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Substantive Pay Equality: Tips, Commissions, and How to Remedy the Pay Disparities They Inflict

Ryan H. Nelson *

Empirical evidence shows that people of color tend to earn less in tips than their white coworkers, and people of color and women tend to earn less in commissions than their white, male coworkers. Moreover, a growing corpus of social science research suggests that neither tipping nor commissions are strict business necessities. Yet, scholars, courts, and practitioners have yet to recognize a disparate impact cause of action under Title VII of the Civil Rights Act of 1964 alleging that tipping and commissions cause employees to receive less pay because of race or sex and cannot be justified as job-related and consistent with business necessity.

This Article explores legal strategies for combatting the pay disparities wrought by tips and commissions. Foremost, it explains why most tipping and commission schemes evidence a prima facie case of disparate impact and why many employers would be unable to prove that such schemes constitute business necessities. Subsequently, it assesses non-litigation alternatives to attacking such pay disparities, including a reconceptualization of Ricci v. DeStefano—an opinion regarded in much employment discrimination scholarship as a material roadblock to substantive workplace equality—as

* Ryan H. Nelson is an Assistant Professor of Law at South Texas College of Law Houston. He would like to thank Ian Ayers, Deanna Barmakian, Elizabeth Bartholet, Jane Bestor, Sharon Block, Zachery W. Brewster, Dallan F. Flake, Janet Halley, Saru Jayaraman, Leanna Katz, Michael Lynn, Regina Larrea Maccise, John List, Ann C. McGinley, Nicole Buonocore Porter, Michael Pollack, Alexander A. Reinert, Christine Riggle, Benjamin I. Sachs, Tony Simons, Edward Stein, Stewart E. Sterk, Michael C. Sturman, Lu-in Wang, Matthew Wansley, and all of the participants at the 2018 Colloquium on Scholarship in Employment and Labor Law for their insightful comments. He would also like to thank M. Broderick Johnson, Nketiah Berko, Natalie Kirchhoff, Areeb Siddiqui, Hannah Vester, Lulu Zhang, and the rest of the *Yale Law & Policy Review* team for their excellent feedback.

offering employers the option of offsetting tip or commission disparities via disparate treatment (i.e., affirmative action).

For generations, employers have maintained tipping and commissions as facially-neutral pay schemes which afford employees formal pay equality, but fail to guarantee pay untethered to employees' races and sexes. This Article provides a roadmap for employees subjugated and discriminated against by such pay schemes. In doing so, it seeks to lay the groundwork for those employees to secure not just facially-neutral pay policies, but substantive pay equality.

INTRODUCTION

Consider an employer that pays higher wage rates to employees holding a high school diploma when white employees are more likely to hold a high school diploma than their African American coworkers. Although the diploma requirement is facially neutral, white employees end up with higher wage rates than African American employees, all else being equal. Such race-based disparate impact would violate Title VII of the Civil Rights Act of 1964 ("Title VII") unless the diploma requirement is job related and consistent with business necessity because, as a unanimous Supreme Court first said more than a generation ago in *Griggs v. Duke Power Co.*, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[1]

However, consider an employer that encourages and facilitates tipping when white employees generally earn higher tips than their African American coworkers. That was the case when a team led by Yale Law School professor Ian Ayers analyzed the tips received by taxicab drivers in New Haven, Connecticut, finding that, after controlling for myriad variables, "African-American cab drivers on average were tipped approximately one-third less than white cab drivers."[2] Alternatively, consider an employer that pays employees via a sales commission plan when its customers generally buy from men more than their female coworkers, resulting in women earning less in commissions than men on average. A report by the Institute for Women's Policy Research found that to be the case with female financial advisors.[3] One of the report's authors attributed the wage gap to the advisors' earning commissions: "The people with the wealthiest clients have the biggest earnings. White men have the best access to the richest clients. Part of this is about who you know."[4]

1. 401 U.S. 424, 427, 431 (1971); *accord* 42 U.S.C § 2000e-2(k)(1)(A)(i) (2018) (codifying *Griggs*).
2. Ian Ayres, Frederick E. Vars & Nasser Zakariya, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1615–16, 1625 (2005).
3. Ariane Hegewisch & Emma Williams-Baron, INST. FOR WOMEN'S POL'Y RSCH., *The Gender Wage Gap by Occupation 2016 and by Race and Ethnicity* 1 (2017), https://iwpr.org/wp-content/uploads/2017/04/C456.pdf [https://perma.cc/S36T-5RA9].
4. Annalyn Kurtz, *Financial Advisers Have the Worst Wage Gap for Women*, FORTUNE (Apr. 4, 2017), http://fortune.com/2017/04/04/equal-pay-day-worst-wage-gap/ [https://perma.cc/NS9R-3UU9] (statement of Ariane Hegewisch).

Today, just like these drivers and financial advisors, people of color in tipped jobs and people of color and women in commissioned jobs tend to earn less than their white, male coworkers for several reasons (e.g., intentional or implicit bias against African American drivers, wealthy men choosing their financial advisor from amongst their mostly male friends), all of which are attributable, in large part, to customer preferences.[5] However, despite evidence that neither tipping nor commissions are always a strict business necessity[6] and the likely inapplicability of other defenses,[7] neither courts nor litigants have recognized a Title VII disparate impact claim alleging that customer preference-based pay schemes like tipping and commissions cause employees to earn less because of their race and/or sex. In my estimation, there are three problems with that lack of recognition.

First, all else being equal, people of color and women are poorer and more apt to benefit from relatively small pay increases than white men.[8] Customer preference-based pay schemes exacerbate this subjugation by causing already marginalized classes of workers to earn even less than their coworkers because of race and/or sex. That reality is compounded by the breadth of the problem; approximately twenty million Americans report earning at least part of their income from tips or commissions,[9] and several occupations traditionally paid via tips disproportionately are comprised of people of color and/or women.[10] In some cases, the depth of the problem is substantial (e.g., the African American drivers in the Ayers et al. study

5. *See infra* Section I.B.1.

6. *See infra* Sections I.B.2, II.B.2.

7. *See infra* Section II.B.3.

8. *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N (2017), https://www.apa.org/pi/ses/resources/publications/minorities [https://perma.cc/L9XJ-LSSU]; *Fact Sheet: Women & Socioeconomic Status*, AM. PSYCH. ASS'N (2017), https://www.apa.org/pi/ses/resources/publications/women [https://perma.cc/ZA4G-USCU].

9. *Infra* notes 50, 57 and accompanying text.

10. As of 2019, people of color comprised 22.3% of working Americans but 59.5% of gaming service workers; 44.5% of taxi drivers and chauffeurs; and 41.9% of baggage porters, bellhops, and concierges. As of 2019, women comprised 47.0% of working Americans but 92.3% of hairdressers, hairstylists, and cosmetologists; 89.0% of maids and housekeeping cleaners; and 83.6% of massage therapists. *Labor Force Statistics from the Current Population Survey, Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STAT. (2020), https://www.bls.gov/cps/cpsaat11.htm [https://perma.cc/XF3W-ZTJN].

earned one-third less in tips than white drivers). Worse still, tipped workers often live "tip to mouth," struggling to support themselves and their families even before the COVID-19 pandemic left the vast majority of tipped workers underpaid, furloughed, or laid off.[11] No employer should acquiesce in its customers' subjugation of already-marginalized workers absent literal business necessity, especially when so many Americans are affected to such a significant degree.

Second, there is a separate problem when employers allow race and/or sex, instead of legitimate factors like performance, to influence how much employees earn. Although this discrimination problem largely overlaps with the subjugation problem, discrimination goes further, objecting even when oft-subjugated employees like female servers earn more in tips than male servers based on sex. Absent special circumstances, Title VII should be a panacea from all employer actions that allow considerations of race and sex to infect the workplace.[12] However, when employers acquiesce to customer preferences impacting employees' paychecks based on race and sex, Title VII has yet to provide a remedy.

Third, highlighting what I call the dereliction problem, the U.S. Equal Employment Opportunity Commission (EEOC) has the power to furnish technical assistance,[13] but the agency has failed to provide guidance regarding the interplay between tips and commissions and disparate impact, leaving workers and employers alike in the dark. Moreover, the EEOC has the power to file civil actions,[14] but it has neglected to file suit alleging that such pay schemes cause disparate impact. The absence of guidance and lawsuits weakens the agency's legitimacy and influence and squanders an opportunity to support workers and employers.

11. Grace Baek, *Restaurant Workers, Already Living "Tip to Mouth," Face More Hardship in Shutdown*, CBS NEWS (Mar. 26, 2020), https://www.cbsnews.com/news/coronavirus-restaurant-jobs-tipping-cbsn-originals-documentary/ [https://perma.cc/3TTQ-4KVZ] (statement of Sarumathi Jayaraman); *see also* Te-Ping Chen, *Out of Work and Tips, Restaurant Workers Face Their Own Coronavirus Crisis*, WALL ST. J. (Mar. 27, 2020), https://www.wsj.com/articles/out-of-work-and-tips-restaurant-workers-face-their-own-coronavirus-crisis-11585313366 [https://perma.cc/GX8M-ASCG].

12. Remedial affirmative action like that exhibited in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), or the *Ricci* offset proposed in Section IV.A., *infra*, are, and should remain, exceptions to Title VII's bar on considerations of race and sex.

13. 42 U.S.C. § 2000e-4(g)(3) (2018).

14. *Id.* § 2000e-5(f)(1).

In this Article, I offer potential solutions to these systemic problems. When customer preference-based pay schemes like tipping or commissions cause employees to earn less than their similarly-situated coworkers because of race and/or sex and cannot be justified by business necessity, I contend that Title VII may afford such employees with a disparate impact cause of action against the employer maintaining that pay scheme. Specifically, this Article argues that: 1) a policy or practice encouraging or facilitating tips or setting commissions that cause race- and/or sex-based pay disparities establishes a prima facie case of disparate impact; 2) because of a circuit split on how to define business necessity, some employers would be unlikely to carry their burden of proving that tips or commissions are a business necessity; and 3) Title VII's merit- and production-based earnings systems defenses do not apply to such pay schemes. Because of the racist history of tipping in America, the empirical data demonstrating race-based tip disparities, and more robust evidence that businesses can survive without tipping, I focus most of my analysis on tipping. Yet, I maintain the cognoscibility of a commission-based disparate impact claim and support that contention where appropriate. I do not contend that this Supreme Court or this EEOC would necessarily reach these conclusions, but rather that fidelity to Title VII jurisprudence supports them without the need for law reform or having to overturn cases that many scholars consider to have chipped away at disparate impact theory (e.g., *Ricci v. DeStefano*;[15] *Wal-Mart Stores, Inc. v. Dukes*[16]). Finally, I propose non-litigation alternatives to combat tip and commission disparities, focusing on alternatives that leverage extant doctrines and social justice campaigns instead of law reform given the torpor of recent Congresses vis-à-vis reform-oriented legislation.

Part I begins by explaining why tips and commissions are materially different, for Title VII purposes, from other pay schemes that may be based, in part, on customer preferences (e.g., bonuses, profit-sharing plans). Having isolated tips and commissions, I recount the legal history of such pay schemes in America from their inception and growth in the late Nineteenth and early Twentieth Centuries to their resilience and ubiquity today, focusing principally on the racist origins of tipping in America. With this groundwork in place, Part I proceeds to expose the discrimination and subjugation wrought by tipping and commissions by analyzing empirical evidence demonstrating that such pay schemes can cause disparate impact based on race and sex and often cause disparate impact against people of

15. 557 U.S. 557 (2009).

16. 564 U.S. 338 (2011).

color in tipped jobs and people of color and women in commissioned jobs, in particular. Furthermore, this Part explains how such pay schemes may not be literal business necessities in light of employers eliminating tipping and commissions, yet the EEOC has failed to provide guidance or file lawsuits to tackle these problems. Finally, this Part reflects on the shortcomings of existing litigation attacking the subjugation and discrimination caused by customer preference-based pay schemes.

Part II proposes a novel litigation strategy to combat these problems. I first analyze the evolution of disparate impact theory under Title VII, starting with *Griggs* and the prominence of disparate impact theory throughout the 1970s and early 1980s. Next, I consider the reluctance to embrace disparate impact theory in the 1980s, the attempted revitalization thereof with the Civil Rights Act of 1991,[17] and what many scholars see as modern headwinds against disparate impact theory (e.g., *Ricci*, *Dukes*). Finally, I apply disparate impact theory to tipping and commissions, analyzing the foundation for a prima facie case and all potentially applicable defenses (i.e., the business necessity defense, the merit or production-based earnings systems defenses).

Part III considers non-litigation alternatives to combat pay disparities caused by tipping and commissions. Foremost, I analyze how employers can eliminate or curb pay disparities, including a reconceptualization of *Ricci* that, theoretically, would allow employers to offset the disparate impact they caused by engaging in disparate treatment to benefit people of color and/or women harmed by such pay schemes (i.e., affirmative action). Finally, I assess extant and prospective law reforms and social justice campaigns that could mitigate or eliminate the pay disparities inflicted by tipping and commissions.

In conclusion, this Article reconceptualizes "the fabled offer of milk to the stork and the fox" as told by the *Griggs* Court.[18] The fable presents a fair-looking practice (i.e., a flat saucer of milk) that disparately impacts one class (e.g., long-beaked storks that cannot easily drink milk from a saucer juxtaposed against foxes that can).[19] For generations, employers have offered employees facially-neutral, customer preference-based pay schemes like the fabled offer of a flat saucer of milk to a stork and a fox. Such formal pay equality has birthed and maintained wage gaps because, in many cases, customers control which employees drink from the saucer (vis-à-vis commissions) and how much they drink (vis-à-vis tipping). Accordingly,

17. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

18. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

19. AESOP, AESOP'S FABLES 23 (V.S. Vernon trans., 1916).

white and male employees generally benefit more from tips and commissions than people of color and women, revealing pay schemes that are fair in form but discriminatory in operation. In response, this Article offers unique legal strategies to attain substantive pay equality by eliminating the unjust wage gaps that customer preference-based pay schemes have entrenched in American workplaces.

I. What's the Problem with Tips and Commissions?

Customer preferences dictate whether and how much to tip, as well as whether to buy from employees who earn a commission from the sale (if the customer even knows that the sale generates a commission). However, these are not the only pay schemes that rely on customer preferences. For example, management may consider customer feedback in deciding how much to raise an employee's salary or hourly wage rate or how much of a bonus to award. Similarly, equity- and profit-sharing plans are functions of, inter alia, customer preferences; all else being equal, if customers prefer Firm A over Firm B, Firm A's equity and profits generally will exceed those of Firm B. Moreover, all of these pay schemes can result in race- and/or sex-based pay disparities. For instance, if employers consider customer feedback in awarding bonuses and that feedback is biased against Arab-American employees, such employees may receive lesser bonuses than their white coworkers because of race.[20] Therefore, in some sense, all of these pay vehicles can be considered customer preference-based pay schemes.

Yet, in this Article, I focus only on tipping and commissions as "customer preference-based pay schemes" (a unique term of art) for two reasons. First, one-off decisions about pay (e.g., setting a salary, hourly wage rate, or bonus) are not the sort of employment decisions that disparate impact theory combats.[21] Rather, disparate impact theory demands an overarching policy or practice. Second, while some cases have considered overarching policies that allegedly caused disparate, sex-based salaries (e.g., setting salaries based on market rates in *American Federation of State, County, and*

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20. For robust analyses of employer liability in this context, see Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 Minn. L. Rev. 2169 (2018); Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 Va. J. Soc. Pol'y & L. 249, 285–91 (2016); and Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1416–22 (2009).

21. *Dukes*, 564 U.S. at 358.

Municipal Employees v. Washington ("*AFSCME*")[22]), no case has considered an overarching policy that allegedly caused disparate, race- and/or sex-based tips or commissions, creating an opportunity for this Article to advance novel arguments. In theory, this Article's litigation strategy might be applied to salary, hourly wage rate, or bonus policies that cause disparate impact based on race or sex (e.g., employees in mostly-white Department A get 10–15% bonuses, but employees in mostly-Hispanic Department B only get 6–8% bonuses) or equity- and profit-sharing plans that do the same (e.g., employees with more than five years tenure, which are mostly men, get more profit shares than employees with less tenure, which are mostly women). However, the existence of ample scholarship in the wake of *AFSCME* contemplating disparate impact claims targeting salary- and hourly wage rate-setting policies[23] would render scholarship echoing those refrains superfluous. Moreover, many bonus policies ostensibly are merit-based systems that cannot be the basis for Title VII liability,[24] and, in any event, litigation raising the specter of bonus-related policies causing disparate impact exists.[25] Finally, to the extent equity- and profit-sharing plans are not merit-based, the lack of statistical evidence of disparate impact caused thereby renders the application of Title VII thereto more theoretical than realistic and, therefore, beyond this Article's scope. Hence, this Article considers tips and, to a lesser extent, commissions.

This Part provides context for tipping and commissions by situating those pay schemes in American legal history. It then proceeds to analyze empirical evidence demonstrating the extent of the subjugation and discrimination wrought by tipping and commissions, the dereliction of the EEOC in responding, and shortcomings of private litigation seeking to remedy those problems.

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22. 770 F.2d 1401, 1405–06 (9th Cir. 1985).

23. *See, e.g.*, ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 171–201 (Cambridge Univ. Press 1999); Judith Olans Brown, Phyllis Tropper Baumann & Elaine Millar Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 146–56 (1986).

24. 42 U.S.C. § 2000e-2(h) (2018).

25. *See, e.g.*, Moussouris v. Microsoft Corp., No. C15-1483JLR, 2018 WL 3584701, at *17–19 (W.D. Wash. July 11, 2018).

A. *American Legal History*

The legal history of tipping highlights its protracted record of subjugating workers of color. In America, the practice of tipping employees has its roots in antebellum classism of the mid-Nineteenth Century. Specifically, "[w]ealthy Americans in the 1850s and 1860s discovered the tradition . . . on vacations in Europe. Wanting to seem aristocratic, these individuals began tipping in the United States upon their return."[26] In response to tipping coming into vogue, the American public resisted, decrying tipping as classist and anti-democratic in our country's first anti-tipping movement.[27] Europeans took their cue from Americans and followed suit, opposing and successfully ending widespread, socially compelled tipping across Europe.[28]

However, domestic employers after the American Civil War relished the opportunity to continue to deny wages to former slaves, and customers relished the opportunity to tip former slaves to paternalistically curtail their new-found liberty, using tips to "praise or punish with cash" as a "directive to give better service" in the future.[29] For example, some Jim Crow-era legislatures allowed employers to pay "newsboys, shoe-shine boys, ushers, doormen, concession attendants and theater cashiers"—jobs predominantly relegated to former slaves in that era—with payments less

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26. Rachel E. Greenspan, *'It's the Legacy of Slavery': Here's the Troubling History Behind Tipping Practices in the U.S.*, TIME (Oct. 15, 2018), https://time.com/5404475/history-tipping-american-restaurants-civil-war/ [https://perma.cc/JM6J-JNRK]; *accord* Sarumathi Jayaraman, *Why Tipping Is Wrong*, N.Y. TIMES (Oct. 15, 2015), https://www.nytimes.com/2015/10/16/opinion/why-tipping-is-wrong.html [https://perma.cc/ZM9W-LF34].

27. Greenspan, *supra* note 26; Elizabeth Wann, *American Tipping Is Rooted in Slavery—And It Still Hurts Workers Today*, FORD FOUND. (Feb. 18, 2016), https://www.fordfoundation.org/ideas/equals-change-blog/posts/american-tipping-is-rooted-in-slavery-and-it-still-hurts-workers-today/ [https://perma.cc/Z9AF-2Q55].

