

RESTRUCTURING THE LABOR MARKET TO DEMOCRATIZE THE PUBLIC FORUM

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INTRODUCTION

We lead our lives within a variety of institutions—including the labor market, public forum, and family—that exert different and often conflicting influences on our identities. The labor market, defined as all exchanges of work for wages, encourages us to accept existing hierarchies and mainstream ideologies,¹ while the public forum functions best when we challenge entrenched power and think independently.² Yet as we move between institutions,

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1. See Devon W. Carbado & Mitu Gulati, *Symposium: Discrimination and Inequality Emerging Issues Working Identity*, 85 Cornell L. Rev. 1259, 1275 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (explaining that a junior “employee must convince senior employees that he has internalized the social norms of the institution by showing that he values the existing structure and will respect the social hierarchy”); see also David C. Yamada, *Dignity, “Rankism,” and Hierarchy in the Workplace: Creating a “Dignitarian” Agenda for American Employment Law*, 28 Berkeley J. Empl. & Lab. L. 305, 310–311 (2007) [hereinafter Yamada, *Dignity, “Rankism,” and Hierarchy*] (stating that “conformity . . . and self-censorship have become standard paths for moving ahead or at least remaining employed”); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 Berkeley J. Empl. & Lab. L. 1, 11 (1998) [hereinafter Yamada, *Voices From the Cubicle*] (opining that “the culture surrounding today’s workplace . . . promotes [] docility, self-censorship, and acceptance of hierarchy”).

2. The Supreme Court of the United States has recognized that “self-government suffers when those in power suppress competing views on public issues ‘from diverse and antagonistic sources.’” *First Natl. Bank v. Bellotti*, 435 U.S. 765, 777 n. 12 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), in turn quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). It is further recognized that the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.” *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). See generally Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-*

rather than constantly reinventing ourselves, we tend to retain the identities that we are most accustomed to inhabiting. For most of us, this means retaining our labor market identities, together with the hierarchies and ideologies they represent, across our interactions with all institutions.³ But we must realize that while the labor market's hierarchies and ideologies arguably benefit our economy, they undeniably impoverish our democracy.

A populace that has accepted hierarchy and ideological conformity in the private sphere is emphatically ill-equipped to embrace equality and ideological diversity—the hallmarks of democracy—in the public sphere.⁴ If we are committed to democracy in the public sphere, our laws must ensure that we are capable of interacting as equals and expressing our own unique viewpoints. Current laws provide no such insurance. Neither the Constitution nor the United States Code prevents private employers from cultivating hierarchy and ideological conformity, or prevents state actors from standing by while privately created hierarchies and ideologies are reproduced in the public forum. Therefore, legal reform will be necessary before we can create an egalitarian and ideologically diverse public forum.

This Article proceeds in three Parts. The first Part examines our labor market identities and their impact on public forum debate; the second Part examines our labor market *gender* identities and their impact on public forum debate regarding gender; and the third Part argues that only by radically restructuring the labor market can we create a democratic public forum.

Part I begins with the assertion that our identities are influenced by our actions⁵—and, in particular, by our labor market

Government Expression: A Speech-Centered Theory of Court Access, 51 Am. U. L. Rev. 835, 865–868 (2002) (explaining that “contrarian viewpoints [and] criticism of the state preserve the legitimacy and accountability of the existing political-legal order”).

3. Our labor market identities dominate because of the large amount of time we spend at work. Bureau of Lab. Statistics, U.S. Dept. of Labor, *American Time Use Survey, Table A-1*, http://www.bls.gov/tus/tables/a1_2008.pdf (accessed Aug. 24, 2010). Americans who engaged in any “working or work-related activities” spent 7.99 hours per day on those activities. *Id.* They did not spend as much time on any other activity, except for sleeping, which consumed roughly 8.61 hours per day. *Id.*

4. See *infra* pts. I(B)–(C) (discussing labor market influences on the public forum).

5. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 25 (Routledge, Chapman & Hall, Inc. 1990). Butler writes, “[T]here is no ‘being’ behind doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed—the deed is everything.” *Id.* (quoting Friedrich Nietzsche, *On the Genealogy of Morals* 45 (Vintage 1969)).

actions.⁶ It proceeds by illustrating that our labor market actions cause us to construct identities accepting of existing hierarchies and reflective of mainstream ideologies.⁷ It concludes by arguing that these labor market identities prevent us from effectively challenging the hierarchies and ideologies of the public forum.⁸ Part II applies the general principles set forth in Part I to the specific example of gender identity. It asserts that our genders, like all aspects of our identities, are influenced by our labor market actions.⁹ It illustrates that our labor market actions—driven by sex-based occupational and workplace segregation, sex-based appearance regulations, and sex-based pay scales—encourage us to construct gendered identities and accept gender stereotypes.¹⁰ It concludes that the gender identities we construct in the labor market prevent us from imagining and, thus, advocating radical alternatives to the gender identities and stereotypes of the public forum.¹¹

Part III proposes legal reforms designed to resolve the problems set forth in Parts I and II. It begins by illustrating that our current laws are incapable of creating a democratic public forum.¹² It proceeds by suggesting new legislation that—by making the labor market either more democratic or less central to identity construction—would be capable of creating a democratic public forum.¹³ New legislation could make the labor market more

6. *See infra* pt. I(A) (describing the influence of the labor market on our identities). Labor market actions take on special importance due to the large amount of time we spend in the labor market. *See supra* n. 3 (discussing the amount of time Americans spend at work).

7. *See infra* pt. I(B) (illustrating the impact that labor market identities have on individuals).

8. *See infra* pt. I(C) (discussing the ramifications labor market identities cause in the public forum).

9. *See infra* pt. II(A) (discussing the effect of labor market actions on gender identities); *see e.g.* Butler, *supra* n. 5, at 25 (stating that “[t]here is no gender identity behind the expression of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results”). Our labor market actions encompass everything from the tasks we are assigned, to the people with whom we are grouped, to the clothes we are required to wear.

10. *See infra* pt. II(B) (demonstrating the impact of labor market actions on the construction and acceptance of gender stereotypes).

11. *See infra* pt. I(C) (discussing the negative effect of gender identities constructed in the labor market on progress in the public form).

12. *See infra* pt. III(A) (pointing out the gaps in current laws that hinder the creation of a democratic public forum).

13. *See infra* pt. III(B) (suggesting reforms that would assist in creating a democratic public forum).

democratic by requiring employers to flatten existing hierarchies and involve their employees in workplace governance. Alternatively, it could make the labor market less central to identity construction by reducing the number of hours employees spend in the workplace. At its most fundamental level, this Article advocates legal reform designed to serve not only our economy but also our democracy.

I. LABOR MARKET IDENTITIES HARM THE PUBLIC FORUM

Part I proceeds in three Subparts. Part I(A) asserts that our identities are influenced by our actions¹⁴—particularly by the actions we repeat over long periods in the labor market.¹⁵ Part I(B) illustrates that our labor market actions are driven by employers,¹⁶ who encourage us to interact within hierarchies,¹⁷ and to incorporate those hierarchies into our own ideologies.¹⁸ Part I(C) demonstrates that the public forum is driven by democratic imperatives and therefore functions best when we interact as equals and express a diverse array of ideologies.¹⁹ Part I con-

14. See Butler, *supra* n. 5, at 25 (illustrating that identity is constituted by expression of gender).

15. See Carbado & Gulati, *Working Identity*, *supra* n. 1, at 1265 n. 11 (noting that “workplace norms or criteria create incentives for employees to socially construct or perform their identities to comport with those norms or criteria”).

16. Sherry Cable & Tamara L. Mix, *Economic Imperatives and Race Relations: The Rise and Fall of the Apartheid System*, 34 J. Black Studs. 183, 201 (2003) (observing that “[e]conomic imperatives drive the structure of the labor market in capitalist societies. . . . A competitive labor market is necessary to keep wages down and profits up.”).

17. See Yamada, *Dignity, “Rankism,” and Hierarchy*, *supra* n. 1, at 315 (noting that “American law expressly embraces rank and hierarchy in the workplace. The predominant employment relationship in the United States is at-will employment, whereby an employee can be discharged for any reason or none at all.”).

18. *Id.* at 319 (discussing the lack of protection for free speech within today’s workplace). Public employees are limited in their ability to bring constitutional claims for abridgements of speech, while private employees are entirely prohibited. *Id.* Public and private employees may have access to some statutory claims (for example, whistleblower claims), but their protection under such statutes is quite limited as well. *Id.*

19. The Equal Protection Clause of the Fourteenth Amendment essentially mandates identity equality within the public forum. U.S. Const. amend. XIV. Indeed, in the eyes of the state, individuals must be equal regardless of their race, alienage, and national origin, unless their inequality is “narrowly tailored” to achieving a “compelling” interest, and with respect to their sex and legitimacy, unless their inequality is “substantially related” to achieving an “important” interest. *Id.* at § 1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–441 (1985). Sometimes the First Amendment’s protection of speech has been justified by reference to a “marketplace of ideas” theory, which presumes that when a diverse array of ideas are expressed the best ideas will prevail and lead to good policy. See

cludes that so long as the labor market remains hierarchical, ideologically homogeneous, and central to identity construction, the public forum will remain essentially undemocratic.²⁰

A. Identity Construction

Identity is the sum of numerous components, ranging from basic demographic characteristics—like race, sex, income, education, and occupation²¹—to less tangible (and more difficult to track) characteristics like behavior, personality, and ideology.²² The latter characteristics, which overlap to some extent, require explanation. Behavior refers to a person’s dress, makeup, hairstyle, and mannerisms;²³ personality refers to a person’s “degree of openness, conscientiousness, extraversion, agreeableness, and neuroticism”;²⁴ and ideology refers, in the words of philosopher Louis Althusser, to “the system of the ideas and representations [that] dominate [a person’s] mind[.]”²⁵

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the theory of our Constitution as utilizing the free trade in ideas to achieve the ultimate goal).

20. For a discussion of the disconnect between the labor market and public forum, see Robert Levering, *A Great Place to Work: What Makes Some Employers So Good (and Most So Bad)* 62 (Random House 1988) (stating that “[w]e generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights you enjoy as a citizen. There’s no process for challenging—or changing—bad decisions made by the authorities. There’s no mechanism to vote for people to represent you in decision-making bodies.”).

21. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 859 (2009) [hereinafter Braman, *Whose Eyes Are You Going to Believe?*] (indicating that “conventional sociodemographic characteristics [include] gender, race, age, household income, education, community type (urban or nonurban) of residence, and region of residence”).

22. See e.g. Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 871 (2002) (introducing a “weak performative model” of identity, wherein “one’s identity will be formed in part through one’s acts and social situation, rather than being entirely guaranteed by some prediscursive substrate”); see also Kenneth L. Schmitz, *The Ontology of Rights*, 3 Ave Maria L. Rev. 275, 284 (2005) (noting that “the singular person is already and internally a composite of many parts, aspects, dimensions, and powers, all sealed by the concrete—if ever-changing—unity of his or her personal identity”).

23. Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 Utah L. Rev. 749, 754 [hereinafter Knouse, *Ideology Politics*].

24. *Id.*; see generally Lewis R. Goldberg, *The Structure of Phenotypic Personality Traits*, 48 Am. Psychologist 26, 26–34 (1993) (tracing the development of the Big-Five factors in personality research—Surgency (or Extraversion), Agreeableness, Conscientiousness, Emotional Stability (or Neuroticism), and Openness—which have influenced the scientific study of individual differences).

25. Louis Althusser, *Ideology and Ideological State Apparatuses*, in *Lenin and Philos-*

Ideology, which is particularly significant to the following discussion, encompasses not only political and religious affiliations but also organizational preferences.²⁶ Organizational preferences, for present purposes, are evaluated along two continua—one ranging from hierarchical to egalitarian,²⁷ and another ranging from ideologically homogeneous to ideologically diverse.²⁸ Some individuals prefer organizations—for example, governments, corporations, universities, and families—whose members interact according to their hierarchical rank (e.g., based on achievement, ancestry, wealth, or race) and share the same ideology (e.g., all ascribe to a common value system such as Protestantism, feminism, and environmentalism, or all share the same investment in their organization's hierarchy). Other individuals prefer organizations whose members interact as equals (regardless of personal achievement, ancestry, wealth, or race) and express ideologically diverse viewpoints—for example, some members may be Protestants, while others may be Catholics or atheists. Still, others may, of course, prefer organizations reflective of other combinations—for example, hierarchy and ideological diversity.

All the aforementioned components of identity are interconnected, such that an alteration in any one may impact others. Some components are, however, more susceptible to alteration than others. While it is difficult to assess the absolute mutability of any given component, it is possible to draw comparisons between components. One might, for example, reasonably argue

ophy and Other Essays 127, 158 (Ben Brewster trans., Monthly Review Press 1971) (defining ideology as “the system of the ideas and representations [that] dominate the mind of a man or a social group”).

26. Braman, *Whose Eyes Are You Going to Believe?*, *supra* n. 21, at 859–860 (using the term “cultural worldview” rather than “ideology” but defining it to include organizational preferences such as hierarchy versus egalitarianism).

27. *Id.* Braman explains how a

“[H]igh grid” worldview corresponds to a preference for a relatively hierarchical ordering, in which entitlements, obligations, opportunities, and offices are all assigned on the basis of conspicuous and largely fixed attributes, such as gender, race, lineage, class, and the like. A “low grid” worldview, in contrast, generates a preference for an egalitarian ordering that emphatically rejects the proposition that such distinctions should figure in this way in societal conditions.

Id. at 859.

28. Parts I(B) and I(C) explain that, while the labor market encourages individuals to prefer hierarchy and (ideological) homogeneity, the public forum encourages individuals to prefer equality and (ideological) diversity. *Infra* pts. I(B)–(C).

that anatomical race and sex²⁹ are less mutable than personality and ideology, which are in turn less mutable than behavior.³⁰

Proceeding from the premise that behavior is more susceptible to alteration than other components,³¹ we can examine how behavioral alterations might affect other components. The likelihood that any given behavioral alteration will affect another component depends on the duration of the behavioral alteration and the mutability of the other component.³² Short-term changes in behavior may generally have little to no impact on personality and ideology, and no impact at all on race or sex.³³ But long-term changes in behavior may significantly impact personality and ideology,³⁴ while still having little or no impact on race or sex. Thus, while short-term alterations in behavior generally may have minimal impacts on identity as a whole,³⁵ long-term alterations may have significant impacts.

From the above discussion, one can conclude that employers, who often have long-term influence over their employees' behaviors, significantly impact their employees' identities. Employers, to be clear, do not *construct* their employees' identities; however, they do *influence* their employees' behaviors in ways that, over time, result in the employees themselves con-

29. The phrase "anatomical race and sex" refers to the biological components of race and sex—skin color and sex organs. This Article later differentiates anatomical sex from gender (the cultural manifestation of masculinity or femininity). *Infra* pt. II(A).

30. It should be noted that race and sex are not entirely immutable—individuals can change the level of melanocytes in their skin or the appearance of their sex organs—and that behavior is not entirely mutable. Certain behaviors, especially those that are addictive, may be quite difficult to alter.

31. See Knouse, *Ideology Politics*, *supra* n. 23, at 754, n. 21 (noting that "[a]ltering one's personality, behavior, or ideology, while significant, seems to require less effort than altering one's quasi-anatomical or anatomical attributes").

32. See *id.* at 753, n. 17 (describing the difference between true alteration and apparent alteration and indicates that over time "[i]t is possible that an individual may begin with one set of attributes . . . and over time incorporate the appearance of alteration so fully into the individual's identity that he or she is most accurately described as having actually altered the attributes").

33. While most short-term changes will have little impact on other components, those that are prompted by catastrophic events may have profound impacts. See *supra* nn. 31–32 and accompanying text (implying that true alteration may take a long period of time and that certain components of identity requires less effort than others).

34. The conclusion that long-term changes in behavior may significantly impact personality and ideology may be drawn for the reasons indicated in *supra* note 32.

35. Of course, short-term influences will not always be insignificant, especially if they involve the use of force or threats to use force. My contention is simply that long-term influences are more often significant than short-term influences.

structing certain identities. The behaviors employers encourage and the identities those behaviors tend to construct are discussed in the following Part.

B. Labor Market Influences

When we enter the labor market, we are encouraged to engage in certain actions, which vary depending on our occupation, workplace, job grade, and, in many cases, race, sex, and other personal traits. Every action in which we engage influences our identity to some extent,³⁶ and actions that we repeat ad nauseam over weeks, months, and years are highly influential.³⁷ Because we spend so much time in the labor market,³⁸ our labor market actions have tremendous influence over our identities—regardless of our awareness or acceptance of their influence.

We begin our labor market careers with identities that have already been shaped in other—hopefully democratic—institutions, such as the family and educational systems. Our existing identities, however, are influenced and often altered by our labor market actions. When our existing identity suggests that we should engage in one set of actions, and our occupation or workplace suggests that we should engage in another, we enter what Professors Devon W. Carbado and Mitu Gulati refer to as an identity “negotiation.”³⁹ We weigh the value of our existing identi-

36. For an excellent discussion of the close relationship between behavior and identity, see Laura Morgan Roberts and Darryl D. Roberts’s discussion of “identity performance” in *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 *Duke J. Gender L. & Policy* 369, 380–386 (2007) (explaining that “workers perform their identities through visible displays of physical appearance (e.g., hair, makeup, clothing, jewelry)[,] . . . symbolic gestures (e.g., displaying photos or cultural artifacts, engaging in cultural rituals)[,] . . . strategic verbal disclosures,” and a variety of other actions).

