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Rolling Back the “Pink Tax”: Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services

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ROLLING BACK THE “PINK TAX”: DIM PROSPECTS FOR ELIMINATING
GENDER-BASED PRICE DISCRIMINATION IN THE SALE OF CONSUMER
GOODS AND SERVICES

KENNETH A. JACOBSEN*

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I. INTRODUCTION

In a recent study sure to add fuel to the debate over the so-called “pink tax,”¹ researchers at the Perelman School of Medicine of the University of Pennsylvania found women pay 40 percent more than men for a popular hair loss fighting foam even though the men’s and women’s versions contain the same volume, drug strength, and inactive

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1. Consumer advocates refer to this cost differential as the “pink tax” because of the prominent pink colors often used to market these products to female consumers.

ingredients.² This study is the latest in a series of surveys and reports dating back to the early 1990s documenting higher prices for various consumer products and services marketed to women than those that are virtually identical but target male consumers. Some of this price disparity can be explained by gender-neutral factors such as variations in the cost of materials, ingredients, tariffs, labor, and marketing. But as the research overwhelmingly demonstrates, gender-based pricing—also known as the “pink tax” or “gender tax”—is a reality that cannot be explained other than by discrimination based solely on gender. The pink tax is pervasive—extending to a diverse group of consumer products such as clothing, toys, bicycles, disposable razors, shower gels, deodorants, shampoos, and services such as dry cleaning, haircuts, clothing alterations, and other retail activities.³ While individual price differences may seem insignificant, their cumulative cost is not.⁴ In a report issued in 1994, the State of California estimated women paid \$1351⁵ more *annually* for the same services as men.⁶ Given the wage gap in the United States, where women statistically make less money

2. News Release, Penn. Med., Retailers Charging Women More than Men for Common Hair Loss Medication (June 7, 2007), <https://www.pennmedicine.org/news/news-releases/2017/june/retailers-charging-women-more-than-men-for-common-hair-loss-medication>.

3. See generally ANNA BESSENDORF, N.Y.C. DEP’T OF CONSUMER AFFAIRS, FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (2015) [hereinafter N.Y.C. STUDY], <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf>.

4. *Id.* at 16 (citing Megan Duesterhaus et al., *The Cost of Doing Femininity: Gender Disparities in Pricing of Personal Care Products and Services*, 28 GENDER ISSUES 175 (2011)).

5. This decades-old estimate has not been adjusted for inflation. In today’s dollars, that annual cost would be approximately \$2191. Also, note that California did not calculate the annual costs of the gender tax on goods, which would certainly add thousands of dollars to the yearly economic burden on female consumers.

6. See *id.* at 15; U.S. CONG. JOINT ECON. COMM., 114TH CONG., THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN’S BUYING POWER 5 (2016) [hereinafter U.S. CONG. JOINT ECON. COMM. REPORT] (report credited to ranking democrat, Carolyn B. Maloney), https://www.jec.senate.gov/public/_cache/files/8a42df04-8b6d-4949-b20b-6f40a326db9e/the-pink-tax---how-gender-based-pricing-hurts-women-s-buying-power.pdf [https://www.jec.senate.gov/public/index.cfm/democrats/2016/12/the-pink-tax]; see also OFFICE OF THE ATTORNEY GEN. OF VT. & THE VT. HUMAN RIGHTS COMM’N, GUIDANCE ON THE USE OF GENDER IN PRICING OF GOODS AND SERVICES 2–3 (2016) [hereinafter VT. GUIDANCE], hrc.vermont.gov/sites/hrc/files/gender-based-pricing-guidance.pdf.

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than men,⁷ the gender tax is a “double-whammy,” adding extra expenses to those who earn less.⁸

While the pink tax is well-documented, the actual response to this phenomenon has been anemic, at best. No federal statute regulates or bars the practice, although legislation has been proposed. State and local laws attempting to rein in the practice are weak, narrowly drafted, and largely unenforced.

This article probes the gender-based pink tax on consumer goods and services and examines whether there is any realistic possibility of stopping this decades-old practice. Part II reviews the reports and surveys that have studied the pink tax and describes their findings and conclusions. Part III surveys the various legislative initiatives that have been adopted or are currently under consideration by Congress, various state legislatures, and local officials. Part III further examines the impact—or more accurately, the ineffectiveness—of these initiatives in curbing this practice. Finally, Part IV explains why there is little hope for meaningful relief or legal recourse for consumers victimized by the pink tax under the current statutory framework and political environment.

II. STUDIES, SURVEYS, AND REPORTS ON THE “PINK TAX”

One of the more recent and comprehensive studies of the pink tax and its economic impact on women was issued in 2015 by the New York City Department of Consumer Affairs (the “City” and the “DCA,” respectively).⁹ Prior studies by other governmental agencies (such as the 1994 California survey) had focused on gender-based pricing for services such as haircuts, dry cleaning, clothing alterations,¹⁰ and other retail commercial activities. The New York City Study, by contrast,

7. INST. FOR WOMEN’S POL’Y RESEARCH, FACT SHEET: THE GENDER AGE GAP BY OCCUPATION 2017 AND BY RACE AND ETHNICITY (2018), https://iwpr.org/wp-content/uploads/2018/04/C467_2018-Occupational-Wage-Gap.pdf.

8. See, e.g., U.S. CONG. JOINT ECON. COMM. REPORT, *supra* note 6, at 1, 6; VT. GUIDANCE, *supra* note 6, at 3; Aimee Picchi, *This Retailer is Striking a Blow Against the “Pink Tax”*, CBS NEWS (Oct. 6, 2016, 12:01 AM) [hereinafter *Retailer Against the Pink Tax*], www.cbsnews.com/news/this-retailer-is-striking-a-blow-against-the-pink-tax/.

9. See N.Y.C. STUDY, *supra* note 3.

10. The issue involving clothing alterations is that men’s suits and other garments are often altered for free, while women must pay for this service.

focused on the cost of consumer goods across five discrete product industries: (1) Toys and Accessories, (2) Children's Clothing, (3) Adult Clothing, (4) Personal Care Products, and (5) Senior/Home Health Care Products.¹¹ The New York City Study then broke the product industries down into thirty-five separate product categories, such as bikes and backpacks under Toys and Accessories, and jeans, shirts, and socks under Adult Clothing.¹²

The City compared 794 products with clear male and female versions drawn from 91 brands sold at two dozen retailers in New York City, both online and in brick and mortar stores.¹³ To ensure that it was comparing "apples to apples" and to minimize differences between the men's and women's products, the City selected male and female versions of these items that were most similar in branding, ingredients, appearance, construction, marketing, and other characteristics.¹⁴

