May 2, 2017

Dear Chicago Public Law & Legal Theory Participants:

Please find attached a forthcoming article I plan to discuss during the workshop next week. The paper is drawn from a book project on the evolution of American fair employment law. At the workshop, I will provide a brief overview of the broader project before launching into the paper itself.

I’m looking forward to the discussion.

Sincerely,

David Freeman Engstrom
“NOT MERELY THERE TO HELP THE MEN”: EQUAL PAY LAWS, COLLECTIVE RIGHTS, AND THE MAKING OF THE MODERN CLASS ACTION

70 STAN. L. REV. ___ (forthcoming 2017)

David Freeman Engstrom

For many, the 2011 case of Walmart v. Dukes—a gender discrimination suit brought on behalf of 1.6 million women—represents, for good or ill, the apogee of the modern class action. Yet Walmart’s recency also raises a puzzle: 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 an Advisory Committee that was not moved to amend Rule 23 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 mid-century battle over how to conceptualize collective rights within the emerging New Deal state. Using the untapped records of a remarkable lawsuit brought by 29 female factory workers against General Motors in 1937 claiming unequal pay and the heated legislative campaigns to enact pay equity laws it spurred, this Article presents overwhelming evidence that labor unions killed the earliest effort to build American anti-discrimination law around the class action. Working against dozens of bills providing for class action authority, damages multipliers, and attorney’s 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 kinds of insights. First, it allows us to imagine alternative pathways in the continuing American struggle to combat workplace discrimination. Indeed, a more potent regulatory response to the problem of gender discrimination in the immediate post-war era could have, decades before a case like Walmart was even imaginable, fundamentally altered the American industrial order and women’s place in it. Second, the early history of the pay equity movement offers an 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 American regulatory state. That history remains highly relevant today as the 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 American 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 at General Motors’s vast Olds Motor Works in Lansing, Michigan. 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 jobs.” The women’s lunchroom was in “a very unsanitary condition” because its broken windows allowed birds to come in and roost on the tables. But what really upset St. John was the pay situation. Though she toiled on the assembly line alongside men, she earned as much as 15 or 20 cents an hour less—a substantial hit when the hourly wage of line-level production workers, male or female, was less than a dollar. Adding insult to injury, St. John’s male co-workers “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. The final straw came in her eleventh year at the plant when St. John was unceremoniously shunted into a newly created “Women’s Assembly Division” and then, a few months later, laid off entirely despite her seniority over men in her former department who kept their jobs. Out 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 28 other women who had worked at the Olds Motor Works to join her. And then she sued.

1 See Record on Appeal, St. John v. General Motors Corporation, Supreme Court of Michigan, Vol. III, at 1125 (hereinafter “Record on Appeal”).
2 Id., Vol. IV, at 1508.
4 Id. at 97.
In retrospect, however, St. John’s lawsuit was not just surprising; it was extraordinary. For starters, the year was 1937. When St. John filed suit, General Motors boasted 190,000 employees and $1 billion in sales, easily placing it among the nation’s, and the world’s, largest and most powerful companies.\(^5\) The lawsuit’s timing also meant that St. John could not assert claims under a statute like Title VII of the Civil Rights Act of 1964 or even the many state-level job discrimination laws that came before it, beginning in 1945 in New York and New Jersey.\(^6\) 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 28 women to assign their claims to her and then brought a common-law damages action hitched to 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.”\(^7\) Most striking of all, St. John’s lawsuit proved uniquely successful: St. John ultimately won a judgment of $56,000, or some three-quarters of a million dollars in present-day value. This almost certainly made it the first significant damages payout in a job discrimination case in the history of America 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 an historical curiosity, for it sits at the center of a pair of related puzzles about the post-war evolution of litigation’s place in the American 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 attorney’s fees for prevailing plaintiffs, could have yielded robust private enforcement efforts not


\(^7\)For the full text of the law at the time, see infra note __. No legislative history remains from Section 556’s passage, and only a very thin archival record. See, e.g., Letter from Richard H. Fletcher, Michigan Labor Commissioner, to Mary Anderson (Sept. 24, 1919), in Records of the Women’s Bureau, National Archives [hereinafter “Women’s Bureau Records”], RG86, Entry 12 (“Office Files of the Director, 1918-1948”), Box 55 (“Mi—Mr”), Folder (“Michigan”) (noting Section 556’s enactment).
unlike present-day employment law. The second and related puzzle sweeps more broadly: Why, in a nation thought pervasively committed to “adversarial legalism,” 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 reputation. Until then, most new regulatory authority was vested in agencies, not courts. The other standard answer is that the class action could not emerge until growing docket pressures, and also the desegregation cases that flowed into federal courts at around the same time, moved the Advisory Committee to replace the original, 1938 version of Rule 23 with the 1966 version. Only once the new Rule 23 unleashed the class action in something like its modern form could it attract the interest of a plaintiff’s bar that was essential to its robust implementation, or could courts begin the process of legal acculturation around due process norms that the class action’s rise required.

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, offer a critical but largely neglected laboratory for testing—and challenging—this standard account. To be sure, some of what we learn from excavating St. John’s case and the legislative campaigns that followed echoes the standard explanations. Pay equity,

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perhaps even more so than the racial integration of American industry, was
technically complicated stuff, particularly as a second Taylor-ist revolution swept
American industry and yielded ever more complex job classification systems for
setting wages. Expert agencies, not generalist judges, seemed to many the better
place to vest primary decision-making authority. 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 American law. As we will see, the rise of the New
Deal order from the Lochner era’s ruins, 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.

But St. John’s lawsuit and the legislative struggles over pay equity it spurred
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 labor that dashed
the hopes of many within the fledgling women’s movement to build an anti-
discrimination regime around class action lawsuits and instead used its political
might to push the new pay equity laws into what many saw as an anemic
administrative system of regulation. Labor did so because it saw in the design of
the new pay equity laws a fundamental, and even existential, choice: whether the
new regime would 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 within the American industrial order, or whether it
would 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 mass litigation’s
place in the evolution of the post-war American regulatory state. As an initial
matter, the St. John episode suggests that the mid-century struggle over what form
the new pay equity laws would take was a legal and political tragedy of the first
order. It is not quite right to say that unions mercilessly strangled early equal pay
laws in the crib out of their own naked 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.\textsuperscript{14} 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 brown counterparts seeking entry to the American industrial order.\textsuperscript{15} 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, the mid-century struggle to find an effective but politically saleable 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 American 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 narrowly trained on the 1960s, when the Advisory Committee reshaped Rule 23 into something like its present form.\textsuperscript{16} Even the more sweeping histories of the class action—including Stephen Yeazell’s magisterial accounting from Medieval times to the present—treat the mid-century period as little more than a footnote between the efforts by 19\textsuperscript{th} and early 20\textsuperscript{th} century equity courts to develop tools to resolve multi-party actions and the 1966 amendments to Rule 23 and the full-scale class action wars that soon followed.\textsuperscript{17} Indeed, the Fair Labor Standards

\textsuperscript{14} To that extent, the story offered here is another example of the rich ironies of American efforts to build and maintain a robust labor movement See, e.g., Robert Korstad & Nelson Lichtenstein, Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement, 75 J. AM. HIST. 786 (1988); Paul Frymer, Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party (2008); Reuel Schiller, Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism (2015).

\textsuperscript{15} See Engstrom, supra note ___.

\textsuperscript{16} See note __, supra, and accompanying text.

\textsuperscript{17} Yeazell, supra note ___; see also Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 COLUM. L. REV. 866, 876 (1977); Stephen C. Yeazell, From Group Litigation to Class Action, 27 UCLA L. REV. 514, 523-35 (1980); Marcus, supra note __, at 610. For classic accounts of the emergence of the “class wars” in the asbestos and agent orange contexts during the 1980s, see John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995); Peter Schuck, Agent Orange on Trial (1986). The 50\textsuperscript{th} anniversary of the 1966 Rule 23 amendments has occasioned a new set of contributions that focus, as does this Article, on roads taken and not taken but focus on 1966 and the years immediately following. See Scott Dodson, A Negative Retrospective of Rule 23, 92 N.Y.U. L. REV. (forthcoming 2017); David Freeman Engstrom, Jacobins at Justice: The Failed Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy, 165 U. PENN. L. REV. (forthcoming 2017); David Marcus, The Short Life and Long Afterlife of the Mass Tort Class Action, 165 U. PENN. L. REV. (forthcoming 2017); Brian Fitzpatrick, The Conservative Case for Class Actions (forthcoming 2017). A final recent line of inquiry uses the emergence of American-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
Act, 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.\(^\text{16}\) But the mid-century period is critical to our understanding, 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 post-war 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 should have primacy in regulating job discrimination.\(^\text{19}\) Other doctrinal tensions continue to this day. As we shall see, Judge Hayden’s memorandum opinion entering judgment in St. John’s favor grappled with a range of evidentiary questions, including how to calculate damages across a disparate plaintiff pool, that are strikingly similar to recent cases.\(^\text{20}\)

Finally, the broader question of how mid-century legislators conceptualized the collective rights of workers animates a more recent line of cases, including a trio currently before the Court, testing the validity of class action waivers in arbitration agreements.\(^\text{21}\) To resolve those cases, the Court will have to reconcile the pro-

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\(^{16}\) Resnik, supra note __, is an exception, though it only devotes 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, e.g., James A. Rahl, The Class Action Device and Employee Suits Under the Fair Labor Standards Act, 37 Ill. L. Rev. 119 (1942); Joseph V. Lane, Jr., Is the Fair Labor Standards Act Fairly Construed?, 13 FORDHAM L. REV. 60 (1944); The Wage and Hour Symposium, 6 LAW & CONTEMP. PROBS. (1939).

\(^{19}\) See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 350 (1977) (holding that “bona fide” seniority system established via CBA is valid despite perpetuating pre-Title VII discrimination); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009) (holding that provision in CBA that clearly requires union members to arbitrate ADEA claims was enforceable); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (holding that employees who previously submitted a claim to arbitration pursuant to their union’s collective bargaining agreement were not barred from bringing statutory antidiscrimination claim in court). See generally FRYMER, supra note __.


\(^{21}\) See Epic Systems Corp. v. Lewis (Dkt. No. 16-285), Ernst & Young LLP v. Morris (Dkt. No. 16-300), and National Labor Relations Board v. Murphy Oil USA (Dkt No. 16-307).
arbitration thrust of the Federal Arbitration Act with the National Labor Relations Act’s protection of the “concerted activities” of workers. To that extent, the mid-century relationship between American 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 MID-CENTURY CIVIL PROCEDURE

When Florence St. John filed suit in Ingham County Circuit Court in Lansing in late 1937, 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 GM’s fruitless appeals to the Michigan Supreme Court, serves two critically important purposes. First, understanding the details of St. John’s lawsuit matter because the case was front-page news across the nation and was also frequently invoked on the floors of states legislatures and Congress in the legislative struggles over pay equity that followed. 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 American industry, 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. 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 mid-century 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 1937

St. John and her 28 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 United States Department of Labor, established in 1920 but plainly hitting its stride in the 1930s under the sympathetic leadership of Labor Secretary Frances Perkins, 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 earned as little as 45 to 60 percent what men did both within and across

22 See note __, infra.
23 On the “policy window” concept, see JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).
a wide range of industries.\textsuperscript{24} Most remarkable, the report announced, is “that this difference is so universal, both in extent and in degree, no matter what the year, the locality, or the type of occupation.”\textsuperscript{25}

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 20th century. By 1937, well before “Rosie the Riveter” entered American factories to take the place of war-bound men, roughly one in five women were already part of the paid workforce, a nearly one-third increase since 1910.\textsuperscript{26} Women had, as historian of labor feminism Dorothy Cobble puts it, “crossed a crucial divide in their relationship to paid work.”\textsuperscript{27}

Such a large jump in labor force attachment no doubt resulted from multiple causes. Among them were smaller families that came from declining birth rates and technological advances that made factory labor less physically demanding.\textsuperscript{28} But women were not increasingly seeking paid employment merely to make “pin money,” to use a common phrase at the time, or as a “meal-ticket until marriage,” to use another.\textsuperscript{29} Indeed, a number of other factors that fueled 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 by the eve of St. John’s lawsuit left roughly one in eight employed women “solely responsible for the entire support of their families.”\textsuperscript{30} Many more women served as joint breadwinners as American

\textsuperscript{24} See MARY ELIZABETH PIDGEON, WOMEN IN THE ECONOMY OF THE UNITED STATES OF AMERICA 56-57 (1937) [hereinafter WOMEN IN THE ECONOMY]. A more specific version is MARY ELIZABETH PIDGEON, DIFFERENCES IN THE EARNINGS OF WOMEN AND MEN – BULLETIN OF THE WOMEN’S BUREAU, NO. 152 (1938) [hereinafter DIFFERENCES IN EARNINGS].

\textsuperscript{25} See WOMEN IN THE ECONOMY, supra note __, at 6.

\textsuperscript{26} See FRANCINE D. BLAU, MARIANNE A. FEBER, & ANNE E. WINKLER, THE ECONOMICS OF WOMEN, MEN, AND WORK 156 (2002) (28% of women over age 15 participated in paid labor force by 1940); see also WOMEN IN THE ECONOMY, supra note __, at 17 (noting increase in female paid workforce participation from 152 in 1,000 in 1910 to 220 in 1,000 in 1930).


\textsuperscript{28} See Z. Clark Dickinson, Men’s and Women’s Wages in the United States, 47 INTERNat’L LAB. REV. 693, 698 (1943) (noting declining birth rates as aspect of female employment trend); WOMEN IN THE ECONOMY, supra note __, at 11 (noting the rise of “machine fabrication as a substitute for the older skilled handcrafts”); COBBLE, supra note __, at 114 (noting that “technological innovations lessened the need for strength in many jobs”).

\textsuperscript{29} See, e.g., Equal Pay for Equal Work for Women, Hearings Before the Committee on Education and Labor, House of Representatives, 80th Cong. (February 9-13, 1948) [hereinafter 1948 House Hearings] at 13 (“pin money”); Dickinson, supra note __, at 714 (“meal ticket”).

\textsuperscript{30} WOMEN IN THE ECONOMY, supra note __, at 79. For divorce rates, see U.S. Department of Health, Education, and Welfare, 100 Years of Marriage and Divorce Statistics, available at http://www.cdc.gov/nchs/data/sr_21/sr21_024.pdf. On the industrial accident crisis, see EMILY C. BROWN, INDUSTRIAL ACCIDENTS TO MEN AND WOMEN (1930) (Women’s Bureau publication reporting more than 100,000 workplace accidents causing permanent disability per annum).
families, still digging out from the Great Depression, struggled to make ends meet.\textsuperscript{31} For many women, then, paid work was not a luxury, but rather a matter of subsistence and even survival.\textsuperscript{32}

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\textit{The Olds Motor Works in Lansing, Michigan (undated postcard, but likely the 1940s)}

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 American industrial order. While the largest chunk of employed women in the 1930s continued to work in domestic and personal service, the roughly twenty percent of working women who instead joined the industrial workforce overwhelmingly entered what labor economists have long labeled the “secondary” segment of the labor market.\textsuperscript{33} 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.\textsuperscript{34} By contrast, St. John and her assignors worked within the “primary” segment of the labor market, where

\begin{itemize}
\item \textsuperscript{31} By 1950, the typical working woman was married. See \textit{Historical Statistics of the United States, Colonial Times to 1970} (1989), including Series D 29-41 (“Labor Force by Age and Sex: 1890 to 1970”) and D 49-62 (“Marital Status of Women in the Civilian Labor Force”).
\item \textsuperscript{32} The war, which claimed upwards of 1 million casualties, including roughly 250,000 dead, makes this more so. By 1944-45, 84\% of women work to support themselves as well as others. See Marguerite J. Fisher, \textit{Equal-Pay-for-Equal-Work Legislation}, 2 Lab. L.J. 578, 579 (1951). Stat is drawn from Women’s Bureau, \textit{Movement for Equal Pay Legislation in the United States} 4 (1950).
\item \textsuperscript{33} \textit{Women in the Economy}, supra note \textsubscript{\_} at 49 (noting that 18 percent of women worked in “manufacturing and mechanical industries”).
\item \textsuperscript{34} For a summary treatment of labor market segmentation theory and its relationship to the sexual division of labor, see Ruth Milkman, \textit{Gender at Work: The Dynamics of Job Segregation by Sex during World War II} 4-7(1987). For a contemporaneous view, see \textit{Women in the Economy}, supra note \textsubscript{\_} at 49.
\end{itemize}
jobs in industries like steel, automobiles, lumber, oil and gas, and construction were comparatively well-paid, full-time, and secure.

