Restructuring the Labor Market to Democratize the Public Forum

Jessica A. Knouse
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ABSTRACT

Restructuring the Labor Market to Democratize the Public Forum makes the provocative argument that the identities we construct in the labor market prevent us from creating a democratic public forum. The labor market, where we spend most of our time as adults, wields tremendous influence over our identities, yet its influences are deeply undemocratic. Employers work to create hierarchy and ideological conformity – through many mechanisms, including sex-based pay scales and stereotypes – rather than to promote equality and ideological diversity. When employer-created hierarchies and ideologies are internalized and reproduced within the public forum, they diminish the possibility of democratic debate. If we want a democratic public forum, we need a labor market that is either democratic or largely irrelevant to identity construction. The labor market could be “democratized” by requiring employers to flatten existing hierarchies and involve employees in workplace governance; it could be rendered largely irrelevant to identity construction by diminishing the number of hours we spend at work.
INTRODUCTION

We lead our lives within a variety of institutions – including the labor market, public forum, and family – that exert different, and often conflicting, influences on our identities. The labor market, defined as all exchanges of work for wages, encourages us to accept existing hierarchies and mainstream ideologies, while the public forum functions best when we challenge entrenched power and think independently. Yet as we move between institutions, rather than constantly reinventing ourselves, we tend to retain the identities that we are most accustomed to inhabiting. For most of us, this means retaining our labor market identities, together with the hierarchies and ideologies they represent, across our interactions with all institutions. But we must realize that, while the labor market’s hierarchies and ideologies arguably benefit our economy, they undeniably impoverish our democracy.


3 Our labor market identities dominate because of the large amount of time we spend at work. Bureau of Labor Statistics, U.S. Dep’t of Labor, American Time Use Survey, Table A-1 (2008), available at http://www.bls.gov/tus/tables/a1_2008.pdf (last visited July 16, 2009). Americans who engaged in any “working or work-related activities” spent 7.99 hours per day on those activities. They did not spend as much time on any other activity, except for sleeping, which consumed roughly 8.61 hours per day. Id.
A populace that has accepted hierarchy and ideological conformity in the private sphere is emphatically ill-equipped to embrace equality and ideological diversity – the hallmarks of democracy – in the public sphere. If we are committed to democracy in the public sphere, our laws must ensure that we are capable of interacting as equals and expressing our own unique viewpoints. Current laws provide no such insurance. Neither the Constitution nor the United States Code prevents private employers from cultivating hierarchy and ideological conformity, or prevents state actors from standing by while privately-created hierarchies and ideologies are reproduced in the public forum. Legal reform will, therefore, be necessary before we can create an egalitarian and ideologically diverse public forum.

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

Part I begins with the assertion that our identities are influenced by our actions – and, in particular, by our labor market actions. It proceeds by illustrating that our labor market actions cause us to construct identities accepting of existing hierarchies and reflective of mainstream ideologies. It concludes by arguing that these labor market identities prevent us from effectively challenging the hierarchies and ideologies of the public forum.

Part II applies the general principles set forth in Part I to the specific example of gender identity. It asserts that our genders, like all aspects of our identities, are influenced by our labor market actions. It illustrates that our labor market actions – driven by sex-based occupational and workplace segregation, sex-based appearance regulations, and sex-based

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4 See Part I(B).
5 See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 25 (1990). Butler writes, “[T]here is no ‘being’ behind doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed – the deed is everything.” Id. (quoting FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 45 (Vintage 1969) (1887)).
6 See Part I(A). Labor market actions take on special importance, due to the large amount of time we spend in the labor market.
7 See Part I(B).
8 See Part I(C).
9 See Part II(A). See, e.g., BUTLER, supra note 5, at 33 (“[T]here is no gender identity behind the expression of gender; that identity is performatively constituted by the very expressions that are said to be its results.”). Our labor market actions encompass everything from the tasks we are assigned, to the people with whom we are grouped, to the clothes we are required to wear.
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pay scales – encourage us to construct gendered identities and accept gender stereotypes.\textsuperscript{10} It concludes that the gender identities we construct in the labor market prevent us from imagining and, thus, advocating radical alternatives to the gender identities and stereotypes of the public forum.\textsuperscript{11}

Part III proposes legal reforms designed to resolve the problems set forth in Parts I and II. It begins by illustrating that our current laws are incapable of creating a democratic public forum.\textsuperscript{12} It proceeds by suggesting new legislation that – by making the labor market either more democratic or less central to identity construction – would be capable of creating a democratic public forum.\textsuperscript{13} New legislation could make the labor market more democratic by requiring employers to flatten existing hierarchies and involve their employees in workplace governance. It could, alternatively, make the labor market less central to identity construction by reducing the number of hours employees spend in the workplace. At its most fundamental level, the article advocates legal reform designed to serve not only our economy but also our democracy.

I. LABOR MARKET IDENTITIES HARM THE PUBLIC FORUM

Part I proceeds in three subparts. Part I(A) asserts that our identities are influenced by our actions\textsuperscript{14} – and particularly, by the actions we repeat over long periods in the labor market.\textsuperscript{15} Part I(B) illustrates that our labor market actions are driven by employers,\textsuperscript{16} who encourage us to interact within hierarchies\textsuperscript{17} and to incorporate those hierarchies into our

\textsuperscript{10} See Part II(B).
\textsuperscript{11} See Part I(C).
\textsuperscript{12} See Part III(A).
\textsuperscript{13} See Part III(B).
\textsuperscript{14} See BUTLER, supra note 5, at 25.
\textsuperscript{15} See Carbado & Gulati, Working Identity, supra note 1, at n.11 ("[W]orkplace norms or criteria create incentives for employees to socially construct or perform their identities to comport with those norms or criteria.").
\textsuperscript{16} Sherry Cable & Tamara L. Mix, Economic Imperatives and Race Relations: The Rise and Fall of the Apartheid System, 34 J. BLACK STUD. 183, 201 (2003) ("Economic imperatives drive the structure of the labor market in capitalist societies. . . . A competitive market is necessary to keep wages down and profits up.").
\textsuperscript{17} See Yamada, Dignity, “Rankism,” and Hierarchy, supra note 1, at 315 ("American law expressly embraces rank and hierarchy in the workplace. The predominant employment relationship in the United States is at-will employment, whereby an employee can be discharged for any reason or none at all.").
own ideologies. Part I(C) illustrates that the public forum is driven by democratic imperatives and therefore functions best when we interact as equals and express a diverse array of ideologies. Part I concludes that, so long as the labor market remains hierarchical, ideologically homogeneous, and central to identity construction, the public forum will remain essentially undemocratic.

A. Identity Construction

Identity is the sum of numerous components, ranging from basic demographic characteristics like race, sex, income, education, and occupation to less tangible (and more difficult to track) characteristics like behavior, personality, and ideology. The latter characteristics,

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

19 The Equal Protection Clause of the 14th Amendment essentially mandates identity equality within the public forum. Indeed, in the eyes of the state, individuals must be equal regardless of their race, alienage, and national origin (unless their inequality is “narrowly tailored” to achieving a “compelling” interest), and with respect to their sex and legitimacy (unless their inequality is “substantially related” to achieving an “important” interest). U.S. CONST. amend. XIV, § 1; City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985). The 1st Amendment’s protection of speech has sometimes been justified by reference to a “marketplace of ideas” theory, which presumes that, when a diverse array of ideas are expressed, the best ideas will prevail and lead to good policy. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

20 For a discussion of the disconnect between the labor market and public forum, see ROBERT LEVERING, A GREAT PLACE TO WORK 62 (1988) (“We generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights you enjoy as a citizen. There’s no process for challenging – or changing – bad decisions made by the authorities. There’s no mechanism to vote for people to represent you in decision-making bodies[,]”).


22 See, e.g., Kenji Yoshino, Covering, 111 YALE L.J. 769, 871 (2002) (introducing a “weak performative model” of identity, wherein “one’s identity will be formed in part
which overlap to some extent, require explanation. Behavior refers to a person’s dress, makeup, hairstyle, and mannerisms;\textsuperscript{23} personality refers to their degree of openness, conscientiousness, extraversion, agreeableness, and neuroticism;\textsuperscript{24} and ideology refers, in the words of philosopher Louis Althusser, to “the system of the ideas and representations which dominate [a person’s] mind[.]”\textsuperscript{25}

Ideology, which is particularly significant to the below discussion, encompasses not only political and religious affiliations but also organizational preferences.\textsuperscript{26} Organizational preferences, for present purposes, are evaluated along two spectra – one ranging from hierarchical to egalitarian,\textsuperscript{27} and another ranging from ideologically homogeneous to ideologically diverse.\textsuperscript{28} Some individuals prefer organizations (e.g., governments, corporations, universities, families) whose members interact according to their hierarchical rank (e.g., based on achievement, ancestry, wealth, or race) and share the same ideology (e.g., all ascribe to a common value system such as protestantism, feminism, environmentalism – or all share the same investment in their organization’s hierarchy). Other individuals prefer organizations whose members interact as equals through one’s acts and social situation, rather than being entirely guaranteed by some prediscursive substrate”). \textit{See also} Kenneth L. Schmitz, \textit{The Ontology of Rights}, 3 AVE MARI A L. REV. 275, 284 (2005) (“[T]he singular person is already and internally a composite of many parts, aspects, dimensions, and powers, all sealed by the concrete – if ever-changing – unity of his or her personal identity”).


\textit{Louis Althusser}, \textit{Ideology and Ideological State Apparatuses}, in \textit{LENIN AND PHILOSOPHY AND OTHER ESSAYS} 127, 158 (Ben Brewster trans., 1971) (defining ideology as “the system of the ideas and representations which dominate the mind of a man or a social group”).

Kahan, \textit{Whose Eyes Are You Going to Believe?}, supra note 21, at 859-860 (using the term “cultural worldview” rather than “ideology”, but defining it to include organizational preferences such as hierarchy versus egalitarianism).

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

I argue, in Parts I(B) and I(C), that while the labor market encourages individuals to prefer hierarchy and (ideological) homogeneity, the public forum encourages individuals to prefer equality and (ideological) diversity.
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(regardless of personal achievement, ancestry, wealth, or race) and express ideologically diverse viewpoints (e.g., some members may be Protestants, while others may be Catholics or atheists). Still others may, of course, prefer organizations reflective of other combinations (for example, hierarchy and ideological diversity).

All the aforementioned components of identity are interconnected, such that an alteration in any one may impact others. Some components are, however, more susceptible to alteration than others. While it is difficult to assess the absolute mutability of any given component, it is possible to draw comparisons between components. One might, for example, reasonably argue that anatomical race and sex are less mutable than personality and ideology, which are in turn less mutable than behavior. Anatomical race and sex, to the extent that they are marked by the level of melanocytes in one’s skin and the valence of one’s sex organs, are most difficult to alter; personality and ideology, which are essentially summaries of one’s recurring behaviors and thoughts, are less difficult to alter; and behavior, which is momentary, is still less difficult to alter.

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

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29 I use the phrase “anatomical race and sex” to refer to the biological components of race and sex – e.g., skin color and sex organs. I later differentiate anatomical sex from gender (the cultural manifestation of masculinity or femininity). See Part II(A).

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

31 While most short term changes will have little impact on other components, those that are prompted by catastrophic events may have profound impacts.

32 Short term influences will, of course, not always be insignificant – especially if they involve the use of force or threats to use force. My contention is simply that long-term influences are more often significant than short-term influences.
From the above discussion, one can conclude that employers, who often have long term influence over their employees’ behaviors, significantly impact their employees’ identities. Employers, to be clear, do not construct their employees’ identities; they do, however, influence their employees’ behaviors in ways that, over time, result in the employees themselves constructing certain identities. The behaviors that employers encourage and the identities that those behaviors tend to construct are discussed in the following section.