28. Greenspan, *supra* note 26.

29. Daniel Levinson Wilk, *The Red Cap's Gift: How Tipping Tempers the Rational Power of Money*, 16 ENTER. & SOC'Y 5, 14–16 (2015); *see also* Greenspan, *supra* note 26; Jayaraman, *supra* note 26; Wann, *supra* note 27; Rev. Dr. William J. Barber II, *The Racist History of Tipping*, POLITICO (July 17, 2019), https://www.politico.com/magazine/story/2019/07/17/william-barber-tipping-racist-past-227361[https://perma.cc/23A2-VVVG].

than the state's minimum wage.[30] Indeed, employers' facially neutral policies and practices (e.g., allowing tips and/or sub-minimum wages for certain jobs, preferring or requiring skills that black workers typically could not obtain because of poor resource allocation for black public schools) accounted for a much larger portion of the black-white wage gap in the late Nineteenth Century than disparate treatment against black workers.[31]

The early Twentieth Century saw the resurgence of the anti-tipping movement driven by principles of fairness (i.e., reticence to pay more for already-purchased goods or services) and opposition to tipping as a nuisance.[32] This movement had powerful allies in industrialists like John D. Rockefeller and Andrew Carnegie and authors like Mark Twain, Ralph Waldo Emerson, and William R. Scott, many of whom decried tipping as un-American and the last of whom even called it a "moral malady."[33] In response, starting in 1909, states and localities began to outlaw tipping, "often in recognition of its racist roots. But the restaurant industry fought back and was powerful enough to roll back local bans on tipping."[34]

Then, during the Prohibition Era, hoteliers sought to make up for lost alcohol profits by augmenting their accounting practices, including separating traditionally bundled room and meal costs.[35] Under the bundled approach, customers would tip (read: bribe) servers "to get a larger portion

30. Aris Folley, *Virginia Senate Repeals Jim Crow Minimum Wage Law Seen as Targeting African-Americans*, HILL (Jan. 22, 2019), https://thehill.com/homenews/state-watch/426404-virginia-lawmakers-repeal-jim-crow-era-law-that-legalized-discrimination [https://perma.cc/39MQ-ZR6S]. Such laws were precursors to the federal tip credit enacted in 1966. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. 830 (1966).

31. Celeste K. Carruthers & Marianne H. Wanamaker, *Separate and Unequal in the Labor Market: Human Capital and the Jim Crow Wage Gap*, 35 J. LAB. ECON. 655, 659–60 (2017).

32. *New Yorkers War Against the Tip*, 4 PUB. POL'Y 89, 89 (1901).

33. *Id.*; Nina Martyris, *When Tipping Was Considered Deeply Un-American*, NPR (Nov. 30, 2015), https://www.npr.org/sections/thesalt/2015/11/30/457125740/when-tipping-was-considered-deeply-un-american [https://perma.cc/P6FP-7AKJ]; WILLIAM R. SCOTT, THE ITCHING PALM: A STUDY OF THE HABIT OF TIPPING IN AMERICA 7 (1916).

34. Barber, *supra* note 29; *accord* KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES 36–38 (McFarland & Co. 1998).

35. Marc S. Mentzer, *The Payment of Gratuities by Customers in the United States: An Historical Analysis*, 30 INT'L J. MGMT. 108, 116 (2013).

of food," resulting in losses for hoteliers and incentivizing tipping bans.[36] Under the separated approach, hoteliers could track (and discipline) servers who provided larger portions in exchange for tips, which likely decreased tip-bribes, so hoteliers relaxed bans on tips, especially when tips reduced payroll costs.[37] Tipping gained more steam when hoteliers converted defunct bars into lunchrooms that served anyone because hoteliers "were more tolerant of tipping in settings where customers chose from a menu, rather than being served a set meal, because the tip did not seem like a bribe to the server to give away food."[38] Once again, tipping endured and, once the practice was countenanced by the 1966 amendments to the Fair Labor Standards Act of 1938 ("FLSA"),[39] it became fully entrenched in American law and society.

Since then, there have been a few movements against tipping. According to Michael Lynn at Cornell University, in the 1970s and 1980s a wave of restaurants banned tipping only to revert back to allowing tips shortly thereafter for the reasons explained in Section II.B.2.[40] The modern movement against tips looks similar, having come "to the fore in October of 2015 when Union Square Hospitality Group's Danny Meyer announced that he was getting rid of tips at his 13 full-service restaurants."[41] This anti-tipping movement has been "inspired by a mix of moral, racial, and gender-related issues, rising labor costs, concerns over discrepancies in pay between servers and cooks, and the increasingly shaky foundations of the restaurant business itself."[42] A related movement borne of similar

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36. *Id.* at 111–12.

37. *See id.* at 111–12, 116.

38. *Id.* at 116.

39. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. 830 (1966).

40. Stephen J. Dubner, *Why Does Tipping Still Exist? (Ep. 396)*, FREAKONOMICS (Nov. 6, 2019), http://freakonomics.com/podcast/tipping [https://perma.cc/8AF5-NCKB].

41. Kevin Alexander, *Banning Tips Can Save Restaurants, if It Doesn't Kill Them First*, THRILLIST (Feb. 21, 2017), https://www.thrillist.com/eat/nation/no-tipping-movement-banning-tips-could-save-restaurant-industry [https://perma.cc/R9Q6-J8UG].

42. *Id.*; *see also* Roberto A. Ferdman, *I Dare You to Read This and Still Feel Good About Tipping*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/18/i-dare-you-to-read-this-and-still-feel-ok-about-tipping-in-the-united-states [https://perma.cc/6655-GAVQ] (citing

motivations is not necessarily pushing to end tipping, but to ban the tip credit,[43] which would require tipped employees to earn at least the same minimum wage as non-tipped employees.[44] Yet, just like the anti-tipping movement of the 1970s and 1980s, today's anti-tipping movement has seen its share of setbacks. In response to Meyer and other owners banning tips, some tipped workers resigned and some customers balked at the increased menu prices, but the restaurants usually persisted.[45] Furthermore, the public remains undecided on banning the tip credit, going so far as to lobby some legislatures to overturn ballot initiatives that had done so,[46] arguing that eliminating the tip credit would increase tipped employees' wages while leaving other employees' wages untouched.[47]

Michael Lynn & Glenn Withiam, *Tipping and Its Alternatives: Business Considerations and Directions for Research*, 22 J. SERVS. MKTG. 328 (2008)); Loren Feldman, *Danny Meyer on Eliminating Tipping: 'It Takes a Year to Get the Math Right'*, FORBES (Jan. 14, 2018), https://www.forbes.com/sites/lorenfeldman/2018/01/14/danny-meyer-on-eliminating-tipping-it-takes-a-year-to-get-the-math-right [https://perma.cc/FK97-4CAR]; Sam Walker, *Inside Danny Meyer's Lonely War on Tips*, WALL ST. J. (Aug. 25, 2018), https://www.wsj.com/articles/inside-danny-meyers-lonely-war-on-tips-1535169670 [https://perma.cc/5TDA-RWHY].

43. Tip credits permit employers to pay tipped employees cash wages at prescribed rates less than minimum wage if the employees make up the difference in tips. *See, e.g.*, 29 U.S.C. § 203(m)(2)(A) (2018).

44. SARUMATHI JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING 36 (Oxford Univ. Press 2016); Tonya Riley, *A Fight Over Tipping Is Tearing Progressives Apart*, MOTHER JONES (June 15, 2018), https://www.motherjones.com/politics/2018/06/a-fight-over-tipping-is-tearing-progressives-apart/ [https://perma.cc/EJM4-CB74].

45. Feldman, *supra* note 42; Nikita Richardson, *Why Tips Won: They're Outdated. They're Discriminatory. And They Aren't Going Anywhere.*, GRUB STREET (Dec. 8, 2018), https://www.grubstreet.com/2018/12/restaurant-tipping-returns.html [https://perma.cc/9D8V-EVTY]; Walker, *supra* note 42.

46. Fenit Nirappil, *It's Official: D.C. Council Has Repealed Initiative 77, Which Would Have Raised Pay for Tipped Workers*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/local/dc-politics/its-official-dc-council-has-repealed-initiative-77/2018/10/16/0532341a-d0b5-11e8-b2d2-f397227b43f0_story.html [https://perma.cc/L9C7-PLP7].

47. Joshua Chaisson, *Restaurant Servers Want to Retain 'Tip Credit'*, DETROIT NEWS (Oct. 24, 2017), https://www.detroitnews.com/story/opinion/2017/10/24/eliminate-tip-credit-chaisson/106974544 [https://perma.cc/6FBX-5QTC].

Today, tipping largely persists. It remains ubiquitous across much of the service industry in restaurants, bars, casinos, hotels, passenger transportation (e.g., taxicabs, ride sharing services, cruise lines), parking lots, and barbershops and beauty salons,[48] where it is commonplace to tip a few dollars or 10–20% on top of the cost of goods or services.[49] In 2013, approximately 1.9% of all American workers reported working in tipped jobs.[50]

Moreover, according to Lynn, there are many reasons why Americans continue to tip service workers. Some people tip to show off. Some people tip to help the server, to supplement their income and make them happy. Some people tip to get future service. Other people tip to avoid disapproval: they do not want the server to think badly of them. And some people tip out of a sense of duty.[51]

Surprisingly, Lynn's studies undercut the common assumption that people tip "to reward servers for [good] service"; to that end, Lynn's studies have found that "*less than four percent* of the differences in tips left by different dining parties can be explained by their ratings of service quality."[52] In other words, although many servers likely believe that performing well increases tips, and that belief causes servers to perform

48. Hilery Simpson, *Tips and Excluded Workers: The New Orleans Test*, U.S. BUREAU OF LAB. STATS. 33 (1997), https://www.bls.gov/opub/mlr/cwc/tips-and-excluded-workers-the-new-orleans-test.pdf [https://perma.cc/46QX-RFF6].

49. *See General Tipping Guide*, EMILY POST INST., https://emilypost.com/advice/general-tipping-guide [https://perma.cc/4XBA-FF2E]; Lorraine Glennon, *How Much of a Tip Should You Leave?*, CONSUMER REPS. (Dec. 19, 2018), https://www.consumerreports.org/tipping/how-much-to-tip [https://perma.cc/MQ43-Z7J2]. This Article does not address so-called "mandatory tips" (e.g., for large restaurant parties) because of the ostensible lack of discretion in leaving lesser amounts.

50. REBECCA CHENEVERT & MARIA GISELA HOFFMAN, U.S. CENSUS BUREAU, ECON. & STAT. ADMIN., COMMON PAY PATTERNS AND EXTRA EARNINGS: 2013, at 3 (2017) (table 1).

51. Saskia de Melker, *Why Do We Tip?*, PBS (Mar. 26, 2016), https://www.pbs.org/newshour/economy/why-do-we-tip [https://perma.cc/9UCF-47TZ]; *accord* Michael Lynn, *Service Gratuities and Tipping: A Motivational Framework*, 46 J. ECON. PSYCH. 74, 86 (2015).

52. de Melker, *supra* note 51 (emphasis added); *see also* Michael Lynn & Michael McCall, *Gratitude and Gratuity: A Meta-Analysis of Research on the Service-Tipping Relationship*, 29 J. SOCIO-ECON. 203, 209 (2000) (service quality accounted for roughly 5% of bill-adjusted tip variability).

better,[53] customers negligibly consider service quality when deciding how much to tip.

On the contrary, the American legal history of commissions paints a much less compelling picture of intentional subjugation. Paying workers for performance can be traced to the Code of Hammurabi and Ancient Babylonia, where masters paid servants for manufacturing goods and completing services in traditional labor markets. The modern practice of employers maintaining incentive plans to compensate workers for performing certain acts became prominent in America at the end of the Second Industrial Revolution together with Frederick Winslow Taylor's scientific management techniques.[54] For example, publications in the early Twentieth Century explained the utility of paying commissions to sales*men* (and they were all men at the time) who sell certain products.[55] Today, commissions persist across sales and promotional occupations, including sales representatives, stockbrokers, and loan officers,[56] with occupations paid, at least in part, on commissions representing approximately 4.4% of all American jobs in 2013.[57]

Unlike tipping, there is no evidence that commissions were birthed from a desire to subjugate marginalized communities. Yet, as explained in Section I.B.1., commissions nonetheless subjugate people of color and women because they entrench white male privileges into the traditional labor market by encouraging customers to choose which workers to buy from. Empowering customers to set employees' wages in this manner proliferates subjugation because, as noted above, white male customers

53. Dubner, *supra* note 40 (Lynn said, "About half of the servers in this country will say that they think their tips are moderately-to-strongly affected by the service they leave. They're wrong when they say that, but they believe it. And because they believe it, tipping in fact does provide an incentive to deliver better service for at least half of the servers in this country.").

54. THOMAS C. MAWHINNEY, PAY FOR PERFORMANCE: HISTORY, CONTROVERSY, AND EVIDENCE 7, 14 (Bill L. Hopkins & Thomas C. Mawhinney eds., 1992); Wilk, *supra* note 29, at 15; *see also* Elizabeth Wasserman, *How to Set Up a Sales Compensation Plan*, INC. (Dec. 16, 2009), https://www.inc.com/guides/sales-compensation-plan.html [https://perma.cc/N3L6-FGYL] (detailing modern sales compensation plans).

55. *Compensating Salesmen*, 105 AM. GAS LIGHT J. 185, 185 (1916).

56. Gail Sessoms, *Five Careers That Are Generally Paid by Commission*, HOUS. CHRON (Mar. 31, 2018), https://work.chron.com/five-careers-generally-paid-commission-8256.html [https://perma.cc/2D7R-8YY6].

57. CHENEVERT & HOFFMAN, *supra* note 50.

have more money than customers of other races and sexes, all else being equal,[58] and customers often choose to buy from workers who look like them.[59] This phenomenon is known as homophily—viz., the tendency of individuals to form social relationships with those who share similar traits.[60] As a result of homophily, racism and sexism thrive with commissions despite the facially neutral historical origins of the pay practice.

B. Subjugation and Discrimination Sans Justification

The historical developments in tipping, particularly as they relate to race, established the normative framework in which tipping now operates. Tipping started as a racist enterprise, and, as this Section demonstrates, it remains a racist enterprise today. The history of commissions does not reveal an intentionally discriminatory pay mechanism, but rather a pay scheme that catered to an all-white, all-male workforce by preferencing the development of business relationships with a richer (read: whiter, predominantly male) clientele.

These histories contextualize the subjugation and discrimination caused by tipping and commissions that I explicate in this Part, as well as the dereliction made evident by the EEOC's muted response thereto. To that end, this Section first analyzes the evidence of pay disparities caused by tipping and, to a lesser extent, commissions. Second, I consider evidence demonstrating a lack of business necessity for such pay schemes in many cases. Third, I show that the EEOC has neglected to issue guidance concerning, or initiate lawsuits to combat, the subjugation and discrimination problems.

1. Pay Disparities in Tipped and Commissioned Occupations

This Section reviews empirical evidence of pay disparities amongst specific tipped and commissioned workers. What ultimately matters are not trends that might be extrapolated from this data in the aggregate (e.g., people of color tend to earn less in tips than their white coworkers

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58. AM. PSYCH. ASS'N, *supra* note 8.

59. Eli Jones, Jesse N. Moore, Andrea J. S. Stanaland & Rosalind A. J. Wyatt, *Salesperson Race and Gender and the Access and Legitimacy Paradigm: Does Difference Make a Difference?*, 18 J. PERS. SELLING & SALES MGMT. 71, 74–75 (1998).

60. *Id.*

wherever they are employed), but rather the proposition that customer preference-based pay schemes alone can cause significant, calculable pay disparities in discrete workforces based on race and/or sex. Moreover, this empirical data represents a small slice of the bigger picture. Tipping accounts for roughly $40 billion per year across America; "[t]hat is larger than the entire health-and-fitness industry; it's double the annual budget for NASA."[61] Though data estimating the scope of commission pay is even less precise, American businesses spend more than $800 billion annually compensating their sales workers,[62] much of which is attributable to commission payments. Hence, the statistical data below should be considered emblematic of deeper subjugation and discrimination problems likely infecting many American workplaces.

With respect to tipping, the Ayres et al. study from this Article's introduction shows that, all else being equal, African American drivers earned one-third less in tips than white drivers.[63] The authors suggest two potential causes: "conscious decision making" (i.e., intentional bias) by passengers and "unconscious disparate treatment" (e.g., implicit bias wherein passengers "round up their tips (to the nearest dollar above their target level) more often when tipping white drivers than when tipping black drivers").[64] Similarly, in a 2008 study, Lynn et al. analyzed tips received by servers at an unnamed national restaurant chain and concluded that, holding other variables constant, customers tipped black servers less than white servers due to "implicit racial attitudes" favoring white servers.[65] U.S. Census Bureau data from 2010 through 2016 confirms that white servers earned more in tips than Latinx servers, who earned more in tips than black

61. Dubner, *supra* note 40.

62. Thomas Steenburgh & Michael Ahearne, *Motivating Salespeople: What Really Works*, 90 HARV. BUS. REV. 71, 71 (2012).

63. Ayers et al., *supra* note 2; *see also* Benjamin Sachs, *Uber: A Platform for Discrimination?*, LAB. Blog (Oct. 22, 2015), https://onlabor.org/uber-a-platform-for-discrimination/ [https://perma.cc/TM6P-XVSQ] (extrapolating the Ayers et al. study to ridesharing app drivers).

64. Ayres et al., *supra* note 2, at 1617–18.

65. Michael Lynn, Michal Sturman, Christie Ganley, Elizabeth Adams, Matthew Douglas & Jessica McNeil, *Consumer Racial Discrimination in Tipping: A Replication and Extension*, 38 J. APPLIED SOC. PSYCH. 1045, 1055–56 (2008); *see also* Michael Lynn & Michael Sturman, *Is the Customer Always Right? The Potential for Racial Bias in Customer Evaluations of Employee Performance*, 41 J. APPLIED SOC. PSYCH. 2312, 2317–18 (2011).

servers, who earned more in tips than Asian servers.[66] A 2014 study by Wayne State University professor Zachary W. Brewster and Lynn emphasized that customer bias likely was driving these disparities because "inter-racial differences in service skills are not able to account for restaurant customers['] racially discriminat[ory] tipping practices."[67] Finally, anecdotal evidence of customers generally tipping servers of color less than their white counterparts supports these results, though less so than empirical evidence.[68] That said, some studies reach the opposite conclusion—finding "no evidence to conclude that all else being equal consumers discriminate against Black restaurant servers by tipping them less than comparable White servers"[69]—which underscores the truism that pay disparities may exist within discrete workforces, but may not exist everywhere.

Concerning gender, the evidence is more muddled. In some cases, statistical evidence shows women earning more than men, as with an analysis concluding that female Uber drivers earned 10–12% more in tips

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66. Gabriela Quintana, *I'm Going to Tip Minority Servers More – and Whites Less*, ECON. OPPORTUNITY INST. (Oct. 16, 2018), http://www.opportunityinstitute.org/blog/post/im-going-to-tip-minority-servers-more-and-white-servers-less/ [https://perma.cc/E2PF-6JHV] (citing U.S. Census Bureau's Integrated Public Use Microdata Series).

67. Zachary W. Brewster & Michael Lynn, *Black–White Earnings Gap among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOCIO. INQUIRY 545, 557 (2014).

68. Casey Quinlan, *D.C. Servers and Bartenders Say the Tipped Wage System Isn't Working for Them*, THINK PROGRESS (June 12, 2018), https://thinkprogress.org/should-dc-restaurants-pay-minimum-wage-these-servers-and-bartenders-think-so-c560d2269e7f/ [https://perma.cc/83KF-NVUR]; REST. OPPORTUNITIES CTRS. UNITED, *Ending Jim Crow in America's Restaurants: Racial and Gender Occupational Segregation in the Restaurant Industry* 26 (2015), http://rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf [https://perma.cc/QU3D-YPXC]; Kari Paul, *Do Americans Tip People of Color Less Money?*, MKT. WATCH (Oct. 31, 2019), https://www.marketwatch.com/story/do-americans-tip-people-of-color-less-money-2017-10-31 [https://perma.cc/TLD7-VE5G]; Kimberly Freeman Brown & Marc Bayardon, *When Tipping Doesn't Make the Difference*, EBONY (Feb. 15, 2016), https://www.ebony.com/news/restaurant-women-tipping-wage [https://perma.cc/9RDZ-SG5J].