37. See *supra* pt. I(A) (discussing identity construction).

38. *Supra* n. 3. “We” refers to “we Americans.” Alexandra Fiore & Matthew Weinick, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 *Hofstra Lab. & Empl. L.J.* 525, 530 (2008) (noting that “[t]wenty-eight percent of Americans work more than forty hours per week and eight percent work more than sixty hours per week. ‘An average American gets [fourteen] days of vacation [per year] but takes only [eleven].’”) (citing Paul B. Brown, *All Tapped Out, or Maybe Not*, *N.Y. Times*, June 2, 2007, at C5); Richard Barry Freeman & Joel Rogers, *What Workers Want* 1 (Cornell U. Press 1999) (discussing how “Americans spend more time at their workplaces than do the citizens of virtually any other developed country”).

39. Carbado & Gulati, *Working Identity*, *supra* n. 1, at 1264.

ty against the value of labor market success and determine whether or not to “compromise”—or, in Professor Kenji Yoshino’s terms, “cover”—our existing identity in favor of continued employment or promotion.⁴⁰ Over time, if we repeatedly compromise our existing identities to perform the actions necessary for continued employment or promotion, we fundamentally alter our identities.⁴¹

Although labor market influences vary substantially—depending on our occupations, workplaces, job grades, et cetera—they generally share at least two common features: first, they encourage us to interact within hierarchies; second, they encourage us to accept and internalize those hierarchies as part of our own ideologies. Some would argue that both features are positive because they help the labor market achieve its economic imperatives. Others, myself included, would argue that both features are negative because they are unnecessary to economic success and unduly detrimental to the public forum.⁴² Robert Fuller, in advocating a “dignitarian society,” argues that the labor market need not encourage either hierarchy or ideological homogeneity.⁴³ He writes:

A fundamental characteristic of a healthy work culture is that everyone, regardless of rank, exhibits a questioning attitude. The freedom to challenge any action, any condition, and any assertion cannot be maintained in an environment laced with rankism. Only by continually demonstrating respect for all opinions and those who hold them will an environment be maintained in which a spirit of inquiry can thrive.⁴⁴

40. *Id.* at 1264–1266; see generally Yoshino, *supra* n. 22, at 772 (explaining and applying the meaning of “covering” one’s identity).

41. It should be noted that I am not making any sort of normative claim about identity alteration. Some identity alterations are positive, others negative. At present, I am simply asserting that time in the labor market can, and often does, alter identity.

42. See *infra* pts. I(B)(1)–(2) (discussing the hierarchical nature of American workplaces and the preference for ideological homogeneity).

43. Robert W. Fuller, *All Rise: Somebodies, Nobodies, and the Politics of Dignity* 54 (Berrett-Koehler Publishers 2006).

44. *Id.* at 54. Fuller argues against hierarchy—or, in his terminology, “rankism”—and ideological homogeneity in the labor market.

Although hierarchy and ideological homogeneity may not be ideal, they currently dominate the labor market—to the great detriment of the public forum. The following two Subparts explore, in greater detail, the arguments for and against a hierarchical and ideologically homogeneous labor market.

1. Hierarchy

The hierarchical nature of modern American workplaces is easily explained by the at-will employment relationship and the history of American workplace organization. At-will employment, “[t]he predominant employment relationship in the United States,” is clearly hierarchical in allowing employees to be “discharged for any reason or none at all.”⁴⁵ Early management theorists clearly proceeded from hierarchical models. Frederick Winslow Taylor, who published *The Principles of Scientific Management* in 1911, “envisioned managers as rational ‘heads’ who would control the unruly ‘hands’ and irrational ‘hearts’ of workers.”⁴⁶ Taylor proposed that low-ranking workers be provided with “instructional cards to explain [their] job[s]”; that their supervisors likewise be provided with “instructional cards on how to complete their jobs efficiently”; and that “only the top authorities [be] allowed to make substantial decisions about their work.”⁴⁷ Both the at-will relationship and Taylor’s theories of management set up a clear hierarchy between employers and employees.⁴⁸

The employer-employee hierarchy is not the only hierarchy within the labor market. Most workplaces have multiple, inter-related hierarchies based on a combination of formal ranks, such as job grades, and informal understandings, such as social stereotypes. As many labor-market observers have noticed, “[t]he

45. Yamada, *Dignity, “Rankism,” and Hierarchy*, *supra* n. 1, at 315.

46. Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do about It*, 29 *Thomas Jefferson L. Rev.* 1, 33 (2006) (citing Robert Kanigel, *The One Best Way: Frederick Winslow Taylor and the Enigma of Efficiency* 1–19 (Penguin 1997)).

47. Dorothy H. Evensen, Patrick Shannon & Jacqueline Edmondson, *Where Have You Gone, John Dewey? Locating the Challenge to Continue and the Challenge to Grow as a Profession*, 108 *Penn St. L. Rev.* 19, 30–31 (2003).

48. Gary C. Gray, *The Responsibilization Strategy of Health and Safety*, 49 *Brit. J. Criminology* 326, 329 (2009) (noting that the “workplace is . . . often poorly equipped to distribute responsibility equally among all parties, given the hierarchy of control under the employment contract.”).

modern workplace is usually organized around a hierarchical division of labor that runs consistently along gender and racial lines.⁴⁹ The nature and effects of these informal hierarchies will be discussed further in Part II.

Hierarchy, then, is a core feature of the American labor market,⁵⁰ and there is evidence that many employers believe it is a positive feature. It might, for example, help employers achieve their economic goals by allowing them to exploit low-ranking employees.⁵¹ In less clearly malign circumstances, hierarchy might help employers by providing a quick dispute-resolution mechanism. When two employees of different ranks disagree, hierarchy instantly resolves their disagreement in favor of the higher-ranked employee. Hierarchy, in this sense, streamlines operations and increases efficiency, which in the short term, may increase profits.

Some argue, however, that hierarchy is not a positive feature and does not help employers achieve their economic goals.⁵² They assert that egalitarian workplaces are the most economically successful. Advocates of “team-based organizations,” for example, say that such organizations “can eliminate unnecessary layers of bureaucracy, thereby creating flatter, less costly, and ultimately higher-performing organizations that can . . . better use the experience and ideas of long-time employees.”⁵³ Employers who have initiated “workplace cooperative efforts”—broadly defined as programs that “involv[e] employees in decision-making activities”—similarly “expect to observe improvements in plant efficiency and productivity, [as] the result of improved job attitudes and perfor-

49. Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 *Hastings L.J.* 1435, 1448 (2008).

50. It should be noted, however, that there is a current trend toward flattening workplace hierarchies. Marley S. Weiss, *Innovations in Collective Bargaining: NUMMI—Driven to Excellence*, 13 *Hofstra Lab. L.J.* 433, 460–461 (1996) (noting that, while the “old model” was based on “many layers of bureaucratic hierarchy,” a number of factors are currently “leading to its decline”).

51. Take, for example, low-ranking, African-American industrial employees in the late 1800s. Cable and Mix report that these employees, who were subordinated on the bases of both occupation and race, were severely exploited. Cable & Mix, *supra* n. 16, at 188.

52. See e.g. Filippa Marullo Anzalone, *Servant Leadership: A New Model for Law Library Leaders*, 99 *L. Lib. J.* 793, 809 (2007) (stating that “hierarchical organizational structures . . . contribute to communications complexities and other dysfunctions in a large number of workplaces”).

53. Joyce Rothschild, *Creating a Just and Democratic Workplace: More Engagement, Less Hierarchy*, 29 *Contemp. Soc.* 195, 197 (2000).

mance, reduced waste, and increased flexibility in utilizing the workforce.”⁵⁴

Notwithstanding these economic arguments against labor market hierarchies,⁵⁵ employers regularly rely on both formal and informal ranking systems—such as job grading, and racial or gender stereotyping, respectively—to produce hierarchies. These hierarchies influence employees to adopt certain behaviors and, ultimately, certain identities. When employees alter their behaviors to fit within a given hierarchy for a period of time, they may begin to alter their personalities and ideologies. They may, for example, become more extroverted or agreeable in the course of comporting with their assigned rank; they may alter their ideology by accepting workplace hierarchies as inevitable or even natural. These alterations in behavior, personality, and ideology may amount, in the aggregate, to an alteration in identity. Alterations in identity are not, of course, confined to the labor market—they follow employees into the public forum with markedly undemocratic results.⁵⁶ Once employees have accepted the hierarchies of the labor market, they cannot help but reproduce them in the public forum.⁵⁷

2. Ideological Homogeneity

American workplaces reflect not only an acceptance of hierarchy, but also a strong desire for ideological homogeneity.⁵⁸ Employers prefer to hire and promote individuals with identities—not only including ideologies, but also behaviors,

54. Rafael Gely, *Whose Team Are You on? My Team or My Team?* 49 Rutgers L. Rev. 323, 333, 378 (1997) (discussing both economic and non-economic benefits of such programs).

55. Non-economic arguments against labor market hierarchies will be discussed later. *Infra* pt. II(B)(3).

56. *See infra* pt. I(C) (discussing public forum ramifications).

57. Tracy E. Higgins and Rachel P. Fink have written about an analogous phenomenon—the transportation of hierarchy from the family (rather than the labor market) into other institutions. *See* Rachel P. Fink & Tracy E. Higgins, *Gender and Nation-Building: Family Law as Legal Architecture*, 60 Me. L. Rev. 375, 389–390 (2008) (explaining that “treating the hierarchical organization of the family as natural or pre-political also naturalizes family hierarchies of age and gender outside the home” and “[i]nsofar as individuals come to understand their location within social hierarchies first from within their own family structure, these power relationships transcend the public/private boundary.”).

58. This may, for example, manifest in a widespread acceptance of the value system that produced the hierarchy.

personalities, races, sexes, et cetera—similar to their own.⁵⁹ Studies, indeed, confirm that “leaders in a variety of situations are likely to show preference for socially similar subordinates and help them get ahead.”⁶⁰ Professor Rosabeth Moss Kanter famously referred to this phenomenon of managers “reproduc[ing] themselves in their own image” as “homosocial reproduction.”⁶¹ While employers may value all forms of homogeneity, it remains arguable that employers value *ideological* homogeneity the most. When employers pursue race- or sex-based homogeneity, they often *use* race and sex as proxies for ideology.⁶² While many employers pursue homogeneity, there are conflicting positions regarding its economic effects.

Many employers, of course, believe that homogeneous workforces are economically beneficial. Homogeneity with respect to employees’ behaviors, personalities, and particularly ideologies may produce economic benefits by decreasing dissent and, by extension, increasing efficiency.⁶³ In the early 1990s, Professor Richard Epstein recognized that “[f]irms whose members have diverse and clashing views may well find it more difficult to make collective decisions than firms with a closer agreement over tastes.”⁶⁴ More recently, Professors Carbado and Gulati reported

59. Rosabeth Moss Kanter, *Men and Women of the Corporation* 48 (Basic Books 1977).

60. Jomills Henry Braddock III & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. Soc. Issues 5, 13 (1987).

61. Kanter, *supra* n. 59, at 48 (noting that, in corporate settings, “men reproduce themselves in their own image”).

62. See generally Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 Yale L.J. 1757 (2003) [hereinafter Carbado & Gulati, *Critical Race Theory*] (describing the complex ways in which race operates in the workplace); see also James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 Case W. Res. L. Rev. 1 (2005) (noting the declining employment levels of persons with disabilities).

63. Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1788 (recognizing that “greater employee homogeneity decreases the transaction costs of managing a workforce”); Thomas W. Joo, *A Trip through the Maze of “Corporate Democracy”: Shareholder Voice and Management Composition*, 77 St. John’s L. Rev. 735, 744 (2003) (citing Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1793–1794). Professors Carbado and Gulati present theoretical and empirical evidence suggesting (with several caveats) that employers have economic incentives to pursue homogeneity. Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1788–1802. Although Carbado and Gulati focus specifically on racial homogeneity, they note that they are, in part, generalizing from studies addressing homogeneity with respect to “invisible demographic variables, such as education and background.” *Id.* at 1794.

64. Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimi-*

that homogeneous workplaces are perceived as “facilitat[ing] trust, loyalty, and cooperative behavior”⁶⁵ and, thus, as being “more efficient and effective than heterogeneous workplaces.”⁶⁶ Thus, the pursuit of ideological homogeneity is arguably beneficial.

Ideological homogeneity is often pursued via race- and sex-based homogeneity.⁶⁷ By hiring employees of the same race or sex, employers attempt to create workforces that are homogeneous with respect to ideology—workforces that generate very little dissent and, thus, are highly efficient. Employers understand that “in the short term, a manager with a demographically homogeneous work team has a better chance of producing [trust and loyalty, which lead to cooperation, hard work, and ultimately economic gains,] than one with a diverse team.”⁶⁸ Thus, “[t]o the extent . . . that individual tastes are grouped by race, by sex, by age, by national origin—and to some extent they are”—employers who pursue demographic homogeneity are acting rationally and efficiently.⁶⁹

It should be noted that, although Title VII of the Civil Rights Act of 1964⁷⁰ formally prohibits the use of race and sex in hiring and promotion,⁷¹ current employment statistics reveal that many occupations and workplaces are highly homogeneous with respect to both race and sex.⁷² Even within demographically heteroge-

nation Laws 67 (Harvard U. Press 1992).

65. Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1802.

66. *Id.* at 1762, 1793–1795 (stating that “[i]n order to increase efficiency, employers have incentives to screen prospective employees for homogeneity, and, in order to counter racial stereotypes, nonwhite employees have incentives to demonstrate a willingness and capacity to assimilate.”).

67. *Id.*; see also Leonard, *supra* n. 62, at 15–16 (explaining that “managers may be motivated to draw distinctions on the basis of group membership to maximize profits or minimize costs”). “A homogeneous workforce, for example, may simplify internal governance of a firm. Search costs for hiring decisions may be so high that reliance on proxies becomes economically sensible.” *Id.*

68. Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1790.

69. Epstein, *supra* n. 64, at 66–67 (noting that “[t]here is a necessary conflict between the commands of any antidiscrimination law and the smooth operation of the firm” to the extent that individual tastes are grouped as mentioned); see also E. Christi Cunningham, *Identity Markets*, 45 *How. L.J.* 491, 578 (2002) (discussing Professor Epstein’s theories).

70. 42 U.S.C. § 2000 (2006).

71. 42 U.S.C. § 2000e-2 (2006) (prohibiting discrimination based on race, color, religion, sex, or national origin); see generally Carbado & Gulati, *Critical Race Theory*, *supra* n. 62 (discussing race).

72. For example, “across the country the day-labor workforce is a relatively homogeneous workforce comprised largely of recently immigrated Latino males.” Amy Pritchard, “We

neous workplaces, however, there is evidence to suggest that employers prefer to hire those who, but for their race, color, sex, or national origin, are ideologically similar to their current employees.⁷³ For example, employers search for employees who engage in behaviors similar to current employees' behaviors—employees who enjoy the same sports; who have personalities similar to current employees' personalities, such as those who are conscientious and only minimally neurotic; and who espouse ideologies similar to current employees' ideologies, for example, those who are willing to accept workplace hierarchies and their ranks within them.⁷⁴

Some, however, dispute the idea that homogeneity is economically advantageous, and argue that dissent and democratic debate are ultimately more profitable. One common critique of homogeneity is that it leads to “groupthink,” which “can cause organizations to ignore important information” and can detract from creativity and innovation.⁷⁵ Creativity and innovation, of course, “generally imply or require criticism and often the tearing down of old ways of doing something.”⁷⁶ Another critique of homogeneity is that “companies with diverse workforces are more adaptable than companies with culturally homogeneous workforces.”⁷⁷ The core argument for diversity in the labor market—and, as will be illustrated, in the public forum⁷⁸—is that when more viewpoints are expressed, more options are available and better choices are made.⁷⁹

Are Your Neighbors?: How Communities Can Best Address a Growing Day-Labor Workforce, 7 Seattle J. for Soc. Just. 371, 376 (2008). The homogeneity of occupations and workplaces based on race and sex is not discussed here, as sex-based segregation will be discussed at length in Part II(B).

73. Carbado and Gulati refer to these individuals as “but for outsiders”—that is, “outsiders who, but for their [race, color, sex, or national origin], are very similar to the insiders.” Carbado & Gulati, *Critical Race Theory*, *supra* n. 62, at 1803.

74. See generally *id.* (discussing homogeneity in the workplace).

75. *Id.* at 1793–1794; see also Rothschild, *supra* n. 53, at 200 (discussing the importance of creativity and innovation).