B. Labor Market Influences

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

We begin our labor market careers with identities that have already been shaped in other (hopefully democratic) institutions such as the family and educational system. Our existing identities are, however, influenced and often altered by our labor market actions. When our existing identity

33 For an excellent discussion of the close relationship between behavior and identity, see Laura Morgan Roberts and Darryl D. Roberts’s discussion of “identity performance” in Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work. 14 DUKE J. GENDER L. & POL’Y 369, 380-86 (2007) (explaining that “workers perform their identities through visible displays of physical appearance (e.g., hair, makeup, clothing, jewelry)[,] symbolic gestures (e.g., displaying photos or cultural artifacts, engaging in cultural rituals)[,] strategic verbal disclosures[, and a variety of other actions]”).

34 See Part I(A).

35 We refer to “we Americans.” RICHARD BARRY FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 1 (1999) (“Americans spend more time at their workplaces than do the citizens of virtually any other developed country.”). Alexandra Fiore & Matthew Weinick, Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change, 25 HOFSTRA LAB. & EMP. L.J. 525, 530 (2008) (“Twenty-eight percent of Americans work more than forty hours per week and eight percent work more than sixty hours per week. ‘An average American gets 14 days of vacation [per year] but takes only 11.’”).

36 Our pre-labor-market identities are also influenced by biological predispositions.
suggests that we should engage in one set of actions, and our occupation or workplace suggests that we should engage in another, we enter what Professors Carbado and Gulati refer to as an identity “negotiation.” We weigh the value of our existing identity against the value of labor market success, and determine whether or not to “compromise” (or, in Professor Kenji Yoshino’s terms, “cover”) our existing identity in favor of continued employment or promotion. Over time, if we repeatedly compromise our existing identities to perform the actions necessary for continued employment or promotion, we fundamentally alter our identities.

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

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

Although hierarchy and ideological homogeneity may not be ideal, they

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37 Carbado & Gulati, Working Identity, supra note 1, at 1264.
39 It should be noted that I am not making any sort of normative claim about identity alteration. Some identity alterations are positive, others negative. I am, at present, simply asserting that time in the labor market can and often does alter identity.
40 See Parts I(B)(i) and (ii).
42 Id. at 54. Fuller argues against hierarchy – or, in his terminology, “rankism” – and ideological homogeneity in the labor market.
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currently dominate the labor market – to the great detriment of the public forum. The following two subsections explore, in greater detail, the arguments for and against a hierarchical and ideologically homogeneous labor market.

i. Hierarchy

The hierarchical nature of modern American workplaces is easily explained by the at-will employment relationship and the history of American workplace organization. At-will employment, “the predominant employment relationship in the United States,” is clearly hierarchical in allowing employees to be “discharged for any reason or none at all[.]”43 Early management theorists clearly proceeded from hierarchical models. Frederick Winslow Taylor, who published THE PRINCIPLES OF SCIENTIFIC MANAGEMENT in 1911, “envisioned managers as rational ‘heads’ who would control the unruly ‘hands’ and irrational ‘hearts’ of workers.”44 Taylor proposed that low-ranking workers be provided with “instructional cards to explain [their] jobs;” that their supervisors likewise be provided with “instructional cards on how to complete their jobs efficiently;” and that “only the top authorities [be] allowed to make substantial decisions about their work.”45 Both the at-will relationship and Taylor’s theories of management set up a clear hierarchy between employers and employees.46

It should, however, be noted that the employer-employee hierarchy is not the only hierarchy within the labor market. Most workplaces have multiple, inter-related hierarchies, based on a combination of formal rank (for example, job grades) and informal understandings (for example, social stereotypes). As many labor market observers have noticed, “The modern workplace is usually organized around a hierarchical division of

43 See Yamada, Dignity, “Rankism,” and Hierarchy, supra note 1, at 315.
46 Gary C. Gray, The Responsibilization Strategy of Health and Safety, 49 BRIT. J. CRIMINOLOGY 326, 329 (2009) (“The workplace is . . . often poorly equipped to distribute responsibility equally among all parties, given the hierarchy of control under the employment contract.”).
labor that runs consistently along gender and racial lines.”

The nature and effects of these informal hierarchies will be further discussed in Part II.

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

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

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48 It should, however, be noted that there is a current trend toward flattening workplace hierarchies. Marley S. Weiss, Innovations in Collective Bargaining: NUMMI – Driven to Excellence, 13 HOFSTRA LAB. L.J. 433, 460-61 (1996) (noting that, while the “old model” was based on “many layers of bureaucratic hierarchy,” a number of factors are currently “leading to its decline”).
49 Take, for example, low-ranking African-American industrial employees in the late 1800s. Cable and Mix report that these employees, who were subordinated on the bases of both occupation and race, were severely exploited. Cable & Mix, supra note 16, at 5-6.
50 See, e.g., Filippa Marullo Anzalone, Servant Leadership: A New Model for Library Leaders, 99 LAW LIBR. J. 793, 809 (2007) (stating that “hierarchical organizational structures . . . contribute to communications complexities and other dysfunctions in a large number of workplaces”).
52 Rafael Gely, Whose Team Are You On? My Team or My Team?, 49 RUTGERS L. REV.
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Notwithstanding these economic arguments against labor market hierarchies, employers regularly rely on both formal and informal ranking systems – such as job grading and racial or gender stereotyping, respectively – to produce hierarchies. These hierarchies influence employees to adopt certain behaviors and, ultimately, certain identities. When employees alter their behaviors to fit within a given hierarchy for a long enough time, they may begin to alter their personalities and ideologies. They may, for example, become more extroverted or agreeable in the course of comporting with their assigned rank; they may alter their ideology by accepting workplace hierarchies as inevitable or even natural. These alterations in behavior, personality, and ideology may, in the aggregate, amount to an alteration in identity. Alterations in identity are not, of course, confined to the labor market – they follow employees into the public forum, with markedly undemocratic results.

Once employees have accepted the hierarchies of the labor market, they cannot help but reproduce them in the public forum.

ii. Ideological Homogeneity

American workplaces reflect not only an acceptance of hierarchy, but also a strong desire for ideological homogeneity. Employers prefer to hire and promote individuals with identities – including not only ideologies but also behaviors, personalities, races, sexes, etc. – similar to their own. Studies, indeed, confirm that “leaders in a variety of situations are likely to show preference for socially similar subordinates

323, 333, 378 (1997) (discussing both economic and non-economic benefits of such programs).

Non-economic arguments against labor market hierarchies will be discussed later.

See Part I(C).

Tracy E. Higgins and Rachel P. Fink have written about an analogous phenomenon – the transportation of hierarchy from the family (rather than the labor market) into other institutions. See Tracy E. Higgins & Rachel P. Fink, Gender and Nation-Building: Family Law as Legal Architecture, 60 Me. L. Rev. 375, 389-90 (2008) (“treating the hierarchical organization of the family as natural or pre-political also naturalizes family hierarchies of age and gender outside the home” and “Insofar as individuals come to understand their location within social hierarchies first from within their own family structure, these power relationships transcend the public/private boundary.”).

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

ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 48 (1977)
and help them get ahead.” Rosabeth Moss Kanter famously referred to this phenomenon of managers “reproducing themselves in their own image” as “homosocial reproduction.” While employers may value all forms of homogeneity, I would argue that what they value ideological homogeneity the most. When employers pursue race- or sex-based homogeneity, they are often using race and sex as proxies for ideology. While many employers pursue homogeneity, there are conflicting positions regarding its economic effects.

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

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59 KANTER, supra note 57, at 48 (noting that, in corporate settings, “men reproduce themselves in their own image”).
61 Carbado & Gulati, Critical Race Theory, supra note 60, at 1788 (“greater employee homogeneity decreases the transaction costs of managing a workforce”); Thomas W. Joo, A Trip Through the Maze of Corporate “Democracy”: Shareholder Voice and Management Composition, 77 ST. JOHN’S L. REV. 735, 744 (2003) (citing Carbado & Gulati, Critical Race Theory). Professors Carbado and Gulati present theoretical and empirical evidence suggesting (with several caveats) that employers do in fact have economic incentives to pursue homogeneity. Although Carbado and Gulati focus specifically on racial homogeneity, they note at page 1794 that they are, in part, generalizing from studies addressing homogeneity with respect to “invisible demographic variables, such as education and background.” Carbado & Gulati, Critical Race Theory, supra note 60, at 1788-1802.
63 Carbado & Gulati, Critical Race Theory, supra note 60, at 1801.
efficient and effective than heterogeneous workplaces." The pursuit of ideological homogeneity is, thus, is arguably beneficial.

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

It should be noted that, although the use of race and sex in hiring and promotion is formally prohibited by Title VII, current employment statistics reveal that many occupations and workplaces are highly homogeneous with respect to both race and sex. Even within demographically heterogeneous workplaces, however, there is evidence to

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64 Id. at 1762: 1793-95 ("In order to increase efficiency, employers have incentives to screen prospective employees for homogeneity, and, in order to counter racial stereotypes, nonwhite employees have incentives to demonstrate a willingness and capacity to assimilate.").
65 Id. See also Leonard, supra note 60, at 15-16 ("[M]anagers may be motivated to draw distinctions on the basis of group membership to maximize profits or minimize costs. A homogeneous workforce, for example, may simplify internal governance of a firm. Search costs for hiring decisions may be so high that reliance on proxies becomes economically sensible.").
66 Carbado & Gulati, Critical Race Theory, supra note 60, at 1789-90.
67 Epstein, supra note 62, at 59-87, 66-67 ("To the extent, therefore, that individual tastes are grouped by race, by sex, by age, by national origin--and to some extent they are--then there is a necessary conflict between the commands of any anti-discrimination law and the smooth operation of the firm.") See also E. Christi Cunningham, Identity Markets, 45 How. L.J. 491, 578 (2002) (discussing Professor Epstein’s theories).
69 For example, “across the country the day-labor workforce is a relatively homogeneous workforce comprised largely of recently immigrated Latino males.” Amy Pritchard, “We Are Your Neighbors”: How Communities Can Best Address a Growing Day-Labor Workforce, 7 Seattle J. For Soc. Just. 371, 376 (2008). The homogeneity of occupations and workplaces based on race and sex is not discussed here, as sex-based segregation will be discussed at length in Part II(B).
suggest that employers prefer hires who, but for their race, color, sex, or national origin, are ideologically similar to their current employees. Employers search, for example, for employees who engage in behaviors similar to current employees’ behaviors (e.g., enjoy the same sports), have personalities similar to current employees’ personalities (e.g., are conscientious and only minimally neurotic) – and espouse ideologies similar to current employees’ ideologies (e.g., are willing to accept workplace hierarchies and their ranks within them).

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

Notwithstanding these arguments against homogeneity, employers continue to favor homogeneous workforces – and, in particular, ideologically homogeneous workforces. If limits on employee speech are any indication of employers’ commitment to ideological homogeneity, one can conclude that most employers are highly committed to such homogeneity. It is, indeed, widely recognized that few employees have

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70 Carbado and Gulati refer to these individuals as “but for outsiders” – that is, “outsiders who, but for their [race, color, sex, or national origin], are very similar to the insiders.” Carbado & Gulati, Critical Race Theory, supra note 60, at 1803.
71 See generally Carbado & Gulati, Critical Race Theory, supra note 60.
72 Carbado & Gulati, Critical Race Theory, supra note 60, at 1793-94. See also Rothschild, supra note 52, at 200.
73 Id. (“[I]f employees on a team have only the right to complement their boss’s ideas, no actual new ideas can be generated. Creativity and innovation generally imply or require criticism and often the tearing down of old ways of doing something.”).
75 See Part I(C).
76 See Part I(C).
anything approaching a robust right to free speech in the workplace. 77

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

C. Public Forum Ramifications

The labor market and public forum are very different institutions. While the labor market encourages us to accept hierarchies and ideological homogeneity, 78 the public forum functions best when we embrace equality and ideological diversity. While the labor market is driven by economic goals, 79 the public forum is motivated by a desire to promote the common good. 80 Although I will later argue that the two institutions are not inherently incompatible, 81 the preferences they currently encourage are clearly incompatible. We cannot simultaneously prefer both hierarchy and equality, or both homogeneity and diversity. And, once we have internalized the hierarchy and homogeneity of the labor market, we are emphatically ill-equipped to interact as equals and express unique ideologies in the public forum. As Professor Vicki Schultz observes, “Work is a site of [such] deep self-formation [that] we cannot easily compartmentalize the selves we learn to become during work hours.” 82 In sum, although we may intellectually understand the needs of the public

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

78 See Part I(B).

79 See Part I(B).

80 Robert Justin Lipkin, Reconstructing the Public Square, 24 CARDOZO L. REV. 2025, 2062 (2003) (“One goal of debate in a democracy is the formulation of the community’s reflective judgment about the common good.”).

