

February 2023

## Hitting the Wall: The Next Step in Addressing the Pink Tax

Danielle A. Essary

Follow this and additional works at: <https://scholarworks.uark.edu/alr>



Part of the [Civil Rights and Discrimination Commons](#), [Human Rights Law Commons](#), [Law and Gender Commons](#), and the [Other Law Commons](#)

---

### Recommended Citation

Danielle A. Essary, *Hitting the Wall: The Next Step in Addressing the Pink Tax*, 75 Ark. L. Rev. (2023).  
Available at: <https://scholarworks.uark.edu/alr/vol75/iss4/6>

This Comment is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact [scholar@uark.edu](mailto:scholar@uark.edu).

# HITTING THE WALL: THE NEXT STEP IN ADDRESSING THE PINK TAX

Danielle A. Essary\*

*Don't stop trying because you've hit the wall. Progress is progress, no matter how small.* —Unknown

## I. INTRODUCTION

For thirty-some-odd years, scholars and consumer advocates have called for the elimination of gender-based price discrimination, also known as the “Pink Tax.”<sup>1</sup> Efforts to address this issue have included studies demonstrating the phenomenon’s existence,<sup>2</sup> social movements incited to garner public support for the cause,<sup>3</sup> consumer attempts to bring the issue before courts in

---

\* J.D. Candidate, University of Arkansas School of Law, 2023. The author sincerely thanks Professor Will Foster for his insight, guidance, and support, which he has consistently offered not only as her faculty advisor for this Comment but also as a mentor. The author also thanks Elizabeth Esparza, her Note and Comment Editor, for the invaluable advice and encouragement she offered during the writing process; Bailey Geller, her friend and this year’s Editor-in-Chief of the *Arkansas Law Review*, for her support during the writing process and her diligence in the publication process; and Jacob Holland, for his abiding encouragement throughout law school and, specifically, for calling the author’s attention to this fascinating topic. Finally, the author would like to thank all her friends and family for their emboldening confidence in her and their shared excitement in all her endeavors. The author would like to give a special thank you to her husband, Michael, and especially her parents, Heather and Rod O’Shields, without whose support she would not have been able to achieve her dream of pursuing a law degree. This Comment is dedicated to them.

1. The New York City Department of Consumer Affairs’ *Gyped by Gender: A Study of Price Bias Against Women in the Marketplace*, published in 1992, constitutes one of—if not the—first in depth study of gender-based price discrimination. Mikayla R. Berliner, *Tackling the Pink Tax: A Call to Congress to End Gender-Based Price Discrimination*, 42 WOMEN’S RTS. L. REP. 67, 69 (2020).

2. See, e.g., ANNA BESSENDORF, N.Y.C. DEP’T OF CONSUMER AFFS., FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (Shira Gans ed., 2015), [<https://perma.cc/8R5S-2PCQ>].

3. See, e.g., ALARA EFSUN YAZICIOĞLU, PINK TAX AND THE LAW: DISCRIMINATING AGAINST WOMEN CONSUMERS 10 (2018) (discussing “Georgette Sand, a French women’s rights group” that “initiated an online petition on *change.org*” with “#Womantax” in its title, a term that quickly “evolved into ‘*taxe rose*,” which, as one can likely guess, is French for

hopes of judicial intervention,<sup>4</sup> and legislative undertakings at both the state and federal level to craft legislation prohibiting the practice.<sup>5</sup> Yet, gender-based price discrimination has proven evasive of regulation,<sup>6</sup> outside the scope of judicial reach,<sup>7</sup> and difficult to isolate in terms of hard proof.<sup>8</sup> Even agreeing on a definition of the Pink Tax has proven challenging, as the waters surrounding the issue are muddied by other recognized discriminatory practices such as the Tampon Tax and the gender wage gap, which all contribute to the additional financial burden imposed by society onto women.<sup>9</sup> The last several decades reveal the elusiveness of the Pink Tax and demonstrate that, thus far, documented efforts to address the practice are individually insufficient to eliminate the practice.<sup>10</sup> Still, each attempt constitutes a vital step, or misstep, in the path to a final solution.

As it seems we have hit the proverbial wall in the Pink Tax movement, now seems to be an appropriate time to reflect on

---

'pink tax'); see also Samantha Anthony, *What Is the "Pink Tax"?*, UMKC WOMEN'S CTR. (Oct. 10, 2018), [<https://perma.cc/8GNG-3VU8>].

4. See, e.g., *Schulte v. Conopco, Inc. (Schulte I)*, No. 4:19 CV 2546, 2020 WL 4039221, at \*1 (E.D. Mo. July 17, 2020); *Goulart v. Edgewell Pers. Care Co. (Goulart II)*, No. 4:19-CV-2568, 2020 WL 4934367, at \*1 (E.D. Mo. Aug. 24, 2020); *Lowe v. Walgreens Boots All., Inc.*, No. 21-cv-02852, 2021 WL 4772293, at \*1 (N.D. Cal. Sept. 23, 2021).

5. See, e.g., Gender Tax Repeal Act of 1995, CAL. CIV. CODE § 51.6 (West 2020); MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997); Pink Tax Repeal Act, H.R. 5464, 115th Cong. (2018).

6. See *infra* Section II.C.1.

7. See *infra* Section II.C.2.

8. See SARAH MOSHARY ET AL., INVESTIGATING THE PINK TAX: EVIDENCE AGAINST A SYSTEMATIC PRICE PREMIUM FOR WOMEN IN CPG 3 (2021), [<https://perma.cc/94JE-M5KZ>].

9. See Bridget J. Crawford, *Pink Tax and Other Tropes*, 34 YALE J.L. & FEMINISM (forthcoming 2022) (manuscript at 2), [<https://perma.cc/BE6F-Q4LU>]. Professor Crawford offers a unique five-part definition of the Pink Tax, the most inclusive definition to date:

Generally speaking, gender equality advocates and the popular press often use the phrase "pink tax" in multiple, overlapping, and shifting ways to describe one or more phenomena: (1) the gender wage gap; (2) gender-based pricing differentials in goods or services; (3) expenditures that women are more likely to have, or have at greater levels, than men do, for safety-related travel or for make-up or personal grooming to conform to traditional gender stereotypes; (4) time-based burdens experienced disproportionately by people with responsibility for households and/or caretaking; and (5) state sales taxes on menstrual products.

*Id.* (manuscript at 32) (footnotes omitted); see also YAZICIOĞLU, *supra* note 3, at 12-13 (section titled "From confusion to clarity: a specific term for each different concept").

10. See *infra* Section II.C.

efforts to date to determine the ways such efforts have either fallen short or stalled entirely. To push past this wall, it is essential to keep in mind the very definition of insanity is “doing the same thing over and over, yet expecting different results.”<sup>11</sup> With high hopes for further regulation on the horizon on one hand and waning confidence that this is an issue that can or should be addressed on the other, an avenue with unexplored potential may be the tipping point needed to finally achieve desired results.

This Comment explores the path to the current state of the issue of gender-based price discrimination. I will address the challenges stalling regulatory and judicial attempts to combat the pricing practice and consider, in light of what this history reveals, a potential next leg of the relay, which would better get at the heart of the issue.

Part II will provide an overview of the Pink Tax, including proposed justifications for the pricing practice as well as explanations for why those justifications fall short of fully explaining or rationalizing the discriminatory pricing practice. This Part also surveys various attempts to combat the practice, ultimately arriving at the current state of attempts to address the issue.<sup>12</sup>

After canvassing the history of the issue and attempts to address it, Part III then considers whether gender-based price discrimination is, in fact, a problem society should be concerned with and why consumers,<sup>13</sup> particularly in a free market, deserve better protection from this form of discrimination.<sup>14</sup> After all, even in a free market, one should not assume consumers are happy with their market choices merely from the fact that choices

---

11. Albert Einstein is often credited with this famous quote.

12. *See infra* Part II.

13. While the general consensus is that this practice targets women, a study advanced by the Federal Trade Commission (FTC) asserts that this practice also targets men in some markets. MOSHARY ET AL., *supra* note 8, at 3. Rather than weakening any arguments against the Pink Tax, including those presented in this Comment, such a study is further evidence that consumers—no matter their gender—deserve protection and that gender-based price discrimination pervades our society. *See id.*

14. *See infra* Part III.

were made.<sup>15</sup> People and their decisions are complex creatures requiring a bit more investigation to fully understand.<sup>16</sup>

Finally, after establishing that gender-based price discrimination is a legitimate problem, Part IV will then discuss why efforts to address the Pink Tax thus far have disappointed and will consider a promising avenue for discouraging the practice as a critical missing piece in the struggle towards the finish line.<sup>17</sup> This Comment then concludes briefly with a few parting thoughts—important takeaways from the appraisal of the Pink Tax’s history presented here—and some final words of encouragement, which I hope will prompt the renewed energy needed to finally surmount the wall.

## II. HEAD IN THE RACE—BACKGROUND

### A. The Basics

The “Pink Tax”—which remains a relatively unfamiliar term to most—refers to the general practice of charging more for products marketed towards women than “for identical or substantially similar products” that are gender neutral or marketed towards men.<sup>18</sup> This term has proven popular among people who are aware of the history of this kind of discrimination because, not surprisingly, pink has historically been “a strong cultural symbol of femininity.”<sup>19</sup> Notwithstanding this cultural tribute, this practice is also labeled “gender-based price discrimination”—an admittedly more accurate phrase, as this practice affects more than just pink products.<sup>20</sup> Still, the terms are

---

15. *But see* YAZICIOĞLU, *supra* note 3, at 20 (citing Tim Worstall, *The Pink Tax Is Nothing to Do with Public Policy, Women Can Solve It for Themselves*, FORBES (Nov. 13, 2014, 10:43 AM), [<https://perma.cc/35NP-RMKS>]). Tim Worstall opined, “Everyone’s already got the choice and that they make the choices they do shows that they’re entirely happy with the choices they are making.” Worstall, *supra*.

16. While Worstall may make a valid point that legislative relief is not the form of relief necessary here, there are many reasons why one’s choice is not always indicative of happiness or even satisfaction. Worstall, *supra* note 15; *see infra* Part III.

17. *See infra* Part IV.

18. Berliner, *supra* note 1, at 69.

19. *Id.*; *see also* YAZICIOĞLU, *supra* note 3, at 7-8.

20. Berliner, *supra* note 1, at 69. Gender-based price discrimination is a more apt label than “Pink Tax” in light of evidence that this practice also targets men in specific markets. *See* MOSHARY ET AL., *supra* note 8, at 3. However, those who have studied gender-based

generally considered interchangeable, and both refer to the markup existing on products and services marketed towards women when the increased cost is based on the gender of the intended consumer.<sup>21</sup> This form of routine discrimination has largely gone unnoticed in the wider sphere of discrimination women have confronted in the last fifty years.<sup>22</sup> Yet this practice, though it embodies a subtler form of discrimination, has a tangible and significant impact on women and deserves to be addressed.<sup>23</sup>

New York City's Department of Consumer Affairs conducted one of the earliest studies on the Pink Tax in 1992 after its Commissioner overheard his executive assistant complaining that she was always charged more for her haircuts than men.<sup>24</sup> The study, which surveyed "eighty haircutting establishments in New York City" via telephone, revealed that, without considering factors such as hair length, difficulty of cut, time required, or any factor besides the gender of the caller, sixty-six percent of the establishments quoted women higher baseline prices for a basic cut, shampoo, and blow dry.<sup>25</sup> Though it is often assumed women's haircuts require more time or skill, this is no longer substantiated today, if it ever was, as many women sport shorter haircuts while many men embrace long, flowing locks.<sup>26</sup> Still, studies conducted in the 2000s consistently found that haircut prices quoted to women were on average higher than those quoted

---

price discrimination and who use the term "Pink Tax" do not claim such a practice never harms men, and the term "Pink Tax" is still an appropriate label for the phenomenon given that women are more often and more greatly harmed by such discriminatory practices. Crawford, *supra* note 9 (manuscript at 33-57) (discussing ways in which women often pay more than men throughout their lives). "Overall, 'women's products cost more 42 percent of the time while men's products cost more [only] 18 percent of the time.'" Melanie McMullen, Note, "*Equal Outcomes*": A Constitutional Comparison of Gender Equality Guarantees in the United States and South Africa, 86 MO. L. REV. 359, 398 (2021) (alteration in original) (quoting BESSENDORF, *supra* note 2, at 5).

21. Berliner, *supra* note 1, at 69.

22. McMullen, *supra* note 20, at 397.

23. Amy T. Brantly & Jennifer M. Oliver, *The Correlation Between Antitrust Enforcement and Gender Equality*, 31 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SECTION CAL. LAWS. ASS'N 116, 116-17 (2021); *see also* McMullen, *supra* note 20, at 397.

24. Berliner, *supra* note 1, at 69.

25. *Id.* at 69-70.

26. *See id.* at 70.

to “men for practically identical services,” again based only on gender and without any consideration of factors bearing on the cost or time required to provide the haircut.<sup>27</sup> This is true for other services as well.<sup>28</sup> But if the existence of price differences for services based entirely on the gender of the recipient is not sufficiently concerning, the cumulative cost is certainly alarming: in 1994, it was estimated that women paid \$1,351 more each year for the same services as men.<sup>29</sup>

Though studies began uncovering the Pink Tax’s impact in the service industry in the 1990s, studies exposing the Pink Tax on goods did not emerge primarily until the 2010s.<sup>30</sup> Such studies were spurred on in part by small movements on social media to call attention to the price differences between similar men’s and women’s products.<sup>31</sup> In 2015, New York City’s Department of Consumer Affairs, again leading the charge to uncover this practice, published one of the most significant and comprehensive studies addressing the Pink Tax on goods.<sup>32</sup> The study focused on analyzing goods across five industries and found, “compared to men and boys, women and girls paid 7% more for toys and accessories, 4% more for children’s clothing, 8% more for adult clothing, 13% more for personal care products, and 8% more for senior home health care products,” demonstrating acutely how women pay more at virtually every stage of life to have the same things as men.<sup>33</sup> This study garnered broad media attention for the Pink Tax for virtually the first time, but it unfortunately contributed no thoughts as to a solution—expressing hopeless resignation that this problem is “largely inescapable” while in the

---

27. *See id.* at 70 (referring to a study conducted in the United Kingdom in 2000 and another conducted at the University of Central Florida and the University of South Carolina-Lancaster in 2011).

