

Passive Discrimination: When Does It Make Sense to Pay Too Little?

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Economists have long recognized employers' ability to construct benefits packages to induce workers to sort themselves into and out of jobs. For instance, to encourage applications from individuals with a highly valued but largely unobservable characteristic, such as patience, employers might offer benefits that patient individuals are likely to value more than other individuals. By offering a compensation package with highly valued benefits but a relatively low wage, employers will attract workers with the favored characteristic and discourage other individuals from applying for or accepting the job. While economic theory generally views this kind of self-selection in value neutral terms, prejudiced employers could exploit this mechanism to systematically discourage individuals on the basis of observable characteristics that the law prohibits employers from considering in their hiring decisions. As long as groups systematically differ in their preferences for various employment terms and conditions, employers can generate sorting in the application and employment acceptance stages, leading to the desired segregated outcome in a way that regulators will find difficult to prevent without dictating uniformity in benefits packages.

We develop a formal model as well as an intuitive discussion of this phenomenon. We provide a number of representative illustrations of how a prejudiced employer could exploit preference heterogeneity for discriminatory ends. These mechanisms include wage and benefit packages such as (1) high pension, low wages; (2) commission-based salaries; (3) Sundays-off policies; and (4) free school tuition. We also note that some employers might end up with a segregated workforce even when they have no intention to sort workers or when they intend to sort for a nondiscriminatory characteristic.

Finally, we conclude that current federal antidiscrimination law inadequately addresses either intentional or unintentional passive discrimination. Neither disparate treatment nor disparate impact frameworks are well suited to grappling with this form of structural discrimination. Passive discrimination facilitates rather than impedes employee choice and thus might not be viewed as discrimination per se, even if it results in workplace segregation or means that individuals with protected characteristics who fail to self sort are least likely to value the form of compensation and fringe benefits they receive. We finish with a discussion of some judicial and legislative approaches that may ameliorate passive discrimination.

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INTRODUCTION

Since the seminal contributions of Gary Becker,¹ scholars have generated a huge theoretical and empirical law and economics literature around the topic of employment discrimination.² In that literature, scholars examine discrimination based on race,³ sex,⁴ religion,⁵ and a host of other characteristics.⁶ Further, researchers develop and investigate models in which discrimination springs from employer,⁷ coworker,⁸ and customer⁹ animus, as well as discrimination that is not generated by animus at all, but through a type of Bayesian inference referred to as statistical or rational discrimination.¹⁰

These models and empirical investigations center on the employment policies and practices known in the legal context as the disparate

¹ Gary Becker, *The Economics of Discrimination* 122 (Chicago 1957) (developing a framework for analyzing workplace discrimination in such a manner that yields quantifiable data and the opportunity for empirical research).

² For a review of this literature, see John J. Donohue, *The Law and Economics of Antidiscrimination Law*, in A.M. Polinsky and Steven Shavell, eds, *2 Handbook of Law and Economics* 1387–1467 (North-Holland 2007).

³ See, for example, John J. Donohue and James J. Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 *J Econ Lit* 1603, 1640 (1991) (evaluating several theories for the economic progress of blacks after 1964).

⁴ See, for example, Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 *U Chi L Rev* 1311, 1334 (1989) (suggesting that sex discrimination laws may have reduced women's aggregate welfare); John J. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 *U Chi L Rev* 1337, 1366 (1989) (arguing that sex discrimination laws can improve workplace efficiency and are necessary to change employer behavior).

⁵ See, for example, Vani K. Borooah, *Is There a Penalty to Being a Catholic in Northern Ireland: An Econometric Analysis of the Relationship between Religious Belief and Occupational Success*, 15 *Eur J Pol Econ* 163, 188 (1999) (suggesting that the overrepresentation of Catholics in the jobless population reflects systematic religious discrimination).

⁶ See, for example, Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State-law Variation: Preliminary Evidence on Educational Participation Effects*, 94 *Am Econ Rev* 447, 448 (2004) (comparing changes in educational participation by individuals with disabilities across states with differing pre-ADA regimes).

⁷ See, for example, Becker, *Economics of Discrimination* at 31 (cited in note 1) (creating a model that accounts for employers' tastes and market forces in order to measure employer discrimination against employees); Dan A. Black, *Discrimination in an Equilibrium Search Model*, 13 *J Labor Econ* 309, 327 (1995) (predicting that minority workers as a group will receive lower wages if any fraction of employers harbors distaste for that group).

⁸ See, for example, Barry R. Chiswick, *Racial Discrimination in the Labor Market: A Test of Alternate Hypotheses*, 81 *J Polit Econ* 1330, 1346 (1973) (presenting evidence that race-based preferences for coworkers lead to income inequality).

⁹ See, for example, George J. Borjas and Steven G. Bronars, *Consumer Discrimination and Self-employment*, 97 *J Polit Econ* 581, 604 (1989) (arguing that white consumers' discriminatory preferences lead to lower incomes for self-employed minorities).

¹⁰ See, for example, Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 *Am Econ Rev* 659, 661 (1972) (postulating that background assumptions about minority employees' capabilities influence the interpretation of objective performance metrics).

treatment of or the disparate impact on individuals in protected classes.¹¹ Regulators and courts tend to frame their inquiries around whether an employer directly and intentionally treats employees from a disfavored group differently or whether the employer imposes job requirements that are unnecessary for the performance of the job but have the effect, intended or not, of disadvantaging individuals in a disfavored group.¹²

In this Article, we present a distinct mechanism of employer discrimination largely ignored by scholars and regulators alike. What we term “passive discrimination” involves the employer’s use of wage and benefits packages that exploit observed, systematic group-level preference heterogeneity to induce workers to sort themselves *ex ante* such that members of a disfavored group view the job opportunity as being less attractive than do members of other groups.

By way of illustration, imagine a setting in which individuals from two groups, Deltas and Omegas, comprise the labor pool from which employees may be hired. While the work productivity of Deltas and Omegas is drawn from the same distribution (that is, the expected productivity of members from each group is equal), a given employer dislikes Omegas for reasons unrelated to their job qualifications. Because Omegas have suffered discrimination historically, legislation designates Omegas as a protected class for employment purposes. Further, while both Deltas and Omegas have similar reservation wages,¹³ Deltas, on average, more highly value some nontransferable good that the employer can procure (or produce) at a cost equal to or lower than the Deltas’ average valuation of the good. To make the illustration more concrete, assume the employer is a brewery and offers free beer at lunchtime.

While the employer prefers to hire only Deltas, regulators and courts could easily observe such behavior and impose legal penalties as well as order the employer to hire Omegas. Because Deltas and Omegas, by assumption, possess equal abilities in terms of job requirements, the employer cannot justify differential hiring decisions based on the claim that Omegas fail to meet a relevant job requirement. Lastly, if the employer attempts to conceal the job’s availability from Omegas by advertising it only in Delta neighborhoods or through Delta social networks, regulators are likely to discover such a plan and may require the employer to advertise more broadly.

¹¹ See John J. Donohue, *Foundations of Employment Discrimination Law* 193 (Foundation 2003).

¹² See, for example, *Griggs v Duke Power Co.*, 401 US 424, 432 (1970) (“Congress directed the thrust of [Title VII] to the *consequences* of employment discrimination, not simply the motivation.”); EEOC Compliance Manual § 604.1 at 2093 (CCH 1999).

¹³ Reservation wages are the lowest wage at which an individual is willing to accept a job.

In our setting, employers may advertise the job broadly and make hiring decisions in a seemingly nondiscriminatory fashion, avoiding lawsuits and penalties from the regulator, and still achieve an ultimate workforce that is predominantly (if not exclusively) composed of Deltas. Specifically, if the employer offers a compensation package composed of a submarket wage as well as access to the free beer at lunchtime, Omegas will find such a job unattractive as they do not value the beer enough to compensate them for the lower wage, while Deltas will still gladly accept the job offers. If the employment regulators note the absence of Omegas in the firm's employment, the brewery can easily produce documentation that it advertised broadly, generated an applicant pool that approximates the relevant labor pool, and offered employment to both Deltas and Omegas at a nondiscriminatory rate. Ultimately, according to the firm, due to no misconduct on its part, Omegas simply lacked interest in working for the brewery. By engaging in passive discrimination of this sort, the employer avoids hiring individuals from the disfavored group without generating regulatory backlash or successful civil litigation.

While scholars who write in the area of discrimination law have tangentially touched on this phenomenon in some isolated contexts, such as discussions of workplace dress codes¹⁴ or the disproportionate burden placed on women by jobs requiring extensive travel,¹⁵ no one has examined these practices in a systematic way.¹⁶ Such discrimination is not generally presented as an avenue for intentional discrimination, but rather as an ancillary effect of employment policies or conditions. When looking at these practices, scholars tend to suggest that either employment discrimination law should be readjusted to better grapple with structural and nonintentional work conditions,¹⁷ or such practices,

¹⁴ See, for example, Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich L Rev 2541, 2544 (1994) (arguing that judicial reliance on community norms of workplace dress and appearance legitimates the gender stereotypes that Title VII was enacted to eliminate).

¹⁵ See, for example, Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 Mich J L Ref 371, 413–14 (2001).

¹⁶ Many have discussed practices that implicate the work-life balance, which may operate to screen out many women from particular jobs. We consider strategies such as the use of long hours and high wages, or substantial face time and high wages, to be special cases, as they more directly implicate productivity than the hypotheticals we present. As we explain in Part I, for purposes of disproving Gary Becker's theory, we presume all workers are equally productive. Cases that integrate productivity are important and doctrinally interesting, but we focus on the simplest examples in this Article and leave more complex cases for later works.

¹⁷ See, for example, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv CR-CL L Rev 91, 105 (2003) (arguing that reorganization of the workplace into a less hierarchical model has allowed discriminatory bias to enter in such a manner that current Title VII doctrine would not remedy).

while lamentable, are potentially justified on nondiscriminatory grounds.¹⁸ Yet recent class actions suggest that much of legal academia and the public underestimate the prevalence of basic animus- or stereotype-driven discrimination.¹⁹ So it should be unsurprising if litigation-savvy employers might deliberately craft compensation structures and packages to exclude certain types of workers.

Lior Strahilevitz's work on using neighborhood amenities to induce segregation in housing communities is a notable exception to the scholarly blinders to the possible relationship between self-sorting and deliberately induced segregation.²⁰ The intuition motivating his work is similar to the one we exploit here. Strahilevitz argues that because anti-discrimination laws prohibit developers from directly marketing new neighborhoods to buyers from favored demographic groups,²¹ developers instead "embed" costly amenities such as golf courses that tend to be little valued by potential residents from disfavored demographic groups. By requiring all residents to pay for these amenities, members of the disfavored group will generally choose not to live in such communities. Because of this likely choice, individuals from favored groups can then treat the existence of these "exclusionary amenities" as both a signal of the neighborhood's demographic make-up and an implicit commitment that the community will maintain that make-up. These amenities essentially enable the developer to segregate the community by inducing the individuals from undesirable groups to self-select away from the community without running afoul of fair housing laws or other local regulations that prohibit discrimination.²² By exploiting observable group-level preference heterogeneity, the developers can passively achieve segregation whereas they would be punished if they overtly attempted to discriminate to achieve the same ends.

In this Article, we begin by presenting a formal model of passive discrimination in which an employer offers a compensation package composed of a below-market cash wage plus some nontransferable benefit that is valued less highly by individuals from the disfavored group. The formal model highlights the conditions under which a sepa-

¹⁸ See, for example, Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 290–312 (Harvard 1995).

¹⁹ Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 *Emp Rts & Emp Policy J* 1, 30–32 (2005) (contrasting the rise of major class action sex discrimination cases against the dominant perception that workplace sex discrimination has largely receded over the last thirty years).

²⁰ See generally Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 *Va L Rev* 437 (2006).

²¹ The law also limits the extent to which developers can provide information regarding the demographic makeup of the existing residential population. See *id.* at 444 n 18.

²² *Id.* at 437.

rating or segregating equilibrium will be achieved.²³ It also shows, however, that in the resulting equilibrium, individuals from the disfavored group need not be “harmed” in terms of ultimate economic well-being.²⁴ Therefore, this sort of equilibrium is not generally subject to Becker’s conclusion that competition will force out employer taste-based discrimination in the labor market. We then provide some real-world illustrations of group-level preference heterogeneity that could generate passive discrimination in various occupational settings. We also note examples where the exploitation of preference heterogeneity may generate normatively attractive worker sorting.

We next discuss when current antidiscrimination law applies to this kind of passive discrimination. We note that some employers hold a discriminatory intent when designing such terms and conditions, while others might be simply unaware or neutral as to when their design of such packages will induce segregation based on membership in a disfavored group. Part III notes doctrinal limits in the context of compensation packages as well as how the passive discrimination setting might magnify some of Title VII’s more general limitations. We conclude with a discussion of how regulators and courts might address passive discrimination.

I. A FORMAL MODEL OF PASSIVE DISCRIMINATION

In this Part, we present a very basic, one-period microeconomic model in which equilibrium occurs in both perfectly competitive labor and goods markets. Because all hypothesized workers are equally productive, and because no market power exists and no state mandate

²³ For those unconvinced in the first instance that competition will force out employer taste-based discrimination or for those interested in relaxing some of the assumptions of perfect competition, such passive discrimination presents a different harm. If an employer attempts to create a segregating equilibrium and does not entirely succeed, the employees he attempted but failed to screen out may experience economic harm vis-à-vis other employees. Many, though not necessarily all, individuals within the disfavored group will receive a compensation package that is of less perceived or actual value to them than to the other employees.

²⁴ Individuals from the disfavored groups who self-sort out of the job, as well as those from the favored groups who self-sort into the job, do, however, experience many harms associated with segregation itself. This harm is less straightforward than the harms associated with residential segregation, such as the exclusion from valuable social networks. But integrated workplaces may provide welfare values to all involved by decreasing stigma and eradicating misperceptions among groups. In other words, those who participate in an integrated workforce benefit by lessening the effects of irrational or incorrect stereotypes.

In addition, much evidence suggests that those from protected groups, such as women, seek integrated and diverse workplaces as a proxy for a nondiscriminatory environment. This point is articulated in Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 Harv Women’s L J 1, 88 (2004). Even workers who economically gain from segregation may have a preference for fairness or diversity that is unsatisfied by a segregated equilibrium.

supports segregation, models like this one typically cannot sustain a deliberately segregated equilibrium. In order to maintain segregation, prejudiced firms would have to pay a premium to favored workers to be sure of attracting them. However, any firm that did so would have higher costs of production than nonprejudiced firms. These higher costs would render prejudiced firms uncompetitive, and in a model of perfect competition, these firms would necessarily go out of business. Thus, employers could not sustain deliberate discrimination against disfavored groups in equilibrium. However, when workers' preferences for an amenity good are correlated with worker types, segregated equilibria are possible, and possibly even unique. Prejudiced firms can use compensation plans that combine cash wages and fringe benefits in an effort to hire only the favored types of workers.

We first discuss some basic background details of the model in Part I.A.1, focusing on the production technology, competitive labor and goods markets, and the (assumed) systematic differences in preferences of two worker types: Deltas and Omegas. We then derive the optimal consumption bundles of Deltas and Omegas. Deltas consume both a generic good and amenities, while Omegas choose to consume only the generic good. In Part I.A.2, we then consider the labor market equilibrium when all labor market compensation must be paid in cash, so that fringe benefits are not allowed. The resulting equilibrium is integrated in the sense that no firm can be sure of sustaining a deliberately discriminatory hiring-and-compensation policy.

Finally, in Part I.A.3, we introduce the possibility of compensation plans that involve both cash wages and fringe benefits, considering first the case where firms face the same amenity price as do their workers. In such cases, a no-fringe-benefits equilibrium exists. As above, this equilibrium is integrated. However, at least one cash-and-fringe compensation plan²⁵ allows prejudiced firms to hire only Deltas in equilibrium. The resulting equilibrium is segregated, in the sense that at least some firms may (1) deliberately avoid hiring Omegas, and (2) stay in business. Interestingly, the Omegas' utility is no lower in this equilibrium than it would be in the cash-wage-only equilibrium. This result follows because of the competitive nature of the labor market, which ensures that other firms will hire Omegas and pay them their marginal product.²⁶ We emphasize this point to highlight how it diverges from standard results suggesting that employer taste-based discrimination is not possible in equilibrium in competitive markets. While Omegas may suffer no

²⁵ Typically, an infinite number of compensation plans exist.

²⁶ If workers are bothered by participating in an economy with a segregated workforce, then their overall welfare will be reduced in any segregated equilibrium. Where this fact is relevant, we will note it. However, the equilibria themselves do not depend on the existence of such a phenomenon.

harm in terms of their valuation of their compensation terms, a social and/or individual cost to segregation may exist independent of utility as measured by the consumption of goods and leisure only.

We also consider the case where firms have a price advantage in purchasing amenities, perhaps because of economies of scale. In this case, no integrated equilibrium exists. Any equilibrium necessarily involves cash-and-fringe compensation plans used to pay Deltas and a cash-only plan used to pay Omegas. Banning fringe benefits would (1) eliminate segregation, (2) reduce Deltas' utility compared to the segregated equilibrium, and (3) have no impact on the Omegas' utility compared to the segregated equilibrium. We note that this condition for equilibrium would hold even when employers harbor no animus toward Omegas. These results occur because forcing firms to use only cash wages prevents Deltas from negotiating discounted amenities without providing any countervailing benefit to Omegas. As above, though, if discrimination is regarded as socially or individually harmful in ways that do not show up in consumption-based utility, then Omegas, as well as Deltas, may well be worse off under a segregated equilibrium.

A. Model Details

Suppose two types of workers, Deltas (signified by Δ) and Omegas (signified by Ω) exist. Every member of each group is identical to all other members of that group in terms of tastes. Preferences for Deltas and Omegas are given by

$$U_{\Delta} = x^{\alpha}b^{1-\alpha} - c \times W \quad (1)$$

$$U_{\Omega} = x - c \times W, \quad (2)$$

where x is the number of units of a generic consumption good a person consumes, b is the number of units of an amenity good (mnemonically, think of this good as "beer"), c is the disutility of working, W equals one if the person works for pay and zero otherwise, and α is a preference parameter for Deltas and lies between zero and one.²⁷

We assume that all jobs in the economy involve the same type of labor, all workers have one unit of labor to offer, and all workers are equally productive. Firms can hire as many workers as they like. If

²⁷ The function $f(x, b) = x^{\alpha}b^{1-\alpha}$ is an example of a type of preferences known as Cobb-Douglas. This form is standard to assume for preferences, because it leads to the result that the consumer spends the fraction α of her income on good x and the rest on good b . See Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* 55 (Oxford 1995) (explaining the use of the Cobb-Douglas utility function in deriving a consumer's optimal consumption bundle of commodities). Nothing important about our results hinges on assuming this type of preferences; we do so for expositional ease.

hired by a firm, each worker can produce Q units of the generic good with her one unit of labor. We normalize the price of a unit of the generic consumption good to be one,²⁸ and we assume that the price of the amenity good is fixed at level p_b .