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 50 cents an hour, well-compensated compared to, say, female garment workers in the women-dominated “needle trades,” where hourly wages were more on the order of 30 cents. Higher wages meant larger potential damages, 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. Third, St. John’s lawsuit was, according to the coinage of the day, either an “equal pay for equal work” or, at worst, an “intra-plant inequality” case.

This latter 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. The more important point is that St. John could steer well clear of a claim that inter-industry, inter-occupation, or inter-plant wage disparities violated what would, in the 1970s, come to 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. 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.

35 See National Conference Speaks for 300,000, UNITED AUTO WORKER, Jan. 1, 1945 (Frieda Miller, director the Women’s Bureau at the U.S. Department of Labor, refers to UAW women as the “elite” of working class women and the time and calls on them to mobilize and lobby to help women workers who were not as fortunate, particularly women in the “traditionally feminine occupations,” where women are “grossly underpaid”).

36 See Equal Pay for Women: Effect of E.O. 9238 on WLB’s General Order 16, 8 War Lab. Reps. xxviii (1943); In re General Elec. Co., 28 War Lab. Rep. (BNA) 666, 667 (1945). 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. REV. 7, 48 (1986) (defining “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, but where ‘there may be a dispute over the correctness of the job’s wage in relation to rates for other jobs in the same plant’”).

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

B. Legal Limbo and the Perils of Litigation

All of this was likely cold comfort to St. John as trial opened in June 1941. 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 Hayden should immediately dismiss the case on purely legal grounds. As GM’s opening statement entered its second hour and devolved into heated counsel colloquies, 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. Indeed, in this tumultuous and transitional period in American law, legal uncertainty was all around, driving up the cost, and also the risk, of St. John’s bold litigation effort.

Some of the arguments GM advanced in its opening statement were easily turned aside as vestiges of Lochner-era jurisprudence. Thus, GM lodged a standard Lochner-ian argument that Section 556’s prohibition on wage discrimination was “arbitrary and confiscatory” because, the company’s lawyer correctly noted, the law “leaves out employers other than manufacturers.” The anti-discrimination law was thus, invoking a classic Lochner-era locution, invalid “class legislation.” But

38 See Engstrom, supra note ___.
40 Id., Vol. I, at 67. The full text of the law at the time was as follows: “Sec. 556. 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 manufacture or production of any article of like value, workmanship and production a less wage, by time or piecework, than is being paid to males similarly employed in such manufacture, production or in any employment formerly performed by males, shall by 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.”
41 See Davidow v. Wadsworth Mfg. Co., 211 Mich. 90 (1920) (invalidating, as “class legislation,” a wage regulation that applies only to certain types of employers). For GM’s use of the term, see Record on Appeal, Vol I, at 1-2.
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.42 Worse, Judge Hayden had himself heard GM’s pre-emptive lawsuit and, holding in abeyance St. John’s earlier-filed lawsuit in the meantime, issued the trial-level decision upholding Section 556 against constitutional attack that the Michigan Supreme Court had then affirmed. With GM citing only decades-old case law in preference to the Michigan Supreme Court’s recent and 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 smugly declare that GM was “threshing old straw.”43 Other shots in GM’s opening salvo of arguments looked forward to the New Deal, not backward to the fast-receding Lochner days, and illustrate the other end of the legal limbo that prevailed as the drive for fair employment got underway in the 1940s. For instance, GM argued that the Wagner Act, and the collective bargaining among management and employees it prescribed, effectively pre-empted Section 556 because it “took the power to fix wages out of the hands of this Court and every court.”44 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 was paid and what others were paid.45 Either version of GM’s argument seemed tailor-made to St. John’s situation. After all, St. John had herself served on the Compensation Committee as a member of the United Auto Workers (UAW).46 And, as GM’s counsel would later extract during cross-examination, several other assignors had participated in union grievance proceedings challenging their transfer to the Women’s Division and subsequent termination, suggesting assent to the collective bargain struck by the union following its historic sit-down strike in 1937.47 The counter to this line of argument, as St. John’s counsel urged, was that the UAW had become the bargaining representative of St. John and the 28 assignors well after the women

42 See Bill of Complaint, Ingham Circuit Court, in Chancery (filed Sept. 29, 1937), Record on Appeal, Vol. I (noting Department investigation of GM on a number of grounds, including the equal pay issue); see also General Motors Corp. v. Read, 294 Mich. 558 (1940) (resolving eventual appeal).
44 Id., Vol I, at 77.
45 Id., Vol. IV, at 1693.
46 [CITE]
47 Record on Appeal, Vol. III, at 1431-32, 1442. For more on the sit-down strike, which some historians have called “the most critical labor conflict of the nineteen thirties,” see Sydney Fine, The General Motors Sit-Down Strike: A Re-Examination, 70 AM. HIST. REV. 691 (1965).
had begun work at the Olds Motor Works.\footnote{Record on Appeal, Vol. I, at 84. Decision of Court, Vol. IV, at 1723.}

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.\footnote{See id., Vol. I, at 84 (Judge Hayden concedes that “[t]his court is not a wage fixing body,” but then notes that St. John’s claims “go way back of the Wagner Act”).}

A third argument, however, got substantially more traction than the first two and made it seem as though St. John would be lucky if she was able to put on much of a case at all. As noted previously, Section 556 made sex-based wage discrimination a \textit{criminal} misdemeanor but did not provide any civil-side enforcement mechanism, let alone a private right of action to those aggrieved.\footnote{See supra note __.}

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 “special benefit” of individuals rather than “merely for the benefit of the public.”\footnote{See, e.g., Johnston v. Cornelius, 200 Mich. 209, 212 (1918) (widow could not bring private suit under criminal statute establishing speed limit, though her husband was killed because driver violated statute, because plaintiff did “not belong to the class for whose protection the law was passed”); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 325 (1927) (rejecting defendant’s claim that Civil Rights Act was a criminal statute that did not give rise to an action for damages because plaintiff “may claim that [the statutory duty] is a duty imposed wholly or in part for their especial benefit”) (quoting Taylor v. Lake Shore, etc., RY., 45 Mich. 74 (1881)).}

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.\footnote{As with its “class legislation” argument, GM was not without legal authority. Earlier, \textit{Lochner}-era decisions had held that a statute did not implyly provide a private right of action if it “adds greatly to common law liabilities,” GM Brief, at 137, thus creating a presumption that legislative action would hew closely to common law doctrine and not act in derogation of it.}

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 state constitution—similar to the right criminal defendants enjoy under the 5\textsuperscript{th} Amendment to the United States Constitution—to block even purely civil discovery of company pay records.\footnote{See Answer and Objections of Defendant to Plaintiff’s Motion for Discovery and Production of Documents,” Record on Appeal, Vol. I, at 45, 46, 48. At the time, the Michigan state constitution stated: “No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.”} Importantly, Michigan Supreme Court case law appeared to permit GM to invoke this right not just against disclosure by the company, as a litigant-entity, but also
against any of its employees with custodial access to those records, even if the employees were not themselves in any legal peril.\textsuperscript{54}

The potency of such an argument had become clear even before GM’s opening statement. In a terse “Order Denying Discovery” entered two weeks before the trial kicked off, Judge Hayden found that the state constitution’s self-incrimination clause “applies to corporations as well as natural persons” and, on that basis, denied St. John’s motion seeking production of “all pay checks and/or bonus checks” of the 29 women and a comparison group of male workers.\textsuperscript{55} Denied the benefit of any discovery at all, St. John’s counsel continued to press the issue as trial approached, serving a subpoena \textit{duces tecum} on a GM paymaster demanding that he furnish those same documents on the first day of trial.\textsuperscript{56} But when Judge Hayden made clear during GM’s opening statement his intention to stand by his earlier discovery ruling, 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.”\textsuperscript{57}

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 first-hand knowledge of men’s higher earnings as a result of

\textsuperscript{54} 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.” Vol. I, at 281. The leading case at the time, only 15 years old, showed the challenges of this broad right against self-incrimination, as the court considered, but ultimately decided against, dismissing a private lawsuit for nuisance rather than allowing discovery that would implicate a corporate defendant’s Fifth Amendment right. See People ex rel. Moll. v. Danziger, 238 Mich. 39, 50-52 (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. Western Mfg. Mutual Ins. Co., 40 Ill. App. 428 (1890). Federal law, too, was in flux at the time. Indeed, while \textit{Hale v. Henkel}, 201 U.S. 43, 44 (1906), denied Fifth Amendment protection for corporations and their papers, it recognized a corporate Fourth Amendment right against unreasonable search and seizure. For perspective on conceptions of corporate and economic privacy under the Fourth and Fifth Amendments during the second half of the nineteenth century and first part of the twentieth, see Ken I. Kersch, \textit{The Reconstruction of Constitutional Privacy Rights and the New American State}, 16 STUD. AM. POL. DEV. 61, 83-85 (2002); Morgan Cloud, \textit{The Fourth Amendment During the Lochner Era}, 48 STAN. L. REV. 555 (1996).

\textsuperscript{55} See Order Denying Discovery (May 15, 1941), Record on Appeal, Vol. I, at 48-49. See also id., Vol. IV, at 1718.

\textsuperscript{56} See Record on Appeal, Vol. I, at __. A subpoena \textit{duces tecum} is a court summons ordering the recipient to appear at a hearing or trial and produce documents or other tangible evidence.

\textsuperscript{57} See Proof of Service of Subpoena Duces Tecum (June 2, 1941), Record on Appeal, Vol. I, at 49; id., Vol. I, at 88 (noting that Ruggles 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”).
a lottery-like “check pool” game she and co-workers played on paydays in which each anted a quarter and then took home the “jackpot” if his or her paycheck, once distributed by the paymaster, bore the highest (presumably random) serial number.58 Because all participants in the game were permitted to verify the serial number of the winner, St. John could credibly recall seeing that many men’s checks were systematically larger than hers, including men who worked the same machines she did.59 Similarly, Betty McLarty, an assignor who logged eight 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 any difference in amount a reflection of a wage differential.60 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 discovery ruling would give way. The breakthrough came when GM’s counsel badly overplayed his hand when 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,61 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.62 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.63 With the proceedings degenerating around him, Judge Hayden

58 Record on Appeal, Vol. I, at 113-14, 511.
59 Id. at 512.
60 Id. at 387.
61 Id. at 307; id. at 352 (female diarist concedes that only “most of them is down there”).
62 Id. at 272-74.
63 Id. at 262. 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. Defense counsel, clearly in possession of records suggesting otherwise, quickly asked, “It wasn’t before February?” 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.” 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?
announced he would consider anew the matter of St. John’s trial subpoena. Two days later, after noting that his study of federal-level 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.64

Yet even as GM’s “carload” of documents flowed into the courtroom, a broader lesson, if it wasn’t already apparent to all involved, should have been coming into focus: private litigation of the sort St. John was attempting was a risky enterprise. Part of this was, then as now, the brute cost of litigation of the sort playing out before Judge Hayden. During six weeks of trial proceedings, St. John and GM would call some 70 witnesses and generate a 2,000-plus page trial record. Costs alone—a category that excludes what are typically much higher attorney’s fees—were ultimately assessed at $463.45, or some $8,000 in present-day terms, with fact-witness fees adding another $513.95.65 This was real money when, according to bar publications at the time, Lansing lawyers made as little as $3 to $5 per hour, and typically enjoyed net annual incomes of $1,000 to $4,000.66 Even lawyers operating on a contingency fee basis—the same bar publications put the standard such fee in a case that went to trial in Lansing at 35 percent67—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 outsized, $56,000 judgment like what St. John ultimately won.68

Judge Hayden’s initial ruling on the incrimination issue hints at a further and critically important aspect of the litigation landscape at mid-century that might not be apparent to modern lawyers’ eyes but surely registered with regulatory

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?”

Id. at 261-62.

64 Id., Vol. II, at 564. Arguably, the trend Judge Hayden identified from the bench was already the rule. In Hale v. Henkel, 201 U.S. at 70, the Supreme Court held, “The 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.” See also Wilson v. United States, 221 US 361, 385 (1911) (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”).

65 Record on Appeal, Vol. IV, at 1650.
67 Id. at 659 (describing contingent fees as follows: “(settled): 25%, (trial) 33 1/3%”).
68 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, EQUAL RIGHTS (October 1942), at 79 (referencing an “out of court settlement” totaling $3250 in March 1941 on behalf of 11 women employees of the Universal Cooler company).
architects in the years that followed. As the early drive for fair employment got underway in the mid-1940s, companies like GM benefited from a kind of Lochnerian hangover in state and federal courts in defending against claims brought under New Deal regulatory mandates. Indeed, Michigan’s “liberal construction,” as GM’s counsel put it, of corporate self-incrimination rights was of a piece with a broader set of judicial holdings at mid-century as skeptical judges created procedural bottlenecks that were plainly intended to delay, even if they could not halt, the advancing New Deal regulatory state.69

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-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.70 But the hangover was also present on the civil litigation side of things, particularly when coupled with the heavy deference trial courts enjoyed under the new federal and state rules of civil procedure promulgated during the 1930s. Indeed, when St. John filed her lawsuit, the Michigan Supreme Court itself had recently referred to the newly expanded discovery provisions of the Michigan Court Rules as “in an experimental stage” and would repeatedly make clear in the years to come that it would heavily defer to trial court decisions interpreting them.71

69 Record on Appeal, Vol. I, at 281 (“Michigan is one of the states taking a liberal construction and includes corporations under its protective wing.”).

70 The apogee of the trend came in Jones v. SEC, 298 U.S. 1 (1936), in which the Court refused to enforce an SEC subpoena after the party 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 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 to corporations and individuals and so free to use subpoenas to amass “big data” in conducting civil and criminal enforcement efforts. See Mariano-Florentino Cuellar, Administrative War, 82 George Wash. L. Rev. 1343, 1405 (2014).

71 See Bartenbach v. Smith, 268 Mich. 653, 659 (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, 333 Mich. 455 (1952) (“Under Rule 40, the granting of discovery is discretionary with the Court.”); Hallett v. Michigan Consol. Gas Co., 298 Mich. 582 (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 Michigan Court Rule No. 41 (1935) (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, 276 Mich. 424 (1936) (“By the express terms of the rule governing
The resulting manifestations of the Lochner-ian hangover among trial courts went well beyond corporate self-incrimination rights. Liberalized pre-trial discovery rules were particularly likely to draw judges’ ire and produce push-back. For instance, many trial judges were known to perform document-by-document in camera review of all requested discovery for relevance even before defendants lodged any objections of their own—a practice that was even then drawing criticism as “overzealous” in protecting corporate privacy, and stands in stark opposition to the relatively unfettered right to inspection, including inadmissible documents that might plausibly lead to the discovery of admissible ones, that modern litigants enjoy. Perhaps more importantly, judges pushed back against “liberalized” discovery procedures by using their discretion under the new rules to deny plaintiffs pre-trial access to defendant’s documents by finding such access was unnecessary to trial preparation. Thus, the spectacle of a “carload” of documents being wheeled into Judge Hayden’s courtroom mid-trial was surely still high drama, particularly in a less litigious time like the 1940s. But it was also not uncommon in antitrust and securities cases at mid-century for a plaintiff to have to wait until the first day of trial to get her first look at documentary evidence that

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72 See Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909 (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,” and also trial court use of local rules to limit “the wide-open nature” of discovery); Stephen Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691 (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 case but not to discovery facts that supported the case of one’s opponent”).

