

On the Basis of Pink: Finding a Balanced Approach to Addressing Gender-Based Price Discrimination on a National Level

I. Introduction

Over the past century, women have made strides in securing the protection of their rights and shaping a more equitable future. Yet, despite this progress, inequality remains. One such area of inequality is the pervasive practice of gender-based price discrimination. Commonly referred to as “the pink tax,” these gender-based price differences impact women as they purchase goods and services necessary to fulfill their basic needs and to function in society.

When discussing the pink tax, the media focuses on higher prices for pink razors and floral-scented deodorant.¹ Although the pink tax has been found to be highest in the personal care sector, the impact of the pink tax spans across nearly all consumer goods and services markets.² For example, studies have shown that consumers pay more when buying bike helmets, infant onesies, adult diapers, shirts, and canes marketed toward female consumers.³ Additionally, the pink tax is prevalent in services. Various studies have found that women are frequently charged higher prices both in the dry cleaning and car repair sectors.⁴ Because of the nature of these products and services, women cannot avoid the pink tax by simply switching out their purchases for the men’s version.

Various competing interests surround the issue of the pink tax. First, women already tend to approach the market at a disadvantage because of continuing pay disparities.⁵ Second, there are various economic reasons supporting the existence of gender-based price discrimination, and some

1. See, e.g., Kristin Myers & Adrian Nesta, ‘Pink Tax’ Pushes Prices Up Nearly 13%, *Study Shows*, THE BALANCE (Mar. 15, 2022), <https://www.thebalancemoney.com/pink-tax-pushes-prices-up-nearly-13-percent-study-finds-5222209>.

2. See ANNA BESSENDORF, N.Y.C. DEP’T OF CONSUMER AFFS., FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (Shira Gans ed., 2015), <https://www.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf>.

3. *Id.*

4. Jessica Love, *The Importance of Appearing Savvy*, KELLOGG SCH. OF MGMT. AT NW. UNIV.: KELLOGG INSIGHT (June 3, 2013), https://insight.kellogg.northwestern.edu/article/the_importance_of_appearing_savvy; *CBS News Goes Undercover to Reveal Gender Price Discrimination*, CBS NEWS (Jan. 25, 2016, 6:59 AM), <https://www.cbsnews.com/news/price-discrimination-gender-gap-cbs-news-undercover-dry-cleaners/>.

5. DEMOCRATIC STAFF OF THE JOINT ECON. COMM., 114TH CONG., THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN’S BUYING POWER 1 (Comm. Print 2016) [hereinafter JOINT ECON. COMM., THE PINK TAX].

argue that such price discrimination is simply proof that the market is working efficiently.⁶ Conversely, there are the equality arguments—the thrust of which is simply that it is unfair that women are forced to pay more for the same products and services. It is only after carefully weighing these considerations that an appropriate solution to the pink tax will be found.

Existing consumer laws are insufficient to address the pink tax. Many of these statutes do not allow claims to be brought on the basis of gender discrimination.⁷ Further, even when state laws do provide room for consumers to bring gender-based price discrimination claims, courts are quick to adopt other explanations for the challenged pricing disparities.⁸ Additionally, judges consistently insist that the “remedy lies with legislation not litigation.”⁹ Thus, attempts to attain judicial remedies will likely prove fruitless and consumers should begin focusing on lobbying for legislation.

Several states have already enacted pink tax legislation. California enacted the California Gender Tax Repeal Act in 1995, becoming the first state in the nation to pass pink tax legislation.¹⁰ Today, seven jurisdictions have legislation addressing gender-based price discrimination.¹¹ While these statutes do represent progress, the limited geographic scope covered by such legislation means that there is still much work to be done.

The pink tax is best addressed on a national scale. Since 2015, the Pink Tax Repeal Act has been introduced in the United States House of Representatives several times.¹² Despite garnering bipartisan support, the bill

6. Stacey Vanek Smith & Karen Duffin, *The Gender Gap Series: The Problem with the Pink Tax*, NPR, at 04:05 (Aug. 16, 2019, 5:26 PM), <https://www.npr.org/2019/08/15/751440592/the-gender-gap-series-the-problem-with-the-pink-tax> (interviewing economist Jennifer Doleac).

7. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-500, CONSUMER PROTECTION: GENDER-RELATED PRICE DIFFERENCES FOR GOODS AND SERVICES 6 (2018) [hereinafter GAO, GENDER-RELATED PRICE DIFFERENCES], <https://www.gao.gov/assets/gao-18-500.pdf>.

8. *See, e.g.*, *Schulte v. Conopco, Inc.*, No. 4:19 CV 2546, 2020 WL 4039221 (E.D. Mo. July 17, 2020), *aff'd*, 997 F.3d 823 (8th Cir. 2021).

9. *Id.* at *6.

10. CAL. CIV. CODE § 51.6 (West 2024).

11. *Id.*; N.Y.C. ADMIN. CODE §§ 20-707 to 20-753 (2011); N.Y. GEN. BUS. LAW § 391-U (McKinney 2024); MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX, §§ 8A-400-05 (1997); 5 GUAM CODE ANN. § 32201(c)(18) (2024); 815 ILL. COMP. STAT. ANN. 505/2TTT (West 2023); VT. STAT. ANN. tit. 9, §§ 4500-4508 (West 2023); VT. STAT. ANN. tit. 9, §§ 2451-2466 (West 2023).

12. Sarah Moshary et al., *Investigating the Pink Tax: Evidence Against a Systematic Price Premium for Women in CPG*, at 2 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_events/1588356/mosharybhatiatuchman_updated2.pdf (paper presented at the Fourteenth Annual FTC Microeconomics Conference, Nov. 4-5, 2021); *see* Pink Tax

has yet to make it past committee.¹³ The proposed Pink Tax Repeal Act would ban gender-based price discrimination for substantially similar products and services.¹⁴ The proposed statute, however, does not provide adequate description of how to apply this standard in practice. Additionally, there are concerns that the substantial similarity standard will lack teeth, giving Congress the appearance of providing consumers with a remedy while failing to supply an enforceable standard. Taking these considerations into account, proposed legislation should adopt a standard more similar to that of several statutes around the nation. Such statutes ban gender-based price discrimination while providing a limited exception for price differences based on the time, difficulty, cost, labor, and materials of producing the goods and services.¹⁵

Additionally, ideal legislation should provide for enforcement by government actors, such as the FTC and state attorneys general, as well as by private consumers. Allowing private actions, and class actions specifically, is important to addressing the pink tax. As seen in 2019 with the United States Women's National Soccer Team's pay discrimination lawsuit,¹⁶ class actions can play a vital role in bringing gender equality to the forefront of national conversations.¹⁷ However, to balance consumer needs with protection of business, potential damages for consumers should be capped at a lower amount than that allowed in government-brought actions, so as to limit the liability exposure faced by businesses. Finally, to address the current lack of information regarding enforcement and effectiveness of existing pink tax legislation, ideal legislation should require Congress to publish a report three years after enactment to evaluate the effectiveness of the law in eliminating the pink tax.

This Comment will explain the various interests that both justify and challenge the existence of the pink tax, examine the current landscape of

Repeal Act, H.R. 3853, 117th Cong. (2021); Pink Tax Repeal Act, H.R. 7828, 118th Cong. (2024).

13. *All Information (Except Text) for H.R.3853 - Pink Tax Repeal Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/3853/all-info> (last visited Apr. 30, 2024).

14. H.R. 7828 § 2(a).

15. N.Y. GEN. BUS. LAW § 391-U; CAL. CIV. CODE § 51.14; MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX, §§ 8A-400-05.

16. *See Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717, 2019 WL 6140478 (C.D. Cal. Nov. 8, 2019); Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html>.

17. *See Das, supra* note 16.

consumer protection and pink tax-specific laws, and propose features for federal pink tax legislation. Part II is divided into two parts, with the first devoted to understanding the impact of the pink tax on women and the second endeavoring to find a balance between the competing economics and equality arguments that factor into the analysis. Part III examines the existing jurisprudence of consumer actions to address the pink tax brought via existing consumer protection laws, demonstrating that no adequate remedy will exist until federal legislation is enacted. Part IV addresses the state of existing and proposed legislation. Part V argues for the enactment of national legislation to address the pink tax and focuses on various aspects of ideal legislation. Finally, Part VI summarizes the arguments and reiterates the national scope of the pink tax problem. Throughout the analysis, this Comment seeks to advance a balanced approach for addressing the issue of gender-based price discrimination to the benefit of all within society.

II. Context and Considerations

A. Understanding the Pink Tax

The pink tax is a term used to describe gender-based price discrimination. More specifically, the pink tax describes the “markup on goods and services marketed to women and for which men pay less for similar products or services.”¹⁸ Although the term contains “tax” in the name, the price discrimination practice described is not an actual tax. The regularity of the price discrimination, however, “effectively becomes a tax on being a woman.”¹⁹ A 2015 New York City Department of Consumer Affairs study, a ground-breaking study on the pink tax, found that “women’s products cost more 42 percent of the time.”²⁰ Not only were women paying more almost half of the time, but the study found that, on average, the products marketed toward women were priced seven percent higher than similar men’s products.²¹

These price differences add up. A 1994 study conducted for the California Senate found that women pay \$1,351 more for similar products and services every year compared to their male counterparts.²² Some suggest that,

18. Amy Fontinelle, *What Is the Pink Tax? Impact on Women, Regulation, and Laws*, INVESTOPEDIA (Dec. 29, 2023), <https://www.investopedia.com/pink-tax-5095458>.

19. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 2.

20. BESSENDORF, *supra* note 2, at 5.

21. *Id.*

22. Fontinelle, *supra* note 18.

adjusting for inflation, this number may now be closer to \$2,161;²³ however, others argue that adjusting the initial 1994 figure for inflation is not sufficient to reflect the true burden of the pink tax today because of the complicated effects of inflation upon prices.²⁴ Regardless, although likely no longer accurate because of inflation and other factors, the 1994 figure remains a shocking indication of the impact of these discriminatory pricing practices on women.

The economic burden is further compounded by other factors, such as the persisting pay disparity in the United States. A 2016 congressional report found that “the pay gap adds up to nearly \$10,500 over the course of a year and roughly \$500,000 over a lifetime.”²⁵ According to a 2022 report from the Bureau of Labor Statistics, on average, women in the United States still earn eighty-three cents for every dollar made by their male counterparts.²⁶ Further, research has found that women drive consumer purchasing, accounting for over eighty percent of all consumer purchases in the United States.²⁷ Thus, not only do women typically make less than their male counterparts, but women also are responsible for putting more assets back into the marketplace via consumer purchases. Put simply, “[t]he only beneficiaries of the ‘pink tax’ are the companies who charge women more than men.”²⁸ With women accounting for over half of the population of the United States,²⁹ the negative impacts of the pink tax are manifold.

Classic examples of the pink tax tend to focus on goods in the consumer care products segment, such as razors and deodorant. This focus likely is driven by the fact that the consumer care products industry has the highest incidence of price differences, with women’s products averaging thirteen

23. CAL. S. JUDICIARY COMM., 2015-2016 REG. SESS., COMMITTEE ANALYSIS OF S.B. 899, at 7 (2016) [hereinafter COMMITTEE ANALYSIS OF S.B. 899], http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0851-0900/sb_899_cfa_20160411_133816_sen_comm.html; Fontinelle, *supra* note 18.

24. Fontinelle, *supra* note 18.

25. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 1.

26. *Median Earnings for Women in 2021 Were 83.1 Percent of the Median for Men*, U.S. BUREAU OF LAB. STAT.: TED: THE ECON. DAILY (Jan. 24, 2022), <https://www.bls.gov/opub/ted/2022/median-earnings-for-women-in-2021-were-83-1-percent-of-the-median-for-men.htm>.

27. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 2.

28. Fontinelle, *supra* note 18.

29. Veera Korhonen, *Total Population in the United States by Gender From 2010 to 2027*, STATISTA (Oct. 6, 2023), <https://www.statista.com/statistics/737923/us-population-by-gender/> (stating that women have represented “approximately 51.1 percent of the population since 2013”).

percent more than men's equivalents.³⁰ Additionally, compared to the other categories typically studied, consumer care products are purchased more frequently by consumers of both genders than are products in other industries.³¹ Despite the frequent (and justified) focus on the consumer care products segment, gender-based price differences permeate throughout the consumer market.

Other examples of the pink tax exist at extreme ends of the consumer life, with products marketed toward children and seniors also featuring gender-based differences in prices. There is little doubt that the pink tax starts young. For example, bike helmets and knee/elbow pads marketed toward young girls cost an average of thirteen percent more than versions marketed toward boys.³² A particularly absurd example in the New York City study compared a unicorn bike helmet with a shark helmet, finding that the unicorn helmet was nearly twice as expensive.³³ On the opposite end of the spectrum, many products designed for seniors are priced differently based on their target gender. With a twenty-one percent difference in price, personal urinals marketed toward women frequently cost more than those marketed toward men.³⁴ Other products directed toward the senior market, like canes, compression socks, supports, and braces also cost more when marketed to women.³⁵ This trend is particularly concerning as "the typical woman aged 65 or older has significantly less income than the typical man of the same age."³⁶ The pink tax does not discriminate against consumers based on age; rather, it appears to target all consumers who purchase products marketed toward women.

Further, the pink tax goes beyond the consumer goods market and affects the services industry as well. The role of gender-based pricing discrimination in services may be harder to spot, however, as it may result from unconscious biases. For example, a study conducted by Northwestern University found that women were consistently quoted a higher price for a car repair when they appeared to have no knowledge of the market price than were men for the same repair with a similar lack of knowledge.³⁷ In a separate study, conducted by CBS News, researchers found that women were frequently charged "at least twice as much" to dry clean the *exact same* button-up shirt as their male

30. BESSENDORF, *supra* note 2, at 11.

31. *Id.*

32. *Id.* at 7.