28. Such services include dry-cleaning, for example. *See* Kenneth A. Jacobsen, *Rolling Back the “Pink Tax”: Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services*, 54 CAL. W. L. REV. 241, 249 (2018).

29. *Id.* at 242. This cost is exacerbated by the fact that women statistically earn less money than men. *Id.* at 242-43.

30. Berliner, *supra* note 1, at 71.

31. *Id.* at 71-72.

32. *Id.* at 72-73.

33. *Id.* at 72.

same breath encouraging consumers to continue to call out the Pink Tax on social media by posting examples.<sup>34</sup>

While its conclusion left much to be desired, New York City's study not only pushed the New York legislature towards action<sup>35</sup> but also helped the issue finally achieve federal attention, resulting in a report published by the United States Congress Joint Economic Committee in 2016 confirming what those familiar with the Pink Tax already knew—"prices for products marketed to women were higher than nearly identical products marketed to men."<sup>36</sup> Studies continued to roll out exposing the premium women pay on goods—each one further illustrating an ever-increasing bill.<sup>37</sup>

### B. Possible Explanations of the Pink Tax

There are potential explanations for the price difference, other than the gender of the intended consumer, that must be considered before determining the Pink Tax is truly to blame for the extra costs women shell out. It is generally understood that a product's price reflects both the cost of the materials and labor that went into producing it as well as consumers' willingness to pay for a particular product.<sup>38</sup> Therefore, if the price of the final

---

34. *Id.* at 72-73.

35. N.Y. GEN. BUS. LAW § 391-u (McKinney 2020); *A Pending New York State Bill Aims to Eliminate the Sweeping "Pink Tax,"* THE FASHION L. (July 10, 2019), [<https://perma.cc/7K53-VPP9>].

36. Berliner, *supra* note 1, at 73. See generally JOINT ECON. COMM., THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN'S BUYING POWER (2016), [<https://perma.cc/UL5T-WH5E>].

37. Berliner, *supra* note 1, at 73. The effect of the Pink Tax has even been identified in the military. The Associated Press, *'Pink Tax': Bill Addresses Higher Female Military Uniform Prices*, 5NEWS (Oct. 25, 2021, 9:45 AM), [<https://perma.cc/PKS4-NQEH>]. A federal bill was recently passed to address the higher costs associated with female uniforms, specifically the outdated standards which lead to women paying more out-of-pocket costs for their uniforms because they are not eligible for certain reimbursements on female-specific uniform items. See *id.*; Military FATIGUES Act of 2021, S. 3016, 117th Cong. (2021); Mariel Padilla, *Congress Votes to Eliminate 'Pink Tax' on Military Uniforms*, THE 19TH (Dec. 15, 2021, 12:23 PM), [<https://perma.cc/DN4B-NULV>] (stating the Military FATIGUES Act of 2021 was included and passed in the final text of the National Defense Authorization Act (NDAA)).

38. Robert J. Dolan, *How Do You Know When the Price Is Right?*, HARV. BUS. REV., Sept.-Oct. 1995, at 174-75 (discussing that the market determines the best price, but companies must actually set prices, which often primarily includes factoring in product cost and then applying a markup).



product is higher than comparable products, one may infer either the product costs more to produce or that consumer demand is responsible for its higher price.<sup>39</sup> Still, neither can fully explain the Pink Tax phenomenon.<sup>40</sup>

Admittedly, those concerned with the Pink Tax are at times overly aggressive and too indiscriminate with the label. For example, after Congresswoman Alexandria Ocasio-Cortez received significant criticism “for spending \$300 on a haircut, lowlights, and gratuity,” former Governor of Wisconsin Scott Walker posted about his “\$26 (with tip) haircut.”<sup>41</sup> Twitter users claimed he had “unknowingly pointed out the Pink Tax on women’s services,” but the existence of the Pink Tax is not necessarily always proven merely by the fact that a woman has paid more for a service.<sup>42</sup> Here, Congresswoman Ocasio-Cortez also paid for lowlights which, as anyone with professionally colored hair can tell you, is not a cheap or quick service.<sup>43</sup> To determine whether a Pink Tax was truly at play here would first require isolating the cost of the haircut, then comparing the level of skill and amount of time that went into Congresswoman Ocasio-Cortez’s and former Governor Scott’s haircuts. Further, the fact that Congresswoman Ocasio-Cortez and former Governor Scott were consumers in different geographic markets could have had a significant impact on the prices they paid for haircuts, so isolating any cost difference due to the Pink Tax would also require a comparison of the markets in Wisconsin and Washington D.C.<sup>44</sup> This is one example of when genuine

---

39. *See id.*

40. Berliner, *supra* note 1, at 74-81 (evaluating tariffs and differentiation costs—which speak to the cost of production—as well as “[p]rice [d]iscrimination and [c]onsumer [w]illingness to [p]ay” as explanations for the Pink Tax and concluding that none are able to “fully explain the Pink Tax on services or goods”) (emphasis in original)).

41. Berliner, *supra* note 1, at 71.

42. *Id.*

43. *Id.*

44. *See* Scott Walker (@ScottWalker), TWITTER (Oct. 12, 2019, 9:22 AM), [https://perma.cc/QW9X-BY5V] (showing that former Governor Walker got his \$26 haircut at a barbershop in Wauwatosa, Wisconsin); Alex Swoyer, *Alexandria Ocasio-Cortez Spends \$300 on Hairdo at Last Tangle Salon in Washington, D.C.*, WASH. TIMES (Oct. 9, 2019), [https://perma.cc/4JD5-KS94] (showing that Congresswoman Ocasio-Cortez had her hair cut and colored in a salon in Washington, D.C.).

differences between services provided or varied costs of living could be the cause of the price difference.

However, there are still many instances in which product or service differentiation cannot fully explain the difference in prices. Differences between men's and women's products are often insignificant—if they even exist at all. For example, Excedrin Complete Menstrual was fifty cents more expensive than the comparable bottle of Excedrin Extra Strength, despite containing the same amount of active ingredients.<sup>45</sup>

When genuine differences do exist, they usually cannot fully explain the price difference. Tariffs often discriminate between men's and women's products, and men's products are surprisingly subject to higher tariffs in some instances.<sup>46</sup> But even when there was “a 4% higher tax rate on men's cotton shirts than women's, women's cotton shirts cost 13% more than men's on the market.”<sup>47</sup> Studies have also shown that women pay more to dry-clean their shirts before “any additional costs based on the fabric of the item, ornamentation, or pleats” are considered.<sup>48</sup> Despite the example above, the same is often true for haircuts—women are quoted higher standard prices than men when they inquire about the cost of a haircut over the phone.<sup>49</sup> This price difference is imposed before a hairdresser ever sees the female caller's hair or determines what style she wants.<sup>50</sup>

The second common justification for the Pink Tax is women are simply willing to pay more for their gender-specific

---

45. *Men Win the Battle of the Sexes*, CONSUMER REPS. (Jan. 2010), [<https://perma.cc/2CMC-VG6V>]. This study found each gel capsule contained “250 milligrams of aspirin, 250 mg of acetaminophen, and 65 mg of caffeine.” *Id.* Though the study did not comment on whether there were differences in the inactive ingredients, it would be difficult to justify how such a variation would be premised on the distinct needs of female consumers.

46. See Michael Barbaro, *In Apparel, All Tariffs Aren't Created Equal*, N.Y. TIMES (Apr. 28, 2007), [<https://perma.cc/4XJQ-4AUW>]; see also Berliner, *supra* note 1, at 75 & n.74 (discussing a Federal Circuit case considering an equal protection claim brought to challenge the higher tariff imposed on men's leather gloves, which was dismissed for failure to state a claim and denied certiorari to the Supreme Court).

47. Berliner, *supra* note 1, at 75.

48. Jacobsen, *supra* note 28, at 249.

49. Berliner, *supra* note 1, at 69-70.

50. *Id.* at 70.

products.<sup>51</sup> The free market rests on the assumption that market actors are rational and well-informed.<sup>52</sup> When this is true, the supply curve, which is the “quantity of goods and services that the producers are willing to provide at each price,” and the demand curve, which is the quantity of goods and services that consumers are willing to purchase at each price, will meet in what is known as market equilibrium.<sup>53</sup> In theory, the most efficient price for a product depends on the market equilibrium, and therefore, is affected by consumer demand.<sup>54</sup> If consumers refuse to purchase the product, the demand curve shifts left, and the new equilibrium price is less.<sup>55</sup> This is the basis for consumers’ power to affect price, but for it to truly work, consumers must be informed and rational.<sup>56</sup>

It is often difficult for consumers to be meaningfully informed. Consumers have always been relegated to their respective halves of the store, as often men’s and women’s products are showcased in separate aisles of the supermarket.<sup>57</sup> This makes comparing products and their prices less intuitive for consumers who are scanning the shelves of the aisles they regularly frequent.<sup>58</sup> Only the most price-conscious consumers will partake in the scavenger hunt required to fully inform themselves about all the comparable products available throughout the store. One may be hard-pressed to find this level of intentionality among consumers. Many of those who have the time to take on such an endeavor can afford the additional cost, and thus may not be concerned with seeking the best deals. On the other hand, those who perhaps need the benefit of every opportunity to save money likely cannot afford the time it would

---

51. YAZICIOĞLU, *supra* note 3, at 21. Hence, the phrase: “*shrink it, pink it and women will buy it at a higher price.*” *Id.* at 19.

52. *Id.* at 16.

53. *Id.* at 17.

54. See *Supply and Demand*, ENCYC. BRITANNICA (2022), [<https://perma.cc/U4SW-XHL7>].

55. See *Shifts in Demand*, ECON. ONLINE (Jan. 13, 2020), [<https://perma.cc/A9YA-Q3LE>].

56. See YAZICIOĞLU, *supra* note 3, at 16.

57. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-500, CONSUMER PROTECTION: GENDER-RELATED PRICE DIFFERENCES FOR GOODS AND SERVICES 13 (2018), [<https://perma.cc/QS4D-ET77>].

58. See CAL. CIV. CODE § 55.7 (West 2022).

cost them to pursue such savings opportunities. The rise in online shopping may mitigate this time pressure to some extent, but there are still many consumers who continue to brave the stores the old-fashioned way, and they should not have to do so expecting to pay additional costs because stores are often organized in ways that make it time consuming to be informed.<sup>59</sup>

While comparing prices was arguably more burdensome before the world of new-age shopping, which now allows users to compare prices with a simple search of the internet, the rise in online shopping, grocery pickup, and even delivery is evidence of consumers and businesses adapting to the increasingly fast-paced world we face. People are looking for ways to minimize the time it takes them to complete certain tasks like grocery shopping, and therefore, they are taking less time to investigate products they buy and to compare prices.<sup>60</sup> The new reality is that many consumers never have the opportunity to make side-by-side comparisons of products because they search for exactly what they want, and in some instances, a consumer might not make his or her own decision about a particular product, such as when a substitution is made in his or her pickup or delivery order.

Further, it is particularly difficult to identify the Pink Tax.<sup>61</sup> When it applies, it is built into the price of the product at a different rate or premium each time.<sup>62</sup> If a consumer suspected a product is subject to the Pink Tax, she could not verify it quickly, or at all, because so many factors are unknown to consumers: most notably, the cost of materials used and the manufacturing

---

59. Berliner, *supra* note 1, at 82.

60. See KARL HALLER ET AL., IBM INST. FOR BUS. VALUE, CONSUMERS WANT IT ALL: HYBRID SHOPPING, SUSTAINABILITY, AND PURPOSE-DRIVEN BRANDS 1 (2022), [<https://perma.cc/A7XP-SEGJ>] (addressing how consumers in 2022 expect integrated shopping experiences that are efficient, experiential, and intuitive). Certain consumer segments appear to be less price sensitive; however, companies should not feel comfortable taking advantage of any perceived price inelasticity because consumer loyalty is unprecedentedly low. Tamara Charm et al., *The Great Consumer Shift: Ten Charts That Show How US Shopping Behavior Is Changing*, MCKINSEY & Co. (Aug. 4, 2020), [<https://perma.cc/K7DW-ZV8P>]. One thing consumers are expending time focusing on is whether companies are living “up to their social and environmental responsibility claims.” HALLER ET AL., *supra*, at 1; see also Charm et al., *supra* (stating that availability, convenience, and value are leading reasons consumers cite for switching brands); discussion *infra* Section IV.B.

61. Berliner, *supra* note 1, at 82.

62. *Id.*

processes employed.<sup>63</sup> For example, in comparing men's and women's white button-down shirts, one might observe the make-up of their fabrics is the same and also that their colors are alike, but what of the buttons or the fit? How do they factor into the price? If the buttons on the women's shirt are daintier than those on the men's shirt and if they are sewn onto the left side of the shirt, rather than the right,<sup>64</sup> can a woman expect to pay an extra \$5—or \$10—for these differences?<sup>65</sup> If the shirt is more tailored, what can a woman expect that should cost her? These differences are genuine, and likely even preferred,<sup>66</sup> but a female customer cannot be sure what exactly she is paying an additional cost for: the cute buttons on the left side of the shirt, the flattering fit, or her identity as woman. In the end, she will probably just buy the shirt because she needs one, at whatever cost it comes.

