



ARTICLE

“Not Merely There to Help the Men”: Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action

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Abstract. Why, in a nation thought pervasively committed to “adversarial legalism,” did mass litigation and, in particular, the class action lawsuit not emerge as significant regulatory tools until at least the 1970s? Standard answers point to New Deal faith in bureaucracy or to an Advisory Committee that was not moved to amend Rule 23 of the Federal Rules of Civil Procedure until mounting docket pressures and the desegregation cases of the 1950s and 1960s forced its hand. This Article challenges these accounts by framing the modern class action’s emergence as part of a broader midcentury battle over how to conceptualize collective rights within the emerging New Deal state. Using the untapped archival records of a remarkable lawsuit brought by twenty-nine female factory workers against General Motors in 1938 claiming unequal pay and the heated state- and federal-level legislative campaigns to enact pay equity laws it spurred, this Article presents novel evidence that labor unions killed the earliest efforts to build U.S. antidiscrimination law around the class action. Working against dozens of bills providing for class action authority, damages multipliers, and attorneys’ fees, unions instead pushed the new pay equity laws into an anemic administrative system of regulation because they saw class actions as an existential threat to the New Deal system of labor relations built around collective bargaining.

Recovering this history yields two sets of insights. First, it allows us to imagine alternative pathways in the United States’s continuing struggle to combat workplace discrimination. Indeed, a more potent regulatory response to gender discrimination built around class actions of the modern sort could have fundamentally altered the U.S. industrial order and women’s place in it. Second, the early history of the pay equity movement offers an

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especially clear example of how the tensions between a labor-driven vision of collective rights and one built around adversarial, aggregated litigation of workplace disputes have shaped the evolution of the U.S. regulatory state. That history remains highly relevant today as the U.S. Supreme Court, in a trio of cases asking whether the National Labor Relations Act bars class action waivers in arbitration agreements, must once more reconcile U.S. labor law and the class suit.

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Introduction

Florence St. John spoke proudly of her “ten-year pin” recognizing a decade of service to General Motors (GM) at the vast Olds Motor Works in Lansing, Michigan.¹ Of course, she had some gripes. The work was hard: St. John assembled harmonic balancers, which Carl Dobbins, a foreman in the department where St. John reported each day, considered “one of the heavier operations.”² The women’s lunchroom was in “a very unsanitary condition” because its broken windows allowed birds to come in and roost on the tables.³ But what really upset St. John was the pay situation. Though she toiled on the assembly line alongside men, she earned as much as fifteen or twenty cents an hour less—a substantial hit when the hourly wage of line-level production workers, male or female, was less than a dollar.⁴ Adding insult to injury, St. John’s male coworkers “kidded” her that they “got a bigger check” even as she “broke the men in”—that is, trained newly arrived male employees—on how to assemble balancers.⁵ The final straw came in her tenth year at the plant, when St. John was unceremoniously shunted into a newly created “Women’s Assembling Division” and then, a few months later, laid off entirely despite her seniority over men in her former department who kept their jobs.⁶ Deprived of a paycheck on which she had long depended, St. John did what a modern observer would not find at all surprising: She found a lawyer willing to take her case. Meeting in living rooms around Lansing, she convinced twenty-eight other women who had worked at the Olds Motor Works to join her.⁷ And then she sued.

In retrospect, however, St. John’s lawsuit was not merely surprising; it was extraordinary. For starters, the year was 1938.⁸ When St. John filed suit, General Motors boasted over 260,000 employees and more than \$1 billion in annual sales, easily placing it among the nation’s, and the world’s, largest and most powerful companies.⁹ The lawsuit’s timing also meant that St. John could

1. See Record on Appeal at 117, *St. John v. Gen. Motors Corp. (St. John I)*, 13 N.W.2d 840 (Mich. 1944) (No. 13).

2. See *id.* at 1125.

3. *Id.* at 1508.

4. See *infra* note 173 (collecting testimony showing wage differentials).

5. Record on Appeal, *supra* note 1, at 106, 157, 290.

6. See *id.* at 89, 117, 894, 1413, 1568.

7. *Id.* at 97; see *St. John I*, 13 N.W.2d 840, 840 (Mich. 1944).

8. *St. John I*, 13 N.W.2d at 840.

9. See TWENTY-NINTH ANNUAL REPORT OF GENERAL MOTORS CORPORATION: YEAR ENDED DECEMBER 31, 1937, at 6, 78 (1938), <https://perma.cc/492E-LCWU> (noting sales of \$1.6 billion). Sales of \$1.6 billion in 1937 would, using a standard inflation calculator, be worth more than \$27 billion today. See *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://perma.cc/TNQ5-H7JB> (archived Sept. 22, 2017).

not assert claims under a statute like Title VII of the Civil Rights Act of 1964¹⁰ or even the many state-level job discrimination laws that came before it, beginning in 1945 in New York and New Jersey.¹¹ Nor was the lawsuit a damages class action. Those, too, did not yet exist in anything like their present form. Instead, St. John asked the twenty-eight women to assign their claims to her and then brought a common law damages action hitched to section 556 of the Michigan Penal Code—an unusual law, passed by the Michigan legislature near the end of the Progressive Era in 1919, that made it a criminal misdemeanor to “discriminate in any way in the payment of wages as between sexes.”¹² Most striking of all, St. John’s lawsuit proved uniquely successful: She ultimately won a judgment of \$55,690, or some three-quarters of a million dollars in present-day value.¹³ This almost certainly made it the first significant damages payout in a job discrimination case in the history of U.S.

10. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2015)).

11. See ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972*, at 118 tbl.4.1 (2009) (summarizing state-level enactments); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1079 & n.29 (2011) (same).

12. See *St. John I*, 13 N.W.2d at 840-41 (quoting Michigan Penal Code, No. 328, § 556, 1931 Mich. Pub. Acts 624, 734 (codified as amended at MICH. COMP. LAWS § 750.556 (2017))). The Michigan legislature originally enacted the law in 1919. See Act of May 12, 1919, No. 239, 1919 Mich. Pub. Acts 427. It was reenacted in 1931 as part of the penal code. Michigan Penal Code, 1931 Mich. Pub. Acts at 734. For an explanation of common law actions piggybacking on criminal statutes, see notes 84-85 and accompanying text below. For the full text of section 556 at the time, see note 71 below. No legislative history remains from section 556’s passage, and there is only a very thin archival record. See, e.g., Letter from Richard H. Fletcher, Comm’r of Labor, Mich., to Women in Indus. Serv., U.S. Dep’t of Labor (Sept. 24, 1919) (on file with author).

The primary source materials cited in this Article are drawn primarily from two archives. The first is the George Meany Memorial AFL-CIO Archive at the University of Maryland, College Park, which contains approximately 40 million documents relating to the American Federation of Labor (AFL), the Congress of Industrial Organizations (CIO) and, after their merger in 1955, the AFL-CIO. The second is the National Archives and Records Administration, located in Washington, D.C. and College Park, Maryland, which houses documents and materials created in the course of business conducted by the United States government. Research performed at the National Archives focused on the records of the Department of Labor’s Women’s Bureau, which long served as the main administrative body of the federal government working on pay equity issues. Legislative materials, particularly submitted bills that were not enacted, come mostly from the relevant state archive or law school library located within the state.

13. See Record on Appeal, *supra* note 1, at 1720, 1733 (entering judgment in the amount of \$55,690 in May 1942); see also *St. John v. Gen. Motors Corp. (St. John II)*, 17 N.W.2d 226, 226-27 (Mich. 1945) (affirming the judgment after GM’s second appeal); *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://perma.cc/WV9X-32RD> (archived Sept. 22, 2017) (reporting that \$55,690 in May 1942 would be worth \$838,831.48 in August 2017).

law. It was also likely the single largest such payout until at least the 1970s, when class action lawsuits under Title VII finally got off the ground. Indeed, no similarly successful lawsuits followed, whether in Michigan or elsewhere, in the years immediately after St. John's stunning victory.

Still, St. John's lawsuit is more than a historical curiosity, for it sits at the center of a pair of related puzzles about the postwar evolution of litigation's place in the U.S. regulatory state. Most immediately: Why did states enacting the nation's first job discrimination laws in the years following St. John's successful lawsuit consistently snub private litigation as a regulatory option and instead vest primary enforcement authority in administrative agencies that many worried would be weak and ineffectual? The battle over pay equity that unfolded in the wake of St. John's lawsuit provides an especially pointed example because, as we will see, state legislatures and Congress rejected dozens of bills that—by explicitly providing for class action authority, damages multipliers, and attorneys' fees for prevailing plaintiffs—could have yielded robust private enforcement efforts not unlike present-day employment law.¹⁴ The second and related puzzle sweeps more broadly: Why, in a nation thought pervasively committed to “adversarial legalism,”¹⁵ did aggregated litigation—and, in particular, the class action lawsuit—not emerge as a significant regulatory tool until the 1970s, some three decades after St. John's much-publicized win?

The standard answer to these questions tends to take one of two forms. The first points to New Deal religion and the powerful faith in expert administration that prevailed until at least the 1960s, when concerns about administrative inefficiency and regulatory “capture” eroded bureaucracy's

14. See *infra* Part II.

15. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001) (arguing that the United States has an institutional and cultural predilection for “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation”). *But see* AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 6 (2017) (contending that the U.S. embrace of adversarialism came later than more static theories rooted in political culture or constitutional structure suggest). Of course, Kagan's work on adversarial legalism was hardly limited to judicial proceedings. A substantial portion of his original study, cited above, focused on adversarialism in the context of purely administrative proceedings. However, one could argue that adversarial proceedings in court, before a judge or jury, most fully embody the adversarialism concept. Indeed, the standard institutional contrast to adversarial legalism is the inquisitorial system used in many civil law systems, where a judge, not litigants, largely controls the prosecution of the case. See, e.g., KESSLER, *supra*, at 2-3 (focusing exclusively on the court context in defining and distinguishing the concepts). It is thus entirely apt to ask why, in a nation thought more committed to adversarial legalism than most others, the class action lawsuit did not become a central regulatory tool until relatively recently.

reputation.¹⁶ Until then, most new regulatory authority was vested in agencies, not courts.¹⁷ The other standard answer is that the class action could not emerge until growing docket pressures and the desegregation cases that flowed into federal courts at around the same time moved the Advisory Committee on Civil Rules (Advisory Committee) to replace the original 1938 version of Rule 23 of the Federal Rules of Civil Procedure with the 1966 version.¹⁸ Only once the new Rule 23 unleashed class actions in something like their modern form could they attract the interest of a plaintiffs' bar that was essential to their robust implementation¹⁹ or could courts begin the process of legal acculturation around due process norms that the class action's rise required.²⁰

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16. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 222-25 (1992) (describing the broad shift at the beginning of the twentieth century toward technocratic expertise as the best way to make sound policy); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-52, 1060-67 (1997) (describing the rise of capture theory and its impact on administration as a regulatory tool); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413-21 (2007) (offering a concise overview of New Deal-era faith in administrative expertise); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684 (1975) (noting the historical role of expertise in legitimating administrative discretion). For an iconic contemporaneous statement in support of administrative expertise, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).
17. For a classic contemporaneous account, see LANDIS, *supra* note 16, at 23-42, which offers an extended comparison of the institutional attributes of agencies and courts. See also J.M. Landis, *Business Policy and the Courts*, 27 YALE REV. 235, 237, 241-42 (1937) (arguing for the superiority of agency over court implementation of public policy by contrasting the "calm of scientific inquiry" at expert agencies with the "overheated atmosphere of litigation" in courts). For a modern version of the argument, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 99-100 (2010).
18. See, e.g., David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702-07 (2011); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 602-09 (2013). On the problems with the 1938 version of the rule, see STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 228-37 (1987); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 54-56 (2010); and Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 701-14 (1941).
19. See Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 675 (1979); cf. STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 10-12 (2017) (discussing the relationship between fee-shifting provisions and the plaintiffs' bar).
20. See Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1767 (2017). According to Resnik, the emergence of the modern class action required not only a formal change to Rule 23 in 1966, but also a "transformation of constitutional understandings of what due process permits" to include "a broader
- footnote continued on next page*

This Article argues that the stunning success of St. John’s lawsuit, and the legislative struggles over pay equity laws that followed in its wake, offers a critical but largely neglected laboratory for testing—and challenging—this standard account. On one hand, some of what we learn from excavating St. John’s case and the legislative campaigns that followed echoes the standard explanations. Pay equity, perhaps even more so than the racial integration of U.S. industry, was technically complicated stuff, particularly as a second Taylorist revolution yielded ever more complex job classification systems for setting wages.²¹ Expert agencies, not generalist judges, seemed to many the better place to vest primary decisionmaking authority.²² Similarly, the roller-coaster six-week trial in St. John’s case made clear to all involved that litigation was not without its challenges. Indeed, the legislative campaigns to enact pay equity laws, like the broader drive for fair employment in which they were embedded, kicked off at a liminal moment in the history of U.S. law. As we will see, the rise of the New Deal order from the *Lochner* era’s ruins,²³ and related developments like the new federal and state rules of civil procedure that emerged at the same time, fostered pervasive legal uncertainty and armed defendants like GM with an array of potent defenses that made litigation an especially risky endeavor.²⁴

But St. John’s lawsuit and the legislative struggles over pay equity that followed also offer overwhelming evidence that an entirely different factor powerfully shaped the new pay equity laws and, with it, the evolution of the modern class action. Indeed, more so than any other factor, it was organized

mechanism to bind absentees without their affirmative consent or their participation at the inception of a lawsuit,” which “had been thought a few decades earlier to be impossible.” *Id.* For two doctrinal milestones in that process of acculturation, see *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), which held that a class judgment could have a broadly preclusive effect within the constraints of due process so long as class members received adequate representation; and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 814 (1985), which held that a mailed notice to absent class members advising them of their right to opt out of a class judgment satisfied due process.

21. Taylorism is a shorthand term for the scientific management of industrial processes as a way to optimize performance and efficiency through centralized managerial planning, analysis of production phases, and incentive payments to workers. *See, e.g.*, DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 214-44 (1987); DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* 38-46 (1980). For Taylor’s original statement of principles, see FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911). For more on the complexities of job classification systems, see notes 185-86 and accompanying text below.

22. *See infra* notes 252-55 and accompanying text.

23. *See Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *infra* note 70.

24. *See infra* Part I.B.

labor that dashed the hopes of many within the fledgling women's movement to build an antidiscrimination regime around class action lawsuits. Instead, labor used its political might to push the new pay equity laws into what many saw as an anemic administrative system of regulation.²⁵ Labor did so because it saw in the design of the new pay equity laws a fundamental, and even existential, choice: Would the new regime serve as an administrative adjunct to the New Deal system of labor-management relations built around collective bargaining as the best way to distribute benefits and burdens in the industrial order? Or would it instead provide a judicial end run around, and even a kind of collateral attack upon, that system? Pay equity, in short, was a battle over how best to conceptualize collective rights in the emerging New Deal order. And the class action lost.

Recovering this history yields a number of insights about the ongoing struggle to achieve gender equality in the workplace and about mass litigation's place in the evolution of the postwar U.S. regulatory state. As an initial matter, the *St. John* episode suggests that the midcentury struggle over what form the new pay equity laws would take was a legal and political tragedy of the first order. It is not right to say that unions mercilessly killed early equal pay laws out of their own raw self-interest. Throughout the period, labor adhered to a consistent and affirmative vision of social transformation through class-based collective mobilization, even as its power waned and that vision slipped further out of reach.²⁶ To that extent, the story offered here provides another example of the rich ironies of U.S. efforts to build and maintain a robust and socially inclusive labor movement.²⁷ And yet it remains the case that labor, in its dogged pursuit of its own collectivist vision, helped channel the nation's first major experiment in regulating workplace discrimination into a feeble administrative response that offered little relief to the Florence St. Johns of the world—or, in the case of the drive to create fair employment practices commissions (FEPCs) paralleling the pay equity movement, her black and

25. On the ways in which administrative enforcement of the new pay equity laws would prove anemic, see notes 256-67 and accompanying text below.

26. For a summary of the debate about the causes of labor's decline, see note 450 below.

27. See generally PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008) (exploring the ways in which legal institutions fostered divisions between the labor and civil rights movements); REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* (2015) (same); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 798-800 (1988) (describing the early promise but ultimate failure of midcentury organized labor to build a racially inclusive, class-based workers' movement).

brown counterparts seeking entry to the industrial order.²⁸ Given the general view among modern economists that much gender inequality in the workplace stems from a slow-moving, path-dependent process of labor market segmentation,²⁹ the midcentury struggle to find an effective but politically salable approach to gender-based wage discrimination was a massive missed opportunity. A more potent regulatory response built around aggregated litigation might have fundamentally altered the U.S. industrial order and women's place in it.

Second, the *St. John* episode offers a needed broadening of our histories of the class action. As already noted, the standard explanations for the class action's emergence are mostly narrowly trained on the 1960s, when the Advisory Committee reshaped Rule 23 into something like its present form.³⁰ Even the more sweeping histories of the class action—including Stephen Yeazell's magisterial accounting from medieval times to the present³¹—treat the midcentury period as little more than a footnote between, on the one hand, the efforts by nineteenth and early twentieth century equity courts to develop tools to resolve multiparty actions and, on the other, the 1966 amendments to Rule 23 and full-scale class action wars that soon followed.³² Indeed, the Fair

28. See generally Engstrom, *supra* note 11 (recounting the midcentury drive by civil rights groups to establish state-level FEPCs).

29. For an overview of the debate about the causes and consequences of occupational segregation, see FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* 238-41 (4th ed. 2002). For classic economic accounts of segmentation theory, see PETER B. DOERINGER & MICHAEL J. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 165-66 (1971); and Michael Reich et al., *Dual Labor Markets: A Theory of Labor Market Segmentation*, 63 AM. ECON. REV. 359, 359 (1973).

30. See *supra* notes 18-20 and accompanying text.

31. See, e.g., Stephen C. Yeazell, *Overhearing Part of a Conversation: Shutts as a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 785 (2006) (“[T]he class suit remained an exotic creature of equity jurisprudence until the 1966 revisions of the Federal Rules of Civil Procedure . . .”).

32. The academic literature on class actions is vast. For extended commentary on the origins of the class action in seventeenth, eighteenth, and nineteenth century equity courts, see YEAZELL, *supra* note 18, at 216-20. See also ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 200-01 (1950); Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1316-21 (1932); Kalven & Rosenfield, *supra* note 18, at 695-701; Stephen C. Yeazell, *From Group Litigation to Class Action: Part I; The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 523-35 (1980); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 876 (1977); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 222-25, 234-62 (1990) (reviewing YEAZELL, *supra* note 18). For classic accounts of the emergence of the “class wars” in the asbestos and agent orange contexts during the 1970s and 1980s, see PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987); and John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384-420 (1995). The fiftieth anniversary of the 1966 amendments to Rule 23

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Labor Standards Act (FLSA) of 1938,³³ the first major regulatory regime built around aggregated litigation and the inspiration for the pay equity bills that flooded state legislatures following *St. John's* lawsuit, barely registers.³⁴ But the midcentury period is critical to our understanding of the class action's evolution, for it shows that while the immediate cause of Rule 23's refashioning in 1966 may have been an Advisory Committee worried about docket pressures and desegregation cases, an important precondition of aggregated litigation's rise was the demise of labor's alternative vision of collective workplace rights. This changing ideological backdrop, as the immediate postwar period gave way to the 1960s and 1970s and labor's sway within the New Deal coalition waned, is fundamental to any causal story about litigation's evolution as a regulatory tool.

Finally, as we take the measure of the class action some fifty years after it emerged in its modern form, the *St. John* episode serves as a reminder of what it replaced and the political and legal compromises it embodied. Some of the resulting tensions played out in the 1980s in well-documented courtroom battles over whether Title VII or the National Labor Relations Act (NLRA)³⁵ should have primacy in regulating job discrimination.³⁶ Other doctrinal

has occasioned a new set of historiographic contributions that focus, as does this Article, on roads taken and not taken, but those contributions concentrate on 1966 and the years following. See generally BRIAN FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (forthcoming 2018); Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917 (2017); David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531 (2017); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565 (2017). A final recent line of inquiry uses the emergence of U.S.-style class actions in other countries—among them Australia and numerous European nations—to sift the mix of cultural, economic, and political forces that shape the choice of aggregate litigation over regulatory alternatives. See, e.g., JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 197-218 (2015); John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895 (2017). However, this work is not explicitly historiographic in the sense of identifying hinge moments of development, whether at midcentury or otherwise.

33. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2016)).

34. *But see* Resnik, *supra* note 20, at 1783-87 (devoting a few pages to early FLSA litigation). Otherwise, much of the academic writing on the FLSA is contemporaneous to its passage and early implementation. See generally Joseph V. Lane, Jr., *Is the Fair Labor Standards Act Fairly Construed?*, 13 FORDHAM L. REV. 60 (1944); James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119 (1942-1943); Symposium, *The Wage and Hour Law*, 6 LAW & CONTEMP. PROBS. 321 (1939).

35. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2016)). The NLRA is also known as the Wagner Act. See *infra* note 77 and accompanying text.

36. See, e.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009) (holding that a provision in a collective bargaining agreement (CBA) that clearly requires union members to

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tensions continue to this day. As we shall see, the trial judge's order entering judgment for St. John grappled with evidentiary questions, including how to calculate damages across a disparate plaintiff pool, that are strikingly similar to those encountered in recent cases.³⁷ Even more immediately, the question of how midcentury legislators sought to vindicate the collective rights of workers animates a more recent line of cases, including a trio currently before the U.S. Supreme Court, testing the validity of class action waivers in arbitration agreements.³⁸ To resolve those cases, the Court will have to reconcile the pro-arbitration thrust of the Federal Arbitration Act (FAA)³⁹ with the NLRA's protection of the "concerted activities" of workers.⁴⁰ To that extent, the midcentury relationship between U.S. labor law and the class action remains highly relevant today, some eight decades after St. John filed her lawsuit.

I. *St. John v. General Motors* and Midcentury Litigation

When Florence St. John filed suit in Ingham County Circuit Court in Lansing in early 1938,⁴¹ she may or may not have intended to spark a movement. Few records remain of St. John's personal life or views. But a detailed account of her lawsuit, recorded in several thousand pages of pleadings, papers, and trial transcripts preserved in their entirety as part of

arbitrate claims under the Age Discrimination in Employment Act was enforceable); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (holding that employees who previously submitted their claims to arbitration pursuant to their union's CBA were not barred from bringing minimum-wage claims under FLSA in court); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 350, 352 (1977) (holding that a "bona fide seniority system" established via a CBA was valid despite perpetuating pre-Title VII discrimination). *See generally* FRYMER, *supra* note 27 (tracing the evolution of tensions between federal civil rights statutes and labor law).

37. *See* *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047, 1049 (2016) (holding that plaintiffs could use representative and statistical evidence to calculate damages in an FLSA case in which the employer had failed to maintain adequate records). *Tyson Foods* is merely the latest Supreme Court statement in a doctrinal line stretching back to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), *superseded in part by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251-262). For a discussion of *Anderson*, see note 277 and accompanying text below.

38. *See, e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017). The Court consolidated these three cases and held oral argument on October 2, 2017. *See* Transcript of Oral Argument, *Epic Sys. Corp. v. Lewis*, Nos. 16-285, 16-300 & 16-307 (U.S. Oct. 2, 2017).

39. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2016)).

40. *See* 29 U.S.C. § 157.

41. *See St. John I*, 13 N.W.2d 840, 840 (Mich. 1944).

GM's fruitless appeals to the Michigan Supreme Court, serves two critically important purposes. First, understanding the details of St. John's lawsuit matters because the case was front-page news across the nation and was frequently invoked on the floors of state legislatures and Congress in the legislative struggles over pay equity that followed.⁴² More than any other event, the case opened a policy window and then, in turn, provided the key factual predicates—regarding the dilemmas facing women workers within the gendered structure of industry in the United States and the possibilities and limits of litigation at the time—during the legislative debates in which the case so frequently featured in the years following.⁴³ Second, the extensive trial-level record in the *St. John* litigation offers modern-day observers a rare and detailed glimpse of the unique—and uniquely uncertain—legal and regulatory environment into which the midcentury pay equity movement was born. In both ways, recounting the case's many dramatic twists and turns is essential to understanding the legislative struggles that followed in its wake.

A. Pay Equity Circa 1938

St. John and her twenty-eight assignors were surely not alone in their belief that they suffered from wage discrimination. An impressive stream of reports by the Women's Bureau of the U.S. Department of Labor, established in 1920 but plainly hitting its stride in the 1930s under the sympathetic leadership of Secretary of Labor Frances Perkins,⁴⁴ offered a thorough portrait of the pay equity problem as St. John readied her lawsuit. One such report, issued in 1937 just months before St. John filed her case, offered a meta-analysis of sorts, drawing together a "mass of evidence" from more than a dozen studies across multiple states and concluding that women frequently earned as little as 45% to 60% of what men did both within and across a wide range of industries.⁴⁵ Most

42. See *infra* notes 229-32 and accompanying text.

43. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984) (offering a theory of the conditions under which policy change becomes politically possible).

44. See generally KATHLEEN A. LAUGHLIN, *WOMEN'S WORK AND PUBLIC POLICY: A HISTORY OF THE WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, 1945-1970* (2000) (offering an account of the creation of the Women's Bureau in 1920 but mostly focusing on the period after 1945); SUSAN WARE, *BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL* (1981) (describing a "women's network" during the New Deal that included Frances Perkins and helped boost the influence and reach of administrative bodies like the Department of Labor and the Women's Bureau).

45. See MARY ELIZABETH PIDGEON, *WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN IN THE ECONOMY OF THE UNITED STATES OF AMERICA: A SUMMARY REPORT 50, 56-57* (1937) [hereinafter PIDGEON, *WOMEN IN THE ECONOMY*]. A more specific version is MARY ELIZABETH PIDGEON, *WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NO. 152, DIFFERENCES IN THE EARNINGS OF WOMEN AND MEN 54-57* (1938) [hereinafter PIDGEON, *DIFFERENCES IN EARNINGS*].

remarkable, the report announced, was “that this difference [was] so universal, both in extent and in degree, no matter what the year, the locality, or the type of occupation.”⁴⁶

Statistics reported by the Women’s Bureau and an array of other outlets also captured the misery such wage differentials could cause. Women had poured into workplaces during the early decades of the twentieth century. By 1938, well before “Rosie the Riveter” entered U.S. factories to take the place of war-bound men,⁴⁷ roughly one in four women were already part of the paid workforce, approximately a one-third increase in the participation rate since 1900.⁴⁸ By the time the dust settled on St. John’s lawsuit, women had, as historian of labor feminism Dorothy Cobble put it, “crossed a crucial divide in their relation to paid work.”⁴⁹

Such a large jump in labor force attachment no doubt resulted from multiple causes. Among them were technological advances that made factory labor less physically demanding and smaller families that came from declining birth rates.⁵⁰ But women were not increasingly seeking paid employment merely to make “pin money,”⁵¹ to use a common phrase at the time, or as a “meal-ticket until marriage,”⁵² to use another. Indeed, a number of other factors fueling rising female labor force attachment, including war- and work-related death and disability among men and a slow but steady rise in divorce rates, had

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46. See PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 6.
47. See Megan Garber, *The Many Faces of Rosie the Riveter*, ATLANTIC (Apr. 24, 2015), <https://perma.cc/9ZMN-AKHJ> (tracing the Rosie the Riveter image’s origins to 1943).
48. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 128 ser.D 11-25 (corrected reprinted 1989) (noting that 25.4% of women over fourteen years old participated in the paid labor force by 1940); see also PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 17 (noting an increase in women’s paid workforce participation in the fifty years leading up to the 1930s from 152 per 1000 employed persons to 220 per 1000 employed persons).
49. DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 12 (2004).
50. See *id.* at 114 (“[T]echnological innovations lessened the need for strength in many jobs”); PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 11 (noting the rise of “machine fabrication as a substitute for the older skilled handcrafts”); Z. Clark Dickinson, *Men’s and Women’s Wages in the United States*, 47 INT’L LAB. REV. 693, 698 (1943) (identifying declining birth rates as an aspect of the trend toward greater female employment).
51. See, e.g., *Equal Pay for Equal Work for Women: Hearings on H.R. 4273 and H.R. 4408 Before Subcomm. No. 4 of the H. Comm. on Educ. & Labor*, 80th Cong. 170 (1948) [hereinafter *1948 House Hearings*] (statement of Louise Stitt, Member of Board, National Consumers League) (“When women first entered industry the idea was prevalent that they were working only for ‘pin money.’”). On the term “pin money,” see VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 62 (1994), which explains that the term describes money women earn to supplement their husbands’ incomes or buy nonessential items.
52. Dickinson, *supra* note 50, at 714.

by the eve of St. John's lawsuit left roughly one in eight employed women "solely responsible for the entire support of their families."⁵³ Many more women served as joint breadwinners as families, still digging out from the Great Depression, struggled to make ends meet.⁵⁴ For many women, then, paid work was not a luxury, but rather a matter of subsistence and even survival.⁵⁵

Figure 1

The Olds Motor Works in Lansing, Michigan at Midcentury



Yet the statistical portrait offered in Women's Bureau reports and elsewhere suggests that St. John and her assignors were also somewhat better off than many of their sisters elsewhere within the U.S. industrial order. While the largest chunk of employed women in the 1930s continued to work in domestic and personal service, the roughly 20% of working women who instead joined

53. PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 79. For divorce rates, see ALEXANDER A. PLATERIS, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, DHEW PUB. NO. (HRA) 74-1902, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS: UNITED STATES, 1867-1967, at 9-10, 22 tbl.1 (1973).

54. By 1950, the typical working woman was married. See BUREAU OF THE CENSUS, *supra* note 48, at 133 ser.D 49-62.

55. By 1944-1945, 84% of employed women worked to support themselves as well as others. Marguerite J. Fisher, *Equal-Pay-for-Equal-Work Legislation*, 2 LAB. L.J. 578, 579 (1951). This statistic is drawn from WOMEN'S BUREAU, U.S. DEP'T OF LABOR, MOVEMENT FOR EQUAL PAY LEGISLATION IN THE UNITED STATES 4 (1950).

the industrial workforce overwhelmingly entered what labor economists have long labeled the secondary segment of the labor market.⁵⁶ This meant work in the textile, apparel, food processing, and electrical industries, where wages and benefits were low and employment was often part-time and uncertain.⁵⁷ By contrast, St. John and her assignors were among the lucky minority of women who worked within the “primary” segment of the labor market, where jobs in heavy industries like steel, automobiles, lumber, oil and gas, and construction were comparatively well paid, full-time, and secure.⁵⁸

St. John’s privileged labor market position at the Olds Motor Works brought with it several advantages. First, St. John and her assignors were, at wages of roughly fifty cents an hour,⁵⁹ well compensated compared to, say, female garment workers in the women-dominated “needle trades,” where hourly wages were more on the order of thirty to forty cents.⁶⁰ Higher wages also meant larger potential damages for wage discrimination, which in turn meant bigger contingency fees and, in theory at least, greater access to willing counsel. Second, women in heavy manufacturing had progressive and increasingly powerful institutional vehicles—large industrial unions that were rapidly gaining members, resources, and prestige—in their fight to improve wages and working conditions.⁶¹ Third, St. John’s lawsuit was, according to the

56. PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 49 (noting that about 18% of women worked in “[m]anufacturing and mechanical industries”). For an overview of labor market segmentation theory and its relationship to gender inequity, see note 29 above. For a historical account of labor market segmentation at the time and its relationship to the “sexual division of labor,” see RUTH MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II*, at 4-7 (1987).