1. Optimal consumption and labor supply decisions.

Let Y_Δ be the income a Delta worker receives if she works for pay; assuming for simplicity that she has zero income otherwise, her income equals $W \times Y_\Delta$. Her utility-maximizing choice of consumption in terms of x and b will then be given by whatever choice of (x, b) maximizes U_Δ subject to the constraint that

$$x + p_b \times b = W \times Y_\Delta. \quad (3)$$

Equation (3) is known as the budget constraint—in this case for Deltas. Each unit of x costs one unit of income, and each unit of b costs p_b , so altogether the Delta's total expenditure is x plus the product of p_b times b . In our static, one-period model, individuals lack a reason to save any income, and thus people will want to spend all their income. Similarly, individuals lack an opportunity to borrow, so people's spending will be limited to their income.²⁹ Thus, Equation (3) is the budget constraint for a Delta.

The form of preferences we have assumed for Deltas implies that their optimal consumption choice is to spend the fraction α of income on the generic consumption good and the remainder on the amenity. Thus, optimal consumption levels for a Delta are given by

$$x^* = \alpha \times Y_\Delta \text{ and } b^* = (1 - \alpha) \times Y_\Delta / p_b \quad (4)$$

if she works for pay, and zero otherwise.³⁰ If the Delta works, then her utility will be

²⁸ In an equilibrium model like this one, we lose no generality in making such a normalization because only relative prices matter. As a result, we simply choose to measure the currency in convenient units.

²⁹ Abstracting from saving does not limit this model's applicability to the case of pension plans. In such cases, we could simply reinterpret the model so that b is retirement income, in which case p_b reflects the interest rate at which saving is possible and Y_Δ is the present value of a Delta's lifetime income. The assumption that Omegas get no utility from retirement income is then equivalent to assuming that they do not live to retirement. Obviously, this assumption is extreme, but the only important point is that Omegas' life expectancy is shorter; we could easily generalize the model to allow Omegas to care about retirement positively but less than Deltas, due to shorter life expectancy.

³⁰ To see why Equation (4) holds, first consider optimal consumption on the generic good. The Delta spends the fraction α of her income Y_Δ on this good, and each unit of x costs one dollar, since the price of x is one by assumption. Thus, she will buy $\alpha \times Y_\Delta$ units of this good. She will spend the remainder of her income, $(1 - \alpha) \times Y_\Delta$, on the amenity good. Its price is p_b , so we must have $p_b \times b^* = (1 - \alpha) \times Y_\Delta$, and dividing by p_b yields the expression in the text.

$$U_{\Delta,work} = [\alpha^\alpha (1 - \alpha)^{1-\alpha} p_b^{\alpha-1}] \times Y_\Delta - c \quad (5)$$

$$= v_\alpha(p_b) \times Y_\Delta - c, \quad (6)$$

where the first term on the right-hand side of (5) is the result of plugging in the optimal consumption levels in (4) to the utility function in (1). The function $v_\alpha(p_b)$ collects the part of $U_{\Delta,work}$ that varies with the preference parameter and the amenity price. The important thing to notice is that this function, and thus the highest possible value of utility, $U_{\Delta,work}$, is a decreasing function of the amenity price.

The above assumptions imply that if a Delta forgoes work, then her utility will be zero.³¹ Thus, she will work for pay if and only if the right-hand side of (6) is non-negative. In other words, inducing Deltas to work requires that firms pay them at least enough income, Y_Δ , to allow them to realize c units of consumption utility.

Next, consider the simpler case of Omegas. Let Y_Ω be an Omega's income if she works for pay, and again assume zero income for non-workers. Omegas have very simple consumption plans based on (2): they consume all their income by purchasing the generic good and spend nothing on the amenity good. Since each unit of the generic good costs one unit of income, this means that Omegas will consume Y_Ω units of the generic good. Utility for working Omegas is thus

$$U_{\Omega,work} = Y_\Omega - c. \quad (7)$$

As with Deltas, Omegas will work if and only if this utility level is at least zero, since that is their utility if they do not work. Thus, an Omega worker will be willing to work if and only if she is paid at least Y_Ω .

2. Labor market equilibrium without fringe benefits.

We are interested in equilibria in which both Deltas and Omegas are employed. A firm will be willing to employ a worker if the revenue the firm gets by selling the worker's output is at least as great as the cost of employing the worker.³² Since the price of the generic good is one dollar and each worker produces Q units if hired, each firm's revenue will be Q dollars times the number of workers it hires. Its cost will be Y_Δ if it employs a Delta and Y_Ω if it employs an Omega.

We will assume perfectly competitive goods and labor markets. We do so because (1) finding discriminatory equilibria in models without perfect competition is easy, and (2) finding them in models *with* perfect

³¹ This is another normalization: it does not affect any result but simply involves choosing a convenient basis for measurement.

³² We assume away all other costs for exposition; again, this assumption is not essential.

competition is difficult.³³ Since all workers in the model are equally productive, incomes will be equalized across workers in any perfectly competitive equilibrium in which workers are paid in cash only (that is, in which no fringe benefits exist). Since we assume all workers are equally productive, if some workers were paid less than others, firms would compete for the lower-paid workers, bidding up their wages until all incomes were equal, contradicting the premise of unequal pay. Thus, in this simple model, we have the result that $Y_D = Y_Q = Y$.

Moreover, this amount of income will exactly equal Q , the revenue that firms realize by producing goods. This is true because (1) any firm paying more than Q dollars to its worker will lose money and go out of business, and (2) any firm paying less than Q will find its worker's wage bid up by other firms seeking to hire the worker away for a wage between the incumbent's wage and the level Q . Thus, only Q is a feasible equilibrium wage. Since Equation (7) tells us that Omegas' utility when they work is $Y_Q - c$, and since $Y_Q = Q$, Omegas will work if and only if $Q \geq c$. Similarly, Equation (6) shows that Deltas will work if and only if $v_a(p_b) \times Q \geq c$. To focus on the only interesting case, when both types of workers work in equilibrium, we assume that Q is at least as great as c or $c / v_a(p_b)$, whichever is greater; again we experience no loss of generality here.³⁴

If all firms simply offered the wage Q to workers, then no reason exists to think Deltas were more likely than Omegas to work at any given firm. In fact, the only mechanism for a firm to attract only Deltas would be to pay them a higher wage than other firms. But in a perfectly competitive equilibrium, we have argued that this wage strategy is impossible as these firms would go bankrupt. Of course, in such an economy, prejudiced firms could refuse to hire Omegas. However, such firms cannot be sure that they would be able to find any Deltas to hire. Should Deltas all happen to work at other firms, a prejudiced firm would not be able to hire the Delta away without paying an above-market wage, and doing so would bankrupt the firm. Meanwhile, in the absence of antidiscrimination laws, no guarantee exists that in equilibrium, an Omega will be able to work for a particular prejudiced firm. But it will necessarily be true that each Omega will be able to work for *some* firm, at the same wage as is paid to Deltas who work for any

³³ See Becker, *Economics of Discrimination* at 36 (cited in note 1) (explaining that in a perfectly competitive labor market, firms that discriminate always face larger costs than firms that do not).

³⁴ These assumptions simply require that both types of worker are productive enough that working is not a waste of their time.

firm.³⁵ For this reason, many scholars believe that competition drives out taste-based discrimination.³⁶

3. Labor market equilibrium with fringe benefits.

Now we allow for firms to pay both fringe benefits and cash wages. Firms will provide compensation by giving fringe-receiving workers some number of units of the amenity good. We assume that workers cannot resell these fringe benefits.³⁷ Since Omegas place no value on the amenity good, intuition suggests that employers should be able to design a combination of wages and amenities compensation that will (1) attract Deltas and (2) repel Omegas. This intuition is correct, as we now show. However, some additional surprising results occur as well.

a) Firms face amenity price p_b . Consider a firm that wishes to hire only Deltas. Suppose this firm offers a cash wage amount, Y_f , less than the labor disutility, c , together with some positive number, b_f , of units of the amenity good. We refer to this compensation plan as $F = (Y_f, b_f)$. Omegas place no value on the amenity goods, and we have assumed away the possibility of resale. Therefore, the value of this compensation to an Omega is simply the Y_f units of the generic good that the Omega can purchase with the cash wage. Since $Y_f < c$ by assumption, an Omega would rather have zero income than work for this compensation plan.

Will compensation plan F attract Deltas? Suppose that $b_f \leq b^*$ from Equation (4). This will cost the firm $p_b \times b^* = (1 - \alpha) \times Q$. Suppose the firm combines this fringe-benefit level with the cash wage $Y_f = \alpha \times Q$. This compensation plan costs the firm exactly Q dollars, which is the break-even worker cost that allows firms to produce in competitive equilibrium, as explained above. Thus, this compensation plan is feasible from the firm's point of view. The compensation plan also allows a

³⁵ If discrimination is per se harmful, rather than harmful only in its impact on workers' consumption opportunities, then of course the equilibrium level of well-being would be different with antidiscrimination laws. We could account for such a harm by subtracting a term from the utility level U_d in Equation (1), and possibly also for U_o in Equation (2); this utility reduction would occur for a worker only when the workforce is segregated. Importantly, the reduction would not affect the way in which either worker is willing to substitute consumption of x for consumption of b , or the work/no-work decision. For this reason, accounting for such harm in this way affects conclusions about workers' welfare in equilibrium but not about the allocation of resources. But consumption levels themselves cannot be affected by discriminatory preferences of firms in a cash-only equilibrium like this one.

³⁶ The classic exception occurs when consumers possess a taste for discrimination. In such cases, firms that treat workers symmetrically may lose business. Hence, civil rights laws would have been necessary to eradicate taste-based discrimination in, for example, the Jim Crow states (1) even after the elimination of state mandates of discrimination and (2) even if all markets were perfectly competitive, provided that (3) sufficiently many consumers were prejudiced.

³⁷ This assumption is stronger than necessary. We just need the cost of resale to be sufficiently positive (in other words, transaction costs are nonzero).

Delta to attain exactly the consumption bundle she would have chosen for herself had she been paid Q dollars in cash and nothing in fringe benefits. Since we assumed previously that α and the amenity price p_b were such that Deltas would choose to work when offered the wage Q , they will also choose to work when offered the compensation plan F just described.

We conclude that there exists a segregated equilibrium in which some firms—those that screen out Omegas, which we call screening firms—offer compensation plan F only, and other firms offer a cash wage of Q together with no fringe benefits. In this equilibrium: (1) only Deltas work for the screening firms, (2) Omegas work only for cash-only firms, and (3) some Deltas may work for cash-only firms.³⁸ We can also show that when Deltas strictly prefer to work when offered a no-fringe wage of Q , firms can design a variety of compensation plans that generate segregated equilibria with fringe benefits.³⁹ It can be shown that all equilibria require that the cost of a screening firm's compensation plan equal Q . Any firm that pays less than that will face competition for its workers, as before. Finally, we note that when no prejudiced firm owners exist, the equilibrium from the prior Part is also an equilibrium here. We have thus shown that when firms face the same amenity price as consumers, they can design a compensation plan that both repels Omegas and attracts Deltas, and allows the firm to stay in business in competitive equilibrium.

b) Firms face amenity price $p_{bf} < p_b$. Next, we consider the case when firms have a price advantage relative to consumers in purchasing the amenity, so that $p_{bf} < p_b$. An example is group purchase of insurance plans, but many other examples exist. In equilibrium, this price advantage means that Deltas must always be paid a compensation plan that involves fringe benefits. The reason is simple: any firm

³⁸ For simplicity, we assume that neither type of worker is unemployed in equilibrium; free entry by firms is sufficient for this result. For similar reasons, we assume (1) that there are fewer prejudiced firms than there are Deltas or (2) that prejudiced firm owners would prefer to operate with an Omega than to go out of business. Assumption (1) ensures that in segregated equilibria, all prejudiced employers hire only Deltas. Assumption (2) ensures that Omegas will be employed in a segregated equilibrium even if Deltas are rationed in such an equilibrium. It would be straightforward to derive assumption (1) as a result of a slightly more general model that required capital for production, with capital having positive opportunity cost. In such a model, prejudiced employers who are unable to hire Deltas would exit the industry, choosing to do something else with their costly capital. Since the return on capital in this industry would rise, other, nonprejudiced capital owners would then enter, and these employers would be willing to hire Omegas. This entry would continue until the industry had no more unemployed Omegas, at which point we would have an equilibrium like the one described in the text. These sorts of assumptions and arguments are conventional in the study of how perfect competition interacts with taste-based preferences.

³⁹ In each of these equilibria, screening firms offer a fringe level b_i that is more than zero but less than b^* , with the cash wage then equaling Q minus $p_b \times b_i$.

that pays a Delta only in cash is providing less than the maximum possible benefit that can be provided at that cost. Another firm could offer to pay the Delta slightly less in cash together with some fringe benefits. Because firms acquire the fringe benefits more cheaply than Deltas, the second firm could provide greater utility to the Delta than the first, while paying less to do so. The Delta would switch jobs and the second firm would earn a greater profit than the first. Thus, no competitive equilibrium exists in which any Delta is paid only in cash.

In fact, firms' advantage in purchasing the amenity means that Deltas will want their employers to purchase all units of the amenity that the Deltas consume. As in the models above, equilibrium requires that firms pay Q for each worker, whether Delta or Omega; if a firm paid less than that, our familiar compensation-competition story would apply. Thus, Deltas will be paid a cash-and-fringe compensation plan that costs Q dollars, while Omegas will once again be paid Q dollars in cash. To find the utility level for Deltas in equilibrium, we need only act as if the Deltas themselves faced the firms' amenity price, p_{bf} , rather than the higher price of p_b . Thus, we simply plug p_{bf} into Equation (6) above, yielding

$$U_{\Delta,f} = v_a(p_{bf}) \times Q - c. \quad (8)$$

Now, it is easy to show that when $p_{bf} < p_b$, it must be true that

$$v_a(p_{bf}) > v_a(p_b), \quad (9)$$

and this implies that

$$U_{\Delta,f} > U_{\Delta,cash\ only} = v_a(p_b) \times Q - c. \quad (10)$$

We have thus shown that when firms have an amenity price advantage relative to consumers, Deltas' utility is strictly greater in the with-fringe equilibrium than it would be if regulators banned fringe benefits. This equilibrium, which is unique under the argument above, is segregated. However, since Omegas continue to receive cash compensation in the amount of Q dollars, their equilibrium utility is unaffected by the existence of fringe compensation: banning fringe compensation plans would not increase Omegas' utility. A fringe ban in the presence of an amenity price advantage on the part of firms would simply cause deadweight loss by forcing Deltas to purchase amenities at an unnecessarily high price, while giving nothing extra to Omegas. Notice that if firms must provide only one compensation plan, workers will be segregated in equilibrium even if no employers harbor animus toward Omegas: the fact that employers have a cost advantage in providing the amenity, while worker type is perfectly correlated with amenity preference, ensures full separation of workers. If firms can offer compensation menus, however, then unprejudiced employers can

avoid segregation by offering workers their choice of plan F or all-cash compensation of Q dollars.

B. Summary and Discussion of Extensions

In Part I.A.3.a, we considered the case in which firms must pay the same price per unit of the amenity as workers. In Part I.A.3.b, we assumed that firms face a lower cost, perhaps because of economies of scale. We defined a segregated equilibrium as one in which a prejudiced employer can guarantee that she will be able to hire a Delta.⁴⁰

We showed that segregated equilibria exist in both cases. When firms possess no cost advantages for amenities, multiple equilibria exist, including a nonsegregated one in which employers pay every worker in wages only. When firms possess an amenity cost advantage and cannot offer workers a choice between compensation plans, a unique equilibrium exists, and it is segregated. Interestingly, Omegas are just as economically well-off in terms of consumption-based utility in this equilibrium as they would be in the equilibrium discussed in Part I.A.3. In other words, they would not benefit economically from eliminating fringe-induced segregation. However, Deltas are strictly better off in the segregated equilibrium than in the no-fringe equilibrium when firms have a cost advantage. Hence, banning segregation-inducing fringe compensation would (1) eradicate segregation, (2) not improve the economic welfare of Omegas, and (3) economically harm Deltas.

Some firms may possess market power in either the labor or product markets, which would allow economically harmful discrimination to persist. Fringe-generated segregation might be especially troublesome in such market power cases because employers could use it to skirt easily monitored disparate treatment proscriptions. Banning fringe benefits would still harm Deltas if firms have an amenity price advantage, though with market power, such a ban could also help Omegas. Regulators could prevent fringe-based discrimination in this model without harming Deltas by mandating that firms offering fringe benefits also offer a cash-only compensation plan whose wage/salary equals the cost to the firm of the cash-and-fringe compensation plan.⁴¹

⁴⁰ For exposition, we have assumed that firms hire either zero or one workers. However, this assumption is not necessary; we could have assumed that firms hire as many workers as they can, with the same production technology described above. Firms that hire numerous workers using only one type of compensation would then be segregated firms, which is the basis for our definition of segregated equilibrium in the text.

⁴¹ It is important to note that the proper mandate would involve the cost of the cash-and-fringe compensation plan to the firm, not its value to Deltas. Mandating the latter would have the effect of raising the cost of employing Omegas relative to Deltas, even though each type of worker is equally productive.

Regulators may experience difficulties monitoring such details, though how much difficulty will vary with the case.⁴²

It is, of course, also possible that segregation is undesirable in its own right—because integrated workplaces break down stereotypes, because individuals incur psychic costs in experiencing discrimination even if they voluntarily sort themselves into nondiscriminatory workplaces, or because the individuals who do not sort themselves out may incur psychic costs in a segregated workplace.⁴³ In such situations, reducing the net pecuniary compensation received by Deltas might be worthwhile in order to bring about an integrated economy. Dealing with either of these extensions would markedly change the welfare implications of the segregated result, and we do not discount the relevance of either case. However, in terms of consumption utility, segregation induced by fringe compensation does not harm the group that is “segregated against,” given perfect competition.

II. ILLUSTRATIONS

In this Part, we first intuitively describe the conditions necessary to create the segregated equilibria described above. We then provide several practical examples in which employers may adopt some conditions. As implied above, in the case of intentional passive discrimination, the intuition of the model requires that the employer be able to identify a good (or a bundle of goods) that satisfies three conditions: (1) the employer knows that the disfavored group values the good on average at a lower amount than other groups of potential employees place on the good; (2) the good is nontransferable; and (3) the employer provides the good for a lower cost than the individuals can purchase it outside of the employment relationship. The third condition generates the most interesting case because when it holds, the employer can ensure that it attracts the favored type of employee.

Each of these conditions merits some discussion. To sort adequately, employers need to identify a good with differential group valuation so as to ensure that the “right” kind of employee will be more attracted to the job’s benefit than will individuals from the group it seeks to discriminate against. Otherwise, if no known systematic valu-

⁴² In more general settings, where all types of workers may prefer some degree of amenities, the analogous mandate would require offering a menu-style compensation package that allows workers to pick among various cash-and-fringe compensation plans whose costs to the firm all are equal.

