

FROM PIN MONEY WORKERS TO ESSENTIAL WORKERS: Lessons About Women’s Employment and the COVID-19 Pandemic From the Great Depression and the Great Recession

Patrice Ruane*

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INTRODUCTION

People understand complex events like economic recessions¹ partly through narrative and storytelling.² The theory of narrative economics argues that “contagious popular stories that spread through word of mouth, the news media, and social media” not only help people understand economic events, but also shape the

1. The National Bureau of Economic Research (NBER) defines a recession as “a significant decline in economic activity spread across the economy, normally visible in production, employment, and other indicators. A recession begins when the economy reaches a peak of economic activity and ends when the economy reaches its trough” and begins to grow. *Business Cycle Dating Committee Announcement June 8, 2020*, NAT’L BUREAU ECON. RSCH. (June 8, 2020), <https://www.nber.org/news/business-cycle-dating-committee-announcement-june-8-2020> [<https://perma.cc/L4B7-EFJW>]. The NBER does not distinguish between a depression and a recession, although it notes that the word depression is “often used to refer to a particularly severe period of economic weakness.” *Business Cycle Dating Procedure: Frequently Asked Questions*, NAT’L BUREAU ECON. RSCH. (July 19, 2021), <https://www.nber.org/business-cycle-dating-procedure-frequently-asked-questions#:~:text=The%20term%20depression%20is%20often,severe%20period%20of%20economic%20weakness.&text=The%20NBER%20determined%20that%20a,a%20trough%20in%20June%201938> [<https://perma.cc/EJH7-97TT>].

2. See Annie Neimand, *How to Tell Stories About Complex Issues*, STAN. SOC. INNOVATION REV. (May 7, 2018), https://ssir.org/articles/entry/how_to_tell_stories_about_complex_issues [<https://perma.cc/U5PU-NEWU>] (“Stories are the most powerful tool we have for increasing understanding and building engagement with complex issues.”).

social reactions and policy responses to those economic events.³ To contextualize the downturn the U.S. economy experienced in 2020 following the beginning of the global COVID-19 pandemic,⁴ economists advanced comparisons to the two most significant economic downturns in modern American history: the Great Depression of the 1930s and the Great Recession beginning in 2007.⁵

The story of working women⁶ is intertwined into the larger narratives of the Great Depression, the Great Recession, and the COVID-19 pandemic recession,⁷ yet the popular narrative of the average working woman has often failed to match the reality. Even though nearly all working women during the Great Depression supported themselves or helped support their families,⁸ the

3. ROBERT J. SHILLER, NARRATIVE ECONOMICS: HOW STORIES GO VIRAL AND DRIVE MAJOR ECONOMIC EVENTS 3 (2020).

4. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [<https://perma.cc/GP4L-MRAQ>]; Matt Egan, *It's Official: The Recession Began in February*, CNN: CNN BUS. (June 9, 2020, 4:42 PM), <https://www.cnn.com/2020/06/08/economy/recession-economy-coronavirus-nber/index.html> [<https://perma.cc/8BZP-X535>].

5. The comparison was apt; during the pandemic recession, the U.S. economy “experienced its greatest job losses since the Great Depression,” exceeding the job losses associated with the Great Recession of 2009. WENDY EDELBERG & JAY SHAMBAUGH, BROOKINGS INST.: HAMILTON PROJECT, HOW THE PANDEMIC IS CHANGING THE ECONOMY 2 (July 2020), https://www.brookings.edu/wp-content/uploads/2020/07/Edelberg_Shambaugh_LO_FINAL.pdf [<https://perma.cc/2VEK-9AQU>] (finding that the combined effects of the public health crisis, the economic shock triggered by the pandemic itself, and individual, business, and government responses “provoked the sharpest and fastest economic downturn in U.S. history”).

6. Because this Article is engaged in a critical analysis of two historical recessions which reinforced traditional and binary gender roles, this Article focuses on a binary concept of gender. Data collection practices have changed within the hundred-year period discussed in this Article (see *infra* note 30) and it is unclear how researchers classified transgender women, particularly with respect to the older datasets. Nevertheless, when I use the words “woman,” “women,” or “female” throughout this Article, I include all women, and the words “man,” “men,” or “male” are intended to be similarly inclusive.

7. I use “COVID-19 pandemic recession” or “pandemic recession” broadly to refer to the economic downturn caused not only by COVID-19, but also by political and societal factors secondary to the actual disease. These phrases should not be read narrowly to refer only to the official period of economic recession, which lasted only from March to April 2020. See, e.g., Ben Casselman, *Officially, the Pandemic Recession Lasted Only Two Months*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/19/business/economy/pandemic-recession-over-coronavirus.html> [<https://perma.cc/QC27-GLZG>].

8. JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE

phrase “pin money worker,” referring to a wife who was supported by her husband but opted to work to buy luxuries, became shorthand for a working woman.⁹ And although men’s employment during the Great Recession hit its lowest level over a year before women’s employment did, leaving women stuck in the recession long after men were experiencing the recovery,¹⁰ conservative writers framed the job losses as a gender battle with women as the winners and men as the losers.¹¹ During the pandemic recession, news stories and opinion writers portrayed the average working woman as someone with children, a job that could be done remotely, and a partner earning enough household income that the woman could afford to stop working and take care of her children full-time.¹² That narrative did not reflect the reality that women were overrepresented in lower-paying jobs that had to be performed in person¹³ and were less likely than men to have jobs that could be done remotely.¹⁴

The pandemic recession diverged from the pattern, seen in both earlier recessions, of an initial wave of job losses borne

TO WOMEN’S LABOR LEGISLATION 21 (1978); Walter Galenson & Robert S. Smith, *The United States, in LABOR IN THE TWENTIETH CENTURY* 11, 16 (John T. Dunlop & Walter Galenson eds., 1978).

9. Erin Blakemore, *Why Many Married Women Were Banned From Working During the Great Depression*, HISTORY (Nov. 8, 2021), <https://www.history.com/news/great-depression-married-women-employment> [https://perma.cc/U3XV-XFSR].

10. Men’s unemployment peaked in October 2009, shortly after the official end of the recession, but women’s unemployment did not peak until more than a year later, in November 2010. Evan Cunningham, *Great Recession, Great Recovery? Trends From the Current Population Survey*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (Apr. 2018), <https://www.bls.gov/opub/mlr/2018/article/great-recession-great-recovery.htm> [https://perma.cc/FT67-M38K]; Bradley Blackburn, *Women Lag Behind Men in Economic Recovery*, ABC NEWS (Mar. 21, 2011, 9:08 AM), <https://abcnews.go.com/US/unemployment-recession-men-return-work-women-left-economic/story?id=13185406> [https://perma.cc/RDR5-4G5R].

11. See, e.g., Doug McKelway, “*Mancession*” Threatens American Dream, FOX NEWS (Dec. 9, 2010), <https://web.archive.org/web/20101211120531/http://politics.blogs.foxnews.com/2010/12/09/mancession-threatens-american-dream> [https://perma.cc/3A5B-PZ3F].

12. See *infra* Subpart III.D.

13. Sarah Chaney & Lauren Weber, *Coronavirus Employment Shock Hits Women Harder Than Men*, WALL ST. J. (May 15, 2020, 5:30 AM), <https://www.wsj.com/articles/coronavirus-employment-shock-hits-women-harder-than-men-11589535002> [https://perma.cc/D4C4-UYQ6].

14. Alexandre Mas & Amanda Pallais, *Alternative Work Arrangements* 25 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26605, 2020), https://www.nber.org/system/files/working_papers/w26605/w26605.pdf [https://perma.cc/6RTE-VKVQ].

predominantly by men.¹⁵ Women's jobs were more negatively impacted than men's jobs in the first wave of pandemic job losses¹⁶ and those job losses came from industries which are typically insulated from loss during recessions.¹⁷ The pandemic recession "eras[ed] decades of progress and intensif[ed] the disparities between men and women across all sectors and demographics."¹⁸ Vice President Kamala Harris called the loss of women's jobs a "national emergency" and said "[i]n one year, the pandemic has put decades of the progress we have collectively made for women workers at risk."¹⁹

This Article argues that inaccurate ideas about women and work during economic downturns, including misconceptions about which women work and how they work, lead to inadequate policy responses and ultimately hurt working women. New Deal-era federal women's aid programs, designed around an artificial picture of the average working woman, did not provide the same robust level of jobs support that men's programs provided.²⁰ Similarly, the major federal stimulus package during the Great Recession invested in male-majority industries²¹ but failed to invest in

15. CONG. RSCH. SERV., R40655, *THE LABOR MARKET DURING THE GREAT DEPRESSION AND THE CURRENT RECESSION* 2–5 (2009) [hereinafter CRS, *THE LABOR MARKET*]; Howard J. Wall, *The "Man-Cession" of 2008–09*, REG'L ECONOMIST, Oct. 2009, at 5, <https://files.stlouisfed.org/files/htdocs/publications/regional/09/10/mancession.pdf> [<https://perma.cc/YFT9-9H62>].

16. In April 2020, women's unemployment rate was 16.2 percent, compared to 13.5 percent for men. *Employment Situation News Release*, U.S. BUREAU LAB. STAT. (May 8, 2020, 8:30 AM), https://www.bls.gov/news.release/archives/empisit_05082020.htm [<https://perma.cc/29PP-5AU8>].

17. Didem Tüzemen & Thao Tran, *Women Take a Bigger Hit in the First Wave of Job Losses Due to COVID-19*, FED. RSRV. BANK KANSAS CITY, Apr. 16, 2020, at 2.

18. *THE BURDEN OF THE COVID-19 PANDEMIC ON WOMEN IN THE WORKFORCE*, OFF. OF CONGRESSWOMAN KATIE PORTER 4 (Dec. 8, 2020), https://porter.house.gov/uploadedfiles/final_-_women_in_the_workforce.pdf [<https://perma.cc/A7Y2-Y49T>].

19. Katie Rogers, *2.5 Million Women Left the Work Force During the Pandemic. Harris Sees a 'National Emergency.'* N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/02/18/us/politics/women-pandemic-harris.html> [<https://perma.cc/2ENJ-RV5Q>] (quoting Kamala Harris); see also *The White House, Vice President Harris Holds Virtual Roundtable With Members of Congress and Advocacy Groups*, YOUTUBE (Feb. 18, 2021), <https://www.youtube.com/watch?v=wRd5g9IILWM> [<https://perma.cc/8APV-Y29Q>].

20. See *infra* Subpart I.C.

21. Throughout this Article, "male-majority industries" refers to industries in which the majority of jobs are held by men and "female-majority industries" refers to industries in which the majority of jobs are held by women. The terms do not suggest leadership of any industry; even in 2021, women do not lead many of the industries in which they are overrepresented.

industries dependent upon women's labor, in part because of the misconception that working women were already "winning" the jobs race.²² Framing the average working woman during the pandemic recession as a remote worker in a two-income household has the potential to steer federal policy away from avenues that would help the majority of women workers who are not remote workers in two-income households.²³ Recovery efforts during the Great Depression and the Great Recession were gender-informed and effective, but biased toward men. These recovery efforts were concentrated in male-majority industries and consequently led to men's employment recovering long before women's employment did. Because pandemic-related job losses have been so unevenly borne by women, gender-informed recovery policies are not only justifiable, but necessary to achieve equitable recovery.

This Article also questions the speculation, articulated in an influential paper by a group of economists,²⁴ that the COVID-19 pandemic will accelerate changing social norms and lead to greater gender parity by increasing the number of people who are accustomed to working remotely and driving men to take on additional childcare responsibilities. The conditions following the Great Depression and the Great Recession were more conducive to changing gender norms and expectations because both events disrupted traditional²⁵ male-breadwinner models of the family and resulted in large numbers of families in which the woman was employed and the man unemployed. But neither resulted in lasting improvements in gender equity in the home or at work. Both events were followed by a reactionary impulse to return to a traditionally gendered view of the organization of labor. The pandemic recession does not present the opportunity to disrupt gender norms by creating more households headed by women breadwinners, yet

22. See *infra* Subpart II.C.

23. See *infra* Subparts III.B and III.C.

24. Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality* 2-3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26947, 2020); see also Brianna Wiest, *Women at the Frontlines of COVID-19 Might Be Starting the Gender Role Reversal of the Century*, FORBES (Apr. 17, 2020, 1:45 PM), <https://www.forbes.com/sites/briannawiest/2020/04/17/women-at-the-frontlines-of-covid-19-might-be-starting-the-gender-role-reversal-of-the-century/?sh=7b795cfb3745> [<https://perma.cc/X7DK-TEZN>].

25. The use of "traditional" in terms like "traditional family models" or "traditionally gendered norms" is intended as a descriptive, not normative, statement referring to hierarchical family and social arrangements that situate a man as the breadwinner or leader superior to other group members.

the risk of a conservative reversion to more traditionally gendered norms is still present.²⁶

Because this Article takes a survey approach and examines aggregate trends in women's employment over time, an in-depth examination of how race, economic status, disability status, educational attainment, sexual orientation, and other identity markers continue to shape women's employment is beyond the scope of this Article.²⁷ It is unquestionable that the pandemic recession has disproportionately impacted Latinx,²⁸ Indigenous, and Black women.²⁹

26. See *infra* Subparts III.C and III.D.

27. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 588 (1990) (stating that “[t]he notion that there is a monolithic ‘women’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation is one I refer to . . . as ‘gender essentialism’” and arguing that “[j]ust as law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke, including black women. The first step toward avoiding this danger is to give up the dream of gender essentialism.”).

28. Throughout, I have used “Latinx” as an inclusive adjective except when a source reported data using a narrower group definition like “Hispanic.” See, e.g., *Latinx*, WOMEN’S MEDIA CTR.: UNSPINNING THE SPIN, <https://womensmediacenter.com/unspinning-the-spin/latinx> [<https://perma.cc/8A73-FV5P>] (last visited Dec. 18, 2021); *Usage and Grammar: Is It Okay to Use “Latinx” Instead of “Latino” or “Latina”?*, CHI. MANUAL STYLE ONLINE, <https://www.chicagomanualofstyle.org/qanda/data/faq/topics/Usage/faq0371.html> [<https://perma.cc/7XP2-7JC5>] (last visited Dec. 27, 2021). See also *Interview with Tom Perez*, 24 HARV. LATINX L. REV. 1, 6–7 (2021) (using the terms “Latinx women” and “Latinx men”); Michele Goodwin, *Women on the Front Lines*, 106 CORNELL L. REV. 851, 916–17 (2021) (same).

29. See, e.g., ANUSHKA KALYANPUR, DANIELLE THOMAS, DIANA WU, LAURA TASHJIAN, MAY D. SIFUENTES & RACHEL HALL, *RAPID GENDER ANALYSIS: COVID-19 IN THE UNITED STATES* 5 (2020), <https://www.care.org/wp-content/uploads/2020/07/7.8.2020-USA-RGA.pdf> [<https://perma.cc/5FS7-5PKH>] (“Essential workers, who are disproportionately BIPOC women, hold more dangerous and tenuous positions, that threaten their—as well as their households’—economic security and health in compounding ways.”); Marguerite Ward & Tyler Sonnemaker, *All the Visceral Ways Black Women in America Have Been Hurt by the Coronavirus Unemployment Crisis*, BUS. INSIDER (June 1, 2020, 10:25 AM), <https://www.businessinsider.com/black-women-hurt-by-coronavirus-pandemic-survey-lean-in-data-2020-4> [<https://perma.cc/YL5U-5UEE>] (“[B]lack women are twice as likely as white men to say that they’d either been laid off, furloughed, or had their hours or pay reduced because of the coronavirus pandemic. Some 54% of [B]lack women reported facing economic challenges like getting laid off or having their pay docked, compared to 44% of [B]lack men, 31% of white women, and 27% of white men.”); Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECON. POL’Y INST. (June 1, 2020), <https://www.epi.org/publication/>

Additional scholarship and investigation into the ways in which the pandemic recession has negatively impacted these women is necessary.

Part I presents the picture of the American workforce prior to the Great Depression, examines the resulting changes to the employment landscape, outlines select federal recovery policies, and discusses the return to social conservatism and traditional gender norms that followed the end of the Great Depression. Part II follows a similar path through the Great Recession, discusses the disparate impacts to women's and men's employment created by the federal response to the recession, and argues that framing the Great Recession as a gender battle contributed to the negative impact women suffered during the recovery. Part III establishes the baseline of American employment prior to the pandemic recession and examines the impacts of the recession on women's and men's employment, including the effect of childcare responsibilities on women. It argues that the pandemic recession uniquely and unnecessarily disadvantaged women and suggests that the inaccurate picture of the average working woman during the pandemic recession poses risks to actual working women because it steers future policy and social responses in the wrong direction.

I. THE GREAT DEPRESSION

The Great Depression of the 1930s followed a long period in which American ideas about work, including who worked, in which jobs or industries, for how many hours, and for how much pay, were rapidly changing. The myth of the pin money worker

black-workers-covid [<https://perma.cc/56LE-EJWY>] (finding that Black women faced the largest job losses and Latinx women had the highest unemployment rate as of April 2020); Nate Rattner & Thomas Franck, *Black and Hispanic Women Aren't Sharing in the Job Market Recovery*, CNBC (Mar. 5, 2021, 2:08 PM), <https://www.cnbc.com/2021/03/05/black-and-hispanic-women-arent-sharing-in-the-job-market-recovery.html> [<https://perma.cc/TC72-H95Q>] (“Black and Hispanic women, in particular, have suffered some of the steepest spikes in unemployment and largest drops in labor force participation rate since the pandemic began.”); *see also infra* notes 258 and 278.

As of November 2021, I was not able to locate data illustrating specific negative impacts of the pandemic recession on transgender women; the data that is available shows that transgender people as a group have suffered greater negative employment effects than cisgender people but does not differentiate between transgender women and transgender men. *See generally* HUM. RTS. CAMPAIGN FOUND., *THE ECONOMIC IMPACT OF COVID-19 INTENSIFIES FOR TRANSGENDER AND LGBT COMMUNITIES OF COLOR 2*, https://assets2.hrc.org/files/assets/resources/COVID19-EconImpact-Trans-POC-061520.pdf?_ga=2.106508291.143513233.1640635425-1108544078.1640635425 [<https://perma.cc/JY5U-EDRP>] (last visited Feb. 27, 2022).

captured the idea that some percentage of working women did not work out of economic necessity, but rather out of boredom or the desire to buy extra luxuries. This inaccurate and misleading myth, combined with social anxiety over changing gender norms fueled by the loss of jobs held by men during the Great Depression and the entrance of more women into the external paid labor force to compensate for jobs lost by men within their family units, led to effective but gender-specific recovery policies that privileged helping men recover jobs over helping the women who also lost jobs. It also led to a return to social conservatism after the recovery that reinforced traditional ideas about gendered roles within the family.

A. *Characteristics of the Women's Workforce Before the Great Depression*³⁰

The half century that preceded the Great Depression was marked by increased urbanization and industrialization.³¹ Both women and men moved from home-based work to the external paid labor force,³² although women participated in work outside the home less frequently than men did and were not paid as much.³³

30. Granular unemployment data for the early half of the twentieth century are not available to the extent that they are for the Great Recession and the pandemic recession, *see infra* Subparts II.B and III.B. The federal government did not begin to collect monthly labor force surveys until March 1940, so the primary available data sources are the decennial censuses from 1900 to 1940, a 1937 unemployment census conducted under Pub. Law 409, and various unemployment studies conducted at the state or city level. Further, the way the Census Bureau classified “unemployed” workers shifted between the 1930 and 1940 census. *See* CRS, *THE LABOR MARKET*, *supra* note 15, at 1–2. I have attempted to generalize the data across time and provide an accurate picture of employment trends but urge caution when comparing employment statistics from the early 1900s to the 1930s and 1940s, and particularly in comparing these statistics to the Bureau of Labor Statistics (BLS) data used in later Parts of this Article.

31. Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 *BERKELEY J. EMP. & LAB. L.* 119, 126 (2012).

32. From 1880 to 1930, the number of women working in the paid labor force more than quadrupled from 2.6 million to 10.8 million. *Id.* Data from the 1910 and 1920 censuses showed that women's occupations were shifting away from in-home jobs (such as servants, dressmakers, and laundresses) and women increasingly occupied commercial-focused jobs (such as clerks, saleswomen, cashiers, and stenographers). JOSEPH A. HILL, *WOMEN IN GAINFUL OCCUPATIONS: 1870 TO 1920* 35 (1929).

33. From 1900 to 1930, approximately 20 percent of women and 85 percent of men participated in the paid labor force. Galenson & Smith, *supra* note 8, at 12. Between 1900 and 1930, women's overall participation rose slightly, from 20.4 percent to 24.3 percent, whereas men's participation fell slightly, from 87.3 percent to 84.1 percent. *Id.*

Nevertheless, single, divorced, and widowed women were more likely than married women to participate in the external paid labor force.³⁴

The American workforce was categorized by extremely high levels of occupational segregation, the phenomenon in which jobs are de facto segregated by gender. In occupations and industries in which women were employed, they commonly held the vast majority of available jobs³⁵ but were significantly underrepresented in many other whole job categories or industries.³⁶ From 1910 to 1940, nearly 90 percent of all working women worked in only ten different occupations, which Alice Kessler-Harris suggests “contributed to the ability to assign low wages and poor status to [those] jobs.”³⁷ In 1920, the U.S. Census Bureau found that women worked in distinct industry sectors from men:

No serious significance should be attached to the fact that in successive censuses, a certain small number of women have been reported as carpenters, masons, blacksmiths, plumbers, and even as locomotive engineers. These are sporadic cases, and many of them probably represent errors. . . . [T]here is no reason to suppose they indicate even the small beginning of a general movement of women into [traditionally male] occupations³⁸

1. The Image of Working Women

During the early twentieth century, the movement of more women, particularly middle-class white women, into the external paid labor force led to “anxiety over changing sexual and gender norms, the stability of the white, middle-class family, the future of motherhood, and gender roles in the family.”³⁹ In the nineteenth and early twentieth centuries, the commonly accepted view of the white

34. In 1920, only 9 percent of married women were employed outside the home, whereas 49 percent of single, widowed, and divorced women were employed. HILL, *supra* note 32, at 75. The disaggregated data cuts against the popular conception of working women as married women working to afford luxuries, discussed *infra* Subpart I.A.1, and instead paints a picture of women providing necessary support to their marital or parental families.