76. Rothschild, *supra* n. 53, at 200. Rothschild states that “if employees on a team have only the right to complement their boss['] ideas, no actual new ideas can be generated. Creativity and innovation generally imply or require criticism and often the tearing down of old ways of doing something.” *Id.*

77. Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 Colum. Bus. L. Rev. 793, 832 n. 214 (citing Juan D. Carrillo & Denis Gromb, *Cultural Inertia and Uniformity in Organizations*, 23 J.L. Econ. & Org. 743, 745 (2007)).

78. See *infra* pt. I(C) (discussing the arguments for diversity in the public forum).

79. See *supra* pt. I(B) (discussing the effects of ideological homogeneity and hierarchy

Notwithstanding these arguments against homogeneity, employers continue to favor homogeneous workforces and, in particular, ideologically homogeneous workforces. Indeed, it is recognized that few employees have anything approaching a robust right to free speech in the workplace.⁸⁰

In sum, employees are encouraged to engage in actions consistent with their occupations, workplaces, and workplace ranks. When repeated over long periods of time, these actions become more and more central to employees' identities, eventually causing them to accept and internalize labor-market hierarchies and ideologies. When these hierarchies and ideologies are imported into the public forum, they impoverish debate and prevent progress. The effects of labor-market hierarchies and ideologies within the public forum are explored in the next Part.

C. Public Forum Ramifications

The labor market and public forum are very different institutions. While the labor market encourages acceptance of hierarchies and ideological homogeneity,⁸¹ the public forum functions best when we embrace equality and ideological diversity. While the labor market is driven by economic goals,⁸² the public forum is motivated by a desire to promote the common good.⁸³ Although later discussion will indicate that the two institutions are not inherently incompatible,⁸⁴ the preferences they currently encourage are clearly incompatible. We cannot simultaneously

on the labor market).

80. Yamada, *Dignity, "Rankism," and Hierarchy*, *supra* n. 1, at 319 (reporting that "few employees enjoy anything close to comprehensive, legally protected rights of free speech in their workplaces" and that, "although employers and 'best practices' gurus wax eloquent about the need for rank-and-file input and feedback, they voice little support for legally enforceable, comprehensive speech protections for workers").

81. *See supra* pt. I(B) (arguing that the labor market influences encouraging workers to interact within hierarchies and to assimilate those hierarchies into a worker's individual ideology are unnecessary to economic success and detrimental to public debate).

82. *See supra* pt. I(B) (discussing the traditional perception of hierarchy and ideological homogeneity as promoting the achievement of economic goals).

83. Robert Justin Lipkin, *Reconstructing the Public Square*, 24 *Cardozo L. Rev.* 2025, 2062 (2003). "One goal of debate in a democracy is the formulation of the community's reflective judgment about the common good." *Id.*

84. I will argue that societies can have successful economies *and* functional public forums, and that egalitarianism and ideological diversity are consistent with achieving both of those goals.

prefer both hierarchy and equality, or both homogeneity and diversity. And, once we have internalized the hierarchy and homogeneity of the labor market, we are emphatically ill-equipped to interact as equals and express unique ideologies in the public forum. As Professor Vicki Schultz observes, “[w]ork is a site of deep self-formation,” and “we cannot easily compartmentalize the selves we learn to become during work hours.”⁸⁵ In sum, although we may intellectually understand the needs of the public forum, the labor market has rendered us incapable of meeting them. So long as we remain workers first and citizens second, we will continue to import our labor-market behaviors, personalities, and—most problematically—ideologies into the public forum.

Since the Founding, Americans have expressed a strong commitment to equality and ideological diversity in the public forum.⁸⁶ Although our definitions of equality and ideological diversity have changed dramatically since 1789, we have always understood them as prerequisites to democracy and therefore protected them through various constitutional and statutory provisions.⁸⁷ The following two Subparts illustrate that, although we have consistently expressed a commitment to an egalitarian and ideologically diverse public forum, we have not satisfied that commitment.

1. Lack of Equality

Equality—at least in some form—has long been viewed as central to the American public forum.⁸⁸ The Founding Fathers,

85. Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1883, 1890 (2000).

86. See e.g. Lipkin, *supra* n. 83, at 2077, 2094 (promoting the “Reconstruction Thesis,” which encourages diversity and the elimination of hierarchy in discourse as being most compatible with the Founders’ vision of democracy). This idea will be discussed in detail in Parts I(C)(1)–(2).

87. See e.g. U.S. Const. amends. I, XIII, XIV, XIX (protecting freedom of religion and speech, prohibiting slavery, guaranteeing equal protection under the laws, and guaranteeing voting rights to citizens of both sexes); Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (2006) (guaranteeing voting rights to all citizens). This idea will be discussed in detail in Parts I(C)(1)–(2).

88. Equality is, for that matter, central to any democratic public forum. Elizabeth S. Anderson, *What is the Point of Equality?* 109 Ethics 287, 313 (1999) (defining democracy as “collective self-determination by means of [an] open discussion among equals” (emphasis added)). Although my own formulation would be slightly different (in that it would focus primarily, though not exclusively, on equality among different identities), Professor Anderson (following, among others, Amartya Sen) argues that the relevant kind of equal-

according to Professor Robert Lipkin, envisioned a public forum “committed to the development of a civic discourse, through which all Americans [could] participate equally in democratic debate[,] free from the divisions and hierarchies, created by, for instance, monarchy, theocracy, aristocracy, or dictatorial rule.”⁸⁹ Equality was key to the Declaration of Independence, which began from the premise that “all [m]en are created equal,”⁹⁰ and remained important to the authors of the Federalist Papers, who reportedly believed that American citizenship “ought to confer equal rights.”⁹¹ Although equality was not expressly guaranteed by either the 1789 Constitution or 1791 Bill of Rights, and although the grievous inequality of slavery persisted until the 1860s, the Founders clearly were committed to at least some forms of equality within the public forum.

Finally, in 1868, equality was inscribed in our Constitution via the Fourteenth Amendment’s Citizenship and Equal Protection Clauses.⁹² Both clauses provide that, within the public sphere, all citizens must stand as equals.⁹³ While the courts

ity within a democracy is equality of access to the resources required for effective participation. *Id.* at 316. A democracy, that is, must provide all its members with the resources they need to flourish as humans, laborers, and citizens. *Id.* at 317. Only when those resources are available are citizens capable of effectively participating in the public forum. *Id.* Emphasizing the importance of equality within the public forum, Julian Wonjung Park wrote:

Above all else, the classical construction of citizenship stressed equality. In his foundational statement on citizenship, Aristotle posited that “a state is composite, and, like any other whole, made up of many parts; these are the citizens, who compose it.” Classical expositions on citizenship deeply influenced eighteenth century philosophers, such as John Locke, Alexis de Tocqueville, and John Stuart Mill—who each emphasized the central role of equality among the members of a citizenship community.

Julian Wonjung Park, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology*, 96 Cal. L. Rev. 999, 1007 (2008).

89. Lipkin, *supra* n. 83, at 2077. Professor Lipkin describes the ideal public forum as one where “individuals can form a community [that] protects their individuality and diversity and [that] fosters self-government and the commitment to the equal freedom of its members.” *Id.* at 2029 n. 17.

90. *Declaration of Independence* [¶ 2] (1776). Stating, “[w]e hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty, and the pursuit of Happiness.” *Id.*

91. James H. Kettner, *The Development of American Citizenship, 1608–1870* 10 (U. N.C. Press 1978); *see also* Park, *supra* n. 88, at 1007 (demonstrating that American citizenship entails “equal membership” and “incorporation into the body politic”).

92. U.S. Const. amend. XIV, § 1.

93. *Id.* The Citizenship Clause provides that “[a]ll persons born or naturalized in the

initially interpreted the Equal Protection Clause narrowly, such that it addressed only a few forms of state-imposed racial inequality, during the past half century they have begun to interpret the Clause more broadly.⁹⁴ Current equal-protection doctrine addresses state-imposed inequalities based on a variety of demographic traits, extending beyond race to alienage, national origin, sex, and legitimacy.⁹⁵ Still, it provides little protection against state-imposed inequality based on non-demographic traits,⁹⁶ while providing no protection against privately imposed inequality.⁹⁷ When privately created inequalities—for example, employer-created hierarchies—are internalized and reproduced within the public sphere, there is no constitutional violation—regardless of their potential detriment to public interactions.

One might point out that, although privately created inequalities are not constitutionally actionable, some are statutorily actionable. Title VII of the Civil Rights Act of 1964, as will be discussed further in Part II(B), prohibits employers from discriminating

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” *Id.* Akhil Amar wrote that the Citizenship Clause “aimed to . . . mak[e] clear that everyone born under the American flag—black or white, rich or poor, male or female, Jew or Gentile—was a free and equal citizen.” Akhil Reed Amar, *America’s Constitution: A Biography* 381–382 (Random House 2005). The Equal Protection Clause reads: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, § 1.

94. See Knouse, *Ideology Politics*, *supra* n. 23, at 770 (discussing the gradual, practical, but not conceptual, shift in the Supreme Court’s interpretation of the Equal Protection Clause to go beyond just protecting African-Americans to include other identity groups as well).

95. *Id.* at 772–773, 776, 779. Current conceptions of citizenship continue to emphasize equality, though some have argued that the emphasis ought to be stronger. See *e.g.* Park, *supra* n. 88, at 1007–1008 (discussing the meaning of the term “citizenship” and its impact on individual rights). On the current citizenship test, for example, only one question directly deals with equality. *Id.* When asked “[w]hat are some of the basic beliefs of the Declaration of Independence?,” a prospective citizen should (according to the answer sheet) respond “[t]hat all men are created equal and have the right to life, liberty, and the pursuit of happiness.” *Id.* at 1032 n. 56, 1036 n. 56. Similarly, on the newest citizenship test, only one question deals with equality. When asked “[w]hat did Martin Luther King, Jr. do?,” a prospective citizen should respond, in part, that he “worked for equality for all Americans.” *Id.* at 1045 n. 85.

96. All traits other than race, alienage, national origin, sex, and legitimacy receive only rational basis review. Knouse, *Ideology Politics*, *supra* n. 23, at 781–782.

97. *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883). “Individual invasion of individual rights is not the subject-matter of the [Equal Protection Clause].” *Id.*; see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 510 (Aspen Publishers 2006) (explaining that “[a]bsent statutory restrictions, private conduct cannot infringe or trample even the most basic rights.”).

minating among employees “because of . . . race, color, religion, sex, or national origin.”⁹⁸ I will argue, however, that Title VII is too narrow (in both its text and current interpretation) to prevent the vast majority of employer-created inequalities. Many such inequalities are not only unaddressed by Title VII, but also, once reproduced within the public forum, unaddressed by the Equal Protection Clause. So long as this pattern continues, we cannot legitimately describe our public forum as egalitarian. Yet neither can we claim that the government is affirmatively depriving us of equality. Indeed, the worst we can say of the government is that it is acquiescing in the production and then reproduction of privately created inequalities.

While the government is not affirmatively depriving us of equality, we are not interacting as equals. This problem could be remedied in a number of ways.⁹⁹ For example, the Equal Protection Clause could be amended to transform equality from a negative right into a positive one.¹⁰⁰ Rather than requiring the government to refrain from imposing inequality, we could require

98. 42 U.S.C. § 2000e-2(a).

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

99. See *infra* pt. III(B) (suggesting that Congress encourage equality in discourse by requiring workplace hierarchies to be flattened, forcing lower-level workers to be included in corporate decisions, and by limiting the time that employees are permitted to spend at work).

100. Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 Conn. L. Rev. 675, 696–697 (1992). “[T]he federal Equal Protection Clause has been applied almost exclusively as a ‘negative’ right, and has not been extended to include positive ‘distributional implications.’” *Id.* For an explanation of the differences between negative and positive rights, see Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 Colum. Hum. Rights L. Rev. 321, 345 (2007).

Traditional political rights such as . . . equal protection . . . are considered negative rights because they only require that the state refrain from interfering in the individual's exercise of the right; they are rights to be free from government interference. Socio-economic rights are identified as positive rights because they impose affirmative obligations upon the state to advance particular areas of social welfare.

Id.

the government to affirmatively guarantee equality—even if it would mean reaching into the private sphere to flatten employer-created hierarchies. Alternatively, new Title-VII-like legislation could provide employees with more robust tools for challenging workplace hierarchies.¹⁰¹ Although Americans have long valued equality within the public forum, we have yet to achieve it in its more robust form.

2. *Lack of Ideological Diversity*

Like equality, ideological diversity, at least in some form, has long been viewed as central to the American public forum. Professor Cass Sunstein writes, “For the framers, heterogeneity was beneficial, indeed indispensable; discussion [had to] take place among people who were different.”¹⁰² Their rationale, as Professor Rebecca Brown explains, was that “[d]ifferences would help legislators hammer out a concept of the public good, as to which they then could enact laws equally for themselves and others to live by.”¹⁰³ This high regard for ideological diversity was arguably reflected in the First Amendment, which prohibits federally imposed abridgements of speech.¹⁰⁴ First Amendment scholar Steven Shiffrin goes so far as to assert that “the First Amendment should be taken to reflect a constitutional commitment to *promoting* dissent.”¹⁰⁵

The importance of ideological diversity and dissent was reaffirmed by nineteenth-century philosopher John Stuart Mill, who

101. See *infra* Part III for a further exploration of ideas for legal reform.

102. Cass R. Sunstein, *The Partial Constitution* 24 (Harvard 1993) (explaining that the framers cited the benefits of discussion among diverse viewpoints in response to “the anti-federalist insistence that homogeneity was necessary to a republic”); see also Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1518 (2002).

103. Brown, *supra* n. 102, at 1518. To support this proposition, Professor Brown cites *The Federalist* No. 10 (James Madison), and characterizes Madison’s argument as “out of difference would come the hope of keeping oppression at bay.” *Id.*

104. U.S. Const. amend. I “Congress shall make no law . . . abridging the freedom of speech, or of the press.” *Id.* Although some would argue that “viewpoint diversity was probably not foremost in the Framers’ minds,” the plain text of the First Amendment allows for an interpretation that protects such diversity. Matthew Keller, Student Author, “*Damn the Torpedoes! Full Speed Ahead*”: *The FCC’s Decision to Deregulate Media Ownership and the Threat to Viewpoint Diversity*, 12 J.L. & Policy 891, 894 (2004) (citing Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 Cath. U. L. Rev. 401, 404 (1989)).

105. Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* 91 (Princeton U. Press 1999).

wrote that “[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”¹⁰⁶ Professor Shiffrin describes Mill’s views as follows:

Mill is concerned about the crushing effects of social customs inducing the mass of people to conform. He exalts autonomy and individuality not only for their positive effects on the individual but also for their beneficial impact on society. For Mill, not to exercise choice, but to acquiesce in custom without thought, is to be no better than an ape or a machine.¹⁰⁷

Thus, ideological diversity was recognized as important to public-forum debate throughout our Nation’s early history.

In the early Twentieth Century, the Supreme Court—prompted by Justices Holmes and Brandeis—began to incorporate some protection for ideological diversity and dissent into its First Amendment doctrine. Justice Holmes, dissenting in *Abrams v. United States*,¹⁰⁸ opined that “the ultimate good desired is [best] reached by free trade in ideas.”¹⁰⁹ Justice Brandeis, in *Whitney v. California*, similarly opined that the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”¹¹⁰ The Court continued to tout the importance of ideological diversity in later cases, such as *Associated Press v. United States*,¹¹¹ where Justice Black wrote that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹¹² Perhaps the strongest judicial statement in favor of

106. John Stuart Mill, *On Liberty and Other Writings* 20 (Stefan Collini ed., Cambridge U. Press 1989).

107. Shiffrin, *supra* n. 105, at 95. Shiffrin writes, “Without [dissent], unjust hierarchies would surely flourish with little possibility of constructive change.” *Id.* at 93.

108. 250 U.S. 616 (1919).

109. *Id.* at 630 (Holmes, J., dissenting) (stating that “the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

110. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

111. 326 U.S. 1 (1945).

112. *Id.* at 20.

viewpoint diversity came in the 1964 decision of *New York Times v. Sullivan*,¹¹³ in which Justice Brennan wrote:

“[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” . . . [We have] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.¹¹⁴

Consequently, ideological diversity became quite central to the Court’s First Amendment doctrine over the course of the twentieth century.¹¹⁵

Yet just as the Constitution does not affirmatively guarantee equality,¹¹⁶ it does not affirmatively guarantee ideological diversity.¹¹⁷ Like the Equal Protection Clause, the Free Speech Clause creates a negative rather than positive right.¹¹⁸ It prohibits the government from abridging speech without making any promise that speech will flourish.¹¹⁹ Thus, while we recognize ideological

113. 376 U.S. 254 (1964).

114. *Id.* at 270 (quoting Judge Learned Hand, *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

115. Keller, *supra* n. 104, at 894–895 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994)).

116. See *supra* pt. I(C)(1) (explaining that, while no express guarantee of equality could be found in the original Constitution or Bill of Rights, it is apparent that the founders had some ideal of equality in public discourse).

117. While the government is not *obligated* to create ideological diversity affirmatively, it is arguably *permitted* to create ideological diversity affirmatively. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court suggested that student body diversity is a compelling interest, in part, because it promotes viewpoint diversity. *Id.* at 324 (citing *Regents of U. Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (plurality opinion)).

