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To Shatter the Glass Ceiling, Clean the Sticky Floor and Thaw the Frozen Middle: How Discrimination and Bias in the Career Pipeline Perpetuates the Gender Pay Gap

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TO SHATTER THE *GLASS CEILING*, CLEAN THE *STICKY FLOOR* AND THAW THE *FROZEN MIDDLE*: HOW DISCRIMINATION AND BIAS IN THE CAREER PIPELINE PERPETUATES THE GENDER PAY GAP

RACHEL DiBENEDETTO*

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There wasn't a great understanding of gender discrimination. People knew that race discrimination was an odious thing, but there were many who thought that all gender-based differentials in the law operated benignly in women's favor. So, my objective was to take the Court step by step to the realization, in Justice Brennan's words, that the pedestal on which some thought women were standing all too often turned out to be a cage.¹

I. INTRODUCTION

Women crack the *glass ceiling*, but rarely pierce the surface.² When women do shatter the glass, they do so in small strides, achieving minor victories.³ This glass, an invisible discriminatory barrier, the cultural predispositions filled with gender⁴ bias, inhibits women from career

1. JEFFREY ROSEN, CONVERSATIONS WITH RBG: RUTH BADER GINSBURG ON LIFE, LOVE, LIBERTY, AND LAW 23-24 (2019).

2. Debra Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, HARV. BUS. REV. (Jan.-Feb. 2020), <https://hbr.org/2000/01/a-modest-manifesto-for-shattering-the-glass-ceiling>.

3. *See id.*

4. This Article acknowledges that the words “sex” and “gender” are not synonymous. “Sex refers to the biological differences between males and females.

advancement—from reaching the ceiling.⁵ Many refused to recognize this often unspoken phenomenon⁶ until the United States Department of Labor called for action.⁷ In enacting anti-discrimination legislation and bridging the gender education gap, women made remarkable headways in overcoming hurdles, yet the roots of the challenge still remain.⁸ How can women shatter the glass ceiling if the *sticky floor* keeps women at entry level, lower paid positions with limited opportunities for career advancement?⁹ This same *sticky floor* characteristically encompasses “pink collar workers”—secretaries, nurses, assistants, and teachers—¹⁰who typically receive imbalanced gender-based investment.¹¹ Similarly, how can women shatter the *glass ceiling* if the *frozen middle* prevents women from attaining high-ranked positions?¹² The *frozen middle*, ordinarily ascribed to the slow progression of female career advancement, or rather, women “frozen” in intermediate management positions, hinders a woman’s upward mobility.¹³ Whether referring to the metaphorical *sticky floor* or the *frozen middle*, the underlying issues consolidate to “traditional gender roles,

Gender refers to the continuum of complex psychosocial self-perceptions, attitudes, and expectations people have about members of both sexes.” Jennifer Tseng, *Sex, Gender, and Why the Differences Matter*, 10 AM. MED. ASS’N. J. ETHICS 427, 427 (2008). Even so, for the purposes of this Article I use the words interchangeably because Congress, courts, and advocates currently use this language synonymously when discussing discrimination. Further, because of the limited research on groups outside of the traditional binary divisions at this time, this Article concretizes on the terms “male” and “female.”

5. *100 Women: ‘Why I Invented the Glass Ceiling Phrase’*, BBC NEWS (Dec. 13, 2017), <https://www.bbc.com/news/world-42026266>.

6. Theresa Vargas, *She Coined the Term ‘Glass Ceiling.’ She Fears it Outlived Her.*, WASH. POST. (Mar. 1, 2018, 7:00 AM EST), <http://www.washingtonpost.com/news/retropolis/wp/2018/03/01/she-coined-the-phrase-glass-ceiling-she-didnt-expect-it-to-outlive-her/>.

7. *See generally* U.S. DEP’T OF LABOR, THE GLASS CEILING INITIATIVE (1991), <https://files.eric.ed.gov/fulltext/ED340653.pdf> (creating the Glass Ceiling Commission).

8. *See 100 Women: ‘Why I Invented the Glass Ceiling Phrase’*, *supra* note 5.

9. Jennifer V.E. Brown et al., *From the Sticky Floor to the Glass Ceiling and Everything in Between: Protocol for a Systematic Review of Barriers and Facilitators to Clinical Academic Careers and Interventions to Address These, With a Focus on Gender Inequality*, 26 SYSTEMATIC REVS. 1, 2 (2020).

10. David Francis, *The Pink-Collar Job Boom*, U.S. NEWS (Sept. 10, 2012), <https://money.usnews.com/money/careers/articles/2012/09/10/the-pink-collar-job-boom>.

11. *See* Brown et al., *supra* note 9.

12. *See* Deenbandhu Chhotu Ram, *A Study on Glass Ceiling and Related Metaphors*, 5 INT’L J. RES. & ANALYTICAL REVS. 184, 187-88 (2018).

13. *See id.*

preferential treatment of male candidates, structures that are unsupportive of family-related career breaks, and lack of effective mentors.”¹⁴ Cleaning the *sticky floor* and thawing the *frozen middle* will pave the way for women to crack the *glass ceiling*. “[B]ut changing the culture means nothing if the law doesn’t change . . . [B]ut the country isn’t ready. Change minds first, then change the law.”¹⁵ Luckily, the laws have changed and maybe the country is ready, but minds have not fully changed.

In every argument exploring the *sticky floor*, *frozen middle*, and *glass ceiling*, women ask themselves whether they have done enough. This question consistently surfaces for both women in leadership positions, like former Supreme Court Associate Justice, Ruth Bader Ginsburg, and for any female employee enduring inherent bias. People constantly encourage women to speak up or fight harder.¹⁶ Women do bear some burden to overcome these barriers, but why should they have to overcome them? This is not to say women should not strive to push past obstacles should they elect to do so. However, breaking down these invisible barriers to eliminate subtle discrimination and bias at each stage in the career pipeline will desegregate occupations. In providing women with a choice free from these obstacles, occupations will become less gender-centric. Accomplishing this goal will disassociate traditionally female dominated professions with lower earned wages and historically male dominated occupations with higher-earned wages. Further, once these professions lean towards a more equal gender makeup, the workplace discrimination and bias will likely become more apparent or ideally, nonexistent.

The Supreme Court made tremendous strides in acknowledging gender-

14. See Brown et al., *supra* note 9.

15. Bobbi Gray, ‘*On the Basis of Sex*’, GRAMEEN FOUND. (Sept. 21, 2020), <https://grameenfoundation.org/stories/blog/on-the-basis-of-sex>.

16. Courtney Connley, *45% of Women Business Leaders Say it’s Difficult for Women to Speak Up in Virtual Meetings*, CNBC (Sept. 3, 2020, 11:00 AM), <https://www.cnbc.com/2020/09/03/45percent-of-women-business-leaders-say-its-difficult-for-women-to-speak-up-in-virtual-meetings.html> (“While it’s certainly appropriate for women, and other colleagues, to call out this behavior the minute it happens, [Dr. Patti] Fletcher says it’s more important for company leaders to do their part to ensure that a culture of talking over women and ignoring them doesn’t persist.”)

based assumptions¹⁷ to promote gender equality amongst jury selection,¹⁸ educational opportunities,¹⁹ employment positions,²⁰ parental roles,²¹

17. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690-91 (2017) (noting that justifications for gender-based distinctions rest on gender based assumptions); *Vance v. Ball State Univ.*, 570 U.S. 421, 455 (2013) (Ginsburg, J., dissenting) (criticizing the majority for ignoring modern workplace realities); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 370 (2011) (citing an amicus brief that highlights sex stereotypes in job assignments and advancement opportunities); *Stanton v. Stanton*, 421 U.S. 7, 15, 18 (1975) (holding that it is unconstitutional to distinguish the age of majority for woman and men based on the assumption that women need less education).

18. *See, e.g.*, *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143-46 (1994) (determining that prosecutors may not use preemptory challenges to dismiss jurors on the basis of sex); *Taylor v. Louisiana*, 419 U.S. 522, 537-38 (1975) (invalidating a Louisiana state statute that only permitted women to serve as jurors when they volunteered and mandated states to call jurors on an equal basis).

19. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 554, 557-58 (1996) (finding that the “separate but equal” policy for the Military Institute violated the Equal Protection Clause of the Fourteenth Amendment); *Miss. Univ. for Woman v. Hogan*, 458 U.S. 718, 733 (1982) (finding that it is unconstitutional for a state to exclude men from nursing school).

20. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (determining that Alabama’s prison guard height and weight requirement violated Title VII); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208-10 (1974) (holding that paying women less than men for the same inspector position violates the Equal Pay Act).

21. *See, e.g.*, *Nguyen v. Immigr. & Nat. Serv.*, 533 U.S. 53, 71-73 (2001) (upholding a law that deems out-of-wedlock children born overseas citizens of their mothers’ citizenship while requiring fathers to acknowledge their paternity); *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981) (overturning a Louisiana state statute that provided husbands the exclusive right to dispose of marital community property); *Califano v. Westcott*, 443 U.S. 76, 88-89 (1979) (finding that a program providing unemployment benefits to families with unemployed fathers but not to families with unemployed mothers was unconstitutional); *Orr v. Orr*, 440 U.S. 268, 282-84 (1979) (finding a statute that required the husband to pay alimony upon divorce and not wives violated the equal protection clause); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (invalidating sex-based distinctions in social security survivor benefit payments); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 649-51 (1974) (holding that mandatory maternity rules for pregnant teachers denied them of constitutional protections afforded by due process); *Frontiero v. Richardson*, 411 U.S. 677, 680-81 (1973) (reviewing a federal statute that automatically granted male members of uniformed forces housing benefits for their wives while requiring females to demonstrate “actual dependency”); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (ruling that, absent a legitimate business reason, an employer cannot refuse to hire a woman with young children while hiring men with similar qualifications).

payment contributions,²² and litigation damages.²³ Aside from the Court interpreting equal protection to incorporate gender-based clarifications explicitly pursuant to the fourteenth amendment²⁴ and implicitly to the fifth amendment,²⁵ the nineteenth amendment serves as the only Constitutional recognition of a right on “account of sex”—granting the women the right to vote.²⁶ In an attempt to bridge the gender gap, Congress has passed federal legislation incorporating sex as a protected class,²⁷ while states have concurrently enacted laws prohibiting sex based employment discrimination.²⁸ Though the Court has begun to recognize sex

22. *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 721-23 (1978) (holding that a requirement that female workers make greater pension contributions than their male counterparts violates Title VII); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (finding a Social Security Act provision distinguishing among the sexes is unconstitutional); *Reed v. Reed* 404 U.S. 71, 76-77 (1971) (finding that a state statute preferring males over females in appointing an administrator of an estate violated the equal protection clause).

23. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545-46 (1999) (granting women punitive damages when employers engage in sex discrimination pursuant to Title VII even if women do not show “egregious” or “outrageous” conduct by their employer).

24. *See* U.S. CONST. amend. XIV; *see also* *United States v. Virginia*, 518 U.S. 515, 534 (1996); *Craig v. Boren*, 429 U.S. 190, 207-10 (1976) (setting intermediate scrutiny as the standard of review for gender discrimination cases); *Reed*, 404 U.S. at 76.

25. *See* U.S. CONST. amend. V; *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (“[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’” (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954))).

26. *See* U.S. CONST. amend. XIX; *see also* *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. on the Judiciary*, 103rd Cong. 194 (1993) (stating that every modern human rights document has a statement that men and women are equal before the law but the United States Constitution does not have such a document).

27. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. 111-2, 123 Stat. 5 (2009) (providing for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII); Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (amending the Civil Rights Act of 1964 to strengthen and improve civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2010) (prohibiting employment discrimination based on race, color, religion, sex, and national origin); Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018) (“No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex.”).

28. *Sex and Gender Discrimination in the Workplace*, NAT’L CONF. ST. LEG. (Mar. 28, 2019), <https://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx> (listing all states except Alabama, Georgia, and Mississippi that

discrimination as a fourteenth amendment classification,²⁹ thus, acknowledging gender inequities, many still remain skeptical about gender-wage disparities.³⁰

*The gender pay gap is a myth, a fallacy, a non-existent notion.*³¹ Opponents debunk the gender pay gap and rebut each claim with one word: *choice*.³² This Article does not discount a woman's desire to take on a "less demanding" or lower paying position.³³ Instead, the core issue turns on whether this *choice* is an autonomous one, meaning one in which a woman fully decides her profession absent any outside influence; a *choice* free from gender discrimination, bias, and norms.³⁴ Challengers repeatedly indicate that the gender pay gap ignores a woman's education and experience.³⁵ However, the notion acknowledges just that. These early onset imbedded barriers and instilled impressions guide young adults' *choices*, leading to lack of equal representation or prolonging workplace discrimination. This Article will push beyond existing legislation reform—whether enacted or proposed—to touch on how early onset gender bias—sociocultural, educational, or environmental factors—contribute to unequal representation in certain fields, consequentially preserving the gender-pay gap. These "constraints" reflect traditional notions of gender classifications, influencing young girls and men to pursue certain academic subjects or particular athletic prospects. While each subset tremendously

enacted sex discrimination legislation).

29. *See supra* notes 23-28.

30. Ruth Umoh, *How to Convince a Skeptic the Pay Gap is Real*, CNBC (Apr. 10, 2018, 12:30 PM), <https://www.cnbc.com/2018/04/10/6-ways-to-convince-a-skeptic-the-pay-gap-is-real.html>.

31. John Phelan, *Harvard Study: "Gender Wage Gap" Explained Entirely by Work Choices of Men and Women*, FOUND. FOR ECON. EDUC. (Dec. 10, 2018), <https://fee.org/articles/harvard-study-gender-pay-gap-explained-entirely-by-work-choices-of-men-and-women/>.

32. *See id.*

33. *The State of the Gender Pay Gap 2020*, PAYSACLE, <https://www.payscale.com/data/gender-pay-gap> (last visited Feb. 1, 2020).

34. *See id.*; *see also* Clara Wajngurt & Pessy J. Sloan, *Overcoming Gender Bias in STEM: The Effect of Adding the Arts (STEAM)*, 14 INSIGHT: A J. SCHOLARLY TEACHING 13, 16 (2019) (conducting a case study to conclude that promoting science, technology, engineering and math ("STEM") courses alongside a more female dominated subject such as the arts, increased participation in the former subjects). Note, while this Article focuses on gender discrimination in terms of a woman's disadvantage, similar historically gendered stereotypes apply to men, dissuading them from pursuing certain careers because of an attached stigma.

35. *See* Niamh McIntyre, *Gender Pay Gap Figures: Debunking the Myths*, THE GUARDIAN (Apr. 5, 2019, 9:32 PM), <https://www.theguardian.com/world/2019/apr/05/gender-pay-gap-figures-debunking-the-myths>.

affects a woman's career choice, this piece briefly highlights occupational segregation as one of the strongest driving forces behind gender wage inequity.³⁶ But why are women in dissimilar professions or rather, female-centric careers seemingly undervalued? This Article does not delve into how the capitalistic system deems a finance manager's position more valuable than an average schoolteacher's position.³⁷ Rather, this piece elucidates the unequal representation in male dominated professions, perpetuating the gender pay gap. This Article focuses on breaking down decades of traditional gender roles, intertwining these permitted opportunities with gender bias to increase representation for both genders within all professions. The unequal opportunity notion does not necessarily reflect physical present barriers, but instead turns on institutional discrimination, inherent gender bias, and gendered-social constructs.

Part I of this Article will begin by examining the historical development of case law and enacted legislation for gender pay inequity. Part II will highlight how gender disparities in salary distributions within a specific controlled group³⁸ surface through workplace discriminatory practices and

36. See Ram, *supra* note 12, at 188.

37. Compare *Average Finance Manager Salary*, Payscale, https://www.payscale.com/research/US/Job=Finance_Manager/Salary (last visited Feb. 1, 2021), with *Average Teacher Salary*, Payscale, <https://www.payscale.com/research/US/Job=Teacher/Salary> (last visited Feb. 1, 2021). In examining each subset, this piece briefly touches upon highly significant, deeply rooted issues that require further research and explanation. The selected points do not explain the gender pay gap in its entirety nor do these points reflect an exhaustive discussion. Instead, this Article highlights how major facets unconsciously impress upon students, consumers, and viewers, molding their perspectives. It circumvents any attempt to reduce wealth inequities at this time, but instead addresses how breaking down systemic discrimination and inherent bias will lead to less gender-centered professions, ultimately eliminating the gender-pay gap. Similarly, this Article does not delve into the public policy reforms necessary to address the difference in working hours and caretaking responsibilities. Instead, it concentrates on how historical discrimination and rooted bias feeds off ever-prevalent stereotypes that reinforce occupational segregation. In succinctly tackling the sub-issues that lead to *sticky floors* and *frozen middles*, women likely will crack more *glass ceilings*. Lastly, when highlighting any strides toward gender wage equality, this piece does not discount *how* companies, media, officials, or others execute their policies. This does not dismiss any skewed efforts, but instead focuses on how those vehicles for change acknowledged the issue and took subsequent action. In a similar vein, any mention of female activists or political figures highlights their efforts, not any oversights. For the purposes of this Article, the complex, layered discussion simply strives to raise awareness, recognize bias, and implement solutions. In the words of Ruth Bader Ginsburg, "the objective [is] to take the [public] step by step to the realization, in Justice Brennan's words, that the pedestal on which some thought women were standing all too often turned out to be a cage." ROSEN, *supra* note 1, at 23-24.

38. See *The State of the Gender Pay Gap 2020*, *supra* note 33 (establishing a controlled pay gap group as those who perform similar jobs with the same employment

latent contractual obligations. Part III will explore how the gender pay gap in a non-controlled group³⁹ exists because of an array of factors but focus on institutional discrimination and gender bias—both stemming from gender norms. Section A will highlight how gender stereotypes and lack of equal representation in multiple facets reinforces gender norms. Section B will tackle the career pipeline, specifically addressing how biased academic and athletic programs may guide a student to pursue a profession. Part IV will demonstrate how these guided *choices* lead to unequal gender representation, thus, perpetuating gender-centered professions. Part IV also will analyze how occupational segregation, driven by aforementioned institutional sexism and reinforced bias partially explains gender wage disparities. Part V will focus on proposed solutions, short term Congressional remedies, and long-term community approaches to increase equal gender workplace representation and in turn, reduce the gender pay gap. In breaking down these social constructs, studies will redirect their focus to address gender issues in a controlled workplace setting instead of contrasting women and men’s earnings on account of the profession itself.

II. “IF THE LAW DIFFERENTIATED BETWEEN PEOPLE ON THE BASIS OF SEX, THEN HOW WILL MEN AND WOMEN EVER BECOME EQUALS?”

As of 2021, women in uncontrolled groups earned approximately \$.82 to every \$1 earned by men.⁴⁰ Women in control groups—those with nearly identical positions and qualifications as their male counterpart—*still* earn \$.98 per every \$1 earned by men.⁴¹ In these controlled and uncontrolled environments, the gender pay gap continues to highlight the racial economic inequity in the United States, where women of color earn significantly less than white men.⁴² The gap widens subject to a woman’s socioeconomic background, ethnicity group, or sexual orientation.⁴³ Even more so, the coronavirus pandemic disproportionately affected the potential earnings of

characteristics). For the purposes of this Article, “control group” refers to persons working in similar, if not the same, professions.

39. *See id.* (establishing an uncontrolled pay gap group by looking at the median salary for all men and women regardless of job type or seniority). For the purposes of this Article, “uncontrolled group” refers to persons working in different occupations.

40. *See id.*; *see, e.g.*, AM. ASS’N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 2 (2020), https://www.aauw.org/app/uploads/2020/10/Simple_Truth_1.8.pdf; Courtenay Stevens, *A Look at the Gender Pay Gap in 2020*, BUSINESS.ORG (Feb. 24, 2020), <https://www.business.org/finance/benefits/gender-pay-gap/>.

41. *See The State of the Gender Pay Gap 2020, supra* note 33.

42. *See id.*; *see also* AM. ASS’N OF UNIV. WOMEN, *supra* note 40.

43. *The AM. ASS’N OF UNIV. WOMEN, supra* note 40.

women from all backgrounds by exacerbating gender roles—specifically, caretaking responsibilities or dwindling industries.⁴⁴ This Article does not discount how these discrepancies largely stem from dozens of discriminatory issues, but instead solely addresses the stark disparities amongst men and women’s total median earnings. Opponents refer to the gender pay gap as a fallacy and argue such disparities result from women’s choices.⁴⁵ They attribute wage loss to pregnancy leave, caretaker roles, and individual effort.⁴⁶ While these factors may contribute to a lesser overall income, the crux of this Article focuses on how implicit gender bias leads to occupational gender segregation.⁴⁷ Asserting that women make these decisions, completely on their own accord, disregards years of women defying stereotypes in pursuing majors, negotiating wages, and working hours. Claiming that a woman cannot receive a higher earning than a man because she has not climbed the corporate ladder ignores the inherent barriers prohibiting women from securing certain positions.⁴⁸ To crack the glass ceiling, and ideally to achieve the same earnings, women must push through countless roadblocks. These barriers reflect implicit or explicit discrimination in controlled groups, childhood development, career pipelines, and workplace routine.⁴⁹ Yet, the law rarely acknowledges or corrects systematic gender bias.⁵⁰

A. Congress Created the Right to Sue

Aside from historically embedded early attitudes towards women, prior legislation set limits on a married woman’s ability to control property,⁵¹

44. *See id.*

45. *See The State of the Gender Pay Gap 2020, supra* note 33.

46. *See id.*

47. *See id.*

48. *See id.*

For example, a roughly equal percentage of men and women begin their careers as individual contributors, i.e., they do not manage people. In 2020, 75% of men and 76% of women ages 20 to 29 are in individual contributor roles. However, by age 30 to 44, 36% of men became supervisors or managers while only 30% of women did. Finally, men are twice as likely to be directors or executives than women by age 45 or older. A total of 6% of women make it into an executive level role at any time of their lives while 12% of men do.

49. *See id.*

50. *See supra* notes 17-27.