35. For example, over 90 percent of dressmakers, seamstresses, laundresses, nurses, milliners, telephone operators, stenographers, typists, and housekeepers were women. *Id.* at 56.

36. The U.S. Census Bureau reported that women held at least half the available jobs in less than 10 percent of the occupational categories tracked. *Id.* at 47 tbl.3.

37. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 249 (1982).

38. HILL, *supra* note 32, at 46.

39. Barzilai, *supra* note 31, at 121.

American middle-class family was that men and women occupied separate spheres of activity, with men responsible for market-based activities and women responsible for home-based production.⁴⁰ The societal archetype of the family was built on fixed gender roles and a paid commercial work versus unpaid home-based labor dichotomy. Race and class influenced this social narrative and the ways in which change against this idealized baseline were interpreted. Poor women and women of color had worked outside their own homes for hundreds of years,⁴¹ so concern about changing family and gender norms necessarily centered on white middle-class women and how their exodus into the workplace could destabilize the traditional family. Social conservatives linked the idea of a working wife to consumerism and the “insatiable desire for material goods,” echoing the linkage between working women and luxury spending underlying the pin money worker myth, in contrast to the virtues of thrift and responsibility exhibited by families that lived within the husband’s sole income.⁴²

Even the progressive labor movement endorsed the traditional, gender-normative family structure. The American Federation of Labor (AFL) promoted the idea of a “family wage,” which encoded the idea of a man as the breadwinner when it was described as “sufficient to maintain [workers] and those dependent upon them in a manner consistent with their responsibilities as husbands, fathers, men and citizens.”⁴³ The AFL helped propagate the idea that women worked to buy luxuries instead of to provide family support, and blamed working women for taking men’s jobs and depressing wages for working men: “Every woman employed displaces a man and adds one more to the idle contingent that are fixing wages at

40. *See id.* at 126 & n.34.

41. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 156 (1989) (“Black women have traditionally worked outside the home in numbers far exceeding the labor participation rate of white women.”).

42. LOIS SCHARF, *TO WORK AND TO WED: FEMALE EMPLOYMENT, FEMINISM, AND THE GREAT DEPRESSION* 40–41 (1980).

43. Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, in *WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN’S LABOR HISTORY* 1, 8 (Ruth Milkman ed., 2013). Contemporary critics of the “family wage” concept often oversimplify the issue and discount the significant economic contributions of wives responsible for home-based production activities such as preserving food or producing clothing. Analysis of compensation of women via a family wage in an economic model that requires the home-based labor of an adult on a full-time basis is beyond the scope of this Article.

the lowest limit.”⁴⁴ The narrative that women were taking men’s jobs was so prevalent that the U.S. Census Bureau conceded the point and offered an alternative framing more beneficial to men:

The occupations in which the percentage of women is increasing are sometimes referred to as those in which women are displacing or crowding out men. But, looking at the matter from another point of view, it might be said with equal validity that they are occupations in which women are releasing men for employment in other pursuits Where the percentage of women is increasing it does not necessarily mean that men are leaving that occupation or that they are being forced out of it in order to give place to women⁴⁵

A U.S. Senate report, however, suggested that commercialization and industrialization of production tasks that had previously been performed by women in the home drove women to seek jobs in the external workforce.⁴⁶ The report characterized this as “a process of substitution . . . by which men have been gradually taking the leading part in industries formerly carried on chiefly in the home and considered distinctively feminine,” and gave the example of garment making and knitting moving from home-based to commercial activities.⁴⁷ Although the over-simplified popular narrative was focused on women entering the external workforce and displacing men, in reality more women entered the external paid labor force and groups of workers shifted to take new jobs in different industries in response to complex forces including systemic industrialization, lack of labor protections, and downward pressure on wages.⁴⁸

44. MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920*, 131–32 (2003). Although the American Federation of Labor (AFL) favored equal pay for women, this assessment blamed women workers for the effect on wages instead of blaming the employers who regularly paid women less than men. *Id.* at 132.

45. HILL, *supra* note 32, at 59.

46. ROYAL MEEKER, *U.S. DEP’T OF LAB., SUMMARY OF THE REPORT ON CONDITION OF WOMAN AND CHILD WAGE EARNERS IN THE UNITED STATES 28* (1915).

47. *Id.* (“As the women have been more or less dispossessed in their specialties they have either gone into work formerly considered men’s, such as the printing trade, or entered newly established industries which had not been definitely taken over by either sex. In both cases they are usually found doing the least skilled and poorest paid work.”).

48. *See id.* at 28–29 (“The individual woman entered the industrial world under the pressure of necessity. The employer invited their entrance en masse because they were cheap, and above all because they were docile and easily managed. They were cheap and easily managed partly because they were in the main young, partly because they were unorganized, and partly

The uncertainty over the role of working women could be seen in the ways working women were characterized as either poor women who had to work or richer women who chose to work. Even Frances Perkins, while advocating for a living wage for women as the New York State Commissioner of Labor, set women who economically needed to work and women who wanted to work in opposition to each other:

Until we have every woman in this community earning a living wage—and by that I mean not less than \$20 a week for the City of New York—until we have a firmly established habit of short working hours and some kind of old-age security, I am not willing to encourage those who are under no economic necessities to compete with their charm and education, their superior advantages, against the working girl who has only her two hands.⁴⁹

The idea that more advantaged women entering the workforce would endanger jobs held by less advantaged women implies that there were just as many wealthy as poor women working. But in the years prior to the Great Depression there was no reason to create artificial competition between women with and without the “economic necessit[y]”⁵⁰ to work because the latter group was so small. Working women started working as teenagers and could expect to keep working throughout their lives.⁵¹ Most working women either supported themselves while they lived alone, or supported their marital or parental families.⁵² Working women were far more likely to be single, divorced, or widowed than they were to be married.⁵³ Even so, the competing narrative persisted

because, as they expected to stay in the industrial world only a short time, they considered it better to accept conditions as they found them than to fight for improvements.”).

49. *Should Women Earn Pin Money?*, MACLEAN'S MAG. (Apr. 1, 1930), <https://archive.macleans.ca/issue/19300401#!&pid=60> [<https://perma.cc/6RZX-3K9C>] (quoting Frances Perkins).

50. *Id.*

51. BAER, *supra* note 8, at 21. Between 1870 and 1920, 25 to 30 percent of women workers were in their teens or early twenties, 40 percent were between their mid-twenties and mid-forties, and about 20 percent were between their mid-forties and mid-sixties. *Id.* at 22. Baer argued that those statistics do not support the idea that women worked only until marriage because they “do not show the pattern we have come to expect in recent years: a decrease in the proportion of women employed during the most common childbearing years followed by an increase after, say, forty.” *Id.*

52. *Id.* at 21 (“The Senate report on women and children in industry showed that nearly all the store and factory workers studied either lived alone and had to support themselves, or with their families (either parental or marital) and had to help support them.”); MEEKER, *supra* note 46, at 19–21.

53. Galenson & Smith, *supra* note 8, at 16. In 1930, 55.2 percent of

that wealthy women were invading the labor force and taking jobs that should go to needier women or men.⁵⁴

2. Wage and Hour Legislation for Women Before the Great Depression

In the years leading up to the Great Depression, progressive labor reformers fighting to establish protective minimum wage and maximum hour legislation⁵⁵ found more success in winning protections for women than for men.⁵⁶ Labor reformers hoped that gains in protections and rights for working women would later open opportunities for protective legislation covering working men.⁵⁷ As these laws were challenged, the jurisprudence was shaped by two competing legal philosophies: rejection of state police powers when exercised broadly to protect all workers, and acceptance of state police powers when invoked more narrowly for the physical protection of women workers.⁵⁸ The effect was that working women and men entered the Great Depression subject to different wage and hour protections, which reinforced the idea that women's jobs were not of equal societal importance to men's jobs.

In 1905's *Lochner v. New York*,⁵⁹ the U.S. Supreme Court struck down a maximum hours law protecting bakers as unconstitutional state interference in the worker's right to sell their own

working women were single, 34.4 percent were widowed or divorced, and only 11.7 percent were married. *Id.*

54. See, e.g., *Should Women Earn Pin Money?*, *supra* note 49 (quoting the *N.Y. Herald Tribune*) (“‘The pin-money worker’ has been a thorn in the flesh of laborites ever since the first modern-minded daughter discovered that it was more interesting to earn her own money than to spend [her] father’s.”).

55. By 1921, forty-six states had passed daily and weekly maximum working hour laws applying almost exclusively to women. Claudia Goldin, *Maximum Hours Legislation and Female Employment: A Reassessment*, 96 J. POL. ECON. 189, 189–90 (1988). Laws in Mississippi and Oregon also covered men, and the law in Georgia covered all textile workers. *Id.* at 190 n.1. Other states tried to pass more general maximum hours legislation but were stopped by state supreme courts. *Id.*

56. Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 LAW & HIST. REV. 275, 295 (2013).

57. JOSEPHINE GOLDMARK, *FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY* 283 (1912) (“Shortening the workday is something that legislation can effect for women and children today, for men doubtless in the future.”).

58. See generally Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869–1895*, 84 MICH. L. REV. 1518 (1986); K.R. Willoughby, *Mothering Labor: Differences as a Device Towards Protective Legislation for Men, 1830–1938*, 10 J.L. & POL. 445, 485 (1994).

59. 198 U.S. 45 (1905).

labor and the employer's right to buy any amount of it.⁶⁰ In *Lochner*, the Court rejected the link between protective legislation and worker health, finding "no reasonable foundation for holding [the maximum hour law] to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals."⁶¹ Although *Lochner* did not distinguish between women and men, decisions immediately after *Lochner* applied its reasoning to laws specifically protecting women. In 1907, New York's highest state court struck down a law that prohibited women from working at night by framing the issue as being about women's right to sell their labor.⁶² In its decision, the court couched the law as discriminatory and emphasized women's right to work as many hours as men: "[A]n adult [woman] . . . is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases, and *as long as she pleases*, within the general limits operative on all persons alike."⁶³

Very shortly after *Lochner*, however, the Court refined its analysis to distinguish working women from working men. In 1908, the Court's decision in *Muller v. Oregon*⁶⁴ articulated a competing concern: the protection of women's health as a broad public health issue. In upholding a ten hour per day maximum hours law for women,⁶⁵ the Court focused on protecting "healthy mothers [who] are essential to vigorous offspring" and found that "the physical well-being of woman [sic] becomes an object of public interest

60. The Court ignored the power differential between the employer and the worker, setting the two on equal footing and interpreting the law as "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts." *Id.* at 61.

61. *Id.* at 58.

62. *People v. Williams*, 81 N.E. 778 (N.Y. 1907). The challenged law prohibited women and minors from working between 9 p.m. and 6 a.m., and over ten hours per day or sixty hours per week. *Id.* at 779.

63. *Id.* at 780 (emphasis added). In a 1923 case invalidating a Washington, D.C. law establishing a minimum wage law for women, the Court again framed the question in terms of freedom to contract: "[W]e cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 553 (1923).

64. 208 U.S. 412 (1908).

65. *Id.* at 416. Labor reformers viewed the underlying law as "an 'opening wedge,' leading, in time, to coverage of all workers." Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 360 (2008).

and care in order to preserve the strength and vigor of the race.”⁶⁶ Both Carol Sanger and Gillian Thomas emphasize that “race” in the opinion refers to whiteness, and highlight that protective labor legislation and prior Court decisions were constructed to protect the jobs more often performed by white women and to exclude jobs most often performed by women of color, including agricultural and domestic work.⁶⁷ The Court called upon the mythos of republican motherhood⁶⁸ and invoked romantic paternalism⁶⁹ when it couched white women’s value to society in terms of childbearing and prioritized white women’s health as *potential mothers* over the individual Lochnerian right to contract ascribed to men.

66. *Muller*, 208 U.S. at 421.

67. Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 468 (1996) (“‘Race’ in this instance referred to . . . very white people. Accordingly, legislative solicitude did not extend to agricultural and domestic work, both the most arduous forms of labor and those most often performed by immigrant and minority women.”); Gillian Thomas, *Feminist Judgments and Women’s Rights at Work*, 94 NOTRE DAME L. REV. ONLINE 12, 13 n.7 (2018) (“Of course, it is plain to which race the Court was referring; the law’s centuries-long indifference to the toll of the brutal labor extracted from women of color speaks for itself.”); see also Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 485 (1996) (“[T]he argument that society should protect the reproductive health of (mostly white) women who worked in paid labor was not ideologically repugnant to the relatively wealthy and propertied white justices of the Muller Court in 1908. . . . Poor white women and [Black] women did not deserve that solicitude.”); KATIE L. GIBSON, RUTH BADER GINSBURG’S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW 24 (2018) (“Although the court forwarded its reasoning through the discursive scripts of abstraction and universality, Justice Brewer’s ‘mothers of the race’ rhetoric narrowly signified *white* women. . . . *Muller v. Oregon* demonstrates how the court’s exaltation of motherhood—communicated through a universalizing rhetoric of abstraction—intersected with the logics of whiteness, heteronormativity, and economic privilege to advance a singular and exclusionary understanding of woman-as-mother in American law.”).

68. Linda Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 AM. Q. 187 (1976); S. Jay Kleinberg, *Widows’ Welfare in the Great Depression*, in THE ROOSEVELT YEARS: NEW PERSPECTIVES ON AMERICAN HISTORY, 1933–1945, 72, 72 (Robert A. Garson & Stuart S. Kidd eds., 1999).

69. Pamela J. Smith, *Part I—Romantic Paternalism—The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER, RACE & JUST. 107, 124 (1999) (“Romantic paternalism undergirded all of these restrictions as [w]hite women’s economic lives took secondary priority to [w]hite women’s primary roles as [w]hite wives and [w]hite mothers. . . . This protection superseded a woman’s individual desire or need for work. Thus, the premium was placed not on her individually but on her role as a [w]hite woman bearing a [w]hite child.”).

By limiting employers' right to force women to work excessive hours, the *Muller* Court "delegitimate[d] the autocratic power of employers and legitimate[d] the basic notion that social controls on the marketplace [were] appropriate."⁷⁰ That it did so by paternalistically focusing on women's perceived physical frailty ignored the fact that it was also unsafe for men to work "unregulated work weeks . . . [that] could run 72 hours or more" in "sweat shop operations"⁷¹ and would later complicate legal arguments surrounding Title VII's ban on employment discrimination based on gender.⁷² By grounding its reasoning in women's home and childcare responsibilities, however, the Court determined that one type of woman—a white woman of childbearing age with a home and a family to care for—represented all women.⁷³ The Court was not wrong to acknowledge that the responsibilities of home and childcare were a significant burden on a large percentage of working women—the duties associated with physically caring for a home were more difficult and time-consuming in 1920 than in 2020⁷⁴—but the Court's choice of archetypal woman shaped the

70. Olsen, *supra* note 58, at 1539.

71. Ginsburg, *supra* note 65, at 370; *see also* Brief for the State of Oregon at 108–09, *Muller v. Oregon*, 208 U.S. 412 (No. 107), 1908 WL 27605 ("The most immediately obvious effect on health is to be found in the prevalence among [laundry] workers of ulcers on the legs and varicose veins. . . . Ironers suffer from headaches and sore eyes, which result from constantly bending over the gas-heated irons in general use. The fumes from the tiny gas-jets—unless these and the air supply to each iron are very carefully regulated—are disagreeably noticeable on entering the room, and sometimes even the laundry, and are of course worst of all just above the iron so heated.").

72. *See* Ginsburg, *supra* note 65, at 370–71 ("Did state women-only protective laws give rise to a BFOQ [bona fide occupational qualification]? If an employer refused to hire a woman because state law prohibited her from lifting required loads, did that law make maleness a BFOQ?").

73. Justice Ginsburg, in her reflection on *Muller* and the strategy taken by the attorneys arguing in favor of the law, posited that this strategic choice ultimately may have been necessary to help win protections for the workers covered by Oregon's law:

[D]id they hold for Oregon because the Brandeis brief seemed to confirm their preconceptions about the relationship between the sexes, the physical superiority of men, women's inherent vulnerability, and society's interest in "the well-being of wom[e]n" as actual or potential mothers as a matter vital "to preserve the strength and vigor of the race"? Had the reports excerpted in the Brandeis brief been inconsistent with the prevailing wisdom about women's confined place in man's world, the Court may well have viewed the material with a more skeptical eye.

Id. at 365 (referencing Brief for the State of Oregon, *supra* note 71).

74. *See* Susan Lehrer, *Protective Labor Legislation for Women*, 17 REV. RADICAL POL. ECON. 187, 189 (1985) ("[P]rotective labor legislation for

jurisprudence and foreshadowed the choice by the media to focus narrowly on one type of working woman later during the pandemic recession.⁷⁵

Just as reformers viewed early maximum hours laws for women as part of a larger strategy to win protections for all workers, they argued that allowing employers to pay working women lower wages was broadly harmful to all workers because “lower wages for women in industrial occupations have a distinct influence on the wages of men. Any industrial group working for less than the [prevailing wage] will have the effect of lowering the wage standards for all employees.”⁷⁶ Between 1912 and 1923, seventeen jurisdictions passed minimum wage laws for women.⁷⁷ Early challengers of the minimum wage laws brought *Lochner*-style arguments under the Due Process Clause of the Fourteenth Amendment,⁷⁸ asserting that “the laws destroyed the freedom of contract between the woman worker and her employer, and thus arbitrarily took away a property right without due process of law.”⁷⁹ Opponents of minimum wage laws argued that, by increasing the cost of women workers, women-only minimum wage laws would prevent employers from hiring women.⁸⁰ Echoing *Muller*, defenders of the laws argued that the laws were “a reasonable exercise of the police powers of the State to protect its women workers from conditions detrimental to their health and welfare.”⁸¹

women . . . must be seen in a different context, one that takes into account the fundamentally different conditions under which women participated in the workforce. Women were not only wage workers, but were also responsible for the maintenance and reproduction of the working class through their domestic labor in the home.”); MARY N. WINSLOW, U.S. DEP’T OF LAB.: WOMEN’S BUREAU, HEALTH PROBLEMS OF WOMEN IN INDUSTRY 5 (1921) (“Long hours in the factory are not as serious for the man, who is through work when he leaves his job at night, as they are for the woman who has often several hours of housework to do after she gets home.”).

75. See *infra* Part III.

76. MILDRED J. GORDON, U.S. DEP’T OF LAB.: WOMEN’S BUREAU, THE DEVELOPMENT OF MINIMUM-WAGE LAWS IN THE UNITED STATES, 1912 TO 1927 3–4 (1928).

77. *Id.* The jurisdictions included fifteen states, the District of Columbia, and Puerto Rico. *Id.*

78. U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]”).

79. GORDON, *supra* note 76, at 319.

80. See Jennifer Friesen & Ronald K.L. Collins, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 472, 476 (1983).

81. GORDON, *supra* note 76, at 319.

Women-only minimum wage laws were upheld until 1923⁸² when the U.S. Supreme Court used language reminiscent of *Lochner* to strike down the District of Columbia's minimum wage law in *Adkins v. Children's Hospital*.⁸³ The Court focused on the idea that minimum wage laws for women restricted women's freedom to sell their labor at lower rates, holding:

[W]e cannot accept the doctrine that women . . . require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore . . . [women's] emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.⁸⁴

Therefore, at the beginning of the Great Depression, many working women were protected by maximum hours laws but not by minimum wage laws.⁸⁵ In a labor market in which women and men are in competition for the same jobs, this combination of protective laws would economically disadvantage women: a maximum hours law would disadvantage women if employers opted to hire men who could work longer hours, but only if the employer were choosing between a man and a woman to fill the same position. Similarly, a minimum wage law applying only to women would only incentivize an employer to hire a man at a lower wage over a woman *for the same position*, not if the employer were hiring for different types of jobs. Before and during the Great Depression, however, the high level of occupational gender segregation meant that men and women were not competing for the same jobs,⁸⁶ lessening the incentive for the employer to hire a man

82. *Id.*

83. 261 U.S. 525 (1923).

84. *Id.* at 553. The right-to-contract framing was baked into the Court's description of the issue at hand. The Court described one appellee as a woman employed as an elevator operator at a rate below the D.C. minimum wage, who was "anxious to continue [her job] for the compensation she was receiving, and that she did not earn more [sic]. . . . she was desirous of continuing and would continue the employment, but for the [minimum wage] order." *Id.* at 542–43.

85. David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1971–72 (2003) (reviewing JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* (2001)). See, e.g., *Bosley v. McLaughlin*, 236 U.S. 385, 393 (1915) (limiting student nurses to eight hours of work per day); *Miller v. Wilson*, 236 U.S. 373, 379–80 (1915) (limiting women to eight hours per day or forty-eight hours per week). The U.S. Supreme Court did not overturn *Adkins* and uphold minimum wage legislation for women until 1937, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

86. See Olsen, *supra* note 58, at 1533–34; see *supra* notes 35–37 and

allowed to work longer hours over a woman whose hours were capped. The effect of both laws working in tandem was that women's earning potential was limited in comparison to men's earning potential, institutionalizing the idea that women's labor contributions were less economically significant than men's. By refusing to limit employers' power to force men to work long hours and allowing employers to underpay women employees,⁸⁷ the Court reinforced the idea that working women provided supplemental, not primary, family support.