57. See PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 50 (noting systemically lower wages in “woman-employing industries” such as textiles, confections, and electrical machinery at the time); *id.* at 38-39 (noting the problems of “part-time employment” and “irregularity of employment” and concluding that “industries that tend to have an especially great seasonal fluctuation in employment also are likely to be the important woman-employers, as for example clothing manufacture and food processing” (capitalization altered)).

58. See *id.* at 50 (showing systemically higher wages in “man-employing industries” such as steel, automobiles, lumber, and construction at the time).

59. See Record on Appeal, *supra* note 1, at 91-92, 386-87.

60. See PIDGEON, *WOMEN IN THE ECONOMY*, *supra* note 45, at 62; *id.* app. A at 127.

61. See *UAW-CIO Women Urge Plans for Full Employment: National Conference Speaks for 300,000*, UNITED AUTOMOBILE WORKER (Detroit), Jan. 1, 1945, at 3, 3 (reporting a speech by Frieda Miller, director of the Women’s Bureau of the U.S. Department of Labor, in which Miller asked women of the United Automobile Workers (UAW) to mobilize and lobby to help women workers who were not as fortunate, particularly women in the “traditionally feminine occupations” where women were “grossly underpaid”).

coinage of the day, either an “equal pay for equal work” case or, at worst, an “intra-plant inequality” case.⁶²

This last fact was critically important. During most of the period for which St. John was seeking to recover damages, she and her assignors worked alongside men within the same department and on the same assembly line and machines, and they performed, at least arguably, the same basic tasks. As traced in more detail below, this eased, though hardly eliminated, evidentiary difficulties at trial.⁶³ The more important point is that St. John could steer well clear of a claim that inter-industry, inter-occupation, or interplant wage disparities violated what would, in the 1970s, travel under the banner of “comparable worth”—that men and women should be compensated equally for work requiring comparable skills, responsibilities, and effort, even where the work performed looks, on its face at least, entirely different.⁶⁴ From a litigator’s perspective, St. John’s case was thus a cleaner shot than, say, a suit by female workers in one factory claiming discrimination relative to male workers in another factory, or a claim by nurses that they should earn the same as electricians based on a judgment about the social value of the work each performs.

St. John was privileged in a final sense: She was plainly better off than the African American men and women who had begun to launch efforts to break down employment barriers in places like Cleveland and Chicago.⁶⁵ As African Americans piled into the industrial North from the rural South in the early decades of the twentieth century, their main problem was wholesale exclusion from large segments of the U.S. industrial order.⁶⁶ St. John’s sudden termination notwithstanding, the problem most women faced in the late 1930s was a less daunting concern about the “terms and conditions” of employment.

62. See *Gen. Elec. Co.*, 28 WAR LAB. REP. 666, 667-69 (1945); Nat’l War Labor Bd., Opinion Letter on Equal Pay for Women: Effect of Executive Order 9328 on WLB’s General Order 16 (June 4, 1943), in 8 WAR LAB. REP. xxviii, xxviii (1943). For a clear summary of these terms, see Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REFORM 7, 48 (1986). Clauss defines “equal pay for equal work” cases as “cases where women worked ‘within the same occupations’ as the men, either interchangeably or as replacements for men,” and “intra-plant inequality” cases as “cases where women did not work within the same or similar jobs or occupations as the men, but where ‘there may be a dispute over [the] correctness of [the job’s] wage rate in relation to rates for other jobs in the same plant.’” *Id.* (alterations in original) (quoting *Gen. Elec. Co.*, 28 WAR LAB. REP. at 668-69).

63. See *infra* Part I.C.1.

64. See generally Clauss, *supra* note 62, at 39-43 (reviewing case law discussing the comparable worth theory); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1732-53 (1986) (same).

65. See Engstrom, *supra* note 11, at 1102-08.

66. See *id.* at 1098-99.

Their challenge, in other words, was how to get a bigger piece of the pie, not how to gain a foothold within U.S. industry and thus eat pie at all.

B. The *St. John* Trial (I): Legal Limbo and the Perils of Litigation

All of this was likely cold comfort to *St. John* as trial opened in June 1941.⁶⁷ After a brief opening statement by plaintiff's counsel, GM devoted virtually the entirety of its much longer opening to an extensive list of reasons why Judge Charles H. Hayden should immediately dismiss the case on purely legal grounds.⁶⁸ As GM's opening statement entered its second hour and devolved into heated counsel colloquies,⁶⁹ two things were clear. First, the trial would be hard-fought. Second, the lawsuit's perch between the *Lochner* era and the New Deal order that was fast replacing it would critically shape the proceedings.⁷⁰ Indeed, in this tumultuous and transitional period in U.S. law, legal uncertainty was all around, driving up the cost, and the risk, of *St. John*'s bold litigation effort.

1. Between *Lochner* and the New Deal

Some of the arguments GM advanced in its opening statement were easily turned aside as vestiges of *Lochner*-era jurisprudence. For instance, GM lodged a standard *Lochnerian* argument that section 556's prohibition on sex-based wage

67. Record on Appeal, *supra* note 1, at 63.

68. Compare *id.* at 64-66 (*St. John*'s opening statement), with *id.* at 66-86 (GM's opening statement).

69. See *id.* at 80-89.

70. The term "*Lochner* era" is derived from the Supreme Court's decision in *Lochner v. New York*, which struck down a state law setting the maximum work hours of bakers. 198 U.S. 45, 57, 64 (1905), *overruled by* *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937). It is used in this Article to represent a set of legal understandings at the turn of the twentieth century regarding property and liberty of contract that yielded a decidedly antiregulatory stance among courts. However, scholars disagree as to whether the key decisions were motivated by a general skepticism about the scope of government police powers under the Constitution or a narrower concern about interest-group transfers through the political process. For a recent summary of the debate, see GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 154 (2017). The term "New Deal order" as used in this Article denotes a period of time between the 1930s and the 1970s when the federal government substantially expanded its coordination of the economy via regulation of industry, management of natural resources, and development of public infrastructure. See generally *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* (Steve Fraser & Gary Gerstle eds., 1989).

discrimination in the “manufacture or production of any article”⁷¹ was “arbitrary and confiscatory” because, the company’s lawyer correctly noted, the law “leaves out all the employers other than manufacturers.”⁷² The law was thus, invoking a classic *Lochner*-era locution, invalid “class legislation.”⁷³ But the Michigan Supreme Court had recently upheld section 556 in response to a separate lawsuit, filed by GM soon after St. John brought hers, seeking to invalidate the law after the Michigan Department of Labor and Industry opened a broad investigation into GM’s labor practices, including its wage structures.⁷⁴ Worse, Judge Hayden had himself heard GM’s preemptive lawsuit and, while St. John’s lawsuit was temporarily removed to a federal district court in Detroit, issued the trial-level decision upholding section 556 against constitutional attack that the Michigan Supreme Court had then affirmed.⁷⁵ With GM citing only decades-old case law in spite of the Michigan Supreme Court’s recent on-point statement and with Judge Hayden displaying growing frustration at being asked to revisit issues he himself had so recently decided, St. John’s counsel could confidently declare that GM was “threshing old straw.”⁷⁶

Other shots in GM’s opening argument looked forward to the emerging New Deal order of things, not backward to the fast-receding *Lochner* days, and help illustrate the other end of the legal limbo that prevailed as legislative campaigns around fair employment got underway in the 1940s. For instance, GM argued that the NLRA (also known as the Wagner Act)⁷⁷—and the

71. See Michigan Penal Code, No. 328, § 556, 1931 Mich. Pub. Acts 624, 734 (codified as amended at MICH. COMP. LAWS § 750.556 (2017)). The full text of section 556 read as follows:

Discrimination as between sexes in payment of wages of males and females engaged in manufacture of any article—Any employer of labor in this state, employing both males and females in the manufacture or production of any article, who shall discriminate in any way in the payment of wages as between sexes or who shall pay any female engaged in the manufacture or production of any article of like value, workmanship and production a less wage, by time or piece work, than is being paid to males similarly employed in such manufacture, production or in any employment formerly performed by males, shall be guilty of a misdemeanor: *Provided, however,* That no female shall be given any task, disproportionate to her strength, nor shall she be employed in any place detrimental to her morals, her health or her potential capacity for motherhood.

Id.

72. Record on Appeal, *supra* note 1, at 67, 69.

73. See, e.g., *Davidow v. Wadsworth Mfg. Co.*, 178 N.W. 776, 777, 780 (Mich. 1920) (invalidating as “class legislation” a wage regulation that applied only to certain types of employers).

74. See *Gen. Motors Corp. v. Read*, 293 N.W. 751, 752-53, 755 (Mich. 1940).

75. See *id.* at 752-53.

76. See Record on Appeal, *supra* note 1, at 80-81; see also *id.* at 74-80 (GM’s argument).

77. See Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2016)). For the most thorough accounting of the Wagner Act’s origins, mandates, and

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collective bargaining among management and employees it prescribed—effectively preempted section 556 because it “took the power to fix wages out of the hands of this Court and every court.”⁷⁸ Alternatively put, the Wagner Act’s protection of the right of employer and employee to make collective bargains regarding terms and conditions of employment, GM’s counsel argued, acted as an estoppel against St. John’s recovery of any differential between what she and others were paid.⁷⁹

Either version of GM’s argument seemed tailor-made to St. John’s situation. After all, St. John had herself served on the Bargaining Committee as a member of the United Automobile Workers (UAW) and so had, GM argued, implicitly agreed to her own rate of pay.⁸⁰ But both were subject to an easy counter: As St. John’s counsel noted, the UAW had become the bargaining representative of St. John and the twenty-eight assignors well after the women had begun work at the Olds Motor Works.⁸¹ Even if Wagner Act preemption constituted a valid defense, it would, as Judge Hayden seemed to agree from the bench, taint only a portion of the time window for which St. John was seeking to recover back pay.⁸² Once again, GM’s assault was swiftly beaten back.

2. *Lochnerian* hangovers and the new civil procedure

A third argument, however, got substantially more traction than the first two and well illustrates a further type of legal uncertainty that prevailed in the 1930s and 1940s as judges struggled to adapt the rules of litigation to the emerging New Deal order. Recall that section 556 made sex-based wage discrimination a *criminal* misdemeanor but did not provide any civil-side enforcement mechanism, let alone a private right of action to those aggrieved.⁸³ At common law, of course, this was not necessarily a problem: Though GM argued vigorously to the contrary, Michigan courts, as in most states, had long entertained common law damages actions piggybacking on purely criminal statutes so long as the statutes in question imposed a duty for the “especial benefit” of individuals rather than “merely for the benefit of the

purposes, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

78. Record on Appeal, *supra* note 1, at 77.

79. *See id.* at 1431, 1692-93.

80. *See id.* at 127-28.

81. *See id.* at 84, 1693, 1723.

82. *See id.* at 84-85 (conceding that “[t]his court is not a wage fixing body” but then appearing to credit the argument of St. John’s counsel that her claims “go way back of the Wagner Act”).

83. *See supra* note 71 (reproducing section 556’s full text).

public.”⁸⁴ Because the law was “obviously intended” for women’s “benefit or protection,” as Judge Hayden would later find in his decision entering judgment for St. John, section 556 plainly supported St. John’s damages action.⁸⁵

But there was a wrinkle: Under Michigan law at the time, section 556’s imposition of a criminal sanction opened up the possibility that GM could invoke its right against self-incrimination under the Michigan Constitution—similar to the right criminal defendants enjoy under the Fifth Amendment to the United States Constitution—to block even purely civil discovery of company pay records.⁸⁶ Importantly, Michigan Supreme Court case law seemed to permit GM to invoke this right not just against disclosure of documents by the company, as a litigant-entity, but also against disclosure of documents by any of its employees with custodial access to them, even if the employees were not themselves in any legal peril.⁸⁷

84. *See, e.g., Bolden v. Grand Rapids Operating Corp.*, 214 N.W. 241, 243 (Mich. 1927) (rejecting the defendant’s claim that the Michigan Civil Rights Act was a criminal statute that did “not give rise to an action for damages” because the plaintiffs “may claim that [the statutory duty] is a duty imposed wholly or in part for their especial benefit” (quoting *Taylor v. L.S. & M.S.R. Co.*, 7 N.W. 728, 729 (Mich. 1881))); *cf. Johnston v. Cornelius*, 166 N.W. 983, 984 (Mich. 1918) (holding that a widow could not bring a private suit under a criminal statute, though her husband was killed because a driver violated the statute, because the plaintiff did “not belong to the class for whose protection the law was passed”).

85. *See Record on Appeal, supra* note 1, at 1634. As with its “class legislation” argument, GM was not without legal authority. Earlier, *Lochner*-era decisions had held that a statute did not impliedly provide a private right of action if it “adds greatly to common law liabilities,” *see* Brief for General Motors Corp., a Delaware Corp., Defendant and Appellant at 137, *St. John I*, 13 N.W.2d 840 (Mich. 1944) (No. 13) [hereinafter GM Brief], thus creating a presumption that legislative action would hew closely to common law doctrine and not act in derogation of it.

86. *See Record on Appeal, supra* note 1, at 45. Then, as now, the Michigan Constitution stated: “No person shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law.” MICH. CONST. of 1908, art. II, § 16 (then); MICH. CONST. art. I, § 17 (now); *see also* U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

87. The law was clearly in a state of flux. Indeed, GM’s counsel noted that “Michigan is one of the states taking a liberal construction and includes corporations under its protective wing.” *Record on Appeal, supra* note 1, at 281. The leading case at the time, only fifteen years old, showed the challenges of this broad right against self-incrimination. There, the court considered, but ultimately decided against, dismissing a nuisance lawsuit rather than allowing discovery that would implicate a corporate defendant’s Fifth Amendment right. *See People ex rel. Moll v. Danziger*, 213 N.W. 448, 448-49, 452 (Mich. 1927). Older decisions by intermediate appellate courts had likewise authorized corporations to invoke the self-incrimination shield to block discovery requests in civil cases. *See, e.g., People v. W. Mfrs. Mut. Ins. Co.*, 40 Ill. App. 428, 429 (1891). Federal law was also in flux at the time. Indeed, while the Supreme Court in *Hale v. Henkel* denied Fifth Amendment protection for corporations and their papers, it

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The potency of such an argument had become clear even before GM's opening statement. In a terse order entered two weeks before the trial began, Judge Hayden found that the state constitution's self-incrimination clause "applies to corporations as well as natural persons."⁸⁸ On that basis, he denied St. John's motion seeking production of "[a]ll pay checks and/or bonus checks" of the twenty-nine women and a comparison group of male workers.⁸⁹ Denied the benefit of any discovery at all, St. John's counsel continued to press the issue as trial approached, serving a subpoena duces tecum on a GM paymaster demanding that he furnish those same documents on the first day of trial.⁹⁰ But when Judge Hayden made clear during GM's opening statement his intention to stand by his earlier discovery ruling,⁹¹ St. John's challenge in putting on her case came into tight, and dispiriting, focus. Even as GM's counsel announced that "a carload" of responsive documents sat just outside the courtroom, their use during trial would remain, as Judge Hayden put it from the bench, "defendant's privilege."⁹²

With no paper discovery to rely on, St. John's counsel struggled, as an initial set of witnesses took the stand, to establish the most basic of facts necessary to make out her case: that there was a sex-based wage differential at the Olds Motor Works at all. Some of these efforts were admirably creative. St. John herself testified that she had firsthand knowledge of men's higher earnings as a result of a lottery-like "check pool" game she and coworkers played on paydays in which each anted up a quarter and then took home the "jack-pot" if the serial numbers on his or her paycheck, once distributed by the paymaster, made up the best poker hand.⁹³ Because all participants in the game were permitted to verify the winner's serial number, St. John could credibly recall seeing that men's checks were consistently larger than hers, including

recognized a corporate Fourth Amendment right against unreasonable search and seizure. 201 U.S. 43, 75-76 (1906). For perspective on conceptions of privacy under the Fourth and Fifth Amendments during the second half of the nineteenth century and the first part of the twentieth, see Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 *STUD. AM. POL. DEV.* 61, 83-85 (2002).

88. See Record on Appeal, *supra* note 1, at 1718.

89. See *id.* at 38-42. For the initial order, see *id.* at 48-49.

90. See *id.* at 55-56. A subpoena duces tecum is a court summons ordering the recipient to appear at a hearing or trial and produce documents or other tangible evidence. See *Subpoena Duces Tecum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

91. See Record on Appeal, *supra* note 1, at 88.

92. *Id.*; see also *id.* (noting that a company official is prepared to testify and that "[h]e is in charge of the records and we have a carload outside"); *id.* at 271 (describing "clock cards, earnings records, and canceled pay checks").

93. *Id.* at 113-14, 511. As St. John explained to the court, ones in the serial number were treated as aces, twos as deuces, and so on. *Id.* at 114.

men who worked the same machines she did.⁹⁴ Similarly, Betty McLarty, an assignor who logged seven years in the sheet metal department with St. John, testified on the stand that her check was consistently smaller than that of her brother-in-law, with whom she commuted to work at the Olds Motor Works each day, thus ensuring that each paycheck's total was based on identical hours worked and that any difference in amount reflected a wage differential.⁹⁵ But as creative as these efforts were, a legal observer could have easily concluded that St. John might not be able to meet her burden in establishing any wage differential, let alone that such a differential was, as section 556 required, the result of sex. Indeed, it seemed as though St. John might prove vulnerable to judgment as a matter of law at the conclusion of her case, thus saving GM the trouble of putting on any defense at all.

In the end, Judge Hayden's initial ruling barring any documentary discovery would give way. The breakthrough came when GM's counsel badly overplayed his hand as St. John's counsel called women to the stand who had kept diaries recording their hours and wages while in GM's employ. Not content to cross-examine the women on obvious gaps in their diaries,⁹⁶ GM's counsel instead took to conducting cross-examination by reference to notes and compilations that, though formally protected from disclosure as attorney work product, were plainly constructed from the cache of payroll records sitting just outside the courtroom.⁹⁷ The trial proceedings thus quickly took on a maddening "gotcha" quality as GM's counsel, candidly informing the court he was "laying a foundation for impeaching" the women, asked them impossibly detailed questions about their hours and wages during different periods of employment.⁹⁸ With the proceedings degenerating around him, Judge Hayden

94. *Id.* at 114.

95. *Id.* at 382, 387.

96. *See id.* at 307; *see also id.* at 352 (female diarist conceding that only "[m]ost of them is down there").

97. *See id.* at 260-63.

98. *See id.* at 261-62. As a concrete example, GM's counsel repeatedly pressed St. John for specific recollections of time periods when she worked or did not work due to illness. In one exchange, he asked her about February 1933, and St. John responded that she was "taken sick" around the first of the month. *Id.* at 125. Defense counsel, clearly in possession of records suggesting otherwise, quickly asked, "It wasn't before February?" *See id.* at 125-26. As another example, GM's counsel elicited testimony that the witness and a fellow worker "came to work at the same time in the morning and left at the same time in the evening." *Id.* at 260. He then engaged in the following line of inquiry:

Q. If I tell you that your clock card shows that you punched out at 6 o'clock on the 24th day of July, 1933, would that be correct?

A. Yes . . .

Q. And if the clock card of Mrs. Ives showed she punched out at 5:55 would that be correct?

A. Yes . . .

Q. If I tell you that your comparative day's work and the clock card of Mrs. Ives showed that you worked half an hour more that day than she did, would that be true?

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announced he would consider anew the matter of St. John's trial subpoena.⁹⁹ Two days later, after noting that his study of federal cases had found "that the tendency has been more and more to permit introduction of testimony and of records under similar situations," Judge Hayden reversed course on his earlier order and granted St. John's motion for discovery.¹⁰⁰

Yet even as GM's "carload" of documents rolled into the courtroom and rescued St. John's case, a seasoned courtroom observer would have seen in Judge Hayden's initial refusal to allow discovery a type of challenge, and a source of litigation risk, that went well beyond self-incrimination rights. Indeed, as St. John's lawsuit gave way to legislative campaigns to enact pay equity laws in the 1940s, companies like GM benefited from a kind of *Lochnerian* hangover in defending against claims brought under New Deal regulatory mandates, as skeptical judges raised procedural barriers that were plainly intended to delay, even if they could not halt, the advancing New Deal regulatory state.

This hangover effect is perhaps easiest to see on the administrative side of things, where judges, bristling at the wide discretion enjoyed by administrative agencies that were as of yet unconstrained by federal or state administrative procedure acts, regularly quashed agency subpoenas that would easily pass muster today or found due process violations in agency actions that are now commonplace.¹⁰¹ But the hangover was also present on the civil litigation side

Id. at 262.

99. *See id.* at 283-85, 541.

100. *Id.* at 560-61, 564-65. Arguably, the "tendency" Judge Hayden identified from the bench was already the rule. In *Hale v. Henkel*, the Supreme Court had held: "The [Fifth] Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation." 201 U.S. 43, 69-70 (1906); *see also* *Wilson v. United States*, 221 U.S. 361, 385 (1911) (holding that a custodian of corporate papers "could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize").

101. The apogee of the trend came in *Jones v. SEC*, 298 U.S. 1 (1936), in which the Court refused to enforce a Securities and Exchange Commission (SEC) subpoena after a securities issuer withdrew a suspicious registration statement, reasoning that to permit the SEC to enforce the subpoena would allow the agency to "become[] an autocracy," *id.* at 12, 23-24. *See also* Katherine Scherb, Comment, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?*, 1996 WIS. L. REV. 1075, 1079 ("Prior to the 1940s, court decisions on the subpoena power of administrative agencies generally interpreted the Fourth and Fifth Amendments broadly, thereby favoring substantial protection for the privacy of corporate and individual records at the expense of agencies' investigatory effectiveness."). The trend away from the obstructionist line of *Jones* and related cases began with *Shapiro v. United States*, 335 U.S. 1 (1948), which some see as the product of a wartime environment that placed agencies in a fundamentally different relationship with corporations and individuals and so free to use subpoenas to amass "big data" in conducting civil and

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of things, particularly when coupled with the heavy deference appellate judges typically granted trial courts under the new federal and state rules of civil procedure promulgated during the 1930s.¹⁰² For instance, many trial judges chafed at liberalized pretrial discovery rules¹⁰³ and were even known to perform document-by-document in camera review of all requested discovery for relevance even before defendants lodged any objections of their own¹⁰⁴—a

criminal enforcement efforts. See Mariano-Florentino Cuéllar, Foreword, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1405-08 (2014).

102. See *Bartenbach v. Smith*, 256 N.W. 584, 586 (Mich. 1934) (“We might add that the rule is still in an experimental stage and its operation must be left to the discretion of the trial judges, so that its advantages and benefits, as experienced by other states, may be fully realized, and the evils, if any, be eliminated.”); see also *Willard v. Gaston*, 53 N.W.2d 332, 335 (Mich. 1952) (noting that under Rule 40 of the Michigan Court Rules, “the granting of discovery is discretionary with the court,” but reversing the trial court’s denial of discovery); *Hallett v. Mich. Consol. Gas Co.*, 299 N.W. 723, 726 (Mich. 1941) (“The question as to whether any certain written report or communication is admissible in evidence must primarily be left to the trial court.”). Discretion to permit depositions under the new version of the Michigan Court Rules was even greater. See MICH. CT. R. 41, § 1 (1933) (repealed 1945) (providing that a court “may, in its discretion, in any civil action therein pending at any time before trial, authorize and order the taking of the deposition of the opposite party or parties”); see also *Magel v. Kulczynski*, 267 N.W. 872, 873 (Mich. 1936) (“By the express terms of the rule governing this practice the trial court may, in its discretion, grant or deny the application to take the deposition of an opposite party.” (emphasis added)). For discussion of the federal rules, see note 103 below.
103. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 735 (1998) (cataloging examples of judges limiting the scope of new discovery procedures by prohibiting cumulative use, limiting interrogatories, and “reviv[ing] the old limitation about inquiring only to build one’s own case but not to discover facts that supported the case of one’s opponent”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 980 (1987) (noting, among other examples, public criticism by Judge Edward Finch of the New York Court of Appeals that liberalized discovery provisions were likely to increase “speculative litigation” (quoting Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 809 (1936))); *id.* at 984 (noting trial courts’ use of local rules to limit “the wide-open nature” of discovery).
104. A standard example is *United States v. Aluminum Co. of America*, 26 F. Supp. 711 (S.D.N.Y. 1939), a civil action brought by the United States in which Judge Caffey refused to permit the government to see any documents produced in response to the government’s trial subpoena until after he had personally screened them for relevance, *id.* at 712-13. See also *Capital Co. v. Fox*, 85 F.2d 97, 100 (2d Cir. 1936) (“It must be remembered, however, that the subpoenas merely required the physical production of the documents in court; the extent of their inspection will be for the judge, like the scope of the oral examination.”); *cf.* *Banks v. Conn. Ry. & Lighting Co.*, 64 A. 14, 15 (Conn. 1906) (“The future of documents after they have, pursuant to an order of production, passed into the control of the court is for its determination, and is a matter quite independent of the act of production which has been completed.”). On the general

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practice that stands in stark contrast to the relatively unfettered right to inspection, including of inadmissible documents that might plausibly lead to the discovery of admissible ones, that modern litigants enjoy.¹⁰⁵

Judges also pushed back against liberalized discovery rules by using their discretion under the new rules to deny plaintiffs pretrial access to defendants' documents by finding that such access was unnecessary to trial preparation.¹⁰⁶ Thus, the spectacle of a "carload" of documents being wheeled into Judge Hayden's courtroom midtrial was surely still high drama, particularly in a less litigious time like the 1940s.¹⁰⁷ But it was also not uncommon in antitrust and securities cases at midcentury for a plaintiff to have to wait until the first day of trial to get her first look at documentary evidence that might make or break her case.¹⁰⁸ As a result, plaintiffs like St. John who were denied pretrial discovery might not be able to form even a rough judgment of their prospects of winning at trial until *after* trial proceedings were in full swing—and crucially, without first expending substantial resources on full-fledged trial and witness preparation.

Of course, it would be easy to exaggerate the degree to which any of these developments shaped regulatory choices as state legislatures considered pay

practice, see IRVING GOLDSTEIN, TRIAL TECHNIQUE § 189(8) (1935); Note, *Subpoenaed Documents in Federal Criminal Cases*, 51 YALE L.J. 687, 689 (1942).

105. See FED. R. CIV. P. 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable.").
106. See, e.g., *Spelman v. Addison*, 2 N.W.2d 883, 884 (Mich. 1942) (refusing pretrial discovery); *Gemsa v. Dorner*, 239 N.W. 332, 332-33 (Mich. 1931) (same). *But see Willard*, 53 N.W.2d at 334-35 (reversing the trial court's refusal to grant pretrial discovery). See generally Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 738-40 (1939) (reviewing judicial practices regarding pretrial discovery).
107. See Marc Galanter, Essay, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 285, 286 fig.1 (2002) (reviewing empirical evidence and describing the period from 1930 to 1960 as "the 'trough' of American litigation" (quoting Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 581)); cf. MOLLY SELVIN & PATRICIA A. EBENER, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 32, 34 fig.2.4 (1984) (reporting per capita filing rates in Los Angeles County over the period from 1880 to 1980 and finding a pronounced decline between roughly 1925 and 1945). For a contemporary view, see Lester G. Seacat, *The Problem of Decreasing Litigation*, 8 U. KAN. CITY L. REV. 135 (1940).
108. See Philip Marcus, *The Big Antitrust Case in the Trial Courts*, 37 IND. L.J. 51, 60 (1961) ("The Antitrust Division of the Department of Justice and private antitrust plaintiffs are often seriously hampered by not having subpoena or discovery powers prior to the filing of a suit."); see also Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 117 (1949) ("Prior to the adoption of the Federal Rules of Civil Procedure in 1938 pre-trial discovery was comparatively rare in the federal courts. . . . Lawyers often proceeded to trial with only the slightest knowledge of their opponent's case.").

equity bills in the years after St. John's stunning victory. After all, the *Lochnerian* hangover demonstrated by Judge Hayden's initial discovery ruling did not pervade all aspects of civil procedure, least of all in Michigan, where trial courts were very much in the vanguard in developing modern pretrial procedures.¹⁰⁹ Yet the *St. John* trial's opening act, and the scuffle over discovery in particular, captures an important truth: The pervasive legal uncertainty—combined with the heavy deference appellate judges were affording trial judges—as the U.S. legal system moved haltingly into a new era of civil procedure should have given pause to legislators considering creating a court- or litigation-centered approach to regulating wage discrimination.¹¹⁰

3. The challenge of finding plaintiffs' counsel

The trial proceedings unfolding in Judge Hayden's courtroom help to illustrate a final broad challenge facing women like St. John as the *Lochner* era receded from view and the New Deal order rose in its place: finding lawyers willing to litigate cases.

Part of the challenge was the brute cost of litigation of the sort playing out in Judge Hayden's courtroom. During six weeks of trial proceedings, St. John and GM would call some seventy witnesses in total and generate a 2000-plus page trial record.¹¹¹ Costs alone—a category that excludes what are typically much higher attorneys' fees—were ultimately assessed at \$463.45, or some \$7000 in present-day terms, with fact witness fees adding another \$513.95.¹¹² This was real money for women like St. John. But it was also a significant sum for Lansing lawyers, who, according to bar publications at the time, made as little as \$3 to \$5 per hour and typically enjoyed net annual incomes of \$1000 to \$4000.¹¹³ Even lawyers operating on a contingency fee basis—the same bar

109. Some accounts have it that the pretrial conference was first used in 1929 in Wayne County Circuit Court and then “rapidly gained favor” in Michigan and beyond until the Federal Rules of Civil Procedure formally authorized federal judges to use it. *See, e.g.,* Clarence L. Kincaid, *A Judge's Handbook of Pre-trial Procedure*, 17 F.R.D. 437, 440-41 (1955).

110. *See* Note, *Scope of Pre-trial Discovery Under the New Federal Rules*, 50 YALE L.J. 708, 709 (1941) (noting a “mass of conflicting opinions on the present scope of discovery”); *see also* William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1133 (1951) (noting complaints “[t]hat non-reviewable rulings on discovery are not uniform among courts, or among different judges on the same court” and “that even the same judge at different times fails to give consistent rulings”).

