Gender, Race & the Inadequate Regulation of Cosmetics

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ABSTRACT: Scholars and other commentators have identified failures in the regulation of cosmetics—which depends heavily on voluntary industry self-regulation—and called for more stringent regulation of these products. Yet these calls have largely neglected an important dimension of the problem: the current laissez-faire approach to the regulation of cosmetics disproportionally places women, and particularly women who are members of other excluded groups, at risk. This Article examines federal cosmetics law and regulation through a feminist lens. It argues that cosmetics law and regulation have lagged behind that of the other major product categories regulated by the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act of 1938 because cosmetics are a gendered product and industry. In addition, conflicting views of the meaning of cosmetics among self-identified feminists, and differences in women’s relationships to cosmetics, mean that reform efforts must confront opposition and tension both within and outside of feminism. Ultimately, this Article questions the legitimacy of the current approach to cosmetics law and regulation. It concludes with several recommendations about how to address some of the failures of cosmetics law and regulation.

INTRODUCTION ........................................................................................................ 277
I. TERMINOLOGY & METHODOLOGY .................................................................. 280
   A. Defining “Cosmetics” ...................................................................................... 280
   B. The “Woman Question” as a Feminist Legal Method ..................................... 282
      1. Defining Feminism ...................................................................................... 283

† Assistant Professor, University of South Carolina School of Law. Thanks to Lewis A. Grossman for inviting me to present a draft of this Article at the American University Washington College of Law and Food and Drug Law Institute Conference, FDA: Past, Present, and Future, and to the conference participants and audience members for their questions, comments, and conversations. Thanks also to Jacqueline R. Fox and Benjamin Means for their feedback and comments on this project, to Jaime R. Harrison for his feedback and comments on drafts of this Article, to Candle M. Wester, Clermon Acklin, Tiffany Pons, and Mary Stamato for their research assistance, and to Vanessa McQuinn for her administrative support.

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II. THE GENDERED & RACIALIZED IMPACT OF THE CONTEMPORARY APPROACH TO THE REGULATION OF COSMETICS

A. Gender, Race, Class & Cosmetics
B. Cosmetics Safety
C. Cosmetics Law & Regulation
   2. Current Law & Regulation
      a. The Federal Food, Drug & Cosmetic Act of 1938 as Amended
      b. FDA Regulations
      c. FDA Staff & Resources
      d. Industry Measures
      e. How Cosmetics Law & Regulation Lag Behind that of Other Product Categories

III. GENDER, FEMINISM & COSMETICS LAW & REGULATION

A. Cosmetics Law & Regulation Have Been Deprioritized as a Result of Women’s Exclusion from Political Participation & Representation, as well as their Longstanding & Close Association with Femininity & Women
   1. The Pure Food & Drugs Act of 1906
      a. Cosmetics Growth & Change, 1906-1938
      b. The Failures of the 1906 Pure Food and Drugs Act & Consideration of Reform
   3. Devaluation of Cosmetics & Cosmetics Law & Regulation

B. Reform of Cosmetics Law & Regulation Must Confront Tensions Resulting from the Debate Among Feminists Regarding the Meaning of Cosmetics & Economic Opportunities in the Cosmetics Industry
   1. The Debate Among Self-Described Feminists
   2. Cosmetics, Entrepreneurship & Economic Opportunity

IV. REFORMING COSMETICS LAW & REGULATION

CONCLUSION
**INTRODUCTION**

The excessive use of lipstick has greatly increased the world’s troubles. Lipstick is not healthful for women. It is not safe for men.1

The approximately fifty billion-dollar American cosmetics and beauty product industry is a gendered industry,2 “created and maintained by women.”3 Whether this industry “is a harmful, objectifying creation or a source of strength and independence for women” has been described as “one of the most contentious debates in American feminisms.”4 Regardless of whether cosmetics are viewed as oppressive, liberating, or something else, many women use or are otherwise exposed to cosmetics.5 For example, 86 percent of women “use some

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2. See ANYA COHEN, IBISWORLD INDUSTRY REPORT 32562: COSMETIC & BEAUTY PRODUCTS MANUFACTURING IN THE US 4 (Mar. 2018). The “cosmetic and beauty product industry” definition is not entirely coterminous with the FDCA’s definition of “cosmetics.” Compare id. at 2, with FDCA § 201(i), 21 U.S.C. § 321(i) (2012); see also infra Section I.A (discussing the FDCA’s definition of cosmetics).


4. Clifford, supra note 3, at 111; see, e.g., FREEDMAN, supra note 3, at 53, 231 (“Cosmetic strategies do help to normalize women, but they insidiously confirm female deviance even while counterbalancing it.”); id. at 231 (“If women don’t want to be regarded as decorative dolls, can they still delight in self-display? Is the ultimate goal to be accepted for oneself—uncoiffed, unadorned, and therefore, in the eyes of many, unkempt? . . . When are cosmetic transformations a negative act of self-rejection, and when are they a positive act of self-enhancement? . . . Many feminists have difficulty finding personal answers to such questions, for they, too, experience the conflict between conviction and convention, between the utopian ideal of natural beauty that includes all, and the actual ideal of cultured beauty that excludes so many.”); NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 113 (1992) (discussing the cosmetics industry and stating that “[w]asting women’s money is the calculable damage; but the damage this fraud does women through its legacy of the dread of aging is incalculable”); BELL Hooks, BLACK LOOKS: RACE AND REPRESENTATION (1992).

5. This exposure may not be voluntary. For example, employers may have dress codes that require female employees to wear makeup. See Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006). Many women are exposed to cosmetics in their workplaces. For example, according to industry estimates, 96% of the workforce in nail salons and other personal care services in the United States is women. CENTERs FOR DISEASE CONTROL & PREVENTION, NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH), NAIL TECHNICIANS’ HEALTH AND WORKPLACE EXPOSURE CONTROL (internal citation omitted), https://www.cdc.gov/niosh/topics/manicure/default.html [https://perma.cc/F7AH-H94U] [hereinafter NIOSH, NAIL TECHNICIANS’ HEALTH]. There is also debate over whether or not cosmetics use can
type of make-up” and women comprise 92.6 percent of hairdressers, hairstylists, and cosmetologists—jobs that often involve exposure to cosmetics.6

The Food and Drug Administration (FDA) regulates “cosmetics” under the Federal Food, Drug, and Cosmetic Act (FDCA). Since enacting the FDCA in 1938, Congress has significantly changed and strengthened the Act’s provisions for the other major product categories that were present in the original 1938 Act (i.e., food, drugs, and medical devices). However, the cosmetics provisions—which span less than two pages of the approximately 500-page amended FDCA—have remained largely unchanged for the past eighty years.7

Accordingly, there is a substantial divide between the law and regulation for cosmetics and that for the other major product categories.8 Cosmetics are the least regulated of the major product categories within FDA’s jurisdiction.9 The Director of FDA’s Office of Cosmetics and Colors has stated, for example, that FDA does not “know the number of manufacturers [of tattoo inks (a type of cosmetic)], who they are, where they are, and what they make.”10 The Director has also indicated that FDA is “just seeing the tip of the iceberg” in terms of the reporting of adverse events related to cosmetics in the voluntary reporting system.11

The cosmetics industry has argued that “[c]osmetics are the safest products that FDA regulates.”12 Yet this does not mean that cosmetics are safe, given the

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8. See infra Section II.C.2.e. (discussing how cosmetics law and regulation lag behind that of other product categories.)


11. FDA, Adverse Event Reports, supra note 10.

large number of people that foodborne illnesses, medications, and tobacco products kill and injure each year.13 Indeed, there is much uncertainty about the safety of cosmetics, and some may not be safe.14 Yet the current approach to cosmetics law and regulation, rather than helping to assess these claims, hinders meaningful evaluation of the safety of the industry.

This Article examines federal cosmetics law and regulation from a feminist perspective.15 Specifically, it asks the “woman question” about cosmetics law and regulation in order to “identify the gender implications” of this regulatory system, “which might otherwise appear to be neutral or objective.”16 The association between cosmetics and femininity is so strong that some readers may question whether there is even a need to ask the “woman question” about cosmetics law and regulation. But as this Article argues, the relationship between the under-regulation of cosmetics and their association with women is both strong and complex. Cosmetics law and regulation have been deprioritized for many reasons, including as a result of differences in women’s usage of cosmetics, the longstanding and close association of cosmetics with femininity and women, and the debate among self-described feminists regarding cosmetics. Explicitly considering how cosmetics law and regulation fail to account for the needs and experiences of women and members of other excluded groups is necessary if these omissions are to be remedied.

13. There are an estimated “106,000 deaths/year from nonerror, adverse effects of medications” in the United States. Barbara Starfield, Commentary, Is US Health Really the Best in the World?, 284 JAMA 483, 484 (July 26, 2000). In addition, the Centers for Disease Control and Prevention estimates that “[a]bout 48 million people (1 in 6 Americans) get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases.” FDA, FOOD SAFETY MODERNIZATION ACT (FSMA), INSPECTION & COMPLIANCE, https://www.fda.gov/food/guidanceregulation/fsma/ucm257978.htm [https://perma.cc/3E FM-LMAW]. About “16 million Americans are living with a disease caused by smoking” and “cigarette smoking is responsible for more than 480,000 deaths per year in the United States.” Centers for Disease Control & Prevention, Fast Facts: Diseases and Death, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm [https://perma.cc/A2AA-4JVC].

14. See also infra Section II.B (discussing potential risks and harms of cosmetics).


This Article proceeds as follows: Part I defines several key terms and introduces the “woman question” as a feminist legal method. Part II examines cosmetics as a gendered product and industry, and highlights several ways that product use and exposure may be shaped by the intersection of gender, race, and class. It then discusses the safety of cosmetics and explains why women, and particularly women who are members of other excluded groups, may be disproportionately impacted by the failures of cosmetics law and regulation. Part II then provides an overview of cosmetics law and regulation, with a focus on how they have lagged behind that of the other major product categories in the FDCA. Against this backdrop, Part III argues that cosmetics law and regulation have been deprioritized as a result of self-described feminists’ participation and representation. It also argues that cosmetics law and regulation have been deprioritized as a result of the debate among self-described feminists over the meaning of cosmetics, as well as differences in women’s relationships to and perspectives on cosmetics. Part IV considers the implications of this analysis for reform. Ultimately, this Article uses a feminist lens to question the legitimacy of the current approach to cosmetics law and regulation and strives to make readers do the same.17

I. TERMINOLOGY & METHODOLOGY

Before turning to a discussion of the gendered and racialized impact of the contemporary regulation of cosmetics in Part II, the current Part discusses several important terms and provides a discussion of the method employed in later sections. In particular, this Article uses an expanded version of “the woman question,” which analyzes “gender . . . within the contexts of multiple identities” to ask how cosmetics law and regulation “leave out or disadvantage women and members of other excluded groups.”18

A. Defining “Cosmetics”

This Article focuses on “cosmetics” as defined under the FDCA. The FDCA defines “cosmetics” to mean “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the

17. See Allison M. Blackman, Manufactured Home Displacement and Its Disparate Impact on Low-Income Females: A Violation of the Fair Housing Act in Boise, Idaho?, 4 THE CRIT: CRITICAL STUD. J. 67, 68-69 (2011) (“Thus, the underlying goal of this article is to challenge and provoke—to raise awareness about involuntary manufactured home displacement, and ultimately to make readers question the legitimacy of ‘fair housing’ laws in their status quo operation.”).
appearance.” The definition includes components of such articles but excludes soap, which FDA has defined narrowly. For example, cosmetics include hair products (e.g., hair dyes, permanent waves, relaxers, cleansing shampoos, and conditioners), makeup (e.g., eye products, lipstick, novelty makeup, permanent makeup, and tattoo ink), nail products (e.g., fingernail polishes and artificial nails), perfumes, deodorants, and skin moisturizers.

Because the subject of this Article is cosmetics law and regulation, this Article focuses on products that FDA regulates as cosmetics, not as cosmetics and another product category (i.e., products with dual classification). It is important to note, however, that “cosmetics” may also meet the definition of one of the FDCA’s other product categories. For example, a “cosmetic” may also be a “drug,” which includes articles intended for therapeutic use and “articles . . . intended to affect the structure or any function of the body of man.” The intended use of a product is central to determining whether it is a cosmetic or a drug or both. The classification of a product determines the scope of FDA’s authority over it and the requirements that the manufacturer must meet. If a product is a drug or a drug and a cosmetic, it is subject to the requirements for

20. Id. The FDA has interpreted the term “soap” to mean articles where “[t]he bulk of the nonvolatile matter . . . consists of an alkali salt of fatty acid and the detergent properties . . . are due to the alkali-fatty acid compounds” and articles that are “labeled, sold, and represented only as soap.” 21 C.F.R. § 701.20 (2018).
22. Cosmetics may include ingredients that are regulated as “color additives;” however, these are distinct regulatory categories with distinct regulatory requirements. See FDCA § 201(i), 21 U.S.C. § 321(i) (2012) (“color additive”); FDCA § 301(i), 21 U.S.C. § 321(i) (2012) (“color additive”); FDCA § 721, 21 U.S.C. § 379e (2012) (Listing and Certification of Color Additives for Foods, Drugs, Devices, and Cosmetics). Unlike “cosmetics,” “color additives” have to be listed (i.e., approved) for a particular use before being so used. Id. Perhaps most importantly for the purposes of the current analysis, “color additives” are not limited to use in cosmetics. Id. FDA may approve a color additive for use in or on food, drugs, and devices—product categories that unlike cosmetics do not have a long gendered-history. See infra Section II.A.
23. See 21 U.S.C. § 359 (stating that the drugs and devices subchapter of FDCA “shall not apply to any cosmetic unless such cosmetic is also a drug or device”); see also FDA, IS IT A COSMETIC, A DRUG, OR BOTH? (OR IS IT SOAP?), https://www.fda.gov/cosmetics/guidanceinformation/lawsregulations/ucm074201.htm [https://perma.cc/U3X4-2N3A].
25. See FDCA § 201(g), (i), 21 U.S.C. § 321(g), (i) (2012); see also Laura A. Heymann, The Cosmetic/Drug Dilemma: FDA Regulation of Alpha-Hydroxy Acids, 52 FOOD & DRUG L.J. 357, 358 (1997) (stating that the answer to the question of whether a product is a cosmetic or a drug under most interpretations of the FDCA is “rooted not in the chemical composition or physiological effect of AHAs but rather in how the manufacturer has positioned the product and the promises made as to its effects”). But see PETER BARTON HUTT ET AL., FOOD AND DRUG LAW: CASES AND MATERIALS 118 (4th ed. 2014) (“FDA has manifested an inclination to categorize articles containing pharmacologically active ingredients as drugs even when their manufacturers make only cosmetic claims.”). The cosmetics industry uses the term cosmeceutical to “refer to cosmetic products that have medicinal or drug-like benefits,” but neither FDCA nor FDA recognize this term. FDA, COSMECEUTICAL, https://www.fda.gov/cosmetics/labelling/claims/ucm127064.htm [https://perma.cc/RHV7-X36X].
drugs, which are much more stringent than those for cosmetics. For example, FDA must approve a “new drug” before it can be lawfully sold, whereas no approval is needed for a cosmetic.