⁴³ See Devah Pager and Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *Ann Rev Sociology* 181, 183 (2008) (suggesting that “those who perceive high levels of discrimination are more likely to experience depression, anxiety, and other negative health outcomes”). This phenomenon could be modeled as discussed in note 35.

ation difference between the groups exists, employers should expect any compensation package would draw applicants from the various groups of potential employees in proportion to their numbers in the labor market at large.⁴⁴

Closely related to the first condition, the second condition requires that employees cannot simply sell or trade the good from their compensation package. If employees could undertake such a transaction, members of the disfavored group could take the job and then, in some secondary market, sell the good to members of the favored groups. In such a scenario, employees from the disfavored group perceive no downside from taking the job and then equalizing their cash wages relative to other employment opportunities through these sales. Formally, the condition of nontransferability is stronger than necessary.⁴⁵

The last condition, that the employer can provide the good more cheaply than the worker could purchase it outside of the employment context, is not required. When it does not hold, employees from favored groups will wind up indifferent between working for the discriminating employer and receiving mixed cash-and-fringe compensation on the one hand, and working for another employer that offers only wages on the other. By contrast, when employers can purchase the amenity more cheaply than can workers, workers from favored groups will have a strict preference for receiving mixed compensation.

While we have thus far focused our attention on intentional passive discrimination, the phenomenon could arise as the accidental by-product of a compensation package designed to achieve other purposes. For example, in the illustration offered in the Introduction, a brewery whose owners and managers are indifferent regarding employing Deltas and Omegas might still want to offer free beer during lunch because it believes that doing so promotes corporate loyalty and knowledge of the product. In such a case, even if the brewery starts out offering this benefit plus a market wage, Deltas who do not secure positions will offer to work for a lower wage given their valuation of the free beer. Eventually, this group valuation will lead to a workforce composed of Deltas, to the exclusion of Omegas. In fact, this outcome will arise even if the brewery operators are originally completely unaware of the differential valuation of the beer between the two groups.⁴⁶

⁴⁴ This condition is analogous to the now well-known single-crossing condition first discussed by Michael Spence, *Job Market Signaling*, 87 Q J of Econ 355 (1973), and J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 Rev Econ Stud 175 (1971).

⁴⁵ It is sufficient to require that such secondary market sales entail nontrivial transactions costs.

⁴⁶ In such a situation, the second and third conditions are satisfied. As for the first condition, the employer acts intending to craft the conditions, but without a discriminatory intent to achieve a segregated equilibrium.

This outcome implies that, as an analytical matter, the employers' intent is not a necessary element in skewing the firm's workforce toward a particular group. Compensation packages will draw the group that has a relatively high preference for the nonwage component(s) of the compensation bundle and repel the group that places a relatively low value on the noncash pay. With this in mind, as we provide some illustrations of how value heterogeneity might generate segregation across firms below, we make no inference regarding the employers' intent in these situations.

A. Race

One example of possible discriminatory screening practices relates to subjective discount rates and pay structures that include a deferred compensation component such as a pension. Ample evidence demonstrates heterogeneity in subjective discount rates across racial groups. To begin with some background, a person's subjective discount rate captures her willingness to delay current consumption for the prospect of increased future consumption. All other things equal, people prefer current consumption over future consumption, which is why virtually no one would view giving her money to a bank for a fixed period, say one year, as an attractive option if the bank only promised to pay back the same sum at the end of the period.⁴⁷ Even if the individual views the bank as perfectly safe, in the sense that the bank is 100 percent likely to pay in accordance with its promise, almost no individual would choose this option.

An individual's subjective discount rate represents how much an individual needs to be paid to delay consumption for a single period. For example, if an individual requires a total payment of \$110 in order to turn over her current holding of \$100 for the next year,⁴⁸ the implied subjective discount rate for that person is 10 percent per year. While everyone exhibits some positive subjective discount rate, individual-to-individual heterogeneity exists in those subjective discount rates. Thus, another person may only require a \$5 interest payment (5 percent discount rate) to give up the \$100 today, while a third individual may only

⁴⁷ People will sometimes keep their money in a bank account even if it does not pay interest on the money because of the costs associated with storing large amounts of cash, namely the risk of theft. Keeping money in the bank may also make other types of transactions more secure (for example, mailing a bank check instead of cash). However, even accounting for these benefits, most individuals would be unwilling to make a deposit if subsequent withdrawal were restricted to only take place after a nontrivial time period, unless they were compensated through the payment of interest.

⁴⁸ In other words, the individual gives up \$100 now and receives the original \$100 plus \$10 interest at the end of the one-year period.

be willing to undertake the transaction for the promise of receiving \$120 at the end of the year (20 percent discount rate).⁴⁹ Scholars offer a number of explanations for this orientation toward favoring current consumption over future consumption. One simple explanation is that individuals do not know if they will live to consume in the future period.⁵⁰ Other evolutionary-based explanations have been offered as well.⁵¹

While individual-level heterogeneity in subjective discount rates is prevalent, labor economists have noted that systematic differences in individual discount rates across racial groups may exist as well. In other words, while individuals within a given race may exhibit a wide range of subjective discount rates, different races, looked at as a group, will yield meaningfully different distributions of discount rates. Of course, every individual of race *Y* is unlikely to exhibit a higher discount rate than every individual of race *Z*, but rather, the average discount rate among individuals of race *Y* will sometimes diverge from the average discount rate among individuals of race *Z*.⁵²

A natural experiment analyzed by John Warner and Saul Pleeter provides some interesting supporting evidence.⁵³ Warner and Pleeter examined an instance in which the Department of Defense offered two different separation benefit packages to enlisted personnel and officers in the US military beginning in 1992. The two options involved a lump sum payment and an annuity payment. In discounted present value terms, the two options were equivalent for individuals with annual subjective discount rates of around 17.5 percent.⁵⁴ In other words, if one calculated what the annuity payments were worth in total at the moment payments began, a person with a discount rate lower than 17.5 percent would prefer to take the annuity, while a person with a discount rate higher than that would prefer the lump sum payment.

⁴⁹ As a general rule, if the amount the individual gives up now is represented by *PV* and the smallest amount the individual is willing to accept in compensation at the end of *n* periods is represented as *FV*, then the individual's subjective discount rate per period is calculated as:

$$i = \left(\frac{FV}{PV} \right)^{\frac{1}{n}} - 1$$

⁵⁰ See Zvi Bodie and Robert C. Merton, *Finance* 49 (Prentice-Hall 2000) (explaining how uncertainty about the time of death affects the rate of interest).

⁵¹ For an example, see Partha Dasgupta and Eric Maskin, *Uncertainty and Hyperbolic Discounting*, 95 Am Econ Rev 1290, 1290 (2005) (suggesting that the phenomenon of hyperbolic discounting, in which impatience is increased by shorter time horizons, may be the result of evolutionary forces shaping preferences in times of uncertainty in order to maximize survival).

⁵² Perhaps higher moments (variance, skewness, and so forth) of the distributions differ too.

⁵³ John T. Warner and Saul Pleeter, *The Personal Discount Rate: Evidence from Military Downsizing Programs*, 91 Am Econ Rev 33 (2001).

⁵⁴ Id at 35 table 1. The break-even discount rate varied based on military status. See id.

By examining the individual's decision regarding which benefit to take, Warner and Pleeter can infer whether the individual's subjective discount rate is higher or lower than the associated break-even discount rate. Because of the detailed data, the researchers examined what effect various characteristics had on the benefit decision and thus on the associated average subjective discount rate. For our purposes, the most interesting finding to emerge from this study was the large racial heterogeneity observed in discount rates. Specifically, conditional on a large number of other effects,⁵⁵ black military enlistees and officers exhibited significantly higher subjective discount rates than other minorities and whites.⁵⁶ This result is robust to a number of specification changes, and the difference is large, with blacks exhibiting, on average, discount rates on the order of five to nine times as great as whites.⁵⁷ Although this particular study is limited to military personnel, we have confidence in its external validity, as it deals with real and substantial decisions (as opposed to experimental tests, which are generally performed over small stakes). Further, the main result of interest for our purposes is consistent with what other studies find regarding a higher average subjective discount rate for African-Americans in broader datasets.⁵⁸

Assuming this empirical regularity holds,⁵⁹ an employer wishing to passively exclude blacks from her workforce could offer a low current wage coupled with generous deferred compensation benefits such as a

⁵⁵ The various controls included sex, number of dependents, education level, wage level, benefit level, year of decision, age, years of service, geographic region, service branch, IQ score, and specialty controls. See *id.* at 43–49.

⁵⁶ Warner and Pleeter, 91 *Am Econ Rev* at 45 table 4, 47 table 5 (cited in note 53).

⁵⁷ See *id.*

⁵⁸ For an older study finding this result, see Emily C. Lawrance, *Poverty and the Rate of Time Preference: Evidence from Panel Data*, 99 *J Polit Econ* 54, 72 (1991) (inferring time preference rates from trends in household food consumption). For a more recent study, see generally Melvin Stephens, Jr and Erin L. Krupka, *Subjective Discount Rates and Household Behavior* (Working Paper, Aug 2006), online at http://www.andrew.cmu.edu/user/ekrupka/discount_08_30_06.pdf (visited Apr 14, 2009).

⁵⁹ Note that we make no general claim to the validity of the empirical finding except to note the high quality of the research papers we cite finding this result. Our primary purpose is one of illustration. Further, we most certainly do not offer an explanation for why subjective discount rate heterogeneity may follow this pattern. A number of logical possibilities present themselves, such as the lower lifespan expectation for African-Americans at most points along the age distribution, higher borrowing costs, and lower permanent incomes. See Elizabeth Arias, *United States Life Tables*, 54 *Natl Vital Statistics Rep* 1, 3 table A (2006), online at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf (visited Apr 14, 2009) (providing life expectancy by age, race, and sex); John V. Duca and Stuart S. Rosenthal, *Borrowing Constraints, Household Debt, and Racial Discrimination in Loan Markets*, 3 *J Fin Intermediation* 77, 92 (1993) (observing that Federal Reserve data suggests that lenders set tighter credit limits for nonwhite borrowers); Joseph G. Altonji and Ulrich Doraszelski, *The Role of Permanent Income and Demographics in Black/White Differences in Wealth*, 40 *J Hum Res* 1, 10 (2005) (concluding that black men would have 20 percent more wealth if they earned the same permanent income as white men). Determining the causal mechanism behind this empirical regularity is beyond the scope of this Article.

large pension or a substantial match in a defined contribution plan. Such a package will attract individuals with relatively low subjective discount rates, whereas it will repel those individuals with high subjective discount rates, as they will view the package as being worth less than other available compensation options (offered by nondiscriminating employers). Note further that this could also represent a situation where a nondiscriminatory employer might engage in unintentional passive discrimination, as employers may possess numerous other reasons to include a generous retirement component in its compensation package, as discussed in Part E.

B. Sex

While the evidence above suggests subjective discount rate heterogeneity across races, evidence of heterogeneity also exists in the closely related concept of risk aversion among men and women. Specifically, many scholars agree that men exhibit a greater propensity to engage in risky activities than do women.⁶⁰ More precisely, women appear to require a larger premium to accept a given increase in income volatility than do men. A number of causal explanations have been offered,⁶¹ but for our purposes, we need note only the observed existence of this differential. Experimental⁶² and observational studies⁶³ well establish

⁶⁰ Of course, any individual woman may be more risk-seeking than any individual man or than the average man.

⁶¹ For example, many evolutionary psychologists explain this tendency as a manifestation of the handicap principle. If risk-taking is associated with higher mortality rates, then all other things being equal, high-quality males will find risky behavior less dangerous than low-quality males will, making the risk-taking behavior more affordable for high-quality males. Thus, potential mates can infer quality from risk-taking propensities. For a discussion along these lines, see Louise Barrett, Robin Dunbar, and John Lycett, *Human Evolutionary Psychology*, 114–18 (Palgrave 2002) (suggesting that male risk-taking may be a method for advertising strong genes). For a formal model, see Eddie Dekel and Suzanne Scotchmer, *On the Evolution of Attitudes towards Risk in Winner-take-all Games*, 87 *J Econ Theory* 125, 126 (1999) (emphasizing the selection advantages of male risk-taking in animal groups in which the dominant male mates with all (or most) of the females).

⁶² Among the relevant experimental studies, see Gerlinde Fellner and Boris Maciejovsky, *Risk Attitude and Market Behavior: Evidence from Experimental Asset Markets*, 28 *J Econ Psych* 338, 346 (2007) (noting female risk aversion in binary lottery choices); Peter Brooks and Horst Zank, *Loss Averse Behavior*, 31 *J Risk & Uncertainty* 301, 317–18 (2005) (observing that “[t]here are no risk seeking women”); Mette Wik, et al, *On the Measurement of Risk Aversion from Experimental Data*, 36 *App Econ* 2443, 2449 (2004) (finding female risk aversion in Northern Zambian agricultural communities).

⁶³ Relevant observational studies include John D. Leeth and John Ruser, *Compensating Wage Differentials for Fatal and Nonfatal Injury Risk by Gender and Race*, 27 *J Risk & Uncertainty* 257, 262–67 (2003) (observing that women exact greater risk premiums in the workplace); Peggy D. Dwyer, James H. Gilkeson, and John A. List, *Gender Differences in Revealed Risk Taking: Evidence from Mutual Fund Investors*, 76 *Econ Letters* 151, 156 (2002) (demonstrating that women tend to take less risky positions when choosing mutual funds); Alma Cohen and

this result.⁶⁴ Courts have also credited this observation, such as in the seminal case *Equal Employment Opportunity Commission v Sears, Roebuck & Co.*⁶⁵

An employer wishing to screen out female workers could exploit this empirical regularity by offering a highly volatile compensation package. For example, the employer could offer most of the job's compensation in the form of an employer match to a defined contribution plan and then restrict the available investment vehicles to high-risk portfolios.⁶⁶ Alternatively, the employer could simply make a large fraction of the employee's compensation contingent on meeting some variable performance goals, such as paying on a commission basis or through a profit-sharing arrangement. In fact, Peggy Dwyer, James Gilkeson, and John List speculate that the paucity of women in the field of mutual fund investment management may be related to the industry's practice of setting compensation as a share of performance.⁶⁷ Some related evidence also suggests that organizing the workplace on the basis of competitive tournaments where employees compete head-to-head for bonus pay could induce women to forego the employment opportunity.⁶⁸ The literature also suggests the possibility that employers desiring a predominantly male workforce, at least in some industries, could substitute higher wages for increased on-the-job safety, given that the risk aversion differential appears to spill over into safety-risk evaluation as

Liran Einav, *Estimating Risk Preferences from Deductible Choice*, 97 Am Econ Rev 745, 760–61 (2007) (explaining that an econometric model based on observed auto insurance deductible choices reveals female risk aversion).

⁶⁴ For a meta-analysis of a large number of studies on this topic, see James P. Byrnes, David C. Miller, and William D. Schafer, *Gender Differences in Risk Taking: A Meta-analysis*, 125 Psych Bull 367, 377 (1999) (finding that while males are more likely to take risks than females, the size of the difference varies and shifts according to context and age level).

⁶⁵ 628 F Supp 1264, 1310 (ND Ill 1986).

⁶⁶ To some extent, § 404(c) of ERISA precludes this through its requirement that retirement plans offer a "broad range" of investment alternatives. See Employee Retirement Income Security Act of 1974 § 404(c), Pub L 93-406, 88 Stat 877, codified at 29 USC § 1104(c); 29 CFR § 2550.404c-5(c)(6). See also Regina Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 Fla Tax Rev 607, 632–34 & n 111 (2000).

⁶⁷ Dwyer, Gilkeson, and List, 76 Econ Letters at 157 (cited in note 63), citing Judith Chevalier and Glenn Ellison, *Are Some Mutual Fund Managers Better Than Others? Cross-sectional Patterns in Behavior and Performance*, 54 J Fin 875, 896 (1999) (noting that only 7 percent of the mutual fund managers in the study's sample were women).

⁶⁸ See, for example, Nabanita Datta Gupta, Anders Poulsen, and Marie-Claire Villeval, *Male and Female Competitive Behavior: Experimental Evidence 2* (IZA Discussion Paper No 1833, Nov 2005), online at <http://ssrn.com/abstract=851227> (visited Apr 14, 2009) (observing that men were more likely than women to choose tournament schemes); Muriel Niederle and Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q J Econ 1067, 1097 (2007) (noting that female preferences for nontournament compensation was not correlated with an inferior capability to compete in the task).

well.⁶⁹ Of course, other nondiscriminatory reasons to organize compensation packages in these ways likely exist, but differential risk aversion suggests another instance where an employer with discriminatory intent could passively induce the desired workforce.⁷⁰

C. Religion

Religion also raises a number of potentially interesting illustrations. For example, businesses without Sunday hours may be relatively more attractive employers for religious Christians since these individuals may value a day off on Sunday more than a randomly chosen individual due to their religious obligation to attend worship services and to generally limit activity on the Christian Sabbath day. The fast food franchisor Chick-fil-A provides a particularly striking illustration of this insight. Chick-fil-A, founded by S. Truett Cathy, “a devoutly religious man who built his life and business based on hard work, humanity, and biblical principles,”⁷¹ requires that all of its locations be closed on Sundays “without exception.”⁷²

This practice could generate passive discrimination at two levels. As indicated above, employees who value having a Sunday-free schedule relatively highly will be disproportionately attracted to apply for and accept Chick-fil-A positions. Perhaps more importantly, franchisees who are not religious Christians will be discouraged from opening franchises with the franchisor. Relative to other fast food chains, Chick-fil-A effectively requires that the franchisee forego one-seventh of its potential revenues.⁷³ While a religious Christian may view this revenue loss as a reasonable religious sacrifice, the nonreligious, or those who recognize a different holy day (for example, Fridays for Muslims or Saturdays for Jews) will not. This no-Sundays policy renders Chick-fil-A franchises relatively more “expensive” for non-Christian franchisees.

⁶⁹ See, for example, Thomas DeLeire and Helen Levy, *Worker Sorting and the Risk of Death on the Job*, 22 J Labor Econ 925, 926–27 (2004) (estimating that about one-quarter of occupational gender segregation is due to differential death risks across jobs).

⁷⁰ The converse is also true. Employers seeking to attract members of a protected class may design or alter their compensation packages to reduce or eliminate the aspects that make them unattractive to such individuals. For instance, after 1977, Sears Roebuck “changed its method of compensating commission salespersons to a ‘salary plus commission basis’ . . . to reduce the financial risk of selling on commission in an effort to attract more women to commission sales.” *Sears*, 628 F Supp at 1289.

⁷¹ Chick-fil-A, *S. Truett Cathy*, online at <http://www.chick-fil-a.com/#struettcathy> (visited Apr 14, 2009).

⁷² *Id.*

⁷³ The one-seventh figure is only illustrative since a potential location may not have its revenues distributed uniformly across the days of the week, but the point remains that the closure almost surely generates a nontrivial loss of revenues for an individual franchisee.

Religiously affiliated schools provide another example where religion might generate heterogeneous valuations among employees. These types of private schools often include among their benefits free or reduced tuition for children of employees. While nonadherents of the given religion may value the private school benefit, individuals practicing the religion affiliated with the school are likely to value the benefit more highly, especially if the school infuses its curriculum with the religion's values and worldview.⁷⁴

A final example of religion-based passive discrimination is highlighted by the case *Catholic Charities of Sacramento, Inc v The Superior Court of Sacramento County*.⁷⁵ In that case, Catholic Charities, an independently incorporated entity which describes itself as "an organ of the Catholic Church,"⁷⁶ excluded contraception from its prescription drug coverage plan, which covered its 183 full-time employees. Catholic Charities maintained that they needed this exclusion to follow the Roman Catholic Church's teaching that considers contraception a sin. Therefore, including birth control coverage under its plan would "improperly facilitate sin."⁷⁷ Litigation arose when Catholic Charities challenged a state law, the Women's Contraception Equity Act (WCEA), which required it to cover prescription contraceptives if it provided group prescription drug coverage.

