WAL-MART MATTERS

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INTRODUCTION

Assuming the empirical evidence supports the claim that Wal-Mart engaged in widespread pay and promotion discrimination against female employees, what could explain the persistence of such a practice in a company known for its devotion to efficiency principles? In answering this question, this Article builds on an earlier coauthored paper that created a model to demonstrate how employment discrimination could persist even in a highly competitive market.[1] That model debunks some economists' predictions about the low incidence of employment discrimination in functional markets.[2] In this Article, I add to the criticism of such sanguine predictions by analyzing a real-world example in which a seemingly competitive market allegedly allows discrimination to flourish. This Article suggests that the reasons why the market may have failed to eliminate sex discrimination at Wal-Mart are of both theoretical and practical importance. In other words, Wal-Mart matters.[3]

Wal-Mart is the largest private employer in the United States, with more than one million current employees.[4] Its employment practices directly affect over one percent of the American workforce.[5]

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1. *See* Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. CHI. L. REV. 797, 802–13 (2009).

2. *See, e.g.*, David Charny & G. Mitu Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 62–63 (1998).

3. Wal-Mart is the largest single domestic and global retailer. *See* Emek Basker, *The Causes and Consequences of Wal-Mart's Growth*, J. ECON. PERSP., Summer 2007, at 177, 177; Steve Burt & Leigh Sparks, *The Implications of Wal-Mart's Takeover of ASDA*, 33 ENV'T & PLAN. 1463, 1466 (2001).

4. *See* Marlon G. Boarnet et al., *Emerging Planning Challenges in Retail: The Case of Wal-Mart*, 71 J. AM. PLAN. ASS'N 433, 433 (2005).

5. This number includes current and past employees as well as rejected applicants. *See, e.g.*, Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL'Y J. 355, 386 (2006) ("Wal-Mart is the nation's largest private

Moreover, other retailers often strive to replicate Wal-Mart's practices, as it has seemingly perfected "the most efficient and profitable relationship between the technology of production, the organization of work, and the new shape of the market."[6] If employment discrimination is pervasive at Wal-Mart, it may thrive throughout the retail market.[7]

From a more theoretical perspective, if this Article accurately accounts for the coexistence of an aggressive pursuit of efficiency gains and pervasive sex discrimination, it poses a strong, real-world challenge to the notion that an unregulated market will eliminate discrimination in a timely or decisive manner. Of course, this case study is just one piece of evidence in a much larger body of literature about whether competitive markets drive out discrimination,[8] but given the size and importance of Wal-Mart, it is a particularly relevant one. In addition, as explained below, this study undermines the assumption that American markets are generally sufficiently competitive to quickly eliminate discrimination. Regardless of whether the Wal-Mart plaintiffs ultimately prevail in a lawsuit, this analysis of the retail labor market speaks to the justification for, if not the efficacy of, government regulation in this area.[9]

This Article first establishes Wal-Mart's seemingly high levels of corporate rationality as demonstrated by its disciplined efforts at achieving company-wide efficiencies and cost savings. It then explains that in addition to rational pursuit of efficiency gains, many Wal-Mart workers who make pay and promotion decisions may hold preexisting preferences for discrimination that corporate culture either reinforces or does little to counteract. Such preexisting preferences are not unique to Wal-Mart management,

employer, with a workforce representing almost 1 percent of total employment in the United States."). More specifically, Wal-Mart accounts for over eight percent of all domestic retail workers. Basker, *supra* note 3, at 178.

6. Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First Century Capitalism?*, NEW LAB. F., Spring 2005, at 21, 22.

7. This is not to suggest that every retailer mimics all Wal-Mart behavior; in fact, many actively seek to distinguish themselves from Wal-Mart. *See* Erin Johansson, *Checking Out: The Rise of Wal-Mart and the Fall of Middle Class Retailing Jobs*, 39 CONN. L. REV. 1461, 1488 (2007). Rather, I am just suggesting that in the absence of a class action lawsuit, a retailer might assume that Wal-Mart has the most cost-efficient pay and promotion policies and copy those policies without giving much thought to the possible sex discrimination that might ensue. For a further discussion, see Part II.B.