69. Zachary W. Brewster, Kenneth Gourlay, & Gerald Roman Nowak III, *Are Black Restaurant Servers Tipped Less Than White Servers? Three Experimental Tests of Server Race Effects on Customers' Tipping Behaviors*, CORNELL HOSP. Q. (forthcoming).

than male Uber drivers, all else being equal.[70] On the other hand, in a 2000 study, Lynn and fellow Cornell University professor Tony Simons found that servers' genders, on average, had no statistically significant impact on tips, though physical attractiveness was a significant predictor for female—and not male—servers' tips.[71] The anecdotal evidence similarly diverges, with some workers saying female servers earn less in tips than men,[72] others saying male servers earn less in tips than women,[73] and others still saying that the sex of the tipper dictates whether male or female servers earn more in tips.[74]

Some empirical data exist with respect to tips received based on employees' national origin, although it is far from conclusive. In a 2019 interview with *Freakonomics Radio*, John List, a University of Chicago professor and the former chief economist at Uber, explained that Uber drivers who changed the language on their Uber app from English to another language (an imperfect proxy for non-American national origin) earned less in tips than drivers who retained English (an imperfect proxy

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70. Bharat Chandar Uri Gneezy, John A. List & Ian Muir, *Drivers of Social Preferences: Evidence from a Nationwide Tipping Field Experiment* (Oct. 2019), (Becker Friedman Inst., Working Paper No. 2019-128, 2019) https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2019128.pdf [https://perma.cc/MW4P-VXYF]; *see also* Stephen J. Dubner, *What Can Uber Teach Us About the Gender Pay Gap? (Ep. 317)*, FREAKONOMICS (Feb. 6, 2018), http://freakonomics.com/podcast/what-can-uber-teach-us-about-the-gender-pay-gap [https://perma.cc/9GF8-TS99].

71. Michael Lynn & Tony Simons, *Predictors of Male and Female Servers' Average Tip Earnings*, 20 J. APPLIED SOC. PSYCH. 241, 245–46 (2000). For commentary on how gender and physical attractiveness may have impacted sex-based tip differentials during the COVID-19 pandemic, see ONE FAIR WAGE, THE UC BERKELEY FOOD LAB. RSCH. CTR., CATHARINE A. MACKINNON, LOUISE FITZGERALD & BARRY COMMONER CTR. FOR HEALTH & THE ENV., *Take Off Your Mask So I Know How Much to Tip You: Service Workers' Experience of Health & Harassment During COVID-19,* TIME'S UP FOUND. (2020), https://timesupfoundation.org/wp-content/uploads/2020/12/OFW_COVID_WorkerExp.pdf [https://perma.cc/8QGJ-FSP6].

72. Brown & Bayardon, *supra* note 68.

73. Kortni Robinson & Nicole Casperson, *Who Makes More in Tips? Most Say Women Do*, THE HUB (May 26, 2016), https://www.ttuhub.net/2016/05/who-makes-more-in-tips-most-say-women-do [https://perma.cc/X77U-SHTR].

74. Rebecca Gardyn, *The Tricky Topic of Tipping*, ADAGE (May 1, 2001), https://adage.com/article/american-demographics/tricky-topic-tipping/43579 [https://perma.cc/2RJH-W28B].

for American national origin), all else being equal.[75] List's inquiry appears to be the only empirical analysis approximating national origin-based tip disparities, although anecdotes generally detail customers tipping non-American servers less than American servers.[76] Finally, while employees' ability to communicate with customers in English might be a business necessity, that contention is inapposite when considering whether policies allowing tips are a business necessity. Therefore, tipping policies could be the basis for viable disparate impact challenges under the strategy described in Part III if employer-specific evidence of national origin-based disparate impact could be marshaled.

No empirical evidence addresses whether other worker classifications influence customer tipping habits, but anecdotal evidence suggests that customers discriminate based on workers' age,[77] sexual orientation and

75. Stephen J. Dubner, *Why Does Tipping Still Exist? (Ep. 396)*, FREAKONOMICS (Nov. 6, 2019), https://freakonomics.com/podcast/tipping [https://perma.cc/BQA4-3TDP]; Chandar et al., *supra* note 70, at 27.

76. Brown & Bayardon, *supra* note 68; *see also* Anneta Konstantinides, *'Don't Tip Immigrants!' New Jersey Couple Leaves Racist Note on Receipt for American-Born Server After Hearing Her Speak Spanish to a Co-Worker*, DAILY MAIL (Jan. 28, 2019), https://www.dailymail.co.uk/news/article-6640483/Couple-leave-Dont-tip-immigrants-note-hearing-American-server-speak-Spanish.html [https://perma.cc/54L5-YZSX] (restaurant patrons left a hostile note to Spanish-speaking server incorrectly perceived to be an immigrant).

77. Gardyn, *supra* note 74 (bias against young servers); Anne Gaviola, *This Restaurant Has a No-Tipping Policy That Doesn't Screw Over Workers*, VICE (Apr. 24, 2019), https://www.vice.com/en_ca/article/wjv5pn/this-restaurant-has-a-no-tipping-policy-that-doesnt-screw-over-workers [https://perma.cc/4WCP-S6UX] (bias against elderly servers).

gender identity,[78] and religion,[79] too. However, empirical evidence would be needed to confirm the existence and causes of tip disparities vis-à-vis these classifications. Moreover, the vast majority of evidence of tip disparities comes from servers and drivers, meaning data from outside these occupations would be necessary to assess the existence and causes of tip disparities in other occupations.

Proceeding to commissions, although scholars generally agree that "[w]orkers receiving commissions may be harmed by the prejudice of their customers,"[80] fewer studies consider class-based differences in commissions, likely because the quantity of tip-generating transactions far exceeds the quantity of commission-generating transactions and tip amounts are relatively-transparent compared to commission rates, which employers may claim to be confidential and/or proprietary.[81] That does not imply that wage gaps do not exist amongst commissioned jobs, but only that they may be harder to detect. Instead, most evidence of pay disparities in commissions concerns allegations of disparate treatment where managers

78. Sherie Ryder, *No Tip for US Waitress with LGBT Tattoo*, BBC (Aug. 15, 2017), https://www.bbc.com/news/blogs-trending-40898638 [https://perma.cc/FLN6-P3J8]; Darron Cardosa, *Confessions of a Waiter: Homophobia Shouldn't Stop You from Tipping Properly*, MIC (June 26, 2018), https://www.mic.com/articles/189943/confessions-of-a-waiter-even-if-you-think-your-server-is-gay-you-still-have-to-leave-a-tip [https://perma.cc/4ZDY-T6TY]; Brad Tuttle, *Worst Restaurant Customers Ever Use Religion, Racism as Excuses for Not Tipping Waiters*, TIME (Nov. 18, 2013), http://business.time.com/2013/11/18/worst-restaurant-customers-ever-use-religion-racism-as-excuses-for-not-tipping-waiters [https://perma.cc/N4AN-AB5S]; Quinlan, *supra* note 68.

79. Eric Reed, *Worst Tippers in America and Their Vile Notes*, STREET (Dec. 2, 2013), https://www.thestreet.com/personal-finance/credit-cards/worst-tippers-america-and-their-vile-notes-html#gid=ci02571b8dd0022687&pid=march-of-the-atheists [https://perma.cc/F88P-38XR]; Hakam S. Shatnawi, *Effect of a Waitresses's Head Scarf (Hijab) on Tipping Behavior in Restaurants*, 8 AFR. J. HOSP., TOURISM & LEISURE 1 (2019) (some empirical data of religion-based tipping exists outside the United States, though the applicability of such data domestically is unclear).

80. John S. Heywood & Daniel Parent, *Performance Pay and the White-Black Wage Gap*, 30 J. LAB. ECON. 249, 282 (2012).

81. *See* Schwan's Home Serv., Inc., 364 NLRB No. 20, 2016 WL 3227714, at *6 (June 10, 2016).

assign sales agents or brokers to customers of the same race,[82] which is beyond the scope of this Article.

Some empirical data suggest race-based wage gaps in occupations traditionally paid via commissions, but these data neither isolate race as a variable nor attempt to account for variables unrelated to customer preferences that may explain the wage gap. For example, a 2017 report by the National Association of Realtors found differences in the income of realtors across racial and ethnic groups,[83] but the report does not confirm what percentage of realtors studied were paid via commissions (although I suspect that nearly all realtors earn commissions), and several variables untethered to customer preferences could explain the wage gap (e.g., people of color being steered into, or choosing to work in, less lucrative residential real estate instead of more lucrative commercial real estate). Anecdotal evidence of customer racism in choosing which commissioned employees to work with exists, but not only is it less persuasive than empirical evidence would be, it also exists to a far lesser degree than with regard to tipping.[84]

Regarding sex, the wage gap between male and female financial advisors in the 2017 Institute for Women's Policy Research report suggests

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82. *See, e.g.*, Press Release, EEOC, John Wieland Homes Settles EEOC Race And Sex Discrimination Lawsuit (June 23, 2010), https://www.eeoc.gov/eeoc/newsroom/release/6-23-10a.cfm [https://perma.cc/WMG5-W8NT]; Reed Abelson, *Black Sales Agents File Discrimination Suit Against Xerox*, N.Y. TIMES (May 10, 2001), https://www.nytimes.com/2001/05/10/business/black-sales-agents-file-discrimination-suit-against-xerox.html [https://perma.cc/FAE3-9T42]; Ann Mariano, *Real Estate Agent Wins Bias Settlement*, WASH. POST (June 7, 1990), https://www.washingtonpost.com/archive/politics/1990/06/07/real-estate-agent-wins-bias-settlement/f2fcccc9-0244-45fa-af1c-576b459fad91/ [https://perma.cc/RHW6-YPXC]; JASON CHAMBERS, MADISON AVENUE AND THE COLOR LINE: AFRICAN AMERICANS IN THE ADVERTISING INDUSTRY 54–55 (Univ. of Pa. Press 2009).

83. NAT'L ASS'N OF REALTORS, 2017 CHOOSING A CAREER IN REAL ESTATE: A PERSPECTIVE ON GENDER, RACE, AND ETHNICITY 6, 10 (2017), https://www.nar.realtor/sites/default/files/documents/Choosing-A-Career-2017.pdf [https://perma.cc/W2L9-PTA5].

84. *See, e.g.*, Hiawatha Bray, *Black Real Estate Agents Overcome Boston-Area Bigotry*, BOSTON.COM (Sept. 18, 2019), http://realestate.boston.com/news/2019/09/18/black-realtors-boston-succeed-despite-bigotry/ [https://perma.cc/AU5T-DAMW]; *see also* Jan Ondrich, Alex Stricker & John Yinger, *Do Real Estate Brokers Choose to Discriminate? Evidence from the 1989 Housing Discrimination Study*, 64 S. ECON. J. 880, 891–93 (1998).

that some customers choose financial advisors based on sex.[85] A 2016 study of retail salespersons suggests similar customer biases,[86] and a 2015 analysis of medical sales representatives similarly reflects a significant gender pay gap.[87] However, some studies fail to identify customer bias consistently favoring male salespersons,[88] and other studies suggest that women close the deal more frequently than men although they generally earn less in total commissions (i.e., implying that women prefer, or are steered into, jobs with lower commission rates).[89]

Finally, all the evidence cited herein assumes that customers can perceive something, rightly or wrongly, about workers. Accurate or not, customers generally can perceive a worker's race or sex, for instance, but they may have difficulty perceiving a worker's disability status or religion, which helps explain the limited evidence of tip and commission disparities between workers of different, relatively less-perceptible classifications. Moreover, no evidence addresses situations where workers' classifications are imperceptible but for stereotypical guessing (e.g., tipping unseen housekeeping staff; purchasing stock based on an email recommendation from a stockbroker who earns a commission on the sale but whose characteristics may be opaque).

In summary, this Section demonstrates that both tipping and commissions are likely to result in significant and demonstrable pay disparities at any specific employer. Those disparities—borne from pay schemes that are not necessary for businesses to survive—contribute to the subjugation and discrimination problems identified above. To that end, these pay schemes are problematic not only because they commonly result in pay disparities, but also because the employers that cling to such pay schemes often do so not out of strict business necessity, but rather to maximize profits. The next section explicates that proposition.

85. Hegewisch & Williams-Baron, *supra* note 3.

86. Theo Lieven, *Customers' Choice of a Salesperson During the Initial Sales Encounter*, 32 J. RETAILING & CONSUMER SERVS. 109, 111 (2016).

87. *The Gender Gap in Medical Device Sales*, MEDREPS.COM (Sept. 8, 2015), https://www.medreps.com/medical-sales-careers/the-gender-gap-in-medical-device-sales [https://perma.cc/6CEU-D9L7].

88. Lois A. Mohr & Steve W. Henson, *Impact of Employee Gender and Job Congruency on Customer Satisfaction*, 5 J. CONSUMER PSYCH. 161, 164 (1996).

89. Emmie Martin, *Women Outperform Men in Sales but Still Earn Less*, BUS. INSIDER (Nov. 6, 2014), https://www.businessinsider.com/women-outperform-men-in-sales-earn-less-2014-11 [https://perma.cc/C82X-GM3V].

2. Businesses Can Survive Without Tipping and Commissions

This section discusses social movements, as well as individual employer initiatives, around tipping and commissions abolition to assess whether these pay schemes are business necessities. I conclude that, in many cases, neither of these pay schemes are strictly necessary for businesses to survive.

Recently, a small cohort of restaurants across America has eliminated tipping,[90] as have other employers (e.g., cruise lines),[91] demonstrating that tipping is not always necessary to stay in business. However, some restaurants have struggled after eliminating tips (e.g., facing lower online customer ratings, seeing some employees quit, experiencing some customers bristle at increased menu prices) and reverted back to allowing tips.[92] In my view, there has not been any sufficient explanation for why some restaurants succeed without tipping whereas others struggle or fail, though some scholars and restaurant-industry onlookers suggest that "high-end" restaurants (i.e., those with wealthier customers less inclined to balk at increased menu prices) can succeed without tipping whereas other restaurants have more difficulty doing so.[93] Yet, both casual and fine dining

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90. *Supra* notes 41–42; *see also* Dave Infante, *All the Restaurants Across the USA That Have Banned Tipping*, THRILLIST (Jan. 26, 2015), https://www.thrillist.com/eat/nation/american-restaurants-don-t-allow-tipping-usa-restaurants-banned-tipping [https://perma.cc/9DZQ-G3C3].

91. Morgan Hines, *USA Today's Guide to Cruise Ship Gratuity Fees and Service Charges*, USA TODAY (Dec. 5, 2019), https://www.usatoday.com/story/travel/cruises/2019/12/05/cruise-gratuities-fees-charges-royal-caribbean-norwegian-carnival-others/4248861002 [https://perma.cc/6ERV-JM5D].

92. Michael Lynn & Zachary W. Brewster, *A Within-Restaurant Analysis of Changes in Customer Satisfaction Following the Introduction of Service Inclusive Pricing or Automatic Service Charges*, 70 INT'L J. HOSP. MGMT. 9, 13 (2018); Michael Lynn, *The Effects of Tipping on Consumers' Satisfaction with Restaurants*, 52(1) J. CONSUMER AFFS. 746, 746 (2018); Michael Lynn, *Should U.S. Restaurants Abandon Tipping? A Review of the Issues and Evidence*, 5(1) PSYCH. ISSUES HUM. RES. MGMT. 120, 120 (2017); Elizabeth Dunn, *The Limitations of American Restaurants' No-Tipping Experiment*, NEW YORKER (Feb. 24, 2018), https://www.newyorker.com/culture/annals-of-gastronomy/the-limitations-of-american-restaurants-no-tipping-experiment [https://perma.cc/EF99-JNP4]; *see also* Dubner, *supra* note 40; Richardson, *supra* note 45.

93. Dunn, *supra* note 92; Lynn & Brewster, *supra* note 92, at 14–15.

restaurants have persisted without tipping,[94] as have businesses with non-tipped workers that run parallel to businesses with tipped workers (e.g., take-out restaurants; catering companies; businesses that provide food service to institutions like jails, hospitals, and schools), suggesting that tipping is not necessary for some businesses. In fact, one study found *no* negative effects after a cruise line eliminated tipping, suggesting that customers' and employees' dissatisfaction after restaurants eliminated tips arose from "subjective preference for tipping policies they were used to in those contexts" and not "tipping's actual effects on service delivery."[95]

In the transportation industry, evidence suggests no business necessity to tip. To that end, from its founding to June 2017, Uber grew from nothing to a valuation worth nearly $70 billion, becoming "the most valuable venture-backed company in history."[96] Yet, in June 2017, Uber first allowed riders to tip drivers.[97] Clearly, this policy was not necessary to Uber because its business was booming before July 2017.[98] Moreover, across industries, the existence of non-tipping businesses abroad (e.g., in China and Japan) calls into doubt whether tipping is a business necessity in America.[99] Yet, as

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94. Brad Tuttle, *21 Trendy Restaurants That Happily Got Rid of Tipping*, MONEY.COM (Sept. 25, 2015), https://money.com/restaurants-no-tipping-ban [https://perma.cc/Z544-4YRA].

95. Michael Lynn & Robert J. Kwortnik, *Tipping Policy Effects on Customer Satisfaction: An Informative Failure to Replicate*, 86 INT'L J. HOSP. MGMT. 1, 1 (2020).

96. Katy Steinmetz, *Uber Fail: Upheaval at the World's Most Valuable Startup is a Wake-Up Call for Silicon Valley*, TIME (June 15, 2017), https://time.com/magazine/us/4819553/june-26th-2017-vol-189-no-24-u-s [https://perma.cc/SK8D-JK86].

97. Andrew J. Hawkins, *Uber Finally Caves and Adds a Tipping Option to Its App*, VERGE (June 20, 2017), https://www.theverge.com/2017/6/20/15840818/uber-tipping-option-app-seattle-minneapolis-houston [https://perma.cc/57HG-XX4Y].

98. *See also* Bharat K. Chandar, Ali Horacsu, John A. List, Ian Muir, and Jeffrey M. Wooldridge, *Design and Analysis of Cluster-Randomized Field Experiments in Panel Data Settings* 22 (Becker Friedman Inst., Working Paper No. w26389, Oct. 2019), https://pdfs.semanticscholar.org/d6d9/44853ed1ede0a9dad50c6384188875a5853e.pdf [https://perma.cc/38Y9-U8WV].

99. Tim Murphy & CNT Editors, *Etiquette 101: Your Guide to Tipping Around the World*, CONDÉ NAST TRAVELER (Mar. 26, 2015), https://www.cntraveler.com/stories/2008-11-11/etiquette-101-tipping-guide [https://perma.cc/H58A-ZY8X].

a rejoinder, businesses often succeed in one country and fail elsewhere, discounting the weight of such evidence.[100]

With respect to commissions as a business necessity, there is less evidence given the lack of any widespread anti-commission movement. Nevertheless, anecdotal evidence from the few companies that have abolished commissions shows that, although some employees quit and some firms backpedaled and reinstated commissions, firms generally saw stability and, in some cases, increased revenues, improved morale, and less management time squandered trying to address salespersons gaming increasingly-complex commission plans.[101] In one high-profile example in 2014, after the U.S. Securities and Exchange Commission ("SEC") accused pharmaceutical giant GlaxoSmithKline of engaging in "transactions and schemes to corruptly transfer things of value to foreign officials in China to increase sales of pharmaceutical products" in violation of the Securities Exchange Act of 1934, GlaxoSmithKline settled with the SEC by agreeing, inter alia, to eliminate commissions for sales representatives.[102] In lieu of commissions, the company began to determine pay based on "selling competency, customer evaluations, and the overall operating profit of [the

100. Dan Harris, *Ten Reasons Chinese Companies Fail in the U.S.*, FORBES (July 21, 2010, 10:10 PM EDT), https://www.forbes.com/sites/china/2010/07/21/ten-reasons-chinese-companies-fail-in-the-u-s [https://perma.cc/4MB2-2UWY].