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

82 Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881, 1883, 1890 (2000).
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forum, the labor market has rendered us incapable of meeting them. So long as we remain workers first and citizens second, we will continue to import our labor market behaviors, personalities, and – most problematically – ideologies into the public forum.

Americans have, since the Founding, expressed a strong commitment to equality and ideological diversity in the public forum. Although our definitions of equality and ideological diversity have changed dramatically since 1978, we have always understood them as prerequisites to democracy and therefore protected them through various constitutional and statutory provisions. The following two subsections illustrate that, although we have consistently expressed a commitment to an egalitarian and ideologically diverse public forum, we have not yet satisfied that commitment.

i. Lack of Equality

Equality – at least in some form – has long been a central feature of the American public forum. The Founders, according to Professor

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83 See, e.g., Lipkin, supra note 80, at 2077, 2094 (2003). This idea will be discussed in detail in Parts I(C)(1) and I(C)(2).

84 See, e.g., U.S. CONST. amends. I, XIII, XIV, and XIX; Voting Rights Act, 42 U.S.C. § 1973–1973aa-6. This idea will be discussed in detail infra in Parts I(C)(i) and (ii).

85 Equality is, for that matter, central to any democratic public forum. Elizabeth S. Anderson, What is the Point of Equality?, 109 ETHICS 287, 313 (Jan. 1999) (defining democracy as “collective self-determination by means of [an] open discussion among equals”) (emphasis added). Although my own formulation would be slightly different (in that it would focus primarily, though not exclusively, on equality among different identities), Professor Anderson (following, among others, Amartya Sen) argues that the relevant kind of equality within a democracy is equality of access to the resources required for effective participation. Id. at 316 ff. A democracy, that is, must provide all its members with the resources they need to flourish as humans, laborers, and citizens. Id. at 317. Only when those resources are available are citizens capable of effectively participating in the public forum. Id. Emphasizing the importance of equality within the public forum, Julian Wonjung Park has written:

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

Julian Wonjung Park, A More Meaningful Citizenship Test? Unmasking the
Robert Lipkin, envisioned a public forum “committed to the development of a civic discourse, through which all Americans [could] participate equally in democratic debate[,] free from the divisions and hierarchies, created by, for instance, monarchy, theocracy, aristocracy, or dictatorial rule.”

Equality was key to the Declaration of Independence, which began from the premise that “all men are created equal[,]” and remained important to the authors of the Federalist Papers, who reportedly believed that American citizenship “ought to confer equal rights.” Although equality was not expressly guaranteed by either the 1789 Constitution or 1791 Bill of Rights, and although the grievous inequality of slavery persisted until the 1860s, the Founders were clearly committed to at least some forms of equality within the public forum.

Equality was, in 1868, finally inscribed in our Constitution via the Fourteenth Amendment’s Citizenship and Equal Protection Clauses. Both clauses provide that, within the public sphere, all citizens must stand as equals. While the courts initially interpreted the Equal Protection Clause narrowly, such that it addressed only a few forms of state-imposed racial inequality, they have over the past half century begun to interpret the clause more broadly. Current equal protection doctrine addresses state-imposed inequalities based on a variety of demographic traits,

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86 Lipkin, supra note 80, at 2077, 2094. Professor Lipkin describes the ideal public forum as one where “individuals can form a community which protects their individuality and diversity and which fosters self-government and the commitment to the equal freedom of its members.” Id. at 2029, n.17.

87 The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights that among these are Life, Liberty and the pursuit of Happiness.”).

88 JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP: 1608-1870, at 10 (1978) (American citizenship entails “equal membership” and “incorporation into the body politic.”).

89 U.S. CONST. amend. XIV, § 1.

90 Id. The Citizenship Clause provides, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Akhil Amar has written that the Citizenship Clause “aimed to . . . mak[e] clear that everyone born under the American flag – black or white, rich or poor, male or female, Jew or Gentile – was a free and equal citizen.” AMERICA’S CONSTITUTION: A BIOGRAPHY, 381-82 (2005). The Equal Protection Clause reads, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

91 See Knouse, Ideology Politics, supra note 23.
extending beyond race to alienage, national origin, sex, and legitimacy.\footnote{Knouse, Restructuring the Labor Market}

It still, however, provides little protection against state-imposed inequality based on non-demographic traits,\footnote{Id. Current conceptions of citizenship continue to emphasize equality, though some have argued that the emphasis ought to be stronger. See, e.g., Park, supra note 85, at 1007-08. On the current citizenship test, for example, only one question directly deals with equality. When asked “What are some of the basic beliefs of the Declaration of Independence?” a prospective citizen should (according to the answer sheet) respond, “That all men are created equal and have the right to life, liberty, and the pursuit of happiness.” Id. at 1032, 1036 (current test, sample question and answer 56). Similarly, on the newest citizenship test, only one question deals with equality. When asked “What did Martin Luther King, Jr. do?” a prospective citizen should respond, in part, that he “worked for equality for all Americans.” Id. at 1045 (new test, question and answer 85).} and no protection against privately-imposed inequality.\footnote{All traits other than race, alienage, national origin, sex, and legitimacy receive only rational basis review. Knouse, Ideology Politics, supra note 23.} When privately-created inequalities (e.g., employer-created hierarchies) are internalized and reproduced within the public sphere, there is no constitutional violation – regardless of their potential detriment to public interactions.

One might point out that, although privately-created inequalities are not constitutionally actionable, some are statutorily actionable. Title VII of the Civil Rights Act of 1964, as will be discussed further in Part II(B), prohibits employers from discriminating among employees “because of . . . race, color, religion, sex, or national origin.”\footnote{The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (“Individual invasion of individual rights is not the subject-matter of the [Equal Protection Clause].”). ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 510 (2006) (“Absent statutory restrictions, private conduct cannot infringe or trample even the most basic rights.”).} I will, however, argue that Title VII is too narrow (in both its text and current interpretation) to prevent the vast majority of employer-created inequalities. Many such inequalities are, thus, not only unaddressed by Title VII but also, once reproduced within the public forum, unaddressed by the Equal Protection Clause. So long as this pattern continues, we

\footnote{42 U.S.C. § 2000e–2(a) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).}
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cannot legitimately describe our public forum as egalitarian. Yet neither can we claim that the government is affirmatively depriving us of equality. Indeed, the worst we can say of the government is that it is acquiescing in the production, and then reproduction, of privately created inequalities.

While the government is not affirmatively depriving us of equality, we are not interacting as equals. This problem could be remedied in a number of ways. The Equal Protection Clause could, for example, be amended to transform equality from a negative right into a positive one. Rather than requiring the government to refrain from imposing inequality, we could require the government to affirmatively guarantee equality – even if it meant reaching into the private sphere to flatten employer-created hierarchies. Alternatively, new Title-VII-like legislation could provide employees with more robust tools for challenging workplace hierarchies.

Although Americans have long valued equality within the public forum, we have yet to achieve it in its more robust form.

ii. Lack of Ideological Diversity

Ideological diversity – at least in some form – has, like equality, long been a central feature of the American public forum. Professor Cass Sunstein writes, “For the framers, heterogeneity was beneficial, indeed indispensable; discussion [had to] take place among people who were different.” Their rationale, as Professor Rebecca Brown explains, was

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96 See Part III.
97 Robert F. Williams, Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond, 24 CONN. L. REV. 675, 696-97 (1992) (“The federal Equal Protection Clause has been applied almost exclusively as a ‘negative’ right, and has not been extended to include positive ‘distributional implications.’”). For an explanation of the differences between negative and positive rights, see Eric C. Christiansen’s article, Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court, 38 COLUM. HUM. RTS. L. REV. 321, 345 (2007) (“Traditional political rights such as . . . equal protection are considered negative rights because they only require that the state refrain from interfering in the individual’s exercise of the right; they are rights to be free from government interference. Socio-economic rights are identified as positive rights because they impose affirmative obligations upon the state to advance particular areas of social welfare.”).
98 Ideas for legal reform will be further explored in Part III.
that “[d]ifferences would help legislators hammer out a concept of the public good, as to which they then could enact laws equally for themselves and others to live by.”\footnote{Brown, \textit{supra} note 99, at 1518. In support of this proposition, Professor Brown cites \textit{The Federalist} 10 (James Madison), and characterizes Madison as arguing that “out of difference would come the hope of keeping oppression at bay.” \textit{Id.}}\footnote{U.S. \textit{CONST.}, amend. 1 (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”) Although some would argue that “viewpoint diversity was probably not foremost in the Framers’ minds,” Matthew Keller, \textit{“Damn the Torpedoes! Full Speed Ahead”: The FCC’s Decision to Deregulate Media Ownership and the Threat to Viewpoint Diversity}, 12 \textit{J.L. \\& POL’Y} 891, 894 (2004) (citing Jonathan W. Emord, \textit{The First Amendment Invalidity of FCC Ownership Regulations}, 38 \textit{CATH. U.L. REV.} 401, 404 (1989)), the plain text of the First Amendment allows for an interpretation that protects such diversity.} This high regard for ideological diversity was arguably reflected in the First Amendment, which prohibited federally-imposed abridgements of speech.\footnote{\textit{Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America} 91 (1999).} First Amendment scholar Steven Shiffrin goes so far as to assert that “[t]he First Amendment should be taken to reflect a constitutional commitment to \textit{promoting} dissent.”\footnote{\textit{JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS} 20 (Stefan Collini ed., 1989) (1859).} The importance of ideological diversity and dissent was reaffirmed by nineteenth-century philosopher John Stuart Mill, who wrote, “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”\footnote{\textit{Shiffrin, supra} note 102, at 95. Shiffrin writes, “Without [dissent], unjust hierarchies would surely flourish with little possibility of constructive change.” \textit{Id.} at 93.} Professor Shiffrin describes Mill’s views as follows:

Mill is concerned about the crushing effects of social customs inducing the mass of people to conform. He exalts autonomy and individuality not only for their positive effects on the individual but also for their beneficial impact on society. For Mill, not to exercise choice, but to acquiesce in custom without thought, is to be no better than an ape or a machine.\footnote{\textit{Id.} at 93.} Ideological diversity was, thus, recognized as important to public forum debate throughout our nation’s early history.

In the early Twentieth Century, the Supreme Court – prompted by Justices Holmes and Brandeis – began to incorporate some protection for
ideological diversity and dissent into its First Amendment doctrine. Justice Holmes, dissenting in *Abrams v. United States*, opined that “the ultimate good desired is [best] reached by free trade in ideas.” Justice Brandeis, in *Whitney v. California*, similarly opined that that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]” The Court continued to tout the importance of ideological diversity in later cases, such as *Associated Press v. United States*, where Justice Black wrote that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Perhaps the strongest judicial statement in favor of viewpoint diversity came in the 1964 decision of *New York Times v. Sullivan*, where Justice Brennan wrote:

“[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” [We have] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. Ideological diversity, over the course of the Twentieth Century, became quite central to the Court’s First Amendment doctrine.

Yet, just as the Constitution does not affirmatively guarantee equality, it does not affirmatively guarantee ideological diversity.

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105 *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

106 *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”).