Because cosmetics law and regulation lag so far behind the law and regulation of the other major product categories, there is a lot riding on a product’s classification and it is a significant source of tension: indeed, one commentator wrote that this tension “has been the primary feature of the evolution of cosmetic law in the last fifty years.”

Finally, because some of the literature and sources cited in this Article use terms such as personal care products, beauty products, beauty supplies, and toilet preparations, it is important to note that while these terms may include “cosmetics,” they are not coterminous with the legal definition of cosmetics. For example, these terms may include products that fall within another product category under the FDCA (e.g., drugs, devices, or dietary supplements) or outside of its reach entirely (e.g., consumer products).

B. The “Woman Question” as a Feminist Legal Method

This Section begins by defining feminism. It then discusses the “woman question” as a feminist legal method—including the method’s strengths and limitations—and how this Article employs the method to examine federal cosmetics law and regulation.

26. See infra Section II.C.2.e.
29. Greff, supra note 27, at 243.
31. See Bartlett, supra note 16.
1. Defining Feminism

The term “feminism” is “troublesome”: it is “confusing and difficult” and even the notion of “defining” feminism is controversial.”32 It has been defined both narrowly and broadly, and is not static.33 Despite the many definitions of feminism, feminism does have boundaries.34 It “takes gender as a central category of analysis.”35 One definition of feminism is “the movement for social, political, and economic equality of men and women.”36 Feminism according to this definition consists of a movement with goals for change, “[a]nd implicit in these goals is access to sufficient information to enable women to make responsible choices.”37 Although having the benefits of being concise, this definition is not unproblematic, as like other short definitions it “reduce[s] the subtle complexity of a messy field of knowledge to [a] neat slogan[].”38

In her article, Feminist Critical Theories, Deborah L. Rhode identifies several common features of the critical feminist theories that she examines.39 Specifically, she states that (1) “they seek to promote equality between women and men;” (2) they “make gender a focus of analysis” and “aim . . . to reconstitute legal practices that have excluded, devalued, or undermined women’s concerns;” and (3) they “aspire to describe the world in ways that correspond to women’s experience and that identify the fundamental social transformations necessary for full equality between the sexes.”40 While the approach of feminist theory differs from other critical approaches, like critical legal studies and critical race scholarship, it also overlaps and often draws upon these approaches.41 The general goal of these theories, “to challenge existing distributions of power,” is one which this Article shares.42

32. CHRIS BEASLEY, WHAT IS FEMINISM? AN INTRODUCTION TO FEMINIST THEORY ix, xi (1999).
33. Id. at xiv, xiii, 25-48.
34. Id. at xv.
37. Id.
38. See BEASLEY, supra note 32, at 26 (noting that despite the benefits of short definitions of feminism, such definitions “are of limited value if you want to grasp the character of the term, feminism, more fully and appreciate its heterogenous forms”).
40. Id. at 619.
41. Id. at 618–19.
42. Id.
2. Asking the “Woman Question”

In Feminist Legal Methods, Katharine T. Bartlett describes the “woman question” as a set of questions “designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.”\(^{43}\) She phrases these questions as: “[H]ave women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so?”\(^{44}\) This inquiry “helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.”\(^{45}\)

The “woman question” has been used to “examin[e] how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women.”\(^{46}\) There is a long history of feminist scholarship asking the “woman question” about diverse areas of the law.\(^{47}\) For example, it has been asked in some form about voting limitations, legal inequities associated with marriage, and birth control.\(^{48}\) It has also been asked about the Restatement (Third)’s standard for medical product defect claims,\(^{49}\) pharmacist refusal clauses,\(^{50}\) health care reform,\(^{51}\) and how the legal system has responded to HIV infection.\(^{52}\)

This Article adds to the existing literature by asking the “woman question” about federal cosmetics law and regulation. Cosmetics are a highly gendered product and industry. This Article uses the “woman question” to argue that by allowing cosmetics law and regulation to lag behind that of the other traditional

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\(^{43}\) Bartlett, supra note 16, at 837.

\(^{44}\) Id. While different scholars have framed the questions somewhat differently, there is substantial overlap in how they have done so. See, e.g., Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN’S L.J. 64, 72-76 (1985) (discussing seven questions, the first four of which “help . . . to identify how law and existence is gendered by patriarchy” and the last three of which “involve the challenge of inventing, of imagining a world for which [there are] no givens”); see also Lydia A. Clougherty, Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability, 75 Neb. L. Rev. 1, 8 (1996) (discussing the essential features of the “woman question” and providing examples of questions that have been asked).

\(^{45}\) Bartlett, supra note 16, at 843.

\(^{46}\) Id. at 837.

\(^{47}\) See id. at 838; see also Clougherty, supra note 44, at 3 n.7 (listing law review articles that apply the “woman question” to different areas of the law).

\(^{48}\) Bartlett, supra note 16, at 838.

\(^{49}\) Dolly M. Trompeter, Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment E Is the Answer to the Woman Question, 48 AM. U. L. REV. 1139, 1145 (1999).


\(^{51}\) See John A. Robertson, Asking the “Woman Question” About Health Care Reform, 3 TEX. J. WOMEN & L. 1 (1994).

\(^{52}\) Breanne Sergent, Comment, To Include or to Exclude? The Policy Question Plaguing Women’s Role in Clinical Trials, 34 J. LEGAL MED. 235 (2013); Mary Anne Bobinski, Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation, 3 TEX. J. WOMEN & L. 7, 56 (1994). And although not explicitly identified as such, it has been asked about FDA’s drug approval process and women’s representation in clinical trials. Christina Cole, Comment & Note, Women and the FDA: Remediating the Past and Preserving the Future, 7 HOU. J. HEALTH L. & POL’Y 127 (2006).
product categories that FDA regulates under the FDCA and by failing to adequately regulate cosmetics, Congress and FDA have left women—and their needs and experiences—out of consideration, thereby jeopardizing their health. However, at the same time that this Article asks the “woman question,” it also recognizes that this method is not without its limitations and has been the subject of critique.53

First, using “women” as a category is problematic.54 It is too general in that it obscures the fact that women and their experiences are not monolithic and undifferentiated, and thus risks essentialism.55 Focusing on women as a category of analysis, without recognizing that women’s experiences are shaped by other factors such as race, ethnicity, sexual orientation, and class, which intersect and interact with gender and shape women’s experiences, excludes women who are burdened on more than one dimension.56 For example, Kimberlé Crenshaw has argued with respect to black women that “[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”57 Of particular relevance to the current analysis, Angela P. Harris has argued that “[t]he relation of black women to the ideal of white beauty is not a more intense form of white women’s frustration: It is something other, a complex mingling of racial and gender hatred . . . .”58 These other factors do not simply magnify the effects of gender, but intersect and interact with gender to mold women’s experiences. The result of essentialism, Harris has argued, “is not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice . . . among them, the voices of black women.”59 Indeed, one longstanding critique of mainstream feminism and feminist legal thought is that they privilege already “race- and class-privileged

53. See Bartlett, supra note 16, at 837-49. As Bartlett notes, some may question whether the “woman question” is really just “a mask for something else, such as legal substance, or politics.” Id. at 843-44. Just because the method shapes substance, however, does not mean that it is substance. Id. Indeed, this is not a distinguishing feature of the “woman question” as a legal method as “all legal methods shape substance.” Id. at 844-45.
55. See, e.g., Bartlett, supra note 16, at 872-73; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 615 (1990) (arguing “that gender essentialism is dangerous to feminist legal theory because in the attempt to extract an essential female self and voice from the diversity of women’s experience, the experiences of women perceived as ‘different’ are ignored or treated as variations on the (white) norm”).
57. Crenshaw, supra note 56, at 140.
58. Harris, supra note 55, at 597-98.
59. Id. at 585.
women.”60 There is also a risk that the use of “woman” as a category may “reinstate . . . the isolation and stigmatization of women.”61

In the context of the current analysis, the use of “women” as a category is problematic because factors other than gender likely impacted the development of cosmetics law. For example, many of the prominent advocates of reform were white middle- and upper-class women who brought their respective values to their reform work.62 The use of “women” is also problematic because different women use and are exposed to cosmetics in different and particular ways, and the risks that this exposure poses are shaped by a variety of factors; therefore, the inadequate regulation impacts them in different and particular ways.63 Race, ethnicity, sexual orientation, age, socio-economic status, and other factors impact women’s experiences with and exposure to cosmetics and how the limitations of current cosmetics law and regulation impact them.64 For example, the risks to an African American woman who uses chemical relaxers and deep conditioners;65 a Vietnamese immigrant woman who works in a nail salon;66 and a white woman who uses dark hair dyes may differ.67 Yet all of these women may be exposed to risks from cosmetics.

Because “factors other than gender victimize women,” it is necessary to ask about other excluded groups.68 Bartlett suggests recasting the “woman question”


61. See Bartlett, supra note 16, at 835.

62. KAY, supra note 3, at 15, 17, 31; see also id. at 31-33 (discussing “morality of visible makeup”); PEISS, supra note 3, at 7, 41 (discussing “morality of visible makeup” and racial attitudes towards cosmetics).


64. See Rhode, Feminist Critical Theories, supra note 35, at 622; Harris, supra note 55, at 587.


67. Llanos et al., supra note 55.

as the “Question of the Excluded,” asking how “women and members of other excluded groups” have been left out or disadvantaged.69 Thus, in considering the “woman question” in the context of cosmetics law, this Article considers how “factors other than gender victimize women” and asks about other excluded groups since “analysis of gender must occur not apart from but within the contexts of multiple identities.”70 In addition, this Article tries to specify the women to which it refers.71 Yet even the more specific categories which this Article uses may be too general in that they risk other forms of essentialism.72 As Harris has remarked in critiquing gender essentialism by focusing on black women, “her aim is not to establish a new essentialism . . . based on the essential experience of black women.”73 Similarly, the aim of this Article is not to replace gender essentialism with other forms of essentialism.

Using “women” as a category for analysis, however, is also too specific. Men also use and are exposed to cosmetics.74 The dangers and risks to human health that cosmetics may pose cannot be controlled by only focusing on women.75 The reforms that this Article proposes in the final Part are likely to have broader benefits in terms of understanding and assessing the risks of cosmetics.

Asking about how cosmetics law and regulation impact “women” creates the illusion of a binary world—woman or man, female or male, feminine or masculine—which fails to account for the complexities of sex and gender.76

69. Id. at 831, 847-48.
70. Id. at 847.
71. See id. at 848 (stating that “any analysis using the general category of woman is itself exclusionary” and discussing E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988), which, according to Bartlett, “suggests that in speaking of ‘women,’ the speaker should name explicitly which women she means”).
72. See Harris, supra note 55, at 585; Bartlett, supra note 16, at 848 (“Any category, no matter how narrowly defined, makes assumptions about the remaining characteristics of the group that fail to take account of members of the group who do not have those characteristics.”); see also Harris, supra note 55, (“My suggestion is only that we make our categories explicitly tentative, relational, and unstable. . . .”).
73. See Harris, supra note 55, at 585.
75. See Minow, supra note 54, at 2.
76. See, e.g., Sara R. Benson, Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed, 12 CARDOZO J.L. & GENDER 31 (2005) (discussing the rights of intersexed people and “[t]he gender binary model [which] posits that only two sexes exist and that every person must fit easily into the category of male or female” and arguing for a right to gender identity, which would recognize “a variable spectrum of gender induced identities”); Katie Reineck, Note, Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People, 24 MICH. J. GENDER & L. 265, 266 (2017) (noting that “non-binary people—who do not identify within the accepted gender binary as men or women. . . . may present in a way typically associated with women, by wearing makeup, keeping their hair long, or wearing clothing sold in the women’s section; in a way typically associated with men, by keeping their hair short, growing facial hair, or wearing clothing sold in the men’s section; or may present androgynously by mixing elements of the two”).
Although sex and gender have often been conflated in the law,\(^{77}\) many have argued that these should be distinguished, as sex is not gender, but “merely one component” of it.\(^{78}\) Especially relevant to the current analysis is the fact that transgender and non-binary individuals use cosmetics and thus are impacted by the state of cosmetics law and regulation.\(^{79}\)

Despite the limitations of the “woman question,” it is a useful frame of analysis and “it still makes sense to talk about ‘women.’”\(^{80}\) First, imperfect as these categories are, analyzing cosmetics law and regulation using categories—including “women”—helps to illuminate the shortcomings of the current regulatory approach.\(^{81}\) Second, the current analysis is constrained by the limitations of the existing data, information, and scholarship that it examines. Many of these sources use “women” as a category and reflect a binary understanding of gender. Nuanced gender information is often unavailable and sources addressing cosmetics, their use, and the people that influenced early regulatory approach.

There is a need for explicit examination of how cosmetics law and regulation have impacted and continue to impact transgender and gender non-conforming individuals. As the cosmetics industry is beginning to explicitly recognize, many transgender and gender non-conforming individuals use cosmetics.\(^{83}\)
This information deficit relates to another feature of the “woman question” that should be acknowledged from the outset. As a legal method the “woman question” “neither guarantees a particular result nor even the right result.” Accordingly, it “does not require decision in favor of a woman,” but rather seeks to expose “interests and concerns that otherwise may be, and historically have been, overlooked.” Accordingly the reforms that this Article suggests in the final Part are aimed at providing additional information in order to better assess the risks that the current regulatory approach poses. This Article proceeds mindful of the limitations of its chosen method.

II. THE GENDERED & RACIALIZED IMPACT OF THE CONTEMPORARY APPROACH TO THE REGULATION OF COSMETICS

This Part begins by discussing the gendered nature of cosmetics in the United States. Although men use cosmetics, cosmetics are strongly associated with women and femininity, and, on average, women use more cosmetics. Cosmetics use is also shaped by factors other than gender, including race, ethnicity, socioeconomic status, and age. This Part also discusses the risks to women’s health that cosmetics may pose and how such risks may be shaped by factors other than gender. It argues that because cosmetics are a highly gendered product and industry, failures in cosmetics law and regulation may disproportionately jeopardize the health of women, particularly women who are members of other excluded groups. This Part then provides an overview of the cosmetics provisions of the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), which largely remain unchanged. Finally, it examines current cosmetics law and regulation and how they lag behind the law and regulation for other major product categories regulated under the FDCA.

