defendant's exclusive control."<sup>289</sup> Another approach could build on Federal Rule 43(c), which governs the taking of testimony when a motion "relies on

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287. *Bulova Watch Co.*, 508 F. Supp. at 1328–29 (citations omitted).

288. See David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 141–43 (2010) (discussing pre-motion discovery and collecting illustrative district court opinions and secondary material).

289. *U.S. ex rel. Polukoff v. St. Mark's Hospital*, 895 F.3d 730, 745 (10th Cir. 2018).



facts outside the record.” Naturally, this approach has limits: the judge is not a party and is not subject to cross-examination. Judge Jed S. Rakoff of the Southern District of New York, in a defamation case, convened a Rule 43(c) hearing “to help inform the Court of what inferences are reasonable or unreasonable” in the context of the lawsuit.<sup>290</sup> Given the role of case management conferences in civil litigation, such a requirement could be integrated into Federal Rule 16 activities.<sup>291</sup> In these ways, the court could seek to identify the value choices driving its decisions, while also acknowledging that those values are contested and contestable.

In addition, we emphasize the importance of the formal requirement of decision writing, which has been disregarded on some Rule 12(b)(6) motions in favor of more conclusory dismissals.<sup>292</sup> Of course, in some situations, the lower federal court has no obligation to provide a written decision, and, accordingly, no explanation will be given at all.<sup>293</sup> However, the requirement of explanation, part of the duty of judicial candor,<sup>294</sup> is widely recognized to be “a defining element of the judicial role.”<sup>295</sup> As Professor Richard H. Fallon, Jr. has stated, judicial candor may be construed to mean “that judges not only avoid deliberate

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290. See Order at 2, *Palin v. N.Y. Times Co.*, 264 F. Supp. 3d 527 (S.D.N.Y. 2017) (No. 17-cv-4853 (JSR)), Docket No. 35; David McTaggart, *Palin v. NY Times: The Case of the “Unusual” Iqbal Hearing*, LAW360 (Nov. 27, 2017); *Pleading—Motions to Dismiss—Twombly/Iqbal—Evidentiary Hearings*, 32 NO. 10 FED. LITIGATOR NL 5 (Oct. 2017) (stating that “the lower court opinions are not uniform in their application of the plausibility standard, and the precise standard and procedure is a moving target. Whether Judge Rakoff’s approach is an outlier or signals another shift in this process is worth tracking”).

291. FED. R. CIV. P. 16. See generally Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 795 (2018) (discussing the scope and centrality of the judge’s managerial authority).

292. See Brescia, *supra* note 266; see also Elizabeth M. Schneider, *Revisiting the Integration of Law and Fact in Contemporary Federal Civil Litigation*, 15 NEV. L.J. 1387, 1391 (2015) (“Scholars who have analyzed district court determinations of motions to dismiss the complaint post-*Iqbal* suggest that 12(b)(6) decisions are now formulaic.”).

293. See generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (discussing justification for judicial reason-giving in some situations but not others).

294. See Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 515 (2002) (stating that judicial decision making involves “judicial judgments about how humans are likely to behave in particular contexts and the likely results of that behavior” and that “candor about that reality is essential,” adding “that candor must come with an active and engaged attitude towards information”).

295. Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2266 (2017).

falsehoods, but also make forthright disclosures concerning vulnerabilities in, and possibly psychologically motivating influences on, their chains of formal legal reasoning.” He continues: “When judges or Justices rely on moral or policy considerations to determine their selection among otherwise legally eligible outcomes, principles of accountability and publicity might support a mandate that they should so disclose.”<sup>296</sup> Certainly a mere “formulaic” recital of the Rule 12(b)(6) standard of plausibility ought not to be sufficient.<sup>297</sup> The process of writing a decision, of explaining why certain facts are disregarded, and of identifying the factors that the court found persuasive can have a salutary effect in bringing biases to the court’s attention before they become entrenched in official judgments.<sup>298</sup> Moreover, decision writing and the giving of reasons makes more transparent the presence of impermissible stereotypes or counter-factual assumptions; it also facilitates appellate review.<sup>299</sup>

To be sure, the problem that we discuss—a court’s “finding” of facts without record support—is not limited to the district courts. Both the Supreme Court and the courts of appeals likewise engage in extra-record fact finding that is critical to their dispute resolution and lawmaking function and they do not always acknowledge the unsubstantiated assumptions upon which their legal rulings are based. Indeed, as Professor Kenneth Culp Davis pointed out forty years ago, the Supreme Court regularly assumes the existence of legislative facts and “is a major lawmaker, but it has no procedure designed for lawmaking.”<sup>300</sup> In some of these

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296. *Id.* at 2267, 2282–83, 2283 n.73 (“Many if not most theories of legal interpretation acknowledge that moral or policy considerations appropriately influence judicial decisionmaking under some circumstances, despite notorious disagreements about the proper occasions and mechanism of influence.”).

297. *Cf.* *Guippone v. Bay Harbour Mgmt. LC*, 434 Fed. App’x 4, 6 (2d Cir. 2011) (“We have repeatedly held that in making the ‘express determination’ required under Rule 54(b), district courts should not merely repeat the formulaic language of the rule, but rather should offer a brief, reasoned explanation.”).

298. Mathilde Cohen, *Reason-Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257, 265 (2008) (warning that decisional reason-giving can be a form of judicial self-protection and career advancement).

299. *Cf.* Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97 (2010) (urging courts to apply motivating factor framework to mitigate effects of employer implicit bias).

300. Davis, *supra* note 284, at 5.

decisions, constitutional principles have been developed based upon gender assumptions that track traditional stereotypes.<sup>301</sup>

The dismissal of a complaint under Rule 12(b)(6) prevents the public from hearing the facts about a woman’s workplace experience. It does so either by blocking the public from knowing what actually happened, because discovery is foreclosed, or by shaping the narrative in a way that normalizes the practice and makes it seem as if the challenged behavior is conventional and to be accepted. The decisions also potentially have a degrading effect on constitutional and statutory protections. Professor Neil S. Siegel has posited that the Supreme Court enhances its legitimacy by encouraging the lower federal courts to enforce a decision more broadly than announced.<sup>302</sup> A reverse process of reciprocity might be hypothesized for a Court that is resistant to Congressional goals: encouraging the lower courts to enforce statutes less broadly than Congress intended. *Twiqbal* offers an unfortunate but clear pathway for these dynamics, exerting downward pressure on constitutional and statutory norms that are denied input from women’s actual experiences. Rather than engaging with factual complexity, the court instead deploys a “rhetoric of inevitability,”<sup>303</sup> making it seem that alternative dispositions are irrational and simply incompatible with the way that the world works—in the language of *Twiqbal*, they are not plausible.<sup>304</sup> In the process, the dismissal blunts the aspirational

301. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 32 (2011) (discussing the Court’s unsubstantiated assumptions about women’s regret about abortion, while acknowledging there was “no reliable data to measure the phenomenon” (quoting *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007))).

302. See Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1242 (2017) (“For those who seek to understand how the American constitutional system operates, reciprocal legitimation—different courts invoking one another as authority in iterative fashion—warrants examination even without an assertion or proof of initial subjective intent.”).

303. Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 4 (1996) (quoting Robert A. Ferguson, *The Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213 (1990)); see also Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1387–88 (1995) (“Judges decide outcomes, and then tell the story in a way that makes the outcome look like a perfectly logical and necessary consequence of the law, handed to us from above, as applied to the facts, handed to us from below.”).

304. Consider whether the law has moved since 1991, when Professor Susan Estrich described evidentiary presumptions that systematically blocked female-plaintiffs from relief in actions alleging sexual harassment in the workplace:

message of the woman's lawsuit and the social movement's broader message.

### 3. Pretrial Termination of Claims Under Rule 56

The application of Federal Rule 56—the motion for summary judgment—similarly has impacted the ways in which women's experiences are communicated (or not) to the public, to the courts, and to policymakers, compounding the constitutional effects of women's invisibility. The motion requires the judge to decide whether there is a “genuine issue as to any material fact” and the movant is entitled to judgment as a matter of law.<sup>305</sup> In employment discrimination cases, the defendant typically is the movant; if the motion is granted, the case is terminated without the jury's participation.<sup>306</sup> As with motions to dismiss, the Rule 56 motion is not designed to empower the judge to find the facts.<sup>307</sup> Rather, the judge is expected to ask how a reasonable jury would view the record, and if factual questions remain, let the case proceed to trial.<sup>308</sup> The well-known and early debates about Rule

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It is . . . somewhat surprising, and even more disquieting, to read again and again in sexual harassment suits not only that the woman loses, but that her credibility suffers because no witnesses were present, or because she did not complain swiftly or publicly enough. Ironically, the forms of harassment most likely to occur in public, and thus be corroborated, are also those which courts are most likely to dismiss as trivial jokes and gestures rather than treat as harassment. But one should rarely expect nontrivial harassment, at least as judicially defined, to take place in public in front of witnesses, or to be memorialized in personnel files. More serious forms of harassment—explicit sexual overtures, threats of firing or promises of promotion, and actual acts of sexual intercourse—are less likely to be accompanied by corroboration, and consequently, the woman is less likely to be believed.

Similarly, to read the judges' opinions, one would expect that the first response of a harassed woman is to complain, both officially *and* privately. But in fact, one sees few cases of women who do this. Indeed, the opinions which most emphatically announce this standard of conduct almost always involve women who did *not* complain.

Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 851 (1991).

305. FED. R. CIV. P. 56.

306. See Peter J. Ausili, *Summary Judgment in Employment Discrimination Cases in the Eastern District of New York*, 16 Touro L. REV. 1403, 1405 (2000) (stating “it is rare” for an employer in an employment discrimination case not to move for summary judgment, and that granting the motion “cuts off a party's right to present his case to the jury” (citing *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 26 (2d Cir. 1988))).

307. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712 (4th ed. 2018) (stating that “the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried”).

308. See *Scott v. Harris*, 550 U.S. 372, 380 (2007) (stating standard).

56—personified by Judges Charles E. Clark and Jerome N. Frank of the Second Circuit Court of Appeals<sup>309</sup>—spotlighted the ease with which a judge could use the summary judgment procedure to displace the jury’s experience and common sense with the judge’s own. Judge Patricia M. Wald of the Court of Appeals for the District of Columbia Circuit warned against the danger twenty years ago:

Summary judgment is not inherently a means for intellectually elitist judges to give their learned views precedence over those of less-educated veniremen, but it can be a handy device for an elitist bent on so doing. Nor is it by nature a firewall by which upper classes conspire to insulate themselves from the onslaughts of the hoi polloi regardless of the merits, but its existence definitely presents that temptation to a judge already inclined to think along these lines.<sup>310</sup>

As with Rule 12(b)(6) dispositions, termination rates of suits involving women’s civil rights and other claims raise red flags about the misuse of Rule 56. The Federal Judicial Center’s November 2007 report analyzing summary judgment practice in federal district courts showed that in 2006, summary judgment was granted, in whole or in part, 77% in employment discrimination cases, 70% in other civil rights cases, 61% in tort cases, and 59% in contract cases.<sup>311</sup> Likewise, Professor Deborah Thompson Eisenberg’s empirical study of 500 Equal Pay Act cases found that dismissing such claims “at the summary judgment stage is the modus operandi for most federal courts,” that female

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309. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1019–21 (2003) (discussing the debate between the two judges, but emphasizing that even Judge Clark would not “have endorsed the expanded summary judgment practices that have emerged”).

310. Wald, *supra* note 279, at 1903.

311. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson (Aug. 13, 2008), <http://www.uscourts.gov/sitcs/default/files/sujulrs2.pdf>. Commentators cite to the FJC’s report in support of the notion that summary judgment is granted in civil rights and employment discrimination cases at disproportionately higher rates than it is in other types of cases. See, e.g., Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective*, 57 N.Y.L. SCH. L. REV. 671, 673 n.9 (2012) (reporting rates); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 225 (reporting findings based on data of Federal Judicial Center that in 2006, “courts granted in whole or in part 80% of defendants’ motions for summary judgment in employment discrimination cases, and courts granted 62.6% of the motions in whole”); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (reporting findings).

judges granted such motions at a lower rate than their male counterparts and that the overall rate somewhat declined after President Obama enacted the Lily Ledbetter Act.<sup>312</sup> In addition, Professors Sandra F. Sperino and Suja A. Thomas have written at length about the ways in which courts have made aggressive use of Rule 56 to dismiss employment discrimination claims and to keep them away from the jury.<sup>313</sup>

The civil jury trial certainly is in eclipse, but the jury's constitutional significance as a check on the misuse of government power should not be ignored—especially when women's loss of their civil jury right through devices such as mandatory contractual provisions is sanctioned by law and works to undermine the substantive protections of anti-discrimination laws.<sup>314</sup> To be sure, a jury might reach the same bottom line as a judge on whether a woman who claims to have suffered discrimination (or harassment, or a loss of benefits, or whatever) ought to prevail. But perhaps not,<sup>315</sup> given differences between judicial and lay perception of factual matters freighted with normative significance.<sup>316</sup> For example, studies have shown that

312. Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815, 817, 829 tbl.7, 839 (2012/2013).

313. SPERINO & THOMAS, *supra* note 250; see Theresa M. Beiner, *When Courts Run Amuck: Book Review*, 5 TEX. A&M L. REV. 391 (2018).

314. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016); Richard Lorren Jolly, *Expanding the Search for America's Missing Jury*, 116 MICH. L. REV. 925 (2018).

315. See Stephanie Francis Ward, *Time's Up*, 104-JUN. A.B.A. 46, 49-50 (2018) (reporting studies showing "that if a woman is added to an appellate panel, the panel is more likely to find against a summary judgment motion in a sex discrimination claim"); see also Michael W. Pfautz, *What Would A Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255 (2015) (finding a higher-than-projected concentration of civil rights cases in which the district court granted summary judgment for defendant, the appeals court reversed, and the jury returned a verdict for the nonmovant).

316. See, e.g., Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 657 (2012):

Although lay jurors of course will exhibit many of the same traits that make judges imperfect, the jury by definition involves a combination of individuals that logically mutes the extremes produced by cognitive error, cognitive illiberalism, conscious or unconscious bias, or different reasoning styles. Further, jurors combine differing life experiences. In addition, the trial judge supervising a case will make evidentiary rulings and give instructions designed to reduce jury errors. If this combination and cross-fertilization fails to sufficiently suppress human

judges in employment discrimination cases tend to give great weight to symbolic compliance with anti-discrimination norms, crediting the statements of management consultants, human resources administrators, and supervisors much more than they do women's testimony.<sup>317</sup> The discrediting of women's testimony follows a traditional script that favors professionals—who often, but not always, are male;<sup>318</sup> employees might not accord HR administrators the same level of deference whether male or female.<sup>319</sup> On the other hand, in many cases expert testimony has proved critical in unpacking cultural stereotypes that infect “common sense” notions about women's motivation (as, for example, the willingness to acquiesce in domestic violence).<sup>320</sup>

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divergence, myopia, or misjudgment, a trial judge stands by to grant judgment as a matter of law or a new trial as necessary.

See also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 533–35 (2010) (stating that a judge “may be a less preferable decisionmaker” than a jury in a civil rights or employment discrimination case “where subtle issues of credibility, inferences, and close legal questions may be involved” because juries are likely “to be far more diverse and to bring a wider range of perspectives”).

317. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 215 (2016) (“To the extent that legal institutions defer to organizations’ symbolic structures even when those structures are ineffective, law in essence condones discrimination.”); cf. Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1893 (2016) (arguing that in administrative law cases, courts should defer “to reasonable agency decisions about the design of procedural arrangements”). Without stating an opinion on whether deference in the public law context is correct, we note that deference to a private actor’s procedural decisions raises different problems. See Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983 (2018) (examining private delegations in civil procedure and their potential for abuse).

318. Cf. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993) (discussing the role of cultural scripts).

319. Cf. Katherine M.K. Kimble, Katlyn S. Farnum, Richard L. Wiener, Jill Allen, Gwennith D. Nuss & Sarah J. Gervais, *Differences in the Eyes of the Beholders: The Roles of Subjective and Objective Judgments in Sexual Harassment Claims*, 40 LAW & HUM. BEHAV. 319 (2016) (discussing the importance of multiple perspectives); see also Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 715 (2012) (noting the lack of “common identity” between a discrimination plaintiff and “the person judging her like there might be if she were before a jury”); Erika Fry & Claire Zillman, *HR Is Not Your Friend*, FORTUNE, Mar. 1, 2018, at 98 (discussing systemic problems in HR’s approach to sexual harassment complaints).

320. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 n.9 (1991) (“Many cases review the jury’s common-sense belief that women can and will leave violent relationships freely. The experts explain the women’s incapacity and failure as a function of many factors, especially the psychology of abused women and traditionalism about the family.”); see also Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195 (1986).

Commentators point to multiple factors in explaining the high termination rates under Federal Rule 56 of civil rights claims—the drive toward efficiency, the desire for docket-clearing, anti-plaintiff bias, pro-corporate preference, conservative judicial ideology, judges’ demographics, gender bias, and so forth.<sup>321</sup> No civil procedure scholar would claim to know for sure why certain trends are occurring. However, empirical studies so far have provided no support for the view that employment discrimination cases are weaker than others at the summary judgment stage.<sup>322</sup>

The high termination rates of gender claims negatively impacts not only the individual litigant, but also judicial and public perceptions of women’s place in society. As the academic literature already notes, dismissals have a snowball effect, operating along the lines of a self-fulfilling prophecy.<sup>323</sup> Because judges write decisions when granting summary judgment but typically not when denying it, judges are encouraged, as retired Judge Nancy Gertner has explained, “to see employment discrimination cases as trivial or frivolous, as decision after decision details why the plaintiff loses.”<sup>324</sup> Moreover, the decision

321. See, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 511 (2014) (“The disproportionate summary disposition of workplace discrimination and other civil rights cases has been prompted by familiar forces—Supreme Court jurisprudence, docket pressures and judicial bias.”). See generally Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014) (noting the lack of public policy discussion about judicial trends and suggesting various causes).

322. See Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865, 867 (2012/2013) (finding “no evidence to support” the claim that employment discrimination cases are “weaker” at Rule 56 stage).

323. See ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 477 (1968) (coining the phrase and defining it as “a false definition of the situation evoking a new behavior which makes the originally false conception come true”).

324. Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 111 (2012). Former Judge Gertner explained:

When the defendant successfully moves for summary judgment in a discrimination case, the case is over. Under Rule 56 of the Federal Rules of Civil Procedure, the judge must “state on the record the reasons for granting or denying the motion,” which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement—“denied”—and the case moves on to trial. Of course, nothing prevents the judge from writing a formal decision, but given caseload pressures, few federal judges do. (During one case-management program in my district, the trainer, a senior judge, told the assembled judges, “If you write a decision, you have failed.” The message was



writing process depends upon heuristics that “serve to justify prodefendant outcomes and thereby exacerbate the one-sided development of the law.”<sup>325</sup> We can add a further feedback effect: judges are likely to draw from this font of “judicial experience” when assessing the sufficiency of a claim before discovery. Given the rise in arbitration and the decline in trials, commentators observe that district court judges lack opportunities to evaluate the merits of claims outside the summary judgment stage;<sup>326</sup> it seems reasonable to assume they will apply the same attitude and heuristic developed in the Rule 56 context at the earlier stage in the lawsuit, when asked to decide the sufficiency of a claim. Thus, rather than turn to discovery and case management, dismissal will seem the appropriate result.

Further, the information gleaned from high disposition rates can be expected to produce adverse incentive effects on women—not already barred by contract—who nevertheless may be discouraged from “speaking up,” “blowing the whistle,” or filing a lawsuit because the costs, financial and emotional, are thought to be not worth the candle. Suppressed litigation rates have spillover effects on public policy given the American system’s reliance on private litigation to enforce regulatory goals.<sup>327</sup> Private litigation in the public interest could be especially important during the Trump presidency, when executive agencies have agendas that are at odds with civil rights and workplace protection

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clear: you would only write a decision when you absolutely had to.) Plaintiffs rarely move for summary judgment.

*Id.* at 113.

325. *Id.* at 110.

326. Cf. Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1784 (2014) (explaining that judges have little experience in deciding claims and that “there are also reasons to question the ability of judges to resolve summary judgment motions without applying subjective standards of believability according to their own inaccessible, irrefutable, and arguably unrepresentative cultural norms”).

327. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140 (2012) (“Whereas European nations regulate the conduct of their citizens largely using ex ante regulations promulgated by a centralized bureaucracy, we frequently rely on ex post law enforcement, much of which results from private suits rather than from governmental actions.”); see also John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

statutes.<sup>328</sup> Once again, procedural decisions indirectly but persistently may work to erode protections. Although in theory “superstatutes” may seem to have entrenched the goals of a social movement,<sup>329</sup> the declining incidence in litigation gives the false impression that statutory protection is no longer needed, and companies are signaled that substantive compliance is neither required nor expected.

Rule 56 decisions affect the flow of information in another way, as well. The development of social norms requires facts from which narratives can be constructed; summary judgment decisions in employment discrimination suits, because they typically reject a finding of liability, provide a one-sided account of gender relations, and so tend to ratify social practices even when those practices no longer align with popular understandings. Recognizing the irony of this example, we draw attention to Judge Kozinski’s dissent from the Ninth Circuit’s en banc decision in *Jespersen v. Harrah’s Operating Co.*,<sup>330</sup> in which the appeals court upheld a requirement that employees wear makeup—only women did—and rejected the argument that the requirement imposed an impermissible burden on women. Judge Kozinski, by contrast, argued that whether the grooming policy imposed an impermissible burden on women ought to be decided by a jury and not according to the court’s common sense understanding of morning make-up routines:

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328. By example, the Obama Administration took steps to halt the trend in non-disclosure agreements. See Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261 (2018) (discussing SEC’s 2015 enforcement action against employer-mandated confidentiality agreements). The Trump Administration sought to roll back the underlying substantive protections. See Elizabeth Dexheimer, *Trump Signs Biggest Rollback of Bank Rules Since Dodd-Frank Act*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/news/articles/2018-05-24/trump-signs-biggest-rollback-of-bank-rules-since-dodd-frank-act>. On the other hand, the Equal Employment Opportunity Commission has filed a number of lawsuits against employers for sexual harassment in response to #MeToo complaints. See Daniel Wiessner, *EEOC Monitor: Commission Turns Up the Heat with Wave of New Lawsuits*, REUTERS LEGAL (Aug. 21, 2018), [https://1.next.westlaw.com/Document/I9d686010a59a11c8a96dc40a4971d468/View/FullText.html?transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I9d686010a59a11c8a96dc40a4971d468/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)).

329. See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010). For a skeptical account, see Mathew D. McCubbins & Daniel B. Rodriguez, *Superstatutory Entrenchment: A Positive and Normative Interrogatory*, 120 YALE L.J. ONLINE 387 (2011) (questioning entrenchment as a sociopolitical fact, as a normative value, and as a political process).

330. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

If you are used to wearing makeup—as most American women are—[the requirement of wearing makeup on the job] may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like. . . .

I would let a jury decide whether an employer can force a woman to make this choice.<sup>331</sup>

As with Rule 12(b)(6) motions, there is a danger on summary judgment that a judge's "common sense" may displace a disputed material fact or shift doctrine in subtle ways but not be made explicit in the decision making process. Take the example of the "reasonable woman standard" for sexual harassment. Back in 1991, the Ninth Circuit Court of Appeals, over a spirited dissent, announced that claims of sexual harassment would be judged from "the perspective of a reasonable woman," explaining that although "there is a broad range of viewpoints among women as a group, . . . many women share common concerns which men do not necessarily share"; and further, that a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."<sup>332</sup> The reasonable woman standard, the Ninth Circuit underscored, "does not establish a higher level of protection for women than

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331. *Id.* at 1117–18 (Kozinski, J., dissenting).

332. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

men”; rather, “a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.”<sup>333</sup> Judge Kozinski joined the majority, and the next year, he wrote the Foreword to a volume entitled *Sexual Harassment in Employment Law*, stating, “It is a sobering revelation that every woman—every woman—who has spent substantial time in the work force in the last two decades can tell at least one story about being the object of sexual harassment.” But he urged “caution and common sense” before letting law and lawyers attempt to remedy “this somewhat seamy, but highly pervasive, corner of workplace misconduct”: “[W]hen men and women are brought together in the workplace, sexual tensions and ambiguities are aggregated with the already formidable tensions and frustrations of the job. The results can be explosive.”<sup>334</sup>

Substantively, the “reasonable woman standard has been criticized for putting into question the credibility of women’s plurality of experiences.”<sup>335</sup> On the other hand, defenders of the approach have emphasized the significance of a legal standard that directs judges to “think from a different perspective than that of the reasonable man.”<sup>336</sup> However, in Judge Kozinski’s description of the standard, the reliance upon common sense reoriented the doctrine back to the perspective of the male judge at the expense of the female litigant.<sup>337</sup> The judicial message, once

333. *Id.* The reasonable woman standard also has elicited criticism as reinforcing gender stereotypes. See, e.g., Robert Unikel, “Reasonable” Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326, 365 (1992).

334. Hon. Alex Kozinski, *Foreword*, in BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* at v–vi (1992).

335. See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 558–67 (1992) (questioning whether the “reasonable woman” standard “penalize[s] women’s different experiences and women’s departures from a stereotypical norm”).

336. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1434 (1992); see also Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411, 1413 (1992) (stating that because the standard “assesses the harasser’s conduct from the perspective of the reasonable victim,” and because most victims are women, “the standard in most cases is the reasonable woman”).

337. Professor Deborah Rhode offers this example of the problem of leaving it to a male judge to identify and remedy sexual harassment in the workplace:

The problem for female workers is that harassment remedies are designed by predominantly male judges and managers from a demonstrably male perspective. Through their eyes, dirty language or pornographic pictures appear part of the American way of life. . . . Even when judges talk about the reasonable woman’s

again, potentially blunted the communicative force of the woman's experience, sending a false signal to the public.

#### 4. Class Certification Denials under Rule 23

Finally, we see a similar dynamic—of the Court's substitution of its own "common sense" of a situation in place of women's testimony and expert analysis—in the operation of class action rules in gender discrimination suits. The class action is an important procedural mechanism for enforcing constitutional and statutory rights when the costs of individual litigation are too expensive for a single plaintiff to bear.<sup>338</sup> But there are other reasons to file a class action, as well—the plaintiffs acquire greater leverage in their negotiations with defendants,<sup>339</sup> and the potential for both social solidarity and media exposure is heightened.<sup>340</sup> Moreover, the class mechanism, as a device that aggregates claims on behalf of a group, highlights that a company's discriminatory practice is not a single event directed at a single worker, but rather a structural or formal feature of the workplace.

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perspective, they often construct it from a male vantagepoint. According to the district court in one recent case involving workers who looked up the plaintiff's skirt with a flashlight, the "reasonable woman" would view the conduct as "childish," not harassing.

Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1464 (1992) (citing *Vermelt v. Hough*, 627 F. Supp. 607 (W.D. Mich. 1986)).

338. FED. R. CIV. P. 23; see William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006) ("The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also—perhaps more so—because the litigation it engenders produces external benefits for society.").

339. See William C. Martucci, Eric Smith & Karen K. Cain, *Class Action Litigation in the Employment Arena—The Corporate Employers' Perspective*, 58 J. MO. BAR 332, 335 (2002) (explaining that from the defendant's perspective, the key threat of a class action is that it gives plaintiff "settlement leverage").