Additionally, in part because consumers are not informed and in part because they are humans, consumers are not, on the whole, very rational.<sup>67</sup> In theory, consumers should maximize their own welfare by maximizing utility and minimizing costs.<sup>68</sup> In reality, consumers are affected by a whole host of other influences, and they “operate with an intuitive and heuristic system of thinking, which often results in poor logical analysis.”<sup>69</sup> One of the most significant influences, which develops into

---

63. *Id.*

64. See Megan Garber, *The Curious Case of Men and Women's Buttons*, ATLANTIC (Mar. 27, 2015), [<https://perma.cc/C5XC-VZ8G>]. As a brief side point, why the practice of sewing buttons onto opposite sides of shirts developed is an interesting mystery in its own right. One theory is spite—the story goes that because “[t]he early days of industrialization . . . coincided with the early days of the women's movement,” manufacturers sought ways to capitalize on developing standardized manufacturing processes by using “little differences in clothing to emphasize bigger differences between the genders.” *Id.* The other theories proffered by Garber are equally, if not more, intriguing. *Id.*

65. Consistent with the earlier line of discussion, if sewing buttons onto the left side of a shirt does cost more, is there an explanation for this price difference other than that the machines used to sew buttons onto shirts were originally designed to sew buttons onto the right side? See Garber, *supra* note 64.

66. See *infra* notes 149-50 and accompanying text (discussing the serious repercussions women face when they do not adhere to expected gender norms).

67. YAZICIOĞLU, *supra* note 3, at 16-17.

68. *Id.* at 16.

69. *Id.* at 18.

instinct in individual consumers, is actually gender.<sup>70</sup> From childhood, people “learn the commonly accepted gender-appropriate characteristics and the importance to comply with such characteristics as well as the negative implications of failing to do so from their peers.”<sup>71</sup> The hold gender stereotypes have on people is often “so inescapable that [it] determine[s], to some extent, ‘who individuals are, what they want and what they choose to do.’”<sup>72</sup> This is true for men and women across the board. A study conducted to “compar[e] consumers’ views of strongly gendered products . . . and their gender-neutral equivalents found that *all* consumers displayed a greater intent to purchase the gendered options.”<sup>73</sup> In tapping into these social constructs, marketers “seem to have successfully convinced both women and men that the gendered products available on the market are in fact different, not only by their design but also by their ingredients and functionality.”<sup>74</sup>

### C. A Slow Mile is Better Than No Mile—Attempts to Address the Pink Tax

#### 1. Legislative Attempts

##### a. State Action

Like the studies, efforts to combat the Pink Tax began on a social level, then moved to the state legislatures, and finally landed at the federal level. Each has ultimately proven insufficient to fully address the widespread practice. But the efforts have contributed to public awareness of the practice, resulting in several class action suits for gender-based price

---

70. *Id.* at 28-31 (discussing the process known as “gender socialization” that occurs throughout one’s life and commenting on the influence that social constructs related to gender have on individuals).

71. *Id.* at 29.

72. Berliner, *supra* note 1, at 83-84 (quoting YAZICIOĞLU, *supra* note 3, at 31).

73. *Id.* at 85 (emphasis added) (citing Miriam van Tilburg et al., *Beyond “Pink It and Shrink It”: Perceived Product Gender, Aesthetics, and Product Evaluation*, 32 PSYCH. & MKTG. 422, 426-33 (2015)).

74. YAZICIOĞLU, *supra* note 3, at 31.

discrimination,<sup>75</sup> and have led to conversations about how to effectively discourage businesses from imposing the Pink Tax.<sup>76</sup>

As previously referenced, awareness of the Pink Tax began as commentary from individual women who were tired of paying so much for certain goods or services when men obtained virtually the same goods or services at a lower cost.<sup>77</sup> It so happened some of these women were in positions that allowed them to inspire deeper investigations into the phenomenon.<sup>78</sup> As a tentative awareness on an individual level grew into a more substantiated concern, women with influence in the media began calling attention to it as well—women like Ellen DeGeneres, who humorously pointed out in 2012 that the recently released Bic Pens For Her (the pink and purple counterparts to standard Bic pens) were “just like regular pens, except they’re pink, so they cost twice as much.”<sup>79</sup>

Public attention continued as a few state legislators began gearing up to formally address the Pink Tax.<sup>80</sup> Recognizing social efforts alone would not be enough—a few state and local legislatures attempted to pass public accommodations laws under their police powers to address gender-based price discrimination: California; Miami-Dade County, Florida; New York City, New York; and even Guam.<sup>81</sup>

Though California’s Pink Tax legislation is better known for pioneering the movement against gender-based price discrimination, Guam’s Deceptive Trade Practices law—signed into effect in 1991—is due credit as the first piece of legislation passed to prohibit the Pink Tax.<sup>82</sup> Guam’s law, which was strides

---

75. *See infra* Section II.C.2.

76. *See, e.g.*, Berliner, *supra* note 1, at 106-08 (discussing “Features of Ideal Legislation”); Crawford, *supra* note 9 (manuscript at 71) (discussing how abandoning “Pink Tax” terminology may be a step in the right direction because “[i]nstrumentally speaking . . . it is unlikely that ‘pink tax’ metaphors will lead directly to legal reform”).

77. *See supra* note 24 and accompanying text.

78. Berliner, *supra* note 1, at 69.

79. *Id.* at 67. Ellen’s chiding joke still rang true in 2016, as evidenced by the study conducted by the United States Congress Joint Economic Committee, which compared pink Bic pens, priced at \$4.97, with black Bic pens, priced at \$2.47. JOINT ECON. COMM., *supra* note 36, at 3.

80. Berliner, *supra* note 1, at 91-98 (discussing State and local legislative efforts).

81. *See id.* at 93-98.

82. Guam Pub. L. 21-18 (1991); *see also* 5 GUAM CODE ANN. § 32201(c)(18) (2020).

ahead of its later counterparts, declared the Pink Tax on both products and services unlawful.<sup>83</sup> Specifically, the pricing practice is encompassed in the statute's definition of "false, misleading, or deceptive acts or practices," which is important to note because it highlights the general expectation that pricing decisions should be based on legitimate economic factors that truly affect prices.<sup>84</sup> Despite a lack of case law applying this section of the law, Guam's Attorney General has power under the law "to intervene to prevent Pink Tax pricing," and Guam appears to be signaling a strong public policy against the Pink Tax practice.<sup>85</sup>

Still, it was California's legislation that truly launched state government movement against the Pink Tax, and, therefore, its Gender Tax Repeal Act of 1995 is "one of the most well-known pieces of Pink Tax legislation in the country."<sup>86</sup> The Act states, "No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender."<sup>87</sup> The Act provides guidance for specific business establishments—specifically tailors, hairdressers, and dry cleaners—requiring disclosures geared towards preventing price discrimination in services when such discrimination is not based on legitimate factors such as "time, difficulty, or [the actual] cost of providing the services."<sup>88</sup> These businesses are required to "clearly and conspicuously disclose to the customer in writing the

---

83. § 32201(c)(18).

84. § 32201(c); Berliner, *supra* note 1, at 97. This position seems to indicate that increasing the price of a product or service is deceptive when the price increase is not grounded in economic factors that actually have some bearing on the cost of the product or service because consumer expectations are that prices will reflect more legitimate factors.

85. Berliner, *supra* note 1, at 98.

86. *Id.* at 93.

87. CAL. CIV. CODE § 51.6(b) (West 2020).

88. CIV. § 51.6. Ironically, though the Act was passed to protect women from this practice, "cases brought under the Act have almost entirely addressed discrimination against men who cannot benefit from 'Ladies' Night' and similar women's discounts." Berliner, *supra* note 1, at 94. See generally Reese v. Wal-Mart Stores, Inc., 87 Cal. Rptr. 2d 346, 349 (Cal. Ct. App. 1999); Angelucci v. Century Supper Club, 158 P.3d 718, 719 (Cal. 2007); Surrey v. TrueBeginnings, LLC, 85 Cal. Rptr. 3d 443, 444 (Cal. Ct. App. 2008); Long v. Playboy Enters. Int'l, No. LA CV11-02128, 2012 WL 12869314, at \*1 (C.D. Cal. Mar. 7, 2012); Cohn v. Corinthian Colls., Inc., 86 Cal. Rptr. 3d 401, 402 (Cal. Ct. App. 2008); Frye v. VH Prop. Corp., B246991, 2014 WL 69126, at \*1 (Cal. Ct. App. Jan. 8, 2014).



pricing for each standard service provided,” “provide the customer with a complete written price list upon request,” and “display in a conspicuous place” a sign stating: “CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON’S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST.”<sup>89</sup>

The Act, as one of the first, was important for signaling to the public that the “Pink Tax is intolerable and against public policy.”<sup>90</sup> But being one of the first often comes at the price of being unable to glean substantial insight from the attempts of others.<sup>91</sup> Unfortunately, here is no different, and the California legislature’s blind spot left holes in the Act concerning effective avenues to seek out violations and how to prove them once discovered.<sup>92</sup> The Act relies primarily on consumers to identify violations and know how to draft complaints that are enforceable against service providers.<sup>93</sup> Additionally, the Act is limited to services, meaning the market for goods is still left entirely to its own devices, without any effort to dissuade Pink Tax practices.<sup>94</sup> In 2016, an attempt to pass legislation to provide protection from the Pink Tax in product markets flamed out, not even reaching a

---

89. CIV. § 51.6. And yes, it specifies all caps.

90. Berliner, *supra* note 1, at 94.

91. *Id.*

92. *Id.*

93. *Id.*

94. CIV. § 51.6; *see* *Lowe v. Walgreens Boots All., Inc.*, No. 21-cv-02852, 2021 WL 4772293, at \*1 (N.D. Cal. Sept. 23, 2021); *Angelucci v. Century Supper Club*, 158 P.3d 718, 720 & n.5 (Cal. 2007) (where defendants argued that the Gender Tax Repeal Act did “not apply in the first instance to plaintiffs’ claim, because defendant’s conduct did not involve the provision of ‘services’”). The Unruh Civil Rights Act—another significant source of consumer protection in California that preceded the Gender Tax Repeal Act—has been interpreted “as broadly condemning any business establishment’s *policy* of gender-based price discounts,” but application to product pricing directly remains to be seen. *Angelucci*, 158 P.3d at 726 (considering the effect of *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985)). Notably, in *Angelucci*, plaintiffs brought claims under both the Unruh Civil Rights Act and the Gender Tax Repeal Act; the court did not specifically consider the latter act, for injury analysis pursuant to section 52(a) of the California Civil Code would have been the same. *See id.* at 720 & n.5.

vote because of concerns regarding vague language and enforceability.<sup>95</sup>

Following its 1995 Act, California stood alone in the continental United States for two years in formal opposition to the Pink Tax, but in 1997, Miami-Dade County, Florida, joined in the effort, passing the Gender Price Discrimination Ordinance.<sup>96</sup> A pioneer in its own right, this law is one of the first to outlaw the Pink Tax on goods as well as services.<sup>97</sup> Still, it was plagued by similar gaps in its potential for enforcement, with the burden of holding businesses accountable under the legislation falling on the consumers.<sup>98</sup> The ordinance was saddled with a sunset provision, but prior to its expiration, the County amended the law to sever the sunset provision.<sup>99</sup>

Following its influential study on the Pink Tax,<sup>100</sup> New York City passed its own version of Pink Tax legislation in 1998, banning dry cleaners, hair salons, and other retail service establishments from setting prices based on gender.<sup>101</sup> Mayor Rudolph Giuliani signed City Council Bill Number 804-A, thereby amending “the Administrative Code of the City of New York to prohibit the public display of discriminatory pricing based on gender by a retail establishment.”<sup>102</sup> Notably, Mayor Giuliani commented that discriminatory prices based on gender were “already prohibited by the City’s Human Rights Law,” but

---

95. Teri Sforza, *‘Pink Tax’ Bill Dies: You’ll Still Pay More for Products Marketed to Women*, ORANGE CNTY. REG. (June 30, 2016, 7:00 AM), [<https://perma.cc/A6EF-AS7E>].

96. Berliner, *supra* note 1, at 95.

97. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997).

98. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997). The ordinance provides a private cause of action, permitting “[a]ny person who suffers a loss as result of a violation of any provision of this article” to recover compensatory damages and expenses related to litigation “from the person committing the violation.” MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX, § 8A-405 (1997).

99. Miami-Dade County, Fla., Ordinance Amending Chapter 8A, Article XIX of the Code of Miami-Dade County, Florida, Relating to Gender Price Discrimination; Deleting the Sunset Provision; Providing Severability, Inclusion in the Code, and an Effective Date (June 18, 2002).

100. *See supra* notes 24-29 and accompanying text.