A. Gender, Race, Class & Cosmetics

Cosmetics are a highly gendered product and industry. On average, women use more cosmetics than men. For example, one survey found that “[t]he


85. Id. at 846.
86. There is, however, a “growing permissibility” of cosmetics and hair dye for straight men. ROBIN TOLMACH LAKOFF & RAQUEL L. SCHERR, FACE VALUE: POLITICS OF BEAUTY 224 (1989); see also Jacob Gallagher, More Men Are Wearing Makeup Than You Think—Here’s Why, WALL ST. J. (Apr. 13, 2018), https://www.wsj.com/articles/more-men-are-wearing-makeup-than-you-thinkheres-why-1523626771
average woman uses 12 products containing 168 unique ingredients every day,” whereas the average man “use[s] 6 products daily with 85 unique ingredients.”

Another poll found that 54 percent of male respondents indicated that they use no “skin care and styling products (such as moisturizers, hair styling products, and makeup) . . . to get ready in the morning on a typical day” whereas only 16 percent of female respondents indicated they use no products. A larger portion of women than men indicated that they use three or more products (45 percent vs. 11 percent). And as noted earlier, most women (86 percent) use makeup—a type of cosmetic.

Cosmetics use may not be voluntary for women. For example, employers may have gendered employee dress codes that require female—but not male—employees to wear makeup. And even when employers do not require women to use cosmetics, women may face other pressures to do so. For example, cosmetics use can impact how people perceive themselves and are perceived by others and may have significant effects on both interpersonal relationships and economic opportunities.

Women also may be exposed to cosmetics through their employment. Women are significantly more likely than men to hold certain jobs that often involve exposure to cosmetics as beauty work is often done for women by others and may have significant effects on both interpersonal relationships and economic opportunities.

[https://perma.cc/TAN8-UNVX]; Peiss, supra note 3, at 265. The men’s grooming and personal care products industry in the United States has grown in recent years. See, e.g., Men’s Personal Care, supra note 3.

87. EWG, Exposures Add Up, supra note 74.
89. Id. The number of products used varied by other factors including age, race, and education. Id.
90. Color Cosmetics, supra note 6; FDCA § 201(i), 21 U.S.C. § 321(i).
91. See Jespersen v. Harrah’s Operating Co., 392 F.3d 1076 (9th Cir. 2004). Jespersen v. Harrah’s Operating Co. was a case that involving a female bartender who was fired for refusing to wear makeup in violation of her employer’s appearance standards. Id. Her case was not successful. Id. The Ninth Circuit Court of Appeals affirmed the grant of summary judgment to the employer; it held that the employee failed to establish a prima facie case of gender discrimination under Title VII of the Civil Rights Act of 1964. Id. Employer dress codes may have class implications.

92. Beauty serves as a “proxy for status and ability.” Nancy L. Etcoff et al., Cosmetics as a Feature of the Extended Human Phenotype: Modulation of the Perception of Biologically Important Facial Signals, 6 PLoS ONE e25656 (Oct. 2011), http://journals.plos.org/plosone/article?id=10.1371/journal. pone.0025656#pone.0025656-Etcofff2 [https://perma.cc/6HK5-8YMS]. However, beauty is malleable. Lauren Silverio, Makeup’s Effects on Self-Perception (Old Dominion Univ., STEM Educ., & Prof’l Stud., OTS Master’s Level Projects & Papers 49, 2010), https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1048&context=ots_masters_projects [https://perma.cc/4JPT-HKEJ]. For example, one study found that study participants “[w]hen inferring trustworthiness, likeability, or competence from an image” of a woman, were “influenced significantly” not only by inherited features “but by the effects of . . . makeup.” Etcoff, supra.

women. For example, in 2017, 92.6 percent of hairdressers, hairstylists, and cosmetologists were women. In addition, 90.5 percent of the people employed in beauty salons were women, as were 73.9 percent of those in nail salons and other personal care services.

Factors other than gender also impact cosmetics use and exposure. Cosmetics usage and exposure differ among women of different racial and ethnic groups. For example, African Americans’ spending on personal care products as a portion of the total market, according to one estimate, exceeds their portion of the U.S. population, which “suggest[s] that they buy and use more such products.” Another study similarly found that African American women spend 80% more than the general market on cosmetics, and two times that of other ethnic groups on hair products.

Indeed, there also may be racial differences in the types of cosmetics women use. For example, many African American girls have chemical relaxers applied to their hair for the first time during childhood and “African American . . . women are more likely [than white women] to use a greater number and variety of hair products, and to have their hair chemically or professionally treated.” In addition, “Black women are more likely . . . to use vaginal douches as well as other fragranced feminine cleansing products such as sprays and wipes.”

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94. Peiss, supra note 3; Kay, supra note 3. While the economic opportunities in the cosmetics industry provides should not be minimized, it is important to recognize that these opportunities may be accompanied by workplace exposure to the cosmetics and associated risks. See infra Section II.B.

95. BLS, Detailed Occupation, supra note 6. Of those 76.7% were white, 16.3% Hispanic/Latina, 13.5% black, and 5.6% Asian. Id.


97. Zota & Shamasunder, supra note 63, at 418–20 (noting that “[w]orkers in the beauty industry, who are predominately women of color and immigrant women, can . . . face occupational health hazards from chemicals in professional cosmetic products”).


100. Dark-skinned women of various races may disproportionately use skin lightening creams, which have several potential adverse outcomes. See Zota & Shamasunder, supra note 63, at 419 (table); see also Imani Perry, Buying White Beauty, 12 CARDOZO J.L. & GENDER 579, 590-91 (2006) (discussing skin-bleaching creams and stating that “[t]he whitening of the world’s wealthy is a much safer affair than that of its poorer, and blacker, populations”).

101. Zota & Shamasunder, supra note 63, at 419.

102. Id. at 420.
There also may be significant racial differences in employment in certain jobs that involve the use of cosmetics. For example, while 76.7 percent of hairdressers, hair Stylists, and cosmetologists are white and 5.6 percent are Asian, only 44.8 percent of people employed in “nail salons and other personal care services” are white and 46.3 percent are Asian.

Furthermore, there may be class differences between beauty workers and customers. For example, in The Managed Hand: Race, Gender, and the Body in Beauty Service Work, Miliani Kang “explore[s] commonalities and differences” among Asian immigrant women in the nail salon industry in the United States. She discusses how nail salons bring “women who usually would not find themselves in the same social circles” into close physical contact and how these interactions “demonstrate how women inhabit bodies differently as well as how women’s bodies are differentially valued and employed.” Kang explores how gender, race, and class interact in nail salons through “three different forms of body labor at Asian-owned nail salons: ‘pampering body labor’ in nail art salons serving mostly white upper- and middle-class women; ‘expressive body labor’ in nail art salons serving mostly black working- and lower-middle-class women; and ‘routinized body labor’ at discount nail salons serving racially and socioeconomically mixed customers.”

B. Cosmetics Safety

The cosmetics industry and FDA have stated that “[c]osmetics are the safest products that FDA regulates.” But even if cosmetics are the safest products that the agency regulates, cosmetics are not necessarily safe, as the harms caused by other products that FDA regulates are well-documented.

103. BLS, DETAILED OCCUPATION, supra note 6.
104. BLS, DETAILED INDUSTRY, supra note 96.
106. Id. at 11-12.
107. Id. at 16.
While a comprehensive review of the literature on cosmetics safety is beyond the scope of this Article, there is reason to be concerned about the potential hazards that cosmetics may pose. Other legal scholars and commentators have discussed the potential risks of a host of cosmetics products, ingredients, and contaminants, including phthalates, permanent hair relaxers, spray tan solutions, tattoos and micropigmentation inks, henna (and henna containing PPD and lead), nail salon products, nanoparticles, and chemicals that have the potential to disrupt the human endocrine system. The potential hazards that the literature discusses vary, and include severe scalp burns, early puberty in girls, premature delivery, adverse effects on male reproductive development, and cancer.

Women may be disproportionately impacted due to differences in exposure. As noted earlier, on average, women use more cosmetics than men and are exposed to more chemicals than men through this use. Women may also be exposed to cosmetics through their work, as “beauty work” is often done by women. Women also may be uniquely vulnerable to potential health harms from chemical exposure. For example, women’s bodies may “store chemicals cumulatively more effectively than men’s bodies, placing women at greater

(drugs); U.S. FOOD AND DRUG ADMINISTRATION, TOBACCO PRODUCTS, https://www.fda.gov/TobaccoProducts/default.htm [https://perma.cc/4DMF-3NUV] (tobacco products); supra note 13 (discussing harms of drugs, foodborne diseases, and cigarettes).

110. The focus of this Article is on physical risks, but cosmetics may pose economic harms as well. See Bryan A. Liang & Kurt M. Hartman, It’s Only Skin Deep: FDA Regulation of Skin Care Cosmetics Claims, 8 CORNELL J.L. & PUB. POL’Y 249, 250 (1999) (“However, the FDA’s focus on physical safety, and its attempted designation of skin care cosmetics as drugs, has ignored the significant responsibility of the agency to protect against highly questionable efficacy claims by certain cosmetics manufacturers.”); Amity Hartman, FDA’s Minimal Regulation of Cosmetics and the Daring Claims of Cosmetic Companies That Cause Consumers Economic Harm, 36 W. ST. U. L. REV. 53, 54 (2008) (“The current regulatory scheme does not always give consumers adequate economic protection.”).


118. See, e.g., Shah & Taylor, supra note 99, at 211–18.

119. See supra Section II.A.

120. PEISS, supra note 3; KAY, supra note 3; supra note 69 and accompanying text; supra Section II.A.
risk.”121 Women of reproductive age and their offspring may be at particular risk from these exposures, as “preconception and prenatal exposure to toxic environmental agents can have a profound and lasting effect on reproductive health across the life course.”122

Women who are members of other excluded groups may be at even greater risk. These women may use or otherwise be exposed to more cosmetics, including particular types of cosmetics, as cosmetics usage and work are not only gendered, but also differ by race.123

The cosmetics that women who are members of other excluded groups are exposed to also may be more hazardous. For example, Imani Perry suggests that “the availability of technological resources is higher for those who are already privileged” and that this may reinforce existing hierarchies: “[i]f one can afford to . . . purchase the gentler products, the odds are that the person is already closer to the [beauty] ideal.”124 One analysis found that “[a] smaller share of hair and beauty products marketed to Black women scored low in potentially harmful ingredients than products aimed at the general public.”125 Cosmetics have been associated with health hazards in women of color.126 For example, one study found an association between using hair dye more than twice a year, use of dark hair dye shades, and salon application of hair dyes and the risk of estrogen-positive breast cancer in African American women.127

Some women may have greater exposure to toxic environmental chemicals due to a variety of factors. A report by the Committee on Health Care for Underserved Women of the American College of Obstetricians and Gynecologists notes that “harmful environmental exposure is inequitably and unequally distributed, which leaves some populations, including underserved

121. De Paz, supra note 117, at 341.
122. Id.; Shah & Taylor, supra note 99, at 209. One analysis found that women ages eighteen to thirty-four—women of reproductive age—are more likely to be “the heaviest buyers of cosmetics.” Millennial Women Key to Growth in Cosmetics Industry, TABS ANALYTICS BLOG (Jan. 20, 2016), https://www.tabsanalytics.com/blog/millennial-women-key-to-growth-in-cosmetics-industry [https://perma.cc/Y2NX-S7WP]; see also AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS COMMITTEE ON GYNECOLOGIC PRACT., COMMITTEE OPINION, NUMBER 589, FEMALE AGE-RELATED FERTILITY DECLINE (Mar. 2014 reaffirmed 2018), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Gynecologic-Practice/Female-Age-Related-Fertility-Decline [https://perma.cc/M4HU-YF75] (discussing age and fertility).
123. See Perry, supra note 100, at 588; see also Zota & Shamasunder, supra note 63.
124. Perry, supra note 100, at 595.
125. PESTANO ET AL., supra note 98.
126. See, e.g., Lauren A. Wise et al., Hair Relaxer Use and Risk of Uterine Leiomyomata in African-American Women, 175 AM. J. EPIDEMIOLOGY 432, 435 (2012) (finding “increased risks of uterine leiomyomata in association with ever use of hair relaxers, duration of use, frequency of use, and total number of burns experienced during use”); Jasmine A. McDonald et al., Hair Product Use, Age at Menarche and Mammographic Breast Density in Multiethnic Urban Women, 17 ENVIRON. HEALTH 1, 8 (2018) (concluding that “childhood hair product use is associated with earlier age at menarche, an established risk factor for breast cancer”).
127. Llanos et al., supra note 65, at 888. The study also found an association between certain hair products and breast cancer in white women. Id. The study noted that there are differences in product use among African American and white women. Id.
women, more vulnerable to adverse reproductive health effects than other populations.” 128 The exposure sources listed for some of the chemicals linked to negative reproductive or developmental health effects in the report include cosmetics and personal care products. 129 “[B]eauty product use may be one way that structural discrimination becomes biologically embedded,” as racial discrimination can influence product use and “[t]argeted racial/ethnic marketing can influence product use and related health inequities.” 130

Some workplaces may expose the women who work in them to high levels of potentially toxic chemicals from cosmetics. 131 For example, one study of Vietnamese women working in nail salons in California noted that “[n]ail technicians handle solvents, glues, polishes, and other agents on a daily basis exposing them to numerous chemicals, many of which are known or suspected to cause cancer, allergies, and respiratory, neurologic, and reproductive harm.” 132 The study measured levels of total volatile organic compounds that exceed the Environmental Protection Agency’s recommended levels and were “in the range . . . at which discomfort is expected and complaints of health symptoms, including headaches and irritations of the eyes, nose, and throat, are common.” 133

Because of differences in usage, exposure, and biology, women may be subject to greater risk from exposure to toxic chemicals in cosmetics than men are. As a result, any regulatory failure to control these risks may disproportionately impact women. Furthermore, because of differences in usage and exposure, women who are members of other excluded groups may be at particular risk. This Article now turns to the shortcomings of cosmetics law and regulation.