340. See Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1022–23 (2017):

[T]hose of us who have never lived outside Rule 23's umbrella may undervalue how creative the Rule was in bringing into being new legal relationships among class members, their counsel, the public, and courts—played out in tens of hundreds of lawsuits. People who did not know each other and whose only commonality might be that they purchased the same product gained legal identity as a cohort advancing claims in court. The class became a litigating entity, able to produce binding outcomes for a host of diverse individuals.

Before a case may be certified, plaintiff must show that the action meets the requirements of a class.<sup>341</sup> This requirement is not merely formal, but rather ensures that the named plaintiff is in a position to provide adequate representation to the unnamed members of the class who will be bound by any resulting judgment.<sup>342</sup> One of the requirements is that of “commonality,” namely, that the named plaintiff and the unnamed class members share common questions of law and fact.<sup>343</sup> Professor Arthur R. Miller and others have written at length about the ways in which *Brown v. Board of Education* and the struggle for racial equality influenced the 1966 revision of Federal Rule 23 which codified the commonality requirement.<sup>344</sup> The Rule does not specify what is meant by commonality, but the rule makers intended “a low threshold of overlap” among the class’s claims.<sup>345</sup> Initially, the standard in gender cases seeking injunctive relief, as in civil actions generally, was not hard to meet.<sup>346</sup> In the generation after Title VII was adopted, as Professors Brooke D. Coleman and Elizabeth G. Porter have written, class litigation was critical to the statute’s enforcement and it “transformed the lives of women at

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341. See Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 425 (2014) (“[A]ssuming a plaintiff capably satisfies the implicit requirements for pleading a class, that plaintiff then carries the burden of satisfying the threshold Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation.”).

342. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 780 (2013):

Because class actions are representative actions, “adequacy” is the glue that holds a class together and ensures due process for absent class members. The system breaks down—and potential due process issues arise—if either the class representative or class counsel is incompetent, suffers from a conflict of interest, fails to assert claims with sufficient vigor, or suffers from other flaws that will detract from a full presentation of the merits.

343. FED. R. CIV. P. 23(a)(2).

344. See Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014) (explaining that the Rules Committee sought “to create a receptive procedural vehicle for the explosion of civil rights cases”); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702 (1987) (discussing impact of desegregation lawsuits on the drafting of Rule 23(b)(2)).

345. Miller, *supra* note 344, at 298 n.25.

346. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 443 (2013) (stating that until *Wal-Mart*, the commonality requirement was “relatively easy to satisfy”).

work,<sup>347</sup> allied with social mobilization and government efforts aimed at eradicating gender discrimination.<sup>348</sup>

As the literature widely notes, the Court revisited the standard for commonality in its 2011 decision in *Dukes v. Wal-Mart*.<sup>349</sup> In *Wal-Mart*, possibly the largest class action ever filed in federal court, 1.5 million women joined together challenging the company's policy of giving individual store managers unfettered discretion to make salary and promotion decisions. The complaint alleged that this practice created a "corporate culture" that produced unequal benefits and diminished opportunities for women relative to men.<sup>350</sup> The Court held that certification was inappropriate because the plaintiffs shared nothing legally relevant in common; the company had no explicit policy of discrimination and plaintiffs' anecdotal and statistical evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory"<sup>351</sup> or to show "a common mode of exercising discretion."<sup>352</sup> In so holding, Justice Scalia's majority decision rejected expert testimony that drew from social framework theory, which the district court had found sufficient at the certification stage to show that the defendant company was "vulnerable" to gender bias.<sup>353</sup>

In earlier employment actions, as Justice Ginsburg emphasized in dissent, the Court had recognized that "discretionary employment practices" that produce disparate results—as in *Wal-Mart*—could give rise to a Title VII claim. Justice Ginsburg questioned the Court's use of appellate review to overturn the trial court's "handling of factual disputes." The majority effectively assumed, she explained, that "most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all,"<sup>354</sup> resting on an unspoken and unsubstantiated presumption that the judiciary can trust a

347. Brooke D. Coleman & Elizabeth G. Porter, *Reinvigorating Commonality: Gender and Class Actions*, 92 N.Y.U. L. REV. 895, 905 (2017).

348. See Schultz, *supra* note 273, 1022–47 (discussing movement advances).

349. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

350. *Id.* at 345.

351. *Id.* at 358.

352. *Id.* at 356.

353. *Id.* at 354.

354. *Id.* at 355.

company's managers to apply a neutral job rule in an unbiased way, even if the real-world effects showed a gender gap.

In the Court's view, as Justice Scalia concluded, the putative members of the class "ha[d] little in common but their sex and this lawsuit"<sup>355</sup>—borrowing his closing line from Judge Kozinski's dissent from the Ninth Circuit's decision to affirm the district court's certification decision.<sup>356</sup> Six years later, Judge Kozinski resigned from the bench, rather, as he stated, than "stay on, at least long enough to defend myself." He apologized to those of his clerks who were made to "feel uncomfortable"; he questioned whether in displaying "a broad sense of humor and a candid way of speaking" he was not "mindful enough of the special challenges and pressures that women face in the workplace."<sup>357</sup>

In this light, *Wal-Mart* illustrates a trend, shown in the previous sections, of courts relying on their own "common sense" of a situation rather than on the evidence presented—evidence that pointed to the "special challenges and pressures" that women face in the workplace when supervisors are given unregulated discretion over the terms and conditions of employment.<sup>358</sup>

355. *Id.* at 359–60:

In sum, we agree with Chief Judge Kozinski that the members of the class: "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F.3d, at 652 (dissenting opinion).

356. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting).

357. PUB. INFO. OFFICE, U.S. COURTS FOR THE NINTH CIRCUIT, STATEMENT OF JUDGE ALEX KOZINSKI (2017), [http://cdn.ca9.uscourts.gov/datastore/general/2017/12/19/AK\\_Retirement\\_Statement.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2017/12/19/AK_Retirement_Statement.pdf).

358. *E.g.*, Michèle E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 30 (2016) ("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."); *see also* Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 121 (2011) (citing limited worker leverage, limited market competition, and little consumer influence as factors that explain why "highly rational and efficient companies need not always sacrifice the bottom line in order to maintain a preference for discrimination"; "economists and legal scholars are simply too sanguine about the rarity of quasi-monopsonistic hiring power and the value of worker productivity"). *But see* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 26 (2011) (arguing that the Court correctly rejected the evidentiary showing and that "Wal-Mart behaved no differently than most American employers"). So far, the Court's decision has not discouraged social mobilization around issues of corporate culture and gender discrimination. *See* Cheryl L. Wade, *Corporate Compliance that Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49



## C. WOMEN, PROCEDURE, AND THE FEDERAL COURTS

Professor Judith Resnik, a noted procedure scholar, observed back in 1991 that the work of feminist procedure often refrains from providing answers and instead seeks to motivate the “opening up of a process of conversation in which, collectively, ideas are explored and then alternative modes suggested by virtue of an extended exchange.”<sup>359</sup> Over the years numerous state and federal judicial task forces have started a conversation about women and law, asking whether judicial decisions reflect a gap between the world as experienced by women and the world as seen by judges of a certain background or disposition.<sup>360</sup> Even raising the question as an agenda item has been an uphill battle. Back in 1990, the Federal Courts Study Committee concluded that the establishment of a national gender bias task force for the federal courts was not needed because “the nature of federal law keep[s] such problems to a minimum.”<sup>361</sup> Indeed, acknowledging that judging is anything but the automatic calling of “balls and strikes” according to neutral and fair rules cuts to the core of common law assumptions about the judicial process and the principle that lawsuits can and ought to be decided “to the exclusion of social norms”:

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LOY. U. CHI. L.J. 611, 635 (2018) (pointing to #MeToo and Time’s Up and stating that “[i]t is clear that the discourse, norms, and practices relating to sexual discrimination and harassment in the business context have evolved”). Moreover, advocates continue to file class actions but on a smaller scale against employers for workplace discrimination. Indeed, having identified individual corporate harassers through #MeToo, groups are investigating whether the companies themselves show company-wide wage disparities. See Tiffany Hsu, *Ex-Employees Sue Nike, Alleging Gender Discrimination*, N.Y. TIMES (Aug. 10, 2018) (“Claiming a culture of sexual harassment and gender bias at Nike that left women demeaned and underpaid, two former employees sued the sports apparel company late Thursday, demanding more equitable policies.”); Daniel Wiessner, *Nike Hit with Equal Pay Claims on Heels of Sex Harassment Allegations*, REUTERS LEGAL (Aug. 10, 2018) (“Former Nike employees have accused the sporting apparel giant of paying women less than men at its Oregon headquarters, months after several top executives at the company stepped down amid claims of widespread sexual harassment.”).

359. Judith Resnik, *Visible on “Women’s Issues,”* 77 IOWA L. REV. 41, 53 (1991).

360. Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 1996 ANN. SURV. AM. L. 1, 2 (1996) (reporting that since 1984, 34 state and 2 federal task forces had “documented that gender bias is alive and well in the American judicial system”).

361. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990). The Ninth Circuit was the first circuit to establish a task force on gender bias, in 1992. See Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143, 2143 (1993) (examining the task force’s findings).