33. *Id.*

34. *Id.* at 15.

35. *Id.* at 7.

36. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 3.

37. Love, *supra* note 4.

colleagues.³⁸ In these cases, there was no difference in the service requested—it was the same car repair and the same button-up shirt. However, the women in each experiment were consistently quoted a higher price than the men. Likely, the difference in pricing is not a standard industry practice, leaving the conclusion that unconscious biases of service providers may play a role in pricing consumers of different genders differently. The role that unconscious biases play in discriminatory pricing thus presents an additional concern to be addressed as legislators attempt to end the pink tax.

The lingering question then is why women are okay with paying more. And there is no easy answer. First, women simply may not know they are charged more for the same products. Both academics and consumer groups have expressed that it may be difficult “for consumers to observe and compare prices paid by other consumers, such as when prices are not posted or can be negotiated.”³⁹ Second, whether or not female consumers know that they are being charged more, women may feel pressure from external forces to purchase the products marketed to women.⁴⁰ These pressures are two-fold, with gender-based marketing and “cultural expectations about gender” each playing a large role in driving consumption patterns.⁴¹ The willingness to pay may also be facilitated by a traditional societal mindset that women cost more. Whatever the reason, the facts are undeniable that, willingly or not, women continue to pay more for goods and services.

In summary, the pink tax is an issue that primarily affects women, while having negative impacts on society as a whole. Women consistently pay more for the products they buy and are often discriminated against, although perhaps on an unconscious level, when purchasing services as well. While the willingness to pay more may be a result of lack of knowledge, societal pressures likely play a large role in women continuing to purchase the goods marketed toward women, despite higher prices.

B. The Economics and Equality Arguments

There are two major competing viewpoints in the pink tax debate. On one side, economic arguments posit that the pink tax is simply one way to show that the market is working efficiently, which is good for society as a whole. On the other side, equality arguments focus on the inherent injustice of

38. *CBS News Goes Undercover to Reveal Gender Price Discrimination*, *supra* note 4.

39. GAO, GENDER-RELATED PRICE DIFFERENCES, *supra* note 7, at 25.

40. *See* Smith & Duffin, *supra* note 6.

41. Smith & Duffin, *supra* note 6, at 06:59 (interviewing economist Linda Yueh); JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 6.

gender-based pricing. Both sides carry great weight and must be considered in addressing the pink tax.

1. An Efficient Market

We should just let the market do its thing. The predominant argument made by economists in discussions of the pink tax is that gender-based price discrimination is “super efficient.”⁴² Explained a different way, the ability of companies to charge different prices to different people, based on how much those people are willing to pay, is seen as the ideal outcome.⁴³ In such a case, economists argue that price discrimination ensures “more of those people who want to buy the good are able to buy it,” which maximizes options for all consumers.⁴⁴ Further, price discrimination reflects “classic” capitalism: “If you can make money off of it, you should.”⁴⁵ As the chosen economic system, capitalism has continued to function in the United States for centuries, and the pink tax is, one might argue, proof that the capitalist market is working efficiently. As one economist put it, the pink tax is actually “a beautiful example of how markets can ultimately lead to more efficient outcomes.”⁴⁶

There are other “legitimate drivers” of the pink tax that must be acknowledged as well.⁴⁷ One oft-cited justification for price differences is tariffs. The average consumer may be unaware that imported goods have varying tariffs placed upon them, with some dependent upon the intended consumer. In 2020, a study for the American Political Science Review found that “imports of women’s goods, on average, are taxed 0.7% more than imports of men’s goods.”⁴⁸ Congress controls the rate of import taxes and differences in such taxes on clothing, leather goods, and shoes “are explicitly based on gender.”⁴⁹ Such gender-based tariffs have existed since as early as the 1950s, when President Truman signed legislation amending the Tariff

42. Smith & Duffin, *supra* note 6, at 04:05 (interviewing economist Jennifer Doleac).

43. *Id.*

44. *Id.*

45. Jessica Wakeman, *Pink Tax: The Real Cost of Gender-Based Pricing*, HEALTHLINE (Aug. 6, 2020), <https://www.healthline.com/health/the-real-cost-of-pink-tax>; see also Mikayla R. Berliner, *Tackling the Pink Tax: A Call to Congress to End Gender-Based Price Discrimination*, 42 WOMEN’S RTS. L. REP. 67, 74 (2020).

46. Smith & Duffin, *supra* note 6, at 05:37 (interviewing economist Jennifer Doleac).

47. Kenneth A. Jacobsen, *Rolling Back the “Pink Tax”: Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services*, 54 CAL. W. L. REV. 241, 250-51 (2018).

48. Timm Betz et al., *Women’s Descriptive Representation and Gendered Import Tax Discrimination*, 115 AM. POL. SCI. REV. 307, 307 (2020).

49. BESSENDORF, *supra* note 2, at 31.

Act to create separate tax rates for footwear based on gender.⁵⁰ Over sixty years later, it was estimated that the higher tariffs on women's goods produce \$300 million annually for the United States government.⁵¹ This practice of taxing imports of women's goods at a higher rate, while arguably an unjust practice on its own, might provide a legitimate reason for some price differences in affected goods as distributors pass on high costs to consumers. However, some researchers have been critical of this proposition, finding a lack of consistent correlation between tariff rates and consumer prices.⁵² Although inherently related, legislation addressing gender-based import taxes may be separate from legislation addressing the pink tax. Regardless, until Congress takes action to eliminate gender-based tariffs on imports, such tariffs constitute a legitimate reason for some gender-based differences in pricing.

Other legitimate economic factors driving gender-based differences are product differentiation and price discrimination. Product differentiation describes the practice of producers changing aspects of a product, including elements such as packaging, in order to attract particular markets of consumers.⁵³ The resulting differences between products can increase manufacturing and marketing costs, which eventually are passed on to the consumer in the form of higher prices.⁵⁴ Although these cost differences may justify price differences in certain industries, such cost differences may lose their legitimacy as a factor in other industries. For example, experts on the fashion industry have found that "the manufacturing cost of an article of clothing is a small fraction of the ultimate retail price," suggesting that cost differences cannot be the sole justification for price differences of clothes marketed to different genders.⁵⁵

Price discrimination, a separate concept from the gender-based price discrimination discussed up to this point, refers to the practice of charging "each customer the maximum amount that consumer is willing and able to

50. Miranda Hatch, Comment, *Is Trade Sexist? How "Pink" Tariff Policies' Harmful Effects Can Be Curtailed Through Litigation and Legislation*, 47 B.Y.U. L. REV. 651, 658 (2022).

51. BESSENDORF, *supra* note 2, at 31 n.37.

52. *Id.* at 31 ("For example, denim jeans are taxed at the same rate for men and women, but DCA found that women's jeans cost 10 percent more on average than men's jeans.").

53. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 5.

54. GAO, GENDER-RELATED PRICE DIFFERENCES, *supra* note 7, at 4; *see also* Berliner, *supra* note 45, at 75-76.

55. BESSENDORF, *supra* note 2, at 30.

pay.”⁵⁶ Thus, if a firm finds that women, more so than men, are willing to pay a higher price for the goods or services, the theory of price discrimination explains that the firm will charge the higher price for the women’s version.⁵⁷ Additionally, if the demand is higher for that product, basic economics explains that a seller should be able to sell that good for a higher price.⁵⁸ Such behavior is not unexpected of firms in a capitalist market and arguably should be encouraged as the product of an efficient market.

Another potential driver of the differences in cost between women’s and men’s products invokes antitrust concerns. Some scholars have argued that “women bear the brunt of anticompetitive and monopolistic behaviors” as they drive the vast majority of consumer purchases in the United States.⁵⁹ While price fixing and other anticompetitive behaviors may play a direct role in discriminatory pricing based on gender, such issues may be addressed under existing antitrust laws.⁶⁰

These economic drivers, most of which create legitimate differences in price, should be considered in addressing the pink tax. While factors like higher costs and higher demand may lead to higher prices for women’s products, the outcome is arguably merely a reflection of an efficient market at work. Any legislation addressing the pink tax thus must take these legitimate economic drivers into consideration, finding a way to preserve market efficiencies while targeting practices that are truly discriminatory.

56. GAO, GENDER-RELATED PRICE DIFFERENCES, *supra* note 7, at 5 n.7. Note that what economists call price discrimination is a separate concept from discrimination on the basis of sex, race, or ethnicity. Instead, economic price discrimination focuses on willingness to pay. See Alexandra Twin, *What Is Price Discrimination, and How Does It Work?*, INVESTOPEDIA (Jan. 29, 2024), https://www.investopedia.com/terms/p/price_discrimination.asp. For example, the price of an airline ticket fluctuates with the consumer's willingness to pay. Airlines know that when a consumer is trying to get onto a last-minute flight, that consumer is willing to pay more for their ticket than a consumer that is booking a flight months in advance. *Id.* Thus, the airline is able to charge the last-minute booker a higher price for the same ticket than the months-in-advance booker. *Id.* As demonstrated by this example, economics' price discrimination differs from the aforementioned gender-based price discrimination in that it differentiates between consumers based on willingness to pay, rather than an inherent characteristic of the consumer, such as gender.

57. JOINT ECON. COMM., THE PINK TAX, *supra* note 5, at 5.

58. See GAO, GENDER-RELATED PRICE DIFFERENCES, *supra* note 7, at 12.

59. Amy T. Brantly & Jennifer M. Oliver, *The Correlation Between Antitrust Enforcement and Gender Equality*, COMPETITION: J. ANTITRUST, UCL & PRIV. SECTION, CAL. LAWS. ASS'N, Spring 2021, at 115.

60. See *id.* at 121.

2. *An Inequitable Practice*

It is not fair that women pay more than men for similar products. To many, the inequality argument comes first as a gut reaction to the idea of the pink tax. Gender-based price discrimination disproportionately affects women,⁶¹ a group that is already paid less than their male counterparts.⁶² But the issue goes beyond mere differences in prices. Critics have also focused on the manipulative role of marketing and the tendency of businesses to prey on consumer naivete.⁶³ More specifically, journalists have noted “that products *explicitly* marketed toward women are generally more expensive than those marketed toward men, despite either gender’s choice to purchase either product.”⁶⁴ Further, critics explain that businesses are able to charge more without incurring consumer complaints because women are simply not aware of the predominance of such discriminatory practices.⁶⁵ Viewed in a cynical light, the pink tax is just another way that corporate America perpetuates the unfair treatment of women.

The disparate impact of the pink tax is likely exaggerated in the context of lower-income families, especially those headed by a single mother. Approximately one-half of children in the United States live in a single parent household, eighty percent of which are headed by a single mother.⁶⁶ This data is particularly significant as single-mother-led families have one of the highest poverty rates with a rate of thirty-one percent.⁶⁷ One factor contributing to this high poverty rate is low employment rates of single mothers. One study found that only fifty percent of single mothers were employed full-time in 2021.⁶⁸ The problem is further compounded by the continuing pay disparities in the workplace, meaning that even when single mothers are engaged in the workforce, they continue to be paid less on

61. *See supra* note 20 and accompanying text.

62. *See supra* note 26 and accompanying text.

63. Yulia Chuzha, *Pink Tax, White Paper: Why Do Women Still Pay More?*, MEDIUM (Mar. 6, 2020), <https://medium.com/@AIMBULANCE/pink-tax-white-paper-why-do-women-still-pay-more-2612c5462636>.

64. *Id.* (emphasis added).

65. *See id.*; GAO, GENDER-RELATED PRICE DIFFERENCES, *supra* note 7, at 25.

66. Louie Andre, *45 Single Parent Statistics You Can’t Ignore: 2024 Gender, Race & Challenges*, FINANCESONLINE, <https://financesonline.com/single-parent-statistics/> (last updated Jan. 1, 2024); *America’s Families and Living Arrangements: 2021*, U.S. CENSUS BUREAU (Nov. 29, 2021), <https://www.census.gov/data/tables/2021/demo/families/cps-2021.html>.

67. Andre, *supra* note 66.

68. News Release, Bureau of Lab. Stat., U.S. Dep’t of Labor, Employment Characteristics of Families – 2022 (Apr. 19, 2023), <https://www.bls.gov/news.release/pdf/fameec.pdf>.

average than their male counterparts, including single fathers.⁶⁹ This discrepancy is highlighted when the statistics for the two groups are compared. Only ten percent of children in the United States live in single-father-led families and these families have a poverty rate of less than half that of single-mother-led families.⁷⁰ Therefore, before even approaching the consumer market, families headed by a single mother are already at an economic disadvantage.

Upon engagement with the consumer market, single-mother-led families continue to be at an economic disadvantage. Not only do these families approach the market with fewer economic resources, but data shows that single mothers tend to have more children than single fathers.⁷¹ Specifically, one study found that single mothers are twice as likely to have four or more children in their household than are single fathers.⁷² Thus, single mothers must spend more of their limited economic resources in the market to provide for the needs of their family. Moreover, such families, being headed by a woman, are guaranteed to be impacted by the pink tax. Single fathers, on the other hand, may only have male children and thus escape the extra financial burden of paying discriminatory gender-based prices. Allowing companies to continue eroding single mothers' already limited economic resources via charging more for the products that such mothers and their daughters need should be concerning to all in society, and in such situations the inequitable consequences of the pink tax are clear.