118. For a discussion of freedom of speech as a negative right, see Frederick Schauer, *Hohfeld’s First Amendment*, 76 *Geo. Wash. L. Rev.* 914, 915–916 (2008) (“Although a right to freedom of speech might plausibly be understood as a positive right against the government to have the government provide some sort of opportunity to speak, or some form of support for speaking, the existing doctrine, with perhaps the one significant exception of the public forum doctrine, refuses to understand the First Amendment right to freedom of speech in such a way. As the doctrine now stands, the right is a right *against* interference—a privilege or a liberty in Hohfeldian language—but it is not a right *to* have the actual opportunity to speak, nor is it a right to have a platform for speaking, nor is it the right to have an audience. The basic right to free speech is the right of a speaker to speak to whomever is willing to listen, but only with the speaker’s own resources.”)

119. Although the Freedom of Speech Clause initially applied against only the federal government, it was incorporated to apply against state and local governments in *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925).

diversity as crucial to the public forum, our Constitution does not deliver ideological diversity. When employer restraints on speech are internalized and imported into the public forum, there is a lack of diversity without any constitutional violation.¹²⁰ While we might, as in the equal protection context, look to statutes to protect employee speech, a review of existing statutes reveals that they are grossly inadequate.¹²¹ The modern labor market, indeed, exhibits “the disturbing signs of a severe chill on private employee expression.”¹²²

The remedies for this lack of ideological diversity mirror the previously discussed remedies for the lack of equality.¹²³ The Free Speech Clause might, for example, be amended to require that the government actively foster ideological diversity in the public forum. Alternatively, new statutes might give employees more meaningful ways to challenge abridgements of speech within the workplace.¹²⁴ Although our history confirms that we value both equality and ideological diversity within the public forum, we have yet to put these values into practice.

In sum, while the labor market encourages us to accept hierarchy and ideological homogeneity,¹²⁵ the public forum requires us to embrace egalitarianism and ideological diversity. One might imagine that this conflict arises naturally from the differing goals of the two institutions. Perhaps the labor market’s economic imperatives can only be achieved through hierarchy and ideological homogeneity, while the public forum’s quest for the common good can only succeed through egalitarianism and ideological diversity. I would argue, however, that the two institutions’ differing goals need not create such conflict. I would, instead, suggest that the labor market’s economic imperatives

120. *Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 547 (1972) (holding, “[t]he First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”).

121. Yamada, *Voices from the Cubicle*, *supra* n. 1, at 1 (“survey[ing] the potential constitutional, statutory, and common law safeguards for private employee speech, ultimately concluding that they are inadequate to provide the necessary level of protection”).

122. *Id.*

123. See *supra* pt. I(C)(1) (discussing several possible legislative remedies for the problem of inequality in the public forum).

124. See *infra* Part III for a further explanation of ideas for legal reform.

125. See *supra* pt. I(B) (discussing labor market influences encouraging workers to interact within hierarchies and to assimilate those hierarchies into a worker’s individual ideology).

could be achieved just as well—if not better—through egalitarianism and ideological diversity. And I would further argue that even if economic imperatives could not be achieved, their detrimental influence on our public forum is more than sufficient reason to alter them.

II. LABOR MARKET GENDER IDENTITIES HARM THE PUBLIC FORUM

While Part I explored identity generally, Part II, following the same format as Part I, explores gender identity specifically. Part II(A) asserts that our gender identities, like every aspect of our identities, are influenced by our labor market actions. Part II(B) illustrates that our labor market actions—influenced as they are by sex-based segregation, sex-based appearance regulations, and sex-based pay scales—encourage us to adopt gendered identities and accept gender stereotypes. Part II(C) argues that the labor market negatively impacts the public forum by preventing women from participating as equals and preventing both sexes from imagining and, thus, advocating gender-neutral power structures.

A. Gender Identity Construction

A person's gender identity represents one aspect of his or her total identity. It encompasses "various individual attributes as they are understood to be masculine []or feminine."¹²⁶ The principles that applied to identity in Part I(A) apply equally to gender identity. Just as sex, income, education, occupation, behavior, personality, and ideology influenced identity as a whole, they also influence gender identity.¹²⁷ Just as certain components of identity were more susceptible to alteration,¹²⁸ those same components of gender identity are also more susceptible to alteration.

126. S.F. Admin. Code (Cal.) § 12C.2 (2010) (providing a definition for purposes of prohibiting the city from discriminating based on gender identity in contracts).

127. *See supra* pt. I(A) (discussing the effect of various characteristics on one's identity). One version of the Employment Non-Discrimination Act (ENDA) defined "gender identity" as "the gender-related identity, *appearance, or mannerisms* or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth" H.R. 2015, 110th Cong. § 3(a)(6) (April 24, 2007) (emphasis added).

128. *See supra* pt. I(A) (explaining that, while some components of identity are more

Sex—as defined by chromosomes, gonads, morphology, hormones, and phenotype¹²⁹—is less mutable than gendered personality traits, which may include agreeableness and neuroticism for females.¹³⁰ Sex is also less mutable than gendered ideologies for both sexes, which may include an acceptance of traditional gender roles. Gendered personality traits and ideologies are, in turn, less mutable than gendered behaviors, which may include wearing dresses, makeup, and jewelry for females.¹³¹ Finally, just as the components of identity were interconnected,¹³² the components of gender identity are also interconnected, such that a change in one can lead to changes in others. When aggregated, such changes can alter gender identity.

Proceeding from the premise that behavior is the most mutable component of gender identity, we can examine how changes in behavior may lead to changes in gender identity. Imagine, for example, a woman who enters the labor market with a non-traditional gender identity but is assigned to work as a waitress and required to wear revealing outfits. Over time, she may adapt her personality and ideology to comply with traditional gender norms, and she may ultimately adopt a more traditional gender

susceptible to alteration than others, it can be difficult to determine the mutability of a particular characteristic).

129. See Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 *Cardozo J.L. & Gender* 135, 137 (2005) [hereinafter Knouse, *Intersexuality*] (finding that “there are at least six components of anatomy which can theoretically be considered in determining anatomical sex, including (1) chromosomes, (2) gonads, (3) external morphology, (4) internal morphology, (5) hormonal patterns, and (6) phenotype. The prototypical female has (1) XX chromosomes, (2) ovaries, (3) a clitoris and labia, (4) a vagina, a uterus, and fallopian tubes, (5) increased estrogen and progesterone production and reception, and (6) breasts. The prototypical male has (1) XY chromosomes, (2) testes, (3) a penis and scrotum, (4) seminal vesicles and a prostate, (5) increased androgen production and reception, and (6) facial and chest hair.”).

130. Studies suggest that, across cultures, women view themselves as more neurotic and agreeable than men view themselves. See e.g. Paul T. Costa, Jr., Antonio Terracciano & Robert R. McCrae, *Gender Differences in Personality Traits across Cultures: Robust and Surprising Findings*, 81 *J. Personality & Soc. Psychol.* 322, 322 (2001) (discussing the variations of gender differences across cultures, and finding that men were determined to rate “higher in [a]ssertiveness and [o]penness to ideas” than women).

131. The facts of *Price Waterhouse v. Hopkins*, discussed below, illustrate that women are often encouraged to wear dresses, makeup, and jewelry. 490 U.S. 228 (1989). Overall, this represents the same relative comparison of components that was made in Part I(A).

132. See *supra* pt. I(A) (explaining that an alteration in one component of identity may affect another).

identity.¹³³ That is, changes in her behavior may lead to changes in her gender identity.

A person's behavior, which includes makeup, clothing, hairstyle, and mannerisms,¹³⁴ clearly impacts his or her gender identity. In 1949, Simone de Beauvoir alluded to this connection between behavior and gender identity in asserting that "[o]ne is not born, but rather becomes, a woman."¹³⁵ Later, Professor Judith Butler drew on de Beauvoir's assertion when she described gender as "a corporeal style, a way of acting the body, a way of wearing one's own flesh as a cultural sign."¹³⁶ Behavior is thus, by all accounts, significant to the construction of gender identity.¹³⁷

133. While the adoption of a traditional gender identity is not inherently problematic, it becomes problematic when it results from the economic coercion of an employer. If, but for her employment (and but for other coercive forces that are beyond the scope of this paper—e.g., a domineering family structure), the woman would have adopted a different gender identity based on her own biological predilections, then there is a problem. If we were at greater liberty to form our identities according to our own predilections, we would observe a far greater amount of diversity.

To be clear, the proposition that changes in behavior can lead to changes in gender identity is *not* synonymous with the proposition that changes in behavior can lead to an opposing gender identity—i.e., a conversion from masculine to feminine or the reverse. Even long-term behavioral changes generally do not convert a person from one gender into the other. Indeed, the incongruities that result when a person is forced into behaviors associated with the opposing gender often lead to tragic results. This could occur in at least two different situations. One is when an anatomical and self-identified male is forced to behave as a female. *See e.g.* Knouse, *Intersexuality*, *supra* n. 129, at 148–149 (discussing the case of an infant boy who, after having his penis damaged, was raised as a girl and, after years of work to reclaim his male identity, committed suicide at the age of thirty-eight). Another is when an anatomical male who self identifies as a female is forced to behave as a male because the rest of her traits are male-oriented.

134. *See supra* pt. I(A) (discussing what constitutes the identity component of behavior).

135. Simone de Beauvoir, *The Second Sex* 267 (Alfred A. Knopf 1989) (originally published in 1949).

136. Judith Butler, *Gendering the Body: Beauvoir's Philosophical Contribution*, in *Women, Knowledge and Reality: Explorations in Feminist Philosophy* 253, 256 (Ann Garry & Marilyn Pearsall eds., Unwin Hyman 1989).

137. However, I do not argue that behavior is determinative of gender identity. I adopt what Professor Kenji Yoshino refers to as a "weak performative" view of identity—rather than a "strong performative" view. Yoshino, *supra* n. 22, at 867–868. As Professor Yoshino explains, under a strong performative view, identity is created through "performance" or behavior. *Id.* at 867 (citing Butler, *supra* n. 5, at 33). Whereas, under a weak performative view, identity may be influenced by both biology and "performance" or behavior. *Id.* at 868, 871 (noting that the "[weak] performative claim does not gainsay that sex has material dimensions, such as sex-based differences in genotype or phenotype. Rather, it states that these material dimensions do not foreclose the possibility that sex also has performative dimensions, such as sex-based differences in demeanor, affect, or grooming.").

Certain aspects of behavior—especially those related to personal appearance—are often dismissed as aesthetic and therefore “trivial.”¹³⁸ While such behaviors may be aesthetic, they are deeply constitutive of gender identity and therefore not trivial.¹³⁹ As Professor Paulette Caldwell asserts, “[j]udgments about aesthetics do not exist apart from judgments about the social, political, and economic order of a society. . . . Aesthetic values determine who and what is valued, beautiful, and entitled to control.”¹⁴⁰ Mary Whisner similarly asserts that “appearance conveys a multitude of messages about class, occupation, race, physical freedom, . . . and gender.”¹⁴¹ Roland Barthes made perhaps the most extreme assertion: “[W]e know that the garment does not *express* but constitutes the person; or rather we know that the person is nothing but this desired image [that] the garment permits us to believe in.”¹⁴² Whether or not one accepts Barthes’ view that personal appearance *constitutes* identity, one cannot deny that personal appearance at least *influences* identity.

If personal appearance influences gender identity, then control over personal appearance may translate into influence over gender identity. When employers require their employees to adopt

138. Courts, for example, often characterize employees’ interests in their own appearances as trivial—though they may simultaneously characterize employers’ interests in their employees’ appearance as substantial. See Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 Harv. Women’s L.J. 73, 74 (1982) (discussing examples of courts trivializing personal appearance); see also *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (characterizing hairstyle as “a matter of relatively low importance”); Kirsten Dellinger & Christine L. Williams, *Makeup at Work: Negotiating Appearance Rules in the Workplace*, 11 Gender & Soc’y. 151, 153 (1997) (noting that “[a]lthough many women spend a significant amount of time each day applying makeup, sustaining a multibillion-dollar industry, women’s concerns about their personal appearance often are trivialized and considered unworthy topics for sociological investigation”) (citation omitted).

139. Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination under Title VII*, 20 U.C. Davis L. Rev. 769, 880 (1987) (asserting “it is well known that styles, makeup, clothing, language, dietary habits, jewelry, adornments, and other similar arguably mutable characteristics have profound connections with ethnic, religious, racial, and gender identity” (emphasis added)).

140. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365, 393. Caldwell further asserts: “Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture.” *Id.* at 370. She emphasizes that “[h]airstyle choices are an important mode of self-expression,” especially when they have cultural significance correlated with not only gender but also racial identity. *Id.* at 383.

141. Whisner, *supra* n. 138, at 73.

142. Roland Barthes, *Pierre Loti: Aziyadé*, in *New Critical Essays* 105, 115 (Richard Howard trans., Farrar, Strauss & Giroux 1980).

gendered appearances, they influence their employees to construct gendered identities. Although some employees may resist their employers' requirements, the consequences of resistance are often dire.¹⁴³ As Whisner reports, "the sacrifices demanded by non-conformity of appearance [can include] loss of employment."¹⁴⁴ To summarize, our behaviors are so significant to our gender identities that, when we cede control of our behaviors, we effectively cede control over our gender identities.

B. Labor Market Influences

The labor market influences our gender-related behaviors—and, by extension, our gender identities—in a variety of ways. Parts II(B)(1) and II(B)(2) illustrate how the labor market creates gender difference through sex-based segregation and appearance regulations, respectively.¹⁴⁵ By imposing such sex-based policies, employers ensure that their male employees adopt "masculine" identities and their female employees adopt "feminine" identities. Part II(B)(3) illustrates how the labor market builds upon these gender differences to create gender hierarchy through sex-based

143. Whisner, *supra* n. 138, at 74–75.

144. *Id.* (additionally noting that the consequences can extend beyond loss of employment to "arrest, . . . expulsion[,] or suspension from school [and, in the past,] sometimes even execut[ion]"). Many fear that, without the appearance differentiation presently relied upon to maintain the gender hierarchy, the hierarchy would fall and, in the resulting unisex society, chaos would reign. *Id.* at 97–101.

Sex-based dress and grooming codes are important to employers because they help reinforce workplace hierarchies. By creating visible differences among employees, dress and grooming codes create visible demarcations of the levels within workplace hierarchies. Dress is, indeed, often indicative of status. Christine Stansell's discussion of the complex dress customs of nineteenth-century New York City, in *City of Women*, provides an example of appearance as a signal of status outside of the workplace. Christine Stansell, *City of Women* 89–94 (U. of Ill. Press 1987). On the Bowery, a popular avenue in nineteenth-century New York, dress not only differentiated men from women, it also created subcategories of men and women. *Id.* at 89. Stansell describes three subcategories of women, each of whom manipulated their appearances to differentiate and express themselves. *Id.* at 93–94. "[R]espectable" women deflected attention by wearing "[m]uted colors [and] a costume that covered the flesh except for the face (including obligatory gloves and hat);" prostitutes drew attention to themselves with "brightly colored dress [and] the comparative absence of coverings (most tellingly, the omission of a hat);" while "Bowery girls" differentiated themselves from both respectable women and prostitutes by wearing "startling combinations of colors, . . . in utter defiance of th[e] conventional laws of harmony and taste." *Id.* (internal quotations omitted). Dress customs on the Bowery, as in all contexts, served to order society by expressing identity, signifying status, and guiding interactions.

145. Sex-based segregation is discussed in Part II(B)(1); sex-based appearance regulations are discussed in Part II(B)(2).

pay scales. The sex-based nature of pay scales is evidenced by the fact that women continue to earn only seventy-eight percent as much as men earn.¹⁴⁶ Part II(B)(4) asserts that, after spending long periods in the labor market, many employees incorporate gender hierarchy into their own ideologies.

1. Gender Difference through Sex-Based Segregation

The labor market has long encouraged men and women to pursue different occupations within different workplaces and, thereby, to construct different gender identities.¹⁴⁷ Economist Heidi Hartmann reported that sex segregation across both occupations and workplaces has existed since pre-industrial times. In pre-industrial farming communities, Hartmann wrote, “men worked in the fields [while] women tended the household plots, small gardens and orchards, animals, and dairies.”¹⁴⁸ In pre-industrial urban centers, some forms of labor were entirely segregated—carpentry, for example, was exclusively male while millinery was exclusively female.¹⁴⁹ Even within partially integrated forms of labor, however, men and women generally performed different tasks.¹⁵⁰ Most often, “men worked at what were considered more skilled tasks, [while] women [worked] at processing the raw materials or finishing the end product.”¹⁵¹

After industrialization, Hartmann reported, men entered the labor market while women remained in the home.¹⁵² Women were allowed to enter the labor market only when “a sharp rise in the demand for [a] service or product” rendered male labor insufficient or when increased mechanization created new low-skill positions.¹⁵³ Although some nineteenth-century social theorists

146. U.S. Women’s Bureau and the Natl. Commn. on Pay Eq., *Women’s Earnings as a Percentage of Men’s*, 1951–2008, <http://www.infoplease.com/ipa/A0193820.html> (accessed Aug. 29, 2010).

