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The Statutory Public Interest in Closing the Pay Gap

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THE STATUTORY PUBLIC INTEREST IN CLOSING THE PAY GAP

Stephanie Bornstein*

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INTRODUCTION

In the fight for gender equality, compensation discrimination has been a perennial problem. Women have always worked outside of the home, particularly women of color, single women, and women whose income was needed to support their families.¹ For these women, work both before industrialization (for example, as domestic laborers) and after (for example, as factory workers) was often undervalued and, correspondingly, underpaid.² For more affluent women, Victorian Era notions of domesticity and separate spheres created the expectation that they should focus on the home and leave the market sphere to their husbands.³ This gendered division of labor reinforced the idea that women were less “suited” for the workplace and that their work was for extra “pin money” rather than a serious contribution to family income.⁴ Again, the result was an undervaluation of women’s market work, resulting in lower pay.⁵

Inequality in women’s pay took center stage in the mid-twentieth century due to women’s greater participation in the paid workforce during World Wars I and II.⁶ Because so many men left work to serve in the wars, jobs that had been filled traditionally by men became open to women.⁷ And because both wars required a significant increase in U.S. production of war-related goods like ammunition and

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1. See generally ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED: A HISTORICAL OVERVIEW* (1981) (describing the history of working women).
 2. See, e.g., *id.*; Claudia Goldin & Kenneth Sokoloff, *Women, Children, and Industrialization in the Early Republic: Evidence from the Manufacturing Censuses*, 42 J. ECON. HIST. 741, 742-74 (1982) (“Women and children located in predominantly agricultural areas were widely perceived as a cheap source of labor for the expanding manufacturing sector.” *Id.* at 759).
 3. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1-3, 23-24 (2000).
 4. See *id.* at 24.
 5. See *id.*
 6. See MARIA L. ONTIVEROS ET AL., *EMPLOYMENT DISCRIMINATION LAW* 375-78 (9th ed. 2016) (citing RUTH MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II* 1 (David Broody et al. ed. advisors, 1987); Cathryn L. Claussen, *Gendered Merit: Women and the Merit Concept in Federal Employment, 1864-1944*, 40 AM. J. LEGAL HIST. 229, 233 (1996)); David Freeman Engstrom, “Not Merely There to Help the Men”: *Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 14-15, 65-66 (2018).
 7. See ONTIVEROS ET AL., *supra* note 6, at 375-78.

airplanes, new jobs were created—with only women there to fill them.⁸ Once women performed jobs previously occupied by men, but at a lower rate of pay, sex-based pay discrimination became obvious, inspiring calls to remedy the problem.⁹ Among those working to end unequal pay were predominantly male unions, who feared their male members would return from war to find their wages “eroded” by the presence of women in the same jobs or, worse, to find themselves replaced by cheaper female labor.¹⁰

Despite years of advocacy and advancement at the state level, it was not until the mid-1960s that the federal legislature acted to redress unequal pay.¹¹ Since then, federal law has prohibited sex discrimination in pay through two parallel mechanisms: the Equal Pay Act of 1963 (EPA)¹² and Title VII of the Civil Rights Act of 1964 (Title VII).¹³ Enacted within one year of each other, the statutes offer two different paths for employees to challenge sex-based pay discrimination.¹⁴ The EPA was codified as an amendment to the already existing Fair Labor Standards Act of 1938 (FLSA).¹⁵ It requires “equal pay” for “equal work” regardless of sex as a minimum labor standard for all covered employers, unless the *employer* can prove that the disparity *was not* based on sex.¹⁶ In contrast, Title VII created a new framework that grew out of the Civil Rights Movement to prohibit intentional discrimination because of race, color, national origin, religion, and sex.¹⁷ Under Title VII, employees can allege sex discrimination in compensation (as well as hiring, firing, and other terms and conditions of work), which the *employee* must prove *was* the result of discrimination.¹⁸

8. *See id.*

9. *See id.*

10. *See* MILKMAN, *supra* note 6, at 74–77; Engstrom, *supra* note 6, at 65–72 (describing unions’ “conflicted position on pay equity” and the impetus to prevent discrimination against men).

11. *See* ONTIVEROS ET AL., *supra* note 6, at 378; Engstrom, *supra* note 6, at 47–83.

12. 29 U.S.C. § 206(d) (2012).

13. 42 U.S.C. §§ 2000e-2 to -17 (2012).

14. *See infra* Part I.A.

15. 29 U.S.C. § 201–219 (2012).

16. *See infra* Part I.A.

17. *See infra* Part I.A.

18. *See infra* Part I.A.

Thus federal law offers two routes to challenge sex discrimination in pay, each with its own strategic advantages and disadvantages for employee plaintiffs.¹⁹ For over three decades, the two laws, along with women's advancement in education and work experience, have helped equalize pay between men and women.²⁰ In one measure of the gender pay gap,²¹ women working year-round full-time went from earning, on average, 57 cents on the dollar of similarly-situated men in 1973 to earning 75 cents on the dollar in 2000.²² Yet for the past two decades, advancement has stalled, with little improvement in women's earnings as compared to men's and a pay ratio stuck at 75 to 80 cents on the dollar since 2000.²³ Beginning in the 1970s, more plaintiffs have pursued sex-based pay discrimination claims under Title VII than under the EPA, viewing Title VII's strategic advantages to outweigh those of the EPA.²⁴ The persistence of the gender pay gap, however, has sparked renewed interest in the EPA and legislative efforts to strengthen its protections.²⁵ Reviving the EPA would allow plaintiffs to benefit from its strongest advantage over Title VII: a burden-shifting approach that, once a plaintiff-employee makes out a *prima facie*

19. *See infra* Part I.A.

20. *See infra* Part II.A.

21. The gender pay gap is the difference between what men and women earn and can be measured in a variety of ways. The most aggregated statistic compares the annual pay of all women working full-time year-round to all men doing the same, to come up with an average overall pay gap. Critics dispute this measurement; yet no matter how finely you parse the data, a wide array of economists document that some pay gap remains. This holds true even after controlling for education, experience, work hours, age, race, and geography, and even when comparing two similarly-situated employees performing the same job. *See* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 588–602 (2018) (citations omitted) [hereinafter *Equal Work*]. Some specific data on the current gender pay gap is provided in Part II.A of this Essay. However, a complete discussion of data supporting the gender pay gap is beyond the scope of this Article, which starts from the proven proposition that a gender pay gap exists. For a detailed discussion of current data on the pay gap, and a response to its critics, see *id.*

22. *See* AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 4 (Spring 2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth.

23. *See id.* The gender pay gap is greater for African-American and Latina women than for white and Asian-American women. *See infra* note 122 and accompanying text.

24. *See infra* Part I.A.

25. *See infra* Part I.A, II.B.

case, requires the defendant-employer to *disprove*, rather than the employee to *prove*, discrimination.²⁶

Yet there is another significant but unexamined advantage to the EPA, based on its enactment as a subsection within the Fair Labor Standards Act rather than the Civil Rights Act: a limitation on an employee's ability to waive its protections. When Congress enacted the FLSA in 1938, its goal was not solely to create individual private rights of action for exploited workers, but also to serve important public interests—to root out unfair competition, balance employer-employee bargaining power, and improve public health and welfare in the wake of the Great Depression.²⁷ As a result, the FLSA prohibits employees from agreeing to accept less than the statutorily required minimum wage or waiving their rights to receive overtime pay, as a matter of public interest.²⁸ When the EPA was enacted in 1963, Congress identified similar goals, raising concerns about the underpayment of female workers whose income was essential to their families' economic security and the U.S. economy as a whole.²⁹ Federal courts have held that, like under the FLSA, employees cannot waive their rights under the EPA.³⁰

This Essay explores the role that the statutory public interest should play in the enforcement of rights under the EPA. Current data shows that, even fifty-five years after the enactment of federal law outlawing sex based pay discrimination, the gender pay gap inflicts huge costs on women, their families, and the U.S. economy, echoing the public concerns that led to the statute's original passage.³¹ That FLSA and EPA rights cannot be waived by an employee calls into question two common employer pay-setting practices often excused under federal law: setting pay by individual negotiation and basing pay on an employee's prior salary. As this Essay argues, both practices unfairly benefit employers due to unequal information and bargaining power; as such, allowing them to excuse unequal pay constitutes a forced waiver of an employee's EPA rights. Part I of this Essay reviews existing law under Title VII and the EPA before turning to examine the statutory public interests and related limitations on waiver of FLSA and EPA rights. Part II applies these considerations to the modern workplace, first identifying the public interests in

26. *See infra* Part I.A.

27. *See infra* Part I.B.

28. *See infra* Part I.B.

29. *See infra* Part I.C.

30. *See infra* Part I.C.

31. *See generally* JESSICA MILLI ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, THE IMPACT OF EQUAL PAY ON POVERTY AND THE ECONOMY (Apr. 2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf> (discussing the consequences of the gender pay gap).

closing today's gender pay gap, then considering employer pay-setting practices through the lens of the nonwaivability of EPA rights.