73 A standard example is United States v. Aluminum Company 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. See also Capital v. Fox, 85 F.2d. 97, 100 (2d Cir. 1936) (“It must be remembered, however, that the subpoenas merely require the physical production of documents in court; the extent of their inspection will be for the judge, like the scope of oral examination.”); Banks v. Connecticut Ry. & Lighting Co., 79 Conn. 116, 119, 64 Atl. 14, 15 (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 fact of production which has been completed.”). On the general practice, see Irving Goldstein, Trial Technique 126 (1935).


75 See FED. R. CIV. P. 26(b)(1) (“Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

might make or break her case. As a result, plaintiffs like St. John who were denied pre-trial 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 this shaped regulatory choices as the drive for fair employment unfolded in the years after St. John’s lawsuit. After all, the Lochner-ian hangover in evidence in Judge Hayden’s initial discovery ruling did not pervade all aspects of civil procedure, least of all in Michigan, where trial courts were seen as in the vanguard in using pre-trial conferences to lay a plan for the remainder of a litigation. It should also be noted that Judge Hayden’s discovery ruling did not irrevocably alter the trajectory of the trial proceedings. As subsequent witnesses were called, St. John’s counsel coolly located the relevant documents now deposited in the courtroom and then read their contents into the record as part of his direct examination. Yet the St. John trial’s opening act captures an important truth: The high cost of litigation, combined with pervasive legal uncertainty and the heavy deference vested in trial judges under new rules of civil procedure, made construction of a robust court- or litigation-centered approach to the new job discrimination laws that state legislatures would soon pass into law especially challenging. As the American legal system moved haltingly into a new era of civil procedure, and as judges sought to reconcile the New Deal regulatory state with the old order of things, regulatory architects could rightly worry that would-be litigants would not come forward if a single ruling—on Wagner Act preemption, or corporate self-incrimination rights, for example—could substantially reduce available damages or, worse, stop the litigation in its

77 See Philip Marcus, The Big Antitrust Case in the Trial Courts, 37 IND. L.J. 51, 60-61 (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”); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 YALE L.J. 117 (1949) (“Prior to the adoption of the Federal Rules of Civil Procedure in 1938 pretrial discovery was comparatively rare in the federal courts…Lawyers often proceeded to trial with only the slightest knowledge of their opponent’s case.”)

78 Some accounts have it that the pre-trial 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 Hon. Clarence L. Kincaid, A Judge’s Handbook of Pre-Trial Procedure, 17 F.R.D. 437, 440-41 (1955).

79 [CITE]

80 See Note, Scope of Pre-Trial Discovery Under the New Federal Rules, 50 YALE L.J. 708 (1941) (noting a “mass of conflicting opinions on the present scope of discovery”); William Speck, The Use of Discovery in United States District Courts, 60 YALE L.J. 1132 (1951) (“That non-reviewable rulings on discovery are not uniform among courts, or among different judges on the same court; that even the same judge at different times fails to give consistent rulings.”).
tracks and then require months or even years of appellate litigation to earn even a chance at reversal.\textsuperscript{81}

The litigation risks posed by a legal and regulatory system in transition almost surely exacerbated a final challenge: finding lawyers willing to litigate cases. 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. 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.\textsuperscript{82} However, the legal uncertainty in evidence in GM’s wide-open menu of arguments made that investment less likely.

This challenge was particularly acute because St. John—and also the legislators who considered equal pay laws in the years following her lawsuit—could not rely on anything like the plaintiff’s 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 grown up around the industrial-accident crisis at the turn of the century.\textsuperscript{83} But there were also vastly fewer lawyers per capita than at present.\textsuperscript{84} Indeed, even an industrial enclave like Lansing could support only 200 total lawyers, according to bar publications at the time, and most of these ran a generalist practice dominated by probate, divorce, and personal injury cases.\textsuperscript{85}

St. John’s lawyers, Martin Pierce and Joseph Planck of the Lansing law firm Pierce, Planck & Ramsey, perfectly embodied the lack of a specialized plaintiff’s bar. Indeed, there is no indication that Pierce and Planck were plaintiff’s lawyers at all, let alone specialists in labor or employment law.\textsuperscript{86} Rather, their representations—at least the ones that generated published (and mostly appellate) opinions in Michigan

\textsuperscript{81} \textit{Equality in Pay Won by Women}, \textit{The Detroit News} (May 29, 1942) (noting the appealability of the judgment “on questions such as the relation of the State law to the Federal Labor Relations Act”).


\textsuperscript{83} See Jerold S. Auerbach, \textit{Unequal Justice: Lawyers and Social Change in Modern America} 41-51 (1976) (noting rise of 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, by largely eliminating liability for workplace accidents, may have counter-intuitively spurred, rather than stymied, the growth of the plaintiff’s bar. After all, the American Association for Justice was, before its more familiar guise as the American Trial Lawyer’s Association, the National Association of Claimants’ Compensation Attorneys.

\textsuperscript{84} See Lawrence Friedman, \textit{American Law in the Twentieth Century} 457 (2004) (noting growth of legal profession from 220,000 lawyers in 1951 to nearly a million by the end of the twentieth century).

\textsuperscript{85} See 1941 Survey of Conditions, supra note __, at 659 (listing the most common areas of practice as “personal injuries, domestic relations, collections and probate practice”).

\textsuperscript{86} Planck, in fact, appears to have been a former county prosecutor. See, e.g., People v. Absher, 214 N.W.2d 954 (1927).
in the years before and after St. John’s lawsuit—suggest a far more pedestrian and apolitical set of disputes: a botched refrigerator repair; a restaurant sale gone bad; a corporate dissolution; divorces; and real estate disputes. The decision of the firm to take St. John’s case was perhaps all the more daring because Lansing, despite being a state capitol, was also a company town. 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, built by Ransom Eli Olds, a founding father of the American auto industry and owner of the Olds Motor Works until GM acquired it in 1908. 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 once in the courtroom.

C. The Complexities of “Similarly Employed” and the Allure of Administration

Had GM said nothing more in its opening statement, then St. John could be confident, particularly once payroll records were safely in 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. 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 28 assignor women were not, as Section 556 required, “similarly employed” to men earning higher wages. 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 stationery bucks, 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 mid-century industrial manufacturing processes as performed by 29 different women sprinkled

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89 See In re Newbrough et al., 236 N.W.2d (Mich, 1931).
91 See Mayes v. Central Trust Co., 279 N.W. 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 (Mich. 1942), and then also Pierce’s service as counsel to a witness during state-level McCarthy-ist hearings about communist activity in Michigan in 1954, http://archive.org/stream/investigationofc195407 unit/investigationofc195407unit_djvu.txt. But these are more than matched by cases in which Pierce represented men in divorce proceedings, including a case involving allegations that their male client committed acts of “extreme cruelty” against his wife. See Heckathorn v. Heckathorn, 284 Mich. 677 (1938).
across three departments at the Olds Motor Works. In turn, this raised obvious questions of institutional competency—and whether Judge Hayden, a common-law judge accustomed to a diet of mostly binary tort, contract, and property disputes, was up to the task at all.

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 their male counterparts on account of differences in strength, aptitude, experience, and reliability. These differences, GM asserted, made men more versatile, permitting their transfer in and out of a wider array of positions. Versatility also paid dividends within positions: Men, for instance, did not require assistance with “set up” or “carry off” of heavy “stock” materials used in the production process or transport of finished products away from the assembly line. 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 female employees.

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 in crafting a defense. 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 that employers “furnish” female workers with “comfortable conveniences” that increased the expense of employing female workers. 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

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93 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—i.e., “more efficient and more profitable.” GM’s S.Ct. Brief, Record on Appeal, Vol. IV, at 94. For a modern case, see Marshall v. St. John Valley Sec. Home, 560 F.2d 12 (1st Cir. 1977). For other contemporaneous invocations of the view that women’s labor was less valuable, see MILKMAN, supra note __, at 81 (noting GE statement in case before the National War Labor Board that “women are worth less for purposes of factory employment than men”).


95 See note __, supra. The unit cost argument was also the cornerstone of GM’s brief before the Michigan supreme court. See GM’s S.Ct. Brief, Record on Appeal, Vol. IV, at 94, 131

96 See Record on Appeal, Vol. I, at 2, 14, 72, 78.
differences resulted from, as GM would later put it in its brief before the Michigan Supreme Court, "the legal capacity of the two sexes."^98

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 of 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." But Michigan legislators then appended a list of paternalistic qualifications that would draw quick constitutional invalidation today: "Provided, 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."^100

Section 556, however, hardly exhausted Michigan law’s paternalisms. Like many states, Michigan had—both before and after the Supreme Court’s 1908 decision in Muller v. Oregon^101 upholding a law limiting women’s work hours as meeting the state’s interest in protecting female health—legislated a further parade of paternalistic laws. Women could not, one section of Michigan’s industrial code mandated, work “longer than an average of nine hours a day or fifty-four hours in any week” or “between six o’clock P.M. and six o’clock A.M.,” thus precluding higher-wage overtime and night-shift work.^103 Nor could women work in any job that required them “to remain standing constantly”^104 or stand “when not necessarily in service or labor.”^105

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^98 GM’s S.Ct. Brief, Record on Appeal, Vol. IV, at 95 (emphasis added).


^100 For the full text of Section 556, see note __, supra. The law’s final clause—providing 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”—would plainly not pass constitutional muster today. See, e.g., General Elec. Co. v. Hughes, 454 F.2d 730 (6th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.). See generally Judith A. Baer, The Chains of Protections: The Judicial Response to Women’s Labor Legislation 42-67 (1978).

^101 208 U.S. 412 (1908).

^102 For state-by-state accountings at the time of St. John’s suit, see Florence P. Smith, State Labor Laws for Women (Bulletin of the Women’s Bureau, No. 156) (1938); Florence P. Smith, State Labor Laws for Women (Revision of Bulletin 98) (1940).

^103 See Michigan Industrial Code, Section 8324. For an example of testimony that establishes this, see Vol. I, 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.”).

^104 See id., Section 8326.

^105 See id., Section 8339. This section provided: “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.” See Trial Transcript, Record on Appeal, Vol. I, at 73.
stranger turns, engage in manufacturing in “basements.”” 106 And perhaps most important of all, a woman could not do “heavy work” or—in a seeming tautology—“work beyond her strength.” 107

GM’s focus on differences in the women’s actual and “legal” capacities triggered an avalanche of testimony, and more heated counsel colloquies, regarding the organization of work at the three departments of the Olds Motor Works that employed women. 108 Much of the testimony St. John and the other women offered 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 the men in” on machines upon their arrival at the factory—underscoring both the unfairness of wage differentials and also the fact that the differentials were well known to all. 109 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 rarely-used 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. 110 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 54-hour limit prescribed by Michigan law, but leaving no paper trail—and, worse, leaving the women uncompensated for the extra time. 111 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 process

106 See id., Section 8346.
107 [CITE]
108 These included the sheet metal department (sometime referred to as the “press department); the motor department; and the paint room.
109 Record on Appeal, Vol. I, at 106-109 (St. John testimony); id. at 289-90 (Lester Phelps testimony); id. at 457-58 (Grace Reeser testimony). Another woman stated she was “mad” to be receiving 21 cents less than men she and St. John had broken in. id., Vol. II, at 485-86, 490-91. For more examples of “break-in,” see St. John Brief, Record on Appeal, Vol. IV, at 14, 40-41; id., Vol. I at 233 (break-in on paint touch-ups); id., Vol. I at 289-90, 297, 305 (same); id. at 334-355 (break-in on paint striping). 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 than we did.” Id., Vol. II, at 500.
110 See Record on Appeal (St. John S.Ct. Brief), Vol. IV, at 68-70; see also id., Vol. IV, at 1599 (“There was nothing to cover the mattress on the cot at that time. There was nothing to cover the springs—they were bare.”).
111 Record on Appeal, Vol. I, 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).
that was, at least some of the time, wholly divorced from green-eyeshaded, “unit cost” analysis.\textsuperscript{112}

As the trial progressed and the issues narrowed, however, Judge Hayden’s task consistently reduced to a pair of 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 custom and tradition, biased and stereotyped understandings of women’s role 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.\textsuperscript{113} 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 also plainly differed in their individual productive capacities.\textsuperscript{114}

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.\textsuperscript{115} Perhaps the clearest evidence of multiple causation was a single, 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 piece-work rather than an hourly basis, a wage gap remained under both compensation schemes, simultaneously

\textsuperscript{112} See id., Vol. II, at 762 (paymaster testifies that “As to the pay roll of April 10, 1937, the record shows that April 10\textsuperscript{th} was a general pay raise for the men and the women remained as they were.”). See also id. at 782 (testimony that men all got raises following the 1937 Flint strike, but women didn’t). This loomed large in Judge Hayden’s ultimate decision. See Decision of Court, id. at 1731.

\textsuperscript{113} For examples of modern cases that explicitly grapple with the “increment” issue, see Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970); Schultz v. American Can Co.-Dixie Prods., 424 F.2d 356 (8th Cir. 1970).

\textsuperscript{114} See GM’s S.Ct. Brief, Record on Appeal, Vol. IV, 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.”).

\textsuperscript{115} By the time of St. John’s lawsuit, researchers had already offered substantial evidence that female employees suffered from higher rates of absenteeism and turnover. See Suggestions for Control of Turnover and Absenteeism, U.S. DOL, Bureau of Employment Securit (October, 1951); Dickinson, supra note __, at 704 (women work less per week, likely because of familial obligations and other “customary inhibitions”). Other analyses made the commonsense observation that, as relatively new entrants to the American industrial order, women tended to be “of lower experience and skill” than men, and also that men’s greater physical strength made them more “flexible” and “better adaptable to emergency assignments” than women. Dickinson, supra note __, 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. Fisher, supra note __, at 578.
suggesting invidious discrimination but also that some portion of the wage gap stemmed from actual sex-based differences in productive capacity. And yet, highly aggregated, industry-by-industry empirics of this sort offered precious little guidance—certainly nothing resembling a methodology—to an adjudicator tasked with disentangling the explanatory possibilities 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. This implied that a plaintiff like St. John could still prevail if she could show that the work she performed approximated that of the men who worked alongside her, even if it was not identical. Indeed, the Supreme Court had, in its decision rejecting GM’s pre-emptive constitutional challenge to Section 556, defined “similarly” as “substantially alike” and “of substantially the same character, quality and quantity.”

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. The question Michigan’s high court left open, of course, was how unlike the work performed had to be—or, in GM’s “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 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”—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.” 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.”

St. John’s counsel also elicited testimony, wherever possible, that painted a portrait of perfect, widget-like interchangeability between male and female workers.

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116 See Dickinson, supra note __, 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 piece work industries in which men’s wages, reduced to an hourly figure, exceeded women’s). But see Differences in Earnings, supra note __, 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”).

117 See 294 Mich. at 565.


119 Record on Appeal, Vol. IV at 1522.

120 Id., at 1508, 1529, 1588. See also id. at 1481-82 (“We had to get our own stock. The stock wasn’t very light.”).

121 See id., Vol. I, at 140. Other examples at 1489-90; 1498-99; 1557, 499-500, 194, 1571, 1596.
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 press, doing the same work I had done, under the same conditions.”

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. 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 15-year veteran of the inspection stations, tartly replied that she and the other women were “not merely there to help the men.”

Finally, St. John’s lawyers took the “unit cost” argument on its own terms, countering GM’s claim that men were more “mechanically inclined” by eliciting testimony that women had unique talents of their own. Earl Pratt, the superintendent of motor inspection, admitted under cross-examination that women might be superior to men on certain jobs—that their “nimble fingers” made them “more apt at” certain tasks. Women were also, fellow inspector Herbert Holmes offered, better at “accurate work,” such as inspection tasks. Though he would sometimes miss problems, Holmes continued with an odd note of condescension given his position as a fellow line worker rather than a supervisor, “they never got by my girls.”