While the Charities' claim that its religious mission precluded it from subsidizing products prohibited by the Catholic Church is at least plausible,⁷⁸ the benefit restriction disproportionately affects religious Catholics relative to others since the former, presumably, are less likely to use birth control drugs than individuals from the latter group. Given that the restriction is less costly for religious Catholics, making the compensation package relatively attractive to those individuals potentially leads to passive discrimination.

⁷⁴ For a model and some empirical support of this proposition, see Danny Cohen-Zada, *Preserving Religious Identity through Education: Economic Analysis and Evidence from the US*, 60 J Urb Econ 372, 393–94 (2006) (finding that religious parents are more likely to send their child to a private school espousing their religion if their religion would be in the minority at the local public school). For indirect evidence of the higher valuation of religious education by members of the religion, see David L. Leal, *Latinos and School Vouchers: Testing the "Minority Support" Hypothesis*, 85 Soc Sci Q 1227, 1236 (2004) (suggesting that Catholic religious affiliation explains why Latinos support school vouchers).

⁷⁵ 85 P3d 67 (Cal 2004).

⁷⁶ *Id.* at 75.

⁷⁷ *Id.*

⁷⁸ See *id.* at 74–76. The California Supreme Court, however, disagreed with this claim, explaining that Catholic Charities did not meet the criteria to be exempted from the WCEA as a religious employer because its services were not aimed entirely at Catholics. See *id.* at 76.

D. Workplace Language Policies

Some scholars have touched upon a similar phenomenon regarding an employer's choice to allow or encourage (or at least refrain from discouraging)⁷⁹ the use of foreign languages in the workplace.⁸⁰ If for various reasons the employer would prefer to hire members of a certain ethnic group (for example, Latinos) to the exclusion of another group of individuals competing in the same labor market (for example, blacks),⁸¹ coupling a pro-foreign-language work policy with sub-market wages might generate the desired segregation passively in ways that regulators or employees themselves will not find obvious.⁸²

E. Noninvidious Exploitation of Preference Heterogeneity

Although we are primarily concerned with screening that leads to legally or normatively objectionable segregation, employers can exploit the same mechanism to achieve ends that most observers would view positively. In fact, this kind of beneficial screening has been examined both theoretically and empirically.

One area where scholars have done significant empirical work involves the question of whether employers can use their compensation packages, specifically deferred compensation or pensions, to attract desired types of employees while repelling disfavored types. Joanne Salop and Steven Salop offered the first screening model in this context, suggesting that, all other things equal, employers want to hire individuals who are likely to stay for a long period. Because workers often lack a mechanism to credibly transmit their private information regarding their propensity to stay, the employer may offer a compensation contract that particularly entices "stayers" while it is unattractive to "leavers."⁸³ Employers achieve their desired workforce by conditioning a significant portion of the employee's income on re-

⁷⁹ See Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 Nw U L Rev 1689, 1703–25 (2006) (evaluating the social costs of English-only workplace rules).

⁸⁰ Conversely, if an employer wanted to screen out members of a particular ethnic group, she could restrict the languages spoken in the workplace.

⁸¹ See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 Ohio St L J 961, 976–80 (2006) (hypothesizing that employers deliberately create jobs that are undesirable to native workers in order to attract a subservient immigrant workforce).

⁸² See Devon Carbado, Catherine Fisk, and Mitu Gulati, *After Inclusion*, 4 Ann Rev of L & Soc Sci, 83, 85–86 (2008) (noting the risk of discrimination by inclusion); Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?*, 44 Wm & Mary L Rev 1521, 1613–16 (2003) (observing that when employers refrain from an English language requirement coupled with low wages, they may disproportionately draw from members of ethnic minority communities).

⁸³ Joanne Salop and Steven Salop, *Self-selection and Turnover in the Labor Market*, 90 Q J Econ 619, 627 (1976).

maining with the employer for a sufficient period via pension benefits that grow with time of service. Individuals who plan to move on quickly will find such an arrangement unattractive since they would then earn submarket pay over the course of their employment.⁸⁴ Because having a mechanism by which employers can detect the employee's type is better in aggregate welfare terms, screening in this context is generally unobjectionable and even normatively preferable.⁸⁵

Perhaps a more general way in which employers may exploit preference heterogeneity for more benign or even attractive ends is to use below-market wages to ensure that only those individuals with a particular "taste" for the job apply. That is, many employers would like to have employees who particularly "believe in" or enjoy working in a given position. However, at the hiring stage, every applicant possesses an incentive to claim to have such tastes. As hiring and firing employees generally entails meaningful costs, simply waiting until the individual is in the position to determine whether she told the truth regarding her preferences is a bad strategy. One way to screen for employees with a high consumption value with respect to the job is to purposefully offer submarket wages. By doing so, only those individuals who receive psychic compensation from doing a job they love will rationally choose to accept the job. Examples of positions in the legal field where the pay is relatively low (compared to feasible alternatives) but the supply of interested employees remains strong may include federal judges, prosecutors, and public defenders. All other things equal, the relatively low pay may increase the likelihood that only very dedicated individuals will accept these jobs.

⁸⁴ A large empirical literature arose to examine this phenomenon. See, for example, Richard A. Ippolito, *Stayers As "Workers" and "Savers": Toward Reconciling the Pension-quit Literature*, 37 J Hum Res 275, 305 (2002) (noting a correlation between saving for retirement and staying on the job even when retirement benefits vest immediately); Richard A. Ippolito, *A Study of Wages and Reliability*, 39 J L & Econ 149, 185, 187 (1996) (suggesting that a worker's wages may be affected by her expected and observed reliability); Steven G. Allen, Robert L. Clark, and Ann A. McDermed, *Pensions, Bonding, and Lifetime Jobs*, 28 J Hum Res 463, 479 (1993) (suggesting that the low turnover of pensioned employees may be more related to a pension-providing employer's reluctance to lay off rather than the employees' reluctance to leave); Alan L. Gustman and Thomas L. Steinmeier, *Pension Portability and Labor Mobility: Evidence from the Survey of Income and Program Participation*, 50 J Pub Econ 299, 315-17 (1993) (observing that pension-covered jobs offer higher levels of compensation than workers can obtain elsewhere).

⁸⁵ For support of this position, see Richard A. Ippolito, *Pension Plans and Employee Performance: Evidence, Analysis, and Policy* 155 (Chicago 1998) (noting the importance of employee reliability and the benefits of compensation schemes that screen for reliable workers).

III. THE INADEQUACY OF TITLE VII IN THE PASSIVE DISCRIMINATION CONTEXT

We begin by describing the basic framework for Title VII⁸⁶ claims. We then note that passive discrimination poses some special problems under existing doctrine. These doctrinal hurdles include the emphasis on differential treatment rather than differential valuation under disparate treatment analysis, the likely exclusion of fringe benefits under disparate impact analysis, and courts' focus on choice and so-called "lack of interest." We conclude this Part with a discussion of some important limitations on a litigation approach to remedying workplace discrimination, with particular attention to how these limitations are likely to impede the successful use of Title VII in the passive discrimination context.

In determining the legality of passive discrimination, we begin with the basic statutory framework. Title VII is the major federal legislation that governs workplace discrimination and courts generally recognize it is intended to reach broadly across employment practices.⁸⁷ Congress enacted this statute "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority [or other protected] citizens."⁸⁸ Congress drafted Title VII both to end workplace discrimination going forward and to remedy individual injuries.⁸⁹

Many scholars and judges view Title VII as fostering individual employee choice and counteracting employers' impulse to apply group stereotypes to individuals.⁹⁰ The underlying intuition seems to be that

⁸⁶ Title VII of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e et seq.

⁸⁷ See, for example, Equal Employment Opportunity Act of 1963, HR Rep 570, 88th Cong, 1st Sess 2 ("The evidence before the committee makes it abundantly clear that job opportunity discrimination permeates the national social fabric—North, South, East, and West. The act is directed at correcting such abuses wherever found and is not focused upon any single section of the country."). See also *Franks v Bowman Transportation Co*, 424 US 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."); *McDonnell Douglas Co v Green*, 411 US 792, 800 (1973) (stating that the "language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices"); *Griggs v Duke Power Co*, 401 US 424, 429 (1971) (explaining that Congress's objective in enacting Title VII was "to remove barriers that have operated in the past to favor an identifiable group").

⁸⁸ *McDonnell*, 411 US at 800.

⁸⁹ See *Oscar Mayer & Co v Evans*, 441 US 750, 756 (1979).

⁹⁰ See, for example, *Sprogis v United Air Lines, Inc*, 444 F2d 1194, 1198 (7th Cir 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."). See also *City of Los Angeles Department of Water and Power v Manhart*, 435 US

regardless of whether a stereotype is true or false as to a disfavored group, it may be false as to any individual who is a member of that group. In the hiring context, for example, each individual should have the opportunity to have her qualifications for a job evaluated and express her preference for such work.⁹¹

While Congress hoped that mandating equal opportunity would eradicate employment discrimination, Congress did not focus on directly ending workplace segregation but rather forecasted that integration would be a beneficial byproduct of ending active discrimination. With few exceptions, Title VII does not promote or even permit quotas or other forms of affirmative action to address workplace segregation.⁹² Congress decided to address employers' ability to deny equal opportunities to individuals because of their race, color, sex, national origin, or religion, rather than dictate that employers achieve equal representation or equal outcomes in workplaces. Thus, for example, while a segregated workplace may raise inferences about an employer's potentially discriminatory behavior, absent evidence of direct discrimination, the decision by individuals in a protected group not to work in a particular firm or even industry is generally unproblematic.⁹³ Thus, Title VII makes it an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms or conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin."⁹⁴

702, 707 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

⁹¹ For instance, as the Supreme Court noted in a case about female prison guards, "In the usual case, the argument that a particular job is dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual to make that choice for herself." *Dothard v Rawlinson*, 433 US 321, 335 (1977).

⁹² In fact, § 703(j) dictates that nothing in Title VII

shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the [protected characteristic] of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any [protected characteristic] employed by any employer . . . in comparison with the total number or percentage of persons of such [protected characteristic] in any community, State, section, or other area.

42 USC § 2000e-2(j).

⁹³ If the numbers are bad enough, a firm might be concerned about a pattern-and-practice lawsuit. See *Hazelwood School District v United States*, 433 US 299, 307-08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

⁹⁴ Section 703(2) also makes it an unlawful employment practice for an employer to "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 USC § 2000e-2(a)(1).

Passive discrimination might implicate two different prohibitions contained in Title VII. First, some have suggested that the active crafting of a sorting strategy might be construed as a failure or refusal to hire. We are skeptical of this proposition, as our hypotheticals presume that employers attempt to get workers to self-sort but that they will also hire any individual who accepts the offered compensation and fringe benefit package.⁹⁵ Second, such a sorting strategy might instead be construed as “otherwise to discriminate with respect to compensation” and to “terms, conditions or privileges of employment.”⁹⁶ Congress elected not to define this language so that courts would read these terms as broadly as possible.⁹⁷ In offering illustrative examples, the Equal Employment Opportunity Commission (EEOC) guidelines⁹⁸ interpret “compensation” to include fringe benefits such as “medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; [and] leave.”⁹⁹ The EEOC compliance manual also includes such practices or activities as “duration of work, work rules, job assignments and duties” as terms, conditions, or privileges of employment.¹⁰⁰

Despite its seemingly blanket prohibition on workplace discrimination, Title VII further states that employers may lawfully

apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality or production . . . , provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.¹⁰¹

For example, to return to the brewery, employers may pay individual workers performing the same sales job different wages based on the amount of beer each is able to sell. So if all male employees sell more beer than any female employee, the employer may permissibly pay all

⁹⁵ Of course, in practice, an employer might both encourage self-sorting and refuse to hire individuals from a disfavored group. Such a combination of practices is easier to deal with under Title VII than our hypothesized litigation-savvy employer or unintentional passive discriminator who lacks any desire to exclude these individuals because of their membership in a disfavored group.

⁹⁶ 42 USC § 2000e-2(a)(1).

⁹⁷ *Rogers v Equal Employment Opportunity Commission*, 454 F2d 234, 238 (5th Cir 1971). See also 1 EEOC Compliance Manual § 613.1(a) at 3002 (cited in note 12).

⁹⁸ While courts have not decided how much deference is due to the EEOC interpretive guidelines, as the EEOC is Title VII's enforcement authority, courts often look to these guidelines in making their decisions.

⁹⁹ 29 CFR § 1604.9(a).

¹⁰⁰ 1 EEOC Compliance Manual § 613.1(a) at 3002 (cited in note 12).

¹⁰¹ 42 USC § 2000e-2(h). Under Title VII, “the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 USC § 2000e(k).

the men higher wages than all of the females though they all perform the same job. We next turn to the specific claims and defenses relevant to assessing passive discrimination under Title VII.

A. Disparate Treatment Claims

Under traditional Title VII jurisprudence, plaintiffs may choose among disparate treatment and disparate impact claims to seek recovery for employment discrimination. Under the theory of disparate treatment, “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”¹⁰² Employers charged with disparate treatment cannot raise a business necessity defense.¹⁰³ They may, however, in the absence of direct evidence, prevail if the plaintiff is unable to prove that the defendant’s proffered legitimate, nondiscriminatory reason for the particular employment practice is a pretext for discrimination.

Within disparate treatment claims, plaintiffs may raise either individual claims or pattern-and-practice claims. In individual claims, each plaintiff must prove that she was treated less favorably than others similarly situated and this disparate treatment was “because of” the plaintiff’s race, color, sex, national origin, or religion. The plaintiff must provide either direct or circumstantial evidence to demonstrate the employer’s discriminatory intent. In pattern-and-practice cases, discriminatory intent is also required, but the plaintiff can satisfy the prima facie case with “statistical evidence demonstrating substantial disparities in the application of employment actions as to minorities and the unprotected groups.”¹⁰⁴ Pattern-and-practice plaintiffs need not present individual victim testimony to support a finding of intentional discrimination—courts may rely purely on evidence of gross statistical disparity,¹⁰⁵ which raises an inference of discriminatory intent. While disparate treatment, particularly in pattern-and-practice cases, may evidence a concern about segregation, courts link this concern to the elimination of discriminatory practices that deprive individuals of employment opportunities or otherwise ad-

¹⁰² *International Brotherhood of Teamsters v United States*, 431 US 324, 335 n 15 (1977).

¹⁰³ See 42 USC § 2000e-2(k)(2).

¹⁰⁴ *Equal Employment Opportunity Commission v Sears, Roebuck & Co.*, 839 F2d 302, 308 (7th Cir 1988).

¹⁰⁵ *Id.* at 310–11. See also *Hazelwood*, 433 US at 307–08. Courts acknowledge that this use of statistics is particularly important in hiring cases where individual applicants may not be aware of other hirings. See, for example, *Sears*, 839 F2d at 312.

versely affect their employment status,¹⁰⁶ rather than view their role as one requiring the direct eradication of segregation as an end in itself.¹⁰⁷

Under disparate treatment claims, whether individual or pattern-and-practice cases, Title VII prohibits the employer from using group-based characteristics or preferences or stereotypes to treat individuals differently even if such stereotypes are largely accurate. So, for example, in *City of Los Angeles Department of Water and Power v Manhart*,¹⁰⁸ the Supreme Court ruled that an employer may not deduct more from women's pay to cover their pensions even though, as an actuarial matter, women as a class are likely to draw on pension benefits longer.¹⁰⁹ Although economic reasoning rather than animus motivated the employer's behavior, the Supreme Court reasoned that as any individual woman may not draw longer than any individual man, her employers may not condition her pay based on her sex.¹¹⁰ Similarly, in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris*,¹¹¹ the Supreme Court prohibited the employers' use of voluntary pension plans in which companies utilized sex-based mortality tables to justify paying women lower monthly retirement benefits than those they paid to men who had made equivalent contributions.¹¹² In both cases, the Court rejected the employers' proffered economic rationale as irrelevant.¹¹³

The mechanism of passive discrimination may take it out of the realm of what counts as "discrimination" under Title VII. For instance, in both disparate treatment and disparate impact cases, courts look at the market value of wages and fringe benefits provided by the employer or the monetary amount of the deduction, rather than the subjective valuation by a particular disfavored group or by an individual within this group. So in *Manhart*, the Supreme Court determined that the employer discriminated by taking more money from women than from men to

¹⁰⁶ See, for example, *Marion v Slaughter Co*, 1999 WL 1267015, *6 (10th Cir).

¹⁰⁷ See, for example, *McDonnell Douglas Co*, 411 US at 800 (explaining that because "[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities . . . '[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination'"), quoting *Griggs*, 401 US at 430–31.

¹⁰⁸ 435 US 702 (1978).

¹⁰⁹ See *id.* at 711. In *Manhart*, the defendant used mortality tables and its own experience to determine that the cost of a pension for the average retired female would be greater than for the average retired male. The city required female employees to make greater monthly contributions to the pension fund, which reduced the women's take-home pay. See *id.* at 705.

¹¹⁰ See *id.* at 708. Notably, the Court rejected the argument that facially equal deductions might impose a disparate impact on men who as a class were less likely to benefit as fully from the pension plan. See *id.* at 708–09.

¹¹¹ 463 US 1073 (1983).

¹¹² See *id.* at 1084–86 ("[E]ven a true generalization about a class cannot justify class-based treatment.").

¹¹³ See *id.* at 1084; *Manhart*, 435 US at 709.

provide pensions. This result generated much controversy, with some scholars suggesting: (1) that Title VII ought not extend to rational discrimination, and (2) that the court improperly determined discrimination based on the employee's costs rather than the employee's actual or expected value or her subjective assessment of that value.¹¹⁴ The Supreme Court in *Norris* declined to accept either of these contentions, expanding *Manhart* and establishing a now well-respected precedent.

Since the Supreme Court has foreclosed the avenue of pursuing passive discrimination claims as disparate treatment in fringe benefits or compensation, plaintiffs may try instead to construe passive discrimination as disparate treatment in hiring. In the absence of direct or strong circumstantial evidence of discriminatory intent, courts would draw no inference of intentional discrimination from the hiring practice

even if the employer would prefer to employ people drawn predominantly or even entirely from [a particular group]. Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted *because* it is the most efficient . . . just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.¹¹⁵

For many of our hypotheticals, the fringe benefits package or method of compensation is by definition most efficient for that employer.¹¹⁶ Those that are not most efficient may still be defended under the employer's weak burden to produce evidence of a legitimate business justification. Even if a smoking gun of discriminatory intent were present, the defendant could still prevail if he showed that this hiring practice would also have been adopted on the basis of efficiency justifications.¹¹⁷

¹¹⁴ See George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U Chi L Rev 489, 542 (1982) (arguing that accounting for mortality tables when organizing a pension plan ought not violate Title VII); Mayer G. Freed and Daniel D. Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, Am Bar Found Res J 583, 624-31 (1981) (arguing that *Manhart* failed to consider Title VII's recognition of prevalent social norms of gender differences); Spencer L. Kimball, *Reverse Discrimination: Manhart*, Am Bar Found Res J 83, 127 (1979) (suggesting that *Manhart* be given the narrowest possible interpretation).