8. For a summary of this literature, see Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 692–93 & nn.8–12 (2007).

9. Such justifications are hardly academic. In May 2010, Rand Paul argued that Title VII ought not limit the ability of private employers to discriminate. *See* Ben Bratman, *Rand Paul and the Business of Discrimination*, JURIST F. (May 28, 2010), http://jurist.org/forum/2010/05/the-business-of-discrimination.php (noting that such views are no longer outside the mainstream).

but the coexistence of such preferences with an otherwise almost single-minded focus on price and related cost-cutting and efficiency-generating measures presents a puzzle. Economic intuition suggests that such a successful focus on efficiency would eliminate discrimination, but this Article demonstrates that discrimination could persist at Wal-Mart at the same time that the company relentlessly pursues efficiency. In particular, this Article reveals that Wal-Mart's decision to compete on price deemphasizes the importance of quality employees, particularly in lower-status positions.

This Article also contends that Wal-Mart's quasi-monopsonistic hiring power, its vigorous union-busting efforts, and its consumers' limited antidiscrimination preferences failed to drive discriminatory behavior out of the retail market. This account presents a direct challenge to those labor economists who suggest that one need not worry about the effects of monopsony on labor markets because "[e]mpirical support for the prevalence of monopsony . . . is limited."[10]

Of course, one could easily tell a behavioral law-and-economics story: Wal-Mart suffers from systematic cognitive biases that both account for the underlying discriminatory preferences and cause it to mistakenly believe, despite significant internal reports to the contrary, that it has no discrimination problem.[11] While such an

10. Glen G. Cain, *The Economic Analysis of Labor Market Discrimination: A Survey*, *in* 1 HANDBOOK OF LABOR ECONOMICS 693, 719 (Orley Ashenfelter & Richard Layard eds., 1986) (reaching this conclusion mainly "because a large fraction of the population lives in larger urban places and because the automobile has greatly expanded the geographic boundaries of the labor market"); *see also* Charles W. Baird, *Unions and Antitrust*, 21 J. LAB. RES. 585, 593 (2000) ("Today, technological progress in transportation and communication has eliminated monopsony power in almost all labor markets.").

11. For instance, under such an account, one might suggest that Wal-Mart decision makers suffered from confirmation bias. Once Wal-Mart executives formed either the belief that the company was not a pervasive discriminator or the belief that it need not address discrimination, executives may have been insufficiently attentive to new evidence contradicting their beliefs. *See* Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 26–28 (1998) (discussing studies suggesting that when people form opinions based on ambiguous evidence, they experience difficulty correctly assessing new evidence that contradicts their earlier formed opinions). Going a step further, as new evidence is provided, individuals may discard evidence that is contrary to their original opinion, but use supportive evidence that is no more probative to further strengthen their original beliefs. *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

Dealing with questions about large-scale institutional discrimination is likely to involve exactly the sort of ambiguous evidence that triggers confirmation bias. Various methodologies for identifying discrimination exist and may produce a mountain of information upon which people can disagree. Similarly, anecdotes of discrimination often raise he-said/she-said issues or account is interesting and in many ways consistent with my own, my approach provides the additional benefit of challenging the traditional law-and-economics account while accepting its assumption that companies such as Wal-Mart would behave as closely as possible to a perfectly rational actor. I also think my account is most consistent with Wal-Mart's general behavior, which shows it to be exceptionally good at predicting and weighing costs and benefits.

I. STRANGE BEDFELLOWS: EFFICIENCY AND EMPLOYMENT DISCRIMINATION

In 2010, the Ninth Circuit upheld the largest class certification ever granted for a sex-discrimination case, paving the way for over 1.5 million past and current female employees of Wal-Mart[12] to collectively pursue claims against the retail giant.[13] Before they can proceed as a class, however, they must wait for the Supreme Court, which recently granted certiorari on procedural questions relating to class certification.[14] Though the litigation itself presents interesting procedural and substantive questions that have sparked scholarly debate elsewhere,[15] I will presume the existence of pervasive pay and promotion discrimination[16] in order to ask a corollary question:

disputes over what counts as the same work or what motivated the decision maker. Thus, when executives were presented with numbers and data that suggested a wide-scale problem or individual acts of pay and promotion discrimination, Wal-Mart's upper management may have read ambiguous evidence in a way that confirmed their beliefs that Wal-Mart is a fair, good employer and that complainers are avaricious, malcontent whiners.