On average, across all five industries, goods for female consumers were likely to cost more than their male counterparts. The price disparity broke down as follows: 7 percent more for Toys and Accessories, 4 percent more for Children's Clothing, 8 percent more for Adult Clothing, 13 percent more for Personal Care Products, and 8 percent more for Senior/Home Health Care Products.¹⁵ Across the entire sample of 794 individual products, the women's versions cost

11. N.Y.C. STUDY, *supra* note 3, at 5. The New York City Study was not the first investigation by the City into the issue of gender pricing in the New York metropolitan area. In 1992, the City conducted an inquiry into "price bias against women in the marketplace," issuing a report titled *Gyped by Gender*. In that report, the City concluded that women paid more than men at dry cleaners, launderers, hair salons and other commercial establishments for virtually identical services. For example, "a survey of 80 hair salons across the [City's] five boroughs showed that, on average, women paid 25 percent more than men for the same haircuts. Similarly, on average, women paid 27 percent more for the identical service of laundering a basic white cotton shirt." See N.Y.C. STUDY, *supra* note 3, at 15 (citing N.Y.C. DEP'T OF CONSUMER AFFAIRS, *GYPPED BY GENDER: A STUDY OF PRICE BIAS AGAINST WOMEN IN THE MARKETPLACE* (1992)). While the disparity in price for haircuts for men and women may appear at first blush to be justified by the length of the hair and the need for more styling for women, this does not explain why women with short hair were still paying more for a haircut than men with ponytails.

12. *Id.* at 5.

13. *Id.*

14. *Id.*

15. *Id.* (discussing how women's products cost more than similar products for men in all but five of the thirty-five product categories surveyed by the City).

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more 42 percent of the time, while the men’s cost more only 18 percent of the time.¹⁶

Particularly noteworthy were those products with double-digit percentage differences, which spanned all product industries and categories:

- Girls’ helmets and pads cost 13 percent more than boys’ helmets and pads.
- Girls’ shirts cost 13 percent more than virtually identical boys’ shirts.
- Women’s dress shirts cost 13 percent more than men’s dress shirts.
- Women’s jeans were 10 percent more than virtually identical men’s products of the same size.
- A survey of forty similar shirts (twenty men’s and twenty women’s) showed an average price disparity of 15 percent.
- Shampoo and conditioner cost 48 percent more for women.
- Razors and razor cartridges cost 11 percent more for women.
- Canes cost 12 percent more for women than they do for men.
- Virtually identical supports and braces for the elderly cost 15 percent more for women.¹⁷

In other words, the price disparity spanned products from “cradle to cane.”¹⁸

A 2016 study conducted jointly by Vermont’s Office of the Attorney General and the state’s Human Rights Commission reached similar conclusions.¹⁹ The Vermont Guidance defined gender-based pricing as “the practice of charging different prices for goods and

16. Other times—in 40 percent of the comparisons—prices were the same. *Id.* at 6.

17. *Id.* at 7–13.

18. *Id.* at 17.

19. The study was titled a “Guidance” because it provided suggestions to Vermont consumers on ways to avoid the financial impact of the pink tax and what they could do if they encountered gender-based pricing, as well as guidance to businesses on how they could use gender-neutral factors in setting retail prices for consumer products and services. *See* VT. GUIDANCE, *supra* note 6, at 1, 10–12.

services based on the consumer's gender,"²⁰ and concluded that over the course of a woman's lifetime, she might pay a "gender tax of tens of thousands of dollars more for the same products and services as men."²¹ Compounding this problem, as the New York Study also noted, was the gender pay gap where "women still make on average 84 cents for every dollar earned by a man" in Vermont.²²

Although not as comprehensive as the New York City Study, the Vermont Guidance nevertheless presented examples of gender-based pricing for a variety of consumer products offered for sale in Vermont. Included among the product comparisons were samples of adult cotton pajamas, children's scooters, razors, haircuts, dry cleaning, and other products and services.²³ While narrower in scope than the New York City Study, the conclusions of the Vermont Guidance were similar: "Gender-based pricing occurs right here in Vermont."²⁴ The researchers concluded that gender-based pricing for goods was a "pervasive practice" that is "unlikely to disappear anytime soon."²⁵

Declaring in bold that gender-based pricing "is a form of discrimination," the Vermont Guidance emphatically warned that such practices are "against the law."²⁶ But as will be explored later in this article, the law in Vermont and in most other states, has been ineffective in combatting this form of discrimination. Additionally, there are serious questions about whether many of those laws even apply to this practice at all.

Both the New York City Study and the Vermont Guidance cited a California study conducted twenty-one years earlier that was the first to quantify the adverse financial impact of the pink tax on female consumers. That 1994 California study, conducted by the State's Assembly Office of Research ("AOR"), surveyed pricing data for dry cleaning, haircuts, and other services. Unsurprisingly, the study found

20. *Id.* at 1.

21. *Id.* at 3.

22. *Id.* (citing NAT'L P'SHIP FOR WOMEN & FAMILIES, FACT SHEET: VERMONT WOMEN AND THE WAGE GAP (2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2017-vt-wage-gap.pdf>).

23. *See generally id.* at 3–10.

24. *Id.* at 1.

25. *Id.* at 11.

26. *Id.* at 1.

disparate pricing for equivalent services based solely on gender.²⁷ And while the California study resulted in the first legislation passed targeting the practice of gender-based pricing, decades later, the problem persists.

The California study was one of several conducted in the 1990s that examined price discrimination for routine consumer services. In 1996, staff in the Office of Legislative Research of the Connecticut General Assembly surveyed ten hairdressers in three cities.²⁸ The survey found that hairdressers generally charged women more for a standard haircut than they did for men, regardless of hair length or the need for special services.²⁹ There was a similar disparity in charges for dry cleaning services, although the researchers noted other possible explanations for these differentials,³⁰ which will be discussed later in this article.

In July 1997, the Massachusetts Senate Post Audit and Oversight Bureau published a similar survey of hair salons, cleverly entitled “Shear Discrimination.”³¹ Among its more significant findings was that, of the 192 hair salons surveyed, over half had blanket policies charging women more than men for basic haircuts, and those salons charged women an average of 40 percent more.³² The Massachusetts’ survey of hair salons mirrored findings of a similar survey of dry cleaners that was conducted eight years earlier by the Consumer Protection Division of the Massachusetts’ Attorney General’s Office,

27. *See id.* at 2–3; N.Y.C. STUDY, *supra* note 3, at 15; S.D. LEGIS. RES. COUNCIL, ISSUE MEMORANDUM 96-22 1 (2000) [hereinafter S.D. ISSUE MEMORANDUM], sdlegislature.gov/docs/referencematerials/IssueMemos/im96-22.pdf; *see also* CAL. S. RULES COMM., BILL ANALYSIS, A.B. NO. 1100, 1995–1996 Sess., at 2 [hereinafter BILL ANALYSIS A.B. NO. 1100], http://leginfo.ca.gov/pub/95-96/bill/asm/ab_1051-1100/ab_1100_cfa_950831_152302_sen_floor.html.