110 See Part I(C)(1).

111 While the government is not obligated to affirmatively create ideological diversity, it is arguably permitted to affirmatively create ideological diversity. In *Grutter v. Bollinger*, 593 U.S. 306 (2003), the Supreme Court suggested that student body diversity is a compelling interest, in part, because it promotes viewpoint diversity. Grutter, 593 U.S. at 324 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S.
Like the Equal Protection Clause, the Free Speech Clause creates a negative rather than positive right.\textsuperscript{112} It prohibits the government from abridging speech, without making any promise that speech will flourish.\textsuperscript{113} Thus, while we recognize ideological diversity as crucial to the public forum, our Constitution does not deliver ideological diversity. When employer restraints on speech are internalized and imported into the public forum, there is a lack of diversity without any constitutional violation.\textsuperscript{114} While we might (as in the equal protection context) look to statutes to protect employee speech, a review of existing statutes reveals that they are grossly inadequate.\textsuperscript{115} The modern labor market, indeed, exhibits “the disturbing signs of a severe chill on private employee expression[.]”\textsuperscript{116}

The remedies for this lack of ideological diversity mirror the previously discussed remedies for the lack of equality.\textsuperscript{117} The Free Speech Clause might, for example, be amended to require that the government actively foster ideological diversity in the public forum. New statutes might, alternatively, give employees more meaningful ways to challenge abridgements of speech within the workplace.\textsuperscript{118} Although our history

\textsuperscript{112} For a discussion of freedom of speech as a negative right, see Frederick Schauer, \textit{Hohfeld’s First Amendment}, 76 GEO. WASH. L. REV. 914, 915-16 (2008) (“Although a right to freedom of speech might plausibly be understood as a positive right against the government to have the government provide some sort of opportunity to speak, or some form of support for speaking, the existing doctrine, with perhaps the one significant exception of the public forum doctrine, refuses to understand the First Amendment right to freedom of speech in such a way. As the doctrine now stands, the right is a right against interference – a privilege or a liberty in Hohfeldian language – but it is not a right to have the actual opportunity to speak, nor is it a right to have a platform for speaking, nor is it the right to have an audience. The basic right to free speech is the right of a speaker to speak to whomever is willing to listen, but only with the speaker's own resources.”).

\textsuperscript{113} Although the Freedom of Speech Clause initially applied only against the federal government, it was incorporated to apply against state and local governments in \textit{Gitlow v. New York}, 268 U.S. 652, 666 (1925).

\textsuperscript{114} Cent. Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972) (“The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”).

\textsuperscript{115} Yamada, \textit{Voices From the Cubicle, supra} note 1, at 1 (“survey[ing] the potential constitutional, statutory, and common law safeguards for private employee speech, ultimately concluding that they are inadequate to provide the necessary level of protection”).

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{See Part II(C)(i).}

\textsuperscript{118} These ideas for legal reform will be further explored in Part III.
confirms that we value both equality and ideological diversity within the public forum, we have yet to put our values into practice.

In sum, while the labor market encourages us to accept hierarchy and ideological homogeneity,\textsuperscript{119} the public forum requires us to embrace egalitarianism and ideological diversity. One might imagine that this conflict arises naturally from the differing goals of the two institutions. Perhaps the labor market’s economic imperatives can only be achieved through hierarchy and ideological homogeneity, while the public forum’s quest for the common good can only succeed through egalitarianism and ideological diversity. I would, however, argue that the two institutions’ differing goals need not create such conflict. I would, instead, suggest that that labor market’s economic imperatives could be achieved just as well – if not better – through egalitarianism and ideological diversity. And I would further argue that, even if they could not, their detrimental influence on our public forum is more than sufficient reason to alter them.

II. LABOR MARKET GENDER IDENTITIES HARM THE PUBLIC FORUM

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

A. Gender Identity Construction

A person’s gender identity is one aspect of their total identity. It encompasses “various individual attributes as they are understood to be masculine and/or feminine.”\textsuperscript{120} The principles that applied to identity in Part I(A) apply equally to gender identity. Just as sex, income, education, occupation, behavior, personality, and ideology influenced identity as a

\textsuperscript{119} See Part I(B).
\textsuperscript{120} San Francisco Administrative Code, Section 12C.2 (providing a definition for purposes of prohibiting the city from discriminating based on gender identity in contracts).
whole, they also influence gender identity. Just as certain components of identity were more susceptible to alteration, those same components of gender identity are also more susceptible to alteration.

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

Proceeding from the premise that behavior is the most mutable component of gender identity, we can examine how changes in behavior may lead to changes in gender identity. Imagine, for example, a woman who enters the labor market with a non-traditional gender identity but is

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121 See Part I(A). One version of ENDA (HR 2015) defined “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth” (emphasis added).

122 See Part I(A).

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

124 Studies suggest that, across cultures, women view themselves as more neurotic and agreeable than men view themselves. See, e.g., Paul Costa, Jr., Antonio Terracciano, Robert R. McCrae, Gender Differences in Personality Traits Across Cultures: Robust and Surprising Findings, J. PERSONALITY AND SOC. PSYCHOL., 81(2), 322-331 (2001).

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

126 See Part I(A).
assigned to work as a waitress and required to wear revealing outfits. She may, over time, adapt her personality and ideology to comply with traditional gender norms, and she may ultimately adopt a more traditional gender identity. Changes in her behavior may, that is, lead to changes in her gender identity.

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

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

To be clear, the proposition that changes in behavior can lead to changes in gender identity is not synonymous with the proposition that changes in behavior can lead to an opposing gender identity — i.e., a conversion from masculine to feminine or the reverse. Even long term behavioral changes generally do not convert a person from one gender into the other. Indeed, the incongruities that result when a person is forced into behaviors associated with the opposing gender often lead to tragic results. This could occur in at least two different situations. One is when an anatomical and self-identified male is forced to behave as a female. See, e.g., Knouse, Intersexuality, supra note 123, at 148-49 (2005) (discussing the case of an infant boy who, after having his penis damaged, was raised as a girl and, after years of work to reclaim his male identity, committed suicide at the age of 38). Another is when an anatomical male who self identifies as a female (because the rest of her traits are female-oriented) is forced to behave as a male.

See Part I(A).


I do not, however, argue that behavior is determinative of gender identity. I adopt what Professor Kenji Yoshino would refer to as a “weak performative” view of identity — rather than a “strong performative” view. Yoshino, supra note 22, at 865-71. As Professor Yoshino explains, under a strong performative view, identity is created through “performance” or behavior, id. at 867 (citing BUTLER, supra note 5, at
Certain aspects of behavior – especially those related to personal appearance – are often dismissed as aesthetic and therefore “trivial.”\textsuperscript{132} While such behaviors may be aesthetic, they are deeply constitutive of gender identity and therefore not trivial.\textsuperscript{133} As Paulette Caldwell asserts, “Judgments about aesthetics do not exist apart from judgments about the social, political, and economic order of a society[ – a]esthetic values determine who and what is valued, beautiful, and entitled to control.”\textsuperscript{134} Mary Whisner similarly asserts that “appearance conveys a multitude of messages about class, occupation, race, physical freedom, . . . and gender.”\textsuperscript{135} Roland Barthes made perhaps the most extreme assertion, writing, “[W]e know that the garment does not express but constitutes the person; or rather we know that the person is nothing but this desired image

\textsuperscript{132} Courts, for example, often characterize employees’ interests in their own appearances as trivial – though they may simultaneously characterize employers’ interests in their employees’ appearance as substantial. See Mary Whisner, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN’S L.J. 73, 74 (1982). See also Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (characterizing hairstyle as “a matter of relatively low importance”). See also Kirsten Dellinger & Christine L. Williams, Makeup at Work: Negotiating Appearance Rules in the Workplace, GENDER AND SOCIETY, Vol. 11, No. 2 (Apr. 1997), 151-77, 153 (“Although many women spend a significant amount of time each day applying makeup, sustaining a multibillion-dollar industry, women’s concerns about their personal appearance often are trivialized and considered unworthy topics for sociological investigation.”)

\textsuperscript{133} Peter Brandon Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. DAVIS L. REV. 769, 880 (1987) (asserting “it is well known that styles, makeup, clothing, language, dietary habits, jewelry, adornments, and other similar arguably mutable characteristics have profound connections with ethnic, religious, racial, and gender identity” (emphasis added).

\textsuperscript{134} Paulette Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 393 (1991). Caldwell further asserts, “Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture[.]” \textit{Id.} at 370. She emphasizes that “[h]airstyle choices are an important mode of self-expression[,]” \textit{Id.} at 383, especially when they have cultural significance correlated with not only gender but also racial identity.

\textsuperscript{135} Whisner, supra note 132, at 73.
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which the garment permits us to believe in.”136 Whether or not one accepts Barthes’s view that personal appearance constitutes identity, one cannot deny that personal appearance at least influences identity.

If personal appearance influences gender identity, then control over personal appearance translates into influence over gender identity. When employers require their employees to adopt gendered appearances, they influence their employees to construct gendered identities. Although some employees may resist their employers’ requirements, the consequences of resistance are often dire.137 As Mary Whisner reports, “[T]he sacrifices demanded by non-conformity of appearance [can include] loss of employment[.]”138 To summarize, our behaviors are so significant to our gender identities that, when we cede control of our behaviors, we effectively cede control over our gender identities.

B. Labor Market Influences

137 Whisner, supra note 132, at 74-75.
138 Id. (additionally noting that the consequences can extend beyond loss of employment to “arrest, . . . expulsion or suspension from school[ and, in the past] sometimes even execut[ion]”). Many fear that, without the appearance differentiation presently relied upon to maintain the gender hierarchy, the hierarchy would fall and, in the resulting unisex society, chaos would reign. Id. at 97-101.

Sex-based dress and grooming codes are important to employers because they help to reinforce workplace hierarchies. By creating visible differences among employees, dress and grooming codes create visible demarcations of the levels within workplace hierarchies. Dress is, indeed, often indicative of status. Christine Stansell’s discussion of the complex dress customs of 19th-century New York City in CITY OF WOMEN provides an example of appearance as a signal of status outside of the workplace. CHRISTINE STANSELL, CITY OF WOMEN 89-94 (Alfred A. Knopf ed., 1986). On the Bowery, a popular avenue in 19th-century New York, dress not only differentiated men from women, it also created subcategories of men and women. Stansell describes three subcategories of women, each of whom manipulated their appearances to differentiate and express themselves. Id. “[R]espectable” women deflected attention by wearing “[m]uted colors[ and] a costume that covered the flesh except for the face (including obligatory gloves and hat)[;]” prostitutes drew attention to themselves with “brightly colored dress[ and] the comparative absence of coverings (most tellingly, the omission of a hat[;])” while “Bowery girls” differentiated themselves from both respectable women and prostitutes by wearing “startling combinations of colors, . . . ’in utter defiance of th[e] conventional laws of harmony and taste[,]’” Id. at 89-94. Dress customs on the Bowery, as in all contexts, served to order society by expressing identity, signifying status, and guiding interactions.
The labor market influences our gender-related behaviors – and, by extension, our gender identities – in a variety of ways. Parts II(B)(i) and II(B)(ii) illustrate how the labor market creates gender difference through sex-based segregation and appearance regulations, respectively. By imposing such sex-based policies, employers ensure that their male employees adopt “masculine” identities and their female employees adopt “feminine” identities. Part II(B)(iii) illustrates how the labor market builds upon these gender differences to create gender hierarchy through sex-based pay scales. The sex-based nature of pay scales is evidenced by the fact that women continue to earn only 78% as much as men. Part II(B)(iv) asserts that, after spending long periods in the labor market, many employees incorporate gender hierarchy into their own ideologies.

i. Gender Difference through Sex-Based Segregation

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

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139 Sex-based segregation is discussed in Part II(B)(i); sex-based appearance regulations are discussed in Part II(B)(ii).
141 Ruth Milkman & Eleanor Townsley, Gender and the Economy, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 600, 601 (Neil Smelser and Richard Swedberg eds., 1994) (observing that the gender-based division of labor is a trans-historical and transcultural phenomenon.).
142 Heidi Hartmann, Capitalism, Patriarchy and Job Segregation by Sex, 1 SIGNS 206, 212 (1976).
143 Id. at 212; 214-15.
144 Id. at 214-15.
145 Id. at 214.
After industrialization, Hartmann reports, men entered the labor market while women remained in the home. Women were allowed to enter the labor market only when “a sharp rise in demand for [a] service or product” rendered male labor insufficient, or when increased mechanization created new low-skill positions. Although some 19th-century social theorists predicted that the “impersonal logic of the market” would eradicate sex segregation, history has not borne out their predictions. Throughout the 20th century, men and women continued to work in different occupations and workplaces. Sociologists William Bielby and James Barron reported, in the mid-1980s, that “the level of occupational sex segregation has changed very little since 1900” and that “60%-70% of male (or female) workers would require reclassification across detailed occupations to equalize the sexual division of labor.”