101. Council of City of N.Y. Int. No. 804-A (Jan. 9, 1998) (amending N.Y.C. Admin. Code § 20-750).

102. Press Release, N.Y.C. Mayor’s Press Office, Mayor Giuliani Signs City Council Bill No. 804-A into Law, Prohibiting the Public Display of Discriminatory Pricing Based on Gender (Jan. 9, 1998) [hereinafter 1998 NYC Press Release], [<https://perma.cc/G9ZV-LKM8>].

this Bill permitted New York City's Department of Consumer Affairs to issue violations and fines for such pricing practices.<sup>103</sup>

In addition to prohibiting actual discriminatory pricing, this addition to the Consumer Affairs title of New York City's Administrative Code required these service establishments to post prices in gender-neutral terms and articulate the differences between the services.<sup>104</sup> A primary distinction between this legislation as compared to other attempts is that New York City's law granted the City's Department of Consumer Affairs the authority to "conduct routine inspections and issue violations," lessening the burden on consumers to recognize gender discriminatory practices and take action to report them.<sup>105</sup> However, the fines imposed for violations of the provision are minimal—as low as \$50 for first-time offenders and reaching only \$500 for repeat offenders—serving as a poor incentive for businesses to change their pricing practices.<sup>106</sup> Further, like in California, New York City's efforts to limit this practice are confined to the service industry, ignoring an entire market in which this practice costs women significantly.<sup>107</sup>

More recently, the State of New York has stepped up to try to close this gap.<sup>108</sup> In 2020, "as [p]art of the FY 2021 Budget" Bill, New York Governor Andrew Cuomo officially banned the Pink Tax.<sup>109</sup> This law prohibits "any individual or entity, including retailers, suppliers, manufacturers or distributors, from

---

103. *Id.*

104. See BESSENDORF, *supra* note 2, at 16; Berliner, *supra* note 1, at 97. For example, dry cleaners should use language like "shirts with ruffles" rather than "blouses" when quoting their prices for certain garments. Berliner, *supra* note 1, at 97.

105. Berliner, *supra* note 1, at 97.

106. *Id.* In the year preceding the Bill's enactment, "13 actions alleging gender pricing discrimination were filed with the [Human Rights Commission] against dry-cleaning and hair cutting businesses." 1998 NYC Press Release, *supra* note 102. Even after affirmatively signaling that this practice was unacceptable, the issue persisted: In 2014 and 2015, almost two decades later, the N.Y.C. Department of Consumer Affairs "issued 118 and 129 violations[,] respectively," for violations of the gender pricing law. Berliner, *supra* note 1, at 97.

107. See 1998 NYC Press Release, *supra* note 102.

108. See N.Y. GEN. BUS. LAW § 391-u (McKinney 2020); see also Phyllis H. Marcus & Christopher J. Dufek, *New York Implements "Pink Tax" Ban*, NAT'L L. REV. (Oct. 2, 2020), [<https://perma.cc/AJ8F-UEN6>].

109. *Former Governor Cuomo Reminds New Yorkers "Pink Tax" Ban Goes into Effect Today*, N.Y. DEP'T OF STATE (Sept. 30, 2020), [<https://perma.cc/CUN2-9UT5>].

charging a different price for two ‘substantially similar’ goods or services based on the gender” of the intended consumer.<sup>110</sup> This all-too-familiar phrase has left some rightfully anticipated loopholes in the protection offered by the law.<sup>111</sup> While the drafters attempted to offer better guidance by outlining factors to be considered in determining whether a violation occurred, these factors are no more specific than the simple statements included in other legislative efforts, which essentially state that price disparities must be based on legitimate differences between products or services.<sup>112</sup>

Despite these legislative shortcomings, other states are stepping up to the plate as well, or at least considering it.<sup>113</sup> Each of these state’s attempts is significant in signaling to businesses and other states that the practice is a problem deserving of attention and action.

---

110. Marcus & Dufek, *supra* note 108.

111. See John F. Banzhaf, *New York’s New “Pink Tax” Ban Has Big Loopholes*, VALUEWALK (Oct. 1, 2020, 1:19 PM), [<https://perma.cc/35UA-MCZ7>]. “Substantially similar” is defined as:

(i) two goods that exhibit no substantial differences in: (A) the materials used in production; (B) the intended use of the good; (C) the functional design and features of the good; and (D) the brand of the good; or (ii) two services that exhibit no substantial difference in: (A) the amount of time to provide the services; (B) the difficulty in providing the services; and (C) the cost of providing the services. A difference in coloring among any good shall not be construed as a substantial difference for the purposes of this paragraph.

GEN. BUS. § 391-u(d).

112. GEN. BUS. § 391-u; see also *supra* Section II.A.

113. See Katie Cerulle, *Connecticut Committee Considers ‘Pink Tax,’* CT NEWS JUNKIE (Mar. 2, 2022, 1:22 PM), [<https://perma.cc/HJ5J-RARG>] (Connecticut); Helena Moreno, *Councilmember Moreno Proposes “Pink Tax” Exemption for New Orleans, Lowering Prices on Diapers & Feminine Hygiene Products*, NEW ORLEANS CITY COUNCIL (Aug. 12, 2020), [<https://perma.cc/KTH6-2XHF>] (Louisiana; statewide efforts to address the Pink Tax—or rather the Tampon Tax—failed, so New Orleans Councilmember Helena Moreno pushed for local tax exemptions); Prohibition Against Gender-Based Pricing Discrimination Act, S.B. 1412, 220th Leg., Reg. Sess. (N.J. 2022) (New Jersey); JACQUE STORM, S.D. LEGIS. RSCH. COUNCIL, GENDER-BASED PRICE DISCRIMINATION: DOES IT REQUIRE A NEW SOLUTION OR ENFORCEMENT OF AN OLD LAW? 3 (2000), [<https://perma.cc/DWQ8-U8B5>] (South Dakota, considering whether existing civil rights law is sufficient to prevent gender-based price discrimination); Jaclyn M. Metzinger & Emily Clark, *The Pink Tax: A Litigation and Legislation Update*, AD L. ACCESS (Feb. 1, 2022), [<https://perma.cc/MQ6R-5XCG>] (Massachusetts).

## b. Federal Action

Unfortunately, a handful of states alone is not able to fully tackle the problem, and federal law has not yet touched this widespread issue in any meaningful way.<sup>114</sup> This may in part be because federal action involves unique challenges with respect to federal authority that states, which have the benefit of expansive police power, do not face.

While equality is often emphasized as a fundamental right in the United States, “gender equality was not one of the fundamental rights contemplated for its citizens.”<sup>115</sup> The United States Constitution contains no express prohibition on sex discrimination outside of the Nineteenth Amendment guaranteeing women the right to vote.<sup>116</sup> Further, because this is not a “tax” in the usual sense of the word, but rather private action by businesses against their consumers, it may be difficult to see what the federal government can really do or what its interest is in the issue.<sup>117</sup>

---

114. The only successful federal action found an unlikely channel to approval in the National Defense Authorization Act. *See* Padilla, *supra* note 37. This Act “eliminates the ‘pink tax’ on military uniforms and aims to address other financial gender inequities in the military.” *Id.* “A recent report from the U.S. Government Accountability Office (GAO) found that women were disproportionately required to pay more out-of-pocket costs as a result of service-wide uniform changes.” *Id.* The report specifically “found that a woman in the Army for two decades likely paid more than \$8,000 out-of-pocket for uniforms, while a man with the same experience paid around \$3,500.” *Id.* This is in part because several items specific to women, such as dress pumps, were omitted from the list of items the military replaces for all enlisted members. *Id.* Senator Maggie Hassan (D-N.H.), who sponsored the FATIGUES Act, stated: “This is a pink tax, plain and simple, and one that has no place in our military—or anywhere in American society.” *Id.*; *see also* Richard Sisk, *Lawmaker Orders Investigation into ‘Pink Tax’ on Women’s Military Uniforms*, MILITARY.COM (July 17, 2019), [<https://perma.cc/WQ8N-9EN9>].

115. *See* McMullen, *supra* note 20, at 360-61.

116. *See id.* at 361.

117. *See* Crawford, *supra* note 9 (manuscript at 51). Gender-based price discrimination, in contrast to the Tampon Tax, is not a literal tax imposed on female-specific products, but rather an observable trend in pricing practices. *Id.* Alara Efsun Yazicioğlu made a similar observation, comparing the Pink Tax to Schrödinger’s cat:

This chapter opened the Schrödinger’s box of the pink tax and discovered that the cat is both alive and dead. The pink tax does not fit into the legal definition of tax and thereby cannot legally be qualified as such. Hence, the cat is dead. On the other hand, the pink tax economically behaves like a fully hidden selective consumption tax. Thereupon, the cat is simultaneously alive.

One well-recognized source of authority for federal action on issues of discrimination is the Commerce Clause.<sup>118</sup> With respect to the Pink Tax, people are primarily concerned about larger retailers and businesses that operate across state lines and, therefore, are within reach of the Commerce Clause. Smaller, local businesses may also engage in gender-based price discrimination, but they are more sensitive to changes in market factors and could be heavily burdened by such high-level regulations anyway.<sup>119</sup> States are better positioned to address gender-based price discrimination within their respective borders after considering the impact such legislation will have on their small business communities.<sup>120</sup>

A less recognized source of authority could be the Equal Protection Clause of the Fourteenth Amendment.<sup>121</sup> At first glance, the Equal Protection Clause does not seem to be at issue because the Pink Tax is the result of private action.<sup>122</sup> However, state governments reap a disproportionate benefit from the Pink Tax through the imposition of sales taxes. While imposing sales tax is not intentionally discriminatory and is neutral on its face, it has a disparate impact on women when they are already charged more for products they purchase because the resulting tax revenue derived from sales to women is greater based on the underlying prices they pay.

---

YAZICIOĞLU, *supra* note 3, at 55-56 (dedicating an entire chapter of her book to the question of whether the Pink Tax is a tax).

118. See McMullen, *supra* note 20, at 374. In contrast to the South African Constitution, which “specifically grants the power to regulate state discrimination alongside the private actions of individuals,” the United States’ only power to regulate state discrimination is through the Commerce Clause. *Id.*

119. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 3, 31 (2004) (discussing the importance of sensitivity “to the impacts of . . . regulations on small business entities” and the purpose of exemptions in “tailoring regulation to maximize its net benefit—by exempting those firms or transactions whose regulation results in a net loss”). “For small businesses, there is simply less margin for error . . .” Laura Rich, *Small Business Sensitivity*, INC. (July 12, 2004), [<https://perma.cc/KU4C-UENT>]. This reality is artfully epitomized by a Persian Proverb: “In the ant’s house the dew is a flood.” Bradford, *supra*, at 1.

120. See, e.g., Small Business Gender Discrimination in Services Compliance Act, CAL. CIV. CODE §§ 55.61-.63 (West 2018).

121. See McMullen, *supra* note 20, at 362.

122. See Crawford, *supra* note 9 (manuscript at 51).

Though the federal government has been slower to act than state governments, it is not for lack of trying that its efforts have been sluggish. In July 2016, Representative Jackie Speier (D-Cal.) introduced the Pink Tax Repeal Act, a bill “[t]o prohibit the pricing of consumer products and services that are substantially similar if such products or services are priced differently based on the gender of the individuals for whose use the products are intended or marketed or for whom the services are performed or offered.”<sup>123</sup> Unfortunately, in a way that echoed the disappointing outcome in California, this Bill died in the Committee on Energy and Commerce.<sup>124</sup> The Pink Tax Repeal Act was revived in 2018 as House Bill 5464 and introduced again by Representative Speier, but it suffered the same fate as its predecessor.<sup>125</sup> This cycle repeated in 2019 with House Bill 2048, although it is worth mentioning the number of cosponsors increased from around thirty for the previous two versions to sixty-eight in the 2019 version.<sup>126</sup> Despite this discouraging pattern of the Pink Tax Repeal Act dying in committee, Representative Speier has faithfully pushed on with a Rosie-esque “We Can Do It” spirit befitting a poster.<sup>127</sup> Representative Speier reintroduced the Act again in June 2021 as House Bill 3853 with only sixty-one cosponsors to date, but chances are not looking good for this revival of the Bill to ever see life outside the Committee, either.<sup>128</sup>

---

123. Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2016); *see also* Press Release, Congresswoman Speier Introduces Pink Tax Repeal Act to End Gender-Based Pricing Discrimination (July 11, 2016), [<https://perma.cc/M8L8-8Q2R>].

124. H.R. 5686.

125. Pink Tax Repeal Act, H.R. 5464, 115th Cong. (2018).

126. Pink Tax Repeal Act, H.R. 2048, 116th Cong. (2019).

127. Press Release, Speier, Fitzpatrick, Huffman, DeSaulnier, Casey, and Collins Announce Bipartisan Rosie the Riveter Congressional Gold Medal Act Signed into Law (Dec. 4, 2020), [<https://perma.cc/PS7H-THQ6>]. “And the iconic image of Rosie the Riveter will continue to inspire generations of young women across America to blaze new trails for years to come.” *Id.*; *see also* Press Release, Congresswoman Speier and “Rosie the Riveter” to Discuss Equal Pay with High School Students on Women’s Equality Day (Aug. 22, 2016), [<https://perma.cc/EB66-LSCN>].