101. Stacy Perman, *For Some, Paying Sales Commissions No Longer Makes Sense*, N.Y. TIMES (Nov. 20, 2013), https://www.nytimes.com/2013/11/21/business/smallbusiness/for-some-paying-sales-commissions-no-longer-makes-sense.html [https://perma.cc/8FEY-ZNLZ]; Susan Adams, *Death of a Sales Commission: Can Killing the Most Basic Incentive Boost Business?*, FORBES (Mar. 23, 2016, 6:00 AM EDT), https://www.forbes.com/sites/susanadams/2016/03/23/death-of-a-sales-commission-can-killing-the-most-basic-incentive-boost-business [https://perma.cc/AS8T-4H9W]; Kristen Lund, *Should Your Business Eliminate Sales Commissions?*, NFIB (Dec. 10, 2014), https://www.nfib.com/content/resources/staffing/should-your-business-eliminate-sales-commissions-bizhelp-67326 [https://perma.cc/BBM5-NA85].

102. *In re* GlaxoSmithKline PLC, Exchange Act Release No. 79005, 2016 WL 5571623 (Sept. 30, 2016); Virginia Harrison, *GSK to Scrap Targets for Sales Reps*, CNN (Dec. 17, 2013, 11:12 AM ET), https://money.cnn.com/2013/12/17/news/companies/gsk-sales-targets/index.html [https://perma.cc/TT9V-92GA].

company's] North America Pharmaceuticals business."[103] After the change, the company is not only surviving but seeing massive increases in profits.[104] I am not suggesting that eliminating commissions necessarily caused this boon or that the company has insulated pay from customer preferences, but rather that ceasing commissions and seeing profits rise thereafter shows that commissions were not a business necessity.

Indeed, this evidence demonstrates that tips and commissions may not be necessary to keep many companies afloat. That business reality renders the pay disparities wrought by these pay schemes as unnecessary conditions of work that may increase profits, but only at the expense of workers of color and women. It is, therefore, shocking that the EEOC has declined to throw down the gauntlet and explicitly target tipping and commissions as violations of laws like Title VII. The next section further develops that contention.

3. (The Lack of) EEOC Guidance and Enforcement

Congress has empowered the EEOC to provide subregulatory, "technical assistance" about what Title VII ostensibly requires.[105] Furthermore, Congress has empowered the EEOC to litigate unlawful employment practices itself or, in the alternative, dismiss the charge of discrimination and allow the person aggrieved to file suit.[106] However, the EEOC's guidance and enforcement vis-à-vis customer preference-based pay schemes are practically nonexistent, which underscores the dereliction problem identified above.

President Clinton was still in office the last time the EEOC updated the compensation discrimination section of its Compliance Manual (i.e., one of its "technical assistance" guides).[107] Consider the history of pay

103. Thomas Sullivan, *GlaxoSmithKline Plans Adjustments to Its Sales Incentive Program*, POL'Y & MED. (May 5, 2018), https://www.policymed.com/2015/04/glaxosmithkline-plans-adjustments-to-its-sales-incentive-program.html [https://perma.cc/GC2W-EK2E].

104. *GlaxoSmithKline Reports Profits Up 34% To £5.48billion*, INSIDER (Feb. 6, 2019, 3:12 PM), https://www.insider.co.uk/news/glaxosmithkline-reports-profits-up-34-13961635 [https://perma.cc/X8MB-YX79].

105. *Supra* note 13.

106. *Supra* note 14.

107. *EEOC Compliance Manual, Section 10: Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 5, 2000), https://www.eeoc.gov/policy/

discrimination since then: *Ledbetter v. Goodyear Tire & Rubber Co.*[108] and the Lilly Ledbetter Fair Pay Act of 2009,[109] the debates resolved by *Dukes*,[110] the #TimesUp Movement[111] the fight for equal pay in Hollywood and women's sports,[112] and a revitalized crusade opposing employers' reliance on market factors in setting employee pay,[113] to name just a few examples. Yet, the EEOC's pay discrimination guidance fails to contend with any of these issues. Such a dereliction of responsibility is unacceptable. The agency need not constantly update its guidance, but waiting two decades to update the guidance addressing something as core to workers' lives as pay is irresponsible. Moreover, the Compliance Manual neglects to consider the viability of disparate impact caused by tips or commissions. To that end, the guidance vis-à-vis disparate impact and pay only addresses policies or practices that hinder or thwart employees of certain classes from securing higher salaries, hourly wage rates, or bonuses (e.g., higher bonuses for heads of household, which may disparately impact female employees; higher salaries for employees with a high school diploma, which may

docs/compensation.html [https://perma.cc/2GAW-JPSX] [hereinafter "EEOC Compliance Manual Compensation Guidance"].

108. 550 U.S. 618 (2007) (receiving a paycheck is not a discrete unlawful practice for the purpose of Title VII's timeframe for filing a timely charge of discrimination with the EEOC).

109. Pub. L. No. 111-2, 123 Stat. 5 (2009) (overruling *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

110. *See generally* Deborah M. Weiss, *A Grudging Defense of* Wal-Mart v. Dukes, 24 YALE J.L. & FEMINISM 119 (2012) (addressing whether aggregate, sex-based disparate compensation is actionable under Title VII absent an overarching corporate pay policy).

111. *Equity*, TIME'S UP NOW, https://timesupnow.org/work/equity [https://perma.cc/L4FY-276L] (fighting to eliminate structural barriers to sex equality, including the gender pay gap).

112. Jamie Doward & Tali Fraser, *Hollywood's Gender Pay Gap Revealed: Male Stars Earn $1m More Per Film than Women*, GUARDIAN (Sept. 15, 2019, 2:20 AM EDT), https://www.theguardian.com/world/2019/sep/15/hollywoods-gender-pay-gap-revealed-male-stars-earn-1m-more-per-film-than-women [https://perma.cc/M87Y-CQL5]; *The Fight for Equal Pay in Women's Sports*, WOMEN'S SPORTS FOUND. (Apr. 2, 2019), https://www.womenssportsfoundation.org/education/fight-equal-pay-womens-sports [https://perma.cc/4HEA-C6LT].

113. Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020) (an employee's prior pay rate is not a "factor other than sex" under the Equal Pay Act).

disparately impact Hispanic employees).[114] Neither tips nor commissions are mentioned at all, let alone criticized as facially-neutral pay schemes that can, and often do, cause disparate impact without being justified by business necessity.

Such a dereliction in providing guidance is problematic for two reasons. First, it leaves employees and employers in the dark, making it more difficult for workers to vindicate their rights and for employers to comply with the law. Indeed, without our federal government blazing the path forward, private parties have largely helmed pay discrimination lawsuits. To take one example, in 2016, the U.S. women's national soccer team wrote on a blank slate when it filed a sex discrimination charge with the EEOC alleging that the U.S. Soccer Federation violated Title VII because, "despite the women's [national soccer] team generating nearly $20 million more revenue [in 2015] than the U.S. men's team, the women are paid about a quarter of what the men earn."[115] The EEOC has provided no guidance concerning equal pay in sports, and its Compliance Manual remains silent on that front today, leaving women athletes to conjecture whether they have been treated unlawfully by their governing bodies. For example, is revenue generated by a team relevant to establishing a prima facie case of sex discrimination, or should men's and women's teams within a particular sport be paid equally notwithstanding the revenue they generate? The EEOC has not provided guidance.

Second, the EEOC's failure to issue guidance explaining how tipping and commissions can violate Title VII has a concrete legal implication. Although the EEOC lacks statutory authority to promulgate interpretations of Title VII carrying the force of law,[116] its Compliance Manual and similar guidelines

114. EEOC Compliance Manual Compensation Guidance, *supra* note 107, Section 10-III(B).

115. *U.S. Women's Team Files Wage-Discrimination Action vs. U.S. Soccer*, ESPN (Mar. 31, 2016), https://www.espn.com/espnw/sports/story/_/id/15102506 [https://perma.cc/94GZ-6AV5]; *see also* Plaintiffs' Collective Action Complaint for Violations of the Equal Pay Act and Class Action Complaint for Violations of Title VII of the Civil Rights Act of 1964 at *87, Morgan v. U.S. Soccer Fed'n, Inc., No. 2:19-cv-01717, 2019 WL 1199270 (C.D. Cal. May 1, 2020).

116. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976), *abrogated on other grounds by* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

may earn deference under *Skidmore v. Swift & Co.*[117] If the EEOC updates its Compliance Manual to mirror this Article's conclusion, *Skidmore* would require deference to the EEOC depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[118] Although *Skidmore* is notoriously "weaker and more contingent" than other deference regimes (like the one established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*),[119] publishing guidance to secure *Skidmore* deference remains a viable, squandered opportunity for the EEOC to augment its influence and combat the racist and sexist implications of customer preference-based pay schemes.

The EEOC's pay discrimination enforcement efforts have not fared much better. In fiscal year 2019, the number of wage-related Title VII charges fell below 4000, a decrease of nearly twenty percent from 2010.[120] There certainly has not been a dearth of pay discrimination or publicity surrounding such instances over the past decade, but nonetheless, fewer workers are engaging the EEOC for help. New litigations have likewise decreased, with the agency focusing on "quality over quantity" in filing lawsuits, as then-EEOC Commissioner Chai Feldblum tweeted in 2012.[121]

There could be many reasons for the EEOC's failure to update its guidance and bring the quantity of pay discrimination lawsuits that the times demand: budget cuts, political attacks (e.g., denying the agency quorum), outdated intake methods that discourage charging parties from

117. Noviello v. City of Boston, 398 F.3d 76, 90 n.3 (1st Cir. 2005) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

118. *See Skidmore*, 323 U.S. at 140.

119. Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 568–69 (2006) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

120. *See Statutes by Issue (Charges Filed with EEOC), FY 2010 - FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm [https://perma.cc/DMB7-FKG5].

121. Chai Feldblum (@chaifeldblum), TWITTER (Oct. 4, 2012, 11:15 PM), https://twitter.com/chaifeldblum/status/254057240724647938 [https://perma.cc/T5ZX-MRZN]; *see also EEOC Litigation Statistics, FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm [https://perma.cc/U2DA-FNPC] (showing that the EEOC filed almost 200 Title VII suits in fiscal year 2010, but fewer than half that by fiscal year 2019).

coming forward (e.g., encouraging in-person interviews for charges), unduly lengthy and ineffective investigations, purposefully weak enforcement laws, financial mismanagement, a loss of faith in the agency being able to secure meaningful remedies for workers, or a combination of these factors.[122] Regardless of the causes, the EEOC is derelict in its duties. Without EEOC guidance or a significant likelihood that the agency will initiate litigation on their behalf, employees must look to private litigation to pursue substantive pay equality. Yet, as the following Section shows, litigation by private parties has failed to attack tipping or commissions themselves as the roots of employee subjugation and discrimination.

C. Extant Litigation Strategies

Until recently, the closest any lawsuits came to attacking customer preference-based pay schemes as causing disparate impact were *McReynolds v. Merrill Lynch* (*McReynolds I*), where brokers alleged that Merrill Lynch's pay policies (e.g., paying commissions to brokers who teamed with other brokers) caused race-based disparate impact in earned commissions,[123] and *McReynolds v. Merrill Lynch* (*McReynolds II*), where brokers claimed, inter alia, that Merrill Lynch's bonus program (which linked bonuses to sales that generated commissions) similarly caused race-based disparate impact.[124] The Seventh Circuit ordered class certification in

122. Maryam Jameel, *More and More Workplace Discrimination Cases Are Being Closed Before They're Even Investigated*, VOX (June 14, 2019, 9:30 AM EDT), https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination [https://perma.cc/D3RR-7LEH]; Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are On Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases [https://perma.cc/Z4NR-5RZK]; THE AMERICAN MIDDLE CLASS: AN ECONOMIC ENCYCLOPEDIA OF PROGRESS AND POVERTY 392–94 (Robert S. Rycroft ed., 2017); *see also* Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 131–41 (2014) (highlighting effects of the Great Recession of 2008 on the EEOC).

123. McReynolds v. Merrill Lynch (*McReynolds I*), 672 F.3d 482, 488 (7th Cir. 2012), *abrogated on unrelated grounds as recognized by* Beaton v. SpeedyPC Software, 907 F.3d 1018 (7th Cir. 2018).

124. McReynolds v. Merrill Lynch (*McReynolds II*), 694 F.3d 873, 877–79 (7th Cir. 2012).

McReynolds I[125] and independently dismissed the disparate impact claim in *McReynolds II* before ruling on class certification, holding that a commission pay scheme was a system that measured earnings based on production, and Section 703(h) of Title VII affords employers a defense in such situations.[126] Subsequently, the cases settled for $160 million.[127] Yet, plaintiffs in the *McReynolds* diptych did not allege that Merrill Lynch's paying brokers via commissions *itself* caused disparate earnings. To wit, no claim targeting the customer preference-based pay scheme itself as causing disparate impact has been litigated on the merits, though one recent action contended, for the first time, that an employer's tipping policy did so.[128]

However, there is a long history of plaintiffs targeting employers' reliance on customer preferences in Title VII litigation. For example, in *Diaz v. Pan American World Airways, Inc.*[129] and *Wilson v Southwest Airlines*,[130] airlines attempted to justify rejecting male applicants for flight attendant jobs by contending that customers' preferences for female flight attendants were a bona fide occupational qualification (BFOQ) that justified sex-based hiring decisions. The restaurant in *Latuga v. Hooters, Inc.* attempted to justify rejecting a male waiter in favor of female waiters for similar reasons.[131] In all three cases, the courts rejected the employers' arguments. Indeed, courts tend to narrowly construe the situations in which employers can rely on customers' sex-based preferences, typically blessing sex-based BFOQs for privacy, safety, or authenticity purposes only.[132] Moreover, given the absence of any BFOQ defense for race-based disparate treatment in Title

125. *McReynolds I*, 672 F.3d at 492.

126. *McReynolds II*, 694 F.3d at 881.

127. Amanda Becker, *BofA's Merrill to Settle Racial Bias Suit for $160 Million*, REUTERS (Aug. 28, 2013, 3:24 PM), https://www.reuters.com/article/us-merrillynch/bofas-merrill-to-settle-racial-bias-suit-for-160-million-idUSBRE97R13X20130828 [https://perma.cc/55SU-H35B].

128. One Fair Wage, Inc. v. Darden Rests., Inc., No. 3:21-cv-02695, 2021 WL 4170788, at *3 (N.D. Cal., Sept. 14, 2021). Disclaimer: this Article's author is one of plaintiff's counsel in this action.

129. 442 F.2d 385 (5th Cir. 1971).

130. 517 F. Supp. 292 (N.D. Tex. 1981).

131. 1996 WL 164427, at *3 (N.D. Ill. Mar. 29, 1996).

132. 29 C.F.R. §§ 1604.2(a)(1)-(a)(2) (2019); United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991); Everson v. Mich. Dep't of Corr., 391 F.3d 737, 756–57 (6th Cir. 2004).

VII, courts have rejected customer preferences driven by race as a BFOQ,[133] although some scholars believe that courts would acquiesce to a BFOQ for race in occupations requiring racial authenticity (e.g., hiring an African American police officer to go undercover to infiltrate an African American gang) despite such claims never having arisen.[134]

Some litigation has focused on allegations of disparate treatment in commissioned jobs, not disparate impact. Most famous in this category was *EEOC v. Sears, Roebuck & Co.*, which concerned allegations that Sears steered women into sales positions offering lower commission payments than sales positions held by men.[135] Similarly, in *Bence v. Detroit Health Corp.*, a female employee alleged that her employer maintained higher commission rates for men than similarly-situated women,[136] and in *Hodgson v. Robert Hall Clothes, Inc.*, a woman contended that her employer established a variable commission structure that paid higher commissions for goods sold by men than goods sold by women.[137] In these cases, plaintiffs' arguments relied on claims that the employer was conscious of employees' sexes and designed a commission plan with those sexes in mind to the detriment of women. Put another way, the claims sounded in disparate treatment because the employers' alleged purpose was to harm women more than men. None of these cases alleged that a benign decision to maintain a commission plan resulted in sex-based disparate impact. Moreover, an employer that becomes aware of disparate impact caused by a policy or practice, but fails to fix it, does not exhibit discriminatory purpose by maintaining it.[138] Therefore, the only vehicle to challenge facially-neutral, customer preference-based pay schemes under Title VII is disparate impact theory.

Recently, plaintiffs have targeted employers' reliance on extrinsic forces to justify wage differentials between men and women. Yet, these cases have not focused on customers as the extrinsic source, but rather on the market

133. *See, e.g.*, Ferrill v. Parker Grp., Inc., 168 F.3d 468, 471 (11th Cir. 1999).

134. *See, e.g.*, K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CALIF. L. REV. 41, 46–47 (2000).

135. 839 F.2d 302, 307 (7th Cir. 1988); *see also* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1752–53 (1990).

136. 712 F.2d 1024, 1027 (6th Cir. 1983).

137. 326 F. Supp. 1264, 1272 (D. Del. 1971), *aff'd in part, rev'd in part*, 473 F.2d 589 (3d Cir. 1973).

138. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979).

itself. For example, in *Rizo v. Yovino*, plaintiffs argued that their employer's reliance on female employees' lower salaries at prior jobs in setting their salaries lower than those of male coworkers constituted sex discrimination in violation of the Equal Pay Act of 1963 (EPA).[139] Such cases likewise allege disparate treatment and not disparate impact, and similar cases alleging disparate impact (e.g., *AFSCME*) have been rejected for reasons explained in Section III.A.

In light of extant litigation failing to combat the root of the subjugation, discrimination, and dereliction problems—viz., the tipping and commission schemes themselves—employees harmed by customer preference-based pay schemes need a different approach.

II. A New Litigation Strategy

This Part considers how employees can challenge pay disparities wrought by customer preference-based pay schemes. Ultimately, I conclude that employees harmed by such pay schemes can make out a viable Title VII disparate impact claim subject to a host of fact- and jurisdiction-specific considerations, which are discussed below.

A. Disparate Impact's Evolution

Legislative history suggests that Congress's main concern when drafting Title VII was itemizing the aspects of working life wherein discrimination occurred (e.g., hiring and firing, employment conditions, segregation and classification, training programs) instead of explicating the legal theories necessary to eradicate such discrimination.[140] Nevertheless, in the late 1960s and early 1970s, lower courts began to read disparate impact theory into the statute. Interpreting Title VII in the context of facially-neutral policies or practices causing race-based disparate impact, courts almost uniformly found such policies and practices to be unlawful unless they were job-related and justified by business necessity.[141] The Supreme Court likewise embraced disparate impact theory in *Griggs*.

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139. Rizo v. Yovino, 950 F.3d 1217, 1219–20 (9th Cir. 2020).

140. Cong. Rsch. Serv., HD6305, Equal Employment Opportunity: Legislative History and Analysis of Title VII of the Civil Rights Act of 1964 19 (1965).

141. *See, e.g.*, United States v. Sheet Metal Workers Int'l Ass'n Loc. Union No. 36, 416 F.2d 123, 131 (8th Cir. 1969); Loc. 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 990 (5th Cir. 1969), *abrogated*

The history of *Griggs* is familiar but warrants briefly recounting. In the decades before Title VII, Duke Power Company's Dan River Steam Station in Eden, North Carolina explicitly excluded black workers from departments with higher-paying jobs.[142] Subsequently, on July 2, 1965 (i.e., the effective date of Title VII and the first date that Duke Power could no longer explicitly exclude black workers from such jobs), it implemented a putative loophole to try to continue effectively relegating black workers to lower-paying departments. Whereas Duke Power had previously required only *external* applicants for higher-paying jobs to hold a high school diploma, it instituted a new policy requiring *internal* applicants for such jobs to also hold a high school diploma (a prerequisite met by roughly 34% of white men and 12% of black men in North Carolina).[143] Moreover, Duke Power required that applicants for such jobs pass two aptitude tests (a prerequisite met by roughly 58% of white test-takers and 6% of black test-takers).[144] To no surprise, these policies disparately impacted black applicants for higher-paying jobs based on race, including Willie Griggs. Griggs sued Duke Power and, in the case bearing his name, the Supreme Court concluded that the policies violated Title VII because they caused race-based disparate impact against black employees and that Duke Power had failed to justify the policies as a "business necessity" that "related to job performance."[145]

The *Griggs* Court's endorsement of disparate impact theory and the business necessity defense was a turning point in the fight between formal and substantive workplace equality. On one hand, one of Duke Power's arguments forwarded an interpretation of Title VII that would have required only formal equality and never substantive equality (i.e., Title VII prohibits only intentional bias).[146] In contrast, the interpretation adopted by the Supreme Court was the one forwarded by Griggs, the EEOC, the United States, and even the traditionally pro-employer U.S. Chamber of

on other grounds as stated in Bernard v. Gulf Oil Corp., 841 F.2d 547, 555 (5th Cir. 1988); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on unrelated grounds by* 472 F.2d 631 (9th Cir. 1972).