Importantly, this Essay in no way seeks to advocate for a protectionist approach or to imply that women need special treatment in compensation practices. Instead it seeks to expose a significant proportion of the gender pay gap for what it actually is: the result of unfair competition and unfair labor practices that injure the public interest and the U.S. economy. Just as a law that requires a minimum wage and an overtime premium for all workers is not “protection” for a special group but, instead, a minimum labor standard that helps the entire U.S. economy, so too is a law that requires for equal pay regardless of sex. Underpaying female workers—who now compose nearly half of the paid workforce and provide 40 to 100% of household income in half of all families with children³²—hurts the entire U.S. economy. Both the FLSA and the EPA were passed with the public concern in mind; it is time to revisit this intention.

I. STATUTORY APPROACHES AND PUBLIC INTERESTS

A. *Two Routes to Remedy Pay Discrimination: Title VII and the Equal Pay Act*

Since the mid-1960s, two separate federal statutes, the Equal Pay Act³³ and Title VII,³⁴ have prohibited sex discrimination in compensation. Enacted as part of two, complementary statutory efforts, each provides its own strategic advantages and disadvantages to employees seeking to redress sex-based pay discrimination. For the most part, Title VII has been the more popular of the two approaches among plaintiffs; in recent years, however, there has been a renewed interest in the EPA.³⁵

Enacted in 1963 as an amendment to the FLSA of 1938, the EPA prohibits sex discrimination as a matter of wage and hour law. To bring a discrimination claim under the EPA, a plaintiff employee or group of employees must make out a prima facie case that, “within any establishment,” they are paid different wages than members of the opposite sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”³⁶ This is not an easy standard to meet. First, any comparison must be within the same “distinct physical place of business,” which may exclude

32. *Id.*

33. 29 U.S.C. § 206(d)(1) (2012).

34. 42 U.S.C. §§ 2000e-2 to -17 (2012).

35. See Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 890, 890–92 (2016).

36. 29 U.S.C. § 206(d)(1).

even different branch offices of the same employer.³⁷ Second, to perform under “similar working conditions” means that only jobs performed with the same likelihood of physical hazards or potential injuries can be compared, and usually excludes jobs performed for different lengths of time or during different hours.³⁸ Third, and most limiting, “equal work” that “requires equal skill, effort, and responsibility” has been interpreted narrowly.³⁹ While federal regulations suggest this analysis “does not require that compared jobs be identical, only that they be substantially equal,”⁴⁰ as applied, federal courts have expected female plaintiffs to produce evidence of a near-identical male comparator who is paid more.⁴¹

The narrow focus of the EPA’s *prima facie* case excludes a great many employees who may believe they have experienced sex discrimination in pay but cannot produce an exact comparator. If, however, a plaintiff-employee is able to make out a *prima facie* case, the EPA provides a strategic advantage: the burden of proof shifts from the plaintiff to the defendant-employer, who must now *disprove* discrimination using an affirmative defense.⁴² The employer can argue that the pay disparity was not discriminatory by showing that it was based on a system of

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37. 29 C.F.R. § 1620.9(a) (2012); *see, e.g., Lenihan v. Boeing Co.*, 994 F. Supp. 776, 797 (S.D. Tex. 1998) (explaining that the same “establishment” in the EPA generally excludes multiple offices of the same business).
 38. 29 C.F.R. § 1620.18(a) (2018); *see Corning Glass Works v. Brennan*, 417 U.S. 188, 204 (1974) (holding that shift differentials do not themselves violate the EPA); *Equal Emp’t Opportunity Comm’n v. Altmeyer’s Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (allowing disproportionately lower pay for part-time employees). *But see Lovell v. BBNT Sols., LLC*, 295 F. Supp. 2d 611, 620–11 (E.D. Va. 2003) (requiring proportionate pay for part-time employees).
 39. 29 U.S.C. § 206(d)(1); NAT’L WOMEN’S LAW CTR., CLOSING THE “FACTOR OTHER THAN SEX” LOOPHOLE IN THE EQUAL PAY ACT (2011), https://www.nwlc.org/sites/default/files/pdfs/4.11.11_factor_other_than_sex_fact_sheet_update.pdf.
 40. 29 C.F.R. § 1620.13(a) (2018).
 41. *See Equal Work*, *supra* note 21 at 585–86. In other work, I argue that, even under existing law, courts could interpret the “equal work” provision more broadly than they currently do. *See id.* at 629–30.
 42. *See* 29 U.S.C. § 206(d); *Lenihan*, 994 F. Supp. at 797–98 (“Unlike an EPA claim . . . to prevail on a wage discrimination claim under Title VII, the plaintiff must prove that the employer acted with discriminatory intent,” and, unlike a Title VII claim, “if the plaintiff succeeds in establishing a *prima facie* case [under the EPA], the burdens of production and persuasion shift to the employer to demonstrate as an affirmative defense that the difference in wages is justified by one of the exceptions specified under the Act.”). *See also Corning Glass Works*, 417 U.S. at 195–97 (1974) (describing burdens in collective actions).

“seniority[,] . . . merit[,] . . . [or] earnings by quantity or quality of production[,]” or—in the most sweeping of the statute’s affirmative defenses—that it was “based on any other factor other than sex.”⁴³ This “any other factor” defense has been the subject of much criticism and is blamed, in large part, for the limitations of the EPA’s reach.⁴⁴ In particular, as discussed in Part II, two common pay-setting practices thought to contribute to the gender wage gap—setting pay by individual negotiation and basing pay on an employee’s prior salary—have, in many federal courts, been excused under this defense.⁴⁵

Offering a different approach to pay discrimination claims, Title VII of the Civil Rights Act of 1964⁴⁶ prohibits sex discrimination in compensation using an antidiscrimination, rather than a minimum labor standards, approach. Title VII prohibits discrimination “because of” race, color, national origin, sex or religion in hiring, firing, terms and conditions of employment, and “compensation.”⁴⁷ Plaintiffs can use one or more of three legal theories to make out a claim of pay discrimination under Title VII: individual disparate treatment alleging intentional discrimination in pay, pattern-or-practice disparate treatment alleging systemic discrimination on behalf of a group, or disparate impact alleging that an employer’s “facially neutral” policies or practices are disproportionately harming members of a protected class.⁴⁸

43. 29 U.S.C. § 206(d)(1)(ii)–(iv) (2012).

44. See, e.g., Brake, *supra* note 35, at 892–901.

45. See *infra* Part II.B.

46. 42 U.S.C. §§ 2000e-2 to -17 (2012).

47. See 42 U.S.C. § 2000e-2; U.S. EQUAL EMP. OPPORTUNITY COMM’N, COMPLIANCE MANUAL, SECTION 10: COMPENSATION DISCRIMINATION 10-III n.13 (2000), <https://www.eeoc.gov/policy/docs/compensation.html> (“‘Compensation’ [under Title VII] has the same meaning as ‘wages’ under the EPA” and includes ‘wages, salary, overtime pay; bonuses; vacation and holiday pay; cleaning or gasoline allowances; hotel accommodations; use of company car; medical, hospital, accident, life insurance; retirement benefits; stock options, profit sharing, or bonus plans; reimbursement for travel expenses, expense account, [or other] benefits.’”); see also 29 C.F.R. § 1620.12(a) (“The term wage ‘rate,’ as used in the EPA . . . is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis.”).

48. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (individual disparate treatment); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (pattern-or-practice disparate treatment); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977) (same); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (disparate impact). A few courts have indicated that, because of the inclusion of the Bennett Amendment in Title VII (discussed in text accompanying *infra* notes 54–60), sex-based pay discrimination claims should not be pursued under Title VII using a

For the most common type of Title VII pay claim—a claim of individual disparate treatment—an employee plaintiff must prove that she was qualified, performing satisfactorily, and paid too little, under circumstances giving rise to an inference of discrimination.⁴⁹ Often, this inference is created, as under the EPA, with evidence of a similarly-situated “comparator” outside of the protected class—for example, a male employee—who was paid more than the plaintiff.⁵⁰ Yet, while it is the most common form of proof, a direct or exact comparator is not *required* by the statutory text of Title VII.⁵¹ This provides a strategic advantage to plaintiffs for using Title VII over the EPA. If the plaintiff succeeds, the burden of production only—not the burden of proof—shifts to the employer defendant to articulate any “legitimate nondiscriminatory reason” for the pay disparity, which the plaintiff can then rebut by proving the employer’s stated reason is a pretext for the real reason, sex discrimination.⁵² While the “legitimate, nondiscriminatory reason” under Title VII functions much as the “any other factor other than sex” defense under the EPA, an important difference is that the plaintiff maintains the burden of persuasion throughout the entire Title VII claim.⁵³ Under the EPA, once the employee makes out a prima facie case, the employer must disprove pay discrimination; under Title VII, the employee must ultimately prove discrimination.

After enacting two statutory routes for plaintiffs to litigate sex-based pay discrimination claims, Congress and the courts struggled with how to create

disparate impact theory. See Sharon Rabin-Margalioth, *The Market Defense*, 12 U. OF PENN. J. OF BUS. L. 807, 827–28, 839–40 (2010). A complete discussion of applying the Title VII frameworks of proof to pay discrimination cases is beyond this Essay’s focus on the EPA. For further discussion, see, e.g., *id.* at 823–37; Deborah Brake, *What Counts as ‘Discrimination’ in Ledbetter and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657, 661–64 (2008).