51. *See, e.g.,* MICH. COMP. LAWS ANN. § 557.21 (West 1981); N.Y. DOM. REL. LAW

prohibited citizenship when a woman married a foreign man,⁵² and prevented women from engaging in aircraft and vessel combat,⁵³—indirectly excluding women from securing certain types of employment. Luckily, decades following the industrial revolution, technological change resulted in a greater need for women to participate in the workforce.⁵⁴ Yet, the economy funneled women into designated roles—the textile industry and factory employment—both fueled by traditional gender stereotypes.⁵⁵ While the Industrial Revolution sparked workforce participation and did open the door for women, this period revealed one of the first sharp contrasts magnifying gender segregated occupations.⁵⁶ By the early twentieth century, women consisted of approximately 25% of the United States workforce yet earned significantly less than men.⁵⁷ To remedy this wage inequity, the National War Labor Board “endorsed policies to provide equal pay” to provide for women that replaced men during World War II, and Congress introduced the Women’s Equal Pay act to prohibit employers from paying “women less than men for work of ‘comparable quality and quantity.’”⁵⁸ Yet, as of 1960, women earned less than two thirds of their male colleagues’ earnings.⁵⁹

Despite influential, committed, corporate opposition, President John F. Kennedy’s administration spearheaded calls for federal legislation to remedy centuries of gender-based pay discrimination.⁶⁰ In 1963, when Congress amended the Fair Labor Standards Act of 1938 to enact the Equal Pay Act of 1963, President Kennedy’s New Frontier Program became

§ 50 (McKinney 2005).

52. *See* Act Relative to the Naturalization and Citizenship of Married Women, ch. 411, 42 Stat. 1021, 1021-22 (1922).

53. *See* Women’s Armed Services Integration Act of 1948, ch. 449, 62 Stat. 356 (1948); *see also* Schlesinger v. Ballard, 419 U.S. 498, 572 (1975) (upholding a federal statute that granted women more years of commissioned service in the military than male naval officers); *cf.* Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978) (permitting women to serve on Navy Ships).

54. *Women and the Early Industrial Revolution in the United States*, GILDER LEHRMAN INST. AM. HIST., <https://ap.gilderlehrman.org/essay/women-and-early-industrial-revolution-united-states> (last visited Feb. 1, 2021).

55. *See id.*

56. Sonya O. Rose, *Gender Segregation in the Transition to the Factory: The English Hosiery Industry 1850-1910*, 13 FEMINIST STUD. 163, 164 (1987).

57. *Equal Pay Act*, HISTORY.COM (Apr. 2, 2019), <https://www.history.com/topics/womens-rights/equal-pay-act>.

58. *Id.*

59. *Id.*

60. *See id.*

the first unequivocal declaration against wage disparities amongst sexes.⁶¹ As stated,

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility.⁶²

During the Congressional hearings for the Equal Pay Act of 1963, testimony varied from employers discouraging women from becoming a part of the workforce to policymakers suggesting economic justifications for women earning lower wages.⁶³ Opponents advocating for the latter cited healthcare costs, familial obligations, and physical distinctions.⁶⁴ However, despite this opposition, the Equal Pay Act became law.⁶⁵ As enacted, the Act provided several exceptions to permit unequal pay based on seniority, merit, production quantity, or “any other factor other than sex.”⁶⁶ Further, the Act excluded white collar workers, accounting for the persistent gender pay gap in these administrative settings.⁶⁷ As part of the Education Amendments in 1972, the Equal Pay Act began to encompass “supervisors, pharmacists, attorneys, and [] other administrative and executive positions.”⁶⁸ President Kennedy himself commended the Act

61. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

62. *Id.*

63. *Equal Pay Act of 1963: Hearing on H.R. 3861 Before the House Special Subcomm. on Labor of the Comm. on Educ. and Labor*, 88th Cong. 215, 96 (1963) [hereinafter *Equal Pay Act of 1963: Hearing*] (statement of W. Boyd Owen, Vice President, Personnel Administration of Owens-Illinois Glass Co.).

64. *Equal Pay Act of 1963: Hearing* 96-98; see also *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (setting limits on a woman’s working hours).

65. See § 206(d)-(e).

66. *Id.*

67. *Id.*

68. Juliene James, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y. L. REV. 1873, 1882 (2004) (citing *Stopka v. All. of Am. Insurers*, 141 F.3d 681 (7th Cir. 1998); *Maxwell v. City of Tucson*, 803 F.2d 444 (9th Cir. 1986); *Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726 (10th Cir. 1984); *Alford v. Cosmyl, Inc.*, 209 F. Supp. 2d 1361 (M.D. Ga. 2002); *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857 (W.D. Va. 2001); *Derouin v. Louis Allis Div.*, 618 F. Supp. 221 (D. Wis. 1985); *Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979).

as a “significant step forward,” but stated “much remains to be done to achieve full equality of economic opportunity—for the average woman worker earns only 60% of the average wage for men.”⁶⁹ Coupled with Title VII of the Civil Rights Act of 1964 the following year, the federal government began to recognize sex based wage discrimination.⁷⁰ However, the Bennet Amendment of Title VII provides that if an employer differentiates wages in accordance with the Equal Pay Act, “[i]t shall not be an unlawful employment practice”—with the aforementioned exceptions.⁷¹ Now, women may challenge glass ceiling gender discrimination and thus, gender-based wage inequity under the Equal Pay Act of 1963 and Title VII.⁷²

These two major pieces of federal legislation, the Equal Pay Act and Title VII, permit women to file suit alleging gender pay discrimination.⁷³ Pursuant to the Equal Pay Act, a petitioner must demonstrate her job is “substantially equal” to that of the higher earning male employee in the same workplace.⁷⁴ After the claimant establishes the prima facie case, the employer bears the burden of proof to demonstrate how one of the affirmative defenses applies to combat the gender inequity claim.⁷⁵ At a federal level, women have less success in equal pay cases, especially because the Equal Pay Act prohibits class actions.⁷⁶ Courts largely grant summary

69. John F. Kennedy, *U.S. President, Remarks Upon Signing the Equal Pay Act* (June 10, 1963), in AM. PRESIDENCY PROJECT.

70. *See e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2010); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972); *see* Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (increasing protections for pregnant employees). The complainant in a disparate pay claim under Title VII must carry the initial burden under the statute of establishing she received lower compensation because of their sex; *see also* § 2000e-2

71. § 2000e-2(e)-(h). In addition, plaintiffs in Title VII disparate treatment cases bear the ultimate burden of proving that the employer intentionally discriminated in the terms and conditions of employment based on sex. In contrast, if a plaintiff makes a prima facie showing under the Equal Pay Act, the burden of persuasion shifts to the employer to justify the pay disparity, and intentional discrimination need not be shown. 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, 821 (2012-2013).

72. Alex Fernández Campbell, *They Did Everything Right – and Still Hit the Glass Ceiling. Now, These Women are Suing America’s Top Companies for Equal Pay*, VOX (Dec. 10, 2019, 8:30 AM), <https://www.vox.com/platform/amp/the-highlight/2019/12/3/20948425/equal-pay-lawsuits-pay-gap-glass-ceiling>.

73. *See e.g.*, § 2000e-2; 29 U.S.C. § 206(d)(1) (2018).

74. *See* Cornish v. District of Columbia, 67 F. Supp. 3d 345, 360-61 (D.D.C. 2014) (citations omitted).

75. *See* § 206(d).

76. *See id.*; Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass*

judgment motions and thus, dismiss claims at a fairly early stage because of two central barriers: “(1) the prima facie case and (2) the employer’s affirmative defenses.”⁷⁷ Because the law sets forth difficult burden thresholds to prevent frivolous lawsuits and liberally interpret the “other factor” requirement under the Equal Pay Act, courts rarely reach the merits of a wage-inequity claim.⁷⁸ Aside from the litigation distinctions such as establishing discriminatory intent, “same establishment,” or “equal work,”⁷⁹ Title VII permits employees to use more avenues to file suit to allege wage discrimination.⁸⁰ While asserting a gender discrimination claim under Title VII seems easier than under the Equal Pay Act, a woman must still demonstrate that such act “was because of her gender.”⁸¹ Additionally, pursuant to Title VII, a petitioner must file a claim within 180 to 300 days, depending on state regulations.⁸² This Article does not proclaim that courts should liberally interpret these regulations in the plaintiff’s favor to address the wage glass ceiling, but merely remove procedural barriers to increase a woman’s ability to have her day in court.⁸³ As such, women will not perceive entering the courtroom as “career suicide” and open the flood gates to promote more awareness.⁸⁴

In an attempt to remove sex based discrimination in the workforce and the military, President Lyndon B. Johnson signed Executive Order 11375, banning hiring and employment discrimination⁸⁵ and enacted Public Law 90-130, eliminating the restriction that female military officers

Ceiling, 63 S.M.U.L. REV. 17, 34 (2010).

77. See 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, 831 (2012-2013) (discussing the detailed requirements to survive summary judgement and case comparisons).

78. See *id.* at 835.

79. Brian D. Murphy, *Equal Theories of Liability? Pay Disparity Claims Under the Equal Pay Act and Title VII of the Civil Rights Act*, N.Y. L. J. (Feb. 21, 2020), <https://www.law.com/newyorklawjournal/2020/02/21/equal-theories-of-liability-pay-disparity-claims-under-the-equal-pay-act-and-title-vii-of-the-civil-rights-act/>.

80. See Michael Burns, *Pay Discrimination Cases – Equal Pay Act vs. Title VII*, AM. SOC’Y EMPLOYERS (Feb. 13, 2018), <https://www.aseonline.org/News/Articles/ArtMID/628/ArticleID/1398/Pay-Discrimination-Cases-Equal-Pay-Act-vs-Title-VII>.

81. See Fernández Campbell, *supra* note 72.

82. See *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM., <https://www.eeoc.gov/time-limits-filing-charge#:~:text=In%20general%2C%20you%20need%20to,discrimination%20on%20the%20same%20basis> (last visited Feb. 1, 2021).

83. See Eisenberg, *supra* note 76, at 67.

84. See Fernández Campbell, *supra* note 72.

85. See *generally* Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 17, 1967).

could not serve as Colonel ranks or above.⁸⁶ More recently, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, permitting employees to bring suit within 180 days of the last paycheck violation as opposed to within 180 days of the first pay discrimination action.⁸⁷ In April 2014, President Obama signed an Executive Order prohibiting federal contractors from discharging or discriminating against any employee for discussing or disclosing the employee's compensation⁸⁸ and a Presidential memorandum mandating federal contractors to submit compensation data to their employees.⁸⁹ The Obama Administration created the National Pay Enforcement Task Force to increase "funding for employment regulatory agencies, including the [Equal Employment Opportunity Commission ("EEOC")]."⁹⁰ Further, the Obama Administration, in partnership with the EEOC and the Department of Labor, proposed that businesses exceeding one hundred employees must submit annual salaries organized by "gender, race, and ethnicity."⁹¹ These regulations standing alone do not correct years of systematic gender bias, stereotypes, and segregation, but coupled with the ability to bring suit to remedy such sex discrimination, they provide a "significant step forward."⁹²

86. See Pub. L. No. 90-130, 81 Stat. 374, 377 (1967).

87. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

88. See Press Release, Office of the Press Sec'y, The White House, Executive Order -- Non-Retaliation for Disclosure of Compensation Information (Apr. 8, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/executive-order-non-retaliation-disclosure-compensation-information>.

89. See Press Release, Office of the Press Sec'y, The White House, Presidential Memorandum -- Advancing Pay Equality Through Compensation Data (Apr. 08, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data>.

90. See Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 566 (2020) (citing Press Release, Office of the Press Sec'y, The White House, FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act (Jan. 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).

91. See FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act, *supra* note 90. *But see* Clare O'Connor, *Trump Halting Equal Pay Measure "A Blatant Attack On Women,"* *Activists Say*, FORBES (Aug. 30, 2017), <https://www.forbes.com/sites/clareoconnor/2017/08/30/trump-halting-equal-pay-measure-a-blatant-attack-on-women-activists-say/?sh=6c8c2da4395b> ("The Trump administration . . . has suspended a policy proposed by President Obama that would have made it easier for women and people of color to identify whether they were being paid less than white male counterparts at work.").

92. See Kennedy, *supra* note 69.

At the state level, procedurally, California, Massachusetts, and New York enacted laws to lessen the plaintiff's burden in proving discrimination by changing the phrase "equal work" to "comparable work."⁹³ Other states such as Oregon and Maryland incorporated the word "comparable" in adopting the phrase "work of a comparable character."⁹⁴ This shift requires employers to produce more extensive explanations for any salary disparities.⁹⁵ Because of the varying interpretations of the phrase "equal work,"⁹⁶ these States broaden the requirements to compare the position's requirements itself rather than the employee's experience.⁹⁷ Substantively, in 2016, Massachusetts passed the first piece of legislation forbidding employees from inquiring about previous salaries from prospective employees to eliminate the reliance on past wages to set current wages.⁹⁸ For years, states and localities either enacted or considered a ban to prohibit an employer from requesting that a prospective employee disclose their previous earnings.⁹⁹ California, Connecticut, Delaware, Hawaii, Illinois, Maine, New York, New Jersey, North Carolina, Oregon, and Vermont followed suit.¹⁰⁰ While each ban varies from state to state, the underlying premise

93. See Fernández Campbell, *supra* note 72.

94. See Christopher T. Patrick, *Rethinking Pay Equity: Who is 'Comparable' for Pay Equity Purposes*, JACKSON LEWIS (Mar. 21, 2019), <https://www.jacksonlewis.com/publication/rethinking-pay-equity-who-comparable-pay-equity-purposes>.

95. See Lobel, *supra* note 90, at 549.

96. See *id.* at 598 (citing *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007); *Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1149-50 (10th Cir. 2002); *Howard v. Lear Corp.*, 234 F.3d 1002, 1005 (7th Cir. 2000); *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250-53 (6th Cir. 1981); *Laffey v. Nw. Airlines Inc.*, 567 F.2d 429, 453 (D.C. Cir. 1976); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973)).

97. See *Gu v. Bos. Police Dep't*, 312 F.3d 6, 16 (1st Cir. 2002).

98. See MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2020); *infra* Part VI(A)(1).

99. See Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017), <http://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history>.

100. See Lobel, *supra* note 90, at 567-68 (citing CAL. LAB. CODE § 432.3(b) (2019); DEL. CODE ANN. tit. 19, § 709B(b) (2019); Ill. Exec. Order No. 2019-02 (J2019); ME. REV. STAT. ANN. tit. 5, § 4577 (2019); N.C. Exec. Order No. 93 (2019); Assemb. B. 1094, 218th Leg. (N.J. 2019); S. 6549, 242nd Leg., Reg. Sess. (N.Y. 2019); N.Y.C., N.Y., Admin. Code § 8-107(25) (2017); Oregon Equal Pay Act of 2017, ch. 197, 2017 Or. Laws 585 (codified in various sections of Or. Rev. Stat.); Joseph Lazazzero, *Vermont Enacts Salary History Inquiry Law*, LITTLER (May 15, 2018), <https://www.littler.com/publication-press/publication/vermont-enacts-salary-history-inquiry-law>; Christopher Neary & Sharon Bowler, *Connecticut Has a New Pay Equity Law*, SRHM (May 30, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/connecticut-has-a-new-pay-equity-law>; William J. Simmons, Martha J. Keon & Judy M. Iriye, *Hawaii Joins Salary History*

tethers on the line of voluntary disclosure.¹⁰¹ Michigan and Wisconsin responded by enacting legislation prohibiting salary bans.¹⁰² These state procedural¹⁰³ and substantive¹⁰⁴ inconsistencies leave gender wage inequity suits in the hands of each state. Unsurprisingly, the federal circuits are split on whether “factor[s] other than sex” under the Equal Pay Act encompasses prior salary inquiries.¹⁰⁵

At the federal level, Congress revisited the Paycheck Fairness Act and proposed amending the Fair Labor Standards Act of 1938 to “provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex.”¹⁰⁶ In early 2019, the House of Representatives ultimately passed the Paycheck Fairness Act, but the Act failed to pass in the Senate.¹⁰⁷ Pursuant to this bill, Congress clarified the language in the Fair Labor Standards Act of 1938; for instance, altering “any other factor other than sex” to “a bona fide factor other than sex, such as education, training, or experience.”¹⁰⁸ In accordance with this Act, the Secretary of Labor shall conduct internal findings and provide public information.¹⁰⁹ A key element of the Act mandates teenage gender pay gap reporting,

Ban Trend, LITTLER (July 6, 2018), <https://www.littler.com/publication-press/publication/hawaii-joins-salary-history-ban-trend>.

101. See Lobel, *supra* note 90, at 569.

102. See Joanne Sammer, *Employers Adjust to Salary-History Bans*, SHRM (June 5, 2019), <https://www.shrm.org/ResourcesAndTools/hr-topics/compensation/Pages/employers-adjust-to-salary-history-bans>.

103. See Lobel, *supra* note 90, at 610.

104. See *supra* notes 91-93 and accompanying text.

105. Compare *Rizo v. Yovino*, 950 F.3d 1217, 1240-41 (9th Cir. 2020) (finding that prior salaries do not fit into the Equal Protection Act’s exception), with *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (holding that a “factor other than sex” includes a previous salary inquiry). Other Circuits use this inquiry as an affirmative defense in certain instances. See, e.g., *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1363 (11th Cir. 2018); *Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App’x 452, 457 (6th Cir. 2017); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988).

106. See Paycheck Fairness Act, H.R.7, 116th Cong. § 1 (2019); see also Pay Equity for All Act of 2019, H.R. 1864, 116th Cong. § 1 (2019) (“prohibit[ing] certain practices by employers relating to restrictions on discussion of employees’ and prospective employees’ salary and benefit history, and for other purposes”).

107. See Lisa Nagele-Piazza, *House Approves Paycheck Fairness Act*, SHRM (Mar. 28, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/house-approves-paycheck-fairness-act>.

108. Paycheck Fairness Act, § 3(a)(2).

109. *Id.* § 6.

requiring a comparison for both informal and formal jobs.¹¹⁰ In examining the types of tasks performed at such an early age, these recommendations focus on reducing gender inequities beginning with a person's initial employment.¹¹¹ Further, Congress delineates how employers may rely on wage history—only if provided by the prospective employee or confirmed after accepting employment.¹¹² The ongoing debate coinciding with the competing federal litigation and state level action, reinforces the need to take a federal stance.¹¹³

B. *The Supreme Court Acknowledged Gender Pay Inequity*

For over a century, Supreme Court decisions hindered a woman's ability to partake in the workforce.¹¹⁴ In differentiating designated roles on account of one's sex or restricting a woman's involvement because of gender-based discrimination, these decisions prevented women and men from securing similar employment.¹¹⁵ Whether limiting workable hours, instituting minimum wage requirements, or prohibiting certain licenses, these direct constraints prevented women from participating in the same fields as men. If women could not have legally acquired the same positions as men, then how could women have earned as much as men? If employers created high-ranked positions that excluded women, then how could women have ever

110. *Id.* § 6(b)(2).

111. *Id.* § 6(b)(2)(G).

112. *Id.* § 8(a).

113. *See generally* Lobel, *supra* note 90, at 581-85 (discussing pending legislation); Jennifer Safstrom, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other Than Sex" in Equal Pay Act Litigation*, 31 *YALE J. L. & FEMINISM* 135, 141-49 (2019) (highlighting the circuit split on whether prior salary is considered a factor "other than sex").

114. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 618 (2007) (alleging employment discrimination pursuant to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act); *see also, e.g.*, United States v. Virginia, 518 U.S. 515, 558 (1996) (challenging a male-only admission policy); Johnson v. Transp. Agency, 480 U.S. 616, 642-643 (1987) (addressing a sex based affirmative action design); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 745 (1982) (holding that Mississippi University for Women's single sex admission policy violated the Equal Protection clause); Goesaert v. Clearly, 335 U.S. 464, 467 (1948) (prohibiting women from receiving their bartender license in a city exceeding a population of 50,000 unless their husband or father or a close relative owned the business); W. Coast Hotel Co. v. Parish, 300 U.S. 379, 413 (1937) (finding setting a minimum wage requirement for women and children did not violate constitutional protections afforded by due process); Muller v. Oregon, 208 U.S. 412, 412 (1908) (upholding state restrictions on women's working hours); Bradwell v. Illinois, 83 U.S. 130, 130 (1873) (denying women the right to practice law).

115. *See supra* notes 51-53.

earned a higher salary? While many of these restrictions no longer exist, unequal representation and gender segregation has not leveled out as a result. Absent these categorical divisions, women remain underrepresented in higher paying professions,¹¹⁶ perpetuating gender segregation or gender discrimination in the workplace and precluding women from career advancement. Legislation merely grants employees the right to file suit—the right to allege gender-based wage inequities.¹¹⁷ In prohibiting discrimination, the law prevents employers from violating statutory regulations. Though more likely, these laws provide employees redressability after suffering from individual harms.¹¹⁸ As the Court sets standards for valid causes of action pursuant to the aforementioned legislation, more petitioners may file suit to set greater precedent in an effort to narrow the gender pay gap.

A woman's ability to file suit holds little weight if the Court does not first acknowledge long-standing systemic gender-discrimination both within the employment environment and outside the confines of the workplace. In 1977, in *Califano v. Webster*, the Supreme Court explicitly recognized how the challenged retirement benefits statute “operated directly to compensate women for past economic discrimination.”¹¹⁹ A male recipient of retirement benefits challenged the Social Security Act, alleging the computation disproportionately provided women with greater payments.¹²⁰ The Court stated that the legislature did not intend to incorporate gender stereotypes and generalizations in the social security statute.¹²¹ Instead, the Court referred to the statute's purpose as “one of redressing our society's longstanding disparate treatment of women.”¹²² It identified the male dominated workforce and how this structure prevents woman from seeking higher paid positions.¹²³ The Court implicitly provided a stepping stone for female employees to argue for remedial action to correct gender based wage inequity on account of “past discrimination” against female

116. *See infra* Part V(A).

117. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2010); *see e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

118. *See* U.S. CONST. art. 3, § 2, cl. 1.

119. *See* *Califano v. Webster*, 430 U.S. 313, 317-18 (1977) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974)) (noting that the “reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important government objective”).

120. *See id.* at 315-16.

121. *See id.* at 316-17.

122. *See id.* at 317 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8 (1977)).

123. *See id.* at 318 (citing *Kahn v. Shevin*, 416 U.S. 351, 353 (1974)).

workers.¹²⁴

Concurrently, while the Court may recognize past discrimination, this holds little weight if the law's interpretation prevents women from seeking reparations. In *Washington County v. Gunther*, four female prison guards brought suit pursuant to Title VII seeking backpay for unequal wages on account of sex discrimination.¹²⁵ The district court dismissed the claim that any pay discrepancy stemmed from "intentional sex discrimination," and held an employee cannot bring a Title VII claim alleging sex-based wage discrimination unless the evidence satisfies the Equal Pay Act of 1963.¹²⁶ After the District Court dismissed the back pay claim, the Court of Appeals reversed the lower court's decision and instead, found "persons alleging sex discrimination 'are not precluded from suing under Title VII to protest . . . discriminatory compensation practices.'"¹²⁷ Once the case reached the Supreme Court, the Court narrowed the issue to interpret the Bennet Amendment to Title VII.¹²⁸ As noted, the Equal Pay Act (1) does not apply to particular businesses in retail, agriculture, fishing, and publishing; (2) requires equivalent skill and effort in similar conditions; and (3) presents "seniority, merit, quantity or quality of production," or other factors outside of sex as affirmative defenses.¹²⁹ In light of historical statutory interpretations, the Court held the Bennet Amendment to Title VII permits wage discrimination challenges in accordance with the four affirmative defenses and does not limit an employee's claim to equal work.¹³⁰ In expanding Title VII's interpretation (or rather, not adopting the narrow approach), the Supreme Court's decision paved the way for female employees to seek redressability on the basis of sex discrimination absent proving equal work to their male counterparts.¹³¹

Taken together, the Court's mere acknowledgment of sex-based pay discrimination and its interpretation of the statutes did not rectify the disparities almost forty years later in a subsequent challenge. In *Ledbetter v. Goodyear Tire & Rubber Co.*, petitioner Ledbetter, the only area manager, filed suit against her employer, Goodyear Tire & Rubber Company, asserting a Title VII pay discrimination claim and an Equal Pay

124. *See id.* at 317.

125. *See Washington Cty. v. Gunther*, 452 U.S. 161, 164 (1981).

126. *See id.* at 164-65.

127. *See id.* at 165.

128. *See id.* at 168.

129. *See id.* at 167-68.

130. *See id.* at 180-81.

131. *See Washington Cty. v. Gunther*, 452 U.S. 161, 164 (1981).

Act of 1963 claim, along with other allegations.¹³² Ledbetter suggested that absent her discriminatory, negative performance evaluations, she would have received higher paychecks as compared to her male counterparts.¹³³ The entirety of the Supreme Court case rested on a procedural issue and arguably evaded the key issue, which was permitting gender pay discrimination.¹³⁴ However, in Justice Ginsburg's dissent, she acknowledges the stark realities of workplace discrimination by stating "the problem of concealed pay discrimination is particularly acute when the disparity arises not because the female is flatly denied a raise but because male counterparts are given larger raises."¹³⁵ While the decision does not explicitly condemn such discrimination, Justice Ginsburg acknowledges that gender disparities exist beneath the surface, and Congress' interpretation of existing legislation serves as a step in the right direction.¹³⁶ As a direct reaction to this case, President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009, removing one statutory barrier that thwarted claimants' abilities to sue like Petitioner Ledbetter's ability to challenge employment gender-based wage discrimination.¹³⁷ Slowly, the Court began to acknowledge that workplace wage inequities stem from years of systematic gender discrimination.¹³⁸ Expanding an employee's right to have her day in court serves as one of the crucial, initial steps in truly applying enacted gender-based legislation to provide recourse for gender wage discrimination.¹³⁹

III. GENDER PAY DISPARITIES IN CONTROLLED GROUPS

For decades, the Court circumvented the issue of gender pay

132. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-22 (2007).

133. *See id.* at 624-45.

134. *See id.* at 642-43 (holding a petitioner must allege unlawful practices within the statute's prescribed limitations and find no support for any policy arguments).

135. *See id.* at 650 (Ginsburg J., dissenting).

136. *See id.* at 661 (conveying that "once again, the ball is in Congress' Court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.")

137. *See Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (2009).

138. *See e.g.*, *Ledbetter*, 550 U.S. at 649-50 (Ginsburg J., dissenting); *Washington Cty. v. Gunther*, 452 U.S. 161, 180-81 (1981); *Califano v. Webster*, 430 U.S. 313, 316-17 (1977).

139. *See, e.g.*, *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1073 (1983) (finding that using gender-based mortality rates to calculate pension plans violated Title VII); *L.A. Dep't. of Water and Power v. Manhart*, 435 U.S. 702, 702 (1978) (holding that Title VII "makes it unlawful for an employer to discriminate against any individual because of such individual's sex," pertaining to pension contributions).

discrimination and merely delineated when an employee may bring a wage-discrimination suit. Now, through several types of gender pay legislation over half of a century, women have successfully brought suit alleging gender-based hiring and gender-based wage inequities.¹⁴⁰ Because of enacted legislation and case precedent explicitly prohibiting employers from paying women lower wages than men in similar positions, disparities within the same field have become less transparent.¹⁴¹ Instead, sex discrimination suits claiming wage inequities often arise in two key instances: (1) alleging discriminatory practices for denying opportunities, or (2) establishing contractual obligations based on gender driven stereotypes. In these scenarios, the statistics often do not blatantly contrast a woman's and a man's earnings. Instead, they show subtle discrepancies that accumulate to demonstrate wage inequities.

A. Workplace Discriminatory Practices

Historically, institutions remain hesitant to remedy gender pay inequality in academia because oftentimes such compensations result from years of underrepresentation and career *choices*.¹⁴² Higher education institutions reluctantly but rightfully address institutional sex discrimination as a present issue, recognizing the pay inequities amongst their professors.¹⁴³

140. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 256 (1979) (challenging a state law that gave hiring preference to veterans over nonveterans pursuant to the Equal Protection Clause on account of the lack of female veterans); *Dothard v. Rawlinson*, 433 U.S. 321, 321 (1977) (finding that in absence of a business necessity, required height and weight restrictions adversely affected different genders); *Califano v. Goldfarb*, 430 U.S. 199, 199 (1977) (holding that affording women less protection for their surviving spouses than male employees constituted wage discrimination); *Schlesinger v. Ballard*, 419 U.S. 498, 498 (1975) (finding a "mandatory attrition statute applicable to women naval officers," does not violate due process); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (deciding that an employer may not refuse to hire woman with children of pre-school age absent a business necessity); *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3rd Cir. 1970) (holding that the Equal Pay Act protects "substantially equal" positions and thus, an employer discriminates when the employer provides women with a new title to offer her lesser wages); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 228 (5th Cir. 1969) (claiming pursuant to the 1964 Civil Rights Act, her employer denied her promotion on account of her sex). See generally Marama Whyte, *Newswomen in Revolt*, HIST. TODAY (May 2017), <https://www.historytoday.com/newswomen-revolt> (describing a suit against Newsweek's policy that only permitted men to become reporters).

141. See *supra* Part II.

142. See Colleen Flaherty, *Paying for Inequity*, INSIDE HIGHER ED. (Oct. 8, 2020), <https://www.insidehighered.com/news/2020/10/08/princeton-settles-federal-government-gender-based-faculty-pay-gap-case>.

143. See *id.*; see also Colleen Flaherty, *Closing the Pay Gap*, INSIDE HIGHER ED. (May 18, 2018), <https://www.insidehighered.com/news/2018/05/18/u-denver->

Does a university have an obligation to correct years of systemic sex discrimination that lead to highly segregated female-dominated professions earning less than male-dominated professions? Likely, no. May the university elect to pay that English professor the same as the Physics professor? Yes, should they choose to do so. Though to argue each department encompasses similar work, absent prior clinical experience, is not as far-fetched as it may seem, being that the profession itself requires a similar level of education across the board. However, the remedy in controlled groups turns on incongruences in annual reviews and department raises.¹⁴⁴ In becoming more transparent about the “merit-based pay system,” professors from the same department may receive more gender-neutral reviews. This Article does not suggest that employers¹⁴⁵ should adjust their average salaries per se to account for how social constructs view particular professions as undervalued compared to others. The philosophical approach at how the nation perceives a science related occupation versus a humanities occupation raises an entirely separate issue. Instead, this Article seeks to reveal inherent gender-based discrimination in hiring practices, performance reviews, and salary increases in similar professions to narrow the gender-pay gap in controlled settings.

The Department of Labor Office of Federal Contract Compliance investigated Princeton University’s pay equity over the course of almost a decade.¹⁴⁶ The University acknowledged how women remain underrepresented in higher paying fields to explain how a physics professor earned more than an English professor.¹⁴⁷ Despite defending these statistical variances with the market changes or performance reviews, in a recent conciliation agreement, Princeton University vowed to pay “\$925,000 to make payments to all 106 women who were full professors from early 2012 to 2014.”¹⁴⁸ In a similar settlement, the University of Denver committed to compensate women through back pay for the same work as their male colleagues.¹⁴⁹ In 2013, at the University of Denver, male professors earned on average \$159,700 annually compared to approximately

settles-eeoc-agreeing-pay-266-million-seven-female-law-professors-who.

144. See Flaherty, *Paying for Inequity*, *supra* note 142.

145. For the purposes of this Article, the term “employers” is used to describe companies “that provide[] . . . job[s] paying wages or a salary to one or more people,” to compare pay rates. *Employer*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/employer> (last visited Feb. 1, 2021).

146. Flaherty, *Paying for Inequity*, *supra* note 142.

147. *See id.*

148. *See id.*

149. See Flaherty, *Closing the Pay Gap*, *supra* note 142.

\$140,000 for female professors.¹⁵⁰ In fact, the median salary for women “was \$7,532 less than that for male full professors before a round of raises . . . and \$11,282 per year less than that for men after raises.”¹⁵¹ However, the University responded that female professors likely received less wages on account of underperformance.¹⁵²

As noted, the gender-pay gap reflects internal employment practices denying women career advancement or salary increases. Employers expose the opportunity gap for women to achieve high ranked positions or equal earnings within professions—male or female dominated.¹⁵³ This *frozen middle* slows people’s careers in middle management. However, the *frozen middle* cools even more for female management positions. Whether willfully or unconsciously, the overwhelming majority of leadership positions consist of men. Thawing the *frozen middle* refers to eliminating the subtle barriers that preserve a sense of doubt and cynicism about women in leadership positions. The *sticky floor* applies in control groups, but the *frozen middle* becomes more prevalent for women in male-dominated professions that have more prospects for management positions. Allison Gamba, a former Goldman Sachs employee, experienced this exact *frozen middle* phenomenon.¹⁵⁴ Her career stalled when she reached a certain point in the organizational hierarchy while she

150. *See id.*

151. *See id.*

152. *See id.*

153. *See, e.g.,* Fernández Campbell, *supra* note 72; Kari Paul, *Women at Google Miss Out on Thousands of Dollars as a Result of Pay Discrimination, Lawsuit Alleges*, THE GUARDIAN (July 22, 2020 6:00 PM), <https://www.theguardian.com/technology/2020/jul/22/google-gender-pay-discrimination-lawsuit> (“Ultimately Google paid women less base salary, smaller bonuses, and less stock than men in equal job codes and locations, the lawsuit alleges. The likelihood of such a disparity occurring by chance rather than by direct discrimination is 1 in 100, [the] analysis showed.”); Stephanie Francis Ward, *Recent Equal Pay Lawsuits by Female Law Professors Has Shined a Light on Academic Compensation Process*, ABA J. (Oct. 1, 2020, 3:30 AM), <https://www.abajournal.com/magazine/article/a-recent-spate-of-gender-discrimination-and-equal-pay-lawsuits-filed-by-female-law-professors-has-shined-a-light-on-the-otherwise-opaque-academic-compensation-process#:~:text=Members%20Who%20Inspire,Recent%20equal%20pay%20lawsuits%20by%20female%20law%20professors%20has,light%20on%20academic%20compensation%20process&text=She%20says%20her%20average%20student,of%20Texas%20School%20of%20Law> (“Although law schools may rely on several factors in determining compensation, in actuality, law school deans often have significant discretion in deciding what to pay professors, and their unchecked decisions can be tainted by gender bias . . . Salaries, raises and appointments should be based on teaching, service and scholarship. But . . . men get better appointments and more respect for their research and writing, with little regard for the work’s quality and importance.”).

154. *See* Fernández Campbell, *supra* note 72.

was fighting for a higher-level leadership position.¹⁵⁵

She went to business school. She snagged a coveted seat at the New York Stock Exchange. She regularly turned mediocre stocks into top-performing investments for Goldman Sachs. She networked, she schmoozed, she even learned to golf — whatever it took to break into the insular boys club of investment banking. So when Gamba read a Bloomberg article¹⁵⁶ about the latest round of promotions at Goldman Sachs in 2010, she was devastated to see her name missing from the list. At 35, she had put in nine years at the company. She later pulled her boss aside on the trading floor and asked him if he had nominated her for managing director. He hadn't. 'I would have been a laughing stock if I had nominated you,' she says he told her.¹⁵⁷

Even after acquiring a seat at the table, Allison Gamba was never actually heard.¹⁵⁸ She filed suit alleging gender discrimination pursuant to Title VII because no woman became managing director in her division.¹⁵⁹ Taken as alleged, she generated greater revenue than a male colleague that received a promotion, yet her “head was up against the glass ceiling.”¹⁶⁰ Women and men's employment histories will inevitably differ, especially for someone filing suit after only decades of serving in the workforce.¹⁶¹ To thaw this *frozen middle*, employers should identify communication and transparency issues in the workplace.¹⁶²

Only recently have women secured positions considered to be top-tiered,¹⁶³

155. *See id.* (reporting that dozens of women filed suit against “Twitter, Microsoft, Google, Disney, and Nike” alleging that the companies passed over them for promotions or paid them less “than the lowest-paid man at her level”)

156. *See id.* (citing Christopher Harper & Joshua Fineman, *Goldman Sachs Appoints 110 Partners Amid Rebound*, BLOOMBERG L. (Nov. 17, 2010, 6:19 PM), <https://www.bloomberg.com/news/articles/2010-11-17/goldman-sachs-promotes-110-to-partner-as-wall-street-rebounds-from-crisis>).

157. *See id.*

158. *See id.*

159. *See id.*

160. *See* Fernández Campbell, *supra* note 72.

161. *See id.*

162. *See infra* Part VI(A).

163. *See* Fernández Campbell, *supra* note 72 (“In 1995, none of the Fortune 500 companies had female CEOs; in 2018, there were 24 women who worked as chief executives in those companies.”); *see also* Valentina Zarya, *The Share of Female CEOs in the Fortune 500 Dropped by 25% in 2018*, FORTUNE (May 21, 2018 8:00 AM), <https://fortune.com/2018/05/21/women-fortune-500-2018/> (reaching a high of 32% in

ever since women have been permitted to enter into these male-dominated professions. Though, how can one argue such present opportunity if Congress only enacted the Equal Pay Act approximately sixty years ago?¹⁶⁴ How can one argue about these “opportunities” if a man “graduated the same year [as a woman] and had less experience?”¹⁶⁵ How can one argue a woman has the same career prospects as a man if many companies still take on the routine practice of asking about an employee’s past salary, when historically, women could not earn as much as a man?¹⁶⁶ Many argue women had the necessary opportunities, but did not take it upon themselves to assert dominance or fight harder.¹⁶⁷ Yet, many find themselves fighting harder and subsequently receiving employee reviews labeling them “as being too aggressive” or facing retaliation for speaking up.¹⁶⁸ Women do need to speak up to change the culture, but more importantly, when they do speak up, women need to receive the same recognition as men when they use their voices. By changing the bias in these reactions, women likely would earn similar respect as men do instead of earning resentment.

Though the discriminatory practices tend to surface in male-dominated professions, the gender pay gap also persists in female-dominated occupations.¹⁶⁹ Comparatively, men climb the *glass escalator*, or rather “glide” past women on an “*invisible escalator*” even in female dominated professions.¹⁷⁰ Men take the *glass escalator*, while women take the *damaged stairs*. While it is equally crucial that men integrate into female-

2017).

164. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

165. See Fernández Campbell, *supra* note 72.

166. See *id.* (“A 2013 study by the American Association of University Women found that women get paid 6.6 percent less than men in their first jobs, even after considering factors such as job location, occupation, college major, and number of hours worked. That sets them up to make less money for years to come.”)

167. See Courtney Connley, *45% of Women Business Leaders Say it’s Difficult for Women to Speak Up in Virtual Meetings*, CNBC (Sept. 3, 2020, 11:00 AM EDT), <https://www.cnbc.com/2020/09/03/45percent-of-women-business-leaders-say-its-difficult-for-women-to-speak-up-in-virtual-meetings.html> (“While it’s certainly appropriate for women, and other colleagues, to call out this behavior the minute it happens, [Dr. Patti] Fletcher says it’s more important for company leaders to do their part to ensure that a culture of talking over women and ignoring them doesn’t persist.”)

168. See Fernández Campbell, *supra* note 72 (“At Twitter, a software engineer said she was put on indefinite leave after complaining to the CEO about gender bias.”)

169. See *The State of the Gender Pay Gap 2020*, *supra* note 33.

170. See Jenna Goudreau, *A New Obstacle For Professional Women: The Glass Escalator*, FORBES (May 21, 2012, 2:28 PM EDT), <https://www.forbes.com/sites/jennagoudreau/2012/05/21/a-new-obstacle-for-professional-women-the-glass-escalator/?sh=302cd18159d6>.

dominated professions absent gender stigmas to become less sex-segregated, when they do, they tend to excel in these positions.¹⁷¹ This Article does not speak to why men enter female dominated careers, but instead concentrates on how when they choose to do so, they tend to out earn women in the same field.¹⁷² As men, particularly white men, become more infuriated with the pink collar benefits, they quickly move up the supervisory ladder.¹⁷³ As such, when men have ample opportunity to succeed in a female dominated profession with “less stress and more time at home,” the choice merely becomes one of earnings.¹⁷⁴ Controlled gender pay analysis indicates that women do not earn as much as their male counterparts.¹⁷⁵ Some analysts attribute men receiving higher salaries or greater promotions to women’s “career interruptions.”¹⁷⁶ While this notion assumes women bear children, take parental leave, and ultimately stay at home, managerial stereotypes override the caretaker gender bias.¹⁷⁷ However, studies indicate certain professions (such as nursing) do not follow the *glass escalator* approach because of the vast number of gendered specializations.¹⁷⁸ Instead, women experience horizontal sex segregation because men tend to gravitate toward more masculine nursing areas.¹⁷⁹

The same issues arise in female-dominated professions, such as nursing, as they do in male-dominated professions—outright discrimination, gender bias, and negotiation tactics.¹⁸⁰ In a stark contrast with females attempting to break the glass ceiling in male-dominated professions, men seem to take female-dominated positions if they offer higher wages, with clear projected growth. Now, somehow when men enter traditionally undervalued occupations, this mitigates the common stereotypes associated with certain positions and employers often increase employees’ wages. Conversely,

171. *See id.*

172. *See* Rosalind C. Barnett & Caryl Rivers, *Men Are Doing Increasingly Well in Female-Dominated Fields*, PSYCHOL. TODAY (Jan. 31, 2020), <https://www.psychologytoday.com/us/blog/womans-place/202001/men-are-doing-increasingly-well-in-female-dominated-fields>.

173. *See* Shaila Dewan & Robert Gebeloff, *More Men Enter Fields Dominated by Women*, N.Y. TIMES (May 20, 2012), <https://www.nytimes.com/2012/05/21/business/increasingly-men-seek-success-in-jobs-dominated-by-women.html>.

174. *See id.*

175. *See The State of the Gender Pay Gap 2020*, *supra* note 33.

176. *See* Goudreau, *supra* note 170.

177. *See id.*

178. *See* Karrie Ann Snyder & Adam Isaiah Green, *Revisiting the Glass Escalator: The Case of Gender Segregation in a Female Dominated Occupation*, 55 SOCIAL PROBLEMS 271, 271-99 (2014).

179. *See id.*

180. *See infra* Part III.

when men obtain advanced positions in female-dominated professions, they receive praise and recognition.¹⁸¹ They are viewed as an asset to the field, and employers rapidly promote men on account of their perceived “dominant” personalities. Further, the stereotypical bias that men possess the natural ability necessary for leadership positions feeds into this existing systemic gender discrimination.

Approximately fifty years prior, Supreme Court Associate Justice, Ruth Bader Ginsburg, stood before several male Justices arguing her first gender discrimination case, challenging a law built around gender assumptions that disadvantaged a man. Her early career rested on the presumption that men will often succeed before women, and to appeal to the courts comprised of mostly men, she needed to have men succeed first to prove “what women were capable of doing.”¹⁸² Therefore, unsurprisingly, men entering female-dominated professions experience upward mobility and increased wages, whereas women still lag behind in the *frozen middle*, regardless of their occupation.