28. *See* S.D. ISSUE MEMORANDUM, *supra* note 27, at 1 (discussing Connecticut study).

29. *Id.*

30. *See id.* at 2 (discussing Connecticut study); *see also* N.Y.C. STUDY, *supra* note 3, at 15 (listing states, including Connecticut, that are “research[ing] the topic” and “publishing official reports of their own.”).

31. MASS. S. POST AUDIT & OVERSIGHT BUREAU, SHEAR DISCRIMINATION: BUREAU SURVEY FINDS WIDE PRICE BIAS AGAINST WOMEN AT MASSACHUSETTS HAIR SALONS DESPITE ANTI-DISCRIMINATION LAWS (1997), [hereinafter SHEAR DISCRIMINATION], <https://archive.org/details/sheardiscriminat00mass>.

32. *Id.*

which found rampant gender-based price discrimination for the dry cleaning of shirts.³³

One of the most comprehensive studies of gender-based pricing for personal care products and services was conducted in 2011 by researchers at the University of Central Florida.³⁴ Observing that research on the “persistent wage gap” and “gendered wage discrimination” that plague women in the workplace were “well documented,” the authors set out to shed brighter statistical light on “underdeveloped” research into discriminatory pricing in the same three industries examined by earlier studies: hair salons, dry cleaners, and retail sales of personal care products.³⁵ The researchers selected products and services that were comparable for men and women “so that meaningful comparisons could be made.”³⁶ Items advertised as unisex, such as soap and toothpaste, or those marketed primarily to one gender like nail polish, were excluded from the study.³⁷

Pricing data was collected by conducting telephone inquiries, store visitations, and examining company websites.³⁸ From an initial list of 1234 hair salons, 100 were chosen at random and pricing information was obtained for basic men’s and women’s haircuts.³⁹ Additionally, from a sample of 784 dry cleaners, 100 were chosen at random and asked for their price schedules for men’s and women’s two-piece suits, blazers, shirts, and slacks.⁴⁰ Lastly, pricing data on categories of personal care products including deodorant, shaving gels or creams, razors, and scented body sprays—used by both men and women but marketed separately to each—was collected from national retail chains

33. According to the 1991 survey of twenty-five dry cleaners in the Boston metropolitan area women were charged an average of two to three times more for the dry cleaning services. The 1997 report updated those statistics, finding little price disparity based on an informal preliminary review, attributing the change to a notification and information program conducted by the Attorney General’s Office following the 1991 study. Because the 1991 survey pool consisted of only twenty-five dry cleaners, such an abatement program was obviously feasible. *Id.*

34. Duesterhaus et al., *supra* note 4, at 175.

35. *Id.* at 176.

36. *Id.* at 179.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 180.

with stores in the study area.⁴¹ A total of 538 individual products in the four separate product categories were coded, including: 199 deodorants, 89 shaving gels or creams, 204 razors, and 46 body sprays.⁴²

Of the 100 salons that were surveyed, women paid on average \$35.02 for a basic haircut while men paid \$22.78.⁴³ The disparity in price ranged from \$0 to \$25.⁴⁴ In their study of dry cleaning, the researchers found no significant differences in the costs of cleaning suits, blazers, or slacks based on gender.⁴⁵ There were, however, significant variations in the basic costs of cleaning men's and women's shirts, averaging \$2.06 and \$3.95, respectively.⁴⁶ This pricing disparity existed independent of any additional costs based on the fabric of the item, ornamentation, or pleats.⁴⁷ Thus, there was an observable pricing disparity for identical shirts when one was labeled for a man while the other was labeled for a woman.⁴⁸ For personal care products, the study found little difference in price across all product lines.⁴⁹ However, the researchers found women's deodorant often contained fewer ounces than men's, thus costing more per ounce and effectively making that product more expensive for women than men.⁵⁰

Although the researchers focused their surveys on three specific product and service areas, they also took note of discriminatory pricing practices in other industries, including the retail clothing industry. They pointed out that a former Chief Economist for the American Apparel Association observed the following:

Since the 1920s, retailers have purchased and have merchandised women's apparel differently than men's The way women's apparel is sold to the retailer is different than men's and retailers

41. *Id.*

42. *Id.*

43. *Id.* at 181.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 181–82.

49. *Id.* at 183 (noting that only a slight difference in pricing was detected for body sprays and no significant differences were found for a package of razors, the numbers of razors in the package, or the cost of individual razors).

50. *Id.*

themselves have a different system for pricing women's apparel than men's. Even in areas where garments are unisex, like knit shirts, a shirt in a men's department will sell for less than the same knit shirt in the women's department.⁵¹

Moreover, a year before the Florida Study was published, Consumer Reports conducted its own comparison of common drugstore products such as shaving gel, deodorant, and body wash, finding a similar pattern but even greater price variances.⁵² That survey found that "products directed at women—through packaging, description, or name—might cost up to 50 percent more than similar products for men."⁵³

Congress has also recently examined the issue of gender disparity in a range of economic spheres. In December 2016, the Democratic staff of the Congressional Joint Economic Committee published a report acknowledging the 20 percent gender pay gap, and went on to describe how the pink tax saddled female workers and consumers with additional financial burdens.⁵⁴ Citing the results of prior governmental, academic, and journalistic studies and offering their own survey of products sold by large online retailers, the researchers found "several examples of dramatic price differences" for products that had nearly identical versions for men and women.⁵⁵ Noting that "[w]omen not only pay more for products; they often pay more for services," the committee researchers also surveyed the now familiar "telling example[s] of prices for dry cleaning and haircuts."⁵⁶ They ultimately concluded that "[g]ender-based price disparities clearly cost women and their families real money that they cannot afford to lose."⁵⁷

Making accurate side-by-side comparisons of male and female versions of products or services is critical to the validity of surveys and studies such as these, which requires so-called "legitimate drivers" that

51. *Id.* at 177 (citing FRANCIS C. WHITTELYSEY & MARCIA CARROLL, WOMEN PAY MORE (AND HOW TO PUT A STOP TO IT) 13 (1995)).

52. *Men Win the Battle of the Sexes*, CONSUMER REP., www.consumerreports.org/cro/2012/05/men-win-the-battle-of-the-sexes/index.htm (last updated Jan. 2010).

53. *Id.*

54. U.S. CONG. JOINT ECON. COMM. REPORT, *supra* note 6, at 1–5.

55. *Id.* at 4.

56. *Id.* (citing Duesterhaus et al., *supra* note 4).