49. See *McDonnell Douglas Corp.*, 411 U.S. at 802 (enunciating the elements that a plaintiff must show to make out a prima facie Title VII claim in the context of racial discrimination).
50. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 943–44 (2016).
51. See *id.*; Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 744 (2011); Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839, 856–57 (2002). Cf. Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 204 (2009) (acknowledging that at least one court has rejected comparator proof as necessary, but still noting the relevance of comparators).
52. See *McDonnell Douglas Corp.*, 411 U.S. at 802–03 (noting in a failure to rehire case, employee’s participation in unlawful conduct sufficed as employer’s legitimate non-discriminatory reason).
53. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

uniformity between the two approaches. When it passed Title VII, Congress specifically included the Bennett Amendment (named for its Senator sponsor), which stated that “[i]t shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in . . . compensation . . . if such differentiation is authorized by the [EPA].”⁵⁴ This “technical correction” clarified that affirmative defenses available under the EPA would also constitute legitimate nondiscriminatory reasons to rebut a plaintiff’s prima facie case under Title VII.⁵⁵ For the first near-decade after the statutes were enacted, a federal Equal Employment Opportunity Commission interpretation presumed that, to make out a claim under Title VII, a plaintiff must also meet the “equal work” test required to make out an EPA claim.⁵⁶ So interpreted, many plaintiffs pursued claims under the EPA, given its advantageous burden of proof framework.⁵⁷

Then, in 1981 in *County of Washington v. Gunther*,⁵⁸ the U.S. Supreme Court held that, while the Bennett Amendment allowed an employer to raise the EPA’s defenses in a Title VII claim, it did not also require Title VII plaintiffs to prove they were performing “equal work.”⁵⁹ So long as a plaintiff could create an inference of pay discrimination because of sex, they could pursue a Title VII claim.⁶⁰ This made a prima facie case under Title VII much easier for plaintiffs to prove; moreover, Title VII provided greater possible remedies, including compensatory and punitive damages, where the EPA allowed for only equitable and liquidated damages.⁶¹ These advantages provided the incentive for more plaintiffs to pursue pay

54. Bennett Amendment, Pub. L. 88-352, tit. VII, § 703(h), 78 Stat. 241, 257 (1964), codified at 42 U.S.C. § 2000e-2(h) (2012).

55. *See id.*; *County of Washington v. Gunther*, 452 U.S. 161, 171–75 (1981).

56. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.7(a) (1966) (explaining that “the standards of ‘equal pay for equal work’ set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII”). The EEOC rescinded this guideline in 37 Fed. Reg. 6837 (1972). *See Gunther*, 452 U.S. at 177.

57. *See, e.g.*, Albert H. Ross & Frank V. McDermott Jr., *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. REV. 1–2, 20, 72–73 (1974).

58. 452 U.S. at 177–80.

59. *Id.* at 168, 180.

60. *Id.* at 180. *See also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 47, at 10-V.

61. *Compare* 42 U.S.C. § 1981a(b), *with* 29 U.S.C. § 216(b).

discrimination claims under Title VII, despite the benefit of the EPA's burden-shifting structure.⁶²

Both the minimum labor standard, wage and hour approach of the EPA and the individual rights, antidiscrimination approach of Title VII have provided redress against pay discrimination for countless plaintiffs whose facts allowed them to succeed using one or both approaches. Yet proving pay discrimination under either legal framework is difficult, particularly given that an employer's defense can include any reason that is not "sex," even if it may incorporate sex stereotypes or past sex discrimination.⁶³ The fact that advancement in the pay gap stalled nearly two decades ago is, in part, due to the limited reach of both statutory approaches. As a result, advocates and legislators have reconsidered their options, looking once again to the more strict liability approach of the EPA, and the potential to narrow its defenses.⁶⁴

While the burden shifting framework of the EPA offers, perhaps, its greatest advantage, there is another potential benefit to reviving a focus on the EPA: the limitation on the ability of employees to waive their rights under the EPA, given that it was incorporated into the FLSA. To consider this issue requires looking back to the passage of the FLSA in 1938 and its amendment by the EPA in 1963.

B. *The Fair Labor Standards Act, the Public Interest, and Nonwaivable Rights*

The Fair Labor Standards Act was enacted in 1938 as part of President Roosevelt's New Deal package of federal programs and statutes to help the U.S. economy recover from the Great Depression.⁶⁵ The FLSA established three main minimum labor standards that applied to employers who engaged in interstate commerce. It placed limitations on child labor, established a federal minimum

62. *See, e.g.*, *Fallon v. State of Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) ("Under Title VII . . . the burden of proof remains with the plaintiff at all times to show discriminatory intent. . . . In contrast, 'the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown.' . . . [U]nder the [EPA], a plaintiff bears the burden of proving a *prima facie* case. If successful, the burden of proof (persuasion) shifts to the defendant to prove that the wage disparity is attributable to one of that Act's four affirmative defenses . . . Thus, the risk of nonpersuasion rests with the employer on the ultimate issue of liability. Under Title VII, . . . [t]he risk of nonpersuasion, then, is always (except for a few exceptions) on a Title VII plaintiff." (citations omitted)).

63. *See infra* Part II.B.

64. *See id.*; *see also* Brake, *supra* note 35, at 890–91.

65. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Dec. 15, 2018).

hourly wage, and instituted overtime premium pay for hours worked beyond forty hours each week for certain employees.⁶⁶ The FLSA was a companion bill to the National Labor Relations Act of 1935 (NLRA) (also known as the Wagner Act), which had established the right for workers to form unions to bargain collectively with employers about wages and other terms of work.⁶⁷ Together, the two bills sought to improve exploitative working conditions and help resolve significant labor strife that had led to crippling work stoppages in the 1920s and '30s.⁶⁸ Both Acts also established federal agency mechanisms, through the National Labor Relations Board and the U.S. Department of Labor, to help enforce the statutory schemes.⁶⁹

While the FLSA was enacted, in part, to provide redress to exploited workers, it was designed to serve a greater public purpose. Both President Roosevelt and Congress viewed the Act as a way to pull people out of poverty and improve the struggling U.S. economy by raising basic living standards and spreading work among the unemployed.⁷⁰ The Act's introductory section details Congressional findings of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," that not only "constitute[] an unfair method of competition" and "lead[] to labor disputes," but that also "obstruct[]," "burden[]," and "interfere[] with . . . commerce."⁷¹ Based on such findings, the Act's stated policy was "to correct and . . . eliminate [such] conditions . . . without substantially curtailing employment or earning power" of workers.⁷²

The legislative record of debate over the bill reflects similar purposes. In his statement introducing the bill, Assistant Attorney General Robert H. Jackson identified the effort as the chance to act upon the "commonplace [principle] that it is bad for America—economically as well as socially—to have child labor, sweated

66. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012); Grossman, *supra* note 65.

67. See 29 U.S.C. §§ 201–219; National Labor Relations Act of 1935, 29 U.S.C. §§ 151–269 (2012).

68. See Grossman, *supra* note 65 (citing FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESSES (1937); FRANCES PERKINS, THE ROOSEVELT I KNEW (1946); ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT (1960)).

69. See 29 U.S.C. § 153–155 (2012); 29 U.S.C. § 204 (2012).

70. See Grossman, *supra* note 65.

71. 29 U.S.C. § 202(a) (2012).

72. 29 U.S.C. § 202(b) (2012).

labor, low standards of living, inhumane and unhealthy working conditions.”⁷³ Jackson’s role at the outset of the debate was to clarify the constitutional basis for regulating interstate commerce, necessary because a prior attempt to regulate wages and hours had been struck down as unconstitutional several years earlier.⁷⁴ Jackson identified congressional power to regulate interstate commerce that “offend[s] against sound national policy,” including unfair competition:

Congress has the power to . . . prohibit the securing of a competitive advantage in interstate commerce through the adoption of oppressive and sweatshop labor conditions. . . . All of the labor practices attacked by this bill are related. All are types of oppression utilized for the purpose of gaining unfair advantage in interstate commerce. One employer cuts wages, while another employs child labor, and still another employ sweatshop conditions, and all of these practices are a part of the vicious competition used in forcing down labor standards. . . .⁷⁵

Likewise, statements by Secretary of Labor Frances Perkins, one of the architects of the Act, focused on its ameliorative impact on the overall U.S. economy during an economic downturn.⁷⁶ Perkins described the bill as “a stabilizer of employment, of income, of the market for goods, of production,” as well as “a stabilizer of price, preventing the undue and disturbing fluctuations . . . which so frequently lead to such downward markets as we have experienced.”⁷⁷ She also identified the bill’s ability to increase the purchasing power of previously underemployed and underpaid workers, viewing the Act as a “buttress” to attempts “to solve the problems of low wages, long hours, and low living standards, which

73. *Fair Labor Standards Act of 1937: J. Hearing on S. 2475 and H.R. 7200 Before the S. Comm. On Educ. And Labor and the H. Comm. On Labor*, 75th Cong. 1 (1937) (statement of Robert H. Jackson, U.S. Dept. of Justice).

74. See Grossman, *supra* note 65. In *A.L.A. Schechter Poultry Corp. v. United States*, the U.S. Supreme Court struck down prior legislation—the National Industrial Recovery Act—as unconstitutional. 295 U.S. 495, 541–42 (1935). In the famous “switch in time that saved nine,” Justice Roberts later changed his position, upholding a challenge to a state minimum wage law in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 which paved the way for the FLSA to be held constitutional. See *Parrish*, 300 U.S. at 398–400 (1937).