147. Ruth Milkman & Eleanor Townsley, *Gender and the Economy*, in *The Handbook of Economic Sociology* 600, 601 (Neil I. Smelser & Richard Swedberg eds., Princeton U. Press 1994) (observing that the gender-based division of labor is a trans-historical and trans-cultural phenomenon).

148. Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 *Signs* 137, 148 (Spring 1976).

149. *Id.* at 150–151.

150. *Id.* at 150.

151. *Id.*

152. *Id.* at 152.

153. *Id.* at 160; see also Cynthia Cockburn, *Machinery of Dominance: Women, Men and*

predicted that the “impersonal logic of the market” would eradicate sex segregation, history has not borne out their predictions.¹⁵⁴ Throughout the twentieth century, men and women continued to work in different occupations and workplaces. Sociologists William Bielby and James Barron reported, in the mid-1980s, that “the level of occupational sex segregation ha[d] changed very little since 1900” and that “[sixty to seventy percent] of male (or female) workers would require reclassification across detailed occupations to equalize the sexual division of labor.”¹⁵⁵

During the 1990s, many occupations remained “sex-typed” in that they continued to be dominated by either males or females.¹⁵⁶ Sociologist Joan Acker reported that, although sex segregation “declined somewhat between 1970 and 1990, [it] remained stable over the 1990s with an Index of Dissimilarity of about fifty-three”¹⁵⁷—meaning that, “to achieve an equal distribution of women and men, [fifty-three] percent of either women or men would have to change to other jobs in which a majority of the other sex [were] employed.”¹⁵⁸ Throughout the 1990s, sociologists worked to identify the key differences between male and female occupations. In 1990, Professor Ronnie Steinberg observed that “[m]en’s jobs require more manual skills and women’s jobs require

Technical Know-How 36 (N.E. U. Press 1988) (describing how the increase in industrialization brought more and more women into the workforce but as unskilled laborers).

154. Milkman & Townsley, *supra* n. 147, at 601; see generally David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 Harv. Civ. Rights-Civ. Liberties L. Rev. 57, 63–66 (1998) (describing how companies can be expected to “rationally” discriminate based upon assumptions on the reduced productivity or benefit of certain classes of workers, including women in some cases).

155. William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 Am. J. Sociology 759, 760 (1986).

156. Milkman & Townsley, *supra* n. 147, at 601 (stating that “gender remains a basic determinant of an individual’s social fare in modern society”); see also Ronnie J. Steinberg, *Social Construction of Skill: Gender, Power, and Comparable Worth*, 17 Work & Occ. 449, 453 (1990) (indicating that “most jobs are so highly sex-segregated and linked to the gender of the typical incumbent that . . . once a job is gender-typed, it is characterized in terms of those aspects of job content consistent with gender stereotypes”) (internal citation omitted).

157. Joan Acker, *Class Questions: Feminist Answers* 139 (Roman & Littlefield 2006).

158. *Id.* at 165 n. 11; see also Donald Tomaskovic-Devey et al., *Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966–2003*, 71 Am. Sociological Rev. 565, 585 (2006) (citing the same index of dissimilarity as Acker but noting that it “probably is an underestimate, since job title detail is lacking”).

more social and verbal skills.”¹⁵⁹ More specifically, women’s jobs often involve “nurturing, cleaning, waiting on other people, and public relations work.”¹⁶⁰ In 1994, Professors Ruth Milkman and Eleanor Townsley reported that “men have a dominant role in the now shrinking manufacturing fields,” while women are “highly concentrated in the clerical and service sectors.”¹⁶¹ They further reported that, although the initial sex-typing of an occupation is often arbitrary, it is rarely overcome.¹⁶²

Current studies reveal that little has changed. The Bureau of Labor Statistics’ 2008 report illustrates that, of the five major occupational categories, women are significantly under-represented in two—(1) natural resources, construction, and maintenance, which is 4.2% female, and (2) production, transportation, and material moving, which is 22.4% female—and either significantly under- or over-represented in sub-occupations of the remaining three.¹⁶³ Within the major category of service occupations, for example, women make up 57.2% of employees, yet the sub-occupation of protective services, which includes police officers, fire fighters, et cetera, is only 22.8% female; the sub-occupation of healthcare support, which includes home health aides, medical and dental assistants, et cetera, is 88.8% female.¹⁶⁴ Thus, although the service industry, as a whole, is relatively inte-

159. Steinberg, *supra* n. 156, at 452.

160. *Id.* at 453 (noting that women’s jobs often draw on domestic skills).

161. Milkman & Townsley, *supra* n. 147, at 603.

162. *Id.* at 611. Doris Weichselbaumer’s study on the impact of sex stereotypes on hiring practices, cataloged in *Is it Sex or Personality? The Impact of Sex Stereotypes on Discrimination in Applicant Selection*, 30 E. Econ. J. 159 (2004), bears out Milkman and Townsley’s assertion. Weichselbaumer created three hypothetical job applicants with identical human capital—a male with a masculine personality, a female with masculine personality, and a female with feminine personality—sent their resumes to a variety of employers, and drew conclusions based on the employers’ desire to interview each of the applicants. *Id.* She found that, with respect to the masculine sex-typed job of network technician, employers preferred men over women, even when there was no difference in human capital or personality. *Id.* at 160, 173–175. Conversely, with respect to the feminine sex-typed job of secretary, employers preferred women over men, even when there was no difference in human capital or personality. *Id.* An occupation, once sex-typed, is thus virtually intractable.

163. Bureau of Lab. Statistics, U.S. Dept. of Labor, *Labor Force Statistics from the Current Population Survey, Household Data Annual Averages*, available at <http://www.bls.gov/cps/cpsaat11.pdf> (last visited July 2, 2010). The other three categories are as follows: (1) management, professional, and related occupations; (2) service occupations; and (3) sales and office occupations. *Id.*

164. *Id.*

grated, its sub-occupations remain segregated. In 2006, similar statistics led Joan Acker to conclude the following:

[I]n spite of the influx of women into all occupations, many of the old gendering processes still operate. Gendered . . . expectations on the part of both employers and employees still influence selection of new job entrants and their experiences on the job, as well as their opportunities for advancement.¹⁶⁵

Thus, many occupations continue to be sex segregated.¹⁶⁶

Yet sex segregation is not limited to the occupational level—sociologists have long observed segregation among and within individual workplaces even within relatively integrated occupations and sub-occupations.¹⁶⁷ Bielby and Barron's seminal study revealed that "men and women in the same census occupation are sorted into distinct organizations or are segregated by job titles within work-settings."¹⁶⁸ Wait staffs are a classic example of men and women being sorted into distinct workplaces. Both men and women wait tables, but individual restaurants tend to hire either all-male or all-female wait staffs.¹⁶⁹ The manufacturing industry provides an example of men and women being segregated by job titles within a single workplace. Some factories employ men and women to perform essentially the same tasks but refer to the men as "operatives" and the women as "assemblers."¹⁷⁰ Other factories segregate men and women by the more direct means of employing them to perform different tasks.¹⁷¹

165. Acker, *supra* n. 157, at 139.

166. Christine L. Williams, *The Unintended Consequences of Feminist Legal Reform: Commentary on the Sanitized Workplace*, 29 *Thomas Jefferson L. Rev.* 101, 103 (2006) [hereinafter Williams, *Unintended Consequences*].

167. *Id.* at 104.

168. Bielby & Baron, *supra* n. 155, at 760. The sorting of men and women into distinct workplaces occurs when "a given line of work can be done exclusively by men in some organizational settings and by women in others." *Id.* at 764. The segregation of men and women by job titles within workplaces occurs when men and women "do equivalent work within an organization but hold distinct job titles." *Id.* at 765.

169. *Id.* at 764–765.

170. *Id.* at 765.

171. *Id.* at 782. When men and women in the same occupation not only hold distinctive job titles but also perform different tasks, Bielby and Baron report that women are likely to be excluded from jobs "that are specialized; require heavy lifting; do not require finger dexterity, verbal aptitude, or clerical perception; or have longer training requirements," as well as from jobs "that involve variable tasks, spatial skills, [or] coordination; that are in

The clothing manufacturing industry, which is somewhat integrated, illustrates typical differences between the tasks assigned to men and women.¹⁷² Cynthia Cockburn reported that, historically, men performed the “skilled” tasks of tailoring and cutting while women performed the “unskilled” task of sewing.¹⁷³ As mechanization increased, the male tasks of tailoring and cutting were “deskilled” and reassigned to women.¹⁷⁴ By the mid-1980s, men were performing the “skilled” tasks of supervising or managing computer systems, and women were performing the “unskilled” task of operating the equipment.¹⁷⁵ Cockburn reported similar patterns of segregation in other industries, including mail-order warehouses and engineering firms.¹⁷⁶ She ultimately illustrated that changes in the content of male and female tasks do not necessarily lead to changes in the overall level of sex segregation.¹⁷⁷

Current statistics reveal that the sex segregation studied by sociologists, like Cockburn, in the 1980s still exists—both among and within individual workplaces. Among workplaces, wait staffs remain highly segregated.¹⁷⁸ In 2006, Professor Christine Williams observed that “high[-]priced restaurants tend to hire men (or women dressed like men), while low-priced restaurants

larger establishments; or that are in enterprises with unions or formal bidding arrangements.” *Id.*

172. See generally Cockburn, *supra* n. 153 (explaining that men typically performed work with machinery, and women performed work that was considered less skilled and did not involve machinery).

173. *Id.* at 47, 48.

174. *Id.* at 48.

175. *Id.* at 73–77.

176. *Id.* at 78–111, 142–166.

177. Cockburn’s discussion of the mail-order industry reveals that it is similarly integrated, but it excludes women from jobs involving heavy lifting and variable skills. *Id.* at 78–111. Like the clothing industry, the mail-order industry has recently undergone increased mechanization and, like the clothing industry, it has managed to continue to segregate males and females into different jobs. *Id.* Males are presently concentrated in “management, maintenance engineering, goods handling, truck driving, assembly of bulk hardware orders, [and] heavy work in despatch and warehouse cleaning,” while females are concentrated in “clerical work, assembly of bulk clothing orders, picking, packing, returns, stock control[,] and light work in despatch.” *Id.* at 96. Cockburn’s discussion of the engineering industry reveals that, like the clothing manufacture and mail order industries, it is integrated, but excludes women from specialized jobs with extensive training requirements and concentrates them instead in clerical positions. *Id.* at 142–166. Male engineering employees are generally managers, developers, or servicers of the machines, while female engineering employees are mere operators of machines. *Id.* at 142.

178. Williams, *Unintended Consequences*, *supra* n. 166, at 103.

employ women.”¹⁷⁹ Within individual workplaces, men and women employed to perform the same tasks continue to be assigned different job titles. Where both men and women perform clerical tasks, men are still often referred to as “administrative assistants” while women are simply “secretar[ies].”¹⁸⁰ Many individual workplaces, however, continue to segregate men and women by the more direct means of assigning them different tasks. Professor Williams found that “in one [toy] store, only women were assigned to the doll and stuffed animal sections, and only men sold electronic games and sporting goods.”¹⁸¹ Thus, sex segregation continues among and within occupations and individual workplaces.

While such high levels of sex segregation are clearly illegitimate, sex segregation is not always illegitimate. It is, however, illegitimate when it is created and maintained by stereotypes rather than biological differences. While most sex segregation is maintained by stereotypes, a small amount may be maintained by statistically significant biological differences.¹⁸² Differences in physical strength, for example, may make certain tasks easier for males than females.¹⁸³ However, increased mechanization has rendered such differences largely irrelevant. And, beyond physical strength, few statistically significant biological differences exist. While it may be statistically significant, women’s “lack of interest” in certain tasks is a cultural, rather than biological, difference.¹⁸⁴ Thus, only a small amount of occupational segrega-

179. *Id.*

180. *Id.*

181. *Id.* at 104. Williams points out a similar phenomenon in another store, where “only women associates were assigned to work the cash register; most of the men were employed in the back, assembling and unloading the toys.” *Id.*; see also Christine Williams, *Inside Toyland: Working, Shopping, and Social Inequality* 50 (U. of Cal. Press 2006) (discussing the retail industry’s enhancement of gender inequality in the workplace).

182. Absent stereotypes, one would expect to see at least *some* “masculine women” in male-dominated occupations and *some* “feminine men” in female-dominated occupations. Weichselbaumer, *supra* n. 162, at 167.

183. To suggest that sex segregation may be *legitimate* in some cases is not, however, to concede that it is not *problematic* in those cases. As Professor Schultz illustrates, “[s]ex segregation structures work environments in which harassment flourishes because numerical dominance encourages male job incumbents to associate their work with masculinity and to police their jobs by treating women and gender-nonconforming men as ‘different’ and out of place.” Vicki Schultz, *The Sanitized Workplace*, 112 Yale L.J. 2061, 2132 (2003).

184. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1314–1315 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988), involved a workplace in which male and female employees performed different tasks. The EEOC alleged that Sears was “engaged in a

tion can be justified by biological differences—and no amount of workplace segregation can be justified by such differences.

Sex segregation, regardless of whether it is legitimate, is highly problematic because it creates gender differences that enable the creation of gender hierarchy. The causal relationship between sex segregation and gender hierarchy will be explored in Part II(B)(3). Congress' attempts to limit sex segregation,¹⁸⁵ which will be discussed in Part III(A), have been largely unsuccessful.¹⁸⁶ While sex segregation is an important means of creating gender difference, it is not the only means. The following Subpart explores how employers create gender difference through the alternative means of sex-based appearance regulations.

2. Gender Difference through Sex-Based Regulations

Where gender difference has not been created through sex-based segregation, it is often created through sex-based appearance regulations. Within sex-integrated workplaces, employers often impose different dress and grooming requirements on males and females—sometimes through formal codes but more often through informal norms.¹⁸⁷ Indeed, “both formal and informal

nationwide pattern or practice of sex discrimination [by, among other things,] failing to hire female applicants for commission selling on the same basis as male applicants, and by failing to promote female noncommission salespersons into commission sales on the same basis as it promoted male noncommission salespersons into commission sales.” *EEOC*, 628 F. Supp. at 1278. Although the lawsuit ultimately failed when the court accepted Sears' argument that the paucity of women in commission sales jobs was due to women's lack of interest in those jobs rather than to Sears' discriminatory hiring practices, the existence of segregation was clearly established. *EEOC*, 839 F.2d at 322. Men were concentrated in commission jobs, which involved the sale of automotive, sporting, building, mechanical, or technical products, while women were concentrated in noncommission jobs, which involved the sale of home furnishings, apparel, cosmetics, jewelry, and other fashion-related products. *Id.*

185. Title VII of the Civil Rights Act was intended to limit sex segregation. Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith before and after Oncale*, 11 *Yale J.L. & Feminism* 155, 234 (1999) (stating that “[a]lthough there is little legislative history to guide the courts in adjudicating issues of sex-based discrimination under Title VII, the sparse legislative history that does exist reveals an intent to redress patterns of sex segregation in the employment market.”).

186. Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1749, 1757 (1990) (asserting that judges have “created an unduly narrow definition of sex discrimination and an overly restrictive role for the law in dismantling sex segregation”).

187. Mark R. Bandsuch, *Dressing up Title VII's Analysis of Workplace Appearance*

comments about an employee's wardrobe, hairstyle, choice in music, facial expressions, speaking voice, choice of vocabulary, intonation, accent, and handshake style" can convey workplace requirements.¹⁸⁸ This Subpart examines three common types of appearance regulations—those governing makeup, clothing, and hairstyle—and shows that the current law acquiesces in all three.

The professional-services firm Price Waterhouse, which attempted to control virtually every aspect of its employees' appearances during the late 1980s, provides an excellent introduction to appearance regulations.¹⁸⁹ Ann Hopkins, a female employee, was pressured to be more feminine in her makeup, clothing, hairstyle, and mannerisms.¹⁹⁰ During her candidacy for partnership, a male partner suggested that "in order to improve her chances[, she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"¹⁹¹ Hopkins sued and was vindicated when the Supreme Court held that Title VII prohibited discrimination against employees who failed to comply with sex stereotypes.¹⁹² There is, however, some disagreement as to whether discrimination against employees who fail to comply with sex-based appearance regulations is prohibited.¹⁹³ Indeed, such regulations have been upheld often.¹⁹⁴

Makeup regulations exist in many workplaces, yet they are more often implicit than explicit. A 1990s study of workplace makeup practices revealed that even in workplaces without explicit regulations,¹⁹⁵ women tended to "internalize the assessments of their coworkers" and to "experience or perceive they [would] experience negative consequences if their makeup [was] not prop-

Policies, 40 Colum. Hum. Rights L. Rev. 287, 295 (2009).

188. *Id.*

189. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989).

190. *Id.* at 235.

191. *Id.* (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part and rev'd in part*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

192. *Id.* at 258.

193. Bandsuch, *supra* n. 187, at 296–297.

194. *See generally* Bandsuch, *supra* n. 187 (discussing the different deferential standards afforded to regulations imposed upon suspect classes, quasi-suspect classes, and all other classes). One court, for example, upheld a no-earrings policy as applied to men but not women (*Kleinsorge v. Eyeland Corp.*, 251 F.3d 153 (3d Cir. 2000)).