B. Latent Contractual Distinctions

In controlled groups—whether primarily female-dominated or male-dominated—¹⁸³women often file sex-based wage inequity suits based on: (1) skill, effort, and responsibility;¹⁸⁴ or (2) bonuses, overtime, and benefits. Though these distinctions intertwine, the latter highlights the latent disparities in contractual obligations. Earlier this year, a United States District Court Judge dismissed the latent disparities in contractual obligations for the United States Women’s National team because:

[t]his approach—merely comparing what each team would have made under the other team’s CBA [(collective bargaining agreement)]—is untenable in this case because it ignores the reality that the MNT [(Men’s National Soccer Team)] and WNT [(Women’s National Soccer Team)] bargained for different agreements which reflect different preferences, and that the WNT explicitly rejected the terms they now seek to retroactively impose on themselves.¹⁸⁵

181. See Snyder & Green, *supra* note 178, at 272, 288.

182. *E.g.*, *At the U.S. Supreme Court: A Conversation With Justice Ruth Bader Ginsburg*, STAN. L. REV (Nov. 11, 2013), <https://law.stanford.edu/stanford-lawyer/articles/legal-matters/>; see also *Moritz v. Comm’r*, 469 F.2d 466, 467 (1972) (appealing a decision that prevented a male petitioner from receiving a tax deduction for caring for a dependent on account of his gender);

183. See *infra* Part V(A).

184. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

185. Jill Martin & Amir Vera, *Judge Dismisses US Women’s National Soccer Team’s*

Opponents argue because the women's CBA focuses on a variety of factors including number of games played, tournaments won, soccer popularity, and acquired sponsorships, a "direct comparison" does not exist.¹⁸⁶ But how does one explain that "if a women's team won 20 games in a row, a player would earn [approximately] 89% of what a male player would make."¹⁸⁷ Also, because the prize money allocated to the Men's World Cup remains significantly larger than the Women's World Cup, the men's team receives a vastly disproportionate prize compared to the women's team.¹⁸⁸

In terms of the Equal Pay argument, the United States Soccer Federation defended this notion, stating the MNT and WNT do not perform equal work, neither in generating revenue or performing labor.¹⁸⁹ However, that same argument lends itself to women and men receiving equal pay in shared gender professions.¹⁹⁰ The mere fact the women "willingly" accepted a CBA with a reduced salary, less benefits, and smaller bonus,¹⁹¹ does not mean they should. The minor nuances in the differing CBAs rests on the USMNT's promotional incentive and game bonuses.¹⁹² Arguing that women do not receive as much publicity or recognition to generate revenue in accordance with their CBA is precisely the point.¹⁹³ Opponents state that companies cannot control how many viewers tune in to a particular sport to raise revenue. While a valid statement, the gender-pay gap reflects viewers' interests and historically, viewers tune into male-dominated sports. As such, promoting female athletics in early education, integrating

Equal Pay Claims, CNN (May 2, 2020), <https://www.cnn.com/2020/05/01/us/uswnt-equal-pay-claims-dismissed/index.html> (quoting *Morgan v. United States Soccer Fed'n., Inc.*, 445 F. Supp. 3d 635, 655 (C.D. Cal. 2020)).

186. See Mahita Gajanan, *The USWNT Seeks Nearly \$67 Million in Damages in Equal Pay Lawsuit Against U.S. Soccer. Here's What to Know About the Case*, TIME (Feb. 21, 2020, 10:56 AM), <https://time.com/5653250/uswnt-equal-pay-lawsuit/>.

187. *Id.*; see ESPN Staff, *USWNT Lawsuit Versus U.S. Soccer Explained: Defining the Pay Gaps, What's at Stake for Both Sides*, ESPN (June 3, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4071258/uswnt-lawsuit-versus-us-soccer-explained-defining-the-pay-gapswhats-at-stake-for-both-sides>.

188. See Gajanan, *supra* note 187.

189. See Graham Hays, *USSF Claims Competition Pool, Physical Demands Gives USMNT Different Job Than USWMT*, ESPN (Mar. 10, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4071870/ussf-claims-competition-pool-speed-of-game-give-usmnt-different-job-than-uswnt>.

190. See *id.*

191. See ESPN Staff, *supra* note 187.

192. See Gajanan, *supra* note 188.

193. See ESPN Staff, *supra* note 187.

women into secondary education sports, and providing equal funding may steer women to participate in more sports. By increasing participation, advertisements, and representation, women will likely receive greater televised coverage and sponsorships, generating greater revenue in accordance with the CBA.¹⁹⁴ These latent contractual obligations rooted in negotiation tactics and gender discrimination result in unequal pay.¹⁹⁵

For example, when employers require prior wage information, men and women then have a narrow range to negotiate salaries within, causing a woman to receive a lower initial salary compared to their male counterpart.¹⁹⁶ The lack of transparency with market salaries and internal salary disclosures causes many women to rely on these biased numbers to negotiate a starting salary.¹⁹⁷ While there are few significant studies on this correlation, the implication arises when a prospective employee does not seek to deviate too greatly from their disclosed previous salary.¹⁹⁸ However, one study indicated that a woman who “refused to disclose [her salary history] was actually offered 1.8% less than a woman who was asked and did disclose.”¹⁹⁹ While previous salary disclosures do not have definitive negative implications, research does suggest that both men and women received higher wages when the question was not asked.²⁰⁰ Removing the question for applications likely will not close the gender pay gap. However, it will alleviate some of the anxiety surrounding salary negotiations and unconscious bias in an attempt to “[p]rice the job, not the person.”²⁰¹ Recently, the Supreme Court denied a Petitioner’s writ of certiorari in a case involving a female math consultant earning approximately \$100,000 less than a man in her position.²⁰² After remanding

194. See Gajanan, *supra* note 188 (“One of the threshold issues is that there’s no agreement on what the relative levels of pay are,” Feldman says. “[U.S. Soccer] claims the women are making just as much if not more than the men. They have to prove they are getting paid less and then prove that the disparity is attributable to gender discrimination and not other gender-neutral factors.”)

195. See *id.*

196. See Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017), <https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history>.

197. See Lobel, *supra* note 90, at 572-73.

198. See *id.* at 573.

199. See Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 5, 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity>.

200. See *id.*

201. See *id.*

202. See Erin Mulvaney, *High Court Won’t Review Salary History Defense in Pay Bias Suits*, BLOOMBERG L. (July 2, 2020, 9:43 AM), <https://news.bloomberglaw.com/daily->

the case to the Ninth Circuit, the court affirmed that previous salary histories should not have any bearing on a present sex discrimination suit.²⁰³ As stated by the EEOC, “this tool exacerbates the gender pay gap in the country . . . because women historically make less than men.” While this ban prohibits questioning an applicant about previous salaries to prevent women from accepting lower salaries, excluding a woman’s past salaries in a discrimination suit ignores years of disparities.²⁰⁴

In a subtle attempt to circumvent the equal work requirement, women experience negotiation bias and bargaining backlash. Aside from the necessary salary disclosures, many still perceive women as having “lower aspirations,” reluctant to begin negotiations, or deem them less “powerful.”²⁰⁵ One study indicated that when women negotiated on behalf of themselves, they feared backlash for acting assertive or lacked confidence in face-to-face discussions.²⁰⁶ These differing behavioral manifestations reflect perceived gender stereotypes and corresponding salary outcomes.²⁰⁷ In fact, stereotypically, men possess stronger negotiator traits and observed competence.²⁰⁸ In one study, researchers concluded that women experienced challenges with “balancing self-advocacy and community[,] managing difficult emotions, and overcoming interpersonal resistance.”²⁰⁹ Balancing assertiveness and even-temperedness coincides with the notion that women should display female stereotypes.²¹⁰ The second concern does not necessarily reflect the overly emotional label, but instead focuses on preemptively managing an anticipated negative reaction.²¹¹ The interpersonal resistance embedded in negotiations highlight how women face more obstacles when working toward their goals.²¹² Negotiation tactics present a formidable task for

labor-report/high-court-wont-review-salary-history-defense-in-pay-bias-suits.

203. *See id.*

204. *See id.*; *see also* Rizo v. Yovino, 950 F.3d 1217, 1240-41 (9th Cir. 2020) (holding that prior salary does not qualify as a “factor other than sex”).

205. *See* Vaani Pardal et al., *Implicit and Explicit Gender Stereotypes at the Bargaining Table: Male Counterparts’ Stereotypes Predict Women’s Lower Performance in Dyadic Face-to-Face Negotiations*, 83 *SEX ROLES* 289, 290 (2020).

206. *See id.*

207. *See id.* at 291.

208. *See id.* at 292.

209. *See* Mara Olekalns et al., *3 of the Most Common Challenges Women Face in Negotiations*, *HARV. BUS. REV.* (Sept. 30, 2019), <https://hbr.org/2019/09/3-of-the-most-common-challenges-women-face-in-negotiations>.

210. *See id.*

211. *See id.*

212. *See id.*

women, and women tend to experience particularly tough obstacles when bargaining for the same working conditions as their male counterparts.²¹³ Though not a definitive justification, the implicit and explicit gender biases in wage negotiations contribute to the ever persistent wage gap.²¹⁴

IV. GENDER PAY DISPARITIES IN NON-CONTROLLED GROUPS

Punitive repercussions set a precedent for change, but they do not remedy institutional gender bias. The Supreme Court has spent decades overturning legislation introduced to discriminate on the basis of sex.²¹⁵ While hiring practices and anti-discrimination policies address male privilege, the laws do not adjust for early occupational differences, lack of representation, and widespread gender norms that perpetuate the gender pay gap. In examining non-controlled groups, women enter traditionally lower-paid professions and primarily female-dominated fields. These career decisions do not occur in a vacuum. This is not to say that women do not select a profession purely based on desire or interest. However, the likelihood that a young girl begins her career path absent any outside guidance seems nearly impossible. This discourse stems from the cumulative influence of redirecting educational, professional, and social tracks to align with distinct, traditional gender stereotypes. Before delving into the distinctions in the academic realm, people must acknowledge the gender attitudes embedded in early expectations. While socioeconomic status, academic achievements, social intelligence, parental influence, and other factors may play a crucial role in gender-based stereotypes, these all turn on community influence through common expression, media, or gender representation.

The *sticky floor* phenomenon represents a discriminatory pattern that keeps women in lower earning positions. This floor encompasses those taking on traditionally female occupations and those in the lowest-paying positions. In contrast to the *glass ceiling*, the *sticky floor* widens at the lowest wage distributions bracket. These deep rooted cultural and social norms prevent women from reaching top-tier positions or overcoming occupation segregation.²¹⁶ The *sticky floor* functions as a pipeline that funnels women into certain positions across all fields and only up the organizational hierarchy commensurate with other women.²¹⁷ This metaphor reflects the

213. *See id.*

214. *See* Pardal et al., *supra* note 206, at 300-01.

215. *See supra* notes 2-14.

216. *See Glass Ceiling or Sticky Floor*, WOMEN POWER (Jan. 18, 2020), <http://womeninpower.org.au/glass-ceiling-or-sticky-floor-barriers-to-careers-of-women/>.

217. *See* Mary S. Morgan, *Glass Ceilings and Sticky Floors: Drawing New Ontologies*

idea that “[m]en are more likely to receive career-track job positions and specific training, conversely female workers tend to be segregated into low-paying, non-career track jobs leading to a lack of higher value and firm-specific skills.”²¹⁸ These same traditionally female-dominated positions often include stagnant positions with rare social mobility opportunities.²¹⁹ Whereas, male dominated professions often include various ranked positions.²²⁰ Though this concept applies to all sectors, this Article highlights how gender stereotypes in multiple facets largely contribute to the *sticky floor*, a pattern of gender-specific careers that begins at women’s initial career point.²²¹ In turn, this same *sticky floor* creates a vicious cycle that leads to occupational segregation. This Section underlines how the *sticky floor*, muddled with early onset gender stereotypes, bias, and discrimination contribute to the public perception of career *choices* and occupational segregation according to gender. As such, the gender pay gap becomes one of contrasting lower earning professions, those primarily consisting of women, with higher earning ones, those primarily consisting of men.²²²

A. Projecting Gender Stereotypes in Childhood Reinforces Gender Norms

Advertising and film consistently distort reality, subconsciously communicating messages that preserve bias and underrepresent women.²²³ The psychological impact media has on childhood and adolescence development distills down to the media’s massive role in affecting children’s attitudes in the career pipeline.²²⁴ This Article does not go

13 (The London School of Economics & Political Science, Working Paper No. 228, 2015), <http://eprints.lse.ac.uk/65859/1/Glass%20ceilings.pdf>.

218. See Lucero, *The Glass Ceiling and the Sticky Floor*, STARTUP LADY (July 31, 2019), <https://www.startuplady.org/en/blog/2019/7/31/the-glass-ceiling-and-the-sticky-floor>.

219. See *Employment and Earnings in Select Occupations*, U.S. DEP’T LABOR, <https://www.dol.gov/agencies/wb/data/employment-earnings-occupations> (last visited Feb. 1, 2021).

220. See *id.*

221. See Ayu Puspitasari & Suharnomo, STICKY FLOOR PHENOMENON IN WOMEN’S CAREER 1, 1 http://eprints.undip.ac.id/77836/1/48_STICKY_FLOOR_PHENOMENON_IN_WOMEN%E2%80%99S_CAREER_-_full_paper.pdf (last visited Dec. 14, 2020).

222. See *infra* Part V(A).

223. See Julia T. Wood, GENDERED LIVES: COMMUNICATION, GENDER, & CULTURE, 31 (1994), excerpt available at <https://www.nyu.edu/classes/jackson/causes.of.gender.inequality/Readings/Wood%20-%20Gendered%20Media%20-%202094.pdf>.

224. See L. Monique Ward & Jennifer Stevens Aubrey, COMMON SENSE, WATCHING GENDER: HOW STEREOTYPES IN MOVIES AND ON TV IMPACT KIDS’ DEVELOPMENT, 20-

into the statistical correlation between television viewing and gender roles,²²⁵ but instead notes how the concentration on stereotypical gender divisions in the media translates to unequal gender representation in reality.²²⁶ Whether in advertisements, academics, or television, the subtle linguistic bias has the undesirable effect of reinforcing gender norms.²²⁷ Early expectations and attitudes in the media inform how young children interact with one another.²²⁸ This subliminal messaging—whether directly spoken or indirectly conveyed —“[b]e a good girl” or “[b]oys will be boys”—conditions children to behave in accordance with a particular stereotype.²²⁹ For years, girls grew up hearing how they should provide for their husbands, act slightly complacent, or adopt certain mannerisms, feeding into this caregiver stereotype.²³⁰ In fact, of teenagers polled, 82% said they heard another person criticize a boy for “acting like a girl.”²³¹ As such, the gender bias and systematic discrimination prevalent in society leave lasting impressions on children, slowly contributing to particular career choices. These *choices*, the *choices* that many believe solely guide a career *choice* do not come free from this constant reinforcement of gender stereotypes.²³² Thus, the gender pay gap inevitably exists because of the occupational gender segregation in non-controlled groups.²³³

1. *Pink and Blue Marketing Preserves Gender Bias*

The toy box, both literally and metaphorically, confines children to these gender stereotypes.²³⁴ In one study, boys’ bedrooms contained more sports,

23 (2017), <https://wnywomensfoundation.org/app/uploads/2017/08/16.-Watching-Gender-How-Stereotypes-in-Movies-and-on-TV-Impact-Kids-Development.pdf>.

225. *See id.*

226. *See id.*

227. *See* James A. Banks & Cherry A. McGee Banks, MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES 145 (7th ed. 2010).

228. *See* Ward & Aubrey, *supra* note 225, at 20-23.

229. AAUW, EARLY GENDER BIAS, <https://www.aauw.org/issues/education/gender-bias/> (last visited Feb. 1, 2021).

230. *See id.*

231. *See* Claire Cain Miller, *Many Ways to Be a Girl, but One Way to Be a Boy: The New Gender Rules*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/upshot/gender-stereotypes-survey-girls-boys.html>.

232. *See* Caroline Knorr, *What Media Teach Kids About Gender Can Have Lasting Effects, Report Says*, CNN (June 29, 2017, 7:36 AM), <https://www.cnn.com/2017/06/29/health/gender-stereotypes-media-children-partner/index.html>.

233. *See infra* Part V(A).

234. *See* Perri Klass, *Breaking Gender Stereotypes in the Toy Box*, N.Y. TIMES (Feb.

machinery, and vehicle toys while girls' bedrooms contained more "domestic items" such as cookware or dolls.²³⁵ Boys categorized any item resembling a doll as "cowboys or soldiers," now, referred to as "action figures."²³⁶ Toys are promoted as feminine or masculine, and children tend to gravitate towards toys associated with their gender.²³⁷ These gender specific toys encourage boys to engage in fantasy play and girls to focus on domestic life.²³⁸ For boys, the former imaginative fantasy resembles a symbolic actuality whereas the latter signifies a girls' reality, at least traditionally.²³⁹ In a different study, children became less restricted to these roles when exposed to counter-stereotypical images of young girls playing with a traditionally masculine toys, such as a car, or a young boy with a clichéd feminine item, a pony.²⁴⁰ This pink and blue market branding extends beyond the toy box into rigid adult advertising and media role portrayals.²⁴¹ Advertisement trends indicate men taking on more caretaking roles and household chores, intertwining historical gender roles.²⁴² Typically these same advertisements portray fathers as "childish," "irresponsible," or "lazy," continuing to misrepresent reality.²⁴³ Regardless of the targeted age audience, persuasive images tend to conform to domestic roles and beauty stereotypes.²⁴⁴ While biased marketing persists for adult consumers, the media's impact on the vulnerable child poses a greater risk for a young girl or young boy's future career choice.

Projecting stereotypes at an early age encourages children to fall into gender specific patterns. Children's toys, textbooks, and television depict women in designated roles. Unequal gender representation and subtle or outright dismissals in these facets inevitably contribute to women's career choices. Combining these perceived gender norms with the academic

5, 2018), <https://www.nytimes.com/2018/02/05/well/family/gender-stereotypes-children-toys.html?auth=login-google>.

235. See Judith E. Owen Blakemore & Renee E. Centers, *Characteristics of Boys' and Girls' Toys*, 53 *SEX ROLES* 619, 619 (2005).

236. See *id.* at 620.

237. See generally *id.* (studying the possible correlation between gender-specific toys and children's developmental skills).

238. See *id.*

239. See *id.*

240. See Klass, *supra* note 235.

241. See generally KIM SHEEHAN, *CONTROVERSIES IN CONTEMPORARY ADVERTISING* 89 (2003) (analyzing the intended and unintended effects of gender stereotypes in advertising).

242. See *id.* at 94.

243. See *id.*

244. See *id.* at 91, 95.

gender inequality²⁴⁵ tends to lead to historically underpaid and disproportionately represented female-dominated career choices. Toys and advertisements inescapably hold greater weight than mere recreational enjoyment. As developmental psychologist Laura Zimmermann stated, “ads shape and reinforce stereotypes . . . [t]hey are obviously not working alone; we have wider societal influences at work, but ads are powerful.”²⁴⁶ These masculine and feminine divisions amongst children’s toys turns on inherent developmental skills such as “scientific,” “artistic,” “musical,” “develops physical skills,” “encourages domestic or household skills,” “encourages nurturance,” “involves construction” or “encourages creativity.”²⁴⁷ Research indicates traditionally masculine toys encourage spatial development²⁴⁸ and conventionally feminine toys develop communication skills.²⁴⁹ Therefore, this comes as no surprise that certain male-dominated professions require higher spatial intelligence²⁵⁰ and female dominated occupations involve greater social skills.²⁵¹ Encouraging children to expand their interests does necessarily equate to removing particular gender specific toys from children, but instead attempts to merge the clear divide.²⁵² Displaying images to include “mixed gender play” expands impressionable young kids’ horizons instead of reinforcing specific development, fostering choices free from biased advertisements.²⁵³

245. See *infra* Part IV(B).

246. See Klass, *supra* note 235.

247. See Blakemore & Centers, *supra* note 236, at 627.

248. See generally Jamie J. Jirout & Nora S. Newcombe, *Building Blocks for Developing Spatial Skills: Evidence From a Large Representative Sample*, 26 PSYCHOL. SCI. 302, 302 (2015) (exploring how spatial skills invariably intertwine with gender roles).

249. See generally Rebecca Y. Hei Li & Wang Ivy Wong, *Gender-Typed Play and Social Abilities in Boys and Girls: Are They Related?*, 74 SEX ROLES 399, 408 (2016) (studying how play and development intertwine to exacerbate gender roles).

250. See generally *The 7 Best Careers for Visual Thinkers*, VISTA COLL. (Sept. 18, 2016), <https://www.vistacollege.edu/blog/careers/the-7-best-careers-for-visual-thinkers/> (highlighting traditionally male-dominated careers in which visual thinkers “excel”).

251. See Rakesh Kochhar, *Women Make Gains in the Workplace Amid a Rising Demand for Skilled Workers*, PEW RES. CTR. (Jan. 30, 2020), <https://www.pewsocialtrends.org/2020/01/30/women-make-gains-in-the-workplace-amid-a-rising-demand-for-skilled-workers/>.

252. See Klass, *supra* note 235.

253. See *id.*

2. *Early Onset Gender Roles' Depiction and Unequal Gender Representation in Television*

Aside from the media's falsification of stereotypical physical attributes, underrepresentation in film and television implies women cannot hold high-ranked positions.²⁵⁴ Children's programming rarely pushes past gender boundaries and instead, restricts how children perceive themselves.²⁵⁵ Some attribute the scarcity of "positive portrayals of women" to the lack of female executives, producers, or directors.²⁵⁶ The organization Common Sense Media recently conducted a study to reveal "a relationship between the media kids watch and the careers to which they aspire."²⁵⁷ When the media features women in customarily female-dominated professions, children tend to express less of an interest in science, technology, engineering, and mathematics ("STEM") related fields.²⁵⁸ Media, arguably the most powerful effective communication tool, has the capacity to intertwine gender stereotypes to explore endless career possibilities.²⁵⁹ Reinforcing masculine traits through superhero programming or sports television suggests young boys should conform to these *masculine* characteristics.²⁶⁰ However, associating particular occupations with a certain gender keeps children in these unyielding boxes, ignoring professional potential.²⁶¹ Based on generational stereotypes and lack of representation, many young girls have a narrow purview of non-traditional role models.²⁶² Absent exposure to same gender roles, how can a young girl dream to become a scientist, mathematician, or president if the dream seems far out of reach?²⁶³

There has been movement towards incorporating more mixed-gender roles, though children's television has not yet reached equal gender representation.²⁶⁴ For programming targeting children under six years

254. See Wood, *supra* note 223.

255. See Ward & Aubrey, *supra* note 224, at 2.

256. See Wood, *supra* note 223, at 32 ("Female film directors are even more scarce, as are executives in charge of MTV. It is probably not coincidental that so few women are behind the scenes of an industry that so consistently portrays women negatively." (internal citation omitted)).