57. *Id.* at 8.

contribute to price discrepancies. For example, price differentials in dry cleaning can frequently be explained by the increased labor costs involved in cleaning a woman’s garment versus a man’s. One marketing expert who has studied such charges points out that men’s shirts all have the same basic shape and are usually made of cotton, polyester, or a blend, which can be laundered instead of dry cleaned.⁵⁸ They can then be ironed on standardized pressing machines that are specifically designed for men’s shirts and can process dozens of shirts an hour.⁵⁹ Women’s shirts and blouses, by contrast, come in a wide variety of shapes, sizes, and materials—including silk and rayon—which can only be dry cleaned, must be hand-pressed, and cannot be ironed by machines that allow for comparable speed and efficiency.⁶⁰ Women’s garments may also have ornamentation that requires special care.⁶¹ But these “legitimate drivers” do not explain the price disparities for laundering the same size men’s and women’s cotton shirts or other nearly identical garments expressed by the studies discussed above.⁶²

III. FEDERAL, STATE, AND LOCAL LEGISLATION

Federal civil rights laws prohibit discrimination in employment, housing, and many other areas, but no federal law bars price discrimination based on gender. This is a shortfall that economist and Yale Law School Professor, Ian Ayres, feels must be addressed. As he puts it:

[T]he most gaping hole in our civil rights law concerns retail gender discrimination. No federal law prohibits gender discrimination in the sale of goods or services. A seller could flatly refuse to deal with a potential buyer of a car or a paperclip because of her gender. And while the civil rights laws of the 1860s prohibited race discrimination in contracting, the civil rights laws a century later only prohibited sex discrimination in a narrow range of “titled” markets. The thousands

58. Utpal Dholakia, *Why Do Women’s Products and Services Cost More?*, PSYCHOL. TODAY (Dec. 29, 2015), <https://www.psychologytoday.com/us/blog/the-science-behind-behavior/201512/why-do-women-s-products-services-cost-more>.

59. *Id.*

60. *Id.*

61. S.D. ISSUE MEMORANDUM, *supra* note 27, at 2.

62. See Duesterhaus et al., *supra* note 4, at 177–78 (disputing common explanations of price differentials by retail businesses and trade associations).

of other markets that make up our economy are completely unregulated with regard to gender . . . discrimination⁶³

Although federal legislation has yet to even begin closing the gap, some states have attempted to provide meaningful solutions to the issue of gender disparity in consumer pricing. California was the first state to enact a bill specifically prohibiting gender-based price discrimination.⁶⁴ Assembly Bill 1100 (1995), sponsored by then California State Assembly Member, Jackie Speier, banned any gender-based charges unrelated to the actual cost of providing the service.⁶⁵ Duly titled the “Gender Tax Repeal Act of 1995,” the statute applied only to services—not goods—and specifically targeted discriminatory pricing for dry cleaning, haircuts, and other services identified in the 1994 California study.⁶⁶ Similarly, New York City passed an ordinance in 1998, which was limited to price discrimination in retail consumer services such as dry cleaning and haircuts.⁶⁷ No parallel law in New York addresses gender-based discrimination in the pricing of goods.⁶⁸

Under the New York City ordinance, posted prices for hair cutting and dry cleaning must reflect actual differences in the required labor that justify charging higher prices.⁶⁹ The law authorizes the City’s DCA to issue citations for violations.⁷⁰ However, although civil penalties for violations range from \$50 to \$250, there is no private right of action or legal remedy for female consumers who pay the excess charges.⁷¹ Adding to this problem is the City’s lack of resources and overall

63. IAN AYRES, PERVERSIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 3 (2001). *See id.* at 176 (quoting Ian Ayres); *see also* Bourree Lam, *Battle of the Prices: Is it Ever Fair to Charge One Sex More?*, THE ATLANTIC (Oct. 18, 2014) [hereinafter *Battle of the Prices*], <https://www.theatlantic.com/business/archive/2014/10/battle-of-the-prices-is-it-ever-fair-to-charge-one-sex-more/381546/>.

64. *See* BILL ANALYSIS A.B. NO. 1100, *supra* note 27; N.Y.C. STUDY, *supra* note 3, at 15; S.D. ISSUE MEMORANDUM, *supra* note 27, at 1.

65. BILL ANALYSIS A.B. NO. 1100, *supra* note 27, at 2.

66. *See id.*

67. *See* N.Y.C., N.Y., ADMIN. CODE tit. 20, §§ 749–53 (2011); *see also* N.Y.C. STUDY, *supra* note 3, at 15–16, nn.18–19.

68. *See* N.Y.C. STUDY, *supra* note 3, at 16.

69. N.Y.C., N.Y., ADMIN. CODE tit. 20, § 750.

70. *See id.* § 753.

71. *See id.*

unwillingness to enforce the law. In a city with thousands of dry cleaners and hair salons, the DCA issued only 118 citations in 2014 and 129 in 2015.⁷² Given the relatively minimal enforcement, it is highly unlikely that other businesses have opted for scrupulous compliance.

One section of New York City’s law that highlights the shortfalls of current legislative remedies in this area, requires city officials to establish and implement an outreach and educational program as part of a larger initiative to “promote women’s financial independence, stability and success.”⁷³ Among the issues about which the program is supposed to provide information is “the prevalence of gender-based pricing.”⁷⁴ Consumers suffering the tangible oppression of gender-based price discrimination are in need of more than informational web postings. They need clear and firm legal remedies. Educating the public about a consumer problem without providing real, tangible solutions to it is no remedy at all.

Miami-Dade County, Florida adopted an ordinance similar to those in California and New York City, prohibiting dry cleaners from charging different prices for services based on gender.⁷⁵ A dry cleaner is permitted to charge higher prices if the cleaning process requires more time, effort, or cost; however, the business must explain to the customer the reasons for the extra charges, and must post prices in a conspicuous place that is easily visible to customers.⁷⁶ The ordinance confers a private right of action on consumers, who can recover damages and attorneys’ fees from dry cleaners, or treble damages with a minimum of \$200 for a willful violation.⁷⁷ The measure also provides for enforcement by county officials and agencies.⁷⁸

72. See N.Y.C. STUDY, *supra* note 3, at 16.

73. N.Y.C., N.Y., ADMIN. CODE tit. 20, § 706.5.

74. *Id.*

75. MIAMI-DADE CTY., FLA., CODE OF ORDINANCES, art. III, § 8A-124.8 (1997), http://miamidade.fl.elaws.us/code/coor_ptiii_ch8a_artiii_div6_sec8a-1248; see also MIAMI-DADE CTY., GENDER-BASED PRICING IS A FORM OF DISCRIMINATION, <https://www.miamidade.gov/business/library/brochures/dry-cleaning-ordinance-brochure.pdf> (last visited May 26, 2018) [hereinafter GENDER BASED PRICING IS A FORM OF DISCRIMINATION].