195. Dellinger & Williams, *supra* n. 138, at 154 (noting that "[n]one of the women interviewed recalled a specific written requirement for makeup use.").

erly applied.”¹⁹⁶ Indeed, “[t]hose who refuse[d] to wear makeup m[ight] suffer job sanctions in certain work contexts.”¹⁹⁷

As seen in *Jespersen v. Harrah’s Operating Co.*,¹⁹⁸ Harrah’s Casino provides a (somewhat rare) example of explicit makeup regulations. In 2000, Harrah’s required all bartenders to be “well groomed, appealing to the eye[,] . . . firm[,] and body toned.”¹⁹⁹ Female bartenders were required “to wear stockings[,] colored nail polish, and . . . their hair teased, curled, or styled.”²⁰⁰ Male bartenders were required to refrain “from wearing makeup or colored nail polish,” and to “maintain short haircuts and neatly trimmed fingernails.”²⁰¹ Darlene Jespersen, a female bartender, said that wearing makeup “made her feel sick, degraded, exposed, and violated[;] interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests)[; and] took away [her] credibility as an individual and as a person[.]”²⁰² Jespersen was fired for refusing to comply with the makeup requirement.²⁰³ She sued but lost in the Ninth Circuit, which held that Title VII allows sex-based appearance regulations so long as they burden male and female employees equally.²⁰⁴ The court found that Jespersen failed to present sufficient evidence that Harrah’s regulations imposed a greater burden on female bartenders.²⁰⁵ Thus, makeup regula-

196. *Id.* at 156. Although the study found that women were pressured to comply with institutional norms, the authors made clear that “women do not wear makeup at work solely because of the pressures imposed by institutionalized appearance norms[; s]ome point[] to the pleasure they receive[] by talking about makeup with other women and getting compliments on their appearance.” *Id.* at 175. Many women also view makeup as “a significant ‘part of competing’ in the workplace.” *Id.* at 165.

197. *Id.* at 175 (noting, however, that the study found “very little evidence of outright resistance to appearance norms in the workplace”). The authors also note that the “cultural practice [of wearing makeup] has consequences that reproduce inequality between men and women.” *Id.*

198. 392 F.3d 1076 (9th Cir. 2004).

199. *Id.* at 1077 (9th Cir. 2004) (internal quotations omitted).

200. *Id.* (internal quotations omitted).

201. *Id.*

202. *Id.* (internal quotations omitted).

203. *Id.*

204. *Id.* at 1081–1083 (declining to apply *Price Waterhouse* to Harrah’s regulations); see generally Megan Kelly, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah’s Operating Co.*, 36 Golden Gate U. L. Rev. 45 (2006) (reviewing both *Jespersen* and the case law leading up to *Jespersen*).

205. *Jespersen*, 392 F.3d at 1081.

tions are often legal when comparable requirements are imposed on male employees.

Clothing regulations have been analyzed in a similar manner. In fact, the Ninth Circuit Court in *Jespersen* used cases involving clothing regulations to arrive at its result. One set of clothing regulations that the *Jespersen* court found distinguishable from Harrah's makeup regulations was imposed by Talman Federal Savings and Loan Association in the mid-1970s.²⁰⁶ Talman allowed male employees to wear "customary business attire," including business suits, "business-type sport jackets and pants and ties" or "leisure suits with a suitable shirt and tie," but required female employees to wear uniforms consisting of "a color-coordinated skirt or slacks and a choice of a jacket, tunic[,] or vest."²⁰⁷ Mary Carroll, a female employee, sued Talman and won in the Seventh Circuit, which held that "two sets of employees performing the same functions [may not be] subjected on the basis of sex to two entirely separate dress codes," where one is more demeaning than the other.²⁰⁸ The court stated, "[s]o long as [clothing regulations] find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, [they may be permissible] even though the standards prescribed differ somewhat for men and women."²⁰⁹ The *Jespersen* court found that, while Talman impermissibly imposed unequal burdens, Harrah's policy permissibly imposed equal burdens.²¹⁰

Hairstyle regulations were also subject to many legal challenges during the 1960s and 1970s.²¹¹ In the early 1970s, Macon

206. *Jespersen*, 392 F.3d at 1080 (citing to *Carroll v. Talman Fed. Savings & Loan Assn.*, 604 F.2d 1028 (7th Cir. 1979). Throughout most of the 1960s, the Talman Federal Savings and Loan Association required all employees to wear uniforms. *Talman*, 604 F.2d at 1029–1030. In the late 1960s, it lifted the requirement for male but not female employees. *Id.*

207. *Talman*, 604 F.2d at 1029–1030 (internal quotations omitted).

208. *Id.* at 1032–1033. Had the dress codes been separate but equally demeaning, they would likely have been permitted.

209. *Id.* at 1032.

210. *Jespersen*, 392 F.3d at 1080.

211. See e.g. *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding sex-based hairstyle regulations); *Willingham v. Macon Telegraph Publg. Co.*, 507 F.2d 1084, 1091–1092 (5th Cir. 1975) (upholding sex-based hairstyle regulations); see also Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 Md. L. Rev. 11, 44 (2006) (stating that a "large number of federal cases were brought in the 1960s and 1970s challenging hair length and beard regulations for students and teachers in public schools"). Both *Price Waterhouse* and *Jespersen*

Telegraph Publishing Company required all employees “who came into contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community.”²¹² This requirement “was interpreted to exclude . . . men (but not women) with long hair.”²¹³ Alan Willingham, a twenty-two-year-old male, was denied employment because of his “longer than acceptable shoulder length hair,” which made him look like a “counter-culture type[].”²¹⁴ Willingham sued but lost in the Fifth Circuit, which held that sex-based hair-length requirements did not violate Title VII.²¹⁵ While *Willingham* preceded *Price Waterhouse*, its reasoning has survived.²¹⁶

Often, sex-based appearance regulations are used to produce gender difference—and the law, as it currently stands, imposes few barriers. If, as previously stated, influence over appearance translates into influence over gender identity, employers currently wield tremendous influence over their employees’ gender identities.²¹⁷ Indeed, the choice “between employment [under a dress code] and the right to present one’s chosen image to the world,”²¹⁸ is rarely a true choice. As many have recognized, “gender differences are produced, identities emerge and are renegotiated, and domination is sustained . . . in the course of . . . dress code enforcement.”²¹⁹ Such enforcement, in the long term, not only creates gender difference but also lays the foundation for gender hierarchy.

included hairstyle regulations. *Price Waterhouse*, 490 U.S. 228; *Jespersen*, 392 F.3d 1076.

212. *Willingham*, 507 F.2d at 1087.

213. *Id.*

214. *Id.*

215. *Id.* at 1092.

216. See e.g. *Rathert v. Vill. of Peotone*, 903 F.2d 510, 514–515 (7th Cir. 1990) (relying on *Kelley*, 425 U.S. 238, which, like *Willingham*, upheld a sex-based hair-length requirement, in upholding a no-ear-stud policy).

217. See *supra* pt. II(A) (explaining that employees may face negative consequences if they resist gendered appearance requirements).

218. Whisner, *supra* n. 138, at 118 (“Clothing regulations conflict directly with the process of a person’s projecting her chosen image to the world.”); see generally Ramachandran, *supra* n. 211 (arguing for a “legal right to free dress, encompassing clothing, hair, jewelry, makeup, tattoo, and piercing choices”).

219. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 New Eng. L. Rev. 1395, 1397 (1992) (citing Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 Harv. L. Rev. 1045, 1049 (1992)).

3. Gender Hierarchy through Sex-Based Pay Scales

Having produced gender difference through the means discussed in Parts II(B)(1) and II(B)(2), the labor market proceeds to produce gender hierarchy through two mechanisms—first, the under-compensation of female-dominated occupations; and second, the under-compensation of female workers in all occupations.²²⁰ Together, these mechanisms have produced a significant and persistent “gender wage gap.”²²¹ From the 1950s to 1980s, women earned roughly fifty-nine percent as much as men earned.²²² During the 1980s, the gap narrowed and, by the early 1990s, women were earning roughly seventy percent as much as men were earning.²²³ In recent years, the gap has narrowed such that, in 2007, women earned roughly seventy-eight percent as much as men earned.²²⁴ While this decrease of approximately twenty percentage points over sixty years is significant, it is not inspiring—particularly in light of the fact that it has resulted largely from decreases in the real earnings of men rather than increases in the real earnings of women.²²⁵ The gender wage gap, thus, continues to produce gender hierarchy.

Although both mechanisms—the under-compensation of female-dominated occupations and the under-compensation of female workers in general—have contributed to the gender wage gap, the former has long been the primary source.²²⁶ As early as 1976, Heidi Hartmann recognized that “[j]ob segregation by sex . . . is the primary mechanism . . . that maintains the superiority of men over women, because it enforces lower wages for women in

220. Indeed, the production of gender difference enables the production of gender hierarchy. Vicki Schultz, *Sex and Work*, 18 *Yale J.L. & Feminism* 223, 227 (2006) (stating that “sex segregation both facilitates and justifies the undervaluation of the women’s work”).

221. Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 *Tex. J. Women & L.* 125, 155 (1995).

222. Milkman & Townsley, *supra* n. 147, at 604.

223. *Id.*

224. National Committee on Pay Equity, *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, <http://www.pay-equity.org/info-time.html> (last visited July 2, 2010).

225. Milkman & Townsley, *supra* n. 147, at 604.

226. *Id.*; McCue & Ureta, *supra* n. 221, at 151 (1995) (stating that “[t]o the extent that wages are largely determined by one’s occupation and that predominantly female occupations pay relatively low wages, the non-convergence in the occupational distributions of men and women precludes a full closing of the gender wage gap”).

the labor market.”²²⁷ And as recently as 2008, Vicki Schultz reaffirmed that “[t]he most significant factor contributing to the [gender] wage gap, at least among workers without college degrees, is women’s concentration in lower-paying, female-dominated occupations and jobs.”²²⁸ Thus, the under-compensation of female-dominated occupations continues to be the primary source of the gender wage gap.

Examples of low-paying female-dominated jobs abound, and tend to be concentrated within the major occupational categories of “sales and office occupations” and “service occupations.”²²⁹ In 1994, Milkman and Townsley reported that “[t]he vast bulk of the female work force remains in low-level, ‘pink collar’ jobs” and “[w]ell over half ([fifty-nine] percent in 1990) of all women workers are employed in clerical, sales, and service work, where pay and status are typically low and opportunities for advancement minimal or nonexistent.”²³⁰ They further noted that women were disproportionately concentrated in contingent jobs characterized by “low pay, poor or nonexistent benefits, a lack of job security, and limited or nonexistent opportunities for advancement.”²³¹ A 2002 study found that care-giving occupations—including the female-dominated occupations of teacher, nurse, daycare worker, and therapist²³²—“receive, on average, lower hourly pay than we would [expect] based on other characteristics of the jobs, their skill demands, and the qualifications of those holding the jobs.”²³³ In considering all other factors, the study found that employment

227. Hartmann, *supra* n. 148, at 208.

228. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, n. 394 (2008).

229. This terminology comes from the Bureau of Labor Statistics’ categories. *Supra* n. 163, at 207.

230. Milkman & Townsley, *supra* n. 147, at 604.

231. *Id.* at 605 (also noting that women represent sixty-six percent of part-time employees and sixty-five percent of temporary employees, but only forty-five percent of the entire labor force). As Hartmann noted in *Capitalism, Patriarchy, and Job Segregation by Sex*, “[s]ubdivision of the labor process ordinarily allow[s] the use of less skilled labor,” and “[m]achinery, unskilled labor, and women workers often [go] together.” Hartmann, *supra* n. 148, at 161.

232. Care occupations are specifically defined as those that provide “a face-to-face service that develops the human capabilities of the recipient.” Michelle Budig, Paula England & Nancy Folbre, *Wages of Virtue: The Relative Pay of Care Work*, 49 Social Problems 455, 455 (2002).

233. *Id.*

in a care-giving occupation generally resulted in a wage penalty.²³⁴

Although the gender wage gap is largely attributable to the under-compensation of female-dominated occupations, it is partly attributable to the under-compensation of females in all occupations.²³⁵ Even in sex-integrated occupations, female employees are undercompensated—in part, because they are underrepresented in authority positions.²³⁶ Increased authority tends to correlate with increased income, and men tend to occupy the highest levels of authority.²³⁷ In 2001, psychologist Madeline Heilman reported that “top management and executive[-]level jobs are almost always considered to be ‘male’ in sex-type.”²³⁸ In 2002, sociologist Ryan Smith reported:

[G]ender differences in job authority account for a large fraction of the pay gap among men and women with similar occupations, jobs, and equivalent human capital investments. Men and women who work in the same occupations for the same employer receive different salaries—with hierarchical differences accounting for [sixty-five percent] of the gap.²³⁹

Thus, even in sex-integrated occupations, employers produce gender hierarchy through sex-based pay scales.

234. *Id.*

235. Men who work in female-dominated occupations tend to rise to higher levels of authority and earn higher wages; women who work in male-dominated or sex-integrated occupations tend to remain in low-level positions and earn lower wages. Christine Williams, *Still a Man's World: Men Who Do "Women's Work"* 176–177 (U. Cal. Press 1995).

236. For a historical account from the early 1980s, see Ruth Cavendish's discussion in *Women on the Line* (Routledge & Kegan Paul 1982), of the sex- and nationality-based division of labor among English factory workers. Cavendish recounts: “It was easy to see the hierarchy of the production workers: on the bottom us ‘girls’ [(the “operators”)], then a chargehand for each line, above him a section supervisor, and then the supervisor.” *Id.* at 48. All of the operators were women (and most were also immigrants), all of the chargehands except for one were men (and most were also Irish), all of the section supervisors were men (and most, from the level of chargehand up, were also white Englishmen), and both of the supervisors were men. *Id.* at 46–51. Cavendish observes that, to the women, “all the men were the same . . . —higher up.” *Id.* at 48.

237. Ryan Smith, *Race, Gender, and Authority in the Workplace: Theory and Research*, 2002 *Ann. Rev. Soc.* 509, 511, 519 (2002).

238. Madeline Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 *J. Soc. Issues* 657, 659 (2001).

239. Smith, *supra* n. 237, at 534.

While Part I(B)(1) discussed the economic efficacy of labor market hierarchies in general, the remainder of this Part will discuss the efficacy of labor market gender hierarchy specifically. Gender hierarchy arguably confers all the same economic benefits as other hierarchies.²⁴⁰ While many employers view gender hierarchy as beneficial to their enterprises,²⁴¹ I will argue that it is detrimental to society as a whole. Before addressing the current arguments for and against gender hierarchy in the labor market, one must understand the historical arguments that originally justified its establishment. These arguments are significant because they provided the initial impetus for employers to create the gender hierarchies that they now maintain.

Women's low wages have been justified by different arguments during different historical periods. In the nineteenth and early twentieth centuries, employers subscribed to the "cult of domesticity"—the view that women ought to remain in the home performing the unpaid labor of wives and mothers, while men entered the labor market to earn "family wages."²⁴² Because women were expected to remain in the home, any labor-market wages they received were considered supplemental to their husband's family wages.²⁴³ Viewing women's wages as "supplemental" led to "the institutionalization of a two-tiered wage structure," under which women earned substantially less than men.²⁴⁴ Over time, this cult-of-domesticity argument was replaced by other,

240. See *supra* pt. I(B)(1) (stating that workplace hierarchies in general may streamline employee interactions and resolve disputes).

241. For example, Franita Tolson notes: "[D]iscriminatory employers can profit financially from discrimination." Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 Del. J. Corp. L. 347, 390 n. 179 (2008).

242. Steinberg, *supra* n. 156, at 458; see e.g. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding the denial of admission to the Illinois Bar for a married woman);

The natural and proper timidity and delicacy [that] belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id.; but see Donna E. Young, *Working across Borders: Global Restructuring and Women's Work*, 2001 Utah L. Rev. 1, 4–5 (noting that the cult of domesticity applied primarily to upper- and middle-class white women, and that "the ideals of domesticity did nothing to hinder labor market participation of women of color and immigrant women").

243. Steinberg, *supra* n. 156, at 458.

244. *Id.*

equally demeaning, arguments; including the argument that women deserve lower wages than men do because female occupations require less “skill.”²⁴⁵

These historical arguments continue to influence many employers who currently believe that gender hierarchy is economically beneficial. Employers reason that female employees, on average, are less productive and less loyal than their male counterparts—in part, because females, on average, are more committed to their families.²⁴⁶ They conclude that female employees should therefore be relegated to low-level (and low-paying) jobs where their low productivity and high resignation rates will have minimal impact.²⁴⁷ Although employers understand that not all female employees are actually less productive and loyal than their male counterparts, many employers lack the resources to screen applicants individually for productivity and loyalty.²⁴⁸ Such employers “rationally” rely on averages and by doing so create gender hierarchies.²⁴⁹ Under this argument, gender hierarchies are economically beneficial because they privilege those employees who, on average, are the most productive and loyal.²⁵⁰

245. *Id.* at 452. This argument regarding skill will be discussed further.