C. Cosmetics Law & Regulation

Despite significant changes in the law with respect to the other major product categories under FDA’s jurisdiction, the FDCA’s cosmetics provisions have remained largely unchanged since the Act was passed in 1938. This Section begins with an overview of the 1938 Act. It then discusses the current laws and regulations with an emphasis on the changes since the FDCA was enacted. It also discusses the cosmetics industry’s self-regulatory measures and how FDA

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128. EXPOSURE TO TOXIC AGENTS, supra note 63, at 1.
129. Id. at 3-4 tbl.2.
130. Zota & Shamasunder, supra note 63, at 419.
131. Women who receive services in these locations may also be exposed to potentially toxic chemicals although likely for shorter time periods than workers. Cosmetics intended for professional use only are less regulated than those intended for consumer use, which may also lead to differences in exposure. See supra Section II.2.d-e.
133. Id. at S274.
regulates cosmetics in this environment. This Section ends by highlighting several significant differences between how cosmetics and other products are regulated. It argues that the divide between cosmetics law and regulation and the law and regulation of the other major product categories defined in the FDCA has grown since the 1938 Act was first enacted. These changes have deprioritized the regulation of cosmetics, the product category most closely associated with women. The limitations of cosmetics law and regulation hinder the ability to meaningfully assess the safety of cosmetics.


The 1938 FDCA created the first federal law for the regulation of cosmetics.134 As discussed in Section I.A, cosmetics are “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance,” including articles intended to be a component of those articles, but not soap.135

The FDCA prohibited certain acts related to the misbranding and adulteration of cosmetics as well as the causing of those acts provided that certain interstate commerce connections were met.136 The FDCA provided that a cosmetic is adulterated if it “contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the [its] labeling . . . or under such conditions of use as are customary or usual,” but it excepted coal-tar hair dyes that comply with certain labeling requirements.137 The FDCA also provided that a cosmetic that “consists in whole or in part of any filthy, putrid, or decomposed substance” or that “has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health,” is adulterated.138 A cosmetic’s container could also render the cosmetic adulterated if the “container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.”139 The FDCA also provided that a cosmetic other than a hair dye containing a coal-tar color that had not been properly batch certified is adulterated.140

135. Id. § 201(i). The definition of cosmetics in the original Act has remained unchanged. Compare id., with FDCA § 201(i), 21 U.S.C. § 321(i) (2012).
136. FDCA § 301 (1938).
137. Id. § 601(a).
138. Id. § 601(b)-(c).
139. Id. § 601(d).
140. Id. § 601(e).
The FDCA also provided that a cosmetic with labeling that “is false or misleading in any particular” is misbranded. A packaged cosmetic is also misbranded if it does not bear a label with “the name and place of business of the manufacturer, packer, or distributor,” and “an accurate statement of the quantity” of contents. Other misbranding provisions addressed the prominence of required information and misleading containers.

2. Current Law & Regulation

a. The Federal Food, Drug & Cosmetic Act of 1938 as Amended

Since 1938, the FDCA’s cosmetics provisions have changed little. The FDCA has grown from about 10 pages to nearly 500, yet the cosmetics provisions remain less than two pages. As in the original act, the current cosmetics provisions focus on prohibiting the certain acts related to the adulteration and misbranding of cosmetics, and like the original act, they except coal-tar hair dyes from the adulteration provision for cosmetics containing any poisonous or deleterious substance.

141. Id. § 602(a).
142. Id. § 602(b).
143. Id. § 601(c)-(d).
146. The FDCA provides that a cosmetic that “contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the [product’s] labeling . . . or under such conditions of use as are customary or usual” or that contains an “unsafe” color additive as defined in FDCA § 721 (21 U.S.C. § 379e(a)) is adulterated, although it excepts coal-tar hair dyes. FDCA §§ 301, 601, 21 U.S.C. §§ 331, 361 (2012). A cosmetic’s container can also render the cosmetic adulterated if the “container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.” Id. Finally, the FDCA also provides that a cosmetic that “consists in whole or in part of any filthy, putrid, or decomposed substance” or that “has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health,” is adulterated. Id. In addition, the FDCA provides that a cosmetic the labeling of which “is false or misleading in any particular” is misbranded. FDCA § 602(a), 21 U.S.C. § 362(a); see also 21 C.F.R. § 1.21 (2018) (failure to reveal material facts); 21 C.F.R. pt. 701 (2018) (Cosmetic Labeling). A cosmetic in packaged form the label of which does not contain “the name and place of business of the manufacturer, packer, or distributor,” “an accurate statement of the quantity” of contents, or the required ingredient declarations is also misbranded. FDCA § 602(b), 21 U.S.C. § 362(b); 15 U.S.C. § 1456 (2012); 21 C.F.R. § 701.3 (2018). Other misbranding provisions address the prominence of required information, mislabeling containers, color additives that don’t conform to packaging and labeling requirements, and violations of regulations issued pursuant to the provisions of the Poison Prevention Packaging Act of 1980 regarding special packaging standards for household substances to protect children from serious injury or illness and noncomplying packages (21 U.S.C. §§ 1472-1473). FDCA § 601(c)-(f), 21 U.S.C. § 362(c)-(f) (2012). There are also requirements for cosmetics under other laws. For example, under the Federal Trade Commission Act, false, misleading, or deceptive advertising claims for cosmetics are prohibited. Federal Trade Commission Act, 15 U.S.C. § 41-58; see also Jason Rea, “Actual Results May Vary”: Toward Fiercer National Regulation of Digitally Manipulated Cosmetics Advertisements, 19 WM. & MARY J. WOMEN & L. 161, 163 (2012).
The adulteration and misbranding provisions have been amended to reflect the changes in how color additives are regulated: the adulteration provisions now refer to unsafe color additives instead of uncertified coal-tar colors in the provision providing that a cosmetic—other than a hair dye—that contains an unsafe color additive is adulterated.\textsuperscript{148} The misbranding provisions also have been amended to add a provision providing that a cosmetic that is a color additive is misbranded if its packaging and labeling do not conform with the regulations for that color additive.\textsuperscript{149} The misbranding provisions have also been amended to provide that a cosmetic is misbranded “‘[i]f its packaging or labeling is in violation of an applicable regulation issued pursuant to [the Poison Prevention Packaging Act (PPPA) (15 U.S.C. 1473-73)].”\textsuperscript{150} Also, intentionally added plastic microbeads in wash-off cosmetics have been banned\textsuperscript{151} due to environmental concerns about microbead pollution.\textsuperscript{152}

b. FDA Regulations

Until 1972, FDA lacked a formal regulatory program for cosmetics, instead taking “regulatory action on a case-by-case basis.”\textsuperscript{153} In the years since, FDA has promulgated regulations specifically for cosmetics under the authority granted to it by Congress under the FDCA, the PPPA, and the Fair Packaging & Labeling Act.\textsuperscript{154} Many of FDA’s cosmetics regulations set forth labeling requirements.\textsuperscript{155} For example, cosmetics that are marketed to consumers are required to have a list of ingredients,\textsuperscript{156} although there are exceptions for fragrances and flavors, which may be listed as such.\textsuperscript{157}

FDA has also restricted or prohibited the use of eleven ingredients or types of ingredients in cosmetics due to safety concerns.\textsuperscript{158} It requires warnings on

149. FDCA § 602(e), 21 U.S.C § 362(e) (2012). Colors that “are marketed and intended for use only in or on hair dyes” are excepted. Id.
150. FDCA § 602(f), 21 U.S.C § 362(f) (2012).
153. GAO, HRD-78-139, supra note 9, at iii.
155. 21 C.F.R. § 701 (2018). There are also regulations related to the approval of color additives for specific uses in cosmetics.
156. FDCA § 601, 21 U.S.C. § 361; 15 U.S.C. § 1456 (2012); 21 C.F.R. § 701.3; see also FDA AUTHORITY OVER COSMETICS, supra note 21 (noting that “[t]his requirement does not apply to cosmetics distributed solely for professional use, institutional use (such as in schools or the workplace), or as free samples or hotel amenities”). Cosmetics that do not have the required ingredient list are deemed misbranded. See FDCA § 601, 21 U.S.C. § 361; 21 C.F.R., § 701.3 (2018).
157. FDCA § 602(a), 21 U.S.C. § 362(a); 21 C.F.R. § 701.3(a).
c. FDA Staff & Resources

Cosmetics are the only major product category that does not have its own center within FDA; instead, cosmetics are regulated by FDA’s Center for Food Safety and Applied Nutrition (CFSAN). In the CFSAN, FDA’s Office of Cosmetics and Colors is responsible for both the oversight of cosmetics regulation as well as the color additive certification program. In a 2008 report prepared by Peter Barton Hutt for the Science Review Subcommittee of the FDA Science Board, he noted that FDA was unable to separate the funding and personnel numbers for cosmetics from the numbers for CFSAN, a difficulty that he indicated others had encountered as well. Nevertheless, Hutt determined that between 1977 and 2007, funding and staff levels for cosmetics regulation decreased to a total of fourteen staff at CFSAN—which he described as “clearly insufficient”—and $3.5 million—which he described as “minimal.”

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159. Id. at 460-61. FDA’s operating plan for fiscal year 2018, indicates a total of 11.7 million dollars in budget authority funding for cosmetics activities (8,106 million for the center, 3,414 for the field, and 0.18 for the National Center for Toxicological Research). FDA, Food and Drug Administration, Operating Plan for FY 2018, https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/manualsforms/Staffmanualguides/Ucm328610.Pdf [https://perma.cc/8QMY-WFQK].
d. Industry Measures

FDA relies heavily on voluntary industry measures for cosmetics.\(^{166}\) FDA has created a voluntary registration program for cosmetics establishments.\(^{167}\) It also has created a voluntary filing program for cosmetics ingredient composition statements.\(^{168}\) These voluntary programs exclude cosmetics that are for professional use only and those that are not for sale.\(^{169}\) The cosmetics industry supported these voluntary programs as a way “to demonstrate the industry’s willingness to supply information to FDA and to discourage Congressional legislation.”\(^{170}\)

The cosmetics industry has undertaken other voluntary measures. For example, the Cosmetic Ingredient Review (CIR) reviews the safety of cosmetics ingredients. The Personal Care Products Council (PCPC), “the leading national trade association representing the global cosmetic and personal care products industry,” created and funds the review.\(^{171}\) As of March 2017, CIR had done safety assessments of 4,740 ingredients—“4,611 [were] determined to be safe as used or safe with qualifications, 12 [were] determined to be unsafe, and 117 [were] ingredients for which the information is insufficient to determine

\(^{166}\) For an analysis of how this compares with the regulation of other products, see Section II.C.2.e below.


\(^{169}\) FDA, Voluntary Cosmetic Registration Program, https://www.fda.gov/cosmetics/registration program/default.htm [hereinafter FDA, Voluntary Cosmetic Registration Program].


safety.’172 The CIR is limited in that “it generally focuses on the ingredients’ potential to cause short-term dermatological reactions . . . not their potential to cause long-term health problems.”173 Also, because the CIR is a voluntary industry measure, companies are not required to follow it.174 It often finds insufficient data to “substantiate safety”175 and a significant amount of information is not available to FDA and the public due to trade secret and fragrance exceptions to public review.176

e. How Cosmetics Law & Regulation Lag Behind that of Other Product Categories

While the FDCA has been amended to give FDA greater authority over the other major product categories under its jurisdiction and strengthen its regulation of those product categories, as discussed above, the cosmetics provisions have remained largely unchanged. Accordingly, cosmetics are the least regulated of the major product categories within the Food and Drug Administration’s (FDA) jurisdiction.177 This Section highlights some of the ways cosmetics law and regulation are less stringent than the law and regulation for other product categories.

As discussed in Section II.B, even if cosmetics are the safest product category, they are not necessarily safe. The shortcomings of current cosmetics law and regulation are particularly problematic because they hinder the ability to


175. Hartman, supra note 110, at 64; EWG, FDA Fails to Protect, supra note 173.


177. Paradise & Fitzpatrick, supra note 9, at 70; see also GAO/HRD-90-58, supra note 9; STATEMENT OF GREGORY J. AHART, supra note 9; GAO, HRD-78-139, supra note 9; see also supra note 161 and accompanying text (noting that cosmetics are the only major product category that does not have its own center devoted to their regulation).
accurately assess the safety of cosmetics, which in turn hinders the development of an appropriate regulatory system for cosmetics, leaving consumers at risk.

While drug, device, and tobacco product establishments and food facilities must register with FDA,\textsuperscript{178} FDA has no mandatory registration requirement for cosmetics.\textsuperscript{179} Instead, FDA’s registration program for consumer cosmetics products is voluntary.\textsuperscript{180} As a result, FDA may not “know the number of manufacturers, who they are, where they are, and what they make.”\textsuperscript{181} Since the Voluntary Cosmetics Registration Program was established in 1972, there have been 3,260 active cosmetics establishment registrations,\textsuperscript{182} but because registration is voluntary and only covers products marketed to consumers, this does not represent “the total number of companies manufacturing or marketing cosmetics in this country.”\textsuperscript{183}

Import and industry data suggest that the number of cosmetics establishments eligible for registration may be much higher than the number who have registered. Based on import records, FDA estimates that there are 29,000 foreign companies that manufacture cosmetics for or export cosmetics to the United States,\textsuperscript{184} and IBISWorld estimates that there are 4,055 cosmetics and beauty product manufacturers in the United States.\textsuperscript{185}

Furthermore, unlike drug registrants, which are required to list with FDA drugs for commercial distribution and provide the name of each ingredient,\textsuperscript{186} cosmetics manufacturers are not required to report the ingredients in their cosmetics products to FDA. FDA “estimate[s] that only one-third of cosmetics

\footnotesize
\begin{itemize}
  \item \textsuperscript{179} See FDA, Voluntary Cosmetic Registration Program, supra note 169; Landa Statement, supra note 158, at 4–5; 9; COHEN, supra note 2, at 35.
  \item \textsuperscript{180} FDA, Voluntary Cosmetic Registration Program, supra note 169; see also Landa Statement, supra note 158, 4–5; COHEN, supra note 2, at 35.
  \item \textsuperscript{181} FDA, Adverse Event Reports, supra note 10.
  \item \textsuperscript{182} FDA, Registration Reports, https://www.fda.gov/Cosmetics/RegistrationProgram/RegistrationReports/default.htm [https://perma.cc/CR62-8CXH]; see also Landa Statement, supra note 158 (stating that in 2012 the Voluntary Cosmetics Registration Program “had[ ] almost 1,600 domestic and foreign registered cosmetics establishments”).
  \item \textsuperscript{183} FDA, Registration Reports, supra note 182; FDA, Voluntary Cosmetic Registration Program, supra note 169 (“About VCRP”).
  \item \textsuperscript{185} COHEN, supra note 2, at 4; see also supra Section I.A (discussing definition of cosmetics).
  \item \textsuperscript{186} FDCA \textsection{} 510, 21 U.S.C. \textsection{} 360 (2018 supp. V); Who must list drugs and what drugs must they list?, 21 C.F.R. \textsection{} 207.41 (2018); What listing information must a registrant submit for a drug it manufactures?, 21 C.F.R. \textsection{} 207.49 (2018); see also FDCA \textsection{} 904(a)(1), 21 U.S.C. \textsection{} 387d (2012); FDA, Submit Ingredient Listing for Tobacco Products, https://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Manufacturing/ucm602792.htm\#9 [https://perma.cc/RK3G-FV62]. While food manufacturers generally do not need to notify or otherwise inform FDA of all of the ingredients that they use in food, this has been the subject of significant critique. See, e.g., Martha Dragich, \textit{GRAS-Fed Americans: Sick of Lax Regulation of Food Additives}, 49 I. L. Rev. 305, 311 (2016).
manufacturers voluntarily file ingredient statements for their products” through the Voluntary Cosmetic Registration Program, which, as noted above, only includes consumer cosmetics. And unlike drugs and foods, which are generally required to have ingredient labeling regardless of whether the product is intended for consumer or professional use, only cosmetics intended for retail sale are required to have ingredient labeling under the Fair Packaging and Labeling Act (FLPA) and FDA’s regulations. Cosmetics intended for professional use only are not required to have ingredient labeling. Accordingly, both the identity and number of ingredients used in cosmetics is unknown. And consumers and workers may be unaware that the cosmetic intended for professional use only contains a potentially harmful ingredient.