142. Griggs v. Duke Power Co., 401 U.S. 424, 426–27 (1971).

143. *Id.* at 427, 430 n.6.

144. *Id.* at 427–28, 430 n.6.

145. *Id.* at 431.

146. Brief for Respondent at 40, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 124), 1970 WL 136686; *see also* Clark v. Dillon Supply Co., 429 F.2d 800, 803 (4th Cir. 1970) (reversing the district court's endorsement of strict formal equality).

Commerce, all of which interpreted Title VII as sometimes requiring substantive equality (i.e., when the discriminatory policy or practice cannot be justified as job-related and consistent with business necessity).[147] Yet, neither party nor their *amici* advocated for complete substantive workplace equality by arguing that Title VII outlaws policies and practices causing a disparate impact even if they are job-related and consistent with business necessity.

Despite the Court endorsing a middle ground between formal and substantive equality, disparate impact theory thrived in the 1970s and early 1980s, largely as a vehicle for challenging unvalidated or poorly-validated preemployment tests that caused disparate impact against people of color.[148] One prominent example was *Albemarle Paper Co. v. Moody*, where the Supreme Court considered such a challenge and held that "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'"[149] Yet, *Albemarle Paper* would become the high-water mark for disparate impact theory in the courts. The very next term, the Supreme Court in *Washington v. Davis* rejected applying disparate impact theory under the Equal Protection Clause.[150] In the early 1980s, in *Guardians Association v. Civil Service Commission* the Court likewise rejected applying disparate impact theory under Title VI of the Civil Rights Act of 1964.[151]

Taking their cue from the Supreme Court, lower courts during the 1980s were hesitant to apply disparate impact claims under Title VII

147. Brief for Petitioner at 9–10, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 124), 1970 WL 122448; Brief of the Attorney General of the State of New York as *Amicus Curiae* in Support of Reversal at 13, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 124), 1970 WL 136684 (citing Decision of EEOC *as reprinted in* Emp. Pracs. Guide (CCH) ¶ 17 (Dec. 2, 1966); Brief for the United States as *Amicus Curiae* at 12, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 124), 1970 WL 136685; Brief *Amicus Curiae* on Behalf of the Chamber of Commerce of the United States of America at 4, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 124), 1970 WL 136687.

148. Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605, 615 (1979); *see also* 29 C.F.R. § 1607.3(A) (2019).

149. 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 1607.4(c) (1972)).

150. 426 U.S. 229, 238–39 (1976).

151. 463 U.S. 582, 584 (1983).

beyond the scope of easily-delineated policies or practices like aptitude tests. In *Pouncy v. Prudential Insurance Co.*, a 1982 Fifth Circuit opinion highlighting this hesitance, the panel concluded that a disparate impact claim "is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices" because such claims were viable "only when an employer has instituted a specific procedure, usually a selection criterion for employment."[152] Applying that logic, the panel gave two reasons for dismissing plaintiff's claim that "the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria" caused disparate impact in the form of racial imbalance in the workforce: 1) "the practices . . . are not selection procedures to which the disparate impact model traditionally has applied," and 2) the plaintiff did not show that "independent of other factors the employment practices he challenges have caused the racial imbalance in [the employer's] work force."[153] Other circuits echoed *Pouncy*'s holding.[154] In other words, courts were hesitant to apply disparate impact claims under Title VII beyond selection procedures (e.g., selecting applicants to be hired; selecting employees to be promoted, disciplined, or terminated), and courts began to require that plaintiffs identify a specific policy or practice that caused disparate effects.

During the 1980s, two other questions percolating through the lower courts were whether disparate impact theory could ever apply to policies implicating multiple, complex factors (e.g., market forces) or to policies involving discretionary or subjective criteria. For example, in 1985, the Ninth Circuit in *AFSCME* concluded that policies implicating "the assessment of a number of complex factors not easily ascertainable" were inappropriate for disparate impact review.[155] In another instance, when bank teller Clara Watson accused her employer of delegating discretion over promotions to management, resulting in Watson being denied a promotion because of her race, her employer countered that policies delegating discretion were beyond the reach of disparate impact theory.[156] In the 1988 case bearing

152. 668 F.2d 795, 800 (5th Cir. 1982) (citations omitted).

153. *Id.* at 801.

154. Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985); Am. Fed'n of State, Cnty. & Mun. Emps. (AFSCME) v. Washington, 770 F.2d 1401, 1405–06 (9th Cir. 1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1014, 1016 (1st Cir. 1984); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); *see also* Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 189 (5th Cir. 1983).

155. *AFSCME*, 770 F.2d at 1406.

156. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 982 (1988).

her name, *Watson v. Fort Worth Bank & Trust*, the Supreme Court rejected that counterargument, holding that Title VII does not confine disparate impact analyses "only to standardized selection practices," as "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."[157] Yet, the Court provided no guidance on what constitutes "appropriate cases," declined to opine on whether this employer's policy was appropriate for disparate impact review, and remanded the case to let the lower courts decide such matters.[158]

Given the Supreme Court's refusal to extend disparate-impact theory beyond Title VII, coupled with growing scrutiny of disparate impact under Title VII in the lower courts, the stage was set for disparate impact theory to suffer a "near-death experience" in *Wards Cove Packing Co. v. Atonio*.[159] To understand *Wards Cove*, the following context is paramount. Before *Griggs* and immediately after it, lower courts generally agreed that business necessity "connotes an irresistible demand" that "mean[s] more than . . . serv[ing] legitimate management functions."[160] "In other words," as one such court reasoned, "management convenience and business necessity are not synonymous."[161] However, during the disparate-impact backlash of the late 1970s and 1980s, some courts began to conclude that business justifications weaker than absolute necessity sufficed.[162] Those cases

157. *Id.* at 989–91.

158. *See id.*

159. Charles A. Sullivan, Ricci v. Destefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 201, 202 (2010) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 (1989), *superseded on some grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)); *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1321 (2011).

160. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); *see also* Rogers v. Int'l Paper Co., 510 F.2d 1340, 1347 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809 (1975).

161. United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *modified on unrelated grounds by* Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988); *see also* Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 600 (1985).

162. *See, e.g.*, United States v. Town of Cicero, 786 F.2d 331, 333 (7th Cir. 1986) (finding sufficient that the employment practice in question significantly serves some "important business purpose").

culminated in 1989 when *Wards Cove* backtracked on the business necessity language from *Griggs*, holding that, while the business necessity defense requires more than "insubstantial justification," there "is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."[163] *Wards Cove* further weakened disparate-impact theory in three additional ways: 1) adopting *Pouncy*'s holding that employees must isolate specific employment policies or practices causing disparate impact; 2) blessing the use of statistics in proving prima facie cases of disparate impact, but only those that reflect the relevant labor market; and 3) shouldering employers with the burden of production and not the burden of persuasion vis-à-vis proving business necessity.[164]

Shortly after *Wards Cove*, Congress attempted to revitalize disparate impact theory with the Civil Rights Act of 1991 (1991 Act).[165] In reality, however, the 1991 Act barely kept disparate impact on life support. On the one hand, Congress explained that "[*Wards Cove*] has weakened the scope and effectiveness of Federal civil rights protections," necessitating the 1991 Act "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in [*Griggs*] and in the other Supreme Court decisions prior to [*Wards Cove*]."[166] To that end, the 1991 Act codified a business necessity defense, explaining that employers can defend against prima facie cases of disparate impact if the policy or practice causing impact is both "job related for the position in question and consistent with business necessity."[167]

However, the 1991 Act failed to clarify whether literal necessity is required to satisfy this defense. To that end, the *Wards Cove* Court interpreted similar language from *Griggs* (i.e., "the touchstone is business necessity")[168] as requiring less than literal necessity. Furthermore, at least one court interpreting the business necessity defense after the 1991 Act required that employers prove less than literal necessity because the 1991

163. *Wards Cove*, 490 U.S. at 659.

164. *Id.* at 654–55, 659; *see also* Patricia Pattison & Philip E. Varca, *The Demise of the Disparate Impact Theory*, 29 AM. BUS. L.J. 413, 436 (1991).

165. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

166. *Id.* at §§ 2(2), 3(2).

167. *Id.* at § 105(a).

168. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Act uses the words "consistent with" instead of "required by."[169] Had the 1991 Act said, "job related for the position in question and *required by* business necessity," there likely would be little doubt that employers must show literal necessity. But it does not say that. It says "consistent with business necessity." One reading of "consistent with" is a "practice . . . closely related to a legitimate business purpose" (i.e., a purpose that harmonizes with, does not conflict with, and therefore is consistent with, business necessity).[170] Legislative history tends to support the argument that the 1991 Act was merely a "compromise" that adopted "a new, seemingly watered-down version" of the *Griggs*-era business necessity defense, as evidenced by Congress's rejection of the phrase "required by business necessity" in earlier versions of the 1991 Act.[171]

In the years since the 1991 Act, confusion has snowballed. Lower courts have adopted a variety of business necessity defense standards, ranging from proof that policies be "demonstrably necessary to meet an important business goal" (i.e., literal necessity), to a relatively lax standard like requiring employers to show that policies are "reasonably necessary to achieve an important business objective," to an incredibly lax standard where employers must prove nothing more than some "manifest relationship and legitimate employment goals."[172] Similarly lacking from the 1991 Act was a repudiation of *Wards Cove*'s holding that plaintiffs must isolate a specific policy or practice causing disparate impact. Indeed, the 1991 Act left that holding untouched, adding only an alternative avenue that allows courts to consider the employer's entire decision-making process if disaggregating the specific policies or practices causing disparate impact would be impossible.[173] In fact, the only holding of *Wards Cove* that the 1991

169. Donnelly v. R.I. Bd. of Governors for Higher Educ., 929 F. Supp. 593 (D.R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997).

170. *Id.* at 593.

171. *Id.* (quoting 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 23.04[1] (1994)).

172. Linda Lye, Note, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 348–54 (1998); *see also* Susan Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 392–393 (1996); William Gordon, Comment, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 531 (2007).

173. 42 U.S.C. § 2000e-2(k)(1)(B) (2018). Tipping and commissions typically are borne of one policy or practice and not multiple, rendering this provision inapplicable.

Act definitively remedied was the holding that employers only faced a burden of production to meet the business necessity defense; the 1991 Act required employers to carry the burden of proof.[174]

Finally, for many scholars, the Supreme Court's relatively recent opinions in *Ricci* and *Dukes* signaled a "crisis" for disparate impact theory.[175] In *Ricci*, for example, the Court looked at two decisions by an employer: 1) its decision to adopt facially neutral tests to decide which employees to promote, and 2) its decision to reject the results of those tests because they caused disparate impact against people of color and the employer feared disparate impact litigation by the people of color harmed thereby.[176] In response, white employees sued, alleging that the employer's race-conscious decision to reject the test results amounted to unlawful disparate treatment.[177]

The *Ricci* Court held that this employer could engage in otherwise-prohibited disparate treatment only if it could "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[178] Applying that new standard, the Court reasoned that the employer had no such strong basis in evidence despite the test's disparate impact because liability would exist only if "the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the [employer's] needs but that the [employer] refused to adopt."[179] In response, scholars criticized *Ricci* on many grounds, arguing that the Court's standard was ahistorical and atextual; that the Court nonetheless ignored the strong basis in evidence that these tests were not business necessities and that less discriminatory alternatives to the tests existed; and that, at a minimum, the Court should have remanded the case for factfinding regarding whether this employer had a strong basis in evidence for its

174. 42 U.S.C. § 2000e(k)(1)(A)(i) (2018); *see also* Ronald Turner, *When the Court Makes Title VII Law and Policy: Disparate Impact and the Journey from* Griggs *to* Ricci, 89 ST. JOHN'S L. REV. 809, 831 (2015).

175. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 252–53 (2011); *see also infra* note 185.

176. 557 U.S. at 563–74.

177. *Id.* at 574–75.

178. *Id.* at 563.

179. *Id.* at 587–92 (citing 42 U.S.C. § 2000e-2(k)(1)(A) (2018)).

decision to reject the test results.[180] However, perhaps the most striking aspect of *Ricci* was not its holding, but Justice Scalia's concurrence "expressing concern that Title VII's disparate impact provisions will require employers 'to make decisions based on (because of) . . . racial outcomes'" in violation of the Equal Protection Clause.[181] Thus, many scholars saw *Ricci* as a harbinger of the impending death of disparate impact theory.

Many scholars believe that this fear was realized in *Dukes*. There, plaintiffs argued that Wal-Mart's putative "policy" of allowing local managerial discretion over pay and promotions was proper for disparate impact analysis.[182] The Court disagreed, holding that acquiescing to local managerial discretion was not a specific employment policy.[183] In reaching that result, the Court resolved that plaintiffs' claims failed, in part, because they "have not identified a common mode of exercising discretion that pervades the entire company," such as managerial discretion exercised "in a common way with[] some common direction."[184] In the wake of *Dukes*, some scholars have questioned whether *Watson* survives at all, expressing skepticism that a policy or practice of delegating discretion to lower-level actors could ever be subject to disparate impact review post-*Dukes*.[185] In light of that skepticism and *Ricci*'s ostensible threat to disparate impact theory holistically, it is no wonder that scholars generally consider disparate impact theory a relic that has limited practical import today.

Based on this complicated history of disparate impact theory under Title VII, how would customer preference-based pay schemes like tipping and commissions fare if challenged? The next Section addresses that question head-on.

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180. Ann C. McGinley, Ricci v. Destefano*: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. 626, 629 (2012); Sullivan, *supra* note 159, at 211; Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 159 (2010).

181. Carle, *supra* note 175, at 299 n.267 (quoting *Ricci*, 557 U.S. at 594 (Scalia, J., concurring)).

182. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355–57 (2011).

183. *Id.* at 357–8.

184. *Id.* at 356.

185. Natalie Bucciarelli Pedersen, *The Hazards of* Dukes*: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 132 (2012); Deborah Thompson Eisenberg, Wal-Mart Stores v. Dukes*: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 254 (2012); Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 450 (2012).

B. Challenging Tipping and Commissions

Based on the foregoing, there are three relevant hurdles to establishing a disparate impact cause of action under Title VII premised on tipping or commissions: 1) establishing a prima facie case of disparate impact, 2) overcoming the business necessity defense, and 3) overcoming the merit or production-based earnings systems defenses.

Scholars have yet to appreciably analyze these elements vis-à-vis tipping or commission policies. Yet, some scholars broach the subject. For example, in their study showing that black servers earned less in tips than white servers because of race, Lynn et al. cited *Griggs*, suggesting that "[c]ustomer tipping that favors White service providers over Black service providers may qualify as . . . an apparently neutral business practice that has an unintended disparate impact on employees of different races."[186] Dallan F. Flake cited this conclusion in his article regarding employer liability for non-employee discrimination where he found that "direct, unconscious discrimination" of customers operating within a facially neutral pay scheme like tipping can lead to disparities in earnings,[187] although he did not go so far as to analyze whether such disparities would constitute a prima facie case of disparate impact. Two law students similarly discussed the prospect of tips establishing a prima facie case of disparate impact, as well as the business necessity defense, albeit without concluding whether the fact pattern constitutes a prima facie case or satisfies the defense.[188] Some scholars have weighed in specifically on the prima facie case requirement or the business necessity defense as applied to tips, each instance of which I discuss in greater detail below. However, no scholarship considers the broader considerations in this Article (e.g., commissions, why tips and commissions are not susceptible to the same flaws as the policies at issue in *Dukes* and *AFSCME*, the merit and production-based earnings systems defenses, and non-litigation alternatives to remedying the pay disparities wrought by tipping and commissions).

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186. Lynn et al., *supra* note 65, at 1057.

187. Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1188–89 (2017).

188. Jakob Feltham, Note, *The Limits of the Law: Tipping, Employment Discrimination, and Legal Theories for Plaintiffs Under Title VII*, 32 WIS. J.L. GENDER & SOC'Y 65, 82 (2017); Jacob Kline, Note, *Fifteen Percent or Less: A Title VII Analysis of Racial Discrimination in Restaurant Tipping*, 101 IOWA L. REV. 1651 (2016).

Ultimately, I find that Title VII disparate impact causes of action challenging tipping and commissions policies would be viable in some, but not all, cases. Given this conclusion and the nuance that accompanies it, it is incumbent on the EEOC to provide guidance about such claims. Moreover, I join the chorus of stakeholders calling for increasing funding to the agency and an end to the political maneuvering that renders it ineffectual at fulfilling one of its core functions—fighting for pay equity.[189]

1. Prima Facie Case

A prima facie case of disparate impact requires a specific employment policy or practice that causes adverse effects based on, inter alia, race or sex.[190] Whether tipping and commission plans constitute such a specific policy or practice is a difficult question. On one hand, typically they are discrete, corporate-level terms and conditions of employment as opposed to one-off decisions by local management. Moreover, they can, and routinely do, cause adverse effects based on, inter alia, race and sex. Through that simple lens, and assuming such a corporate-level instruction, tipping and commissions appear to be specific policies or practices. However, three counterarguments deserve discussion: a) policies affording too much discretion are inappropriate for disparate impact scrutiny; b) policies relying on multiple, complex factors are inappropriate for disparate impact scrutiny; and c) employers' lack of control over customers' actions precludes Title VII liability. I address each of these in turn. I then conclude by addressing the *Dukes* fact pattern head-on—what if the corporate office takes a hands-off approach and vests in local management the authority to decide whether to maintain tipping or commissions, and local management does so, thereby causing adverse race- or sex-based effects? For the reasons

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189. *See, e.g.*, Jaclyn Diaz & Paige Smith, *Senate Floats Slight EEOC Funding Boost, Rejects White House Cut*, BLOOMBERG NEWS (Sept. 26, 2019, 4:26 PM), https://news.bloomberglaw.com/daily-labor-report/senate-floats-slight-eeoc-funding-boost-rejects-white-house-cut [https://perma.cc/36NU-LG25]; Jaclyn Diaz, *House Moves to Ramp Up Equal Employment Enforcement Funding*, BLOOMBERG NEWS (June 25, 2019, 3:24 PM), https://news.bloomberglaw.com/daily-labor-report/house-moves-to-ramp-up-equal-employment-enforcement-funding [https://perma.cc/37TY-2FRU].

190. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989), *superseded on some grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)).

explained below, I contend that this approach merely narrows the claim rather than destroys it.

First, one could argue that a policy allowing *customer* discretion (e.g., whether and how much to tip, whether to buy from an employee who earns commissions) is akin to Wal-Mart's putative policy of allowing *managerial* discretion over pay and promotions that *Dukes* found not to be a specific employment policy. Perhaps there is no material distinction between Wal-Mart's policy affording discretion over pay and promotions to local managers at 3400+ stores and employers' policies affording discretion over tipping and commission-generating purchases to customers in millions of restaurants, hotels, taxicabs, and stores. In both situations, the decision makers have unfettered discretion to determine pay. Through that framing, the only difference appears to be scale. Therefore, perhaps tipping and commissions are mere "delegated discretion" policies, the likes of which *Dukes* found not to be specific employment policies.[191]

In my view, this framing misconstrues *Dukes* because the degree of discretion is a red herring in disparate impact analyses. Rather, I contend that *Dukes* rejected the application of disparate impact theory to Wal-Mart's putative policy of delegating discretion to local managers because there was no employer action, and the relevant theories of Title VII liability only prescribe what employers do, not what they do not do. Put another way, I maintain that Title VII never forces employers to act when *de facto* discrimination pervades the workplace, even at the hands of the employers' agents; instead, it prohibits employers from acting (i.e., barring disparate treatment) and allows employers to react if they acted in the first place (i.e., per *Ricci*, allowing employers to engage in disparate treatment upon showing a strong basis in evidence that their actions would have caused disparate impact liability but for disparate treatment). In the words of then-Judge Kennedy in *AFSCME*, "Title VII does not obligate [an employer] to eliminate an economic inequality that it did not create."[192]

One might argue that distinguishing between employer action and inaction is specious because both action and inaction can cause results. True, but the text and jurisprudence of Title VII relies on action verbs, prohibiting employers that "discriminate" against individuals[193] by disparately *treating* or disparately *impacting* employees, and interpreting disparate impact theory as requiring action ensures that courts will hold employers liable only for what those employers did. Therefore, *Dukes*

191. *See* 564 U.S. at 357.