Additionally, because there are differences in societal expectations surrounding consumption by the genders, women may not have a meaningful choice to purchase other products available in the marketplace.⁷³ In examining the workplace, for example, studies have found that women tend to consume products that are "expressly 'feminine' in order to reinforce their feminine identities but also to fulfill gendered expectations in the workforce."⁷⁴ More specifically, researchers have found that grooming, makeup, and wardrobe selection play a substantial role in the perception of women in the workplace and thus their professional success.⁷⁵ Because the

69. See *supra* note 26 and accompanying text.

70. Andre, *supra* note 66; *America's Families and Living Arrangements: 2021*, *supra* note 66.

71. *America's Families and Living Arrangements: 2021*, *supra* note 66.

72. *Id.*

73. See *supra* note 41 and accompanying text.

74. Megan Duesterhas et al., *The Cost of Doing Femininity: Gendered Disparities in Pricing of Personal Care Products and Services*, 28 GENDER ISSUES 175, 186 (2011).

75. Julia Carpenter, *How a Woman's Appearance Affects Her Career*, CNN MONEY (Sept. 20, 2017, 11:24 AM), <https://money.cnn.com/2017/09/20/pf/women-attractiveness-work/index.html>.

success of women in the workforce is directly impacted by their conformity to certain gender stereotypes, female consumption choices are thereby limited to a select category of goods that are made specifically with the female consumer in mind.⁷⁶ External pressures in the form of advertising have also been found to impact consumption patterns, serving to reinforce gender stereotypes regarding which products are acceptable for women to purchase.⁷⁷ Consequently, the evidence demonstrates that societal expectations, reinforced through various channels, constrain women from purchasing goods that are marketed to the opposite gender.

Further, research has shown that forcing women to switch to the lower-priced goods that are marketed to men “would lower consumer welfare.”⁷⁸ This finding is based in the intersection of consumer welfare and revealed preference theories. Consumer welfare is based on individual satisfaction, measurement of which must take into account individual preferences.⁷⁹ Revealed preference theory argues that a consumer’s consumption patterns are the “best indicator of their preferences.”⁸⁰ Applied here, revealed preference theory would explain that if women tend to purchase products marketed toward women, that tends to suggest that such products are the ones that women prefer. It then follows that women have a lower preference for products that are marketed toward men. Thus, if a woman is forced to purchase a men’s product over the women’s version that she prefers, her individual satisfaction is lower. As she is less satisfied, there is a resulting decrease in her consumer welfare. As a result, women would suffer a detriment, potentially to both their social acceptance and their well-being, if compelled to switch to the men’s version of products as the only avenue for escaping the pink tax.

Nevertheless, the economics and equality arguments may not be as incompatible as they seem at first glance. In the view of Joan Robinson, a female economist from the 1930s, price discrimination should not exist in a perfectly competitive market.⁸¹ Assuming that we live in a perfectly competitive market, “a more expensive product should have more features,

76. Duesterhas et al., *supra* note 74.

77. *See supra* note 41 and accompanying text.

78. Moshary et al., *supra* note 12, at 17.

79. *Glossary of Statistical Terms: Consumer Welfare*, ORGANISATION FOR ECON. COOP. & DEV. (OECD), <https://web.archive.org/web/20220119060846/https://stats.oecd.org/glossary/detail.asp?ID=3177> (last updated Mar. 15, 2002).

80. Will Kenton, *Revealed Preference in Economics: What Does It Show?*, INVESTOPEDIA (Aug. 31, 2023), <https://www.investopedia.com/terms/r/revealed-preference.asp>.

81. Smith & Duffin, *supra* note 6, at 06:52 (interviewing economist Linda Yueh) (describing how Joan Robinson viewed price discrimination).

it should be qualitatively different.”⁸² This, however, is not the case in the United States. In all studies finding differences in prices based on gender, the products compared had “similar male and female versions” and had similar branding, materials, ingredients, and marketing.⁸³ Although marketing may affect costs that are later passed on to consumers, some economists argue that if marketing is the sole reason for purchasing the more expensive product without substantial differences in features, such an outcome may not be economically efficient.⁸⁴ Perhaps there are legitimate economic drivers for gender-based differences in pricing, but to accept the economic arguments initially presented without further consideration of other factors would be to ignore some of the complexity inherent in the pink tax issue.

Additionally, economic arguments rationalizing the existence of the pink tax are susceptible to push-back for another reason: they are often based on the premise of the rational consumer.⁸⁵ Rational consumer theory, or rational choice theory, is the theory that all consumers act rationally when making decisions about purchasing goods.⁸⁶ Rational choice theory, however, does not map well onto the consumer patterns of women purchasing items subject to the pink tax. In the context of the pink tax, there are two main issues. First, women often do not know they are being charged more for essentially the same products that their male counterparts purchase at a lower price.⁸⁷ Because female consumers are thus prevented from making rational choices as a result of the lack of information available to them, these consumers cannot be said to be acting as rational consumers. Second, women tend to be motivated by factors other than price in making purchasing decisions.⁸⁸ These additional factors, such as marketing and cultural pressures, are not viewed as rational motivators under rational choice theory. Therefore, female consumers, being motivated by such non-rational factors, cannot be said to act within the rational consumer model.⁸⁹ This finding rebuts a fundamental presumption of the price discrimination justification, and therefore, the existence of the pink tax cannot be labeled as a sign of market efficiency.

82. *Id.* at 07:14.

83. BESSENDORF, *supra* note 2, at 5.

84. Smith & Duffin, *supra* note 6, at 07:28 (interviewing economist Linda Yueh).

85. See Akhilesh Ganti, *Rational Choice Theory: What It Is in Economics, with Examples*, INVESTOPEDIA (May 27, 2023), <https://www.investopedia.com/terms/r/rational-choice-theory.asp>.

86. *Id.*

87. See *supra* note 39 and accompanying text.

88. See *supra* notes 40-41 and accompanying text.

89. Ganti, *supra* note 85; see also Berliner, *supra* note 45, at 81 (“[N]either women nor men are fully ‘informed’ or ‘rational’ regarding gender-related products.”).

Nonetheless, if market efficiency is the goal, there may yet be a solution. Having established that gender-based price discrimination is not an efficient market practice, it follows that market efficiency would be improved by elimination of the pink tax. Economist Joan Robinson recommended regulation by the government.⁹⁰ Other economists have agreed, arguing that one reason for the existence of government institutions is to ensure “that markets operate fairly.”⁹¹ Under our system of capitalism, government interference in the market may be viewed skeptically; however, such intervention is necessary in some situations to protect the individuals engaging in the market.⁹² The practice of discriminatory pricing based on gender is one such situation.

The pink tax is a complicated issue, complicated further still by a general lack of knowledge as to the source and effects of the practice. Economists posit that the pink tax is merely proof that the market is working efficiently, charging higher prices to consumers who are willing to pay more. Contrasting with this argument, however, is a focus on the inherent inequity of the pink tax. As gender-based price discrimination has a disproportionately high impact on over half of the United States population, it is an arguably unfair practice that demands the attention of the nation and its legislature.

III. Examining the Deficiencies of Existing Consumer Protection Laws

Although there is currently no federal legislation addressing the pink tax, consumers have begun challenging this practice under state consumer protection laws. Courts, however, seem reluctant to address such issues. Only four cases have been reported thus far of consumers suing on the explicit theory of “pink tax” price discrimination. A review of the limited case law follows, accompanied by commentary on how the handling of these cases in the lower courts may prove valuable to the legislature in developing a balanced and enforceable standard for addressing the pink tax.

A. The Cases

The first two cases, filed by Brandi Goulart and Carla Been in July 2019, alleged that defendants engaged in “gender-discriminatory pricing schemes”

90. Smith & Duffin, *supra* note 6, at 08:32 (interviewing economist Linda Yueh) (discussing how Joan Robinson recommended remedying price discrimination).

91. *Id.* at 08:55.

92. Sarwat Jahan & Ahmed Saber Mahmud, *What Is Capitalism?*, INT’L MONETARY FUND, <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Capitalism> (last visited Feb. 22, 2024).

in violation of the Missouri Merchandising Practices Act (MMPA).⁹³ More specifically, Goulart and Been alleged that the disposable razor refill blades they had purchased online from Schick cost more than the “corresponding male-marketed version.”⁹⁴ However, because both women had signed an arbitration agreement by virtue of purchasing the razor blades through the Schick website, the federal district court for the Eastern District of Missouri compelled arbitration and the cases were thus taken out of the court system.⁹⁵

The other two cases, filed by Karen Schulte and Bridgette Lowe, were addressed by the court. In both, the courts held that the cited state consumer protection statutes did not provide plaintiffs with the protection they sought regarding the alleged pink tax practices.⁹⁶ Although the cases do not hold much positive precedential value for future plaintiffs hoping to combat gender-based pricing practices through the court system, the language employed by judges in dismissing these two cases is illuminating. In each, judges emphasized the ability of the female plaintiffs to purchase the men’s version of the product and appeared hesitant to conclude that the alleged price differences were rooted in gender.⁹⁷ As these cases provide important lessons for future legislation, each will be examined in turn below.

1. Schulte in the Eastern District of Missouri

Schulte began when Karen Schulte filed a proposed class action lawsuit in Missouri state court.⁹⁸ The case was then removed to the federal district court for the Eastern District of Missouri.⁹⁹ This case is particularly illustrative as judges in both the Eastern District of Missouri and later the Eighth Circuit handed down opinions directly addressing the pink tax issues that were raised. Similar to the lawsuits discussed above, *Schulte*’s suit was also brought under the Missouri Merchandising Practices Act. *Schulte* alleged that defendant Conopco, Inc.’s pricing of antiperspirants was “arbitrary and unjustified and constitutes an unfair practice in violation of the MMPA.”¹⁰⁰

93. *Goulart v. Edgewell Pers. Care Co.*, No. 4:19-CV-02559, 2020 WL 3000433, at *1 (E.D. Mo. June 4, 2020); *Goulart v. Edgewell Pers. Care Co.*, No. 4:19-CV-2568, 2020 WL 4934367, at *1 (E.D. Mo. Aug. 24, 2020); *Been v. Edgewell Pers. Care Co.*, No. 4:19-CV-02601, 2020 WL 2747293, at *3 (E.D. Mo. May 27, 2020).

94. *Goulart*, 2020 WL 3000433, at *1; *Been*, 2020 WL 2747293, at *3.

95. *Goulart*, 2020 WL 3000433, at *1, *4; *Been*, 2020 WL 2747293, at *3.

96. *Schulte v. Conopco, Inc.*, No. 4:19 CV 2546, 2020 WL 4039221, at *1 (E.D. Mo. July 17, 2020); *Lowe v. Walgreens Boots All., Inc.*, No. 21-CV-02852, 2021 WL 4772293, at *1 (N.D. Cal. Sept. 23, 2021).

97. *Schulte*, 2020 WL 4039221, at *6; *Lowe*, 2021 WL 4772293, at *4.

98. *Schulte*, 2020 WL 4039221, at *1.

99. *Id.* at *2.

100. *Id.* at *1.

Specifically, Schulte’s complaint detailed how Conopco engaged in a “gender-discriminating pricing scheme” in the marketing of Dove brand antiperspirants.¹⁰¹ Schulte alleged that there were two separate Dove brand antiperspirants: one that was “sold in packaging which [was] more ‘feminine’ and available in ‘feminine’ scents,” and another that was “marketed in more ‘masculine’ packaging and [came] in a variety of ‘masculine’ scents.”¹⁰² The two products also differed in the audience targeted in their advertising as well as where the products were sold in stores.¹⁰³ Further, Schulte alleged that the two antiperspirants “contain[ed] the same active ingredients” but differed in size, with the men’s product providing 2.7 ounces to the 2.6 ounces provided by the women’s version.¹⁰⁴

The main thrust of Schulte’s argument was that Conopco engaged in “an ‘unfair practice’ which violate[d] the MMPA because it [was] gender-discriminatory pricing.”¹⁰⁵ Moreover, Schulte argued that the alternative (to purchase men’s products) was “even more unfair due to social conditioning and social expectations.”¹⁰⁶

In response, Conopco focused on Schulte’s concession that “the men and women’s products at issue [were] not identical.”¹⁰⁷ Conopco pointed out that “Schulte’s complaint [did] not assert any factual allegations regarding the costs associated with the production, the research and development, and the marketing of these different product lines.”¹⁰⁸ Further, Conopco argued that Schulte “was not deceived by her purchase” and “received what she paid for.”¹⁰⁹

After establishing that Conopco’s pricing scheme was permissible under Missouri law, the court addressed the other pink tax arguments made by Schulte.¹¹⁰ Two themes run through the court’s opinion: first, women are free

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *2.

106. *Id.*

107. *Id.* at *3.