The number of ingredients used in cosmetics is likely higher than the number of ingredients voluntarily reported by the cosmetics industry. The number of ingredients that the industry has submitted to the Voluntary Cosmetic Registration Program and the number of ingredients in the International Cosmetic Ingredient Dictionary, however, may give some indication of the number of ingredients used in cosmetics. The industry has submitted about “6,000 ingredients used in 81 product categories” to the Voluntary Cosmetic Registration Program. The International Cosmetic Ingredient Dictionary and Handbook “lists over 21,000 individual ingredients that were once used, or are currently used, or are merely a supplier’s hope for future use,” and one review of the CIR process estimates that about “30% may be excluded from . . . review” and about “32% are currently in use.” FDA estimated at one point that there were “about 12,500 different cosmetic ingredients and a similar number of fragrance ingredients . . . being used by the cosmetic industry.”

Concerns about cosmetics manufacturers failing to voluntarily register their establishments and products and file ingredient statements are not new. In a 1978 report, the United States General Accounting Office (GAO) recommended that

187. Landa Statement, supra note 158.
188. See supra note 180 and accompanying text.
189. FDCA § 403(i), (q), 21 U.S.C. § 343(i), (q) (2012); FDCA § 502(e), 21 U.S.C. § 352(e) (2012).
192. See, e.g., Sharon E. Jacob et al., Commentary, p-Phenylenediamine in Black Henna Tattoos: A Practice in Need of Policy in Children, ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 790, 791 (2008).
193. See Boyer et al., supra note 172.
2018] Gender, Race & the Inadequate Regulation of Cosmetics 303
Congress give FDA the authority to require cosmetics establishment and product registration and the filing of ingredient statements. ¹⁹⁷

The infrequency of cosmetics establishment inspections is also cause for concern. While the frequency of inspection for food, drug, device, and tobacco product establishments is specified by law, there are no comparable requirements for cosmetics establishments. ¹⁹⁸ For example, the FDCA provides that domestic food facilities must be inspected, depending on their risk classification, once every three or five years. ¹⁹⁹ The FDCA has also directed FDA to inspect drug and device establishments according to a risk-based schedule established by regulation. ²⁰⁰

Given the lack of statutory mandate for cosmetics establishment inspection and the FDA’s limited resources, it is not surprising that cosmetics establishments are inspected infrequently. In 2016, FDA inspected a total of 136 cosmetics establishments—133 domestic and 3 foreign. ²⁰¹ The lack of required establishment registration may also complicate inspection efforts, as FDA may be unaware of some cosmetics establishments. ²⁰² The low inspection rate for cosmetics establishments is not new. In 1978, FDA’s Cosmetics Director noted that “[a]t FDA’s fiscal 1979 levels, a cosmetic plant would be inspected without special circumstances every 20 to 25 years.” ²⁰³

Furthermore, the scope of FDA’s inspection authority for cosmetics is limited compared to drugs, certain devices, tobacco products, and foods. For example, if FDA has a reasonable belief that a food is adulterated and presents a threat of serious adverse health consequences or death, it may access records related to the food. ²⁰⁴ FDA may also inspect records bearing on whether “prescription drugs, nonprescription drugs intended for human use, restricted devices, or tobacco products” are adulterated. ²⁰⁵

¹⁹⁷. See GAO, HRD-78-139, supra note 9, at 133.


²⁰². See GAO, HRD-78-139, supra note 9; see also GAO, HRD-78-139, supra note 9, at v (stating that in the mid-1970s FDA “identified about 1,000 additional manufacturers, which it had never inspected because they had been unknown to the agency”).

²⁰³. JAMES T. O’REILLY & KATHARINE A. VAN TASSELL, FOOD AND DRUG ADMINISTRATION § 17-9 (2018) (citing Address by Eiermann, FDA Cosmetics Director, to Society of Cosmetics Chemists (Sept. 27, 1978)).


In contrast, FDA’s inspection authority for cosmetics is generally restricted to certain establishments and vehicles and does not extend to records. Accordingly, manufacturers “have refused Food and Drug Administration inspectors access to manufacturing records.” This may prevent FDA from, for example, effectively enforcing its requirement “that labeling of cosmetics that have not been adequately tested for safety including a warning to that effect,” as the law doesn’t require that manufacturers “make their test results available to the agency.” This may also limit FDA’s ability to investigate safety issues potentially associated with cosmetics.

While FDA has promulgated quality systems regulations, known as Current Good Manufacturing Practice regulations, for foods, drugs, and devices, it has only issued non-binding draft guidance and guidelines for cosmetics. This may hinder FDA’s ability to adequately regulate cosmetics as Good Manufacturing Practice regulations would provide “criteria to determine whether adequate methods, facilities, and controls are used in all phases of manufacturing and distribution of cosmetics.”

The lack of mandatory reporting of adverse events to FDA is another area where cosmetics lag behind. While dietary supplement, drug, and device manufacturers must report certain adverse events and food manufacturers must report reportable foods, there are no comparable mandatory requirements for cosmetics. FDA relies on voluntary measures for cosmetics. Without

206. Id.
207. GAO, HRD-78-139, supra note 9, at iii.
208. Id.
213. FDA, COSMETIC GOOD MANUFACTURING PRACTICES, supra note 168; Landa Statement, supra note 158; see also Greff, supra note 27, at 246. The FDCA requires FDA to promulgate regulations regarding tobacco product manufacturing practice regulations. See FDCA § 906, 21 U.S.C. § 387f(e); see also FDA, Tobacco Product Manufacturing Practice; Request for Comments, 82 Fed. Reg. 55,613 (Nov. 22, 2017).
214. GAO, HRD-78-139, supra note 9, at v.
217. See FDA, Adverse Event Reports, supra note 10.
218. Daum, supra note 171. CFSAN has an adverse event report system where consumers, manufacturers, and health care professionals can voluntarily report adverse events associated with regulated products including cosmetics. See FDA, Adverse Event Reports, supra note 10; Michael Kwa et al., Research Letter, Adverse Events Reported to the US Food and Drug Administration for Cosmetics and Personal Care Products, Research Letter, 177 JAMA INTERNAL MED. 1202 (Aug. 2017).
mandatory reporting for cosmetics, as the Director of FDA’s Office of Cosmetics and Colors recently stated in an interview, “often . . . [FDA is] just seeing the tip of the iceberg in [the adverse event reporting system].”\(^\text{219}\) For example, as of November 15, 2016, FDA had received 1,386 consumer “reports of reactions reported to be associated with” certain cosmetics cleansing conditioners:\(^\text{220}\) “When . . . FDA inspected the manufacturing and distribution facilities for these products, [it] learned that consumers had reported reactions in more than 21,000 complaints submitted to . . . the companies that market and manufacture the products.”\(^\text{221}\) Under the current law, the companies are not required to report these complaints.\(^\text{222}\) At one point, FDA had regulations for a voluntary program for the filing of cosmetics product experiences by cosmetics manufacturers, but these regulations were revoked.\(^\text{223}\)

Finally, cosmetics do not require FDA approval prior to sale.\(^\text{224}\) In every other major product category included in the 1938 FDCA, at least some products now must be approved before they can be lawfully sold.\(^\text{225}\) Under the FDCA, the policing of the adulteration and misbranding of “cosmetics” as a category takes place after a violation occurs.\(^\text{226}\) And in a judicial action to enforce the Act, the burden is on the government to prove that the product is adulterated or misbranded,\(^\text{227}\) rather than on the manufacturer to show that it is safe.\(^\text{228}\)

\begin{footnotes}
\footnote{219. FDA, \textit{Adverse Event Reports}, supra note 10.}
\footnote{220. FDA, \textit{Information About WEN}, supra note 209.}
\footnote{221. Id.}
\footnote{222. Id.}
\footnote{223. See 21 C.F.R. § 730 (1997) (Voluntary Filing of Cosmetic Product Experiences); FDA, Food and Cosmetic Labeling; Revocation of Certain Regulations, 62 Fed. Reg. 43,071, 43,073 (revoking 21 C.F.R. pt. 730); FDA, \textit{Adverse Event Reports}, supra note 10. In the notice proposing to revoke the Voluntary Cosmetic Reporting Program regulations, FDA noted that the program suffered from “serious limitations”: industry participation was “very limited and selective, the reports lack[ed] sufficient details to be useful, and annual reports are sent in long after the occurrence of an adverse reaction.” FDA, Food and Cosmetic Labeling; Revocation of Certain Regulations; Opportunity for Comment, 61 Fed. Reg. 29,708, 29,710 (June 12, 1996) (proposed rule). FDA also noted its “budgetary constraints.” \textit{Id}.}
\footnote{224. See FDA, \textit{Voluntary Cosmetic Registration Program, supra note 169.}
}
\footnote{225. See FDCA § 409, 21 U.S.C. § 348 (food additives); FDCA § 505, 21 U.S.C. § 355 (new drugs); FDCA §§ 513, 515, 21 U.S.C. §§ 360e(a), 360e (class III devices). As noted earlier, “color additives” have to be approved for a particular use before being so used. See supra note 22.}
\footnote{227. FDCA §§ 301, 601, 602, 21 U.S.C §§ 331, 361, 362.}
\footnote{228. See, e.g., GAO, HRD-78-139, supra note 9.}
This Part argues that cosmetics law and regulation have been deprioritized as a result of their longstanding and close association with femininity and women, and women’s exclusion from political participation and representation. The 1906 Pure Food and Drugs Act did not explicitly address cosmetics. While the 1938 Federal Food, Drug and Cosmetic Act did, women were excluded from full participation during the consideration of both Acts, and consideration of the later Act was marred by the biases of some of the male participants. This Part also argues that cosmetics law and regulation have been deprioritized as a result of their longstanding and close association with women and femininity, which have often been devalued. Finally, this Part argues that cosmetics law and regulation have been deprioritized as a result of debate among self-described feminists regarding the meaning of cosmetics and differences in women’s relationships to and views of cosmetics more generally.

A. Cosmetics Law & Regulation Have Been Deprioritized as a Result of Women’s Exclusion from Political Participation & Representation, as well as their Longstanding & Close Association with Femininity & Women

1. The Pure Food & Drugs Act of 1906

The Pure Food and Drugs Act of 1906 did not regulate cosmetics. Historian Gwen Kay describes the omission of cosmetics from the 1906 act as an economic and political decision. While earlier bills defined “drug” to include “cosmetics,” in 1900, cosmetics were dropped from the legislation, apparently in exchange for the support of the National Pure Food and Drug Congress. At that time, the cosmetics industry’s scope was limited: the 1899 manufacturing census put the value of “perfumery and cosmetic” industry

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229. See Federal Food & Drugs Act, 34 Stat. 768 (June 30, 1906) [hereinafter Pure Food and Drugs Act].
231. See, e.g., S. 4144, 55th Cong. (1898); H.R. 9154, 55th Cong. (1898).
232. Oscar E. Anderson, Jr., Pioneer Statute: The Pure Food and Drugs Act of 1906, 13 J. PUB. L. 189, 195 (1964); Charles O. Jackson, Food and Drug Legislation in the New Deal 4 (1970); Kay, supra note 3, at 15. The National Pure Food and Drug Congress was convened to support a food and drug law and was to be comprised of delegates “embr[ac]ing as far as possible every interest involved in the production, manufacturer, and sale of food, drugs and liquor products,” as well as “Scientists and Health Departments,” and “those who have charge of local laws in the various States and Territories.” 1898 J. PROC. OF THE NAT’L PURE FOOD & DRUG CONGRESS 4, https://ia801404.us.archive.org/21/items/journalproceedi00unkgoog/journalproceedi00unkgoog.pdf. Proposed language from the 1898 proceedings of the National Pure Food and Drug Congress included cosmetics within the definition of drug. Id. at 36.
products at about seven million dollars, and in 1904 the value was about eleven million dollars.233

Gender—as well as race, ethnicity, and class—likely contributed to the failure of Congress to include cosmetics in the 1906 Pure Food and Drugs Act. Unlike food and drugs—which had problems that generated broad public outrage and which were included in the 1906 Pure Food and Drugs Act234—cosmetics, while not without their hazards,235 “were extremely easy to overlook.”236 The industry was relatively small,237 and cosmetics were “purchased and consumed by only half the population”: women.238 In addition, many women made their own cosmetics at home.239 Even among women who used what today would be considered cosmetics, many may have sought to hide this use as “[a]mong white women . . . popular concern centered on the morality of visible makeup,” which was “associated with prostitutes and actresses.”240 Indeed, the “[w]omen applying dangerous lead-based whitening lotions . . . [who] began to appear in medical case records after the Civil War . . . [went] to great lengths to conceal their cosmetics use.”241

The use and advertising of cosmetics also reflected racial and ethnic tensions, including white concerns about maintaining existing racial hierarchies.242 At the time, “the standard of beauty inherently assumed a northern European face.”243 Skin whiteners—which were marketed to both white and black women—“remained the most popular cosmetic throughout the nineteenth century.”244 Cosmetics “reinforced a noxious racial aesthetic,” in which “[n]lotions of Anglo-American beauty . . . were continually asserted in relation


235. See, e.g., PEISS, supra note 3, at 41-42.

236. KAY, supra note 3, at 30.

237. See supra note 68 and accompanying text.

238. KAY, supra note 3, at 30.

239. Id. at 10–12.

240. Id. at 32–33; PEISS, supra note 3, at 7.

241. PEISS, supra note 3, at 41.

242. Id. at 40–43.

243. KAY, supra note 3, at 31.

244. PEISS, supra note 3, at 40.
to people of color”\textsuperscript{245} and “[s]kin whiteners and hair straighteners were tokens in a heated debate” about beauty standards among black women.\textsuperscript{246}

While women’s organizations played an important role in the enactment of the 1906 Pure Food and Drugs Act,\textsuperscript{247} cosmetics do not appear to have been a central focus of many of these groups. This may have been because “[t]he women who belonged to many of these groups, upper-class and white, would most likely not have worn (visible) cosmetics at the beginning of the century”\textsuperscript{248} because “women who visibly wore cosmetics in the last third of the nineteenth century were [considered] morally suspect and liable to criticism.”\textsuperscript{249} These groups may have “unconsciously applied middle- and upper-class morals and solutions to the food and drug problem.”\textsuperscript{250} Indeed, one history of the push for pure food and drug laws, which focuses on the role of women, makes scant mention of cosmetics, noting only in passing that in 1898, a proposed definition of “drug” included cosmetics, and that in 1905 the National Consumers’ Leagues’ Pure Food Committee included in their goals that “agencies should ensure cosmetics were safe and properly labeled.”\textsuperscript{251} But because cosmetics were included within the proposed definition of drugs until 1900, it’s difficult to distinguish early general support for drug legislation from support for cosmetic legislation.\textsuperscript{252}

Women’s lack of representation in the legislative process during the consideration and passage of the 1906 Pure Food and Drugs Act may have also contributed to the exclusion of cosmetics, as women did not have the right to vote nationwide until approximately 14 years after the Act was signed into law.\textsuperscript{253} When the Pure Food and Drugs Act passed in 1906, no woman had ever served in the United States House of Representatives or Senate.\textsuperscript{254} It would be

\textsuperscript{245} Id. at 31, 34 (stating that “[f]or white Americans, sustaining a visual distinction between white and black masked an uncomfortable truth, that Africans and Europeans were genealogically mixed” and “[i]n advice manuals and formula books, white fears of losing their superior racial identity underwrote old anxieties about cosmetic artifice”).