The view that written law drives legal outcomes is plausible only because written law (to the extent that it has any meaning at all) is usually in accord with social norms. . . . While written law is sufficiently flexible to support virtually any social norm, the social norms of a particular group are not sufficiently flexible to support virtually any written law.<sup>362</sup>

Nevertheless, the question persists: whether and to what extent entrenched stereotypes about women, markets, and social arrangements continue to drive procedural decisions of the sort discussed in this Part. In answering the question, the legal community now has the benefit of a Bar that has become one-third female<sup>363</sup> and years of self-study. As Justice Ruth Bader Ginsburg wrote two decades ago in her foreword to the Report of the Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, “close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women’s voices, and to accord women’s proposals the respect customarily accorded ideas advanced by men.” She added that “self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.”<sup>364</sup> The Working Group convened in the wake of Judge Kozinski’s resignation did not discuss whether and how judicial attitudes about women might be affecting their disposition of lawsuits by women or suits involving gender equality claims. We understand the omission: the Working Group’s focus was narrowly tailored to the problem of sexual misconduct by judges as employers and supervisors.<sup>365</sup>

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362. Lynn M. LoPucki & Walter O. Weyrauch, 49 *DUKE L.J.* 1405, 1434, 1435 (2000). See Chief Justice Roberts *Statement, Nomination Process*, U.S. CTS., <http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> (“My job is to call balls and strikes and not to pitch or bat.”) See also Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 *HARV. L. REV.* 2118, 2120 (2016) (“Judges are umpires, or at least should always strive to be umpires.”).

363. Jennifer Cheeseman Day, *More than 1 in 3 Lawyers Are Women*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html> (stating that the “number of women lawyers [is] at [a] record high but men [are] still [thc] highest earners”).

364. Ruth Bader Ginsburg, *Foreword to Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, reprinted in 84 *GEO. L.J.* 1651, 1651–52 (1996).

365. See Helen Hershkoff, *Some Questions about #MeToo and Judicial Decision Making*, *The Harbinger*, N.Y.U. REV. OF L. & SOC. CHANGE (forthcoming 2019) (manuscript on file with author) (raising additional questions).

However, President Trump's devaluation of women in his policies, rhetoric, and conduct makes it all the more imperative for the judiciary to hold a mirror up to itself and to uphold constitutional ideals. Certainly, the appearance of judicial impartiality can be as destructive to public trust as impartiality itself.<sup>366</sup> At the least, the procedural trends we have identified deserve official consideration to assess whether the Federal Rules of Civil Procedure are securing their stated goal of the "just, speedy, and inexpensive determination of every action,"<sup>367</sup> and not working to "abridge . . . any substantive right."<sup>368</sup>

#### IV. GENDERED INEQUALITY AND THE WOMAN'S CONSTITUTION

Of course, rules of procedure cannot compensate for gaps and defects in substantive law. And so we return to the topic of this symposium: the Constitution in the age of Trump and whether a mobilized public can encourage constitutional law to be more responsive to women's experiences.<sup>369</sup> In our view, the Constitution is sufficiently capacious to remediate the structural nature of discrimination, to hold government and non-governmental actors accountable for gender inequality, and to adapt anti-discrimination law to account for the changing nature

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366. See *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html> (letter submitted to the Senate Judiciary Committee by law professors on the importance of impartiality to judicial character and to the integrity of the judiciary). For disclosure, both authors signed this letter.

367. FED. R. CIV. P. 1 (emphasis added).

368. 28 U.S.C. § 2072(b) (2012) (providing that the "general rules of practice and procedure" prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right"); see Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897 (2014):

So why is it that most employees lose their cases at the hands of federal judges? "Surprisingly, there have been few robust attempts to answer this core question. Thus, while we have extensive data demonstrating that discrimination litigants fare poorly in the courts, we know very little about why." Therefore, we need to identify why the more systematic approach to eradicating unlawful workplace conduct is not occurring in the federal courts. We must inform judges about the realities of today's workplaces and the abuse, discrimination, and harassment that some employees endure. And we must persuade judges to consider their own biases.

*Id.* at 956–57 (quoting Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1277 (2012)).

369. See, e.g., Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1758 (2012) (calling for the constitutional "imposition of some institutional social responsibility").

of the male/female divide. But we do not ignore that the current doctrine on gender equality leaves women unprotected in significant ways.

In these times, we think it unlikely that the Trump Court will protect women unless women lay claim to an explicit place in the constitutional text.<sup>370</sup> Mobilizing in favor of an Equal Rights Amendment offers significant strategic advantages<sup>371</sup>—as then-Professor Ruth Bader Ginsburg said in a lecture delivered in 1979, “to spark overdue change in laws and in the perspective of public officials—judges, legislators, and administrators” and “to establish firmly . . . the principle that women and men should be counted by their government as individuals of equal value and dignity.”<sup>372</sup> At the same time, caution about achieving social change through constitutional change seems warranted. To borrow from Judge Patricia M. Wald, women should avoid putting all their “eggs” and “hopes” in “one basket or in one branch of government”:

There are periods when courts are receptive to enforcing declarations of fundamental values or rights in constitutions and charters. This was so in the 1960s and 1970s for American women. But even then, . . . courts were willing to interpret the Constitution as guaranteeing equal rights for women only in

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370. See William H. Rehnquist, *The Notion of a Living Constitution*, 545 TEX. L. REV. 693, 705 (1976):

Success in amending the Constitution would, of course, preclude succeeding transient majorities in the legislature from tampering with the principle formerly [sic] added to the Constitution.

I know of no other method compatible with political theory basic to democratic society by which one’s own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society.

371. See, e.g., Editorial Bd., Editorial, *A Rebuke to Trump, a Century in the Making*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/opinion/a-rebuke-to-trump-a-century-in-the-making.html> (“The E.R.A. would add an extra layer of legal protection for women—and men—against discrimination.”); Jessica Neuwirth & Molley Tormey, *The Time Is Now for the Equal Rights Amendment*, FORBES (March 7, 2018), <https://www.forbes.com/sites/break-the-future/2018/03/07/the-time-is-now-for-the-equal-rights-amendment/#5a6483015e71> (“It’s time to translate social consciousness into political action and pass the Equal Rights Amendment (ERA) once and for all. If not now—the “Year of Women”—then when?”).

372. Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 945 (1979).

the “easy cases” where laws treated men and women differently based on archaic notions of women’s roles.<sup>373</sup>

Mobilizing for an ERA thus must be combined with engagement on other fronts, including the local, the legislative, and the media, taking seriously the extreme economic inequality that has come to define America and women’s lives.

In this Part we identify judicially created “gaps” in the Constitution that work to the detriment of women,<sup>374</sup> which, we argue, could be overcome by a constitutional amendment. We explore the likely impact of President Trump’s judicial appointments on women’s constitutional progress. And we close by discussing the ways in which a constitutional amendment could invigorate constitutional enforcement, both by the Court and by the elected branches. We put to the side questions about the ratification deadline for the existing version of the Equal Rights Amendment<sup>375</sup> and whether a “fresh start” is needed for the language of a proposed amendment.<sup>376</sup> We do not need to resolve these questions to sketch out the ways in which an equal rights amendment could alter constitutional understandings and improve women’s lives—and in the process, the lives of all Americans.

#### A. GENDER EQUALITY AND CONSTITUTIONAL POTENTIAL

The Constitution—as law, as metaphor, and as aspiration—has enabled women to overcome traditional social barriers and to claim important legal rights, including the right to sit on a jury, to

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373. Patricia M. Wald, *Some Unsolicited Advice to My Women Friends in Eastern Europe*, 46 SMU L. Rev. 557, 568 (1992).

374. See generally Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

375. Congress set a ratification deadline of seven years for the Equal Rights Amendment, which later was extended for ten years. See Ginsburg, *supra* note 372. For a discussion of the “fresh start” approach, see THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, *THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES* (2018).

376. See Wendy McElroy, *An Amendment Takes Congress Back in Time*, HILL (Sept. 16, 2014), <https://thehill.com/blogs/pundits-blog/civil-rights/217789-an-amendment-takes-congress-back-in-time> (explaining that the “fresh start” approach to an ERA is set out in H.J. Res. 56 and S.J. Res. 10, which would “restart the ERA process with a need to secure 38 ratifications but without a deadline”).

own property, to enter into contracts, and to enter professions.<sup>377</sup> Moreover, through the enforcement power of Section 5 of the Fourteenth Amendment, Congress has enacted laws that bar the formal exclusion of women from workplace opportunities and that provide remedies for some of the more manifest and egregious effects of gendered exclusion.<sup>378</sup> However, the Supreme Court has blunted the Constitution's egalitarian potential by curtailing legislative remedies in cases that directly involve gender discrimination, as well as in cases that indirectly affect women's interests.<sup>379</sup>

These decisions are well known. In the *Civil Rights Cases*, the Court limited the scope of the Fourteenth Amendment to state action, thus restricting future legislative efforts to regulate private conduct that subordinates women.<sup>380</sup> In *Dandridge v. Williams*,<sup>381</sup> involving rights to public assistance, the Court narrowed rights under the Constitution to classical liberal rights usually described with the adjective "negative" and exclude any duty to provide services such as education, housing, or food or for the government to take responsibility for the gendered effects of market relations.<sup>382</sup> In *United States v. Morrison*,<sup>383</sup> the Court limited Congress's power to devise remedies under the Commerce Clause and Section 5 of the Fourteenth Amendment for gender-based

377. See Sylvia A. Law, *In Defense of Liberal Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Cynthia Bowman & Robin West eds. forthcoming, 2019) (unpublished manuscript on file at New York University School of Law); see also Julie C. Suk, *The Constitution of Mothers: Gender Equality and Social Reproduction in the United States and the World*, 9 CONLAWNOW 23, 31 (2017–2018) (discussing exclusion of women from professions and politics).