75. 75th Cong., *supra* note 73, at 2–3, 7.

76. 75th Cong., *supra* note 73, at 173–74 (statement of Hon. Frances Perkins, Sec’y of Labor).

77. *Id.*

mean[t] a low purchasing market for the product of manufactured goods.”⁷⁸ In addition, Perkins noted that, where states had reduced working hours to eight-hour days, both public health and community involvement improved.⁷⁹

Given the shared purpose of spreading employment and reducing unfair competition, the FLSA prohibited individual employees from agreeing to waive their statutory rights. Regulations enforcing the statute make clear that the FLSA’s “minimum standards . . . may be exceeded, but cannot be waived or reduced.”⁸⁰ Case law interpreting the Act follows course. In 1945, in *Brooklyn Sav. Bank v. O’Neil*,⁸¹ an early case in which the U.S. Supreme Court held that an employee could not waive his entitlement to liquidated damages for a FLSA violation, the Court explained the connection between the statutory public interest in the FLSA and its nonwaivability:

[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . . Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged . . . with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. . . . The statute was a recognition of the . . . unequal bargaining power as between employer and employee . . . requir[ing] federal compulsory legislation to prevent private contracts . . . which endangered national health and efficiency and . . . interstate commerce.”⁸²

As the Court recognized, the FLSA created minimum labor standards to correct a balance of power, in which desperate workers might be willing to accept substandard

78. *Id.*

79. *Id.* at 188 (statement of Hon. Frances Perkins, Sec’y of Labor).

80. 29 C.F.R. § 541.4 (2014) (“Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act.”)

81. 324 U.S. 697 (1945).

82. *Id.* at 704–707.

wages or conditions, hurting the larger society.⁸³ As a result, the Court explained, “No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act.”⁸⁴

In a series of more recent cases, federal courts have recognized the FLSA’s “‘broad remedial intent,’ to address ‘unfair method[s] of competition in commerce’ that cause ‘conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,’”⁸⁵ which necessitates limits on its waiver. Federal courts have held that individual FLSA plaintiffs may not waive their right to a minimum wage,⁸⁶ an overtime premium,⁸⁷ or even to the arguably more procedural (as opposed to substantive) right of participating in a FLSA collective action.⁸⁸

83. *Id.* at 707.

84. *Id.*

85. *Gaffers v. Kelly Servs., Inc.*, 203 F. Supp. 3d 829, 837 (E.D. Mich. 2016) (citations omitted), *rev’d on other grounds*, 900 F.3d 293 (6th Cir. 2018).

86. *O’Brien v. Ecotech Const. Services, Inc.*, 183 F. Supp. 2d 1047, 1049 (N.D. Ill. 2002) (“[W]here a right is conferred for the benefit of the public at large, and the implementation of that right requires a limitation of the directly-involved individuals’ freedom of contract, the argument in favor of nonwaivability is particularly compelling.”).

87. *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016) (“[T]he Supreme Court has already closed that door and ‘frequently emphasized the nonwaivable nature of an individual employee’s right . . . to overtime pay under the Act.’ . . . ‘FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.’” (citation omitted)); *Killon v. KeHE Distribs., LLC*, 761 F.3d 574, 587 (6th Cir. 2014); *Letner v. City of Oliver Springs*, 545 F. Supp. 2d 717, 724 (E.D. Tenn. 2008) (“[A]n employee’s right to be paid overtime compensation in accordance with the FLSA, and to pursue claims for damages allowable by the Act are statutory rights which affect the public interest and, hence, rights which may not be waived by an employee.”); *Usery v. Godwin Hardware, Inc.*, 426 F. Supp. 1243, 1270 (W.D. Mich. 1976) (“To permit an employer to thus reap the benefit of his own wrongdoing . . . would defeat the purposes of the Act, for it would reduce the incentives to reduce hours of work and spread employment, deprive employees of the intended extra compensation for overtime work, and subject complying employers to unfair competition in the marketplace.”).

88. *Gaffers*, 203 F. Supp. 3d at 840 (“[T]his right to a collective action is not ‘merely procedural,’ and the law recognizes no such distinction between ‘procedural’ and ‘substantive’ rights under the FLSA.” (citing *Boaz*, 725 F.3d at 606)). *But see* *Feamster v. Compucom Sys., Inc.*, 2016 WL 722190 at *9 (W.D. Va. 2016) (“The court believes that the holding in *Brooklyn Savings Bank* is narrow and applies only when employees

C. *The Equal Pay Act as a Subset of the Fair Labor Standards Act and Its Interests*

Twenty-five years after the passage of the FLSA, Congress revisited similar public interests when it amended the statute to add the Equal Pay Act of 1963.⁸⁹ Like President Roosevelt and the New Deal Congress before them, President Kennedy and the Civil Rights-era Congress viewed sex discrimination in compensation as both a social and an economic injustice.⁹⁰ And like the FLSA, the EPA included congressional findings that having “wage differentials based on sex” in commerce “depresses wages and living standards for employees necessary for their health and efficiency.”⁹¹ As the bill explained, underpaying female workers not only “prevents the maximum utilization of the available labor resources” and “cause[s] labor disputes,” which then “obstruct[s]” and “burdens commerce and the free flow of goods, . . . constitut[ing] an unfair method of competition.”⁹² Given these findings, the “declared . . . policy” of the EPA was “to correct the[se] conditions” through regulation of interstate commerce.⁹³

While the EPA is often viewed as a corollary to civil rights protections focused on individual attainment of equality,⁹⁴ the legislative record of the EPA tells a different story. In his statement introducing the bill, Senator Pat McNamara began by linking the EPA to the FLSA it sought to amend, identifying equal pay by sex as the FLSA’s fourth minimum labor standard:

waive their rights to the protections afforded in the FLSA, specifically the rights to overtime wages, minimum wages, and liquidated damages. . . . [T]he court does not find the holding . . . instructive regarding waiver of the right to participate in collective action litigation.”). Note, however, that employees may be required to arbitrate their collective FLSA claims where governed by predispute arbitration clauses. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *Rodriguez-Depena v. Parts Auth., Inc.*, 877 F.3d 122, 124 (2d Cir. 2017), *cert. denied*, 2018 WL 2046393 (June 11, 2018).

89. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, THE EQUAL PAY ACT OF 1963: EDITOR’S NOTE, <https://www.eeoc.gov/laws/statutes/epa.cfm> (last visited Dec. 15, 2018); *Equal Pay Act for Women Enacted*, CQ ALMANAC 1963 511–13 (19th ed., 1964), <http://library.cqpress.com/cqalmanac/cqal63-1315824>.

90. *See* John F. Kennedy, *Remarks Upon Signing the Equal Pay Act*, THE AMERICAN PRESIDENCY PROJECT (June 10, 1963), <http://www.presidency.ucsb.edu/ws/?pid=9267>; Ross & McDermott, *supra* note 57, at 2–6.

91. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, codified at 29 U.S.C. § 206(d) (2012).

92. *Id.*

93. *Id.*

94. *See, e.g.*, Ross & McDermott, *supra* note 57, at 17–20.

As we all know, the Fair Labor Standards Act provides that workers must be paid a decent minimum wage; that if employees must put in long hours, they must be paid at an overtime rate; and that children may only be employed under rigid conditions which protect their health and safety. The bill I now introduce would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.⁹⁵

The EPA, he noted, would establish “a most worthy national policy” with which both employers and labor unions could readily comply due to their long-established familiarity with existing fair labor standards provisions.⁹⁶ In supporting the bill, McNamara cited the reliance of most U.S. industry “upon the contributions of American women,” noting that “in modern day America, woman’s role as a provider, for not only herself but her family, has become an essential role.”⁹⁷

Likewise, Secretary of Labor W. Willard Wirtz offered testimony on the public interests served by the EPA, noting “the necessity to utilize fully the skills of women in our labor force,” whose participation “is expected to increase to more than 30 million within the next 10 years.”⁹⁸ Thus, like the FLSA before it, “[e]qual pay legislation is an essential step toward the administration’s goals of economic growth and social justice,” whose “need and justification . . . [is] . . . a matter of common knowledge.”⁹⁹ As Wirtz explained, women were particularly disadvantaged by their lack of equal bargaining power, given that only one in seven women in the workforce were covered by a collective bargaining agreement.¹⁰⁰ And the impact on women’s earnings “has an undesirable effect on many aspects of the life of our Nation,” including “affect[ing] adversely the general purchasing power and the living standard of workers,” “offer[ing] an unfair competitive advantage” for certain employers, and “prevent[ing] the maximum utilization of workers skills to the detriment . . . of production.”¹⁰¹

95. Comm. on Educ. and Labor, Legis. History of the Equal Pay Act of 1963, Amending Sec. 6 of the Fair Labor Standards Act of 1938, As Amended, Pub. L. No. 88-38, 88th Cong., H.R. 6060 and S. 1409, 1 (1963) (Statement of Sen. Pat McNamara).

96. *Id.* at 4.

97. *Id.* at 5.

98. *Id.* at 33–34 (Letter & Statement of W. Willard Wirtz, Sec’y of Labor).

99. *Id.*

100. *Id.*

101. *Id.* at 35.