128. Pink Tax Repeal Act, H.R. 3853, 117th Cong. (2021).

## 2. Judicial Attempts

Women in states that do not have legislation tailored to this issue are also recognizing this is a practice from which they deserve protection and are taking matters into their own hands, filing suits under existing law to challenge the protection currently available to them. Missouri in particular seems to be a hotbed of cases challenging the legality of the Pink Tax.<sup>129</sup> In 2020, the Eastern District of Missouri heard at least four suits that were “substantially the same,” in which plaintiffs alleged that “unfair ‘Pink Tax’ pricing of Schick products for women” violated the Missouri Merchandising Practices Act (“MMPA”).<sup>130</sup> The complaints in these cases “are identical but for legally immaterial differences such as the named plaintiffs and the particular razors or razor refills at issue.”<sup>131</sup> Motions to Dismiss or to Compel Arbitration and to Stay Litigation were filed and granted by the courts in each instance, and Motions to Remand were denied in each instance, allowing the courts to avoid the issue entirely in this set of cases.<sup>132</sup>

Another case before the Eastern District of Missouri did finally force the court to consider gender-based price discrimination under the MMPA.<sup>133</sup> In *Schulte v. Conopco, Inc.*, the plaintiff proposed a class action lawsuit alleging the higher cost of women’s antiperspirants—which contained the same active ingredients with only slight differences in inactive ingredients and provided 0.1 ounces less product than the corresponding men’s antiperspirants—was discrimination in pricing and violative of the MMPA.<sup>134</sup> “The MMPA protects consumers from unfair practices ‘in connection with’ the sale or

---

129. See *Goulart II*, No. 4:19-CV-2568, 2020 WL 4934367, at \*2 (E.D. Mo. Aug. 24, 2020).

130. *Id.*; see also *Goulart v. Edgewell Pers. Care Co. (Goulart I)*, No. 4:19-CV-02559, 2020 WL 3000433, at \*3, \*7 (E.D. Mo. June 4, 2020); *Been v. Edgewell Pers. Care Co.*, No. 4:19CV2601, 2020 WL 2747293, at \*1 (E.D. Mo. May 27, 2020); *Been v. Edgewell Pers. Care Co.*, No. 4:19-cv-02602, 2020 WL 1531015, at \*1 (E.D. Mo. Mar. 31, 2020).

131. *Goulart II*, 2020 WL 4934367, at \*2. Interestingly, the same lawyers are involved in each of these cases, resulting in nearly identical pleadings. *Id.*

132. See *id.* at \*6.

133. *Schulte I*, No. 4:19 CV 2546, 2020 WL 4039221, at \*1-2 (E.D. Mo. July 17, 2020).

134. *Id.* at \*1.



marketing of a good or service,”<sup>135</sup> and the Act defines “unfair practice . . . as any practice which offends any public policy as it has been established by the Constitution, statutes or common law of Missouri, or by the Federal Trade Commission or is unethical, oppressive or unscrupulous; and presents a risk of, or causes, substantial injury to consumers.”<sup>136</sup>

The court was not only unconvinced that gender-based discrimination, as described by the plaintiff, falls under the MMPA as an unfair practice, but appeared entirely unsympathetic towards the plaintiff until the final paragraph, in which the court half-heartedly acknowledged that the plaintiff “highlighted a pervasive issue of women being subjected to *questionable* pricing practices” after helpfully noting men would have to pay the same price as women for any particular deodorant.<sup>137</sup> This insightful observation entirely misses the point of Schulte’s argument—it is unfair for women to have to sacrifice the benefits of gender-specific products in order to avoid paying a premium when men do not have to make that choice.<sup>138</sup>

Throughout the opinion, the court clung to the convenient arguments that it could not find discrimination because both “[m]en and women . . . may purchase any brand of Dove antiperspirant” they want, that the free market empowers any consumer to “survey the available alternatives . . . and avoid those that are inadequate or unsatisfactory,” and that the practice was not unfair because “the ingredients . . . were [not] hidden or inaccurate.”<sup>139</sup> This before finally landing on the one argument

---

135. *Id.* at \*2.

136. *Id.* at \*3.

137. *Id.* at \*5-6 (emphasis added). Specifically, the court states, “Women are able to purchase any of the Dove antiperspirants for the same price as men regardless of the scent or variety.” *Id.* at \*6. “Karen Schulte sued numerous companies for violating the Missouri Merchandising Practices Act (MMPA) through their marketing of men’s and women’s antiperspirants.” *Schulte v. Conopco, Inc.*, 997 F.3d 823, 825 (8th Cir. 2021). On appeal from a dismissal of one of her suits, the Eighth Circuit noted that while Schulte might have a preference as to what scent of antiperspirant she uses, “preference-based pricing is not necessarily an unfair practice” as defined by the MMPA. *Id.* at 827.

138. See *Schulte I*, 2020 WL 4039221, at \*6. Specifically in this case, “it is unfair for women to have to . . . smell like a man”—rather than a woman, as is presumably their preference—“to get a better price on their deodorant” while men get to smell masculine—as is presumably their preference—and enjoy a lower price by comparison. *Id.* at 2.

139. *Id.* at \*5-6. The court equated the facts of this case to those in *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163 (C.D. Cal. 2014), in which the court held Walmart “did not

that, if all else fails, the judiciary can usually hide behind when faced with emerging social issues: “Her remedy lies with legislation not litigation.”<sup>140</sup> Without providing any justification for why the plaintiff’s intentionally limited “claims are not amenable to judicial resolution,” the court, in a resigned dismissal of the claim, verbally handed the issue off to legislative efforts that have gone cold.<sup>141</sup>

### III. HITTING A WALL—THE HEART OF THE PINK TAX ISSUE

With legislative efforts to combat the Pink Tax either falling flat or stalling entirely and the judiciary sitting on its hands awaiting guidance, the lack of urgency may make one wonder if this is an issue deserving of more significant attention. After all, many posit the Pink Tax is simply the free market working efficiently.<sup>142</sup> Champions of the free market are unconvinced

---

violate . . . consumer laws by selling Equate Migraine medication for more than \$9 and Equate Extra Strength medications for less than \$3 when both products contained the same active ingredients at the same quantity of doses,” with the only difference between the products being different colored packaging. *Id.* at \*4. The court in *Boris* “found the parties received what they paid for and that ‘a consumer’s assumptions about a product are not the benchmark for establishing liability.’” *Id.*

140. *Schulte I*, 2020 WL 4039221, at \*6.

141. *Id.* Plaintiff conceded “sweeping, overreaching attempts to summarily prohibit gender-based (or any) pricing differentials are better left to legislators, not the judiciary,” but pleaded with the court to consider her more limited claim. *Id.* at \*4. She stated:

[I]n certain specific and limited instances, the unique facts and circumstances attendant to in imposition of the “Pink Tax” may be such that a *jury* (not a Court), analyzing and weighing those facts and circumstances, could find that such imposition of the Pink Tax, being wholly or inadequately justified, constitutes an “unfair practice” under the Missouri Merchandising Practices Act.

*Id.*

142. YAZICIOĞLU, *supra* note 3, at 19-21; *see also Schulte I*, 2020 WL 4039221, at \*5 (the court citing the fact that “the FTC has advocated for the free marketplace and requires that an actionable injury ‘must be one which consumers could not reasonably have avoided’” and defendants arguing that the plaintiff’s claim “‘concerns issues of free market pricing and the role of consumer choice in the marketplace’ that are not amendable to” suit); Steven Horwitz, *Is There Really a Pink Tax?*, FOUND. FOR ECON. EDUC. (May 13, 2015), [<https://perma.cc/Y3WR-2N6R>] (“So is this really a ‘pink tax’ or is it a ‘blue discount?’ And is it really that firms are somehow punishing women, or is it that women’s preferences are such that they are willing to pay more to get exactly the product they want?”).

women are without power to snuff out the Pink Tax,<sup>143</sup> and in certain circumstances, they might be right.<sup>144</sup>

On an individual level, a female consumer confronted with choices may choose a gender-neutral or male-specific alternative if it is cheaper, but to tell women this is their only remedy is to hand them a small, insufficient band-aid for a persistent wound. This “solution” is predicated on a number of assumptions that are no longer true, if they ever were.

Most importantly, the point remains that the issue is *not* that women pay more for gender-specific products—claiming this is a gross, if not deliberate, mischaracterization of the current reality. The real issue is women pay more for their gender-specific products *while men do not have to*. Men’s products are considered the baseline<sup>145</sup> (as there are often no gender-neutral options), and the premium charged on female-specific products, at its core, is a premium charged for not being male.<sup>146</sup> Whether

---

143. It is also important to recognize antitrust concerns may be in play here, as an efficient free market depends in part on sufficient competition. YAZICIOĞLU, *supra* note 3, at 17; *see also* JOINT ECON. COMM., *supra* note 36, at 5. The persistence of the Pink Tax may be evidence that some markets are not “fully competitive, and competitors who would drive down inexplicably high prices for women’s versions of products and services may be prevented from entering the market.” JOINT ECON. COMM., *supra* note 36, at 5. “As a result, firms holding a significant share of market power would be able to continue charging more for goods and services targeting women.” *Id.* This is one argument in support of government intervention, “as the federal government takes an active role in maintaining competitive markets.” *Id.* This also presents an opportunity for businesses to develop in ways that focus on this potentially underserved market, as Georgina Gooley recognized when she co-founded women’s razor subscription service, Billie. Leah Bourne, *The Pink Tax Revolution Is Here, and It’s Being Led by Women*, GLAMOUR (May 7, 2018), [<https://perma.cc/9WHL-VSN9>]. Gooley explained she “was looking at the shaving category, and wondering why a women’s subscription service hadn’t been created, and why women have been an afterthought in the category . . . . Do women not shave? It didn’t make sense.” *Id.* Billie’s success is certainly evidence that women comprise a responsive and profitable market. *See infra* notes 209-17 and accompanying text.

144. *See* YAZICIOĞLU, *supra* note 3, at 20-21.

145. Berliner, *supra* note 1, at 86-87 (discussing androcentrism).

146. YAZICIOĞLU, *supra* note 3, at 19. “Prices . . . do not merely reflect costs and efforts of service [or product] providers, they also reflect the ‘prestige’ or perceived value of what is purchased. *Id.* Is it so surprising women would want to benefit from products tailored to them, as men do already? Horwitz, *supra* note 142. Horwitz’s comment that telling women they will “just have to smell like a man” to avoid the Pink Tax “implies that women might *care* about how the products smell more than men do” and mischaracterizes reality. *Id.* Men might value smelling like a man, or other male-specific products, just as much, but we would not know it as things stand because no premium is applied to test the

men and women are equal has historically been contested, but men and women have always existed.<sup>147</sup> Therefore, there should have either been two distinct baselines or one gender-neutral baseline. If this were the case, either everyone would have paid the premium for gender-specific products or no one would have. Telling women they can choose different products to avoid the Pink Tax misses the mark because the only real choice is whether to sacrifice the female-specific product in order to pay what men pay for their male-specific product or to simply accept that they must pay more in order to get the female-specific product.

If this is a choice, it is more accurately described as a Hobson's choice.<sup>148</sup> First, it has been shown that women who do not adhere to gender norms face serious repercussions.<sup>149</sup> For example, a woman's physical appearance is generally more closely tied to her professional success than a man's.<sup>150</sup> Though her appearance may not always hold her back, it is a risk society asks her to shoulder when it tells her that her only option, if she does not want to pay the Pink Tax, is to avoid female-specific products and services. The message is she must select the ill-fitted men's white button-down shirt over the tailored women's white button-down shirt to save money, but then turn the other cheek if she is told she looks unprofessional because her clothes are baggy or frumpy.

---

price elasticity of male-specific products or services. *See id.* (“[P]rice discrimination takes place because the different groups have different price elasticities for the product.”).

147. *See* YAZICIOĞLU, *supra* note 3, at 5 (discussing the definition of sex, stating that there are two biological labels for sex, one of which is assigned to individuals “at the time of their birth on the basis of a number of anatomical criteria”). Still, because gender is an expression of a person's identity that must “be signaled and performed,” there are at least three forms of gender expression—masculine, feminine, and androgynous—which are also deserving of consideration in this conversation surrounding an appropriate “baseline.” *See id.* at 4-6.

148. A Hobson's choice is defined as “an apparently free choice when there is no real alternative” or “the necessity of accepting one of two or more equally objectionable alternatives.” *Hobson's Choice*, MERRIAM-WEBSTER, [<https://perma.cc/CM5J-XQYN>] (last visited Oct. 15, 2022). Depending on one's perception of gender-norms, one or both definitions apply here.

149. YAZICIOĞLU, *supra* note 3, at 34.

150. *Price Waterhouse v. Hopkins*, in which a female employee's partnership application was put on hold because she failed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,” provides a concrete example of this unfortunate reality. 490 U.S. 228, 235 (1989).

Second, even if she does opt to forgo female-specific products or services when she can, she still cannot escape the Pink Tax entirely.<sup>151</sup> There are instances in which women cannot choose differently. On the service side, “[w]omen do not get the option to order a ‘men’s service’ and thereby to pay the ‘men’s price.’”<sup>152</sup> For example, when a woman receives the same haircut as a man, she is generally charged more, although the services are identical.<sup>153</sup>

Additionally, multi-vitamins are gender-distinct and developed to recognize inherent differences in men’s and women’s bodies.<sup>154</sup> The differences are based on biology, not preferences. So, when women’s vitamins are more expensive than men’s, should a woman really be expected to sacrifice what is healthiest for her if that is what it takes for her to avoid the Pink Tax? While there are differences in the products, two arguments exist for why those differences should not result in a higher price. One, men require higher dosages of certain vitamins because of specific biological needs and because statistically they are larger; therefore, they often receive more product even though they pay less.<sup>155</sup> Two, the product may vary and the cost of producing it may even vary, but consumers’ expectations are the same for both men and women. Regardless of gender, a person purchasing a

---

151. See YAZICIOĞLU, *supra* note 3, at 35-36 (“[The Pink Tax] cannot be avoided by being reasonably attentive. It cannot be avoided by becoming a ‘market maven[.]’ It cannot be avoided without facing social, economic and psychological repercussions.”).

152. *Id.* at 35.