108. *Id.*

109. *Id.*

110. Under the MMPA, a deceptive practice is defined as “any method, act, use, practice, advertisement, or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression.” MO. CODE REGS. ANN. tit. 15, § 60-9.020(1) (2024). An unfair practice, on the other hand, is “any practice which offends any public policy . . . or is unethical, oppressive or unscrupulous; and presents a risk of, or causes, substantial injury

to purchase the men's version and thus pay less for the product, and second, price regulation is a matter for the legislature, not the courts.¹¹¹ Before acknowledging that "Schulte ha[d] highlighted a pervasive issue of women being subjected to questionable pricing practices in the marketplace," the court explained that women are free to purchase "any brand of Dove antiperspirant which undermines any discriminatory accommodation claim."¹¹² The freedom of consumers to choose thus seemed to play an important role in the court's holding that the state's consumer protection laws were not applicable. Throughout the opinion the court also expressed a desire to defer to the legislature on the issue of gender-based price discrimination. First stating that "price regulation is a quintessentially political question and thus nonjusticiable," the court went on to review other statutes invoked by Schulte beyond the MMPA that may have been applicable, such as the Robinson-Patman Act, before dismissing each in turn.¹¹³ At the end of the opinion, the court reiterated its stance that the solution to the pink tax "lies with legislation not litigation."¹¹⁴

Various lessons can be learned upon reading *Schulte*.¹¹⁵ First, while the district court appeared sympathetic to Schulte's complaint, sympathy does not get litigants very far without a specifically tailored legal ground on which to base their claim. Schulte alleged violations of multiple statutes in her complaint, with the Missouri Merchandising Practices Act as her primary vehicle; yet none of the existing consumer protection laws provided Schulte with a legal avenue for relief.¹¹⁶ Second, corporate defendants, like Conopco, will likely be quick to point out when consumers fail to allege facts regarding the costs of production, research and development, and marketing that may contribute to higher prices for some goods.¹¹⁷ While these costs may prove to be legitimate drivers of higher prices, federal legislation addressing the pink tax must address the typical lack of business information available to

to consumers." *Schulte*, 2020 WL 4039221, at *3. In applying these definitions, the Eastern District of Missouri held that Schulte's complaint did not allege a deceptive or unfair practice under the MMPA. *Id.* at *6. In analyzing the case, the district court noted that "Missouri law does not compel identical products to be sold at the same price." *Id.* at *4. Analogizing the gender-based price difference alleged by Schulte to a price difference between private and major brand products in a prior case, the court held that such pricing was allowed under the MMPA. *Id.*

111. *See Schulte*, 2020 WL 4039221, at *4-5.

112. *Id.* at *5-6.

113. *Id.* at *4-5.

114. *Id.* at *6.

115. *Id.* at *1.

116. *Id.* at *4.

117. *See supra* note 108 and accompanying text.

consumer litigants when initially pleading a gender-based price discrimination claim.¹¹⁸ Third, the court seemed to fixate on the fact that Schulte could just as easily purchase the men's version of the product at a lower price, thereby making her argument of price-discrimination superfluous.¹¹⁹ Yes, female consumers are free to purchase the men's version, but this cannot be the ideal solution. Research has shown that, if coerced into buying the men's version, women would suffer harm both socially and personally.¹²⁰ Buying the men's version must not be the only proffered solution for our mothers, our sisters, and our daughters. Fourth, the court stated that the issue is one for "legislation not litigation."¹²¹ This demonstrates that the existing patchwork of consumer protection laws are insufficient and adds weight to the argument that legislation is needed on a national scale to effectively protect the rights of consumers.

2. Schulte in the Eighth Circuit

Schulte's story, however, was not yet over. She appealed her case to the Eighth Circuit, which affirmed the district court's dismissal.¹²² After reviewing the record, the court launched into an analysis of why Schulte's claims had no legs upon which to stand.¹²³ The court first contended that Schulte "ignores that the different scents, packaging, and labels make the products potentially attractive to different customers with different preferences."¹²⁴ In conjunction with this statement, the court cited a Missouri case that allowed price differences "because 'flat pricing under conditions of differential cost . . . tend to distort the normal operation of the marketing system.'"¹²⁵ However, nothing in the record showed that there were differential costs in the manufacture of the antiperspirants at issue. Furthermore, it is unclear why the court quoted this passage to argue that differences in the products simply may make the products attractive to different customers. There was no evidence supporting a finding of differential costs on the part of the manufacturer, and, even if there was such evidence, the court failed to explain how consumer preferences have any

118. *See supra* Section II.B.1.

119. *See supra* note 112 and accompanying text.

120. *See supra* notes 78-80 and accompanying text.

121. *Schulte*, 2020 WL 4039221, at *6.

122. *Schulte v. Conopco, Inc.*, 997 F.3d 823, 825 (8th Cir. 2021).

123. *Id.* at 825-27.

124. *Id.* at 826.

125. *Id.* (quoting *Foremost Dairies, Inc. v. Thomason*, 384 S.W.2d 651, 656-57 (Mo. 1964) (en banc)).

impact on the costs a company chooses to undertake. Although it is possible that Schulte ignored attributes of the products that made them more attractive to certain consumers over others, the Eighth Circuit failed to adequately demonstrate the relevance of such an omission.

The court next addressed the pleading threshold plaintiffs must meet when bringing gender-based price discrimination actions. Explaining that even if state law prohibits gender-based discriminatory pricing, litigants “cannot plausibly allege it using only retail-price differences without plausibly alleging that the *only* difference between the products is the gender of the purchaser.”¹²⁶ Without explicitly stating a conclusion on this point, the court implied that Schulte failed to meet this threshold.

In the closing paragraph of the Eighth Circuit’s opinion, the court emphasized the fact that Schulte could have purchased the men’s version if she wished to do so.¹²⁷ The court first quoted Schulte, who said that “men and women are able to purchase a product marketed to the opposite sex.”¹²⁸ Immediately afterward, the court commented on the irony of such a statement, explaining that a fundamental premise of her claim was that “all men and all women must purchase products marketed to their gender.”¹²⁹ As demonstrated by this opinion, such a slip-up by plaintiffs’ counsel can prove damaging.

After emphasizing that “both [men and women] have an equal opportunity to buy” the products at issue, the court concluded that Schulte’s decision to not purchase the men’s version was not the result of any discriminatory practice.¹³⁰ Specifically, the court concluded that her purchasing decision “illustrates a difference in demand based on product preferences, not the purchaser’s gender.”¹³¹ While this conclusion goes one step further than the court’s prior analysis regarding differences in consumer preferences, the Eighth Circuit again failed to fully explain how different preferences necessarily precludes a concurrent existence of discriminatory pricing practices.

A reading of the Eighth Circuit’s opinion in the *Schulte* case does little to illuminate the legal and economic reasoning behind the conclusion that Missouri law does not prohibit gender-based price discrimination, yet it does contain some important lessons. First, plaintiff’s counsel must be meticulous in pleading pink tax cases. As demonstrated here, any concession that

126. *Schulte*, 997 F.3d at 826.

127. *Id.* at 826-27.

128. *Id.* at 826.

129. *Id.*

130. *Id.*

131. *Id.* at 826-27.

consumers are free to purchase products marketed to the opposite gender will become a focal point of the court's analysis and an anchor for finding that no discrimination occurred. Second, courts are hesitant to conclude that any difference in pricing between goods marketed to men versus to women must be based on consumer gender. Here, the court established the requirement that plaintiffs must plausibly allege that the *only* difference in retail-price is because of gender. Given the location of the language establishing this pleading requirement, the court seems to imply that the probable existence of any evidence regarding differences in costs or factors other than gender may be sufficient to defeat a pink tax claim. Any shred of evidence suggesting a reason for price differences would seem to satisfy this low burden.

3. *Lowe in the Northern District of California*

The most recent case addressing the pink tax was filed by Bridgette Lowe in the federal district court for the Northern District of California. Filed in April 2021, Lowe's class action complaint alleged that defendants' pricing of hair regrowth treatment "amount[ed] to a 'pink tax' on female consumers."¹³²

Specifically, Lowe explained that Walgreens sells its men's and women's foam hair regrowth treatment at different prices, despite the fact that both versions "contain the same active ingredient and formulation of Minoxidil."¹³³ As of March that year, the two versions sold at significantly different prices with the women's version costing almost one-and-a-half times the price of the men's version.¹³⁴ Part of Lowe's complaint alleged that the products' packaging was "likely to deceive a reasonable consumer into believing the that Women's Product is unique or specially formulated to make it appropriate for women."¹³⁵ Lowe conceded, however, that the two versions had different dosage instructions, with the men's version instructing consumers to apply the product twice a day versus once a day for female consumers.¹³⁶ Seeking various remedies, Lowe brought claims under a variety of statutes, including California's Unruh Act.¹³⁷

132. *Lowe v. Walgreens Boot All., Inc.*, No. 21-cv-02852, 2021 WL 4772293, at *1 (N.D. Cal. Sept. 23, 2021).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *2. The Unruh Act, more fully known as the Unruh Civil Rights Act, provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what

Defendants responded by presenting reasons for the differences in price and rejecting the relevance of the Unruh Act to Lowe's action. First, defendants argued that under federal law, the FDA requires that Walgreens' generic version of the foam hair regrowth treatment "must be labeled identically" to the brand name version.¹³⁸ Second, defendants argued that the Unruh Act applies only to "accommodations, advantages, facilities, privileges, or services." Therefore, the Act was not applicable to goods and Lowe's action could not be sustained under the Act.¹³⁹

The court agreed with defendants on all claims. First, the court analyzed the laws regulating the drug industry. According to the interpretations of the FDA and of the Supreme Court, the law and accompanying regulations mandated that brand-name drugs and their generic versions have identical labels.¹⁴⁰ Put another way, there was a "duty of sameness imposed by the FDA."¹⁴¹ Although this has little to do with justifying the differences in price between the products, the court's analysis here is important in explaining why certain products may have different men's or women's versions, despite containing essentially the same components. In such a case, where differences in packaging are mandated by federal law, it is easy for defendants to argue that their hands are tied and that any resulting price differences are out of their control.

Before concluding the case, the court briefly analyzed Lowe's claim under California's Unruh Act. The Act's language does not explicitly include language making it applicable to gender-based discrimination in goods; however, the Act does prohibit discrimination on the basis of sex and sexual orientation.¹⁴² Despite this prohibition, the court concluded that the Act only proscribed such discrimination in the context of services, not goods.¹⁴³ As a

their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51(b) (West 2024).

138. *Lowe*, 2021 WL 4772293, at *2.

139. *Id.* at *2, *4.

140. *Id.* at *4.

141. *Id.*

142. *Id.*

143. *Id.* The court looked at the legislative history of the Unruh Act in reaching its conclusion. *Id.* Originally, the California legislature had passed a version of that act "that applied to both goods and services," but it was vetoed and the current version—limited to services—was enacted in its place. *Id.*

result, the court concluded that Lowe's claim found no grounds in the Act and must be dismissed.¹⁴⁴

While *Lowe* lacks the expressive dicta of the *Schulte* cases, the court's opinion here is informative in other respects. Primarily, it presents an example of how defendants may efficiently argue that product differences based on gender are justified under federal statutes and regulations. Here, the differences between the men's and women's versions mostly manifested in a difference in packaging, while the actual products themselves were essentially identical. Differences in cost for the different elements of packaging or requirements to conform with brand-name manufacturers' practices may provide defendants with justifications for their own differences in products marketed to women versus men. Additionally, the case clearly demonstrates that existing consumer protection laws are insufficient to prevent this kind of discrimination. For consumers in California faced with the pink tax as it relates to goods, there appears to be no legal remedy.

B. Lessons for Ideal Legislation

Taken together, these cases provide ample lessons for legislators in drafting effective pink tax legislation. First, there is a need for legislation to address the issue of gender-based price discrimination. As stated in *Schulte v. Conopco, Inc.*, courts are of the opinion that the remedy for female consumers is "with legislation not litigation."¹⁴⁵ Interestingly, as of 2020, the plaintiffs' bar has acknowledged "the 'pink tax' as a theory of liability under state consumer protection laws."¹⁴⁶ The case law, however, fails to demonstrate that such state laws adequately give female consumers protection. Because of this deficiency, there is an on-going need for legislation at the national level to address the pink tax issue.

Second, the cases discussed herein demonstrate the commitment of courts to interpret statutes in a way that is both strictly confined to their text and that, arguably, allows companies the widest latitude to continue setting their prices in a discriminatory manner.¹⁴⁷ Courts cannot be faulted for interpreting statutes in a manner that is faithful to the text and legislative history, yet the tendency of courts to allow ample leeway to companies engaging in pink tax

144. *Id.* at *5.

145. *Schulte v. Conopco, Inc.*, No. 4:19 CV 2546, 2020 WL 4039221, at *6 (E.D. Mo. July 17, 2020).

146. Jaclyn M. Metzinger, *The Pink Tax: Discrimination or Actual Differentiation?*, KELLEY DRYE (Jan. 8, 2020), <https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/the-pink-tax-discrimination-or-actual-differentiation/>.

147. *See, e.g., supra* notes 142-44 and accompanying text.

pricing should be concerning. In the course of drafting legislation, legislators must be aware of this trend and should make efforts to ensure that statutes are clear. In particular, ideal legislation should set out clear standards and procedures for evaluating claims. Legislation that embraces these attributes would take advantage of the courts' commitment to strict textual interpretations, while curtailing their ability to interpret the law in a way that provides companies with victory in every instance.

Third, ideal legislation should take consumer welfare into account in determining permissible defenses. In each of the cases discussed herein, women brought actions challenging the pricing of the women's version of a product that was essentially identical to the cheaper men's version.¹⁴⁸ Every conversation around the pink tax necessarily centers on that familiar fact-pattern, with the women's version costing more. And the favored response remains the same, what one commentator summed up as: "Here's what you can do, ladies, buy the men's stuff!"¹⁴⁹ That, however, cannot be the only solution given to the women of America. Research has suggested that forcing women to switch to products designed for men would have a negative impact on their consumer welfare.¹⁵⁰ In order to limit such negative effects upon women, ideal legislation must find a way to limit this as being the proffered solution, with a narrow exception included for economically justifiable differences in prices. These trends must be considered and appropriately weighed against economic arguments when drafting legislation to effectively address the pink tax.