111. Record on Appeal, *supra* note 1, at ii-xvi (listing witnesses).

112. *Id.* at 1650, 1707; *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://perma.cc/XN2K-824B> (archived Sept. 23, 2017) (reporting that \$463.45 when costs were assessed in July 1942 would be worth \$6938.16 in August 2017).

113. *See* David Morris, *Survey of Conditions of Practice of the Legal Profession in Michigan*, 20 MICH. ST. B.J. 638, 659 (1941).

publications put the standard such fee in a case that went to trial in Lansing at one-third¹¹⁴—could ill afford to lose more than a few cases in a row and still keep the lights on back at the office, even after an outsize \$56,000 judgment like St. John ultimately won.¹¹⁵

But the high cost of litigation was surely exacerbated by the pervasive legal risk posed by a legal and regulatory system in transition. As was well understood even then, policymakers who wish to deploy private litigation as a regulatory tool must not just induce lawyers to accept, and thus invest in, individual cases. Rather, robust implementation also typically requires private investment in enforcement infrastructure, including expertise in the legal area and, ideally, a firm-level architecture for identifying and attracting clients.¹¹⁶ The legal uncertainty demonstrated by GM’s wide-open menu of arguments made that investment less likely.

The challenge was particularly acute because St. John—and the legislators who considered equal pay laws in the years following her lawsuit—could not rely on anything like the plaintiffs’ bar that exists today. This may have been due in part to the advent of worker’s compensation schemes in the 1920s, which some have argued stymied the growth of the personal injury bar that had developed around the industrial accident crisis at the turn of the century.¹¹⁷ But there were also vastly fewer lawyers per capita than there are now.¹¹⁸ Indeed, even an industrial enclave like Lansing could only support

114. *Id.* (describing contingent fees as “(settled): 25%, (trial): 33 1/3%”).

115. The historical record provides scattered glimpses of other litigation around the time of St. John’s lawsuit, but always on a much smaller scale. See *Michigan Court Orders Equal Pay for Women*, 28 EQUAL RTS. 79, 79 (1942) (referring to an “out of court settlement” totaling \$3250 in March 1941 on behalf of eleven women employees of the Universal Cooler company).

116. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1323 (2012).

117. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41-51 (1976) (noting the rise of the personal injury bar, composed in substantial part of foreign-born lawyers who were excluded from the elite precincts of the profession). Some, of course, have suggested just the opposite: that the advent of worker’s compensation, though it largely eliminated liability for workplace accidents, may have counterintuitively spurred, rather than stymied, the growth of the plaintiffs’ bar. See Nora Freeman Engstrom, *The Plaintiffs’ Bar: Where It’s Been, Where It’s Going*, Address Before the Inner Circle of Advocates (Aug. 2014) (on file with author). After all, the American Association for Justice was, before its more familiar guise as the American Trial Lawyers Association, the National Association of Claimants’ Compensation Attorneys. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 196 (2004); *Mission & History*, AM. ASS’N FOR JUST., <https://perma.cc/YGB6-EX25> (archived Sept. 24, 2017).

118. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 457 (2002) (noting the legal profession’s growth from 221,605 lawyers in 1951 to a projected million-plus by the end of the twentieth century).

200 total lawyers, according to bar publications at the time, and most of these ran generalist practices dominated by probate, divorce, and personal injury cases.¹¹⁹

St. John's lawyers, Martin Pierce and Joseph Planck of the Lansing law firm Pierce, Planck & Ramsey,¹²⁰ perfectly embodied the lack of a specialized plaintiffs' bar. Indeed, there is no indication that Pierce and Planck were plaintiffs' lawyers at all, let alone specialists in labor or employment law.¹²¹ Rather, their representations—at least the ones that generated published (and mostly appellate) opinions in Michigan in the years before and after St. John's lawsuit—suggest a far more pedestrian and apolitical set of disputes: a defective refrigerator,¹²² a restaurant sale gone bad,¹²³ a corporate dissolution,¹²⁴ divorces,¹²⁵ and real estate disputes.¹²⁶ The firm's decision to take St. John's case was perhaps all the more daring because Lansing, in addition to being the state capital, was also a company town.¹²⁷ This point could not possibly have been lost on Pierce and Planck, who filed the lawsuit against GM from their downtown offices in the Olds Tower Building,¹²⁸ named for Ransom Eli Olds, a founding father of the U.S. auto industry and owner of the Olds Motor

119. See Morris, *supra* note 113, at 659 (listing the most common areas of practice as “personal injuries, domestic relations, collections and probate practice”).

120. Record on Appeal, *supra* note 1, at 25.

121. Planck, in fact, appears to have been a former county prosecutor. See, e.g., *People v. Absher*, 214 N.W. 954, 954 (Mich. 1927) (noting Planck's role as an assistant prosecuting attorney in Lansing).

122. See *Gates Rubber Co. v. Kold-Hold Mfg. Co.*, 41 N.W.2d 324, 324 (Mich. 1950).

123. See *Mitchell-Morris & Co. v. Samaras*, 38 N.W.2d 904, 904 (Mich. 1949).

124. See *In re Newbrough*, 236 N.W. 233, 234 (Mich. 1931).

125. See, e.g., *Kuhfal v. Kuhfal*, 27 N.W.2d 512, 512 (Mich. 1947).

126. See *Mayes v. Cent. Tr. Co.*, 279 N.W. 923, 923 (Mich. 1938). The only traces in the historical record of what today might be called a “cause lawyer” orientation came in a 1942 case before the Michigan Supreme Court in which the firm represented a physician convicted of “manslaughter by abortion,” see *People v. Bradfield*, 1 N.W.2d 550, 551 (Mich. 1942), and in Pierce's representation of a man who later appeared as a witness in McCarthyist hearings before the House Committee on Un-American Activities in 1954 on communist activity in Michigan, see *Investigation of Communist Activities in the State of Michigan—Part 7 (Lansing): Hearings Before the H. Comm. on Un-American Activities*, 83d Cong. 5448 (1954) (statement of Richard Fox). But these are more than matched by cases in which the firm represented men in divorce proceedings, including a case involving allegations that its male client committed acts of “extreme cruelty” against his wife. See *Heckathorn v. Heckathorn*, 280 N.W. 79, 80 (Mich. 1938).

127. In the decades following the founding of the Olds Motor Vehicle Company in 1897, Lansing grew into a major U.S. industrial center for the manufacturing of automobiles and parts. See, e.g., *Lansing's History*, LANSING, <https://perma.cc/H2CQ-BAM7> (archived Sept. 24, 2017) (noting Lansing's leading role as a producer of automobiles).

128. See Record on Appeal, *supra* note 1, at 25.

Works before GM acquired it in 1908.¹²⁹ In the end, the fact that Pierce and Planck agreed to take St. John's case in the first place is nearly as surprising as the stunning success the lawyers enjoyed in the courtroom.

C. The *St. John* Trial (II): Pay Equity's Complexities and Judicial Competence

Had GM said nothing more in its opening statement at trial in Judge Hayden's courtroom, then St. John could have been confident, particularly once Judge Hayden's order allowed the payroll records into evidence, that she would be able to put on a competent and perhaps even a winning case. After all, those records mostly confirmed substantial wage differentials between male and female workers at the Olds Motor Works.¹³⁰ But GM's counsel did not rest there. The remainder of GM's opening sketched a final argument, and the core of its substantive defense: St. John and the twenty-eight assignor women were not, as section 556 required, "similarly employed" to men earning higher wages.¹³¹ As GM laid out this last leg of its case—and as the clean legalisms of "class legislation," Wagner Act preemption, and rights against self-incrimination gave way to grimy descriptions of rattlers, skids, gons, scoop pans, baffles, dies, presses, and stationary bucks¹³²—St. John and her counsel were confronted with yet another difficult challenge. Indeed, rebutting GM's argument and making out their affirmative case would require them to guide a generalist court through a dense thicket of testimony on midcentury industrial manufacturing processes as performed by twenty-nine different women sprinkled across three departments at the Olds Motor Works. In turn, this raised obvious questions of institutional competency—and whether Judge Hayden, a generalist, common law judge accustomed to a diet of bilateral tort, contract, and property disputes, was up to the task at all.

1. The puzzle of "similarly employed" and "actual" versus "legal" capacity

GM's argument from section 556's "similarly employed" provision was two-pronged. The first was a predictable line of attack that would become a staple of the pay equity debate in the decades to come: Women workers were less valuable than men on account of differences in strength, aptitude,

129. See *Ransom E. Olds*, R.E. OLDS FOUND., <https://perma.cc/X4R8-LSSG> (archived Sept. 24, 2017).

130. See *infra* note 173.

131. See Record on Appeal, *supra* note 1, at 72-74; see also *supra* note 71 (providing the full text of section 556).

132. See, e.g., Record on Appeal, *supra* note 1, at 90, 129, 303, 973, 1044, 1053, 1161.

experience, and reliability.¹³³ These differences, GM asserted, made men more versatile, permitting their transfer in and out of a wider array of positions.¹³⁴ Versatility also paid dividends *within* positions. Men, for instance, did not require assistance with “setup” or “carry off” of heavy “stock” materials used in the production process or transport of finished products away from the assembly line.¹³⁵ From there, GM’s counsel quickly worked up to an appealingly quantitative conclusion: Men were paid more than women at the Olds Motor Works because they had a lower “net unit cost” of production—meaning it cost GM less to manufacture an article using male employees than using female employees.¹³⁶

The second prong of GM’s defense was less obvious and, as with the company’s claim that the Wagner Act estopped St. John from contesting wages set via collective bargaining, creatively leveraged the advancing New Deal regulatory state. GM argued that any gender-based pay differential was “deducible” from a raft of paternalistic state laws placing restrictions on women’s employment and requiring employers to “furnish” female workers with “comfortable conveniences” that increased the expense of employing female workers.¹³⁷ On this view, the “unit cost” differential, and thus the pay differential, between male and female workers could not be ascribed to invidious discrimination or even sex-based differences in *actual* productive capacity. Rather, those differences resulted from, as GM would later put it in its brief before the Michigan Supreme Court, “the *legal* capacity of the two sexes.”¹³⁸

133. As GM put it later in its brief before the Michigan Supreme Court, men’s “adaptability to factory work, ability, experience, and strength” added up to a lower net unit cost of articles manufactured by men and a greater marginal product on the part of male workers—that is, men were “more efficient and more profitable.” GM Brief, *supra* note 85, at 94. For a contemporaneous invocation of the view that women’s labor was less valuable, see MILKMAN, *supra* note 56, at 80-81, which notes GE’s statement in a case before the National War Labor Board (NWLB) that “women are worth less for purposes of factory employment than men” (quoting Gen. Elec. Co., 28 WAR LAB. REP. 666, 686 (1945)). For a more modern case, see *Marshall v. St. John Valley Sec. Home*, 560 F.2d 12, 16 (1st Cir. 1977).

134. See Record on Appeal, *supra* note 1, at 440; GM Brief, *supra* note 85, at 60-62 (noting that men regularly cycled through and transferred in and out of departments and divisions, thus performing a “wider range of work”); Reply Brief for General Motors Corp., a Delaware Corp., Defendant and Appellant at 33, *St. John I*, 13 N.W.2d 840 (Mich. 1944) (No. 13) [hereinafter GM Reply Brief].

135. Record on Appeal, *supra* note 1, at 1271. For an example of a reference to “setup” and “carry-off” work, see GM Brief, *supra* note 85, at 131.

136. The unit cost argument was the cornerstone of GM’s brief before the Michigan Supreme Court. See GM Brief, *supra* note 85, at 94-95, 131-32; *supra* note 133.

137. See Record on Appeal, *supra* note 1, at 2, 14, 72-74, 78.

138. GM Brief, *supra* note 85, at 95 (emphasis added).

GM did not have to look far to find fodder for this second prong of its argument. Section 556 was itself a case in point, embodying all the tensions and contradictions in gender norms at the time. The statute contained muscular equality language, subjecting to liability any employer “who shall discriminate in any way in the payment of wages as between sexes.”¹³⁹ But Michigan legislators then appended a list of paternalistic qualifications that would draw quick constitutional invalidation today: “*Provided, however,* That no female shall be given any task, disproportionate to her strength, nor shall she be employed in any place detrimental to her morals, her health or her potential capacity for motherhood.”¹⁴⁰

Section 556, however, hardly exhausted Michigan law’s paternalisms. Like many states, Michigan had—both before and after the U.S. Supreme Court’s 1908 decision in *Muller v. Oregon* upholding a law limiting women’s work hours in order to protect female health¹⁴¹—legislated a further parade of paternalistic laws.¹⁴² Women could not, one section of Michigan’s labor code mandated, work “longer than an average of nine [9] hours a day or fifty-four [54] hours in any week,”¹⁴³ thus precluding higher-wage overtime work. Nor could women work in any job that “unnecessarily” required them “to remain standing constantly”¹⁴⁴ or stand “when not necessarily in service or labor.”¹⁴⁵ And women could not, in one of the industrial code’s stranger turns, engage in

139. See Michigan Penal Code, No. 328, § 556, 1931 Mich. Pub. Acts 624, 734 734 (codified as amended at MICH. COMP. LAWS § 750.556 (2017)).

140. See *id.* The law’s proviso would plainly not pass constitutional muster today. See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (holding that gender classifications require an “exceedingly persuasive” justification that “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

141. 208 U.S. 412, 416-17, 421-23 (1908).

142. For general state-by-state accountings of women-protective legislation at the time of St. John’s suit, see FLORENCE P. SMITH, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, BULLETIN NO. 156, STATE LABOR LAWS FOR WOMEN: DECEMBER 31, 1937 (1938); and FLORENCE P. SMITH, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, BULLETIN NO. 144, STATE LABOR LAWS FOR WOMEN: HOURS, HOME WORK, PROHIBITED OR REGULATED OCCUPATIONS, SEATS, MINIMUM WAGE (1937).

143. See MICH. COMP. LAWS § 8324 (1929) (repealed 1967); see also *id.* (prohibiting women from working more than ten hours in any single day). For an example of testimony regarding this constraint, see Record on Appeal, *supra* note 1, at 465 (“Several times the men did work over an hour or more than the women because we were not allowed to work longer than ten hours a day.”).

144. See MICH. COMP. LAWS § 8326 (1929) (repealed 1964).

145. See *id.* § 8339 (repealed 1975) (“No employer of female help shall neglect or refuse to provide seats as provided in this act, nor shall make any rules, orders or regulations in their shops, stores or other places of business requiring females to remain standing when not necessarily in service or labor therein.”).

certain kinds of manufacturing “in any basement.”¹⁴⁶ St. John countered GM’s focus on differences in the women’s actual and “legal” capacities with an avalanche of testimony regarding the organization of work at the three departments of the Olds Motor Works that employed women.¹⁴⁷ Much of the testimony was convincing and even damning. A parade of women echoed St. John’s claim that men bragged about earning more even as the women “broke those men in” on machines upon their arrival at the factory—underscoring both the unfairness of wage differentials and the fact that the differentials were well known to all.¹⁴⁸ The women also fairly demolished GM’s claim that statutorily mandated “comfortable conveniences” could plausibly explain wage differentials. Those “conveniences” amounted, on the women’s telling, to a women’s bathroom furnished with a mirror, a hot plate for cooking, and a cot that often lacked a mattress—“a few cheap fixtures and accessories,” as St. John’s counsel put it in later briefing.¹⁴⁹ Other GM arguments grounded in Michigan law’s many paternalisms also took heavy fire: Multiple women testified that foremen sometimes punched women’s timecards while they remained on the shop floor, thus forcing them to work beyond the fifty-four-hour limit prescribed by Michigan law but leaving no paper trail—and thus leaving the women uncompensated for the extra time.¹⁵⁰ Finally, and perhaps most damning of all, St. John’s counsel used the now-admitted payroll records to show that men always got raises when women did, but women didn’t always get raises when men did—suggesting a wage-setting

146. *See id.* § 8346 (repealed 1971).

147. These were the sheet metal department (sometimes referred to as the press department), the motor inspection department, and the paint shop. *See, e.g.,* GM Brief, *supra* note 85, at 2-3 (listing the assignments of the twenty-nine women).

148. Record on Appeal, *supra* note 1, at 106-09 (direct examination of Florence St. John); *id.* at 157 (same); *id.* at 289-90 (direct examination of Lester Phelps); *id.* at 457-60 (direct examination of Grace M. Reeser). Another woman stated she was “mad” to be receiving twenty-one cents less than men she and St. John had broken in. *Id.* at 485-86, 490-92 (cross and redirect examination of Merreta Cobb). For more examples of “break-in,” see Record on Appeal, *supra* note 1, at 233 (break-in on paint operations); *id.* at 289-90, 297 (paint touch-ups); *id.* at 305 (dry sanding); *id.* at 334-35 (paint striping); and Brief for Plaintiff and Appellee at 14, 40-41, 56, 58-59, *St. John I*, 13 N.W.2d 840 (Mich. 1944) (No. 13) [hereinafter *St. John Brief*]. Other testimony suggested that the wage gap was well known: One witness reported that a male colleague “used to brag a little, generally we were on the same job and he used to brag that he got a little more money that [sic] I did.” Record on Appeal, *supra* note 1, at 500.

149. *See* *St. John Brief*, *supra* note 148, at 68-70; *see also* Record on Appeal, *supra* note 1, at 349 (“[W]e had a cot with no mattress on it, just the springs.”).

150. Record on Appeal, *supra* note 1, at 235; *see also id.* at 253 (“I remember we worked overtime and our boss punched our card for us and left us on the floor working at least a half hour or an hour.”); *id.* at 336 (“The boss would say, you stay working and I will see your card is punched.”). At least some of the women occasionally worked the night shift. *Id.* at 223 (noting that Mary Bentley and Isabelle Ives did so).

process that was, at least some of the time, based on something other than productivity increases and rigorous “unit cost” analysis.¹⁵¹

2. The puzzle of multiple causation and calculating damages

As the trial progressed and the issues around section 556’s “similarly employed” requirement narrowed, Judge Hayden’s task consistently reduced to a pair of more specific puzzles that have dogged courts and administrative agencies hearing wage discrimination claims ever since. The first puzzle was how to estimate the increment of the wage differential that could be ascribed to sex-based differences in actual or “legal” productive capacity as against the increment that could be ascribed to discrimination, whether due to biased and stereotyped understandings of women’s roles and abilities or simple inertia when women’s wage rates failed to keep pace with technological advances reducing the importance of physical strength on the shop floor.¹⁵² The second puzzle related to the first but was in many ways even more difficult: how to determine liability, and especially damages, in an aggregated lawsuit brought on behalf of numerous women who performed different tasks, earned different wages, and plainly differed in their individual productive capacities.¹⁵³

On the first puzzle, a growing and surprisingly sophisticated body of research in economics and management science at the time suggested that the gender wage gap resulted from a tricky mix of more and less legitimate causes.¹⁵⁴ Perhaps the clearest evidence of multiple causation was a single

151. *See id.* at 762 (paymaster testifying that “the record shows that April 10th was a general pay raise for the men and the women remained as they were”); *see also id.* at 782 (countering the testimony that men received raises when women did not by suggesting that the discrepancy resulted from a 1937 strike). The fact that men alone received raises loomed large in Judge Hayden’s ultimate decision. *See id.* at 1731.

152. For an example of a more modern case that explicitly grapples with the “increment” issue, see *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 263-65 (3d Cir. 1970).

153. *See GM Brief*, *supra* note 85, at 119 (“[T]he claimants received different wages, worked in different departments and performed different duties, and the same is true as to the men.”).

154. By the time of Judge Hayden’s order entering judgment, researchers had already offered substantial evidence that female employees suffered from higher rates of absenteeism and turnover. *See Dickinson*, *supra* note 50, at 704, 706 (noting that women work fewer hours per week on average and suggesting “customary inhibitions” as a potential cause); B. Fain Tucker, *Equal Pay for Equal Work*, *WOMEN LAW. J.*, Spring 1945, at 12, 13 (noting the general view that “[l]ower ‘presenteeism’ among women workers necessitates temporary transfers of replacement operators resulting in dislocation and disorganization of departmental efficiency”); *see also* BUREAU OF EMP’T SEC., U.S. DEP’T OF LABOR, SUGGESTIONS FOR CONTROL OF TURNOVER AND ABSENTEEISM 19-20 (1951) (summarizing, in a somewhat later publication, evidence on absenteeism). Other analyses made the commonsense observation that as relatively new entrants to the U.S. industrial order, women tended to be “of lower experience and skill” than men and contended that men were more “flexib[le]” and “better adaptable to emergency

footnote continued on next page

durable finding at the time: While the ratio of women's earnings to men's tended to be higher in industries where workers were compensated on a piecework rather than an hourly basis, a wage gap remained under both compensation schemes, simultaneously suggesting not only invidious discrimination but also that some portion of the wage gap stemmed from actual sex-based differences in productive capacity.¹⁵⁵ And yet highly aggregated, industry-level empirics of this sort offered precious little guidance—certainly nothing resembling a methodology—to an adjudicator tasked with disentangling causation in particular cases.

Judge Hayden's task was made even more difficult by section 556's requirement that women be "similarly" rather than "identically" employed.¹⁵⁶ This implied that a plaintiff like St. John could still prevail if she showed that the work she performed approximated that of the men who worked alongside her, even if the work was not identical. Indeed, the Michigan Supreme Court had, in its decision rejecting GM's previous constitutional challenge to section 556, defined "similarly" as "substantially alike" and "of substantially the same character, quality and quantity."¹⁵⁷ Put in modern-day terms, section 556 could thus be read to impose a weak "accommodation mandate," requiring that an employer pay a woman the same as a man even where she had a somewhat higher "unit cost" of production.¹⁵⁸ The question Michigan's high court left open, of course, was how unlike the work performed had to be—or in GM's

assignments" than women. Dickinson, *supra* note 50, at 707, 714. GM's argument that women's lower "legal capacity" explained wage differentials also enjoyed something of a conceptual lineage: As women's groups pursued minimum wage laws in the two decades leading up to St. John's lawsuit, opponents of those measures had argued that wage floors would, by increasing the cost to management of employing women, have a disemployment effect. *See, e.g., Fisher, supra* note 55, at 586 ("An argument frequently raised against equal-pay legislation is the contention that if women are paid equal wage rates with men they will as a consequence lose their jobs.").

155. *See* Dickinson, *supra* note 50, at 709-10, 718 (noting that "the ratio of women's hourly earnings to men's tends to be higher in piece work than in day work jobs" but providing multiple examples of piecework industries in which men's wages, reduced to an hourly figure, exceeded women's). *But see* PIDGEON, *DIFFERENCES IN EARNINGS, supra* note 45, at 6 (noting "how haphazard the method of fixing the piece rate may be and how often it still is dependent in the final analysis upon the arbitrary judgment of a foreman or manager or upon some other unscientific factor").
156. *See* Michigan Penal Code, No. 328, § 556, 1931 Mich. Pub. Acts 624, 734 734 (codified as amended at MICH. COMP. LAWS § 750.556 (2017)).
157. *Gen. Motors Corp. v. Read*, 293 N.W. 751, 754 (Mich. 1940).
158. *See* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 231 (2000) (defining an accommodation mandate as "a requirement that employers take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers"); *see also* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 836 (2001) (defining an accommodation right as "a claim to receive treatment from a defendant that disregards some (though not all) differential input costs").

“unit cost” terms, how great the shortfall in women’s marginal product relative to men’s—before an employer could legally duck paying equal wages.

St. John’s trial strategy on this issue was to downplay the degree to which female production workers required regular assistance from men when performing heavier work. A common refrain among the women was that the time imperatives of Fordist assembly-line work—male and female workers alike, one witness memorably noted, had to “hurry like lightning”¹⁵⁹—left women with no choice but to retrieve their own stock or perform other heavy work in order to, in oft-repeated phrases, “reach my production quota” or “get production out.”¹⁶⁰ And indeed, multiple women testified that foremen repeatedly told them that if they could not perform the same work as men, they “had no business being there.”¹⁶¹

St. John’s counsel also elicited testimony, wherever possible, that painted a portrait of perfect, widget-like interchangeability between male and female workers on the shop floor. St. John herself described how, when the plant whistle announced a new shift, male workers “stepped up and took over without even stopping the wheel on the presses, doing the same work that [the women] had done . . . [u]nder the same conditions.”¹⁶² Interchangeability was equally clear, if less dramatic, at inspection stations in the motor department: Male and female witnesses alike testified that inspectors were moved among each of five different positions in a round-robin pattern to counter “monotony” and revive flagging attention spans.¹⁶³ When GM’s counsel bore down and tried to salvage this damaging line of testimony by challenging one witness, Roxa Riffle, on whether she was able to move boxes of inspected pistons by herself, Riffle, a fifteen-year veteran of the inspection stations, tartly replied that she and the other women were “not merely there to help the men.”¹⁶⁴

159. Record on Appeal, *supra* note 1, at 1522.

160. *Id.* at 1508, 1529, 1588; *see also id.* at 1481 (“We had to get our own stock. The stock wasn’t very light.”).

161. *See also id.* at 140; *see id.* at 499-500, 1557, 1571, 1596.

162. *See id.* at 115; *see also id.* at 338 (“We did the same work. They picked up our trays and pencils and started right in where we left off [at the paint shop].”); *id.* at 346 (“[T]he men would be there ready to take on jobs and stood by us and was ready to take the job from us when we turned the machine off at night [at the press room].”); *id.* at 347 (“[W]hen we would come down they would be running our jobs . . .”). Judge Hayden ultimately credited this testimony. *See id.* at 1728.

163. *See id.* at 819, 822, 855; *id.* at 1377, 1445. As one of the women testified:

There was no difference between what the woman did in number 1 position and what the man did if he was there, and no difference between what the woman did in number 2 position or the third position, fourth position or fifth position, and what the man did in those positions.

Id. at 842.

164. *See id.* at 861-62.

Still, GM proved effective at chipping away at St. John's case. GM's counsel told Judge Hayden that men did "heavier and rougher work" and that "men's duties embrace[d] a lot more than the women's duties did."¹⁶⁵ GM's counsel also forced several women to admit, under heated cross-examination, that they could not perform certain heavy tasks, such as lifting car hoods onto the conveyer belt or pulling "cripples"—that is, car hoods with imperfect pain¹⁶⁶—off of it.¹⁶⁷ In response to the women's testimony that all machines on the shop floor had "production cards" setting forth the same "production quotas" whether the operator was male or female, GM elicited testimony from male witnesses who explained that this was because men were "handicapped" by the requirement that they stop their own labors to help women perform heavy tasks.¹⁶⁸ Riley Place, an industrial engineer in the standards department who specialized in time study work, offered support for this view, testifying that women were solely engaged in "machine operation" whereas men did the "complete operation," including the tasks the women did as well as further duties, such as moving "gons," or trucks, of stock to and from the assembly line and lifting pans of material.¹⁶⁹ The superintendent of the sheet metal division was most insistent of all, stating that it "wouldn't be physically possible to operate the department with women only."¹⁷⁰ GM's counsel asked: "You had to have men in there to help the women?"¹⁷¹ The response: "Yes, sir."¹⁷²

The resulting evidentiary morass was even more daunting in light of the second puzzle facing Judge Hayden: assuming liability, how to calculate damages across twenty-nine women who varied both in the tasks they performed and in their individual productive capacities. The depth of the problem was abundantly clear from the payroll records that had been belatedly entered into evidence. On the one hand, determining the wage levels for the

165. *See id.* at 142.

166. *See id.* at 221-22.

167. A good example is as follows:

Q. But the men could lift pans that you couldn't lift?

A. Well, I don't doubt but what they could.

Q. You don't doubt but what they did either, would you?

A. No, I wouldn't doubt but what they did.

Id. at 1544. GM lawyers also extracted testimony from Mary Bentley that women did not, and could not, lift hoods onto the conveyor belt because management had "put the conveyor so high a woman couldn't hardly reach it." *Id.* at 326.

168. GM Brief, *supra* note 85, at 64. For testimony by the women that the production cards were no different for male and female machine operators, and an explanation of production cards more generally, see Record on Appeal, *supra* note 1, at 420-21.

169. Record on Appeal, *supra* note 1, at 977-78.

170. *Id.* at 1015.

171. *Id.*

172. *Id.*

women and for a male comparison group was straightforward during the period beginning in 1936. This was the year GM began using plantwide pay “brackets”; workers were allocated to a bracket and then paid one of three rates based on their length of service.¹⁷³ But on the other hand, determining wage levels and differentials prior to GM’s establishment of the bracket system—and thus during the bulk of the period for which St. John was seeking to recover damages—was far harder. Prior to 1936, pay schedules were a kaleidoscope of pay rates because each department or work group within a department received a bonus for each pay period that was pegged to the unit’s “efficiency.”¹⁷⁴ Because the bonus was calculated as a percentage of total pay, it tended to exacerbate existing wage disparities between men and women, as Judge Hayden would ultimately note in his opinion entering judgment.¹⁷⁵ As a result, not only did the bonus system make it difficult to calculate with precision wage disparities across workers, but it also ensured that wage differentials varied widely over time, from as much as thirty-eight cents to as little as a few cents or, as GM argued, no difference at all for men and women working in the same departments and on the same or similar machines.¹⁷⁶

173. See St. John Brief, *supra* note 148, at 18. As an example, men in the paint shop were allocated to the “K” bracket and earned 75¢, 78¢, or 81¢ depending on experience, while women who worked there were allocated to the “I” bracket and earned 60¢, 63¢, or 66¢. Record on Appeal, *supra* note 1, at 195, 208; see also *id.* at 212-13 (noting pay brackets in the press room of 54¢, 57¢, and 60¢ for women; 69¢, 72¢, and 75¢ for men operating light presses; and 72¢, 75¢, and 78¢ for men operating heavy presses).

174. For a range of testimony on the workings of the bonus system, see Record on Appeal, *supra* note 1, at 91, 154, 160, 230, 321, 694. See also St. John Brief, *supra* note 148, at 17-18 (discussing the bonus system).

175. See Record on Appeal, *supra* note 1, at 1732-33.

176. See *id.* at 1682-87 (asserting GM’s argument that the wage difference between St. John and two other men assigned to similar machines was as wide as 38¢ and as narrow as 6¢—or even no difference at all); GM Brief, *supra* note 85, at 97 (“[I]t is undisputed that there were thousands of such differentials in wages; differentials as between women and women, as between men and men, and as between men and women which constantly changed and fluctuated.”).

Figure 2
Women of the Olds Motor Works



Hand-dated June 6, 1939. Courtesy of the Eddy Family, Portland, Michigan. Among those pictured are at least three assignors from the St. John case: Marietta Anderson, Emma Scoby, and Lena Swartz.