¹¹⁵ *Equal Employment Opportunity Commission v Consolidated Service Systems*, 989 F2d 233, 236 (7th Cir 1993). In *Consolidated Service Systems*, 73 percent of applicants and 81 percent of hires at the Korean-owned company were Korean. At most 3 percent of the relevant work force in the area was Korean. The EEOC declined to pursue its disparate impact claim on appeal. Id at 235-36.

¹¹⁶ For instance, the provision of free school tuition can be economically justified regardless of whether the employer desires to induce segregation. It costs less for schools to provide tuition than for employees to purchase such tuition on the open market.

¹¹⁷ *Consolidated Service Systems*, 989 F2d at 236.

Easy disparate treatment cases include instances in which an employer offers a potential plaintiff a facially different wage than others similarly situated. For example, an employer may offer to pay male bus drivers \$20 an hour and offer to pay equally qualified female bus drivers \$15 an hour. Similarly, the employer may offer Caucasian bus drivers comprehensive health insurance and fail to offer African-American drivers the same insurance package. Even if such a facially discriminatory policy were designed to favor individuals within the protected group, it would be impermissible. So, for example, an employer could not lawfully assign female bus drivers to daytime routes and assign male bus drivers to nighttime routes under the rationale that women might find the nighttime routes less safe or more difficult to manage with child care responsibilities.

If, on the other hand, the employer offers all bus drivers lower wages and higher pension benefits than other area employers, individual employees cannot successfully lodge a disparate treatment claim. Even if empirical evidence indicates that, as a group, African-American drivers are the least likely to draw from such a pension plan or that African-American drivers have a higher discount rate and place a lower value on such pensions, the employer has treated each individual black driver the same as all its other drivers. Courts look at objective treatment from the employer's perspective—not at subjective interpretation or valuation of treatment from the employee's perspective. So we contend no individual disparate treatment claim could succeed.

Under pattern-and-practice claims, however, if employers devised a very successful sorting mechanism, plaintiffs might be able to satisfy the prima facie showing of gross statistical disparity. For instance, in *International Brotherhood of Teamsters v United States*,¹¹⁸ the Supreme Court, sidestepping a debate over proper statistical analysis,¹¹⁹ suggested that the complete or very nearly complete absence of members of a protected class in a particular job can compel an inference of discrimination.¹²⁰ Later courts have been “particularly dubious of attempts by employers to explain away ‘the inexorable zero.’”¹²¹ Some have gone so far as to suggest that “the 100% sex-segregated workforce is highly

[I]f, though the motives behind adoption of the [word-of-mouth hiring] method were a mixture of discrimination and efficiency, [the employer] would have adopted the identical method of recruitment even if he had no interest in the national origin of his employees, the fact that he had such an interest would not be a “but for” cause of the discriminatory outcome and [] there would be no liability.

¹¹⁸ 431 US 324 (1977).

¹¹⁹ *Id.* at 335 n 15.

¹²⁰ See *id.* at 342 n 23. See also *Equal Employment Opportunity Commission v Andrew Corp.*, 1989 WL 32884, *14 (ND Ill).

¹²¹ *Capaci v Katz & Besthoff, Inc.*, 711 F2d 647, 662 (5th Cir 1983).

suspicious and is sometimes alone sufficient to support judgment for the plaintiff.”¹²² So if the high pension, low wages strategy resulted in a workforce with no or very few African-American drivers in a labor pool with many qualified African-American drivers, employers may face a Title VII problem. Yet despite judicial statements that mere evidence of statistical disparity is sufficient to satisfy the prima facie case, plaintiffs rarely prevail in such cases without testimony about individual acts of discrimination.¹²³ In fact, many circuits are diluting the inference to be drawn from the inexorable zero, with some circuits merging it “into statistical disparity analysis, focusing on the diagnostic value of the zero in comparison to other forms of statistical analysis.”¹²⁴

Only if the employer foolishly allowed the discovery of direct evidence of discriminatory intent, such as a memo that reads “our workplace provides generous pension benefits because we wish to attract Caucasian workers and repel African-American workers,” will the employer face real difficulty in providing nondiscriminatory explanations for the gross disparity.¹²⁵ Even then, the plaintiffs might not prevail. Such a memo would reveal race-based animus and an intent to achieve a segregated workplace, but a plaintiff still bears the burden of proving the occurrence of discrimination as defined by Title VII. As mentioned earlier, § 703(a) prohibits discrimination against “any individual” because of such “individual’s race, color, religion, sex, or national origin,” whereas here the employer has relied on preferences that tend to be correlated with protected characteristics but has offered each individual a package that is facially equal to the packages offered to all other job candidates.¹²⁶ Even though most or even all individuals with a protected

¹²² *Loyd v Phillips Brothers, Inc.*, 25 F3d 518, 524 n 4 (7th Cir 1994).

¹²³ For a view that statistics alone are not compelling, see *Sears*, 839 F2d at 360 (Cudahy dissenting).

¹²⁴ Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U Mich J L Ref 447, 485 (2008). Circuit courts have split on how to treat the inexorable zero; most treat it as rebuttable presumption that the employer intended to exclude, while a minority require additional evidence to establish an inference of discrimination. See *id.* at 475.

¹²⁵ Similarly, if employers purposely use commission-based salaries as a mechanism to screen out women, then it will not qualify for Title VII’s exception for differential pay under “a merit system or system which measures earnings by quantity or quality or production,” as the differences would be “the result of an intention to discriminate because of race, color, religion, sex or national origin.” 42 USC § 2000e-2(h). See also 2 EEOC Compliance Manual § 10-IV(F)(1) at 6729 (CCA 2003) (providing permissible examples such as paying word processors by the number of documents produced and paying sales people on their volume of sales). If such screening occurred because employers used commission as a proxy for ambitious salespersons, then § 703(h) permits it. Nonetheless, if, such screening is a result of discriminatory intent, but no direct evidence of such intent exists, the defendant is likely to prevail.

¹²⁶ Compare 42 USC § 2000e-2(a)(1), with *Teamsters*, 431 US at 335 n 15:

characteristic may subjectively value the package less than other individuals, the employer has relied on group-based preferences but has left it to the individual to decide whether to accept the job and the benefits package. Perhaps, though, a court faced with such direct evidence of discriminatory animus might analogize it to harassment cases in which employer behavior, when sufficiently severe and pervasive, is taken to constitute a change in the terms and conditions of employment for the harassed individual.¹²⁷ If the benefits package is constructed in such a way as to discourage all or nearly all individuals with a protected characteristic, perhaps a court would view that as the equivalent of offering a facially discriminatory benefits package.

Alternatively, courts might use such memos or other direct evidence of discriminatory intent to construe such employer efforts to segregate as a hiring policy. For instance, in word-of-mouth hiring, a practice that might be viewed as similar to what we term passive discrimination, an employer might ask or merely rely on employees to provide applicants rather than use easily accessed advertisements or filings with state employment agencies. When employers engage in such behavior with the intent to create a segregated workforce, courts have deemed such practices discriminatory; but conversely, when companies merely allow this practice or no direct evidence of discrim-

Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of *differences in treatment*.

(emphasis added). Contrast our hypotheticals with the finding of the Court in *Teamsters* in which “numerous qualified . . . applicants . . . either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.” *Id.* at 338.

¹²⁷ See *Faragher v City of Boca Raton*, 524 US 775, 786 (1998) (holding that Title VII encompasses more than formally different terms and conditions of employment and includes hostile work environments that also alter the initial terms of the employment relationship). Even in harassment cases, however, harassed workers are being treated differently than other individuals. If everyone is subject to similarly unwelcome and severe or pervasive behavior, such harassment is not actionable. See *Malhotra v Cotter & Co.*, 885 F2d 1305, 1308 (7th Cir 1989) (“A member of [a racial minority group] has no right to a more congenial working environment than a white male, and therefore he can complain only about harassment that is discriminatory in character or purpose.”).

Another possibility is that a court could use § 703(m) as a standalone provision. This provision states: “Except as otherwise provided in this [Act], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 USC § 2000e-2(m). This provision seems concerned with so-called mixed motive cases but might also be interpreted to suggest that Title VII prohibits any employer practice motivated by a protected characteristic, including crafting compensation packages, even if the practice results in facially neutral treatment.

minatory intent exists, courts often find it unobjectionable, as it is much cheaper than alternative hiring strategies.¹²⁸

So in some ways, passive discrimination looks like word-of-mouth hiring in that it yields segregated workforces without forcing employers to reject disfavored applicants. In addition, in both word-of-mouth hiring cases and in most of our hypotheticals, the employment practice is by definition efficient for that employer.¹²⁹ Thus, the defendant could still avoid damages in either scenario if he showed that the particular hiring practice would also have been adopted on the basis of efficiency justifications.¹³⁰ Yet in a meaningful sense, even tacit approval of word-of-mouth hiring constitutes discrimination in a way that our hypotheticals do not. Word-of-mouth hiring excludes disfavored workers from the applicant pool and thus from hiring opportunities. In passive discrimination, however, all potential employees have equal access to the applicant pool and are presented with identical opportunities. We assume the employer is willing to and does make offers to disfavored applicants in the hope that they will turn down the jobs.¹³¹

The examples of passive discrimination raised in this Article generally do not fall under disparate treatment analysis.¹³² If employers rendered African-Americans ineligible for pension benefits, denied women access to commission jobs, or prohibited only native Spanish speakers from speaking Spanish at work, workers could raise viable claims under the disparate treatment model.¹³³ Title VII clearly prohibits employers

¹²⁸ See, for example, *Consolidated Service Systems*, 989 F2d at 235–36 (7th Cir 1993). The Seventh Circuit made clear that no inference of intentional discrimination could be drawn from the mere existence of the word-of-mouth hiring practice. But see *Andrew Corp.*, 1989 WL 32884 at *18 (holding that a word-of-mouth hiring system for clerical employees was discriminatory, as its implementation, coupled with a work force from which minorities had been excluded, perpetuated an all-white work force).

¹²⁹ For instance, the provision of free school tuition is economically justifiable regardless of whether the employer desires to discriminate. The case still may reach the jury as the employer must believe the economic rationale—she cannot merely refer to efficiency if it is not claimed to have motivated her decisionmaking.

¹³⁰ See *Consolidated Service Systems*, 989 F2d at 236. See also note 117.

¹³¹ We believe Title VII could capture cases in which the employer attempts to get workers to self-sort but also refuses to hire those undesired workers who are willing to accept employment. Our hypotheticals presume a litigation-savvy employer who wishes both to comply with Title VII and to have a segregated workforce.

¹³² Some sex discrimination cases, however, are more complicated, with some courts suggesting that the failure to cover contraceptives may count as disparate treatment and some academics further contending that the failure to cover infertility treatments may also be included.

¹³³ Passive discrimination, as it occurs in the religious context, presents some distinct doctrinal questions as the text of Title VII contains two religious exemptions. First, the educational programs exemption allows an educational institution to hire an employee within a specific religion, if the institution is run by a particular religion or if the institution's curriculum propagates a particular religion. 42 USC § 2000e-2(e)(2). This exemption covers all employees regardless of whether their activities are intimately connected with the institution's religious activities. By its terms, it

from treating individuals differently because of discriminatory animus or outmoded stereotypes or even seemingly rational group-based stereotypes.¹³⁴ Yet, as currently conceived, disparate treatment claims seemingly do not prohibit the employer from using group-based characteristics, preferences, or stereotypes to treat individuals similarly in hopes that such treatment will encourage applicants from disfavored groups to sort themselves out of a job based on their own preferences. As any individual applicant may defy the stereotype and elect into the job, no disparate treatment has occurred even if an employer succeeds in achieving a segregated workplace. Such a construction of disparate treatment claims fosters Title VII's implied guarantee of equal opportunities, not equal outcomes.

B. Disparate Impact

In contrast, disparate impact claims allow plaintiffs to prevail even when they have not been treated differently than other employees and lack direct proof of the intent to discriminate.¹³⁵ First elucidated in *Griggs v Duke Power Co.*,¹³⁶ a plaintiff can succeed if she identifies a particular employment practice with a significant adverse impact on a

does not cover terms and conditions of employment as they relate to compensation. The other exception allows religious corporations to discriminate in employment with respect to those individuals who perform work connected with "the carrying on by such corporation, association, educational institution, or society of its activities." 42 USC § 2000e-1(a). In determining the scope of this exception, courts weigh "significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious." *Equal Employment Opportunity Commission v Townley Engineering & Manufacturing Co.*, 859 F2d 610, 618 (9th Cir 1988). Legislative history of the § 702 amendment suggests judges should construe the exemption narrowly and courts tend to weigh for-profit status and secular output heavily against qualifying an organization as a religious corporation. See *id.* at 618–19. So only a very narrow range of employers may discriminate in hiring. For instance, Chick-fil-A would not qualify for such an exemption. That being said, qualifying schools could simply refuse to hire outside the religion. If such institutions do so in an effort to covertly rather than legally and overtly discriminate, attention to this disparity could force schools to be candid about their religious agenda.

¹³⁴ Title VII also contains a bona fide occupational qualifications (BFOQ) defense in which considering the sex, religion, or national origin of a potential employee is "reasonably necessary to the normal operation of that particular business or enterprise." 42 USC § 2000e-2(e)(1). Courts construe the BFOQ exception narrowly. See, for example, *Dothard*, 433 US at 334 (stating that due to the restrictive language of the statute, the relevant legislative history, and the interpretation of the EEOC, the BFOQ exception should be an extremely narrow exception). In addition, the BFOQ defense generally does not apply to terms and conditions of employment such as compensation packages. See *Equal Employment Opportunity Commission v Fremont Christian School*, 781 F2d 1362, 1366–67 (9th Cir 1986) (invalidating a discriminatory health insurance benefit plan that awarded benefits premised on a religious belief that only men can be heads of households and holding that the BFOQ exception "does not apply to the full range of possibly discriminatory employment actions").

¹³⁵ See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L Rev 701, 782 (2006).

¹³⁶ 401 US 424 (1971).

protected class and the defendant “fails to demonstrate that the challenged employment practice is job related for the position in question and consistent with business necessity.”¹³⁷ If the challenged practice significantly serves the legitimate employment goals of the employer,¹³⁸ the plaintiff can still prevail if she can prove that a less discriminatory alternative employment practice equally serves the defendants’ goals.¹³⁹ Passive discrimination seemingly fits better under a disparate impact analysis, as employers devise facially neutral compensation packages and other terms and conditions that may result in fewer individuals from a disfavored group in a workplace than would otherwise exist in the absence of such mechanisms.

The plaintiff bears the initial burden of demonstrating that a facially neutral employment practice has a significant adverse impact on a protected class.¹⁴⁰ To use women as an example, a female plaintiff can make such a showing through at least three different methods: (1) showing the suspect employment practice excludes women in a specified geographical area at a substantially higher rate than men, (2) providing evidence of the percentage of female applicants that are actually excluded by the practice, or (3) documenting the level of employment of women by the employer in comparison with the percentage of women in the relevant labor market or geographic area.¹⁴¹ For instance, if a restaurant required applicants to bench press one hundred pounds in order to be considered for a wait staff job, female plaintiffs could likely use any of the methods above to demonstrate a disparate impact.¹⁴² The

¹³⁷ 42 USC § 2000e-2(k) (codifying the standard set out in *Griggs*, 401 US at 429–33).

¹³⁸ See, for example, *Watson v Fort Worth Bank & Trust*, 487 US 977, 998–99 (1988) (stating that certain hiring practices, such as university tenure systems, may have a discriminatory impact, but are still valid if they are legitimately related to a sufficient business purpose); *New York City Transit Authority v Beazer*, 440 US 568, 587 n 31 (1979) (upholding a prohibition against hiring current methadone users because the prohibition served the legitimate employment goals of safety and efficiency).

¹³⁹ See 42 USC § 2000e-2(k). See also *Albemarle Paper Co v Moody*, 422 US 405, 425 (1975) (holding that if an employer meets the burden of proving that certain employment tests are job-related, the complaining party can still succeed if he can show that other selection devices, which do not have a similarly undesirable effect, would serve the employer’s legitimate interests).

¹⁴⁰ *Albemarle*, 422 US at 425.

¹⁴¹ See *Chambers v Omaha Girls Club*, 629 F Supp 925, 948 (D Neb 1986).

¹⁴² Many cases turn on what counts as the relevant comparison group. See, for example, *Caviale v State of Wisconsin, Department of Health & Social Services*, 744 F2d 1289, 1294 (7th Cir 1984) (overturning a district court ruling requiring the comparison pool to possess subjective qualities and instead limiting the comparison pool to those that possess the “minimum objective qualifications necessary”). Some circuits also require evidence of statistical significance to satisfy the prima facie case. See, for example, *Fudge v City of Providence Fire Department*, 766 F2d 650, 658 (1st Cir 1985) (“[I]n cases involving a narrow data base, the better approach is for the courts to require a showing that the disparity is statistically significant.”). The Seventh Circuit allows for disparate impact so long as there is statistical significance even if the magnitude in difference in selection rates is quite small. See *Bew v City of Chicago*, 252 F3d 891, 893 (7th Cir 2001) (agree-

defendant would then have the opportunity to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁴³ To return to our example, the restaurant might contend that weightlifting is an effective proxy to assess whether wait staff can carry trays stacked heavy with food and drinks.¹⁴⁴

Most importantly for our hypothetical employers, courts seem amenable to cost-based justifications for employment practices.¹⁴⁵ While courts and scholars disagree over the contours of what constitutes “job related and consistent with business necessity,”¹⁴⁶ many defendants

ing with the district court’s finding of disparate impact for a test in which 98.24 percent of blacks passed compared with 99.96 percent of whites). Some courts accept statistical evidence as well as other forms of proof to demonstrate disparate impact. See *Thomas v Metroflight, Inc.*, 814 F2d 1506, 1511 (10th Cir 1987) (holding that “statistical studies, evidence of experience in sufficiently similar circumstances, expert testimony on decisionmaking in the context of [the potentially discriminatory rule] or other evidence” can be used to prove disparate impact). Some courts also require substantiality of impact in addition to statistical significance. See *id.* at 1511 n 4 (discussing cases in which the disparity of the impact must be both substantial as well as statistically significant); *Frazier v Garrison Independent School District*, 980 F2d 1514, 1524 (5th Cir 1993) (stating that statistical disparities alone, without a demonstration of the magnitude of the disparity, are insufficient for satisfying a prima facie case of discrimination).

¹⁴³ 42 USC § 2000e-2(k)(1)(i). Congress formulated this text in response to *Watson*, in which a defendant could satisfy this standard by producing “evidence that its employment practices are based on legitimate business reasons,” see 487 US at 998, which Congress perceived as an overly defendant-friendly interpretation. See HR Rep 102-40, 102d Cong, 1st Sess (1991), reprinted in 1991 USCCAN 549, 566–68. Congress, however, left this “job related and consistent with business necessity” standard ambiguous. Lower courts must still grapple with pre-1991 precedents that appear to be in tension. For example, in cases like *Beazer*, in which the employer’s antimethadone policy was challenged, the Court articulated a relatively lenient standard, suggesting the employer’s legitimate goals need only be significantly served by their policy. See 440 US at 587 n 31. This was weaker than the suggestion in *Dothard*, where the Court seemed to require that the policy directly measure a characteristic essential to job performance. See 433 US at 331–32.