378. For an overview of the Supreme Court's treatment of Title VII, see, e.g., GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* (2016).

379. See Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397 (2015) (summarizing advantages of an ERA over the Fourteenth Amendment).

380. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

381. *Dandridge v. Williams*, 397 U.S. 471 (1970).

382. See Jamal Greene, *A Private Law Court in a Public Law System*, 12 LAW & ETHICS HUM. RTS. 37, 37 (stating that the "United States Supreme Court does not recognize social and economic rights").

383. *United States v. Morrison*, 529 U.S. 598 (2000); see Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 136 (2000) (arguing that *Morrison* "can be seen to employ ostensibly gender-neutral tools to achieve a substantive victory for the social institution of male dominance"); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 624 (2001) (criticizing the Court's reliance on a theory of "categorical federalism" that is "factless" and challenged by feminism).

violence. In *Seminole Tribe of Florida v. Florida*,<sup>384</sup> the Court limited Congress's power to abrogate state sovereign immunity under Article I of the Constitution, impeding relief for state violations of federal statutes that involve social and economic protections (for example, back-pay for state employees, of particular importance to women). In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,<sup>385</sup> the Court held that the First Amendment limits state authority to authorize public-sector agency-shop arrangements (thus jeopardizing the collective ability of women unionists to bargain for higher wages and benefits). To these we can add the overall problem of the Court's singular focus on a bad-actor approach to discrimination, which imposes high evidentiary standards of intent upon plaintiffs and withholds remedies for the gendered effects of structural arrangements.<sup>386</sup>

At the same time, we recognize that Court precedent could support a counter-narrative that is more hospitable to women's claims.<sup>387</sup> The *Hibbs* Court gestured at the idea of treating pregnancy discrimination as gender discrimination, incorporating an anti-subordination principle into equality doctrine.<sup>388</sup> *VMI*

384. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

385. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

386. See generally Judith Olans Brown, Wendy E. Parmet & Phyllis Tropper Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 *BUFF. L. REV.* 573, 641–42 (1987) (stating that discrimination law “cannot address the structural inequities of the labor market that make rights of equal access hollow for women struggling to fulfill familial obligations”). See also Spencer, *supra* note 346, at 441 (criticizing *Wal-Mart* as reflecting “bad actor” theory of discrimination).

387. See generally Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 *DUKE L.J.* 771 (2010) (discussing the role of anti-subordination principles in Justice Ginsburg's concept of gender equality); Siegel, *supra* note 35, at 1003–04 (explaining that in *Young v. UPS*, “comparison is no longer the sole determinant of pregnancy discrimination”; “[p]robing an employer's reasons in a balancing framework . . . may bring to light implicit biases”).

388. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); see also Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 *OHIO ST. L.J.* 1095, 1113 (2009) (“As Justice Ginsburg's Carhart dissent cautions, when regulation of pregnant women reflects or enforces sex-role stereotypes of the separate spheres' tradition, the law may violate equal protection.”). For a less celebratory reading, see Jennifer Yatskis Dukart, *Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 *CALIF. L. REV.* 541, 544 (2005) (“While *Hibbs* shares the strengths of the Ginsburg strategy, the protection afforded by *Hibbs* may share also the weaknesses of the earlier Ginsburg cases. Namely, *Hibbs* does not fully address or recognize the disparate impact issues that prompted the FMLA, nor does it lend itself to advances in recognizing ‘difference theory’ in pregnancy discrimination or other areas

underscored that sex classifications may be used “to compensate” for “disabilities . . . suffered.”<sup>389</sup> *Obergefell*, recognizing that two people of the same sex have a right to marry, highlighted the significance of intimate and associational choices to dignity and autonomy.<sup>390</sup> Likewise, scholars now question whether constitutional equality actually is “empty,”<sup>391</sup> providing strong arguments for locating a positive concept of social citizenship at the core of the federal Constitution.<sup>392</sup> Indeed, some commentators have argued that the existing statutory safety net, as interpretations of the Constitution, provides a foundation for recognizing specific positive rights in the Fourteenth Amendment. In particular, they ascribe to the Affordable Care Act evidence of an emerging doctrine of affirmative government duty.<sup>393</sup> Relatedly, other commentators read the Court’s decision in *Sebelius*,<sup>394</sup> affirming the constitutionality of the Affordable Care Act, as “in strong tension with the absence of positive rights under the Constitution.”<sup>395</sup> Nevertheless, there is no ignoring the fact that under current doctrine, given the absence of affirmative constitutional commitments, gender equality scores a victory when the gender gap is closed by denying benefits to men as well as to women—the remedy of leveling down instead of up.<sup>396</sup>

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affecting women in the workforce. Furthermore, the male bias exhibited by formal equality theory is also present in *Hibbs*.”).

389. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

390. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

391. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

392. *E.g.*, William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 166 (2001) (justifying a Constitution that afforded all Americans “rights to decent work and livelihoods, social provision, and a measure of economic democracy, including rights on the part of wage-earning Americans to organize and bargain collectively with employers”). Others have found in the Court’s Tenth Amendment cases a source for “ascribing special service responsibilities to states.” See Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty”* in *National League of Cities v. Usery*, 86 YALE L.J. 1165, 1174 (1977).

393. See Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639 (2012).

394. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

395. Jack M. Beerman, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 277, 278 (2015).

396. *E.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (redressing gender differential in immigration law by withholding benefit from mothers and fathers); see Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 Harv. L. Rev. 170, 171 (2017) (characterizing the decision as developing “a progressive vision of gender equality for the non-marital family,” but one that left the plaintiff with “an empty victory for the individual who came to the Court seeking justice and recognition”); see also Julie Suk, *Gender Equality and the Protection of Motherhood in Global Constitutionalism*, 12 LAW & ETHICS HUM. RTS. 151, 175 (2018) (“In the United States, several Supreme



## B. THE PRESIDENT'S ARTICLE III LEGACY

Barring unexpected developments, President Trump leaves a mark on the federal judiciary—some would call it a stain—that will last well into the middle of the twenty-first century.<sup>397</sup> His Article III legacy goes beyond the usual influence that a president has on doctrinal developments through the appointment process—although because of his unusually high number of judicial appointments, his doctrinal influence on matters affecting women will be stark.<sup>398</sup> As with other aspects of his presidency, Trump has been a disrupter of norms.<sup>399</sup> In his tweets and statements, he has expressed a view of the Article III courts that subverts and even mocks the concept of judicial independence, and he has contributed to an increasingly political understanding of the Supreme Court and of the lower courts that runs counter to democratic principles. He seems to view federal judges as party loyalists; rule-of-law values and judicial temperament do not figure in his conception.<sup>400</sup> Indeed, this disregard of norms began even before Trump entered the White House, with the Senate's

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Court decisions have explicitly stated that special protections for mothers are in tension with constitutional guarantees of due process or equal protection, and/or statutory guarantees of nondiscrimination.”).

397. See Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> (reporting that “[w]hile the brawl over Judge Kavanaugh’s confirmation may be over, people on both sides of the debate agree that it will have lasting ramifications on the Senate, the country and the court”).

398. See Stuart Chinn, *Disagreement and Resentment in Contemporary Politics*, 53 TULSA L. REV. 219, 219 (2018) (“The influence of presidential elections in shaping constitutional doctrine through the judicial appointments mechanism has long been noted among scholars.”).

399. See Garrett Epps, *Requiem for the Supreme Court*, ATLANTIC (Oct. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/supreme-court-loses-its-special-status/572416/> (observing that the appointment of Brett Kavanaugh to the Supreme Court is “a demonstration that in the new order there is no individual, no norm, no institution not subject to the control of the ruling party”).

400. See Matt Ford, *Brett Kavanaugh Disqualified Himself from the Supreme Court*, NEW REPUBLIC (Sept. 27, 2018) (stating that the nominee confirmed that “he would be a partisan warrior for the right,” defending against charges of sexual misconduct as “a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and . . . revenge on behalf of the Clintons”); see also Adam Liptak, *Retired Justice John Paul Stevens Says Kavanaugh Is Not Fit for Supreme Court*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/us/politics/john-paul-stevens-brett-kavanaugh.html> (“In an unusual rebuke from a former member of the Supreme Court, Justice John Paul Stevens said on Thursday that Judge Brett M. Kavanaugh was not qualified to sit on the court.”).

refusal to consider President Obama's nominee to the Supreme Court.<sup>401</sup>

Trump has shaped his judicial legacy in conscious disregard and indeed opposition to women's constitutional aspirations. The future composition of the Supreme Court was front and center during the 2016 presidential campaign,<sup>402</sup> and as a candidate Trump made clear his determination to make appointments that run counter to women's constitutional equality. Since taking office, President Trump has filled more than a third of the seats on the Article III courts, including two appointments to the Supreme Court,<sup>403</sup> and, as he has put it, with judges "picked by the Federalist Society."<sup>404</sup> By attitude and act, he has made clear that in his view, federal judges are the President's men—both literally and figuratively. His appointments have been lacking in gender and racial diversity,<sup>405</sup> and driven by the most rigid of constitutional litmus tests—tests that include the overruling of *Roe v. Wade*.<sup>406</sup> His characterization of federal judges who

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401. See Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1108 (217) ("In sum, affording Judge Garland no process was unprecedented and further subverted public regard for the Supreme Court and the confirmation process, while the nomination and confirmation of Justice Gorsuch may have had similar effects.").