IV. Legislative Landscape

A. Existing Legislation

Six states and local governments currently have laws specifically addressing the pink tax: California; Miami-Dade County, Florida; New York; New York City; Guam; and Illinois. Four of the six proscribe gender-based discriminatory pricing of both goods and services, while New York City and Illinois prohibit only gender-based pricing for services. Another state,

148. See, e.g., *supra* notes 100-03 and accompanying text.

149. Candice Elliott, *The Pink Tax: Understanding and Combatting Unfair Gender Pricing*, LISTEN MONEY MATTERS, <https://www.listenmoneymatters.com/the-pink-tax/> (last visited Mar. 15, 2022); see also *The Pink Tax, Presented by Bankrate*, LEVEL D&I SOLS. (May 25, 2022), <https://www.leveldi.com/post/the-pink-tax-presented-by-bankrate> ("You can save money by shopping for gender-neutral products or those targeted toward men."); *Schulte v. Conopco, Inc.*, 997 F.3d 823, 826 (8th Cir. 2021) ("If Schulte's primary concern is price, she is free to purchase the Men + Care antiperspirant.").

150. See *supra* notes 78-80 and accompanying text.

Vermont, has a law that broadly prohibits discrimination on the basis of sex and has been interpreted as prohibiting pink tax practices. The laws vary in the standards imposed and whether the right of enforcement lies only with the state attorney general or allows for private actions as well. Because the nuances of statutory language play a large role in determining whether pink tax legislation will successfully pass through a legislature, the specific language of each of the existing laws will be examined in detail below. Such examination will provide a foundation for the federal legislation proposed in Part V.

1. California

In 1995, California became the first state to enact legislation specifically addressing the pink tax.¹⁵¹ Codified as California Civil Code section 51.6, the Gender Tax Repeal Act of 1995 (“1995 Act”) prohibits gender-based price differences for services “of similar or like kind.”¹⁵² However, the act allows for differences that are “based specifically upon the amount of time, difficulty, or cost of providing the services.”¹⁵³ The act also requires that certain businesses, such as tailors, dry cleaners, and barbers, clearly display price lists to customers that detail the prices for the standard services offered by the establishment.¹⁵⁴ Both private citizens and government actors, such as the Attorney General and district and city attorneys, may bring a civil action under the act.¹⁵⁵ In terms of penalties, the act provides that a court may grant actual damages “for each and every offense,” and up to three times actual damages but no less than \$4,000, plus attorney’s fees.¹⁵⁶ However, as of 2016, less than five reported lawsuits had been brought under the 1995 Act.¹⁵⁷ Whether this reflects a lack of enforcement data or simply a lack of enforcement, it raises questions as to whether the law has been effective in

151. CAL. CIV. CODE § 51.6 (West 2023); see Lane Gillespie, *The Pink Tax: Latest Updates and Statistics*, BANKRATE (Feb. 27, 2023), <https://www.bankrate.com/personal-finance/pink-tax-how-women-pay-more/>.

152. CAL. CIV. CODE § 51.6(b).

153. *Id.* § 51.6(c).

154. *Id.* § 51.6(f).

155. *Id.* § 52(c).

156. *Id.* § 52(a).

157. Teri Sforza, *Women’s Products That Cost More Than Men’s? It’s Called the ‘Pink Tax,’ and Not Everyone’s Mad*, ORANGE CNTY. REG. (Apr. 18, 2016, 11:12 AM), <https://www.ocregister.com/2016/04/18/womens-products-that-cost-more-than-mens-its-called-the-pink-tax-and-not-everyones-mad-2/>; Jacobsen, *supra* note 47, at 256 (“And although that law has been on the books for decades, consumer advocates and California legislators see wide gaps in coverage and enforcement.”).

remedying the pink tax problem—a question that must be addressed by future federal legislation.

Similar legislation had previously been introduced in California in 1994 but, after passing the California legislature, the 1994 bill was vetoed by the governor.¹⁵⁸ A year later, the governor gave two reasons for approving the 1995 version of the bill: first, the new version included a provision allowing for differences in prices based on “time, difficulty, or cost of providing the services,” and second, the new version did not prohibit differences in the pricing of goods.¹⁵⁹

While the governor accepted the bill for these two reasons, others criticized the newly enacted legislation on the same grounds. Arguing that the 1995 Act was drafted “too narrowly,” some were concerned that the new law created an insurmountable pleading burden for plaintiffs.¹⁶⁰ Because of that high burden, critics worried that the act would “provide only feeble protection against gender discrimination” and pushed for broad prohibitions on gender-based price differences that gave no defenses based on whatever “burdens” there were to business.¹⁶¹ As demonstrated by the governor’s refusal to sign the 1994 version of the act, broad prohibitions on pink tax pricing are unlikely to be enacted unless they allow for exceptions based upon gender-neutral factors, such as time or cost. However, there is equal and valid reason for concern that pink tax legislation featuring enough carve-outs to get it through the legislature will prove too weak upon its testing in the real world.

In 2022, the California legislature expanded the state’s existing pink tax law to include a prohibition on gender-based pricing for goods.¹⁶² Introduced as Assembly Bill 1287 and enacted as California Civil Code section 51.14 (“2022 Act”), the law bans price differences for “goods that are substantially similar.”¹⁶³ Goods are considered “substantially similar” under the 2022 Act if there are “[n]o substantial differences in the materials,” if the “intended use” of the goods is similar, if the “functional design and features are similar,” and if the goods are from the same brand or “both brands are owned by the same individual or entity.”¹⁶⁴ However, the law allows for differences in pricing that are based upon the time, difficulty, cost, labor, and materials

158. Recent Legislation, *Cal. Civ. Code § 51.6 (West Supp. 1996)*, 109 HARV. L. REV. 1839, 1840 (1996).

159. *Id.* (quoting CAL. CIV. CODE § 51.6(c)).

160. *Id.* at 1841-42.

161. *Id.* at 1839.

162. CAL. CIV. CODE § 51.14.

163. Assemb. B. 1287, 2021-2022 Reg. Sess. (Cal. 2022); CAL. CIV. CODE § 51.14(b).

164. CAL. CIV. CODE § 51.14(a)(3)(A).

required to manufacture the goods, as well as any other gender-neutral reason for charging a different price.¹⁶⁵ Unlike the 1995 Act, the 2022 Act only allows for enforcement by the Attorney General.¹⁶⁶ The potential penalties, however, are more harsh as courts may impose injunctions, award direct restitution, or order a civil penalty of up to \$10,000 for the first violation and up to \$1,000 for each violation thereafter.¹⁶⁷ While the total civil penalty is not to exceed \$100,000, the 2022 Act includes a few important exceptions allowing the total penalty to go well beyond the \$100,000 limit.¹⁶⁸

The law regulating the pricing of goods in California is particularly noteworthy for a few reasons. First, with regard to goods, the statute does not allow for a private right of action; instead, enforcement power is held only by the Attorney General.¹⁶⁹ This feature is important as the lack of private right of action means that businesses are likely exposed to less liability than if such a right of action was included.¹⁷⁰ Second, the remedies under the law differ depending on whether there was a violation regarding goods or services.¹⁷¹ Violations based on the pricing of goods carry a higher monetary penalty than violations based on the pricing of services.¹⁷² Finally, despite the fact that Californians were aware of the pink tax, it took nearly two decades for the legislature to expand the law to prohibit gender-based price discrimination for goods. Yet, despite this expansion, there continues to be a lack of data on the enforcement and impact of California's pink tax laws.

Existing California law was shaped by a history of failed proposals and backlash from the business community. Before section 51.14 was added in 2022, several bills were submitted to the California legislature to address the pink tax on goods. Of note was Senate Bill 899, which died in the Assembly

165. *Id.* § 51.14(c).

166. *See id.* § 51.14(d).

167. *See id.* § 51.14(d)(1)-(3).

168. *Id.* § 51.14(d)(4). The law provides that “a court may impose additional civil penalties upon a defendant exceeding one hundred thousand dollars (\$100,000) if the defendant subsequently violates this section with respect to the same goods for which the maximum civil penalty has been previously imposed under a separate civil action or for any good for which the Attorney General has not brought civil action pursuant to this section.” *Id.*

169. *See supra* note 166 and accompanying text.

170. CAL. S. JUDICIARY COMM., 2021-2022 REG. SESS., COMMITTEE ANALYSIS OF ASSEMB. B. 1287, at 1-7 (2022) [hereinafter COMMITTEE ANALYSIS OF ASSEMB. B. 1287], https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/ab_1287_bauer-kahan_sjud_analysis.pdf.

171. *See supra* notes 156, 166-67.

172. *See supra* notes 166-67.

in 2016 after passing the California Senate.¹⁷³ Senate Bill 899 differs in many important respects from the 2022 Act, which originated in the Assembly. First, the two texts differ in how “substantially similar” is defined. Under Senate Bill 899, two goods were defined as being substantially similar if the goods shared the same brand, same functional components, and ninety percent of the same materials or ingredients.¹⁷⁴ Conversely, under the 2022 Act, two goods are substantially similar if the goods share substantially the same materials, their intended use, functional design and features are similar, and the brand is the same or both brands are owned by the same individual or entity.¹⁷⁵ This latter definition allows room for more arguments as to what might be considered substantially similar. While such greater flexibility may make it easier for consumers to plead violations under the act, it may also provide more opportunities for lawyers and judges to create reasons why products do not fall within that flexible definition.

Second, the list of exceptions included for when price differentials are allowed varies between the two texts. Both include exceptions for differences in time, difficulty, cost, labor, and materials, as well as “other gender-neutral reason[s].”¹⁷⁶ Senate Bill 899, however, enumerated tariffs as an additional basis for exception and included a blanket statement allowing a retailer to pass-through a price set by an entity further up in the supply chain that is out of that retailer’s control.¹⁷⁷

Third, the texts differ in the remedies provided and in who has the right of enforcement. Senate Bill 899 mirrored the remedies given under the 1995 Act, whereas the current law allows for larger recovery upon finding of a violation.¹⁷⁸ To appease concerns that the higher penalties may “stifle product innovation or invite abuse,” the existing statute limits enforcement power to only the Attorney General.¹⁷⁹ In contrast, Senate Bill 899 would have again mirrored the 1995 Act, which allowed for enforcement by private citizens as well as the Attorney General, any district attorney, or any city attorney.¹⁸⁰

Senate Bill 899 faced substantial push-back from the business community, particularly retailers and manufacturers, who expressed concern that the bill

173. S.B. 899, 2015-2016 Reg. Sess. (Cal. 2016).

174. *Id.*

175. CAL. CIV. CODE § 51.14(a)(3)(A) (West 2023).

176. S.B. 899(c)-(d), 2015-2016 Reg. Sess. (Cal. 2016); CAL. CIV. CODE § 51.14(c).

177. S.B. 899(d), 2015-2016 Reg. Sess. (Cal. 2016).

178. S.B. 899(f), 2015-2016 Reg. Sess. (Cal. 2016); CAL. CIV. CODE § 51.14(d).

179. CAL. CIV. CODE § 51.14(d); COMMITTEE ANALYSIS OF ASSEMB. B. 1287, *supra* note 170, at 7.

180. S.B. 899(f), 2015-2016 Reg. Sess. (Cal. 2016).

may lead to issues with product pricing and that the bill was too ambiguous to be efficiently enforced.¹⁸¹ The California Retailers Association argued that the “substantially similar” definition would be nearly impossible to apply to goods, where “there are endless ambiguities.”¹⁸² Critics also argued that the bill would force retailers to gender-identify all products.¹⁸³ However, as supporters countered, if the goods were not already gendered, “then there would be no price differences between similar products and there would be no cause of action to bring.”¹⁸⁴ Although the text of the 2022 Act arguably contains even more ambiguities, the added flexibility and redistribution of enforcement power appeared sufficient to quell the concerns expressed six years earlier.

This history in California illustrates the need for legislatures to anticipate business push-back while drafting pink tax legislation. Two of the most common concerns raised by businesses are the ambiguity in defining “substantially similar” goods and the potential liability exposure created by such legislation. It was only after revising Senate Bill 899 to assuage these concerns that pink tax legislation passed through the California legislature. As demonstrated, the business community can serve as a powerful force of opposition against pink tax legislation, and thus Congress must be prepared to overcome this hurdle in enacting federal legislation.

2. *Miami-Dade County, Florida*

Miami-Dade County in Florida followed California’s lead in 1997, enacting a law that made pink tax pricing illegal for both goods and services.¹⁸⁵ According to the county ordinance, businesses may not charge different prices for goods based on gender.¹⁸⁶ However, like California’s 1995 Act, the Miami-Dade County ordinance provides for certain exceptions, allowing for price differences based upon the “time, difficulty or cost of providing the good or service.”¹⁸⁷ The ordinance gives enforcement power both to private citizens and to the county department, which also receives written complaints from consumers.¹⁸⁸ Penalties for violating the ordinance

181. COMMITTEE ANALYSIS OF S.B. 899, *supra* note 23, at 10-13.

182. *Id.* at 12.

183. *Id.*

184. *Id.* at 15.

185. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997).

186. *Id.* § 8A-402.

187. *Id.*

188. *Id.* §§ 8A-403, 405.

include compensatory damages, attorney's fees, and court costs.¹⁸⁹ However, as seen in California, there is no enforcement data available to evaluate the ordinance's effectiveness in addressing pink tax practices.¹⁹⁰

The Miami-Dade County ordinance, however, provides an interesting model to help combat some of the practical difficulties of enforcement.¹⁹¹ Under the law, private consumers are empowered to file written complaints of suspected pink tax violations.¹⁹² Such private complaints assist the government agencies responsible for enforcement in identifying violations, and a similar provision should be included in federal legislation to likewise facilitate enforcement.