76. See MIAMI-DADE CTY., FLA., CODE OF ORDINANCES, art. III, §§ 8A-124.8, 8A-124.10.5.

77. *Id.* § 8A-124.9.

78. *Id.* § 8A-124.10.

While Miami-Dade's dry cleaning ordinance has received the most attention from researchers and the national media,⁷⁹ another county ordinance titled the Gender Pricing Ordinance actually provides much broader protection for women, and is currently mentioned jointly in brochures and other county releases about the dry cleaning measure.⁸⁰ Article XIX of the Miami-Dade municipal code broadly prohibits gender-based price discrimination in any form stating, "No seller of a good or service shall charge a customer a different price for a good or service based solely on the customer's gender or the gender of the beneficiary of the good or service."⁸¹

County officials touted the adoption of this "pioneering legislation," noting that it was the first county in Florida to do so.⁸² Akin to the ordinance specifically targeting the pricing practices of dry cleaners, the Gender Pricing Ordinance provides a private right of action with similar remedies.⁸³ However, there is no reported data about enforcement of the Gender Pricing Ordinance. Furthermore, its legislative history indicates that the ordinance contained a "sunset provision" which automatically caused the law to expire on July 18, 2002.⁸⁴ Therefore, despite its widespread references in the county's own brochures and online postings, it is not quite clear that the ordinance is still even on the books.

79. See, e.g., *Battle of the Prices*, *supra* note 63.

80. See, e.g., GENDER-BASED PRICING IS A FORM OF DISCRIMINATION, *supra* note 75.

81. MIAMI-DADE CTY., FLA., CODE OF ORDINANCES, art. XIX, § 8A-402(a) (1997), http://miamidade.fl.elaws.us/code/coor_ptiii_ch8a_artxix_sec8a-402.

82. See *Price Gender Discrimination*, MIAMI-DADE CTY., <http://www.miamidade.gov/business/laws-price-gender.asp> (last modified Jan. 25, 2017, 10:50:45 AM); MIAMI-DADE COUNTY CONSUMER SERVS. DEPT., GENDER PRICING ORDINANCE AND DRY CLEANING & LAUNDERING ORDINANCES, <https://faculty.insead.edu/vanzandt/pm/Session10/Examples/GenderPricing-A4.pdf> (last visited May 26, 2018).

83. See MIAMI-DADE CTY., FLA., CODE OF ORDINANCES, art. XIX, § 8A-405.

84. *Miami-Dade Legislative Item File Number: 971579*, MIAMI-DADE COUNTY, <http://www.miamidade.gov/govaction/matter.asp?matter=971579&file=faalse&yearFolder=Y1997> (last visited May 26, 2018).

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A. Problems with Existing Consumer Protection Laws

Because existing laws do not adequately protect consumers, proponents of bills aimed at eliminating the pink tax argue that there is a need to enact legislation explicitly prohibiting the practice.⁸⁵ Advocates of this more targeted legislation point to studies and surveys spanning decades, like the ones cited in this article, which have failed to curb discriminatory pricing.⁸⁶

Opponents, however, contend that narrowly tailored legislation is unnecessary because existing laws provide adequate protection. Adopting new laws would generate chaos, hinder businesses, and perhaps even raise prices.⁸⁷ Those opposing narrower legislation cite to civil rights statutes adopted in most states, which generally prohibit unequal treatment on the basis “sex” in any business or other “public accommodation.”⁸⁸ Consumer advocates counter that these civil rights laws are largely ineffective in curbing this practice, apply only to services and not goods, and are rarely, if ever, enforced in the context of gender discrimination. For example, although the Unruh Civil Rights

85. See SHEAR DISCRIMINATION, *supra* note 31 (“Despite Massachusetts laws and regulations that prohibit gender-based pricing discrimination at hair salons, more than half of Massachusetts hair salons surveyed had a blanket policy of charging women more than men for a basic haircut with the same services, regardless of the hair length or styling.”).

86. See S.D. ISSUE MEMORANDUM, *supra* note 27, at 3; see also N.Y.C. STUDY, *supra* note 3, at 16 (“Unfortunately, even with the dialogue and legislation, [gender-based price discrimination] is an issue that still persists today.”).

87. For example, the California Chamber of Commerce and the California Retailers Association, opposing new legislation that would broaden the scope of the Gender Tax Repeal Act of 1995, argued that retailers and businesses in the consumer service sector would have to make subjective judgments about what constitutes the “same” or “similar” goods or services; would have to justify legitimate, gender-neutral costs factors which account for the pricing disparity in order to avoid liability under the statutes; and may even just raise prices on all goods and services to make them “equal.” Teri Sforza, *Women’s Products That Costs More Than Men’s? It’s Called the ‘Pink Tax’ and Not Everyone’s Mad*, Orange County Reg. (Apr. 19, 2016, 6:58 AM) [hereinafter *It’s Called the Pink Tax*], <https://www.ocregister.com/2016/04/19/womens-products-that-cost-more-than-mens-its-called-the-pink-tax-and-not-everyones-mad/>.

88. It was these state laws that were most frequently invoked in court challenges to so-called “Ladies Night,” where bars offered free or reduced admission and lower prices for drinks to women. See *infra* Part III Section B.

Act was enacted by the California legislature in 1959, it did nothing to stem the tide of gender-based price discrimination in that state.⁸⁹ This resulted in the adoption of the Gender Tax Repeal Act four decades later.⁹⁰ And although that law has been on the books for decades, consumer advocates and California legislators see wide gaps in coverage and enforcement.⁹¹ Despite the fact that, under section 52(a) of the California Civil Code, an aggrieved consumer can recover a minimum of \$4000 for each violation, plus attorneys' fees and costs,⁹² fewer than five lawsuits (the primary enforcement tool under the statute) have been filed under the law in twenty years.⁹³ Recent bills introduced in both the California Senate and Assembly attempting to extend the law to goods as well as services suffered severe pushback from industry lobbyists and business advocacy groups. As a result, these bills never came to fruition.⁹⁴

In addition to state civil rights laws, some urge that general state consumer protection statutes provide adequate legal remedies for aggrieved consumers. These statutes prohibit "unfair" and "deceptive" business practices and are largely enforced by the State's Attorney General.⁹⁵ Although many also confer private rights of action to aggrieved consumers, the enumerated categories of unlawful practices listed in the laws do not neatly encompass gender-based price discrimination.

For example, although the Vermont Attorney General has declared unequivocally that gender-based pricing is a violation of the Vermont

89. See Jennifer Warren, *State Bans Gender Bias in Service Pricing*, L.A. TIMES (Oct. 14, 1995), http://articles.latimes.com/1995-10-14/news/mn-56735_1_gender-based-pricing.