192. *AFSCME*, 770 F.2d 1401, 1407 (9th Cir. 1985).

193. 42 U.S.C. § 2000e-2(a)(1) (2018).

should be read as rejecting only an interpretation of Title VII that would obligate employers to engage in affirmative action to monitor their agents' actions to discern whether, in the aggregate, those actions cause disparate impact.

To that end, plaintiffs in *Dukes* only identified what Wal-Mart failed to do; Wal-Mart passively allowed local managerial discretion over promotion and pay matters, which resulted in women ostensibly seeing disparate treatment at the hands of local management. In the words of the *Dukes* majority's *dicta*, perhaps if Wal-Mart had required that local managerial discretion be exercised "in a common way with[] some common direction" (i.e., had Wal-Mart qua principal-employer acted separately from the individual, aggregated acts of its management-agents), then disparate impact scrutiny may have been proper.[194] Yet, because Wal-Mart did not act, disparate impact review was inappropriate.

Post-*Dukes*, a handful of courts have held as much. In *McReynolds I*, the Seventh Circuit distinguished Wal-Mart's passive delegation of managerial discretion in *Dukes* from a Merrill Lynch policy that affirmatively paid commissions to brokers in the same office who teamed with each other.[195] The panel reasoned that the "company-wide polic[y]" of allowing brokers to team with each other was a specific policy because it was a "practice[] of Merrill Lynch, rather than [a] practice[] that local managers can choose or not at their whim," whereas "delegation to local management of the decision whether to allow teaming" would have suffered from the same fatal flaw as the putative policy in *Dukes*.[196] In an unrelated case decided a few months later, the Seventh Circuit confirmed that the "single national policy" in *McReynolds I* "was the missing ingredient in [*Dukes*]."[197]

Similarly, in *Davis v. District of Columbia*, the D.C. Circuit considered a disparate impact claim brought by a group of mostly African American former employees who alleged that their former employer had terminated them as part of a multi-employee reduction in force ("RIF") (i.e., mass layoff) that gave managers discretion to decide who to terminate, but only from a roster of employees in certain positions. This allegedly caused race-based

194. 564 U.S. at 356.

195. *McReynolds I*, 672 F.3d 482, 487–90 (7th Cir. 2012), *abrogated on unrelated grounds as recognized by* Beaton v. SpeedyPC Software, 907 F.3d 1018 (7th Cir. 2018).

196. *Id.* at 490.

197. Bolden v. Walsh Constr. Co., 688 F.3d 893, 898 (7th Cir. 2012).

disparate impact amongst employees selected for termination.[198] The panel declined to determine whether all RIFs were appropriate for disparate impact scrutiny, but aptly concluded that this RIF was a specific employment practice appropriate for disparate impact review because the employer selected the positions from which managers could select employees for termination.[199] The Sixth and Seventh Circuits ruled similarly regarding RIFs that "select[ed] only certain (predominantly female) departments" and "focus[ed] cuts on offices where 'black employees are concentrated'" in *Shollenbarger v. Planes Moving & Storage* and *Council 31, American Federation of State, County, and Municipal Employees v. Ward*, respectively.[200]

Finally, in *Ellis v. Costco Wholesale Corp.*, the Northern District of California considered a putative class action brought by current and former Costco employees alleging that Costco's "uniform policies and practices with regard to its promotion system" (i.e., only promoting from within, only considering employees in specific positions for certain promotions, requiring certain experience before promoting into specific positions) caused disparate impact against female employees.[201] Using my language, all of these policies reflected Costco acting, so the policies were suitable for disparate impact review. Using the *Ellis* court's language, the plaintiffs

198. 925 F.3d 1240, 1243–45 (D.C. Cir. 2019).

199. *Id.* at 1249–50. An RIF occurs when an employer terminates employees "with no intention of replacing" the positions, and the terminations cause "a permanent cut in headcount." *What Is the Difference Between a Furlough, a Layoff and a Reduction in Force?*, SOC'Y FOR HUM. RES. MGMT. (2021), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/furloughlayoffreductioninforce.aspx [https://perma.cc/K2D5-V8AS]. A single-employee RIF would not be appropriate for disparate impact scrutiny, whereas coordinated mass layoffs (i.e., a multi-employee RIF) would because they reflect a single policy or practice unifying multiple terminations. In contrast, passively delegating authority to managers to terminate individual employees—even if those terminations evince disparate impact in the aggregate—would not be appropriate for disparate impact analysis because such passive delegation, like the passive delegation in *Dukes*, is not a specific policy or practice.

200. 925 F.3d at 1250 (quoting Shollenbarger v. Planes Moving & Storage, 297 Fed. App'x 483, 486 (6th Cir. 2008); Council 31, Am. Fed'n of State, Cnty. & Mun. Emps. v. Ward, 978 F.2d 373, 375, 377–78 (7th Cir. 1992)).

201. 285 F.R.D. 492, 496, 498 (N.D. Cal. 2012).

> identify specific employment practices Costco implements companywide under the influence and control of top management. Unlike in *Dukes*, which the Supreme Court concluded merely identified the delegation of discretion (*i.e.,* the absence of a policy), here Plaintiffs identify specific practices and a common mode of guided discretion directed from the top levels of the company.[202]

Cases interpreting the Fair Housing Act ("FHA") (which, for our purposes, is analyzed in the same manner as Title VII[203]) point to a similar result. For example, in *National Fair Housing Alliance v. Federal National Mortgage Ass'n*, the Northern District of California concluded that Fannie Mae's policy of delegating discretion over foreclosed property maintenance "based on the properties' age and value" to lower-level agents and employees was a specific policy subject to disparate impact review under the FHA.[204] Had Fannie Mae passively acquiesced in allowing lower-level agents and employees discretion to decide foreclosed property maintenance matters, there would have been no overarching action, so *Dukes* would have foreclosed disparate impact review. However, the court correctly held that the action at bar—guiding foreclosed property maintenance based on the age and value of the property—was appropriate for disparate impact scrutiny. The Eastern District of Pennsylvania and the Northern District of Georgia reached similar results in *City of Philadelphia v. Wells Fargo & Co.* and *Dekalb County v. HSBC North America Holdings, Inc.*, respectively, in which they held that defendant-banks' policies of "reverse redlining" (a common direction for locally-delegated discretion) could be subject to disparate impact review under the FHA although the policies involved delegating discretion to lower-level actors.[205] Likewise, in *City of Oakland v. Wells Fargo Bank, N.A.,* the Northern District of California found that the defendant-bank's policies "incentiviz[ing] loan officers to sell [certain loans], require[ing] prepayment penalties that prevent borrowers from refinancing [certain] loans, and fail[ing] to underwrite loans based on objective underwriting" constituted specific policies (read: actions) subject to disparate impact review under the FHA despite affording discretion.[206]

202. *Id.* at 509 (citations omitted).

203. Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 295 (7th Cir. 2000).

204. 294 F. Supp. 3d 940, 948 (N.D. Cal. 2018).

205. City of Phila. v. Wells Fargo & Co., No. CV 17-2203, 2018 WL 424451, at *1, 4 (E.D. Pa. Jan. 16, 2018); Dekalb Cnty. v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104, at *15 (N.D. Ga. Sept. 25, 2013).

206. No. 15-CV-04321, 2018 WL 3008538, at *15 (N.D. Cal. June 15, 2018).

Just like the actions in *McReynolds I*, *Davis*, *Ellis*, and the cases interpreting the FHA, all commission schemes and all lawful tip schemes reflect employer actions. Commission schemes are the easier case because they definitionally reflect employer action (i.e., employers advising employees, in writing or otherwise, of the terms and conditions of earning pay). Practically, the overwhelming majority of tipping schemes similarly reflect employer actions like paying cash wages below the minimum wage (which encourages employees to earn enough tips to meet and exceed the tip credit), agreeing to the Tip Reporting Alternative Commitment with the Internal Revenue Service,[207] printing a "tip" line on bills, displaying signage encouraging tips, providing machines that accept debit or credit cards and prompt customers to tip, or requiring employees to track and report tips so the employer can "demonstrate that the employee received at least [the amount taken as a tip credit] in actual tips."[208] Moreover, employer actions prefigure all lawful tipping schemes because tips are taxable income, and employers allowing tips have obligations stemming therefrom, "including recordkeeping and reporting responsibilities, collecting taxes on tips, filing certain forms, and paying or depositing taxes."[209]

Hence, I contend that all commission and tipping pay schemes are subject to disparate impact review except unlawful tipping schemes where employers acquiesce to tipping without acting in any way to encourage or facilitate it (e.g., a plumbing company where, unbeknownst to management, plumbers occasionally earn tips during home visits but never report them; a hotel where the general manager sees that bellhops occasionally earn tips, but says and does nothing to encourage or facilitate tipping, even though the hotel violates federal law when it is aware of tipping but fails to keep records of tips, report them, collect and pay taxes on them, and complete related forms). In my opinion, such employer inaction (i.e., failure to encourage or facilitate tips) would be just as inappropriate for disparate impact review as Wal-Mart's inaction in *Dukes*.

The second argument against a prima facie case of disparate impact was best articulated by then-Judge Kennedy writing for the Ninth Circuit in *AFSCME* considering a challenge to the state-employer's policy of setting

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207. *Tip Reporting Alternative Commitment*, INTERNAL REVENUE SERV. (2004). https://www.irs.gov/pub/irs-utl/foodtrac.pdf [https://perma.cc/LCW7-N7V9].

208. *See* 29 C.F.R. § 531.59(b).

209. *Tip Recordkeeping & Reporting*, INTERNAL REVENUE SERV. (2021), https://www.irs.gov/businesses/small-businesses-self-employed/tip-recordkeeping-and-reporting [https://perma.cc/3CNF-2QYY].

salaries based on prevailing market rates: "the decision to base compensation on the competitive market . . . involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis."[210] Applied here, one might contend that tipping and commissions similarly are inappropriate for disparate impact scrutiny because they, too, involve assessing complex factors (e.g., employee performance, food quality, restaurant ambiance, customer bias). Factually that may be true, but I argue that a policy's reliance on multiple, complex factors or market forces, like the degree of discretion afforded to lower-level actors, is a red herring.

Consider *AFSCME* in light of my interpretation of *Dukes*. The state-employer acted in *AFSCME* by enacting a policy that mandated how local management must set salaries. Because the employer acted, its action should be subject to disparate impact scrutiny regardless of other considerations (e.g., whether that action requires consideration of complex factors or requires some degree of discretion). Had the state-employer in *AFSCME* taken a hands-off approach in setting pay—for example, letting local managers decide whether to base pay on prevailing market rates, the job's comparable worth, or other factors—such inaction would insulate the employer from disparate impact review just like Wal-Mart's inaction in shaping local managers' discretion over promotions and pay was inappropriate for disparate impact scrutiny in *Dukes*. Through this lens, the vast majority of tipping and commissions schemes withstand the market forces argument because they reflect employer action, as detailed above.

The third and final argument against a prima facie case of disparate impact raises issues of causation. As Lu-in Wang has argued, tipping "effectively allow[s] individual customers to determine how much to reward their particular servers," and if courts see customers as the cause of the disparate impact, it is doubtful that courts would hold employers liable.[211] I agree that this framing presents a practical hurdle to liability vis-à-vis tipping and, by extension, commissions, likely stemming from an instinct to blame only "the very last step in the chain of causation."[212]

210. 770 F.2d 1401, 1406 (9th Cir. 1985).

211. Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL'Y & L. 101, 158 (2014); *see also* Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 250 (2016); Tyler D. Lane, *Are You Ready for the Check?: Employers Face Title VII Disparate Impact Liability for Discriminatory Tipping Practices*, 44 U. DAYTON L. REV. 53, 74 (2018).

212. *See* Bennett v. Spear, 520 U.S. 154, 169 (1997).

However, this counterargument fails to persuade because Title VII liability is triggered, inter alia, when discrimination would not have occurred but for the employer's action[213] and that action proximately caused discrimination;[214] there is no requirement that the employer's action be the very last step in the causal chain. Applied here, pay disparities in tips and commissions would not occur but for the employer maintaining tips or commissions *and* customers acting within the parameters of those pay schemes. Moreover, proximate causation is often described in terms of foreseeability,[215] and two facts show that discriminatory earnings are a foreseeable result, and therefore a proximate cause, of tipping and commissions. First, ample scholarship demonstrates discrimination against people of color in earned tips and commissions and women in earned commissions.[216] Second, employers see that discrimination realized on employees' paystubs and in tax filings when people of color and women earn less in tips or commissions than their white, male counterparts. Finally, though Title VII jurisprudence has yet to adopt tort concepts like intervening and superseding causation, employer liability would exist even if such concepts were incorporated into employment discrimination law. To that end, because it is foreseeable that customers' intervening acts (i.e., tipping, buying goods or services that generate commissions) would be discriminatory in the aggregate, those acts fall within the scope of the risk of the employer paying employees with tips or commissions, so the customers' acts are not superseding acts that eliminate the employer's liability.[217]

Finally, employers would not be able to entirely dodge liability as Wal-Mart did in *Dukes* (i.e., by allowing local managers discretion over pay matters such that any disparate impact arising in the aggregate as a result of local decisions cannot be attributed to Wal-Mart writ large). A local manager who maintains a facially neutral policy like tipping or commissions can still trigger liability for the localized disparate impact that it causes because the local manager acted. Accordingly, whereas an employer

213. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

214. *See* Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011). *Staub*'s proximate causation standard should apply to Title VII. *See also Id.* at 417; Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 272 (2d Cir. 2016) (collecting cases applying *Staub* to Title VII).

215. REST. (THIRD) OF TORTS, § 29(d) (2009).

216. *Supra* Section I.B.1.

217. REST. (THIRD) OF TORTS, § 34(d), (e), (g).

allowing local discretion over pay matters avoids a national lawsuit, local policies causing disparate impact remain subject to Title VII scrutiny if those policies evidence action. In such cases, the claim survives; its locus narrows. Practically, this approach may make it much more difficult for an aggrieved person to evidence disparate impact because smaller numbers tend to yield less conclusive statistical results, and statistical evidence of disparate pay likely would be a precondition to such a claim's viability. On the other hand, it might be easier for an aggrieved person to marshal statistical evidence of localized disparate impact given the smaller sample size needed to be representative of the population affected by the policy. Regardless of these practical considerations, a Title VII disparate impact claim remains cognizable so long as an agent of the employer acts and that action causes adverse effects based on, inter alia, race or sex.

Therefore, I contend that employees subject to tipping or commission schemes can, but will not always, demonstrate a prima facie case of disparate impact under Title VII because those pay schemes typically reflect employer actions and can cause race- and/or sex-based disparate impact. Indeed, the FLSA countenances tipping and commissions,[218] and I am not suggesting that Title VII rendered moot those parts of the FLSA. Employers are not *per se* liable for maintaining tipping or commission schemes because policies must actually cause disparate impact to trigger a prima facie case. If discriminatory customer preferences fail to manifest in employees' wages, the employer cannot be liable. To that end, perhaps these customers are not biased, or perhaps some customers tip black waiters less than white waiters, but those tips are counteracted by other customers tipping black waiters more than white waiters. In either case, pay would not diverge statistically based on race, so the employer would not violate Title VII.

As another example, customer preference-based pay schemes might impose no disparate impact where the suspect classification is hidden to customers, as in some instances of religious differences between employees. To that end, tips earned by Catholic employees are not likely to differ materially from tips earned by Protestant employees based on religion because customers likely cannot tell the difference from the limited-in-time interactions that sitting at a restaurant or greeting a bellhop entail. That is not to suggest that such differences always escape recognition by customers (e.g., a beautician may disclose her religion to customers in conversation, a parking attendant may wear a yarmulke which implies his religion), but rather to explain that disparate impact likely will not occur

218. 29 U.S.C. §§ 203(m)(2), 207(i) (2018); 29 C.F.R. §§ 531.50–531.60, 778.117–778.122; *see also* Fair Labor Standards Amendments of 1966, *supra* note 30.

when employee differences are unknown to the customer. Similarly, some tipped or commissioned employees may be practically invisible to customers (e.g., tipping an unseen food delivery courier who leaves the delivery at your door to maintain social distance during a pandemic, purchasing goods online from commissioned employees known only by their avatar or screenname), meaning pay disparities based on customer preferences would be rare. Yet, because a prima facie case can result from such pay schemes, we must consider possible defenses.

2. Business Necessity

Tipping and commissions certainly appear to be job-related (i.e., tips and commissions incentivize performance,[219] tips please customers[220]), but are they a business necessity? The answer depends on jurisdiction given that the Supreme Court has not clarified what business necessity means.[221] In the Eleventh Circuit, for instance, "'business necessity' really means 'necessity'" in the literal sense:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with less differential racial impact.[222]

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219. *Supra* notes 51–53 & accompanying text; *see also* Catalina Amuedo-Dorantes & Traci Mach, *Performance Pay and Fringe Benefits: Work Incentives or Compensating Wage Differentials?*, 24 INT'L J. MANPOWER 671, 671 (2003); Thomas Lemieux, W. Bentley MacLeod & Daniel Parent, *Performance Pay and Wage Inequality*, 124 Q. J. ECON. 1, 1 (2009).

220. *See supra* note 51.

221. *Compare* Ricci v. DeStefano, 557 U.S. 557, 587–89 (2009) ("the examinations were . . . consistent with business necessity"), *with id.* at 636 (arguing that the majority "simply shuts from its sight the formidable obstacles" that the employer would have had in proving business necessity) (Ginsburg, J., dissenting).

222. Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995) (quotations and citations omitted), *aff'd*, 85 F.3d 643 (11th Cir. 1996).

The Third and Eighth Circuits agree.[223] Under such a strict standard, many employers maintaining tips and commissions would not qualify for the business necessity defense for two reasons. First, as the evidence in Section II.B.2. shows, some employers likely would be unable to demonstrate literal business necessity for such pay schemes because similar employers have succeeded without them. This is especially true given that, after the 1991 Act, the employer has the burden of proving business necessity.[224]

Indeed, neither of the ostensibly job-related rationales for tipping and commissions (i.e., improving performance, pleasing customers) are literal business necessities. Foremost, using tipping or commissions to improve performance from good to better or incrementally improve customers' experience "to extract supra-competitive profits" (i.e., wage gouging) should not be considered a business necessity, and doing so makes the pay scheme appear less "job-related," as Title VII requires, and more related to seizing market power.[225] Yet, improving performance or customer appeal "from a sub-competitive position to the competitive level of zero economic profits" should qualify as a business necessity, and the absence of wage gouging to outperform competitors mitigates the concern that the pay scheme may not be job-related.[226] Accordingly, to prove this defense, employers should be required to prove that they would be sub-competitive without the performance boost and/or customer appeal of tips or commissions; query how many employers would know, admit, and endeavor to prove as much.

Furthermore, employers would need to introduce evidence that mooring pay to customer preferences improves employees' performance and customers' experience (e.g., testimony from employees, customers, and experts). In response, plaintiffs likely would introduce employees' testimony that tips or commissions do not incentivize better performance because earnings seem arbitrary or biased, as well as customers' testimony that tips do not improve customer experience because they tip neither to show off nor to help employees, but rather to attempt to incentivize performance. Faced with a genuine dispute over an issue of material fact,

223. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242 (3d Cir. 2007); Bradley v. Pizzaco of Neb., 7 F.3d 795, 797–99 (8th Cir. 1993).