B. *The Employment Landscape During the Great Depression*

The Great Depression encompassed two economic downturns: August 1929 to March 1933, and May 1937 to June 1938, with a period of sluggish and partial recovery in between.⁸⁸ In March 1933, the worst month of the Great Depression, approximately 15.5 million Americans were unemployed, representing more than a quarter of the civilian labor force.⁸⁹

Men's jobs were hardest hit during the Great Depression: one million men became unemployed over the course of the decade, due largely to their concentration as farm workers, the rise of mechanization, and the "shift from an agrarian to an industrial economy."⁹⁰ Nearly 60 percent of the jobs lost in the first downturn and 75 percent in the second downturn came from mining, construction, manufacturing, and factory jobs, industries with high levels of men's employment.⁹¹

In contrast, women gained 1.3 million jobs between 1930 and 1940, due primarily to growth in the need for clerical and other white-collar workers.⁹² Married women⁹³ substantially increased

accompanying text.

87. See *infra* notes 111–112 and accompanying text.

88. CRS, THE LABOR MARKET, *supra* note 15, at 2.

89. Irving Bernstein, *Chapter 5: Americans in Depression and War*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/chapter5> [<https://perma.cc/HXV3-F992>] (last visited Feb. 27, 2022).

90. CRS, THE LABOR MARKET, *supra* note 15, at 2–5.

91. *Id.* at 6. The Census Bureau found that decreases in skilled and supervisory occupations exclusively impacted men, and decreases in construction, factory, and farm jobs disproportionately impacted men. *Id.* at 3–5.

92. *Id.* at 2, 4.

93. All sources cited in this Article discussed the added worker effect as being present within married opposite-gender couples in which the man, but not the woman, had previously been in the labor force. Throughout this Article, I maintain the use of gendered terms such as "husband" and "wife" to reflect the historical statistics, but I do not suggest that phenomena such as the added worker effect only occur within opposite-gender married couples.

their participation in the paid labor force⁹⁴ primarily because of the added worker effect, in which women who previously were not in the labor market were pushed into the workforce to compensate for the loss of a husband's job.⁹⁵

Married women's entrance into the paid labor force conflicted with the strong societal bias against white middle-class wives and mothers working outside the home.⁹⁶ Claudia Goldin argues that the Depression-era increase in policies that prohibited hiring married women ("hire bars") or mandated firing previously-employed women after they married ("retain bars") was a reaction to these social changes and an attempt to reinforce conservative gender norms.⁹⁷ Marriage bars among school teachers were already common,⁹⁸ and both formal and informal marriage bar policies gained popularity in the private sector throughout the 1920s and 1930s.⁹⁹ To justify marriage bars, employers cited

94. Claudia Goldin, *The Quiet Revolution That Transformed Women's Employment, Education, and Family*, 96 AM. ECON. REV. 1, 5 (1996).

95. Andriana Bellou & Emanuela Cardia, *Baby-Boom, Baby-Bust and the Great Depression* 5 (IZA Inst. of Lab. Econ., Discussion Paper No. 8727, 2014), <https://www.iza.org/publications/dp/8727/baby-boom-baby-bust-and-the-great-depression> [<https://perma.cc/Q387-R77N>]; Kristin E. Smith & Marybeth J. Mattingly, *Husbands' Job Loss and Wives' Labor Force Participation During Economic Downturns: Are All Recessions the Same?*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Sept. 2014), <https://www.bls.gov/opub/mlr/2014/article/husbands-job-loss-and-wives-labor-force-participation-during-economic-downturns-are-all-recessions-the-same.html> [<https://perma.cc/B2V4-SE34>]. Depression-era work relief programs that included means testing may have artificially dampened the added worker effect and disincentivized some wives from entering the workforce. See *infra* Subpart II.C.2; Bellou & Cardia, *supra* (finding that married women whose husbands were unemployed and not on work relief had a 50 percent higher workforce participation rate than women whose husbands were privately employed).

96. See *supra* notes 39–42 and accompanying text.

97. CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 160–66 (1990). Marriage bars applicable to men were rare. *Id.* at 161. See also SCHARF, *supra* note 42, at 44 ("The two-pronged attack against the married woman worker during the 1920s—that she abrogated her social responsibilities on the one hand while competing economically on the other—remained the basis for discriminatory practices as the Depression intensified and levels of popular apprehension kept pace with mounting numbers of unemployed.").

98. In 1928, 61 percent of school boards would not hire married women as teachers and 52 percent would not retain a newly married woman teacher, although it is unclear whether a school district would fire a newly married woman teacher or simply refuse to renew her contract when it expired. GOLDIN, *supra* note 97, at 161–62.

99. See *id.* at 163–64. Goldin argues that the data shows that the Depression caused companies to formalize marriage bar policies: "The

family protectionist concerns (for example, that working wives contributed to the breakdown of the family and led to child neglect or lowered birth rates) and male workers pointed to economic concerns and the myth that women were taking men's jobs.¹⁰⁰ Both explanations bolstered the gender-normative view of the traditional family and the popular narrative that working wives selfishly elected to work when they did not economically have to work.

Early in the Great Depression, the federal government moved to codify marriage restrictions for government employees. Section 213 of the Economy Act of 1932 specified that in any personnel reductions by the U.S. government, a married person whose spouse was also employed by the government "shall be dismissed" before other employees.¹⁰¹ The Act also specified that in hiring, "preference shall be given" to applicants whose spouse was not employed by the government.¹⁰² Although facially neutral, in practice the law had a disproportionately negative impact on women: three-quarters of the over 1600 workers fired following Section 213 were women.¹⁰³ The practice of using marital status to inform dismissals spread from the federal government to state governments, and by 1940 a majority of states had proposed or enacted legislation restricting married women's ability to hold state government jobs.¹⁰⁴ The rise of formal marriage bars in both the public and private sectors illustrates the backlash against women's employment, and specifically against white married women entering the labor market.

Depression, it seems, led firms to extend a discretionary marriage bar into the realm of firm policy. Where firms had exercised discretion in the hiring and firing of married women before the Depression and during its first year, they instituted strict policies not to hire and not to retain married women by 1940." *Id.* at 164.

100. SCHARF, *supra* note 42, at 43–44.

101. Economy Act of 1932, Pub. L. No. 72–212, § 213, 47 Stat. 382 (1932) (repealed 1937).

102. *Id.*

103. Kathleen M. Keller, *Federalizing Social Welfare in a World of Gender Difference: A History of Women's Work in New Deal Policy*, 8 S. CAL. REV. L. & WOMEN'S STUD. 145, 156 (1999). One positive interpretation of Section 213 is that it arose out of the desire to spread the wealth of government jobs: "[A]midst such high unemployment, it was selfish for more than one person in a family to have a job." *Id.*

104. GOLDIN, *supra* note 97, at 165–66.

C. Federal Policy Responses

President Roosevelt pursued fulfillment of his 1932 promise of a “new deal for the American people” by launching aggressive packages of domestic legislation.¹⁰⁵ Many New Deal programs systematically excluded women and reinforced the idea that the ideal American family structure situated a man as the breadwinner and the head of the household.

1. Wage and Hour Legislation—The National Industrial Recovery Act and the Fair Labor Standards Act

Early New Deal legislation attempted to establish the first national minimum wage and maximum hour regulations for both women and men through the 1933 National Industrial Recovery Act (NIRA).¹⁰⁶ The NIRA allowed industries to establish “codes of fair competition” that would impose minimum wage and maximum hour rules,¹⁰⁷ would bind the entire applicable industry, and could be enforced through the courts.¹⁰⁸ Eventually, NIRA codes covered over 90 percent of industrial employees in applicable industries.¹⁰⁹ These codes had both positive and negative impacts for working women. Because they raised minimum wage rates and because women were concentrated in the lowest-wage occupations, the codes benefitted working women.¹¹⁰ A quarter of the

105. Franklin D. Roosevelt, Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago (July 2, 1932).

106. Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 105 (2000).

107. *Id.* at 106–07. These codes would be reviewed by advisory committees and ultimately approved by the National Recovery Administrator and signed by the President. *Id.* If an agreement could not be reached, the National Industrial Recovery Act (NIRA) authorized the President himself to “prescribe a limited code of fair competition” establishing maximum hours, minimum pay rates, and other necessary employment conditions. National Industrial Recovery Act, Pub. L. No. 73–67, § 1, 48 Stat. 195 (1933).

108. Harris, *supra* note 106, at 107. Structuring the NIRA to use individual industry codes, each requiring the formation of representative groups, public hearings on proposed codes, revisions, and submittal to the President for signature, could translate into months of delay before minimum wages and maximum hour caps were in place for workers in a majority of industries. Arthur T. Martin, *The President's Reemployment Agreement*, 1 LAW J. OHIO ST. UNIV. 155, 155–56 (1935). Only six weeks after the NIRA was enacted, President Roosevelt also enacted the President's Reemployment Agreement, which invited employers to enter into prescribed agreements limiting work weeks to between 35 and 40 hours for both women and men and created a minimum wage scale of between \$12 and \$15 per week. *President's Reemployment Agreement*, 37 U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. 262, 263–64 (1933).

109. KESSLER-HARRIS, *supra* note 37, at 262.

110. *Id.* at 263.

NIRA codes, however, established facially lower rates for women than for men.¹¹¹ Further, because women and men were segregated into different jobs, the NIRA codes were used to set higher wages for jobs commonly held by men than for jobs commonly held by women, even when the jobs required equal skill level.¹¹² Ultimately, the combined effect of facially lower rates for women and de facto wage differentials for positions based on gender was that the NIRA systematized lower wage rates for women and reinforced the gendered wage gap.¹¹³

The NIRA was struck down as unconstitutional in 1935 in *A.L.A. Schechter Poultry Corp. v. United States*¹¹⁴ on the grounds that it violated the Commerce Clause¹¹⁵ by attempting to regulate intra-state commerce and was an improper exercise of legislative power by the executive branch.¹¹⁶ Thereafter, some employers began to increase working hours and cut wages,¹¹⁷ but Roosevelt and Secretary of Labor Frances Perkins continued to pursue labor standards legislation.¹¹⁸ In 1938, Roosevelt signed the Fair Labor Standards Act (FLSA), which established maximum hour and minimum wage rules for all employees.¹¹⁹ To avoid the constitutionality concerns raised by the NIRA and *Schechter*, the FLSA grounded its jurisdiction in the Commerce Clause and specifically covered only industries that made products that traveled in interstate commerce.¹²⁰ Male-majority¹²¹ industries such as manufacturing, mining, and transportation were involved in interstate commerce and thus those workers benefitted from wage and hour protections, but female-majority sectors such as hospitality and domestic service were not covered by the FLSA.¹²² Although the FLSA appeared

111. *Id.* at 262. For example, a garment industry code paid \$1.00 per hour for male dress operators and \$0.90 per hour for female operators. *Id.*

112. *Id.* at 262–63. For example, dress cutters and sample makers were both considered skilled garment industry positions, but male-majority dress cutters were paid forty dollars per week, whereas female-majority sample makers were paid thirty dollars per week. *Id.*

113. *Id.* at 263.

114. 295 U.S. 495, 554 (1935).

115. U.S. CONST. art. I, § 8 (“Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”).

116. *Schechter Poultry*, 295 U.S. at 554.

117. Harris, *supra* note 106 at 112.

118. Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV., Dec. 2000, at 32, 34.

119. Fair Labor Standards Act, 28 U.S.C. § 201 (1938).

120. Keller, *supra* note 103, at 160, 181.

121. *See supra* note 21.

122. Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards*

gender-neutral because it did not include the NIRA's wage differentials, its interplay with the highly gender segregated workforce resulted in greater protections for men.¹²³

Although the wage and hour legislation under the New Deal that largely excluded women seems to run counter to the pre-Depression judicial decisions allowing maximum hour laws for women, on a deeper level the case law approach is consistent with the FLSA approach. Neither the judicial precedent nor the FLSA treated women and men equally. In *Muller*,¹²⁴ the Court viewed women as fundamentally different from men based on their physical characteristics and familial roles, and thus applied different working rules. Similarly, the FLSA viewed women's and men's jobs differently when it distinguished between domestic and hospitality work and other modes of commercial employment. Although the earlier judicial precedent and the later legislation were grounded in different constitutional principles, neither viewed women and men, or their jobs, as equal in value.

2. Work Relief—The Civilian Conservation Corps and the Works Progress Administration

The Roosevelt Administration pursued and prioritized work relief and job creation programs such as the Civilian Conservation Corps (CCC) and the Works Progress Administration (WPA) in an attempt to lessen the stigma associated with direct cash

Act of 1938, 26 POLITY 635, 645–46 (1994) (“The statute failed to extend to workers in laundries, hotels, hairdressing, restaurants, and domestic service, in part because persons with influence in the Administration tended to assume out of hand that such types of employment lay well within the confines of ‘intrastate commerce . . .’”). The exclusion of women was at least partly intentional; Roosevelt made clear that he did not envision wage and hour protections extending to some women when he said “[n]o law ever suggested intended a minimum wages and hours bill to apply to domestic help.” FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938 VOLUME: THE CONTINUING STRUGGLE FOR LIBERALISM 198 (1941), <https://quod.lib.umich.edu/p/ppotpus/4926315.1938.001/238?page=root;rgn=full+text;size=100;view=image;q1=197> [<https://perma.cc/CK58-UEFJ>].

123. Keller, *supra* note 103, at 160, 181. Further, the women workers left without FLSA coverage were different from the men left without coverage. Two-thirds of exempt women earned annual wages below the \$800 annual minimum established by the FLSA. Mettler, *supra* note 122, at 652. Only one-third of exempt men earned under the \$800 annual minimum, and the remainder of the exempt men were professionals or managers earning the highest salaries available at the time. *Id.*

124. *Muller v. Oregon*, 208 U.S. 412 (1908).

relief,¹²⁵ restore morale, and help unemployed workers maintain their skills.¹²⁶

The CCC was established for the dual purposes of relieving unemployment and restoring natural resources through public projects.¹²⁷ Enrollment in the CCC was limited to unmarried men between eighteen and twenty-five¹²⁸ from families receiving direct relief.¹²⁹ CCC workers received base pay of \$30 per month,¹³⁰ \$25 of which was sent directly home to their families.¹³¹ The Army organized regimented CCC camps where workers were fed, housed, clothed, and provided with high school and trade school classes.¹³²

125. William W. Bremer, *Along the "American Way": The New Deal's Work Relief Programs for the Unemployed*, 62 J. AM. HIST. 636, 638–39 (1975) (“[C]onventional forms of direct relief . . . subjected [the unemployed] to means tests to prove their destitution . . . [and were] given in kind, so that others prescribed what the unemployed should eat and wear . . . Viewed as charity, direct relief bore a stigma derived from traditional assumptions that workless people were . . . incapable of managing their own affairs.”).

126. CONG. RSCH. SERV., R41017, *JOB CREATION PROGRAMS OF THE GREAT DEPRESSION: THE WPA AND THE CCC 2* (2010) [hereinafter CRS, *JOB CREATION PROGRAMS*].

127. Emergency Conservation Work Act (ECWA) of 1933, Pub. L. No. 73–5, ch. 17, 48 Stat. 22. The CCC employed three million men over its nine-year span. Catherine A. Paul, *Civilian Conservation Corps*, VA. COMMONWEALTH UNIV.: SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/great-depression/civilian-conservation-corps> [<https://perma.cc/5EQF-RY3D>] (last visited Mar. 14, 2022).

128. Veterans, members of Indigenous tribes, and “residents of the territories” could be enrolled regardless of marital status or age, although enrollment caps were set for each of those groups. CRS, *JOB CREATION PROGRAMS*, *supra* note 126, at 7; Exec. Order No. 6160 (June 7, 1933), reprinted by FRANKLIN D. ROOSEVELT PRESIDENTIAL LIB. & MUSEUM, http://www.fdrlibrary.marist.edu/_resources/images/eo/eo0003.pdf [<https://perma.cc/E3JB-YQNH>].

129. LOU ANN SPEULDA & RHODA OWEN LEWIS, *History of the CCC and WPA and Other Depression-Era Programs in Region 6 of the USFWS, in REGION 6: HISTORICAL AND ARCHITECTURAL ASSESSMENT OF THE DEPRESSION ERA WORK PROJECTS 3* (2003), <https://web.archive.org/web/20200420084708/https://www.fws.gov/uploadedFiles/Depression%20Era%20Programs%20-%20Region%206.pdf> [<https://perma.cc/X388-PGYA>]; Neil M. Maher, *A New Deal Body Politic: Landscape, Labor, and the Civilian Conservation Corps*, 7 ENV'T HIST. 435, 437 (2002).

130. *Employment Conditions and Unemployment Relief: Emergency Conservation Work During 1933*, 38 U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. 518, 520 (1934).

131. *U.S. Census Bureau History: The Civilian Conservation Corps, 1933–1942*, U.S. CENSUS BUREAU (Mar. 2020), https://www.census.gov/history/www/homepage_archive/2020/march_2020.html [<https://perma.cc/V6WQ-3WMQ>].

132. SPEULDA & LEWIS, *supra* note 129, at 4–6.

The holistic program was designed not just to provide a paycheck, but to improve the workers' health¹³³ and their future job prospects.

The messaging surrounding the CCC tied manual labor to ideas about masculinity. The Emergency Conservation Work Act provided for employment "in the construction, maintenance and carrying on of works of a public nature in connection with the reforestation of lands" and, when describing the kinds of projects to be funded, evoked images of outdoor manual labor and physical jobs traditionally held by men.¹³⁴ An advertisement for the Illinois Emergency Relief Commission described the CCC as "A Young Man's Opportunity for Work[,] Play[,] Study & Health."¹³⁵ The director of the CCC spoke about the program in terms of reinforcing the social construct of the male identity: "Our purpose is not only to rebuild forests and lands, but to build men."¹³⁶ This linkage between government-sponsored manual labor and masculinity

133. A study of incoming CCC enrollees found that after several months the men were less likely to be underweight and had a lower rate of tuberculosis infections than similarly aged men in the general population. Maher, *supra* note 129, at 441, 444.

134. Emergency Conservation Work Act (ECWA) of 1933, Pub. L. No. 73-5, ch. 17, 48 Stat. 22 (describing the work to be done as "the prevention of forest fires, floods and soil erosion, plant pest and disease control [and] the construction, maintenance or repair of paths, trails and fire-lanes in the national parks and national forests"). The ECWA specified "no discrimination shall be made on account of race, color, or creed," but made no reference to gender. *Id.* Despite its stated mission not to discriminate, the program under-employed men of color. Although the CCC camps did provide employment for 200,000 Black and 80,000 Indigenous men, collectively they represented less than 12 percent of the 2.5 million men employed by the CCC in its nine-year lifespan and many states maintained segregated camps. See John A. Salmond, *The Selection of Negroes, 1933-1937*, in *THE CIVILIAN CONSERVATION CORPS, 1933-1942: A NEW DEAL CASE STUDY* (1967), https://www.nps.gov/parkhistory/online_books/cc/salmond/chap5.htm [<https://perma.cc/BG2Q-5QKY>]; Ashley McNeil, *Moving Forward Initiative: The African American Experience in the Civilian Conservation Corps*, CORPS NETWORK (Aug. 17, 2017), <https://corpsnetwork.org/blogs/moving-forward-initiative-the-african-american-experience-in-the-civilian-conservation-corps> [<https://perma.cc/PRB9-XJSG>].

135. Albert M. Bender, *A Young Man's Opportunity for Work, Play, Study & Health*, LIBR. CONG., <https://www.loc.gov/pictures/item/92513367> [<https://perma.cc/5LZX-Z9WD>] (last visited Mar. 14, 2022).

136. Maher, *supra* note 129, at 441, 442. Here and throughout, when I use the terms "male identity," "male status," and "male authority," I am referring to the idea that there is an identity grounded in the social construct of maleness, or "the illusion of one fixed natural masculinity." Raewyn Connell, *Masculinities*, RAEWYN CONNELL, http://www.raewynconnell.net/p/masculinities_20.html [<https://perma.cc/DEL4-B3E7>] (last visited Nov. 10, 2021).

would be repeated in the “shovel-ready” messaging surrounding the American Recovery and Reinvestment Act (ARRA) in 2008.¹³⁷

Women were formally excluded from the CCC¹³⁸ and cut off from its financial, educational, and health benefits, so the National Women’s Trade Union League pushed for a parallel program for unemployed women.¹³⁹ The resulting program, nicknamed “She-She-She” camps by critics,¹⁴⁰ was never intended to approximate the robust relief program provided for men.¹⁴¹ In contrast to the 300,000 to 500,000 men employed annually across all CCC camps,¹⁴² only 2000 total women stayed for an eight-week term across all of the women’s camps each year.¹⁴³ CCC administrators refused to employ women in reforestation and community rebuilding projects, and the women’s programs were instead kept separate and confined to on-campus group activities and education.¹⁴⁴ The women received a maximum wage of \$25 per month and, unlike the CCC men who received free room and board, were required to pay \$15 per month to the camp for their own room and board.¹⁴⁵ Whereas the CCC’s payment structure was designed to help unmarried men support their parental families, the payment structure used in the women’s camps does not reflect the reality that many unmarried

137. See *infra* Subpart II.C.1.

138. See, e.g., Joseph M. Speakman, *Into the Woods: The First Year of the Civilian Conservation Corps*, PROLOGUE MAG., Fall 2006, <https://www.archives.gov/publications/prologue/2006/fall/ccc.html> [<https://perma.cc/6UEU-X3Z6>].

139. Joyce L. Kornbluh, *The She-She-She Camps: An Experiment in Living and Learning, 1934–1937*, in *SISTERHOOD AND SOLIDARITY: WORKERS’ EDUCATION FOR WOMEN, 1914–1984*, 253, 257–58 (Joyce L. Kornbluh & Mary Frederickson eds., 1984).

140. *Id.* at 255.