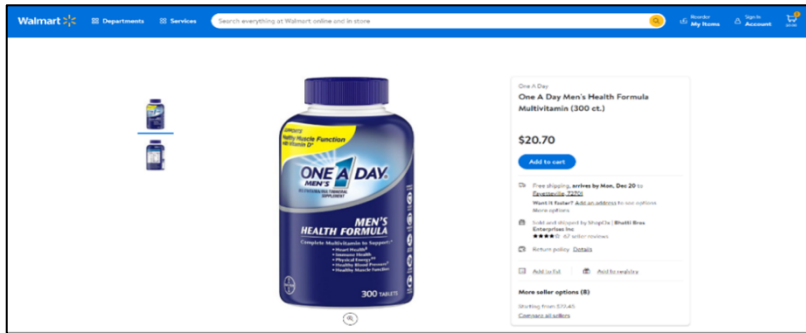
153. Berliner, *supra* note 1, at 70 (“In a 2000 study in the United Kingdom, even when the caller specified that the male customer and his wife had almost identical hairstyles, 150 unisex salons gave price quotes for the woman’s haircut at a 43% markup, on average.”).

154. Interestingly, it has been shown that standardized doses for gender-neutral medications are based off the average man—still more evidence of the how the historic view that men are the “normal” (and women are variations) has shaped our society. Louise Lerner, *Women Are Overmedicated Because Drug Dosage Trials Are Done on Men, Study Finds*, UNIV. CHI. NEWS (June 22, 2020), [<https://perma.cc/KP3E-LHFV>]; see also *Male Bias in Drug Development Trials Creates Overmedication*, OPEN ACCESS GOV’T (Aug. 14, 2020), [<https://perma.cc/7842-ZMGV>]; Berliner, *supra* note 1, at 86.

155. Jenn Sinrich, *What’s the Difference Between Men’s and Women’s Multivitamins?*, VITAMIN SHOPPE (Mar. 8, 2021), [<https://perma.cc/JER2-ATJA>]; Lerner, *supra* note 154; see also *What’s the Difference Between Men’s and Women’s Daily Supplements?*, NAT. WELLBEING (May 20, 2018), [<https://perma.cc/B5GT-T9ZH>]. There are certain vitamins women require more of as well, such as iron and folic acid. Sinrich, *supra*. Still, a consumer cannot easily tell whether certain vitamins are more expensive and whether the cost justifies the price difference between men’s and women’s multivitamins.

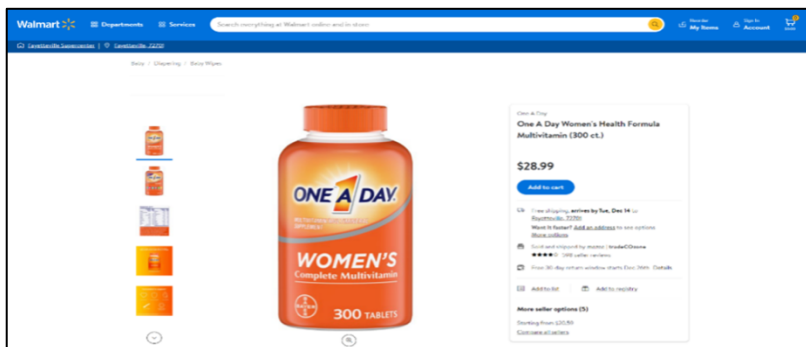
multi-vitamin is paying for the combination of vitamins that is optimal for improving and maintaining his or her health.<sup>156</sup> Women pay more for this same expectation.

**Figure 1**



*Figure 1: The price of a men's multivitamin on Walmart.com<sup>157</sup>*

**Figure 2**



*Figure 2: The price of a comparable women's multivitamin on Walmart.com<sup>158</sup>*

156. Or at least what is optimal without the high cost of personalized vitamins. See *What's the Difference Between Men's and Women's Daily Supplements?*, *supra* note 155.

157. One a Day Men's Health Formula Multivitamin (300 ct.), WALMART INC., <https://walmart.com> (last visited Dec. 3, 2021).

158. One A Day Women's Health Formula Multivitamin (300 ct.), WALMART INC., <https://www.walmart.com> (last visited Dec. 3, 2021). These images serve as an example of the price difference consumers may encounter—and that this author actually did encounter—when searching for gender-specific products on a major retailer's website.

Defining products by their purpose or by the average consumer's expectation is unorthodox, but it gets at the heart of the issue.<sup>159</sup> When consumers share the same expectations of their respective products, the costs should be the same.<sup>160</sup> While the price differences between these products may even be valid in some instances, one could argue it should not justify the price difference between products with the same purpose: "If the American . . . analysis of sex discrimination were focused simply on the discriminatory outcome and impact—without the restrictions of discriminatory purpose—true substantive equality could be within reach."<sup>161</sup>

Some have expressed fears that artificially forcing the prices between these types of men's and women's products to be equal would unfairly harm businesses,<sup>162</sup> and others have even

---

159. Some courts have been hung up on the fact that the products at issue are different, seemingly without considering whether this should be the standard used to evaluate this issue—the Eighth Circuit in *Schulte v. Conopco*, for example, "ruled that the plaintiff would have to allege that the *only* difference between the products was the price and the intended target of the marketing." Metzinger & Clark, *supra* note 113 (reporting "on an emerging legislative and litigation trend relating to the 'pink tax'").

160. As one observer remarked:

Though there may be legitimate drivers behind some portion of the price discrepancies unearthed . . . these higher prices are mostly unavoidable for women. Individual consumers do not have control over the textiles or ingredients used in the products marketed to them and must make purchasing choices based only on what is available in the marketplace. As such, choices made by manufacturers and retailers result in a greater financial burden for female consumers than for male consumers.

BESSENDORF, *supra* note 2, at 6. When there are opportunities to make products better suited for female or male consumers, we should encourage pursuing such opportunities and encourage consumers to select the product best suited for them. However, particularly in instances where a manufacturer cannot fully explain why a comparable product is more expensive for one gender, it should spread the cost difference to the product's gendered counterpart to better reflect consumers' identical expectations that they are purchasing a product best suited to their gender.

161. McMullen, *supra* note 20, at 401. This highlights the distinction between "formal equality versus substantive equality," which "illustrates how equal outcomes sometimes require unequal treatment." *Id.* at 360. As it has become that clear consumers' rights in the free market alone are insufficient to combat the Pink Tax, some additional step is apparently required to achieve substantive equality for a "historically disadvantaged class." *Id.*

162. See, e.g., YAZICIOĞLU, *supra* note 3, at 21 (stating that one would not expect a producer to stop profiting off of cashews simply because "people tend to eat a bowl of them against their best interest."); Sforza, *supra* note 95 (reporting that the California Chamber of Commerce branded a bill to end gender-based price discrimination a "job killer" and that the California Retailers Association believed that the legislation would "result in confusion, inaccurate pricing and increased costs").

expressed skepticism that the true motivation behind the call to end the Pink Tax is a desire for equality.<sup>163</sup> Yet, if businesses depend so greatly on the Pink Tax that ending the practice even for this small sub-set of products<sup>164</sup> would legitimately cause such substantial harm, then skeptics can no longer deny the practice. Further, even if these concerns are valid, it must be noted that not one of these critics has, in good faith, suggested spreading the cost of the Pink Tax to men's products as a solution to simultaneously level the playing field and protect businesses.<sup>165</sup> It seems they are perfectly happy to continue to let the fate of businesses rest on women's wallets.<sup>166</sup>

Ultimately, statements instructing women to simply make better market choices to avoid the Pink Tax assume the problem lies with them<sup>167</sup>—that they are either failing to be educated consumers or lacking the necessary self-control to make decisions that accurately represent their values. Claiming women are irrational consumers is comically underinclusive: all consumers are irrational on some level.<sup>168</sup> Men are not rational simply because they choose men's products, and men's products happen to be cheaper. Studies have proven “human beings possess only ‘bounded rationality,’” which falls short of the “Olympian rationality” presumed by the pure free market approach.<sup>169</sup> It is no secret “who individuals are, what they want and what they choose to do all are determined to a certain extent by the gender stereotypes of the society they live in.”<sup>170</sup> Marketers have

---

163. See, e.g., Horwitz, *supra* note 142 (“[I]t’s interesting that the call here is for sellers to cut their prices for women, rather than raise their prices for men. We see the same phenomenon with the wage gap, where it’s always a reason to raise women’s wages and not to cut men’s wages.”).

164. Specifically, products for which consumers’ expectations are exactly the same, regardless of gender.

165. Steven Horwitz mentioned spreading the cost across men’s products but as a criticism of those calling for an end to the Pink Tax, not as a solution offered in furtherance of the call. See Horwitz, *supra* note 142.

166. Or vice versa in instances in which men are targeted by gender-based price discrimination. See *supra* note 11 and accompanying text.

167. YAZICIOĞLU, *supra* note 3, at 20. “If you don’t like the ‘pink tax[,]’ then you don’t have to play the game. Buy the men’s products. Or better yet, buy whatever’s on clearance.” *Id.*

168. *Id.* at 17.

169. *Id.*

170. *Id.* at 31.



capitalized on gender stereotypes, convincing consumers the products are different between genders, and “most consumers, and not just women, opt for items that ‘match’ their gender, regardless of their price.”<sup>171</sup>

#### IV. IT’S A RELAY, NOT A SPRINT

I hope it is clear the Pink Tax is an issue we, as a society, should be concerned about and that there is no single, magical solution to the problem. This practice is deeply entrenched into business practices and to change this norm will require action on multiple levels affecting the market. For this reason, efforts to combat the Pink Tax are best described as a relay, not a sprint, with each segment comprising a distinct and vital role in confronting the Pink Tax.

##### A. Legislation—The First Leg

There is currently little state legislation in place to address the Pink Tax and no widespread federal legislation at all.<sup>172</sup> But, even if there were more pervasive legislation concerning the Pink Tax, there are reasons to believe it would not be as effective as some believe. First, as previously discussed, gender-based price discrimination can be difficult to identify and to describe.<sup>173</sup> There are many legitimate reasons why a product might be priced differently. One example is certain color dyes might be more expensive because they are more costly to obtain or concentrate—it is possible pink is one of those more expensive dyes.<sup>174</sup> These

---

171. *Id.* Further, to the extent that self-control plays a role, statistically, women have more self-control than men, even as children. *See id.* at 22-23. The Marshmallow Test is a “test created by the psychologist Walter Mischel” “to measure the willpower, i.e. the ability to delay gratification and resist temptations, of individuals” by presenting “a choice between one reward,” a marshmallow that one can eat immediately, “and a larger reward,” two marshmallows that one must wait to eat. *Id.* at 22. In conducting this study, “Mischel observed that even when the reward values were equated and the motivation was the same, girls usually waited longer than boys.” *Id.*

172. Outside of the federal legislation addressing the Pink Tax in the military, an important but narrow scope. *See* Military FATIGUES Act of 2021, S. 3016, 117th Cong. (2021).

173. *See* discussion *supra* Section II.B.

174. In reality, this could be the result of androcentrism, the concept of “male-centeredness.” Berliner, *supra* note 1, at 86. Historically, goods marketed towards men were

other factors make it difficult to tell when the price difference is genuinely because of gender-based price discrimination,<sup>175</sup> which makes the practice difficult to articulate in legislation. States that have acted on this issue have proven this.<sup>176</sup> Generally, state legislation has been virtually indistinguishable: businesses may not charge different prices for “substantially similar” products on the basis of gender.<sup>177</sup> While this represents the right spirit, “substantially similar” has proven to be a particularly difficult term to nail down. In the bill pending before Congress, the definition of the key phrase is “no substantial differences,” which offers no more guidance than the phrase itself.<sup>178</sup> Efforts in New York to define the phrase more specifically are admirable. The State defines “substantially similar or like kind” as goods that “share the same functional components” and “share ninety percent of the same materials or ingredients.”<sup>179</sup> However, it is

---

considered “normal” and goods marketed towards women were the “variation” or “luxury.” *See id.* This initial belief sets the tone for which goods and materials along the chain of production should cost more to make or obtain, not necessarily because it was genuinely more expensive but because the material was valued differently. *See YAZICIOĞLU, supra* note 3, at 18-19. This effect can be seen in other areas, too. For example, “in *Boyd v. Ozark Air Lines*, the Eighth Circuit held that a minimum height requirement . . . for plane pilots did not discriminate against women because the qualification was needed for the pilot to reach the controls in the cockpit.” Berliner, *supra* note 1, at 87 (footnote omitted). However, cockpits were initially designed to fit men when women were not permitted to fly, so when women finally could serve as pilots, they were punished for failing to meet a standard designed for someone else. *See id.* The saying “it’s a man’s world” carries some bit of truth, as most sayings do, and even though society has begun moving away from this reality, the fact that it started off as such still affects the state of things today. *See id.*

175. Much legislation provides exceptions for price differences based on legitimate differences, often including “differences passed from the manufacturer to the retailer that are out of the retailer’s control.” Therefore, if the manufacturer prices certain materials higher that tend to be used for women’s products, or if the retailer uses a more expensive manufacturer altogether for those materials, then the retailer can continue to charge a higher price for those products, even if in the end the reason for the initial price difference of the materials is gender-based. Berliner, *supra* note 1, at 101.

176. *See* discussion *supra* Section II.C.1.a.

177. *See supra* notes 110-11 and accompanying text.

178. Pink Tax Repeal Act, H.R. 3853, 117th Cong. § 2(d) (2021). Truly, this is the functional equivalent of a circular definition.

179. S. 2679 § (1)(b)(ii)-(iii), 2019-2020 Leg., Reg. Sess. (N.Y. 2019). To be sure, this definition offers greater clarity than others. For example, it is worth noting here that the Excedrin and likely the multivitamins previously discussed would be captured by this definition and, therefore, impacted by this legislation. *See supra* notes 45, 154-56 and accompanying text.

yet to be seen whether this definition fully resolves the ambiguity plaguing other states' definitions of "substantially similar."