The other aspect of the evidentiary challenge posed by the aggregated nature of St. John’s lawsuit was perfectly, and colorfully, illustrated by testimony St. John’s lawyers elicited from Lena Swartz, a sturdy immigrant to the United States who spent twelve years at the Olds Motor Works beginning in 1926:

Mostly they give me heavy jobs like men. They think I am heavy woman I can stand heavy job. . . . They put me on a little machine, they say I am a heavy woman, I break machine, and got a big machine for me. They put me on a big machine, press.¹⁷⁷

The problem was that women like Swartz might do work that was substantially like, or even identical to, the work performed by the men operating heavy presses alongside her.¹⁷⁸ But the same might not be true of all twenty-eight women whose claims St. John was asserting alongside her own.¹⁷⁹

177. Record on Appeal, *supra* note 1, at 544, 547-48.

178. Similar testimony came from Vernice C. Smith, who worked in the press room from 1930 to 1937 on a spot welder, air hammer and riveter, and tap drill. *Id.* at 539-40. Smith testified that her own nephew was pulled off the line performing those same jobs because “he couldn’t take it” and yet earned more than she did. *Id.* at 541.

179. For more modern decisions wrestling with this issue and using, in a more complex version of what Judge Hayden would, an average differential across clusters of employees, see *Brennan v. City Stores, Inc.*, 479 F.2d 235, 242 (5th Cir. 1973); *Marshall v.*
footnote continued on next page

Though GM did not explicitly invoke Swartz's testimony, its argument at trial followed perfectly from it: Notwithstanding the women's assignment of claims to St. John, the case remained "twenty-nine distinct, separate claims," and each "should be determined separately."¹⁸⁰ Moreover, the only way to do so, GM asserted, was "to designate, during each period, during that entire time, what the differential was for each period, and the name of the man who did similar work and the amount of the damages for the various periods."¹⁸¹ To do otherwise and decide the case by "general verdict" would be to engage in "pure[] speculation" and risk overcompensating women whose wages exceeded their productive capacity while *undercompensating*, GM generously noted, women whose productive capacities exceeded their wages.¹⁸² An aggregated approach "lumping" the women together, GM concluded with a flourish that gestured ahead to the class action wars of the 1980s and 1990s, would be a "rule of expediency" rather than of law.¹⁸³

D. Denouement: Decision and Appeal

To be sure, Judge Hayden was not entirely without guidance in addressing either of the two puzzles he faced in adjudicating St. John's claims. As noted previously, a fast-growing body of social science research published as the pay equity issue came to the fore in the late 1930s and 1940s plumbed the causes of the wage gap and offered a menu of explanatory possibilities that could at least structure a judge's analysis.¹⁸⁴ In addition, Judge Hayden wrote his final order in St. John's case at a time of growing industrial use of job evaluation and job classification systems, as wartime wage controls and the spread of unions led to

J.C. Penney Co., 464 F. Supp. 1166, 1181-92 (N.D. Ohio 1979), *amended by* No. C73-530, 1979 WL 179 (N.D. Ohio Mar. 26, 1979); and *Hodgson v. J.M. Fields, Inc.*, 335 F. Supp. 731, 732-37 (M.D. Fla. 1971).

180. Record on Appeal, *supra* note 1, at 1696.

181. *Id.* at 1697.

182. *Id.* at 1696-97 ("Supposing the right differential should be 7¢ as to one and the court grants 21¢. The court is imposing a burden upon us in violation of law. If a woman is entitled to 10¢ differential and the court gives her 5¢, the court violates the law by giving that woman less than she is entitled to.")

183. *Id.* at 1699-700. For an articulation of a similar argument in the 1990s, see *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992), which noted that "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation," *id.* at 853. For the canonical articulation of the "day in court" concept, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which noted the "inherent tension between representative suits and the day-in-court ideal" of due process, *id.* at 846.

184. See *supra* notes 154-55 and accompanying text.

the formalization of wage structures.¹⁸⁵ Had he desired, Judge Hayden could have accessed an increasingly rich set of protocols and accompanying vocabulary for characterizing industrial jobs and then arraying them in terms of difficulty, responsibilities, and working conditions.¹⁸⁶

What is striking, however, is how little in the way of more specific tools Judge Hayden had at his disposal within the four corners of the trial record for parsing St. John's claims. For example, the parties failed to present any quantitative analysis of wage patterns at the Olds Motor Works, save some testimony of an accountant called by St. John who examined the payroll records and bonus system and thus helped to lay the foundation for Judge Hayden's ultimate finding that the bonus system exacerbated gender-based wage disparities.¹⁸⁷ While modern pay equity cases, and job discrimination cases more generally, routinely feature econometric evidence adduced by one or both sides,¹⁸⁸ Judge Hayden was mostly on his own in the search for regularities in wage patterns within the payroll records and accompanying testimony.

Just as striking is the near-total absence of case law upon which Judge Hayden could rely in working through the women's claims. The first wartime equal pay decisions of the National War Labor Board (NWLB), set up within the executive branch soon after the United States formally entered World War II in December 1941 to manage labor disputes and stabilize wages in key war industries, were still several months away when Judge Hayden entered judgment in May 1942.¹⁸⁹ In particular, Judge Hayden lacked the benefit of the NWLB decisions in late 1942 and 1943 addressing key issues such as when "set up" and other "extra labor costs" should be given weight in assessing violations

185. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, DIFFERENTIALS IN PAY FOR WOMEN 9 (1945) (on file with author) (noting the "[g]reat advances in general theories of job evaluation and job classification" during the war years).

186. For a lucid contemporaneous overview of the job analysis and job evaluation procedure, see *Equal Pay for Equal Work for Women: Hearings on S. 1178 Before a Subcomm. of the S. Comm. on Educ. & Labor*, 79th Cong. 23-26 (1945) [hereinafter *1945 Senate Hearings*] (statement of Frieda S. Miller, Director, Women's Bureau, U.S. Department of Labor). For a lengthy statement on the employer-side advantages of job-evaluation schemes, see *1948 Housing Hearings*, *supra* note 51, at 271-300 (statement of James W. Grove, Chief Industrial Engineer, Armstrong Cork Co.).

187. See Record on Appeal, *supra* note 1, at 740-43, 1732-33.

188. For an account of the advent of econometric analysis in equal-pay cases during the 1970s, see Michael O. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737, 738-42 (1980).

189. For a full accounting of the NWLB's work, see 1 NAT'L WAR LABOR BD., THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD: INDUSTRIAL DISPUTES AND WAGE STABILIZATION IN WARTIME (1947); 2 *id.* (1948); 3 *id.* (1949). For a brief account of the NWLB's formation and purposes, see 1 *id.* at 6-7; and Lewis B. Schwellenbach, Foreword to 1 NAT'L WAR LABOR BD., *supra*, at VII, VII.

of the equal pay principle.¹⁹⁰ Similarly, the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, its first statement on how to calculate damages in aggregated actions under the FLSA, would not come until 1946.¹⁹¹

An alternative source of guidance was litigation brought under a cluster of state laws first enacted in the 1920s prohibiting discrimination on the basis of sex in paying public school teachers.¹⁹² However, the few published cases at the time of the *St. John* trial involved a straightforward comparison of the duties, experience, and training of a single female plaintiff as against a single male comparator performing either identical tasks or starkly different ones.¹⁹³ Also

190. See, e.g., *Gen. Motors Corp.*, 3 WAR LAB. REP. 348, 356 (1942); *Brown & Sharpe Mfg. Co.*, 3 WAR LAB. REP. 321, 325-26 (1942); cf. *Nw. Match Cos.*, 13 WAR LAB. REP. 133, 136-37 (1943); *Spokane, Wash., Detail & Stock Shops*, 13 WAR LAB. REP. 33, 38-39 (1943); *Bendix Aviation Corp.*, 10 WAR LAB. REP. 40, 45-47 (1943).

191. 328 U.S. 680, 687-88 (1946), *superseded in part by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251-262 (2016)). The FLSA, enacted in 1938 at the height of the New Deal, remains the primary federal statute regulating wage and hour conditions. See Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219). Its four main provisions (i) establish the forty-hour work week, see 29 U.S.C. § 207; (ii) establish a national minimum wage, see *id.* § 206; (iii) guarantee time-and-a-half for overtime work in certain jobs, see *id.* § 207; and (iv) prohibit child labor, see *id.* § 212. For a contemporaneous accounting of the law's key provisions and the process of its enactment, see John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464 (1939). In *Anderson*, the plaintiffs challenged their employer's practice of keying compensation to punch cards less an estimated amount of time spent walking to work stations and engaging in various kinds of work prep. 328 U.S. at 682-84. Justice Murphy's decision, though largely crediting the findings below in favor of the employer, held that because the FLSA requires employers to keep records, the lower court could award wage restitution to employees even where the award was approximate. *Id.* at 688, 693. The FLSA, Justice Murphy reasoned, was not meant to turn on "[s]plit-second absurdities." *Id.* at 692.

192. See, e.g., CAL. SCH. CODE § 5.730 (1929) (repealed 1987) ("Females employed as teachers in the public schools of the state shall, in all cases, receive the same compensation as is allowed male teachers for like services, when holding the same grade certificates."); N.J. STAT. ANN. § 18:13-10 (West 1937) (current version at N.J. STAT. ANN. § 18A:6-6 (West 2017)) ("No discrimination based on sex shall be made in the formulation of a scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, college, university, or other educational institution supported in whole or in part by public funds.");

193. See *Chambers v. Davis*, 22 P.2d 27, 30 (Cal. Dist. Ct. App. 1933) (ordering equalization of salaries between one female and one male gym teacher who held the same certifications). Another case came a few years after Judge Hayden's decision but was likewise focused on a relatively simple comparison of a single pair of employees. See *Murphy v. Sch. Comm.*, 73 N.E.2d 835, 835-36 (Mass. 1947) (rejecting a discrimination claim by a female math teacher but discussing only a single comparator: a male woodworking teacher). It is also perhaps worth noting that the teacher pay cases were public sector cases and so were thought to be easier than private sector cases for two reasons: First, wage information tends to be publicly available; and second, "[c]ivil service systems

footnote continued on next page

of limited utility were cases brought by the NAACP as part of its campaign to equalize salaries between black and white teachers in segregated school districts throughout the South beginning in the 1930s. Most of these cases came after Judge Hayden issued his decision in 1942.¹⁹⁴ More importantly, the NAACP typically sought only declaratory and injunctive relief in its litigation efforts—relief that could in turn be used to negotiate a narrowing of the salary gap going forward—and so did not broach the question facing Judge Hayden of how to perform retrospective damages calculations across a pool of claimants.¹⁹⁵

Though Judge Hayden was working in a quantitative and doctrinal vacuum, his opinion, issued in May 1942, nearly a year after he took the case under advisement,¹⁹⁶ betrayed no lack of confidence or trace of doubt—and certainly none of the skepticism he had displayed in initially rejecting St. John’s requests for discovery. Coming in at just over a dozen pages, the opinion was an across-the-board win for St. John, and even a rout, for Judge Hayden sprinkled his opinion with devastating findings of fact that helped insulate the decision from appellate review.¹⁹⁷

Judge Hayden began by rejecting GM’s claim that “certain practices, requirements, and conditions present in the employment of, or work done by[,]

offer an easily available basis for job-evaluation studies to demonstrate lack of equity.” Deborah E. Bell, *Unionized Women in State and Local Government*, in *WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN’S LABOR HISTORY* 280, 292 (Ruth Milkman ed., 1985).

194. Two early cases included *Alston v. School Board*, 112 F.2d 992, 993-94 (4th Cir. 1940), and *Mills v. Board of Education*, 30 F. Supp. 245, 246 (D. Md. 1939). But the bulk of the NAACP cases did not produce published decisions until the mid-1940s. See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 119-21 (1994) (noting that many of the most significant salary equalization cases, in states like Alabama, Arkansas, Florida, Georgia, and Texas, were not filed until 1941 or 1942 and were still pending by mid-1943).

195. See, e.g., *Alston*, 112 F.2d at 993-94 (noting that the plaintiffs sought only declaratory and injunctive relief). Tellingly, once southern school boards learned to use facially neutral merit systems to set teacher salaries based on education, experience, and classroom evaluations, salary equalization cases devolved into an evidentiary morass on par with St. John’s lawsuit, and courts uniformly refused to find violations, at least in part because they were ill equipped to second-guess board evaluations. See TUSHNET, *supra* note 194, at 121 (reviewing the second wave of cases and concluding that “once school boards understood how to use merit pay systems, the potential for further equalization was limited”); Jonathan L. Entin, *Litigation, Political Mobilization, and Social Reform: Insights from Florida’s Pre-Brown Civil Rights Era*, 52 FLA. L. REV. 497, 506 (2000) (book review) (arguing that the salary equalization cases had “an ambiguous impact at best” because of “the adoption of merit pay schemes that, while formally neutral, wound up paying black teachers less than whites”).

196. See Record on Appeal, *supra* note 1, at xxi-xxii.

197. See *id.* at 1720-34.

the women” could justify the wage differentials at the Olds Motor Works.¹⁹⁸ “I am brought to the conclusion,” Judge Hayden instead explained, “that any differentiation urged as between the employment of men and women upon the record as made exists only in theory, rather than in fact; in form, rather than in substance.”¹⁹⁹ Indeed, the work of the women in all three departments was “alike,” and even “identical” to, the work performed by men.²⁰⁰

A second part of the opinion drastically narrowed the evidentiary focus and, in a quick pair of strokes, undermined the rest of GM’s defense. The decision rejected out of hand GM’s argument that state-mandated rest breaks or the provision of “comfortable conveniences” raised the cost of employing women and justified pay differentials.²⁰¹ GM’s proofs, Judge Hayden noted, were “not persuasive.”²⁰² But more importantly, they were “not material” under section 556 because they did not concern “work.”²⁰³ A similar move torpedoed GM’s claim that male workers were more versatile because they could be transferred in and out of a greater variety of positions. The evidence GM offered on this point, Judge Hayden asserted, “does not go to the issue of similarity of work.”²⁰⁴ Judge Hayden thus took a different position than would the NwLB just over a year later when it recommended as part of its mediation of a labor dispute involving the Bendix Aviation Corporation an “allowance” of five cents an hour for twenty minutes of rest during each woman’s eight-hour shift.²⁰⁵

Most striking of all were Judge Hayden’s findings on the only issue that remained: damages. Judge Hayden began with a point that GM had only weakly contested: The women “steadily received less pay than did men,” and the resulting wage differentials added up to “a constant and substantial difference.”²⁰⁶ From there, however, the opinion was more opaque. Judge

198. *Id.* at 1726.

199. *Id.*

200. *Id.* at 1726-28; *accord id.* at 1727 (“The work of the men and women [in the paint shop] was alike, in fact, identical.”). Judge Hayden thus adopted a liberal interpretation of “similarly,” noting that an interpretation that skews too closely to “identical” “would in fact nullify any useful purpose that [the statute] might serve, in that it would deprive it or make it impossible of any practical working application and thus defeat the very purpose for which it was enacted.” *Id.* at 1724-26.

201. *See id.* at 1729. For GM’s “comfortable conveniences” argument, see *id.* at 78.

202. *Id.* at 1729.

203. *Id.*

204. *See id.* at 1729-30.

205. *See* Bendix Aviation Corp., 11 WAR LAB. REP. 669, 673 (1943); *see also* Gen. Elec. Co., 28 WAR LAB. REP. 666, 671-72 (1945) (discussing Bendix’s resolution of the rest period issue).

206. Record on Appeal, *supra* note 1, at 1730-31.

Hayden declared that the resulting differential was “capable of reasonably definite ascertainment” even if the record did “not lend itself to arithmetical computation to a definite degree of certainty.”²⁰⁷ Noting the difficulties of calculating the precise pay differential across the six-year period covered by the suit, particularly before GM adopted the bracket system in 1936, Judge Hayden simply averred that “the average difference in pay,” across the entire period and across all twenty-nine women, was twenty-one cents per hour—more than the fifteen- to eighteen-cent differential on the face of many of the wage brackets GM established in 1936.²⁰⁸ When this average was multiplied across the twenty-nine women during the full period they were in GM’s employ, the resulting judgment came to \$55,690.²⁰⁹

During the two yearlong appeals to the Michigan Supreme Court that followed, only one of the ninety-two errors GM assigned in its brief to Judge Hayden’s handling of the trial²¹⁰ made any headway. In April 1944, the Michigan Supreme Court remanded the case to Judge Hayden demanding a more detailed backup for his twenty-one-cent determination.²¹¹ Judge Hayden obliged, and his revised order entering judgment for St. John was ultimately upheld on a second appeal.²¹²

Yet if Judge Hayden and GM violently disagreed about virtually every aspect of his handling of the case, they seemed, as the dust settled on the proceedings, to be of a similar mind on at least one point: St. John’s case was a difficult one and posed particular challenges for courts populated by generalist judges. GM’s version of the argument was set forth in its brief on the first of the two appeals to the Michigan Supreme Court. It gained heft from a then-recent report of the U.S. Department of Labor summarizing the work of the NLRB and, contrary to GM’s interests, detailing a pair of decisions that recommended raising women’s wages as a wage stabilization measure.²¹³ But

207. *Id.* at 1732-33.

208. *Id.* at 1731-33. For various testimony establishing a pay differential of fifteen to eighteen cents, see note 173 above.

209. Record on Appeal, *supra* note 1, at 1733.

210. *See id.* at 1-20.

211. *See St. John I*, 13 N.W.2d 840, 842 (Mich. 1944). In remanding the case following the first appeal, the Michigan Supreme Court invoked section 11(c) of Michigan Court Rule 37: “The trial judge shall sign and file . . . an opinion in which he shall set forth his decision and the substance of the judgment with a concise statement of his reasons therefor, and where he awards damages, the manner in which he has determined the amount.” *See id.* (quoting MICH. CT. R. 37, § 11(c) (1933) (repealed 1945)).

212. *See St. John II*, 17 N.W.2d 226, 226-27 (Mich. 1945).

213. *See* U.S. Dep’t of Labor, *National War Labor Board Directs Equal Pay*, LAB. INFO. BULL., Nov. 1942, at 12, 12-13. The two decisions were against GM and Brown & Sharpe. *See id.* at 12; *see also* Gen. Motors Corp., 3 WAR LAB. REP. 348, 355-56 (1942); Brown & Sharpe

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the report then quickly turned to discussion of the challenges faced by the NWLB in adjudicating pay equity cases, including the difficulty of performing the “unit cost” analysis at the heart of GM’s defense.²¹⁴ GM quoted at length from the report in its brief:

Employers recognize equal pay as a reasonable policy, but the words in which it has been modified in the past have been the subject of endless discussion. Without a good analysis of the actual requirements of work on the individual job performed, no exact wording can be found that assures a real fitting of women workers’ pay to the jobs they do. . . . The surest method of decision on wage rates is through a really good job study. As the National War Labor Board has stated in its opinions in the recent cases cited above, the principle of equal pay—*must be worked out in individual situations by parties who cooperate in good faith to secure the desired objectives.*²¹⁵

Only through a detailed and highly technical “job study,” GM hastened to add in its brief, could one achieve a reasonable calculation of the “unit labor cost” of male and female workers, which was the “only fair basis” for applying the equal pay principle.²¹⁶ In light of the trial court’s adverse fact findings that left little room for appellate reversal, GM was using a large chunk of its briefing before the Michigan Supreme Court to attack the competency of courts to adjudicate pay equity cases at all.

A weary Judge Hayden, in his parting statement from the bench during one of the parties’ last appearances before him, just prior to the first of the two appeals, sounded a similarly skeptical, if less detailed or prescriptive, note. “No matter if General Motors has to pay as [sic] judgment on the lawsuit,” he said, “in the last analysis it will not have indulged in the grief this court has had to in wrestling with this case, this trial, and you gentlemen.”²¹⁷

As legislative drives to enact pay equity laws began in earnest in the months and years following St. John’s remarkable lawsuit, the frustration evident in GM’s brief and in Judge Hayden’s withering statement from the bench would take a new and expanded form. In their place, a pitched battle would soon emerge about which set of institutions and which processes—litigation in courts, agency-led enforcement actions, or privately conducted collective bargaining between labor and management—would be the primary vehicle for protecting women from discrimination in the workplace.

Mfg. Co., 3 WAR LAB. REP. 321, 325-26 (1942). For a thorough accounting of the NWLB’s pay equity work, see 1 NAT’L WAR LABOR BD., *supra* note 189, at 290-92.

214. See U.S. Dep’t of Labor, *supra* note 213, at 12-13.

215. GM Brief, *supra* note 85, at 129-30 (quoting U.S. Dep’t of Labor, *supra* note 213, at 12).

216. See *id.* at 130-31 (quoting U.S. Dep’t of Labor, *supra* note 213, at 12).

217. Record on Appeal, *supra* note 1, at 1702.

II. From Litigation to Legislation: The Drive to Enact Pay Equity Laws in *St. John's* Wake

At the time *St. John* filed suit against GM in 1938, section 556 was, according to Commissioner Lionel Heap of the Michigan Department of Labor and Industry, a “dead letter” that his department “ha[d] never enforced or attempted to enforce.”²¹⁸ Moreover, no state apart from Montana, which passed a law strikingly similar to section 556 in 1919, had enacted equal pay legislation.²¹⁹ However, by the time *St. John* collected her judgment upon the Michigan Supreme Court’s rejection of GM’s second appeal in early 1945, the pay equity issue was exploding all around.

But a surprising thing happened as the nascent women’s movement fought to enact laws permitting women in *St. John’s* position to sue for redress via private lawsuits. Indeed, the nearly two dozen states that enacted equal pay laws prior to the federal Equal Pay Act of 1963²²⁰ almost uniformly rejected bills providing for class action authority, damages multipliers, and attorneys’ fees and instead channeled enforcement efforts into an anemic administrative scheme overseen by underresourced and distractible state labor and industrial commissions.²²¹ This systematic stripping out of the litigation-enhancing mechanisms from the dozens of bills that flowed into state legislatures and Congress entirely foreclosed sequels to the *St. John* litigation and, as many within the women’s movement feared, channeled pay equity claims into a slow burn of weak administrative enforcement efforts.²²² This Part asks why—and ultimately concludes that it was organized labor, more than any other single factor, that shaped the regulatory choices made at the dawn of the pay equity movement.

A. Postwar Politics and a Legislative Deluge

As Table 1 below reflects, several of the equal pay bills that flooded state legislatures even before war’s end won quick passage in Massachusetts, Illinois,

218. See Women’s Bureau, U.S. Dep’t of Labor, News Items from Michigan for the Woman Worker 1 (n.d.) (on file with author).

219. See Act of Mar. 7, 1919, ch. 147, 1919 Mont. Laws 288, 288 (codified as amended at MONT. CODE ANN. § 39-3-104 (2017)); *infra* Table 1 (providing a timeline of state equal pay legislation).

220. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2016)).

221. For more on the shortcomings of the administrative schemes most states created, see notes 256-67 and accompanying text below. For an accounting of state rejection of bills prescribing a class action approach, see notes 307-09 and accompanying text below.

222. See Vernon Seigler, *Equal Pay for Women Laws: Are They Desirable?*, 5 LAB. L.J. 663, 672-79 (1954) (collecting views of state agency administrators that exceptions made enforcement difficult). By the mid-1950s, legislative efforts in a number of these states were focused on closing loopholes. See *id.* at 667.

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Washington, and New York.²²³ During 1947, pay equity advocates advanced bills in another eight states, and the Women's Bureau could claim active interest in equal pay legislation in thirty-four states.²²⁴ Victories came in Rhode Island in 1946; New Hampshire and Pennsylvania in 1947; and Alaska, California, Connecticut, and Maine in 1949.²²⁵ By the time dozens of federal efforts in Congress finally bore fruit with the Equal Pay Act of 1963, twenty-two states already had equal pay laws on their books.²²⁶

223. See Act of July 22, 1943, 1943 Ill. Laws 743 (codified as amended at 820 ILL. COMP. STAT. 110/1 to /3 (2017)); Act of July 10, 1945, ch. 584, 1945 Mass. Acts 598 (codified as amended at MASS. GEN. LAWS ch. 149, §§ 1, 105A-105C (2017)); Act of Apr. 14, 1944, ch. 793, 1944 N.Y. Laws 1755 (codified as amended at N.Y. LAB. LAW § 194 (McKinney 2017)); Act of Mar. 22, 1943, ch. 254, 1943 Wash. Sess. Laws 786 (codified at WASH. REV. CODE § 49.12.175 (2017)). In addition, Montana's law, the only other law that predated the wartime and postwar drive to enact equal pay legislation, was drawn out of desuetude after the Montana Commissioner of Agriculture, Labor, and Industry asked the state's attorney general in 1946 for a formal opinion on the statute's reach. See R.V. Bottomly, Attorney Gen. of Mont., Opinion No. 190 on Labor, Payment of—Employees, Male and Female (Aug. 7, 1946), in 1945-1946 MONT. ATT'Y GEN. REP. 260, 260-61.

224. See COBBLE, *supra* note 49, at 105.

225. See BUREAU OF NAT'L AFFAIRS, INC., EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 31-52 (1963) (summarizing twenty-two state equal pay laws as of 1963).

226. See *id.* at 31, 40-51.

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Table 1
Federal- and State-Level Drives to Enact Equal Pay Laws

Year	Enactments by State ²²⁷	Congressional Bills ²²⁸
1919	Michigan, Montana -----	-
1943	Illinois, Washington	-
1944	New York	-
1945	Massachusetts	2
1946	Rhode Island	2
1947	(Massachusetts), New Hampshire, Pennsylvania	3
1948	-	-
1949	Alaska, California, Connecticut, Maine	4
1950	-	-
1951	(Massachusetts)	16
1952	New Jersey	1
1953	(Connecticut)	7
1954	-	4
1955	Arkansas, Colorado, Oregon	9
1956	-	7
1957	(California)	11
1958	-	-
1959	Hawaii, Ohio, (Pennsylvania), Wyoming	16
1960	-	1
1961	Wisconsin	11
1962	Arizona, (Michigan)	11

(Italics) denotes substantive amendment to a previously enacted law.

One reason for the sudden emergence of the pay equity issue, of course, was St. John's lawsuit itself. The case drew nationwide and generally sympathetic press coverage,²²⁹ with some noting the novelty of Judge Hayden's ruling.²³⁰

227. See *infra* Appendix A (compiling all equal pay statutes and significant amendments thereto prior to the enactment of the federal Equal Pay Act of 1963).

228. See JOHN P. EARNER, LIBRARY OF CONG., EQUAL PAY FOR EQUAL WORK: FEDERAL LEGISLATIVE ACTIVITY 1945 TO 1962, at 1-22 (on file with author) (providing a digest of equal pay legislation from the Seventy-Ninth through Eighty-Seventh Congresses).

229. See, e.g., *29 Women Win \$55,690 in Wage-Equality Ruling*, N.Y. TIMES, May 29, 1942, at 14; *Court Upholds Equal Pay for Men, Women in Like Work*, WALL ST. J., Sept. 7, 1940, at 2; *Equality in Pay Won by Women*, DETROIT NEWS, May 29, 1942, at 2; *Gen. Motors Loses Fight Against Equal Pay for Men, Women*, CHI. DAILY TRIB., Sept. 7, 1940, at 21; *General*
footnote continued on next page

Similarly, calls to legislative action in newspapers and handbills regularly referred to (and often reprinted in full) Judge Hayden's opinion entering judgment for the women.²³¹ St. John's victory was also a regular feature of congressional testimony as federal legislative campaigns got underway in 1945.²³²

But other, bigger forces drove pay equity onto policy agendas as well. One was the wartime influx of "Rosies" into U.S. industry, often in the same positions and performing the same tasks as the war-bound men they replaced, but at lower wages.²³³ This, feminist labor historians such as Ruth Milkman, Dorothy Cobble, and Nancy Gabin have shown, sharpened perceptions of systematic wage discrimination and fueled growing activism among working class women.²³⁴ Wartime economic imperatives also drew the federal government into the fray and placed a public imprimatur on the equal pay principle. As noted previously, within a few months of Judge Hayden's trial-level decision in the *St. John* case, the newly established NWLB issued a pair of decisions, one of them directed at GM itself, articulating the importance of the equal pay principle and recommending, as part of a broader order covering a

Motors Challenges Michigan Equal Pay Law, WALL ST. J., Sept. 29, 1939, at 4; *General Motors to Fight Court's Wage Act Ruling*, CHI. DAILY TRIB., Nov. 28, 1939, at 6; *Pay Discrimination Laid to G.M. in Woman's Suit*, DETROIT FREE PRESS, Apr. 9, 1938, at 1. The Associated Press also reported on the filing of the lawsuit, which ensured that the story made it into scores of smaller papers. See, e.g., *First Damage Suit Filed by Woman to Collect Man's Pay*, ESCANABA DAILY PRESS, Apr. 16, 1938, at 1; *Michigan Court Orders Equal Pay for Women*, *supra* note 115.

230. See, e.g., *29 Women Win \$55,690 in Wage-Equality Ruling*, *supra* note 229 ("The award is said to be the first ever made under a State law of 1931 requiring pay equality for men and women in industry."); James M. Haswell, *Equal Wage for Women Is Court Edict*, DETROIT FREE PRESS, May 29, 1942, at 2 ("Judge Hayden's rulings on these details are the first of their kind, and presumably will serve as precedents.").
231. See, e.g., "Equal Pay for Equal Work!": *Women Workers of Illinois Demand Square Deal*, ILL. ST. FED'N LAB. WKLY. NEWSL., Apr. 3, 1943, at 1.
232. See *1945 Senate Hearings*, *supra* note 186, at 175 (statement of John W. Gibson, Special Assistant to the Secretary of Labor).
233. See COBBLE, *supra* note 49, at 97 ("World War II also changed the minds of many women about their own capacities and about what constituted wage justice. Many never forgot the experience of doing exactly what a man had been doing the day before and receiving half his wages."). For statistics on the growth of women in various manufacturing industries, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN FACTORIES: ESTIMATED NUMBER OF WOMEN PRODUCTION WORKERS EMPLOYED IN MANUFACTURING INDUSTRIES, OCT. 1939-MAY 1947, at 4 tbl.1 (1947), which shows, among other things, an increase in the proportion of women production workers across all manufacturing industries from 24.1% in October 1940 to 32.5% in April 1945.
234. See COBBLE, *supra* note 49, at 15-22; NANCY F. GABIN, FEMINISM IN THE LABOR MOVEMENT: WOMEN AND THE UNITED AUTO WORKERS, 1935-1975, at 90-95 (1990); MILKMAN, *supra* note 56, at 49, 65-98.

range of wartime labor practices, increases in women's wages in order to narrow sex-based wage differentials.²³⁵ As one academic commentator noted, the NWLB's robust statement of the equal pay principle, coming as it did from such a "potent instrument of public authority," could be joined with Judge Hayden's decision in *St. John's* case to form a pair of "milestones of legal wage controls."²³⁶

B. Pay Equity and the Dilemmas of Regulatory Design

In many ways, state-level legislative debate over equal pay followed predictable lines that reflected the legal and regulatory challenges demonstrated by *St. John's* case in the Michigan courts.