\textsuperscript{246} See, e.g., id. at 7; NOLIWE M. ROOKS, HAIR RAISING: BEAUTY, CULTURE, AND AFRICAN AMERICAN WOMEN 37 (1996).


\textsuperscript{248} KAY, supra note 3, at 15, 17.

\textsuperscript{249} Id. at 31.

\textsuperscript{250} Id. at 15, 17.


\textsuperscript{252} See Anderson, supra note 232, at 195.

\textsuperscript{253} U.S. CONST. amend. XIX.

\textsuperscript{254} JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30261, WOMEN IN CONGRESS, 1917-2018: SERVICE DATES AND COMMITTEE ASSIGNMENTS BY MEMBER, AND LISTS BY STATE AND CONGRESS (2018), https://fas.org/sgp/crs/misc/RL30261.pdf [https://perma.cc/VMN3-KBQN]. The lack of diversity was not limited to gender. There were also no African American, Asian American, Native American, or Hispanic American senators. Ethnich Diversity in the Senate, UNITED STATES SENATE, https://www.senate.gov/senators/EthnicDiversityintheSenate.htm [https://perma.cc/XZK9-AEN8]. The Asian Americans and Hispanic Americans in the House of Representatives were all non-
over a decade until the first woman served in the House and even longer until a woman served in the Senate.\textsuperscript{255} As one commentator noted, “the undeniable reality of women’s political impotence in 1906 surely constituted a major factor in the exclusion of cosmetics from the 1906 Act.”\textsuperscript{256}

2 \textbf{The Federal Food, Drug & Cosmetic Act of 1938}

While a comprehensive examination of the history of the cosmetics provisions of the 1938 FDCA is beyond the scope of this Article, portions of that history provide examples of how gender shaped consideration of bills to strengthen the law. Between the enactment of the Pure Food and Drugs Act of 1906 and the passage of the 1938 FDCA, it became more socially acceptable for women to use cosmetics, and the cosmetics industry grew substantially. At the same time, a number of women were seriously injured by cosmetics that federal law was powerless to address and there were growing concerns about the safety of cosmetics. The history of cosmetics and the development of cosmetics law during the period preceding the 1906 Pure Food and Drugs Act through the enactment of the 1938 FDCA illustrates the gendered roots of cosmetics law.\textsuperscript{257} This history is particularly important because this law has changed little in the intervening eighty years. The 1938 Act, with few modifications, remains the basis of cosmetics law and regulation, and women still fall far short of equal representation in the United States Senate and House of Representatives.\textsuperscript{258}

\textbf{a. Cosmetics Growth & Change, 1906-1938}

In the years after the enactment of the 1906 Pure Food and Drugs Act, the cosmetics industry grew rapidly.\textsuperscript{259} By 1920, the toilet goods industry was “one of the largest . . . in the United States, behind food, clothing, and automobiles.”\textsuperscript{260} In 1933, the U.S. Census Bureau reported that the value of

\begin{itemize}
\item voting delegates or resident commissioners from Hawaii and Puerto Rico. HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, http://history.house.gov/People/Search/ [https://perma.cc/HCD7-S4UA] (search by categories and by congress).
\item \textsuperscript{255} MANNING & BRUDNICK, supra note 254.
\item \textsuperscript{256} Daum, supra note 171.
\item \textsuperscript{257} The Author plans to more fully examine legislative history of the cosmetics provisions of the FDCA and the role of women in future scholarship.
\item \textsuperscript{258} Darla Cameron & Kim Soffen, For Every Woman in Political Office in South Carolina, There Are Six Men, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/graphics/2018/politics/women-running-for-office/?utm_term=.d24fb48a3a9b [https://perma.cc/3M8H-JS7J] (stating that 22 out of 100 Senators and 84 out of 432 House members are women).
\item \textsuperscript{259} See 1921 MANUFACTURES CENSUS, supra note 233, at 745, 746 tbl.623; see also GILBERT VAIL, A HISTORY OF COSMETICS IN AMERICA 137 (1947) (listing statistics from the reports of the United States Census Bureau). In 1929, the value of the industry was approximately $193 million. It then declined to $153 million in 1931. VAIL, supra, at 137.
\item \textsuperscript{260} KAY, supra note 3, at 39.
\end{itemize}
cosmetics industry production was about 97 million dollars.\textsuperscript{261} That same year Senator Royal S. Copeland introduced a bill, S. 1944, to strengthen the 1906 Pure Food and Drugs Act,\textsuperscript{262} by, among other things, extending the Act to prohibit the adulteration, misbranding, and false advertisement of cosmetics. During a hearing on the bill in December of 1933, the Secretary of Agriculture testified that “[t]he cosmetic industry ha[d] become of first importance,” whereas it had been “in its infancy” when the 1906 Act was written.\textsuperscript{263} By 1937—the year before the enactment of the Federal Food, Drug, and Cosmetic Act of 1938—the value of cosmetics industry production was about 132 million dollars.\textsuperscript{264}

The tremendous growth of the industry was accompanied by a shift in the acceptability of cosmetics use. Cosmetics use became more broadly acceptable for women: for example, a 1915 article in McClure’s referred to cosmetics as “affording much legitimate daily comfort.”\textsuperscript{265} “[W]omen from across the country, from different social classes and racial-ethnic groups, enthusiastically embraced cosmetics—especially makeup—in the early twentieth century,” although “[a]ge, marital status, economic class, ethnic origins, and residence influenced women’s relationship to the new mass market.”\textsuperscript{266}

Cosmetics, particularly makeup, had a multitude of meanings.\textsuperscript{267} For example, women used cosmetics “to play the lady or the hussy, to look older or younger, to signify common identities as ‘American’ and ‘respectable,’ or to invoke class and ethnic distinctions.”\textsuperscript{268} But despite these differences and contradictions, in the 1920s and 1930s, “[m]akeup was a true expression of feminine identity”\textsuperscript{269} and by the 1930s, “had become an aesthetic expression woven deeply into women’s daily life.”\textsuperscript{270}

At the same time, workplace appearance requirements “became increasingly regimented,” both requiring that women wear cosmetics and regulating women’s cosmetics use.\textsuperscript{271} And the growth of the beauty industry opened up new employment opportunities for women, e.g., as beauticians, product demonstrators, and drugstore clerks.\textsuperscript{272} Entrepreneurs brought beauty culture and

\textsuperscript{261} VAIL, supra note 259, at 137.
\textsuperscript{262} See DUNN, supra note 1, at 37, 39, 42, 45-46 (S. 1944).
\textsuperscript{263} DUNN, supra note 1, at 1049 (Statement of the Honorable Henry A. Wallace, Secretary of Agriculture).
\textsuperscript{264} See VAIL, supra note 259, at 137 (listing statistics from the reports of the United States Census Bureau).
\textsuperscript{265} KAY, supra note 3, at 39.
\textsuperscript{266} PEISS, supra note 3, at 6, 168.
\textsuperscript{267} Id. at 6, 190.
\textsuperscript{268} Id. at 190.
\textsuperscript{269} Id. at 166. Conversely, “[c]osmetics were not readily reconciled with a heterosexual masculine identity.” Id.
\textsuperscript{270} Id. at 200.
\textsuperscript{271} See id. at 193.
\textsuperscript{272} Id. at 5.
cosmetics to customers and “many of the most successful were immigrant, working-class, or black women.”

b. The Failures of the 1906 Pure Food and Drugs Act & Consideration of Reform

Concerns about the safety of cosmetics and the limitations of the 1906 Act accompanied the growth of the industry. These concerns reflect the gendered state of cosmetics. In the 1930s, there were numerous reports of cosmetics seriously injuring women, which the Pure Food and Drugs Act could not prevent.

Several books highlighted the dangers of cosmetics and the lack of protections for consumers: for example, in 1933, Arthur Kallet and F.J. Schlink, who founded Consumers Union and Consumers’ Research Inc., published the influential book *100,000,000 Guinea Pigs.* The book devotes a chapter to “[d]anger [i]n [c]osmetics,” which begins with a statement about the dangerous “path followed by women of all times and of all countries in search of the beauty promised by magic and mysterious potions.” The book noted that “[t]he purchaser of cosmetics has no protection whatever” and discussed women injured by cosmetics and cosmetic procedures. In 1934, Mary Catherine Phillips, also of Consumers’ Research, published *Skin Deep: The Truth about Beauty Aids—Safe and Harmful* in response to “numerous women readers” who requested advice on cosmetics brands. In *Skin Deep,* Phillips was even more explicit than Kallet and Schlink about who cosmetics consumers were: she stated that “the feminine consumer has little, if any protection against dangerous poisons in the form of cosmetics.” Phillips also stated that for some cosmetics “little research has been done of a scientific, disinterested nature that can be used

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273. *Id.* at 5, 64-70 (discussing the entrepreneurial successes of Elizabeth Arden, Annie Turnbo Malone, Helena Rubinstein, Madam C.J. Walker); *see also* Perry, *supra* note 100, at 580.

274. These were not the first concerns about or injuries caused by cosmetics. A number of cosmetics in the mid-nineteenth century, for example, contained mercury, lead, and arsenic. *See, e.g.*, Peiss, *supra* note 3, at 21.

275. *See, e.g.*, Ruth DeForest Lamb, AMERICAN CHAMBER OF HORRORS: THE TRUTH ABOUT FOOD AND DRUGS VIII (1936); Pure Food and Drugs Act, *supra* note 229.


277. *Id.* at 78.

278. *Id.* at 78, 82–84, 89, 94.


280. *Id.* at 9.
or relied on by consumers.”\footnote{281} And in 1936, Ruth deForest Lamb, FDA’s first Chief Education Officer, published *American Chamber of Horrors*, which discussed the limits of the 1906 Act and FDA’s lack of authority over cosmetics.\footnote{282} Like the authors of the other two books discussed above, she provided examples of cosmetics that seriously injured women.\footnote{283} The book was based on an FDA-sponsored exhibit that was “so shocking” that a reporter accompanying First Lady Eleanor Roosevelt to see the exhibit, “dubbed [it] the ‘American Chamber of Horrors.’”\footnote{284}

These works also reflect the important role women played in bringing attention to the problems of cosmetics and their regulation.\footnote{285} In fact, Lamb dedicated her book to the “gallant group of women . . . holding the front-line trenches in the consumers’ war for pure foods, drugs and cosmetics.”\footnote{286} Women and women’s organizations played a central role in the push for the federal regulation of cosmetics in the first part of the 20th century and the passage of the 1938 Federal Food, Drug, and Cosmetic Act. As Gwen Kay observes in her book, *Dying to Be Beautiful: The Fight for Safe Cosmetics*, “[t]he leading proponents for inclusion of cosmetics in a new law . . . were mostly women’s organizations and consumer groups.”\footnote{287}

In 1933, Senator Copeland introduced S.1944, the “original bill leading to the enactment of the [FDCA].”\footnote{288} FDA’s Annual Report that same year noted that federal law was “wholly without jurisdiction over cosmetics, except in those


\footnote{283. LAMB, *supra* note 275, at 15–39.}


\footnote{285. See LAMB, *supra* note 275; PHILLIPS, *supra* note 279; KALLET & SCHLINK, *supra* note 276.}

\footnote{286. LAMB, *supra* note 275, at Dedication.}

\footnote{287. KAY, *supra* note 3, at 3; see, e.g., *Foods, Drugs, and Cosmetics: Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 6906, H.R. 8805, H.R. 8941 and S. 5, Before the Subcomm. of the Comm. on Interstate and Foreign Commerce, 74th Cong. 1 (1935)* [hereinafter 1935 *Hearing*] (stating that the Director of the Bureau of Foods, Drugs, and Hotels of the Kentucky Health Department in her testimony stated that she did not have to tell the committee “that the woman consumer is very definitely interested in cosmetics”).}

\footnote{288. See DUNN, *supra* note 1, at 24, 29-30.}
rare instances when the labeling bears medicinal claims.” 289 S. 1944 would have extended the Pure Food and Drugs Act of 1906 to prohibit the manufacture, shipment, and sale of adulterated or misbranded cosmetics and the false advertisement of cosmetics. 290

In testimony on the proposed legislation, FDA’s chief, W.G. Campbell, referenced “Koremlu Cream” and “Lash Lure,” two products that caused a series of injuries to women and illustrated the limits of existing law. 292 Koremlu was a depilatory that used “thallium acetate, an ingredient commonly found in rat poison, to destroy and remove hair.” 293 The cosmetic, which “was applied mostly to women’s lips,” caused “loss of axial or pubic hair; baldness; temporary or long-term paralysis; and optic nerve damage.” 294 FDA cited Koremlu Cream as an example of a product the federal government lacked authority over under the 1906 Act, writing that the product was only removed from the market when “the manufacturer was forced into bankruptcy by accumulation of damage suits.” 295