¹⁴⁴ The plaintiff might counter that the alternative employment practice of having applicants carry actual loaded trays is no more costly and as good or better at measuring the desired characteristic as well as having a less disparate impact on women.

¹⁴⁵ See, for example, *Equal Employment Opportunity Commission v Francis W. Parker School*, 41 F3d 1073, 1078 (7th Cir 1994) (stating that the school’s policy of linking compensation to experience was “an economically defensible and reasonable means of determining salaries”); *Finnegan v Trans World Airlines, Inc.*, 967 F2d 1161, 1163–65 (7th Cir 1992) (strongly implying that even if a disparate impact claim could be stated on a fringe benefits package, the cost savings would constitute a business justification); *Robinson v Lorillard Corp.*, 444 F2d 791, 799 n 8 (4th Cir 1971) (stating that “considerations of economy and efficiency will often be relevant to determining the existence of business necessity [but] dollar cost alone is not determinative”); *United States v South Carolina*, 445 F Supp 1094, 1116 (D SC 1977) (stating that a policy that caused a disparate impact survived the business necessity test inasmuch as there “appears to be no alternative available to the [employer] within reasonable limits of risk and cost”).

¹⁴⁶ See, for example, Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 Cal L Rev 669, 671 (2007) (comparing arguments that the business necessity defense is only invalid when the employment policy is “needless” with arguments that the defense is only valid if the policy is substantially necessary); Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 Ga L Rev 387, 387–88 (1996) (arguing that the business necessity defense should require that the policy be essential to the continued viability of the business); Michael Carvin, *Disparate*

prevail under this defense. If the practice is unusual and not spread throughout the industry, an employer might face some difficulty showing the practice is job-related and consistent with business necessity, but the threshold is relatively low. Moreover, many of our hypotheticals rely on the employers' efficiency gain in providing particular benefits. Even so, some subset of hypothetical plaintiffs might prevail under disparate impact analysis if courts engage in such analysis.

The Supreme Court, however, has cast doubt as to whether fringe benefits and compensation packages are subject to disparate impact analysis.¹⁴⁷ In *Manhart*, the pension case described above, the Court stated in dicta:

The suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees . . . has no force in the sex discrimination context because each retiree's total pension benefits are ultimately determined by his actual life span; any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex" and consequently immune from challenge under the Equal Pay Act. Even under Title VII itself—assuming disparate impact analysis applies to fringe benefits—the male employees would not prevail. Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply and this Court has never held that discrimination must always be inferred from such consequence.¹⁴⁸

This language poses several problems for passive discrimination cases. The *Manhart* dicta might be read to suggest that judges may never apply disparate impact analysis to wages or fringe benefits claims,¹⁴⁹ though another possible reading might merely indicate that disparate impact analysis is only available to minorities and not to men, or that

Impact Claims under the New Title VII, 68 Notre Dame L Rev 1153, 1157–58 (1993) (arguing that the language of the statute only requires that the policy be connected with or related to business necessity, rather than an essential method or the best means, and that it is therefore not a particularly demanding standard).

¹⁴⁷ Fringe benefits cases under disparate impact analysis have dealt with the exclusion of particular benefits, such as contraceptives or fertility treatments, rather than the decision to provide compensation in the form of fringe benefits. See, for example, *Cooley v Daimler Chrysler Corp*, 281 F Supp 2d 979, 986 (ED Mo 2003) (holding that female employees established a prima facie case of disparate impact due to the employer's health plan not covering prescription contraceptives). In the case of fringe benefits, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Rose v Wells Fargo & Co*, 902 F2d 1417, 1424 (9th Cir 1990), citing *Watson*, 487 US at 994.

¹⁴⁸ *Manhart*, 435 US at 710 n 20.

¹⁴⁹ See Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L & Contemp Probs 53, 54 (1986).

where “disparate impact to one group results from avoiding disparate treatment of another, the practice is justified by a business necessity.”¹⁵⁰

Likely as a result of this language, few cases have grappled with compensation and fringe benefits under disparate impact analysis. In *Finnegan v Trans World Airlines, Inc.*,¹⁵¹ the Seventh Circuit held that across-the-board cuts in fringe benefits, including reductions in vacation time and elimination of dental insurance, were not eligible for disparate impact analysis under the ADEA.¹⁵² Judge Richard Posner rejected even a prima facie case of disparate impact for “across-the-board cuts in wages and fringe benefits necessitated by business downturns,” because “it would mean that every time an employer made an across-the-board cut in wages or benefits he was prima facie violating the age discrimination law. Practices so tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold.”¹⁵³ As Judge Posner explained,

The concept of disparate impact was developed for the purpose of identifying discriminatory situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—although not necessarily deliberately, excluded black or female workers from equal employment opportunities . . . [whereas the policies here] are an unavoidable response to adversity.¹⁵⁴

Finnegan is distinguishable from most of the passive discrimination we discuss as it was both unintentional and was a response to economic pressures, rather than being the original design of the compensation package. It may also be distinguishable as an age case where compensation and benefits are very likely to be closely correlated with group membership, whereas not all compensation and fringe benefits are likely to correlate with race or sex. Even so, Judge Posner emphasized the importance of “exclusion” from opportunity. But, as discussed below, passive discrimination does not exclude anyone from opportunity—it just makes the opportunity less desirable.

Finnegan also raises another possible problem with including passive discrimination under disparate impact analysis. In dicta, Judge Posner suggested that judges lack the institutional competence to “re-design corporate compensation packages.”¹⁵⁵ He observed that “virtually

¹⁵⁰ Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw U L Rev 1505, 1530 (2004).

¹⁵¹ 967 F2d 1161 (7th Cir 1992).

¹⁵² *Id.* at 1163 (holding that “changes in compensation, made in response to business adversity” could not provide the basis of a disparate impact claim).

¹⁵³ *Id.* at 1164–65.

¹⁵⁴ *Id.* at 1164.

¹⁵⁵ *Finnegan*, 967 F2d at 1165.

all elements of a standard compensation package are positively correlated with age¹⁵⁶—similarly, as we noted in Part II, many preferences regarding compensation may also be positively correlated with group membership as defined by Title VII. Finally, *Finnegan* poses the problem that remedying disparate impact on one group may raise the specter of disparate treatment of another group. For instance, if women value pension policies more highly than men as they are likely to live longer, and if men could bring disparate impact claims, the court cannot remedy such violations by ordering the women to pay more into the insurance policy or to receive less pay. Given these arguments, disparate impact analysis may not be an applicable tool to redress passive discrimination.

C. The Lack of Interest Defense

The so-called “lack of interest defense,”¹⁵⁷ available in both disparate treatment¹⁵⁸ and disparate impact cases, is particularly relevant to the causation questions raised in potential passive discrimination cases. Lack of interest is a nondiscriminatory explanation for statistical disparities¹⁵⁹ and may be used to rebut the plaintiff’s prima facie case.¹⁶⁰ Under this “defense,” employers dispute the causal chain by showing that employees’ voluntary choices, rather than particular employment practices, cause workplace inequality or segregation. For example, in

¹⁵⁶ *Id.* at 1164.

¹⁵⁷ Many refer to the “lack of interest defense,” though defendants often deploy this argument not as a formal affirmative defense, but, as mentioned in the text, as a way to rebut the inference of causation raised by statistical disparity.

¹⁵⁸ Courts have recognized the lack of interest defense as available even in pattern-and-practice cases that rely on the inexorable zero. In *Equal Employment Opportunity Commission v O & G Spring and Wire Forms Specialty Co.*, 38 F3d 872, 874 (7th Cir 1994), the EEOC sued a manufacturer for its failure to hire African-Americans. The trial court found that the inexorable zero in the company’s hiring decisions supported a prima facie case of hiring discrimination. The company argued that the lack of African-American hires could be explained by African-Americans’ lack of interest in working in a place where Polish or Spanish was spoken. The appellate court rejected this formulation of the lack of interest argument, noting that such evidence would be relevant only if “African-Americans exhibited this propensity in significantly greater proportion to other native-born English speakers.” *Id.* at 877. Only then could an employer defend an argument of self-selection bias on the part of African-Americans. Yet in our hypotheticals, the employer could argue in his defense that the individuals within the group do in fact exhibit the propensity that causes them to self-sort.

¹⁵⁹ See, for example, *Sears*, 839 F2d at 313 (allowing the defendant to use a variety of evidence, including external labor force data, national survey data, and data from surveys of store employees, to demonstrate that women are less interested in commission sales positions, thus rebutting the presumption of discrimination given the disparities in hiring demonstrated by the EEOC’s statistical evidence). See also *Catlett v Missouri Highway & Transportation Commission*, 828 F2d 1260, 1266 (8th Cir 1987) (explaining that the highway commission had not provided adequate evidence demonstrating that women have a lack of interest in highway maintenance work sufficient to rebut the statistical disparities in the hiring of women).

¹⁶⁰ See *Teamsters*, 431 US at 360 n 46.

Sears, the EEOC claimed that Sears “engaged in a nationwide pattern or practice of discrimination against women . . . by failing to hire and promote females into commission sales positions on the same basis as males.”¹⁶¹ Although the EEOC presented statistical evidence that Sears was significantly less likely to hire female applicants than male applicants for commission sales, Sears rebutted the inference of discrimination by suggesting that female applicants themselves lacked interest in commission sales. The district court agreed and found that the company had merely honored the preexisting employment preferences of working women themselves.¹⁶² The appellate court accepted the reasons for women’s lack of interest in commission sales job, including “a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales.”¹⁶³ If the employer succeeds in showing that individual preference rather than a specific employment practice causes a disparate impact, then it need not even reach the question of whether the employment practice is job-related and consistent with business necessity.¹⁶⁴ In addition, if the defendant need not reach this question, the plaintiffs lose the opportunity to prove that an equally effective, but less discriminatory, alternate employment practice should be utilized instead.¹⁶⁵

This lack of interest argument has been successful in both disparate treatment and disparate impact cases.¹⁶⁶ Scholars have already recognized the problem the lack of interest doctrine poses for the structure of the

¹⁶¹ 839 F2d at 307.

¹⁶² *Sears*, 628 F Supp at 1324–25. See also Vicki Schultz and Stephen Patterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U Chi L Rev 1073, 1077–78 (1992) (arguing that the validity of the lack of interest defense relied upon in *Sears* depends on the claim that women’s aversion to the position arose from social or cultural forces beyond the employer’s control).

¹⁶³ *Sears*, 839 F2d at 320. The dissent criticized the majority for accepting such stereotypes, suggesting that something other than lack of interest must explain the statistical disparities:

Women, as described by *Sears*, the district court, and the majority, exhibit the very same stereotypical qualities for which they have been assigned low-status positions throughout history. . . . The stereotype of women as less greedy and daring than men is one that the sex discrimination laws were intended to address. . . . There are abundant indications that women lack neither the desire to compete strenuously for financial gain nor the capacity to take risks.

Id at 361 (Cudahy dissenting). Interestingly, the EEOC brought the case as a disparate treatment case, rather than as a disparate impact case. This allowed the defendants to make the argument that the very structure of pay was the reason so few women ended up in commission sales.

¹⁶⁴ 42 USC § 2000e-2(k)(1)(B)(ii).

¹⁶⁵ So, for example, if plaintiffs can show that a menu of compensation strategies would maintain the same level of sales while excluding fewer women, then the plaintiff can force the defendant to adopt such a practice. The lack of interest argument forecloses this path.

¹⁶⁶ Some view it as part of a larger counterrevolution in employment discrimination law that reflects judges’ belief “that discrimination is not prevalent in today’s workplace.” Ann McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J L & Pub Policy 415, 471 (2000).

labor process and for organizational form.¹⁶⁷ Vicki Schultz and Stephen Patterson suggest that courts often “credit the lack of interest defense in sex discrimination cases,” as they “have assumed that women’s work aspirations and identities are shaped exclusively through early socialization or even innate predispositions, rather than in response to labor market conditions.”¹⁶⁸ Over time, courts have also “begun to rationalize racial inequality in employment as the reflection of racial differences in work preferences that are not rooted in larger labor market conditions.”¹⁶⁹

While Schultz and Patterson suggest that many work-related preferences are endogenous to the labor market, it may also be that employers intentionally or unintentionally act upon those compensation and fringe benefits preferences that are exogenous to the labor market. This Article suggests that labor market conditions that shape women’s and other minorities’ interests in particular jobs may include not only the mere job descriptions and duties, but also the terms, conditions, and privileges of employment and the structure of compensation. Yet employers and courts seem to, with few exceptions, view these packages as within the employers’ discretion to design and the employees’ discretion to take or leave. Passive discrimination suggests that courts’ acceptance of such preferences under the lack of interest doctrine may open the door for the employer to use such preferences with impunity.

D. Nondoctrinal Limits on Title VII

As discussed, many forms of passive discrimination escape both existing disparate impact and disparate treatment models. Even if courts recognized passive discrimination as actionable under Title VII and plaintiffs could satisfy the prima facie case, defendants seem likely to use lack of interest to prevent recovery. We further observe that should courts revisit and expand these doctrines, other barriers endemic to Title VII provide substantial hurdles for passive discrimination suits. This Part briefly overviews the substantial limits to a litiga-

¹⁶⁷ Mark Gould, *Law and Philosophy: Some Consequences for the Law Deriving from the Sociological Reconstruction of Philosophical Theory*, 17 *Cardozo L Rev* 1239, 1357 (1996):

[A]n organizational form may have a disparate impact on economically homogenous black and white workers, and when it does, that organizational form should be subject to legal sanction. Disparate impact theory should not only be reinstated as a check on facially neutral hiring practices that actually discriminate, it should be extended to include facially neutral organizational forms that discriminate.

But see Neil Dishman, *Defending the Lack of Interest Defense: Why Title VII Should Recognize Differing Job Interests between the Sexes*, 14 *Geo Mason U Civ Rts L J* 189, 214–15 (2004).

¹⁶⁸ Schultz and Patterson, 59 *U Chi L Rev* at 1081 (cited in note 162).

¹⁶⁹ *Id.* at 1082.

tion-based strategy in: (1) perceiving discrimination, (2) reporting discrimination, and (3) winning suits.

1. Perceiving discrimination.

Many people fail even to recognize employment discrimination because few members of disfavored groups consciously acknowledge “the illegitimacy of their disadvantaged position in the status system.”¹⁷⁰ Many individuals resist recognizing the existence of pervasively unfair group-based outcomes, as doing so would challenge the widely held and deep-seated belief that the world is just and that outcomes are based on personal control, meritocracies, and fairness.¹⁷¹ That being said, some individuals reject the belief in a just world and may instead accurately perceive discrimination or even see discrimination where either none exists or it is not legally cognizable. Some theorists contend that members of low-status groups may be more susceptible to this vigilance bias “because of their more frequent encounters with prejudice.”¹⁷² Limited empirical evidence, however, suggests that the tendency among individuals to overlook or minimize discrimination (“minimization bias”) is more prevalent than the vigilance bias.¹⁷³

Even for those individuals who perceive workplace discrimination, passive discrimination is particularly likely to be invisible. Recent studies suggest that those workers who feel discriminated against tend to identify the source as either harassing behavior or subjective decisionmaking systems that result in a wage differential.¹⁷⁴ For instance, self-reporting studies show that individuals complain most about being passed over for promotion, being assigned undesirable tasks, and hearing racist comments.¹⁷⁵ The form of discrimination outlined in this Article, however, facially treats employees the same. While individuals within protected classes may place different values on the compensation packages, employers do not formally exclude individuals from

¹⁷⁰ Cheryl R. Kaiser and Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 L & Soc Inquiry 801, 804 (2006).

¹⁷¹ Id at 804–06 (reviewing a number of studies supporting the proposition that people often do not see or minimize discrimination when it is directed at them).

¹⁷² Brenda Major, et al, *Perceiving Personal Discrimination: The Role of Group Status and Legitimizing Ideology*, 82 J Personality & Soc Psych 269, 270, 280 (2002).

¹⁷³ See id at 270. See also Russell K. Robinson, *Perceptual Segregation*, 108 Colum L Rev 1093, 1142 (2008) (suggesting that the weight of empirical evidence is in favor of the minimization bias, and that the tendency is to underestimate discrimination).

¹⁷⁴ Tristin K. Green, *Targeting Workplace Context: Title VII As a Tool for Institutional Reform*, 72 Fordham L Rev 659, 683–87 (2003).

¹⁷⁵ K.A. Dixon, Duke Storen, and Carl E. Van Horn, *A Workplace Divided: How Americans View Discrimination and Race on the Job* 14 (Rutgers, Jan 2002), online at http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Work_Trends_020107.pdf (visited Apr 14, 2009).

these terms. Potential plaintiffs have a difficult enough time recognizing disparate treatment in hiring, much less identifying the ways in which facially neutral wage structures and fringe benefit packages have been organized in order to encourage them to opt out of it.¹⁷⁶ Passive discrimination may successfully encourage potential employees to sort themselves out of jobs, but those individuals seem much more likely to view such sorting as evidence of personal agency and control rather than perceiving it as discriminatory. This is particularly true when employers act like our hypothesized litigation-savvy employers who engage in no other discriminatory behavior.

Much of the potential discrimination discussed in this Article is quite subtle and can remain invisible as part of the established status quo. For example, despite the fact that insurance plans have long failed to cover contraceptives, women did not begin challenging this coverage gap until 2000.¹⁷⁷ Similarly, individuals seem unlikely to perceive generous pension packages, Sundays off, free tuition, or commission-based wages as discriminatory rather than part of the established workplace and the existing world. That being said, individuals have challenged English-only workplaces—perhaps because these policies seem to more clearly exclude some employees (who cannot speak English or desire to speak a second language) or because they often reflect a change in the employers' policies, which had previously allowed other languages.¹⁷⁸ So, the perception barrier is not an insurmountable one, but it suggests cutting-edge litigation may be slow in coming.

2. Reporting discrimination.

For whatever small percentage of applicants and employees who do perceive discrimination, even fewer individuals act upon such intuitions to pursue litigation or other remedies. As we posit, passive discrimination presumably dissuades many individuals from even accepting employment. The employer has not refused to offer them em-

¹⁷⁶ See Ian Ayres and Peter Siegelman, *The Q-word As Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 *Tex L Rev* 1487, 1492 (1996) (discussing how the use of subjective hiring standards and the requirement that hiring statistics be based on the qualified population in the relevant job market has made it increasingly difficult for plaintiffs to recognize or prove that disparate treatment in hiring has occurred).

¹⁷⁷ As Kathryn Kolbert, cofounder of the Center for Reproductive Law and Policy noted, “[The exclusion of contraceptive coverage] is a problem that is so obvious it got hidden. Because women were denied coverage for so long, no one ever questioned it.” Debra Baker, *Viagra Spawns Birth Control Issue: Advocates Invoke Bias Laws in Urging Insurance Coverage of Contraceptives*, 84 *ABA J* 36, 36 (Aug 1998) (reporting an interview with Kathryn Kolbert).