90. See generally *id.*

91. See *It's Called the Pink Tax*, *supra* note 87.

92. See CAL. CIV. CODE § 52(a) (West 2007 & Supp. 2018) (allowing private parties to seek damages for violations of the Americans with Disabilities Act).

93. *It's Called the Pink Tax*, *supra* note 87.

94. See S.B. 899, Gen. Assemb., 2015–16 Reg. Sess. (Cal. 2016); A.B. 1576, Gen. Assemb., 2017–18 Reg. Sess. (Cal. 2017); Jazmine Ulloa, *Bill to End Gender Disparity in Retail Pricing is Withdrawn after Pushback from Industry Lobbyists*, L.A. TIMES (June 29, 2016, 11:38 AM), <http://www.latimes.com/politics/la-pol-sac-california-toys-gender-discrimination-20160628-snap-story.html>.

95. See VT. GUIDANCE, *supra* note 6, at 2 (citing VT. STAT. ANN. tit. 9, §§ 2453 *et seq.* (2012)).

Consumer Protection Act (“VCPA”),⁹⁶ the statutory language is not so clear. Furthermore, the statute has never been upheld in court as applying to the practice of gender-based pricing. The VCPA, like its counterparts in other states, prohibits and declares unlawful “unfair methods of competition” or “unfair . . . acts or practices in commerce”⁹⁷ The statute does not define what methods, acts, or practices are “unfair,” instead importing prohibitions from § 5(a)(1) of the Federal Trade Commission Act.⁹⁸ However, that federal law says nothing about gender-based pricing, so it is of no use in interpreting the applicability of the Vermont law to these practices.

The VCPA also empowers the Office of the Attorney General to promulgate regulations fleshing out the barebones mandate of the law,⁹⁹ which that Office has indeed done. Consequently, the Office has adopted specific regulations targeting deceptive pricing of consumer goods.¹⁰⁰ However, those rules prohibit businesses from advertising the price of goods as being “reduced” or “on sale” when they are in fact not. Moreover, the rules also prohibit misleading comparisons of the price or value of products with those of competitors.¹⁰¹ Ultimately, those rules do not say anything pertaining to gender-based pricing.

In addition to questions about whether the Vermont law even applies to the pink tax, there are also serious questions about the adequacy of any remedies that might be available to consumers. While section 2461(b) of the Act confers a private right of action on a consumer to recover damages from a business,¹⁰² remedies are still

96. *Id.*

97. VT. STAT. ANN. tit. 9, § 2453(a) (2012).

98. *Id.* § 2453(b) (“It is the intent of this legislature that in construing [this Act] the courts of this state will be guided by the construction of similar terms contained in § 5(a)(1) of the Federal Trade Commission Act” (codified as 15 U.S.C. § 5(a)(1) (2012))).

99. *Id.* § 2453(c).

100. *See* 3-2-108 VT. CODE R. § 110 (2018) (effective Jan. 28, 1974).

101. *Id.*

102. The Vermont Attorney General may recover a civil penalty of \$10,000 for the state for each violation, but that is largely a deterrent factor which has been ineffective, as evidenced by the survey and conclusions of the Attorney General’s own Guidance which found the pink tax to be a “pervasive practice . . . unlikely to disappear anytime soon.” VT. GUIDANCE, *supra* note 6, at 11. There is no reported data of any such civil penalty being collected by the Attorney General, and any such

limited to the “consideration” paid for the product or service, with no minimum statutory damages.¹⁰³ However, there are no reported cases of this occurring. That is hardly surprising. Who would file a lawsuit over the price of a haircut or the cost of dry cleaning a blouse? Even with a provision authorizing the recovery of attorneys’ fees,¹⁰⁴ what lawyer would take that case? If a minimum recovery of \$4000 (plus the potential for attorneys’ fees) drew less than five lawsuits in the twenty-year history of California’s Gender Tax Repeal Act,¹⁰⁵ a statute like Vermont’s with no minimum statutory recovery and nominal remedies will certainly draw little interest.

In my home state of Pennsylvania, our own Unfair Trade Practices and Consumer Protection Law (“UTPCPL”)¹⁰⁶ would similarly be of little, if any, utility in combatting the practice of gender-based pricing. Unlike the Vermont statute, the Pennsylvania UTPCPL specifically describes conduct that constitutes a violation of the statute in twenty separately enumerated subparagraphs.¹⁰⁷ None of those provisions even arguably prohibits gender-based price discrimination for consumer goods or services.¹⁰⁸ That leaves the “catch-all” provision of section 201-2(4)(xxi), often invoked in litigation under the statute when none of the preceding subparagraphs apply. The “catch-all” provision proscribes “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”¹⁰⁹ Even assuming that the conduct of the retailers is “fraudulent or deceptive” (a dubious proposition at best), do differences in pricing based solely on gender create a “likelihood of confusion or misunderstanding?”¹¹⁰ One would think not. While the practice may be unfair, there is no real “confusion” or “misunderstanding” on her part, as the prices for both men’s and women’s versions of the product are presumably obvious and available.

penalty would not reimburse consumers who have borne the financial burden of the practice.

103. VT. STAT. ANN. tit. 9, § 2461(b).

104. *Id.*

105. *It’s Called the Pink Tax*, *supra* note 87.

106. 73 PA. CONS. STAT. §§ 201-1 et seq. (2018).

107. *Id.* § 201-2(4).

108. *See id.*

109. *Id.* § 201-2(4)(xxi).

110. *Id.*

News reports about the pink tax in the media, along with the declared goals of the studies conducted by various states, were specifically used to “inform consumers [and] raise awareness about the issue of gender pricing,”¹¹¹ and provide “guidance” on ways to avoid its economic consequences.¹¹² Under these circumstances, it would be difficult to make a case for “confusion” or “misunderstanding” about the pink tax under the Pennsylvania UTPCLP—a necessary element for a violation of the “catch-all” provision.

Still, other practical obstacles render the Pennsylvania UTPCLP an ineffective tool to curb these practices. Like the Vermont statute, despite the UTPCLP providing a private right of action to consumers, its remedies are limited. Successful plaintiffs can recover up to three times their actual damages or \$100, whichever is greater¹¹³—hardly worthy of the time and effort of a lawsuit.

Other procedural impediments also severely limit both the availability and effectiveness of remedies under the Pennsylvania UTPCLP. The section authorizing private civil remedies requires that the plaintiff have suffered an ascertainable loss “as a result of” the conduct prohibited by the statute.¹¹⁴ Pennsylvania appellate courts have held that this statutory causation requirement mandates that the plaintiff allege and prove “justifiable reliance” on the defendant’s illegal conduct.¹¹⁵ It is hard to see how a female shopper who purchased a more expensive version of the garment individually “relied” on any price discrimination in connection with the sale. This “justifiable reliance” requirement also dooms any class actions that might be brought under the UTPCLP, as issues of individual reliance have uniformly been held to overwhelm common issues, thereby rendering class certification inappropriate.¹¹⁶ In summary, state consumer protection laws are poor weapons for attacking the pink tax.