224. *Supra* note 174.

225. *See* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669, 669, 685 (2007).

226. *Id.* at 672, 85.

the party carrying the burden of proof (i.e., the employer) is more likely to lose. In rare cases, employers may be able to show that a policy change (e.g., reverting back to allowing tips after prohibiting them) saved the business from impending failure. However, absent such stark evidence, there most likely is no literal business necessity for tipping or commissions in most cases.

However, employers would fare much better in the First Circuit, where business necessity means "reasonably necessary to achieve an important business objective,"[227] or in the Northern District of California where business necessity requires the employer to "demonstrate that the employment practice significantly serves legitimate employment goals" but need not "show that those employment goals 'require' the employment practice."[228] Encouraging good performance and pleasing customers appear to be important business objectives and legitimate goals, but are tips and commissions reasonably necessary to achieve them? Do they significantly serve those ends? To put it differently, can employers prove that "the challenged practice . . . *effectively* carr[ies] out the business purpose it is alleged to serve," as the Eleventh Circuit asks?[229] Such fact-specific inquiries call for employers to introduce statistical and/or anecdotal evidence that tipping or commissions have a reasonable or significant nexus to achieving these ends. No court has considered this issue, but I suspect that employers would be able to carry such a relatively light burden.

At a minimum, Congress or the Supreme Court should resolve this circuit split. Further, I contend that the *Griggs*-era literal business necessity test comports with the text of the 1991 Act because "necessity" is the state of being "absolutely needed"[230] and achieves the optimal balance between employees' rights and employers' obligations. Title VII could bar any disparate impact, business goals notwithstanding, or it could permit disparate impact and prohibit only disparate treatment, but the Supreme Court and Congress adopted a moderate middle ground instead. The lax business necessity standards of the First Circuit and the Northern District

227. Donnelly v. R.I. Bd. of Governors for Higher Educ., 929 F. Supp. 593, 593 (D.R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997).

228. Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 322 (N.D. Cal. 1992).

229. Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995) (emphasis added), *aff'd*, 85 F.3d 643 (11th Cir. 1996).

230. *Necessity,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/necessity [https://perma.cc/R6PH-PKQK]; *Necessary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/necessary [https://perma.cc/AY8V-TEPU].

of California tip the scales too far in favor of employers who can get away with discriminatory policies as long as those policies have some relationship to the employers' stated business goals. The Eleventh Circuit got it right by holding that necessity means necessity; other courts should follow suit.

Finally, even if an employer proves business necessity under any standard, employees nevertheless can establish liability by "showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs."[231] Pooling or sharing tips or commissions would blunt discriminatory pay disparities, if not purge them entirely,[232] suggesting liability for employers who fail to implement such alternatives no matter the jurisdiction.

3. Alternate Defenses

Section 703(h) of Title VII offers defenses to employers who "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 of production" when those differences would otherwise result in Title VII liability, so long as the differences do not stem from an intent to unlawfully discriminate.[233] Analyses of these defenses in scholarship and litigation are exceedingly rare, but might they apply here?

Foremost, employers maintaining a facially-neutral, customer preference-based pay scheme are not applying "different standards of compensation" as seen in cases like *Bence* and *Hodgson*;[234] they are applying one standard of compensation to all employees. Therefore, the exemption for "different standards of compensation" in Section 703(h) would not apply. But what about the next clause in Section 703(h)? Many customer preference-based pay schemes cause employers to apply different terms and conditions of employment (i.e., pay) that, but for some defense, might result in disparate impact liability. Do such pay schemes qualify as any of the systems in Section 703(h) (e.g., a merit system, a production-based

231. Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii)).

232. Lane, *supra* note 211, at 76–77. For further discussion of tip pooling and sharing, see *infra* Section III.A.

233. 42 U.S.C. § 2000e-2(h) (2018).

234. *See supra* notes 136–137 and accompanying text.

earnings system) such that employers maintaining them are exempt from liability? To answer that question, we must ask: does "bona fide" apply to "merit system" and/or "a system which measures earnings by quantity or quality of production"? If so, what does "bona fide" mean? Are tipping or commissions "merit system[s]" or "system[s] which measure[] earnings by quantity or quality of production"?

First, notice that "bona fide" immediately precedes "seniority [system]," but not "merit system" or "a system which measures earnings by quantity or quality of production." Therefore, we must first ask whether "bona fide" modifies only the term that it immediately precedes or subsequent terms, too. This issue is paramount because tips and commissions are not seniority systems, but colloquially they might be considered merit systems or systems measuring earnings by production quantity or quality. Two canons of statutory interpretation are helpful here. On one hand, when terms are in parallel construction, the series-qualifier canon applies a leading adjective like "bona fide" to all terms in parallel construction.[235] For example, "searches" and "seizures" appear in parallel in the Fourth Amendment, so "unreasonable," which immediately precedes only the word "searches," applies equally to the word "seizures," too.[236] A similar proposition is the nearest-reasonable-referent canon, which would not apply "bona fide" to terms not in parallel construction.[237] Hence, the question becomes: which terms in Section 703(h) are constructed in parallel with "seniority [system]"?

"[M]erit system" is in parallel because seniority system and merit system are constituted by combining one adjective and one noun and both terms precede the comma that separates "merit system" and "a system which measures the earnings by quantity or quality of production." As such, "bona fide" must apply to "merit system."[238]

However, it is less clear whether "a system which measures the earnings by quantity or quality of production" is in parallel with seniority system and merit system. On one hand, no one-word adjective could

235. *Series-Qualifier Canon*, BLACK'S LAW DICTIONARY 1574 (10th ed. 2014).

236. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012).

237. *See id.* at 152.

238. *Cf.* Calibuso v. Bank of Am. Corp., 893 F. Supp. 2d 374, 393 (E.D.N.Y. 2012) (presuming without analysis that "bona fide" applies to "merit system"); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 910 n.28 (C.D. Cal. 1976) (same), *modified on other grounds* No. 74-767-F, 1976 WL 13332 (C.D. Cal. July 6, 1976).

precede "system" and connote "a system which measures the earnings by quantity or quality of production," meaning that long phrase is constructed as in parallel with "seniority [system]" and "merit system" as the English language allows. Furthermore, there is no practical distinction between these three systems in the workplace to justify applying "bona fide" only to some. On the other hand, the Seventh Circuit in *McReynolds II* found the comma between "merit system" and "a system which measures the earnings by quantity or quality of production" to fatally preclude applying "bona fide" to the latter,[239] although I find that argument unconvincing because the comma is grammatically appropriate.[240] An impermissible comma might suggest some congressional intent to sever parallelism between the terms before and after it, but the permissible use of a comma in a list does little if anything to suggest whether the terms before and after it are in parallel.

Far more damning is the placement of the article "a." Section 703(h) does not follow the pattern: article, adjective, noun, noun, noun (e.g., "a bona fide seniority or merit system, or system which measures the earnings by quantity or quality of production"), in which case one could argue that the adjective "bona fide" should apply to all three nouns based on their parallel construction. Rather, Section 703(h) follows the pattern: article, adjective, noun, noun, *second article*, noun (i.e., "a bona fide seniority or merit system, or *a* system which measures the earnings by quantity or quality of production"). The second "a" breaks the connection between the adjective, "bona fide," and the third noun, "system which measures the earnings by quantity or quality of production," strongly implying that this final noun is not in parallel with the first two.[241] Thus, I contend that "bona fide" applies to "merit system", but likely does not apply to "a system which measures the earnings by quantity or quality of production."

Assuming those propositions to be true, what does "bona fide" mean as applied to "merit system" in Section 703(h)? The Supreme Court in *International Brotherhood of Teamsters v. United States*, grappling with the narrow issue of whether a seniority system that predated Title VII was "bona fide" given the disparate impact it caused after Title VII went into

239. McReynolds v. Merrill Lynch (*McReynolds II*), 694 F.3d 873, 883 (7th Cir. 2012).

240. *See* Catherine Traffis, *When to Use a Comma Before "Or"*, GRAMMARLY BLOG (2021), https://www.grammarly.com/blog/comma-before-or [https://perma.cc/76ZA-FV2V].

241. *See Articles*, GRAMMARLY BLOG (2021), https://www.grammarly.com/blog/articles [https://perma.cc/4527-SUXN] ("The usual word order is article + adjective + noun.").

effect, defined a bona fide seniority system as one that is not only facially-neutral, but also does not "have its genesis in racial discrimination."[242] Since *Teamsters*, however, courts considering policies and practices that began after Title VII's effective date have defined "bona fide" in varied ways. For example, the Central District of California held that "a system which relies on discriminatory devices *not based on a business necessity* is not a bona fide merit system."[243] The Eastern District of New York similarly found that a pay scheme "is not protected under Section 703(h) unless it actually measures what it purports to measure."[244] Finally, although the Seventh Circuit in *McReynolds II* concluded that "bona fide" did not apply to "a system which measures the earnings by quantity or quality of production," it went on to state, in dicta, that the concept of bona fide "is inherently built into what it means for a system to measure quantity or quality of production,"[245] suggesting that the court might similarly rule that "bona fide" is inherently built into what it means for a system to be based on merit.

Given these various interpretations of "bona fide," what does it mean when applied to tipping or commission policies? In light of the statutory construction canon that, "[i]f possible, every word and every provision is to be given effect,"[246] I contend that "bona fide" should be given some meaning independent of the term that it modifies, if possible, thereby discounting the Seventh Circuit's holding. Beyond that, *Teamsters* should be afforded due weight; any policy or practice having its genesis in discrimination cannot be bona fide. Consider that holding in light of the legal history presented in Section II.A that the root of tipping in America was racist (e.g., postbellum employers wanting to deny paying wages to former slaves). At first blush, one might argue that modern tipping policies are not bona fide because their genesis was discriminatory. However, I think such an argument misconstrues *Teamsters*. The point of the "genesis in racial discrimination" holding in *Teamsters* was to root out pre-Title VII disparate treatment that, post-Title VII, masquerades as facial neutrality while causing intended disparate impact. Applied here, ample race-based disparate treatment existed in postbellum America, including employers disparately treating African-Americans by relegating them to tipped jobs to deny them wages

242. 431 U.S. 324, 356 (1977).

243. *League of United Latin Am. Citizens*, 410 F. Supp. at 910 n.28 (emphasis added).

244. Calibuso v. Bank of Am. Corp., 893 F. Supp. 2d 374, 393 (E.D.N.Y. 2012).

245. McReynolds v. Merrill Lynch (*McReynolds II*), 694 F.3d 873, 883 (7th Cir. 2012).

246. SCALIA & GARNER, *supra* note 236, at 174.

based on race, but such treatment was never intended to cause the sort of disparate impact that tipping causes today.[247] No evidence suggests that employers in the late Nineteenth Century intended for customers to tip African-American employees less than white employees; at the time, tipped jobs were predominantly held by African Americans, so the idea of tipping white employees anything, let alone less than African-American employees based on race, does not materially appear in the historical evidence of how tipping originated in America. Accordingly, I contend that the *Teamsters* holding likely is inapposite.

Therefore, we are left only with cases interpreting "bona fide" as requiring proof that the system is a business necessity. These cases give me pause because, absent textual context, "bona fide" means "made in good faith without fraud or deceit," "made with earnest intent," "neither specious nor counterfeit," or "genuine."[248] No definition says "bona fide" means "necessary for business." However, in context, interpreting "bona fide" as requiring business necessity makes more sense than any alternative. One could think of a business necessity as something needed, something not extraneous, something that the employer would genuinely or earnestly use, as opposed to a specious or counterfeit claim of necessity that serves as pretext for an alternative motive. Seeing no better alternative, I contend that an employer seeking to defend a seniority or merit system causing disparate impact by invoking Section 703(h) must show that the system is a business necessity.

However, construing "bona fide" in Section 703(h) as requiring proof of *literal* business necessity would render the words "seniority or merit" (i.e., the varieties of systems) irrelevant. In other words, if Section 703(h) requires that an employer prove a literal business necessity, such a strict standard would meet any business necessity standard under Section 703(k), and no employer would need to prove that the policy or practice also qualifies as one of the varieties of systems in Section 703(h). The words "seniority or merit" in Section 703(h) would be useless despite the cannon that every provision of a law should be given effect, if possible. Title VII ostensibly places us between a rock and a hard place: read "bona fide" out of the statute (i.e., as the Seventh Circuit appears to have done in *McReynolds II*), or read "seniority or merit" out of the statute (i.e., interpreting "bona fide" as requiring literal business necessity).

Despite the seeming impasse, a middle ground can give effect to every provision of Title VII by interpreting "bona fide" in Section 703(h) as

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247. *See supra* notes 29–31 and accompanying text.

248. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 140 (11th ed. 2004).

requiring one of the lax business necessity standards. As used in Section 703(h), "bona fide" should mean a system that is "reasonably necessary to achieve an important business objective" or that "significantly serves legitimate employment goals."[249] Hence, if an employer can meet this lower threshold and prove that the policy or practice is a seniority or merit system, the employer qualifies for a Section 703(h) defense and not the business necessity defense. Concomitantly, if an employer can meet the strict business necessity standard but cannot show that the policy or practice is such a system, the employer qualifies for the business necessity defense and not a Section 703(h) defense. We can harmonize Title VII's defenses in this manner. Furthermore, reading Section 703(h) in this way underscores the need to interpret Section 703(k) literally; unless Section 703(k) requires literal business necessity, we must read "bona fide" out of Section 703(h). Applied here, I suspect that at least some employers would be able to carry the far lighter burden of showing that tipping or commissions are reasonably necessary to achieve an important business objective or significantly serve legitimate employment goals, suggesting that the focus should be on the final inquiry—viz., whether such pay schemes are "[bona fide] merit system[s]" or "system[s] which measure[] earnings by quantity or quality of production."

The Supreme Court has only grappled with seniority systems under Section 703(h), not merit systems.[250] However, the Fourth Circuit has considered the meaning of a "merit system," holding that "a merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."[251] Applying that standard, tipping is unbounded by an "organized and structured procedure" because, if disparate impact exists at all, it is because the employer gave customers discretion regarding whether and how much to tip. Furthermore, customers may evaluate employees in a "systematic" fashion, but I have never seen employers provide customers with predetermined criteria to guide or shape how they should tip. At most, I have seen guidance like "20% tip recommended for good service" on menus and bills without any structure or predetermined criteria defining what constitutes "good service." This lack of structure suggests that tipping is not a merit system. However, employers theoretically could give customers

249. *See supra* notes 227–228 and accompanying text.

250. *See, e.g.*, Am. Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

251. Equal Emp. Opportunity Comm'n v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980) (internal quotation marks omitted).

predetermined criteria to structure their tipping in such a way that a reasonable factfinder could find it to be a merit system under the Fourth Circuit's standard (e.g., "20% tip recommended for servers who arrive at your table within 5 minutes of sitting, check on you every 15 minutes, promptly respond to reasonable questions and complaints, and project a professional demeanor at all times by smiling and speaking in a respectful tone"), so long as the employer can show that customers actually follow such guidelines. However, I find the likelihood of such guidelines being used and the possibility of evidence of their efficacy to be highly unlikely, suggesting that tipping as we know it is not a merit system. More significantly, I find it impossible to argue that tips are based on employees' merit when data shows that service quality typically accounts for no more than four or five percent of tip differences.[252]

In contrast, no empirical data suggests what percent of a sale generating a commission is based on the seller's merit. Yet, we do know that sales commission plans tend to be organized, structured, subject to systematic evaluation, and reliant on predetermined criteria. However, they offer no organization or structure for customers deciding whether to purchase something. How could they? I cannot fathom how employers could give customers meaningful, facially-neutral guidelines to shape purchasing decisions (e.g., "You should buy this product if the salesperson acts in the following way . . ."). Under a commission plan, employees necessarily will be paid based on a combination of undeterminable criteria (i.e., goings on inside customers' minds) and determinable criteria (i.e., how much commission the employee earns for making sales). The question for a court is whether such a pay scheme is a system based on "merit." In my view, it is not because of the probable inability of employers being able to prove that customers materially relied on commissioned employees' merit when choosing whether to buy something.

Turning to the final defense under Section 703(h), the phrase "a system which measures earnings by quantity or quality of production" was borrowed from the EPA,[253] but neither the Supreme Court nor the legislative history of the EPA or Title VII provide relevant guidance on what it means. Few courts have considered the phrase, but the Seventh Circuit in *McReynolds II* held that a commission plan that allocated "production

252. *See supra* note 52 and accompanying text.

253. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellants and Reversal, McReynolds v. Merrill Lynch (*McReynolds II),* 694 F.3d 873 (7th Cir. 2012), 2011 WL 3283754, at *7 n.3 [hereinafter EEOC Brief in *McReynolds II*].

credits" was such a system.[254] However, the court appears to have reached its conclusion based on a misunderstanding of piecework pay. Plaintiffs in *McReynolds II*, joined by the EEOC as amicus curiae, contended that Section 703(h) applies "only to 'piecework' production systems, like the manufacture of physical products on an assembly line, and not the sort of financial-asset production-credit system at issue here."[255] The panel rejected that argument, finding that the word "quality" in Section 703(h) "plainly expands the reach of § 703(h) beyond quantity-based piecework compensation systems."[256] That holding is unjustified because, with piecework, "workers' pay is based simply on the quantity *and quality* of their output,"[257] even if "the piece-work payment encourages the employee to maximize the quantity of output by sacrificing the quality."[258] Finally, despite the Seventh Circuit relying, in part, on Merrill Lynch's labeling the results of sales "production credits," labels can mislead and should be rejected if they fail to accurately describe something.[259]

In *Bence*, the Sixth Circuit reached a similar conclusion in the context of a commission scheme that offered employees more commissions for sales of gym memberships for men (which were only sold by male employees) than sales of gym memberships for women (which were only sold by female employees).[260] Analyzing former female employees' EPA disparate treatment challenge to the commission structure, the court held that the production-based earnings systems defense was inapplicable not because commissions were based on the production of intangible things (i.e., sales), but because the lawsuit challenged facially-different commission rates; under the court's logic, had the commission structure applied equal

254. *McReynolds II*, 694 F.3d at 880–84.

255. *Id.* at 882; *accord* EEOC Brief in *McReynolds II*, *supra* note 253, at *7 n.3.

256. *McReynolds II*, 694 F.3d at 882.

257. Lester Picker, *The Decline of "Piece Rate" Compensation in Manufacturing*, NBER DIG. 2 (May 2011) (emphasis added), https://www.nber.org/sites/default/files/2019-08/may11.pdf [https://perma.cc/7GDJ-NDFW].

258. Mark Casson, THE FIRM AND THE MARKET: STUDIES ON MULTINATIONAL ENTERPRISE AND THE SCOPE OF THE FIRM 167 (1987).

259. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563–65 (2012) (holding that payment was a tax despite statute labeling it a "penalty").

260. Bence v. Detroit Health Corp., 712 F.2d 1024, 1026 (6th Cir. 1983).

commission rates to women and men, but nevertheless caused a disparate impact, it would have qualified for the defense.[261]

However, construing a commission scheme as "a system which measures earnings by quantity or quality of production" belies the optimal reading of Section 703(h). "Production" means "something produced," as in a "product," and, as relevant here, to "produce" means "to cause to have existence or to happen," to "bring about," "to give being, form, or shape to," or to "make" or "manufacture."[262] In one sense, a salesperson produces a sale by causing it to happen or bringing it about, but she or he does not make or manufacture anything. In fact, I cannot imagine an occupation where the employee does not cause something to happen. A litigator produces an argument by giving it form. A travel agent produces a planned vacation by causing it to happen. A manager produces a shift schedule by making it. If "production" in Section 703(h) simply means causing anything tangible or intangible to happen, then every job that I can imagine is compensated by some system that "measures earnings by quantity or quality of production" because all employees are paid based on their ability to cause things to happen. To that end, the litigator's salary, the travel agent's hourly wage rate, and the manager's bonus are functions of how well they produce results. Section 703(h) should not be interpreted such that it insulates potentially all pay schemes from disparate impact liability when such a monumental exemption merits explicit statutory language. Finally, the genesis of the Section 703(h) defense in the EPA suggests that Congress's intent was to exempt employers from liability under Title VII if physical differences between women and men affect the quality and quantity of things they produce (e.g., in a piecework-based pay scheme), but not to exempt employers from liability when customer preference-based pay schemes unrelated to physical differences cause disparate impact.