¹⁷⁸ See, for example, *Equal Employment Opportunity Commission v Premier Operator Services, Inc.*, 113 F Supp 2d 1066, 1073 (ND Tex 2000) (holding that an employer's blanket prohibition on the speaking of a language other than English on the employer's premises violated Title VII).

ployment but, rather, has selected terms and conditions of employment that make the job less desirable to individuals of particular protected classes. If such discrimination poses a cognizable claim and the individuals perceive it as such, they could choose to file directly with the EEOC. Many potential plaintiffs, however, lack the resources to pursue a claim,¹⁷⁹ and many of those who are hunting for jobs seem especially vulnerable in this respect. Such resource constraints may explain why plaintiffs are also less likely to pursue disparate impact claims, which, unlike disparate treatment claims, do not provide for damages.¹⁸⁰ Most disparate impact cases tend to deal with employment tests, with few novel claims advanced.¹⁸¹

For those individuals who wish to challenge these terms and conditions after they have already been employed, most must use internal grievance mechanisms before they can file a complaint with the EEOC. So those few who are not “efficiently” sorted out of the segregated workplace will have to take any ensuing dispute to the internal grievance system. These internal mechanisms tend to construe problems as misunderstandings rather than as legal grievances.¹⁸² Not surprisingly, for those individuals already in an employment situation, most decide not to seek either internal or external remedies.¹⁸³

¹⁷⁹ See Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey*, 141–42, 262 (American Bar Foundation 1977) (reporting that people facing job discrimination problems are the least likely to have access to available resources, such as government agencies, and have the lowest rate of lawyer use). Some evidence also suggests that employees may be less likely to file suit in periods of economic strength. See, for example, John J. Donohue and Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S Cal L Rev 709, 710 (1993) (suggesting that in times of prosperity, potential litigants are more likely to bypass their legal remedies when new jobs and market opportunities are available).

¹⁸⁰ See 42 USC § 1981a(a)(1) (providing for compensatory and punitive damages in intentional discrimination cases). That being said, Michael Selmi suggests that “many of the recent large class action claims have proceeded under an intentional discrimination theory, even though many of their core allegations sound in traditional disparate impact language.” Selmi, 53 UCLA L Rev at 735 n 142 (cited in note 135).

¹⁸¹ Selmi, 53 UCLA L Rev at 742–43 (cited in note 135).

¹⁸² See Lauren B. Edelman, Christopher Uggen, and Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures As Rational Myth*, 105 Am J Sociology 406, 449 (1999) (discussing the manner in which internal grievance systems approach claims as managerial problems, rather than as an issue of the legal rights of the employee).

¹⁸³ Kaiser, 31 L & Soc Inquiry at 813–14 (cited in note 170). A Rutgers study suggests that about 34 percent of those believing they suffered unfair treatment did nothing, with at best 3 percent initiating a lawsuit. See Dixon, *A Workplace Divided* at 15 (cited in note 175).

3. Winning suits.

Of all discrimination cases brought to the EEOC, plaintiffs receive favorable decisions in only 28 percent of the claims.¹⁸⁴ Of those victorious in lower courts, many employment discrimination plaintiffs have their victories overturned at the appellate level, while defendants are likely to preserve their lower court victories.¹⁸⁵ Of all employment discrimination plaintiffs, those claiming either race or sex discrimination (excepting harassment cases) fare particularly badly.¹⁸⁶ Victims hardly fare better in internal complaint systems.¹⁸⁷

In disparate treatment and disparate impact cases, plaintiffs are both far more likely to file and to win firing cases than hiring cases.¹⁸⁸ Firing, rather than hiring, cases are more common because in disparate impact firing claims “the relevant pools exist within the firm (a greater fraction of black than white employees were terminated), whereas in a hiring case great debate concerns the appropriate determination of the qualified applicant pool.”¹⁸⁹ These disparate impact cases are generally difficult to win—in 2002, only 13 percent of plaintiffs prevailed at the district court level with disparate impact claims.¹⁹⁰

Several factors might explain such poor results as compared to most civil litigation.¹⁹¹ Judges and juries “may falsely assume that mem-

¹⁸⁴ See Laura Beth Nielsen and Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in Laura Beth Nielsen and Robert L. Nelson, eds, *Handbook of Employment Discrimination Research: Rights and Realities* 3, 31 (Springer 2005) (reporting that of all the favorable decisions, 99 percent are from EEOC action and settlement and 1 percent from litigated trial victory).

¹⁸⁵ See Kevin M. Clermont, Theodore Eisenberg, and Stewart Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 *Empl Rts & Empl Policy J* 547, 552 (2003) (finding that despite the fact that plaintiffs appeal at a rate fifteen times greater than defendants, plaintiffs obtain one-quarter the number of reversals that defendants do).

¹⁸⁶ See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveal Low Success Rates for Women and Minorities*, 37 *UC Davis L Rev* 511, 516–17 (2003) (analyzing jury verdicts in California employment law cases and concluding that judicial and juror bias substantially disadvantages women and minorities in employment discrimination cases).

¹⁸⁷ See Lauren B. Edelman, Howard S. Erlanger, and John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *L & Socy Rev* 497, 529–30 (1993).

¹⁸⁸ See John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan L Rev* 983, 1015 (1991) (analyzing the increased use of antidiscrimination suits to protect the existing positions of workers, rather than to open employment opportunities for disadvantaged groups); Selmi, 53 *UCLA L Rev* at 739 (cited in note 135).

¹⁸⁹ Stewart J. Schwab, *Employment Discrimination*, in Boudewijn Bouckaert and Gerrit De Geest, eds, 3 *Encyclopedia of Law and Economics* 583 (Edward Elgar 2000). See also, for example, *Wards Cove Packing Co v Atonio*, 490 US 642, 650–51 (1989).

¹⁹⁰ Selmi, 53 *UCLA L Rev* at 739 (cited in note 135).

¹⁹¹ That being said, many employment discrimination suits settle, and the number may be higher than most data reflects, as increasing numbers of invisible settlements are not recorded in the docket. Nonetheless, employment discrimination suits settle at a substantially lower rate than other types of civil actions. See Eric Conn, Note, *Hanging in the Balance: Confidentiality Clauses*

bers of a protected class err on the side of vigilance.”¹⁹² They overlook or underestimate “the significant social costs entailed in bringing a discrimination claim.”¹⁹³ If a single person or a few individuals bring the action, judges and juries may “wonder why other group members have not stepped forward to bring similar charges against the employer” and presume those who brought the suit are troublemakers.¹⁹⁴ David Oppenheimer suggests that “jury pools, already affected by race and gender bias, are being unduly influenced by incorrect information about the civil justice system and employment discrimination law” such as the misperception that minorities are routinely winning meritless cases.¹⁹⁵ Similarly, Michael Selmi contends that most judges believe the “role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence.”¹⁹⁶ This empirical evidence suggests that even if existing doctrine prohibits passive discrimination, plaintiffs are unlikely to successfully combat it through litigation.

IV. POTENTIAL SOLUTIONS

This Article fits within a larger debate about the appropriate framework with which to address workplace discrimination and segregation. Even for those generally sanguine about the market’s ability to price out discrimination, a perfectly functioning market will not eliminate the problems identified in this Article. As discussed in Part I, intentional passive discriminators, unlike less savvy market actors, can achieve a segregating equilibrium. Even those employers that possess no discriminatory animus and respond rationally to market pressure

and Postjudgment Settlements of Employment Discrimination Disputes, 86 Va L Rev 1537, 1538 n 6 (2000) (comparing the tort settlement rate of 74 percent and the employment discrimination settlement rate ranging from 61.3 percent to 67.7 percent). There has been no significant increase in reported settlements after the statutory amendments to Title VII that took place in 1991. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La L Rev 555, 570 n 58 (2001). See also generally Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 NC L Rev 927, 929 (2006) (arguing that confidential settlement agreements make employment discrimination invisible and reduce the deterrent effect of discrimination statutes). While the number of settlements might mean the data fails to pick up some remedies, such settlements further stoke judges’ beliefs that “most plaintiffs are whiners and complainers” as the favorable outcomes “are shielded from judicial imprimatur.” *Id.* at 932.

¹⁹² Kaiser, 31 L & Soc Inquiry at 824 (cited in note 170).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 824–25.

¹⁹⁵ Oppenheimer, 37 UC Davis L Rev at 562 (cited in note 186). See also Selmi, 61 La L Rev at 557 (cited in note 191) (decrying the general consensus that employment discrimination cases are all too easy to win, which the author argues is fueled by popular books dramatizing the damage done by employment discrimination suits).

¹⁹⁶ Selmi, 61 La L Rev at 563 (cited in note 191).

to eliminate irrational and inefficient discrimination face little incentive to eliminate unintentional passive discrimination.¹⁹⁷

If one were concerned about either the workplace segregation created by passive discrimination or the disregard for group-based preferences for particular compensation structures and fringe benefits, some judicial and legislative actions might be taken to reduce these phenomena.¹⁹⁸ Title VII reform provides one obvious approach. That being said, scholars disagree as to whether Title VII can effectively address the organizational structures and workplace norms that foster discriminatory outcomes and segregated workplaces.¹⁹⁹ Some contend that Title VII has made major gains²⁰⁰ and with a little guidance can continue to do so in new contexts.²⁰¹ As discussed in Part III, however, much social psychology literature suggests that reliance on individual claimants to recognize, report, and litigate discrimination has significant limitations.²⁰² While Title VII has certainly caused many businesses to be increasingly careful about their hiring and firing practices, scholars have not resolved the degree to which Title VII should be credited with reducing workplace discrimination and changing public opinion in favor of integrated workplaces.

Rather than attempt to resolve this debate, we merely suggest possible solutions within Title VII's litigation-based framework as well

¹⁹⁷ See Green, 72 *Fordham L Rev* at 673 (cited in note 174) (noting that the "entrenched, taken-for-granted nature of institutionally enabled discrimination renders it particularly resistant to market-induced reform").

¹⁹⁸ Of course, no such changes might be needed if cases of intentional passive discrimination are rare or adequately captured by pattern-and-practice claims and one is unconcerned with both unintentionally induced workplace segregation and group-based differences in perceived or actual compensation and fringe benefits so long as no individual discrimination exists. As explained in Part I, in a perfect market, self-sorting inflicts no economic harm on either Deltas or Omegas. In an imperfect market, however, individuals in the group with the disfavored preference may have to choose between a job with benefits that they do not value as highly as other employees or an otherwise less desirable job.

¹⁹⁹ See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 *Wash & Lee L Rev* 3, 7–8 nn 15–16 (2005) (detailing numerous articles that criticize the impact of antidiscrimination law and numerous articles that suggest future uses of employment discrimination law to restructure the workplace).

²⁰⁰ See, for example, James J. Heckman and Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 *Am Econ Rev* 138, 173–74 (1989) (concluding that federal antidiscrimination policy was responsible for the increased employment and higher relative wages for blacks in the South Carolina manufacturing industry).

²⁰¹ See Michael Zimmer, *Systemic Empathy*, 34 *Colum Hum Rts L Rev* 575, 603 (2003) ("A mini-Civil Rights Movement in the courts—undertaking more systemic cases and using expertise to help draw the inference of discrimination—may prove useful for developing a more empathetic federal judiciary.").

²⁰² See, for example, Kaiser and Major, 31 *L & Soc Inquiry* at 824 (cited in note 170) (discussing the cognitive and motivational barriers that hamper individual litigants from effectively using the legal system to pursue antidiscrimination claims).

as present some more innovative approaches. These options include standalone legislation, education initiatives, and incentivized employer restructuring. We offer preliminary suggestions but do so cognizant of the risks of unexpected and perverse outcomes. We encourage other scholars to think systematically about the prevention of and possible remedies for passive discrimination.

A. Litigation Strategies

1. Title VII expansion.

One possible strategy, favored in other contexts by many legal academics, involves the legislative or judicial expansion of disparate impact litigation.²⁰³ To begin with, courts could apply disparate impact doctrine to the structure of compensation and to the provision of fringe benefits. In so doing, they would need to clarify the dicta in *Manhart* and narrowly construe or abandon the Seventh Circuit's holding in *Finnegan* as applied to Title VII. When evaluating compensation packages and other fringe benefits, they would have to decide the role of statistics and subjectivity in determining how to value the packages and when different group valuations rise to the level of disparate impact. As mentioned above, such assessments can be difficult for courts, but they already do much statistical work in assessing conventional disparate impact and pattern-and-practice claims. Such expansion would address both intentional and unintentional passive discrimination cases.

As briefly mentioned above, the judiciary may greet attempts to expand the scope of disparate impact suits or to limit the potential defenses with skepticism and hostility. Courts have tended to interpret Title VII in a stingy manner,²⁰⁴ have been reluctant to expand Title VII,²⁰⁵ and in recent years have retrenched as to "what constitutes an actionable employment discrimination claim."²⁰⁶ They have resisted efforts to

²⁰³ See, for example, Selmi, 53 UCLA L Rev at 704 n 12 (cited in note 135) (listing numerous articles proposing such reforms); Charles Sullivan, *Re-reviving Disparate Impact* *59–60 (Seton Hall Public Law Research Paper No 9, Aug 2004), online at <http://ssrn.com/abstract=581503> (visited Apr 14, 2009); Laura Beth Nielsen and Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation As a Claiming System*, 2005 Wis L Rev 663, 708 (arguing that expanding the application of disparate impact theories could significantly reduce employment inequality).

²⁰⁴ See Zimmer, 34 Colum Hum Rts L Rev at 586–93 (cited in note 201) (concluding after a review of cases and academic studies that judges are inherently unsympathetic to discrimination cases); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala L Rev 741, 789 (2005) (arguing that plaintiffs face strong judicial resistance to a finding of illegal discrimination).

²⁰⁵ See Sullivan, 98 Nw U L Rev at 1565 (cited in note 150) (discussing judicial doctrines that have limited, rather than expanded, the scope of Title VII).

²⁰⁶ Nielsen, 2005 Wis L Rev at 673 (cited in note 203).

characterize default arrangements and organizational structures as particular employment practices open to challenge.²⁰⁷

The possibility of judicial backlash or legislative rollback is even more worrisome than the mere prospect of judicial hostility. Attempts to expand Title VII to cover heterogeneous preferences or to narrow disparate impact defenses could simultaneously encourage courts to restrict Title VII through other means such as raising the standards for statistical evidence, or making *prima facie* claims harder to establish. Such a strategy of giving in on substance and taking away on procedure may ultimately hurt more than it helps. Similarly, congressional expansion of Title VII may facilitate a legislative rollback.²⁰⁸ Just as courts can undo protections when faced with litigation they view with a skeptical eye, Congress can do even more by changing the actual text of Title VII. For example, the Civil Rights Act of 1991²⁰⁹ was a mixed set of pro-plaintiff and pro-defendant policies.²¹⁰

Even so, allowing disparate impact suits in this area may yield some benefits. In addition to the prospect of successful plaintiffs (either through litigated triumphs or settlements), merely forcing workplaces to elucidate a business necessity justification may itself change some exclusionary practices.²¹¹ Making compensation and fringe benefits susceptible to disparate impact analysis might denaturalize these practices, which itself may encourage voluntary change.²¹² So those risk-averse employers who unintentionally engage in passive discrimination and those who face low costs in changing the policies may do so once made aware of the practices' potential illegality. Litigation and doctrinal adjustments may also influence front-end behavior for new employers or those independently considering new compensation and fringe benefit packages.

²⁰⁷ Travis, 62 Wash & Lee L Rev at 39–40 (cited in note 199).

²⁰⁸ See Bernice Sandler, *Publicly-supported Single Sex Schools and Policy Issues*, 14 NY L Sch J Hum Rts 61, 66 (1997) (arguing that experience has demonstrated that opening any controversial statute for amendment often leads to restrictions in the statute's impact). Consider also Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 Wayne L Rev 1093, 1101–06 (1993) (discussing the consequences of the enactment of the Civil Rights Act of 1991, which significantly amended Title VII, and its effects on the Age Discrimination in Employment Act).

²⁰⁹ Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1071, codified as amended at 42 USC § 2000e et seq.

²¹⁰ By opening up Title VII, proponents were able to undo some of the defendant-friendly, post-*Griggs* litigation but also allowed the addition of some pro-defendant changes. Similarly, revisiting Title VII to debate the scope of disparate impact litigation could allow other amendments that could be net losers for plaintiffs. See note 208.

²¹¹ See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 135–36, 178–79 (Random House 2007) (discussing the power of the business justification rule in propelling “reason-forcing” conversations regarding policies that may have a discriminatory impact on certain groups).

²¹² See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 Berkeley J Empl & Labor L 283, 375 (2003) (discussing the feminist interest in denaturalizing workplace structures).

2. Standalone legislation.

As individual compensation packages and other terms and conditions of employment become more salient, interest groups may instead push for standalone legislation to address particular mechanisms of passive discrimination. Such an approach avoids the pitfalls of opening up Title VII to amendment.²¹³ Independent legislation may also bypass some of the litigation hurdles associated with Title VII if it does not primarily rely on individual claimants for enforcement. Of course, this sort of case-by-case approach fails to provide comprehensive protection against a determined employer.

For instance, one piece of model legislation which might be taken as a response to passive discrimination,²¹⁴ the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), targeted insurance providers rather than employers.²¹⁵ The bill “require[d] all private insurance plans that provide prescription drug coverage to include prescription contraceptive coverage.”²¹⁶ As Congress allowed this bill to languish for several years, state-by-state legislation may present a more viable option. So far, at least thirty-three states have regulated insurance coverage relating to contraceptives either by requiring policies that cover prescription drugs to also cover contraceptives or by prohibiting health plans from excluding contraceptive services or supplies.²¹⁷ One such state, Illinois, has also undertaken an awareness campaign to educate the public about mandatory contraceptive coverage.²¹⁸ When fringe benefits or compensation packages are facially neutral but exclude something of high value to most individuals within a particular group, legislative intervention can remedy such exclusion.

²¹³ For instance, concern about legislative rollback is one reason advocates drafted the Americans with Disabilities Act (ADA) rather than amend Title VII. See Brian K. Esser, Comment, *Beyond 43 Million: The “Regarded As” Prong of the ADA and HIV Infection—A Tautological Approach*, 49 Am U L Rev 471, 476 (2000); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-generation Civil Rights Statute*, 26 Harv CR-CL L Rev 413, 429 (1991).

²¹⁴ This is not a perfect fit as the lack of contraceptive coverage seems an unlikely mechanism to exclude either women or nonreligious employees from a particular employer or from the general workforce. It is a good example, however, of a policy relating to fringe benefits where employers may simply have not considered women’s interests.

²¹⁵ See S 104, 107th Cong, 1st Sess, in 147 Cong Rec S 97 (Jan 22, 2001); HR 1111, 107th Cong, 1st Sess, in 147 Cong Rec H 1010 (Mar 20, 2001).

²¹⁶ National Women’s Law Center, *Contraceptive Coverage: A Multi-track Approach 2* (May 2008), online at <http://www.nwlc.org/pdf/Contraceptive%20Coverage%20MultiTrack%20Approach%20May%202000.pdf> (visited Apr 14, 2009).