“Lash Lure,” which was used for dying eyebrows and eyelashes, “contained paraphenylenediamine (PPD), an aniline dye that repeatedly achieved the rating of ‘most dangerous’ in the list of hair dyes.” 296 It resulted in injuries ranging from “temporary nausea, discomfort, or vision problems” to blindness and

289. Id. at 26 (reproducing portions of FDA’s 1933 Annual Report).
290. Id. at 30, 31, 33; S. 1944, 73rd Cong., § 2(c), 5, 6, 9.
291. DUNN, supra note 1, at 1122.
292. KAY, supra note 3, at 70. Koremlu is discussed in 100,000,000 Guinea Pigs, and both Koremlu and Lash Lure are discussed in Skin Deep and American Chamber of Horrors. See KALLET & SCHLINK, supra note 276; PHILLIPS, supra note 279; LAMB, supra note 275.
293. KAY, supra note 3, at 70. See, e.g., Hillick v. Edwards & Son, 143 Misc. 277 (N.Y. 1932) (actions of three plaintiffs each alleging that she suffered injuries from the use of Koremlu Cream); Smith v. Denholm & McKay Co., 192 N.E. 631 (Mass. 1934) (action by plaintiff alleging that she suffered peripheral neuritis from thallium poisoning from Koremlu Cream); Greengard v. Odorono Co., 235 A.D. 806 (N.Y. 1932) (action by plaintiff alleging she developed severe skin poisoning from Odorono which was advertised for use in “eliminating perspiration”). But see DUNN, supra note 1, at 1041 (statement of American Medical Association representative) (noting “case of child swallowing Odorono,” containing “dangerous lead acetate”). In the United States, the use of thallium in rat poison has been banned “due to its toxicity from accidental exposure.” CDC NIOSH, Thallium: Systemic Agent, https://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750026.html [https://perma.cc/R6VB-DY5H].
294. KAY, supra note 3, at 71.
295. DUNN, supra note 1, at 26 (reproducing portions of FDA’s 1933 Annual Report). In a 1934 Senate hearing, the FDA chief noted that Koremlu contained a rat poison “for which no antidote has . . . been found” and that it removes the hair not just from the site of application, but from the entirety of the body. DUNN, supra note 1, at 1154.
296. KAY, supra note 3, at 71.
death.\textsuperscript{297} Lash Lure was still on the market when the FDA chief first testified about it.\textsuperscript{298} Koremlu and Lash Lure were not alone in injuring women. The legislative history of the FDCA indicates that “extremely toxic substances” such as certain coal-tar dyes and metals like lead, arsenic, mercury and thallium” in “a number of preparations . . . caused serious impairment in the health of users.”\textsuperscript{299}

While the debate over the cosmetics provisions of legislation intended to address shortcomings of the 1906 Act mentioned that men used cosmetics “too,”\textsuperscript{300} much of the focus was on women.\textsuperscript{301} Despite this, women’s direct participation in the legislative proceedings appears to have been relatively limited and debate of the cosmetics provisions of bills reflected the perspectives—and biases—of the male participants.

Senator Hattie W. Caraway, the sole woman Senator at the time, was present for subcommittee hearings on the legislation.\textsuperscript{302} Women also testified on the legislation before the subcommittee.\textsuperscript{303} Both Senator Caraway’s membership on the subcommittee and the testimony of women were of sufficient note that during a December 1933 subcommittee hearing, “Mrs. William Dick Sporborg of Port Chester, [New York]” remarked on them.\textsuperscript{304} She stated that she was “the first woman . . . permitted to appear” at the hearing and that “all . . . men” had testified before her that day and the day before.\textsuperscript{305} She also remarked that she

\textsuperscript{297} Id. at 72; see also Clyde E. Harner, Dermato-Ophthalmitis Due to the Eyelash Dye Lash-Lure, 101 JAMA 1558-59 (1933) (reporting three cases of women injured by Lash Lure); Oliver P. Bourdon, Severe Eye Symptoms Due to Dyeing the Eyelashes, 101 JAMA 1558-59 (1933) (reporting three cases of women injured by Lash Lure); Sigmund S. Greenbaum, Conjunctivitis Due to Lash-Lure Dermatitis with Conjunctivitis, 110 JAMA 1560 (1933) (reporting case of woman injured by an eyelash dye, Larieuse); R. C. Jamieson, Eyelash Dye (Lash-Lure) Dermatitis with Conjunctivitis, 110 JAMA 1560 (1933) (reporting case of woman injured by Lash-Lure); A. W. McCally et al., Corneal Ulceration Following Use of Lash-Lure, 110 JAMA 1560 (1933) (reporting case of woman injured by Lash-Lure); Sigmund S. Greenbaum, Dermatoconjunctivitis Due to Lash-Lure, An Eyelash and Eyebrow Dye, 101 JAMA 363 (1933) (reporting case of woman injured by Lash-Lure); S. B. Forbes & W. C. Blake, Fatality Resulting from the Use of Lash-Lure on the Eyebrow and Eyelashes, 103 JAMA 1441 (1934) (reporting fatality after using Lash-Lure). American Chamber of Horrors stated that there were at least 17 cases of Lash Lure injuries reported in the Journal of the American Medical Association, but there was no way to know how many women in total were so injured. LAMB, supra note 275, at 19.\textsuperscript{298} DUNN, supra note 1, at 1154-55; see also LAMB, supra note 275, at 22.\textsuperscript{299} DUNN, supra note 1, at 115-16; see also id. at 160; id. at 484; id. at 572 (quoting Congressman Virgil Chapman as stating, “Many harmful and dangerous cosmetics have been sold to the public and used by unsuspecting women so as to result in their permanent disfigurement and impairment of their health”); id. at 256; Virgil Munday Chapman, History, Art & Archives, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/People/Listing/C/CHAPMAN,-Virgil-Munday-(C000317) [https://perma.cc/38J-PW33]; see also DUNN, supra note 1, at 256.\textsuperscript{300} See DUNN, supra note 1, at 156.\textsuperscript{301} See, e.g., 1935 Hearing, supra note 287, at 165 (quoting Congressman Virgil Chapman as stating that “the committee realizes that women use cosmetics externally, internally, and eternally”).\textsuperscript{302} DUNN, supra note 1, at 150; at 96, 269-70, 597, 969; MANNING & BRUDNICK, supra note 254, 96-97. She later served as a conferee for the Senate. DUNN, supra note 1, at 597, 969. The 1930 Census identified Senator Caraway as white. FIFTEENTH CENSUS, supra note 282.\textsuperscript{303} See, e.g., Hearings Before a Subcommittee of the Committee on Commerce on S. 1944, 73rd Cong. (1933) [hereinafter 1933 Hearings]; 1935 Hearing, supra note 287.\textsuperscript{304} 1933 Hearings, supra note 303, at 339. The 1930 Census identified Mrs. William Sporborg as white. FIFTEENTH CENSUS, supra note 282 (listing Constance Sporborg).\textsuperscript{305} Id. at 339, 340.
was “glad to see a woman on th[e] Senatorial Committee whose decisions and recommendations will effect so many women who are users of drugs, cosmetics, and foods.”

The Senate debate reflected the male Senators’ attitudes towards women. During Senate debate, male Senators referred to a “beautiful girl” who “lost her eyes” and her vision after use of an eyelash dye. The “beautiful girl,” who remains nameless through the debates, appears to have been a social worker who was injured before a dinner to honor her civic activity by an eyelash dye that contained “a poison.” The woman was likely Hazel Fay Brown (Musser), whose injuries from Lash-Lure are described in detail (with before and after photographs) in American Chamber of Horrors.

During the debate, the woman is largely reduced to the subject of the male Senator’s viewing. Senator Copeland appeared to joke about submitting “the photograph of a beautiful young woman” to Senator James Hamilton Lewis, promoting objections about other Senators experiencing “envy” and “the suspension of proper senatorial activities,” as well as laughter. Senator Copeland responded by stating that he would “give [the photograph] to the Senate . . . so that there may be no feeling of discrimination.” Senator Lewis, in an apparent reference to the photograph, “object[ed] to the exhibits which have caused trouble.” And, Senator Matthew M. Neely expressed concern about Senator Copeland “absorbing the entire attention of the Senate in the photographs of the beautiful girl.”

Discussion of the cosmetics provisions of the proposed legislation was punctuated by laughter: Senator Copeland after remarking on the manufacture, sale, and use of cosmetics, prompted laughter when he joked about Senator Lewis having “no doubt . . . been a profound student in the fields involved.” There was also laughter after Senator Neely stated that lipstick “is not safe for men,” and again after Senator Copeland asked whether Senator Neely would like to “testify on the subject at any great length.”

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306. Id. at 344.
307. DUNN, supra note 1, at 156-57, 279.
308. Id. at 156, 279.
309. LAMB, supra note 275, at 15-18; KAY, supra note 3. The 1930 Census identified Hazel Fay Musser as white. FIFTEENTH CENSUS, supra note 282.
310. FDA’s chief, W.G. Campbell appears to have shown a photograph of the injured woman during a 1934 Senate hearing. See DUNN, supra note 1, at 1154-55.
312. Id.
313. DUNN, supra note 1, at 156.
314. Id.; SENATORS OF THE UNITED STATES, supra note 312, at 56.
315. DUNN, supra note 1, at 156.
316. Id.
The debate also reflected the male Senators’ judgments about women’s use of cosmetics: for example, Senator Neely remarked that he’d be “very much more enthusiastic about the bill if it” “contain[ed] an inhibition against the excessive use of the abominable lipstick.”\textsuperscript{317} And Senator Connally remarked that “[i]t seems . . . the more solemn [women] are, the less cosmetics they use.”\textsuperscript{318} In contrast, Senator Copeland, who led the push for new legislation, remarked that the woman who was blinded after using the eyelash dye was “preparing herself, as she properly should for an occasion so important to her.”\textsuperscript{319} And that he was “glad to say there” that the bill did not prohibit the use of lipstick.\textsuperscript{320} Senator Copeland remarked that he viewed “it as the solemn duty of every woman to be as beautiful as she can be” and that he did “not blame any woman for using cosmetics if they tend in the direction of making her more attractive.”\textsuperscript{321} In explaining what he meant by solemn duty, he later stated, “I mean, of course, it is my solemn duty to help them to be as beautiful as they can be.”\textsuperscript{322}

In the course of the legislative debate, Senator Copeland referenced the “fair woman” becoming fairer as a result of cosmetic use.\textsuperscript{323} Given racialized notions of beauty,\textsuperscript{324} this may have had racial undertones. Senator Copeland went on to state that the Senate’s “respect for [the fair woman] is such that [they] desire that whatever she uses may be safe to use.”\textsuperscript{325} Who the law was intended to protect was at times described in limited terms. For example, Senator Copeland remarked, “I want all women, in whom I have an interest, to be guarded and protected against the use of things which may be damaging.”\textsuperscript{326} Copeland also appealed to his fellow male senators, stating that “[e]very Senator having in mind the welfare of his wife, his children, his grandchildren, and his great-children if there be such, is interested in having the measure enacted into law because of what it will do—promote their welfare, maintain their health, and extend their lives.”\textsuperscript{327}

3 Devaluation of Cosmetics & Cosmetics Law & Regulation

Food is life-sustaining and everyone must eat. Drugs may treat serious illness and can be lifesaving. In contrast to those traditional product categories

\textsuperscript{317} Id.
\textsuperscript{318} Id. at 278.
\textsuperscript{319} Id. at 156.
\textsuperscript{320} Id.
\textsuperscript{321} Id. at 278.
\textsuperscript{322} Id. at 279.
\textsuperscript{323} Id. at 694.
\textsuperscript{324} See KAY, supra note 3; PEISS, supra note 3.
\textsuperscript{325} DUNN, supra note 1, at 694.
\textsuperscript{326} Id. at 278 (emphasis added).
\textsuperscript{327} Id. at 185 (emphasis added). But see id. at 155 (quoting Senator Copeland as stating that the “bill is intended to safeguard the men and women, the boys and girls, and the babies of this country”).
in the FDCA, cosmetics are often viewed as frivolous or trivial. The trivialization of cosmetics may be reinforced by the very meaning of the word “cosmetic,” as one common definition is “superficial.”

While cosmetics have different meanings for different women—and these meanings are shaped by factors including race and socio-economic status—cosmetics are closely associated with femininity. In particular, cosmetics are associated with a “deeply-ingrained American cultural definition of femininity denoted as a particular kind of commercialized feminine beauty.” Indeed, cosmetics use has been shown to significantly impact impressions of femininity.

At the same time that cosmetics are closely associated with femininity, traits and qualities associated with women or femininity have been devalued. For example, Mary Anne C. Case has noted “the continuing devaluation, in life and in law, of qualities deemed feminine.” And as Deborah Zalesne has observed, in Jespersen v. Harrah’s Operating Co., Inc.—a case that unsuccessfully challenged the firing of a female bartender for failing to comply with her employer’s appearance standards, which required female employees to wear makeup—“the court failed . . . to consider the fact that the makeup, hair, and dress requirements are deeply rooted in traditional notions of how men and women should look and are based on stereotypes that deride feminine traits and marginalize individuals who possess such traits.”

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328. See, e.g., POUCHER’S PERFUMES, COSMETICS AND SOAPs (Hilda Butler ed., 10th ed. 2000); DELLINGE & WILLIAMS, supra note 93, at 153; WOLF, supra note 4, at 9.


331. See, e.g., Richard Russell, A Sex Difference in Facial Contrast and Its Exaggeration by Cosmetics, 28 PERCEPTION 1211, 1217 (2009) (suggesting that “an important function of cosmetics may be to increase the apparent femininity, and hence attractiveness, of the female face by increasing facial contrast”); Jane E. Workman & Kim K.P. Johnson, The Role of Cosmetics in Impression Formation, 10 TEXTILES & CLOTHING RES. J. 63 (1991) (stating that “[r]esults support the use of cosmetics as a cue in forming impressions of another’s . . . femininity”); Cathryn L. Cox & William H. Glock, Resume Evaluations and Cosmetics Use: When More Is Not Better, 14 SEX ROLES 51, 51, 56 (1986) (noting that “[c]osmetics use has been traditionally used by women to control their physical appearance” and finding “that cosmetics tend to enhance the perceived attractiveness and femininity of women”).