3. *New York*

In January 1998, New York City became the third United States jurisdiction to enact legislation countering the pink tax.¹⁹³ City Council Bill No. 804-A prohibited the public display of gender-based pricing for services by retailers.¹⁹⁴ The enacted bill gave the New York City Department of Consumer Affairs the power to collect a civil penalty of \$50 to \$250 for the first offense and then a penalty of \$100 to \$500 for any subsequent offenses.¹⁹⁵ Each day that a retailer's pricing display is not in compliance with the law is considered a separate violation.¹⁹⁶

One way that retailers may escape liability under the enacted bill is to remove any references to gender, while still keeping other distinctions that may be linked to gender (e.g., long versus short hair).¹⁹⁷ Although this potential loophole may explain how some service providers avoid enforcement actions, it fails to explain why there has been only minimal

189. *Id.* § 8A-404; MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. III, div. 4, § 8A-124 (2023).

190. Jacobsen, *supra* note 47, at 254.

191. *But see* Berliner, *supra* note 45, at 96.

192. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX, § 8A-403 (2023).

193. Press Release, Off. of the Mayor of N.Y.C, Mayor Giuliani Signs City Council Bill No. 804-A into Law, Prohibiting the Public Display of Discriminatory Pricing Based on Gender (Jan. 9, 1998), <https://www.nyc.gov/html/om/html/98a/pr019-98.html>.

194. *Id.* For example, dry cleaners may not advertise different prices using terms such as "shirts" and "blouses," as these terms are "inherently gender-based." BESSENDORF, *supra* note 2, at 16. Rather, posted prices "must reflect actual differences in required labor," which means labeling items as "shirts with ruffles, shirts with pleats, etc." instead. *Id.*

195. N.Y.C. ADMIN. CODE § 20-753 (2023).

196. *Id.*

197. Frank Bruni, *For the Sexes, Equality Under the Law and Under the Hair Clippers*, N.Y. TIMES (Jan. 10, 1998), <https://www.nytimes.com/1998/01/10/nyregion/for-the-sexes-equality-under-the-law-and-under-the-hair-clippers.html>.

enforcement of the law. For example, in 2015, the Department of Consumer Affairs issued less than 150 citations.¹⁹⁸ Additionally, similar to the other laws discussed in this section, an analysis of the effectiveness of the New York City law suffers from a lack of more recent enforcement data.

Over two decades later, in 2020, the state of New York enacted its own pink tax legislation.¹⁹⁹ Section 391-U of the New York General Business Laws (“2020 Act”) applies to goods and services and makes it illegal to charge a different price on the basis of the customer’s gender.²⁰⁰ Similar to California’s 2022 Act, New York’s 2020 Act uses the “substantially similar” terminology.²⁰¹ Under New York law, “substantially similar” goods are those that exhibit “no substantial differences” in materials, intended use, functional design and features, and brand.²⁰² The equivalent services are those that have “no substantial difference” in the time, difficulty, and cost of providing the services.²⁰³ Similar to other legislation, the 2020 Act allows exceptions based on the time, difficulty, cost, labor, and materials necessary for the production of goods or provision of services, as well as any other gender-neutral reason for a price difference.²⁰⁴ The 2020 Act also provides for enforcement by the Attorney General and remedies include injunctive relief and direct restitution, as well as a civil penalty of up to \$250 for the first violation and up to \$500 for each following violation.²⁰⁵

Although the 2020 Act has since served as a template for other pink tax legislative proposals and laws around the country, legal commentators have noted that the law has yet to “generate significant enforcement interest or publicity.”²⁰⁶ The 2020 Act is still relatively new, but this does not seem a promising sign that legislative attempts to end the pink tax are actually working.

198. BESSENDORF, *supra* note 2, at 16.

199. Press Release, N.Y. Dep’t of State, Former Governor Cuomo Reminds New Yorkers “Pink Tax” Ban Goes into Effect Today (Sept. 30, 2020), <https://dos.ny.gov/news/former-governor-cuomo-reminds-new-yorkers-pink-tax-ban-goes-effect-today>.

200. N.Y. GEN. BUS. LAW § 391-U (McKinney 2024).

201. *Id.* § 391-U(3).

202. *Id.* § 391-U(1)(d)(i).

203. *Id.* § 391-U(1)(d)(ii).

204. *Id.* § 391-U(4).

205. *Id.* § 391-U(6).

206. Gregory T. Parks et al., *California ‘Pink Tax’ Law Prohibits Gender-Based Pricing of Consumer Products*, MORGAN LEWIS (Nov. 1, 2022), <https://www.morganlewis.com/pubs/2022/11/retail-dyk-california-pink-tax-law-prohibits-gender-based-pricing-of-consumer-products>.

Similar to the pattern seen in California, New York's 2020 Act was the product of several pieces of earlier legislation that died in the state legislature. In 2018, New York senators introduced Senate Bill 8787.²⁰⁷ This bill defined goods of a "substantially similar or like kind" as goods that share the same brand, same functional components, and ninety percent of the same materials or ingredients.²⁰⁸ Conversely, the 2020 Act defines goods as "substantially similar" if there is little difference in the materials used, the intended use, or the brand.²⁰⁹ Further, the 2020 Act includes a definition for when services are considered "substantially similar."²¹⁰

The two pieces of legislation also differed in the exceptions allowed. Under Senate Bill 8787, differences based upon labor, materials, tariffs, and other gender-neutral reasons were allowed.²¹¹ Additionally, Senate Bill 8787 would have allowed a retailer to pass through a price to the consumer that was set by an entity further up the supply chain, if the retailer had no option to change the offending price.²¹² The 2020 Act, while still allowing for differences based upon labor, materials, and other gender-neutral reasons, does not include tariffs within its list of exceptions.²¹³ Instead, the 2020 Act adds a few exceptions that are more services-oriented (i.e., time, difficulty, and cost).²¹⁴ The 2020 Act also carries stronger enforcement mechanisms, empowering courts to grant injunctions and direct restitution in addition to the civil penalties provided for in both versions of the legislation.²¹⁵

After Senate Bill 8787 died in committee in 2018, a different bill was introduced (and put to rest) in the New York Assembly in 2019.²¹⁶ Assembly Bill 629 departed substantially from the previously introduced senate bills in one important manner: Rather than containing the same "substantially similar

207. S.B. 8787, 2017-2018 Reg. Sess. (N.Y. 2018).

208. *Id.* sec. 1, § 391-U(1).

209. N.Y. GEN. BUS. LAW § 391-U(1)(d)(i) (McKinney 2024).

210. *Id.* § 391-U(1)(d)(ii).

211. S.B. 8787 sec. 1, § 391-U(2)(a).

212. *Id.* sec. 1, § 391-U(2)(b).

213. *See* N.Y. GEN. BUS. LAW § 391-U(4).

214. *Id.*

215. *Id.* § 391-U(6).

216. Assemb. B. 629, 2019-2020 Reg. Sess. (N.Y. 2019). Senate Bill 2679 was also introduced (and died) in 2019. *See Senate Bill S2679*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2019/S2679> (last visited Feb. 23, 2024). Notwithstanding the sponsor's desire to take "a more 'cautious approach,'" Senate Bill 2679 was identical to Senate Bill 8787 (the bill that was introduced in the previous session). Gavrielle Jacobvitz, *New York Considering Bill to Ban 'Pink Tax' Pricing Disparities*, HUFFPOST (June 10, 2019, 5:26 PM), https://www.huffpost.com/entry/new-york-state-legislature-pink-tax-bill_n_5cfeab92e4b0aab91c0a2487; *see* S.B. 2679, 2019-2020 Reg. Sess. (N.Y. 2019); S.B. 8787, 2017-2018 Reg. Sess. (N.Y. 2017).

or like kind” language, Assembly Bill 629 simply said that it was illegal to charge a different “price for goods on the basis of gender.”²¹⁷ However, there was some confusion regarding this definition later in the legislative process as representatives sought clarity on how the definition would be operationalized.²¹⁸ During a chamber hearing, when asked how the definition works, the bill’s sponsor replied that the goods must be substantially similar.²¹⁹ The sponsor explained that the definition requires the goods to meet the same requirements as those contained in the previously proposed senate bills.²²⁰ Despite this drafting confusion, the bill fared better than the previous senate bills. Assembly Bill 629 passed the Assembly in the summer of 2019, but later died in the state Senate in early 2020.²²¹

The saga in New York demonstrates the importance of having a well-understood definition as to what goods may become the subject of litigation. The broad definition featured in Assembly Bill 629 was the main topic of conversation at chamber hearings when the bill was discussed.²²² Additionally, legislation was passed in New York only after the definition of what constitutes “substantially similar” goods was modified to add more flexibility.²²³ This is clearly an area where legislators should be paying close attention.

4. *Guam*

Enacted in 1991, Guam’s Deceptive Trade Practices Law is the oldest law prohibiting gender-based pricing in the United States.²²⁴ Under the law, businesses are prohibited from charging “different prices for the same goods or services on account of the . . . sex [or] sexual preference . . . of the consumers.”²²⁵ Like other statutes, the law provides for enforcement by the Attorney General and allows for private actions.²²⁶ The law also provides the

217. Assemb. B. 629, 2019-2020 Reg. Sess. sec. 1, § 391-U(1)(a) (N.Y. 2019).

218. Transcript of Proceedings of the N.Y. State Assembly, at 34-36 (June 11, 2019) [hereinafter Transcript], <https://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-11-19.pdf>.

219. *Id.* at 35.

220. *See id.* at 35-36.

221. *A00629 Actions*, N.Y. STATE ASSEMBLY, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00629&term=2019&Actions=Y (last visited Apr. 30, 2024).

222. Transcript, *supra* note 218, at 34-36.

223. *See* N.Y. GEN. BUS. LAW § 391-U(1)(d) (McKinney 2024).

224. *See* Guam Pub. L. No. 21-18 (1991).

225. 5 GUAM CODE ANN. § 32201(c)(18) (2022).

226. *Id.* §§ 32107-32113.

typical list of remedies, including restitution, actual and punitive damages, costs, and attorney's fees.²²⁷

Guam's law differs from the others discussed in a few respects. Primarily, the law does not define what "same goods or services" means, thereby leaving the inference that the law would only apply to goods and services that are, in fact, identical. If this conclusion is correct, the language likely forecloses any pink tax-related action from being brought under Guam's law. Even if the above conclusion is incorrect, the law fails to provide for any carve-outs based on gender-neutral reasons for price differences, like time, difficulty, or cost. The absence of such exceptions is likely attributable to the nature of the statute as it is not directed specifically toward pink tax pricing, but instead provides a broad prohibition against discriminatory practices. Further, similar to the laws discussed above, there is no data regarding the enforcement of Guam's law. Thus, it is unclear whether the approach taken in Guam has been effective in addressing pink tax pricing practices over the past thirty years.

5. *Illinois*

Illinois law was amended in 2017 to prohibit gender-based price differentials for services.²²⁸ Introduced into the Illinois Senate as Senate Bill 298, the Consumer Fraud and Deceptive Business Practices Act was intended to address the upcharge many women paid for services such as dry cleaning, haircuts, and tailoring.²²⁹ The statute features a long list of examples of factors upon which price differences may be based.²³⁰ These factors include the "amount of time, difficulty, cost[,] . . . the qualifications, experience, or expertise of the individual or business providing the services, [and] market conditions" for the services.²³¹ Additionally, similar to California's 1995 Act, businesses must provide customers with a list of prices upon request.²³² Although the law was enacted over five years ago,²³³ there has yet to be any reported litigation involving this particular section in conjunction with gender-based pricing.

227. *Id.*

228. 815 ILL. COMP. STAT. ANN. 505/2TTT (West 2023).

229. *Id.* at 505/2TTT(b); Veronica Carter, *New Illinois Law Targets Gender-Based Price Discrepancies*, PUB. NEWS SERV. (Aug. 23, 2017), <https://www.publicnewsservice.org/2017-08-23/civic-engagement/new-illinois-law-targets-gender-based-price-discrepancies/a59093-1>.

230. 815 ILL. COMP. STAT. ANN. 505/2TTT(a).

231. *Id.*

232. *Id.* at 505/2TTT(b).

233. *Id.* at 505/2TTT.

6. Vermont

Two statutes in Vermont have been interpreted by the state Attorney General and Human Rights Commission as prohibiting gender-based pricing for both goods and services: the Public Accommodations Act²³⁴ and the Consumer Protection Act.²³⁵ In 2016, the Vermont Attorney General released a report addressing the pink tax issue and how Vermont's laws provide a remedy.²³⁶ Under the Public Accommodations Act, businesses are prohibited from treating people differently on the basis of sex, sexual orientation, and gender identity.²³⁷ The Act provides for enforcement by the Vermont Human Rights Commission and allows private citizens to sue offenders.²³⁸

Additionally, under the Consumer Protection Act, businesses are prohibited from engaging in unfair trade practices.²³⁹ Enforcement of this Act is delegated to the Attorney General, but private citizens who have been harmed are reserved the right to sue offending businesses as well.²⁴⁰ Both the Public Accommodations Act and the Consumer Protection Act provide for a penalty of \$10,000 for each violation.²⁴¹ Upon release of the report, the Vermont Attorney General expressed a desire to clarify what the law requires of Vermont businesses and thereby avoid having to file enforcement actions.²⁴² Recognizing that many consumers and businesses are simply unaware of pink tax pricing schemes, the Attorney General's office and Vermont Human Rights Commission sought to first educate these groups, allowing businesses an opportunity to self-correct before an official complaint was filed.²⁴³

As of 2018, there had been no reported cases of private consumers suing under the Vermont Consumer Protection Act.²⁴⁴ Moreover, there is a lack of data as to whether the two laws have been effective in remedying the issue

234. VT. STAT. ANN. tit. 9, §§ 4500-4508 (2023).

235. VT. STAT. ANN. tit. 9, §§ 2451-2483b (2023).

236. OFF. OF THE ATT'Y GEN. OF VT. & THE VT. HUM. RTS. COMM'N, GUIDANCE ON THE USE OF GENDER IN PRICING OF GOODS AND SERVICES (June 2016), <https://hrc.vermont.gov/sites/hrc/files/gender-based%20pricing%20guidance.pdf>.