²¹⁷ See The Henry J. Kaiser Family Foundation, *State Mandated Benefits: Contraceptives, As of August 1, 2007*, online at <http://www.statehealthfacts.org/comparatable.jsp?ind=487&cat=10&print=1> (visited Apr 14, 2009) (listing the states that mandate that insurance providers cover contraceptives).

²¹⁸ See Planned Parenthood Action Illinois, *Planned Parenthood, Governor Blagojevich Announce Contraceptive Insurance Awareness Campaign* (2004), online at http://www.ppaction.org/ppil/pp_gov_mktg.html (visited Apr 14, 2009).

Other issues relating to terms and conditions of employment and compensation packages that are identified in this Article seem more resistant to tailored legislative fixes.²¹⁹ If only a few employers engage in particular screening behavior, interest groups may not prioritize addressing such behavior since it will only directly affect a limited number of individuals. In addition, some of the mechanisms of passive discrimination provide a benefit that many individuals highly value (though not those sorted out), rather than deny a benefit that few value very highly (while those that are sorted out do not). Other mechanisms provide a benefit that is highly valued by a small number of individuals, but given their intense preferences, those individuals would strenuously oppose any legislation to eliminate the benefit. For instance, interest groups seem extremely unlikely to muster the political will to eliminate “Sundays off” policies.²²⁰

The ultimate success of either Title VII expansion or standalone legislation may depend on the reasons for the underlying discrimination. If employers sort out individuals with a protected characteristic because of inadvertence or expense, blanket prohibitions should be satisfactory in eliminating the exclusionary practice. Such action would bring the behavior to the employers’ attention and raise the specter of litigation costs. On the other hand, if employers use compensation and other terms, conditions, and privileges of employment as a sophisticated mechanism for intentional discrimination or as a proxy for some other desired characteristic, then targeted litigation and legislative approaches may just encourage employers to devise a new sorting mechanism. For instance, some employers might have used tests and college degrees as an imperfect proxy to screen out African-Americans in the 1960s and 1970s. The advent of disparate impact legislation means that similarly animus-laden employers may now use low-wage, high-pension strategies to screen out African-Americans. If passive discrimination is sanctionable behavior, determined employers may seek another imperfect

²¹⁹ For instance, language policies may pose serious challenges to an easy legislative fix. Many of those most affected by “English-only” policies lack legislative clout and many states face pressure from English-only movements. That being said, at least one state (California) has prohibited English-only policies under state fair employment and housing department regulations as well as through statewide legislation. See Cal Gov Code § 12951 (West).

²²⁰ Even if such a constituency existed, such a policy would raise serious religious accommodation issues for employers, and many states still have blue laws prohibiting the operation of particular businesses on Sundays. See *McGowan v Maryland*, 366 US 420, 444–52 (1961) (holding that Maryland’s blue laws promote the secular values of “health, safety, recreation, and general well-being” and thus violate neither the Free Exercise Clause nor the Establishment Clause); Maarten Goos, *Sinking the Blues: The Impact of Shop Closing Hours on Labor and Product Markets* *2 (CEP Discussion Paper No 664, Dec 2004), online at <http://cep.lse.ac.uk/pubs/download/dp0664.pdf> (visited Apr 14, 2009) (noting that as of 1997, at least eight states still had Sunday closing laws).

but legal screening strategy.²²¹ Of course, even forcing them to abandon the existing approach and to find a new, litigation-proof approach raises the employers' costs.

B. Nonlitigation Strategies

In addition to legal efforts, nonlegal and voluntary strategies might also help address problems raised by passive discrimination. They might serve either as a complement to legal sanctions or as an alternate option if legal sanctions are unavailable. We briefly discuss education-based strategies as well as various methods to incentivize employers to change their behavior. Yet some of the most effective remedies we consider raise other problems and unintended consequences that warrant serious consideration.

1. Raising awareness.

If courts and legislatures fail to reach the question of when fringe benefits and other compensation structures are subject to challenge under disparate impact analysis, the EEOC could issue nonbinding advisory guidelines on the subject. These guidelines could identify areas in which existing employer behavior to screen for a particular characteristic or longstanding wage and compensation structures disadvantage particular groups. In so doing, the EEOC might suggest alternative, clearly compliant structures, such as those discussed below. By merely raising the issue, unintentional passive discriminators could be alerted to the effects of their practices. If inadvertent or unconscious bias drives most of these practices, simple education might go a long way. As Professor Tristin Green notes, “[S]ociologists have explained that the racial or gendered character of taken-for-granted institutionalized practices is often rendered invisible to current incumbents of organizational positions.”²²² Those workplaces interested in enhancing diversity might restructure such invisible barriers to workplace integration.²²³

²²¹ See Ayres and Siegelman, 74 *Tex L Rev* at 1491–93 (cited in note 176) (discussing how the rise of disparate impact liability induced employers to shift from objective tests to less transparent subjective evaluation metrics in order to eliminate individuals from disfavored groups).

²²² Green, 72 *Fordham L Rev* at 670 (cited in note 197).

²²³ Yet just as litigation strategies have limits, so too do education strategies. For example, following the guidance of human resource departments and lawyers, many companies have adopted harassment and diversity training programs to avoid litigation. As Professor Bisom-Rapp notes, however, very little evidence supports the effectiveness of sexual harassment training. See Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 *U Ark Little Rock L Rev* 147, 162–65 (2001); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *Berkeley J Empl & Labor L* 1, 4–5 (2001).

While such guidelines often receive little deference from courts,²²⁴ they may still influence intentional but risk-averse passive discriminators. If they send a signal of possible liability, even if a very speculative signal, employers and human resource managers take notice. As sociologist Lauren Edelman has documented, many employers adopt practices based on management consultants' claims that the recommended practices would render organizations free from legal liability, even when such claims are not rooted in any established case law.²²⁵ In turn, some evidence suggests that courts will incorporate these organizational efforts into legal standards for compliance, thus creating a synergistic feedback loop.²²⁶ So EEOC attention and guidelines might create a reinforcing regime to combat passive discrimination.

Employers, or other actors in the workplace,²²⁷ might also be encouraged to combat firm segregation and discrimination more broadly. Existing organizational efforts to promote diversity include "implementation of organizational accountability by creating new positions or taskforces designed specifically to address diversity issues, managerial bias training, and mentoring and network practices."²²⁸ Such processes could be expanded to include concern for how the existing organizational structure may not satisfy minority employee preferences even if it does not formally exclude them. Some empirical evidence suggests programs designed to increase minority recruitment and employment have been successful,²²⁹ so reason exists to be hopeful about expanding the focus of these programs.

²²⁴ Courts have not resolved the level of deference due the EEOC but often decide cases contrary to EEOC guidelines. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *Fordham L Rev* 1937, 1949–61 (2006).

²²⁵ Lauren B. Edelman, *Overlapping Fields and Constructed Legalities: The Endogeneity of Law*, in Justin O'Brien, ed., *Private Equity, Corporate Governance, and the Dynamics of Capital Market Regulation* 55, 70 (Imperial College 2007) (suggesting that lawyers and management consultants "emphasise and even exaggerate the threatening aspects of legal environments" in order to shield businesses from possible liability).

²²⁶ See Edelman, Uggen, and Erlanger, 105 *Am J Sociology* at 408 (cited in note 182).

²²⁷ Those employee institutions engaged in collective action, such as unions, might themselves be made aware of these problems and be encouraged to bargain over these particular terms and conditions of employment. In order for this strategy to work, these bargaining units need to be effective representatives of those individuals with protected characteristics. That being said, if passive discrimination keeps these individuals from disfavored groups out of particular workplaces, then organization of existing employees may be unlikely to focus on these issues.

²²⁸ Pager and Shepherd, 34 *Ann Rev Sociology* at 195 (cited in note 43). As evidence indicates that poorly designed programs can create new or reinforce old stereotypes as well as increase hostility between employees, it is important to be mindful of the limitations of diversity training. See Bisom-Rapp, 22 *Berkeley J Empl & Labor L* at 38–44 (cited in note 223).

²²⁹ See Harry J. Holzer and David Neumark, *What Does Affirmative Action Do?*, 53 *Indus Labor Rel Rev* 240, 269 (2000) (investigating how extensive recruiting, intensive screening, and on-the-job training contribute to the success of workplace affirmative action policies in hiring more minorities and women).

2. Incentivizing employer restructuring.

In addition to mandating changes in employer behavior and educating employers, legislators and the EEOC can also incentivize voluntary changes in employer practices. While the EEOC's primary task is to investigate, conciliate, and litigate, the EEOC also possesses the authority to undertake initiatives to combat employment discrimination. For example, the EEOC recently designed a "freedom to compete" program, characterized as an "outreach, education, and coalition-building strategy designed to complement the agency's enforcement and litigation programs."²³⁰ In addition, the EEOC currently crafts reports outlining what it considers to be best practices to eradicate discrimination.²³¹ Such tools might also be used to combat these subtle compensation terms-and-conditions issues.²³² The EEOC could also incentivize creative solutions and reward those companies that develop and embody the gold standard approach.²³³

For most of the problems identified in this Article, figuring out ways to enhance employee choice should help reduce benefits discrimination for those with atypical preferences. Ideally, such choice also creates a secondary beneficial effect on workplace segregation by decreasing the number of members of protected classes who voluntarily opt out of firms with undesirable packages and structures. Such organizational adjustment may contribute to long-term stability by increasing the fairness of compensation and other terms and conditions of employment.²³⁴

While federal tax law encourages employers to give all workers with the same experience the same fringe benefits package, employers can still

²³⁰ EEOC, *Facts about the Freedom to Compete Initiative*, online at <http://www.eeoc.gov/initiatives/compete/index.html> (visited Apr 14, 2009).

²³¹ See, for example, EEOC, *Interim Report on Best Practices for the Employment of People with Disabilities in State Government* (Oct 29, 2004), online at http://www.eeoc.gov/initiatives/nfi/int_states_best_practices_report.html (visited Apr 14, 2009) (finding that a number of states have established hiring and training programs specifically for individuals with disabilities and that adequate procedures exist to handle requests for reasonable accommodations).

²³² David Charny and G. Mitu Gulati have suggested the EEOC provide rewards to workplaces that study and restructure their workplaces to eradicate bias in subjective decisionmaking and

the effects of certain groups choosing self-defeating strategies. Such a program should be legally viable (race- or gender-neutral) as long as it is framed in terms of ensuring an equal opportunity workplace; incentives for adopting such programs could come from both economic advantages and from the pressures exerted by a reconstructed employment discrimination doctrine.

David Charny and G. Mitu Gulati, *Efficiency-wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-level" Jobs*, 33 Harv CR-CL L Rev 57, 105 (1998).

²³³ Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 BC L Rev 367, 404 (2008) (discussing diversity programs that have purposes and effects beyond reducing and ending litigation).

²³⁴ See Faye Crosby, *The Denial of Personal Discrimination*, 27 Am Behavioral Scientist 371, 382 (1984).

maximize their tax benefits and allow employee choice within packages. For example, the federal government currently offers its employees the choice of multiple health plans²³⁵ rather than limiting them to one, as is often the case in the private sector. Such choice allows employees to select a package that best matches their expectations and preferences.²³⁶ One can imagine similar options for pension benefits in which employees could elect how much pay to take directly as wages and how much to backload through pension benefits.²³⁷ Rather than the status quo in which employers often automatically enroll employees through defined benefit plans, the EEOC could encourage employers to allow workers to decide whether and how much to invest in defined contribution plans.²³⁸ Employers could allow employees to decide how to distribute their matching contributions, which could include benefits such as health insurance.

Analogous compensation menus might be offered for positions that currently rely on commission sales. The EEOC could encourage employers to offer a variety of wage packages in sales jobs that allow individuals to assess their desired level of risk-taking in determining the composition of their salaries. While the businesses may seek to incentivize sales through a commission,²³⁹ creative employers might find non-

²³⁵ See Cynthia Dailard, *State Contraceptive Coverage Laws: Creative Responses to Questions of Conscience*, 2 Guttmacher Rep Pub Policy 4, 1 (1999), online at <http://www.guttmacher.org/pubs/tgr/02/4/gr020401.pdf> (visited Apr 14, 2009) (noting the 285 plans available in the Federal Employees Health Benefits Program). In practice, however, employees are often limited by geography to a few choices. See *Federal Employees Health Benefit Plan Information for 2008*, online at <http://www.opm.gov/insure/08/planinfo.asp> (visited Apr 14, 2009) (providing information on the plans available in each of the fifty states).

²³⁶ In order for such choice to work, insurance packages need to be more transparent. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash L Rev 363, 386 n 132 (1998) (detailing the difficulties employers and employees face in ascertaining what medical services are covered by their health insurance providers). Both employers and employees need to be able to easily ascertain whether such packages cover services and prescriptions most likely to be utilized by protected classes such as prescription contraceptives or sickle cell-related procedures. Perhaps EEOC training of human resources and benefits personnel could help firms achieve this transparency.

²³⁷ This may create problems for other protected groups. While African-Americans may rationally opt out of pension benefits, Hispanics, who traditionally have longer life expectancies, are the most likely to opt out of pensions. See Dorothy A. Brown, *Pensions, Risk, and Race*, 61 Wash & Lee L Rev 1501, 1530 (2004) (analyzing the racial differences between workers who receive pension benefits, and finding that whites are the most likely to be covered by pensions, while Hispanics are the least likely to be covered).

²³⁸ See GAO, *Pension Plans: Characteristics of Persons in the Labor Force without Pension Coverage* 7 n 6 (Aug 2000), online at <http://www.gao.gov/archive/2000/he00131.pdf> (visited Apr 14, 2009) (“While defined benefit plans generally enroll qualified employees automatically, defined contribution plans, such as 401(k) plans, are generally voluntary and employees must choose to participate in them.”).

²³⁹ For purposes of the model and the hypotheticals, we assume that all workers are equally productive regardless of compensation offered. If commission-based sales actually track produc-

compensation measures to encourage the same high level of sales. For instance, Sears adjusted the level of salary dependent on commission when it decided it wanted to attract more female employees.²⁴⁰ Rather than eliminate commission-based jobs or offer all employees the same commission, Sears could have provided multiple options.

Employee choice could also address the problems raised by “Sundays off” policies. If Chick-fil-A is serious about its desire to provide “a day off to spend with family and friends,”²⁴¹ then perhaps franchisees or employees should have some discretion over which day that will be. While religious employees of non-Sunday faiths can already seek accommodation under Title VII, Sundays need not be the default day off for all employees if Chick-fil-A does not seek to send a religious message.

Of course, employee choice raises several concerns.²⁴² First, for employee choice to work, such choices must be perceived as valid choices. Successfully providing a menu requires that employers not stigmatize some of the options—as some suggest has happened under so-called “mommy tracks.”²⁴³ Such practices might be less likely as

tivity, then the question of whether employers should be encouraged to abandon the practice is outside the scope of this Article. At least some evidence, though, suggests preference for salary-based risk is unrelated to productivity or skill. See note 68.

²⁴⁰ See note 70.

²⁴¹ Chick-fil-A, *Frequently Asked Questions*, online at <http://www.chick-fil-a.com/Work.asp> (visited Apr 14, 2009).

²⁴² The three authors disagree about the viability of such an approach. One major concern is the possibility that employees may choose poorly in attempting to satisfy their preferences. For instance, most workers elect not to participate in their pension plans, which might make sense for some black workers but makes little sense for Hispanics, who have the highest life expectancy. See Dorothy A. Brown, 61 Wash & Lee L Rev at 1521 (cited in note 237). If we are right about the effectiveness of screening mechanisms, many individuals already have an accurate sense of their preferences, which should, but may not, align with their actual needs.

A very different approach would be to decrease employers’ incentives to provide fringe benefits. As the tax code is currently structured, it encourages employers to provide compensation in the form of fringe benefits. Neither they nor the employee pays taxes on such benefits, though the employees would pay taxes if they procured such services on the open market. If reducing either workplace segregation or equalizing the perceived value of compensation received is the primary goal, the government could stop subsidizing these benefits. Yet such an outcome seems unpalatable. As explained earlier in the Article, it lowers the economic value of compensation to Deltas without a corresponding rise in economic value to Omegas. If all we care about is equality in perceived compensation or decreasing workplace segregation, then this is unobjectionable. But one of the currently extolled virtues of employers is that they choose to provide these services particularly when they get a good deal for employees.

One could then further combine an elimination of the tax incentives with government provision of many of these services. The government could provide greater amounts of health care and social services to alleviate the burden on the employer. Even then, though, employers could try to offer greater benefits to achieve the same sorting function. A truly socialized system might eliminate this possibility, but, of course, the costs and benefits of such an approach raise a much larger debate than can be adequately addressed in this Article.

²⁴³ See, for example, Amy L. Wax, *Family-friendly Workplace Reform: Prospects for Change*, 596 Annals Am Acad Polit & Soc Sci 36, 37 (2004) (observing how mommy tracks have devalued employees who choose fewer hours); Joan Williams, *Exploring the Economic Meanings of Gend-*

most of the forms of passive discrimination we identify would not involve the employee opting into less hours for less pay but into the same hours for differently structured pay.

Second, facilitating choice poses significant administrative costs for small and sometimes even large employers. Rather than providing one benefits package and one compensation structure, benefits and payroll personnel and structures must accommodate a variety of options. As increasing numbers of employers seek to provide choice with attention to previously unnoticed discrimination, health and pension benefit market niches may develop. Even then, many, though not all, fringe benefits rely on pooling. For instance, in order for employers to get good deals on group health and life insurance, insurance providers often require that they put all the employees on the same group policy. Otherwise, if those who believe themselves least likely to draw on the insurance opt out, insurance companies are unlikely to offer employers the same discounts.

CONCLUSION

By naming, describing, and modeling a rarely discussed mechanism of employment discrimination, this Article adds to the literature on subtle forms of discrimination and the causes of workplace segregation. By way of example, we examine the employment law context to show that legislators and courts failed to draft and interpret Title VII with such problems in mind. Both intentional and unintentional passive discrimination can lead to segregated workplaces, but as currently conceived, doctrinal and practical problems may foreclose Title VII as an effective deterrent or remedy. As a first step, we note a number of changes that might be made to Title VII or to legislation more generally to address particular mechanisms of passive discrimination in terms and conditions of employment. As scholars across disciplines have noted, reformers may need to conceptualize major changes in order to address these problems of segregation and structural discrimination. These problems, which we hypothesize in perfectly competitive markets with idealized workers, may be exacerbated if we relax some of the assumptions of our model, such as the notion of equally productive workers. While we introduce passive discrimination in the context of race, sex, national origin, and religion, we hope to pursue future scholarship to address how the deployment of such

er, 49 Am U L Rev 987, 995 (2000) (arguing that the work of employees in flex-time and part-time positions are generally marginalized relative to the work of other employees). But see Mary Anne Case, *How High the Apple Pie?: A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 Chi-Kent L Rev 1753, 1768 (2001) (suggesting employers are successfully choosing to reduce the stigma of so-called mommy tracks and recasting them as “life outside of work” options), quoting Sue Schellenbarger, *Work & Family: Shedding Light on Women’s Records Dispels Stereotypes*, Wall St J B1 (Dec 20, 1995).

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mechanisms affect other categories including family status, sexual orientation, and disability.