246. Women spend more time engaged in domestic activities than men do. See Paula England & Nancy Folbre, *The Silent Crisis in U.S. Child Care: Who Should Pay for the Kids?* 563 *Annals Am. Acad. Pol. & Soc. Sci.* 194, 195 (1999) (stating, “[w]omen generally devote more time and money to children than men do. Over the last [twenty-five] years, [women] have substantially increased their overall hours of market work to help provide family income. Men, however, have only slightly increased their hours of . . . domestic labor.”). Women are also perceived as more committed to their families than men are. See Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 *Cap. U. L. Rev.* 923, 923–924 (2002) (stating, “[t]he prevailing institutional explanation for women’s turnover and exit is that women choose to leave the [workplace] when . . . the pull of the family undermines their commitment to the practice of law.”).

247. Charny & Gulati, *supra* n. 154, at 64 (explaining that employers “might expect women as a group to have higher quit rates than men because they tend to have children”).

248. *Id.* “[E]mployers do not have the resources to examine the individual qualifications of applicants, and instead make judgments based on group affiliations.” *Id.*

249. *Id.* at 63–64 (explaining that statistical (rational) discrimination models “begin with the assumption that firms rationally expect job applicants from certain groups to be less productive than typical applicants”); see also Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 *Va. L. Rev.* 825, 849–850 (2003) (highlighting that “[i]mportant present-day problems of discrimination include rational statistical discrimination, in which employers rationally use protected-class status as a proxy for lower productivity.”).

250. There are other arguments suggesting that gender hierarchy is economically beneficial. Given the fact that gender hierarchy is the status quo, there may be great costs

I disagree with the above argument, and suggest that gender hierarchy is unnecessary and often detrimental to economic success. In the long term, employers will derive greater benefits from privileging the individuals who are *actually* the most productive and loyal than from privileging individuals who come from groups that are *on average* more productive and loyal.²⁵¹ Reliance on averages will cause employers to favor some males who are “below average” and overlook some females who are “above average”—both of which will create mediocre (and economically inferior) workforces. It is arguable that the profits reaped from privileging the most productive and loyal employees will outweigh the costs incurred by screening to identify those employees. In sum, gender hierarchy impedes labor-market success.

4. Ideological Homogeneity Regarding Gender (Stereotyping)

After years of operating within the labor market’s rigid gender hierarchies, employees often begin to internalize and accept those hierarchies as part of their own ideologies. They begin to believe that the patterns they see in the labor market—men in positions of authority and women in positions of submission—are inevitable and even natural.²⁵² That is, the labor market’s influences over behavior translate into influences over ideology. Sex-segregated occupations and workplaces, for example, influence ideology by “naturaliz[ing]” sex-based employment.²⁵³ Similarly,

associated with dismantling it. As Professor Samuel Bagenstos points out, hierarchy may be

motivated by the costs employers believe they will incur in the course of integrating a firm or in managing the conflicts that inevitably arise in a diverse workforce. Although some of these costs might result from the need to respond to the discriminatory tastes of coworkers, others might result simply from the relative ease of enforcing informal workplace norms in a homogeneous workforce.

Bagenstos, *supra* n. 249, at 849–850.

251. See e.g. Charny & Gulati, *supra* n. 154, at 64 (noting that “enterprising firms might find it profitable to make the additional investment needed to select the most productive members of less productive groups”).

252. See generally Steinberg, *supra* n. 156 (explaining that definitions of skilled labor and traditional hierarchies based on gender have been accepted by both employers and employees).

253. Sex-segregated occupations and workplaces influence behavior by encouraging men and women to pursue different types of employment. As Galen Sherwin has noted, “sex segregation is [often criticized as] harmful because it reinforces and naturalizes social constructions of gender difference.” Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. Rev. L. & Soc. Change 35, 67 (2005).

sex-based appearance regulations influence ideology by “naturalizing” sex-based appearance differences,²⁵⁴ and sex-based pay scales influence ideology by “naturalizing” gender hierarchy.

Some would argue that employers benefit economically when their employees share common ideologies regarding gender roles and hierarchy, but ideological homogeneity is, in my view, ultimately detrimental. Although ideological homogeneity regarding gender may be beneficial to the extent that conformity is beneficial,²⁵⁵ neither homogeneity nor conformity proves beneficial in the long term. All of the arguments against ideological homogeneity previously discussed in Part I(B)(2) apply equally to ideological homogeneity regarding gender.²⁵⁶ Such homogeneity impedes creativity, innovation, and adaptability and, therefore, impedes economic success.²⁵⁷ Yet, as detrimental as ideological homogeneity may be for the labor market, it is far worse for the public forum.

C. Public Forum Ramifications

Many individuals become so accustomed to operating within the gender hierarchies and stereotypes of the labor market that they indiscriminately accept them when they encounter them in the public forum.²⁵⁸ Parts II(C)(1) and (2) illustrate that the gender hierarchies and stereotypes of the labor market are reproduced, with very little resistance, in the public forum. Yet until the public forum is free from gender hierarchies and stereotypes, it will not be truly democratic.

254. Sex-based appearance regulations influence behavior by encouraging men and women to adopt different styles of self-presentation. Klare, *supra* n. 219, at 1397 (exploring Professor Mary Joe Frug’s assertion that “dress codes enforce patriarchal attitudes about women’s proper roles and behavior”).

255. Bandsuch, *supra* n. 187, at 321. “Some appearance rules promote conformity in an effort to increase trust, fairness, loyalty, and performance.” *Id.*

256. See Carbado & Gulati, *supra* n. 62 and accompanying text (describing complexities of discrimination and Critical Race Theory).

257. See *supra* pt. I(B)(1) (discussing the formation of hierarchies in the workplace).

258. There are, of course, men and women who resist traditional gender roles and the traditional gender hierarchy. See generally Rachael Halloran, *Women Moving into Non-Traditional Jobs*, 7 Ill. Lab. Mkt. Rev. 1 (2001) (discussing the opportunity for women in non-traditional roles).

1. Lack of Equality Regarding Gender

Gender equality is crucial to democracy,²⁵⁹ but a brief review of our Nation's history illustrates that labor-market hierarchies have long been reproduced in the public forum. From the Founding until 1920, women were denied the most basic of public-forum rights—the right to vote.²⁶⁰ Although women's public-forum participation improved after the ratification of the Nineteenth Amendment in 1920,²⁶¹ gender equality remained elusive. Still today, women have not risen to the same levels of public-forum power as their male counterparts. Women were not elected to the United States House of Representatives and Senate until 1916²⁶² and 1932,²⁶³ respectively. And it was not until 1980 that a woman was elected to the Senate without being preceded by either her husband or her father.²⁶⁴ Finally, of the 541 members in the 111th Congress, only ninety-five are women.²⁶⁵ Clearly, we have not yet

259. See *supra* pt. I(C)(1) (providing a general discussion of why equality is crucial to democracy).

260. U.S. Const. amend. XIX. In this portion of the Article, I focus on the national public forum, rather than individual state public fora. However, “[w]omen first used their right to vote in the Utah territory election of August 1870.” Barbara A. Perry, *Like Father Like Daughter: The Admission of Women into Formerly All Male “Private” Clubs: A Case Comment on Bd. of Directors of Rotary Intl. v. Rotary Club of Duarte*, 23 New Eng. L. Rev. 817, 851 n. 313 (1988). When women were given the right to vote, they were given “a claim to a seat in the public forum where they could affect the ongoing discourse and promote the conditions for equality of respect between the sexes.” Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA Women's L.J. 103, 113–114 (1994).

261. U.S. Const. amend. XIX.

262. Jeannette Rankin of Montana was elected to represent Montana in 1916. Julia L. Ernst, *The Congressional Caucus for Women's Issues: An inside Perspective on Lawmaking by and for Women*, 12 Mich. J. Gender & L. 189, 192 n. 9 (2006). Esther Morris was the first woman ever to hold public office in the United States. Marcy Lynn Karin, *Esther Morris and Her Equality State: From Council Bill 70 to Life on the Bench*, 46 Am. J. Leg. Hist. 300, 300 (2004). “In 1870, when she took her oath of office to uphold the laws of the [Wyoming] Territory, Morris became the first woman in the United States to hold a public office.” *Id.*

263. Hattie Caraway was elected to the United States Senate in 1932. Perry, *supra* n. 260, at 851 n. 313. While Rebecca Latimer Felton became the first woman to serve in the United States Senate in 1922, she was appointed rather than elected and only served for a single day. Biographical Directory of the United States Congress, *Felton, Rebecca Latimer*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000069> (accessed Feb. 24, 2010).

264. Paula Hawkins was elected in 1980 to represent Florida. L. Buckner Inniss, *A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones*, 8 Tex. F. on C.L. & C.R. 51, 68, n. 89 (2003).

265. Mildred Amer & Jennifer E. Manning, Congressional Research Service, *Member-*

achieved the gender equality that is prerequisite to a truly democratic public forum.

2. Lack of Ideological Diversity Regarding Gender

Similarly, we have not yet achieved the ideological diversity that is prerequisite to a truly democratic public forum.²⁶⁶ A brief review of our Nation's history reveals that labor-market gender ideologies have long been reproduced in the public forum, resulting in a very narrow debate on gender roles and relations.²⁶⁷ Most proposals to eradicate gender roles and abolish gender hierarchy have gone unheard or, when heard, unheeded.

The traditional gender roles generated in the labor market still dominate many Americans' ideologies regarding what is appropriate in the public forum. A recent survey reveals that twenty-one percent of Americans believe that men make the best political leaders while only six percent believe that women make the best political leaders.²⁶⁸ These results are somewhat surprising given that, when asked whether men or women are more likely to possess specific traits important to leadership (such as honesty and intelligence), Americans consistently responded that women are more likely to possess those traits.²⁶⁹ Thus, while a majority of Americans claim to value honesty and intelligence in their leaders, and to think that women are on average more hon-

ship of the 111th Congress: A Profile, http://assets.opencrs.com/rpts/R40086_20081231.pdf (Dec. 31, 2008). Seventy-eight women serve in the House and seventeen serve in the Senate. *Id.*

266. For the reasons discussed in Part I(C)(2), the public forum requires ideological diversity regarding all subjects, including gender.

267. Indeed, there is a widespread sense that gender equality has been achieved. This sense has led a majority of Americans to be relatively apathetic to issues of gender equality. For example, as Elizabeth Sepper points out:

De jure equality, of course, does not exist in the United States (contrary to the public's general assumption that it does). The United States Congress has refused to pass the Equal Rights Amendment that would create equality for women under the law, and no further progress has been made to secure equal rights under the law.

Elizabeth Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty*, 30 U. Pa. J. Intl. L. 585, 592 n. 20 (2008).

268. Pew Research Center, *Men or Women: Who's the Better Leader? A Paradox in Public Attitudes*, <http://pewsocialtrends.org/pubs/708/gender-leadership> (Aug. 25, 2008). The remaining sixty-nine percent of Americans believed that men and women were equally qualified. *Id.*

269. *Id.*

est and intelligent than men, a higher percentage of Americans nevertheless prefer male leaders than prefer female leaders.²⁷⁰

Gender hierarchies and stereotypes in the public forum prevent creativity, innovation, adaptation, and ultimately democracy. A public forum steeped in gender hierarchies and stereotypes cannot generate the debate necessary to achieve the greatest common good. Until gender hierarchies are flattened and unconventional gender roles are accepted, we will not be able to engage in truly democratic public-forum debate.

III. LABOR MARKET REFORM COULD DEMOCRATIZE THE PUBLIC FORUM

Parts I and II illustrated that the labor market impedes democracy by encouraging employees to internalize hierarchies and ideologies that ultimately prevent them from engaging in effective public-forum debate. Part III builds on Parts I and II by arguing that, since existing laws acquiesce in these negative impacts of the labor market, reform is in order. Part III(A) illustrates that existing constitutional and statutory provisions are incapable of delivering an egalitarian and ideologically diverse public forum—and, thus, of delivering democracy. Part III(B) suggests several ways in which existing constitutional and statutory provisions could be modified to ensure equality and viewpoint diversity in the public forum.

A. The Inadequacy of Existing Laws

Neither the Constitution nor the United States Code affirmatively guarantees an egalitarian and ideologically diverse public forum.²⁷¹ The Constitution applies only to state actors,²⁷² and creates only negative rights against government-imposed

270. *Id.*

271. While some state and local laws may *contribute* to an egalitarian and ideologically diverse public forum, they do not *guarantee* such a forum—and their analysis is beyond the scope of this article.

272. Employees cannot charge their private employers with violating the Equal Protection or Free Speech Clauses. See *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 897–898 (1961) (noting that “the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.”).

inequality and censorship.²⁷³ It does not provide for claims against private employers who actively cultivate inequality and ideological conformity or against state actors who passively permit such inequality and ideological conformity to be reproduced in the public forum. Further, while the United States Code does, in many cases, apply to private actors, it similarly creates only negative rights against a few types of inequality and censorship. It leaves the vast majority of private inequality and censorship unregulated—and leaves the vast majority of that which is regulated undisturbed. Thus, current laws cannot guarantee democracy.

The following two Subparts explore the inadequacy of current laws. Part III(A)(1) illustrates that current laws allow private employers to manipulate virtually every aspect of their employees' identities, thereby cultivating both hierarchy and ideological conformity. Part III(A)(2) illustrates that, even when current laws prohibit the private manipulation of some particular aspect of identity—as employment laws prohibit employers from manipulating gender identity—such laws still allow a great deal of employer manipulation. So long as our laws fail to adequately redress privately imposed inequality and censorship, they will fail to deliver an egalitarian and ideologically diverse public forum.

1. Hierarchy and Ideological Homogeneity

The Constitution and United States Code afford private employers tremendous influence over their employees' identities. The Constitution offers no remedy against either private employers who actively cultivate hierarchy and ideological conformity, or state actors who passively allow those privately created hierarchies and ideologies to be reproduced in the public forum.²⁷⁴ Constitutional provisions such as the Equal Protection and Free Speech Clauses impose neither limits nor obligations on private employers, and impose a few limits, but no obligations, on state actors. While state actors are formally limited in their ability to deny equal protection of the laws or abridge the freedom of speech, they are practically limited only with respect to *certain*

273. U.S. Const. amends. I, XIV.

274. See *supra* pt. I(C) (discussing the impact of privately created hierarchies and ideologies on the public forum).

denials of equality and *certain* abridgements of speech.²⁷⁵ For example, they can with relative ease deny equality to the poor or elderly,²⁷⁶ and abridge speech deemed incitement or obscenity.²⁷⁷

While the Constitution imposes few limits, it imposes even fewer obligations. Neither private employers nor state actors are constitutionally obligated to provide an egalitarian or ideologically diverse environment.²⁷⁸ However, the Constitution does permit Congress to encourage such a public forum. For example, Congress can mandate certain forms of equality and free speech in the private labor market by legislating under the Commerce Clause²⁷⁹ or the Fourteenth Amendment.²⁸⁰ Through such mandates, Congress can indirectly encourage an egalitarian and ideologically diverse public forum. Congress' past mandates, however, have been narrow in their coverage and limited in their effect.

Congress' mandates regarding equality in the private labor market have touched upon only a few forms of equality. Title VII of the Civil Rights Act of 1964 mandates equality based only on race, color, national origin, religion, and sex;²⁸¹ the Equal Pay Act

275. For example, the state is prohibited from actively imposing inequality based on the following: (a) race, alienage, or national origin, except through laws that are narrowly tailored to achieve compelling interests; (b) sex or legitimacy, except through laws that are substantially related to important interests; and (c) on any other basis, except through laws that are rationally related to legitimate interests. *City of Cleburne*, 473 U.S. at 440–441. The state is similarly prohibited from censoring speech except in certain broadly defined circumstances. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 996–1158 (15th ed., Foundation Press 2004).

276. See e.g. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (upholding an age classification under rational basis review); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (noting that wealth classifications have never triggered strict scrutiny).

277. *Miller v. Cal.*, 413 U.S. 15, 23 (1973) (stating that “obscene material is unprotected by the First Amendment”); *Brandenburg v. Ohio*, 395 U.S. 444, 448–449 (1969) (stating that the First Amendment does not protect advocacy “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

278. U.S. Const. amend. XIV (prohibiting state actors from denying citizens equal protection of the laws, but not placing any affirmative duties on them to provide a diverse environment).

279. U.S. Const. art. I, § 8, cl. 3; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (allowing anti-discrimination legislation under the Commerce Clause).

280. U.S. Const. amend. XIV, § 5 (allowing Congress to enforce all provisions of that Amendment, including the Equal Protection and Due Process Clauses, which incorporate the right of free speech through appropriate legislation); see generally Matthew D. Taggart, *Title II of the Americans with Disabilities Act after Garrett: Defective Abrogation of Sovereign Immunity and its Remedial Impact*, 91 Cal. L. Rev. 827, 839–840 (2003) (discussing Congress' power under Section V of the Fourteenth Amendment).