However, some state legislators are still trying to enact legislation to address gender-based pricing. The South Dakota Senate debated a

111. N.Y.C. STUDY, *supra* note 3, at 15.

112. *See* VT. GUIDANCE, *supra* note 6, at 1, 11.

113. 73 PA. CONS. STAT. § 201-9.2(a).

114. *Id.*

115. *See, e.g.,* Kern v. Lehigh Valley Hosp. Inc., 108 A.3d 1281, 1289 (Pa. Super. Ct. 2015).

116. *Id.*

bill aimed at prohibiting gender-based price discrimination that was virtually identical to the one adopted in California.¹¹⁷ Although it was reported out of the Senate Judiciary Committee, it failed to receive a majority of votes in the Senate.¹¹⁸ Several other states—including Connecticut, Florida, Georgia, Illinois, New Hampshire, New York, Rhode Island, and West Virginia—have considered similar legislation, none of which has been enacted.¹¹⁹ Unfortunately, legislation on the state level to prohibit gender-based price discrimination has continued to move at a glacial pace.

Recent efforts to curb the pink tax on the federal level have also been unsuccessful. On July 8, 2016, United States Representative, Jackie Speier (D-CA), who successfully ushered through the Gender Tax Repeal Act as a member of the California Assembly in 1995, introduced the Pink Tax Repeal Act in the United States House of Representatives along with twenty-four co-sponsors.¹²⁰ Supported by the Consumers Union (the advocacy and policy arm of Consumer Reports), the Consumer Federation of America, and other organizations, the Pink Tax Repeal Act would have prohibited businesses from charging different prices for similar products or services based on the gender of the customer.¹²¹ The language was straightforward:

It shall be unlawful for any person to sell or offer for sale in interstate commerce any two consumer products from the same manufacturer that are substantially similar if such products are priced differently

117. S.B. 133, 71st Leg. Assemb., Reg. Sess. (S.D. 1996) (cited and discussed in the S.D. ISSUE MEMORANDUM, *supra* note 27, at 2).

118. S.D. ISSUE MEMORANDUM, *supra* note 27, at 2.

119. See Duesterhaus et al., *supra* note 4, at 188; S.D. ISSUE MEMORANDUM, *supra* note 27, at 2.

120. H.R. 5686 – Pink Tax Repeal Act: Overview, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5686/actions> (last visited May 26, 2018).

121. See Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2016), <https://www.congress.gov/114/bills/hr5686/BILLS-114hr5686ih.pdf>; Carla Fried, *Pink Tax Repeal Act Aims to Make Pricing Fair to Women*, CONSUMER REP. (July 11, 2016), <https://www.consumerreports.org/shopping/pink-tax-repeal-act-aims-to-make-pricing-fair-to-women/>.

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based on the gender of the individuals for whose use the products are intended or marketed.¹²²

The Bill states that two products are “substantially similar” if “there are no substantial differences in the materials used in the product, the intended use of the product, and the functional design and features of the product.”¹²³ In an apparent nod to the marketing practices of manufacturers and retailers and the name given to the “pink tax,” the definitions went on to explicitly provide that “[a] difference in coloring among any consumer products shall not be construed as a substantial difference”¹²⁴ The Bill contained virtually identical language prohibiting discriminatory pricing for “substantially similar” services,¹²⁵ defining that similarity as circumstances where there is “no substantial difference in the amount of time to provide the services, the difficulty in providing the services, or the cost of providing the services.”¹²⁶

Authority to enforce the proposed law was vested in the Federal Trade Commission (“FTC”) and state Attorneys General, empowering each to seek injunctive relief or damages on behalf of consumers.¹²⁷ Significantly, no private right of action was created by the statute. Instead, consumers harmed by violations could recover their losses only through restitution actions brought by the FTC or lawsuits brought by a state Attorney General in its *parens patriae* capacity.¹²⁸

The Pink Tax Repeal Act was referred for consideration by the House Committee on Energy and Commerce but died at the expiration of the last Congress.¹²⁹ With the present composition of the United States House and Senate, current political climate, and a full agenda in Congress, prospects for its re-introduction and enactment in the near future appear bleak.

122. H.R. 5686 § 2(a)(1).

123. *Id.* § 2(d)(1).

124. *Id.*

125. *Id.* § 2(a)(2).

126. *Id.* § 2(d)(2).

127. *Id.* § 2(c).

128. *Id.*

129. See *All Information (Except Text) for H.R. 5686 – Pink Tax Repeal Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5686/all-info> (last visited May 26, 2018).

B. Ladies' Night

No discussion of gender-based pricing for goods and services would be complete without at least some mention of “Ladies’ Nights,” which is the practice of providing free or reduced admission and other discounts to women, often at bars and nightclubs. However, this practice also extends to car washes, gyms and other businesses as well.¹³⁰

In 1985, the California Supreme Court held that ladies’ nights violated the state’s Unruh Civil Rights Act—a law that, as previously noted, guarantees every California citizen the right of “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”¹³¹ Other states soon followed, finding that ladies’ nights and other gender-based special events are forms of unlawful sex discrimination under their civil rights “accommodations” laws.¹³²

In 2007, a lawyer specializing in gender bias sued a Las Vegas gym that offered discounts on initiation fees and a separate workout area for women.¹³³ That same year, the California Supreme Court affirmed a decision that awarded statutory damages against a club that waived its \$20 entrance fee to women.¹³⁴ Critics of ladies’ nights¹³⁵ group those promotions with a broader class of gender-based price discrimination practices like those used by hair salons and dry cleaners who charge men and women different prices for the same service.¹³⁶

130. See Richard Thompson Ford, *Rights Gone Wrong: How the Civil Rights Movement Led to a Ban on Ladies Night*, SLATE (Nov. 1, 2011, 4:26 PM) [hereinafter *Rights Gone Wrong*], http://www.slate.com/articles/news_and_politics/jurisprudence/features/2011/should_ladies_nights_really_be_illegal_an_excerpt_from_richard_t/week_1/should_ladies_nights_really_be_illegal_an_excerpt_from_richard_t_1.html; *Battle of the Prices*, *supra* note 63.

131. Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2007 & Supp. 2018)).