237. *Id.* at 1-2.

238. *Id.* at 2.

239. *Id.*

240. *Id.*

241. *Id.*

242. Elizabeth Hewitt, *Officials Warn Against Gender Discrimination in Pricing*, VT DIGGER (June 30, 2016, 3:28 PM), <https://vtdigger.org/2016/06/30/officials-warn-against-gender-discrimination-in-pricing/>.

243. *Id.*

244. Jacobsen, *supra* note 47, at 257-58.

of gender-based price discrimination in Vermont. Because of this absence of information, it is unclear whether the Vermont laws, or any of the other laws discussed thus far, have been successful in eliminating the pink tax. As legislators continue to work toward ending the pink tax, future legislation must provide mechanisms for gathering statistics on the enforcement and effectiveness of enacted laws.

B. Proposed Legislation

Since 2015, several jurisdictions across the United States have proposed pink tax-related bills. Of these, only three states—California, New York, and Illinois—have enacted legislation. In other states, proposed pink tax-related bills have not fared so well. Although each of the proposed bills varied slightly in language, none made it out of committee. Finally, pink tax legislation has been introduced in the United States House of Representatives every session for the past eight years, to no avail. A detailed analysis of the currently proposed federal Pink Tax Repeal Act at the end of this section will identify the various provisions that must be modified to increase the chances of the proposal’s passage through Congress. This Part provides an analysis of several past proposals, along with lessons to be learned for future legislative proposals.

1. New Jersey

Legislators in both the New Jersey Senate and Assembly joined the pink tax fight in 2020 and 2021 with identical bills being introduced in each body.²⁴⁵ Senate Bill 2039 and Assembly Bill 5488 both sought to prohibit gender-based pricing for services and for “substantially similar” goods.²⁴⁶ The bills defined “substantially similar” goods as those with “no significant differences” in materials, function, and functional design or features.²⁴⁷ Like other bills, the New Jersey proposals allowed for price differences based on labor, materials, tariffs, or other gender-neutral reasons.²⁴⁸ Also, similar to California’s Senate Bill 899 and New York’s Senate Bill 8787, the New Jersey bills permitted retailers to pass on a price set by another entity that the

245. S.B. 2039, 2020-2021 Reg. Sess. (N.J. 2020); Assemb. B. 5488, 2020-2021 Reg. Sess. (N.J. 2021). These two bills have been carried forward into more recent sessions of the New Jersey legislature, with the most recent bill being introduced in the New Jersey Assembly in January 2024. *See* S.B. 1412, 2022-2023 Reg. Sess. (N.J. 2022); Assemb. B. 565, 2022-2023 Reg. Sess. (N.J. 2022); Assemb. B. 1451, 2024-2025 Reg. Sess. (N.J. 2024).

246. S.B. 2039 § 2(b); Assemb. B. 5488 § 2(b).

247. S.B. 2039 § 2(b); Assemb. B. 5488 § 2(b).

248. S.B. 2039 § 2(c); Assemb. B. 5488 § 2(c).

retailer is unable to change.²⁴⁹ In terms of penalties, though, the New Jersey bills diverge from others around the nation. Under the proposed legislation, businesses in New Jersey would face up to a \$10,000 fine for their first violation, and up to \$20,000 for each subsequent violation.²⁵⁰ Additionally, punitive damages and treble damages may be granted to injured consumers.²⁵¹ The assembly bill lived only a short life, dying in committee.²⁵² Comparatively, the senate bill did well, passing the New Jersey Senate before also dying in committee in the state assembly.²⁵³

The New Jersey bills appear to have some of the same flaws as other pink tax legislation. Specifically, the proposed bills' definition of "substantially similar" goods is identical to that of California's 2020 Act and New York's 2022 Act, except that both of the enacted laws contain an additional branding requirement that must be met before goods are classified as substantially similar.²⁵⁴ If New Jersey repeats the history seen in New York, legislation will be passed only after a branding requirement is added to the definition of substantially similar goods.²⁵⁵ Additionally, the New Jersey bills fail to address how enforcement and effectiveness of the legislation would be tracked to assess the bills' impact once enacted.

2. Rhode Island

In early 2020, senators in Rhode Island joined the pink tax conversation. The senators proposed a bill prohibiting differences in pricing for "substantially similar" hygiene products.²⁵⁶ As was the case with many other pink tax-related bills that year, the Rhode Island senate bill died in

249. S.B. 2039 § 2(c); Assemb. B. 5488 § 2(c).

250. S.B. 2039 § 3 & statement; Assemb. B. 5488 § 3 & statement.

251. S.B. 2039 statement; Assemb. B. 5488 statement.

252. *See Bill A5488: Session 2020-2021*, N.J. LEGIS., <https://www.njleg.state.nj.us/bill-search/2020/A5488> (last visited Feb. 23, 2024).

253. *See Bill S2039 SaSa (2R): Session 2020-2021*, N.J. LEGIS., <https://www.njleg.state.nj.us/bill-search/2020/S2039> (last visited Feb. 23, 2024).

254. CAL. CIV. CODE § 51.14(a)(3)(A) (West 2023); N.Y. GEN. BUS. LAW § 391-U(1)(d)(i) (McKinney 2024).

255. *See discussion supra* Section IV.A.3.

256. S.B. 2731, 2020 Reg. Sess. sec. 1, § 6-58-2 (R.I. 2020). To fall within Senate Bill 2731's parameters, products would need to come from the same manufacturer and have "a similar build, ingredients, or size." *Id.* sec. 1, § 6-58-1(5). Differences in scent or color were not permissible reasons to charge a different price under the bill. *Id.* Unlike other proposals, the Rhode Island bill only applied to hygiene products and did not provide an enumerated list of exceptions. Willful violators of the bill would have faced a fine of up to \$500 for their first offense, with an additional \$1,000 for every violation thereafter. *Id.* sec. 1, § 6-58-3.

committee.²⁵⁷ Because the bill would apply only to hygiene products, it does not provide a good model for future federal legislation addressing the pink tax as a whole.

3. *Hawaii*

Two years later, in 2022, Hawaii saw its first pink tax bill introduced in the state senate.²⁵⁸ Covering both goods and services, Senate Bill 2518 used the same “substantially similar” language as legislation introduced and enacted in other states.²⁵⁹ Substantially similar goods are those with only minimal differences in materials, intended uses, and functional design or features.²⁶⁰ The equivalent services are those with only minimal differences in the time, difficulty, or cost of providing the services.²⁶¹

Unlike other pink tax legislation, Senate Bill 2518 does not contain a list of exceptions for when price differences may be acceptable. As demonstrated by the events in California in 1995, it appears unlikely that pink tax legislation will be enacted without containing any exceptions to account for legitimate drivers of price differences.²⁶² The bill died in the Hawaii Senate before ever reaching the House.²⁶³

4. *Connecticut*

The state of Connecticut also saw its first pink tax bill introduced in 2022.²⁶⁴ Like legislation in other states, Senate Bill 189 would have made it “a discriminatory practice . . . for a business to charge different prices” for goods or services that are “substantially similar.”²⁶⁵ According to the bill, goods are substantially similar if they share the same materials, intended use, features and functional design, and brand.²⁶⁶ Correspondingly, services are substantially similar if there is “no substantial difference” in the time, difficulty, or cost of providing the services.²⁶⁷ Also similar to other

257. 2020 Regular Session: Rhode Island Senate Bill 2731, LEGISCAN, <https://legiscan.com/RI/bill/S2731/2020> (last visited Feb. 23, 2024).

258. S.B. 2518, 31st Leg., Reg. Sess. (Haw. 2022).

259. *Id.* § 2.

260. *Id.*

261. *Id.*

262. *See supra* Section IV.A.1.

263. *Hawaii Senate Bill 2518*, LEGISCAN, <https://legiscan.com/HI/bill/SB2518/2022> (last visited Feb. 23, 2024).

264. S.B. 189, 2022 Feb. Sess. (Conn. 2022).

265. *Id.* § 3(b).

266. *Id.* § 3(a)(4).

267. *Id.* § 3(a)(5).

legislation, Senate Bill 189 enumerated differences in time, difficulty, cost, labor, and materials as factors upon which price differentials may be based.²⁶⁸

Senate Bill 189, though, included a slightly different catch-all provision at the end. Instead of permitting price differences based upon “any other gender-neutral reason,”²⁶⁹ the bill’s provision allowed for differences based on “[a]ny matter that is unrelated to sex or gender identity or expression.”²⁷⁰ However, despite the difference in the specific language of Connecticut’s catch-all provision, this provision would likely have the same functional result as other open-ended exceptions.²⁷¹

Also of interest is how the bill would delegate enforcement power, opting to place enforcement with the Commission on Human Rights and Opportunities, rather than with the state Attorney General.²⁷² The Commission would be required not only to facilitate enforcement but also to educate businesses across the state on their rights and responsibilities.²⁷³ In fact, education has been cited as one of the main goals for the legislation by Connecticut senators.²⁷⁴ Despite such hopes for the proposal, the bill died in committee with promises that it will be introduced next session.²⁷⁵

The bill’s focus on education is notable, especially as studies show that many consumers remain unaware of pink tax pricing practices.²⁷⁶ However, education only solves one part of the issue, and the bill mirrors others in failing to provide a mechanism for assessing its effectiveness once enforcement has begun.

5. Federal Legislation

The United States House of Representatives saw the same pink tax bill introduced every legislative session from 2015 through 2021 by former

268. *Id.* § 3(c)(1).

269. CAL. CIV. CODE § 51.14(c) (West 2024); N.Y. GEN. BUS. LAW § 391-U(4) (McKinney 2024).

270. S.B. 189 § 3(c)(2).

271. *See* discussion *infra* Part V.

272. S.B. 189 § 4(d).

273. *Id.* § 3(e).

274. Katie Cerulle, *Connecticut Committee Considers ‘Pink Tax,’* CT NEWS JUNKIE (Mar. 2, 2022, 1:22 PM), <https://ctnewsjunkie.com/2022/03/02/connecticut-committee-considers-pink-tax/>.

275. Katie Cerulle, *‘Pink Tax’ Bill Dies in Committee,* CT NEWS JUNKIE (Mar. 30, 2022, 12:00 PM), <https://ctnewsjunkie.com/2022/03/30/pink-tax-bill-dies-in-committee-2/>.

276. *See supra* note 39 and accompanying text.

Representative Jackie Speier.²⁷⁷ In 2024, a slightly modified version of the bill was introduced by Representative Norma Torres.²⁷⁸ Named the Pink Tax Repeal Act, the congressional bill uses the same “substantially similar” language that has been introduced and enacted in many bills across the country.²⁷⁹ As the bill is currently drafted, substantially similar goods are those with “no substantial differences in” materials, intended use, and functional design and features.²⁸⁰ Further, substantially similar services are those with “no substantial differences in” the time, difficulty, or cost required to provide the services.²⁸¹ While these definitions are rather standard in pink tax bills, the congressional bill is different from many others in that it includes no list of exceptions for when prices may differ.

In terms of enforcement, the most recent House bill would grant enforcement powers to state attorneys general and to the Federal Trade Commission, as well as any designated state consumer protection officer.²⁸² State attorneys general may seek injunctions, “compel compliance,” and “obtain damages, restitution, or other compensation on behalf of” consumers.²⁸³ The FTC’s means of enforcement would be the same as those laid out in the Federal Trade Commission Act.²⁸⁴ There is currently no private right of action provided for in the bill.

The last Pink Tax Repeal Act introduced by former Representative Speier garnered the support of Consumer Reports, the Consumer Federation of America, and the National Women’s Law Center.²⁸⁵ However, the bill faced opposition from members of the business community.²⁸⁶ Particular concern

277. See Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2016); Pink Tax Repeal Act, H.R. 5464, 115th Cong. (2018); Pink Tax Repeal Act, H.R. 2048, 116th Cong. (2019); Pink Tax Repeal Act, H.R. 3853, 117th Cong. (2021).

278. See Pink Tax Repeal Act, H.R. 7828, 118th Cong. (2024).

279. See H.R. 7828 § 2(a).

280. *Id.* § 2(d)(1).

281. *Id.* § 2(d)(2).

282. *Id.* § 2(b)-(c). In contrast, the pre-2024 versions of the Pink Tax Repeal Act would have provided for enforcement only by state attorneys general and the Federal Trade Commission. See, e.g., H.R. 3853 § 2(b)-(c).

283. H.R. 7828 § 2(c)(1).

284. *Id.* § 2(b).

285. Juliegrace Brufke, *Speier Introduces Bill to End the ‘Pink Tax’*, THE HILL (Apr. 10, 2018, 4:39 PM), <https://thehill.com/homenews/house/382536-speier-introduces-bill-to-end-the-pink-tax/>.

286. GovTrack.us, *Pink Tax Repeal Act Would Ban Higher Prices Based on Gender, Like for Haircuts*, MEDIUM (Apr. 11, 2019), <https://govtrackinsider.com/pink-tax-repeal-act-would-ban-higher-prices-based-on-gender-like-for-haircuts-f8b2db1d0f93>.

was raised over the ambiguity of the bill's language, which many feared might lead to an overwhelming number of frivolous lawsuits.²⁸⁷

Although businesses are quick to oppose proposed pink tax legislation, often pointing to the ambiguities inherent in legislative proposals, it is possible that a slightly ambiguous national law might still be preferable to a patchwork of state regulations.²⁸⁸ Especially for large businesses that operate within many states, having one set of standards is preferable to fifty separate standards, each with its own slight variation in language. An expensive and complicated piecemeal approach is all that awaits businesses if Congress continues its failure to pass national pink tax legislation.