Alternatively, Section 703(h) should be interpreted such that "production" means creating something tangible. Under that reasonable reading, piecework rightly would be exempted from causing disparate impact when one employee on a *production* line (an apt name) earns more than another because she or he manufactures more and/or higher-quality, tangible widgets than her or his coworkers. Supporting that conclusion, the relatively scant scholarship on Section 703(h) often references "a system which measures earnings by quantity or quality of production" as a

261. *Id.* at 1029.

262. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 991 (11th ed. 2004).

"piecework" system.[263] In contrast, a commission scheme does not measure earnings by quantity or quality of production because the thing produced (i.e., a sale) is intangible. Similarly, tipping does not measure earnings by quantity or quality of production because the thing produced (e.g., a good customer experience) is intangible. If Section 703(h) had insulated from liability systems that measure earnings only by quantity, then perhaps commissions based on producing tangible and/or intangible things (e.g., a widget maker paid piecemeal for each widget produced, a nurse paid a commission for seeing each patient) would satisfy the defense because that interpretation would not have the absurd effect of insulating nearly all pay schemes from liability. But Section 703(h) does not say that; it insulates from liability systems that measure earnings by quantity *or quality*. To avoid absurd conclusions without jettisoning the text entirely, Section 703(h) should be interpreted to exclude systems that measure earnings based on producing intangible things.

Therefore, I find it unlikely that an employer would be able to defend against a tipping or commission pay scheme by invoking Section 703(h). Setting aside the application and meaning of the term "bona fide," it is unlikely that tipping or commission schemes would constitute merit systems because customers do not evaluate employees' merit per structured, predetermined criteria. It is also unlikely that tipping or commission schemes are production-based earnings systems because they do not measure the production of tangible things.

III. Non-Litigation Alternatives

In this Part, I consider two means of achieving substantive pay equality outside of litigation when disparate impact does occur: 1) reforms managed by the employer that caused the disparate impact, and 2) external reforms. Pursuing these strategies would bypass the need for litigation by mitigating against or even eliminating the disparate impact wrought by tipping and commissions before workers see that impact reflected on their paychecks.

263. *See, e.g.*, Sean Connelly, County of Washington v. Gunther*: The Supreme Court Provides a Title VII Remedy for Victims of Intentional Sex-Based Wage Discrimination*, 31 CATH. U. L. REV. 123, 124 & n.1 (1981); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 229 n.75 (2001); *see also* Jeffrey A. Blevins, *In Pursuit of Wages Based on Job Value* – Gunther v. County of Washington, 29 DEPAUL L. REV. 907, 911 (1980) (interpreting the same language from the EPA).

A. Employer-Managed Reforms

Consider a restaurant owner who notices that, in a calendar year, her bartenders of color earned an average of $15,000 in tips whereas her white bartenders earned an average of $20,000 in tips. What can she do to avoid disparate impact liability? One solution is tip pooling where she requires tipped employees to pool all or part of their tips and split them with other employees after each shift.[264] A similar concept exists vis-à-vis commissions when sales teams equally split sales proceeds, although the phrase "commission pooling" is uncommon. Theoretically, pooling and redistributing tips or commissions would eventually eradicate disparate impact because the process would eliminate individualized earnings differences. However, no research assesses the mitigating effects of tip (or commission) pooling or sharing on earning disparities to confirm that hypothesis. Furthermore, tip pools on shifts with more bartenders of color are likely to sum to lesser totals than tip pools on shifts with more white bartenders, likely resulting in long-term, persistent, race-based tip differentials.

Alternatively, the restaurant owner could mandate fixed tip amounts or eliminate tipping and pay employees a salary or hourly wage rate, as could an employer maintaining a commission sales plan, thus restricting customer discretion. In such cases, the employer would have imposed a pay scheme that eludes customer discretion and disparate impact, although it would subject the employer to potential disparate treatment claims depending on how the employer sets salaries or hourly wage rates between employees.

Finally, there is an alternative that may allow employers to maintain customer-preference based pay schemes that cause disparate impact without risking Title VII liability. Recall that, in *Ricci*, an employer imposed a facially-neutral policy that caused disparate impact.[265] The same could be

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264. Employer-mandated tip pooling and employee-driven tip sharing, the latter of which is discussed *infra* in Section IV.B, are lawful only if the employer does not use a tip credit to pay a sub-minimum wage. *See Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs15.pdf [https://perma.cc/YXU4-Z7CF] (last visited Dec. 29, 2020). For recent developments on which employees can receive payouts from employer-mandated tip pools, see *U.S. Department of Labor Issues Final Rule to Amend Tipped Employee Regulations*, U.S. DEP'T OF LAB. (Dec. 22, 2020), https://www.dol.gov/newsroom/releases/whd/whd20201222-3 [https://perma.cc/6XEW-8RQ4].

265. Ricci v. DeStefano, 557 U.S. 557, 563–74 (2009).

said of some employers that maintain tipping and commission schemes. Then, in *Ricci*, to avoid a perceived risk of disparate impact liability, the employer engaged in disparate treatment.[266] The Supreme Court had no quarrel with the employer's intent to nullify, via disparate treatment, the disparate impact that it had caused; rather, the *Ricci* majority merely condemned the employer acting without a strong basis in evidence that disparate impact liability would have resulted otherwise.[267] Well, what if a strong basis in evidence exists?

What if a restaurant that facilitates tipping sees that black servers earn less in tips than white servers because of race (i.e., a strong basis in evidence of a prima facie case of disparate impact); some of the restaurant's competitors have succeeded after prohibiting tips (i.e., a strong basis in evidence for a lack of business necessity for tipping); and the restaurant could pool tips or pay servers a set wage rate (i.e., a strong basis in evidence of less-discriminatory alternatives than tipping)? I contend that *Ricci* allows that restaurant to engage in disparate treatment to nullify the disparate impact that it created in the first place. Hence, the restaurant could bridge the pay gap by paying only black servers extra (e.g., this week, the average tips earned by white servers exceeded that of black servers by $X, so we are paying all black servers $X more this week to offset customer biases and negate the pay disparity) or by offering only black servers preferential shifts or tables. Just like the white employees harmed by the employer revoking the test results in *Ricci*, white servers harmed by not receiving extra pay or preferential treatment could sue the restaurant under a disparate treatment theory, but here their employer cleared the strong-basis-in-evidence hurdles established by *Ricci* that allow disparate treatment, so such a claim should fail.

However, such a "*Ricci* offset" would be administratively difficult for employers to effectuate, create morale problems amongst white servers, incentivize underperformance in servers of color, and likely engender a public relations storm that employers may want to avoid more than disparate impact liability. On the first point, not all employers track employees' self-identified races and sexes,[268] and those that do are forced to slot employees into rigid categories that may not match employees' actual identities (i.e., only one of seven races/ethnicities, one of the binary sexes), all of which makes race- and sex-based preferential treatment

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266. *Id.* at 574–75.

267. *Id.* at 563.

268. *Cf.* 29 C.F.R. § 1602.7 (requiring employers with at least 100 employees to annually file a form identifying employees' races and sexes).

difficult. On the second point, white servers are likely to feel jealous, angry, or dejected that they were excluded from the *Ricci* offset solely because of their race. Such feelings make performance and retention difficult for employers and, accordingly, may cost employers more in the long run than disparate impact liability. On the third point, a *Ricci* offset would eliminate the pay incentive for servers of color to perform at their peak to earn more tips if they expect their employer to gross them up to earn what white servers earn regardless. As a possible rejoinder, employers generally retain the right to terminate employees, including underperforming servers, at will, so employers could discipline or terminate underperforming servers. However, one could imagine servers walking a fine line—performing well enough to evade discipline or termination, but not performing as hard as they would have had they not expected a *Ricci* offset. In summary, this alternative to liability appears rife with costs and risks for employers. Additionally, it remains untested in litigation. Thus, while I stand by its theoretical viability, I recognize that the shifting sands around disparate impact law make this a tenuous alternative in reality and one that this Supreme Court may not embrace.

Finally, studies have found that customer-preference based pay schemes help close the male-female wage gap in salaried and hourly jobs because "[o]utput-based pay schemes provide more objective information on productivity than do typical supervisory evaluations."[269] In other words, the male-female wage gap exists largely due to a combination of employers relying on market factors in setting pay and employers' disparate treatment (e.g., bias that men perform better than women). Incorporating the feedback of third parties, such as customers, however biased, may actually allow employers to close wage gaps borne, in part, of sexist stereotypes by enabling employers to consult, and make informed decisions based off of, aggregate customer feedback. For example, a female employee paid with a base salary plus commissions on sales might earn more of a performance-based raise in her base salary than she otherwise would have by pointing out how much she earned in commissions—a proxy for her above average performance. Absent such data, her employer would have been more likely to rely on its subjective stereotype that women underperform men.

Ironically, however, leveraging output-based pay schemes to close wage gaps would not relieve employers of any Title VII liability arising out of

269. John S. Heywood & Patrick O'Halloran, *Racial Earnings Differentials and Performance Pay*, 40 J. HUM. RES. 435, 449 (2005); *see also* Tony Fang & John S. Heywood, *Output Pay and Ethnic Wage Differentials: Canadian Evidence*, 45 INDUS. RELS. 173, 192 (2006).

those pay schemes. For example, assume that an employer pays employees a base salary plus commissions on sales and, on average, female sales agents earn a lesser salary than their male counterparts because the employer relied on patriarchal market forces to set salaries. Even if female sales agents earn salary raises faster than their male counterparts because the commission scheme demonstrates to their employer how well they perform with hard-and-fast numbers—thereby reducing the male-female wage gap—the employer could not lawfully maintain that commission scheme if it causes disparate impact (e.g., women earn less in commissions than men because of their sex), absent some defense or one of the non-litigation alternatives outlined above.

B. Law Reform and Social Justice

Law reform campaigns to eliminate tipping and/or the tip credit[270] also serve to combat the subjugation and discrimination of women and people of color highlighted by this Article.[271] Similar activism should attack commission-based sales plans for causing a similar discriminatory effect. If federal law reform were practical, I would advocate for statutorily defining customer preference-based pay schemes like tipping and commissions as examples of facially-neutral employment policies that can cause unlawful disparate impact. That way, the persons aggrieved by such policies would not need to force most employers into providing substantive pay equality through impact litigation. However, given the recalcitrance of recent Congresses vis-à-vis social justice, I am not placing much stock in legislative reform of Title VII.

Alternatively, activists should engage in social justice campaigns to stymie the demands for, and supply of, customer biases. To that end, activists should continue to try to persuade employers to abandon tipping and commissions because of, inter alia, the disparate impact that they can and often do cause (i.e., attacking *employers'* demand for customer preferences to serve a role in pay schemes). Similarly, activists should attempt to persuade tipped and commissioned employees to voluntarily share all or part of their tips or commissions with coworkers, thereby eliminating or at least lessening disparate impact (i.e., attacking *employees'*

270. *See, e.g.*, *supra* note 42; *About*, ONE FAIR WAGE (2020), https://onefairwage.com/about [https://perma.cc/G3L8-BKJG].

271. *See* Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html [https://perma.cc/8J8W-H5H6].

demand for customer preferences to serve a role in pay schemes). Finally, perhaps activists could attack the supply of customers' implicit biases as follows.

One contemporary strategy deployed in pursuit of pay equality has been forcing employers to be transparent about how much they pay women and men (e.g., the United Kingdom law mandating employers publicly report their gender pay gap,[272] efforts to add more-detailed pay disparity data to EEO-1 Reports[273] and reports to the U.S. Department of Labor's Office of Federal Contract Compliance Programs[274]) or, at least, prohibiting employers from chilling employee attempts to compare pay.[275] These efforts are motivated by a combination of facilitating employer self-reflection, shame, and competition: employers forced to reckon with sex-based pay gaps may address them when they may not have otherwise, publicizing pay gaps might shame employers into resolving them, and employers that publicize comparatively worse pay gaps may face more competition recruiting quality workers and business partners.

What if we could achieve that sort of self-reflection and shame vis-à-vis discriminatory tipping? For example, what if a mobile app allowed customers to track their tips alongside the perceived race and sex of the worker, calculated bias, and recommended to the customer how much to tip to begin to remedy that bias (e.g., "You appear to tip black workers 15% but white workers 17%, which is an 8.8% difference based on race. You can start to close this gap by tipping your next black worker 19%."). Customers with access to mobile apps might have the chance for self-reflection and the opportunity to expose and correct their supply of otherwise implicit biases.

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272. Liz Alderman, *Britain Aims to Close Gender Pay Gap with Transparency and Shame*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html [https://perma.cc/BM95-VADV].

273. Lisa Nagele-Piazza, *EEOC Reduces Employee Pay Data Requirements*, SOC'Y FOR HUM. RES. MGMT. (Sept. 11, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-should-review-eeo-1-guidance-before-pay-data-reporting-deadline.aspx [https://perma.cc/5VTR-4MFX].

274. Lisa Nagele-Piazza, *OFCCP Won't Review Federal Contractors' EEO-1 Pay Data*, SOC'Y FOR HUM. RES. MGMT. (Nov. 25, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ofccp-will-not-review-federal-contractor-eeo-1-pay-data.aspx [https://perma.cc/B47M-5R6J].

275. Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 587–96 (2020).

Were these results shareable and viewable by others, perhaps the fear or reality of public shame would compel some customers into more egalitarian tipping habits. However, self-reflection and remedial action would be dependent on customers' interest in curing implicit biases and access to a mobile app. Also, such a proposal would be unlikely to succeed regarding commissions because customer choices typically are binary (i.e., buy from this worker or don't), customers may not know whether that worker earns commissions based on sales, and customers generally do not know how much workers earn in commissions, meaning customers' opportunity to moderate their supply of bias would be limited. Nonetheless, further entrepreneurialism that strives to curb the pay disparities wrought by customer preferences should be pursued.

Conclusion

Substantive pay equality is essential. For too long, we have acquiesced in surface-level, formal workplace pay equality, brushing aside the underbelly of systemic subjugation and discrimination ushered in by customer preference-based pay schemes and acquiescing in the EEOC's dereliction when it comes to combatting those systemic problems. And, despite this Article's protracted argument, its basic premise is simple: employers should not take action that adversely affects workers based on race or sex unless doing so is absolutely necessary for business. Yet, in many cases, tips and commissions cause such adverse effects and are not absolute business necessities. In my view, that is enough for Title VII to provide a remedy.

To that end, further legal research may prove useful in achieving substantive pay equality, including research into the viability of litigation raising non-Title VII claims. On one hand, I doubt the benefit of research regarding Section 1981 or the EPA because the former does not embrace disparate impact liability[276] and the latter's "any other factor other than sex" defense[277] effectively precludes disparate impact claims against tipping and commission schemes because such policies likely can be justified by a reasonable, sex-neutral factor (i.e., tips and commissions incentivize

276. *See* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982).

277. 29 U.S.C. § 206(d)(1) (2018).

employee performance).[278] On the other hand, if future studies provide evidence of pay disparities in tipping or commissions on bases beyond those protected by Title VII (e.g., age, disability status), analyses may be warranted vis-à-vis the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA), both of which have vulnerabilities different from those in Title VII.[279] Additionally, analyses of state and municipal laws may be valuable, especially laws that apply standards different than those under Title VII.

Furthermore, might aggrieved workers have some common-law recourse by arguing that their employer is liable, vicariously or negligently, for putting them in harm's way, the harm being lower pay at the hands of customers? Case law has yet to describe discriminatory pay as a harm that can be remedied in tort, but the theoretical prospect has allure. Perhaps employees harmed by contractual pay schemes (e.g., some commission plans) could craft a claim that their employers breached the covenant of good faith and fair dealing stemming from that contract.[280] In another vein, could aggrieved workers target customers as defendants?[281] For example, could commissioned workers denied a commission because of their race argue that they would have been the third-party beneficiary of the putative contract between their employer and the customer and sue the customer for refusing to contract based on race? Section 1981, which embraces third-

278. Because incentivizing employee performance is reasonable, I decline to address the circuit split on whether unreasonable, sex-neutral factors qualify for this defense. *See* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 172–75 (2011).

279. The Age Discrimination in Employment Act's "reasonable factors other than age" defense, 29 U.S.C.§ 621(f)(1) (2018), presents hurdles similar to the EPA's "any other factor other than sex" defense. Americans with Disabilities Act disparate impact claims are relatively rare "because of the predominance of individual issues, such as the nature and extent of a plaintiff's disability and the cost of accommodations." George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2319 (2006).

280. To date, such claims have been narrowly construed in the context of employment contracts. *See, e.g.*, Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (1977).

281. *Cf.* Bartlett & Gulati, *supra* note 211.

party beneficiary claims,[282] could provide a basis for such a suit. However, such claims likely would be longshots given the difficulty in proving intentional customer bias, as required under Section 1981, and the lack of significant compensatory damages in many commission-related transactions.

Finally, might an employer contractually bound to maintain a customer preference-based pay scheme (e.g., in an employment contract, a collective bargaining agreement, or a policy or practice construed to be contractual) viably argue that courts should not enforce such a contract per *Shelley v. Kraemer*?[283] In *Shelley*, the Supreme Court held that the Equal Protection Clause barred judicial enforcement of racially-restrictive housing covenants between private parties.[284] Might *Shelley* be extended such that courts would refuse to enforce employment contracts that establish facially-neutral, customer preference-based pay schemes like tipping or commissions when they cause disparate impact? I doubt that *Shelley* extends beyond housing covenants,[285] and I suspect that *Washington v. Davis*[286] precludes extending *Shelley* to pay schemes causing disparate impact, but additional research into all of these potential causes of action is warranted.

To complete this conversation, we should also acknowledge some of the counterarguments that may be raised against eliminating or holistically reconceptualizing customer preference-based pay schemes, even though I contend that these negative repercussions are insufficiently weighty to justify maintaining most such schemes. Across several industries where employees expect tips or commissions, such a dramatic upheaval to the status quo could risk an exodus of talented workers and the demotivation of high-performing workers who may lack the incentives to optimally perform and serve customers. Additionally, it could risk disrupting economies of scale that are societally beneficial; a highly-commissioned real estate broker, for instance, may exit a brokerage firm and hang a shingle instead if commissions were eliminated or pooled. Conversely, it could exacerbate the free-rider problem for low-performing workers who, upon

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282. *See* Macedonia Church v. Lancaster Hotel Ltd. P'ship, 560 F. Supp. 2d 175, 180 (D. Conn. 2008).

283. 334 U.S. 1 (1948).

284. *Id.* at 20.

285. *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 480–83 (2007).

286. 426 U.S. 229, 239 (1976).

being guaranteed pay untethered to tips or commissions, may perform with less effort, thus lowering customer satisfaction and intensifying extant morale problems between high- and low-performing workers. Finally, ending or curbing customer preference-based pay schemes could eliminate an arguably valuable and measurable means of customer feedback, the lack of which could allow customer service problems to fester. Despite these potential repercussions, substantive pay equality remains a worthy aspiration, both on its own merit and because pay equity can help to eradicate racist and sexist power hierarchies in our workplaces.

In conclusion, tipping and commissions often result in employees earning less than their coworkers because of their race and/or sex. In many cases, employers acquiescing in such pay disparities maintain customer preference-based pay schemes despite them not being a business necessity. By refusing to undertake actions that could cure these pay disparities, employers' unjustifiable silence subjugates people of color and women and perpetuates discrimination against them. My hope is that the novel litigation strategy, as well as the non-litigation alternatives, outlined in this Article will provide workers, employers, activists, and the EEOC with ammunition to fight back against such harms and work toward the ultimate goal of substantive pay equality.