During the 1990s, many occupations remained “sex-typed” in that they continued to be dominated by either males or females. Sociologist Joan Acker reports that, although sex segregation “declined somewhat between 1970 and 1990, [it] remained stable over the 1990s with an Index of Dissimilarity of about [53]” – meaning that, “to achieve an equal distribution of women and men, 53 percent of either women or men would have to change to other jobs in which a majority of the other sex [were] employed.” Throughout the 1990s, sociologists worked to identify the key differences between male and female occupations. In 1990, Ronnie Steinberg observed that “men’s jobs require more manual skills and women’s jobs require more social and verbal skills.” More specifically,
women’s jobs often involve “nurturing, cleaning, waiting on other people, and public relations work.” In 1994, Ruth Milkman and Eleanor Townsley reported that “men have a dominant role in the now shrinking manufacturing fields,” while “women are highly concentrated in the clerical and service sectors.” They further reported that, although the initial sex-typing of an occupation is often arbitrary, it is rarely overcome.

Current studies reveal that little has changed. The 2008 Bureau of Labor Statistics report illustrates that, of the five major occupational categories, women are significantly under-represented in two – (1) natural resources, construction, and maintenance, which is 4.2% female and (2) production, transportation, and material moving, which is 22.4% female – and either significantly under- or over-represented in sub-occupations of the other three. Within the major category of service occupations, for example, women make up 57.2% of employees, yet the sub-occupation of protective services (which includes police officers, fire fighters, etc.) is only 22.8% female while the sub-occupation of healthcare support (which includes home health aides, medical and dental assistants, etc.) is 88.8% female. Thus, although the service industry is, as a whole, relatively integrated, its sub-occupations remain segregated. Similar statistics led Joan Acker to conclude, in 2006, that:

154 Id. at 453 (noting that women’s jobs often draw on domestic skills).
155 Milkman & Townsley, supra note 141, at 603.
156 Id. at 611. Doris Weichsalbaumer’s study on the impact of sex stereotypes on hiring practices, cataloged in Is it Sex or Personality? The Impact of Sex Stereotypes on Discrimination in Applicant Selection, 30 E. Econ. J. 159 (2004), bears out Milkman and Townsley’s assertion. Weichsalbaumer created three hypothetical job applicants with identical human capital – a male with a masculine personality, a female with masculine personality, and a female with feminine personality – sent their resumes to a variety of employers, and drew conclusions based on the employers’ desire to interview to each of the applicants. Id. She found that, with respect to the masculine sex-typed job of network technician, employers preferred men over women, even when there was no difference in human capital or personality. Id. at 160, 173-75. Conversely, with respect to the feminine sex-typed job of secretary, employers preferred women over men, even when there was no difference in human capital or personality. Id. An occupation, once sex-typed, is thus virtually intractable.

158 Id.
In spite of the influx of women into all occupations, many of the old gendering processes still operate. Gendered . . . expectations on the part of both employers and employees still influence selection of new job entrants and their experiences on the job, as well as their opportunities for advancement. Many occupations, thus, continue to be sex segregated. Yet sex segregation is not limited to the occupational level – even within relatively integrated occupations and sub-occupations, sociologists have long observed segregation among and within individual workplaces. Bielby and Barron’s seminal study revealed that “men and women in the same census occupation are sorted into distinct [workplaces] or are segregated by job titles within [workplaces].” Wait staffs are a classic example of men and women being sorted into distinct workplaces. Both men and women wait tables, but individual restaurants tend to hire either all-male or all-female wait staffs. The manufacturing industry provides an example of men and women being segregated by job titles within a single workplace. Some factories employ men and women to perform essentially the same tasks, but refer to the men as “operatives” and the women as “assemblers.” Other factories segregate men and women by the more direct means of employing them to perform different tasks.

The clothing manufacture industry, which is somewhat integrated, illustrates typical differences between the tasks that men and women are

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159 Acker, supra note 151, at 139.
161 Bielby & Baron, supra note 149, at 760. The sorting of men and women into distinct workplaces occurs where “a given line of work [is] done exclusively by men in some organizational settings and exclusively by women in others.” Id. at 764. The segregation of men and women by job titles within workplaces occurs where men and women “do equivalent work within an organization but hold distinctive job titles.” Id. at 765.
162 Id. at 764-65.
163 Id.
164 Id. Where men and women in the same occupation not only hold distinctive job titles but also perform different tasks, Bielby and Baron report that women are likely to be excluded from jobs “that are specialized; require heavy lifting; do not require finger dexterity, verbal aptitude, or clerical perception; or have longer training requirements[,]” as well as from jobs “that involve variable tasks, spatial skills, [or] coordination; that are in larger establishments; or that are in enterprises with unions or formal bidding arrangements.” Id. at 782.
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assigned.\textsuperscript{165} Cynthia Cockburn reports that, historically, men performed the “skilled” tasks of tailoring and cutting while women performed the “unskilled” task of sewing.\textsuperscript{166} As mechanization increased, the male tasks of tailoring and cutting were “deskilled” and reassigned to women.\textsuperscript{167} By the mid-1980s, men were performing the “skilled” tasks of supervising or managing computer systems and women were performing the “unskilled” task of operating the equipment.\textsuperscript{168} Cockburn’s reports similar patterns of segregation in other industries, including mail order warehouses and engineering firms.\textsuperscript{169} She ultimately illustrates that changes in the content of male and female tasks do not necessarily lead to changes in the overall level of sex segregation.\textsuperscript{170}

Current statistics reveal that the sex segregation sociologists like Cockburn studied in the 1980s still exists – both among and within individual workplaces. Among workplaces, wait staffs remain highly segregated.\textsuperscript{171} In 2006, Christine Williams observed that “high priced restaurants tend to hire men (or women dressed like men), while low-priced restaurants employ women.”\textsuperscript{172} Within individual workplaces, men and women employed to perform the same tasks continue to be assigned different job titles. Where both men and women perform clerical tasks, men are still often referred to as “administrative assistants” while women

\textsuperscript{165} See generally \textit{Cockburn}, supra note 147.
\textsuperscript{166} \textit{Id.} at 47.
\textsuperscript{167} \textit{Id.} at 48.
\textsuperscript{168} \textit{Id.} at 73-77.
\textsuperscript{169} \textit{Id.} at 78-111; 142-66.
\textsuperscript{170} Cockburn’s discussion of the mail order industry reveals that it is similarly integrated, but excludes women from jobs involving heavy lifting and variable skills. \textit{Id.} at 78-111. Like the clothing industry, the mail order industry has recently undergone increased mechanization and, like the clothing industry, it has managed to continue to segregate males and females into different jobs. \textit{Id.} Males are presently concentrated in “management, maintenance engineering, goods handling, truck driving, assembly of bulk hardware orders, [and] heavy work in despatch and warehouse cleaning[,]” while females are concentrated in “clerical work, assembly of bulk clothing orders, picking, packing, returns, stock control and light work in despatch.” \textit{Id.} at 96. Cockburn’s discussion of the engineering industry reveals that, like the clothing manufacture and mail order industries, it is integrated, but excludes women from specialized jobs with extensive training requirements and concentrates them instead in clerical positions. \textit{Id.} at 142-66. Male engineering employees are generally managers, developers, or servicers of the machines, while female engineering employees are mere operators of machines. \textit{Id.} at 142.
\textsuperscript{171} Williams, \textit{Unintended Consequences}, supra note 160, at 103.
\textsuperscript{172} \textit{Id.}
are simply “secretaries.”  Many individual workplaces, however, continue to segregate men and women by the more direct means of assigning them different tasks. Williams found that “in one [toy] store, only women were assigned to the doll and stuffed animal sections, and only men sold electronic games and sporting goods.”

Sex segregation, thus, continues among and within occupations and individual workplaces.

While such high levels of sex segregation are clearly illegitimate, sex segregation is not always illegitimate. It is, however, illegitimate when it is created and maintained by stereotypes rather than biological differences. While most sex segregation is maintained by stereotypes, a small amount may be maintained by statistically significant biological differences. Differences in physical strength, for example, may make certain tasks easier for males than females. Increased mechanization has, however, rendered such differences largely irrelevant. And, beyond physical strength, few statistically significant biological differences exist. Women’s “lack of interest” in certain tasks is, while statistically

173 Id.
174 Williams, Unintended Consequences, supra note 160, at 104. Williams points out a similar phenomenon in another store, where “only women associates were assigned to work the cash register; most of the men were employed in the back, assembling and unloading the toys.” Id. See also CHRISTINE WILLIAMS, INSIDE TOYLAND: WORKING, SHOPPING, AND SOCIAL INEQUALITY 50 (University of California Press 2006).
175 Absent stereotypes, one would expect to see at least some “masculine women” in male-dominated occupations, and some “feminine men” in female-dominated occupations.
176 To suggest that sex segregation may in some cases be legitimate is not, however, to concede that it is not in those cases problematic. As Professor Schultz has illustrated, “Sex segregation structures work environments in which harassment flourishes because numerical dominance encourages male job incumbents to associate their work with masculinity and to police their jobs by treating women and gender-nonconforming men as “different” and out of place.” Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2132 (2003).
177 E.E.O.C. v. Sears, Roebuck and Co., 628 F. Supp. 1264, 1314-15 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988), involved a workplace where male and female employees performed different tasks. The E.E.O.C. alleged that Sears was “engaged in a nationwide pattern or practice of sex discrimination[ by, among other things,] failing to hire female applicants for commission selling on the same basis as male applicants, and by failing to promote female noncommission salespersons into commission sales on the same basis as it promoted male noncommission salespersons into commission sales.]” 628 F. Supp. at 1278. Although the lawsuit ultimately failed when the courts accepted Sears’ argument that the paucity of women in commission sales jobs was due to women’s lack of interest in those jobs rather than to Sears’ discriminatory hiring practices, the existence of segregation was clearly
significant, a cultural rather than biological difference. Thus, only a small
amount of occupational segregation can be justified by biological
differences – and no amount of workplace segregation can be justified by
such differences.

Sex segregation, regardless of whether it is legitimate, is highly
problematic because it creates gender differences that enable the creation
of gender hierarchy. The causal relationship between sex segregation and
gender hierarchy will be explored in Part II(B)(iii). Congress’s attempts to
limit sex segregation, \(^\text{178}\), which will be discussed in Part III(A), have been
largely unsuccessful. \(^\text{179}\) While sex segregation is an important means of
creating gender difference, it is not the only means. The following section
explores how employers create gender difference through the alternative
means of sex-based appearance regulations.

ii. Gender Difference through Sex-Based Regulations

Where gender difference has not been created through sex-based
segregation, it is often created through sex-based appearance regulations.
Within sex-integrated workplaces, employers often impose different dress
and grooming requirements on males and females – sometimes through
formal codes, but more often through informal norms. Indeed, “both
formal and informal comments about an employee’s wardrobe, hairstyle,
choice in music, facial expressions, speaking voice, choice of vocabulary,
tonation, accent, and handshake style [can convey workplace

\(^\text{178}\) Title VII of the Civil Rights Act was intended to limit sex segregation. Hilary S.
Axam & Deborah Zalesne, \textit{Simulated Sodomy and Other Forms of Heterosexual
“Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the
Myth of the Gender Monolith Before and After Oncale}, 11 \textit{YALE J.L. & FEMINISM
155, 234} (1999) (“Although there is little legislative history to guide the courts in
adjudicating issues of sex-based discrimination under Title VII, the sparse legislative
history that does exist reveals an intent to redress patterns of sex segregation in the
employment market.”).