Still, GM proved effective at chipping away at St. John’s case. GM’s counsel offered substantial testimony suggesting that men did “heavier and rougher work” and “men’s duties embrace[d] a lot more than the women’s duties did.” They also

122 See id., Vol. I, at 115 (testifying that when “the whistle blew” announcing the end of a shift, the male workers coming onto the next shift “stepped up and took over without even stopping the wheel on the presses, doing the same work that I had done”). 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.” [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.” [press room]). Finally, one woman said: “Men would be there ready to take the jobs from us when we turned the machines off at night. When we came down [from the changing room in the morning] they would be running our jobs.” See id. at 347. The judge ultimately credited this. See Decision of Court, id., Vol. IV, at 1728.

123 See id., Vol. II, at 819, 822, 855; id., Vol. III, at 1377 (noting “monotony”), 1445. As one of the women testified, “There was no difference between what the women 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 these positions.” Id., Vol. II, at 842.


125 Id., Vol. III, at 995 (noting men are more “mechanically inclined” and need less training); see also GM Brief, id., Vol. IV, at 62 (using same phrase).

126 See Record on Appeal, Vol. III, 1410.


128 Id. at 662.

129 See id., Vol. I, at 142.
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.\textsuperscript{130} GM likewise sought to neutralize 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 through 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.\textsuperscript{131} Foremen concurred with these views, with one testifying that men assigned to touch up paint on car hoods could, in a pinch, be moved to the “plain muscle work” of pulling “cripples” — that is, car hoods with imperfect paint — off the line, but women could not do such work.\textsuperscript{132} Similar claims came as GM’s counsel called witnesses further up the chain of command. Riley Place, an industrial engineer in the standards department who specialized in time study work, testified that women were solely engaged in “machine operation,” whereas men did the “complete operation,” including the tasks the women did and also further duties, such as moving “gons,” or trucks, of stock to and from the assembly line and lifting pans of material.\textsuperscript{133} The superintendent of the sheet metal division was most insistent of all, stating it “wouldn’t be physically possible to operate the department with women only.”\textsuperscript{134} “You had to have the men in there to help the women?,” GM’s counsel asked. Came the response: “Yes, sir.”\textsuperscript{135}

The resulting evidentiary morass was even more daunting in light of the second puzzle facing Judge Hayden: assuming liability, how to calculate damages across 29 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 women and for a male comparison group was straightforward during the period beginning in 1936. This was the year GM began using plant-wide pay “brackets” to which workers were allocated and then paid one of three rates based on their length of service. As just one example, men in the paint shop were allocated to the “K” bracket and earned 75, 78, or 81 cents depending on experience, while women who worked there were allocated to the “I”

\textsuperscript{130} A good example is as follows:

Q: But the men could lift pans that you couldn’t?
A: Well, I don’t doubt that they could.
Q: You don’t doubt but what they did either, would you?
A: No, I wouldn’t doubt but what they did.

\textit{Id.}, Vol. IV, 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.” Vol. I, at 326.

\textsuperscript{131} GM’s S.Ct. Brief, Record on Appeal, Vol. IV, at 64.

\textsuperscript{132} \textit{Id.}, Vol. IV, at 1299.

\textsuperscript{133} \textit{Id.}, Vol. II, at 977-78.

\textsuperscript{134} \textit{Id.}, Vol. III, at 1015.

\textsuperscript{135} \textit{Id.}, at 1015.
But 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, as GM missed no chance to point out, a kaleidoscope of hundreds or even thousands of ever-shifting wage rates determined by foremen or other lower-level supervisors and managers based on their assessment of the quality and quantity of the individual’s work. As a result, wage differentials ranged over time from as much as 40 cents to as little as five cents for men and women working in the same departments and on the same or similar machines.

The other aspect of the evidentiary challenge posed by the aggregated nature of St. John’s lawsuit was perfectly, and colorfully, illustrated by the testimony of

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136 Id., Vol. I, at 170 et seq.; id. at 195, 208 (noting pay brackets in the paint shop of 60, 63, or 66 cents for women and 75, 78, and 81 cents for the men); id. at 212 (noting pay brackets in press room of 54, 57, and 60 cents for women and 69, 72, and 75 for men operating light presses and 72, 75, and 78 for men operating heavy presses).

137 [CITES]

138 Id., Vol. IV, at 1682-87 (GM argument that difference between St. John and two other men assigned to similar machines was as wide as 38 cents and as narrow as six cents); GM’s S.Ct. Brief, id., Vol. IV, at 97 (“It 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.”).
Lena Swartz, a Polish immigrant who spent 12 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 women, I break machine, and got a big machine for me. They put me on a big machine, press.139

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.140 But the same might not be true of all 28 women whose claims St. John was asserting.141

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.”142 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.”143 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 capacity exceeded their wages.144 An aggregated approach, 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—and would deprive GM and even certain women of their rightful “day in court.”145

140 Similar testimony came from Vernice Smith, who worked in the press room from 1930 to 1937 on a spot welder, air hammer and riveter, and tap drill, 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. See id. at 540-41.
142 Id., Vol. IV, at 1696.
143 Id. at 1697.
144 Id. at 1696-97 (“Supposing the right differential should be 7c as to one and the court grants 21c. The court is imposing a burden on us in violation of law. If a women is entitled to 10c differential and the court gives her 5c, the court violates the law by giving that woman less than she is entitled to.”).
145 Id. at 1700. For an early articulation of a similar argument in the 1990s, see Malcolm v. National Gypsum Co., 995 F.2d 346, _ (2d Cir. 1993) (“The systemic urge to aggregate litigation must not be allowed
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 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.\(^{146}\) 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 the formalization of wage structures.\(^{147}\) Had he known where to look, 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.\(^{148}\)

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 the parties’ claims. For example, the parties themselves 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 opined that a percentage-based bonus system in place during the early 1930s had compounded underlying wage differentials. While modern-day pay equity cases, and job discrimination cases more generally, routinely feature econometric evidence adduced by one or both sides,\(^{149}\) Judge Hayden was on his own in the search for regularities within the hundreds of hours of testimony and accompanying payroll records.

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

\(^{146}\) See supra note ___.
\(^{148}\) For a lucid contemporaneous overview of the job evaluation procedure, including a “job analysis” for each job and then “job grading” in which all jobs are arrayed according to “their relative difficulties, responsibilities, and working conditions,” see WLB General Order No 31. For a lengthy statement on the employer-side advantages of job evaluation schemes, see Statement of J.W. Grove Before the Subcommittee on Education and Labor of the House of Representatives (Feb. 13, 1948).
\(^{149}\) 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).
Department of Labor 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 a year away. Judge Hayden thus lacked the benefit of NWLB decisions addressing issues such as when “set up” and other “extra labor costs” should be given weight in assessing violations of the equal pay principle.\(^{150}\)

Similarly, the U.S. Supreme Court’s decision in *Anderson v. Mt. Clemens Pottery Corp.*,\(^ {151}\) its first statement on how to calculate damages in aggregated actions under the Fair Labor Standards Act, would not come until 1946.\(^ {152}\) Nor were the FLSA cases that had begun to flow into federal courts much help. Those cases merely held, without discussion, that “similarly situated” was not the same as “identically situated” for purposes of determining which workers could band together to bring a “collective action” under the Act.\(^ {153}\)

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.\(^ {154}\) 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.\(^ {155}\) As a result, none of the cases exhibited the difficulties of comparing productive capacity and placing a value on secondary or tertiary job tasks or legally mandated

\[^{150}\text{See, e.g., NWLB orders in GM; Browne & Sharpe; Bendix; Diamond Match; Spokane Detail.}\]

\[^{151}\text{328 U.S. 680 (1946).}\]

\[^{152}\text{In *Mt. Clemens*, the plaintiffs challenged the employer’s practice of keying compensation to punch cards less an estimated amount of time spent walking to work stations and engaging in various kinds of work prep. Justice Murphy’s decision, though largely crediting the findings below in favor of the employer, held that, because the FLSA requires employers to keep records, the lower court could award wage restitution to employees even where the award was approximate. The FLSA, Justice Murphy reasoned, was not meant to turn on “split-second absurdities.” *Id.* at___.}\]


\[^{154}\text{See, e.g., Cal. Educ. Code § 13801 (“Females employed as teachers in the public schools of this state shall, in all cases, receive the same compensation as is allowed male teachers for like service, when holding the same grade certificates.”) (enacted____; repeated 1943); Mass. Gen. Laws Ann. Ch. 71 (“Women teachers employed in the same grades and doing the same type of work with the same preparation and training as men teachers shall be paid at the same rate as men teachers.”); N.J. Stat. Ann. § 18:13-10 (“No discrimination based on sex shall be made in the formulation of a scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, college, university, or other educational institution supported in whole in part by public funds.”).}\]

\[^{155}\text{Compare Chambers v. Davis, 22 P.2d 27, 30 (Cal. Dist. Ct. App. 1933) (ordering equalization of salaries between male and female gym teachers who supervised men’s and women’s sports, respectively, but held the precise same certifications) with Murphy v. School Committee of Lawrence, 73 N.E.2d 835 (Mass. 1947) (rejecting discrimination claim by female math teacher, but discussing only a single comparator: a male woodwork teacher).}\]
accommodations that Judge Hayden faced in adjudicating the wage discrimination claims of St. John and her 28 assignors.156

A closer match were cases brought as part of the NAACP’s campaign to equalize salaries between black and white teachers in segregated school districts throughout the South beginning in the 1930s. But on closer inspection, even these cases provided surprisingly little guidance. For starters, the NAACP’s campaign did not gain momentum or generate substantial case law until after Judge Hayden had issued his decision in 1942.157 In addition, the NAACP typically sought only declaratory relief in its litigation efforts—relief that could in turn be used to negotiate a narrowing of the salary gap going forward.158 Thus, the decisions thus did not grapple at all with the question facing Judge Hayden of how to perform retrospective damages calculations across a pool of claimants. Most important of all, the NAACP cases trafficked in far starker facts. Indeed, the NAACP’s most notable victories came in cases in which salary schedules were de jure and explicitly race-based—and also created far sharper pay disparities than GM’s wage system.159 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.160

156 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 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 Ruth Milkman, Ed., WOMEN, WORK & PROTEST: A CENTURY OF U.S. WOMEN’S LABOR HISTORY* (1985).

157 Two early cases included: Mills v. Board of Educ., 30 F. Supp. 245 (D. Md. 1939) and Alston v. School Bd. of City of Norfolk, 112 F.2d 992 (4th Cir. 1940). But the bulk of the NAACP cases did not produce published decisions until the mid-1940s. See LESLIE BROWN, UPBUILDING BLACK DURHAM: GENDER, CLASS, AND BLACK COMMUNITY DEVELOPMENT IN THE JIM CROW SOUTH 28-29 (2008); *Equal Salaries Advocated by White Professors, NAACP Presses Fight in Virginia, CLEVELAND CALL & POST*, Mar. 16, 1939, at 12 (noting that salary equalization cases had been filed in Alabama, Georgia, Florida and Louisiana).

158 See, e.g., Alston v. School Bd. of City of Norfolk, 112 F.2d 992 (4th Cir. 1940) (noting…).

159 Mills v. Board of Educ., 30 F. Supp. 245 (D. Md. 1939) (“I also find from the evidence that in Anne Arundel County there are 243 white teachers and 91 colored teachers; but no one colored teacher receives so much salary as any white teacher of similar qualifications and experience.”). For another example of a stark pattern, see Morris v. Williams, 149 F.2d 703, 708 (8th Cir. 1945) (“The explanation that substantially all colored teachers are worth less than substantially all white teachers; that the basic salaries of colored teachers are accordingly lower than the basic salaries of white teachers; and that it is therefore logical that public funds should be distributed to them on a percentage basis is not sustained by the evidence.”).

160 In the second wave of NAACP cases, courts typically upheld merit systems so long as they steered clear of facially discriminatory terms, even if errors were made, and even if white salaries were systematically higher than black salaries. See Turner v. Keefe, 50 F. Supp. 647, 651 (S.D. Fla. 1943) (holding
Even tort law, with its endlessly varied factual scenarios, offered few ready analogies upon which Judge Hayden could draw in separating out actionable and non-actionable causes of the wage differentials across the 29 women. Though it might seem odd to a modern-day observer, courts at mid-century were simply not in the regular business of causal apportionment of the sort demanded by St. John’s case. Indeed, most states had been slow to introduce contribution between negligent tortfeasors, and had almost uniformly embraced contributory negligence in preference to comparative negligence precisely because of administrability concerns, particularly the practical difficulty of making the comparative causal estimates necessary to divide loss among plaintiffs and defendants.161

Perhaps the closest analogue at the time was the so-called “eggshell plaintiff” line of cases, in which a defendant might argue for mitigated damages on the ground that the plaintiff suffered from a pre-existing condition or disability that contributed to or exacerbated her injury—thus requiring judge or jury to

that teacher salary schedule based on “(1) physical health, personality and character; (2) scholarship and attitude; (3) instructional skill and performance” was constitutional, and noting that the court was not “versed either in the philosophy of teaching or in the various methods of determining teacher effectiveness”); Reynolds v. Bd. of Pub. Instruction for Dade Cnty., Fla., 148 F.2d 754, 755 (5th Cir. 1945) (affirming dismissal of claim and finding that continuing race-based disparities in teach and principal salaries “resulted from the exercise of the judgment and discretion of the [members of the district’s Rating Committee] as public officials in evaluating the worth and effectiveness of the respective groups”). Interestingly, in the concluding paragraph of the Reynolds decision, the Fifth Circuit noted the school board’s argument that the “education” of black teachers “cost them more”—an argument akin to GM’s “unit cost” claim—but that the defense was “not tried out.” 148 F.2d at 757. School districts also maneuvered around an initial wave of adverse rulings by implementing testing procedures which had the effect of increasing white teacher salaries. See Scott Baker, Testing Equality: The National Teacher Examination and the NAACP’s Legal Campaign to Equalize Teachers’ Salaries in the South, 1936-63, 35 HIST. OF EDUC. Q. 1, 49-50 (1995). For caselaw, see Reynolds v. Bd. of Pub. Instruction, 148 F.2d 754, 756 (5th Cir. 1945) (holding that salary scale that permitted teachers dissatisfied with pay to take tests prepared by the National Committee on Teacher Examinations was constitutional); Thompson v. Gibbes, 60 F. Supp. 872, 876 (E.D.S.C. 1945) (holding that state system of examination and certification was constitutional). For accounts of this litigation, and the conclusion that the NAACP soon got out of the business of bringing such cases because of the difficulty of proving that local officials administered merit systems with an unequal hand, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 121 (1994) (“Yet, 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 (review of BEN GREEN, BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA’S FIRST CIVIL RIGHTS MARTYR), 52 Fla. L. Rev. 497, 506 (2000) (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”).

161 See Reporter’s Note, RESTATEMENT (THIRD) OF TORTS, Sec. 7 (“Effect of Plaintiff’s Negligence When Plaintiff Suffers an Indivisible Injury”) (noting that modern adoption of comparative negligence did not begin until 1955 in Arkansas). Only three states, Mississippi, Wisconsin, and Nebraska had comparative negligence prior to 1955. For a contemporaneous view, see CHARLES O. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936).
apportion causation between the defendant’s conduct and the pre-existing condition.162 Such cases pose famously difficult adjudicatory challenges even in individuated cases and to this day constitute a “massive gray area,” according to a modern treatise.163 But the analytic task facing Judge Hayden in adjudicating the claims of all 29 women was even more complicated. In fact, it more closely resembled a development in American tort law that was still decades away: mass toxic torts, particularly asbestos cases, which raised complex questions about how to determine liability and calculate damages across a group of plaintiffs who suffered different levels of exposure at different times, manifested different levels of disease, and engaged in varying amounts of independent conduct (such as smoking) that worsened both the probability and the extent of their disease.164

Although 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, 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 only 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. Judge Hayden began by rejecting GM’s claim that “certain practices, requirements, and conditions present in the employment of, or work done by the women” could justify the wage differentials at the Olds Motor Works. “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

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162 For leading modern cases, see Benn v. Thomas, 512 N.W.2d 537 (1994) (applying “eggshell plaintiff” rule to defendant’s claim that plaintiff’s history of coronary disease, not a motor accident, was the proximate cause of the heart attack following the accident); Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) (same result in case in which women claimed motor accident had triggered chronic schizophrenia that had previously been latent).