141. When the New York Times announced the planning of the women’s camps, the paper described their purpose as “social and educational laboratories [from which] women will go forth to cope more intelligently and with renewed strength and courage for their special problems.” *40 Women’s Camps Planned for Needy*, N.Y. TIMES, June 16, 1934, at L17, <https://timesmachine.nytimes.com/timesmachine/1934/06/16/issue.html> [<https://perma.cc/EL9R-EJWW>].

142. CRS, *JOB CREATION PROGRAMS*, *supra* note 126, at 7.

143. The women’s program established twenty-eight camps and schools, each hosting approximately sixty students for the two-month term. Kornbluh, *supra* note 139, at 261. Ultimately, the women’s camps were dissolved by 1937, only one hundred centers were established for women, and between 8000 and 10,000 women total attended camps and school programs. *Id.* at 255.

144. *Id.* at 261. Campers worked an average of three hours per day on gender-stereotyped activities such as sewing, painting signs, preparing hospital dressing, and other clerical tasks. *Id.* at 267–69.

145. *Id.* at 268. See also *New Deal Resident Camps for Unemployed Women*, PENNPRAXIS (Jan. 22, 2021), <https://storymaps.arcgis.com/stories/02050ee5b4d543cf93821f56382367c2> [<https://perma.cc/ZSP7-UECB>].

women also supported their families.¹⁴⁶ Hilda Smith captured the disparities between the CCC program and the women's program: "The CCC camps with their millions of dollars for wages, education work, travel and supervision constantly remind me of what we might do for women from the same families. As so often is the case, the boys get the breaks; the girls are neglected."¹⁴⁷

The WPA was established in 1935 and was charged with establishing a work relief program "to move from the [direct] relief rolls . . . the maximum number of persons in the shortest time possible."¹⁴⁸ Foreshadowing the transportation infrastructure investments in the ARRA enacted during the Great Recession and the Bipartisan Infrastructure Investment and Jobs Act (IIJA) signed in 2021, over 75 percent of WPA employment involved public works and construction projects performed primarily by men.¹⁴⁹ In addition to the structural inequality built into the WPA through its allocation of funds to public works and construction jobs that did not employ women, two provisions of the WPA served either to prohibit or disincentivize women from working. WPA jobs were available only to "one unemployed person per family eligible for or receiving direct relief,"¹⁵⁰ and participants were primarily middle-aged men supporting their families.¹⁵¹ This requirement directly blocked some population of married women from relief, since a wife could not hold a WPA job if her husband held one. The WPA also gave higher priority for available jobs to households with lower

146. See *supra* note 44 and accompanying text.

147. Kornbluh, *supra* note 139, at 272.

148. Exec. Order No. 7034 (May 6, 1935), *reprinted by* U.C. SANTA BARBARA: AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/executive-order-7034-creating-machinery-for-the-works-progress-administration> [<https://perma.cc/3472-TFVD>] (last visited Mar. 14, 2022). Rather than distribute funds to local governments or other agencies, the Works Progress Administration (WPA) hired participants directly onto federal payrolls. CRS, JOB CREATION PROGRAMS, *supra* note 126, at 4. In contrast, both a prior Depression-era agency and the Great Recession's American Recovery and Reinvestment Act (ARRA) both disbursed money to other governmental entities which then funded projects. *Id.*; see *infra* Subpart II.C.

149. CRS, JOB CREATION PROGRAMS, *supra* note 126, at 5. The remaining 25 percent involved public service or welfare-related jobs, such as sewing, goods production, school lunch programs, and public health work, performed primarily by women. *Id.*; see *infra* Subparts II.C and III.D.

150. CRS, JOB CREATION PROGRAMS, *supra* note 126, at 3. See also Exec. Order No. 7046, 44 C.F.R. § 201.5(e) (1938) ("Preference in the employment of workers shall be given to persons from the public relief rolls, and . . . at least 90 percent of all persons working on a work project shall have been taken from the public relief rolls.").

151. SPEULDA & LEWIS, *supra* note 129, at 8.

incomes.¹⁵² If a wife entered the labor market as an added worker, her wages would raise the family income and could lower the husband's probability of receiving a WPA job or make him ineligible.¹⁵³

Given the income restrictions, families were incentivized to self-structure so that the husband took a WPA job and the wife remained outside the labor market. In a detailed economic analysis, T. Aldrich Finegan and Robert A. Margo asserted that average pay rates would cause families to prefer the scenario in which the husband took the WPA job.¹⁵⁴ They found that the average WPA wage exceeded the average wage earned by wives of men eligible for work relief, and argued that WPA jobs were more stable than the private sector jobs available to those workers.¹⁵⁵ They concluded that work relief programs, including the WPA, reduced the added worker effect, and that even more married women would have entered the external labor force in the absence of work relief programs.¹⁵⁶

Finegan and Margo's economic analysis is strengthened when the societal pressures toward traditional family structures are considered. Families did not make employment decisions in a gender-neutral environment; they made decisions against a backdrop that linked masculinity to a man's status as the primary breadwinner¹⁵⁷ and viewed women workers as a threat to men's jobs.¹⁵⁸ The family wage cap for eligibility and the rates paid for WPA jobs, coupled with the gender-normative pressures to send a male breadwinner to work, helped depress the added worker effect and disincentivized wives of men eligible for work relief from seeking their own jobs.

152. T. Aldrich Finegan & Robert A. Margo, *Work Relief and the Labor Force Participation of Married Women in 1940*, 54 J. ECON. HIST. 64, 66 (1994); CRS, JOB CREATION PROGRAMS, *supra* note 126, at 3 n.11 ("Congress also established preferences for employment on WPA projects (e.g., relative need of families . . .)").

153. Finegan & Margo, *supra* note 152, at 66.

154. *Id.*

155. *Id.* at 67. Although it is possible that a husband and wife, both working non-WPA jobs, could earn a combined income exceeding a husband working a single WPA job, the structure of the WPA prioritized giving jobs to unemployed workers with very low family incomes who were unlikely to have other employment options. *See id.*

156. *Id.* at 74.

157. Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 98 (2002).

158. *See, e.g.,* McGERR, *supra* note 44, at 131–32.

D. *Return to Social Conservatism and the Embrace of Gendered Family Norms*

Despite the gain of 1.3 million women's jobs and the increased workforce participation by married women,¹⁵⁹ the Great Depression helped to strengthen, not disrupt, cultural pressures against women working outside the home and re-entrenched the gendered division of labor within the family unit.¹⁶⁰ Instead of embracing women in the paid labor force as a permanent advance for women and expanding the idea of the family structure to include either a woman or a man as a household breadwinner, many Americans reacted to the social and economic insecurity by embracing social conservatism and viewing the non-working wife as a symbol of prosperity.¹⁶¹ Men's unemployment, on the other hand, symbolized a loss of male authority both in society and within the family unit.¹⁶²

Sociologist Dr. Mira Komarovsky conducted interviews during 1935 with fifty-nine white families which included an unemployed man who had previously been the family's sole provider.¹⁶³ Most of the subjects were families that had been receiving government relief assistance for three to four years with negligible income from other sources, not families in which the role of the breadwinner

159. *See supra* Subpart I.B.

160. Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 24 (2013) ("The Depression experience . . . disrupted neither the sexual division of labor nor the ideology of a 'woman's place': indeed, the latter was actually strengthened by the resurgence of cultural norms censuring married women for employment outside the home."). Ramsey argues that the Great Depression "failed to change . . . the dominant ideology that required women to excuse their employment as conditioned on family (or patriotic) need." *Id.*

161. *See* Keller, *supra* note 103, at 145, 155 ("Social disruption and economic anxiety made people yearn for more stable familial relations and a bygone prosperity symbolized by the non-working wife."); THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 81 (1912) ("It is a fact of common observation that in this lower middle class there is no pretence [sic] of leisure on the part of the head of the household But the middle-class wife still carries on the business of vicarious leisure, for the good name of the household and its master.").

162. MIRRA KOMAROVSKY, *THE UNEMPLOYED MAN AND HIS FAMILY: THE EFFECT OF UNEMPLOYMENT UPON THE STATUS OF THE MAN IN FIFTY-NINE FAMILIES* 2-3 (1940).

163. *Id.* at 9. The families selected for the study were categorized as "complete families," in which the husband, wife, and at least one child lived together, and the men had previously been skilled laborers or white-collar workers. *Id.* at 4. The men had been unemployed for an average of three to four years at the time of the study. *Id.*

had shifted from husband to wife.¹⁶⁴ Komarovsky's study asked participants whether the loss of the role as economic provider also resulted in the man's loss of authority within the family, measured by "the decline in the willingness of the family to accept his control whether or not he succeeded in maintaining it through added coercion."¹⁶⁵ The study implicitly treated a family structure in which the husband and father had control as the positive prior status quo, and sought to understand how the loss of the man's employment had caused the family to deviate from that baseline.¹⁶⁶

The qualitative study examined how both the wives and husbands reacted to the man's loss of employment and found "three patterns of loss of authority": (1) unemployment "crystallized the inferior status of the husband," (2) it undermined the "coercive control" previously exercised by the husband, or (3) it "lowered the status of a beloved and respected" man.¹⁶⁷ The husbands reported loss of self-esteem and status stemming from the change in the family dynamic. One man said, "Before the depression I wore the pants in this family, and rightly so. During the depression I lost something. Maybe you call it self-respect, but in losing it I also lost the respect of my children, and I am afraid I am losing my wife."¹⁶⁸

The way in which Komarovsky reported her findings sheds light on the prevailing attitude toward the family structure. Komarovsky concluded that "unemployment does tend to lower the status of the husband," but she based this conclusion on a finding of a "breakdown of the husband's authority" in only thirteen of fifty-nine families.¹⁶⁹ Komarovsky's interpretation implies that

164. *Id.* at 9. "Relief" as used in the interviews refers to government assistance; the participating families were identified by the Emergency Relief Administration and some interviewees mentioned cashing relief checks, so they were likely receiving direct cash benefits. *Id.* at 4, 31.

165. *Id.* at 10.

166. The study cites "a wife who has always accepted her husband's control of the financial affairs of the family [and] now wants to have a greater part in it" as indicative of the loss of male control. *Id.* at 11.

167. *Id.* at xi, 25–33. Komarovsky described the three patterns:

In some families the hitherto concealed contempt for the husband came into the open; in others unemployment has reversed the husband-wife relation—dominance of the husband having been changed to his complete subordination; in still others the husband suffered a loss of respect, a change which is best described in the words of the wife: "I still love him, but he doesn't seem as 'big' a man."

Id. at 23.

168. *Id.* at 41.

169. *Id.* at 23. An alternative interpretation of this finding is that unemployment *did not* lower the status of the husband.

she expected the breakdown in authority to be much rarer or that she expected the man to retain authority regardless of his employment status. That a change in the attitudes of only 22 percent of the families was considered significant illustrates the strength of the gendered social norms at the end of the Great Depression and the extent of the backlash against non-traditional family structures.

Further, Komarovsky's interpretation of her own findings implicitly supports a normative return to the traditionally gendered family structure. Its baseline nuclear family is one in which the husband wields authority which at least partly derives from his economic power.¹⁷⁰ The disruption reported by the families in the study was rooted in the erosion of clearly delineated, yet unequal, gender roles in which the husband held more economic power than the wife. And if a husband's unemployment leads to his loss of power and authority, then an unemployed wife must also be lacking in power. If these families, and presumably others, wished to return to a family structure headed by a single male breadwinner, it reflected a tacit wish, or at least agreement, to return to the cultural value of structural women's subordination.¹⁷¹ Rather than normalizing greater variety in family structures, one result of the Great Depression was a return to more traditionally gendered family dynamics.

II. THE GREAT RECESSION

The Great Recession, which lasted from December 2007 through June 2009, was the largest economic downturn in the United States since World War II.¹⁷² Although the economy began to

170. *Id.* at 2 (“In the traditional patriarchal view of the family, the husband is expected to support and protect the wife, and she, in turn, to take care of his household, to honor and obey him. A certain subordination to the authority of the husband is part of the woman’s share in their reciprocal relations. In so far as the husband’s claim to authority is based upon his supporting his wife, unemployment may tend to undermine it.”); *see also id.* at 42 (“In summary, it must be stated that the downfall of the husband was due most frequently to the loss of his earning power.”).

171. The study resurfaced during the Great Recession, when regressive ideas about gender norms again arose in response to economic uncertainty and high levels of men’s unemployment. *See, e.g.,* Don Peck, *How a New Jobless Era Will Transform America*, ATLANTIC (Mar. 2010), <https://www.theatlantic.com/magazine/archive/2010/03/how-a-new-jobless-era-will-transform-america/307919> [<https://perma.cc/MMU3-YPK5>] (quoting the Komarovsky study and calling it a “classic sociology of the Depression”).

172. Robert Rich, *The Great Recession*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709 [<https://perma.cc/89XJ-KCT5>]. The Great Recession resulted in a loss of 4.3 percent in gross domestic product and a loss of approximately \$14 trillion in the net worth of U.S. households and nonprofit organizations. *Id.*

grow and the recessionary period officially ended in June 2009,¹⁷³ the job market continued to decline until November 2010.¹⁷⁴ Similar to what had happened during the Great Depression, anxiety about losses of jobs held by men combined with an inaccurate and misleading myth that working women were flourishing and led to the creation of recovery policies that selectively benefitted men's employment and left women behind.

A. *Characteristics of the Women's Workforce Before the Great Recession*

In the years preceding the beginning of the Great Recession, women still participated in the external paid labor force at lower rates than men did, and women experienced a significant wage gap and high rates of occupational segregation. Women's gains in all three measures—participation, wage parity, and occupational segregation—had slowed, then plateaued, in the years approaching the Great Recession.

Women's participation in the paid labor force doubled between the Great Depression and the beginning of the Great Recession;¹⁷⁵ however, those gains slowed throughout the 1970s and 1980s, and remained largely unchanged from 1990 to 2008.¹⁷⁶ By

173. See *Business Cycle Dating Committee Announcement June 8, 2020*, *supra* note 1 (“The peak [that occurred in February 2020] mark[ed] the end of the expansion that began in June 2009 . . .”). The NBER considers employment as just one factor in determining the dates of a recession, meaning that employment can continue to decline even after the recession has officially ended. *Business Cycle Dating Procedure: Frequently Asked Questions*, *supra* note 1.

174. Christopher J. Goodman & Steven M. Mance, *Employment Loss and the 2007–09 Recession: An Overview*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Apr. 2011), <https://www.bls.gov/opub/mlr/2011/04/art1full.pdf> [<https://perma.cc/KE64-XVQ7>] (“Monthly job losses averaged 712,000 from October 2008 through March 2009—the most severe 6-month period of job losses since 1945 Despite the official end of the recession [in June 2009], non-farm employment declined by another 1.2 million until reaching a trough in February 2010.”).

175. In 1947, approximately 32 percent of women participated in the paid labor force. Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 807 (2017). In 2008, approximately 60 percent of women participated in the labor force. U.S. BUREAU LAB. STAT., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2012, 14 (2013), https://www.bls.gov/opub/reports/race-and-ethnicity/archive/race_ethnicity_2012.pdf [<https://perma.cc/95K4-7Z4B>] [hereinafter LABOR FORCE CHARACTERISTICS 2012].

176. Kimberly Christensen, *He-cession? She-cession? The Gendered Impact of the Great Recession in the United States*, 47 REV. RADICAL POL. ECON. 368, 370 (2015). Women's labor force participation rose approximately 7

2008, 60 percent of women and 73 percent of men participated in the paid labor force.¹⁷⁷ In 2009, the average wage rate for a woman working full-time was only 77 percent of what a man working full-time earned.¹⁷⁸ The wage gap between Black and Latinx women and white men was much larger, however. In 2009, Black women earned only 62 cents to every dollar earned by a white man, and Hispanic women earned only 53 cents to every dollar earned by a white man.¹⁷⁹ Further, the rate of increase of women's wages had slowed, then stopped, in the years immediately preceding the Great Recession.¹⁸⁰

The American workforce was still characterized by high levels of segregation by gender in the years preceding the Great Recession.¹⁸¹ Much of the change came from women entering jobs that had traditionally been held by men; however, this movement was

percent from 1972 to 1979, another 7 percent from 1979 to 1989, but only 2 percent from 1989 to 2008. LABOR FORCE CHARACTERISTICS 2012, *supra* note 175, at 14.

177. LABOR FORCE CHARACTERISTICS 2012, *supra* note 175, at 14. Despite the gap in employment rates, approximately 5 percent of both men and women were unemployed. *Id.* at 46. More women than men were in a group neither employed in, nor actively trying to join, the paid labor force. *Id.* at 61. The size of this third category, which includes full-time homemakers and stay-at-home parents, helps determine the size of the available pool of added workers. *See generally* Jennifer Sherman, *Bend to Avoid Breaking: Job Loss, Gender Norms, and Family Stability in Rural America*, 56 SOC. PROBS. 599 (2009).

178. Abby Lane & Katherine Gallagher Robbins, *The Wage Gap Over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), <https://web.archive.org/web/20201109214957/https://nwlc.org/blog/wage-gap-over-time> [<https://perma.cc/U4QP-LAWU>]. The statistic of 77 cents to the dollar reflects the average rate earned by all working women compared to all working men.

179. *Id.* The Current Population Survey uses the group designation "Hispanic," which may not include all people who would be captured by the group designation "Latinx." *Id.* I have retained the Survey's original designation for accuracy.

180. In 1973, women made 57 cents for every dollar earned by men, but women had been "stuck at 77 cents for about a decade" in 2012. *Id.*

181. Francine D. Blau, Peter Brummund & Albert Yung-Hsu Liu, *Trends in Occupational Segregation by Gender 1970–2009: Adjusting for the Impact of Changes in the Occupational Coding System* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17993, 2012), <https://www.nber.org/papers/w17993> [<https://perma.cc/Q96Q-RFTW>]. The study authors used a segregation index that expressed gender workforce segregation as the proportion of women who would have to change occupations for the distribution of women and men to be the same. *Id.* at 11. Zero on the segregation index reflects complete integration and 100 on the index reflects complete segregation. *Id.* The study authors found that the index fell from 64.5 percent segregated in 1970 to 51 percent segregated in 2009. *Id.*

not evenly distributed across all jobs.¹⁸² By 2009, women held more than half of education, health services, and leisure and hospitality jobs, but were “substantially underrepresented” in industries including construction, transportation, and utilities.¹⁸³ Similar to the plateaus in the participation and wage gaps, gender integration in the workforce improved steadily throughout the 1970s and 1980s, then slowed considerably in the 1990s and 2000s.¹⁸⁴ Moreover, occupational gender segregation began to rise in the early 2000s for younger women,¹⁸⁵ foreshadowing the continued high rates of occupational segregation during the pandemic recession.

B. *The Employment Landscape During the Great Recession*

The Great Recession was “notable for the breadth of industries that were affected,” but job losses were not spread evenly across industries.¹⁸⁶ Highly cyclical industries¹⁸⁷ such as construction and manufacturing were among the hardest hit.¹⁸⁸ Employment in state and local government increased through August 2008 and

182. *Id.* at 21. Women increased their participation in traditionally male, white-collar occupations at a higher rate than their overall average, but their representation in traditionally male, blue-collar occupations, and specifically in construction, lagged behind the overall average. *Id.* The study authors reported that women entered management positions 7.7 percentage points faster than average but entered construction positions 9.8 percentage points slower than average. *Id.*

183. U.S. BUREAU LAB. STAT, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2010) [hereinafter BLS 2010 DATABOOK].

184. Blau, Brummund & Liu, *supra* note 181, at 16. Occupational segregation fell by six percentage points in the 1970s, approximately four percentage points in the 1980s, but only two percentage points in the 1990s and one percentage point in the 2000s. *Id.*

185. Christensen, *supra* note 176, at 373–75 (finding that “young women were less likely than [older women] to hold jobs in traditionally male-dominated occupations”).

186. Goodman & Mance, *supra* note 174, at 5.

187. Cyclical industries are more responsive to the business cycle, and experience higher revenues during economically prosperous periods and lower revenues during downturns or recessions. Paul Tracy, *Cyclical Industry*, INVESTINGANSWERS (Oct. 1, 2019), <https://investinganswers.com/dictionary/cyclical-industry> [<https://perma.cc/FSH6-8WXZ>].

188. By December 2010, construction had fallen by 28.8 percent, representing 2.2 million jobs, since its peak in 2006. Goodman & Mance, *supra* note 174, at 5. Manufacturing employment fell 14.6 percent, representing a loss of 2 million jobs, between December 2007 and June 2009. *Id.* Employment in parts and motor vehicle manufacturing was particularly hard hit, falling 35 percent. *Id.* More unusually, private service industries that had previously not seen large job losses during recessions, including retail and wholesale trade, transportation and warehousing, information, and leisure and hospitality “all experienced their largest sustained job losses on record.” *Id.* at 7.

then fell,¹⁸⁹ and employment in education and health services, which had grown regardless of the state of the overall economy for the past thirty years, continued to grow but at a slower rate.¹⁹⁰ Men's overrepresentation in the hardest-hit industries meant that men's jobs accounted for the majority of the initial losses.¹⁹¹

This pattern of early men's job losses matched the pattern seen in every U.S. recession since 1970.¹⁹² Women typically gain jobs early in recessions,¹⁹³ with women's job losses following later.¹⁹⁴ The unusual feature of the Great Recession was what initially happened to women's jobs: nearly a quarter of jobs lost early in the Great Recession were held by women¹⁹⁵ and it was the only recession since the early 1970s to reflect early losses in women's jobs.¹⁹⁶ The added worker effect mitigated the early losses in women's jobs, but there were not enough added women workers to fully replace the lost jobs or to cause women to gain jobs as they had during

189. *Id.* State and local government employment fell by 0.3 percent, despite the fact that it typically does not decline in recessions and actually increased during the 1990–91 and 2001 recessions. *Id.*

190. *Id.*

191. 78 percent of jobs lost between the fourth quarter of 2007 and the first quarter of 2009 had been held by men. Wall, *supra* note 15, at 5. During that period, men's unemployment rate rose to 8.9 percent, whereas women's unemployment rate rose to 7.2 percent. *Id.* By 2010, men's unemployment rate reached 10.5 percent, representing a total loss of 6 million jobs, and women's unemployment rate reached 8.6 percent, representing 2.7 million jobs. LAWRENCE MISHEL, JOSH BIVENS, ELISE GOULD, & HEIDI SHIERHOLZ, *THE STATE OF WORKING AMERICA* 321 (12th ed. 2012).