A number of Congresspeople testified that, as of 1963, women had become the heads of many families or were contributing significant family income, making the underpayment of women a matter of general economic concern.¹⁰² Moreover, both Secretary Wirtz and other members of Congress noted the detrimental impact that pay discrimination against women had on the wages and employment of *men*. As one Senator explained, equal pay was a principle of vital importance during an economic downturn because hiring women to do comparable work at lower pay than men might be used to undercut the wage rate of men, or to displace men from the workforce.¹⁰³

Importantly, because the EPA was drafted and adopted as one section within the FLSA, the regulatory architecture of the FLSA applies similarly. This means that, like FLSA rights, EPA rights cannot be waived by private individuals, because those rights derive from a statute with a broader public purpose. In 1970, in *Shultz v. Wheaton Glass Co.*,¹⁰⁴ an early case applying the EPA, the United States

102. *Id.* at 55 (Statement of Rep. Frances P. Bolton) (“There are 24 million women in the labor force today and by 1970 we shall have over 30 million. Most women work to contribute to essential living expenses for themselves or their families. For example, over 6 million single women workers support themselves; over 2 million working women are heads of families; others are the primary wage earner in the family although not technically the family head. Married women who are not the primary wage earner in the family work to raise family living standards and to send children through college in many, many families, but there are others who must work to give their children proper education. The contribution of these women to the Nation’s productive resources must be recognized, encouraged, and maximized.”); *Id.* at 67 (Statement of Mr. Staggers) (“Most women work to contribute to essential living expenses. Millions of single women work to support themselves; many working women are heads of families, and others are the primary wage earner in the family although they are not technically the family head. Many, many thousands of single women support one or both parents and in many cases other members of their families who are in need.”).

103. *Id.* at 63–64 (Statement of Mr. Rivers of Alaska) (“Another desirable product of this legislation would be discontinuance of the process of allowing unscrupulous employers to profit by exploiting women for the purpose of gaining a competitive advantage, while at the same time rejecting the services of men to whom they would have to pay better wages. Thus this legislation would establish fair play in the area of employment and wages for both men and women as well as improving the situation for our considerate and scrupulous employers by protecting them against the inroads of unfair competition in this regard.”); *Id.* at 66–67 (Statement of Mr. Staggers) (“If both are paid equally for equal work, not only will women be protected but men as well. The employer who pays a woman a lower wage for the same work will also hire cheap labor. In areas of chronic unemployment, this equal pay legislation will protect the jobs of men as well as assure women who must work that they will receive a fair wage.”)

104. 421 F.2d 259 (3d Cir. 1970).

Court of Appeals for the Third Circuit explained that “[t]he Act was intended as a broad charter of women’s rights in the economic field.”¹⁰⁵ Its purpose was to root out sex-based stereotypes about women’s “inferiority” in the market sphere and “eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.”¹⁰⁶ Four years later, the U.S. Supreme Court underscored this legislative intent in *Coming Glass Works v. Brennan*,¹⁰⁷ one of the only decisions on the EPA to reach the Supreme Court.¹⁰⁸ As the Court explained,

Congress enacted the Equal Pay Act ‘(r)ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor’ . . . [It considered] evidence of the many families dependent on the income of working women . . . The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex ‘constitutes an unfair method of competition.’¹⁰⁹

With this purpose in mind, federal courts have, in more recent cases, held that, like other FLSA rights, EPA rights cannot be waived. In one case, *Boaz v. FedEx Customer Info. Serv. Inc.*,¹¹⁰ the United States Court of Appeals for the Sixth Circuit struck down an employment contract that imposed a six-month limitation on the employee plaintiff’s ability to raise pay claims as an unlawful waiver of EPA rights, noting that “the Supreme Court’s rationale [in *Coming Glass Works*] for barring waiver of FLSA claims appears fully applicable to claims under the Equal Pay Act.”¹¹¹ As a result, the Sixth Circuit explained, “[a]n employer who pays women

105. *Id.* at 265.

106. *Id.* See also *Belfi v. Prendergast*, 191 F.3d 129 (2d Cir. 1999) (describing the EPA’s statutory purpose); *Ende v. Bd. of Regents of Regency Univ.*, 757 F.2d 176 (7th Cir. 1985); *Shultz v. First Victoria Nat. Bank*, 420 F.2d 648 (5th Cir. 1969).

107. 417 U.S. 188 (1974).

108. *Id.*

109. *Id.* at 206–07.

110. 725 F.3d 603 (6th Cir. 2013).

111. *Id.* at 605, 607.

less than a lawful wage might gain the same competitive advantage as an employer who pays less than minimum wage.”¹¹² In another, *Fontenot v. Safety Council of Sw. La.*,¹¹³ the United States District Court for the Western District of Louisiana granted summary judgment to the employee plaintiff on the issue of whether agreeing to an employment contract waived her EPA claim.¹¹⁴ “[T]he Sixth Circuit and Eleventh Circuit have considered the issue of whether an employee can explicitly waive an EPA claim,” the District Court explained, “concluding that allowing such a waiver would be against the legislative policy underlying the EPA.”¹¹⁵ Moreover, the court noted, “[b]oth Supreme Court and Fifth Circuit precedent indicate that a claim under the EPA, which is incorporated within the FLSA, may not be waived.”¹¹⁶

Based on Congressional intent, and as recognized by the Supreme Court and several lower federal courts in application, the EPA, as part of the FLSA, serves not only to correct the exploitation of individual workers, but also to remedy inequitable bargaining power between employer and employee, unfair competition by unscrupulous employers, and the social and economic harms that result from both. Because these interests impact society as a whole, neither the minimum labor standards that require a minimum wage and an overtime premium, nor the minimum labor standard that requires equal pay for equal work regardless of sex, can be waived by individuals.

112. *Id.* at 607.

113. 2017 WL 2831248 (W.D. La., June 28, 2017).

114. *Id.* at *7–8 (“[Plaintiff] contends that she has not waived her EPA claim by freely entering into her contract with [defendant employer] . . . [T]he Court notes the supporting case law that an EPA claim cannot be waived. The EPA was enacted in 1963 and incorporated into the [FLSA] of 1938 . . . Prior to the EPA’s enactment, the Supreme Court held that an employee’s rights under the FLSA are unwaivable. The Fifth Circuit has not directly addressed the issue of whether a plaintiff may waive an EPA claim, however, it has recently recognized that “[t]he general rule establishes that FLSA claims . . . cannot be waived.”).

115. *Id.* at *7 (citing *Boaz*, 725 F.3d at 607; *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 906 (11th Cir. 1987) (“stating in dicta that allowing an employee to prospectively waive her rights under the EPA would thwart the EPA’s legislative policy,” *id.* at *7, n. 116).

116. *Id.* at *8 (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707; *Jewell Ridge Coal Corp. v. Local No. 6167, UMWA*, 325 U.S. 161, 167 (1945); *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 164 (5th Cir. 2015)).

II. IMPLICATIONS FOR EMPLOYER PAY-SETTING PRACTICES

A. *The Modern Pay Gap as a Matter of Public Interest*

In the over five decades since the passage of the Equal Pay Act and Title VII, laws prohibiting sex-based pay discrimination have helped contribute to major economic gains by women in the workforce.¹¹⁷ Yet even the most recent data on the gender pay gap shows that the public interests behind the passage of the EPA have yet to be achieved and remain a significant concern to women, their families, and the U.S. economy as a whole.

Women's participation in the paid workforce has grown dramatically over time. In 1948, only about one-third (32.7%) of all U.S. women participated in the labor market, and women made up just over one-quarter (28.6%) of the U.S. workforce.¹¹⁸ By 2016, over half (56.8%) of all women worked for pay, and women composed nearly half (46.8%) of the paid labor force.¹¹⁹ Despite this growth in women's workforce participation rates, earnings between women and men have not kept pace. Using one measure of the gender pay gap—comparing annual earnings of all women and men engaged in full-time year-round work—women's earnings have increased from an average of 57 cents on the dollar earned by men in 1973 to 80 cents on the dollar today.¹²⁰ When hourly wages are compared, which includes part-time workers and adjusts for men's greater number of hours worked per year, women earn an average of 83 cents for each dollar men earn per hour.¹²¹ The wage gap is worse for women of color: in recent aggregated data, African-American women earn only 63 cents annually, 65 cents hourly, and Latina women earn only 54 cents annually, 58 cents hourly, for every dollar earned by white men.¹²²

117. See AM. ASS'N OF UNIV. WOMEN, *supra* note 22.

118. WOMEN'S BUREAU, U.S. DEP'T OF LAB., LABOR FORCE PARTICIPATION RATE BY SEX, RACE AND HISPANIC ETHNICITY, 1948–2016 ANNUAL AVERAGES, https://www.dol.gov/wb/stats/NEWSTATS/facts/lf_prate_sex_race_hisp_2016_txt.htm (last visited Dec. 15, 2018).

119. *Id.*

120. See *Equal Work*, *supra* note 21, at 588–94; AM. ASS'N OF UNIV. WOMEN, *supra* note 22; See ELISE GOULD ET AL., ECON. POLICY INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN'T BE EXPLAINED AWAY (2016), <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/>.