257. See Ward & Aubrey, *supra* note 224, at 3.

258. See *id.* at 4.

259. See *id.* at 5.

260. See *id.* at 7.

261. See *id.* at 35.

262. Am. Ass'n of Univ. Women, *Early Gender Bias*, AAUW, <https://www.aauw.org/issues/education/gender-bias/> (last visited Feb. 1, 2021).

263. See *id.* (noting that an awareness of gender roles is critical for a more equitable future).

264. See Ward & Aubrey, *supra* note 224, at 17.

old, “male characters are more likely to be shown in traditionally masculine occupations (e.g., firefighter, U.S. president), whereas female characters are more likely to be shown in traditionally feminine occupations (e.g., dancer, seamstress).²⁶⁵ While certain characters present an anomaly such as Doc McStuffins or Dora the Explorer, the majority focus on the prince and princess dynamic.²⁶⁶ For children between the ages of seven and ten, media content depicts men in non-domesticated settings, and when they are featured in a domestic role, “they are humorously inept.”²⁶⁷ On the other hand, when the media portrays women in a male-dominated fields, they introduce them in secondary positions.²⁶⁸ Progressing to early and late adolescence, the shows become much more gender specific i.e. female-targeted *Hannah Montana* or male-targeted *Star Wars: The Clone Wars*.²⁶⁹ When television programming includes women with professional aspirations, they steer them towards involvement in the arts or success, both of which become dependent on male characters.²⁷⁰ Similarly, according to a Common Sense Media study evaluating the “top grossing films of 2015,” male actors had over 12% greater screen and speaking time than female actresses.²⁷¹ In pictures with male lead characters, males had approximately 22% more screen time and approximately 23% more speaking time.²⁷² In children’s television, male characters outnumbered the female characters two to one.²⁷³ This underrepresentation in television leaves young girls with limited role models for typically overly represented male occupations. Side-stepping women, misapplying traditional roles, and ignoring progressive cultures in the classroom and in the media reinforces the notion that young girls must confine themselves to specific subjects, characteristics, or careers.

B. Career Pipeline: How Biased Academic and Athletic Programs Affect Professional Choices

Every day, young children witness gender inequality in their homes, schools, communities, and media.²⁷⁴ Women tend to receive less support

265. *See id.* at 18.

266. *See id.*

267. *See id.*

268. *See id.*

269. *See id.* at 19.

270. *See Ward & Aubrey, supra* note 224, at 20.

271. *See id.* at 17.

272. *See id.*

273. *See id.*

274. *Gender Equality*, UNICEF, <https://www.unicef.org/gender-equality> (last visited Feb. 1, 2021).

than their male counterparts when pursuing a particular study area—perpetuating the gender gaps in learning.²⁷⁵ Worldwide, 25% of young women between the ages of fifteen and nineteen are “neither employed nor in education or training” compared to 10% of men.²⁷⁶ While social constructs of male conformity may “fuel child labour, gang violence, disengagement from school, and recruitment into armed groups,”²⁷⁷ this Article focuses on how gender norms disproportionately affect women. In 1972, Congress enacted Title IX to guarantee the right to education to all persons regardless of sex.²⁷⁸ Yet, decades after the enactment of Title IX, discrimination against women and young girls still persists.²⁷⁹ The courts’ Title IX interpretation turns on its willingness, deference, and application, but while this legislation attempts to remedy discrimination,²⁸⁰ it does not tackle the inherent gender bias in the educational system.²⁸¹

1. *The Underlying Subtext in Academic Textbooks*

Not only does the media have a strong inclination to promote men in all facets of success, but underrepresentation in academic textbooks continuously underlines how women need to break the glass ceiling to achieve equal occupational representation, a driving force behind gender inequity. How can gender-balance exist in American textbooks if women’s history does not reflect women as historical figures?²⁸² To account for this lack of historical representation, textbooks seem to dismiss women’s roles

275. *See id.* (“The safety, hygiene and sanitation needs of girls may be neglected, barring them from regularly attending class.”).

276. *See id.*

277. *See id.*

278. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972).

279. *See* Maria D. Greenberger & Neena K. Chaudhry, *Sex Discrimination in Education: Miles to Go Before We Sleep*, A.B.A. (Oct. 1, 2005), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/fall2005/hr_Fall05_sexdiscrimination/.

280. *See* § 1681.

281. *See* Michelle Ann Frantz, *School Sexism and its Educational Implications* 1, 1 (1994) (unpublished masters thesis, Grand Valley State University) (on file with Grand Valley University State) (investigating the forces that contribute to gender inequity in schools).

282. *See* Kay A. Chick, *Gender Balance in K-12 American History Textbooks*, 1 SOC. STUD. RES. & PRAC. 284, 284-85 (2006); *see also* BANKS & BANKS, *supra* note 228, at 143 (reinforcing the notion that gender bias in academia extends beyond textbooks into American literature used in school curricula, but the same bias also exists in textbooks, books, and television); *Where are the Women?*, NAT’L. WOMEN’S HIST. MUSEUM, <https://www.womenshistory.org/social-studies-standards> (last visited Feb. 1, 2021) (“Each time a girl opens a book and finds a womanless history, she learns she is worth less.”).

and provide less descriptive text.²⁸³ The number of males and females in textbooks only slightly varied from early grade levels to higher education.²⁸⁴ Even given increased female representation, male representation increased at a higher rate.²⁸⁵ Not only do textbook authors systematically write out women, but when they do include women they are “portrayed in subservient roles.”²⁸⁶ The invisibility of women, or rather the preferential treatment of men, tells young girls that because women have not “yet” succeeded, they cannot.²⁸⁷ These textbooks lag behind the constantly changing mixed-gender stereotypes.²⁸⁸ The two-fold solutions—highlighting women’s history and altering female imaging—are required for women to become part of the narrative and less of an addendum.²⁸⁹ Gender bias in academia primarily surfaces through teacher-student interactions, but heavily relying on a biased textbook for the curriculum instills a sense of unattainable goals, underpinning sexism in childhood education.²⁹⁰ The widespread bias and marginalization in frequently used textbooks incidentally leads to preserving the unequal representation in academic programs.²⁹¹ Projecting gender based stereotypes in a crucial instrument used in primary and secondary education reinforces norms in academics, and is arguably the most influential force shaping a child’s career pipeline.

The underlying subtext in academic textbooks, particularly historical roles, conveys a narrow, misguided message, one in which women contribute less to the public.²⁹² The influential nature of textbooks does not turn on whether women *are* portrayed, but *how* women are portrayed in history.²⁹³ History cannot change, but the way textbooks represent women

283. See Chick, *supra* note 283, at 285.

284. See *id.* at 287.

285. See *id.* at 288.

286. See Valeria Perasso, *100 Women: ‘We Can’t Teach Girls of the Future with Books of the Past’*, BBC NEWS, (Oct. 9, 2017), <https://www.bbc.com/news/world-41421406>; see also BANKS & BANKS, *supra* note 228, at 144 (noting that the media often portrays women only in family roles).

287. See BANKS & BANKS, *supra* note 228, at 146 (discussing how male students dominate the classroom).

288. See Perasso, *supra* note 287.

289. See *Where are the Women?*, *supra* note 282.

290. See BANKS & BANKS, *supra* note 228, at 143-46.

291. *Infra* Part IV(B).

292. See Annie Chiponda & Johan Wassermann, *Women in History Textbooks – What Message Does This Send to the Youth*, 6 YESTERDAY & TODAY 13, 14-15 (2011).

293. See *id.* at 14.

can.²⁹⁴ In a United States study, a pattern revealed an increased number of women in history textbook indexes.²⁹⁵ In reviewing several textbooks, research indicates that men appear more frequently than women in content and illustrations.²⁹⁶ Sheer numbers alone do not explain the substantial influence unequal representation in history textbooks has on young girls.²⁹⁷ Because textbooks are perceived “to reflect the reality and truth,” as the “cultural mirrors of society,” then the subtext carries an immeasurable amount of weight.²⁹⁸ They depict women’s rise to power on account of powerful men as women merely serving as a bystander to scientific discoveries, and women still taking on traditional domestic roles.²⁹⁹ Shifting messaging to deviate from the alleged “status quo” to expose young girls to alternative possibilities, all while emphasizing the mere fact women rarely crack the *glass ceiling* does not mean they cannot crack the *glass*, is not a far-fetched notion.³⁰⁰ Interpreting the historical content to include greater equal representation and increase the female narrative may desegregate gender roles.³⁰¹ In facilitating this new perspective, the messaging may guide young girls to engage in less traditionally female dominated occupations, providing them with more of a *choice* free from this underlying subtext.

2. *Unequal Gender Participation in Vocational Training and Science, Technology, Engineering, and Mathematics*

The mere fact that women surpass men in acquiring bachelor’s and master’s degrees does not correlate to nontraditional, high-wage earning career choices.³⁰² Gender stereotypes reflect a “(a) lack of early exposure to nontraditional occupations and role models; (b) student attitudes; (c) unsupportive career guidance practices and materials; (d) lack of encouragement to participate in math, science, and technology; [and] (e) stereotyped instructional strategies and curriculum materials.”³⁰³ Studies

294. *See id.* at 24 (asserting that how women are portrayed in textbooks affects how people perceive women).

295. *See id.* at 19.

296. *See, e.g., id.*

297. *See* Chiponda & Wassermann, *supra* note 293, at 21.

298. *See id.* at 21, 23.

299. *See id.* at 22-23.

300. *See id.* at 24.

301. *See id.* at 25.

302. *See* MARY E. LUFKIN ET AL., GENDER EQUITY IN CAREER & TECHNICAL EDUCATION 421, 432 <https://www.napequity.org/nape-content/uploads/CH-20-GE-in-Career-Tech-Ed.pdf> (last visited Feb. 1, 2021).

303. *See id.*

indicate that many students pursue a particular career choice because of their initial exposure, self-confidence, and role model access.³⁰⁴ Familial, educational, and cultural biases tend to steer students into specific courses associated with femininity or masculinity.³⁰⁵ Further, often guidance counselors or administrative personnel use aptitude exams engraved with inherent bias to expose students to particular careers, deterring students from choosing non-traditional coursework.³⁰⁶ While a greater number of female students have selected science and math courses to bridge the gender gap for mathematic disciplines, few girls continue to take on engineering or computer science courses.³⁰⁷ The visual representation in curriculum materials depict young boys as succeeding in technological careers through practical work, whereas the same materials portray young girls merely studying their text.³⁰⁸

Women consistently remain underrepresented in technical education fields such as engineering technology or electronics.³⁰⁹ Prior to 1972, public policy clearly delineated men as breadwinners and women as caretakers.³¹⁰ Along with the long standing, outdated stigma associated with vocational education (career and technical education), categorical gender division translate into vocational studies.³¹¹ The present aforementioned barriers preventing equal gender participation reinforces gender stereotypes in academia.³¹² In career and technical education, gender equity encourages high school students to pursue non-traditional career choices.³¹³ However, these courses inevitably perpetuate occupational gender-based segregation.³¹⁴ According to the National Women's Law Center's career and technical education enrollment study, women represented over 85% of participants in cosmetology, childcare, and

304. *See id.*

305. *See id.*

306. *See id.*

307. *See id.* at 433.

308. *See* LUFKIN ET. AL., *supra* note 302.

309. *See* Greenberger & Chaudhry, *supra* note 279 (“A National Women’s Law Center investigation of enrollment patterns in twelve geographically diverse states across the country reveals that girls represent more than five out of six students in courses leading to traditionally female occupations and fewer than one out of six students in courses leading to nontraditional occupations.”).

310. *See* LUFKIN ET AL., *supra* note 302, at 421.

311. *See id.* at 428.

312. *See id.*

313. *See id.* at 422.

314. *See id.* at 428 (analyzing the current gender inequity in career and technical education).

healthcare.³¹⁵ Whereas, men made up at least 75% in “agriculture, precision production, engineering, construction and repair, and automatic service” subjects.³¹⁶ This does not discount the regional demand for certain occupations, but instead these statistics turn on lack of equal enrollment in high school vocational programs.³¹⁷ Under the Perkins Act of 1984 and the Carl D. Perkins Career and Applied Technology Education Act of 1990, Congress contributed over \$100 million in state grants to remedy this gender inequity in vocational studies.³¹⁸ As defined in the Perkins Act, “nontraditional training” refers to “occupations or fields of work, including careers in computer science, technology, and other emerging high skill occupations.”³¹⁹ As reformed in 1998, 2006, and 2017, the reauthorization of the Perkins Act provides over \$1 billion to programs at secondary and postsecondary levels to promote technical education.³²⁰ Promoting and encouraging student participation in these nontraditional subjects tends to increase female enrollment in such technical courses.³²¹

STEM fields tend to have a greater “influence on global progress,” yet women remain underrepresented in STEM fields.³²² Female participation has increased in “law, medicine, and business,” making up approximately 50% of law students, more than 50% of medical school applicants, and approximately 40% of masters of business administration students.³²³ However, this increase does not correlate with those entering STEM professions.³²⁴ Though women consist of approximately 50% of the United States’ workforce with college degrees, they represent merely 24% of those in science and engineering related careers.³²⁵ Those 24% of female scientists and engineers tend to gravitate towards social sciences and environmental life sciences.³²⁶ Each subset further breaks down into a disproportionate gender representation—approximately 18% in computer science, 19% in engineering, 39% in physical sciences, and 43% in mathematics.³²⁷ Women pursuing a career in STEM earn 33% more than

315. *See id.* at 427.

316. *See* LUFKIN ET AL., *supra* note 302, at 427.

317. *See id.* at 427-28.

318. *See id.* at 423.

319. *See id.* at 424.

320. *See id.*

321. Greenberger & Chaudhry, *supra* note 279.

322. Wajngurt & Sloan, *supra* note 34, at 13.

323. *Id.* at 14-15.

324. *Id.* at 15.

325. *Id.*

326. *Id.*

327. *Id.*; *see also id.* (“The engineering, computer, and math statistics can be further

women entering non-STEM fields; however, women still continue to dominate in more female centric subjects—“education, health, and psychology.”³²⁸ Not only does such inclination prevent increased earnings, but STEM positions have a higher growth rate than non-STEM positions.³²⁹ This lack of equal participation in educational programs leads to lack of equal representation in career *choices*. However, women continue to encounter discriminatory barriers that hinder women’s participation in STEM.³³⁰

Lingering historical stereotypes in educational subjects discourage women from pursuing traditionally masculine topics—physics, mathematics, and economics.³³¹ Further, many female students gravitate towards professions promoting “humanitarian ideals and interpersonal goals.”³³² In fact, women make up approximately 74% of all healthcare practitioners and 74% of educational professionals—both considered “helping” professions.³³³ Women continue to encounter discriminatory barriers that hinder women’s participation in STEM.³³⁴ Confronting female stereotypes surrounding interests, abilities, or commitment turns on combating discouragement, harassment, and hostility.³³⁵ Cultural expectations and natural predispositions steer women to hone skills necessary for such professions.³³⁶ Further, students lack role models to help identify with STEM professions and develop a greater interest in pursuing particular subjects as early as primary and secondary schooling.³³⁷ Because engineers design items used daily, such as “buildings, bridges, computers, cars, wheelchairs, and X-ray machines,” these items tend to develop from the male perspective.³³⁸ To attract more young girls to pursue a career in

broken down to a selection of specific STEM careers to show that women comprise 35% of chemists; 11% of physicists and astronomers; 34% of environmental engineers; 23% of chemical engineers; 18% of civil, architectural and sanitary engineers; 17% of industrial engineers; 11% of electrical and computer hardware engineers; and 8% of mechanical engineers.” (internal citation omitted)).

328. Wajngurt & Sloan, *supra* note 34, at 14.

329. *Id.*

330. Greenberger & Chaudhry, *supra* note 280.

331. Wajngurt & Sloan, *supra* note 34.

332. *Id.*

333. *Id.*

334. Greenberger & Chaudhry, *supra* note 279.

335. *Id.*

336. Wajngurt & Sloan, *supra* note 34.

337. *Id.* at 17.

338. *Id.* at 14 (citation omitted); *see also id.* (“For example, the original automobile airbags were designed by men for the adult male body, and some deaths of women

STEM, educational facilities added arts to broaden students' interests.³³⁹ This "interdisciplinary learning" style embedded with the arts promotes collaboration, awareness, and creativity for real-world application.³⁴⁰ Simply investing in educational programs to incorporate certain subjects with vocational and STEM curriculums likely will increase participation in underrepresented fields.³⁴¹

3. *Inequities Extend Beyond the Classroom into School Athleticism*

Gender inequities extend beyond the classroom setting into the playing field—athletic scholarships and team funding.³⁴² For quite some time, the National Collegiate Athletic Association did not offer women scholarships nor did they host any female championship games.³⁴³ Yet, studies indicate that young women involved in sports "are healthier, have greater academic success, and have lower rates of drug use, smoking, and teenage pregnancy."³⁴⁴ Since Title IX's enactment, the number of women participating in college-sports exceeds five times the number of female students than before 1972; approximately two in five young women participate in "high-school varsity sports."³⁴⁵ Historically, campuses designed physical education programs for female sports around "fear of competitiveness" to prevent "strenuous physical activity."³⁴⁶ In the late nineteenth century, professionals modified female basketball to have fewer players, greater restrictions, and could not "snatch[] the ball from [] opponents."³⁴⁷ During WWII, women began to replace men as cheerleaders because colleges reduced their women's sports programs and men fought overseas.³⁴⁸ As more and more women began cheering, cheering became a less ambitious sport and progressively sexualized activity.³⁴⁹ Cheering no longer required skill, athleticism, or leadership, but instead the

and children resulted from the deployment of these airbags.").

339. *Id.* at 13.

340. *Id.* at 18-19.

341. LUFKIN ET AL., *supra* note 303, at 435.

342. Greenberger & Chaudhry, *supra* note 279.

343. Alia Wong, *Where Girls are Missing Out on High-School Sports*, THE ATLANTIC (June 26, 2015), <https://www.theatlantic.com/education/archive/2015/06/girls-high-school-sports-inequality/396782/>.

344. Greenberger & Chaudhry, *supra* note 279.

345. Wong, *supra* note 343.

346. Robyn Ryle, *THROW LIKE A GIRL, CHEER LIKE A BOY: EVOLUTION OF GENDER, IDENTITY, AND RACE IN SPORTS* 3-4 (2020).

347. *Id.* at 4.

348. *Id.* at 5.

349. *Id.* at 6.

sport merely highlighted a woman's attractiveness and her femininity.³⁵⁰ Because Title IX included athletic programs, athletic directors began to try to circumvent the legislation's requirements and categorize teams based on skill—both of which failed.³⁵¹ Instead, Congress elected to segregate sports on the basis of gender, further reinforcing masculinity.³⁵² Now, though young women makeup approximately half of the student population, women still only receive approximately one third of the athletic operations budgets allocated to recruit athletics.³⁵³ This Article does not speak to whether school athletics should require baseline participation, but instead encourages schools to promote athletic programs as those available to mix genders to decrease gender inequity and increase equal opportunities.³⁵⁴

V. REPRESENTATION IN FEMALE DOMINATED VS. MALE DOMINATED PROFESSIONS

Whether examining controlled or non-controlled groups, occupational segregation serves as one of the most prominent, if not the most prominent, driving forces behind gender pay inequity. As indicated in controlled groups, the discrimination becomes slightly more apparent. Still, the unequal representation in primarily male-dominated professions marginalizes women, making them more susceptible to gender pay inequity. However, the less recognizable discrepancies materialize when contrasting earnings in non-controlled groups. While the Bureau of Labor analyzed the labor force breakdown by industry, age, and education,³⁵⁵ this Article focuses on striving to eliminate gender career bias evident in media and academia to increase overall demographic representation. In providing women with a *choice*, one free from instilled stereotypes and gender norms, this *choice* likely will meet the more fitting definition, an automatous decision. This Article does not ignore the ever-present demands in particular professions or the implication that working

350. *Id.*

351. *Id.* at 12.

352. See Ryle, *supra* note 346; see also Gillian R. Brassil, *Sarah Fuller, With a Kickoff, Is the First Woman to Play Football in a Power 5 Game*, N.Y. TIMES (Nov. 28, 2020), <https://www.nytimes.com/2020/11/28/sports/sarah-fuller-woman-kicker-vanderbilt.html> (“Sarah Fuller became the first woman to play during a regular-season game in one of college football’s Power 5 conferences by booting a kickoff on Saturday for Vanderbilt to start the second half against Missouri.”).

353. Greenberger & Chaudhry, *supra* note 279.

354. See Wong, *supra* note 343.

355. *Women in the Labor Force: a Databook*, U.S. BUREAU LAB. STATS. (Dec. 2019), <https://www.bls.gov/pub/reports/womens-databook/2019/>.

women take on a career in addition to domestic responsibilities. This piece simply focuses on how gender stereotyping becomes engraved in a child's mind, implicitly impacting career *choices*. In eliminating gender norms and increasing participation, these traditional gender specific occupations will become less gender-centric. While the challenge remains to abolish the notion that historically female centric professions should earn less, that raises a new set of challenges dependent on working hours, public functions, and other factors, all unaccounted for in this Article.