The second reason legislation may be less effective in addressing the Pink Tax than some expect is because the legislation is extremely difficult to enforce. In part, this is because the statutes themselves are vague, as was just discussed.<sup>180</sup> But additionally, the enforcement mechanisms are just not practical. In states offering a private right of action, consumers are ill-equipped to pursue recourse. They are certainly not privy to the inner workings of the retailer or manufacturer of the product and cannot see the factors that might be at play in setting the price. This can either manifest in consumers not bringing claims at all because they are unsure if their claims are valid or in an abundance of invalid claims that waste administrative or judicial resources.

Further, the opportunities to compare products are also becoming less frequent, particularly with online shopping. Now, consumers simply search the products they wish to purchase, and depending on what they search, they may never see the male counterpart or even gender-neutral alternatives.<sup>181</sup> Similarly, in states where enforcement of the Pink Tax legislation relies on an attorney general, or some other regulatory agency, to take action against a business, it may take a significant investigation into product pricing before ultimately being able to conclude whether a business is violating Pink Tax legislation. This is not to say it cannot be done, but with the vast and ever-increasing number of

---

180. See *supra* notes 177-78 and accompanying text.

181. To take this point one step further, with the pervasiveness of targeted advertising, a search may not even be necessary. A search engine or social media platform may detect a user's gender and prompt him or her with ads for only male-specific or female-specific products. See Tanya Kant, *Identity, Advertising, and Algorithmic Targeting: Or How (Not) to Target Your "Ideal User"*, MIT CASE STUDIES IN SOC. & ETHICAL RESPS. OF COMPUTING, Summer 2021, at 2-3, 11. Kant explains that "[t]argeting mechanisms use a dizzyingly extensive list of categories to profile people" and lists gender first as one of these factors. *Id.* at 2-3. She further explains that profiling consumers is "made useful and profitable through establishing 'like-to-like users' who are aggregated with and against other groups of users." *Id.* at 3. She warns that, "Despite (or indeed because of) its monetizable qualities, targeting creates a host of stark ethical problems in relation to identity articulation, collective privacy, data bias, raced and *gendered discrimination* and socioeconomic inequality." *Id.* (emphasis added). To combat this type of targeted advertising, users must actively beat an algorithm many of them have never seen.

products offered by businesses, this raises concerns about how many “boots on the ground” it would actually take to keep up with the market and effect real change this way—all the while women remain subject to potentially violative prices and continue to overpay.

Another reason why legislation might not be effective is it is relatively easy for businesses to circumvent. In order to be effective, there must be a threshold by which businesses can determine whether they are in compliance, like the New York bill attempts to provide, but this same threshold also describes to businesses exactly how they can avoid being subject to the legislation at all.<sup>182</sup> If the standard is whether ninety percent of the materials or ingredients are the same, businesses can adjust their products just slightly so that only eighty-nine percent of the components are the same.<sup>183</sup> Given the intended effect of Pink Tax legislation is to decrease the profits businesses earn disproportionately from women, it is not a huge stretch to believe many businesses will seek ways to get around these laws.

Additionally, at a higher level, the conversation surrounding gender-based price discrimination may be leading legislative efforts astray.<sup>184</sup> As Bridget Crawford insightfully points out, “calling something a ‘tax’ does not mean that it is, at least in the ways that economists and tax scholars tend to talk about taxes.”<sup>185</sup> Perhaps by clinging to the pithy, short-hand term of “Pink Tax,” legislators are impelled to take action in certain ways that are not best suited to the problem.<sup>186</sup> Moving beyond this imprecise language and elevating discussion of the Pink Tax may remove blinders that limit creative solutions to the real issue at hand.<sup>187</sup>

Ultimately, one cannot help but wonder whether such legislation is even worth pursuing when it seems the odds are stacked against the efforts. But really, it still might be worthwhile. Legislation has significant value even outside of its

---

182. *See* S. 2679.

183. *See* S. 2679.

184. *See* Crawford, *supra* note 9 (manuscript at 1, 2, 10).

185. *Id.* at 10.

186. *See id.* at 2, 10.

187. *See id.* As Professor Crawford eloquently states, “[C]oncrete legal change requires greater clarity than figurative tax talk can provide in naming and norming a vision for the future.” *Id.* at 9.

most basic purpose of establishing standards. Legislative efforts can capture the attention of the media and the public, making it a powerful tool for raising awareness of an issue. Particularly because consumers may not realize this practice is real or as pervasive as it is, public awareness is vital to reaching a point when consumers are making informed decisions about their purchases in ways that enable the market to work efficiently. This can place some power back into the hands of consumers because their dissatisfaction with this practice can be communicated through their demand, which, in theory, should affect the prices of these female-oriented products.<sup>188</sup>

Further, legislation, specifically at the federal level, could also raise awareness among states that have not yet acted on this issue and among businesses directly through its signaling effect. Bringing this issue to the forefront of states' dockets may amplify efforts to raise awareness and encourage states to impose regulations that touch small businesses within their borders.<sup>189</sup> Still, such legislation would likely continue to be plagued by the same defects previously identified in existing legislation.<sup>190</sup> But, as previously stated, raising awareness could be an effective step towards addressing gender-based price discrimination.

Arguably, the signaling effect of such legislation may be significantly more meaningful than enforcement anyways. Admittedly, the value of signaling is probably tied to how seriously businesses take the threat of this surging opposition to gender-based price discrimination. If a business does not anticipate such a movement really capturing the attention of consumers, they will find ways to circumvent legislation.<sup>191</sup> However, if a business appreciates the policy behind legislation prohibiting gender-based price discrimination, it could prove to be an excellent opportunity to distinguish itself from its

---

188. See *supra* notes 51-56 and accompanying text; see also *infra* Section IV.C. But see *supra* notes 57-74 and accompanying text (explaining why consumer power in the free market alone is insufficient to combat the Pink Tax).

189. See Small Business Gender Discrimination in Services Compliance Act, CAL. CIV. CODE §§ 55.61-.63 (West 2018).

190. See *supra* Section II.C.1. Further, any effectiveness of legislation may be better addressed at a more local level in order to touch businesses of all sizes and scopes. See CIV. §§ 51.61-.63.

191. See *supra* note 175 and accompanying text.

competitors, particularly today, when stakeholder interests are becoming more central to a business's success.<sup>192</sup>

### B. ESG—The Second Wind

With legislative efforts to reach this issue lacking as well as consumer protection and civil rights claims failing to gain traction in courts, the question becomes, “How else can businesses be motivated to stop imposing the Pink Tax?” The answer to this question could be the missing force needed to finally push past this wall we seem to be hitting in making progress against the Pink Tax. Consumers and shareholders alike are demonstrating more often they expect businesses to consider and report on environmental, social, and governance (“ESG”) topics.<sup>193</sup> In a quasi-extension of the era of corporate social responsibility and a period of renewed dedication to stakeholder interests, businesses who focus on operating ethically and responsibly, not just on maximizing short-term profits, are experiencing sustainable profitability and consumer loyalty.<sup>194</sup> ESG disclosures are not only directly affecting investment decisions but are also presenting a unique “opportunity for companies to highlight the integration of ESG factors into longer-term business strategies.”<sup>195</sup> In this instance, ESG also presents the best chance

---

192. Michal Barzuza et al., *The Millennial Corporation* (Sept. 6, 2021) (unpublished manuscript), [<https://perma.cc/X72W-H7G2>].

193. Even “accounting firms are jumping on [the] bandwagon,” excited about a new direction for their firms with the increasing popularity of these reporting metrics and the chance to “rebrand a scandal-plagued profession as experts on climate change, diversity and winning consumers’ trust.” Michael O’Dwyer & Andrew Edgecliffe-Johnson, *Big Four Accounting Firms Rush to Join Sustainability Trend*, *FIN. REV.* (Sept. 1, 2021, 4:27 PM), [<https://perma.cc/5T5Y-SAYB>].

194. See Subodh Mishra, *ESG Matters*, *HARVARD L. SCH. F. ON CORP. GOVERNANCE* (Jan. 14, 2020), [<https://perma.cc/49UK-WRJ2>] (discussing the apparent “link between ESG . . . and financial performance” and considering various explanations for this relationship, including the effect of “better managing its material ESG risks” and “the younger generation’s push to consider social issues”).

195. See David M. Silk et al., *Wachtell Lipton Discusses ESG Disclosures — Considerations for Companies*, *COLUMBIA L. SCH.: THE CLS BLUE SKY BLOG* (Mar. 10, 2020), [<https://perma.cc/J5DN-NWMW>]; see also WACHTELL, LIPTON, ROSEN & KATZ, *ADVANCING STANDARDIZED SUSTAINABILITY/ESG METRICS AND DISCLOSURES 1* (2020), [<https://perma.cc/7H44-6DGY>].

In a bid to bring clarity, simplicity and coherence to the alphabet soup of ESG disclosure frameworks and prevent companies from being overwhelmed by the

companies have of avoiding poorly drafted, burdensome, or just simply ineffective legislation. If companies act now, of their own volition, against the Pink Tax, they can make the rules and set the standards for themselves.<sup>196</sup>

Companies are already considering similar social issues in their annual 10-K statements.<sup>197</sup> For example, CVS Health Corporation's 2021 10-K report includes ESG goals the company has set out to accomplish before 2030.<sup>198</sup> Under the heading "Healthy Business," CVS states it is "committed to operating a healthy business for all [its] stakeholders, including [its] patients, customers, stockholders, clients, partners, communities and colleagues."<sup>199</sup> As part of this initiative, CVS expresses a commitment "to acting responsibly with respect for human rights,

---

hundreds, if not thousands, of potential ESG-related data points and metrics, the International Business Council (IBC) of the World Economic Forum (WEF), in collaboration with the four major accounting firms, has released its final recommendations for a set of universal, standardized, and industry-agnostic ESG and sustainability metrics and disclosures. . . . Based on "a belief that the interrelation of economic, environmental and social factors is increasingly material to long-term value creation," the IBC/WEF framework defines a set of "Stakeholder Capitalism Metrics" for companies to use and publicly report performance against broader dimensions of sustainable value and ESG factors on a more standardized and consistent basis. These metrics can also be used to track a company's contributions toward the Sustainable Development Goals (SDGs).

*Id.*

196. "If you look at how many women are CEOs of Fortune 500 companies . . . it's easy to see how this got neglected." Bourne, *supra* note 143; *see also* Emma Hinchliffe, *The Female CEOs on This Year's Fortune 500 Just Broke Three All-Time Records*, FORTUNE (June 2, 2021, 5:30 AM), [https://perma.cc/DG97-MRPK] ("In 2021, the number of women running businesses on the *Fortune* 500 hit an all-time record: 41."). While this number is beginning to grow, ESG offers the opportunity to motivate companies to address this issue much sooner, without having to wait for more women to finally be, as the inimitable Justice Ruth Bader Ginsburg said, "in all places where decisions are being made." Mary Kate Cary, *Ruth Bader Ginsburg's Experience Shows the Supreme Court Needs More Women*, U.S. NEWS (May 20, 2009, 12:06 PM), [https://perma.cc/AP8P-CFBT].

197. "A 10-K is a comprehensive report filed annually by a publicly-traded company . . . and is required by the U.S. Securities and Exchange Commission (SEC)." Will Kenton, *10-K: Definition, What's Included, Instructions, and Where to Find It*, INVESTOPEDIA (Apr. 18, 2022), [https://perma.cc/XB7Y-64VJ]. Information provided in a 10-K includes the company's "history, organizational structure, financial statements, earnings per share, subsidiaries, executive compensation," management's discussion and analysis, and identified risks the company faces. *Id.*

198. *See* CVS Health Corp., Annual Report (Form 10-K) 17-18 (Feb. 9, 2022) [hereinafter 2021 CVS 10-K], [https://perma.cc/U55T-BN6Y].

199. *Id.* at 17.

privacy, information security, public policy, marketing and advertising,” and a focus on “diversity, equity and inclusion . . . .”<sup>200</sup> Working towards better price equality or at least disclosures regarding price disparities in their advertisements for products could easily be part of this goal. Further, in the section for a “Healthy Community,” CVS claims it is working to reduce health disparities, promote and enhance equity, and ensure “at-risk communities can thrive.”<sup>201</sup> Because some products subject to the Pink Tax are health products, working towards price equality is a step towards this goal as well.

Microsoft’s 2021 10-K included a section regarding “Pay Equity,” in which it highlighted its 2020 Diversity and Inclusion Report.<sup>202</sup> The report compared what women in its U.S. operations earned as compared to their male counterparts.<sup>203</sup> In similar fashion, companies could begin to include a “Price Equity” section, in which they monitor what the final prices of their products are and compare the final prices of men’s and women’s products. While this may seem challenging logistically, companies are in the best position to monitor the Pink Tax within their organization as part of their supply-chain operations. Individual companies are certainly in a much better position than state or federal governments to isolate and address the issue at its

---

200. *Id.*

201. *See id.* After this Comment was selected for publication in 2022, CVS announced that, during a period of significant inflation and in the face of supply-chain issues impending a shortage, it planned to “lower prices on CVS Health and Live Better tampons, menstrual pads, liners, and cups” and pay “the sales taxes on menstrual products in 12 states,” including Arkansas. Beth Ann Mayer, *CVS Dropping Price of Tampons and Paying the ‘Pink Tax’: What to Know*, HEALTHLINE (Oct. 18, 2022), [<https://perma.cc/J3HZ-YY75>]. In many of the articles reporting on CVS’s decision, the sales tax on menstrual products is dubbed the Pink Tax. *See, e.g., id.*; Tom Ryan, *CVS Battles the ‘Pink Tax’*, RETAILWIRE (Oct. 17, 2022), [<https://perma.cc/NGE3-WVGJ>]. While this particular action does not address the Pink Tax as this author defines it, but rather the Tampon Tax, it is certainly evidence that CVS is living up to their words in addressing forms of inequity women face. Mayer, *supra* (discussing “menstrual inequity,” “period poverty,” and other circumstances affecting women’s abilities to access these vital products); *see also Here for Women.*, CVS, [<https://perma.cc/VC65-GKGZ>] (last visited Jan. 12, 2023) (indicating CVS has considered the impact of the Pink Tax as well, stating the company does not “think women should pay more than men for the same thing”).