\(^\text{179}\) Vicki Schultz, \textit{Telling Stories about Women and Work: Judicial Interpretations of
Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest
Argument}, 103 \textit{HARV. L. REV.} 1749, 1757 (1990) (asserting that judges have “created
an unduly narrow definition of sex discrimination and an overly restrictive role for the
law in dismantling sex segregation”).

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This section examines three common types of appearance regulations – those governing makeup, clothing, and hairstyle – and shows that the current law acquiesces in all three.

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

Makeup regulations exist in many workplaces, yet they are more often implicit than explicit. A 1990s study of workplace makeup practices revealed that, even in workplaces without explicit regulations, women tend to “internalize the assessments of their coworkers” and to “experience or perceive they will experience negative consequences if their makeup is not properly applied.” Indeed, “[t]hose who refuse to wear makeup may suffer job sanctions in certain work contexts.”


Id. at 1782.

Id. at 1782.

Id. at 1780-81.

See generally Bandsuch, *supra* note 180. One court, for example, upheld a no-earrings policy as applied to men but not women (Kleinsorge v. Eyeland Corp., 251 F.3d 153 (3d Cir. 2000)).

Dellinger & Williams, *supra* note 132, at 154 (“None of the women interviewed recalled a specific written requirement for makeup use[.]”).

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

Id. at 175 (noting, however, that the study found “very little evidence of outright
Harrah’s casino provides a (somewhat rare) example of explicit makeup regulations. In 2000, Harrah’s required all bartenders to be “‘well groomed, appealing to the eye, . . . firm and body toned.’” Female bartenders were required “to wear stockings[.], colored nail polish, and . . . their hair ‘teased, curled, or styled[,]’” and male bartenders were required to refrain “from wearing makeup or colored nail polish” and “maintain short haircuts and neatly trimmed fingernails.” Darlene Jespersen, a female bartender, said that wearing makeup “made her feel sick, degraded, exposed, and violated[;] interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests)[;] and ‘took away [her] credibility as an individual and as a person[,]’” Jespersen was fired for refusing to comply with the makeup requirement. She sued, but lost in the Ninth Circuit, which held that Title VII allows sex-based appearance regulations so long as they burden male and female employees equally. Jespersen, the court found, had not presented sufficient evidence that Harrah’s regulations imposed a greater burden on female bartenders. Makeup regulations are, thus, often legal.

Clothing regulations have been analyzed in a similar manner. The Jespersen court, in fact, used cases involving clothing regulations to arrive at its result. One set of clothing regulations that the Jespersen court found distinguishable from Harrah’s makeup regulations was imposed by Talman Federal Savings and Loan Association in the mid-1970s. Carroll v. Talman Federal Savings and Loan Association, 604 F.2d 1028, 1029-30 (7th Cir. 1979), cert denied 445 U.S. 929 (1980). Throughout most of the 1960s, the Talman Federal Savings and Loan Association required all employees to wear uniforms. Id. In the late 1960s, it lifted the requirement for male but not female employees. Id.
or “leisure suits with a 'suitable shirt and tie,'” but required female employees to wear uniforms consisting of “a color-coordinated skirt or slacks and a choice of jacket, tunic or vest.” Mary Carroll, a female employee, sued Talman and won in the Seventh Circuit, which held that “two sets of employees performing the same functions [may not be] subjected on the basis of sex to two entirely separate dress codes[,]” where one is more demeaning than the other. The court stated, “So long as [clothing regulations] find some justification in commonly accepted social norms and are reasonably related to the employer’s business needs, [they may be permissible] even though the standards prescribed differ somewhat for men and women.”

The Jespersen court found that, while Talman’s had impermissibly imposed unequal burdens, Harrah’s policy permissibly imposed equal burdens.

Hairstyle regulations were subject to many legal challenges during the 1960s and 1970s. In the early 1970s, Macon Telegraph Publishing Company required all employees “who came into contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community[].” This requirement “was interpreted to exclude . . . men (but not women) with long hair[].” Alan Willingham, a 22-year-old male, was denied employment because of his “longer than acceptable shoulder length hair,” which made him look like a “counter-culture type[].” Willingham sued, but lost in the Fifth Circuit, which held that sex-based hair-length requirements did not violate Title VII. While Willingham preceded Price Waterhouse, its reasoning

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196 Id. at 1029.
197 Id. at 1032-33. Note that, had the dress codes been separate but equally demeaning, they would likely have been permitted.
198 Id. at 1032.
199 Jespersen, 392 F.3d at 1080.
200 See, e.g., Kelley v. Johnson, 425 U.S. 238 (1976) (upholding sex-based hairstyle regulations) and Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (upholding sex-based hairstyle regulations). See also Gowri Ramachandran, Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing, 66 Md. L. Rev. 11, 44 (2006) (“A large number of federal cases were brought in the 1960s and 1970s challenging hair length and beard regulations for students and teachers in public schools.”). It should be noted that both Price Waterhouse and Jespersen included hairstyle regulations.
202 Id. at 1087.
203 Id.
204 Id. at 1092.
Sex-based appearance regulations are often used to produce gender difference – and the law, as it currently stands, imposes few barriers. If, as previously stated, influence over appearance translates into influence over gender identity, then employers currently wield tremendous influence over their employees’ gender identities. Indeed, the choice “between employment [under a dress code] and the right to present one’s chosen image to the world,” is rarely a true choice. As many have recognized, “[G]ender differences are produced, identities emerge and are renegotiated, and domination is sustained . . . in the course of . . . dress code enforcement.” Such enforcement, in the long term, not only creates gender difference but lays the foundation for gender hierarchy.

Having produced gender difference through the means discussed in Parts II(B)(i) and II(B)(ii), the labor market proceeds to produce gender hierarchy through two mechanisms – first, the under-compensation of female-dominated occupations; and second, the under-compensation of female workers in all occupations. These mechanisms have, in combination, produced a significant and persistent “gender wage gap.”

During the 1980s, the gap narrowed such that by the early 1990s women were earning roughly 70% as much as men. During the 1980s, the gap narrowed such that by the early 1990s women were earning roughly 70% as much as men. In recent years, the gap has further narrowed such that, in 2007, women earned roughly 78% as much as men.

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206 See Part II(A).

207 Whisner, supra note 132, at 118 (“Clothing regulations conflict directly with the process of a person’s projecting her chosen image to the world.”). See generally Ramachandran, supra note 200 (arguing for a “legal right to free dress, encompassing clothing, hair, jewelry, makeup, tattoo, and piercing choices”).


210 Milkman & Townsley, supra note 141, at 604.

211 Id.
as men.\textsuperscript{212} While this decrease of approximately 20 percentage points over 60 years is not insignificant, neither is it inspiring – particularly in light of the fact that it has resulted largely from decreases in the real earnings of men rather than increases in the real earnings of women.\textsuperscript{213} The gender wage gap, thus, continues to produce gender hierarchy.

Although both mechanisms – the under-compensation of female-dominated occupations and the under-compensation of female workers – have contributed to the gender wage gap, the former has long been the primary source.\textsuperscript{214} As early as 1976, Heidi Hartmann recognized that “[j]ob segregation by sex . . . is the primary mechanism . . . that maintains the superiority of men over women, because it enforces lower wages for women in the labor market.”\textsuperscript{215} And, as recently as 2008, Vicki Schultz reaffirmed that “[t]he most significant factor contributing to the [gender] wage gap, at least among workers without college degrees, is women’s concentration in lower-paying, female-dominated occupations and jobs.”\textsuperscript{216} The under-compensation of female-dominated occupations, thus, continues to be the primary source of the gender wage gap.

Examples of low-paying female-dominated jobs abound, and tend to be concentrated within the major occupational categories of “sales and office occupations” and “service occupations.”\textsuperscript{217} Milkman and Townsley reported in 1994 that “[t]he vast bulk of the female work force remains in low-level, ‘pink collar’ jobs” and “[w]ell over half (59 percent in 1990) of all women workers are employed in clerical, sales, and service work, where pay and status are typically low and opportunities for advancement minimal or nonexistent.”\textsuperscript{218} They further noted that women were disproportionately concentrated in contingent jobs, characterized by “low pay, poor or nonexistent benefits, a lack of job security, and limited or


\textsuperscript{213}Milkman & Townsley, supra note 141, at 604.

\textsuperscript{214}Id. Kristin McCue & Manuelita Ureta, \textit{Women in the Workplace: Recent Economic Trends}, 4 TEX. J. WOMEN & L. 125, 151 (1995) (“To the extent that wages are largely determined by one’s occupation and that predominantly female occupations pay relatively low wages, the non-convergence in the occupational distributions of men and women precludes a full closing of the gender wage gap.”)

\textsuperscript{215}Hartmann, supra note 142, at 208.


\textsuperscript{217}This terminology comes from the Bureau of Labor Statistics categories.

\textsuperscript{218}Milkman & Townsley, supra note 141, at 604.
A 2002 study found that care-giving occupations – including the female-dominated occupations of teacher, nurse, daycare worker, and therapist – “receive, on average, lower hourly pay than we would [expect] based on other characteristics of the jobs, the skill demands, and the qualifications of those holding the jobs.” Net of all other factors, the study found that employment in a care-giving occupation generally resulted in a 5-6% wage penalty.

Although the gender wage gap is largely attributable to the under-compensation of female-dominated occupations, it is partly attributable to the under-compensation of females in all occupations. Even in sex-integrated occupations, female employees are under-compensated – in part, because they are under-represented in authority positions. Increased authority tends to correlate with increased income, and men tend to occupy the highest levels of authority. Psychologist Madeline Heilman reported in 2001 that “top management and executive level jobs

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\(^{219}\) Id. at 605 (also noting that women represent 66% of part-time employees and 65% of temporary employees, but only 45% of the entire labor force). As Hartmann noted in Capitalism, Patriarchy, and Job Segregation by Sex, “[s]ubdivision of the labor process ordinarily allow[s] the use of less skilled labor[, and m]achinery, unskilled labor, and women workers often [go] together.” Hartmann, supra note 142, at 224-25.

\(^{220}\) Care occupations are specifically defined as those that provide “a face-to-face service that develops the human capabilities of the recipient.” Michelle Budig, Paula England, Nancy Folbre, Wages of Virtue: The Relative Pay of Care Work, 49 SOCIAL PROBLEMS 455, 455 (2002).

\(^{221}\) Id.

\(^{222}\) Id.

\(^{223}\) Men who work in female-dominated occupations tend to rise to higher levels of authority and earn higher wages; women who work in male-dominated or sex-integrated occupations tend to remain in low-level positions and earn lower wages.

\(^{224}\) For a historical account from the early 1980s, see Ruth Cavendish’s discussion, in WOMEN ON THE LINE (Routledge & Kegan Paul, 1982) of the sex- and nationality-based division of labor among English factory workers. Cavendish recounts: “It was easy to see the hierarchy of the production workers: on the bottom us ‘girls’ [(the “operators”)], then a chargehand for each line, above him a section supervisor, and then the supervisor.” Id. at 80-81. All of the operators were women (and most were also immigrants), all of the chargehands except for one were men (and most were also Irish), all of the section supervisors were men (and most, from the level of chargehand up, were also white Englishmen), and both of the supervisors were men. Id. at 76, 82, 85, 86-87. Cavendish observes that, to the women, “all the men were the same . . . – higher up.” Id. at 77-78.