A. Overall Demographic Representation in Gender-Centric Professions

To delve into solutions to rectify this inequity, people must recognize historically female and male dominated professions. According to the United States Department of Labor, the most predominant occupations for women include “[r]egistered nurses[, s]ecretary and administrative assistants[, e]lementary and middle school teachers[, m]anagers, all other[, and c]ustomer service representatives.”³⁵⁶ For “[p]reschool and kindergarten teachers[, s]ecretaries and administrative assistants[, c]hildcare workers[, d]ental assistants[, and m]edical assistants,” women make up over 90% of personnel.³⁵⁷ In contrast, women make up less than 5% of the workforce in the following occupations: carpentry, automotive services, electricians, construction, construction trade supervisors, machinery mechanics, maintenance workers, machinists, firefighters, installation workers, and “[g]rounds maintenance.”³⁵⁸ Still, the Department of Labor’s projected trend highlights how women will continue to dominate in caregiving professions such as home health care aids, nurse practitioners, counselors, and other assistants.³⁵⁹ Turning to the STEM fields, the Department of Labor calculated women only represent over 50% in fields such as the social sciences.³⁶⁰ While waiters and waitresses, childcare workers, cashiers, and personal care aides makeup some of the “[m]ost common occupations for [w]omen,” they also makeup some of the lowest median earning professions for women.³⁶¹ Similarly so, in housekeeping cleaners, teacher assistants, and miscellaneous personal

356. *Employment and Earnings in Select Occupations*, *supra* note 219.

357. *Id.*

358. *Id.*

359. *High Demand Occupations*, U.S. DEP’T LABOR, <https://www.dol.gov/agencies/wb/data/high-demand-occupations> (last visited Feb. 1, 2021) (noting the Department of Labor’s projects the largest increase for female representation in occupations in both solar photovoltaic installers and wind turbine service technicians, likely attributed to solutions designed to combat climate change).

360. *See Employment and Earnings in Select Occupations*, *supra* note 219.

361. *See id.*

appearance workers careers, women make up over 80% of the workers, yet have the lowest median earnings.³⁶²

In the past century, the number of women in the workforce has nearly multiplied by ten.³⁶³ As of 2016, more women than men obtained advanced degrees; yet,³⁶⁴ in that same year, the total male population earned a median income of approximately \$10,000 more than the total female population.³⁶⁵ Women earned the highest median income working as surgeons, nurse anesthetists, dentists, pharmacists, or engineering managers.³⁶⁶ Yet, none of those listed occupations represent primarily female-dominated professions.³⁶⁷ While this does not necessarily place women under the 10% benchmark, this leaves women below equal representation.³⁶⁸ Dozens of occupations exhibit a wide gender pay gap.³⁶⁹ In fact, female financial specialist earn approximately half of male financial specialists.³⁷⁰ This does not ignore the differing experience, professional title, and gender representation; however, even so, this raises the question of why women earn significantly less³⁷¹—why pay inequity has become less career-based and more gender-based. Many will immediately refute this point, attributing the pay inequity to professional skill, time, or responsibilities. To echo an earlier note, the key is not to evaluate why a finance manager earns more than a school educator,³⁷² but instead why the finance field is primarily comprised of men, lending itself to the point that men earn more than women. This Article does not dismiss those aforementioned factors but reiterates that such “justifications” do not account for ever-present, systemic gender bias governing substantial facets of life, guiding career *choices*. To crack the *glass ceiling*, essentially to

362. *See id.*

363. *100 Years of Working Women*, U.S. DEP'T LABOR, <https://www.dol.gov/agencies/wb/data/occupations-decades-100> (last visited Feb. 1, 2021).

364. *Women Earned Majority of Doctoral Degrees in 2016 for 8th Straight Year and Outnumber Men in Grad School 135 to 100*, AEI.ORG (Sept. 28, 2017), <https://www.dol.gov/agencies/wb/data/facts-over-time/earnings-and-earnings-ratios>.

365. *Earnings and Ratios*, U.S. DEP'T LABOR, <https://www.dol.gov/agencies/wb/data/facts-over-time/earnings-and-earnings-ratios> (last visited Feb. 1, 2021).

366. *Employment and Earnings in Select Occupations*, *supra* note 219.

367. *See id.*

368. *See id.*

369. *See id.*

370. *See id.*

371. *See id.*

372. *Compare Average Finance Manager Salary*, *supra* note 37, with *Average Teacher Salary*, *supra* note 37.

provide women the opportunity to earn more than her male counterpart, rests on providing women with the opportunity to choose to do so.

B. *Cracking the Political Glass Ceiling*

Shattering, or merely cracking the surface, applies to any profession whether male-dominated or female-dominated. However, as indicated, men tend to ride the *glass escalator* in female-orientated professions, advancing their careers at a faster rate than women. Therefore, women struggle to earn high rank positions, positions typically attributed to men across the board. This Article elects to demonstrate how preconceived notions, consistent discrimination, and gender norms in historically male-controlled occupations prevent women from achieving similar success, should they strive to do so. Taken together, discriminatory laws and inherent bias prevented women from holding public office, ironically and arguably a fundamental caretaker role. To a degree, the political *glass ceiling* represents the *glass ceiling* across all professions. But only now, centuries later from the first United States' presidential election, the world welcomes, Madam Vice President Kamala Harris, a former Senator from California.³⁷³ “[T]he world [was] watching with bated breath,”³⁷⁴ because slowly, Madam Vice President Harris cracked the political glass ceiling.³⁷⁵ In Vice President Harris' acceptance speech she stated, “While I may be the first woman in this office . . . I will not be the last, because every little girl watching tonight sees that this is a country of possibilities.”³⁷⁶

373. Ann Telnaes, *Madam Vice President*, WASH. POST (Nov. 7, 2020, 6:44 P.M.), <https://www.washingtonpost.com/opinions/2020/11/07/madam-vice-president/>.

374. Holly Ellyatt, *'The fight for America': The World is Watching the U.S. Election. Here's What it Thinks*, CNBC <https://www.cnbc.com/2020/11/03/the-whole-world-is-wthe-us-election-the-worlds-media-is-watching-on-.html> (last updated Nov. 6, 2020, 6:52 AM).

375. See Telnaes, *supra* note 373.

376. Lauren Gambino, *'I Won't be the Last': Kamala Harris, First Woman Elected US Vice-President, Accepts Place in History*, THE GUARDIAN (Nov. 8, 2020, 9:33 EST), <https://www.theguardian.com/us-news/2020/nov/07/kamala-harris-victory-speech-first-woman-vice-president>.

Kamala Harris represents what America should have seen long ago in women, had the media and politicians not lost their way by coddling those far too eager to put women back in the kitchen and in the nursery. Our cultural imaginations can now be turned to all the women who every day work hard, succeed and are capable of running America.

Anthea Butler, *Vice President-Elect Kamala Harris Shattered the Glass Ceiling for All Women. It's About Time.*, NBC NEWS (Nov. 7, 2020, 11:57 AM EST), <https://www.nbcnews.com/think/opinion/vice-president-elect-kamala-harris-shattered-glass-ceiling-all-women-nca1246493>.

However, former Senator Harris became much more than the current Vice President; she became the presumptive nominee for the next Democratic ticket, paving her way to become the first female President of the United States,³⁷⁷ and maybe then fully shattering the political glass ceiling.

In 1922, with women only receiving the right to vote a few years prior,³⁷⁸ the Senate appointed the first female United States Senator, Georgia Democrat, Rebecca Latimer Felton.³⁷⁹ A few years later, Nellie Tayloe Ross became the first female Governor in the United States, replacing her deceased husband, a former Wyoming Democrat. In 1933, President Franklin D. Roosevelt appointed Frances Perkins, Secretary of Labor, as the first woman to serve in a presidential cabinet.³⁸⁰ Appointed by President Harry Truman in 1949, Burnita Shelton Matthews became the first female federal district court judge, serving on the United States Court for the District of Columbia.³⁸¹ President Ronald Regan appointed the first female United States Supreme Court Justice, Sandra Day O'Connor. The nation did not see the first female United States Secretary of State until 1997 with Madeleine K. Albright.³⁸² As early as 1872, the first woman ran for United States President, all while she could not vote free of state law restrictions.³⁸³ For decades, women ran as third party candidates, such as the first female nomination for a major party, Margaret Chase Smith, or Congresswoman Shirley Chisholm, who received over 150 delegate votes at the Democratic Convention.³⁸⁴ Only in 2016 did Hilary Clinton slightly crack

377. Martin Kettle, *Kamala Harris for President in 2024? This Might be Joe Biden's Thinking*, THE GUARDIAN (Aug. 12, 2020, 10:30 EDT), <https://www.theguardian.com/commentisfree/2020/aug/12/president-kamala-harris-in-2024-this-might-be-joe-bidens-thinking>.

378. See U.S. CONST. amend. XIX.

379. *Milestones for Women in American Politics: Women in the U.S Senate*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/sample/timeline?field_timeline_group_tid=318.

380. *Milestones for Women in American Politics: Women in Federal Executive Office*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/sample/timeline?field_timeline_group_tid=318 [hereinafter *In Federal Executive Office*].

381. *Milestones for Women in American Politics: Women in the Judiciary*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/sample/timeline?field_timeline_group_tid=318.

382. *In Federal Executive Office*, *supra* note 380.

383. *Milestones for Women in American Politics: Women and the Presidency*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/levels_of_office/women-presidential-and-vice-presidential-candidates-selected- [hereinafter *Women and the Presidency*]; see U.S. CONST. amend. XIX.

384. *Women and the Presidency*, *supra* note 383.

the political glass ceiling in becoming the first female Presidential Candidate to represent a major political party.³⁸⁵ Eight years prior, she became “the first woman to win a major party’s presidential primary for the purposes of delegate selection.”³⁸⁶ Despite her loss in the 2016 election, Secretary of State Clinton secured almost three million more votes than her opponent, the first female candidate to outperform in the popular vote.³⁸⁷

In 1983, with only two women in the senate, twenty-two in the house, and twenty-four in Congress,³⁸⁸ Democratic Vice President Walter Mondale selected New York Congresswoman Geraldine Ferraro as his running mate, making Ferraro the first woman on a major party presidential ticket.³⁸⁹ Twenty four years later, in 2008, Senator John McCain designated Alaska Governor Sarah Palin as his running mate.³⁹⁰ Though neither tickets succeeded, the public twice witnessed a woman campaigning for the second-highest political position in the United States.³⁹¹ Up until the twenty-first century, less than 10% of United States Senators were women.³⁹² While the current United States Congress includes twenty six female senators and a hundred and one female representatives, the fact remains that women make up less than 25% of the members of Congress.³⁹³ As of the 2020 election, at least one hundred and forty-one women will serve in Congress.³⁹⁴ In fact, twice as many women ran for Congressional seats

385. *Id.*

386. *Id.*

387. Gregory Krieg, *It’s Official: Clinton Swamps Trump in Popular Vote*, CNN POL. (Dec. 22, 2016, 5:34 AM ET), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>.

388. *History of Women in the U.S. Congress*, CENT. FOR AM. WOMEN & POL. (2020), <https://cawp.rutgers.edu/history-women-us-congress>.

389. Lila Thulin, *The Woman Who Paved the Way*, SMITHSONIAN MAG. (Aug. 10, 2020, 11:55 A.M.), <https://www.smithsonianmag.com/history/geraldine-ferraro-unprecedented-1984-campaign-vice-president-180975491/>; see Bella Abzug and Mim Kelber, *Despite the Regan Sweep, A Gender Gap Remains*, N.Y. TIMES (Nov. 23, 1984), <https://www.nytimes.com/1984/11/23/opinion/despite-the-regan-sweep-a-gender-gap-remains.html>. (“All-male control of national political leadership is no longer written in stone, or engraved on voting machines.”).

390. Thulin, *supra* note 389.

391. *Id.*; see also *Women Presidential and Vice President Candidates: A Selected List*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/levels_of_office/women-presidential-and-vice-presidential-candidates-selected-list (listing all presidential and vice-presidential candidates to appear on any party ticket).

392. *History of Women in the U.S. Congress*, *supra* note 388.

393. *Id.*

394. Simone Pathe et al., *A Record Number of Women Will Serve in the Next Congress*, CNN POL. (Nov. 13, 2020, 1:12 PM ET), <https://www.cnn.com/2020/11/13/politics/election-2020-record-women-in-congress/index.html>.

in 2020 than in 2016.³⁹⁵ This upward trend breaks records, but does not nearly reach equal gender representation.³⁹⁶ Similar to other underrepresented professions, women cannot crack the political glass ceiling with the existing barriers in the career pipelines.³⁹⁷ The traditional pipeline to a Congressional seat rested on women acquiring law or business degrees.³⁹⁸ Yet, Harvard Law School did not admit women until 1950, and until the 1970s, women represented only 5% of lawyers.³⁹⁹ Absent the traditional prerequisites, a majority of women acquired their Congressional seats through lateral entry—becoming a widow or lacking elective office experience.⁴⁰⁰

The lack of political representation is twofold: legislative impediments hindering a woman's progression in the political pipeline and the continuing gender bias propagating gender-role stereotypes. In the 1950s, social constructs construed politics as “a man's game.”⁴⁰¹ Not only would a woman's involvement in politics deter her from concentrating on caretaker and homemaker roles, but would lower the political role's prestige.⁴⁰² Along with nonconformity, one poll suggested men have a greater emotional capacity for politics.⁴⁰³ Women continuously fight for a seat at the table.⁴⁰⁴ Decades ago, the table held women as half a member and while at the table, men informed them they “must look like a girl, act like a girl, think like a man.”⁴⁰⁵ This stigma continues to shape females' campaigns. While the ongoing women's movement and polling data inevitably alters the political landscape, lack of representation in political positions partially stems from the question “would you vote for [a woman] president?”⁴⁰⁶ According to a Gallup poll, in 2020, only 93% of a hundred people indicated that they would vote for a “well-qualified [female] for

395. *Id.*

396. *Id.*

397. Barbara Palmer & Dennis Simon, *BREAKING THE POLITICAL GLASS CEILING: WOMEN AND CONGRESSIONAL ELECTIONS* 7 (2006).

398. *E.g., id.*

399. *E.g., id.*

400. *See id.* at 8-9.

401. *E.g., id.* at 3.

402. *See* Palmer & Simon, *supra* note 397.

403. *E.g., id.* at 4.

404. *E.g., id.* at 5.

405. *E.g., id.* at 6.

406. *See* Clare Malone, *From 1937 To Hillary Clinton, How Americans Have Felt About A Woman President*, FIVETHIRTYEIGHT (June 9, 2016), <https://fivethirtyeight.com/features/from-1937-to-hillary-clinton-how-americans-have-felt-about-a-female-president/>.

president.”⁴⁰⁷ Yet, in 2019, six women announced the candidacy for the United States Presidency.⁴⁰⁸ Still, in 2020, a voter questioned how Congresswomen-elect Ashley Hinson of Iowa would manage her role, stating “The lady at the door, she thought I should be at home with my children.”⁴⁰⁹ While women have made tremendous strides in holding political office, the political *glass ceiling* demonstrates that more and more women strive for a seat at the table, but for centuries, laws and minds have not been in their favor.

VI. PROSPECTIVE SOLUTIONS: PRAGMATIC SHORT TERM AND OPTIMISTIC LONG TERM

Closing the gender wage gap requires a complex, multi-faceted, proactive approach. First, people need to debunk the myth. Simply because the economic gender inequity manifests largely through bias and discrimination does not mean such disparities do not exist. Luckily, the Supreme Court and Congress have recognized wage inequity.⁴¹⁰ Though the gender pay gap stems from an array of factors, these factors become intricately intertwined to prevent women from achieving economic equality. As noted, this Article circumvents issues such as gender specific parental leave, minimum living wage rates, and calculated weekly hours worked. Second, people need to hone-in on how systemic discrimination and unyielding bias leads to occupational differences. As noted, traditionally female dominated professions often lead to lower earned wages. Further, within the similar professions, men and women still earn dissimilar wages.⁴¹¹ Addressing these preconceived notions to combat gender roles in multiple facets and workplace discriminatory practices will demonstrate an effort to close the gap. These solutions will help make a career *choice* truly a choice—one free from as much as outside influence as possible. The positive consequence—closing the gender gap will lead to a greater number of women shattering the *glass ceiling*.

407. *The Presidency*, GALLUP (2020), <https://news.gallup.com/poll/4729/presidency.aspx>.

408. *E.g., Milestones for Women in American Politics: Women in Congress*, CENT. FOR AM. WOMEN & POL. (2020), https://cawp.rutgers.edu/sample/timeline?field_timeline_group_tid=318 (naming “Representative Tulsi Gabbard (D-HI), Senator Kirsten Gillibrand (D-NY), Senator Kamala Harris (D-CA), Senator Amy Klobuchar (D-MN), Senator Elizabeth Warren (D-MA), and Marianne Williamson” as candidates for presidency).

409. *E.g.,* Pathe et al., *supra* note 395.

410. *See supra* Part I.

411. *See* Sarah Jane Glynn, *Explaining the Gender Wage Gap*, CENT. FOR AM. PROGRESS (May 19, 2004), <https://www.americanprogress.org/issues/economy/reports/2014/05/19/90039/explaining-the-gender-wage-gap/>.

Policy agendas have the capacity to overcome bias to ensure men and women receive equal pay.⁴¹² The pragmatic short-term solutions focus on broad legislative mandates and internal business strategies. This condensed list of suggestions view gender pay equality as “economic opportunities,” “not only moral imperatives.”⁴¹³ Short term solutions avoid unnecessary disclosures and promote necessary transparency, whereas the optimistic long-term solutions redirect the focus towards marketing approaches, media selection, and increased investment. The latter of which, the most consuming, yet highly significant concern, deconstructs bias in multiple sectors, primarily tackling bias awareness and opportunity gaps. Without addressing these fundamental issues, the discrimination and bias in the career pipeline will perpetuate the gender pay gap both in controlled and non-controlled groups. Ignoring institutionalized sexism embedded in our nation’s history ignores the compounding problem apparent in all facets of life. While this Article highlights how even subtle prejudice affects career *choices* and widens the gender pay gap, these solutions extend beyond the workplace.

A. *Pragmatic Short-Term Solutions*

“[C]hanging the culture means nothing if the law doesn’t change.”⁴¹⁴ Turning to the federal government for avenues of redress seeks to punish discrimination, but does not adjust social norms, advocate for representation, or promote salary discussions. Asking Congress to legislate merely reminds employers that employees have recourse for discriminatory gender-based pay practices. However, Congress and employers may enact several short-term, feasible, practical suggestions to remedy gender pay inequities: (1) adopt the Paycheck Fairness Act; (2) uniformly interpret existing legislation; (3) provide clear guidelines for performance evaluations necessary for career advancement; and (4) implement workplace and hiring bias training to promote equal representation. While this does not serve as an exhaustive list, these short-term solutions do account for existing gender-based wage discrepancies. The long-term solution turns on dismantling inherent gender stereotypes in communities, households, and academia. Implementing gender diverse programs at an early age will widen the career pipeline to increase representation in male-dominated fields and eliminate workplace gender stereotypes, thus narrowing the gender pay gap.

412. See *Closing Gender Pay Gaps: 12 Solutions for Pay Equality*, THE B TEAM (Sept. 18, 2020), <https://bteam.org/our-thinking/news/closing-gender-pay-gaps-12-solutions-for-pay-equality>.

413. *E.g., id.*

414. *E.g., Gray, supra* note 15.

1. *Address Senate Inaction*

The comprehensive Paycheck Fairness Act will not independently solve the gender pay gap, but women should no longer wait for Congress to take action.⁴¹⁵ The Senate has not seen a call to action for over a year.⁴¹⁶ As Robin Bleiweis, research associate for Women’s Economic Security for the Women’s Initiative at American Progress, stated, “Politicians are quick to voice support for equal pay for equal work, but empty rhetoric is not the same as concrete action.” Supporters argue the Act creates nationwide uniformity and remedies state inconsistencies.⁴¹⁷ Opponents discredit the claim that “the wage gap is driven by discrimination,” because “laws on the books say[] that discrimination is illegal.”⁴¹⁸ Some lawmakers blocked the Paycheck Fairness Act, arguing that passing such legislation would increase lawsuits and harm businesses—absent any evidence that states with pay transparency laws have a greater number of lawsuits.⁴¹⁹ Even should this argument hold truth, an increase in lawsuits would merely underline how pay disparities likely *do* exist. These challengers emphasize how employers use experience, education, and abilities to adjust pay scales.⁴²⁰ Merely arguing the law protects outright discrimination ignores how gender bias plays an implicit, yet substantial, role from hiring to promotions. This recent legislation encompasses an array of suggested short term solutions, such as requiring data collection and closing legislative loopholes.⁴²¹ In fact, the Act contains provisions to implement negotiation skills instruction, conduct extensive research, and increase internal transparency.⁴²² This Article extracts a few targeted goals from the Act, including prohibiting past salary disclosures, protecting employee wage discussions, providing wage market transparencies, and mandating

415. See Robin Bleiweis, *\$546 Billion and Counting: Senate Inaction on Paycheck Fairness Continues to Shortchange Women*, CENT. FOR AM. PROGRESS (Mar. 26, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/news/2020/03/26/481834/546-billion-counting-senate-inaction-paycheck-fairness-continues-shortchange-women/>.

416. See *id.*

417. E.g., *id.*

418. E.g., Tamara Lytle, *Closing the Gender Pay Gap*, SHRM (June 4, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/summer2019/pages/closing-the-gender-pay-gap.aspx>.

419. See Jonathan Timm, *When the Boss Says, ‘Don’t Tell Your Coworkers How Much You Get Paid’*, THE ATLANTIC (July 15, 2014), theatlantic.com/business/archive/2014/07/when-the-boss-says-dont-tell-your-coworkers-how-much-you-get-paid/374467/.