402. See Christopher W. Schmidt, *The Forgotten Issue? The Supreme Court and the 2016 Presidential Campaign*, 93 CHI-KENT L. REV. 411, 414–15 (2018) (stating that "according to exit polls, more than any election in recent memory, the voters placed the Supreme Court at or near the top of their list of issues that affected their selection").

403. See Kimberly Strawbridge Robinson, *Trump's Judicial Victory*, 87 U.S.L.W. 209 (Aug. 2, 2018) ("[T]he Trump Administration broke the record for the most circuit court judges confirmed."); see also Jessie Kokrda Kamens, *Confirmation Fast Track*, BLOOMBERG L. (July 23, 2018) (reporting that as of this date, the Trump Administration had secured confirmations of 24 appellate judges; President Obama confirmed 16 during his first two years in office, President Bush, 17, President Clinton, 22, and President George H.W. Bush, 22); Stephen B. Presser, *Evaluating President Obama's Appointments of Judges from a Conservative Perspective: What Did the Election of Donald Trump Mean for Popular Sovereignty?*, 60 HOW. L.J. 663 (2017) (predicting that Trump's judicial appointments would follow a "conservative" ideology).

404. Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017) (quoting President Trump); see also Caroline Fredrickson, *The Least Dangerous Branch—And the Last Hope of the Left*, 12 HARV. L. & POL'Y REV. 121, 144 (2018) (acknowledging that the "Trump agenda" could "take over the courts" through the judicial appointment process and the fact that 38% of court seats will become vacant during the Trump presidency).

405. See Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 415 (2018) (providing statistics and discussing "Trump's neglect of ethnic minorities, LGBT individuals, and women when considering and confirming jurists").

406. See Tobias, *supra* note 401, 1103 ("President Trump's putative deployment of litmus tests, specifically regarding the very divisive abortion issue, was especially problematic.").

oppose his views as “Obama judges” and “so-called judges” produced an unusual response by the Chief Justice of the Supreme Court.<sup>407</sup>

As Professor Jack M. Balkin has put it, “Stocking the judiciary with jurists of roughly similarly ideological views can produce, over time, significant changes in constitutional doctrine.”<sup>408</sup> The President’s approach to the Article III courts have put him on a collision course with separation of powers and with the nation’s constitutional commitment, at times honored in the breach, to judicial neutrality and professional competence.<sup>409</sup> He also deeply resists the counter-majoritarian role of the courts as protectors of the dispossessed and downtrodden. Our criticisms of judicial decisions in the previous Parts should not put in question our view of the Article III courts as an institution marked by collegiality, tradition, and professionalism, and our hope that the federal judiciary will be more than Trump’s Court despite the power politics that have accompanied the nomination process.<sup>410</sup> At the least, we know that political tides change, and the Court’s approach to the Constitution changes as well. Although the social process is not determinate and the time frame never certain, the Supreme Court responds to public opinion, to elections, to war, and to relations with law clerks and other judges.<sup>411</sup> President Eisenhower’s confession that his appointment

407. See Adam Liptak, *Roberts Rebukes Trump for Swipe at ‘Obama Judge,’* N.Y. TIMES, Nov. 22, 2018, at A-1 (reporting that “Chief Justice John G. Roberts Jr. defended the independence and integrity of the federal judiciary on Wednesday, rebuking President Trump for calling a judge who had ruled against his administration’s asylum policy ‘an Obama judge.’”).

408. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005).

409. See Adam Gopnik, *What Most Disqualifies Brett Kavanaugh for the Supreme Court?*, NEW YORKER (Oct. 4, 2018), <https://www.newyorker.com/news/daily-comment/what-most-disqualifies-brett-kavanaugh-for-the-supreme-court> (stating that until Trump no “democratically elected leader has openly sneered at women,” that “Trumpism has now become the central and defining faith of the Republican Party,” and that Justice Kavanaugh is “an insurance policy” for the executive).

410. See Erin Kelly, *Supreme Court Justices Condemn Partisan Treatment of Nominee Brett Kavanaugh by Senators*, USA TODAY (Sept. 14, 2018), <https://www.usatoday.com/story/news/politics/2018/09/14/brett-kavanaugh-justices-condemn-partisan-treatment-nominee/1303030002/> (quoting Justice Kagan saying that the confirmation process has been “an unfortunate thing . . . . Because it makes the world think we are sort of junior varsity politicians. I think that’s not the way we think of ourselves, even given the fact that we disagree.”).

411. See Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2068 (2016) (“At the risk of generalizing, [studies] tend to find that

of Earl Warren to the Court was “the biggest damned-fool mistake I ever made”<sup>412</sup> may be unusual, but it illustrates the unknown effects of life-time tenure, reputational concerns, and external events on Supreme Court Justices’ attitudes and the development of constitutional doctrine.<sup>413</sup>

### C. CONSTITUTIONAL AMENDMENT AND GENDER EQUALITY

Even before Trump became President, political support for an equal rights amendment had regained steam. Proponents argue that an ERA can encourage development of a “responsive state” that recognizes and gives respect to the social and economic requirements of contemporary life.<sup>414</sup> They see an ERA as necessary institutional support for “congressional authority to legislate” the kinds of affirmative and regulatory programs that are essential for all Americans.<sup>415</sup> And they see an ERA as the basis for securing a “social reproduction infrastructure” that enables society to grow and flourish.<sup>416</sup>

These different visions converge on an important point: that an ERA will not simply extend the Fifth and Fourteenth Amendments with all of their judicially-created doctrinal gaps to women, but rather will entail a more robust and substantive notion of gender equality. This is so for a number of reasons.

First, the scope and content of an equal rights amendment would not be tied to originalist arguments that look to the intentions of the eighteenth-century Founding Fathers or even to

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when the ‘mood of the public’ is liberal (or conservative), the Court is significantly more likely to issue liberal (or conservative) decisions.”)

412. Ed Whelan, *This Day in Liberal Judicial Activism—January 11*, NAT’L REV. (Jan. 11, 2014). Another version has it as “the biggest damn fool thing I ever did.” Michael O’Donnell, *Commander v. Chief*, ATLANTIC (April 2018).

413. See Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES (July 5, 2005), <https://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html> (discussing presidential judicial appointments whose judicial philosophies differed from those of their nominating president).

414. Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1763 (2012).

415. MacKinnon, *supra* note 44, at 578.

416. See Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 444 (2017).

those of the post-Reconstruction period.<sup>417</sup> Indeed, many leading proponents of originalism recognize that the theory can be normatively attractive only if it is allied with a dynamic approach to Article V—“an effective amendment process” that “permits each generation to change the Constitution.”<sup>418</sup> Without entering the debate of whether originalism is at odds with a “living constitution,”<sup>419</sup> an ERA, adopted in the twenty-first century, would draw from a different founding history that acknowledges structural discrimination as a cause of gendered inequality and subordination, recognizes the importance of public goods, and appreciates the role of law in creating, sustaining, and perpetuating social and market relations that disadvantage women.<sup>420</sup> Moreover, the amendment would build on the Constitution’s existing protection for reproductive and marital choice—and move forward from those baselines.

Second, an ERA would not be constrained by the Court’s interpretive approach to the Fourteenth Amendment, which builds on three tiers of scrutiny accompanied by three standards of review—rationality (or minimal), intermediate, and strict.<sup>421</sup> This is not the occasion to review criticisms of the Court’s approach or to argue in favor of a new approach.<sup>422</sup> Our point is

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417. See Donna J. King, *The War on Women’s Fundamental Rights: Connecting U.S. Supreme Court Originalism to Rightwing, Conservative Extremism in American Politics*, 19 CARDOZO J.L. & GENDER 99, 135 (2012) (arguing that originalism as an interpretive theory has ensured that the Court reflects “pre-Reconstruction era ideologies”); see also Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 446 (2014) (“Giving feminists cause for worry, however, some of the most prominent self-proclaimed originalists have announced themselves perfectly comfortable with the conclusion that the Constitution does not prohibit sex discrimination.”).

418. John O. McGinnis & Michael B. Rappaport, *An Originalist Future*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 34, 38 (2014).

419. On the view that originalism can support a dynamic reading of the Constitution, see James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433 (2013); see also Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456 (2001) (describing how early suffragists pushed for an evolutionary approach to the Constitution in reaction to originalism).

420. See Suk, *supra* note 416, at 444 (“A twenty-first-century ERA could serve as the foundation for collective efforts to complete the revolution in the way Americans work, reproduce, and raise the next generation in the post-industrial age.”).

421. See Ryan James & Jane Zara, *Equal Protection*, 4 GEO. J. GENDER & L. 1 (2002) (setting forth tiers and standards in the context of gender decisions).

422. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011) (“The words ‘scrutiny’ and ‘review’ suggest an examination rather than a result. Yet in this jurisprudence, looks can kill.”). See generally Suzann B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

that an ERA would not be bound by the Court's past approaches to standards of review.<sup>423</sup> As an example, the Court could decide to take gender differences openly into account when reviewing legislation, but invalidate only those laws that treat such differences as grounds for gendered subordination.<sup>424</sup>

Third, an ERA need not be constrained by the judicially-created state action requirement that the Court has imposed upon the Fourteenth Amendment and which in practice has limited the scope of judicial remedies and legislative solutions.<sup>425</sup> Models of alternative approaches are available from constitutions abroad and from state constitutions, not all of which track federal interpretive doctrine.<sup>426</sup> Indeed, alternative approaches remain embedded in the Court's abandoned or ignored Fourteenth and Fifteenth Amendment decisions; as Professor Archibald Cox explained in 1966:

To transfuse into the enforcement provision of the fifteenth amendment the familiar necessary and proper clause principle that "Congress may use any rational means to effectuate the constitutional prohibition" implies that under the parallel enforcement provision of the fourteenth amendment Congress may regulate activities which do not themselves violate the prohibitions of that amendment, where the regulation is a rational means of effectuating one of its prohibitions. The formula, moreover, might supply an answer, in many instances, to the argument that Congress cannot regulate private conduct under the fourteenth amendment because the amendment deals only with state action. One could well say, "Granted that

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423. See Patricia Thompson, *The Equal Rights Amendment: The Merging of Jurisprudence and Social Acceptance*, 30 W. ST. U. L. REV. 205 (2003) (discussing the relation between constitutional amendment and standards of review).

424. We differentiate between gender classifications that benefit women for past injustice and those that perpetuate harm. Compare Edward J. McCaffery, *Equality, of the Right Sort*, 6 UCLA WOMEN'S L.J. 289 (1996), with Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

425. See Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 2 (2018) (questioning the "dichotomous" nature of the state action doctrine). For a history of the debates concerning the ERA and private conduct, see Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009); see, e.g., Bruce E. Altschuler, *State ERAs and Employment Discrimination*, 65 TEMPLE L. REV. 1267 (1992).

426. See Paul Taylor & Philip G. Kiko, *The Lost Legislative History of the Equal Rights Amendment: Lessons from the Unpublished 1983 Markup by the House Judiciary Committee*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 341, 369-71 (2007) (discussing state action and the Pennsylvania ERA); Altschuler, *supra* note 425 (surveying state ERA treatments of a governmental-involvement requirement).

the prohibitions in section 1 of the fourteenth amendment are addressed only to the states and not to private persons, still the congressional power to enact measures helping to effectuate those prohibitions may include the regulation of private activities where that is a means of implementing the prohibition against the state.” For example, a law prohibiting discrimination against Negroes in the sale and rental of housing could well be viewed as a means of bringing about the breakup of the urban ghettos which are serious obstacles to the states’ performance of their constitutional duty not to discriminate in the quality of education and other public services.<sup>427</sup>

These judicial decisions reveal that it is not necessary to take a binary approach to constitutional enforcement—targeting all state action and excluding all private action—and instead more sensitive and nuanced approaches are possible.<sup>428</sup> In appropriate cases, the ERA could be a source of redress for the gendered effects of laws that create, enable, and sustain social and economic arrangements that produce not “simply losers,” as Professor Robert M. Cover wrote in discussing discrete and insular minorities, but also “perpetual losers”—women who for generations have carried the burden of cumulative disadvantage.<sup>429</sup>

Finally, a major advantage of an ERA would be the decoupling of its enforcement power from the Court’s current approach to Congress’s enforcement power under Section 5 of the Fourteenth Amendment.<sup>430</sup> By its history and text, the Fourteenth Amendment looks to Congress, and not the Court or the

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427. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 103 (1966).

428. On the relation between state action and social and economic rights, see Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004). See generally Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010) (discussing a hybrid approach to the enforcement of state constitutional law and common law); Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 BUFF L. REV. 455 (2011) (discussing the “radiating” effects of constitutional rights on private law doctrines even in federal law).

429. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982).

430. The ERA that so far has been ratified by thirty-six states includes as Section 2 the following language: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” See Roberta W. Francis, *The History Behind the Equal Rights Amendment*, EQUAL RTS. AMEND.: UNFINISHED BUS. FOR CONST., <https://www.equalrightsamendment.org/history.htm> [<https://web.archive.org/web/20180831181756/https://www.equalrightsamendment.org/history.htm>].

President, as the primary enforcer of the Constitution's guarantee of equality and due process.<sup>431</sup> However, the Supreme Court has inverted the constitutional design, with the Court claiming that because it has supreme and exclusive authority to give substantive content to constitutional rights,<sup>432</sup> it may limit Congress's power to devise remedies and, further, may limit such remedies only for a violation of a right that the Court already has specifically identified.<sup>433</sup> The practical effect has been to roll back legislative solutions that could carry forward gender equality<sup>434</sup>—as the invalidation of the Violence Against Women Act amply shows.<sup>435</sup>

To be sure, leaving rights enforcement to Congress poses a significant risk. Political sympathies may shift, and representatives may be self-interested or venal.<sup>436</sup> But as Justice William H. Brennan famously argued in *Katzenbach v. Morgan*,<sup>437</sup> the power to enforce equality provisions does not include the power to dilute or contract them.<sup>438</sup> As he put it, the enforcement power is a one-way ratchet. The Court's 1997 decision in *City of*

431. See Garrett Epps, *The Struggle Over the Meaning of the 14th Amendment Continues*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-struggle-over-the-meaning-of-the-14th-amendment-continues/564722/> (“Section 5 put Congress, not the president or the (hitherto) pro-slavery Supreme Court, in charge of enforcing the new democratic rules.”).

432. See Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (discussing the rise during the Rehnquist Court of the Court's view that its power of judicial review is not only supreme, but also “that interpretation by non-judicial actors is somehow unnatural”); see also GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 269 (2006) (“Relying almost entirely on segregation-era analyses of the Fourteenth Amendment, the Court held [in *City of Boerne v. Flores*, 521 U.S. 507 (1997)] that it, not Congress, had ‘primary authority’ for determining how to protect minority rights in the states.”).

433. See Vada Berger, Nicole Walthour, Angela Dorn, Dan Lindsey, Pamela Thompson & Gretchen von Helms, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 437, 481 (1989) (“Congress’ Section 5 enforcement authority is subservient to the Supreme Court’s authority to interpret the substantive scope of the fourteenth amendment.”).

434. See Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 HARV. J.L. & GENDER 1 (2013) (discussing the demise of the ERA and the legislative campaign for the Economic Equality Act).

435. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2011) (discussing invalidation of the Violence Against Women Act).

436. See Anita S. Krishnakumar, *How Long Is History’s Shadow?*, 127 YALE L.J. 880 (2018) (reviewing JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)). See also Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 683 (defending a court-centric approach over popular constitutionalism).

437. 384 U.S. 641 (1966).

438. *Id.* at 651 n.10.



*Boerne*<sup>439</sup> undermined the utility of the ratchet approach under the Fourteenth Amendment by invalidating legislative enforcement measures that were said to implement notions of equality that the Court had not yet recognized.<sup>440</sup> An ERA need not track this doctrinal gloss.<sup>441</sup> We leave to another day the possibility that politics will fail, that Congress abdicates its responsibility, and that judicial review will be needed to overcome legislative blockage.

### CONCLUSION

The Trump Administration has produced a firestorm of tweets, protests, and headlines about the place of women in our current constitutional regime. As significant, it has highlighted the nation's constitutional failure to promote substantive gender equality and to take responsibility for laws and programs that exacerbate women's subordinate position.<sup>442</sup> The invisible hand of

439. *City of Boerne v. Flores*, 521 U.S. 507 (1997). For criticisms, see Post & Siegel, *supra* note 37, at 1946 (equating *Boerne* with an enforcement model and stating that the model “seeks to exclude Congress from the process of constitutional lawmaking because it regards the integrity of our system of constitutional rights as dependent upon its complete insulation from the contamination of politics”); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (“[A]lthough the *Boerne* Court properly rejected the plenary ‘substantive’ interpretation of Section Five, the Court’s conclusion that judicial interpretations of the provisions of the Amendment are the exclusive touchstone for congressional enforcement power finds no support in the history of the Fourteenth Amendment.”).

440. See, e.g., Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1641 (1998) (“We are not unmindful that—especially in the civil rights arena—the Supreme Court of late has been willing to interpret away . . . settled precedents [involving civil rights].”); see also William E. Forbath, *Why Is this Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1772 (1994) (discussing rejection of “the idea that the Court is the sole significant source of constitutional interpretation and innovation”).

441. We note as well the concerns expressed by courts and commentators about judicial capacity to enforce social and economic rights. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (arguing that certain affirmative claims function as constitutional principles that inform legislative activity but are not judicially enforceable). At least one of the current authors disagrees with the view that socio-economic rights are non-justiciable. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999). Our emphasis on congressional enforcement power in part meets these criticisms; it would protect new rights against invalidation, and it would leave space for a mobilized public to participate in political activity.

442. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

the market, propped up by law, courts, and custom, has relegated too many Americans—male, female, cis, trans, inter, homosexual, heterosexual, queer—to lives of stunted opportunity, violence, and economic pain. An Equal Rights Amendment, conceived as a substantive commitment to equality, liberty, and dignity, could provide a remedy for historic gender subordination; it could protect against plutocratic greed; and it would give expression to liberal democratic ideals. The Constitution in the age of Trump is yet to be written, and it is time for women— together with men— to write it.