192. In each of the five recessions during that period, men's employment share fell earlier and more quickly than the share of employment held by women. Christensen, *supra* note 176, at 380–81.

193. For example, although the unemployment rate exceeded 10 percent in the 1980 recession, women saw a net jobs gain. Heather Boushey, *Infographic: The Importance of Women Breadwinners*, CTR. FOR AM. PROGRESS (Apr. 30, 2009), <https://www.americanprogress.org/issues/economy/news/2009/04/30/5853/infographic-the-importance-of-women-breadwinners> [<https://perma.cc/9QZE-N57D>].

194. On average, women's job losses started between nine and eighteen months after the official start of the recession, and they sometimes started after the recession was officially over. Christensen, *supra* note 176, at 380–81.

195. Between late 2007 and early 2009, women accounted for 22 percent of job losses and women's unemployment rate rose 2.5 percent. Wall, *supra* note 15, at 5. See also Smith & Mattingly, *supra* note 95, at 3 (“[C]ontrary to popular discourse, women held a larger percentage of the jobs lost during the Great Recession than in previous recessions.”).

196. See Christensen, *supra* note 176, at 381; see also Arne L. Kalleberg & Till M. von Wachter, *The U.S. Labor Market During and After the Great Recession: Continuities and Transformations*, RSF: THE RUSSELL SAGE FOUND. J. SOC. SCI., Apr. 2017, at 1, 7.

the Great Depression.¹⁹⁷ Women whose husbands stopped working were more than twice as likely to enter the labor force than women whose husbands remained working,¹⁹⁸ suggesting that women's job losses could have been even more substantial in the absence of the added worker effect.

The added women workers did not take jobs equivalent to those they might have held had they been continuously employed. Added women workers with college degrees were more likely to enter service positions than to enter professional positions, and were more likely to enter service positions than similarly-educated women workers already in the workforce.¹⁹⁹ Further, the industries that grew and buoyed women's employment in past recessions—education, health, and government—saw smaller job gains during the Great Recession than they had in earlier recessions.²⁰⁰ Even when women entered the paid labor force as added workers, they took lower-paid, less prestigious jobs than those held by their counterparts already in the paid labor market.

Finally, foregone employment—the estimated growth in employment that would have occurred had the recession not happened²⁰¹—negatively impacted women more than men.²⁰² Women not only lost jobs, but they also lost the career progress they would have made in the absence of the recession. The combined effect of the actual job losses and the lost opportunities meant that the Great Recession was worse for women than it appeared on the surface.

C. Federal Policy Responses

The ARRA was enacted in 2009 with the goals of preserving and creating jobs, promoting economic recovery, assisting those most impacted by the recession, investing in transportation and infrastructure projects with long-term economic benefits,

197. Smith & Mattingly, *supra* note 95, at 4.

198. Further, the added worker effect was also observed in the 1981–82 and 1990–91 recessions, indicating that this feature of the Great Recession was not unusual. *Id.*

199. *Id.* at 14.

200. Boushey, *supra* note 193.

201. Howard J. Wall, *This Recession's Effect on Employment: How It Stacks Up for Blacks, Whites, Men and Women*, FED. RSRV. BANK ST. LOUIS: BRIDGES (Jan. 1, 2010), <https://www.stlouisfed.org/publications/bridges/winter-20092010/this-recessions-effect-on-employment-how-it-stacks-up-for-blacks-whites-men-and-women> [<https://perma.cc/WP22-TTQD>].

202. Kristie M. Engemann & Howard J. Wall, *The Effects of Recessions Across Demographic Groups*, 92 FED. RSRV. BANK ST. LOUIS REV., 2010, at 1, 8. When using the raw employment numbers, it appears that men's employment was impacted 2.46 times more than women's employment; however, when accounting for foregone employment, that rate drops to 1.33 times. *Id.*

and stabilizing state and local government budgets.²⁰³ The ARRA contained appropriations for infrastructure, construction, public works, and transportation projects, as well as investments in education services.²⁰⁴

1. Transportation Infrastructure Investments

The ARRA provided \$48 billion for transportation infrastructure investments.²⁰⁵ Over half of the funds were subject to conditions that the money would be forfeited if not spent quickly, including:

- Requirements that 50 percent of the funds be obligated within 120 or 180 days of apportionment to the state²⁰⁶
- Conditions that any unobligated funds remaining after one year would be withdrawn and reallocated, incentivizing states to award the funds quickly²⁰⁷
- Priority given to projects that were already under construction or those expected to be completed within a short timeframe²⁰⁸

203. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 3, 123 Stat. 115, 115–16.

204. *Id.*; Kimberly Amadeo, *ARRA, Its Details, With Pros and Cons*, BALANCE (Nov. 17, 2020), <https://www.thebalance.com/arra-details-3306299> [<https://perma.cc/9HY5-ENCV>].

205. Victor Mendez, *How the Recovery Act Is Helping to Modernize Our Transportation System*, WHITE HOUSE (Feb. 17, 2016, 12:01 AM), <https://obamawhitehouse.archives.gov/blog/2016/02/17/how-recovery-act-helping-modernize-our-transportation-system> [<https://perma.cc/S69F-PGU7>]. This money included \$275 billion in highway infrastructure funds, \$1.1 billion for airports, \$6.9 billion for transit capital assistance grants, and \$750 million in discretionary capital investments to be distributed by the Department of Transportation (DOT). American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 205–11.

206. *Id.* at 206, 209–11. A 120-day requirement was attached to the \$275 billion in highway infrastructure funds. U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 206, 209–11. IMPLEMENTING GUIDANCE (Apr. 1, 2009), <https://www.fhwa.dot.gov/economicrecovery/guidance.htm> [<https://perma.cc/SKU2-ZCNB>]. A 180-day requirement was attached to the \$6.9 billion in transit capital assistance grants. American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 209–11. A requirement that 50 percent of the available funds be awarded within 120 days and the remaining funds be awarded within one year was attached to the \$1.1 billion in airport grants. *Id.* at 205.

207. American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 206, 209–11. This condition was attached to the \$275 billion in highway infrastructure funds and to the \$6.9 billion in transit capital assistance grants. *Id.*

208. *Id.* at 205–06, 211. The timeframe could range between 150 days and three years depending on the type of project. *Id.*

Beyond specific grants that tied funds to allocation within a defined number of days, the ARRA also included a blanket “Preference for Quick Start Activities,” which stated that recipients of ARRA funds “shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated no later than 120 days” after the enactment of the ARRA.²⁰⁹

The phrase used colloquially to refer to these quick-start construction and infrastructure projects—“shovel-ready”²¹⁰—evoked images of American workers on jobsites doing manual labor.²¹¹ President Obama spoke of the \$275 billion in highway infrastructure funds in terms of their ability to create employment:

Over the next few weeks, we will launch more than 200 construction projects across this country, fueling growth in an industry that’s been hard hit by our economic crisis. Altogether, this investment in highways will create or save 150,000 jobs by the end of next year, most of them in the private sector.²¹²

One specific image—“seeing shovels hit the ground”²¹³—evoked the same link between manual labor and masculinity that the advertising for the CCC camps evoked nearly a hundred years earlier.²¹⁴ Those construction industry jobs, characterized as “good jobs that pay more than average,”²¹⁵ were overwhelmingly held by men. Women were “substantially underrepresented” in the construction industry and held less than 10 percent of all construction-industry jobs,²¹⁶ illustrating how few shovel-wielding jobs could have been expected to go to women. The ARRA’s focus on infrastructure projects funneled billions of dollars into an industry in which women represented only a tiny fraction of workers at the time it was enacted. Although the ARRA included funds for

209. *Id.* at 302.

210. Manuel Roig-Franzia, *The Obama Buzzword That Hit Pay Dirt*, WASH. POST (Jan. 8, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010703662_pf.html [<https://perma.cc/WC6Y-G8QQ>].

211. Speaking two weeks after signing the ARRA, President Obama focused not on work more realistically being done with bulldozers or excavators, but on “seeing shovels hit the ground.” Remarks by the President and the Vice President on Transportation Infrastructure (Mar. 3, 2009, 10:00 AM), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-and-vice-president-transportation-infrastructure> [<https://perma.cc/9J8E-8WYE>].

212. *Id.*

213. *Id.*

214. *See supra* Subpart I.C.2.

215. Remarks, *supra* note 211.

216. BLS 2010 DATABOOK, *supra* note 183, at 1, 34. Women held less than 3 percent of construction laborer jobs and only 6 percent of construction manager jobs. *Id.*

job training,²¹⁷ the ARRA's infusion of funds did not bring more women into the construction industry.²¹⁸ One possible explanation for the lack of women entering the construction industry despite the availability of funds for training is that the overwhelming focus on quick-start projects and the priority placed on projects already in construction did not incentivize, or even allow time for, the training of new workers. Ultimately, women were largely shut out from the benefits of this significant portion of the economic recovery efforts.²¹⁹

2. Education Services Investments

The ARRA also provided funding to the female-majority education industry.²²⁰ The \$53.6 billion State Fiscal Stabilization Fund (SFSF) was allocated to the states primarily for education services²²¹ and to restore state budget gaps from the 2008–09 and 2009–10 school years.²²² States were required to use over 80 percent of SFSF funds “for the support of elementary, secondary, and postsecondary education” and the remainder of the funds for

217. The ARRA included \$3.95 billion for “Training and Employment Services,” including \$750 million for “worker training and placement in high growth and emerging industry sectors,” \$500 million of which was earmarked to “prepare workers for careers in energy efficiency and renewable energy.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 3, 123 Stat. 115, 172–73.

218. Although women occupied a slightly higher percentage of construction manager jobs in 2010, they did not hold more construction laborer jobs. Women held 5.9 percent of construction manager jobs in 2009 versus 6.8 percent in 2010, and 2.7 percent of construction laborer jobs in both 2009 and 2010. BLS 2010 DATABOOK, *supra* note 183, at 1, 34; U.S. BUREAU LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK 28, 34 (2011) [hereinafter BLS 2011 DATABOOK]. Moreover, the total number of construction laborer jobs held by women decreased year-over-year. In 2009, women held 38,528 total construction laborer jobs (2.7 percent of 1,427,000 jobs) versus 34,209 jobs in 2010 (2.7 percent of 1,267,000 jobs). BLS 2010 DATABOOK, *supra* note 183, at 34; BLS 2011 DATABOOK, *supra*, at 34.

219. Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL'Y J. 211, 277 (2012).

220. In 2009, women accounted for 69.4 percent of jobs in “educational services.” BLS 2010 DATABOOK, *supra* note 183, at 47. This statistic does not differentiate between jobs within that industry, meaning that it does not separate teachers from administrators or support staff. *Id.* Women accounted for the majority of all teacher jobs in 2009—ranging from 54.9 percent of secondary school teachers to 97.8 percent of preschool and kindergarten teachers—except for postsecondary teachers (49.2 percent women). *Id.* See *supra* note 21.

221. American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 279–80. The SFSF was to be administered by the Department of Education. *Id.*

222. Kitchen, *supra* note 219, at 276.

“education [or] other government services,” which could include renovation or repair of school facilities.²²³

Because SFSF funds were authorized for broad use across a wide variety of educational and non-educational purposes, the SFSF did not provide the same level of assistance to women classroom teachers as the transportation and infrastructure stimulus did to the male-majority construction industry.²²⁴ Whereas Obama focused on creating new jobs when discussing the infrastructure piece of the ARRA, when he turned to the SFSF he spoke of retaining existing jobs:

It will provide funds to train a new generation of math and science teachers, while giving aid to states and school districts to stop teachers from being laid off and education programs from being cut. In a place like New York City, 14,000 teachers who were set to be let go may now be able to continue pursuing their critical mission.²²⁵

As early as October 2009, the Obama Administration reported that over half of the jobs “created or saved” by the stimulus package were in education.²²⁶ The SFSF was “designed . . . under

223. *State Fiscal Stabilization Fund*, U.S. DEP’T EDUC. (Mar. 7, 2009), <https://web.archive.org/web/20090401180607/https://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html> [<https://perma.cc/PDM3-6D5A>]; American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 281. Funds allocated under the SFSF could be used for “any activity” authorized by the Elementary and Secondary Education Act of 1965, the Individuals with Disabilities Education Act, the Adult and Family Literacy Act, the Carl D. Perkins Career and Technical Education Act of 2006, or “for modernization, renovation, or repair of public school facilities.” *Id.* The only prohibitions on how local educational agencies could use SFSF money included payment of maintenance costs, athletic stadiums or facilities that charged for admission to the general public, vehicle purchases, improvements to standalone administration or support facilities, or repair of facilities used for religious purposes. *Id.* at 281–82.

224. For example, renovation and repair of school facilities would necessarily involve the construction industry, in which women were “substantially underrepresented.” American Recovery and Reinvestment Act of 2009, § 3, 123 Stat. at 281; *see supra* note 216 and accompanying text.

225. Remarks, *supra* note 211. In his remarks about the SFSF, President Obama also mentioned that it would create additional construction jobs (“It’s an investment that will create jobs building 21st century classrooms and libraries and labs for millions of children across America”) and create new tax credits for middle-class families and college students. *Id.* The SFSF incorporated different incentives designed to support the education system in general, not all directly aimed at job creation or retention. *See id.*

226. Michael Cooper & Ron Nixon, *Stimulus Data Indicate Gains for Education*, N.Y. TIMES, Oct. 31, 2009, at A1, A10, <https://perma.cc/FR8D-KAV6> (“Of the 640,239 jobs recipients claimed to have created or saved so far . . . more than half—325,000—were in education. Most were teachers’ jobs

the assumption" that states would need federal funds to maintain education programs during the recession, and it allowed states to cut state spending for K–12 and higher education back to 2006 levels and make up the difference with the federal funds.²²⁷ Because the goal was not job creation, the program would not have helped added workers or newly-unemployed women to make net job gains. Further, it is unclear whether jobs that were "saved" by the SFSF, particularly classroom teacher jobs, would truly have been lost had the states not received the federal stimulus money²²⁸ because states were allowed to cut education budgets and make up the shortfall with SFSF funds.

Even if both stimulus efforts were similarly focused on new job creation, the construction and education industries were not gender-segregated to the same degree and therefore women would not have benefitted by investments in education to the same degree that men benefitted from investments in construction.²²⁹ While the construction industry was highly gender-segregated at all levels, within the education industry, the percentage of jobs held by women

that states said were saved when stimulus money averted a need for layoffs.").

227. JENNIFER COHEN, NEW AM. FOUND., *THE STATE FISCAL STABILIZATION FUND AND HIGHER EDUCATION SPENDING IN THE STATES 2*, (2010), <https://files.eric.ed.gov/fulltext/ED540794.pdf> [<https://perma.cc/TZ5P-BZKG>]. The author argued that the structure of the program created an "unfortunate consequence" and "effectively incentiviz[ed] states . . . to create gaps in education funding to gain eligibility for the funds in 2009 or 2010." *Id.* at 12.

228. States were not required to distinguish between jobs saved and jobs created in their reporting to the Department of Education, nor were they able to identify any specific job categories (i.e., teachers or, even more broadly, education related versus non-education related jobs). U.S. DEP'T EDUC., *AMERICAN RECOVERY AND REINVESTMENT ACT REPORT: SUMMARY OF PROGRAMS AND STATE-BY-STATE DATA 4–5* (2009), <https://web.archive.org/web/20200814165458/https://www2.ed.gov/policy/gen/leg/recovery/spending/arra-program-summary.pdf> [<https://perma.cc/B9GE-LL8W>]. *See also* Cooper & Nixon, *supra* note 226. For example, Indiana reported saving or creating 13,232 jobs in education through the ARRA money, but Indiana's director of the government efficiency division of the state budget office reported that he could not state that those jobs were created or retained. *Id.*

229. In 2009, women held nearly 70 percent of educational services jobs, but men held over 90 percent of construction industry jobs. BLS 2010 *DATABOOK*, *supra* note 183, at 43, 47. Although the educational services sector was larger than the construction sector, that still did not offset the effect of the occupational segregation. In 2010, the BLS reported that 9 million people were employed in the construction sector and 13 million in the education sector. *Id.* Thus, because 90 percent of the 9 million construction workers were men and 30 percent of the 13 million education workers were men, 12 million men were employed across both sectors. Similarly, because 10 percent of the 9 million construction workers were women and 70 percent of the 13 million education workers were women, 10 million women were employed across both sectors.

decreased as the educational level of the students, and teacher salary, increased.²³⁰ Therefore, new job creation in the construction industry would have disproportionately benefitted men but new job creation in primary and secondary education would have benefitted women only somewhat more than men, and new higher-paying postsecondary education jobs would have benefitted men and women equally. Although SFSF funds benefitted women teachers, the SFSF did not provide the same boost to women's employment as the infrastructure investments did to men's employment.

D. *Differential Impacts on Men and Women's Employment During the Recovery*

“You're looking at a two-track recession and a two-track recovery.”²³¹

Men's employment hit its lowest point in October 2009, only a few months after the official end of the recessionary period in June, but women's employment levels continued to fall until November 2010.²³² One significant reason for women's lagging recovery was the concentration of women, particularly women of color, in state and local government jobs.²³³ Even as private employment recovered, public sector employment continued to contract for years after the official end of the recession as governments responded to budget gaps by instituting austerity measures and shedding jobs.²³⁴

230. Women held 98 percent of preschool and kindergarten jobs, and only 49 percent of postsecondary education jobs. BLS 2010 DATABOOK, *supra* note 183, at 30.

231. Jordan Weissmann, *The Recession Was Sexist (So Is the Recovery)*, ATLANTIC (Dec. 8, 2011), <https://www.theatlantic.com/business/archive/2011/12/the-recession-was-sexist-so-is-the-recovery/249646> [<https://perma.cc/JM9Z-BCB5>].

232. Cunningham, *supra* note 10, at 2; see also Rakesh Kochhar, *In Two Years of Economic Recovery, Women Lost Jobs, Men Found Them*, PEW RSCH. CTR. (July 6, 2011), <https://www.pewresearch.org/social-trends/2011/07/06/two-years-of-economic-recovery-women-lose-jobs-men-find-them> [<https://perma.cc/2CVV-E8RH>].

233. Christensen, *supra* note 176, at 382. In 2011, women accounted for 60 percent of state and local government employees, but 48 percent of wage and salary workers overall. *Id.* Black workers were also disproportionately overrepresented in state and local government when compared to their total percentage share of the labor force. *Id.*

234. *Id.* at 382–83 (“The Great Recession caused the largest drop ever recorded in state and local government revenues. . . . [B]etween 2007 and 2011 [two years after the Great Recession officially ended], state and local government suffered a decline of over 765,000 jobs. Approximately 70 percent of those laid off were women and nearly 20 percent were [Black.]”).

Moreover, when women did gain back recovery jobs, they were not equivalent to the jobs they lost during the recession. Women lost well-paying public sector jobs but gained back low-paying jobs in retail and hospitality, and lower-paid medical positions such as home health aides.²³⁵ This widened the existing wage gap between men and women: between 2011 and 2012, well into the official recovery, men's real wages rose and women's real wages fell.²³⁶ The cumulative effect of targeted efforts to revive jobs in male-majority fields, coupled with continued job losses in female-majority fields, left women experiencing the recession long after men began the recovery.²³⁷

E. *Framing the Great Recession as a Gender Battle*

One popular narrative used to conceptualize the patterns of job losses during the Great Recession linked the loss of a job to the loss of perceived social status and masculinity.²³⁸ This was triggered by, and grounded in, the initial job losses borne by men. Opinion writers formulated the beginning of the Great Recession as a catastrophic “mancession” that “threaten[ed the] American Dream.”²³⁹ Even writers who did not couch the disparate effects of the job losses in combative terms described recession unemployment as dangerously destabilizing to the male identity. One sociologist investigating the impact of job loss on traditional masculinity found:

It changes how men think of themselves. Usually men see themselves as supporters of the family, and since a lot of them are no longer able to do that alone on their income, they have to construct their identity in a new way to allow them to still think positively of themselves.²⁴⁰

Conservative opinion writers went further, casting women as the winners of a “gender war” and describing the recession as a “he-cession” that “dramatically accelerated” the “great shift of power from males to females”²⁴¹ and agitated “soldiers on

235. *Id.* at 384.

236. Women's earnings decreased from 82.2 percent to 80.9 percent of men's earnings. *Id.*

237. Blackburn, *supra* note 10.

238. *See supra* note 136 and accompanying text.

239. McKelway, *supra* note 11.

240. *Shifting Domestic Roles for Men Who Lost Jobs in Current Recession*, SCIENCE DAILY (Aug. 23, 2011), <https://www.sciencedaily.com/releases/2011/08/110823104835.htm> [<https://perma.cc/A6AU-3MCG>] (quoting Ilana Demantas).

241. Reihan Salam, *The Death of Macho*, FOREIGN POL'Y (June 21, 2009, 5:02 PM), <https://foreignpolicy.com/2009/06/21/the-death-of-macho> [<https://>

the front lines of the gender wars.”²⁴² That antagonistic framing carried through to descriptions of the recovery: the addition of health and education components to the ARRA was called a “disturbing and ominous” attempt to “‘skew’ employment further towards women.”²⁴³

The media’s use of gendered portmanteaus such as mancession, he-cession, she-cession, and he-covey²⁴⁴ to describe both the recession and the recovery amounted to more than just shorthand for complex economic effects. The oppositional and adversarial language helped create, then reinforce, the gendered frame that would be used to view the entire arc of the Great Recession, which was connected to a deeper unease about shifting gender roles. In 2010, one writer projecting the effects of the Great Recession far beyond the immediate economic consequences predicted the effect of men doing less paid work than their wives would destabilize “traditional” marriage, shred the “social fabric” of “white working-class communities,” and lead to the “marginalization of working class men in family life.”²⁴⁵ The focus on shoring up the male identity,

perma.cc/F9L9-UZ8Y].