163 DAN B. DOBBS, LAW OF TORTS 195 (2000) (“Difficult problems of causation and apportionment arise when the defendant is negligent toward a plaintiff who is already suffering from a disease or disability.”). See also Rowe v. Munye, 702 N.W.2d 729, 749 (Minn. 2005) (Meyer, J., dissenting) (noting the “vast gray area consisting of injury to plaintiffs with preexisting conditions”).

164 See, e.g., Cimino v. Raymark Industries, Inc., 151 F.3d 297 (5th Cir. 1998) (reversing district court trial plan that allocated 150 randomly selected plaintiffs to one of five categories based on time and extent of exposure, etc., with damages to be awarded based on extrapolation from the trials). Another development that would put courts in the business of estimating the relative contributions of a plaintiff and a defendant to an injury but was still more than a decade away was the shift from contributory negligence to comparative negligence. See Restatement (Third) of Torts, Reporter’s Note, Sec. 7 (“Effect of Plaintiff’s Negligence When Plaintiff Suffers an Indivisible Injury”). For general treatment of these issues in toxic tort cases, see JENNIFER EGGEN, TOXIC TORTS IN A NUTSHELL 286-299 (2010); see also Bert Black & David E. Lillenfield, Epidemiologic Proof in Toxic Tort Litigation, 52 Fordham L. Rev. 732 (1984) (noting challenges in intervening cause cases since epidemiological studies establish causes at the group, not individual, level).
in theory, rather than in fact; in form, rather than in substance.”\textsuperscript{165} Indeed, the work of the women in all three departments was “alike,” and even “identical” to, the work performed by men.\textsuperscript{166}

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. GM’s proofs, Judge Hayden noted, were not “persuasive.”\textsuperscript{167} But more importantly, they were “not material” under Section 556 because they did not concern “work.”\textsuperscript{168} 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.”\textsuperscript{169} Judge Hayden thus broke somewhat with the position taken by the NWLB in a decision that was just months away holding that “an allowance of 5¢ an hour” could be made for 20 minutes of rest during each woman’s 8-hour shift.\textsuperscript{170}

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.”\textsuperscript{171} From there, however, the opinion was more opaque. Judge Hayden declared that the resulting differential was “capable of reasonably definite ascertainment” even if the record “[did] not lend itself to arithmetic computation to a definite degree of certainty.”\textsuperscript{172} Limiting himself to the six years of payroll records that had been entered into evidence, Judge Hayden simply averred that “the average difference in pay,” across the entire period covered by the suit and across all 29 women, was 21 cents—substantially more than the differential of 12- to 15-cent differential on the face of many of the the wage brackets GM established in 1936.\textsuperscript{173} When this average was multiplied across the 29 women, the resulting judgment came to $56,690.\textsuperscript{174}

\textsuperscript{165} Opinion of the Court, Record on Appeal, Vol. IV, at 1726.
\textsuperscript{166} 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 skewed to closely to “identical” “would in fact nullify any useful purpose that [the statute] might serve, in that it would deprive or make it impossible of any practical working application and thus defeat the very purpose for which it was enacted.” Id. at 1725-26.
\textsuperscript{167} [CITE]
\textsuperscript{168} [CITE]
\textsuperscript{169} Opinion of the Court, Record on Appeal, Vol. IV, at 1730.
\textsuperscript{170} See Bendix.
\textsuperscript{171} Id. at 1730-31.
\textsuperscript{172} Id. at 1733.
\textsuperscript{173} Id.at 1641.
\textsuperscript{174} Id. at 1644.
During the two yearlong appeals to the Michigan Supreme Court that followed, only one of the 92 errors GM assigned in its brief to Judge Hayden’s handling of the trial made any headway. In April 1944, the Michigan Supreme Court remanded the case to Judge Hayden demanding a more detailed back up for his 21-cent determination. 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 trial-level proceedings, to be of a similar mind on at least one point: St. John’s case was a difficult one for courts.

GM’s version of the argument was set forth in its brief before the Michigan Supreme Court. It gained heft from a recent report of the United States Department of Labor summarizing the work of the NWLB. The report detailed the two NWLB decisions entered in the months after Judge Hayden’s decision that recommended, as a wage stabilization measure, raising women’s wages because they violated the equal pay principle. But the report then quickly turned to discussion of the challenges faced by the NWLB in adjudicating the cases, including the difficulty of performing the “unit cost” analysis at the heart of GM’s defense. GM quoted at length from the Report in its brief:

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.

Only through a detailed and highly technical “job study,” GM hastened to add, could an adjudicator arrive at a reasonable calculation of the “unit labor cost” of male and female workers, which was the “only fair basis” for applying the equal

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175 See St. John v. General Motors Corp., 13 N.W.2d 840 (Mich. 1944); St. John v. General Motors Corp., 17 N.W.2d 226 (Mich. 1945). In remanding the case upon the first appeal, the Michigan supreme court invoked Court Rule No. 37, § 11(c), requiring: “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 St. John, 13 N.W.2d at 842.
176 The best accounting of the NWLB’s work is a contemporaneous one. See THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD: INDUSTRIAL DISPUTES AND WAGE STABILIZATION IN WARTIME (1946), esp. Chap 4 (“Equal Pay for Women”).
177 The two decisions were against Browne & Sharpe and GM. See Browne & Sharpe Mfg. Co., 3 WAR LAB. REP. 321 (1942); General Motors Corp., 3 WAR LAB. REP. 348 (1942).
178 GM’s S.Ct. Brief, Record on Appeal, Vol. IV, at 130 (emphasis in original brief).
pay principle. 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 the parties’ last appearance before the case went up on appeal for the first time, sounded a similarly skeptical, if less detailed or prescriptive, note. “No matter if General Motors has to pay a 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.”

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 1937, Section 556 was, according to Commissioner Lionel Heap of the Michigan Department of Labor and Industry, a “dead letter” that his Department “had never enforced or attempted to enforce.” Moreover, no state apart from Montana, which passed a law strikingly similar to Section 556 in 1919, had enacted equal pay legislation. 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 other 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 in 1963 rejected dozens of bills providing for class action authority, damages multipliers, and attorney’s fees and instead channeled enforcement efforts into an anemic administrative scheme. This systematic stripping out of the litigation-enhancing mechanisms from the 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 anemic administrative enforcement efforts.

This Part asks why—and ultimately concludes that it was organized labor, more

180 Record on Appeal, Vol. IV, at 1702.
182 See Seigler, supra note __, at ___ (collecting views of state agency administrators that exceptions made enforcement difficult). By the mid-1950s, legislative efforts in many of these states were focused on closing loopholes. See California (A. 988); Illinois and Michigan (S. 1032), and Montana and New York (A. 597 and S. 1751). See generally Seigler, supra note __, at 667.
than any other single factor, that shaped the regulatory choices made at the dawn of the pay equity movement.

A. Post-War Politics and a Legislative Deluge

As Table 1 reflects, several of the equal pay bills that flooded state legislatures even before war’s end won quick passage in Massachusetts, Illinois, Washington, and New York. During 1946 and 1947, pay equity advocates advanced bills in another eight states, and the Women’s Bureau could claim active interest in equal pay legislation in 34 states. Victories followed in Rhode Island in 1946, New Hampshire in 1947, Pennsylvania in 1948, and then Alaska, California, Connecticut, and Maine in 1949. By the time dozens of federal-level efforts in Congress finally bore fruit with the Equal Pay Act of 1963, fully 22 states already had equal pay laws on their books.

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183 See ILL. REV. STAT. c. 48, §§ 4(b), 4(b) (1945); MASS. LAWS 1945, c. 584; WASH. REV. STAT. ANN. (Remington, Supp. 1943) § 7636-1; L. 1944 c. 793, § 2. In addition, Montana’s law, the only other law that predated the wartime and post-war drive to enact equal pay legislation, was drawn out of desuetude after the Montana Commissioner of Agriculture, Labor, and Industry asks State Attorney General in 1946 for formal opinion on the statute’s reach. See Report of the Attorney General of the State of Montana, Jan. 1, 1945 to Dec. 15, 1946, at 260.

184 See Transcript, “October 1946 Conference,” Box 897, folder (“WB Conf. 1946”), Record Group 86, Women’s Bureau Papers, National Archives; see also COBBLE, supra note __, at 105.


186 Id.
### Table 1. Federal- and State-Level Drives to Enact Equal Pay Laws

| Year | Enactments by State | # Congressional Bills
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<tr>
<td>187</td>
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<tr>
<td>1919</td>
<td>Michigan, Montana</td>
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<tr>
<td>1943</td>
<td>Washington</td>
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<tr>
<td>1944</td>
<td>Illinois, New York</td>
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<tr>
<td>1945</td>
<td>Massachusetts</td>
<td>2</td>
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<tr>
<td>1946</td>
<td>Rhode Island</td>
<td>2</td>
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<tr>
<td>1947</td>
<td>New Hampshire</td>
<td>3</td>
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<tr>
<td>1948</td>
<td>Pennsylvania</td>
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<tr>
<td>1949</td>
<td>Alaska, California,</td>
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<tr>
<td></td>
<td>Connecticut, Maine</td>
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<tr>
<td>1950</td>
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<tr>
<td>1951</td>
<td>(Massachusetts)</td>
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<tr>
<td>1952</td>
<td>New Jersey</td>
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<td>1953</td>
<td>(Connecticut)</td>
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<tr>
<td>1954</td>
<td>-</td>
<td>4</td>
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<tr>
<td>1955</td>
<td>Arkansas, Colorado,</td>
<td>9</td>
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<td></td>
<td>Oregon</td>
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<tr>
<td>1956</td>
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<td>7</td>
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<tr>
<td>1957</td>
<td>(California)</td>
<td>11</td>
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<td>1958</td>
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<tr>
<td>1959</td>
<td>Hawaii, Ohio,</td>
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<tr>
<td></td>
<td>Wyoming</td>
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<tr>
<td>1960</td>
<td>(Pennsylvania)</td>
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<tr>
<td>1961</td>
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<tr>
<td>1962</td>
<td>Arizona, (Michigan),</td>
<td>11</td>
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<td></td>
<td>Wisconsin</td>
<td></td>
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<td>1963</td>
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( Italics) denotes substantive amendment to previously enacted law.

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One reason for the sudden emergence of the pay equity issue, of course, was St. John’s lawsuit itself. The case drew nationwide press coverage, and calls to legislative action in newspapers and handbills regularly referenced (and often reprinted in full) Judge Hayden’s opinion entering judgment for the women. St. John’s victory was also a regular feature of congressional testimony as federal legislative campaigns got underway in 1945.

But other, bigger forces drove pay equity onto policy agendas as well. One was the wartime influx of “Rosies” into American industry, often in the same positions and performing the same tasks as the war-bound men they replaced, but at lower wages. This, feminist labor historians such as Dorothy Cobble and Nancy Gabin have shown, sharpened perceptions of systematic wage discrimination and fueled growing militancy, especially among working class women. Wartime economic imperatives also drew the federal government into the fray and lent a public imprimatur to 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 National War Labor Board (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 range of wartime labor practices, increases in women’s wages to narrow sex-based wage differentials and thus maximize the labor supply available for war

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188 See, e.g., Pay Discrimination Laid to G.M. in Women’s Suit, THE DETROIT FREE PRESS (Apr. 9, 1938) at 1; General Motors to Fight Court’s Wage Act Ruling, CHICAGO DAILY TRIBUNE (Nov. 28, 1939); Gen. Motors Loses Fight Against Equal Pay for Men, WOMEN, CHICAGO DAILY TRIBUNE (Sept. 7, 1940), at 21; General Motors Challenges Michigan Equal Pay Law, WALL. ST. J. (Sept. 29, 1939); Court Upholds Equal Pay for Men, Women in Like Work, WALL. ST. J. (Sept. 7, 1941), at 2; 29 Women Win $55,690 in Wage-Equality Ruling, N.Y. TIMES (May 29, 1942), at 14; Equal Wage for Women Is Court Edict, THE DETROIT FREE PRESS (May 29, 1942) at 2; Equality in Pay Won by Women, THE DETROIT NEWS (May 29, 1942). 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, THE ESCANABA DAILY PRESS (Apr. 16, 1938); Michigan Court Orders Equal Pay for Women, EQUAL RIGHTS (October 1942), at 79.


190 See Gibson testimony before Subcommittee of Senate Committee on Education and Labor (Oct. 31, 1945).

191 See COBBLE, supra note __, 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 growth of women in various manufacturing industries, see UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN FACTORIES (1947) (showing, among other things, an increase in the proportion of women production workers across all manufacturing industries from 24.1 to 33.2 percent).

192 COBBLE, supra note __, at ___; GABIN, supra note __, at ___; see also MILKMAN, supra note __, at 49.
production. As one academic commentator noted, the WLB’s robust statement of the equal pay principle, coming as it did from such a “potent instrument of public authority,” joined with St. John’s case to form a pair of “milestones of legal wage controls.”

B. Pay Equity and the Puzzle of Regulatory Choice

In many ways, state-level legislative debate over equal pay followed predictable lines that reflected the legal and regulatory challenges in evidence in St. John’s case in the Michigan courts. 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. The very first law, enacted in Washington state in 1943, joined Michigan’s Section 556 in mandating equal wages for “similarly employed” men and women. And a handful of state laws—including those in Alaska, Arkansas, Oregon, Pennsylvania, and, for a time, Massachusetts—allowed an arguably looser comparison, prohibiting discrimination for “comparable work,” parroting language used in WLB case law during the war. But most states required a plainly tighter connection than did Judge Hayden’s interpretation of Section 556. Thus, the laws of Illinois, Maine, New Hampshire, and Rhode Island required “equal” work, while those in Arizona, California, Hawaii, Missouri, Montana, and Wyoming required the “same” work. Most restrictive of all, Ohio’s law applied only to “identical” work, ensuring that only the Lena Schwartzes of American manufacturing could confidently assert claims. The remaining states’ laws (Colorado, Connecticut, New Jersey, New York, Vermont, Wisconsin) vaguely

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193 See ‘Equal Pay’ Report Hailed by Women, N.Y. TIMES (Aug. 19, 1942). Soon after, the NWLB announced that war industry employers need not obtain the usual pre-clearance 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 have otherwise stalled equalization efforts. See NWLB TERMINATION REPORT, Chap. 24 (“Equal Pay for Women”).

194 Dickinson, supra note __, at 701-02. Others agreed: Ruth Roemer, Legislative Representative to the United Electrical, Radio, and Machine Workers of American (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 Hearings, at 195.

prohibited “discriminatory” rates, thus leaving it to the courts to decide the precise content of the anti-discrimination mandate.\textsuperscript{196}

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:

that nothing herein shall prohibit a variation of rates or 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, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith.\textsuperscript{197}

The latter of these—termed a “catch-all” exception—drew special ire from the Women’s Bureau as effectively gutting the law.\textsuperscript{198}

The end result of both kinds of provisions was, as an internal AFL-CIO memo from the mid-1950s 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.\textsuperscript{199} 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 \textit{Corsi v. Bentley Stores, Corp.}\textsuperscript{200} The \textit{Corsi} court narrowly construed the New York equal pay law’s prohibition on


\textsuperscript{197} An Act to Amend 1197.5 of the Labor Code, approved July 10, 1957.