C. Lessons for Ideal Legislation

Two major themes emerge from a review of the current legislative landscape. First, legislators must be prepared to address opposition from the business community. States such as California and New York have been successful in responding to the concerns of businesses. Both of these states have enacted legislation that balances the need for a remedy to the pink tax with the economic necessity that businesses may continue to compete on the basis of price. For example, these state legislatures included a list of exceptions to account for certain gender-neutral reasons for price differences.²⁸⁹ Further, legislation that allows more flexibility in the definition of "substantially similar" goods and services has been effective in quelling concerns of businesses and in passing through state legislatures.²⁹⁰ Finally, enacted legislation reflects the need for a balance between enforcement power and the permitted level of recovery. In states where higher penalties may be imposed upon violators, successful legislation has limited enforcement to a smaller group, such as only the state attorney general.²⁹¹

Second, there is a scarcity of information relating to enforcement of enacted pink tax legislation. Because of this lack of data, it is unclear whether the enacted legislation has proved effective in eliminating the pink tax.²⁹² As this uncertainty makes it difficult to assess whether the legislation is sufficiently tailored to address the pink tax problem, future legislation must

287. *Id.*

288. Jacobsen, *supra* note 47, at 264.

289. *See supra* notes 165, 204 and accompanying text.

290. *See, e.g., supra* notes 181-84 and accompanying text.

291. *See, e.g., supra* note 179 and accompanying text.

292. *See, e.g., supra* note 157 and accompanying text.

provide a means for evaluating the effectiveness of efforts to end the pink tax.

V. Ideal Legislation

As the congressional pink tax bill's long-time sponsor has said: "This is stupid. This is crazy. This is discrimination. It is time for us to deal with it, and there is a way to deal with it."²⁹³ Yet the solution may not look exactly like Speier thinks it looks. With modification, the currently proposed Pink Tax Repeal Act might have a chance to pass Congress and become an effective consumer protection mechanism.

The pink tax is a complicated issue, with valid concerns on both sides. Currently, the Pink Tax Repeal Act is a comparatively simple piece of legislation that fails to address the economics and equality interests that surround this issue. Ideal legislation must address each interest in turn, balancing the two to find a solution that gives consumers a remedy while preserving the freedom of businesses to set prices and compete. Some may argue that the economic arguments in the pink tax debate are sufficient reason to completely curb any legislative efforts. Although the economic arguments are important to consider, "American society has determined that economic efficiency alone cannot justify discriminatory practices."²⁹⁴ Because the pink tax is a discriminatory practice, the economic arguments must give way to legislation that will promote equality for all consumers.

Given that ideal national pink tax legislation must be politically viable, each provision of the legislation must sufficiently address concerns on both sides of the debate. Beginning with the "substantially similar" standard, the Pink Tax Repeal Act currently requires that the materials, intended use, and functional design and features have no substantial difference for products to fall within the bill's definition.²⁹⁵ Likewise, the bill requires that the time, difficulty, and cost of providing the services is not substantially different.²⁹⁶ The factors listed in the definition for substantially similar services have become standard around the nation. However, the two pink tax laws that have been successfully passed in California and New York incorporate a fourth requirement in their definition of substantially similar goods: that the goods are of the same brand.²⁹⁷ The California law does provide a slightly broader

293. H.R. REP. NO. 117-57, 4010 (2022) (statement of Rep. Jackie Speier).

294. Recent Legislation, *supra* note 158, at 1843.

295. H.R. 7828, 118th Cong. § 2(d)(1) (2024).

296. *Id.* § 2(d)(2).

297. CAL. CIV. CODE § 51.14(a)(3)(A) (West 2023); N.Y. GEN. BUS. LAW § 391-U(1)(d)(i) (McKinney 2024).

definition, though, allowing goods to either be from the same brand or from brands that are owned by the same individual or entity.²⁹⁸ Broadening this requirement to match California's is imperative because the narrower definition of New York's law leaves what some legislators have called a "branding loophole."²⁹⁹ If the law were to require products to come from the same brand in order to be considered substantially similar, businesses could simply move products marketed toward one gender under a different brand name and escape all liability under the law as a result.³⁰⁰ Thus, if the additional branding requirement is added to the current text, it must use the broader language of the California law.

Some may argue that the addition of the "same brand" requirement will make it more difficult for consumers to challenge pink tax pricing. Perhaps that is true. On the other hand, the addition of such a requirement will likely make the law more palatable to businesses. The branding requirement would likely limit businesses' liability exposure as there must be some connection between the goods before an action can be brought challenging their pricing practices.³⁰¹ As businesses remain the primary opposition for every piece of pink tax legislation, legislators must include the same brand requirement in their federal proposal.³⁰²

As currently drafted, some ambiguities remain in the substantially similar standard definitions. Members of the business community often cite ambiguity as one of the main reasons for their opposition to pink tax legislation.³⁰³ In light of such concerns, it is ironic that when Senate Bill 8787 and Senate Bill 2679 were introduced in New York with a more specific definition (i.e., "goods that . . . share ninety percent of the same materials or ingredients"), both bills died in committee.³⁰⁴ Yet the law that was passed in New York in 2020 contained no such specifics, opting instead for broader requirements, like similar intended use and features.³⁰⁵ In the fight of ambiguity and over-definition of terms, ambiguity continues to win in state legislatures.³⁰⁶ Broader language, what some may call "ambiguous"

298. CAL. CIV. CODE § 51.14(a)(3)(A).

299. COMMITTEE ANALYSIS OF ASSEMB. B. 1287, *supra* note 170, at 9.

300. *See id.*

301. *See id.*

302. *See, e.g., supra* note 286 and accompanying text.

303. GovTrack.us, *supra* note 286.

304. S.B. 8787, 2017-2018 Reg. Sess. (N.Y. 2018); *see* S.B. 2679, 2019-2020 Reg. Sess. (N.Y. 2019); *see supra* notes 208, 216 and accompanying text.

305. N.Y. GEN. BUS. LAW § 391-U(1)(d)(i) (McKinney 2024).

306. *See supra* note 223 and accompanying text.

language, is likely preferable for both sides.³⁰⁷ More flexibility in defined terms allows both consumers and businesses more room to find winning arguments in courtrooms. As a result, other than the addition of the broader same brand requirement, the language of the substantially similar definitions in the Pink Tax Repeal Act should remain the same.

Next, drafters of the congressional bill need to add a provision containing factors to determine when differences in pricing may be acceptable. Similar provisions have been included in enacted and proposed legislation around the country and are a vital part of recognizing the validity of economic arguments in the pink tax debate.³⁰⁸ For example, if a product costs more to make, it is reasonable for that product to cost more to purchase. Common factors that have been included in legislation are the time, difficulty, cost, labor, and materials required to manufacture the goods or provide the services.³⁰⁹ A handful of proposed pink tax bills around the nation also incorporate tariffs in the list of exceptions.³¹⁰ Ideal legislation would add tariffs to the list above as that is a cost that is outside the control of businesses and therefore may reasonably be passed down to the consumer.³¹¹ However, drafters should reject addition of the catch-all provisions seen in a few states that allow for price differences based upon “any other gender-neutral reason.”³¹² If the legislation already allows for differences based upon time, difficulty, cost, labor, materials, and tariffs, it is unclear what function the catch-all provision serves other than allowing businesses to argue their way out of any and all liability. Taken to its extreme, the catch-all provision may render the law entirely useless for consumers.

To incentivize and facilitate enforcement, legislators must revise the section of the bill detailing enforcement power and remedies. The Pink Tax Repeal Act is currently drafted to allow only for enforcement by the FTC, state attorneys general, and any designated state consumer protection officer.³¹³ Penalties that may be imposed by the FTC include a fine of \$1,000 to \$5,000 and/or up to a year in prison.³¹⁴ Conversely, state attorneys general and designated state consumer protection officers may seek injunctions,

307. *Contra* Berliner, *supra* note 45, at 106.

308. *See* CAL. CIV. CODE § 51.14(c) (West 2023); N.Y. GEN. BUS. LAW § 391-U(4). *But cf.* Berliner, *supra* note 45, at 94 (arguing that such exceptions make it difficult for consumers to prove gender-based price discrimination).

309. *See* CAL. CIV. CODE § 51.14(c); N.Y. GEN. BUS. LAW § 391-U(4).

310. *See supra* notes 177, 211, 248 and accompanying text.

311. *See supra* notes 47-51 and accompanying text.

312. *See* CAL. CIV. CODE § 51.14(c); N.Y. GEN. BUS. LAW § 391-U(4).

313. H.R. 7828, 118th Cong. § 2(b)-(c) (2024).

314. 15 U.S.C. § 50.

compel compliance, or obtain damages, restitution, or other compensation.³¹⁵ To facilitate enforcement, ideal legislation should require Congress to establish a system for consumers to file complaints.³¹⁶ These enforcement groups have many responsibilities and consumer complaints will help draw attention to particularly egregious violations that demand investigation.

Further, legislators must redraft the bill to allow for a limited private right of action. Handing consumers enforcement power may scare businesses, as it would open the door for class actions. The ensuing trepidation may be mitigated, however, if recovery in private actions is capped at the amount of actual damages.³¹⁷ By excluding the possibility of treble and punitive damages, the likely recovery of a consumer who brings an action under the law would amount to little more than a drop in the bucket for many businesses.

Additionally, private actions, and class actions in particular, have proved vital in bringing change in conversations surrounding other social issues. One notable example is the equal pay class action that was brought by members of the United States Women's National Soccer Team.³¹⁸ Such lawsuits bring voice to issues that otherwise may remain unnoticed. Even if consumers are unsuccessful in arguing their case in court, the media attention garnered when a class sues under the new law might provide enough incentive for businesses to begin changing their pricing practices. With a little incentive, businesses around the United States may begin following the lead of companies like CVS who have already begun taking strides to eliminate gender-based price discrimination.³¹⁹ The increased liability exposure that accompanies the addition of a private right of action might raise concerns among members of the business community;³²⁰ thus, the potential damages in such actions must be limited to quell liability concerns and give the bill a chance to pass through the legislature.

Additionally, to address the current lack of data on enforcement and effectiveness of pink tax legislation around the nation, the bill must include a requirement that Congress publish a report with enforcement statistics and

315. H.R. 7828 § 2(c).

316. *See, e.g., supra* note 188 and accompanying text.

317. *But see* Berliner, *supra* note 45, at 108.

318. Das, *supra* note 16.

319. *See CVS Health Is Here for Women*, CVS, <https://www.cvshealth.com/womens-health.html> (last visited Feb. 24, 2024); *see also* Berliner, *supra* note 45, at 90 (“[I]ncreased awareness and public outrage can successfully push retailers to eliminate the Pink Tax for their customers.”).

320. *See* COMMITTEE ANALYSIS OF ASSEMB. B. 1287, *supra* note 170, at 7.

data reflecting the effectiveness of the legislation in eliminating gender-based price discrimination.³²¹ To allow time for enforcement to begin and data to be collected, the report should be published three years after the act goes into effect. Such data will provide valuable insight for legislators to determine whether amendments are necessary to fine-tune the language of the act or provide more effective enforcement measures.

The Pink Tax Repeal Act, as currently drafted, is oversimplistic and thus insufficient to address the complexities of the pink tax issue. Ideal national legislation will need to account for more nuances if it is to pass Congress and be effective. The definition of “substantially similar” goods should be expanded to include a requirement that the goods come from the same brand or brands that are owned by the same entity or individual. A provision must be added to allow exceptions, accounting for valid reasons for price differentials. Enforcement power should be granted to the individual consumer, though damages in such actions should be capped at actual damages. Each of these changes is vital to creating a piece of legislation that addresses the pink tax problem in a balanced way. The economic arguments must be taken into consideration alongside the desire to end this discriminatory practice. Thus, before any change can occur, Congress needs to revise the current Pink Tax Repeal Act to reflect these considerations. Ruth Bader Ginsburg once said, “Real change, enduring change, happens one step at a time.”³²² This is the first step.

VI. Conclusion

The pink tax is a discriminatory practice that affects women in all states, all walks of life, and at all ages. Each year, these women lose hundreds of their hard-earned dollars when buying the same goods and services as their male counterparts. This is discrimination, and it must be stopped. There are many valid reasons that products and services may be priced differently, but gender alone is not one.

After examining the economics and equality arguments that form the two sides of the pink tax debate, it is clear that each presents important points for consideration when drafting ideal legislation. Current case law where consumers have attempted to use existing consumer protection laws to no avail also bolsters the case for national legislation addressing gender-based price discrimination. Businesses continue to provide the most frequent

321. *See, e.g.*, Identifying Barriers and Best Practices Study Act, Pub. L. No. 116-187, 134 Stat. 903 (2020).

322. RBG at 35:04 (CNN Films, Storyville Films & Participant Media 2018) (interviewing Ruth Bader Ginsburg).

opposition to legislative efforts to end the pink tax. However, the emerging patchwork of legislation around the country will, in time, take a greater monetary toll on businesses as each state adopts its own subtly different standards and imposes higher and higher penalties. Each of these issues will be best addressed by national legislation.

Ideal legislation will provide consumers with a path for relief and have an eye toward progress, while continuing to protect the ability of businesses to compete on the basis of price with their competitors. Legislation must balance both the economic and the equality considerations in order to adequately address the issue. The pink tax is not a simple issue and therefore cannot have a simple solution. The path forward for the Pink Tax Repeal Act will be complicated, but so is progress.

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