281. 42 U.S.C. § 2000e–2(a) (quoted *supra* n. 98). Title VII expressly rests on both the

of 1963²⁸² mandates equality based only on sex,²⁸³ the Age Discrimination in Employment Act of 1967 mandates equality based only on age;²⁸⁴ and Titles I and II of the Americans with Disabilities Act²⁸⁵ mandate equality based only on disability.²⁸⁶ Other labor market hierarchies—those based, for example, on political affiliation, education, or income²⁸⁷—remain unregulated.

Congress' mandates regarding free speech in the private labor market have similarly touched upon only a few forms of employer censorship.²⁸⁸ Employee speech is generally protected only if it either leads to retaliation for reporting an employer's illegal practices or "constitutes a form of concerted activity 'for the purpose of . . . mutual aid or protection.'"²⁸⁹ Because current laws acquiesce in the private cultivation of both hierarchy and ideological conformity, they serve the labor market at the expense of the public forum.

2. Gender Hierarchy and Gender Stereotypes

Even when employment laws formally prohibit private employers from cultivating particular hierarchies and ideologies—as the Equal Pay Act and Title VII do with respect to gender hierarchy and gender stereotypes—they still allow a great

Commerce Clause and Congress' Section V power. Deborah Epstein, *Can a Dumb Ass Woman Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 Geo. L.J. 399, 437 (1996).

282. 29 U.S.C. § 206(d).

283. *Id.* (quoted *infra* n. 291 and accompanying text). The Equal Pay Act is treated as resting on Congress' power under Section V of the Fourteenth Amendment. See e.g. *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 550 (5th Cir. 2001); *Timmer v. Mich. Dept. of Com.*, 104 F.3d 833, 838–842 (6th Cir. 1997); *Anderson v. St. Univ. of N.Y.*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000).

284. 29 U.S.C. § 623(a)–(i). The ADEA, analyzed as resting on both the Commerce Clause and Congress' power under Section V of the Fourteenth Amendment, protects individuals over forty years of age from employment discrimination. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (employing an analysis of Congress' power under both the commerce clause and Section V to determine the validity of the ADEA); see also 29 U.S.C. § 631(a) (implementing the age limit).

285. 42 U.S.C. § 12101 (2006).

286. 42 U.S.C. § 12101(b)(4) (2006).

287. These other hierarchies remain unregulated only to the extent they are viewed as separable from "protected" traits. *Id.*

288. See Yamada, *Dignity, "Rankism," and Hierarchy*, *supra* n. 1, at 319 (explaining that "few employees enjoy anything close to comprehensive, legally protected rights of free speech in their workplaces").

289. *Id.* (quoting National Labor Relations Act, 29 U.S.C. § 157 (2006)).

deal of employer manipulation.²⁹⁰ While the Equal Pay Act and Title VII might have created an egalitarian and ideologically diverse labor market—and, in turn, public forum—had they been interpreted differently, existing conditions illustrate that neither statute has been transformative.

The Equal Pay Act, passed in 1963, provides:

No employer . . . shall discriminate . . . on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and [that] are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system [that] measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.²⁹¹

Comparable-worth advocates have argued that the Equal Pay Act requires employers to equalize wages for female- and male-dominated jobs that involve similar levels of skill, effort, and responsibility.²⁹² Yet the Act has never been interpreted as doing so. Instead, it has been interpreted to require “only that an employer pay women equal wages for doing work *virtually identical* to the work done by the employer’s male employees.”²⁹³ That is, courts are willing to require equal pay for the *same* work but not equal pay for *different*, though potentially comparable, work.²⁹⁴

Even if the Equal Pay Act were interpreted as comparable-worth advocates desire, women still would have difficulty proving

290. The constitutional law regarding gender identity is the same as that regarding identity in general. *Supra* pt. III(B)(1). While the Constitution prevents state actors from affirmatively creating gender hierarchy and enforcing stereotypical gender roles, it does not require state actors to affirmatively create gender equality or deconstruct stereotypical gender roles.

291. 29 U.S.C. § 206(d)(1).

292. George Schatzki, *An Observation about Comparable Worth*, 9 U. Puget Sound L. Rev. 491, 491 (1986).

293. *Id.* (emphasis added). “The Act only tells employers, ‘Look, if you have men and women doing the same work, don’t be a sexist bully; pay them the same wage.’” *Id.*

294. Thomas N. Hutchinson, *The Fair Pay Act of 1994*, 29 Ind. L. Rev. 621, 630 (1994). “No matter how broadly the Equal Pay Act is construed, it is unlikely that a court would permit a comparison of dissimilar jobs.” *Id.*

that their jobs involve equal levels of skill. Female-dominated occupations are regularly perceived as less skilled than male-dominated occupations, regardless of the tasks they entail.²⁹⁵ As Professor Kathryn Stanichi observed, “once a job becomes ‘female,’ it is mythologized as easier, unskilled[,] and worthless; similarly, once a job becomes ‘male’ it is mythologized as difficult and highly skilled.”²⁹⁶ A 1974 study comparing the perceived complexity of a variety of jobs found that the female jobs of nursery-school teacher and childcare worker were perceived as less complex than the male jobs of dog-pound attendant, parking-lot attendant, and zookeeper.²⁹⁷ Thus, the characterization of jobs as “skilled” versus “unskilled” is often more political than descriptively accurate.²⁹⁸

Yet comparable worth advocates have performed empirical studies proving that female-dominated occupations often involve at least as much skill as higher-paid, male-dominated occupations. One study created objective measures of job complexity and compared the wages for equally complex female- and male-dominated jobs.²⁹⁹ It found that female-dominated jobs were associated with much lower wages than equally complex male-dominated jobs.³⁰⁰ Notwithstanding such findings, most Equal Pay Act litigation has been unsuccessful.³⁰¹ Indeed, even when

295. Steinberg, *supra* n. 156, at 452.

296. Kathryn M. Stanichi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. Rev. 467, 475 (2005).

297. Steinberg, *supra* n. 156, at 456. Female-dominated care-taking and clerical jobs, for example, are perceived as relatively unskilled, although they involve emotional and technical skills. *Id.* at 453.

298. *Id.* at 476.

299. Steinberg, *supra* n. 156, at 452–453 (referring to a 1982 study that resulted in the finding that the percentage of females in a certain occupation affects the wage differentials by gender).

300. *Id.* at 456.

301. *Id.* See also Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 Colum. J.L. & Soc. Probs. 225, 229–230 (1994).

One way to measure the Act's utility is to compare the number of claims filed under it to the number brought under the other main federal law proscribing sex discrimination in employment, Title VII of the Civil Rights Act of 1964. Plaintiffs bring approximately eighty percent of their employment discrimination claims under Title VII, leaving the remaining twenty percent to be divided among the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act. This comparison, however, is of limited use because Title VII covers so many categories of discrimination in addition to sex. Nonetheless, the Equal Employment Opportunity Commission (“EEOC”) files few Equal Pay Act claims, leading some critics to charge that employers have become complacent because they know that the Act is not being

judges have acknowledged that unequal wages are sex-based rather than substance-based, they have declined to take remedial action for fear of “disrupting the entire economic system of the United States.”³⁰²

Like the Equal Pay Act, Title VII has failed to mitigate the under-compensation of female-dominated occupations. Title VII provides:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of . . . sex [and] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.³⁰³

Comparable-worth advocates have attempted to use this text to equalize the wages of women and men who perform different jobs for the same employer.³⁰⁴ When employers set the wages for female-dominated jobs lower than for similar male-dominated jobs, comparable worth advocates raise sex-based disparate-impact claims.³⁰⁵ Yet employers can avoid liability by pointing to non-discriminatory reasons for the disparate impact—for example, “prevailing market rates” justify lower wages for the female-dominated jobs and higher wages for the male-dominated jobs.³⁰⁶ Thus, neither the Equal Pay Act nor Title VII has successfully mitigated the under-compensation of female-dominated occupations.³⁰⁷

well-enforced. These patterns imply that the Equal Pay Act has not lived up to its potential for achieving ‘wage justice.’

Id.

302. Steinberg, *supra* n. 156, at 468 (quoting *Lemons v. City and County of Denver*, 1978 U.S. Dist. LEXIS 18332 at *1, 17 Fair Empl. Pract. Case 906 (D. Colo. Apr. 28, 1978).

303. 42 U.S.C. § 2000e-2(k)(1)(a)(i).

304. Hutchinson, *supra* n. 294, at 630–631.

305. *Id.*

306. *Id.* “Market rates reflect factors that define the value of different jobs, including the availability of workers in a particular occupation and their ability to bargain collectively for higher wages. [I]f women are to use a disparate treatment action, they must present substantial proof that the market justification is mere pretext and then prove their case by a preponderance of the evidence.” *Id.* at 631.

307. Hutchinson, *supra* n. 294, at 629.

Often, Title VII has been used to attack the under-compensation of women in sex-integrated occupations and workplaces, but success has been limited.³⁰⁸ In 2001, a group of women sued Wal-Mart under Title VII, alleging that it had “systematically denied promotion and equal pay to its female employees.”³⁰⁹ The women introduced evidence that, “while two[-]thirds of [Wal-Mart’s] employees were women, only one[-]third of managers and only [fifteen percent] of senior managers were women.”³¹⁰ They later introduced “an expert witness study, finding that female hourly workers earn up to \$0.37 less per hour than their male counterparts[, and] female managers earn nearly [five-thousand dollars] less than male managers in yearly salary.”³¹¹ Nine years later, however, the lawsuit remains unresolved.³¹²

Thus, employment laws acquiesce in not only the under-compensation of female-dominated occupations but also the under-compensation of female employees in all occupations. Even where Congress has explicitly prohibited the private cultivation of certain hierarchies and stereotypes, its prohibitions have met little success. While it would be inaccurate to say that we have not made any progress, it is reasonable to say that, if we are truly committed to democratic self-government, legal reform could be beneficial.

B. Suggested Reforms

Part III(B) suggests legal reforms to limit the private cultivation of hierarchy and ideological conformity. Part III(B)(1)

308. *EEOC*, 628 F. Supp. at 1264, is a classic example of Title VII litigation attacking the fact that women and men in the same general occupation and workplace earned different salaries.

309. Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 Conn. L. Rev. 1685, 1690 (2007) (discussing *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007)); see also *Women Be Wary of Wal-Mart*, <http://walmartwatch.com/img/documents/women-and-walmart.pdf>. (accessed July 5, 2010) (providing statistics, evidence, and commentary regarding Wal-Mart’s discrimination against women).

310. Lobel, *supra* n. 309, at 1690.

311. *Id.*

312. See e.g. Alexandria Sage, *Wal-Mart Sex Discrimination Case Back in Court*, Reuters, (Mar. 25, 2009), <http://www.reuters.com/article/topNews/idUSTRE52O0P820090325> (accessed July 5, 2010) (explaining that Wal-Mart is asking the Ninth Circuit Court of Appeals to reverse the lower court decision that gave the case class-action certification).

proposes that Congress make the labor market more democratic by requiring employers to flatten hierarchies and include employees in corporate governance. If we were to practice democracy on a daily basis in the labor market by debating on an equal footing with others whose opinions differ radically from our own, we would be more equipped to engage in democratic debate in the public forum. Part III(B)(2) proposes that Congress make the labor market less central to identity construction by diminishing the amount of time we spend in our workplaces. If we spent less time at work and more time in the public forum or other democratic institutions, we would develop identities more capable of democratic participation.

1. Make the Labor Market More Democratic

Democratizing the labor market by preventing employers from cultivating hierarchy and ideological homogeneity would help to democratize the public forum. As many scholars have recognized, “actual experience with democratic participation is what whets the appetite, and develops the capacity, for more.”³¹³ This Subpart suggests constitutional and statutory reforms to democratize the labor market.

The Constitution, at present, confers negative rights against state-imposed inequality and censorship, but confers no positive right to an egalitarian or ideologically diverse public forum.³¹⁴ If we are serious about democracy, the Equal Protection and Free Speech Clauses should be amended to confer such rights. As amended, the Constitution would not only prevent the government from imposing inequality and censorship, but would also obligate it to provide the conditions necessary for an egalitarian and ideologically diverse public forum. To fulfill this positive obligation, Congress might expand and strengthen existing employment laws through the means discussed below. If the public forum remained undemocratic after existing laws were altered,

313. Rothschild, *supra* n. 53, at 197 (citing Carol Pateman, *Participation and Democratic Theory* (Cambridge U. Press 1970)).

314. *See supra* pt. III(A) (explaining that by only protecting an employee against only a few select forms of discrimination, the laws allow other forms of discrimination to remain unregulated).

then citizens could charge the federal government with violating the Constitution.

Employment laws, at present, confer only negative rights against certain forms of privately imposed inequality and censorship.³¹⁵ To provide a democratic public forum, these laws must not only be expanded to cover a greater set of hierarchies and a greater range of censorship, but must also be strengthened to actually eliminate the hierarchies and censorship they currently cover. While it is not clear that the laws should be expanded to prohibit *all* hierarchies, it is clear that they should prohibit more than they do at present. While we might reasonably allow employers to institute hierarchies that do not impact democratic participation,³¹⁶ we might prohibit hierarchies that detract from such participation—for example, those based on ideology, behavior, personality, sexual orientation, marital status, or parental status. Also, existing laws should be expanded to cover more forms of censorship. They should prohibit employers from cultivating ideological conformity and mandate employee involvement in workplace governance. Employees, to the greatest extent possible, should be encouraged to develop and express their own viewpoints.

Employment laws, in addition to being expanded, should be strengthened to actually prohibit the hierarchies and ideologies they purport to prohibit—such as gender hierarchies and gender stereotypes. Strengthening employment laws will require either radical reinterpretation of existing laws or the passage of new, more forceful laws. The Equal Pay Act, for example, might be reinterpreted or amended to require equal pay for work that is qualitatively equal though substantively different. Then, employers would be prohibited from paying employees in male-dominated jobs more than employees in equally complex female-dominated jobs. Similarly, Title VII might be reinterpreted or amended to prevent employers from creating sex-segregated occupations and workplaces, imposing sex-based appearance regulations, and defending sex-based pay scales by showing that

315. *See supra* pt. III(A) (discussing the inadequacy of existing laws in guaranteeing an egalitarian and ideologically diverse public forum).

316. This would likely allow for only a small set of hierarchies. Those based on actual job performance might be allowed (so long as job performance was measured objectively, which would be difficult); those based on seniority would be questionable.

prevailing market rates for male-dominated jobs are higher than those for female-dominated jobs.

These reforms, if implemented, would prevent us from serving the labor market at the expense of the public forum. They would benefit both our employers and our democracy. Indeed, our employers would benefit from hiring and promoting based on actual merit rather than averages or stereotypes, and from being exposed to a broad array of suggestions for improvement. Our democracy would benefit from a citizenry accustomed to interacting as equals and engaging in independent thought. By creating an egalitarian and ideologically diverse labor market, such reforms would create an egalitarian and ideologically diverse public forum.

2. Make the Labor Market Less Central to Identity

While democratizing the labor market would be an effective means of promoting democracy, it would be arduous and politically difficult. However, Congress might diminish the labor market's negative impacts through the alternative means of decreasing the amount of time Americans spend in the labor market.³¹⁷ The less time we spend in the labor market, the less likely labor-market demands will govern our choices regarding identity construction.³¹⁸ For example, Congress might limit the number of hours that can be spent in the labor market or, to avoid any potential infringement on autonomy, create incentives for individuals to participate in democratic activities outside of the labor market. By encouraging employees to limit their time in the labor market or increase their time in more democratic institutions, Congress, in effect, could diminish the influence of the labor market's hierarchies and ideologies.

317. For one proposal to lessen the amount of time spent in the labor market, see Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* 131 (Judith Fudge & Rosemary Owen, eds., Hart Publishing 2006) (arguing that reducing the hours in a typical workweek will allow improvements in family life and other non-work-related goals).

318. This, of course, presumes that the other institutions individuals interact with will be democratic. If time in the labor market were replaced by time in an authoritarian family, the problem would not be resolved.

Only when the labor market's hierarchy and ideological homogeneity have been reduced will we be able to fulfill our commitment to democracy. When gender hierarchies have been eradicated from the labor market, we will be able to interact as equals in the public forum. When gender stereotypes have been eradicated from the labor market, we will be able to imagine (and, thus, debate) radically different gender ideologies—for example, the abolition of sex categories. Unless and until the government enables us to create diverse identities and ideologies in the private sphere, such identities and ideologies will not be manifest in the public sphere.

CONCLUSION

Labor-market hierarchies and ideologies prevent us from achieving an egalitarian and ideologically diverse public forum. Labor-market gender-hierarchies and stereotypes exemplify this problem, because their reproduction in the public forum clearly prevents us from interacting as equals and imagining radically different gender ideologies. Both constitutional and statutory reform could limit the labor market's negative impacts. The Constitution could be reformed by obligating the state to create the conditions necessary for a democratic public forum. Employment statutes could be reformed by preventing employers from imposing sex-based segregation, appearance regulations, and pay scales. Other statutes could encourage Americans to spend less time in the labor market and more time in democratic institutions. At its most fundamental level, this Article argues that the law should not serve the economy at the expense of democracy. Instead, it should foster the equality and diversity necessary for true democracy.