\textsuperscript{198} See Women’s Bureau, “What You Don’t Want in an ‘Equal Pay’ Bill” (December 1947), in Women’s Bureau Records, RG86, Entry 41 (“General Records of the Division of Legislation and Standards, 1920-1966”), Box 8 (“Equal Pay, 1946-1964”), Folder (“Equal Pay 1947”). For an overview of exceptions clauses, see \textsc{Bureau of National Affairs}, \textit{supra} note \textsuperscript{198}, at 40-51. 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 or any other reasonable differentiation other than difference in sex.” The law then concluded with a catch-all provision authorizing employers to pay women a lower rate based on “any other reasonable differentiation”—a “particularly wide loophole,” as the head of the Division of Women and Children at the Rhode Island State Department of Labor put it. \textit{See Fisher, supra} note \textsuperscript{198}, at 585.


\textsuperscript{200} 1947 WL 57471 (Oct. 31, 1947).
“discriminatory” rates and thus broke with a regulatory guidance document the New York Industrial Commission had promulgated soon after 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 could not support a claim.\textsuperscript{201} 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.\textsuperscript{202} Legislatures in large industrial states like Ohio and Illinois likewise regularly fielded, and mostly rejected, bills that would have loosened the comparability requirement from something requiring perfect parity.

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 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.

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 industry-wide studies of wage rates and develop guidelines for estimating the “net unit cost” of male and female labor.\textsuperscript{203} An initial set of bills advanced in Congress beginning in 1945 sought further sources of expertise, calling for the creation of “industrial labor committees” that, harking back to the corporatist National Industrial Recovery Act, would be composed of representatives from various segments of the industrial order and tasked with establishing wage rates within and across occupations.\textsuperscript{204} Without at least some such expert guidance on how to navigate the complexities of implementing the equal pay principle, one commentator concluded, “courts are apt to flounder.”\textsuperscript{205}

\textsuperscript{201} Id.
\textsuperscript{202} Seigler, supra note __ at 679.
\textsuperscript{203} [CITES]
\textsuperscript{204} Interestingly, even the Women’s Bureau was concerned that such committees would not be sufficiently expert. Though they would bring together different corporatist elements and thus facilitate an “educational process,” they would also be comprised of persons who are “amateurs in regulation” and so might lack the “degree of skill” necessary to perform job evaluation. See “Legislative Analysis – S. 1178, Women’s Equal Pay Bill,” in Women’s Bureau Records, RG86, Entry 41 (“General Records of the Division of Legislation and Standards, 1920-1966”), Box 7 (“Equal Pay, 1940-1945”), Folder (“Equal Pay 1945”).
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.\textsuperscript{206} Administrative enforcement of the new equal pay laws, they argued, was preferred because it could be structured to emphasize educative process and the informal “conciliation” of claims, and could thus gently correct “irrational” prejudices without resort to the hard-edged and unyielding legalities of judicial proceedings. 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.” 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 of the law’s requirements.”\textsuperscript{207}

But the legislative struggles over equal pay also make clear that an administrative approach to the pay equity issue, like the FEPC campaigns that were unfolding in Congress and state legislatures at the same time, put 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 politics would trump expertise and rule of law. Senator Robert Taft, drawing a direct analogy to FEPC debate, complained that the equal pay bills 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.”\textsuperscript{208} Taft similarly raised the specter of “a zealous administrator” using the “blank check” provided by equal pay laws to “find quite different types of work to be comparable in character” without being

\textsuperscript{206} See Engstrom, supra note __.

\textsuperscript{207} See Statement of Miss Frieda S. Miller, Director, Women’s Bureau, U.S. Department of Labor, Before the Subcommittee of the Senate Committee on Education and Labor in support of S. 1278, the “Women’s Equal Pay Act of 1945,” in Women’s Bureau Records, RG86, Entry 41 (“General Records of the Division of Legislation and Standards, 1920-1966”), Box 7 (“Equal Pay, 1940-1945”), Folder (“Equal Pay 1945”). Labor 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 Schwellenbach testimony (Oct. 29, 1945), before Subcommittee of Senate Committee on Education and Labor.

constrained by “the scientific and equitable systems of job analysis and wage evaluation which have been generally adopted.” Representative Howard Smith from Virginia 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.” “I 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?”

Many women’s groups, perhaps seeing an invitation in the anti-New Deal broadsides of Republicans like Taft and Smith, outlined 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 survived the second of two appeals created a civil action for damages and “in an additional equal amount of liquidated damages” (i.e., double damages), provided that such action “may be maintained in any court of competent jurisdiction by any 1 or more employes for and in behalf of himself or themselves and other employes similarly situated,” and authorized “reasonable attorney’s fees” for successful claimants. Bills advanced in more than a dozen other states likewise provided for double-damages, class action authority, and attorney’s fees, often drawn verbatim from the “suggested draft bill” the Women’s Bureau began to circulate in 1944.

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 Fair Labor Standards Act (FLSA), enacted in 1938 just after St. John

filed her lawsuit against GM. But nor, in drafting bills that closely tracked the FLSA, were women’s groups unmindful of the trade-offs 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—one commentator noted 25 “civil employee suits” alone within a year of the FLSA’s enactment in 1938—and had begun to produce a string of trial and appellate court decisions, suggesting a growing presence on federal court dockets. And indeed, FLSA litigation went into hyper-drive in mid-1946 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 his workplace, or to “don and doff” protective gear—was compensable. The ruling instantly created billions in potential liability for American industry, including for GM, which faced a lawsuit along with the other “Big Three” auto manufacturers seeking some $400 million in damages. The rapidity with which Congress intervened in 1947 with the Portal-to-Portal Act, virtually eliminating employer responsibility for portal-to-portal pay and giving the policy retroactive effect, makes clear that an effective private enforcement infrastructure had begun to take shape.

At the same time, however, the FLSA cases evidenced growing judicial anxiety about aggregated litigation and thus highlighted some of the risks of an

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217 See *The Portal to Portal Issue*, N.Y. Times (Jan. 4, 1947) at 14 (noting filed claims of more than $2 billion); Harold Walsh, *March of Finance*, L.A. Times (Dec. 19, 1946), at A12 (predicting that employer liability could run to $10 billion).
218 See Walter W. Ruch, *$400,000,000 Asked of Auto ‘Big Three’*, N.Y. Times (Jan. 3, 1947) at 5.
enforcement approach built solely around private lawsuits. For instance, most federal courts to confront the issue by the mid-1940s had held that, in providing for a right of action to “one or more employees for and in behalf of himself or themselves and other employees similarly situated,” Congress intended to take the FLSA’s “collective action” outside of Rule 23. This was important, for the dominant interpretation of Rule 23 at the time—which entirely lacked today’s (b)(3) damages option—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. But even as courts declared FLSA claims to be beyond Rule 23, they still imposed what amounted to an opt-in requirement in holding that due process limited the res judicata effect of a court’s judgment to workers who had affirmatively made some expression of desire to participate in the proceeding. If that expression could come post-judgment, as some advocated at the time, the effect on the willingness of employees to sue would have been negligible. But most courts soon required opt-in prior to judgment, thereby undermining the protective anonymity enjoyed by absent class members while proceedings were still pending and also systematically reducing the size and scope of FLSA actions—and, by extension, plaintiffs’ settlement leverage.

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 WLB 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 restitution of back wages, such an action is not practical where small amounts are involved.” Women’s Bureau analysts also voiced the classic concern about over-zealous 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

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221 See Rahl, supra note __, at 131.

222 See Wright, 69 F. Supp. at 624 (____) (citing Hansberry v. Lee, 211 U.S. 32 (1940)); see also Shain v. Armour & Co., 40 F. Supp. 488, 490 (W.D. Ky. 1941) (“The prosecution of such a class action must, however, be in accordance with the constitutional requirement of due process of law. Conditions must be such that the final judgment, either in favor of or against the plaintiff, is res judicata as to all the members of the class.”). See generally Rahl, supra note __; Poole, Private Litigation Under the Wage and Hour Act, 14 Miss. L.J. 157 (1942).

223 See Rahl, supra note __.

courts.” In so doing, pay equity advocates acknowledged a concern about runaway litigation that was a 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 blanketed the state with a letter to “Mr. Manufacturer” warning of a torrent of litigation. “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.” As the debate over portal-to-portal pay under the FLSA makes clear, litigation’s opponents had, several decades before the modern-day litigation wars, already begun to develop a rhetorical template likening lawsuits to “blackmail,” “legalized raids,” and a “racket.”

But if women’s group were understandably wary of an all-litigation approach, they also evinced a keen awareness that purely administrative implementation would not suffice to vindicate rights, either. “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 inspections. This does not exist at present.” 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....” In espousing this view, Anderson could draw on a growing body of evidence from state-level administrative efforts to implement the earliest equal pay laws. It was clearly not the case that state labor agencies had been entirely supine in those efforts. New York’s Industrial Commission reported investigating 137 equal pay cases in

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226 See Letter from Paul E. Kirker to “Mr. Manufacturer” (Mar. 11, 1943), in Women’s Bureau Records, RG86, Entry 8 (“General Correspondence of the Women’s Bureau, 1919-1948”), Box 48 (“Unions”), Folder (“Unions Misc. Unions A-C”). To address such concerns, an interesting set of bills advanced in Congress sought to screen out smaller-fry actions by requiring that a lawsuit be filed by “three or more employees,” or that “all employees affected” be joined. See H.R. 715 (Kelly) (1956-57). 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 (Bolton) (19??).


And in Michigan, shortly after GM’s separate constitutional challenge to Section 556 failed and thus paved the way for St. John’s lawsuit to proceed, the Michigan Department of Labor and Industry brought a series of enforcement efforts that, though relatively small in scale, still suggest the possibility of credible and even muscular administrative implementation. 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, 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 just 27 labor inspectors, only four of whom were allocated to “regulations affecting women and children.” For Harold Bledsoe, who had first-hand knowledge from his perch as a commissioner at the time of St. John’s lawsuit, the Department was “weak.” 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.” In response to another survey, California officials noted a “lack of personnel to

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232 See MICHIGAN LABOR AND INDUSTRY, Vol. 1, No. 1 (November 1941) at 6 (announcing 126 backpay awards totaling $6,614.56 in October 1941 and providing details of an investigation in which three women spot welders at a Michigan office supply factory received backpay awards ranging from $4 to $46 and a fourth received an award of $308).


promote such programs” and ultimately concluded: “Compliance hampered by lack of personnel.”

Second was something a modern observer would call agency “capture.” “If certain companies are pressed,” AFL-CIO Regional Representative Kathleen Lowrie reported from Michigan in 1945 to Frieda Miller at the Women’s Bureau, “the front office [of the agency] hears about it.” 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.

Even where agencies found clear violations, 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.

Given the complex trade-offs entailed by the choice between pure litigation or 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 as a support or prod. 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 1946 in response to Anderson’s request for guidance about how to maximize the efficacy of equal pay laws. 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. As evidence, Gibson pointed to a case against Briggs Manufacturing Company in which the Department accused the Detroit company of paying unequal wages to women in an aircraft plant and the

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company, after first refusing to budge, caved when the affected women filed a lawsuit.240 Summoned to meetings in Washington, D.C., to offer further counsel, Gibson pointed to more examples of the power of private litigation: a case against manufacturer Nash Kelvinator in which “back wages” were being sought by way of a “ct. case involving several million”;241 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.”;242 and a similar case against a truck company in which “[employer] complied + obviated ct. case.”243

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. Thus, 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.” This, the report noted, was “proof of the effectiveness of the law.”244 Similarly, Lowrie’s field report from Michigan—which, as previously noted, expressed concern about the susceptibility of state labor agencies to capture—made damages actions under Michigan’s Section 556 seem an ordinary complement to agency enforcement efforts as the war drew to a close. “When compliance is not voluntary,” she noted in her 1945 report, “enforcement is had by employee suits.”245

In the end, however, virtually no states took such views to heart. Of the 22 states to enact equal pay laws prior to the Equal Pay Act of 1963, only Massachusetts, acting in 1945, and New Jersey, acting in 1952, enacted an equal pay law with anything close to the full set of litigation-boosting mechanisms contained in the FLSA or the Women’s Bureau’s draft bill—and Massachusetts reconsidered just two years later, unanimously enacting an “emergency law” designed to address “certain questions” that had arisen since 1945, removing the


242 Id.


244 Letter from Caroline Davis, Director, Women’s Dept., UAW, to Tom Downs, Representation to the Michigan CIO Council (June 26, 1956), in Meany Archive, RG13-006 AFL-CIO Economic Research Department, Office of Wage and Industrial Relations, Anne Draper Files, 1963-1994, Box 8, Folder (“Equal Pay—1966 AFL-CIO Staff Study”).

attorney-fee provision, and granting the Massachusetts commissioner of labor gatekeeper powers over private lawsuits by permitting them only “if approved by the commissioner.”

C. The Union Connection: Control, CBAs, and Collateral Attacks

What best explains the form the new pay equity laws took? The details of the St. John litigation and the terms of the legislative debate that unfolded after it show that New Deal faith in administration was strong, and also 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 St. John’s case and the legislative drives it helped kick off also contain hints of a further dynamic that powerfully shaped the regulatory choice of administration over litigation.

For instance, embedded in John Gibson’s account of private litigation as “a big club” in aid of enforcement actions brought by the Michigan Department of Labor and Industry is a revealing nugget. The women’s lawsuit against the Briggs company had permitted the Department to compel payment of back wages, Gibson reported, even though “the Union was in sympathy with the company.”

Another hint comes in a Women’s Bureau memo circulated to women’s groups with the playful title, “What You Don’t Want in an ‘Equal Pay’ Bill.” 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 and put obstacles in the way of good enforcement.” Turning to a catalog of threats, the memo quickly named two now-familiar ones: injection of “list[s] of grounds justifying wage differentials” and removal of liquidated (or double) damages and attorney’s fees for successful plaintiffs. But a third threat followed just after: amendments providing for a liability carve-out for “a union contract which establishes a differential on the basis of sex.”


249 Id.
As we will see, labor’s pivotal political position at the time not only helps to explain the pattern of political successes and failures women’s groups experienced and the ultimate form equal pay laws took. Understanding the union role in the drive to enact equal pay laws in Congress and state legislatures also offers the surest evidence that the broader struggle to enact job discrimination laws at mid-century was not just a battle over the precise form equal pay laws would take or the rigor with which the new laws would be enforced. It was also a much deeper struggle, much of it fought from within the New Deal coalition, to establish and defend a particular vision of the post-war American industrial order.

To see this, 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.