132. See *Rights Gone Wrong*, *supra* note 130 (noting similar bans in Iowa, Pennsylvania, Connecticut, and Hawaii).

133. *Id.*

134. *Id.*

135. See *Battle of the Prices*, *supra* note 63 (mentioning George Washington University law professor, John Banzhaf).

136. See *Rights Gone Wrong*, *supra* note 130.

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IV. PROSPECTS FOR THE FUTURE

With more consumers migrating to online shopping,¹³⁷ the practice of gender-based price discrimination is becoming a national issue that calls for a federal solution. Interestingly, some online retailers are reducing prices on a variety of women’s personal care products to equalize the prices that women pay for these items:

From a luxury tax on tampons and pads (seriously, a ‘luxury’ tax), to just paying for [sic] more for things like shampoo and soap, women have to cough up more money – thousands of dollars more per year, according to studies – just for being women. Take women’s razors for instance – they cost an average of 108 percent more than men’s razors. Which is why many of us at Boxed – and beyond – end up using men’s razors.

It’s flat out gender discrimination, not to mention the fact that the gender wage gap that already has women making about 20 percent less than men [W]e want to do our part as well to raise awareness and eliminate the pink tax where we can.

So starting today, Boxed is reducing the prices on women’s items like deodorant, razors and soap to match those of their male counterparts. We’re also reducing the sales tax amount from the list price on tampons and pads

This is just a start, of course, but we’re hoping other retailers and manufacturers will follow suit. We just can’t sit back and perpetuate the Pink Tax anymore.¹³⁸

However, voluntary measures like these are rare and manufacturers and retailers are reluctant to cut profits in markets with hefty competition and in industries with already slim margins.

The activities of a local hair salon or dry cleaner do not affect interstate commerce or constitute state action and therefore probably

137. See Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016), fortune.com/2016/06/08/online-shopping-increases/.

138. Julie Evans, *It’s Time to #RETHINKPINK – Boxed is Saying No to Pink Tax*, BOXED (Oct. 7, 2016), <https://blog.boxed.com/2016/10/07/its-time-to-rethinkpink-boxed-is-saying-no-to-pink-tax/>; see also *Retailer Against the Pink Tax*.

cannot constitutionally be regulated by federal legislation like the Pink Tax Repeal Act.¹³⁹ Nonetheless there is a huge gap between these purely local businesses, on the one hand, and national manufacturers and retailers that are subject to regulation by Congress, on the other. And just because these local businesses may be beyond the reach of federal law does not mean that their discriminatory pricing practices are immune from regulation. Unfortunately, the patchwork of state and local legislation targeting gender-based pricing is scattered, narrow in scope, and largely ineffective. As previously discussed, any such laws usually apply only to retail consumer services—not goods—and these services are limited. The remedies for violations are nominal and provide little incentive to pursue private enforcement. As statistics from the New York City Study demonstrate, and as the City itself acknowledges, the problem “still persists today” despite the (minimal) enforcement of the law by the DCA and the City’s consumer education outreach program.¹⁴⁰

Even in California, which enacted the first law targeting the pink tax, researchers found that 45 percent of hair salons, 46 percent of launderers, and 17 percent of dry cleaners still charged women more for these services.¹⁴¹ Loopholes built in the law allowed businesses to avoid its prohibitions by claiming that women’s services were more difficult or time-consuming than those for men.¹⁴²

One solution might be the adoption of a “model” statute by each of the states that mirrors federal legislation. The model would provide a comprehensive framework of regulation and enforcement. But any effort to revive the Pink Tax Repeal Act in Congress to serve as a hub for that network would no doubt be met with the same resistance that

139. The Bill apparently recognized this constitutional limitation and applied its prohibitions only to goods sold or offered for sale “in interstate commerce.” Curiously, however, no similar limitation appeared in the section prohibiting gender-based price discrimination for “services.” Pink Tax Repeal Act, H.R. 5686, 114th Cong. § 2(a)(1)–(2) (2016), <https://www.congress.gov/114/bills/hr5686/BILLS-114hr5686ih.pdf>.

140. See N.Y.C. STUDY, *supra* note 3, at 16.

141. See Duesterhaus et al., *supra* note 4, at 188 (citing Enrique Rivero, *Survey Reveals Gender Bias at Salons, Cleaners*, DAILY NEWS OF L.A. (Oct. 29, 1998), <https://www.thefreelibrary.com/SURVEY+REVEALS+GENDER+BIAS+AT+SALONS%2c+CLEANERS.-a083843353>).

142. *Id.*

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doomed the recent proposed amendments to the Gender Tax Repeal Act in California.¹⁴³ If efforts to strengthen laws against gender-based pricing failed in such a progressive state as California, prospects for adoption of any model statute in other states are dim. And with health care, trade, infrastructure, immigration, and other more pressing issues dominating the agenda in Congress, and in the current political climate, there is little appetite for this type of progressive legislation. Thus, the prospects for any meaningful progress in curtailing these practices in the near term are not encouraging.

Despite this outlook, it does not mean that we should stop trying to implement change or that there is no hope for the future. This was a watershed year for women finding their collective voices, born of sexist and outright misogynistic attitudes in Washington and despicable acts of sexual violence perpetrated against women by those in power in Hollywood, sports, politics, and virtually every other corner of society. More women than ever, most with no prior experience, are running for public office on the local, state, and national levels.¹⁴⁴ Some label 2018 the “Year of the Woman” in politics.¹⁴⁵ As these women achieve levels of power and influence in state legislatures and Congress, the headwinds against meaningful gender reform may diminish.

Harnessing those collective voices can also directly influence change with businesses that engage in these discriminatory practices. While some retailers have acknowledged these practices and changed, many others have not. Unified resistance through boycotts of targeted retailers who profit the most from gender-based pricing can be an effective tool, as can shareholder resolutions introduced to their boards of directors to bring pressure on corporate executives who are motivated more by profit than gender equality. These types of resolutions are often accompanied by high profile media campaigns that shed light on the subjects more broadly and publicly, which is another benefit of this strategy.

143. See *supra* Part III Section A.

144. See Rebecca Traister, *The Other Women’s March in Washington*, THE CUT (Jan. 19, 2018, 3:42 PM), <https://www.thecut.com/2018/01/women-candidates-2018-elections.html>.

145. See, e.g., John McCormick & Bill Allison, *Candidates and Contributors May Make 2018 the Year of the Woman*, BLOOMBERG (Jan. 19, 2018, 1:00 AM PST), <https://www.bloomberg.com/news/articles/2018-01-19/candidates-and-contributors-may-make-2018-the-year-of-the-woman>.

This leads us to another area of activism—consumer education. The existing patchwork of regulation and mandatory disclosures by governmental agencies is too limited in scope and largely ineffective. An organized, aggressive, *national* effort to educate women about these pricing disparities—identifying specific categories and types of products for which they are paying inflated prices—and to steer those consumers to the men’s versions of those same products will save women thousands of dollars annually. As the research confirms, most women are unaware of those pricing differentials and the substantial savings that could be achieved in a fair system. Until legislation or other solutions to the problem can be achieved, it is important to inform women and the general public about this this insidious “pink tax” in order to apply pressure for reform.