242. McKelway, *supra* note 11.

243. Christina Hoff Sommers, *No Country for Burlly Men*, WASH. EXAMINER (June 29, 2009, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/no-country-for-burly-men> [<https://perma.cc/63FR-C6J9>]. See also Hanna Rosin, *The End of Men*, ATLANTIC (July/August 2010), <https://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135> [<https://perma.cc/V2LM-YKBC>] (“The working class, which has long defined our notions of masculinity, is slowly turning into a matriarchy, with men increasingly absent from the home and women making all the decisions. . . . Indeed, the U.S. economy is in some ways becoming a kind of traveling sisterhood: upper-class women leave home and enter the workforce, creating domestic jobs for other women to fill.”); Hans Bader, *Obama’s Job-Killing Stimulus Package Replaced Investments With Welfare, Out of Political Correctness*, COMPETITIVE ENTER. INST. (June 25, 2009), <https://cei.org/blog/obamas-job-killing-stimulus-package-replaced-investments-with-welfare-out-of-political-correctness> [<https://perma.cc/NA8A-WSLA>] (“Obama’s \$800 billion stimulus package was purged of most investments in roads and bridges, and filled instead with welfare and social spending, out of political correctness, after feminist leaders complained that building and repairing roads and bridges would put unemployed blue-collar men to work, rather than women.”).

244. See, e.g., Daniel Bukszpan, *The Man-Cession and the He-Covey*, CNBC (Jan. 25, 2012, 2:49 PM), <https://www.cnn.com/id/46135226> [<https://perma.cc/85RQ-K9AS>].

245. Peck, *supra* note 171. The article also asserted that “men’s identities are far more defined by their work than women’s, and both men and women become extremely uncomfortable when men’s work goes away.” *Id.* The racial subtext in some of the most alarmist writing of the time, while outside the scope of this Article, is important as it is also present in the conversations surrounding the pandemic. When Peck warns about the dangers of single motherhood and

itself intrinsically tied not just to work but specifically to being the breadwinner or the head of the household, reinforced traditional gender norms and ideas about gender roles within the family and society.²⁴⁶

That gendered interpretation was not only misleading, but wholly fabricated. The unusual gender-related feature of the Great Recession was not that men suffered early job losses²⁴⁷ but that women also lost jobs in the early days.²⁴⁸ As the recovery progressed and men regained jobs, women continued to experience slower job gains in key female-majority industries, new job losses as local governments cut more jobs, and the effects of foregone employment. The reality was that women experienced both the initial job losses that men usually experience plus the long recessionary tail that women usually experience. Kimberly Christensen illustrated the gap between the popular conception and the reality of women's jobs and foreshadowed the discourse surrounding women's work during the pandemic recession when she noted:

matriarchal populations while also noting that white working-class communities are "beginning to look like [B]lack inner-city neighborhoods," race and gender are intertwined. *Id.*

246. Joan C. Williams & Allison Tait, "Mancession" or "Momcession"?: *Good Providers, a Bad Economy, and Gender Discrimination*, 86 CHI.-KENT L. REV. 857, 862 (2011). Time-use studies also pointed to the continuation of traditionally gendered home responsibilities even as outside work responsibilities were disrupted. A 2009 study found that working mothers continued to take on a double shift of housework and/or childcare even with an unemployed spouse. Rosemary Black, *Working Moms More Overburdened Than Ever During the 'Mancession'; Out-of-Work Hobbies Add to Woes*, DAILY NEWS (Jan. 25, 2010, 5:13 PM), <https://www.nydailynews.com/life-style/working-moms-overburdened-mancession-out-of-work-hobbies-add-woes-article-1.462944> [<https://perma.cc/2QS6-XLZM>]. Although the recession "brought about a relatively small and short-lived decline" in the number of hours mothers spent on unpaid housework/childcare as unemployed husbands assumed more childcare responsibilities, during the recovery period, as more women lost their jobs, "the gender division of unpaid work hours reverted to the prerecession pattern." Ebru Kongar & Günseli Berik, *Time Use of Parents in the United States: What Difference Did the Great Recession Make?* 4, 26 (Levy Econ. Inst. of Bard Coll., Working Paper No. 812, 2014).

247. In each of the five U.S. recessions since 1970, men's share of employment "fell first and fell faster than women's." Christensen, *supra* note 176, at 381. The loss of men's jobs during the Great Recession was unusual in terms of the total number of jobs lost but was a function of occupational gender segregation and cyclicity, which also characterized the most recent past recessions. *Id.*

248. In three of the five previous U.S. recessions, women gained jobs early in the recession. *Id.*

[C]ontrary to the public perception, the average American working woman is not putting on her skirted suit and grabbing her briefcase on the way to her high-powered and well-paid managerial job. Instead, the average American working woman—like her mother before her—is a clerical worker, a nurse, or an elementary school teacher.²⁴⁹

By selectively framing the recession as catastrophic for men and ignoring the warning signs of unusual effects on women, the popular narrative about the Great Recession's job losses contributed to the ARRA's policy responses that privileged men's jobs and created the lagging wave of women's job losses.²⁵⁰ In contrast, the choice of a different narrative to explain the Great Recession could have influenced alternative policy responses. In the months before the ARRA was passed, writers suggested that the issue was not men's jobs versus women's jobs, but rather the loss of low-wage jobs that disproportionately impacted lower-wage and blue-collar workers.²⁵¹ A recovery designed around a "lower-wage worker" framing could have emphasized care jobs, including education, along with "shovel-ready" infrastructure jobs.²⁵² This could have helped ameliorate the negative impacts on women's jobs that lingered long after the negative impacts on men's jobs. This missed opportunity to frame the problem in an inclusive way that better captured the full employment picture, which then shaped the design of the recovery policies, would be repeated in the attempt to address the recession following the COVID-19 pandemic.

III. THE PANDEMIC RECESSION

The pandemic recession's effect on American employment is significantly different from the effects of both past events: the majority of jobs lost early in the recession were in different industry sectors and they were overwhelmingly held by women. But the pandemic recession added challenges related to childcare and remote

249. *Id.* at 373; *see infra* Subpart III.D.

250. *See supra* Subpart II.D.

251. *See, e.g.*, Randy Albelda, *The Macho Stimulus Plan*, BOSTON.COM (Nov. 28, 2008), http://archive.boston.com/news/nation/articles/2008/11/28/the_macho_stimulus_plan [<https://perma.cc/S3RH-JHS5>] (arguing that the proposed stimulus package overlooked low-income women and would not help women in proportion to their unemployment rates, and calling for expanded investments in "social infrastructure," including education and healthcare); Linda R. Hirshman, *Where Are the New Jobs for Women?* N.Y. TIMES (Dec. 9, 2008), <https://www.nytimes.com/2008/12/09/opinion/09hirshman.html> [<https://perma.cc/AL58-J5FT>] (calling for investments in social work and teaching to address rising unemployment rates of women).

252. Kitchen, *supra* note 219, at 277.

work that were not present in the past, and misleading ideas about women and work continued to influence the narrative. Ultimately, the inaccurate picture of working women during the pandemic has limited early policy responses, and the mass exit of women from the workforce back into the home risks reinforcing traditional gender norms and shifting households back toward traditional family structures and conceptions of gender.

A. *Characteristics of the Women's Workforce Before the Pandemic Recession*

The factors that have consistently characterized women's employment since the 1920s—lower rates of participation than men, high levels of both horizontal and vertical occupational segregation, barriers to advancement, and a wage gap—are still present a hundred years later. Although both men's and women's employment rates decreased slightly between 2008 and 2018, the gap between men's and women's employment rates held steady: 73 percent of men and 60 percent of women were employed in 2008, whereas 69 percent of men and 57 percent of women were employed in 2018.²⁵³

Horizontal occupational segregation, or gender segregation across occupations at similar skill level, continued its trend of slow improvement between the Great Recession and the beginning of the pandemic recession.²⁵⁴ The extent of horizontal gender segregation varies across occupation and across industry: women hold three-quarters of jobs in the educational and health services industry—98 percent of preschool/kindergarten teachers and 89 percent of registered nurses are women—but are still “substantially under-represented” in the construction and manufacturing industries.²⁵⁵ Working women are still clustered in a small number of job types:

253. LABOR FORCE CHARACTERISTICS 2012, *supra* note 175, at 6; U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2019) [hereinafter BLS 2019 DATABOOK]. The U.S. economy did not recover the 8.7 million jobs lost during the Great Recession until mid-2014, leaving less than six years between the end of the jobs recovery and the beginning of the pandemic recession. See *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET & POL'Y PRIORITIES (June 6, 2019), <https://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession#:~:text=Progress%20erasing%20the%20jobs%20deficit,continued%20to%20add%20jobs%20thereafter> [https://perma.cc/D4PT-5ASV].

254. Paula England, Andrew Levine & Emmal Mishel, *Progress Toward Gender Equality in the United States Has Slowed or Stalled*, 117 PROC. NAT'L ACAD. SCIS. U.S. 6990, 6991–94 (2020) (finding that while occupational segregation had improved since the 1970s, it “moved much faster in the 1970s and 1980s than it has since 1990” and characterizing the trend as “a slowdown, but not a complete stall of occupational desegregation”).

255. BLS 2019 DATABOOK, *supra* note 253, at 2–3, 47–48, 50–54.

over half of all jobs held by women are situated in only five job categories.²⁵⁶ Women's employment is also characterized by high levels of vertical occupational segregation or stratification, which occurs when women are progressively less represented as occupations move up the ladder through managerial and then executive positions. Before the pandemic recession, women accounted for half of entry-level workers but only 21 percent of C-suite executives.²⁵⁷

Working women still experience a significant wage gap—in 2018, women working full-time in wage and salary jobs earned an average of 81 percent of what men in full-time jobs earned.²⁵⁸ The wage gap for women of color is even larger than the average wage gap across all working women—in 2018, Black women earned 67 percent of what men earned, and Hispanic women earned 63 percent of what men earned.²⁵⁹ One study examining horizontal segregation defined occupations in which women held at least 75 percent of jobs as female-majority, occupations in which women held less than 25 percent of jobs as male-majority, and occupations in which women held between 25 and 75 percent of jobs as integrated.²⁶⁰ The study

256. Michelle Holder, Janelle Jones & Thomas Masterson, *The Early Impact of COVID-19 on Job Losses Among Black Women in the United States* 12 (Levy Econ. Inst. of Bard Coll., Working Paper No. 963, 2020). The top job categories for Black women include office and administrative support, healthcare support, sales, healthcare practitioners and technical positions, and management. *Id.* Four of these job categories are also in the top job categories for white women, with education, training, and library replacing healthcare support. *Id.*

257. MCKINSEY & CO., *WOMEN IN THE WORKPLACE 2020* 8 (2020). The biggest obstacle is the first step up to a manager position: women experience a representation loss of 9 percentage points between entry-level positions, where they hold 47 percent of jobs, and manager positions where they hold 38 percent of jobs. *Id.* Every successive step, including from manager to senior manager/director, vice president, senior vice president, and then C-suite, sees a smaller percentage reduction in the number of women holding those positions when compared to the entry-level to manager step. *Id.* The term “C-suite” refers to executive-level managers with titles such as chief executive officer, chief financial officer, and chief operating officer. Andrew Bloomenthal, *C-Suite*, INVESTOPEDIA (July 21, 2021), [https://www.investopedia.com/terms/c/c-suite.asp#:~:text=%22C%2Dsuite%22%20refers%20to,chief%20information%20officer%20\(CIO\)](https://www.investopedia.com/terms/c/c-suite.asp#:~:text=%22C%2Dsuite%22%20refers%20to,chief%20information%20officer%20(CIO)) [<https://perma.cc/6HX4-PY9T>].

258. BLS 2019 *DATABOOK*, *supra* note 253, at 3.

259. *Id.* See also Robin Bleiweis, Rose Khattar & Jocelyn Frye, *Women of Color and the Wage Gap*, CTR. FOR AM. PROGRESS (Nov. 17, 2021), <https://www.americanprogress.org/article/women-of-color-and-the-wage-gap> [<https://perma.cc/8HJ9-VVX5>]; *Race & Gender Wage Gaps*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/issue/race-gender-wage-gaps> [<https://perma.cc/83DJ-ZC9F>] (last visited Dec. 19, 2021).

260. ARIANE HEGEWISCH & HEIDI HARTMANN, INST. WOMEN'S POL'Y RSCH., *OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE*

found a wage penalty for workers in female-majority jobs, where both women and men earned less than workers of comparable skill levels working in either integrated or male-majority occupations earned.²⁶¹ This wage penalty for working in female-majority occupations could suggest that women workers are driven toward jobs assigned less societal value, that society devalues the types of work traditionally performed by women, or that employers underpay their women workers. Whatever the cause, the result of the persistent high levels of horizontal occupational segregation is that women are more likely to hold lower-paying jobs than men are, even in occupations of comparable skill level.

The idea of choice lurks underneath the discussion of both horizontal and vertical occupational segregation, often discussed in terms of women opting into industries or occupations with more flexibility as a way to balance family and job responsibilities.²⁶² Proponents of this choice-based viewpoint argue that women voluntarily “occupy lower-paying fields of work than men” in order to “prioritize family and flexibility,” so the wage gap and both horizontal and vertical occupational segregation are bargained-for

12 (2014), <https://iwpr.org/wp-content/uploads/2020/08/C419.pdf> [<https://perma.cc/8PX3-8MQY>]; See *supra* note 21.

261. HEGEWISCH & HARTMANN, *supra* note 260, at 13; see also Blau & Kahn, *supra* note 175, at 826–27.

262. See, e.g., Kelly Field, *Why Are Women Still Choosing the Lowest-Paying Jobs?*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/education/archive/2018/01/why-are-women-still-choosing-the-lowest-paying-jobs/551414> [<https://perma.cc/Q9JK-ASZH>] (discussing one woman’s move from a corporate job to a job as a hairstylist as being about “freedom and flexibility” and stating “[a]s a hairstylist, she expects to make half what she earned as a customer-service manager in the corporate world, ‘but the work-life balance will more than make up for it’”); Lisa Chow, *Why Women (Like Me) Choose Lower-Paying Jobs*, NPR: PLANET MONEY (Sept. 11, 2013), <https://www.npr.org/sections/money/2013/09/11/220748057/why-women-like-me-choose-lower-paying-jobs> [<https://perma.cc/MFC8-QSQS>] (“[W]omen often make decisions that lead them to earn less than they otherwise might.”); but see Grace Hawkins, *Women, Work, and the Façade of Choice*, MEDIUM (Oct. 20, 2018), <https://medium.com/s/story/women-work-and-the-facade-of-choice-f1c033a826b4> [<https://perma.cc/TF6J-6QAD>] (“It’s not that women ‘prioritize family and flexibility,’ it’s that we shoulder the responsibilities of family life at the cost of our careers—and do so because our husbands and our society demand it.”). Even feminist Linda R. Hirshman, as she advocates against the “choice feminism” movement that has encouraged highly educated women to drop out of the workforce in favor of homeschooling and “mommy blogging” and criticizes a society that presents these women with an incomplete menu of economic and career options, still accepts the premise that these decisions are fundamentally a product of choice. See LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* (2006).

outcomes of conscious choices.²⁶³ In the context of the pandemic, the preconceived notion that women already held more flexible jobs led to the assumption that women could adapt their jobs to accommodate increased childcare and home-care responsibilities.²⁶⁴ This is overly simplistic, in part because flexibility can be measured across multiple job characteristics. Jobs with location or schedule flexibility—the ability to telecommute or work outside of normal business hours—also come with family-unfriendly attributes such as long work hours.²⁶⁵ Temporal flexibility, or the ability to work part-time, is more closely associated with better work-life balance.²⁶⁶ Women are less likely to work in jobs that offer schedule or location flexibility and thus less likely to work in jobs that encourage telecommuting, but are more likely to work jobs that offer temporal flexibility in the form of shorter hours or part-time employment.²⁶⁷ This rebuts the assumption, underlying pandemic discourse, that women had prioritized jobs that include a work-from-home component and therefore would be minimally affected by school closures related to the pandemic.²⁶⁸

B. *The Employment Landscape During the Beginning of the Pandemic Recession*

At the end of January 2020, the World Health Organization declared a global public health emergency following an outbreak of COVID-19, the disease caused by the novel coronavirus.²⁶⁹ The Centers for Disease Control and Prevention (CDC) recommended physical distancing, instructing people to stay six feet away from others not living in their households.²⁷⁰ By mid-March school dis-

263. See Hawkins, *supra* note 262 (outlining and then rebutting this argument).

264. See *infra* Subpart III.C.

265. Mas & Pallais, *supra* note 14, at 14.

266. *Id.* at 25.

267. *Id.* In 2018, 23.8 percent of women and 11.8 percent of men “usually” worked part time. BLS 2019 DATABOOK, *supra* note 253, at 114–16. The percentage of women working part time has not changed in the last fifty years. *Id.* at 3.

268. See *infra* Subparts III.C and III.D. In September 2020, 22 percent of working women and 28 percent of working men had jobs that allowed telecommuting. Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Sept. 2020), <https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm> [<https://perma.cc/3SFJ-Q7N8>].

269. Taylor, *supra* note 4.

270. *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 20, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [<https://perma.cc/S3F6-MWZ2>].

tricts began closing,²⁷¹ and California was the first state to issue a statewide stay-at-home order.²⁷² Some states implemented tiered systems that required businesses to close depending on metrics such as the rate of infection present in the community.²⁷³ The economic shock associated with the pandemic²⁷⁴ resulted in the fastest and steepest downturn in U.S. history, with job losses nearly matching those in the Great Depression.²⁷⁵ Although the job market

271. Taylor, *supra* note 4.

272. Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1199 (2020). In March 2020, forty-two states and territories issued mandatory stay-at-home orders. *Id.* A study using GPS phone data early in the pandemic suggested that people did not wait to be told to stay home and instead began curtailing their movements in many states even before official orders took effect. Clare Malone & Kyle Bourassa, *Americans Didn't Wait for Their Governors to Tell Them to Stay Home Because of COVID-19*, FIVETHIRTYEIGHT (May 8, 2020), <https://fivethirtyeight.com/features/americans-didnt-wait-for-their-governors-to-tell-them-to-stay-home-because-of-covid-19> [<https://perma.cc/9Z6T-2G8X>].

273. For example, California's *Blueprint for a Safer Economy* linked business closures to public health metrics, reducing business operations as markers of viral transmission worsened. CAL. DEP'T PUB. HEALTH, BLUEPRINT FOR A SAFER ECONOMY: CALIFORNIA'S COLOR-CODED COUNTY TIER SYSTEM (Dec. 2020), <https://emd.saccounty.net/EMD-COVID-19-Information/Documents/California-Color-Coded-Tier-System--en.pdf> [<https://perma.cc/5WE2-FSCJ>]. At the highest risk level, based on the rate of daily new cases and the percentage of positive tests, many non-essential business operations were not allowed to open. *Id.*

274. As of May 2021, the question of whether the economic crash was caused by the pandemic itself, or the government-ordered shutdowns in response to the pandemic, remains open. *Compare* Andrew Van Dam, *Governors' Shutdowns Did Not Cause the Pandemic Jobs Crisis*, WASH. POST (Jan. 25, 2021, 3:00 AM), <https://www.washingtonpost.com/business/2021/01/25/lockdowns-job-losses> [<https://perma.cc/5F7S-7DR7>] (“People started staying at home before the shutdowns were ordered, data shows.”), *with* Editorial Board, *News From the Non-Lockdown States*, WALL ST. J. (June 23, 2020), <https://www.wsj.com/articles/news-from-the-non-lockdown-states-11592954700> [<https://perma.cc/ZMA2-ZH46>] (“[P]rivate job losses were higher in states that locked down like Colorado (9.5%) compared to economically similar ones that didn't like Utah (4.6%).”). A detailed analysis of the underlying causes of the job losses is beyond the scope of this Article. The author intends the employment data to note the fact, not the cause, of the pandemic-related job losses.

275. EDELBERG & SHAMBAUGH, *supra* note 5, at 2; *What Is the Economic Cost of COVID-19?*, ECONOMIST (Jan. 9, 2021), <https://www.economist.com/finance-and-economics/2021/01/09/what-is-the-economic-cost-of-covid-19> [<https://perma.cc/HSM5-2WXD>] (estimating that “the world economy probably shrank by 4.3% in 2020, a setback matched only by the Depression and the two world wars”); CONG. RSCH. SERV., UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (2021) (“The unemployment rate peaked in April 2020, at a level not seen since data collection started in 1948 . . .”) (footnote omitted).

recovered more quickly than it recovered in either past event,²⁷⁶ as of March 2021 the unemployment rate was still nearly double what it had been before the pandemic crash, although by November 2021 it had improved but not fully recovered.²⁷⁷

Unlike during the Great Depression and the Great Recession, the first wave of pandemic-related job losses disproportionately impacted women. In April 2020, women's unemployment rate rose to 16.2 percent, whereas men's employment rose to 13.5 percent.²⁷⁸ This pattern of early women's job losses is both significant and unusual: during the Great Recession, men's unemployment peaked at 11.1 percent in 2009 and women's unemployment peaked a year later at 9 percent.²⁷⁹ Because physical distancing measures were a significant driver of the slowdown, the three hardest hit industries were not construction, manufacturing, or other cyclical industries, but instead were hospitality and restaurants,²⁸⁰ health care,²⁸¹ and

276. EDELBERG & SHAMBAUGH, *supra* note 5, at 3. Job gains in May, only two months after the initial decline, were "the fastest on record." *Id.*

277. In March 2021, the U.S. unemployment rate was 6 percent, compared to 3.5 percent in February 2020. U.S. BUREAU LAB. STAT., THE EMPLOYMENT SITUATION—MARCH 2021 (2021), https://www.bls.gov/news.release/archives/empisit_04022021.pdf [<https://perma.cc/QC2E-8LE7>]. By November 2021, the U.S. unemployment rate was 4.2 percent. U.S. BUREAU LAB. STAT., THE EMPLOYMENT SITUATION—NOVEMBER 2021 (2021), https://www.bls.gov/news.release/archives/empisit_12032021.pdf [<https://perma.cc/WQS3-7VFR>].