For the millions of women like Florence St. John who had flowed into American workplaces during the first half of the century, labor’s pivotal position was a mixed blessing. On the one hand, the 1930s and 1940s witnessed what labor historians have dubbed a “feminization of unions.” 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. 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 women and minorities, into the fold. 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. Even the AFL began to enter lower-skill, majority-female occupations, with its International Ladies Garment Workers Union seeing an especially dramatic rise in membership after a major organizing drive in 1934. As a result, female union membership grew three-fold during the 1930s, from 265,000 to some 800,000 on the eve of World War II, even if the proportion of women members, at roughly 10

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250 COBBLE, supra note __, at 15.
251 See Dickinson, supra note __, at 699.
253 See MILKMAN, supra note __, at 33-42 (describing effect of industrial unionism on women’s position within labor).
percent, remained static.\textsuperscript{255} Even more significant growth came soon after as “Rosies” entered American industry to replace warbound men, this time producing substantial absolute \textit{and} relative gains: By the end of the war, women represented three million, or more than 20 percent, of the nation’s 12.6 million union members.\textsuperscript{256} 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 28 assignors were members— grew from being a “no woman’s land,” in Gabin’s phrasing, to one in which a determined cadre of “labor feminists” carved out secondary leadership positions and forced women’s issues onto union agendas.\textsuperscript{257}

On the other hand, the immediate post-war period came at an especially unsteady time for women unionists. As legislative campaigns gained momentum in the immediate post-war years, the proportion of female union members declined as the nation undertook demobilization and “reconversion” to a peacetime economy. Part of this resulted from the voluntary withdrawal of women to their pre-war 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 American industrial order.\textsuperscript{258} 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 percent in electrical machinery, from 24 to 9 percent in auto, and from 22 to 9 percent in iron and steel, just as the pay equity issue was creisting politically.\textsuperscript{259}

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\item The best source is Leo Troy, \textit{Trade Union Membership}, 1897-1962 (unpublished NBER paper, 1965).
\item “No woman’s land” is from GABIN, at 24. “Labor feminists” is from COBBLE, supra note \textsuperscript{6}, at 6. The growing female presence on the shop floor and in union halls produced concrete organizational gains as well: As women hit more than a quarter of total UAW membership in 1944, the union created the first-of-its-kind Women’s Department to systematically advance women’s issues. See GABIN, at 1. See also Nancy Gabin, \textit{Women and the UAW in the 1950s}, in MILKMAN, supra note \textsuperscript{260}, at 260. Other accounts include, among many possibilities, Sharon Hartman Strom, \textit{Challenging “Women’s Place”: Feminism, the Left, and Industrial Unionism in the 1930s}, 9 \textit{FEMINIST STUD.} 359 (1983); Sharon Hartman Strom, “We’re No Kitty Fopleys”: Organizing Office Workers for the CIO, in \textit{WOMEN, WORK, AND PROTEST: A CENTURY OF WOMEN’S LABOR HISTORY} (Ruth Milkman, Ed., 1985); Ronald Schatz, “Union Pioneers”: The Founders of Local Unions at General Electric and Westinghouse, 1933-1937, \textit{66 J. OF AM. HIST.} 586 (1979).
\item Compare MILKMAN, supra note \textsuperscript{\textsuperscript{260}}, at 102, \textit{with D’ANN CAMPBELL, WOMEN AT WAR WITH AMERICA: PRIVATE LIVES IN A PATRIOTIC ERA} (1984).
\item See \textit{WOMEN IN FACTORIES}, supra note \textsuperscript{260}. Only women’s share of textile manufacturing avoided substantial decline, dropping from 51 to 46 percent. \textit{Id.} As Milkman reports, in September 1945, one-quarter of women who had worked in factors three months before had lost their jobs, and more than one million had lost their jobs by the end of 1945. \textit{MILKMAN, supra note \textsuperscript{260}}, 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
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Worse, even in the best of times, unions were deeply conflicted on the equal pay issue. This is not to say that labor’s feminization yielded no 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 1952.260 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.261 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.262 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.263

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.264 From the perspective of male unionists, women were not strike-breaking scabs, as in the race context, but something almost as bad: “wage cutters,” as Labor Secretary Schwellenbach put it in congressional testimony in 1948, and “a constant threat to maintenance of general wage levels.”265 As a result, most union grievances asserting the equal pay principle during the 1930s and 1940s were not filed 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 at the time, “chiseling”—the man’s job by removing tasks from its description to decreasing—or, at the very least, static—female influence within the labor movement. Compare MILKMAN, supra note __, with COBBLE, supra note __.

261 COBBLE, supra note __, at 100.
262 See CIO NEWS (Oct. 27, 1941) (on file with author) (noting NWLB decision to adjust wages because “the jobs customarily performed by women are paid less, on a comparative job content basis, than the jobs customarily performed by men”).
263 COBBLE, supra note __, 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, esp. Chap. 5 (2016); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
264 See MILKMAN, supra note __, 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 of employers of women’s lower pay and thus prevent female substitution.”).
justify filling it with lower-wage female labor. Thus, union-filed equal pay demands at mid-century were at bottom protests against management efforts to alter an established system of sex segregation within American industry—and may well have done more to consolidate the structure of gender inequality within American industry than to ameliorate it.

There is no more vivid illustration of these complicated dynamics than a photo that appeared in 1939 in the United Auto 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.” The accompanying caption explained that men were “dressed in women’s clothes because the company paid women’s rates” and that the CIO’s victory in a recent recognition election “brought a new contract and men’s wages.”

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266 MILKMAN, supra note __ at 45, 47 (“Most equal pay cases in both auto and electrical manufacturing during the period were brought by the union (primarily on behalf of men), not by women....”). An example of use of the “chiseling” term at the time is the National War Labor Board’s decision in General Motors Corp. and United Automobile, Aircraft & Agricultural Implement Workers of America, Case Nos. 125 & 128 (Sept. 3, 1942), at pp. 34-35 (noting the strategy of making the “slightest change” to a job in order to justify reclassifying it as a woman’s job).

267 GABIN, at 34; see also MILKMAN, supra note __, 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.”); MILKMAN, supra note __ at 47, 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.”).

A photo from a September 1939 issue of the United Auto 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.269 Many locals fought for equal pay provisions in collective bargaining agreements throughout the later 1930s and 1940s, as the pay equity issue came to the fore. Studies throughout the period found that roughly one-fifth to one-third of union contracts contained equal pay clauses.

269 See GABIN, supra note __, 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 where men were not directly threatened.”).

The flip-side, of course, was that two-thirds of CBAs lacked such clauses—and, in many instances, the contract terms affirmatively sanctioned wage differentials. Thus, a standard UAW-CIO clause stated:

All jobs shall be designated as male or 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.271

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. Yet even CBAs with robust equal pay clauses were no guarantee that women could seek recourse. A common lament among women was that union officials simply ignored their complaints about wage injustices, often questioning whether women belonged in the workplace at all. As one female machine operator wrote in 1955, “Our committee man (AFL) doesn’t care one way or the other. He thinks women should stay at home.”272

Such sentiments, however, went well beyond mid-century gender morés. There was also a strong 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 chief arguments in the St. John case: women’s need for assistance on the shopfloor with heavier tasks such as “set-up” and carry-off systematically reduced male productivity in ways that were not reflected in, and indeed worked to erode, male wage scales.273 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 1944 in which he upbraided women attending the New York Women’s Trade Union League for accepting “the advantages but not the responsibilities of union membership.”274 In the view of many male unionists, women were all too


272 Cited in COBBLE, supra note __, at 102.

273 [CITE]

happy to collect a paycheck on the backs of union efforts, but were far less likely to do engage in the hard work of doing battle with management.

Other, more concrete examples reveal that, where the equal pay principle butted up against other labor aims, 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 Swartz—were plainly performing jobs on par with men.275 Similarly, during periods of unemployment, unions cast aside the equal pay principle and instead negotiated agreements that formally excluded women from a wide array of jobs they had previously done and even capped the number or proportion of women who could be hired.276 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 memo 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.”277

This brief background 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, president of the Rhode Island State Federation of Labor, to a survey by the AFL-CIO’s national office asking about the union’s experience with the state’s equal pay law. “The nature of the Rhode Island Industrial make-up is such that requires a very large number of women,” Devine noted, perhaps referencing the large number of electrical workers in the state. He continued, without any trace of irony: “We have felt that equal pay laws were needed so that men would not be discriminated against.”278

275 See GABIN, supra note __, at 32.
276 An often-invoked example along these lines is a 1941 grievance that ripened into a 36-hour strike at the Kelsey Hayes plant in Detroit. On Gabin’s and Milkman’s telling, the UAW, suspecting that management was about to substitute women for men in a host of positions, filed a grievance demanding “removal of all girl employees from machine work.” Management agreed to observe a hiring freeze, but then triggered a strike by hiring two women onto the night-shift. 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, in addition, stipulated that “female employees at no time will exceed 25 per cent of the total [workforce].” GABIN, supra note __, at 51. See also MILKMAN, supra note __, at 69-70. Another example comes from the NWLB decision in Bendix Aviation Corp., 10 War Lab. Rep. 45 (1943) (noting company allegation that “the union has forced the company to retain men on women’s job and restricted the number of women the company could hire”).
278 See Letter from Arthur Devine, President, Rhode Island State Federation of Labor, to William F. Schnitzler, Secretary-Treasurer, AFL-CIO (April 20, 1956), in Meany Archive, RG13-006 AFL-CIO
More concretely, organized labor’s conflicted stance on pay equity 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 collective bargaining agreements that unions made a condition of their support in large industrial states like Illinois, Pennsylvania, and California and also New Hampshire and Rhode Island. Even Pennsylvania’s carve-out, which was accompanied by a seemingly conflicting provision, could have substantial bite. When female glass blowers at Continental Can Company near Pittsburgh brought a common-law *assumpsit* action under the state’s equal pay law that closely paralleled St. John’s earlier lawsuit, the company, joined by the union as amicus, argued that the collective bargaining agreement precluded their claim. Some 20 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 collective bargaining agreements. 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, 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

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279 The language of these carve-outs varied. Thus, California’s law provided: “Wage differentials provided for in a valid collective bargaining agreement between an employer and a bona fide labor organization are not a violation of this section.” It would remain a part of the law until 1957. Illinois’s law provided: “______.” 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 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, agency, or collective bargaining representative shall be a complete satisfaction of such claim and a complete bar to any action based on such claim.” For evidence that unions conditioned their support on inclusion of a carve-out in California, see Letter from Elisabeth Zeigler to Gov. Earl Warren (June 24, 1949), in “Governors Chaptered Bill Files,” provided by California State Archives (on file with author) (noting that because “union representatives,” and also certain employers, “believed that the law should not interfere with the collective bargaining process”)

280 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.”

281 [CITES TO BRIEFS]. The women were presumably legacy employees of the Hazel-Atlas Glass Company, which Continental Can acquired in 1956, leading to the United States Supreme Court’s important antitrust decision in *United States v. Continental Can Co.*, 378 U.S. 441 (1964).
must have and would result in making a mockery and a farce of labor-management negotiations and bargaining. We refuse to strike down and destroy what has taken labor so many years to attain.\textsuperscript{282}

Though the Pennsylvania Supreme Court reversed the trial court two years later, finding a different way to reconcile the conflicting statutory provisions,\textsuperscript{283} the damage had been done. Unionized women in Pennsylvania—some 35 percent of the state’s female workforce at the time—enjoyed only a highly uncertain set of legal protections during the fifteen-plus years between war’s end and the state high court’s \textit{Stollar} decision.

Less obvious, but no less significant, is how labor’s desire to safeguard collective bargaining—and, more specifically, to preserve its opportunistic invocation of the equal pay principle—explains systematic labor efforts to channel legislative efforts toward an administrative approach and away from 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.”\textsuperscript{284} And most union-tendered bills, including the very first bill advanced in Congress by staunch union allies Wayne Morse and Claude Pepper in 1945, made no provision for employee suits at all and instead vested sole enforcement authority in the Department of Labor.\textsuperscript{285}

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 decision-makers, 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 Labor—further enhanced agency access. 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

\begin{footnotesize}

\textsuperscript{283} See \textit{Stollar v. Continental Can Co.}, 180 A.2d 71 (Pa. 1962) (reversing trial court decision sustaining defendant’s argument of waiver of claim based on CBA).


\end{footnotesize}
protect male wages. 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. 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 the setting of broad enforcement priorities or in the adjudication of particular cases.

The potential benefits of an administrative approach, however, went well beyond the possibility that agencies vested with authority to enforce equal pay laws might shade policy priorities or case adjudication in unions’ favor. Enforcement by labor-friendly agencies also likely meant closer union integration into the enforcement regime. An early case in point came in 1943 when the NWLB entered an order holding that wage rates, “especially when developed by collective bargaining, are presumed to be correct in relation to other jobs in the plant.” Another powerful example came two years later in an NWLB’s decision in a case involving electrical giant Westinghouse. In that case, the NWLB ordered Westinghouse to eliminate sex-based wage differentials by immediately increasing all women’s rates by 4 cents per hour. More notable was the NWLB’s requirement that Westinghouse set aside a fund pegged to the number of women affected by the order “to be allocated by the parties through collective bargaining”

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286 See notes _—_ supra and accompanying text.
287 See Leo Wolman, Labor Peace in 1947, WASH. POST (Jan. 5, 1947) at B5 (noting unions’ “addition to litigation”); Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, on. S.70 a Bill to Exempt Employers from Liability for Portal-to-Portal Wages in Certain Cases, and Other Purposes, 80th Cong. 1st Sess., Jan. 15-30, 1947, at 17, 32 (noting that unions had made FLSA litigation a “wholesale business” and went on “fishing expedition[s]” hoping that “lightning would strike”).
288 Such control was likely seen as especially important during the earliest legislative campaigns to enact equal pay laws, as American industry underwent peacetime demobilization and reconversion of the wartime economy. Particularly delicate was the question of how to treat women as returning veterans were reincorporated into the American industrial order. Judicious implementation of equal pay laws could easily be seen as among the “measures” that Senator Morse of Oregon, speaking at a 1948 congressional hearing on the equal pay issue, deemed necessary to “facilitate the withdrawal of considerable numbers of women from the active labor force, out of the competition for jobs with returning veterans and their sisters who have more need or desire for post-war employment.” 1948 House Hearings, at 23. See also Dickinson, supra note _—_ at 719-20 (“Large-scale and rapid re-employment of men (and of women) from the armed forces must be arranged after the war…”).
289 See Smith Wood Products Co. and Evans Products Co., 13 WAR LAB. REP. 161 (1943). For a more general statement of policy, contained in a letter from NWLB Chairman William Davis to Labor Secretary Schwellenbach near the end of the war, see Letter, 8 WAR LAB. REP. xxviii (1945).
290 See 28 WAR LAB. REP. 666 (1945).
toward the end of “narrowing differentials between men’s and women’s rates.”291

If agency administration gave politically powerful unions a seat at the table when formulating policy on the front end, then agency implementation could also lead to desirable union involvement at the back, remedial end.

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. Until then, 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, were the best way to achieve economic justice for all workers.292 The best example is a letter AFL President William Green wrote to Frances Bolton in 1953 in response to her circulation of a draft equal pay bill. Noting that the Women’s Bureau had advanced similar bills since 1945, Green 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.”293 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.”294 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.295

CIO unions, by contrast, were more open to state regulation via the new equal pay laws, but only as an adjunct to the collective bargaining process. The written statement and testimony of a UAW representative during hearings in 1948

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291 Id. at 667; see also W.L.B. Orders Wage Rise for 50,000 Women, N.Y. HERALD TRIBUNE (Dec. 17, 1945) (noting that set-aside “will be paid according to a division to be worked out by the company and the union ‘to further narrow sex differentials’”).


295 Id.
are especially revealing in this regard. The UAW’s written statement noted several failures of collective bargaining since the war to eliminate sex-based wage differentials and had instead resulted in a “restrictive agreement” whereby “[m]any relatively simple tasks normally performed by women at lower rates were being performed by men at higher rates.”296 But the solution that followed from this admitted return of “old habits” was not damages actions that could force a change on local union and company alike. Rather, government could provide legislation that, though hardly “a panacea or a substitute for union action,” would provide a “favorable atmosphere” and also “a supplement and, when necessary, a corrective to the collective-bargaining process.”297

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.298 After sustained study of all past legislative proposals and state-level enforcement efforts by a special “staff committee” spanning all departments,299 the AFL-CIO unveiled its new policy in a quartet of memos and, following soon after, letters to key members of Congress.300 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 legislation as desired by other unions and most influential women’s organizations.”301 The centerpiece of the compromise measure, the memo then explained, would be reliance “primarily on administration rather than judicial enforcement.”302

296 1948 Hearings at 176-78.
297 Id.
302 Id.
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 backpay upon an employer’s non-compliance with an order of the Secretary of Labor. 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.” Thus, an employee enjoyed neither an “independent right of court suit, nor recourse from an adverse finding by the Secretary.” 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. 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.

For a concrete illustration of this “danger,” 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 several of her assignors reveals deep frustration with the ability 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 post-war purges of women from the auto and electrical industries. Other pieces of trial testimony are even more revealing. Toward the end of 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

304 Id. (?)
306 See Vol. IV, at 1430, 1568. See also MILKMAN, supra note __, at 114-15, 107-08, 145-47 (providing examples of failures).
and the UAW. But St. John firmly responded that the union had “tried to mix in” with the lawsuit after she filed it but that she had rejected any such involvement. Even more tellingly, St. John then testified that her decision to sue was at least in part rooted in her frustration with the failure of the union-dominated Michigan Department of Labor and Industry to pursue her case. “[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.”