\(^{225}\) Ryan Smith, Race, Gender, and Authority in the Workplace: Theory and Research, 2002 ANN. REV. SOC. 509, 511, 518 (2002).
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are almost always considered to be ‘male’ in sex-type.” Sociologist Ryan Smith reported in 2002, “[G]ender differences in job authority account for a large fraction of the pay gap among men and women with similar occupations, jobs, and equivalent human capital investments. Men and women who work in the same occupations for the same employer receive different salaries – with hierarchical differences accounting for 65% of the gap.” Thus, even in sex-integrated occupations, employers produce gender hierarchy through sex-based pay scales.

While Part I(B)(i) discussed the economic efficacy of labor market hierarchies in general, the remainder of this part will discuss the efficacy of labor market gender hierarchy specifically. Gender hierarchy arguably confers all the same economic benefits as other hierarchies. It may, however, also confer additional benefits – or (as I will argue) no benefits. While many employers believe that gender hierarchy is beneficial, I will argue that it is affirmatively detrimental. Before addressing the current arguments for and against gender hierarchy in the labor market, however, one must understand the historical arguments that originally justified its establishment. These arguments are significant because they provided the initial impetus for employers to create the gender hierarchies that they now maintain.

Women’s low wages have been justified by different arguments during different historical periods. In the 19th and early 20th centuries, employers subscribed to the “cult of domesticity” – the view that women ought to remain in the home, performing the unpaid labor of wives and mothers, while men entered the labor market to earn “family wages.”

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227 Smith, supra note 225, at 534.
228 See Part I(B)(i) (it may streamline employee interactions and resolve disputes).
230 See, e.g., Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”). But see Donna E. Young, Working Across Borders: Global Restructuring and Women’s Work, 2001 Utah L. Rev. 1, 4-5 (2001) (noting that the cult of domesticity applied primarily to upper and middle class white women, and that “the ideals of domesticity did nothing to hinder labor market participation of
Because women were expected to remain in the home, any labor market wages they received were considered “supplemental” to their husband’s “family wages.”231 Viewing women’s wages as “supplemental” led to “the institutionalization of a two-tiered wage structure,” under which women earned substantially less than men.232 This “cult of domesticity” argument was, over time, replaced by other (equally demeaning) arguments – for example, the argument that women deserve lower wages than men because their occupations require less “skill” than men’s.233

These historical arguments continue to influence many employers who currently believe that gender hierarchy is economically beneficial. Female employees are, employers reason, on average less productive and less loyal than their male counterparts – in part, because females are on average more committed to their families.234 Female employees should therefore, they conclude, be relegated to low-level (and low paying) jobs where their low productivity and high resignation rates will have minimal impact.235 Although employers understand that not all female employees are actually less productive and loyal than their male counterparts, many employers lack the resources to screen applicants individually for productivity and loyalty.236 Such employers “rationally” rely on averages, and by doing so create gender hierarchies.237 Under this argument, gender hierarchies are economically beneficial because they privilege those employees who are on average the most productive and loyal.238

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231 Steinberg, supra note 150, at 458.
232 Id.
233 Id. at 452. This argument regarding skill will be discussed further, infra.
234 Women spend more time engaged in domestic activities than men. See time use statistics. Women are also perceived as more committed to their families than men.
235 Charny & Gulati, supra note 148, at 63-64 (explaining that employers might expect “women as a group to have higher quit rates than men because they tend to have children”).
236 Id. at 63-64 (“[E]mployers do not have the resources to examine the individual qualifications of applicants, and instead make judgments based on group affiliations”).
237 Id. at 63-64 (explaining that “[statistical (rational) discrimination models] begin with the assumption that firms rationally expect job applicants from certain groups to be less productive than typical applicants”). See also Samuel R. Bagenstos, “Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825, 849-50 (2003) (“Important present-day problems of discrimination include rational statistical discrimination, in which employers rationally use protected-class status as a proxy for lower productivity.”).
238 It should be noted that there are other arguments suggesting that gender hierarchy is
I disagree with the above argument, and suggest that gender hierarchy is unnecessary and often detrimental to economic success. In the long term, employers will derive greater benefits from privileging the individuals who are actually the most productive and loyal than from privileging individuals who come from groups that are on average more productive and loyal. Reliance on averages will cause employers to favor some males who are below average and overlook some females who are above average — both of which will create mediocre (and economically inferior) workforces. The profits reaped from privileging the most productive and loyal employees will, I would argue, outweigh the costs incurred by screening to identify those employees. In sum, gender hierarchy impedes labor market success.

iv. Ideological Homogeneity re Gender (Stereotyping)

After years of operating within the labor market’s rigid gender hierarchies, employees often begin to internalize and accept those hierarchies as part of their own ideologies. They begin to believe that the patterns they see in the labor market — men in positions of authority and women in positions of submission — are inevitable and even natural. The labor market’s influences over behavior, that is, translate into influences over ideology. Sex-segregated occupations and workplaces, for example, influence ideology by “naturalizing” sex-based employment. Similarly, sex-based appearance regulations influence ideology by “naturalizing” economically beneficial. Given the fact that gender hierarchy is the status quo, there may be great costs associated with dismantling it. As Professor Samuel Bagenstos points out, hierarchy “may . . . be motivated by the costs employers believe they will incur in the course of integrating a firm or in managing the conflicts that inevitably arise in a diverse workforce. Although some of these costs might result from the need to respond to the discriminatory tastes of coworkers, others might result simply from the relative ease of enforcing informal workplace norms in a homogeneous workforce.” Id.

See, e.g., Charny & Gulati, supra note 148, at 64 (noting that “enterprising firms might find it profitable to make the additional investment needed to select the most productive members of less productive groups”).

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

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

C. Public Forum Ramifications

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

i. Lack of Equality re Gender

Gender equality is crucial to democracy, but a brief review of our nation’s history illustrates that labor market hierarchies have long been reproduced in the public forum. Women were, from the founding until

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241 Sex-based appearance regulations influence behavior by encouraging men and women to adopt different styles of self-presentation. Klare, supra note 208, at 1397 (exploring Professor Mary Jo Frug’s assertion that “dress codes enforce patriarchal attitudes about women’s proper roles and behavior”).

242 Bandsuch, supra note 180, at 321 (“Some appearance rules promote conformity in an effort to increase trust, fairness, loyalty, and performance.”).

243 See Part I(B)(i).

244 There are, of course, men and women who resist traditional gender roles and the traditional gender hierarchy. [cite]

245 See Part I(C)(i) for a general discussion of why equality is crucial to democracy.
1920, denied the most basic of public forum rights – the right to vote. After 1920, although women’s public forum participation improved, gender equality remained elusive. Still today, women have not risen to the same levels of public forum power as their male counterparts. Women were not elected to the United States House of Representatives and Senate until 1916 and 1932, respectively. And it was not until 1980 that a woman was elected to the Senate without being preceded by either her husband or her father. Finally, of the 541 members in the 111th Congress, only 95 are women. Clearly, we have not yet achieved the gender equality that is prerequisite to a truly democratic public forum.

i. Lack of Ideological Diversity re Gender

Neither have we achieved the ideological diversity that is

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246 U.S. CONST. amend. XIV. I focus in this portion of the paper on the national public forum, rather than individual state public forums. However, “[w]omen first used their right to vote in the Utah territory election of August 1870.” Barbara A. Perry, Like Father Like Daughter: The Admission of Women into Formerly All Male “Private” Clubs: A Case Comment on Board of Directors of Rotary International v. Rotary Club of Duarte, 23 NEW ENG. L. REV. 817, 851, n.313 (1988/1989). When women were given the right to vote, they were given “a claim to a seat in the public forum where they could affect the ongoing discourse and promote the conditions for equality of respect between the sexes.” Joellen Lind, Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right, 5 UCLA WOMEN’S L.J. 103, 113-14 (1994).


248 Hattie Caraway was elected to the United States Senate in 1932. Perry, supra note 246, at 851, n.313. While Rebecca Latimer Felton in 1922 became the first women to serve in the United States Senate, she was appointed rather than elected and only served for a single day.


prerequisite to a truly democratic public forum. A brief review of our nation’s history reveals that labor market gender ideologies have long been reproduced in the public forum, resulting in a very narrow debate on gender roles and relations. Most proposals to eradicate gender roles and abolish gender hierarchy have gone unheard or, when heard, unheeded.

The traditional gender roles generated in the labor market still dominate many Americans’ ideologies regarding what is appropriate in the public forum. A recent survey revealed that 21% of Americans believe that men make the best political leaders, while only 6% believe that women make the best political leaders. These results were somewhat surprising given that, when asked whether men or women were more likely to possess specific traits important to leadership (e.g., honesty and intelligence), Americans consistently responded that women were more likely to possess those traits. Thus, while a majority of Americans claimed to value honesty and intelligence in their leaders, and claimed that women were on average more honest and intelligent than men, they nevertheless preferred male leaders.

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

III. LABOR MARKET REFORM COULD DEMOCRATIZE THE PUBLIC FORUM

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

252 There is, indeed, a widespread sense that gender equality has been achieved. This sense has led a majority of Americans to be relatively apathetic to issues of gender equality. For example, as Elizabeth Sepper points out, “De jure equality, of course, does not exist in the United States (contrary to the public’s general assumption that it does). The United States Congress has refused to pass the Equal Rights Amendment that would create equality for women under the law, and no further progress has been made to secure equal rights under the law.” Elizabeth Sepper, Confronting the “Sacred and Unchangeable”: The Obligation to Modify Cultural Patterns Under the Women’s Discrimination Treaty, 30 U. Pa. J. INT’L L. 585, 592, n.20 (2008).

253 Pew Research Center, Men and Women: Who’s the Better Leader?, http://pewsocialtrends.org/pubs/708/gender-leadership. The remaining 69% of Americans believed that men and women were equally qualified. Id.

254 Id.

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

A. The Inadequacy of Existing Laws

Neither the Constitution nor the United States Code affirmatively guarantees an egalitarian and ideologically diverse public forum.256 The Constitution applies only to state actors,257 and creates only negative rights against government-imposed inequality and censorship.258 It does not allow claims against private employers who actively cultivate inequality and ideological conformity, or against state actors who passively permit such inequality and ideological conformity to be reproduced in the public forum. While the United States Code does in many cases apply to private actors, it similarly creates only negative rights against a few types of inequality and censorship. It leaves the vast majority of private inequality and censorship unregulated – and leaves the vast majority of that which is regulated undisturbed. Current laws, thus, cannot guarantee democracy.

The following two subsections explore the inadequacy of current laws. Part III(A)(i) illustrates that current laws allow private employers to manipulate virtually every aspect of their employees’ identities, and thereby to cultivate both hierarchy and ideological conformity. Part III(A)(ii) illustrates that, even when current laws prohibit the private manipulation of some particular aspect of identity – as employment laws prohibit employers from manipulating gender identity – such laws still allow a great deal of employer manipulation. So long as our laws fail to adequately redress privately-imposed inequality and censorship, they will

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

257 Employees cannot charge their private employers with violating the Equal Protection or Free Speech Clauses. CITE CASE.

258 U.S. CONST. amends. I, XIV.
fail to deliver an egalitarian and ideologically diverse public forum.

i. Hierarchy and Ideological Homogeneity

The Constitution and United States Code afford private employers tremendous influence over their employees’ identities. The Constitution offers no remedy against either private employers who actively cultivate hierarchy and ideological conformity, or state actors who passively allow those privately-created hierarchies and ideologies to be reproduced in the public forum.\(^{259}\) Constitutional provisions such as the Equal Protection and Free Speech Clauses impose neither limits nor obligations on private employers, and a few limits – but no obligations – on state actors. While state actors are formally limited in their ability to deny equal protection of the laws or abridge the freedom of speech, they are practically limited only with respect to certain denials of equality and certain abridgements of speech.\(^{260}\) They can, for example, easily deny equality to the poor or elderly\(^{261}\) and abridge speech that is deemed incitement or obscenity.\(^{262}\)

While the Constitution imposes few limits, it imposes even fewer obligations. Neither private employers nor state actors are constitutionally obligated to provide an egalitarian or ideologically diverse environment. The Constitution does, however, permit Congress to encourage such a public forum. Congress can, for example, mandate certain forms of equality and free speech in the private labor market by legislating under

\(^{259}\) See Part I(C).