278. *Employment Situation News Release*, *supra* note 16. As with other employment-related statistics, using only a single rate for all women hides the disproportionate impact on women of color. White women's unemployment reached 15 percent in April 2020, a level exceeding what was experienced by either men or women at the worst point of the Great Recession, whereas Black women's unemployment reached 16.2 percent and Hispanic women's unemployment reached 20.2 percent. Holder, Jones & Masterson, *supra* note 256, at 5–6.

279. Cunningham, *supra* note 10, at 2.

280. *Three Decades of Restaurant Jobs Were Lost During the Last Two Months*, NAT'L REST. ASS'N (May 8, 2020), <https://restaurant.org/education-and-resources/resource-library/three-decades-of-restaurant-jobs-were-lost-during-the-last-two-months> [<https://perma.cc/BCV6-S5PH>].

281. Despite the need for healthcare workers to combat COVID-19, in the first months of the pandemic, "[h]ospitals and doctors' offices lost billions in revenue when they canceled elective surgeries and non-emergent visits to prepare for a possible surge in COVID-19 patients and to reduce the spread of the virus." Soumya Karlamangla & Melanie Mason, *Thousands of Healthcare Workers Are Laid Off or Furloughed as Coronavirus Spreads*, L.A. TIMES (May 2, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-05-02/coronavirus-california-healthcare-workers-layoffs-furloughs> [<https://perma.cc/ZE6Z-3LBB>]. Between February and April 2020, nearly 1.5 million healthcare workers lost their jobs. *Nearly 1 in 10 Health Care Workers Lost Their Job Between February and April, But Health Care Employment Rebounded Slightly*

retail,²⁸² female-majority industries that are typically well insulated during recessions.²⁸³

Occupational segregation explains both why so many women lost their jobs and why many women who kept their jobs were required to risk exposure to the coronavirus during the pandemic. Prior to the crash, women held the majority of jobs across the three hardest-hit industries and were significantly overrepresented in health care, in which they held nearly 80 percent of jobs.²⁸⁴ Women were also overrepresented in jobs considered to be “essential,”²⁸⁵ including grocery workers, workers providing dependent care services, and healthcare professionals providing emergency/necessary care or working directly with COVID-19 patients.²⁸⁶ In total, women

in May, KAISER FAM. FOUND. (June 16, 2020), <https://www.kff.org/coronavirus-covid-19/press-release/nearly-1-in-10-health-care-workers-lost-their-job-between-february-and-april-but-health-care-employment-rebounded-slightly-in-may> [https://perma.cc/4ZAY-QSHP]; Margot Sanger-Katz, *Why 1.4 Million Health Jobs Have Been Lost During a Huge Health Crisis*, N.Y. TIMES: UPSHOT (May 10, 2020), <https://www.nytimes.com/2020/05/08/upshot/health-jobs-plummeting-virus.html> [https://perma.cc/2UGP-SZAF].

282. Melissa Repko & Lauren Thomas, *Retail Workers Slammed by Job Cuts, Pushed Into New Roles as Coronavirus Shakes Their Industry*, CNBC (July 22, 2020, 3:35 PM), <https://www.cnbc.com/2020/07/22/coronavirus-retail-workers-slammed-by-job-cuts-pushed-into-new-roles.html> [https://perma.cc/U544-T6ZQ].

283. Tüzemen & Tran, *supra* note 17, at 2.

284. *Id.* Across all three of the hardest-hit industries, women held 63 percent of jobs. *Id.* Women also held a large number of jobs in industries linked through the supply chain to those hardest-hit industries. For example, women in garment manufacturing experienced both supply-side interruption as a result of factory closures owing to stay-at-home orders and demand-side interruption from retail store closures. Monika Queisser, Willem Adema & Chris Clarke, *COVID-19, Employment and Women in OECD Countries*, Vox EU (Apr. 22, 2020), <https://voxeu.org/article/covid-19-employment-and-women-oecd-countries> [https://perma.cc/6GJY-AT83].

285. One in three jobs held by women was designated essential and women of color were more likely than any other group to hold essential jobs. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html?referringSource=articleShare> [https://perma.cc/9YV6-Y83N].

286. In conjunction with the stay-at-home orders issued by individual states, the U.S. Department of Homeland Security issued advisory guidance identifying critical workers who should continue to work despite pandemic-related restrictions. Christopher C. Krebs, Director, Cybersecurity and Infrastructure Security Agency, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, (Mar. 28, 2020), <https://web.archive.org/web/20200329080739/https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> [https://perma.cc/447T-29FQ].

held 77 percent of jobs that required close personal contact and could not be done remotely, including healthcare support, personal services, and food preparation.²⁸⁷ Because occupational segregation funnels women into a small number of industries, women were left vulnerable to higher levels of unemployment and higher risks of disease exposure, which also created the risk of negative financial consequences if women were fired, had to take unpaid time off, or faced large medical bills.²⁸⁸

The unique features of the pandemic crash foreclosed avenues which helped mitigate the negative effects of the earlier crises on women's employment. The added worker effect that caused gains in women's employment relative to men during previous crashes did not function during the pandemic, because even if women who were not previously in the paid workforce had entered the job market, they would have been replacement workers instead of added workers.²⁸⁹ For women to maintain their collective share of the external paid labor force, the number of added women workers would have had to account for the number of displaced women workers. Further, women increased their representation in the labor force during the Great Recession because women added workers took female-majority service and retail jobs.²⁹⁰ New jobs in those industries were unavailable during the pandemic, and the biggest population of women added workers during the Great Recession—mothers—was less available than in past events to enter the external paid labor force during the pandemic owing to childcare responsibilities.²⁹¹

287. Chaney & Weber, *supra* note 13. While some of these industries were declared essential and required women to continue to work (and thus risk exposure to the coronavirus), others were ordered to close, leaving those women unemployed until their business sectors could reopen. Phil Willon, Hannah Fry, Rong-Gong Lin II, Maura Dolan & Alex Wigglesworth, *L.A. Orders All Nonessential Businesses Closed, Bans Public Gatherings of Any Size*, L.A. TIMES (Mar. 19, 2020, 9:35 PM), <https://www.latimes.com/california/story/2020-03-19/as-coronavirus-spreads-california-puts-national-guard-on-alert-asks-u-s-navy-for-help> [<https://perma.cc/77XS-LGSS>].

288. *See, e.g.*, Maria L. La Ganga, *Her COVID-19 Treatment Cost More Than \$1 Million. Who's Going to Pay for It?*, L.A. TIMES (Feb. 8, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-02-08/covid-treatment-hospital-bills-health-insurance-waivers> [<https://perma.cc/J7PJ-QTAB>].

289. *Displaced Workers Summary*, U.S. BUREAU LAB. STAT. (Aug. 27, 2020, 10:00 AM), <https://www.bls.gov/news.release/disp.nr0.htm> [<https://perma.cc/7HW6-QHDP>]. Here, the terms “replacement workers” and “added workers” refer only to the total number of workers present in the labor force; they do not suggest that some workers were “taking” other workers’ jobs.

290. *See supra* notes 199–200 and accompanying text.

291. Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle

In the first year of the pandemic recession, the federal government did not attempt jobs programs similar to the ARRA or any of the New Deal programs that could have addressed women's job losses. A modern version of the Depression-era work relief programs that employed men directly²⁹² could have placed unemployed women into necessary jobs, such as contract tracing,²⁹³ that could be done safely from home.²⁹⁴ A pandemic-informed version of the ARRA's targeted industry investments might have directed stimulus payments to workers and business owners in the hardest hit industries while lockdown measures restricted or closed those businesses.²⁹⁵ Instead, the four federal stimulus packages proposed in the first year of the pandemic ignored the recession's disparate impact on women's jobs.²⁹⁶ President Biden's original March

Tertilt, *This Time It's Different: The Role of Women's Employment in a Pandemic Recession* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27660, 2020); see *infra* Subpart III.C. It is, of course, possible that some mothers entered the external paid labor force as added workers in addition to taking on added childcare responsibilities resulting from school and daycare closures.

292. See *supra* Subpart I.C.2.

293. Contact tracing allows a local health department to track the spread of the coronavirus by calling people who have been diagnosed with COVID-19 and collecting a list of others with whom the infected person has been in contact. *Contact Tracing Steps—Infographic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing-infographic.html> [<https://perma.cc/E4BD-5HDU>].

294. In July 2020, the American College of Physicians and the American Medical Association sent a letter to the U.S. Senate and U.S. House of Representatives urging that the federal government invest in contact tracing and add “at least 100,000 or more [contact tracers] to meaningfully control transmission of the virus” to the existing population of 2200 contract tracers employed before the pandemic. Letter from the American College of Physicians, et al. to Nancy Pelosi, Kevin McCarthy, Mitch McConnell & Chuck Schumer (July 20, 2020), <https://unitedstatesofcare.org/wp-content/uploads/2020/07/Contact-Tracing-Sign-On-Letter-to-Congressional-Leadership.pdf> [<https://perma.cc/KU5K-3AUL>].

295. See, e.g., *Considerations for Restaurant and Bar Operators*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 18, 2020), <https://web.archive.org/web/20201129111608/https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> [<https://perma.cc/WBE8-2WKX>] (providing guidance that restaurant owners eliminate indoor dining and/or reduce indoor dining occupancy).

296. The \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act of March 2020 provided aid that would help women, including temporary unemployment insurance expansions, expanded sick leave, and loans for distressed companies, but earmarked only \$25 million in specific funding to “women’s business centers.” Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281, 295 (2020). The funding to the women’s business centers, which are intended to help women entrepreneurs “start and grow successful businesses,” could be used for a wide variety of

2021 American Jobs Plan proposed sweeping jobs investments but largely failed to acknowledge the disproportionate job losses experienced by women.²⁹⁷ The one area where the plan specifically referenced female-majority jobs was in an investment that aimed to “[s]olidify the infrastructure of our care economy by creating jobs and raising wages and benefits for essential home care workers. These workers—the majority of whom are women of color—have been underpaid and undervalued for too long.”²⁹⁸ While the plan acknowledged that the care economy has its own system of infrastructure, it ignored the fact that care work *is* itself infrastructure.²⁹⁹ Traditionally performed by women and most often by women of

business-related expenses, including education, training, and advising small businesses and their employees. *Office of Women’s Business Ownership*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/about-sba/sba-locations/headquarters-offices/office-womens-business-ownership> [https://perma.cc/9LNZ-WM86]; CARES Act, 134 Stat. 281. The May 2020 Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, which earmarked money specifically “to avert layoffs of public sector workers like . . . health workers[] and teachers who [had] been left out of previous measures,” passed the House but never became law. Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, H.R. 6800, 116th Cong. (2nd Sess. 2020); *The “Heroes Act” Isn’t Politics—It’s Essential, Especially for Women*, NAT’L ORG. FOR WOMEN (May 15, 2020), <https://now.org/media-center/press-release/the-heroes-act-isnt-politics-its-essential-especially-for-women> [https://perma.cc/U2XX-EMQM]. The Republican Party proposed a “pared-down” response to the HEROES Act which did not include additional state or local aid or direct stimulus payments to individuals, but it did not pass the U.S. Senate. Sarah Hansen, *Second Stimulus Update: GOP Bill Fails in the Senate. Will There Ever Be More Relief?*, FORBES (Sept. 10, 2020, 1:23PM), <https://www.forbes.com/sites/sarahhansen/2020/09/10/second-stimulus-update-gop-bill-fails-in-the-senate-will-there-ever-be-more-relief/?sh=6cd1376772bd> [https://perma.cc/3Q4J-5FZD]. The American Rescue Plan Act, signed by President Biden in March 2021, also failed to address women’s job losses directly, although it did provide funds for programs that would lead to improvements in women’s employment, including expanding child and dependent care credit, expanding the child tax credit, and offering incentives to employers to extend emergency paid leave to additional workers. American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4 (2021).

297. *Fact Sheet: The American Jobs Plan*, WHITE HOUSE: BRIEFING ROOM (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan> [https://perma.cc/JP5K-REDB].

298. *Id.* As of March 2022, the American Jobs Plan had not become law.

299. Moira Donegan, *How Domestic Labor Became Infrastructure*, ATLANTIC (Apr. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/why-care-work-infrastructure/618588> [https://perma.cc/F9ZT-C2SJ] (defining infrastructure as “the basic physical and organizational structures needed for the operation of a society”).

color,³⁰⁰ care work, including health care, childcare, and elder care, forms part of the foundation of U.S. society. Senator Kirsten Gillibrand succinctly captured this idea when she tweeted, “Paid leave is infrastructure. Child care is infrastructure. Caregiving is infrastructure.”³⁰¹ By including only a passing reference to the mechanics of the care economy and disregarding the fact that care work is “just as essential to the functioning of the economy as roads and bridges are,”³⁰² the Biden Administration missed a significant opportunity to acknowledge and help redefine women’s care work as a vital part of our national infrastructure.

Instead, by the time the IIJA was passed in November 2021,³⁰³ it was more narrowly focused on traditional physical infrastructure investments including providing access to clean drinking water, expanding access to broadband internet, repairing and rebuilding roads and bridges, investing in public transit, upgrading power infrastructure, and reinforcing infrastructure against weather- and cyber-related threats.³⁰⁴ Echoing President Obama’s remarks about construction jobs created by the ARRA, the Biden Administration also focused on creating jobs in male-majority infrastructure-related industries, stating of the IIJA: “tens of thousands of plumbers and pipefitters are going to get work done in good paying jobs” and “[t]his law is going to make high-speed [i]nternet affordable and available everywhere—everywhere in America—urban[,] suburban, rural—and create jobs laying down those broadband lines.”³⁰⁵ Investments in care infrastructure, including childcare, elder care, and early

300. JOCELYN FRYE, CTR. FOR AM. PROGRESS, ON THE FRONTLINES AT WORK AND AT HOME: THE DISPROPORTIONATE ECONOMIC EFFECTS OF THE CORONAVIRUS PANDEMIC ON WOMEN OF COLOR 8–9 (2020), https://cf.americanprogress.org/wp-content/uploads/2020/04/WOCcorona-report-1.pdf?_ga=2.85533529.1309322439.1641075940-1225626416.1639950512 [<https://perma.cc/K6RE-NPS3>].

301. Kirsten Gillibrand (@sengillibrand), TWITTER (Apr. 7, 2021, 5:29 AM), <https://twitter.com/SenGillibrand/status/1379773312482607106> [<https://perma.cc/8MMK-QGRM>].

302. Donegan, *supra* note 299.

303. Infrastructure Investment and Jobs Act, Pub. L. 117–58, 135 Stat. 429 (2021).

304. *Fact Sheet: The Bipartisan Infrastructure Deal*, WHITE HOUSE: BRIEFING ROOM (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal> [<https://perma.cc/696J-KTL9>].

305. *Remarks by President Biden at Signing of H.R. 3684, the Infrastructure Investment and Jobs Act*, WHITE HOUSE: BRIEFING ROOM (Nov. 15, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/15/remarks-by-president-biden-at-signing-of-h-r-3684-the-infrastructure-investment-and-jobs-act> [<https://perma.cc/U39D-7J6A>].

childhood education, industries in which a disproportionate number of jobs are underpaid and are held by women of color,³⁰⁶ were moved to the Build Back Better Plan. The Build Back Better Plan, which had been progressively reduced in size from \$3.5 trillion to \$1.85 trillion, appeared unlikely to pass as of December 2021,³⁰⁷ leaving the commitments to funding care economy jobs uncertain. Again, just as happened in recovery packages during the Great Depression and the Great Recession, the federal government chose to invest in jobs predominantly held by men and refused to make necessary investments in jobs predominantly held by women.

C. *The Impact of Childcare Responsibilities on Women's Employment*

“Let me say the quiet part loud: In the COVID-19 economy, you're only allowed a kid or a job.”³⁰⁸

Every state announced some degree of school closures in March 2020,³⁰⁹ and many schools would remain closed at least through March 2021.³¹⁰ Thousands of parents received virtually no notice—closures in Los Angeles were announced on Friday, March 13 and took effect on Monday, March 16, and closures in Arizona were announced on Sunday, March 15 and took effect on Monday, March 16.³¹¹ The burden of providing childcare when schools suddenly closed fell disproportionately onto women.

306. Ronald Brownstein, *Biden's Economic Policy Moves Away From the Strategy of His Party's Past Two Presidents*, CNN (Nov. 16, 2021, 2:37 PM), <https://www.cnn.com/2021/11/16/politics/biden-infrastructure-bill-jobs-childcare/index.html> [<https://perma.cc/97PH-W9BW>].

307. Ellen Ioanes, *Did Joe Manchin Just Kill Build Back Better on Fox News?*, Vox (Dec. 19, 2021, 3:08 PM), <https://www.vox.com/2021/12/19/22844969/manchin-build-back-better-setback-biden-social-spending-bill> [<https://perma.cc/5GTG-2F5Q>].

308. Deb Perelman, *In the COVID-19 Economy, You Can Have a Kid or a Job. You Can't Have Both.*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html> [<https://perma.cc/P3NV-J5QR>].

309. *Map: Coronavirus and School Closures in 2019–2020*, EDUC. WK. (Oct. 13, 2021), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [<https://perma.cc/5NRU-HBJD>]. 67 percent of public school districts across the United States cancelled in-person classes in mid-March 2020. DANIEL A. COX & SAMUEL J. ABRAMS, AM. ENTER. INST., *THE PARENTS ARE NOT ALL RIGHT: THE EXPERIENCES OF PARENTING DURING A PANDEMIC 3* (2020).

310. *Map: Coronavirus and School Closures in 2019–2020, supra* note 309; *Map: Where Were Schools Required to Be Open for the 2020–21 School Year?*, EDUC. WK. (June 14, 2021), <https://www.edweek.org/leadership/map-where-are-schools-closed/2020/07> [<https://perma.cc/N2EX-37LG>].

311. Howard Blume, Hailey Branson-Potts, Ruben Vives & Alex

Before the pandemic, working mothers were more likely than working fathers to provide childcare and working mothers spent more time on childcare than working fathers.³¹² As early as the first few months of the pandemic, the negative career effects on women with children were apparent. Women with children experienced “a large reduction in the probability of full-time employment compared to men with children, and this effect [was] not mediated” by any industry or occupation factors.³¹³ Women with children experienced “substantially higher rates of absence from work” than women without children,³¹⁴ which could predict later job losses.³¹⁵

Academic studies and opinion articles published early in the pandemic theorized that forced parental telecommuting during the pandemic would cause couples to share housework and childcare more equally,³¹⁶ and nearly half of fathers with children under age

Wigglesworth, *LAUSD to Shut for at Least 2 Weeks*; , L.A. TIMES (Mar. 14, 2020), https://enewspaper.latimes.com/infinity/article_share.aspx?guid=f4ee6077-1842-4bd8-ab61-1f958bda1321 [<https://perma.cc/M6PB-6LRU>]; Lily Altavena, *All Arizona Schools Ordered Closed Through March 27*, AZCENTRAL (Mar. 15, 2020, 7:06 PM), <https://www.azcentral.com/story/news/local/arizona-education/2020/03/15/all-arizona-schools-close-due-coronavirus/5055982002> [<https://perma.cc/MVY3-SBCE>].

312. 71.1 percent of working fathers with children under age six spent time on childcare on workdays and spent an average of 1.57 hours on childcare per workday; 91.2 percent of similar working mothers spent an average of 1.90 hours on childcare per workday. SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, *AN UNEQUAL DIVISION OF LABOR: HOW EQUITABLE WORKPLACE POLICIES WOULD BENEFIT WORKING MOTHERS* 22 (2018).

313. Benjamin W. Cowan, *Short-Run Effects of COVID-19 on U.S. Worker Transitions* 9–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27315, 2020) (suggesting, for example, that those job losses were not a result of business closures); see also Tim Henderson, *Mothers Are 3 Times More Likely Than Fathers to Have Lost Jobs in Pandemic*, PEW: STATELINE (Sept. 28, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/28/mothers-are-3-times-more-likely-than-fathers-to-have-lost-jobs-in-pandemic> [<https://perma.cc/2RTU-TWWX>].

314. Laura Montenovo, Xuan Jiang, Felipe Lozano Rojas, Ian M. Schmutte, Kosali I. Simon, Bruce A. Weinberg & Coady Wing, *Determinants of Disparities in COVID-19 Job Losses* 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27132, 2020) https://www.nber.org/system/files/working_papers/w27132/w27132.pdf [<https://perma.cc/86KT-XLN3>].

315. See, e.g., Sandra Ebberts, *Is Absenteeism Harming Your Workforce Productivity?*, RANDSTAD (June 8, 2020), <https://www.randstad.com/workforce-insights/talent-management/absenteeism-harming-your-workforce-productivity> [<https://perma.cc/5NHG-CW78>] (linking absences to negative impacts on the employer, including loss of revenue and morale).