202. *See* Microsoft Corp., Annual Report (Form 10-K) 9 (July 29, 2021) [hereinafter 2021 Microsoft 10-K], [<https://perma.cc/X5WH-HBU2>].

203. *See id.*



source. Whether companies are willing to invest in such efforts is something else entirely.

However, with legislation clearly on the horizon, if not already arrived in some jurisdictions, companies would be wise to proactively eliminate the Pink Tax and to communicate their stance on the practice to gain favor with consumers now.<sup>204</sup> Companies are unquestionably recognizing the threats posed by the dangerous waters of stakeholder interests. Their reputations and bottom lines are increasingly jeopardized by what consumers, employees, and, quite frankly, any member of social media say about them.<sup>205</sup> To this point, ESG concerns will sneak into corporations' 10-Ks whether they like it or not. Even if companies refuse to get ahead of ESG issues, such as gender-based price discrimination, and fail to disclose a plan of action to address stakeholder concerns, they will still have to report these issues as risks in their 10-K, particularly as these concerns gain attention.<sup>206</sup> At a certain point, stakeholders will likely complain about the company's failure to address their concerns.<sup>207</sup> They may even initiate shareholder proposals to try to force companies' hands in adjusting their business practices to mitigate the Pink Tax or address other ESG concerns.<sup>208</sup>

Voluntarily addressing gender-based price discrimination is a strategy that has worked well for companies that have spearheaded the call against the Pink Tax at the corporate level.<sup>209</sup> After realizing it was perpetuating the Pink Tax,<sup>210</sup> Boxed, a bulk

---

204. See *supra* Section II.C.1; KPMG, CORPORATE TAX: A CRITICAL PART OF ESG 7 (2019), [<https://perma.cc/ET84-QMJU>].

205. See Barzuza et al., *supra* note 192, at 28-33.

206. See, e.g., 2021 CVS 10-K, *supra* note 198, at 36. Yet another Hobson's choice, but it does not feel good when the shoe is on the other foot. See *supra* note 148 and accompanying text. Even if companies do not explicitly list ESG concerns, many admit their success depends in large part on the public perception of the company, which implicates ESG concerns if the public finds such concerns notable. See, e.g., Target Corp., Annual Report (Form 10-K) 5 (Mar. 10, 2021), [<https://perma.cc/PLR6-CVS3>].

207. See Barzuza et al., *supra* note 192, at 28-33.

208. See Matteo Tonello, 2022 Proxy Season and Shareholder Voting Trends, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2022), [<https://perma.cc/Y55M-CJ3J>].

209. See Bourne, *supra* note 143.

210. See *id.* Without realizing it, Boxed was passing along the cost of the Pink Tax, imposed by everyone before it on the supply chain, to its consumers. *Id.* It was only after Nitasha Mehta, the female "head of vendor marketing at Boxed," became angry after

online retailer, not only changed its prices so its “customers pay equal prices for equal products, regardless of their gender,” but it also “reduced the list price on feminine hygiene products in states where they are taxed to compensate for the unfair tax treatment.”<sup>211</sup> By adopting their “#RethinkPink” campaign, Boxed actually began “absorbing the price difference” for its female consumers, but it has more than made up for the decreased profit margins on female-specific products “by bringing in new customers.”<sup>212</sup>

Not long after Boxed adopted its Pink Tax-conscious business model, Billie, “a women’s razor subscription service,” launched to continue the efforts.<sup>213</sup> In addition to providing more affordable women’s razors by adopting the subscription service model that has been relatively limited to men’s razor companies, part of Billie’s model includes offering a “Pink Tax Rebate” to customers who refer friends to the subscription service.<sup>214</sup> The new company reached its “12-month goal in four-and-a-half months” and has benefitted from significant support to the tune of \$4.5 million in funding.<sup>215</sup> Other efforts to combat the Pink Tax have included launching marketing campaigns such as the European Wax Centers #AxThePinkTax campaign<sup>216</sup> as well as

---

realizing “she was paying more than men for lots of the same personal care products” that she looked “into her own company’s prices.” *Id.* At this point, it is not that every supplier or retailer intends to charge women more, but gender-price discrimination is so pervasive in the supply chain, despite being relatively unheard of, that people do not think about it or its cumulative effect on women. *Id.* (stating that Boxed was simply “getting its prices from manufacturers” and had to make a concerted effort to set prices that countered the effects of the Pink Tax).

211. *Pink Tax: Why Boxed Is Taking a Stand Against Unfair Gender Pricing*, BOXED: BLOG (Mar. 1, 2019), [<https://perma.cc/P27P-EEPE>]. While the reduction in list price to accommodate taxes on feminine hygiene products is addressing the Tampon Tax, not the Pink Tax, it deserves attention as an example of companies proactively addressing gender discrimination in the marketplace.

212. *See* Bourne, *supra* note 143.

213. *See id.*

214. *See The Pink Tax Rebate*, BILLIE, [<https://perma.cc/6EMM-LF36>] (last visited Oct. 16, 2022). “On behalf of the razor companies out there—we’re sorry you’ve been overpaying for pink razors. It’s time you got some money back.” *Id.* While the Rebate averages only \$1 per referral, in this gesture of goodwill, Billie is not only helping raise awareness of the issue but recognizing in a tangible way that women do overpay. *See id.*

215. Bourne, *supra* note 143.

216. *See id.* The company says it has always charged men and women the same prices for the equivalent services but wanted to help contribute to the cause. *See id.*

creating gender-neutral brands such as Soapwalla and Mender CBD Apothecary.<sup>217</sup>

These companies recognize that apathy towards this issue is just as harmful as discriminatory intent.<sup>218</sup> In contrast, a representative from Target, who was asked about pricing differentials within the company, stated Target’s “competitive shop process ensures that [it is] competitively priced in local markets,” attributing such differences potentially to “production costs or other factors.”<sup>219</sup> While this may explain price differentials, it does not justify them:

[M]eeting competitors’ prices in local [or national] markets is not a business justification under the civil rights laws. The fact that your competitors are price-gouging on [female-specific products] doesn’t mean that you have to. Price-gouging is never a business justification for discrimination—even if it really helps a seller raise its profits.<sup>220</sup>

So far, efforts to combat the Pink Tax have been mostly concentrated in retailers and smaller start-ups.<sup>221</sup> Though there are few to speak of, the companies that have taken stances against the Pink Tax show it can be profitable. Their success is evidence of consumers’ receptivity to Pink Tax-conscious companies, but in order for more companies, particularly larger ones, to adjust their business practices to be more sensitive to the Pink Tax, greater evidence of a collective consumer desire for an end to the Pink Tax is required.

### C. Consumers—Closing the Gap

Despite some legislatures and companies stepping up to address the Pink Tax, it will likely take some time before the practice is truly driven from the market, and even when the dust has settled, there may be instances when the Pink Tax rears its

---

217. Amy Flyntz, *The Pink Tax: What It Is + How These Brands Are Leading the Change Against It*, WELL INSIDERS, [<https://perma.cc/7WBD-678N>] (last visited Oct. 16, 2022).

218. See *supra* notes 209-17 and accompanying text.

219. Ian Ayres, *Which Retailers Charge the Largest ‘Pink Tax’?*, FORBES (Jan. 7, 2016, 10:39 AM), [<https://perma.cc/YM3R-2TKP>].

220. *Id.*

221. Bourne, *supra* note 143.

ugly head. When all else fails, one must be her own advocate. In this case, filling these gaps requires taking advantage of the one point that has been consistently raised to curb efforts to eliminate the Pink Tax: consumers must make meaningful market choices to help combat the Pink Tax.<sup>222</sup>

However, in order for this to be an option, female consumers must be aware of this practice.<sup>223</sup> Every couple of years, there seems to be a resurgence of attention to the Pink Tax, specifically social media trends pointing out the price differences on products.<sup>224</sup> Yet there are still many who are not aware of the practice, so as legislation and corporate initiatives work at a high level to raise awareness, consumers must work on the ground to raise awareness amongst themselves.

Rachel Winard, founder of Soapwalla, advises consumers to live by the saying, “If you see something, say something.”<sup>225</sup> Consumers should take note of when prices differ between men’s and women’s services, such as dry-cleaning, and make their case for why the service provider should honor the men’s price for its female customers.<sup>226</sup> This approach obviously will work better with locally owned businesses, which generally have more flexibility than large retailers, but it is a step in the right direction.

With respect to larger companies, consumers should focus on shopping brands and purchasing from stores that are mindful of the Pink Tax, and they should be aware of which companies impose the largest Pink Tax.<sup>227</sup> Unfortunately, many companies who make this list are popular: Club Monaco, Urban Outfitters, Levi’s, Carter’s, CVS, Target, and Walgreens, among others.<sup>228</sup> When armed with such knowledge, and while awaiting more protection, consumers will either have to put their money where

---

222. See *supra* notes 52-56 and accompanying text.

223. See *supra* notes 57-59 and accompanying text.

224. See Berliner, *supra* note 1, at 67, 71, 89-90 (noting Ellen’s announcement of the Pink Tax, Twitter’s burst of attention on the Pink Tax, and other social media movements such as #PinkTax and #AxthePinkTax); see also YAZICIOĞLU, *supra* note 3, at 10.

225. See Flyntz, *supra* note 217.

226. *Id.*

227. See Ayres, *supra* note 219.

228. *Id.* This study was conducted by compiling a report of “the average gender disparities of different retailers” sorted by product type categories. *Id.*

their morals are and shop elsewhere or surrender once and for all to the free market rationale of the Pink Tax.<sup>229</sup>

## V. CONCLUSION

The purpose of this Comment is two-fold: first, to raise awareness of an issue that still seems to be largely lurking in the shadows—eluding exposure of the discrimination it embodies<sup>230</sup>—and second, to steer the conversation surrounding the Pink Tax in a new direction in hopes of sparking new ideas for how to combat the practice.<sup>231</sup> The purpose is not to disparage or discourage legislative efforts, past or pending,<sup>232</sup> nor is the purpose to decry the free market, as an efficient market is almost surely vital to a final resolution of this issue.<sup>233</sup> The Pink Tax is complicated and is deeply woven into today's business practices—any and all attempts to weed it out are noble and indeed worthy of celebration. Still, we must learn from instances in which efforts have fallen short in order to craft a meaningful solution.

A reflection on the last thirty years of the Pink Tax plight leaves us with some insightful observations to carry forward into what is hopefully a new wave of progress on this issue. Perhaps most importantly, a consensus must be reached on what the issue actually is.<sup>234</sup> So long as people continue to trivialize gender-based price discrimination, particularly by mischaracterizing the

---

229. See *supra* notes 15-16, 51 and accompanying text.

230. See *supra* Parts II, III.

231. This is a purpose which hopefully reflects a similar motivating spirit to that of Bridget Crawford in her article. Professor Crawford begins her argument clearly outlining her ultimate goal:

Slogans referring to figurative taxes are less likely to influence law and human behavior, despite their descriptive force in both popular and academic literature as a short-hand for group-based disparities. This Article catalogues and evaluates what makes for effective tax talk, in terms of impact on the law generally as well as day-to-day actions on the ground. With this roadmap, lawyers, policy makers and others will be able [to] make more forceful and precise arguments aimed at reforming the law and changing human behavior.

See Crawford, *supra* note 9 (manuscript at 1).

232. See *supra* Section II.C.1.

233. See *supra* Part III.

234. See *supra* notes 137-41 and accompanying text.

phenomenon, progress will be stunted.<sup>235</sup> Additionally, because the Pink Tax is not a true tax and is particularly difficult to capture in both language and practice, it requires a unique approach which must lean heavily on the spirit of the issue.<sup>236</sup> Finally, as history evinces, a force is missing in our current approach to address this issue: social attention and research on the Pink Tax merely lay the groundwork,<sup>237</sup> legislation alone misses the mark,<sup>238</sup> and consumer power is not enough to close the remaining gaps.<sup>239</sup> These are but three legs of a race that is proving more and more reminiscent of a relay, and progress in each—while still progress—is slow. The ESG movement, which is steadily gaining momentum, holds great potential to be a much needed second wind.<sup>240</sup> The unique flexibility and natural incentives captured by the ESG movement are unlike that of any previous efforts, giving this path a certain edge in motivating change that may prove to be the missing force in the Pink Tax movement.<sup>241</sup>

The combined efforts of each of these legs is sure to be the key to pushing past this wall the Pink Tax movement has hit, but there is still much race to be run even after overcoming this hurdle—as “comfort is the enemy of progress,”<sup>242</sup> we must not rest in the norm, but always challenge it by envisioning something better.

---

235. See *supra* notes 137-41 and accompanying text.

236. See Crawford, *supra* note 9 (manuscript at 1-2).

237. See *supra* notes 24-37 and accompanying text.

238. See *supra* Section IV.A.

239. See *supra* Part III.

240. See *supra* Section IV.B.

241. See *supra* Section IV.B.

242. P.T. Barnum is often credited with this quote.