Here, then, is some of the most dramatic evidence of the deep structure of regulatory choice 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 what 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 would not. Litigation, on this view, was not a salutary adjunct to collective bargaining. On the contrary, it was an end run around, a collateral attack upon, and even an existential threat to that system.

The question remains, of course, whether labor’s “stand on enforcement procedures,” as a letter to Congresswoman Edna Kelly put it in 1956, 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, Congress went dark throughout the 1950s. Indeed, during the 82nd through 86th Congresses, a period spanning 1951-1961, some 72 bills were introduced, but no hearings were held and no bills were reported out of committee. As AFL-CIO analysts themselves recognized in the middle of that fallow period, the “absence of support from the AFL-CIO had discouraged action” on any bills. 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 Labor Secretary could

308 Id.
do so—and the union even managed to strong-arm the Women’s Bureau into accepting it as its own.\textsuperscript{312}

Turning to the state level, the general lack of formal legislative history—a condition that continues in many states to this day—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 long before the national AFL-CIO revised the AFL’s outright opposition to such laws in 1956.\textsuperscript{313} 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.\textsuperscript{314}

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 equal pay law’s comparability provision, the New York Federation of Labor advanced a string of bills designed to resuscitate New York’s equal pay law by loosening the comparability requirement.\textsuperscript{315} But, like the national AFL-CIO’s “compromise” bill in 1956, the state federation’s proposed bills also sought to place all enforcement authority in the state labor agency’s hands,


\textsuperscript{313} See Memorandum on Responses from State Bodies on Equal Pay Legislation (May 24, 1956), in Meany Archive, RG21-001 AFL-CIO Department of Legislation Records, 1906-1978, Series 1—Legislative Reference Files, 1921-1978, Box 16, Folder (“Equal Rights 1956/01-1956/12”) (noting that all eleven state federation bodies surveyed had supported enactment of equal pay legislation).

\textsuperscript{314} See Letter from Elisabeth Zeigler to Gov. Earl Warren (June 24, 1949), in “Governors Chaptered Bill Files,” provided by California State Archives (on file with author) (noting, in her capacity as a representative of the California Federation of Business and Professional Women’s Clubs, that, because “employers 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 the bill”).

permitting individuals to seek redress in court only if “the employer does not comply with the commissioner’s order within thirty days.”

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 suit “for an in behalf of herself or themselves and others similarly situated” and to collect liquidated damages were the first to fall to amendments, setting a pattern that would repeat in other states. After efforts to re-insert both provisions were easily beaten back, the original bill’s champions complained that Pennsylvania women had “been sold down the river.” This bill provides that [women] shall have access to the courts,” another legislator noted with clear sarcasm, “and so if they have fifty dollars damages coming they can pay a lawyer at least thirty-five dollars and collect fifteen dollars for themselves.” In California, early bills tracked the Women’s Bureau’s recommended bill in its inclusion of the full panoply of litigation-boosting provisions but then quickly pulled back. The law that was enacted in 1949 limited backpay to 30 days, made no provision for liquidated damages or attorney’s fees—and, as already noted, also excepted wage differentials if “by contract between the employer and the recognized bargaining agent of the employees.” With the original bill’s various litigation-promoting provisions stripped away, the law’s “effectiveness,” as one legislator put it, “has been impaired almost to the vanishing point.”


318 Pennsylvania Legislative Journal—House (June 16, 1947), at 5478.

319 Id. at 5479.

320 See A.B. 169.

In 1968, as complaints brought under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 began to flow in substantial numbers into the Department of Labor, the Equal Employment Opportunity Commission (EEOC), and the federal courts, the Detroit Free Press ran an article profiling the recent victory of Diane Bruno, a typist at Detroit’s Dana Corporation, manufacturer of axles, transmissions, and other powertrain components for automakers like GM. When Dana Corp. 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 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. 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.”

For her part, Florence 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 twenty years after St. John’s much larger one, as “history-making.” After all, St. John’s husband (and fellow machinist) Cleon had recently passed away, and St. John herself was nearing the end of her life, which came two years later, in 1970, at the age of 74. Still, at the time the article ran, St. John appears to have been living just outside Detroit, in Trenton, Michigan, 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 confirmed her view she expressed on the stand in Judge Hayden’s courtroom back in 1941 that administrative agencies had a tendency to “turn[] politics” when it came to individual cases. 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 brief newspaper obituary.

What is clear, however, 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-

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323 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.”).
324 [CITE]
outs, and denuded class action provisions—left wage discrimination largely unregulated. This left workers like St. John unprotected save 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-damages but no legal fees. All told, of the 9 million women in the labor force during the 1950s in the 22 states with equal pay laws, more than half of them (some 5 million) were in states like California, Pennsylvania, Ohio, and Illinois, where enforcement efforts were virtually non-existent.325

In the meantime, the labor market fortunes of women like St. John did not improve and likely grew worse. The post-war 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.326 And, beginning 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 65 percent in 1955 to less than 60 percent in 1970, even as technological advances made physical strength less important in many jobs like St. John’s.327 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.328 Viewed through this lens, St. John’s lawsuit and the legislative campaigns it spurred were plainly a hinge moment. A different regulatory response built around class actions rather than labor’s alternative collectivist vision may well have altered the American industrial order and women’s place in it.

325 See U.S. Department of Commerce, Bureau of the Census, 1950 Census of the Population (reporting women works totaling roughly 1 million in each of these states).
326 See MILKMAN, supra note __, at 112. For instance, in Detroit, women as percentage of production workers dropped from 19 percent in October 1939 to 10 percent in 1944 to 7.5 percent in June 1945. See U.S. Dept. of Labor, Recent Trends Affecting the Employment of Women in Automobile Manufacturing in Detroit, in Women’s Bureau Records, RG86, Entry 12 (“Office Files of the Director, 1918-1948”), Box 55 (“Mi—Mn”), Folder (“Michigan”).
328 See BLAU ET AL., supra note __, at 224. (reporting results of regression analysis in which occupational and industry segregation explains roughly half of the variance in gender wage differentials during the 1990s); id. at 144 (noting that measures of occupational segregation by sex was “substantial and largely constant” from 1900 to 1970, with gradual decreases thereafter). For the literature on trends in occupational segregation, see, e.g., Edward Gross, Plus Ca Change? The Sexual Structure of Occupations Over Time, 16 SOCIAL PROBLEMS 198 (1968); Jerry A. Jacobs, Long-Term Trends in Occupational Segregation by Sex, 95 AM. J. OF SOC. __ (1989).
Equally clear is that the St. John episode holds important lessons for our understanding of the evolution of litigation’s place in the American regulatory state. Despite decades of heated debate about the class action’s proper form and function, historical work on the historical 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 19th century and first part of the 20th 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. Another has focused intensively on the forces that shaped the Advisory Committee’s amendment of Rule 23 in 1966. 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.

The St. John episode broadens these accounts in important ways. To begin, directing attention to the neglected but critical mid-century 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 19th and early 20th century equity courts had confronted. As already noted, the most sustained mid-century judicial encounter with the mass action came in FLSA cases, and the federal courts quickly ruled out opt-out mechanisms and broadly preclusive judgments of the modern sort. 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 Supreme Court held that members of a class not present as parties to a n earlier litigation could not be bound by the judgment unless they were adequately represented by parties who were present. And judicial anxiety was present at the state level as St. John’s lawsuit unfolded, as evidenced by the

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329 [CITES]
330 See, e.g., YEEAZELL, supra note __. See also Robert Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U. L. REV. 213 (1990); Abram Chayes, Foreword: Public Law Litigation and Burger Court, 96 HARV. L. REV. 4, 26 (1982). For earlier commentary, see ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY 200 (1950); Zechariah Chafee, Jr., Bills of Peace with Multiple Parties, 45 HARV. L. REV. 1297 (1932); Kalven & Rosenfield, supra note __, at 695-701.
331 See Marcus, supra note __; Marcus, supra note __.
332 See Marcus, supra note __; Engstrom, supra note __.
333 See notes __-__ supra and accompanying text.
Michigan Supreme Court’s holding, in *International Typographical Union v. County of Macomb*, that even absent parties could be bound by a judgment in a class suit.

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 cabining mass litigation under the laws along the lines of the FLSA’s “collective” action. 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.

But other counter-factual accounts are easily glimpsed. For one, a raft of new state-level pay equity laws built around a robust litigation mechanism might have, in addition to increasing the frequency with which judges were made to confront mass litigation’s puzzles, 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-play actors far more bent on “playing for rules” within the system than St. John’s one-off, general-practice counsel.

It is also important to note that litigation under the new pay equity laws was likely to play out in the state courts, not the federal courts. This matters because judicial encounters with aggregated litigation at mid-century went to the heart of an emerging debate about the relative merits of administration and litigation. 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. At the state level, by contrast, litigation may have done better in the comparison to

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336 See notes ___ supra and accompanying text.
337 See Resnik, supra note ___.
339 Kalven & Rosenfield, supra note ___.
agency-led enforcement. As noted above, the state administrative state was far less well-developed than its federal counterpart at mid-century and was also significantly, and even grossly, underresourced. While federal judges may have felt little pressure to strengthen the FLSA’s collective action and make it an effective reform mechanism, state judges may 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 would 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 $.40/hour fell below wage rates in most large-scale industries. Nor did the FLSA’s overtime rules hold substantial transformative potential outside the portal-to-portal issue because of, among other things, coverage exemptions that blunted their effect. 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, the pay equity laws had far more potential to upend the social and economic status quo. Sympathetic judges would have seen reform possibilities that turned on effective class mechanisms. And robust litigation of the new pay equity laws would have presented sharp managerial challenges that might have convinced ambivalent or even unsympathetic judges to go along.

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

341 See notes __-__ supra and accompanying text.
342 Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives on S. 2475 and H.R. 7200, Bills to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce and for Other Purposes, Part II, 75th Cong., 1st Sess., June 7-15, 1937, at 338-42 (providing wages in most American industries). Affected industries were largely confined to the South. Even for the South, FLSA’s agricultural exemption meant that the statute promised less reform than might have seemed on the surface. See generally NORLUND, supra note __, at 45, 60, 67.
pathologies of each type of institution. As already noted, that was no less true at mid-century, 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 rise of the class action as a central feature of the American regulatory state. 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. On this view, agencies remained the primary enforcement vehicle within the American regulatory state until at least the 1950s not solely because of a Landis-like faith in administrative expertise and vigor, but because of labor’s efforts to ensure that enforcement happened on terms consistent with its collectivist plan. The resulting mid-century clash of collectivist visions should be central to any causal account of the modern class action’s emergence going forward.

A final lesson of the St. John episode turns away from pivotal moments longsince 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 American regulatory state is how to reconcile it with competing statutory frameworks, particularly labor law. As already noted, 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 National Labor Relations Act on whether seniority protections built into union CBAs that instantiated past discrimination were actionable under Title VII. 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. In both sets of cases, the Supreme Court navigated the tensions between collectively negotiated workplace agreements and private, and often aggregated, litigation by workers seeking to protect separate and conflicting rights to redress.

344 See note __, supra, and accompanying text.
345 See Leo Troy, Trade Union Membership, 1897-1962 2 (1965) (noting 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, 13-45 (2016).
346 See note __, supra. For a recent overview, 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 (2016).
347 See note __, supra, and accompanying text.
348 See note __, supra, and accompanying text.
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. At issue is whether Section 7 of the National Labor Relations Act’s protection of employees’ ability to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” trumps the Federal Arbitration Act’s guarantee 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.” For arbitration’s opponents, the case may well be the last best chance to halt arbitration’s advance from the domain of consumer protection, where it has most fully taken hold, to the critical area of workplace disputes.

A key question in the cases is whether the NLRA’s protection of “other concerted activities” amounts to a “contrary congressional command” sufficient to override the FAA’s liberal pro-arbitration thrust. Yet, as the decisions and briefing in the lower courts reflect, the FLSA’s legislative history offers precious little guidance. Congress never explicitly discussed the right to file class or consolidated claims, leaving little in the way of a specific congressional command. But nor did Congress hint that its protection of “concerted activities” was limited to actions taken by a formally recognized union, leaving open the

349 See note __, supra.
353 See CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (repeating the “contrary congressional command” test from Shearson/Am. Express); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (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.”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (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 of 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. The employee-parties 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.” On this view, Section 7’s protection of “other concerted activities” is a substantive right that renders the arbitration agreement unenforceably whether or not there is a contrary congressional command. See Murphy Oil, SG Cert Petition, at 14 n.5; [OTHER BRIEF CITES]. The difference does not seem to matter for purposes of the present analysis, as labor’s mid-century relationship to mass litigation can inform both whether Section 7 of the NLRA constitutes a “contrary congressional command” as well as whether collective litigation is part of any substantive right created therein.

354 See Morris v. Ernst & Young, 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.”).
possibility that Congress meant to give the provision, as the Seventh Circuit put it, an “intentionally broad sweep.” 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 is 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. In addition, 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, the notion that class action lawsuits should be protected and preserved by the NLRA as an alternative form of “concerted activit[y]” would have rung hollow to many mid-century unionists’ ears. Viewing the St. John episode in this light, it might seem more than a stretch to argue that unions sought, and Congress inscribed in the NLRA, a substantive right to collective litigation for workers.

But another reading of the historical evidence is also available and yields strong inferences that point in the opposite direction. In particular, labor’s highly selective involvement in equal pay litigation at mid-century—typically to prevent employers from “chiseling” men’s wages—suggests that labor was not opposed to 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 over the AFL’s opposition—offers a further example.

To be sure, labor’s selective use of litigation in both contexts was less than principled and even cynical. Both, it could be argued, were strategic blunders.

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355 See Epic Systems, 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”).

356 This point is also made by the Fifth Circuit. See D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 361 (5th Cir. 2013) (“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 Epic Systems, 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.”).

357 See note __, supra, and accompanying text.

358 See John Frey, No Fair! Portal-to-Portal Suits Violate a Basic Principle of Collective Bargaining, AM. FEDERATIONIST (Feb. 1947) at 17 (Metal Trades Dept. president opposes portal litigation because “[o]ur trade union movement has no assets more valuable than its agreements with employers and the integrity which is involved”); AFL Members Raid CIO ‘Portal’ Office, N.Y. TIMES (Jan. 17, 1947) at 16 (noting outright violence between AFL and CIO locals on the portal litigation issue).

359 See Linder, supra note __ at 138, 171-72, 176 (describing the portal-to-portal litigation as underwritten and perhaps even initiated by CIO unions; AFL unions, however, criticized the litigation as dishonoring collective bargaining agreements).
that cost labor far more than it gained.\textsuperscript{360} Still, it bears repeating that mid-century 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 “mutual aid or protection.”

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. 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 mid-century unions saw as anathema to their core vision of the American 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 cases like Walmart \emph{v.} Dukes, and litigation’s creeping replacement by often toothless arbitration.\textsuperscript{361} Indeed, were the Court to hold that the FAA trumps the NLRA by pointing to labor’s reservations about class litigation during legislative struggles over pay equity laws, it would be using labor’s mid-century pursuit of an 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 hope 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.

\textsuperscript{360} \textit{Id.} at 167, 178 (arguing that CIO-led portal litigation was part of an effort to gain leverage in the collective bargaining process but, by provoking a congressional response that weakened the FLSA, mostly hurt unorganized workers, who depended on the FLSA’s baseline protections more than organized ones).

\textsuperscript{361} For synthetic commentary, see Judith Resnik, \textit{Fairness in Numbers: A Comment on AT&T \emph{v.} Concepcion, Wal-Mart \emph{v.} Dukes, and Turner \emph{v.} Rogers}, 125 HARV. L. REV. 78 (2011).