121. See *Equal Work*, *supra* note 21, at 588–94; GOULD ET AL., *supra* note 120, at 1, 6.

122. See *Equal Work*, *supra* note 21, at 588–94; AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 11 (providing annual figures from 2016); GOULD ET AL., *supra* note 120, at 13

There is significant debate over how to measure the gender pay gap, a full discussion of which is beyond the scope of this Essay.¹²³ Yet even when controlling for most relevant factors—for example, education, experience, hours worked, days worked, age, race, geography—and even comparing similar model workers doing the same job in the same office, economists find that an unexplained pay gap of 7 to 13.5% remains.¹²⁴ While research suggests that one-third to one-half of the gender pay gap can be attributed to actual demographic differences between men and women in hours worked or time off for childbearing or rearing (and, to a lesser degree, remaining differences in experience or education levels), that leaves up to one-half of the gender pay gap still caused by gender workforce segregation and discrimination.¹²⁵

(providing hourly figures from 2015). Asian-American women now earn, on average, more than white women, with a median hourly wage of \$18 to white women's \$17. Eileen Patten, *Racial, Gender Wage Gap Persists in U.S. Despite Some Progress*, PEW RESEARCH CENTER (July 1, 2016), <https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.

123. See *Equal Work*, *supra* note 21, at 588–94.
124. See *id.*; GOULD ET AL., *supra* note 120, at 7, 36 n. 9–10 (citing one study that found a 13.5% difference when industry, occupation, and work hours were controlled to model “a man and woman with identical education and years of experience working side-by-side in cubicles,” and another that found a disparity of 8.4% remained after controlling for not only education, industry, occupation, experience level, and geography, but also race, ethnicity, and metropolitan region); AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 20 (citing studies that found a gender wage gap of 7% one year after college graduation and 12% ten years later even after controlling for “college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status”).
125. See *Equal Work*, *supra* note 21, at 588–94; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 26 (Nat'l Bureau of Econ. Research, NBER Working Paper Series, Working Paper 21913, 2016), <http://www.nber.org/papers/w21913.pdf> (“[W]hile the share of the gender wage gap due to human capital (education and experience) has declined noticeably, the share accounted for by locational factors like occupation and industry actually increased from 27% of the 1980 gap to 49% of the much smaller 2010 gap.”); Goldin & Sokoloff, *supra* note 2, at 1098 (attributing 32–42% of the gender pay gap among college graduates working full-time year-round to the gap between occupations); GOULD ET AL., *supra* note 120, at 20–21; ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN'S POL'Y RESEARCH., OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE 16 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C419.pdf>.

Perhaps most shockingly, improvement in reducing the overall gender pay gap has been stalled *for two decades*, with no significant improvement in women's earnings as compared to men's (ranging between 75 and 80 cents on the dollar) since 2000¹²⁶—a clear indication that the public policy goals behind the EPA have yet to be attained. Moreover, the impact to the U.S. economy is sustained and severe. Women have higher rates of poverty due, in part, to the gender wage gap.¹²⁷ One group of researchers estimate that if the gender pay gap was closed, the poverty rate among all women would be reduced by half.¹²⁸ Data shows that, during the course of her lifetime, an average working woman will lose over \$500,000 due to the gender pay gap—over \$800,000 if she has a college degree.¹²⁹ The pay gap also reduces women's economic security once they retire, in the form of reduced Social Security and retirement benefits tied to the depressed wages they earned while employed.¹³⁰

Because women now provide a greater proportion of family income, unequal pay that affects women also affects all U.S. families and children. Demographic data shows that, today, 70% of all women and 75% of single women

126. See *Equal Work*, *supra* note 21, at 588–94; AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 4; GOULD ET AL., *supra* note 120, at 8.

127. See *Equal Work*, *supra* note 21, at 599–601; see, e.g., AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 4 (citing JESSICA L. SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016 (2017) (reporting that, depending on age, 11%–13% of women live below the federal poverty line as compared to 8%–10% of men)).

128. See *Equal Work*, *supra* note 21, at 599–601; HEIDI HARTMANN ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, HOW EQUAL PAY FOR WORKING WOMEN WOULD REDUCE POVERTY AND GROW THE AMERICAN ECONOMY 1 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C411.pdf>.

129. See *Equal Work*, *supra* note 21, at 599–601; see generally SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 115–30 (2016) (describing the impact of unequal pay over a woman's lifetime); GOULD ET AL., *supra* note 120, at 7 (citing CYNTHIA HESS ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, THE STATUS OF WOMEN IN THE STATES 50 (May 2015)).

130. See *Equal Work*, *supra* note 21, at 599–601; AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 5 (citing JOCELYN FISHER & JEFF HAYES, INST. FOR WOMEN'S POL'Y RESEARCH, THE IMPORTANCE OF SOCIAL SECURITY IN THE INCOMES OF OLDER AMERICANS: DIFFERENCES BY GENDER, AGE, RACE/ETHNICITY, AND MARITAL STATUS (Aug. 2013)).

who have children under eighteen work.¹³¹ Nearly two-thirds of women earn at least one-quarter of family income,¹³² and 42% of women with children under the age of 18 are the sole or primary earner in the family.¹³³ One study documents that, if single mothers who worked received equal pay, two-thirds would earn more.¹³⁴

It should come as no surprise, then, that the impact of the pay gap on U.S. women and their families reverberates throughout the U.S. economy. First, cutting poverty rates in half for women and households headed by single mothers would relieve taxpayers and the government as a whole from necessary social supports. For example, one study estimated that, if the pay gap for women were eliminated, women's increased earnings would amount to sixteen times the government expenditures on Temporary Assistance to Needy Families in 2015.¹³⁵ This loss of income translates into loss of productivity—and purchasing power—in the economy overall. According to researchers, if women were paid equally, the U.S. economy “would have produced additional income of \$512.6 billion,” which “represents 2.8% of 2016 gross domestic product.”¹³⁶ Another study estimated that achieving gender parity in the workplace worldwide could add between \$12 and \$28 trillion to annual global GDP in 2025.¹³⁷

As current data shows, despite major gains in women's advancement, the same concerns that motivated the passage of the Equal Pay Act remain today: risks of unfair competition, exploitation of female workers' unequal bargaining position,

131. See *Equal Work*, *supra* note 21, at 599–601; NAT'L WOMEN'S LAW CTR. A SNAPSHOT OF WORKING MOTHERS 1 (Apr. 2017), <https://nwlc.org/wp-content/uploads/2017/04/A-Snapshot-of-Working-Mothers.pdf>.

132. See *Equal Work*, *supra* note 21, at 599–601; AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 5 (bring the total to 63% in 2012).

133. See *Equal Work*, *supra* note 21, at 599–601; AM. ASS'N OF UNIV. WOMEN, *supra* note 22, at 5 (citing Sarah Jane Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CTR. AM. PROGRESS (Dec. 19, 2016), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>).

134. See *Equal Work*, *supra* note 21, at 599–601; HARTMANN ET AL., *supra* note 128, at 1.

135. See *Equal Work*, *supra* note 21, at 599–601; MILLI ET AL., *supra* note 31, at 2.

136. See *Equal Work*, *supra* note 21, at 599–601; MILLI ET AL., *supra* note 31, at 2.

137. See *Equal Work*, *supra* note 21, at 599–601; Jonathan Woetzel et al., *The Power Of Parity: How Advancing Women's Equality Can Add \$12 Trillion To Global Growth*, MCKINSEY GLOBAL INSTITUTE (2015), <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>.

and the resulting costs to the U.S. economy, health, and welfare.¹³⁸ As a result, advocates and legislators at both the federal and state level are considering ways to amend and strengthen the federal EPA and its state equivalents.¹³⁹ Yet even under existing law, based on the EPA's placement within the text of the FLSA, there is room to argue that some employer pay-setting practices operate as, in effect, forced waivers of the EPA's nonwaivable rights.

B. *Employer Pay-Setting Practices as Impermissible Waivers of FLSA Rights*

Both the high hurdle for a plaintiff-employee to make out a prima facie case of unequal pay for "equal work" and the wide berth of a defendant-employer's defenses limit the reach of the Equal Pay Act.¹⁴⁰ But it is the affirmative defense that allows an employer to escape liability if it can prove that a pay disparity was the result of "any other factor other than sex"¹⁴¹ that most directly implicates the public interest. In particular, reconsidering the public nature of the harms the EPA sought to redress and the fact that EPA rights are nonwaivable calls into question two common practices employers use to set pay: individual negotiation and reliance on an employee's prior salary.

1. Setting Pay by Individual Negotiation

In the professional sector, employers often establish an employee's pay through individual negotiation with the employee seeking to be hired or promoted.¹⁴² This means that, even if an employer offers two job candidates with

138. See Fair Pay Act, H.R. 2095 § 2, 115th Cong. (2017); Charles Carver, *Formal Training Does Not Always Eliminate Gender-Based Negotiation Differences*, 18 CARDOZO J. CONFLICT RESOL. 1, 8–9 (2016).

139. See *Equal Work*, *supra* note 21, at 624–31; CAL. LAB. CODE § 432.3 (West 2018); CAL. LAB. CODE § 1197.5 (West 2018); MASS. GEN. LAWS ch. 149, § 105A (2018); OR. REV. STAT. § 652.220 (2018); Fair Pay Act, H.R. 2095, 115th Cong. (2017); S. 819, 115th Cong. (2017); Paycheck Fairness Act, H.R. 1869, 115th Cong. (2017); S. 819, 115th Cong. (2017); S. 104, 218th Leg. (N.J. 2018); Christian Hetrick, *New Jersey Lawmakers Overwhelmingly Pass Pay Equity Bill*, OBSERVER (Mar. 26, 2018), <http://observer.com/2018/03/new-jersey-lawmakers-overwhelmingly-pass-pay-equity-bill/>; Kate Nielson, *States Notch Multiple Equal Pay Victories in 2017*, AM. ASS'N OF UNIV. WOMEN (Oct. 13, 2017), <https://www.aauw.org/2017/10/13/state-equal-pay-victories-in-2017>.