1. Defining comparable work

A principal legislative battleground—the "crux of enforcement," as Frieda Miller put it in congressional testimony shortly after she succeeded Mary Anderson as head of the Women's Bureau in 1944—was how to structure the "determination of comparability of work performed by men and women" that had consumed so much airtime in Judge Hayden's courtroom back in 1941.²³⁷ The very first pay equity law passed after the *St. John* trial, in Washington state in 1943, mirrored Michigan's section 556 in mandating equal wages for "similarly employed" men and women.²³⁸ And a handful of other states' laws—those in Alaska (then still a territory), Arkansas, Oregon, Pennsylvania, and, for a time, Massachusetts—allowed an arguably looser comparison, prohibiting

235. See "Equal Pay" Report Hailed by Women, N.Y. TIMES, Aug. 19, 1942, at 22. Soon after, the NWLB announced that war industry employers need not obtain the usual preclearance from the Board before altering wage schedules where the changes were aimed at narrowing sex-based wage differentials—thus eliminating some of the wartime red tape that might otherwise have stalled equalization efforts. See 1 NAT'L WAR LABOR BD., *supra* note 189, at 290.

236. Dickinson, *supra* note 50, at 701-02. Others agreed: Ruth Roemer, Washington Representative to the United Electrical, Radio, and Machine Workers of America, CIO, noted that the Board's decision was "the first major recognition by a public body in a concrete situation affecting thousands of women." See 1948 House Hearings, *supra* note 51, at 195 (statement of Ruth Roemer, Washington Rep., United Electrical, Radio, and Machine Workers of America, CIO).

237. See 1945 Senate Hearings, *supra* note 186, at 23; see also *Our History: An Overview 1920-2012*, U.S. DEP'T LAB., <https://perma.cc/GD8V-3J69> (archived Sept. 25, 2017) (noting that Mary Anderson directed the Women's Bureau from 1920 to 1944).

238. See Act of Mar. 22, 1943, ch. 254, § 17-1, 1943 Wash. Sess. Laws 786, 786 (codified at WASH. REV. CODE § 49.12.175 (2017)); see also *infra* Appendix A. Note that every state that enacted pay equity laws in the 1940s or thereafter broke with Michigan and section 556 by enacting civil as opposed to purely penal prohibitions on wage discrimination. See *infra* Appendix A. For an overview of statutory provisions generated by the AFL-CIO, see Memorandum 5-6 (n.d.) (on file with author).

discrimination for “comparable” work,²³⁹ parroting language used in NWLB case law during the war.²⁴⁰

But most states required a plainly tighter connection than did Judge Hayden’s interpretation of section 556. Thus, the laws of Connecticut, Illinois, Maine, New Hampshire, and Rhode Island required “equal” work,²⁴¹ while those in Arizona, California, Hawaii, Montana, and Wyoming required the “same” work.²⁴² Most restrictive of all, Ohio’s law applied only to “identical” work,²⁴³ ensuring that only the Lena Swartzes of U.S. industry could confidently assert claims. The remaining states’ laws (Colorado, New Jersey, New York, and Wisconsin) vaguely prohibited “discrimination” in pay rates,²⁴⁴ thus leaving it to the courts to decide the precise content of the antidiscrimination mandate.

A related point of contention concerned whether to include exceptions qualifying the comparability determination. In states like California, the list of exceptions could quickly mushroom during legislative jockeying. By enactment, California’s equal pay law provided:

[N]othing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, interruptions of work for rest periods or restrictions or prohibitions on lifting or moving objects in excess of specified weight, . . . or other

239. *See, e.g.*, Act of Mar. 24, 1955, No. 361, § 2, 1955 Ark. Acts 848, 849 (codified as amended at ARK. CODE ANN. § 11-4-610 (2017)); *see also infra* Appendix A. The initial version of Massachusetts’s law, enacted in 1945, defined discrimination in wages as paying “salary or wage rates less than the rates paid to male employees for work of comparable character or work on comparable operations.” *See* Act of July 10, 1945, ch. 584, § 3, 1945 Mass. Acts 598, 599 (codified as amended at MASS. GEN. LAWS ch. 149, §§ 105A-105C (2017)). Two years later, the state legislature amended the law to cover “work of substantially the same character or work on substantially the same operations.” *See* Act of June 24, 1947, ch. 565, 1947 Mass. Acts 578, 579 (codified as amended at MASS. GEN. LAWS ch. 149, § 105A).

240. *See* 1 NAT’L WAR LABOR BD., *supra* note 189, at 291-92 (recounting the NWLB’s General Order No. 16 and multiple Board decisions directing that companies pay equal wages to women performing work of “comparable quality and quantity” to that of men).

241. *See, e.g.*, Act of July 22, 1943, § 1, 1943 Ill. Laws 743, 743 (codified as amended at 820 ILL. COMP. STAT. 110/1 (2017)); *see also infra* Appendix A.

242. *See, e.g.*, Act of July 2, 1949, ch. 804, § 1, 1949 Cal. Stat. 1541, 1541 (codified as amended at CAL. LAB. CODE § 1197.5 (West 2017)); *see also infra* Appendix A.

243. *See* Act of Apr. 16, 1959, § 1, 1959 Ohio Laws 555, 555 (codified as amended at OHIO REV. CODE ANN. §§ 4111.17, .99 (2017)).

244. *See, e.g.*, Act of Apr. 7, 1955, ch. 181, § 2, 1955 Colo. Sess. Laws 503, 503-04 (codified as amended at COLO. REV. STAT. § 8-5-102 (2017)); *see also infra* Appendix A.

reasonable differentiation, factor or factors other than sex, when in good faith based upon such differences, factor or factors.²⁴⁵

The latter of these—termed a “catch-all” exception—drew special ire from the Women’s Bureau as effectively gutting the law.²⁴⁶

The combined effect of these comparability and catch-all provisions was, as a contemporaneous internal AFL-CIO memorandum would put it, an “overcrowded lexicon of words and phrases” that gave courts ample license to apply the laws far more narrowly than Judge Hayden had.²⁴⁷ A dramatic illustration came just two years after the Michigan Supreme Court’s final action in St. John’s case, when a New York trial court handed down its decision in *Corsi v. Bentley Stores Corp.*²⁴⁸ The *Corsi* court narrowly construed the New York equal pay law’s prohibition on discriminatory rates—and thus rejected a guidance document the New York Industrial Commission had promulgated soon after the New York law’s enactment in 1944—in holding that even small differences between the duties of male and female sales clerks in the men’s and women’s departments of a major department store would defeat a claim.²⁴⁹ Every year thereafter, women’s groups in New York advanced bills that sought to eliminate the law’s catch-all exception, but to no avail.²⁵⁰

2. Choosing agencies or courts

But the main battleground, and in many ways the more revealing one, was which set of institutions—trial courts like Judge Hayden’s or an administrative agency armed with a mix of regulatory, enforcement, and adjudicatory powers—would take the lead in implementing the new equal pay laws. Much

245. Act of July 2, 1949, ch. 804, § 1, 1949 Cal. Stat. 1541, 1541 (codified as amended at CAL. LAB. CODE § 1197.5 (West 2017)).

246. See Women’s Bureau, U.S. Dep’t of Labor, What You Don’t Want in an “Equal Pay” Bill 2 (1947) (on file with author). For an overview of exceptions clauses, see BUREAU OF NAT’L AFFAIRS, INC., *supra* note 225, at 40-50. As an example, Rhode Island’s law did not apply “if one worker is considered more valuable than the other worker due to his availability for the work, a difference in seniority, experience, training, skill or ability, or occasional differences in services performed.” See Fisher, *supra* note 55, at 585 (reporting an unpublished response to a questionnaire by the head of the Rhode Island State Department of Labor’s Division of Women and Children). The law then concluded with a catch-all provision authorizing employers to pay women a lower rate based on “any other reasonable differentiation except difference in sex,” Act of Apr. 25, 1946, ch. 1786, § 2, 1946 R.I. Pub. Laws 282, 283 (codified as amended at R.I. GEN. LAWS § 28-6-18 (2017))—a “particularly wide loophole,” as the head of the Division of Women and Children at the Rhode Island State Department of Labor put it. See Fisher, *supra* note 55, at 585.

247. See Memorandum, *supra* note 238, at 4.

248. No. 23060, 1947 WL 57471 (N.Y. City Ct. Oct. 31, 1947).

249. See *id.*

250. Seigler, *supra* note 222, at 679.

of the resulting debate during legislative jockeying focused on the relative efficacy of the two approaches—and thus largely tracked the modern debate about the merits and demerits of agencies versus courts as policy implementers, or between public and private enforcement of law.²⁵¹

Champions of an agency-centered approach to the pay equity issue offered the usual odes to administrative expertise, highlighting the ability of agencies to perform industrywide studies of wage rates and develop guidelines for estimating the “net unit cost” of male and female labor. Without at least some expert guidance on how to navigate the complexities of implementing the equal pay principle, one commentator concluded, “courts are apt to flounder.”²⁵²

Other champions of an administrative approach to equal pay sketched a vision of agency-led enforcement that paralleled the position of mainline civil rights groups like the NAACP who were pressing for FEPC laws in state legislatures and Congress at the same time. On this view, administrative enforcement was preferred because it could be structured to emphasize education through informal “conciliation” of claims, gently correcting “irrational” prejudices without resort to the hard-edged and unyielding legalities of judicial proceedings.²⁵³ Some of the most spirited testimony in this regard came from Frieda Miller, who repeatedly invoked her prior experience as New York’s industrial commissioner in advocating administrative hearings as “an effective, almost indispensable, aid to enforcement.”²⁵⁴ Administrative hearings, Miller explained, “need not assume the aspect of a trial in which the ‘accused’ is arraigned before a court” and could instead take the form of a “conference” permitting “full and free discussion of all relevant facts” that could quickly clear up “[m]inor derelictions” caused by “bona fide misunderstanding[s] of the law’s requirements.”²⁵⁵

251. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630-41 (2013) (providing an overview of the literature).

252. See Marguerite J. Fisher, *Equal Pay for Equal Work Legislation*, 2 INDUS. & LAB. REL. REV. 50, 54 (1948). Importantly, these views were not just public posturing. Handwritten notes from a private meeting on a 1945 equal pay bill indicate that Senator Tunnell, a congressional point person on the issue, said: “Type of analysis needed here (men + women at machines) cannot be done by a ct.” See Notes (n.d.) (on file with author).

253. See Engstrom, *supra* note 11, at 1085-87.

254. See *1945 Senate Hearings*, *supra* note 186, at 27 (statement of Frieda S. Miller, Director, Women’s Bureau, U.S. Department of Labor).

255. *Id.* Secretary Schwellenbach offered similar testimony:

Administrative enforcement proceedings are a valuable device in developing an informed and coherent policy. They also serve to screen from the courts a multitude of small cases which raise no very complicated legal or factual problems, and which can conveniently and properly be disposed of, formally or informally, at the administrative level.

See *id.* at 6 (statement of Lewis B. Schwellenbach, U.S. Secretary of Labor).

But administrative enforcement, women's groups understood, also brought risks. "To enforce this law—as it really should be enforced [sic] to be effective—would," as Anderson explained in a speech to women unionists in late 1943 shortly after Illinois enacted one of the very first equal pay laws, "require an enormous staff of specially trained inspectors. This does not exist at present."²⁵⁶ She continued: "I doubt therefore if you can expect any comprehensive *staff* administration of the law. The law will operate when a complaint is brought, through the courts"²⁵⁷

Such views gained credence throughout the later 1940s as a body of evidence accumulated from state-level administrative efforts to implement the earliest equal pay laws. To be sure, state labor agencies were not entirely supine in those efforts. New York's Industrial Commission reported investigating 137 equal pay cases in 1945.²⁵⁸ And not long after trial in St. John's case ended, the Michigan Department of Labor and Industry announced a series of enforcement efforts that, though relatively small in scale, still suggested the possibility of credible and even muscular administrative implementation.²⁵⁹ However, even in states like New York and Michigan, agency-led enforcement efforts unmistakably raised two kinds of problems.

The first was simple resource constraints. As the war drew to a close and legislative consideration of pay equity laws gathered steam, five of the six governor-appointed commissioners of Michigan's Department of Labor and Industry were made principally responsible for worker's compensation, leaving the rest of Michigan labor law in the hands of the sixth commissioner and roughly two dozen labor inspectors, the overwhelming majority of which were said to "check chiefly for safety" rather than for compliance with regulations regarding women.²⁶⁰ To Harold Bledsoe, who had firsthand

256. See Mary Anderson, Dir., Women's Bureau, U.S. Dep't of Labor, Women in War Work and the Equal Pay Issue, Address at the Interstate Conference of the Illinois and Wisconsin Women's Trade Union Leagues and Committees 2 (Oct. 24, 1943) (on file with author).

257. *Id.*

258. See Notes 1, 7 (Oct. 9, 1964) (on file with author).

259. See *Wage Claims Won by Women Welders*, MICH. LAB. & INDUSTRY, Nov. 1941, at 6 (announcing 126 back-pay awards totaling \$6614.56 in October 1941 and providing details of an investigation in which three women spot welders at a Michigan office supply factory received back-pay awards ranging from \$4 to \$46 and a fourth received an award of \$308).

260. See Letter from Kathleen Lowrie, Reg'l Representative, Women's Bureau, U.S. Dep't of Labor, to Frieda S. Miller, Dir., Women's Bureau, U.S. Dep't of Labor 2 (Aug. 27, 1945) (on file with author) [hereinafter Aug. 27, 1945 Lowrie Letter] (noting the Department's employment of twenty-seven inspectors, twenty-five of whom were focused on safety issues while the other two were focused on child labor issues); see also Letter from Kathleen Lowrie, Reg'l Dir., Women's Bureau, U.S. Dep't of Labor, to Frieda S. Miller, Dir., Women's Bureau, U.S. Dep't of Labor 2 (Nov. 23, 1946) (on file with author)

footnote continued on next page

knowledge from his perch as a commissioner at the time of St. John's lawsuit, the Department was "weak."²⁶¹ Somewhat later surveys of other states' officials responsible for the implementation of equal pay laws painted an even bleaker picture. "Since this law was assigned to this Bureau for administration," New Jersey's Department of Labor and Industry reported in one such survey, "there has been no field staff available to make any routine inspections to determine compliance."²⁶² In response to another survey, California officials noted a "lack of personnel to promote such programs"²⁶³ and ultimately concluded that "compliance [had been] hampered by lack of personnel."²⁶⁴

Second was something a modern observer would call agency "capture." "If certain companies are pressed," Women's Bureau Regional Representative Kathleen Lowrie reported from Michigan in 1945 to Frieda Miller, the Bureau's director, "the front office [of the agency] hears about it."²⁶⁵ Lowrie's report continued: "So inspectors learn to tiptoe around and end up with their hats in their hand. They can check on violations and write orders, but they don't enjoy being laughed at, or made to feel like monkeys, and they want to keep their jobs."²⁶⁶

Even where agencies found clear violations, resource-strapped or politically cowed investigators often made no effort to get back pay, thus giving companies every incentive to wait to comply until after an agency brought an enforcement action.²⁶⁷

Beyond these standard concerns, the legislative struggles over equal pay also make clear that an administrative approach to the new pay equity laws, like the FEPC laws under consideration by Congress and state legislatures at the same time, imposed costs by placing women's groups at the heart of a much broader debate about the legitimacy and future of the New Deal administrative state. Indeed, conservative legislators countered champions of administration with the concern that uncabined agency discretion and raw politics would

(noting the Department's employment of twenty-six inspectors, with only four specifically allocated to "laws and regulations affecting women and minors in trade and service").

261. See Aug. 27, 1945 Lowrie Letter, *supra* note 260, at 2.

262. Memorandum from Laura Harris, Enforcement of State Equal Pay Laws 13-14 (Apr. 11, 1956) (on file with author).

263. Letter from C.J. Haggerty, Exec. Sec'y-Treasurer, Cal. State Fed'n of Labor, to William F. Schnitzler, Sec'y-Treasurer, AFL-CIO 2 (May 2, 1956) (on file with author).

264. Summary of Responses from State Bodies on Equal Pay Legislation 1 (n.d.) (on file with author).

265. Aug. 27, 1945 Lowrie Letter, *supra* note 260, at 2.

266. *Id.*

267. Memorandum from Laura Harris, *supra* note 262, at 6 (noting that the Connecticut labor agency made "[n]o attempt to get back pay").

trump expertise and rule of law. Senator Robert Taft, drawing a direct analogy to the FEPC debate, complained that the equal pay bill advanced in Congress in 1946 was “a sort of FEPC for women” and so “would put a new Federal bureau into every business office in the United States, and turn over to it the question of what kind of wages should be paid.”²⁶⁸ Representative Wint Smith from Kansas sounded a somewhat different separation-of-functions alarm, invoking “one of our fundamental American principles that you cannot get good administration of law if you let the man who administers make the laws, rules, and regulations and administer his own laws, rules, and regulations.”²⁶⁹ “We thought,” he concluded, “we divided up our administrative, judicial and legislative branches. Does not this law here simply put broad sweeping powers under an administrator and he makes rules and he interprets his own rules?”²⁷⁰

Many women’s groups, wary of agency resource constraints and capture concerns, and surely aware of the anti-New Deal broadsides of Republicans like Taft and Smith, advanced bills with a starkly different court- and litigation-centered approach to enforcement of the new pay equity laws. Given the catalyzing role St. John’s lawsuit played in the early legislative campaigns, this should not be surprising. More arresting for a present-day observer is that many of these bills contained a distinctly modern range of litigation-boosting mechanisms designed to yield robust private litigation efforts beyond what common law actions piggybacking on section 556 like St. John’s could support. Thus, an equal pay bill advanced in the Michigan legislature in 1945 soon after St. John’s lawsuit created a civil action for damages and “an additional equal amount of liquidated damages” (that is, double damages).²⁷¹ It also provided that such action “may be maintained in any court of competent jurisdiction by any 1 or more employes [sic] for and in behalf of himself or themselves and other employes [sic] similarly situated,” and it authorized “reasonable attorney’s fee[s]” for successful claimants.²⁷² Bills advanced in more than a dozen other states likewise provided for class action authority, double damages, and

268. See 92 CONG. REC. 10,547-48 (1946) (statement of Sen. Taft); see also EARNER, *supra* note 228, at 24.

269. 1948 House Hearings, *supra* note 51, at 36 (statement of Rep. Smith during testimony of David Ziskind on behalf of the Committee for the Promotion of Equal Pay for Women).

270. *Id.*

271. S. 338, 63d Leg., Reg. Sess. § 5 (Mich. 1945).

272. *Id.*

attorneys' fees,²⁷³ often drawn verbatim from the model state bill the Women's Bureau began to circulate in 1943.²⁷⁴

To be sure, women's groups were not proposing a litigation- and court-centered regime in a vacuum. Many of the equal pay bills drew directly on the language of the FLSA, enacted in 1938 just after St. John filed her lawsuit against GM.²⁷⁵ But nor, in drafting bills that closely tracked the FLSA, were women's groups unmindful of the tradeoffs that their choice of litigation over administration entailed.

On the one hand, as the pay equity movement got off the ground in Congress and state legislatures, privately initiated FLSA lawsuits were mounting and had produced a string of trial and appellate court decisions, suggesting that an effective private enforcement infrastructure had begun to take shape.²⁷⁶ And indeed, FLSA litigation went into hyperdrive in mid-1946

273. For a sampling, see S. 1253, 56th Leg., Reg. Sess. § 1 (Cal. 1945); ; H.R. 1112, 154th Gen. Court, 1st Sess. § 5 (Mass. 1945); H.R. 948, 154th Gen. Court, 1st Sess. (Mass. 1945); H.R. 437, 70th Leg., Reg. Sess. § 4 (Mich. 1959); Mich. S. 338 § 5; S. 482, 1947 Gen. Assemb., Reg. Sess. § 4 (Pa. 1947); and H.R. 356, 1945 Gen. Assemb., Reg. Sess. § 5 (Pa. 1945).

274. See *Legislation—N.Y. Labor Law, Section 199-a: "Equal Pay for Equal Work,"* 46 COLUM. L. REV. 442, 451 (1946) (summarizing the provisions of the "Women's Bureau Suggested Draft Bill"). For an early version of the Women's Bureau's model bill, see Suggested Language for an Act to Abolish Sex Discrimination in the Payment of Wages (1943) (on file with author) [hereinafter 1943 Model Bill]. Bills with these three litigation-enhancing mechanisms would remain part of the model state bill put out by the Women's Bureau until at least 1964. See Women's Bureau & Comm. of State Equal Pay Adm'rs, Suggested Language for a State Act to Abolish Discriminatory Wage Rates Based on Sex § 4(a)-(b) (1964) (on file with author).

275. For an overview of the FLSA's provisions, see note 191 above. The Women's Bureau's 1943 model bill provided:

Any employer who violates the provisions of this Act shall be liable to the employee or employees affected in the amount of their unpaid wages, and in an additional equal amount of liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated

1943 Model Bill, *supra* note 274, § 3. This closely tracks the original language of the FLSA, section 16(b) of which provided:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated

Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2016)).

276. See, e.g., *Pentland v. Dravo Corp.*, 152 F.2d 851, 851, 856 (3d Cir. 1945); *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 622, 625 (S.D. Iowa 1946); *Swettman v. Remington Rand, Inc.*, 65 F. Supp. 940, 944-45 (S.D. Ill. 1946); *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D.N.J. 1944); *Smith v. Stark Trucking, Inc.*, 53 F. Supp. 826, 828 (N.D. Ohio 1943); *Shain v. Armour & Co.*, 40 F. Supp. 488, 489-90 (W.D. Ky. 1941); *Hargrave v.*

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when the Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.* that so-called portal-to-portal time—that is, the time it takes for an employee to travel from a plant’s entrance to a work station or don protective gear—was compensable.²⁷⁷ The ruling instantly created billions of dollars in potential liability for U.S. industry,²⁷⁸ including for GM, which faced a lawsuit along with the other “Big Three” auto manufacturers seeking some \$400 million in damages.²⁷⁹ The rapidity with which Congress intervened with the Portal-to-Portal Act of 1947, virtually eliminating employer responsibility for portal-to-portal pay and giving the immunity retroactive effect, further suggests faith in, and even concern about, the regime’s efficacy.²⁸⁰

The growth of FLSA cases was also plainly fueling judicial anxiety about aggregated litigation, underscoring the risks of an enforcement approach built solely around private lawsuits.²⁸¹ For instance, most federal courts to confront the issue by the mid-1940s had held that in granting a right of action to “one or more employees for and in behalf of himself or themselves and other

Mid-continent Petroleum Corp., 36 F. Supp. 233, 235 (E.D. Okla. 1941); *Saxton v. W.S. Askew Co.*, 35 F. Supp. 519, 521-22 (N.D. Ga. 1940). See generally Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 368, 385 n.114, 386 n.115 (1939) (noting that twenty-five “civil employee suits” alone had been filed within a year of the FLSA’s enactment in 1938).

277. 328 U.S. 680, 691 (1946), *superseded in part by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251-262). For contemporaneous accounts of *Anderson’s* impact, see George Edward Cotter, *Portal to Portal Pay*, 33 VA. L. REV. 44, 44-47 (1947); and Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 114-66 (1991). The Court had previously made similar decisions for the mining and forestry industries. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 170 (1945), *superseded by statute*, Portal-to-Portal Act, 61 Stat. 84; *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 n.2, 598 (1944), *superseded by statute*, Portal-to-Portal Act, 61 Stat. 84. These industries, however, presented unusual problems of employee access to work sites and garnered much less attention for that reason. See Linder, *supra*, at 96-97.
278. See *The Portal-to-Portal Issue*, N.Y. TIMES, Jan. 4, 1947, at 14, 14 (noting that labor unions had filed claims of more than \$2 billion); Harold Walsh, *March of Finance*, L.A. TIMES, Dec. 19, 1946, at 12, 12 (predicting that employer liability could run up to \$10 billion).
279. See Walter W. Ruch, *\$400,000,000 Asked of Auto “Big Three,”* N.Y. TIMES, Jan. 3, 1947, at 5, 5.
280. See § 2, 61 Stat. at 85-86. The Act passed the House by a 6:1 margin and the Senate by a vote of 64-24. William S. White, *House Portal Bill Passed by 345-56; Would Quash Suits*, N.Y. TIMES, Mar. 1, 1947, at 1, 1; William S. White, *Senate Votes, 64-24, to Ban Portal Suits, Curb Wage Claims*, N.Y. TIMES, Mar. 22, 1947, at 1, 1. The retroactivity piece of the law took the form of a jurisdiction-stripping provision that was upheld by the Second Circuit in *Battaglia v. General Motors Corp.*, 169 F.2d 254, 259-60 (2d Cir. 1948), now a mainstay of federal courts jurisprudence.
281. See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 212-15 (1992) (noting that judicial discomfort with broad preclusion doctrines had reached a high point by 1938, when the Federal Rules of Civil Procedure were first promulgated).

employees similarly situated,” Congress intended to take the FLSA’s “collective action” outside the requirements of Rule 23.²⁸² This was important, for a common interpretation of Rule 23 at the time—which did not yet contain today’s (b)(3) damages option²⁸³—was that multiple claimants seeking money judgments on the basis of different hours worked, in different positions, and at different rates of pay did not raise common questions of law or seek common relief within the meaning of the rule and so could not support an aggregated action.²⁸⁴ But even as courts interpreted the FLSA’s aggregation mechanism on its own terms, separate from Rule 23’s strictures, they imposed what amounted to an opt-in requirement, holding that due process limited the res judicata effect of a court’s judgment to workers who had affirmatively agreed to participate in the proceeding.²⁸⁵ If opt-in could come postjudgment—thus

282. See, e.g., *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa 1946) (noting that section 16(b)’s “fiat supersedes the Rules of Civil Procedure”); *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D.N.J. 1944) (noting the distinction between aggregated actions brought under Rule 23 and those brought under section 16(b)); *Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 317-18 (D. Minn. 1941) (concluding that an FLSA claim is “not a true class action under Rule 23” and finding instead “that all Congress intended under Section 16 of the [FLSA] was a permissive joinder in any suit brought by an employee for the benefit of others similarly situated”); *Lofther v. First Nat’l Bank of Chi.*, 45 F. Supp. 986, 988 (N.D. Ill. 1941) (“Congress did not intend by Section 16(b) of the [FLSA] to permit a plaintiff or plaintiffs to maintain a true class action on behalf of all others said to be similarly situated, but rather intended to permit a joinder of such suits by employees ‘similarly situated’ and that any employee or employees might authorize or designate a representative or agent to maintain such actions in their behalf.”); *Saxton v. W.S. Askew Co.*, 35 F. Supp. 519, 521 (N.D. Ga. 1940) (noting that an FLSA action fell within Rule 24’s intervention rule, not Rule 23).

283. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (describing Rule 23(b)(3)’s damages option as an “innovation” of the 1966 amendments).

284. See Rahl, *supra* note 34, at 131-32.

285. See *Wright*, 69 F. Supp. at 624 (“If the suits required the inclusion of employees who did not wish to enter their appearance, then a claim that the provision was unconstitutional as against them would have considerable merit”); *Pentland v. Dravo Corp.*, 4 F.R.D. 350, 352 (W.D. Pa.) (“The contention that counsel may prosecute an action on behalf of persons who have not authorized him to do so . . . and yet will be bound by the judgment, is altogether too astonishing to be accepted.”), *rev’d*, 152 F.2d 851 (3d Cir. 1945); *Fink*, 65 F. Supp. at 318 (rejecting the expansive interpretation of section 16(b) on the grounds that “under no circumstance should it be assumed that Congress intended to emasculate the very essence of due process”); *Shain v. Armour & Co.*, 40 F. Supp. 488, 489-90 (W.D. Ky. 1941) (recognizing that Congress with the term “similarly situated” authorized a more “comprehensive and inclusive” treatment of joinder than what “generally accepted principles applicable to class suits” allowed, but refusing to agree that absent class members could be included in the class on the grounds that “[t]he prosecution of such a class action must . . . be in accordance with the constitutional requirement of due process of law”). For contemporaneous case surveys, see Rufus G. Poole, *Private Litigation Under the Wage and Hour Act*, 14 MISS. L.J. 157, 164-68 (1942); Rahl, *supra* note 34, at 124-34; and Recent Case, *Labor Law—Fair Labor Standards Act—FLSA Class Action Limited to Employees Giving Assent*, 55 HARV. L. REV. 688, 688-89 (1942).

allowing a kind of “one-way intervention,” as some called it—employees could enjoy the benefits of a win without suffering the preclusive effects of a loss, and they could also enjoy protective anonymity while proceedings were still pending and thus be shielded from retaliatory actions by employers.²⁸⁶ But many courts appear to have required opt-in *before* judgment, or even soon after the complaint was filed, eliminating both benefits and thereby systematically reducing the size and scope of FLSA actions—and, by extension, plaintiffs’ settlement leverage.²⁸⁷

Concerns about an all-litigation approach extended beyond the FLSA experience to a more general critique of private enforcement. As Mary Anderson explained in a memo to NLRB Chairman William Davis in 1943, “legal action” in court was “expensive and since it would not result in an increase in the employee’s current rate but only in restitution of back wages, such an action is not practical where small amounts are involved.”²⁸⁸ Women’s Bureau analysts also voiced the classic concern about overzealous enforcement: Granting an agency sole enforcement authority, an internal memo noted, “would serve to screen out a great number of small cases which would otherwise have to be tried in the Federal courts.”²⁸⁹

286. See Linder, *supra* note 277, at 169 (discussing the one-way intervention concern); Rahl, *supra* note 34, at 133-36 (discussing opt-in procedures).

287. The evidence here is somewhat equivocal. For instance, some newspaper accounts of the portal-to-portal lawsuits during 1946 and 1947 suggest that the standard practice was to attach to the complaint the names of those who wished to opt in and that judges even demanded as much. See *Bethlehem Sued for \$200,000,000*, N.Y. TIMES, Dec. 29, 1946, at 3, 3 (noting a 535-page brief with the names of 13,000 workers who were opting in); *Rules Individuals Must Sign*, WALL ST. J., Feb. 1, 1947, at 2, 2 (noting a court ruling giving a plaintiff twenty days to file signed declarations of some 5500 employees who allegedly wished to opt in or else face dismissal). But at least two courts at the time held open the possibility that plaintiffs could join postjudgment. See *Pentland*, 152 F.2d at 856 (“It is arguable, as amici have argued in this case, that the proper procedure is to keep the case open until time of final judgment, and determine then whether the judgment shall be binding only upon those who have joined or whether to bring in all others similarly situated by supplementary proceedings.”); *Fowkes v. Dravo Corp.*, 75 F. Supp. 514, 514 (E.D. Pa. 1946) (holding open the opt-in period “until time of final judgment when the court shall determine whether the judgment shall be binding only on those who have joined or whether to allow others similarly situated to be brought in by appropriate supplementary proceedings”). The best evidence of the effect of an opt-in mechanism on litigation’s size and scope comes by comparing opt-in rates in FLSA cases, which are typically between 15% and 30%, see Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313 (2005), and opt-out rates in class actions brought under Rule 23, which are typically 1% or lower, see Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004).