316. See generally Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree.*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html> [<https://perma.cc/V45T-2C8H>]; Daniel L. Carlson,

twelve self-reported spending more time on homeschooling than their spouse spent.³¹⁷ But time-use studies showed that this narrative was false and found that the additional burdens of childcare fell primarily on women. In families in which both parents were employed and worked remotely during the pandemic, telecommuting mothers did more housework than telecommuting fathers did.³¹⁸ Further, telecommuting mothers were more likely than telecommuting fathers to be working with a child present, indicating mothers had concurrent responsibility for childcare and work.³¹⁹ The time-use findings were consistent with pre-pandemic studies on telecommuting, which found that remote work reinforces gender norms by requiring women to multitask and handle childcare while working, increases interruptions in mothers' work days, and leads women to devote any time saved by not commuting to childcare.³²⁰ In fact, one study found that women with college degrees and remote-capable jobs were most likely to leave their jobs during the pandemic, in part because of burnout due to concurrent work and home responsibilities, but also because they are more likely to have the economic ability to take leave.³²¹ This suggests that women

Richard Petts & Joanna R. Pepin, *Changes in Parents' Domestic Labor During the COVID-19 Pandemic*, SOCIO. INQUIRY (forthcoming 2021) (manuscript at 3) (<https://onlinelibrary.wiley.com/doi/10.1111/soin.12459> [<https://perma.cc/347K-KLLH>]) (“[T]he pandemic may provide an opportunity for fathers to act on their stated desires to be more engaged at home. Parents' division of domestic labor may have become more equal if fathers' increases in housework and childcare outpaced new responsibilities for mothers. The pandemic removed workplace barriers (e.g., lack of paid leave, inability to telecommute) often cited as key impediments to fathers' domestic involvement.”).

317. Miller, *supra* note 316. Only 3 percent of women agreed that their husbands spent more time on homeschooling, and 80 percent of mothers reported spending more time on homeschooling than their spouse. *Id.* Additionally, the percentage of women who reported spending more time on housework and childcare (70 and 66 percent, respectively) did not change significantly since before the pandemic. *Id.*

318. Thomas Lyttelton, Emma Zang & Kelly Musick, *Gender Differences in Telecommuting and Implications for Inequality at Home and Work* 30 (July 8, 2020) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645561 [<https://perma.cc/V67X-6YPW>]). Telecommuting mothers were also more likely than fathers to report feeling anxiety, loneliness, and depression. *Id.*

319. *Id.*

320. *Id.* at 6–7.

321. Misty L. Heggeness & Palak Suri, *Telework, Childcare, and Mothers' Labor Supply* 24 (Fed. Rsrv. Bank of Minneapolis: Opportunity & Inclusive Growth Inst., Working Paper No. 52, 2021) (“Mothers with low levels of education in telework-compatible occupations do not look any different than their counterparts without children in terms of work engagement. Telework allowed them to stay tethered to a job they probably needed to put food on

in lower-paid remote jobs still experienced the same high levels of exhaustion and burnout, but were not as economically able to leave work during the pandemic.³²²

Women taking short employment gaps or switching to part-time work is of concern because interruptions in work history are associated with significant economic losses over the life of a career.³²³ Even a year taken off work from a minimum-wage job represents a substantial loss of lifetime income—a one-year gap for an eighteen-year-old worker who would have made \$14,500 in that year can result in a lifetime income loss of almost \$72,000.³²⁴ Women who experience career breaks earn less when they return to work, they do not make up the losses in retirement savings or social security benefits,³²⁵ and some women who lose their jobs will never return.³²⁶ Because women tend to hold “the most marginal, low-authority positions” and have the shortest tenures, they are at risk when companies base layoff decisions on tenure or use a “last

the table and a roof over their head. They most likely paid a price, however, in terms of exhaustion and burn out. Custodial mothers with high-levels of education in telework-compatible jobs disproportionately left the workforce and took leave. These mothers experienced the same high-intensity level of multitasking childcare with paid labor but most likely had enough resources within their household or savings to make the choice to step back from juggling pandemic care and paid work.”); *id.* at 34 fig.2 (showing spikes in the percentage of both college-educated and non-college mothers with remote-capable jobs reporting that they were on leave from a job during the worst months of the pandemic).

322. *Id.* at 24.

323. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386–87 (2001). The BLS found that the negative earnings effects of career gaps continue to impact workers at least twenty years after the end of the last break. Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV., Sept. 1995, at 14, 18.

324. MICHAEL MODOWITZ, ALEX ROWELL & KATIE HAMM, CTR. FOR AM. PROGRESS, CALCULATING THE HIDDEN COST OF INTERRUPTING A CAREER FOR CHILD CARE 9 (2016). The total is comprised of the year of lost wages, \$30,250 in lost lifetime wage growth, and \$27,134 in lost retirement assets and benefits, adding up to a 4 percent reduction in lifetime income for that one lost year of work. *Id.* A first-grade teacher who takes a five-year break early in her career can experience a 20 percent reduction in lifetime income. *Id.*

325. *Id.* at 2.

326. Chabeli Carrazana, *Coronavirus Pandemic Creates America's First Female Recession Amid Child Care, Unemployment Woes*, USA TODAY (Aug. 5, 2020, 2:57 PM), <https://www.usatoday.com/story/news/politics/elections/2020/08/03/coronavirus-pandemic-sets-women-back-amid-unemployment-child-care-crisis/5573123002> [<https://perma.cc/B7NH-55BT>].

hired, first fired” approach.³²⁷ Therefore, women leaving jobs during the pandemic, even for short periods of time, is not a minor disruption, but rather a serious issue with significant future career and economic consequences.

D. *The Picture of the Average Woman During the Pandemic Is Important—and Inaccurate*

“Your husbands, they want to get back to work, right?
They want to get back to work. We’re getting
your husbands back to work.”³²⁸

During both the Great Depression and the Great Recession, assumptions about which women worked and how they worked created an artificial image of working women that did not reflect the lived experiences of women workers. This inaccurate image helped drive policy initiatives that hurt women’s employment in the long run. The New Deal women’s summer camp relief program rested on the idea that most women did not work to provide primary family support and therefore did not need more robust work relief options. The ARRA’s focus on new transportation and infrastructure jobs was predicated on the assumption that men specifically, not lower-wage workers more broadly, needed help. Gender-normative ideas about work, home, and family informed the policy responses designed to address both crises. Stimulus packages aimed at men and male-majority industries that ignored women’s job losses and female-majority industries restored the gendered status quo after the recessions ended.³²⁹

Just as in the past, the popular picture of the average working woman during the first year of the COVID-19 pandemic was inaccurate and it limited early social and policy responses. The narrative of women and work during the pandemic focused on one type of woman—a married white woman with children and a remote-capable job, who could afford either to keep her job or to stay home with her children.³³⁰ This image of the average working woman is not

327. Alexandra Kalev, *Research: U.S. Unemployment Rising Faster for Women and People of Color*, HARV. BUS. REV. (Apr. 20, 2020), <https://hbr.org/2020/04/research-u-s-unemployment-rising-faster-for-women-and-people-of-color> [<https://perma.cc/X2TM-ZD3F>].

328. Dominick Mastrangelo, *Trump’s Pitch to Women on Coronavirus Recovery: ‘We’re Getting Your Husbands Back to Work’*, HILL (Oct. 27, 2020, 4:52 PM), <https://thehill.com/homenews/523026-trumps-pitch-to-women-on-coronavirus-recovery-were-getting-your-husbands-back-to-> [<https://perma.cc/37H9-XJCL>] (quoting President Donald Trump).

329. See Sommers, *supra* note 243.

330. See, e.g., Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women>.

race-neutral—Black and Latinx workers are less likely than white workers to be able to telework—and it privileges the experience of women with jobs that can be done remotely, who have the contributions of a working partner, and who survived the first wave of pandemic job losses.³³¹ Policies designed around this construction of the average working woman exclude the millions of women who do not live in dual-earner households in which both partners can telecommute or in which one partner can leave a job to manage childcare.³³²

[html?auth=link-dismiss-google1tap \[https://perma.cc/TDF8-ZBG9\]](https://perma.cc/TDF8-ZBG9) (reporting on a mother who cared for her three-year-old twins while her husband worked during the day and then worked her own job remotely from 6 p.m. until 2 a.m., and another mother who ran her business from 3 a.m. to 8 a.m., then juggled work and watching her son until noon when her husband took over childcare). Similar news stories were accompanied by pictures of women working at home on laptops while children look on nearby (or, in some, hang on their bodies). See, e.g., Allison Robinson, *COVID-19 Is Causing a Backslide in Workplace Gender Equality. Here's How to Stop It*, FORTUNE (Aug. 3, 2020, 7:00 AM), <https://fortune.com/2020/08/03/covid-19-working-moms-gender-equality-backslide> [<https://perma.cc/U88J-H6AY>]; Perelman, *supra* note 308; EJ Dickson, *Coronavirus Is Killing the Working Mother*, ROLLING STONE (July 3, 2020, 9:00 AM), <https://www.rollingstone.com/culture/culture-features/working-motherhood-covid-19-coronavirus-1023609> [<https://perma.cc/CKE7-ELC8>]; Gina Navaroli, *Working Moms Are Struggling to Engage at Work—And It Will Cost the Economy \$341B*, MSNBC (Apr. 17, 2020, 10:44 AM), <https://www.nbcnews.com/know-your-value/feature/working-moms-are-struggling-engage-work-it-will-cost-economy-ncna1185256> [<https://perma.cc/SK4B-Q6XY>]; Pablo Uchoa, *Coronavirus: Will Women Have to Work Harder After the Pandemic?*, BBC (July 14, 2020), <https://www.bbc.com/news/business-53363253> [<https://perma.cc/BC8Y-JYYB>].

331. Perelman, *supra* note 308; Cohen & Hsu, *supra* note 330; see also Rasheed Malik & Taryn Morrissey, *The COVID-19 Pandemic Is Forcing Millennial Mothers Out of the Workforce*, CTR. FOR AM. PROGRESS (Aug. 12, 2020, 5:00 AM), <https://www.americanprogress.org/issues/early-childhood/news/2020/08/12/489178/covid-19-pandemic-forcing-millennial-mothers-workforce> [<https://perma.cc/53PS-FR5F>]; Elise Gould & Heidi Shierholz, *Not Everybody Can Work From Home*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 19, 2020, 1:15 PM), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home> [<https://perma.cc/2EYZ-BPFZ>] (finding that 30 percent of white workers and 37 percent of Asian workers can work remotely, but only 20 percent of Black workers and 16 percent of Latinx workers can).

332. 41 percent of mothers were the sole or primary breadwinners for their families, defined as single mothers and married women who earn more than their partners. Sarah Jane Glynn, *Breadwinning Mothers Continue to Be the U.S. Norm*, CTR. FOR AM. PROGRESS (May 10, 2019, 5:17 PM), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm> [<https://perma.cc/3S43-5EER>]. Breadwinning mothers are more likely to head lower-income families, and the poorest breadwinning mothers are also the most likely to be single mothers. *Id.*

The theme of choice, which was used before the pandemic to explain away gendered job segregation and which formed the basis for the Depression-era pin money myth that women chose to work for luxury money and justified policies of selectively firing married women, carried through the discourse surrounding working women during the pandemic recession. A *Time* story started by acknowledging forced furloughs and layoffs in healthcare and hospitality, but then reported “[m]any women are leaving the workforce not because their jobs have vanished but because their support systems have [vanished]. . . . Women’s decisions to exit the labor force this year will likely impact their own professional and financial goals for the rest of their lives.”³³³ Another writer focused on the limited options available to women in lower-paying jobs: “For low-income and single moms, the pandemic has exacerbated *the hard choices* between spending a significant portion of their income on child care[,] finding a cheaper but potentially lower-quality option[,] or leaving the workforce to become a full-time caregiver.”³³⁴ But this choice narrative oversimplifies the economic realities faced by women who do not match the picture of a dual-income family with two remote workers. If schools close suddenly and childcare is no longer available, or if the household does not include another adult wage-earner, the ability to “choose” between already limited options disappears.

When women’s job losses are presented as the outcome of voluntary decisions, policymakers and the public become less willing to address the issue or even acknowledge that there is a collective problem.³³⁵ That lack of concern was reflected in the early feder-

333. Abby Vesoulis, *If We Had a Panic Button, We’d Be Hitting It.* *Women Are Exiting the Labor Force En Masse—And That’s Bad for Everyone*, *TIME* (Oct. 17, 2020, 1:12 PM), <https://time.com/5900583/women-workforce-economy-covid> [<https://perma.cc/KYL8-H9TU>] (emphasis added); see also Malik & Morrissey, *supra* note 331 (presenting the problem as women being “forced” out of jobs when they were “unable to work” because of childcare responsibilities).

334. Alicia Sasser Modestino, *Coronavirus Child-Care Crisis Will Set Women Back a Generation*, *WASH. POST* (July 29, 2020, 4:00 AM), <https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment> [<https://perma.cc/K8M5-95SL>] (emphasis added). This article acknowledged that advocates predicted the loss of a half million childcare slots, leaving it more challenging for single mothers to find childcare during the pandemic and potentially requiring women to leave jobs to provide childcare, but did not ask how single mothers not in the workforce were expected to pay their bills. *Id.*

335. See HIRSHMAN, *supra* note 262, at 25 (arguing that using the concepts of “choice[]” and an individual’s “own . . . business” insulates people’s actions from scrutiny and creates an expectation that “no one can look at [them]”); Helaine Olen, *Opinion: A Lousy Myth About Moms, Kids and Work Makes a Comeback. Republicans Are Running With It.*, *WASH. POST* (May 9, 2021, 8:00

al response, which largely ignored the massive job losses borne by women.³³⁶ In a campaign rally on October 27, 2020, ten months after the first job losses related to the pandemic, President Trump signaled his view that women's employment is ultimately less important than men's employment when he couched the recovery in gendered terms: "Your husbands, they want to get back to work. . . . We're getting your husbands back to work."³³⁷ This argument reinforces the cultural norm that if one partner in an opposite-gender couple has to lose a job to care for the house or the family, it is more likely to be the woman.³³⁸

One theory hypothesizes that the pandemic will result in greater gender parity because it will spur employers and individual

AM), <https://www.washingtonpost.com/opinions/2021/05/09/just-time-mothers-day-lousy-myth-about-moms-kids-work-makes-comeback-republicans-are-running-with-it> [<https://perma.cc/HF5W-ZCRP>] ("It is, after all, an American character trait to take personal responsibility for solving a systemic failure—like millennials who think they don't have enough savings because they order avocado toast, instead of because they're drowning in student loan debt. Similarly, women, pushed out of the workforce by our family-unfriendly workplaces, lack of care-taking infrastructure and the continuing societal expectation that women—and not men—are the primary parent responsible for the well-being of children, often say they are decisive actors in their own stories.").

336. See *supra* note 296 and accompanying text.

337. Mastrangelo, *supra* note 328.

338. Not only are these lessons consistent with those from the Great Depression and the Great Recession, but they are also consistent with what other countries have experienced in other epidemics. During the 2014 Ebola outbreak in Guinea, Liberia, and Sierra Leone, "gender norms meant that women were more likely to be infected by the virus, given their predominant roles as caregivers within families and as front-line health-care workers." Clare Wenham, Julia Smith, Sara E. Davies, Huiyun Feng, Karen A. Grépin, Sophie Harman, Asha Hertzen-Crabb & Rosemary Morgan, *Women Are Most Affected by Pandemics—Lessons From Past Outbreaks*, NATURE (July 8, 2020), <https://www.nature.com/articles/d41586-020-02006-z> [<https://perma.cc/NE59-MRKK>]. The Liberian unemployment rate tripled for men and women, but men's employment recovered much more quickly than women's employment recovered, in part because women were clustered in jobs as self-employed food vendors and the industry did not regain consumer confidence quickly after the virus. Melinda Gates, *The Pandemic's Toll on Women: COVID-19 Is Gender-Blind, but Not Gender-Neutral*, FOREIGN AFF. (July 15, 2020), <https://www.foreignaffairs.com/articles/world/2020-07-15/melinda-gates-pandemics-toll-women> [<https://perma.cc/DF57-L8VS>]. Sara E. Davies & Belinda Bennett, *A Gendered Human Rights Analysis of Ebola and Zika: Locating Gender in Global Health Emergencies*, 92 INT'L AFFS. 1041, 1043 (2016) ("The short- and long-term responses to Ebola show that the male bias is very much present in thinking about disease outbreaks: there is little to no discussion about gendered impacts of the disease in framing the crisis, data disaggregated by sex were late in coming, and no strategy includes gender indicators.").

families to adjust their standard practices to better enable working women to balance job and family responsibilities:

[T]he COVID-19 pandemic is likely to accelerate changing social norms and expectations. . . . Many businesses are now becoming much more aware of the childcare needs of their employees and respond by rapidly adopting more flexible work schedules and telecommuting options. Through . . . changing norms, some of these changes are likely to become persistent.³³⁹

This argument posits that more men will step into primary caretaking roles, either because their women partners make more money or because their women partners work in jobs that cannot be done remotely, which will result in changes to gender-segregated inter-family norms.³⁴⁰ This argument, however, is centered around the idealized picture of the working woman in a two-earner household with a higher-paying job that includes schedule and/or temporal flexibility.³⁴¹ Changes to these norms are less likely to benefit the majority of women who do not fit this idealized picture.

339. Alon, Doepke, Olmstead-Rumsey & Tertilt, *supra* note 24, at 2–3; *see also* David G. Smith & W. Brad Johnson, *Gender Equity Starts in the Home*, HARV. BUS. REV. (May 4, 2020), <https://hbr.org/2020/05/gender-equity-starts-in-the-home> [<https://perma.cc/L8ET-X45R>] (“The presence of more men sharing more fully in domestic duties for an extended period of time has the potential to create a sea change in gendered norms—at home and at work.”); Daniel L. Carlson, Richard J. Petts & Joanna R. Pepin, *Men and Women Agree: During the COVID-19 Pandemic Men Are Doing More at Home*, COUNCIL ON CONTEMP. FAMS., <https://contemporaryfamilies.org/covid-couples-division-of-labor> [<https://perma.cc/JL39-RKLQ>] (last visited Mar. 5, 2022) (“The COVID-19 pandemic has eliminated some of the structural barriers to sharing domestic work—particularly for men—since many adults are now working from home. The pandemic has demonstrated that many jobs can be done remotely. To the extent such arrangements increase, this may create greater egalitarianism, because recent evidence from before the pandemic shows that men who work from home share more equally in domestic labor.”).

340. Alon, Doepke, Olmstead-Rumsey & Tertilt, *supra* note 24, at 3 (“The literature on policy changes that engineer a similar change (e.g., ‘daddy months’ and other forms of paternity leave) suggest that such a reallocation of duties within the household is likely to have persistent effects on gender roles and the division of labor.”). In 2011, only 20 percent of fathers were the primary caregivers for preschool-age children in families with a wife in the workforce. *One-Third of Fathers With Working Wives Regularly Care for Their Children*, *Census Bureau Reports*, U.S. CENSUS BUREAU (Dec. 5, 2011), <https://www.census.gov/newsroom/releases/archives/children/cb11-198.html> [<https://perma.cc/S96C-6SA8>].

341. The example cited in the paper—“a wife who is a doctor or nurse working in a hospital married to an office worker who can work from home during the crisis”—does not resemble the average American family. *See* Alon, Doepke, Olmstead-Rumsey & Tertilt, *supra* note 291, at 39.

Moreover, a family model with a woman as breadwinner and a man as caretaker did not become common during either the Great Depression or the Great Recession, when the added-worker effect made employed wife/unemployed husband pairings more common than those family arrangements had been before the recession. Instead of normalizing and supporting women as breadwinners, there was a strong traditionalist push to return to a model of the family predicated on a man as the primary breadwinner. The presence of government and private-sector policy initiatives discouraging women from working amplified this effect during the Great Depression, as did the targeted recovery initiatives that privileged men's jobs over women's jobs during the Great Recession. The situation created by the COVID-19 pandemic is arguably different—women did not gain employment ground in the beginning of the pandemic recession, so it is plausible that without the same catalyst, there might not be the same backlash. It is equally plausible, if not more likely, however, that the mass exit of women from the external paid labor force back into the home in response to the pandemic will “result in a large-scale backslide toward ‘traditional’ gender norms” and “may shift families toward traditional structures and conceptions of gender—a shift toward social conservatism.”³⁴² Both short- and long-term policy and social responses must account for this risk of traditionalist backlash and provide enhanced support for women reentering the workforce.

CONCLUSION

During the beginning of the COVID-19 pandemic and recession, the decisions people made were informed by traditional and gender-specific ideas about work and family that have not changed since the Great Depression. Even as working women have gained greater representation in the workforce and made progress toward equitable pay, the simple choice narrative—that women can choose whether to work or to stay home without significant damage to the family's finances—is just a gloss on the pin money myth that women work to afford luxuries instead of to provide family support. Telling the story about women and work during the pandemic recession by focusing on mothers *choosing* not to work obscures the societal pressures that make it far more likely the parent in a heterosexual couple leaving work to care for the children and the home will be the woman. Constructing the average working woman as a remote worker in a two-income household centers a minority

342. Benjamin M. Seitz et. al., *The Pandemic Exposes Human Nature: 10 Evolutionary Insights*, 117 PNAS 27767, 27770 (2020).

of working women and deemphasizes the single mothers, breadwinning women, women who have to work in-person, and women who lost their jobs early in the pandemic recession.

The pandemic recession will create a serious setback for the status of women's employment—a “disaster for feminism”³⁴³—unless gender-conscious policies are employed with the immediate goal of regaining what was lost and a long-term goal of achieving equity. One lesson to take away from past recessions is the effectiveness of gender-informed recovery policies—the Great Depression's gender-specific preference for men and the Great Recession's gender-conscious preference for men both resulted in improved recovery for men's jobs over women's jobs. Because the current workforce is still highly gender-segregated and stratified, facially neutral jobs recovery policies have disparate impacts on women versus men. When grounded in accurate descriptions of the workers most impacted by job losses, gender-conscious recovery efforts following the pandemic can be effective and efficient, and are necessary.

343. Helen Lewis, *The Coronavirus Is a Disaster for Feminism*, ATLANTIC (Mar. 19, 2020), <https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302> [<https://perma.cc/L7R8-PPAX>].