420. See Lytle, *supra* note 418.

421. See Bleiweis, *supra* note 415.

422. See Paycheck Fairness Act, H.R. 7, 116th Cong. §§ 4-6 (2019-2020).

internal salary reporting. While the Act encourages training, subsection three of this Part provides a more detailed discussion on how to implement employment bias training in employee hiring, workplace meetings, and daily routines.⁴²³ Many employers remain reluctant to alter their hiring practices. Undeniably, these policy shifts will likely cost major companies and result in time consuming efforts to rectify internal gender-based disparities.⁴²⁴ However, compensating women for similar work to correct inconsistencies “doesn’t come free.”⁴²⁵ While a noble practice, these policy recommendations to do not necessarily request companies rectify past injustices. In fact, these suggestions—whether for employees or the Court—come at little to no cost. They often only come at accepting workplace gender discriminatory realities. Major corporations have begun to lead by example. Companies such as Google, Facebook, American Express, Starbucks, and Progressive have eliminated inquiring about salary history to promote fair wages.⁴²⁶ Systematically, women fall into gender specific roles at an early age, carrying their lower earned wages from position to position, perpetuating gender disparities.⁴²⁷ Some employees rely on previous salary to screen out prospective employees or to determine a new employee’s starting salary.⁴²⁸ Employers may hone in on the cognitive preconceptions subliminally to convince prospective employees to negotiate for lower salaries, or mistakenly to compare an applicant’s qualifications to place them in certain positions.⁴²⁹ Some employers claim an applicant’s salary history determine market values, but this subjective reliance uses past discrimination to continue to undervalue a woman’s role in both controlled and non-controlled groups.⁴³⁰ Enacting the Paycheck Fairness Act to prohibit employers from requesting prior wages aims to settle the Circuit Split on whether salary histories justifies pay

423. *See infra* Part VI(A)(3).

424. *See* Lytle, *supra* note 419.

425. *E.g., id.*

426. *See, e.g.,* Madison Alder, *Amazon, BofA Join Employers That Won’t Ask for Pay History*, BLOOMBERG L. (Jan. 30, 2018, 7:31 AM), <https://news.bloomberglaw.com/employee-benefits/amazon-bofa-join-employers-that-wont-ask-for-pay-history-1>; *supra* Part III(B); *see also* NAT’L. WOMEN’S LAW CTR., ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 3 (2018), <https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf> (listing companies that no longer seek an employee’s prior salary information).

427. *See* NAT’L. WOMEN’S LAW CTR., *supra* note 427.

428. *See id.*

429. *E.g., id.*

430. *See id.*

inequity.⁴³¹ Should Congress enact this legislation, employers may circumvent the law and ask about expectations, implicitly inquiring about current salaries for similar roles.⁴³² However, adopting this practice serves as a substantial step to value the “[p]rice the job, not the person.”⁴³³

While the National Labor Relations Board (“NLRB”) protects employees’ right to engage in concerted activity to address pay discrepancies,⁴³⁴ the Act enhances the existing Equal Pay requirement that an employer may not retaliate against an employee for discussing their wages beyond the NLRA repercussions.⁴³⁵ Absent minor exceptions, private sectors employers may not prohibit their employees from discussing their compensation,⁴³⁶ despite approximately 61% of all United States employers “explicitly prohibit[] or strongly discourage[] pay discussions.”⁴³⁷ Even given laws protecting employees, asking someone their salary somehow has become equated with the question “[w]hat’s your worth as a person?”⁴³⁸ Aside from divulging into this deeply problematic, complex question, a person’s salary has become taboo.⁴³⁹ However, how much someone earns does not equate to their “self-worth.”⁴⁴⁰ Nonetheless, this overarching apprehension or humiliation seems to deter employees from discussing their salaries.⁴⁴¹ This legal action serves as a noteworthy tool in promoting equal pay in controlled groups to discover whether employees

431. *See id.*

432. *See* John Hawkins, *Actions HR Should Take Regarding the Salary History Question*, HR PROFS. MAG. (2020), <https://hrprofessionalsmagazine.com/2020/02/26/actions-hr-should-take-regarding-the-salary-history-question/>.

433. *E.g.*, Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 5, 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity>; *see* NAT’L WOMEN’S LAW CTR., *supra* note 426.

434. *E.g.*, *Employee Rights*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employee-rights> (last visited Feb 1, 2021).

435. *See* Paycheck Fairness Act, H.R.7, 116th Cong. § 8(4); *see also* Timm, *supra* note 419 (noting that under the Nation Labor Relations Board, all employees have the right to engage in concerted activity concerning their wages)

436. *See Employee Rights*, *supra* note 435.

437. *E.g.*, Timm, *supra* note 419.

438. *E.g.*, Tim Herrera, *Why You Should Tell Your Co-Workers How Much Money You Make*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/smarter-living/pay-secrecy-national-labor-rights-act.html>.

439. *E.g.*, *id.*

440. *Contra id.*

441. *See id.*

earn different wages.⁴⁴² Because private sector employers tend to justify wage discrepancies based on prior experience, salary histories, or initial negotiations, the lack of transparency keeps certain people in better positions.⁴⁴³ This legal action reframes the question to become more about equally beneficial outcomes and less centered around workplace gossip.⁴⁴⁴ Encouraging internal transparency does come with negative ramifications;⁴⁴⁵ however, the growing interest in being more transparent trends in a positive direction.⁴⁴⁶ The simple act of informing employees of their rights and promoting salary conversations likely will eliminate gender pay disparities in controlled groups.⁴⁴⁷ Market wage transparency indirectly encourages women to negotiate for higher initial salaries. Certain websites such as LinkedIn, PayScale, or Salary provide a solid baseline for prospective employers to inquire about potential salary ranges.⁴⁴⁸ Aside from the inherent bias present in negotiations and promotions, many argue that women should simply “speak up.”⁴⁴⁹ Many women refrain from “speak[ing] up” because of the negative connotations associated with women being “overly pushy.”⁴⁵⁰ Similarly, a Georgia State University study indicated that linguistics play a significant role in how women react to certain situations.⁴⁵¹ In fact, people use the word “bossy” to describe women and girls one and half more times than for men and

442. *See id.*

443. *See* Herrera, *supra* note 438.

444. *See id.*

445. *See generally* Zoe B. Cullen & Bobak Pakzad-Hurson, EQUILIBRIUM EFFECTS OF PAY TRANSPARENCY IN A SIMPLE LABOR MARKET (2020), https://www.hbs.edu/faculty/Publication%20Files/CPH-transparency_259249ab-8591-4b4f-a8c1-5e5466ba3139.pdf (analyzing the impacts of providing pay transparency).

446. *See generally* Andrew Chamberlain, IS SALARY TRANSPARENCY MORE THAN A TREND?: ECONOMIC RESEARCH ON THE IMPACT OF GREATER WORKPLACE TRANSPARENCY 4, 11 (2015), https://www.glassdoor.com/research/app/uploads/sites/2/2015/04/GD_Report_2-2.pdf (noting the gradual shift in companies providing more transparency).

447. *See* Herrera, *supra* note 438 (“[T]hat although there is not enough data to draw a direct casual line between pay secrecy and unfair wages, we do know that in the public sector, where wage transparency is far more common, pay tends to be more equal and benefits are more evenly distributed.”).

448. *See id.*

449. *See* Timm, *supra* note 419.

450. *See id.*; *see also* Olga Khazan, ‘Pushy’ Is Used to Describe Women Twice as Often As Men, THE ATLANTIC (May 23, 2014), <https://www.theatlantic.com/business/archive/2014/05/pushy-is-used-to-describe-women-twice-as-often-as-men/371291/> (reviewing a study conducted to determine how people describe women and men disproportionately).

451. *See* Khazan, *supra* note 450.

boys.⁴⁵² Both men and women seemed to chastise prospective female employees when they initiated negotiations.⁴⁵³ Naturally, this turns on increasing negotiation tactics and eliminating gender bias at this stage; however, implementing pay transparency—internally and externally—decreases the gender divide.⁴⁵⁴ Adopting such practice eliminates employees speculating about potential salaries and avoids employers underpaying on account of one’s gender.⁴⁵⁵ If “[s]he didn’t know she was being paid less [how] could[] she [try to] negotiate for higher pay[?]”⁴⁵⁶ One of the stronger arguments rests on how many companies make subjective determinations to differentiate employees’ wages.⁴⁵⁷ Instead, these arguments suggest companies reveal *how* they set pay standards.⁴⁵⁸ Being more transparent about the process is equally as fundamental, specifically revamping performance evaluations that negatively result in compensation inconsistencies.⁴⁵⁹ Similar to how providing employees to discuss their wages amongst their fellow colleagues promotes a fair salary negotiation, market wage transparency to prospective employees minimizes future issues claiming disparate treatment.⁴⁶⁰ Disclosing how much an average person in a ranked position earns evades uncomfortable salary conversations that reflect prior wages, negotiation bias, or undervalued employees.

In the same vein of increasing transparency, mandating employer salary reporting to impartial third parties or, specifically, to the EEOC, provides a safeguard to use employment data to identify discrimination and gender wage disparities. As of 2019, the EEOC requires all companies with over 100 employees to report and identify their employees by “category, sex, race, and ethnicity.”⁴⁶¹ During the Obama administration, the EEOC announced a plan to mandate employers to submit wage information

452. *See id.*

453. *E.g.*, A.C. Shilton, *How to Be an Ace Salary Negotiator (Even if You Hate Conflict)*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/smarter-living/how-to-negotiate-salary.html>.

454. *Cf.* Samantha Cooney, *Should You Share Your Salary With Co-Workers? Here’s What Experts Say*, TIME (Aug. 14, 2018, 4:15 PM EDT), <https://time.com/5353848/salary-pay-transparency-work/>.

455. *Cf. id.*

456. *E.g., id.*

457. *Cf. id.*

458. *See id.*

459. *See infra* Part VI(A)(3).

460. *See* Herrera, *supra* note 438.

461. *E.g.*, *EEO-1: No Data Collection in 2020 Due to Coronavirus*, SHRM (May 7, 2020), <https://www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx?erid=348> (noting the EEOC delayed these disclosure due to Covid-19).

until the Trump administration delayed this action.⁴⁶² However, after suit, a federal court required the EEOC to proceed with the mandate.⁴⁶³ The EEOC did not seek renewal of the component requiring the reporting. The EEOC determined that the burden imposed on employers did not outweigh the costs of data collection.⁴⁶⁴ In lieu of this failed renewal, California implemented legislation to mandate private employers to provide wage information to the Department of Fair Employment and Housing to target equal pay.⁴⁶⁵ When reporting these values, these reports should include disclaimers regarding comparative groupings, average hours, and prior experience.⁴⁶⁶ Still considering these factors and possible misconceptions, mandatory disclosures to third parties will promote internal awareness of potential wage inequities due to gender discrimination. As noted, the California Legislature acknowledged how some employers pay their employees differing wages for an array of reasons, but the Legislatures intend these disclosures will identify wage patterns to combat the gender pay gap and strengthen existing legislation.⁴⁶⁷ Data collection will likely reveal discrepancies in similarly situated positions reflecting largely discriminatory reasons, or ideally, reinforce the notion that the bias appears in all facets—prior experiences or market fluctuations.⁴⁶⁸

2. *Interpret Existing Legislation*

Establishing a fixed, uniform interpretation for the Equal Pay Act and Title VII of the Civil Rights Act in the Supreme Court may remove procedural barriers in filing suit. In Equal Pay Act cases, the plaintiff has the burden of proving the employee performed “equal work” to that of equal skill, effort,

462. *E.g.*, Paige Smith et al., *Gender Pay Reporting May Start in Weeks Across Corporate America*, BLOOMBERG (Mar. 6, 2019, 6:00 AM EST), <https://www.bloomberg.com/news/articles/2019-03-06/u-s-companies-told-to-report-gender-racial-pay-data-to-eec>.

463. *E.g.*, *id.*; see Nat. Women’s Law Ctr. et al., v. Office of Mgmt. & Budget et al., 358 F. Supp. 3d 66, 93 (D.D.C. 2019).

464. *E.g.*, Laura A. Mitchell, *Breaking News: EEOC Will Not Seek Renewal of Pay Data Collection At This Time*, NAT’L L. REV. (Dec. 11, 2020), <https://www.natlawreview.com/article/breaking-news-eeoc-will-not-seek-renewal-pay-data-collection-time>.

465. Employers: annual report: pay data, S. 973 (2020).

466. *E.g.*, Jeffery F. Webb & George W. Abele, *California Passes Employer Pay Data Reporting Requirement: SB 973 Awaits Governor’s Signature*, PAUL HASTINGS (Sept. 8, 2020), <https://www.paulhastings.com/publications-items/details/?id=6370fe6f-2334-6428-811c-ff00004cbded>.

467. *E.g.*, *id.*

468. *See id.*

and responsibility under similar working conditions.⁴⁶⁹ Plaintiffs must establish a prima facie case of gender-based wage discrimination. First, in prescribing “equal work,” Congress intended the word “equal” to equate to “*substantially* equal,” and not “*identical*.”⁴⁷⁰ This liberal construction acknowledges that any person does not and likely cannot, perform exactly the same type or amount of work. It is nearly impossible for attorneys to take on the same cases, educators to teach the same classes, or physicians to assist the same patients. A person’s title alone may determine whether “jobs are *substantially* equal.”⁴⁷¹ Second, using a ridged, narrow, interpretation of skill, effort, and responsibility under in the Equal Pay Act prevents plaintiffs from bringing suit.⁴⁷² Shifting this one construction does not necessarily equate to successful lawsuits for the plaintiffs, but merely permits employees to allege gender-based wage inequity. In measuring skill, how does one compare physical versus mental effort? In measuring effort, how does one measure a person’s exertion? And in measuring responsibility, how does one measure specific accountability? The Court should hone in on interpreting skill, effort, and responsibility in accordance with the EEOC’s guidelines that suggest evaluating the job itself, not the person.⁴⁷³

The affirmative defenses pursuant to the Equal Pay Act includes the seniority system, merit system, production quantity, or “any other factor other than sex.”⁴⁷⁴ Employers do not use these affirmative defenses to circumvent discrimination, but instead use them as exceptions to provide non-discriminatory reasons for wage distinctions. The larger, more challenging issue turns on the Supreme Court interpreting the “factor other than sex.” However, the broad, inconsistent Court interpretations undermine existing afforded protections.⁴⁷⁵ For example, in *Corning Glass*

469. *E.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

470. *See* Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) (denying defendant’s argument that women performed unequal work because men took on extra tasks).

471. *E.g.*, *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/guidance/facts-about-equal-pay-and-compensation-discrimination> (last visited Feb 1, 2021) (emphasis added).

472. *See* § 206(d).

473. *See* *Facts About Equal Pay and Compensation Discrimination*, *supra* note 472 (Skill: “The issue is what skills are required for the job, not what skills the individual employees may have.” Effort: “The amount of physical or mental exertion needed to perform the job.” Responsibility: “The degree of accountability required in performing the job.”).

474. *See* § 206(d).

475. *See* NAT’L. WOMEN’S LAW CTR., PAYCHECK FAIRNESS: CLOSING THE “FACTOR

Works v. Brennan, where the plaintiff filed suit because men worked the night shift and earned more than women working the day shift, the Supreme Court rejected the defendant's argument that the differential in pay reflected the fair market.⁴⁷⁶ In fact, the Court held:

... the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral *factor other than sex*, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work.⁴⁷⁷

Though, still some courts accept this "market economics" as a "*factor other than sex*."⁴⁷⁸ This open-ended interpretation permits an employer to justify wage discrimination using nearly any defense.⁴⁷⁹ Clarifying the justifications does not alter the plaintiff's high burden in proving a prima facie case, but instead provides set guidelines on what constitutes the fourth affirmative defense—"factor other than sex."⁴⁸⁰

Should Congress elect to adopt the Paycheck Fairness Act, employers would no longer heavily rely on this affirmative defense unless the defense remains consistent with the business' needs. This necessary, universal clarification will close the legislative loophole. The Act ensures when an employer claims a "factor other than sex," such must be based on a bona fide factor—education, training, or experience—position related, or business

OTHER THAN SEX" GAP IN THE EQUAL PAY ACT 1-2 (2009), <https://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf>.

476. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 190, 205 (1974).

477. *Id.* at 209-10 (emphasis added).

478. See, e.g., *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, n.6 (7th Cir. 2006); *AFSCME v. State of Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985); *Greer v. Univ. of South Carolina*, No. 3:10-1390 (MBS)-(JRM), 2012 WL 405773, at *8 (D.S.C. Jan. 20, 2012); *Schultz v. Dep't of Workforce Dev.*, No. 09-Cv-274-SLC, 2011 WL 13359148, at *5 (W.D. Wis. Mar. 1, 2011); *Glunt v. GES Exposition Servs.*, 123 F. Supp. 2d 847, 859 (D. Md. 2000); cf. *Sparrock v. NYP Holdings*, No. 06 Civ. 1776 (SHS), 2008 WL 744733, *16 (S.D.N.Y. Mar. 4, 2008); *Glunt v. GES Exposition Services*, 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing *Mazzella v. RCA Global Comm, Inc.*, 814 F.2d 653 (2d. Cir. 1987)); *Walter v. KFGO Radio*, 518 F.Supp. 1309, 1318 (D.N.D.1981).

479. See *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005). For a greater discussion of how employers use the "market economics" as a fourth affirmative defense in wage discrimination cases; see also Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 175-76 (2011) (explaining how the market defense applies to Equal Pay Cases).

480. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018).

necessity.⁴⁸¹ The defense will not apply if an employee sets forth an alternative business practice that would eliminate pay disparities and the employer refused to adopt the practice.⁴⁸² Requiring an employer specifically to justify any wage discrepancies ensures proper discretion in determining employees' compensation to guarantee nondiscriminatory action. The Legislature did not propose the Paycheck Fairness Act to burden the employer, but rather, clearly delineate why men and women earn different wages in similarly situated positions to discourage gender-based wage inequities. Aside from the Senate's inaction, interpreting the fourth affirmative defense in the Court using a narrow approach avoids inconsistent decisions that award some plaintiffs relief and deny others the same protections. While the broad Title VII interpretation raises issues in itself, under Title VII, employees may set forth a reasonable, substantiated claim with fewer procedural barriers, and the employer must rebut the presumption.⁴⁸³ This Article briefly touches upon these differences but concludes that interpreting existing legislation with more fixed guidelines likely will prevent frivolous, unfounded lawsuits; increase claims with merit; and provide clearer justifications.

3. *Provide Clear Guidelines for Performance Evaluation*

Aside from enacting legislation primarily proposed to address explicit compensation discrepancies and increase penalties for employment violations, employers must acknowledge how performance evaluations play a significant role in promotional opportunities. Although each company that uses performance evaluations conducts their evaluations differently, the consistent rubric boils down to employers constructing a set criteria, inviting employees to critique themselves, and employers assessing employee's performances.⁴⁸⁴ Companies rely on performance evaluations to measure employments to determine potential promotions.⁴⁸⁵ The discussion does not turn on awarding particular leniency, but instead providing necessary disclosures to provide greater transparency. Though auditing employment qualifications to adjust performance evaluations may affect how employers perceive a certain skill set or may reveal implicit bias in the scores themselves, offering clear guidelines from the onset ensures fairness. For example, as

481. See Paycheck Fairness Act, H.R.7, 116th Cong. § 3 (2019).

482. See *id.*

483. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

484. Lori Nishiura Mackenzie et al., *Why Most Performance Evaluations Are Biased, and How to Fix Them*, HARV. BUS. REV. (Jan. 11, 2019), <https://hbr.org/2019/01/why-most-performance-evaluations-are-biased-and-how-to-fix-them>.

485. *Id.*

innocuous as the assessments may appear to the public, the questions themselves often raise implicit bias.⁴⁸⁶ When the vague, subjective questions turn on the evaluator's perspective, how can the company claim the performance evaluations remain objective?⁴⁸⁷

Many see the open box, the blank space on performance evaluations, as a gateway for perpetuating gender bias and hindering promotional opportunities.⁴⁸⁸ One study indicated that men and women receive different types of feedback—men often receive more goal orientated feedback, whereas women frequently receive more developmental specific feedback.⁴⁸⁹ Women either received “vague praise” or comments pertaining to “communication style.”⁴⁹⁰ Accordingly, one study revealed that the phrase “too aggressive” materialized in 76% of women's reviews compared to the 24% in men's evaluations.⁴⁹¹ Evaluator's preconceived stereotypes about a woman's caretaking roles tend to skew assessments to focus on collaboration instead of leadership.⁴⁹² As such, the negative feedback disadvantages women and hinders promotional opportunities.⁴⁹³ If women receive “vague praise,” then how can an employer key in on an accomplishment necessary for a promotion? A critical barrier exists for employers that hesitate to provide critical feedback because of a hypothetically construed, predicted response.⁴⁹⁴ The open box section permits employers to explain any possible negative scores and thus, employers should not eliminate this option, but rather improve their feedback to avoid vague, unsubstantiated claims.⁴⁹⁵

Performance evaluations should shift gears to compare an employee's

486. See Rachel DiBenedetto, *Reducing Recidivism or Misclassifying Offenders?: How Implementing Risk and Needs Assessment in the Federal Prison System Will Perpetuate Racial Bias*, 27 J. L. & POL'Y 414, 426-27 (2019) (relying on biased questions generates biased results).

487. Mackenzie et al., *supra* note 485 (including innocuous questions and statements such as, “describe the ways the employee's performance met *your* expectations” (emphasis added)).

488. *See id.*

489. See Shelly J. Correll & Caroline Simard, *Research: Vague Feedback is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016), <https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back>.

490. *See id.*

491. *See id.* (“Comments such as ‘Her speaking style and approach can be off-putting to some people at times’ point to a manager's concern but do not offer ways to improve specific behaviors.”).

492. *See id.*

493. *See id.*

494. *See id.*

495. Mackenzie et al., *supra* note 484.

performance against the company's goals rather than against their fellow colleagues. To remedy this ambiguity, employers first should use a more holistic approach, providing clearer guidelines that alter the questions to reflect the company-wide goals and position specific expectations.⁴⁹⁶ Second, evaluators should look towards collective data rather than seeking confirmation bias.⁴⁹⁷ The latter suggests that absent necessary changes to the questions themselves, employers have the capacity to explain potential issues or express their praise in the open box.⁴⁹⁸ This effortless, sensible solution draws attention to whether an employee meets the company's expectations, instead of not conforming to the performance evaluator's bias. At Microsoft, technology leader Lauren Antonoff designed and implemented the pilot program, Step Up, geared towards leadership development, successfully demonstrating how managers can improve feedback to "level[] the playing field."⁴⁹⁹ Adopting some of Step Up's suggestions, employers should (1) outline specific indicators that demonstrate high skill; (2) include greater details regarding desirable outcomes; (3) connect feedback to specific instances; and (4) provide similar length reviews for all employees.⁵⁰⁰ While skewed questions and negative feedback reflecting inherent bias raises dozens of issues in itself, at least with clear, detailed guidelines for more receptive feedback, companies have the capacity to rationalize any discrepancies between men and women. Equally so, women need to combat these barriers and use their voices, but others need not suppress them through subconscious gender bias in these workplace evaluations. Ideally, offering greater transparency in all facets of the workplace will provide women with more opportunities to speak up, instilling a sense of confidence rather than a fear of judgment.