288. Memorandum from Mary Anderson, Dir., Women’s Bureau, to William H. Davis, Chairman, Nat’l War Labor Bd. 3 (Oct. 28, 1943) (on file with author).

289. See Legislative Analysis: S. 1178, Women’s Equal Pay Bill (n.d.) (on file with author).

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In so doing, pay equity advocates acknowledged a concern about runaway litigation that was also the centerpiece of industry opposition to the new equal pay laws. A representative example came in Washington state, at the height of the successful drive to enact an equal pay law in 1943, when the Manufacturers' Association of Washington circulated a letter addressed to "Mr. Manufacturer" warning of a torrent of litigation.²⁹⁰ "If this bill becomes a law," the letter noted, "an employer could be constantly and forever tied up in a civil suit and the ambulance chaser type of lawyer could work up cases with very little trouble."²⁹¹ Such statements, as well as similar ones made during the debate over portal-to-portal pay under the FLSA, make clear that litigation's opponents had, several decades before the modern-day litigation wars, already begun to develop a rhetorical template likening lawsuits to "blackmail,"²⁹² "legalized raids,"²⁹³ and a "racket."²⁹⁴

Given the complex tradeoffs entailed by the choice between pure litigation and administration, some of the most astute voices within the movement argued that private litigation could be potent, not necessarily as a standalone enforcement mechanism, but when used in concert with administrative enforcement. That message came through loud and clear in a letter John Gibson, who served as chairman of the Michigan Department of Labor and Industry at the time of St. John's lawsuit, sent to Mary Anderson in 1942 in response to Anderson's request for guidance about how to maximize the efficacy of equal pay laws.²⁹⁵ Central to effective enforcement, in Gibson's view, was that women have a "right of recovery under the statute," which had been "the big club in Michigan" ever since the Michigan Supreme Court had held that women enjoyed such a right under section 556.²⁹⁶ "One of our chief arguments for compliance," Gibson continued, was that "women can go into court any time within six years and recover the full amount of money due

290. See Letter from Paul E. Kirker, Chairman, Econ. Info. Comm., Mfrs. Ass'n of Wash., to Mr. Manufacturer 1 (Mar. 11, 1943) (on file with author).

291. See *id.* To address such concerns, an interesting set of bills advanced in Congress sought to screen out small-fry actions by requiring that a lawsuit be filed by "three or more . . . employees" and that "all similarly situated female employees" affected be joined. See H.R. 715, 85th Cong. § 4 (1957). Other bills provided that any recovery by the Secretary of Labor in an agency enforcement action barred a separate employee suit. See H.R. 7172, 83d Cong. § 3(c) (1954).

292. *Hoffman Raps Portal Suits as "Blackmail,"* CHI. DAILY TRIB., Jan. 14, 1947, at 25, 25.

293. *Back Pay Suits,* WASH. POST, Dec. 23, 1946, at 6, 6.

294. *Need for a New Labor Code,* L.A. TIMES, Feb. 11, 1947, at A4, A4.

295. See Letter from John Gibson, Chairman, Mich. Dep't of Labor & Indus., to Mary Anderson, Dir., Women's Bureau, U.S. Dep't of Labor 1 (Dec. 29, 1942) (on file with author).

296. *Id.* at 2.

them arising out of discrimination,” with the money “paid out of profits.”²⁹⁷ “It seems that when this is considered,” he finished the thought,” “there is a tendency on the part of management not to quibble over technicalities.”²⁹⁸ Summoned to meetings in Washington, D.C. to offer further counsel, Gibson offered specific examples to back up his claim about the power of private litigation: a case against manufacturer Nash Kelvinator Corporation in which “back wages” were being sought by way of a “ct. case involving several million”;²⁹⁹ a threatened lawsuit against the Neo Corporation that led to, as the meeting notes put it, “back pay arranged outside the courts thru Mich. Dept.”;³⁰⁰ and a similar case against a truck company in which the employer “complied + obviated ct. case.”³⁰¹ A variety of field reports concurred on the value of private litigation—or at least the threat thereof—as part of a broader enforcement architecture. For example, a UAW official reported on a lawsuit several women filed against the Excello Corporation after which “the company yielded and paid the women back pay rather than go through the courts to do it.”³⁰² This, the letter noted, was “proof of the effectiveness of the law.”³⁰³ Similarly, Lowrie’s field report from Michigan—which, as previously noted, expressed concern about the susceptibility of state labor agencies to capture³⁰⁴—made damages actions under Michigan’s section 556 seem an ordinary complement to agency enforcement efforts as the war drew to a close.³⁰⁵ “When compliance is not voluntary,” she noted in her 1945 report, “enforcement is had by employee suits.”³⁰⁶

In the end, however, virtually no states took such views to heart. Of the twenty-two states to enact equal pay laws prior to the Equal Pay Act of 1963, only Massachusetts, acting in 1945, and Oregon, acting somewhat later in 1955, passed laws with the full set of litigation-boosting mechanisms contained in the FLSA or the Women’s Bureau’s draft bill.³⁰⁷ And Massachusetts reconsidered just two years later, unanimously enacting an “emergency law”

297. *Id.*

298. *Id.*

299. Notes, Conference on Federal Equal Pay Bill (June 30, 1945) (on file with author).

300. *Id.*

301. Notes 5 (n.d.) (on file with author).

302. Letter from Caroline Davis, Dir., Women’s Dep’t, UAW, to Tom Downs, Representative, Mich. CIO Council 1 (June 26, 1956) (on file with author).

303. *Id.*

304. See *supra* notes 265–66 and accompanying text.

305. See Aug. 27, 1945 Lowrie Letter, *supra* note 260, at 4.

306. See *id.*

307. See *infra* Appendix A (providing citation information for each state enactment).

designed to address “certain ambiguities” that had arisen since 1945.³⁰⁸ Among other changes, that law removed the attorneys’ fee provision and granted the Massachusetts commissioner of labor gatekeeper powers over private lawsuits by permitting them only “if approved by the commissioner.”³⁰⁹ In several of the larger industrial states that enacted pay equity laws in the twenty years following the *St. John* case—among them California, Illinois, Michigan, New York, and Ohio—women who suffered wage injustices could not invoke laws with any litigation enhancements at all, whether class action authority, double damages, or attorneys’ fees.³¹⁰

C. The Union Connection: Control, Collective Bargaining Agreements, and Collateral Attacks

What best explains the form the new pay equity laws took? The details of the *St. John* litigation and the contours of the legislative debate that unfolded thereafter show that New Deal faith in administration was strong and that litigation was expensive and risky. On both counts, an approach to equal pay laws built around class action lawsuits already faced strong headwinds. But close examination of the *St. John* case and the legislative drives it helped kick off also reveals a further dynamic that powerfully shaped the regulatory choice of administration over litigation: organized labor’s desire to protect the New Deal system of labor-management relations built around collective bargaining.

An early hint of labor’s role in shaping the new pay equity laws is embedded in John Gibson’s account of successfully demanding the Briggs Manufacturing Company’s compliance with section 556 and payment of back wages, even though “*the Union was in sympathy with the company.*”³¹¹ Another hint comes in a Women’s Bureau document circulated to women’s groups with the playful title “What You Don’t Want in an ‘Equal Pay’ Bill.”³¹² The memo began with a call to arms, noting that “there are many groups, and among them even some women, who while paying lip service to the principle, will do everything they can to pass weak laws or to put obstacles in the way of good

308. See Act of June 24, 1947, ch. 565, 1947 Mass. Acts 578, 578-79 (codified as amended at MASS. GEN. LAWS ch. 149, § 105A (2017)).

309. See *id.*

310. See *infra* Appendix A. Among other large industrial states, Pennsylvania provided for attorneys’ fees but neither class action authority nor double damages. See *infra* Appendix A. Rhode Island provided for class action authority and double damages, but not attorneys’ fees. See *infra* Appendix A. And New Jersey provided for double damages and attorneys’ fees but permitted aggregation only by assignment of employees’ claims to the Commissioner of Labor and Industry. See Act of Apr. 8, 1952, ch. 9, § 8, 1952 N.J. Laws 45, 47-48 (codified at N.J. STAT. ANN. § 34:11-56.8 (West 2017)); *infra* Appendix A.

311. Letter from John Gibson to Mary Anderson, *supra* note 295, at 2 (emphasis added).

312. See Women’s Bureau, *supra* note 246, at 1.

enforcement.”³¹³ Turning to a catalog of threats, the memo quickly named a now-familiar one: injection of “list[s] of grounds justifying wage differentials.”³¹⁴ A second section titled “What to Work For in ‘Equal Pay’ Bills” exhorted women to fight for a now-familiar provision: double damages and court costs and attorneys’ fees for successful plaintiffs.³¹⁵ But the memo also listed a further type of provision to be avoided: any creating a liability carve-out for “a union contract which establishes a differential on the basis of sex.”³¹⁶

As detailed below, labor’s pivotal political position at the time helps to explain the pattern of political successes and failures women’s groups experienced and the ultimate form equal pay laws took. But examining labor’s role also offers the surest evidence that the broader struggle to enact job discrimination laws at midcentury was more than just a battle over the precise form equal pay laws would take or the rigor with which the new laws would be enforced. Rather, it was a much deeper struggle, much of it fought from *within* the New Deal coalition, to establish and defend a particular vision of the postwar U.S. industrial order.

1. Labor’s conflicted position on pay equity

To understand the union role in the midcentury drive to enact pay equity laws, one must first understand the unique position of organized labor within the New Deal industrial and political economy. As women’s groups mounted the first legislative campaigns to enact equal pay laws, they faced a political challenge that many other groups within the New Deal coalition faced. Lacking substantial political-organizational capacity of their own, women were largely dependent upon organized labor for political muscle.³¹⁷ Legislative action from within the coalition was simply not possible without at least some labor support. And yet a heady mix of economics and rampant sexism, particularly among the union rank and file, left labor painfully conflicted on the pay equity issue even as women exerted growing influence within union ranks.

For the millions of women like Florence St. John who had flowed into U.S. workplaces during the first half of the century, labor’s pivotal position was a

313. *Id.* (emphasis omitted).

314. *Id.* at 2.

315. *Id.* at 3.

316. *Id.* at 2.

317. On labor’s pivotal political position within the New Deal coalition at the time, see KEVIN BOYLE, *THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM: 1945-1968*, at 3-5 (1995); and Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, *supra* note 70, at 122, 123.

mixed blessing. On the one hand, the 1930s and 1940s witnessed the beginning of what labor historians have dubbed a “feminization of unions.”³¹⁸ Much of this was a simple function of rising female membership. At the turn of the century, organized labor was “lukewarm if not chilly towards women workers.”³¹⁹ Part of the reason was simple economics: In the era before industrial unionism, trade unions derived their economic power from exclusion, not inclusion, and so had little reason to bring unskilled workers, particularly if those workers were women and minorities, into the fold.³²⁰ However, things began to change in the 1930s with the rise of industrial unionism and its focus on sopping up excess un- and semi-skilled labor to maximize union bargaining leverage.³²¹ Even the American Federation of Labor (AFL) began to enter majority-female occupations, with its International Ladies Garment Workers Union seeing an especially dramatic rise in membership after a major organizing drive in 1934.³²² As a result, female union membership grew threefold during the 1930s, from 260,000 to some 800,000 on the eve of World War II, even though the *proportion* of women members, at roughly 10%, remained relatively static.³²³ Even more significant growth came soon after as “Rosies” entered U.S. industry to replace war-bound men, this time producing substantial absolute *and* relative gains: By the end of the war, women represented about 3 million, or more than 20%, of the nation’s 12.6 million union members.³²⁴ With this growth in female membership came steadily expanding voice and influence within union ranks. Indeed, it was during this time that the UAW—of which St. John and many of the twenty-eight assignors were members—grew from being a “no woman’s land,” in

318. COBBLE, *supra* note 49, at 15 (capitalization altered).

319. See Dickinson, *supra* note 50, at 698-99; see also Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1161 (1991) (noting the AFL’s “ambivalence toward organizing women” (capitalization altered)).

320. See ROSALIND ROSENBERG, *DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY* 119 (rev. ed. 2008); James J. Kenneally, *Women in the United States and Trade Unionism*, in *THE WORLD OF WOMEN’S TRADE UNIONISM: COMPARATIVE HISTORICAL ESSAYS* 57, 65 (Norbert C. Soldon ed., 1985). The standard view is that craft and trade unions, with their relatively more skilled memberships relative to semi- and unskilled industrial unions, “derived their negotiating power from limiting the available pool of workers with particular skills.” See Engstrom, *supra* note 11, at 1109 (emphasis omitted).

321. See MILKMAN, *supra* note 56, at 33-39 (describing the effect of industrial unionism on women’s position within labor).

322. See ROSENBERG, *supra* note 320, at 119.

323. See Gladys Dickason, *Women in Labor Unions*, 251 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 71 tbl.2 (1947).

324. *Id.* (estimating that 3 million women were union members in 1944 and that women constituted nearly 22% of all union members at the time); see also LEO TROY, *TRADE UNION MEMBERSHIP, 1897-1962*, at 8 tbl.5 (1965) (estimating that total union membership was 12.56 million in 1945).

Gabin's phrasing,³²⁵ to one in which a determined cadre of "labor feminists" carved out secondary leadership positions and forced women's issues onto union agendas.³²⁶

But the shifting economics of organizing cannot alone capture the realities of women's status within organized labor as the first legislative drives for pay equity got off the ground. Labor, and much of the nation more generally, was also deeply sexist, at least by modern standards. A central idea that drove labor's reluctance to organize or fully integrate women "was packaged and marketed as the 'family-wage ideology.'"³²⁷ That ideology held that men were breadwinners—and should be paid a wage sufficient to support a dependent wife and children—whereas women should serve in domestic roles.³²⁸ It came into sharpest relief in rampant discrimination against married women, who were seen as failing to fulfill their obligations to their husbands and children.³²⁹ But the idea reared its head in a more general way when male unionists openly questioned whether any women, married or unmarried, should be in the workplace at all. Indeed, a common lament among women unionists was that union officials simply ignored their complaints about wage or other workplace injustices.³³⁰ As one female worker reportedly wrote, "[O]ur committee man (AFL) doesn't care one way or the other. He thinks women should stay at home."³³¹

Male unionist antagonism toward women, however, went well beyond midcentury gender mores. It also was fueled by a further sense among many male unionists that women who worked in unionized shops were not pulling their share of the load. One version of the complaint echoed one of GM's arguments in the *St. John* case: Women's need for assistance on the shop floor with heavier tasks such as "setup" and "carry-off" systematically reduced male productivity in ways that were not reflected in, and indeed worked to erode,

325. GABIN, *supra* note 234, at 24.

326. COBBLE, *supra* note 49, at 6. The growing female presence on the shop floor and in union halls produced concrete organizational gains as well: In 1944, the union created the first-of-its-kind Women's Department to systematically advance women's issues. See GABIN, *supra* note 234, at 1; see also Nancy Gabin, *Women and the United Automobile Workers' Union in the 1950s*, in WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY, *supra* note 193, at 259, 260-61.

327. Crain, *supra* note 319, at 1163 (quoting Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, in WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY, *supra* note 193, at 1, 2).

328. See COBBLE, *supra* note 49, at 116-19; GABIN, *supra* note 234, at 36-38; Crain, *supra* note 319, at 1162-65.

329. See GABIN, *supra* note 234, at 38.

330. See COBBLE, *supra* note 49, at 102.

331. *Id.* (quoting a 1955 letter from a female machine operator to an organization advocating equal pay).

male wage scales.³³² The complaint also extended to the union hall. A dramatic version of this came in 1944 when R.J. Thomas, president of the UAW, gave what came to be known among women's groups as the "bombshell speech" in which he described to the women attending the annual meeting of the New York Women's Trade Union League a "feeling" among male trade unionists, as a Women's Bureau document recounting the speech put it, "that women accept the advantages but not the responsibilities of union membership; that they accept union wages but begrudge the payment of union dues; that they do not take an active part in union affairs but instead expect others to do their union work for them."³³³ In the view of many male unionists, women were all too happy to collect a paycheck on the backs of union efforts but were far less likely to engage in the hard work of doing battle with management.

The swirl of economics and ideology that had shaped women's status within the labor movement for decades left women unionists in an especially perilous position as legislative drives to enact pay equity laws gained momentum in the immediate postwar period. Indeed, as the nation undertook demobilization and "reconversion" to a peacetime economy, the proportion of women in the industrial labor force dropped substantially.³³⁴ Part of this decline surely resulted from the voluntary withdrawal of women from the labor market to return to prewar domestic roles, but part of it was their involuntary "purge" from employment rolls as veterans returned from war and sought to retake their prior positions within the U.S. industrial order.³³⁵ Whatever the mechanism, the proportion of women production workers across a wide range of industries fell precipitously between 1944 and 1946, from 49% to 39% in electrical machinery, 24% to 9% in auto, and 22% to 10% in iron and steel.³³⁶ The result was a declining female presence within union ranks just as the pay equity issue was cresting politically.

332. See, e.g., GM Brief, *supra* note 85, at 131-32; GM Reply Brief, *supra* note 134, at 11.

333. See *Women and the Unions 1* (1944) (on file with author). For other evidence of male unionist concerns at the time about women's commitment to unionism, see Dickason, *supra* note 323, at 72. Dickason notes: "Among the unions themselves there has been in the past some distrust of women's loyalty as union members and a tendency to look upon them as an unstable and unreliable factor in the union—a 'blithering liability[,] as one male unionist put it." *Id.* (quoting THERESA WOLFSON, *THE WOMAN WORKER AND THE TRADE UNIONS* 78 (1926)).

334. For accounts of demobilization and its effect on women, see GABIN, *supra* note 234, at 111-42; and MILKMAN, *supra* note 56, at 99-127. For statistics on women's declining share of the industrial labor force, see note 336 below.

335. See D'ANN CAMPBELL, *WOMEN AT WAR WITH AMERICA: PRIVATE LIVES IN A PATRIOTIC ERA* 222-26 (1984) (emphasizing a voluntary return to domestic roles); MILKMAN, *supra* note 56, at 101 (emphasizing purges).

336. See BUREAU OF LABOR STATISTICS, *supra* note 233, at 6-7 tbl.3. Only women's share of textile manufacturing avoided substantial decline, dropping from 51% to 47%. *Id.* at 8 tbl.3. As Milkman reports, by September 1945, one-quarter of women who had worked

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Even in the best of times, unions were deeply conflicted on the pay equity issue. To be sure, the feminization of unions beginning in the 1930s brought the pay equity issue more fully onto union agendas and produced plenty of success stories. Persistent efforts to establish the equal pay principle in the meatpacking industry beginning in the 1940s cut sex-based wage differentials by as much as half by 1952.³³⁷ Women also experienced success in the electrical industry, where women unionists used a combination of conferences, grievances, pickets, and strikes to agitate for equal pay.³³⁸ During the war, the United Electrical Workers (UE) filed a claim before the NWLB and won a landmark decision against General Electric (GE) in which the Board ordered wage adjustments to increase women's pay relative to men's.³³⁹ When GE reinstated its prior wage schedule upon the disbandment of the NWLB at war's end, the UE made equal pay a centerpiece of nationwide strikes against both GE and Westinghouse in 1946 and won substantial concessions.³⁴⁰

Beyond these marquee examples, however, the record is far more mixed. The reason is that union support for the equal pay principle was often highly instrumental—aimed more at propping up men's wages by preventing substitution of women workers at lower pay than furthering the interests of female union members.³⁴¹ From the perspective of male unionists, women were not strikebreaking scabs, as in the race context, but something almost as bad: “wage cutters,” as Secretary of Labor Lewis Schwellenbach put it in congressional testimony in 1948, and “a constant threat to maintenance of

in factories three months earlier had lost their jobs, and more than one million had lost their jobs by the end of 1945. MILKMAN, *supra* note 56, at 112. While some labor scholars have sought to show a continuing pattern of gender militancy as a critical bridge to the feminist activism of the 1970s, the reality is that the legislative drive to enact equal pay laws came at a time of decreasing—or at the very least, static—female influence within the labor movement. *Compare id.* at 1, 11 (surveying the postwar “defeminization of basic industry” and concluding that women workers “failed to prevent the reconstruction of a postwar world of sex-segregated work modeled along prewar lines”), with COBBLE, *supra* note 49, at 9 (noting the connection between feminist activism in the 1970s and earlier generations of female unionists).

337. See Bruce Fehn, *African-American Women and the Struggle for Equality in the Meatpacking Industry, 1940-1960*, J. WOMEN'S HIST., Spring 1998, at 45, 45-46, 58 (1998).

338. COBBLE, *supra* note 49, at 101.

339. See Gen. Elec. Co., 28 WAR LAB. REP. 666, 668, 685, 692 (1945) (concluding that “the union has established the existence in the plants . . . of substantial differentials between rates for women's jobs and men's jobs which cannot be justified on the basis of comparative job content” and recommending measures to narrow pay disparities).

340. See COBBLE, *supra* note 49, at 102. For more modern examples of union-driven reform efforts, see KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE 126-50 (2016).

341. See MILKMAN, *supra* note 56, at 27 (“Both the UE and the UAW advocated equal pay for equal work for women, but their main goal was to remove the economic advantage to employers of women's lower pay and thus prevent female substitution.”).

general wage levels.”³⁴² As a result, most union grievances asserting the equal pay principle during the 1930s and 1940s were filed not by women but rather by men protesting the hiring of a woman into a “man’s job” but at a woman’s rate, often by “diluting”—or in the more colorful language of the time, “chiseling”—the man’s job by removing tasks from its description to justify filling it with lower-wage female labor.³⁴³ Thus, union-filed equal pay demands at midcentury were at bottom protests against management efforts to alter an established system of sex segregation within U.S. industry—and may well have done more to consolidate the structure of gender inequality within U.S. industry than to ameliorate it.³⁴⁴

There is no more vivid illustration of the complicated dynamics of labor’s position on pay equity than a photo that appeared in 1939 in the *United Automobile Worker*, the main publication of the UAW, featuring four male union members dressed in women’s clothing and holding signs that read, “Help the Poor Woikin Goil—Vote CIO” and “Vote CIO—Restore Our Manhood.”³⁴⁵ The accompanying caption explained that men were “dressed in girl’s [sic] clothes because the company paid them *women’s* rates” and that the Congress of Industrial Organizations (CIO) victory in a recent recognition election “brought a new contract and *men’s* wages.”³⁴⁶

342. 1948 *House Hearings*, *supra* note 51, at 78 (statement of Lewis B. Schwollenbach, U.S. Secretary of Labor). For a similar invocation of the term, see Dorothy S. Brady, *Equal Pay for Women Workers*, 251 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 54 (1947).

343. See MILKMAN, *supra* note 56, at 45, 47 (“Most equal pay cases in both auto and electrical manufacturing in the prewar period were brought by the union (primarily on behalf of men), not by women . . .”). For an example of use of the term “chiseling” at the time, see 1945 *Senate Hearings*, *supra* note 186, at 126 (statement of Lewis G. Hines, Legislative Rep., American Federation of Labor). For further contemporaneous discussion of the chiseling concept, though not the term, see *General Motors Corp.*, 3 WAR. LAB. REP. 348 (1942), in which the NLRB asserted that the strategy of making “slight or inconsequential changes” to a job in order to justify reclassifying it as a woman’s job “is not compatible with the principle of equal pay for equal work,” *id.* at 356.

344. See GABIN, *supra* note 234, at 34; see also MILKMAN, *supra* note 56, at 27 (“The practical result [of union use of the equal pay principle to resist female substitution] was to stabilize the existing pattern of job segregation by sex, whereby women and men did not do ‘equal work.’”); *id.* at 47 (“Thus, the equal pay demands made by the CIO in the years before World War II, while challenging *particular* management initiatives affecting the sexual division of labor, unintentionally helped consolidate the *general* structure of gender inequality in industry.”); *id.* at 65 (“[T]he main impact of the unions on the sexual division of labor in the prewar period was to stabilize it by establishing seniority systems and by resisting female substitution.”).

345. See UNITED AUTOMOBILE WORKER (Detroit), Sept. 13, 1939, at 7 (capitalization altered) (on file with author).

346. *Id.* (emphasis added). The photo is also noted in MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 149 (1995).

Figure 3
Vote CIO—Restore Our Manhood



A photo from a September 1939 issue of the *United Automobile Worker* dramatically illustrates the complexities of the union stance on equal pay within the UAW and beyond.

The instrumental nature of labor's support made unions highly inconsistent in advocating the equal pay principle.³⁴⁷ Many locals fought for equal pay provisions in collective bargaining agreements (CBAs) throughout the later 1930s and 1940s, as the pay equity issue came to the fore. Indeed, studies throughout the period found that as many as one-fifth to one-third of union contracts contained equal pay clauses.³⁴⁸ The flip side, of course, was that around *two-thirds* of CBAs lacked such clauses—and, in many instances, the contract terms affirmatively sanctioned wage differentials. For example, a standard UAW-CIO clause stated: “All jobs shall be designated as male or

347. See GABIN, *supra* note 234, at 32 (“[D]espite its verbal commitment to equal pay for equal work, the UAW was inconsistent in its advocacy of equal pay for comparable or even equal work, tending to overlook or avoid the problem of unequal wage rates when men were not directly threatened.”).

348. The standard view, as articulated in legislative testimony at the time, was that roughly one-third of all CBAs contained equal pay clauses. See, e.g., *1945 Senate Hearings*, *supra* note 186, at 34-36; see also *1948 House Hearings*, *supra* note 51, at 124-25 (noting a 1947 study of 1000 agreements by the Bureau of Labor Statistics that found “[s]lightly over one-fourth” contained equal pay clauses). Some accounts put the number higher. See, e.g., WOMEN'S BUREAU, *supra* note 185, at 9-10 (noting that a wartime study of eighty union contracts “in a large midwestern war-industry area” found that half had equal pay clauses). Other studies offered a less rosy view. See, e.g., Bureau of Labor Statistics, U.S. Dep't of Labor, “Equal Pay for Equal Work” Provisions in Collective Bargaining Agreements (1951) (on file with author) (noting that a 1951 study found that only 17% of 2644 agreements contained equal pay clauses—including 30% of CIO agreements but only 11% of AFL agreements).

female before regular production is established or before being timed and no female employee shall replace a male employee unless she receives the same rate of pay as the male employee on such jobs.”³⁴⁹ The result was that as the first legislative campaigns to enact equal pay laws got off the ground, the majority of unionized women lacked a concrete basis for contesting unequal pay by way of union grievance systems.

Other more concrete examples reveal that where the equal pay principle butted up against other labor aims—particularly protecting the jobs of male members—most unions showed little or no interest in challenging sex-based wage differentials or the sexual division of labor more broadly. Union committee chairmen, eager to preserve men’s jobs during grievance proceedings, argued that certain jobs were unhealthy or too difficult for women, even where at least some women—like the physically robust Lena Swartz³⁵⁰—were plainly performing jobs on par with men.³⁵¹ Similarly, during periods of unemployment, unions cast aside the equal pay principle and instead negotiated agreements formally excluding women from a wide array of jobs they had previously done and even capping the number or proportion of women who could be hired.³⁵² Thus, where men’s jobs came under threat, many unions could quickly succumb to an exclusionary impulse rather than pursuing the equal pay principle. As a Women’s Bureau memorandum noted in 1944, local unions all too frequently “used women’s wage rates as a pawn to be sacrificed in favor of other seemingly more important objectives.”³⁵³

349. See Bureau of Labor Statistics, U.S. Dep’t of Labor, Selected Excerpts from Labor-Management Agreements Regarding “Equal Pay for Equal Work Clauses” (1950) (on file with author). Another standard formulation held: “Female employees performing the work of male employees shall receive the male employees’ rate.” *Id.*

350. See *supra* text accompanying note 177.

351. See GABIN, *supra* note 234, at 32.

352. An often-invoked example along these lines is a 1941 grievance that ripened into a thirty-six-hour strike at the Kelsey Hayes plant in Detroit. See *id.* at 51. On Gabin’s and Milkman’s tellings, the UAW, suspecting that management was about to substitute women for men in a host of positions, filed a strike notice demanding the removal of all women from machine work. See *id.*; MILKMAN, *supra* note 56, at 69-70. Management agreed to observe a hiring freeze but then triggered a strike by hiring two women onto the night shift. MILKMAN, *supra* note 56, at 69. The strike settlement, considered a victory for the union, was anything but for women: Management and the union agreed to remove women from a substantial number of machine positions and stipulated that female employees would not exceed 25% of the total workforce. GABIN, *supra* note 234, at 51; see also MILKMAN, *supra* note 56, at 69-70. Another example comes from the NWLB decision in *Bendix Aviation Corp.*, 10 WAR LAB. REP. 40 (1943), which notes the company’s allegation that “the union has forced the company to retain men on women’s jobs and restricted the number of women the company could hire,” *id.* at 49.

353. See *Women and the Unions*, *supra* note 333, at 2.

Understanding labor's conflicted position on pay equity helps make sense of otherwise puzzling statements by union officials during the drive to enact equal pay laws. A revealing example is the response of Arthur Devine and Edwin Brown, president and secretary-treasurer, respectively, of the Rhode Island State Federation of Labor, to a survey by the AFL's national office asking about the union's experience with the state's equal pay law.³⁵⁴ "The nature of the Rhode Island Industrial make-up is such that [it] requires a very large number of women," Devine and Brown noted,³⁵⁵ perhaps referring to the large number of textile workers in the state.³⁵⁶ They continued, without any trace of irony: "We have felt that equal pay laws were needed so that men would not be discriminated against."³⁵⁷

2. The design of pay equity laws, collective bargaining, and labor's control imperative

If labor's conflicted position on pay equity provides a more textured understanding of the politics of pay equity, it also helps explain several key features of the new equal pay laws that states began to enact even before war's end. Easy examples include the liability carve-outs for wage rates specified in CBAs that unions made a condition of their support in large industrial states like California, Illinois, and Pennsylvania, as well as in New Hampshire and Rhode Island.³⁵⁸ Even Pennsylvania's carve-out, which was accompanied by

354. See Letter from Arthur W. Devine, President, and Edwin C. Brown, Sec'y-Treasurer, R.I. State Fed'n of Labor, to William F. Schnitzler, Sec'y-Treasurer, Am. Fed'n of Labor (Apr. 20, 1956) (on file with author).