333. Case, supra note 332, at 3.

FDA is not immune to sociopolitical influences. Thus, the association with women and femininity may have contributed to cosmetics law and regulation being deprioritized. Others have argued that “FDA has been an inadequate protector of women’s health” and that “FDA inaction [has] directly damaged the health of large numbers of women on more than one occasion.”

FDA’s guidelines—Considerations for the Clinical Evaluation of Drugs—for many years “largely excluded women of childbearing potential from clinical trials,” a position that many viewed as “reflect[ing] gender stereotyping more than concerns about good science.”

Gender gaps in clinical research may also impact the study—and regulation—of cosmetics safety. Medicine “generally has paid more attention to the risks and benefits of new drugs with a male model in mind, rather than a female” and “knowledge concerning the effects of various treatments on women and their unique needs remains sparse and underdeveloped.” Current knowledge of the effects of cosmetics, a highly gendered product, on women’s health, is similarly underdeveloped. For example, one epidemiologist at the Harvard T.H. Chan School of Public Health stated that “[f]or decades we’ve been studying what’s in the air that you breathe and the water you drink. But you wake up in the morning . . . and you may use a shampoo or a conditioner, and a

335. See Mara Sanders, Sex, Drugs, and Advisory Committees: An Analysis of Pharmaceutical Industry Manipulation of FDA Vulnerability to Sociopolitical Influences on Matters of Women’s Health, 48 COLUM. HUM. RTS. L. REV. 149, 150 (2017) (arguing that FDA “displays a number of biases that distort scientific analysis, from normative judgments about women’s sexuality to a patronizing sense that women require heightened protection against the risks posed by otherwise effective drugs”).

336. Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 WASH. L. REV. 1, 51 (1995); see also Pub. Citizen Health Research Grp. v. Comm’r, Food & Drug Admin., 724 F. Supp. 1013, 1021 (D.D.C. 1989) (holding that “a more than seven year delay in issuing a regulation impacting on women’s health is certainly an unreasonable delay”); Amanda L. Allen, A Plan C for Plan B: A Feminist Legal Response to the Ways in Which Behind-the-Counter Emergency Contraception Fails Women, 11 N.Y. CITY L. REV. 401, 411 (2008) (arguing that “[a]t the very least, the ways in which the FDA decision [regarding Plan B, an emergency contraceptive] privileged antiquated views about women’s and girls’ sexuality along with the ideological agenda of a conservative presidential administration over science, medicine, and women’s health offers support for the feminist critique of the law as an inherently patriarchal institution”); Vicki Lawrence MacDougall, Medical Gender Bias and Managed Care, 27 OKLA. CITY U. L. REV. 781, 786 (2002) (“rais[ing] the haunting question whether managed care has the built-in propensity to perpetuate—if not sanction and encourage—medical gender bias to the detriment of the health of women enrolled in managed care plans”); Rebecca Weisman, Reforms in Medical Device Regulation: An Examination of the Silicone Gel Breast Implant Debacle, 23 GOLDEN GATE U. L. REV. 973, 982 (1993) (discussing silicone gel breast implants, diethylstilbestrol (DES), and the Dalkon Shield and arguing that “failed to act responsibly when dealing with products affecting women’s health and safety”).


338. See, e.g., Rothenberg, supra note 337, at 1208.


340. Rothenberg, supra note 337, at 1203.
toothpaste, and cosmetics, and they all contain many different chemicals. And we pretty much never thought about them.”

B. Reform of Cosmetics Law & Regulation Must Confront Tensions Resulting from the Debate Among Feminists Regarding the Meaning of Cosmetics & Economic Opportunities in the Cosmetics Industry

The debate among self-described feminists regarding the meaning of cosmetics and differences among women with respect to cosmetics may complicate reform efforts. As discussed earlier, the use of, exposure to, and meaning of cosmetics may differ as a result of the intersections between gender, race, and class. In addition, the economic and entrepreneurial opportunities that cosmetics may provide may create tensions that may further complicate efforts to reform cosmetics law and regulation.

1. The Debate Among Self-Described Feminists

There is substantial debate among feminists over the meaning of cosmetics and the cosmetics industry. This debate is part of a larger debate about beauty and appearance. In her essay, Appearance as a Feminist Issue, Rhode describes an “increasingly fragmented” feminist movement in which “different subcultures have differed sharply on matters of appearance.”

Some feminists are concerned about the costs of appearance norms, including financial costs, health risks, discrimination, “the devaluation and sexualization of women,” and the exacerbation of economic, racial, and gender inequalities. For example, Naomi Wolf argues that images of female beauty” are used “as a political weapon against women’s advancement” and that cosmetics and the cosmetics industry contribute to this “beauty myth,” pressuring women to adhere to unrealistic beauty standards and hence constraining them. Other feminists have focused on “[a]ppearance [a]s an

342. See supra Sections II.A & B. They may also differ based on other characteristics including sexual orientation, ethnicity, socio-economic status, and age.
343. See Deborah L. Rhode, Appearance as a Feminist Issue, 69 SMU L. REV. 697, 697 (2016) (stating that “as the feminist movement has grown increasingly fragmented, different subcultures have differed sharply on matters of appearance” and that “[w]hen it comes to appearance, what women want is not always the same or always compatible”); see also Susan Brownmiller, Femininity 157-61 (1984) (discussing the feminism and the tensions over makeup).
344. Rhode, supra note 343, at 699; see also Craig, supra note 330.
345. Id. at 699-704.
opportunity for self-expression and self-determination,” albeit with limits. For example, Jennifer Baumgardner and Amy Richards have argued that “[u]sing makeup isn’t a sign of our sway to the marketplace and the male gaze; it can be sexy, campy, ironic, or simply decorating ourselves without the loaded issues.”

However, regardless of how one views cosmetics use, the current state of cosmetics law and regulation is concerning because many women use or are exposed to cosmetics. If cosmetics use generally is oppressive, then the current state of cosmetics law and regulation reinforces this because it disproportionately puts women’s health at risk. If cosmetics use is liberating, then the current state of cosmetics law and regulation is troubling because cosmetics use is not liberating if it comes with unknown and, thus, unaccepted risks.

2. Cosmetics, Entrepreneurship & Economic Opportunity

Women’s divergent interests may also hinder the development of cosmetics law and regulation. As discussed in Section II.B, cosmetics use and exposure may have negative health effects. But cosmetics are also big business, and it is important to recognize the economic opportunities that the cosmetics industry has provided and continues to provide women, including women who are members of other excluded groups. Women’s economic interests and considerations will likely impact any potential reforms.

There is a long history of the cosmetics industry providing economic opportunities for diverse women. For example, Peiss writes that while “beauty culture mainly offered women low-wage work, it became one of a handful of occupations . . . to sustain female entrepreneurship and ownership” and “[w]omen . . . became inventors, manufacturers, and distributors of beauty products.”

The women entrepreneurs came from different classes (although many were poor), were of different races, and were both immigrants and native-born. For example, Annie Turnbo Malone and Sarah Breedlove (known as Madam C.J. Walker) were two black women entrepreneurs who built thriving businesses selling hair care products, an industry that has “long been one of the few sites of success for black women entrepreneurs.”

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347. Rhode, supra note 343, at 705–07.
349. See supra note 2 and accompanying text.
351. Id. at 63–64, 96.
352. Id. at 67–70.
who grew up in poverty in Canada, established Elizabeth Arden. And Helena Rubinstein, who came from “a middling Jewish family” and moved to New York from Europe after World War I started, began a cosmetics company bearing her name. All four of these women built “business empires.” Although there is some debate over whether Malone or Breedlove was the first black female millionaire in the United States, both women were among the first.

Beauty work, including that involving the use of cosmetics, is still often done by women, and women comprise the majority of workers in many jobs that involve such work. According to the chief scientist of the Personal Care Products Council, “[w]omen and people of color account for nearly 74% of all employment in the personal care products sector and 61.2% of management positions.” As a result, many women have an economic interest in cosmetics, which may be impacted by changes in cosmetics law and regulation. For example, in 2012, Deborah May testified at a Congressional hearing about the economic contributions that the handcrafted soap and cosmetic industry makes. She stated that the “industry is over 200,000 small businesses hand producing small batches of soaps and cosmetics,” of which 95% “are women-owned” and urged exemptions for small businesses from if FDA were to be given new authority over cosmetics. Accordingly, any reform efforts may confront opposition from those with divergent interests.

should exempt braiders from cosmetology licensing requirements and authorize state administrators to promulgate substantive regulations that are reasonably related to braiding and natural styling’’); see also Perry, supra note 100, at 581. 
354. Peiss, supra note 3, 64-66.
355. Id. at 66-67
356. Id. at 70.
358. Kay, supra note 3; Peiss, supra note 3; see also BLS, DETAILED OCCUPATION, supra note 6 and accompanying text (discussing occupational data); BLS, DETAILED INDUSTRY, supra note 96 and accompanying text (same).
361. Id. at 4. She also stated that she supported several principles related to cosmetic regulation. Id. at 4–5.
Finally, this Article considers how asking the woman question and the excluded group question could inform reform efforts. It is mindful of the fact that the method that it employs does not lead to a particular end. It does, however, reveal the gendered roots of cosmetics law and regulation, and highlight the need to further investigate how cosmetics and the current state of cosmetics law and regulation impact women, including members of excluded groups. It is not enough to simply claim that cosmetics are the safest product category that FDA regulates, as the current state of cosmetics law and regulation hinders the ability to meaningfully assess the safety of cosmetics. This Article suggests several changes to begin to reform cosmetics law and regulation to better account for women’s experiences, safety, and needs.

A number of scholars and other commentators have proposed or supported reforms to cosmetics law and regulations. In addition, the General Accounting Office has studied and issued recommendations on cosmetics law and regulation, and members of Congress have introduced bills to strengthen cosmetics law. While many of these proposals and bills suggest fairly broad cosmetics reforms, the reforms that this Article argues for are more limited in scope. This is not to say that additional reforms are not needed—they very well may be. As an initial matter, however, this Article argues for reforms that facilitate the collection of information to more accurately assess the safety of cosmetics and the risks that they may pose to human health, including that of diverse women. The reforms that this Article suggests would also begin to narrow the gap between the regulation of cosmetics—a highly gendered product—and that of the other major product categories, which lack the same gendered history and associations.

First, Congress and FDA should require that establishments involved in the production and distribution of cosmetics intended for use in the United States register with the FDA, just as food, drug, device, biologics, and tobacco product

362. See Bartlett, supra note 16, at 837.
363. See, e.g., De Paz, supra note 117; Mason, supra note 158; Julie Mueller, Pulling Our Hair Out and Glossing over the Problem: A Call to Strengthen the FDA’s Power to Regulate Cosmetics Through an Amendment to the Federal Food, Drug, and Cosmetic Act, 79 U. Pitt. L. Rev. 317 (2017); Shah & Taylor, supra note 99; Brittany Stepp, You Don’t Know What’s in Your Shampoo, and Neither Does the FDA: A Call for Change, 10 Drexel L. Rev. 277 (2017); Watnick, supra note 117; Johnson, supra note 116, at 120.
364. GAO, HRD-78-139, supra note 9; see also STATEMENT OF GREGORY J. AHART, supra note 9; GAO/HRD-90-58, supra note 9.
366. There is overlap, however, between the reforms that this Article argues are needed and those proposed by others. See, e.g., Cosmetic Modernization Amendments of 2017, H.R. 575, 115th Cong. (2017); FDA Cosmetic Safety and Modernization Act, S. 2003, 115th Cong. (2017); Watnick, supra note 117, at 637–49 (discussing federal legislative proposals); Mueller, supra note 363.
establishments do. \textsuperscript{367} Registration requirements help to facilitate post-market enforcement activities. \textsuperscript{368} Without mandatory registration, FDA may not even know that a facility is producing cosmetics.

Second, Congress and FDA should require that cosmetics establishments also be required to provide FDA with a listing of ingredients used in cosmetic products intended for use in the United States. As noted above, filing ingredient statements for each cosmetic product is currently voluntary. \textsuperscript{369} In response to a comment requesting that FDA make the program mandatory, FDA stated that it “has no statutory authority to require mandatory cosmetic product reporting.” Together, establishment registration and product listing requirements would provide FDA with information about “the locations, business trade names, and types of activity (manufacturing or packaging) of cosmetic product establishments,” and help facilitate the distribution of regulatory information and the conduct of inspections. \textsuperscript{370}

Third, Congress and FDA should require that cosmetics manufacturers and distributors report certain adverse events to the agency. As noted above, there is no requirement that such events be reported, which hampers FDA’s ability to monitor the safety of cosmetics. The required adverse event reporting should include demographic information, including sex, race, and ethnicity, for the person who experienced the event.

Fourth, Congress should extend FDA’s authority over cosmetics to allow the agency to inspect records under certain circumstances. \textsuperscript{372} As noted above, under the FDCA, FDA’s general inspection authority with respect to cosmetics is limited to certain establishments and vehicles. \textsuperscript{373}

Fifth, Congress and FDA should collect and publish data on FDA’s regulatory activities and budget for cosmetics in an easily accessible format. As noted above, such information is not currently readily available, and without this


\textsuperscript{369} See Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Cosmetic Registration Program, 73 Fed. Reg. 76,360 (Dec. 16, 2008).

\textsuperscript{370} 73 Fed. Reg. 76,361.


information it is difficult to fully assess the adequacy of FDA’s cosmetics regulation.374

Finally, Congress and FDA should encourage more research into the potential hazards that cosmetics may pose to women’s health, including to members of other excluded groups, such as racial and ethnic minorities.

The proposals in this Section are not intended to serve as a comprehensive fix, but rather to serve as first steps designed to provide the information needed to more fully assess the current state of cosmetics law and regulation and the safety of cosmetics.

CONCLUSION

Examining cosmetics law and regulation through a feminist lens demonstrates how the shortcomings of current regulatory approach disproportionately jeopardize women’s health. Cosmetics are closely associated with cultural constructs of femininity and womanhood, and are a highly gendered product and industry. While women use more cosmetics than men and are the majority of workers in the cosmetics industry,375 cosmetics law and regulation have largely neglected women’s diverse experiences and needs. These omissions impact women differently and may vary as a result of many factors, including race and socio-economic status.376 Recognizing the failure of current cosmetics law and regulation for women is a precursor to remedying these injustices.377 The impact of these shortcomings, however, is not limited to women who use cosmetics, either personally or at work. Men and children also use cosmetics, and everyone, regardless of whether they use cosmetics or not, may be exposed to cosmetics. Thus, cosmetics law and regulation should be strengthened in order to more accurately assess the risks that cosmetics may pose to human health.

374. See supra Section II.C.2.c.
375. See supra Section II.A.
376. See Rothenberg, supra note 337, at 1207.