4. *Implement Unconscious Bias Training*

While Congress may instruct organizations and allocate funds to provide training throughout all facets—hiring, negotiations, promotions, and outreach—proposed legislation does not indicate *how* to do so. Major companies utilize unconscious bias training as an attempt to promote diversity, inclusion, and equality.⁵⁰¹ Often, these organizations turn to these

496. *See id.*

497. *Four Ways to Mitigate Bias in Performance Evaluations*, MGMT. CTR., <https://www.managementcenter.org/article/four-ways-to-mitigate-bias-in-performance-evaluations/> (last visited Feb. 1, 2021).

498. *See* Mackenzie et al., *supra* note 485.

499. *See* Correll & Simard, *supra* note 490.

500. *See id.*

501. Janice Gassam Asare, *I'm a Diversity and Inclusion Expert Who Admits That 'Unconscious Bias' Trainings Don't Really Work. Here Are 3 Ways Companies Can*

trainings as a necessary repercussion rather than a preventative tool.⁵⁰² As a result, these implicit bias trainings result in little to no changes in workplace culture.⁵⁰³ However, similar to performance evaluation questions, unconscious bias training tends to reflect embedded existing stereotypes.⁵⁰⁴ For example, Ernst & Young found themselves in a heated controversy in the EY Power-Presence Purpose Training encouraging women to “signal fitness and wellness,” suggesting attendees rate “masculine” or “feminine” attributes, or signaling that “women ha[ve] smaller brains than men.”⁵⁰⁵ Treating these trainings as a daunting task instead of a reluctant solution dampens any possible retention or internal success.⁵⁰⁶ Because bias manifests in different ways according to varying professions, companies should not use universal trainings.⁵⁰⁷ Therefore, implementing unconscious bias training in the workplace only serves a purpose if the training truly identifies issues, facilitates conversations, and offers solutions.

Altering unconscious bias training to incorporate profession-specific, relevant hypothetical scenarios likely will make the training more concrete and increase awareness.⁵⁰⁸ More importantly, these trainings should acknowledge systematic discrimination and promote policy changes.⁵⁰⁹ However, employees of all backgrounds should contribute to the presentation to shift the narrow-minded, biased perspective. Indisputably, people often fail to recognize their unconscious bias, but employment trainings have the capacity to change minds. Incorporating conducted questionnaires, measured inclusivity, and tracked representation into bias training tailors the training to the issues prevalent within the organization. These unconscious bias trainings should speak to a larger systematic issue beyond stray workplace remarks. Honing in on developmental stereotypes, occupational segregation, and workplace gender bias will likely suppress

Ensure They're Not a Waste of Time, BUS. INSIDER (July 9, 2020, 9:09 AM), <http://www.businessinsider.com/how-to-improve-your-companys-dei-unconscious-bias-training-2020-7>.

502. *Id.*

503. *Id.*

504. *See id.*

505. Allana Akhtar, *An Ernst & Young Seminar Reportedly Suggested Women Have Small Brains and Said They Should Avoid Talking to Men Face-to-Face*, BUS. INSIDER (Oct. 21, 2019, 5:41 PM), <https://www.businessinsider.com/ernst-and-young-reportedly-hosted-a-training-with-gender-stereotypes>.

506. Asare, *supra* note 501.

507. The implicit bias training ideally should extend beyond interacting with colleagues to include interactions with students, patients, clients, or any other personnel to highlight issues at the ground level.

508. Asare, *supra* note 501.

509. *Id.*

preconceived notions about a woman's "responsibilities." Adopting pending legislation, interpreting Congressional language, providing clearer guidelines, and implementing beneficial training serve as pragmatic, short-term solutions. While these suggestions involve recognizing subconscious bias to alter perspectives, those will later fall into shape in concentrating on optimistic long-term solutions. In the interim, these simple, realistic policy changes may have a long-term impact, should employers and legislature choose to adopt such practices.

B. *Optimistic Long-Term Solutions*

Early engraved notions prevalent in advertising, media, and education communicate messages that reinforce designated roles. Cumulative reinforced ideals in these major categories either guide women into these "designated roles" or force them to break barriers. The latter comes attached with stigmas and discrimination. Rewriting this narrative provides both men and women with authentic choices. In turn, these autonomous choices will increase nontraditional participation and thus, desegregate certain occupations. Ideally, adjusting perceived stereotypes from the onset will promote bias awareness and decrease subtle discrimination. Should Congress adopt new legislation, the Court interpret laws consistently, employers provide clearer evaluation guidelines, and companies implement enhanced bias training, they quickly can enact minor change. However, the long-term suggestions attack the career pipeline from its initial point to transform a person's entire trajectory, which will clean the *sticky floor* and thaw the *frozen middle*. While they do not represent an exhaustive list, these recommendations have the capacity to change minds—slowly, no longer becoming a seemingly, idealistic feat.

1. *Market Gender Neutral Products*

Marketing outside of the classroom holds a substantial amount of weight in socially conditioning viewers to conform to a specific stereotype.⁵¹⁰ Industries continue to advertise items such as toys or cars that emphasize gender roles.⁵¹¹ However, urging companies to implement more inclusive children's marketing using categorical groupings, benefits both the consumer and the seller.⁵¹² On the seller's end, marketing more inclusively avoids alienating consumers, expands consumer outreach, and increases product sales. On the consumer end, the purchaser does not need to defy

510. *See supra* Part IV(A)(1).

511. *See* Katie Powers, *Shattering Gendered Marketing*, AM. MKTG. ASS'N. (Sept. 3, 2019), <https://www.ama.org/marketing-news/shattering-gendered-marketing/>.

512. *See id.*

stereotypes to purchase a children's toy. In 2015, the retail corporation, Target, adopted this approach and eliminated "boys" and "girls" isles to promote gender-neutral products. Though there is no direct correlation between eliminating the pink and blue marketing and increased sales in this instance, marketing gender neutral products does not seem to have harmed the company financially.⁵¹³ In fact, other United States retailers set pace for record closings, while Target increased their shares. Brands and companies should continue to follow suit, especially for children's toys, school supplies, or household items.⁵¹⁴ In fact, one Bic study indicated that 67% of young adults from 18-24 indicated their preference for gender neutral products.⁵¹⁵ Therefore, it comes as no surprise that Bic's pen "For Her" received great ridicule for marketing items that had little to no differentiation from a non-gendered product.⁵¹⁶ The sarcastic responses only demonstrated that promoting masculinity or femininity in toys focuses on colors rather than functionality.⁵¹⁷ Eradicating gender specific marketing for children's toys that invariably reinforce traditional gender roles will likely shift young girls' interests, abilities, and goals.

These preconceived notions, the subtle communications prevalent in advertisements implicitly contribute to career *choices*. This vicious cycle of gender specific marketing deceives consumers into selecting products that often come at a higher price that are "nearly identical to those marketed to men."⁵¹⁸ This type of advertising communicates to children that they

513. *See id.*

514. *See id.*

515. *See id.*

516. *See id.*

517. *See id.*

A few years after its release, the Bic pen "For Her" began attracting online ridicule. The pen was "designed to fit comfortably into a woman's hand," featured pastel colors and was priced at a 70% increase from Bic's non-gendered pen. Consumers disagreed with the brand's assumption that women want pens based on appearance and their feminine characteristics, not their functionality. They also took issue with the pen's higher price.

"Before these pens, I was nothing. I was a mere inconsequential woman, stumbling around writing nonsense with big pens that made me look ridiculous," one customer wrote sarcastically in an Amazon review. In response to consumer concerns, Bic released a lukewarm statement that fell short of an apology.

518. *Id.*

“are inherently different . . . so they need different types of toys.”⁵¹⁹ Because research associates these gender-divided toys with specific developmental skills, this reinforces gender stereotypes at an early age.⁵²⁰ Portraying young children playing with diverse objects in the sales market sets a precedent to collapse the foundation. Marketing children’s products absent gender-specific classification appears like a simple, feasible solution, but this changes corporate America’s minds, those typically resistant to changing their internal policies and altering their product designs. While marketing plays an immeasurable role in shifting attitudes, the same marketing could transform textbook portrayals, educational programs, hiring practices, and domestic attitudes. People hold the power to provide children with gender-neutral media, literature, puzzles, or toys. But this merely adopts one facet, these same people should elect to use gender-neutral terms to describe professions or designating chores equally. Shifting from pink and blue marketing to gender neutral advertising concentrates on reshaping unavoidable exposures to promote gender equality. Intertwining gender roles in recreational play at an early age strives to increase viewership for media that defies gender stereotypes and participation in non-traditional courses. Shifting the narrative to eliminate gender norms early on permits women to make decisions free from discrimination and bias, decisions that guide career choices and perpetuate the gender pay gap.

2. *Produce and Select Media that Defies Gender Stereotypes*

Between selecting toys and television, people have the capacity to choose how children view gender roles. Recognizing subconscious biases in two major areas—marketing and television—helps shape how a child plays. The latter intertwines well with the broader media. Television’s “constant exposure to the same dated concepts . . . concepts like: Boys are smarter than girls [or] certain jobs are best for men and others for

519. *See id.*

Over the course of a woman’s life, the financial impact of these gender-based pricing disparities is significant. In 1994, the State of California studied the issue of gender-based pricing of services and estimated that women effectively paid an annual “gender tax” of approximately \$1,351 for the same services as men. While DCA’s study does not estimate an annual financial impact of gender pricing for goods, the findings of this study suggest women are paying thousands of dollars more over the course of their lives to purchase similar products as men.

NYC DEP’T OF CONSUMER AFFAIRS, *From Cradle to Cane: The Cost of Being a Female Consumer* 6 (Dec. 2015), <https://www1.nyc.gov/site/dca/partners/gender-pricing-study.page>.

520. *See supra* Part IV(A)(1).

women,” underpins skewed messaging.⁵²¹ Shifting this description to defy stereotypes and interweave gender roles communicates a direct message to challenge traditional notions. People should elect to expose children to television shows that have strong female leads or men as nurturing fathers.⁵²² Because younger adults “do not want to be lectured to” while watching a show and select their own television shows, other media platforms should spark conversations to invite this age group to look for shows that defy stereotypes.⁵²³ For these younger adults, they may consider “This is Us,” that depicts a father as nurturing, or “Madam Secretary” that shows “women playing a prominent role in the fictional stories about Washington, D.C.”⁵²⁴ Though, when television shows depict women in affluent positions, they hold them to “impossible standards” and measures success as women “having it all.”⁵²⁵ These same political television shows such as *Madam Secretary* or *Scandal* offer predominately female representations with paradoxical conflicts—balancing career life and family life.⁵²⁶ Despite subtle gender stereotypes still apparent in nearly all television shows, selecting media that challenges gender roles serves as a step in the right direction. Because of the huge generational divide, the public expresses concern about young girls taking on traditionally male norms.⁵²⁷ However, should the media remain confined to these gender specific ideals, people should emphasize how the mere fact that television depicts a certain character in a particular way does not necessarily mean a child must act in accordance with such portrayal.⁵²⁸ Thus, even though television shows may still constrain women to certain patriarchal ideals, lack the necessary inner ambition, or portray women with little to no flaws, they have begun to defy gender stereotypes.⁵²⁹

521. Knorr, *supra* note 232; *see supra* Part IV(A)(2).

522. Knorr, *supra* note 232; *see also supra* Part IV(A)(2).

523. *See* Knorr, *supra* note 232.

524. Teresa Caprioglio, *Women Near TV's White House: Power, Gender, and Race on US Narrative Television 1* (Apr. 13, 2018) (Thesis) (on file with University of New Mexico UNM Digital Repository).

525. Katie Lynn Schwind, *Politics, Feminism, and Popular Television: Madam Secretary as a Politician, Wife, and Mother 2-3* (Jan. 2017) (M.A. thesis) (on file with Graduate Studies at Digital Commons at Denver University).

526. *See id.* at 9. For a greater discussion regarding how the media represents women in the White House, *see id.* *See also contra id.* at 100-01 (analyzing how certain depictions set “unrealistic standards” for women in political positions)

527. Ward & Aubrey, *supra* note 223, at 4.

528. Knorr, *supra* note 232.

529. *See* Schwind, *supra* note 526, at 100.

3. *Invest in Girls*

At the crux of the gender pay gap lies occupation segregation. A person's choice of study, and subsequently, a potential major choice within that study becomes one of the most significant driving forces behind these occupational *choices*.⁵³⁰ Even after breaking barriers and pursuing more lucrative, male-dominated professions, women still face constant discrimination in controlled groups, earning less than a male colleague.⁵³¹ To overcome these obstacles, many proclaim the solution is to invest in women's right to education.⁵³² However, women continuously surpass men in University enrollment and awarded degrees in the United States.⁵³³ Women over age twenty-five account for more than half of the college-educated labor force, yet a man with a bachelor's degree typical earns on average approximately \$26,000 more per year.⁵³⁴ To account for these discrepancies, many attribute any wage differences to how capitalism values the major or profession. Naturally, this turns on the underlying issues with how much education is required for a specific career. Therefore, women must now make a series of cumulative *choices* including (1) acquiring more degrees than a man; (2) choosing more profitable majors; (3) acquiring a graduate degree in addition to a liberal arts major; (4) negotiating the first paycheck; (5) pursuing more than a vocational degree; or (6) considering an industry specific certification.⁵³⁵ People likely will continue to face these obstacles when pursuing a particular occupation, especially in more broadly divided careers, but investing in girls focuses on encouraging equal participation to pursue diverse subjects so that these obstacles become less gender-centric.

Women's educational achievements have not bridged the gender wage gap, but instead these achievements funnel women into largely female dominated majors within traditionally male-dominated majors.⁵³⁶ Thus, educational attainment merely means that women may have a greater right

530. Anthony P. Carnevale et al., *WOMEN CAN'T WIN: DESPITE MAKING EDUCATIONAL GAINS AND PURSUING HIGH-WAGE MAJORS, WOMEN STILL EARN LESS THAN MEN* 4 (2018), https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Women_FR_Web.pdf.

531. See *The State of the Gender Pay Gap 2020*, *supra* note 33.

532. Carnevale et al., *supra* note 531, at 4.

533. Dani Matias, *New Report Says Women Will Soon Be Majority of College-Educated U.S. Workers*, NPR (June 20, 2019, 10:09 PM ET), <https://www.npr.org/2019/06/20/734408574/new-report-says-college-educated-women-will-soon-make-up-majority-of-u-s-labor-f>.

534. *Id.*

535. Carnevale et al., *supra* note 531, at 6-7.

536. *Id.* at 19.

to education (at least in the United States), but rarely do they make the same *choices*.⁵³⁷ Thus, investing in girl's education extends beyond this right. Instead, this solution suggests increased funding for programs for young girls to explore STEM, financial, political, or other roles.⁵³⁸ Policymakers should invest in girls' education to encourage gender research, increase female participation, and promote gender equity.⁵³⁹ The root of the gender gap problem rests on the connotations with certain career *choices*. The phrase "gender-pay gap" likely would cease to exist or significantly shrink, should these early *choices* become choices free from inherent gender bias that facilitates a career pipeline to reduce occupational segregation.⁵⁴⁰

Recognizing everyone's subconscious bias proves a daunting task, but investing in girls' education—exposing them to diverse professions, providing female role models, altering textbook gender bias—will dramatically impact girls' choices.⁵⁴¹ Research revealed that students gravitate towards a particular course largely because of stereotypes and bias.⁵⁴² In the early 2000s, a number of high schools offered career and technical education coursework comprised of agriculture, business, consumer sciences, health occupations, marketing, technology, and trade.⁵⁴³ However, these offerings remained vastly divided—reinforcing gender inequity.⁵⁴⁴ First, redesigning STEM education to include traditionally female oriented interdisciplinary subjects, such as the arts or humanities, will increase awareness for STEM fields and decrease gender segregation to eliminate the existing bias.⁵⁴⁵ Aside from reviewing nontraditional practices, collecting recent professional data, increasing external support, and investing in programs designed to combat gender inequity in coursework inevitably will increase participation.⁵⁴⁶ In fact, implemented

537. *Id.*

538. See, e.g., Lufkin et al., *supra* note 302, at 437-38; *Invest in Girls*, COUNCIL FOR ECON. EDUC., <https://www.councilforeconed.org/programs-2/invest-in-girls/> (last visited Feb. 1, 2021); *Top 10 Reasons to Invest in Girls' Education*, FAWCO, <https://www.fawco.org/global-issues/target-program/target-program-education/education-blog/3616-top-10-reasons-invest-in-girls-education> (last visited Feb. 1, 2021).

539. See Lufkin et al., *supra* note 302, at 438.

540. Carnevale et al., *supra* note 530, at 6.

541. *Id.* at 33.

542. See *supra* Part IV(B)(2).

543. See Lufkin et al., *supra* note 302, at 422.

544. See *id.* at 428.

545. Wajngurt & Sloan, *supra* note 34, at 13, 18-19; see LUFKIN ET AL., *supra* note 303, at 434-38.

546. See Lufkin et al., *supra* note 303, at 434-36.

programs in Ohio, North Dakota, Illinois, and Minnesota *did* increase female participation in nontraditional coursework.⁵⁴⁷ Unfortunately, because of lack of funding, these programs no longer exist.⁵⁴⁸

Investing in girls' education will expose young adults to diverse role models in nontraditional careers and provide students with a *choice* free from lingering bias. To the same effect, shifting the textbook narrative and financing school athleticism will transform bias in the educational system. Creating innovations designed to promote female involvement ideally shifts the career pipeline to promote autonomous choices and decrease occupational segregation. In identifying and targeting gender-specific inequality amongst both men and women, the response shifts towards addressing gender-related, evidence-based approaches to bridge the gender gap in particular sub-sectors.⁵⁴⁹ For example, the United Nations Children's Emergency Fund ("UNICEF") created the Gender Action Plan to combat gender equality in "health, education, political participation and economic opportunity."⁵⁵⁰ Tackling gender inequality using a piecemeal strategy comprised of direct messaging, community leaders, and legislative advocacy attempts to deconstruct gender bias segment by segment.⁵⁵¹ These multifaceted, long-term solutions encourage women to enter high-paying fields, and increases participation in the higher-paid occupational groups within those fields.⁵⁵²

VII. CONCLUSION

Creating the right to file suit on account of gender wage inequity acknowledges ever-present disparities and seeks to remedy discriminatory practices. In control groups, wage inequity often surfaces twofold: (1) writing off women for higher ranked positions—outright gender discrimination and reliance on biased figures—and (2) latent contractual distinctions—initial salary disclosures and revenue seeking opportunities. In non-controlled groups, gender pay inequities stem from an array of factors, but strongly derives from occupational segregation. Aside from the economic issues associated with devaluing certain professions, the gender pay gap exists largely because this segregation exists. Early on set gender

547. *See id.* at 436-37.

548. *Id.* at 436.

549. *See* U.N., Econ. & Soc. Council, UNICEF Gender Action Plan, 2018–2021, ¶ 27, U.N. Doc. E/ICEF/2017/16 (2017).

550. *Id.* at ¶ 5.

551. *See id.* at ¶ 28. ("For example, a focus on gender equality in strengthening health systems should help not only to improve maternal and newborn health, but also to build a quality health workforce that advances women as professionals.")

552. *See* CARNEVALE ET AL., *supra* note 530, at 18-19.

roles, lack of exposure, and unequal representation reinforces gender norms outside of the classroom as well as within the educational sector. The former primarily materializes in toy advertising and television programming. Whereas academia, the perpetual gender stigma attached to vocational training, STEM programs, and school athleticism becomes one of an initial, noticeable, gender divisions. Systemic discrimination and overarching bias have become so engraved in the culture that people rarely acknowledge how this subtle messaging holds significant weight. The manifestation of gender stereotypes in these highly significant facets inevitably shape a child's perspective, implicitly contributing to their career pipeline, a series of *choices*. These professional *choices* unescapably lead to stark contrasts in demographic representation in historically, gender-centric professions. However, female dominated occupations have become equated with lower median wages. The gender pay gap fundamentally reflects the connotation that women earn less because biased marketing, media, and academics considerably funnels them into lower-paid careers.

In promoting equal participation, these occupations will become less gender segregated. In shifting the narrative from the onset, people will choose their professions less inclined to adhere to antiquated stereotypes. Redirecting this messaging will remove any connotations that a certain profession heavily favors a particular gender and eliminate wage disparities on account of a person's gender. Underlying subtle discrimination in the workplace and highlighting divided occupations is a crucial step in achieving women's economic equality. However, this step does not discount necessary policies to value traditional female occupations, though that remains a separate issue. Now, not only must women continuously strive to overlook unavoidable developmental gender bias, but they must shatter the *glass ceiling* to consequently achieve equal pay. But to shatter the *glass ceiling*, humanity must clean the *sticky floor*, which guides women to traditional pink-collar employment, and thaw the *frozen middle*, the barrier hindering female advancement. “[C]hanging the culture means nothing if the law doesn’t change . . . Change minds first, then change the law.”⁵⁵³ In an attempt to eliminate gender disparities, changing the law generates pragmatic, short-term solutions. But “[c]hang[ing] minds” topples the whole system, bringing about optimistic, long-term results. “[S]tep by step [] the realization . . . that the pedestal on which some thought women were standing all too often [hopefully will no longer] be a cage.”⁵⁵⁴ This first step is the first realization: fixing gender bias will fix occupational segregation and redefine one word, the word *choice*.

553. Gray, *supra* note 15.

554. Rosen, *supra* note 1.