355. See *id.* at 1.

356. See generally GARY GERSTLE, *WORKING-CLASS AMERICANISM: THE POLITICS OF LABOR IN A TEXTILE CITY, 1914-1960*, at 20-22 (Princeton Univ. Press 2002) (1989) (recounting the rapid growth of the textile industry in New England states, including Rhode Island); FLORENCE KELLEY, *WAGE-EARNING WOMEN IN WAR TIME: THE TEXTILE INDUSTRY 14* (1919) (noting that in the 1910s, one-third of women in Rhode Island were employed and two-thirds of employed women worked in industry—both proportions higher than those in other states).

357. See Letter from Arthur W. Devine and Edwin C. Brown to William F. Schnitzler, *supra* note 354, at 1-2.

358. The language of these carve-outs varied. For example, California's law provided: "A variation in rates of pay as between the sexes is not prohibited where the variation is provided by contract between the employer and a bona fide labor organization recognized as a bargaining agent of the employees." Act of July 2, 1949, ch. 804, § 1, 1949 Cal. Stat. 1541, 1541. It would remain a part of the law until 1957. See Act of July 16, 1957, ch. 2384, § 1, 1957 Cal. Stat. 4130, 4130 (codified as amended at CAL. LAB. CODE § 1197.5 (West 2017)). For evidence that unions conditioned their support on inclusion of a carve-out in California, see note 418 and accompanying text below.

Pennsylvania's law provided:

Any employee may directly or through his attorney, agent or collective bargaining representative waive, compromise, adjust, settle or release any claim which such employee may

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seemingly conflicting language providing that an employer-employee agreement “shall be no defense” to an equal pay claim,³⁵⁹ could have substantial bite. When female glass blowers at Continental Can Company near Pittsburgh brought a common law assumpsit action in 1960 under the state’s equal pay law that closely paralleled St. John’s earlier lawsuit, the company argued that the CBA precluded the women’s claim.³⁶⁰ Ruling nearly twenty years after Judge Hayden rejected GM’s argument that the Wagner Act preempted section 556, the Pennsylvania trial court sided with the employer, dismissing the women’s claims as “inconsistent with the national and State statutory schemes” protecting CBAs.³⁶¹ The opinion concluded its analysis with a flourish:

When a recognized collective bargaining agent negotiates an agreement on behalf of the members of the union it represents, and that agreement is approved and ratified by those members, it is binding upon them all. To permit an employe [sic], or as in this case, a group of them, to set aside or disregard that agreement or any portion thereof would destroy the stability that such agreements must have and would result in making a mockery and a farce of labor-management negotiations

have under this act, either before or after commencement of suit thereon, and a waiver, compromise, adjustment, settlement or release of any such claim by such employee or his attorney, agent or collective bargaining representative shall be a complete satisfaction of such claim and a complete bar to any action based on such claim.

Act of July 7, 1947, No. 544, § 4(c), 1947 Pa. Laws 1401, 1403 (codified as amended at 43 PA. STAT. AND CONS. STAT. ANN. § 336.5 (West 2017)). Illinois’s law provided “that nothing herein shall prohibit [a variation in rates of pay] where the same is authorized by a contract between an employer and a recognized bargaining agent.” Act of July 22, 1943, § 1, 1943 Ill. Laws 743, 743 (codified as amended at 820 ILL. COMP. STAT. 110/1 (2017)). New Hampshire’s law provided that “variation in rates of pay as between the sexes is not prohibited where such variation is provided by contract between the employer and the recognized bargaining agent of the employees or, in case there is no such bargaining agent, where such variation is provided by written agreement or contract between the employer and not less than five of his employees.” Act of June 12, 1947, ch. 193, § 2, 1947 N.H. Laws 257, 258 (codified as amended at N.H. REV. STAT. ANN. § 275:37 (2017)). Rhode Island’s law provided that “nothing herein contained shall prohibit a variation in rates of pay as between the sexes where the same is provided for by a contract between the employer and the recognized bargaining agent of the employees.” Act of Apr. 25, 1946, ch. 1786, § 2, 1946 R.I. Pub. Laws 282, 283 (codified as amended at R.I. GEN. LAWS § 28-6-18 (2017)).

359. The conflicting language was as follows: “Any agreement between the employer and an employee to work for less than the wage to which such employee is entitled under this act shall be no defense to such action.” § 4(a), 1947 Pa. Laws at 1402.

360. See *Stollar v. Cont’l Can Co.*, 23 Pa. D. & C.2d 463, 464-65 (Ct. C.P. 1960), *aff’d*, 176 A.2d 699 (Pa. Super. Ct. 1961), *rev’d*, 180 A.2d 71 (Pa. 1962). The women were legacy employees of the Hazel-Atlas Glass Company, *see id.* at 464, which Continental Can acquired in 1956, leading to the U.S. Supreme Court’s important antitrust decision in *United States v. Continental Can Co.*, 378 U.S. 441 (1964).

361. *Stollar*, 23 Pa. D. & C.2d at 469.

and bargaining. We refuse to strike down and destroy what has taken labor so many years to attain.³⁶²

Though the Pennsylvania Supreme Court reversed the trial court's decision two years later, finding a different way to reconcile the conflicting statutory provisions,³⁶³ the damage had been done. Women in Pennsylvania's unionized workplaces—likely a substantial total in a state where union density approached 40% of all nonagricultural workers well into the 1960s³⁶⁴—enjoyed only a highly uncertain set of legal protections during the more than fifteen years between war's end and the state high court's *Stollar* decision.

Labor's desire to safeguard collective bargaining—and more specifically, to preserve its opportunistic invocation of the equal pay principle—also explains its preference for an administrative approach to the new pay equity laws as against the litigation-centered approach preferred by women's groups. Indeed, internal union memos throughout the period repeatedly expressed concern about “extreme ‘court reliance’” bills, as one such memo put it, and instead voiced support for bills relying on “administrative discretion.”³⁶⁵ And most union-tendered bills, including the very first bill advanced in Congress by staunch union allies Senators Wayne Morse and Claude Pepper in 1945, made no provision for employee suits at all, instead vesting sole enforcement authority in the Department of Labor.³⁶⁶

As a general matter, this union preference for administration over litigation made eminent sense. Labor's superior political-organizational capacity meant that it could exert more reliable control over agency decisionmakers, whether directly or through legislative overseers, than politically insulated judges. The revolving door between labor agencies and union ranks—in Michigan, for instance, John Gibson left his position as commissioner to head the Michigan CIO and was succeeded by George Dean, who had just served as president of the Michigan Federation of Labor³⁶⁷—further enhanced agency access.

362. *Id.*

363. See *Stollar v. Cont'l Can Co.*, 180 A.2d 264, 273-74 (Pa. 1962).

364. See Barry T. Hirsch et al., *Estimates of Union Density by State*, MONTHLY LAB. REV., July 2001, at 51, 52 tbl.1.

365. Dep't of Research, AFL-CIO, *Federal Equal Pay Bills for Women (86th Congress) 2, 9 (1959)* (on file with author).

366. See S. 1178, 79th Cong. § 6 (1945); see also *Federal Equal Pay Statute Proposed*, 8 WAGE & HOUR REP. 635, 635 (1945) (noting that the Morse-Pepper bill “makes no provision for employee wage suits,” with the ostensible purpose of ensuring that “unintentional violation[s] would not subject employers to heavy retroactive payments”).

367. See *Conference on Rate for the Job (Equal Pay): March 17, 1945*, at 1 (Apr. 11, 1945) (on file with author) (identifying Gibson as the president of the Michigan CIO Council and a former Michigan labor commissioner); Letter from John W. Gibson, Commissioner, Mich. Dep't of Labor & Indus., to Mary Anderson, Dir., Women's Bureau, U.S. Dep't of

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This is not to suggest that unions did not sometimes deploy litigation themselves where it could benefit them. As noted above, unions would sometimes join lawsuits under pay equity laws to protect male wages.³⁶⁸ And unions were heavily involved in FLSA suits, particularly the flood of litigation in 1946 and 1947 following the *Anderson* decision on portal-to-portal pay.³⁶⁹ Even so, channeling the new pay equity laws into administration, or at least limiting the litigation possibilities, brought a certain safety. By keeping enforcement decisions in the hands of agency administrators rather than judges, unions gained at least some assurance that implementation of the equal pay principle would align with union interests and prerogatives, whether in setting broad enforcement priorities or adjudicating particular cases.³⁷⁰

The most direct and powerful evidence of labor's effort to steer the design of the new equal pay laws toward agencies and away from courts and litigation came as legislative efforts in Congress heated up in 1956 after the AFL-CIO merger the year before.³⁷¹ As detailed below, the newly merged AFL-CIO, feeling the heat on the pay equity issue, developed and then threw its weight behind a bill that, as an internal memo explained, relied "primarily on administrative rather than judicial enforcement."³⁷²

Labor 1 (Mar. 31, 1943) (on file with author) (noting that Dean succeeded Gibson as commissioner); Aug. 27, 1945 Lowrie Letter, *supra* note 260, at 3 (noting that Dean served as president of the Michigan Federation of Labor for about ten years).

368. See *supra* notes 341-49 and accompanying text.

369. See *Portal-to-Portal Wages: Hearings on S. 70 Before a Subcomm. of the S. Comm. on the Judiciary*, 80th Cong. 22, 32 (1947) (statement of Sen. Homer E. Capehart) (noting that unions had made FLSA litigation a "wholesale business" and had gone on "fishing expedition[s]" hoping that "lightning would strike"); Leo Wolman, *Labor Peace in 1947*, WASH. POST, Jan. 5, 1947, at B5, B5 (noting that unions found it "essential . . . to promote litigation").

370. Such control was likely seen as especially important during the earliest legislative campaigns to enact equal pay laws, as U.S. industry underwent peacetime demobilization and reconversion of the wartime economy. Particularly delicate was the question of how to address women in the workplace as returning male veterans were reincorporated into the U.S. industrial order—a question that arose frequently in legislative debates around equal pay. See *1945 Senate Hearings*, *supra* note 186, at 11 (statement of Sen. Morse during testimony of Frieda S. Miller, Director, Women's Bureau, U.S. Department of Labor) (noting the coming "oversupply of labor"). Other commentators at the time noted the challenge of "[l]arge-scale and rapid re-employment of men (and of women) from the armed forces" and the resulting need for "measures" to "facilitate the withdrawal of considerable numbers of women from the active labour force, out of the competition for jobs with returning veterans and with their sisters who have more need or desire for postwar employment." Dickinson, *supra* note 50, at 719-20.

371. For a recounting of the AFL-CIO merger, see ROBERT H. ZIEGER, *THE CIO: 1935-1955*, at 357-71 (1995).

372. Comments on Federal Equal Pay Legislation 1 (1956) (on file with author).

Prior to 1956, the AFL and CIO had pursued separate tracks on equal pay laws that reflected each group's relationship to politics more generally. For its part, the AFL had hewed to its longstanding position that private collective bargaining, rather than state-administered regulatory interventions, was the best way to achieve economic justice for all workers.³⁷³ The best example during the early pay equity debate is a letter AFL President George Meany wrote to Representative Frances Bolton in 1953 in response to her circulation of a draft equal pay bill.³⁷⁴ Noting that the Women's Bureau had advanced similar bills since 1945, Meany opened with a stout rejection of the very idea of regulating pay equity: "The American Federation of Labor has regarded this proposal as unwise and has not supported it."³⁷⁵ He then noted the long history—"time after time, and with increasing frequency"—of AFL efforts "to eliminate the historic differentials maintained between the pay of men and women workers doing comparable work."³⁷⁶ Pay equity, however, was an

extremely complex problem of federal intervention and federal law enforcement. We feel that in a free competitive economy, the task of establishing and safeguarding the principle as well as practice of equal pay to women workers is properly within the province of collective bargaining and not of police action by the government.³⁷⁷

For their part, CIO unions, in keeping with the greater openness of industrial unions to political solutions compared to the AFL's trade unions,³⁷⁸ were more open to government regulation via the new equal pay laws, but only as an adjunct to the collective bargaining process. The written statement and testimony of a trio of UAW representatives during House hearings in 1948 on the pay equity issue are especially revealing in this regard.³⁷⁹ After expressing support for the concept of equal pay for women, the statement noted several recent instances in which collective bargaining had not just failed to eliminate sex-based wage differentials but had in fact created them via a

373. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (offering a sweeping account of the early labor movement's embrace of private ordering over statism); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985) (similar).

374. Letter from President, Am. Fed'n of Labor, to Hon. Frances P. Bolton 1 (June 11, 1953) (on file with author).

375. *Id.*

376. *Id.* at 1-2.

377. *Id.* at 2.

378. On the CIO's comparative embrace of politics, see ROBERT H. ZIEGER & GILBERT J. GALL, *AMERICAN WORKERS, AMERICAN UNIONS: THE TWENTIETH CENTURY 94-96* (3d ed. 2002).

379. See *1948 House Hearings*, *supra* note 51, at 176-80 (statement of William H. Oliver, Co-director, UAW-CIO Fair Practice Department, et al.).

“restrictive agreement” under which “[m]any relatively simple tasks normally performed by women at lower rates were being performed by men at higher rates.”³⁸⁰ But the solution that followed from this admitted return of “old habits,” the UAW officials continued, was not private lawsuits seeking damages that could force equalization of wage structures on local union and company alike.³⁸¹ Rather, the UAW supported a bill then circulating in Congress that would have granted sole enforcement authority to the Secretary of Labor, with the power to order injunctive relief and, in cases involving reinstatement of female employees, back pay.³⁸² Perhaps most tellingly, the bill provided for the establishment of “industry committees” made up of representatives of labor and management that would be “empowered to make investigation of abuses and recommendations for their reform.”³⁸³ While hardly “a panacea or a substitute for union action,” this combination of limited public enforcement and corporatist oversight would provide a “favorable atmosphere” as well as “a supplement and, when necessary, a corrective to the collective-bargaining process.”³⁸⁴

But as equal pay legislation became a state-level reality and gained traction in Congress, the Executive Council of the newly merged AFL-CIO, noting that “[d]isagreement has arisen” on the equal pay issue between the AFL and CIO wings, resolved to reconcile the legacy entities’ divergent positions.³⁸⁵ After sustained study of all past legislative proposals and state-level enforcement efforts by a special staff committee spanning multiple departments,³⁸⁶ the AFL-CIO unveiled its new policy in a quartet of memos and, following soon after, letters to key members of Congress.³⁸⁷ The AFL-CIO’s new policy, one of the memos explained, would center on a “compromise proposal” that, by steering between existing bills, “would avoid harmful consequences feared by some unions and yet put the AFL-CIO on record in support of federal equal pay

380. *Id.* at 176-77.

381. *See id.* at 178-79.

382. *See id.* at 1-6 (full text of H.R. 4408); *id.* at 179-80 (statement of William H. Oliver, Co-director, UAW-CIO Fair Practice Department, et al.) (expressing UAW support for H.R. 4408).

383. *Id.* at 179 (statement of William H. Oliver, Co-director, UAW-CIO Fair Practice Department, et al.).

384. *Id.* at 177, 179-80.

385. Memorandum from Stanley Ruttenberg and Peter Henle to Matthew Woll and David McDonald 1, 3 (Feb. 6, 1956) (on file with author); *see also* Memorandum from Stanley Ruttenberg to William F. Schnitzler (May 31, 1956) (on file with author).

386. *See* Memorandum from Peter Henle to Mr. Schnitzler (Mar. 19, 1956) (on file with author); Memorandum from William F. Schnitzler to Stanley Ruttenberg et al. (Mar. 16, 1956) (on file with author).

387. *See, e.g.,* Letter from Sec’y-Treasurer, AFL-CIO, to Rep. Edna F. Kelly (Dec. 26, 1956) (on file with author).

legislation as desired by other unions and most influential women's organizations."³⁸⁸ The centerpiece of the compromise measure, as noted previously, would be reliance "primarily on administrative rather than judicial enforcement."³⁸⁹

Yet the proposed amendments to existing bills that the AFL-CIO began to circulate soon after were hardly a middle-ground compromise from the perspective of women's groups advancing bills built around class action lawsuits. Indeed, under the AFL-CIO's compromise measure, employees could only bring suit to collect back pay upon an employer's noncompliance with a direct order of the Secretary of Labor.³⁹⁰ But "if the Secretary's findings are against her," the memos walking through the compromise measure noted, "[n]o provision is made for employee appeal."³⁹¹ Thus, an employee would enjoy, as the memo put it in regard to a similar bill under consideration, neither an "independent right of court suit, nor recourse from an adverse finding by the Secretary."³⁹² The conclusion of one of the memos made crystal clear why granting the Secretary such powerful, and unreviewable, gatekeeper authority was necessary to protect union prerogatives:

By substituting administrative action for civil suits, the compromise would minimize the danger that collective bargaining agreements would suddenly be placed in danger through civil suits.

Such a danger already exists under present law which requires a union to represent everyone in the bargaining unit fairly. Women have sued unions under this provision, charging discrimination.³⁹³

A year later, as equal pay bills moved through Congress, another internal AFL-CIO memo recounted the reasons the AFL-CIO had supported a compromise approach to equal pay that provided for "enforcement through administrative procedures rather than direct court action."³⁹⁴ "It was felt," the memo explained, "that direct court action might lead to a rash of decisions that could adversely affect and upset collective bargaining relations."³⁹⁵

For a concrete illustration of this concern, the new leadership of the AFL-CIO needed only look back to St. John's case more than a decade before. While the trial record is otherwise sparse on the matter, the testimony of St. John and

388. Comments on Federal Equal Pay Legislation, *supra* note 372, at 1.

389. *Id.*

390. See Dep't of Research, *supra* note 365, at 6.

391. *Id.*

392. *Id.* at 7.

393. Comments on Federal Equal Pay Legislation, *supra* note 372, at 3.

394. Memorandum from Nancy Pratt to Saul Miller, Equal Pay 1 (Apr. 11, 1957) (on file with author).

395. *Id.*

several of her assignors reveals deep frustration with the will or capacity of the UAW or the union-dominated Michigan Department of Labor and Industry to seek recourse on their behalf. Several of the women had pursued the union grievance process when they were laid off in 1938 but did not prevail—reflecting a well-documented pattern of unions’ failure to vigorously protect female seniority during postwar purges of women from the auto and electrical industries.³⁹⁶ Other pieces of trial testimony are even more revealing. Midway through St. John’s stint on the witness stand, GM’s counsel probed the origins of her lawsuit and even made vague intimations that St. John’s legal action was part of a “conspiracy”—presumably between her and the UAW.³⁹⁷ But St. John firmly responded that the union had “tried to mix in” with the lawsuit after she filed it but “had nothing to do with it so far as we were concerned.”³⁹⁸ Even more tellingly, St. John then testified that her decision to sue was at least in part rooted in her frustration with the Michigan Department of Labor and Industry.³⁹⁹ “[A]fter the State Labor Board turned politics and wouldn’t do anything for us,” she noted from the stand, “we went to see Mr. Pierce.”⁴⁰⁰

Here, then, is some of the most dramatic evidence of the political economy of the pay equity movement as women’s groups and their allies within the New Deal coalition sought to enact equal pay laws in the wake of St. John’s lawsuit. Equal pay laws with strong litigation enhancements like those women’s groups favored would have permitted women to challenge wage injustices on their own initiative and on their own terms, even when state agencies or local union officials refused. Litigation, on this view, was not a salutary adjunct to collective bargaining. On the contrary, it was an end run around, and a collateral attack upon, the system of labor-management relations ushered in by the New Deal upon which labor relied.

3. Gauging labor’s imprint

The question remains, of course, whether labor’s “stand on enforcement procedures,” as a letter to Congresswoman Edna Kelly put it in 1956,⁴⁰¹ substantially influenced legislative campaigns or the form equal pay laws ultimately took. At the federal level, at least, labor’s imprint is unmistakable. After an initial burst of legislative activity during the second half of the 1940s,

396. See Record on Appeal, *supra* note 1, at 1430, 1432, 1568; MILKMAN, *supra* note 56, at 107-08, 114-15, 145-47 (providing examples of failures).

397. See Record on Appeal, *supra* note 1, at 95-98.

398. *Id.* at 98-99.

399. *Id.* at 100. On the union’s domination of the Michigan Department of Labor and Industry, see note 367 and accompanying text above.

400. Record on Appeal, *supra* note 1, at 100.

401. Letter from Sec’y-Treasurer to Rep. Edna F. Kelly, *supra* note 387.

Congress went dark on equal pay throughout the 1950s. Indeed, during the Eighty-Second through Eighty-Sixth Congresses, a period spanning 1951-1961, some seventy-two bills were introduced, but no hearings were held, and no bills were reported out of committee.⁴⁰² As newly appointed Women's Bureau chief Alice Leopold reported to union officials in the middle of that fallow period, the "absence of support from the AFL-CIO had discouraged action" on any bills.⁴⁰³ Moreover, the AFL-CIO's opposition to a judicial role in implementing equal pay laws would stiffen as time went on. By 1961, the union was pressing a new version of a "substitute" bill that eliminated the ability of women to file any lawsuit, even to enforce agency orders requiring wage restitution—only the Secretary of Labor could do so.⁴⁰⁴ The union even managed to strong-arm the Women's Bureau into accepting the bill as its own.⁴⁰⁵

Turning to the state level, the general lack of formal legislative history—a condition that continues in many states to this day⁴⁰⁶—makes firm judgments about the effect of labor's conflicted stance harder to find. At the outset, it is important to concede that even state federations of labor appeared to support campaigns to enact state equal pay laws before the newly merged AFL-CIO revised the national AFL's longstanding opposition to such laws in 1956.⁴⁰⁷ It is also worth noting that employers, not just unions, had an interest in limiting the laws' efficacy and coverage by weakening private enforcement provisions or inserting carve-outs for wage rates established via collective bargaining.⁴⁰⁸

402. See EARNER, *supra* note 228, at 3-17.

403. Memorandum from Stanley Ruttenberg to William F. Schnitzler, *supra* note 385, at 1; see also *Women's Bureau: Directors' Gallery*, U.S. DEP'T LAB., <https://perma.cc/U5L9-YB9M> (archived Oct. 22, 2017) (noting that Leopold directed the Women's Bureau from 1953 to 1961).

404. See H.R. 364, 87th Cong. §§ 5-7 (1961); see also Explanation of Changes in H.R. 364 (n.d.) (on file with author) (enumerating changes made to the bill in response to the AFL-CIO's demands); Letter from Esther Peterson, Dir., Women's Bureau, U.S. Dep't of Labor, to George D. Riley, Legislation Dep't, AFL-CIO 1 (Mar. 8, 1961) (on file with author) (enclosing the list of changes and describing them as "the modifications agreed upon" in a meeting between union representatives and Women's Bureau staff).

405. See Meeting in Esther Peterson's Office on Equal Pay Bill 1 (1961) (on file with author); see also Letter from Esther Peterson to George D. Riley, *supra* note 404, at 1 (noting "the understanding arrived at in the Conference between union representatives and Department staff").

406. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 104 (2009) ("[I]n many states legislative history is slim or not easy to obtain.").

407. See Memorandum on Responses from State Bodies on Equal Pay Legislation 1 (May 24, 1956) (on file with author) (noting that all eleven state federation bodies surveyed had supported enactment of equal pay legislation).

408. See Letter from Elisabeth Eberhard Zeigler, Legislative Representative, Cal. Fed'n of Bus. & Prof'l Women's Clubs, Inc., to Earl Warren, Governor of Cal. 2 (June 24, 1949) (on file with author) (noting, in her capacity as a representative of the California

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And yet the remaining evidence strongly suggests that unions exerted substantial pressure on state legislatures, systematically channeling legislative efforts toward an anemic, mostly administrative approach. As just one example, in the wake of a New York trial court's decision in the *Corsi* case adopting a restrictive interpretation of the state's equal pay law's comparability provision,⁴⁰⁹ the New York State Federation of Labor advanced a bill designed to resuscitate New York's equal pay law by loosening the comparability requirement to allow equal pay claims based on "substantially similar" work.⁴¹⁰ But like the national AFL-CIO's "compromise" bill in 1956, the state federation's proposed bill sought to place all enforcement authority in the state labor agency's hands, permitting individuals to seek redress in court only if "the employer does not comply with the commissioner's order within thirty days."⁴¹¹

Other evidence from state legislative campaigns, particularly in large, industrial, and heavily unionized states, is telling if not definitive. During Pennsylvania's first substantial legislative drive to enact an equal pay law in 1947, provisions authorizing an employee to bring a class action and to collect double damages were some of the first to fall to amendments, setting a pattern that would repeat in other states.⁴¹² After efforts to reinsert both provisions were easily beaten back, one legislator complained that Pennsylvania women had "been sold down the river."⁴¹³ "The bill provides that [women] shall have access to the courts," another legislator noted with clear sarcasm, "and so if they

Federation of Business and Professional Women's Clubs, that because "employers [sic] representatives, union representatives and many legislators believed that the law should not interfere with the collective bargaining process," a collective-bargaining carve-out "was essential to passage of" proposed equal pay legislation in California).

409. See *Corsi v. Bentley Stores Corp.*, No. 23060, 1947 WL 57471 (N.Y. City Ct. Oct. 31, 1947); see also *supra* notes 248-49 and accompanying text (recounting the *Corsi* case).

410. See Assemb. 958, 179th Leg., Reg. Sess. § 4 (N.Y. 1956); Letter from Harold C. Hanover, Chairman, Legislative Comm., N.Y. State Fed'n of Labor, to William F. Schnitzler, Sec'y-Treasurer, AFL-CIO 2 (Apr. 14, 1956) (on file with author).

411. See N.Y. Assemb. 958 § 4. Interestingly, there is evidence that the national AFL-CIO's "compromise" bill may have been patterned after the state federation's bills. See Comments on Federal Equal Pay Legislation, *supra* note 372, at 2 (noting the federal measure's similarity to bills being pressed by the New York Federation in that it "does not permit employees to initiate civil suits themselves"). For more discussion, see AFL-CIO, A Summary of the AFL-CIO Position in Support of Federal Equal Pay Legislation 2 (1956) (on file with author).

412. See 30 PA. LEGIS. J. 2935-36 (1947) (statement of Rep. Lovett) (rejecting amendments providing for liquidated damages that would have "put the bill back into its original form"); *id.* at 3924-25 (statement of the Clerk of the Senate) (noting Pennsylvania Senate amendments striking the ability of an employee to bring suit "for and in behalf of herself or themselves and others similarly situated").

413. *Id.* at 5476, 5478 (statement of Rep. Andrews).

have fifty dollars damages coming they can pay a lawyer at least thirty-five dollars and collect fifteen dollars for themselves.”⁴¹⁴ The first pay equity bill advanced in California, in 1945, tracked the Women’s Bureau’s recommended bill in its inclusion of the full panoply of litigation-boosting provisions—but the legislature quickly pulled back.⁴¹⁵ The law enacted in 1949 limited back pay to thirty days and made no provision for liquidated damages or attorneys’ fees.⁴¹⁶ It also excepted wage differentials if they came about “by contract between the employer and a bona fide labor organization recognized as a bargaining agent of the employees”⁴¹⁷—a provision that was “essential to passage,” according to a letter a women’s group sent to California Governor Earl Warren urging him to sign the bill, to satisfy the requirement among “union representatives” and employers that “the law should not interfere with the collective bargaining process.”⁴¹⁸ With this carve-out in place, and the original bill’s various litigation-promoting provisions safely stripped away, the California Federation of Labor likewise urged the Governor to sign the bill into law.⁴¹⁹ But in so doing, the Federation’s chief lobbyist was also quick to note that given the parade of amendments, the law’s “effectiveness ha[d] been impaired almost to the vanishing point.”⁴²⁰

III. Legacies: *St. John*, Gender Equality, and Collective Rights in U.S. Law

Nearly thirty years after Florence St. John filed her remarkable lawsuit—as complaints brought under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 began to flow into the Department of Labor, the Equal Employment Opportunity Commission (EEOC), and the federal courts—the *Detroit Free Press* ran a story profiling the victory of Diane Bruno, a typist at Detroit’s Dana Corporation, a manufacturer of auto parts for automakers like GM.⁴²¹ When Dana Corporation denied Bruno a promotion to a better-paying position as an “industrial specialist clerk” despite her seniority over the man who got the job—to protect her, management said, from the “dirt, noise, and

414. *Id.* at 5479 (statement of Rep. Goff).

415. *See* S. 1253, 56th Leg., Reg. Sess., § 1 (Cal. 1945).

416. *See* Act of July 2, 1949, ch. 804, § 1, 1949 Cal. Stat. 1541, 1541 (codified as amended at CAL. LAB. CODE § 1197.5 (West 2017)).

417. *Id.*

418. Letter from Elisabeth Eberhard Zeigler to Earl Warren, *supra* note 408, at 2.

419. Letter from C.J. Haggerty, Exec. Sec’y & Legislative Representative, Cal. State Fed’n of Labor Legislative Comm., to Earl Warren, Governor of Cal. (June 23, 1949) (on file with author).

420. *Id.*

421. Helen Fogel, *She Wins \$885 and Makes History*, DETROIT FREE PRESS, Aug. 25, 1968, at D1, D1.

profane language” that came with a job closer to the shop floor—she filed a complaint with the EEOC, then in only its second month of operation.⁴²² The EEOC-brokered settlement, inked in 1968 after three years of agency-led investigation, negotiation, and deliberation, produced the towering headline: “She Wins \$885 and Makes History.”⁴²³

For her part, St. John may not have noticed the headline at all, and so may not have had occasion to object to the article’s characterization of Bruno’s victory, more than two decades after St. John’s much larger one, as “history-making.”⁴²⁴ After all, St. John’s husband (and fellow machinist) Cleon had recently passed away, and St. John, who had relocated to Daytona Beach, Florida, was nearing the end of her life, which came two years later.⁴²⁵ Still, St. John appears to have still made visits to her daughter outside Detroit at the time,⁴²⁶ making it at least possible that the case came to her attention. If St. John happened to see the article, perhaps the three long years the EEOC took to resolve Bruno’s case might have confirmed the view she expressed on the stand in Judge Hayden’s courtroom back in 1941 that administrative agencies had a tendency to “turn[] politics” in individual cases.⁴²⁷ Or perhaps St. John was relieved to learn that Bruno’s victory came via the efforts of a publicly funded administrative agency rather than a full-fledged civil lawsuit, privately funded lawyers, and a draining, six-week trial. We will never know one way or the other, as no record of St. John’s life, much less her views on her lawsuit or the legislative battles that followed in its wake, survives apart from a marriage license and a brief newspaper obituary.⁴²⁸

Whatever St. John thought about her own place in history, the story of her lawsuit and the midcentury pay equity movement she helped kick off holds important implications for a number of modern debates about U.S. antidiscrimination law and class actions.