140. See *supra* text accompanying notes 36–45; *Equal Work*, *supra* note 21, at 605.

141. 29 U.S.C. § 206(d)(iv) (2012).

142. See, e.g., Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation is Not a Factor other than Sex under the Equal Pay Act*, 10 GEO. J. GENDER

identical resumes the exact same job at the exact same pay, the candidates' resulting salaries may be different based on each one's ability to successfully negotiate for a higher starting salary. Once starting salaries are set, all future pay raises relate back to the original salary, compounding any pay differential exponentially into the future.

Many federal courts to consider the issue have allowed a "market defense,"¹⁴³ holding that, where an employer sets pay through individual negotiation and the employee agrees to what the employer offers, this serves as a "factor other than sex" that justifies any pay disparity, excusing the employer from liability under the EPA.¹⁴⁴ Within certain appellate circuits and in more recent cases, other courts have disagreed, holding that, without an additional justification such as a crucial recruiting need, relying solely on negotiation or market factors may violate the EPA.¹⁴⁵

& L. 1, 3–9 (2009); Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 178 (2011).

143. *See, e.g.*, Elzer, *supra* note 142, at 21–22; Porter & Vartanian, *supra* note 142, at 162; Rabin–Margalioth, *supra* note 48, at 807–11; Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 581 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)).
144. *See, e.g.*, Wernsing v. Dep't of Human Servs., 427 F.3d 466 (7th Cir. 2005) (holding employer need not ignore market wages when setting pay); Am. Fed'n of State, Cty., & Mun. Emps. v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985) (excusing pay differential based on "prevailing market rates"); Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980) (holding employer may consider market value of employee's skills); Ottaviani v. SUNY New Paltz, 679 F. Supp. 288 (S.D.N.Y. 1988) (explaining that a market-based pay differential is allowed); Ciardella v. Carson City Sch. Dist., 671 F. Supp. 699 (D. Nev. 1987) (stating that market-based pay differentials are considered a "factor other than sex").
145. *See Equal Work*, *supra* note 21, at 634; *see, e.g.*, Thibodeaux-Woody v. Hous. Cmty. Coll., 593 Fed. App'x 280, 283–85 (5th Cir. 2014) (holding that male employee's ability to negotiate higher pay is not a "factor other than sex"); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (stating "the fact that the employer's bargaining power is greater with respect to women than . . . men is not the kind of factor [other than sex] Congress had in mind," and rejecting employer's argument that it paid male employees more "because it could not get them for less"); King v. Acosta Sales & Mktg., Inc., 678 F.3d 470, 473 (7th Cir. 2012) (stating that, while the employer need not "ignore" market factors, it failed to prove its justification "actually account[ed] for the [pay] difference"); Leatherwood v. Anna's Linens Co., 384 Fed. App'x 853, 860 (11th Cir. 2010) (holding that "a staffing shortage" and "need to lure [the comparator employee] away from a competitor" justified pay difference); Mulhall v. Advance Sec., Inc., 19 F.3d 586 (11th Cir. 1994) (denying summary judgment to employer who failed

When an individual employee in need of a job is left to negotiate with an employer, there is an unequal balance of bargaining power. It was this very concern that led, in part, to the passage of both the National Labor Relations Act, to encourage the formation of unions to bargain collectively, and the FLSA, to set minimum labor standards.¹⁴⁶ In passing the EPA, legislators were mindful that bargaining power was even lower for female workers, whose work traditionally commanded lower pay and who were less likely to be represented by a union.¹⁴⁷ Moreover, as a great deal of social science research now documents, women may be disadvantaged in pay negotiations by sex stereotypes.¹⁴⁸ Gender stereotypes create the expectation that women should be cooperative and compliant; if they assert themselves by negotiating for higher pay, women may be penalized for doing so, where men would not.¹⁴⁹

Compounding this power imbalance is an unfair lack of information among employees that skews any negotiation undertaken. Employees rarely discuss their pay with each other and are often actively discouraged from doing so, which disadvantages female employees who lack needed information for salary negotiations—and to ever discover if they are being paid less than male

to prove that “market forces demanded” paying male comparators more); *Dreves v. Hudson Grp. Retail, LLC*, 2013 WL 2634429, at *8 (D. Vt. June 12, 2013) (holding that male employee’s ability to negotiate higher pay is not a “factor other than sex”); *Futran v. Ring Radio Co.*, 501 F. Supp. 734 (N.D. Ga. 1980) (rejecting employer’s “factor other than sex” defense that it “took considerably less money to attract” plaintiff to the job than her male comparator due to “her inferior bargaining position as a woman”).

146. *See supra* notes 67–69 and accompanying text.

147. *See supra* notes 98–102 and accompanying text.

148. *See Equal Work*, *supra* note 21, at 633–34; Porter & Vartanian, *supra* note 142, at 183–95; Elzer, *supra* note 142, at 3–9.

149. *See Equal Work*, *supra* note 21, at 633–34; *see generally* LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007); Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators’ Beliefs About Requests for a Higher Salary*, 56 *HUM. REL.* 635 (2003); Laura J. Kray et al., *Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration*, 87 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 386 (2002); Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 *J. PERSONALITY & SOC. PSYCHOL.* 942 (2001); Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-analysis*, 52 *PERSONNEL PSYCHOL.* 653 (1999).

coworkers.¹⁵⁰ Scholars and advocates have noted the important role of “pay transparency” in exposing and remedying the problem of sex-based pay disparities.¹⁵¹

While a few courts have recognized that women’s unequal bargaining power should not justify a pay disparity,¹⁵² the goals behind the EPA call for greater consideration of this issue. If part of the statutory public interest in passing the EPA was to balance the scales between female employee and employer and to root out unfair competition caused by exploitation of wages,¹⁵³ gender pay disparities based on market factors or individual negotiation should be impermissible. Just as a female employee cannot waive her right to bring an EPA claim because she agreed to an employment contract that limited her ability to do so,¹⁵⁴ the employee should not be held to have waived her right to receive equal pay because she agreed to an employment contract—for which she had unequal bargaining power and information—that paid her less than an equally-situated man.¹⁵⁵

Looking to cases in which federal courts held that EPA rights cannot be waived provides two examples for how a plaintiff could raise such an argument in a lawsuit in which she has met her prima facie case. First, as in *Boaz*, a plaintiff could raise impermissible waiver in response to a defendant’s affirmative defense that individual negotiation is a “factor other than sex” that excuses pay discrimination.¹⁵⁶

150. See, e.g., Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 373–77 (2013).

151. See *Equal Work*, *supra* note 21, at 621; see, e.g., Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 963 (2011) (“The benefit of transparency lies not simply in the final wage results, but in the very process of developing a compensation system with clearly understood goals, performance standards, and auditing controls.”); Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043, 1043 (2012) (arguing pay transparency may “help prevent, root out, and correct the discrimination in the first place”); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, U.C. IRVINE L. REV. 781, 783 (2014) (“[M]andatory disclosure of meaningful salary information would tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall.”).

152. See *supra* note 145.

153. See *supra* notes 90–93, 100–101 and accompanying text.

154. See *supra* notes 110–116 and accompanying text; *Boaz v. FedEx Customer Info. Serv. Inc.*, 725 F.3d 603, 605, 607 (6th Cir. 2013).

155. See *supra* notes 110–116 and accompanying text; *Fontenot v. Safety Council of Sw. La.*, 2017 WL 2831248, at *7–8 (W.D. La., June 28, 2017).

156. See *Boaz*, 725 F.3d at 605, 607.

In addition to arguing that setting pay by individual negotiation is inextricably linked to “sex” due to gender biases in negotiation,¹⁵⁷ the plaintiff could argue that allowing such a defense is allowing the defendant to argue that plaintiff has waived her EPA right to equal pay. Second, as in *Fortenot*, where a defendant argues that agreeing to a negotiated salary forecloses a plaintiff’s EPA claim, the plaintiff could take a proactive, rather than responsive, stance by seeking her own motion for partial summary judgment on the issue, to remove the defendant’s option for raising it affirmatively.¹⁵⁸

Under either procedural approach, the substantive argument is the same. First, were it not for the employee’s unequal bargaining power and lack of information about male comparator pay, she would not have agreed to unfairly lower pay. The fact that she negotiated her agreement, therefore, cannot waive her EPA right to be paid equally.¹⁵⁹ If, after individual negotiations, the employer agrees to pay a male employee more than a female employee for equal work, the employer then arguing that the difference is justified by the female employee’s acceptance of the pay offered is tantamount to the employer arguing that she waived her right to equal pay under the EPA. Second, and more fundamentally, regardless of whether the female employee would have agreed otherwise, the statute requires, as a minimum labor standard, that she receive equal pay: just as she could not agree to accept less than the minimum wage or to forego overtime pay,¹⁶⁰ she cannot agree to be paid less than a male comparator for equal work.