\(^{260}\) The state is prohibited, for example, from actively imposing inequality based on race, alienage, or national origin except through laws that are narrowly tailored to achieve compelling interests; from actively imposing inequality based on sex or legitimacy except through laws that are substantially related to important interests; and, finally, from actively imposing inequality on any other basis except through laws that are rationally related to legitimate interests. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985). The state is similarly prohibited from censoring speech except in certain broadly defined circumstances. KATHLEEN M. SULLIVAN & GERALD GUNThER, CONSTITUTIONAL LAW 996-1158 (15th ed. 2004).


\(^{262}\) Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (stating that the First Amendment does not protect “advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); Miller v. California, 413 U.S. 15, 23 (1973) (stating that “obscene material is unprotected by the First Amendment”).
the Commerce Clause or Fourteenth Amendment. Through such mandates, Congress can indirectly encourage an egalitarian and ideologically diverse public forum. Congress’s past mandates have, however, been narrow in their coverage and limited in their effect.

Congress’s mandates regarding equality in the private labor market have touched upon only a few forms of equality. Title VII of the Civil Rights Act of 1964 mandated equality based only on race, color, national origin, religion, and sex; the Equal Pay Act of 1963 mandated equality based only on sex; the Age Discrimination in Employment Act of 1967 mandated equality based only on age; and Titles I and II of the Americans with Disabilities Act mandated equality based only on disability. Other labor market hierarchies – those based, for example, on political affiliation, education, or income – remain unregulated.

Congress’s mandates regarding free speech in the private labor market have similarly touched upon only a few forms of employer censorship. Employee speech is generally protected only if it either

264 U.S. CONST. amend. XIV, S. 5 (allowing Congress to enforce all provisions of that Amendment (including the Equal Protection Clause and Due Process Clause, which incorporates the right of free speech) by appropriate legislation). See generally Matthew D. Taggart, Title II of the Americans with Disabilities Act after Garrett: Defective Abrogation of Sovereign Immunity and its Remedial Impact, 91 CAL. L. REV. 827, 839-40 (2003) (discussing Congress’s power under Section 5 of the Fourteenth Amendment).
268 42 U.S.C. § 12101(b)(4) (2000). The ADA, resting on both the Commerce Clause and Congress’s Section 5 powers, protects individuals with disabilities from employment discrimination.
269 These other hierarchies remain unregulated only to the extent that they are viewed as separable from “protected” traits.
270 See Yamada, Dignity, “Rankism,” and Hierarchy, supra note 1, at 319.
leads to retaliation for reporting an employer’s illegal practices or “constitutes a form of concerted activity ‘for the purpose of . . . mutual aid or protection.’” Inasmuch as current laws acquiesce in the private cultivation of both hierarchy and ideological conformity, they serve the labor market at the expense of the public forum.

ii. Gender Hierarchy and Gender Stereotypes

Even when employment laws formally prohibit private employers from cultivating particular hierarchies and ideologies – as, for example, the Equal Pay Act and Title VII do with respect to gender hierarchy and gender stereotypes – they still allow a great deal of employer manipulation. While the Equal Pay Act and Title VII might (had they been interpreted differently) have created an egalitarian and ideologically diverse labor market – and, in turn, public forum – existing conditions illustrate that neither statute has been transformative.

The Equal Pay Act, passed in 1963, provides:

_No employer . . . shall discriminate . . . on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex._

This text has been the subject of much debate.

Comparable worth advocates have argued that the Equal Pay Act requires employers to equalize wages for female- and male-dominated jobs that involve similar levels of skill, effort, and responsibility. Yet

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274 The constitutional law regarding gender identity is the same as that regarding identity in general (discussed in Part III(B)(i)), so is not reiterated at this point. While the Constitution prevents state actors from affirmatively creating gender hierarchy and enforcing stereotypical gender roles, it does not require state actors to affirmatively create gender equality or deconstruct stereotypical gender roles.
276 George Schatzki, _An Observation About Comparable Worth_, 9 U. PUGET SOUND L.
the Act has never been so interpreted – it has instead been interpreted to require “only that an employer pay women equal wages for doing work virtually identical to the work done by the employer’s male employees.” Courts, that is, are willing to require equal pay for the same work, but not equal pay for different (though potentially comparable) work.

Even if the Equal Pay Act were interpreted as comparable worth advocates desire, women would still have difficulty proving that their jobs involve equal levels of skill. Female-dominated occupations are regularly perceived as less skilled than male-dominated occupations, regardless of the tasks they entail. As Professor Kathryn Stanchi has observed, “[O]nce a job becomes ‘female,’ it is mythologized as easier, unskilled and worthless; similarly, once a job becomes ‘male’ it is mythologized as difficult and highly skilled.”

A 1974 study, comparing the perceived complexity of a variety of jobs, found that the female jobs of nursery school teacher and childcare worker were perceived as less complex that the male jobs of dog pound attendant, parking lot attendant, and zookeeper. The characterization of jobs as “skilled” versus “unskilled” is, thus, often more political than descriptively accurate.

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

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277 Id. ("The Act only tells employers, ‘Look, if you have men and women doing the same work, don't be a sexist bully; pay them the same wage.’").
278 Thomas N. Hutchinson, The Fair Pay Act of 1994, 29 IND. L. REV. 621, 630 (1994) ("No matter how broadly the Equal Pay Act is construed, it is unlikely that a court would permit a comparison of dissimilar jobs.").
279 Steinberg, supra note 150, at 456.
281 Id. at 456. Female-dominated care-taking and clerical jobs, for example, are perceived as relatively unskilled, although they involve emotional and technical skills.
282 Id. at 456.
283 Steinberg, supra note 150, at 453.
284 Id. at 456.
litigation has been unsuccessful.\textsuperscript{285} Indeed, even when judges have acknowledged that unequal wages are sex-based rather than substance-based, they have declined to take remedial action for fear of “‘disrupting the entire economic system of the United States[.]’”\textsuperscript{286}

Title VII, like the Equal Pay Act, has failed to mitigate the undercompensation of female-dominated occupations. Title VII provides:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of . . . sex [and] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.\textsuperscript{287}

Comparable worth advocates have attempted to use this text to equalize the wages of women and men who perform different jobs for the same employer.\textsuperscript{288} When employers set the wages for female-dominated jobs lower than those for similar male-dominated jobs, comparable worth advocates raise sex-based disparate impact claims.\textsuperscript{289} Yet employers can avoid liability by pointing to non-discriminatory reasons for the disparate impact – e.g., “prevailing market rates” justify lower wages for the female-dominated jobs and higher wages for the male-dominated jobs.\textsuperscript{290}

\textsuperscript{285}Id. See also Ellen M. Bowden, Closing the Pay Gap: Redefining the Equal Pay Act’s Fourth Affirmative Defense, 27 COLUM. J.L. & SOC. PROBS. 225, 230 (1994) (“One way to measure the Act’s utility is to compare the number of claims filed under it to the number brought under the other main federal law proscribing sex discrimination in employment, Title VII of the Civil Rights Act of 1964. Plaintiffs bring approximately eighty percent of their employment discrimination claims under Title VII, leaving the remaining twenty percent to be divided among the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act. This comparison, however, is of limited use because Title VII covers so many categories of discrimination in addition to sex. Nonetheless, the Equal Employment Opportunity Commission (“EEOC”) files few Equal Pay Act claims, leading some critics to charge that employers have become complacent because they know that the Act is not being well-enforced. These patterns imply that the Equal Pay Act has not lived up to its potential for achieving “wage justice.””).

\textsuperscript{286}Steinberg, supra note 150, at 468, (quoting Lemons v. City and County of Denver, 17 FEP Case 906, as quoted in Feldberg, 1990)).


\textsuperscript{288}Hutchinson, supra note 278, at 630-31.

\textsuperscript{289}Id.

\textsuperscript{290}Id. (“Market rates reflect factors that define the value of different jobs, including the availability of workers in a particular occupation and their ability to bargain collectively for higher wages. [I]f women are to use a disparate treatment action, they
Thus, neither the Equal Pay Act nor Title VII has successfully mitigated the under-compensation of female-dominated occupations.291

Title VII has often been used to attack the under-compensation of women in sex-integrated occupations and workplaces, but success has been limited.292 In 2001, a group of women sued Wal-Mart under Title VII, alleging that it had “systematically denied promotion and equal pay to its female employees.”293 They introduced evidence that, “while two thirds of [Wal-Mart’s] employees were women, only one third of managers and only 15% of senior managers were women.”294 They later introduced “an expert witness study, finding that female hourly workers earn up to $0.37 less per hour than their male counterparts[,] and] female managers earn nearly $5000 less than male managers in yearly salary.”295 Eight years later, however, the lawsuit remains far from resolved.296

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

B. Suggested Reforms

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

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291 Hutchinson, supra note 278, at 629.

292 The Sears case, cited supra at note 177, is a classic example of Title VII litigation attacking the fact that women and men in the same general occupation and workplace earned different salaries.


294 Id. (“[W]hile two thirds of [Wal-Mart’s] employees were women, only one third of managers and only 15% of senior managers were women”).

295 Id.

Knouse, Restructuring the Labor Market

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

i. Make the Labor Market More Democratic

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

This subpart suggests constitutional and statutory reforms to democratize the labor market.

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

Employment laws, at present, confer only negative rights against certain forms of privately-imposed inequality and censorship. To provide a democratic public forum, these laws must not only be expanded to cover a greater set of hierarchies and a greater range of censorship, but also strengthened to actually eliminate the hierarchies and censorship they

297 Rothschild, supra note 52, at 197 (citing CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970)).
298 See Part III(A).
299 See Part III(A).
currently cover. While it is not clear that the laws should be expanded to prohibit all hierarchies, it is clear that should prohibit more than at present. While we might reasonably allow employers to institute hierarchies that do not impact democratic participation, we might prohibit hierarchies that detract from such participation – for example, those based on ideology, behavior, personality, sexual orientation, marital status, parental status, etc. Existing laws should also be expanded to cover more forms of censorship. They should prohibit employers from cultivating ideological conformity and mandate employee involvement in workplace governance. Employees should, to the greatest extent possible, be encouraged to develop and express their own viewpoints.

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

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

ii. Make the Labor Market Less Central to Identity

300 This would likely allow for only a small set of hierarchies. Those based on actual job performance might be allowed (so long as job performance was measured objectively, which would be difficult); those based on seniority would be questionable.
While democratizing the labor market would be an effective means of promoting democracy, it would be arduous and politically difficult. Congress might, however, diminish the labor market’s negative impacts through the alternative means of diminishing the amount of time Americans spend in the labor market.\footnote{For one proposal to lessen the amount of time spent in the labor market, see Vicki Schultz & Allison Hoffman, The Need for a Reduced Workweek in the United States, in Judith Fudge & Rosemary Owen, eds., PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131 (Hart Publishing, 2006).} The less time we spend in the labor market, the less likely that labor market demands will govern our choices regarding identity construction.\footnote{This, of course, presumes that the other institutions individuals interact with will be democratic. If time in the labor market were replaced by time in an authoritarian family, the problem would not be resolved.} Congress might, for example, limit the number of hours that can be spent in the labor market or (to avoid any potential infringement on autonomy) create incentives for individuals to participate in democratic activities outside of the labor market. By encouraging employees to limit their time in the labor market or increase their time in more democratic institutions, Congress could effectively diminish the influence of the labor market’s hierarchies and ideologies.

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

CONCLUSION

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