422. *Id.*

423. *Id.*

424. *See id.* (“The Bruno case may be a history-making one, but the EEOC will not verify whether or not the Bruno case is the first or one of the first filed in the nation.”).

425. *See Florence A. St. John*, ST. J. (Lansing), Dec. 23, 1970, at A-2, A-2; Geneva K. Wiskemann, *St. John v. GM Corp.*: Miscellaneous Notes from Secondary Resources (2015) (on file with author) (noting that Cleon died in 1968).

426. *See Florence A. St. John*, *supra* note 425, at A-2.

427. *See Record on Appeal*, *supra* note 1, at 100; *supra* text accompanying note 400.

428. *See Ingham Cty., Mich., Marriage License* (1935) (on file with author); *Florence A. St. John*, *supra* note 425.

A. *St. John* and the Struggle for Gender Equality

One thing that is clear is that the years separating *St. John*'s stunning courtroom win, finalized on appeal in 1945, and Diane Bruno's much smaller, EEOC-brokered win in 1968, were, in hindsight, a painful missed opportunity. The systematic dilution of the strong bills advanced by women's groups—and the enactment in their stead of laws with tight comparability provisions, union carve-outs, and denuded class action provisions—left wage discrimination largely unregulated. This left workers like *St. John* unprotected save in situations where a state agency, such as the Michigan Department of Labor and Industry, or a union (whether with or without an equal pay clause in its CBA to use as leverage) would go to bat for them, or in those few cases for which women could find counsel willing to bring a lawsuit based on the prospect of single, not multiple, damages and no possibility of legal fees. All told, of the approximately 8.5 million women in the labor force during the 1950s in the twenty states with equal pay laws, more than half of them worked in states like California, Pennsylvania, Ohio, and Illinois, where equal pay laws were weak.⁴²⁹

In the meantime, the labor market fortunes of women like *St. John* did not improve and likely grew worse. The postwar purge of women from the labor force—in which companies and unions alike baldly trampled upon the seniority rights of many women—was the first blow.⁴³⁰ And soon after the drive for pay equity in the 1940s and early 1950s, the gender earnings ratio of full-time workers began to *decrease*, falling from 64% in 1955 to less than 60% in 1970, even as technological advances made physical strength less important in many jobs like *St. John*'s.⁴³¹ Most important of all, sex segregation by industry and occupation—which is consistently found to hold the greatest explanatory power in predicting the gender wage gap—barely budged between war's end and the mid-1960s, consigning women to secondary segments of the labor market and locking in path dependencies that systematically disadvantaged them.⁴³² Viewed through this lens, *St. John*'s lawsuit and the legislative

429. See 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION: 1950, at 1-125 tbl.73 (1953) (reporting women workers totaling roughly one million in each of these states).

430. See GABIN, *supra* note 234, at 119-22, 127-30; MILKMAN, *supra* note 56, at 112-15. For instance, the percentage of production workers in the auto industry who were women dropped from a wartime high of 24.8% in April 1944 to less than 10% in 1946 and 1947. MILKMAN, *supra* note 56, at 113.

431. See BLAU ET AL., *supra* note 29, at 146 fig.5.1.

432. See *id.* at 223-24, 224 tbl.10-1 (7th ed. 2014) (reporting results of a regression analysis in which occupational and industry segregation explains roughly one-half of the gender wage differential in 1998); *id.* at 144 (noting that “the degree of occupational segregation by sex was substantial and largely constant” from 1900 to 1970, with gradual decreases thereafter). For commentary on trends in occupational segregation, see Edward Gross, *footnote continued on next page*

campaigns it spurred were plainly a hinge moment. A different regulatory response built around class actions rather than labor's alternative collectivist vision might well have altered the trajectory of women's workplace role in the ensuing decades. Women today, it seems possible, might be making more than roughly eighty cents for each dollar that men earn.⁴³³

B. *St. John* and the Class Action's Emergence

Equally clear is that the *St. John* episode holds important lessons for our understanding of the evolution of litigation's place in the U.S. regulatory state. Despite decades of heated debate about the class action's proper form and function, historical work on the evolution of mass litigation remains very much in its infancy. As noted at the outset, one line of work has traced the origins of the modern class action to efforts by equity courts throughout the nineteenth century and the first part of the twentieth to assimilate existing due process norms to a host of new lawsuits involving plaintiff- and defense-side aggregation, many of them by and against unincorporated business associations.⁴³⁴ Another has focused intensively on the forces that shaped the Advisory Committee's amendment of Rule 23 in 1966.⁴³⁵ Still another more recent body of work examines the rise (and fall) of the mass tort class action and the consumer class action and, with the benefit of several decades of critical perspective, asks questions about roads *not* taken during the 1970s and 1980s as the class action wars flared.⁴³⁶

The *St. John* episode broadens these accounts in at least two ways. To begin, directing our attention to the neglected but critical midcentury period permits us to imagine alternate paths along which aggregated litigation might have developed. Indeed, *St. John's* lawsuit came just as federal and state courts alike began in earnest to probe the relationship of due process to the class action in a wider set of controversies than nineteenth and early twentieth century equity courts had confronted. As already noted, the most sustained midcentury judicial encounter with the mass action came in FLSA cases, and the federal courts quickly decided against opt-out mechanisms and broadly preclusive

Plus Ça Change . . . ?: *The Sexual Structure of Occupations over Time*, 16 SOC. PROBS. 198 (1968); and Jerry A. Jacobs, *Long-Term Trends in Occupational Segregation by Sex*, 95 AM. J. SOC. 160 (1989).

433. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 66 fig.1, 69 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 21,913, 2016), <https://perma.cc/QU2Z-7YXN> (estimating female-to-male earnings ratios and demonstrating that the ratio hovered around 80% as of 2010).

434. See *supra* note 20.

435. See *supra* notes 18-19 and accompanying text.

436. See *supra* note 32 and accompanying text.

judgments of the modern sort.⁴³⁷ But FLSA litigation in the 1940s is only part of the story. At the federal level, growing judicial anxiety about mass actions was also apparent in *Hansberry v. Lee*, a case on the enforceability of a racially restrictive covenant decided shortly after St. John filed suit, in which the U.S. Supreme Court held that members of a class not present as parties to an earlier litigation could not be bound by the judgment unless they were adequately represented by parties who were present.⁴³⁸ And active judicial engagement with the class suit was also present at the state level as St. John's lawsuit unfolded, as evidenced by the Michigan Supreme Court's limited holding in *International Typographical Union v. Macomb County* that absent parties in a financial dispute could be bound by a judgment in a class suit only if it was "totally impracticable" to bring all parties before the court.⁴³⁹

Could a regime of pay equity regulation built around aggregated litigation have altered the path down which class action doctrine traveled or otherwise sped the trip? A skeptic might respond that state courts interpreting the new pay equity laws would have quickly gone the way of the federal courts, declining the invitation to extend the force of a class judgment and thereby cabin mass litigation under the new laws along the lines of the FLSA's "collective" action.⁴⁴⁰ If so, then litigation under the new pay equity laws would have resembled smaller-scale suits much like St. John's, with class action provisions serving as more of a glorified joinder device than a source of broadly preclusive judgments. The new pay equity laws, on this view, might have increased the frequency with which judges had to confront the due process and other puzzles raised by the modern class action. But none of this would have made much of a start toward the legal "acculturation" around due process that some have argued was necessary to the modern class action's emergence.⁴⁴¹

But other counterfactual possibilities are easily glimpsed. For one, a raft of new state-level pay equity laws built around robust litigation mechanisms might, in addition to increasing the frequency with which judges were made to confront mass litigation's puzzles, have helped spur the development of a litigation infrastructure. Most notably, frequent litigation might have led to the development of a specialized employment bar separate and apart from organized labor. This, in turn, would have empowered a new set of repeat

437. See *supra* notes 285-87 and accompanying text.

438. 311 U.S. 32, 37-38, 42-44 (1940).

439. 11 N.W.2d 242, 244-46 (Mich. 1943) (quoting *City of Detroit v. Detroit United Ry.*, 197 N.W. 697, 702 (Mich. 1924)).

440. See *supra* notes 285-87 and accompanying text.

441. See, e.g., *supra* note 20 (detailing Resnik's acculturation theory of the class action's emergence).

players far more bent on “play[ing] for rules” within the system than St. John’s one-off, general practice counsel.⁴⁴²

It is also important to note that litigation under the new pay equity laws would have been likely to play out in the state courts, not the federal courts, under different institutional conditions. This matters because judicial encounters with aggregated litigation at midcentury went to the heart of an emerging debate at the time about the relative merits of administration and litigation.⁴⁴³ Indeed, the many federal court decisions paring back the power of the FLSA’s “collective” action can be read as reflecting a preference for administrative enforcement by the Wage and Hour Division of the U.S. Department of Labor, which was relatively vigorous in the early 1940s.⁴⁴⁴ At the state level, by contrast, litigation under pay equity laws that provided for robust private enforcement might have done better in the comparison with agency-led enforcement. As noted above, the state-level administrative state at midcentury was significantly, and even grossly, underresourced.⁴⁴⁵ While federal judges may have felt little pressure to strengthen the FLSA’s collective action and make it an effective reform mechanism, state judges might have been predisposed to see class litigation under the new pay equity laws as more a linchpin of the regime than a superfluous substitute for public administration.

Finally, the FLSA and the pay equity laws were fundamentally different in their transformative potential, which could have further altered the judicial calculus. With the obvious exception of the portal-to-portal pay battle in 1947, an FLSA lawsuit in the 1940s and 1950s might not have struck a federal judge, even one sympathetic to organized labor, as a potential tool of reform because the statute promised little by way of economic or social change. Even before World War II dramatically increased wage rates, the FLSA’s minimum wage requirement of forty cents per hour fell below wage rates in most large-scale industries.⁴⁴⁶ Nor did the FLSA’s overtime rules hold substantial transforma-

442. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98-100 (1974). For more concrete analyses of how specialized litigation bars form and their impact on the making of substantive law, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004); and Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

443. See Kalven & Rosenfield, *supra* note 18, at 714-21.

444. See WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM* 61-71 (1997).

445. See *supra* notes 260-64 and accompanying text.

446. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor*, 75th Cong. 338-42 (1937) (setting forth wages in most U.S. industries); see also *Fair Labor Standards Act of 1938*, Pub. L. *footnote continued on next page*

tive potential outside the portal-to-portal issue because of, among other things, provisions exempting particular employee types—including retail and agricultural workers—that blunted the rules’ effect.⁴⁴⁷ Because the FLSA to a significant extent reflected the economic status quo in the United States, a federal judge would have seen little need for powerful class actions to implement its goals. By contrast, pay equity laws had far more potential to upend the social and economic status quo by fundamentally altering women’s place in the industrial order. While this radical potential might have predisposed judges against the laws, it is also possible that sympathetic judges would have seen reform possibilities as turning on effective class mechanisms. And even for judges who were more ambivalent about the new pay equity laws’ potential for reform, robust litigation of the sort that one would expect under the bills advanced by women’s groups would have presented sharp judicial management challenges that might have convinced many judges to go along with a more aggregated approach.

The second and related way the *St. John* episode broadens existing accounts of the class action’s evolution is by situating aggregated litigation among a wider menu of regulatory means of vindicating collective interests. Since at least the New Deal, regulatory architects have faced a basic choice between courts and agencies in fashioning collective forms of redress, and that choice has been shaped at key moments in time by generalizations about the competencies and pathologies of each type of institution.⁴⁴⁸ As already noted, that was no less true at midcentury, when New Deal faith in bureaucracy plainly steered legislators enacting the first pay equity laws away from a court- and litigation-centered approach, or a few decades later, in the 1960s and 1970s, when growing skepticism about bureaucracy’s workings helped clear the way for the rise of the class action as a central feature of the U.S. regulatory state.⁴⁴⁹

But the story of *St. John*’s lawsuit and the legislative struggles that followed in its wake suggest that an equally important precondition of the class action’s emergence and rapid growth in the 1970s was the falling away of a labor-based vision of collective rights built around collective bargaining.⁴⁵⁰ On

No. 75-718, § 6, 52 Stat. 1060, 1062-63 (codified as amended at 29 U.S.C. § 206 (2016)) (setting a minimum wage that would reach forty cents an hour after seven years).

447. See § 13, 52 Stat. at 1067 (codified as amended at 29 U.S.C. § 213).

448. For incisive analyses, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 7 (1994). On “capture” theory, see note 16 and accompanying text above.

449. See *supra* note 16 and accompanying text.

450. See TROY, *supra* note 324, at 2 tbl.2 (reporting that union penetration peaked at 32.7% in 1953 and declined thereafter). For a recent synthesis of the vast academic literature on labor’s decline, see Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 13-46 (2016). Among the standard factors to which labor’s decline has been attributed are the deradicalizing effect of U.S. labor law, including the Wagner Act, deindustrialization,
footnote continued on next page

this view, agencies remained the primary enforcement vehicle within the U.S. regulatory state until at least the 1950s not solely because of a Landis-like faith in administrative expertise and vigor⁴⁵¹ but also because of labor's efforts to ensure that enforcement happened on terms consistent with its collectivist plan. The resulting midcentury clash of collectivist visions should be central to any causal account of the modern class action's emergence going forward.

C. *St. John* and the Modern Supreme Court

A final implication of the *St. John* episode turns away from pivotal moments long since passed and toward debates that are still unfolding in the present. One question that has continually arisen as the class action has come to occupy a central place in the U.S. regulatory state is how to reconcile it with competing statutory frameworks, particularly labor law.⁴⁵² As already alluded to, an early version of this tension came in the form of the collision between Title VII of the Civil Rights Act of 1964 and the NLRA on whether seniority protections built into union CBAs that instantiated past discrimination were actionable under Title VII.⁴⁵³ Another came in the 1990s in the form of the question whether a CBA can waive private rights of action under Title VII and cognate federal antidiscrimination laws.⁴⁵⁴ In both sets of cases, the U.S. Supreme Court navigated the tensions between collectively negotiated workplace agreements and private, often aggregated, litigation by workers seeking to protect separate and conflicting rights to redress.

The most recent version of this tension—and the one to which the *St. John* episode most directly speaks—comes in a trio of cases currently before the Supreme Court testing the validity of class action waivers in arbitration agreements in employment contracts.⁴⁵⁵ In all three cases, employees are contesting whether they are bound by a contract requiring that they submit all workplace disputes to binding arbitration and that they do so on an individual basis rather than by way of a group, class, or collective action.⁴⁵⁶ While the

and the “fissuring” of the workplace via corporate contracting of domestic and foreign subcontractors. *Id.* at 14-15, 21 & n.92.

451. *See supra* notes 16-17.

452. *See supra* note 36 (collecting case law reconciling civil rights and labor laws, including the question of the validity under Title VII of bargained-for seniority systems). For a recent overview of these and other statutory tensions, see Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 163-67 (2016).

453. *See supra* note 36 and accompanying text.

454. *See supra* note 36 and accompanying text.

455. *See supra* note 38.

456. *See supra* notes 38-40 and accompanying text.

Supreme Court has already upheld class and concerted action waivers in the consumer protection context,⁴⁵⁷ it has not yet done so in the employment context. Given the widespread practice of employers imposing such waivers,⁴⁵⁸ the cases before the Court would seem to represent the last best chance to halt arbitration's advance from the domain of consumer protection to the critical area of workplace disputes.⁴⁵⁹

What makes the employment context different from the consumer context is a basic statutory collision. On one side is section 2 of the FAA,⁴⁶⁰ which mandates that “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁶¹ On the other is section 7 of the NLRA,⁴⁶² which protects employees’ ability “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴⁶³ The question presented in the cases is whether the NLRA’s protection of “concerted activities for the purpose of . . . mutual aid or protection” encompasses the right to seek collective legal redress and thus trumps the presumed enforceability of arbitration contracts under section 2 of the FAA.⁴⁶⁴

One version of the argument for why the FAA must yield is that the NLRA, which was enacted more than twenty years after the FAA, provides a “contrary congressional command” sufficient to override the FAA’s liberal pro-

457. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-37, 340, 352 (2011).

458. A recent study found that eighty Fortune 100 companies have used arbitration agreements in connection with workplace disputes, and thirty-nine of those companies used class action waivers. See Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America’s Top 100 Companies 2* (2017), <https://perma.cc/HP57-EQ9Z>. Even using conservative definitions of “worker” (such as those that exclude independent contractors), the same study found that roughly one-third of Fortune 100 companies have used arbitration agreements with class waivers. See *id.* at 5-6.

459. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308, 2312 (2013) (upholding the enforceability of an arbitration contract containing a class action waiver provision in the antitrust context); *Concepcion*, 563 U.S. at 336-37, 340, 352 (2011) (doing the same in the consumer contract context).

460. See Federal Arbitration Act, Pub. L. No. 68-401, § 2, 43 Stat. 883, 883 (1925) (codified as amended at 9 U.S.C. § 2 (2016)).

461. 9 U.S.C. § 2.

462. See National Labor Relations Act of 1935, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (codified as amended at 29 U.S.C. § 157 (2016)).

463. 29 U.S.C. § 157.

464. See, e.g., Brief for the NLRB at i, *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. Aug. 9, 2017), 2017 WL 3447770.

arbitration thrust.⁴⁶⁵ Yet as the decisions and briefing in the lower courts reflect, the NLRA's legislative history offers precious little guidance on the issue. Congress never explicitly discussed the right to file class or consolidated

465. See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (“The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”); see also *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (restating *McMahon*'s “contrary congressional command” test); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (explaining that the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).

Not all the parties agree that the cases should be resolved at the intersection of the FAA and the protection of “other concerted activities” in section 7 of the NLRA. Instead, the employee-side parties in the various cases further argue that the case can be resolved by applying the FAA's “saving clause,” which provides that an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2. On this view, section 7's protection of “other concerted activities” is a substantive statutory right that, when read alongside the FAA's saving clause, renders arbitration agreements containing class action waivers unenforceable whether or not there is a “contrary congressional command.” See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017); Petition for a Writ of Certiorari at 14 n.5, *Murphy Oil*, No. 16-307 (U.S. Sept. 9, 2016), 2016 WL 4761717. See generally Note, *The Substantive Waiver Doctrine in Employment Arbitration Law*, 130 HARV. L. REV. 2205, 2207-19 (2017) (offering a concise survey of the “substantive waiver doctrine” on which this argument is based).

But the difference between this argument and the “contrary congressional command” argument may not matter for purposes of the present analysis of how the *St. John* episode and labor's midcentury relationship to the class action bears on the trio of cases currently before the Court. Indeed, a judicial determination as to whether the right to “engage in other concerted activities” is substantive or procedural will necessarily turn, at bottom, on which types of activities were thought “so important to the statutory scheme that Congress forbade their waiver,” see Note, *supra*, at 2219 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)). The resulting inquiry, rooted in a study of text, purpose, and history, may not be so different from the Court's parsing of the NLRA for evidence of a “contrary congressional command.”

Still another theory of the cases before the Court is keyed to the Norris LaGuardia Act (NLA), Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115), rather than the NLRA. The claim proceeds from the fact that the NLA, in addition to barring federal courts from issuing injunctions against nonviolent labor disputes, 29 U.S.C. § 104, and declaring that workers “shall be free from the interference, restraint, or coercion of employers,” *id.* § 102, including in their pursuit of “other concerted activities,” *id.*, also specifically invalidated any laws that were contrary to that policy, see *id.* § 115 (“All acts and parts of acts in conflict with the provisions of this chapter are repealed.”); *id.* § 103 (“[A]ny other undertaking or promise in conflict with the public policy declared in section 102 of this title[] is declared to be contrary to the public policy of the United States [and] shall not be enforceable in any court of the United States”). But here again, the judicial inquiry will focus on whether the NLA's language creates a right to collective litigation that is sufficiently strong to create the necessary conflict.

claims, leaving little in the way of a specific congressional command.⁴⁶⁶ But nor did Congress hint that its protection of “concerted activities” was limited to actions taken by a formally recognized union, leaving open the possibility that Congress gave the provision, as the Seventh Circuit put it, an “intentionally broad sweep.”⁴⁶⁷ This congressional silence makes historical evidence of the sort offered by the *St. John* episode all the more valuable.

On the one hand, one could read the events surrounding *St. John*’s remarkable lawsuit as supporting the view that Congress could not have possibly meant for the NLRA to preserve collective litigation of workplace grievances. Part of this might be simple chronology: When the NLRA was enacted in 1935, the FLSA and pay equity laws—the two statutory areas that most directly raised the possibility of a regulatory regime built around aggregated litigation—were still a few years away.⁴⁶⁸ But this argument suffers from obvious flaws. Indeed, one could no more make it than claim that Congress did not intend for the NLRA to protect an email soliciting union membership because email did not exist in 1935. Here, the *St. John* episode offers a more defensible position: Given labor’s consistent efforts to rid the new pay equity laws of class action provisions, culminating in the AFL-CIO’s strong-arm position in 1956,⁴⁶⁹ the notion that class action lawsuits should be protected by the NLRA as an alternative form of “concerted activit[y]” would have rung hollow to many midcentury unionists’ ears. Viewing the *St. John* episode in this light, some might conclude it more than a stretch to argue that unions sought, and Congress inscribed in the NLRA, a right to collective litigation for workers.

But a better reading of the historical evidence is also available and points in the opposite direction. In particular, labor’s highly selective involvement in equal pay litigation at midcentury—typically to prevent employers from “chiseling” men’s wages⁴⁷⁰—suggests that labor was not irrevocably opposed to

466. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 996 (9th Cir. 2016) (Ikuta, J., dissenting) (“Congress did not discuss the right to file class or consolidated claims against employers” (quoting *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013))), *cert. granted*, 137 S. Ct. 809 (2017).

467. See *Lewis*, 823 F.3d at 1153 (“There is no hint that [section 7 of the NLRA] is limited to actions taken by a formally recognized union.”); see also *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) (noting in dicta that the NLRA does not require that workers combine “in any particular way”).

468. This point is also made by the Fifth Circuit. See *D.R. Horton*, 737 F.3d at 361 (“Congress did not discuss the right to file class or consolidated claims against employers, although such a discussion would admittedly have occurred prior to the existence of Rule 23 or the FLSA.”); see also *Lewis*, 823 F.3d at 1154 (“There is no reason to think that Congress intended the NLRA to protect only ‘concerted activities’ that were available at the time of the NLRA’s enactment.”).

469. See *supra* Part II.C.2.

470. See *supra* note 343 and accompanying text.

aggregated litigation in any form but rather sought to ensure its opportunistic, and tightly controlled, use. The CIO's heavy involvement in the portal-to-portal cases in 1946 and 1947—though done over the AFL's opposition—offers a further example.⁴⁷¹ To be sure, labor's selective use of litigation in both contexts was less than principled and even cynical. And both, it could be argued, were strategic blunders that cost labor far more than it gained.⁴⁷² Still, it bears repeating that midcentury labor was not anti-class action or even anti-litigation so much as it wished to deploy litigation on its own terms. Used properly, collective litigation could very much serve the purpose, to invoke the language of the NLRA itself, of the “mutual aid or protection” of workers.⁴⁷³

Without more evidence linking the struggles over pay equity and the FLSA to congressional debate over the Wagner Act back in 1935, the *St. John* episode offers more context than definitive answers. However, even mere context helps bring into focus the potential ironies on either side of the cases currently before the Court. Were the Court to credit labor's highly selective use of litigation in the pay equity and portal-to-portal contexts in holding that the NLRA preserves class-based arbitration, then it risks blessing a procedural mechanism that many midcentury unions saw as anathema to their core vision of the U.S. industrial order. But the alternative reading seems worse in light of subsequent history, including the steady decline of organized labor; the Court's systematic weakening of the class action mechanism in recent cases like *Wal-Mart Stores, Inc. v. Dukes*;⁴⁷⁴ and litigation's creeping replacement by often toothless arbitration.⁴⁷⁵ Indeed, were the Court to hold that the FAA trumps

471. See Linder, *supra* note 277, at 138 (noting that AFL unions criticized portal-to-portal litigation “as dishonoring collective bargaining agreements”); *id.* at 172, 176 (describing the portal-to-portal litigation as underwritten and perhaps even initiated by CIO unions); see also *AFL Members Raid CIO “Portal” Office*, N.Y. TIMES, Jan. 17, 1947, at 16, 16 (noting outright violence between AFL and CIO locals on the portal-to-portal litigation issue). For the AFL's position as explained by the president of its Metal Trades Department, see John P. Frey, *No Fair: Portal-to-Portal Suits Violate a Basic Principle of Collective Bargaining*, AM. FEDERATIONIST, Feb. 1947, at 17. The AFL opposed such litigation because its “trade union movement ha[d] no assets more valuable than its agreements with employers and [its] integrity.” *Id.*

472. See Linder, *supra* note 277, at 167, 178 (arguing that CIO-led portal-to-portal litigation was part of an effort to gain leverage in the collective bargaining process but mostly hurt unorganized workers, who depended on the FLSA's baseline protections more than did organized ones, by provoking a congressional response that weakened the FLSA).

473. See 29 U.S.C. § 157 (2016).

474. 564 U.S. 338, 342, 359 (2011) (denying class certification in a case involving about 1.5 million female employees asserting gender discrimination because of a failure to satisfy Rule 23's commonality requirement).

475. For a synthesis, see Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78
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the NLRA by pointing to labor's reservations about class litigation during legislative struggles over pay equity laws, it would be using labor's midcentury pursuit of its alternative collectivist vision to close off one of the few remaining ways workers can seek collective redress long after labor's alternative vision has faded from view. One would imagine that even St. John, who bravely sued GM when her union could not or would not help her, would have seen the bitter irony in that situation.

(2011). For a comprehensive overview of Supreme Court case law restricting the class action mechanism, see Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

Appendix A
State Equal Pay Laws and Significant Amendments
Prior to Enactment of the Federal Equal Pay Act of 1963

State (Year of Enactment)	Citation
Alaska (1949)	Act of Mar. 7, 1949, ch. 29, 1949 Alaska Sess. Laws 80 (codified as amended at ALASKA STAT. § 18.80.220 (2017))
Arizona (1962)	Act of Mar. 14, 1962, ch. 23, 1962 Ariz. Sess. Laws 36 (codified as amended at ARIZ. REV. STAT. §§ 23-340 to -341 (2017))
Arkansas (1955)	Act of Mar. 24, 1955, No. 361, 1955 Ark. Acts 848 (codified as amended at ARK. CODE ANN. §§ 11-4-607 to -612 (2017))
California (1949, 1957)	Act of July 2, 1949, ch. 804, 1949 Cal. Stat. 1541 Act of July 16, 1957, ch. 2384, 1957 Cal. Stat. 4130 (codified as amended at CAL. LAB. CODE § 1197.5 (West 2017))
Colorado (1955)	Act of Apr. 7, 1955, ch. 181, 1955 Colo. Sess. Laws 503 (codified as amended at COLO. REV. STAT. §§ 8-5-101 to -105 (2017))
Connecticut (1949, 1953)	No. 287, 1949 Conn. Pub. Acts 261 No. 404, 1953 Conn. Pub. Acts 522 (codified as amended at CONN. GEN. STAT. §§ 31-75 to -76 (2017))
Hawaii (1959)	Act of May 21, 1959, No. 122, 1959 Haw. Sess. Laws 77 (codified as amended at HAW. REV. STAT. § 387-4 (2017))
Illinois (1943)	Act of July 22, 1943, 1943 Ill. Laws 743 (codified as amended at 820 ILL. COMP. STAT. 110/1 to /3 (2017))
Maine (1949)	Act of Aug. 6, 1949, ch. 262, 1949 Me. Laws 207 (codified as amended at ME. STAT. tit. 26, § 628 (2016))
Massachusetts (1945, 1947, 1951)	Act of July 10, 1945, ch. 584, 1945 Mass. Acts 598 Act of June 24, 1947, ch. 565, 1947 Mass. Acts 578 Act of Mar. 27, 1951, ch. 180, 1951 Mass. Acts 148 (codified as amended at MASS. GEN. LAWS ch. 149, §§ 1, 105A-105C (2017))
Michigan (1919, 1931, 1962)	Act of May 12, 1919, No. 239, 1919 Mich. Pub. Acts 427 Michigan Penal Code, No. 328, § 556, 1931 Mich. Pub. Acts 624, 734 Act of Apr. 12, 1962, No. 37, 1962 Mich. Pub. Acts 33 (codified as amended at MICH. COMP. LAWS § 750.556 (2017))
Montana (1919)	Act of Mar. 7, 1919, ch. 147, 1919 Mont. Laws 288 (codified as amended at MONT. CODE ANN. § 39-3-104 (2017))

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State (Year of Enactment)	Citation
New Hampshire (1947)	Act of June 12, 1947, ch. 193, 1947 N.H. Laws 257 (codified as amended at N.H. REV. STAT. ANN. §§ 275:36 to :41 (2017))
New Jersey (1952)	Act of Apr. 8, 1952, ch. 9, 1952 N.J. Laws 45 (codified at N.J. STAT. ANN. §§ 34:11-56.1 to .11 (West 2017))
New York (1944)	Act of Apr. 14, 1944, ch. 793, 1944 N.Y. Laws 1755 (codified as amended at N.Y. LAB. LAW § 194 (McKinney 2017))
Ohio (1959)	Act of Apr. 16, 1959, 1959 Ohio Laws 555 (codified as amended at OHIO REV. CODE ANN. §§ 4111.17, .99 (2017))
Oregon (1955)	Act of Apr. 4, 1955, ch. 193, 1955 Or. Laws 209 (codified as amended at OR. REV. STAT. §§ 652.210-.230, .990 (2015))
Pennsylvania (1947, 1959)	Act of July 7, 1947, No. 544, 1947 Pa. Laws 1401 Equal Pay Law, No. 694, 1959 Pa. Laws 1913 (codified as amended at 43 PA. STAT. AND CONS. STAT. ANN. §§ 336.1-.10 (West 2017))
Rhode Island (1946)	Act of Apr. 25, 1946, ch. 1786, 1946 R.I. Pub. Laws 282 (codified as amended at R.I. GEN. LAWS §§ 28-6-17 to -21 (2017))
Washington (1943)	Act of Mar. 22, 1943, ch. 254, 1943 Wash. Sess. Laws 786 (codified at WASH. REV. CODE § 49.12.175 (2017))
Wisconsin (1961)	Act of Sept. 27, 1961, ch. 529, 1961 Wis. Sess. Laws 581 (codified as amended at WIS. STAT. §§ 111.31-.32 (2017))
Wyoming (1959)	Act of Feb. 2, 1959, ch. 150, 1959 Wyo. Sess. Laws 208 (codified as amended at WYO. STAT. ANN. §§ 27-4-301 to -304 (2017))