2. Setting Pay by Prior Salary

A second, and related, common pay-setting practice called into question by the statutory public interest behind the EPA is an employer’s use of an employee’s prior salary to set current pay. Rather than negotiating generally to set employee pay, many employers ask job candidates about the last salary they received, then offer slightly more to attract the candidate.¹⁶¹ This means that, even if an employer

157. See *supra* notes 148–49 and accompanying text.

158. See *Fontenot*, 2017 WL 2831248, at *1–3, 7–8.

159. See *supra* notes 145–47 and accompanying text; *Fontenot*, 2017 WL 2831248, at *1–3, 7–8 (“[Plaintiff] argues that there are ‘hundreds of reported EPA cases’ that involve employment situations where the employee freely entered into his or her employment situation. [She] claims that, logically, if a plaintiff who voluntarily entered into an employment contract were barred from bringing an EPA claim, then EPA claims would only lie where an employee accepted a job under duress.” *Id.* at *3).

160. See *supra* notes 84–88 and accompanying text.

161. See, e.g., Porter & Vartanian, *supra* note 142, at 183–95.

offers two job candidates with identical resumes the exact same job at the exact same pay, the candidates' resulting salaries may be different based on each one's prior salary. The employer may view this practice as equitable if it offers the same percentage increase to both candidates over their prior pay.¹⁶²

As with the issue of individual pay negotiation, federal courts are divided on whether employees' prior salaries may justify a pay disparity by gender.¹⁶³ A number of federal courts have held that, where the pay disparity is a result of an equal increase above a prior starting salary, this constitutes a legitimate "factor other than sex" to excuse the employer from liability under the EPA.¹⁶⁴ Within certain appellate circuits and in more recent cases, other courts have disagreed, holding that prior salaries, alone, cannot justify a differential under the EPA¹⁶⁵—including a recent, notable Ninth Circuit decision overruling its own precedent on the issue.¹⁶⁶

Like pay disparities caused by individual negotiation, excusing sex-based pay differences based on prior salaries runs counter to the public interests inherent in the EPA. Due to the long history of undervaluing and underpaying female workers in the United States, a female employee's prior pay may have, itself, been unfairly depressed by sex discrimination.¹⁶⁷ Setting current pay based not on the value or demands of the position but, instead, on the past pay of the person holding the position perpetuates this disadvantage into the future.¹⁶⁸ Imagine two identical

162. See, e.g., *Rizo v. Yovino*, 887 F.3d 453, 457–58, 468 (9th Cir. 2018) (rejecting an employer's policy of paying the same 5% increase over the prior salary of both male and female employees where it perpetuated past sex discrimination in violation of the EPA), *cert. granted, judgment vacated*, 139 S.Ct. 706 (Feb. 25, 2019).

163. See *Equal Work*, *supra* note 21, at 609–10; see, e.g., *Recent Legislation*, 131 HARV. L. REV. 1513, 1517 (2018) (citing cases in the Seventh, Eighth, and Ninth Circuits holding prior salaries were a justification, and in the Tenth and Eleventh Circuits, holding otherwise) (citations omitted).

164. See, e.g., *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466 (7th Cir. 2005); *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003); *Noel v. Medtronic Electromedics, Inc.*, 973 F. Supp. 1206, 1213 (D. Colo. 1997).

165. See, e.g., *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F. Supp. 985 (D. N.J. 1996).

166. See *Rizo*, 887 F.3d at 467–68 (overruling *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982)), *cert. granted, judgment vacated*, 139 S.Ct. 706 (Feb. 25, 2019) (holding that vote of Judge Reinhardt, who died 11 days before the *en banc* decision was finalized, should not have been counted to establish a majority).

167. See *supra* notes 1–10 and accompanying text.

168. See *Rizo*, 887 F.3d at 457–58, 468.

employees, one male and one female, doing the exact same job in 1962 (before the EPA was enacted), for which he is paid \$15,000 and she \$12,000, simply because she is a woman. If, in 1964, they both move to a new employer who offers them 5% over their prior salary, again performing the exact same job, some courts would hold their pay differential justified as based on a “factor other than sex.”¹⁶⁹ Imagine they each get a 5% raise every two years until they both retire in 2019; the same courts would hold this pay practice beyond the reach of the EPA, despite that he now makes about \$61,250 and she about \$49,000—not to mention any proportionately larger bonuses or retirement, social security, or other benefits he received or will receive tied to annual pay.¹⁷⁰

If an employer benefits from past sex discrimination, it is engaging in unfair competition and exploiting workers in violation of the public interests Congress articulated when enacting the EPA.¹⁷¹ Because these harms redound to the detriment of society as a whole, not just to individual underpaid female employees, the nonwaivability of EPA rights is implicated.¹⁷² A plaintiff who has met her prima facie case in an EPA lawsuit and whose employer seeks to justify a sex-based pay disparity with prior salaries could raise the issue of waiver in the same ways as described previously for an employer justification based on individual negotiation.¹⁷³ In addition to arguing that, where it perpetuates past sex discrimination, using a prior salary is not a “factor other than sex,”¹⁷⁴ as in *Boaz*, a plaintiff could argue that allowing such a defense is, in effect, a forced waiver of her EPA right to equal pay.¹⁷⁵ Or, if a defendant argues that an equal percentage raise over a prior salary for men and women forecloses a plaintiff’s EPA claim, as in *Fortenot*, the plaintiff could proactively seek her own motion for partial summary judgment on the issue, to remove the defendant’s option as an affirmative defense.¹⁷⁶

169. *See supra* note 164 and accompanying text.

170. Amounts calculated using a compound interest calculator at 2.5% increase every year for 55 years. *See, e.g.*, U.S. SEC, Investor.gov, Compound Interest Calculator, <https://www.investor.gov/additional-resources/free-financial-planning-tools/compound-interest-calculator> (last visited Dec. 15, 2018)

171. *See supra* Part I.C.

172. *See supra* Part II.A.

173. *See supra* notes 156–60 and accompanying text.

174. *See Rizo v. Yovino*, 887 F.3d 453, 457–58, 468 (9th Cir. 2018).

175. *See Boaz v. FedEx Customer Info. Serv. Inc.*, 725 F.3d 603, 605, 607 (6th Cir. 2013).

176. *See Fontenot v. Safety Council of Sw. La.*, 2017 WL 2831248, at *1–3, 7–8 (W.D. La., June 28, 2017).

Again, regardless of the procedural mechanism, the substantive arguments would be the same, and would echo those raised when arguing against justifying a gender-based pay disparity based on individual salary negotiation.¹⁷⁷ Were it not for the employee's lower prior salary and lack of information about male comparator pay, she would not have agreed to unfairly lower pay. And regardless, if an employer intentionally chooses to pay a male employee more than a female employee for equal work, the employer then arguing that the difference is justified by the female employee's prior lower salary is, in effect, the employer arguing that she waived her right to equal pay under the EPA.

Indeed, legislative efforts to amend the EPA and its state equivalents have focused on these very pay-setting practices. Among recent state and federal legislative proposals are requirements for greater pay transparency by employers, calls to redress gender bias in pay negotiations, and prohibitions on employer reliance on prior salaries—all of which highlight the persistent public concerns of unfair competition, unequal bargaining power, and exploitation of workers.¹⁷⁸ In the meantime, for those litigating under the current EPA, that the right to equal pay for equal work regardless of gender is a statutory right that cannot be waived may offer employee plaintiffs additional lines of argument.

CONCLUSION

When the Equal Pay Act was enacted in 1963 as a subsection of the Fair Labor Standards Act of 1938, its placement was not by accident. Legislators recognized that sex-based pay discrimination was a societal problem with social and economic consequences for the community as a whole.¹⁷⁹ The requirement of equal pay for equal work regardless of sex was, therefore, added as another in a line of minimum labor standards, along with requirements for a minimum wage, overtime premiums, and limits on child labor.¹⁸⁰ All four minimum labor standards are required of covered employers engaging in interstate commerce, unless the employer can prove it is entitled to a statutory exception or defense.¹⁸¹ And all four standards are designed to benefit the U.S. economy as a whole, by correcting for unequal bargaining power between employer and employee, prohibiting unfair competition that harms complying businesses, protecting the health and safety of

177. *See supra* notes 159–160 and accompanying text.

178. *See Equal Work, supra* note 21, at 621, 626–31; Brake, *supra* note 35, at 890–91.

179. *See supra* Part I.C.

180. *Id.*

181. 29 U.S.C. § 206(d) (2012).

exploited workers, and ensuring maximum contributions to the productivity and spending power of the U.S. economy.¹⁸²

Due to these critical public interests, Congress designed the FLSA and the EPA to ensure that individuals could not waive their rights to each minimum standard by private agreement.¹⁸³ As Congress expressed, and as numerous courts have held, allowing individuals to do so would undermine the very statutory intent behind the FLSA and the EPA.¹⁸⁴ Given the stubborn persistence of the gender pay gap—even after more than fifty years during which sex-based pay discrimination has been prohibited—it is time to revisit the public aims and associated limits on waiver of rights under the EPA. The gender pay gap comes at a cost to us all; it is in our shared public interest to redress it.

182. *See* Grossman, *supra* note 65.

183. *See supra* Part I.B. & C.

184. *See id.*