12. Mark Trumbull, *Wal-Mart Suit Shows Glass Ceiling Still an Issue*, CHRISTIAN SCI. MONITOR (Feb. 8, 2007), http://www.csmonitor.com/2007/0208/p01s02-ussc.html.

13. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *cert. granted*, 79 U.S.L.W. 3128 (Dec. 6, 2010) (No. 10-277).

14. More specifically, the Supreme Court granted certiorari on the questions of whether claims for monetary relief can be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure and whether the 23(b)(2) certification was consistent with Rule 23(a). Wal-Mart Stores, Inc. v. Dukes, 79 U.S.L.W. 3128 (Dec. 6, 2010) (No. 10-277).

15. *See, e.g.*, Elizabeth Chamblee Burch, *Introduction:* Dukes v. Wal-Mart Stores, Inc., 63 VAND. L. REV. EN BANC 91 (2010), http://www.vanderbiltlawreview.org/articles/2010/10/Burch-Introduction-to-Dukes-Roundtable-77-Vand.-L.-Rev.-En-Banc-10-2010.pdf; Gregory Mitchell, *Good Causes & Bad Science*, 63 VAND. L. REV. EN BANC 133 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Mitchell-Good-Causes-and-Bad-Science-63-Vand.-L.-Rev.-En-Banc-133-2010.pdf.

16. Such an assumption is a controversial one, but enough supporting scholarship justifies it as a reasonable possibility. *See, e.g.*, Ritu Bhatnagar, Dukes v. Wal-Mart *as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 248–51 (2004); Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 44–45 (2005). Of course, as a legal and even as a factual, nonlegal matter, this alleged discrimination may not have occurred. Wal-Mart

How could widespread sex discrimination emerge and persist in a company known for its relentless devotion to efficiency and cost minimization? The answer matters for employees, employment-discrimination scholars, and policymakers because it reveals something about the limitations of the market's ability to influence and correct for strongly entrenched corporate culture. Of course, the factual question of whether Wal-Mart discriminated is also an important one, but one this Article bypasses in order to explore the implications of such alleged discrimination.

This Part first establishes Wal-Mart's strong commitment to efficiency as a pathway to low prices and its overall success in fulfilling that commitment. Then I briefly describe the plaintiffs' allegations of discrimination along with their explanation of how Wal-Mart's organizational structure and corporate culture allowed such discrimination to flourish. While the *Dukes v. Wal-Mart* plaintiffs may not ultimately prevail in court, their account suggests the plausible existence of what economists or laypersons might consider pay and promotion discrimination.[17] For the purposes of this Article, I want to explore whether the retail market could allow such a phenomenon to persist, regardless of whether a jury would necessarily find Wal-Mart's practices to violate Title VII.

A. *Corporate Commitment to Efficiency*

Wal-Mart, the world's largest discount retailer, has chosen

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has several possible defenses, including challenges to the statistical data and arguments about self selection, as well as an overarching narrative of a few bad apples acting contrary to Wal-Mart's direction. *See, e.g.*, *Dukes*, 603 F.3d at 607, 614–15, 636, 638; Hart, *supra* note 5, at 372–74. Whether a jury ultimately finds that Wal-Mart's behavior satisfies the legal standards under Title VII is irrelevant. My analysis holds so long as one could reasonably be convinced that Wal-Mart engaged in what an economist would consider nonproductivity-based discrimination.

17. For a lay definition of pay and promotion discrimination, see GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 13 (2d ed. 1971) ("[O]ne individual is said to discriminate against (or in favor of) another if his behavior toward the latter is not motivated by an 'objective' consideration of fact.") and Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 137 (1994) ("[D]iscrimination in economic life usually consists in sorting people according to traits rather than productivity.").

These definitions should be distinguished from what satisfies the legal standard for discrimination. For instance, unintentional discrimination would seem to satisfy the economists' definition as it is behavior not motivated by an objective consideration of fact, but it would not satisfy the legal standard required for a finding of intentional discrimination. *See, e.g*. *EEOC v. Wal-Mart*, No. 6:01-CV-339-KKC 2010 U.S. Dist. LEXIS 13192, at *3 (E.D. Ky. Feb. 16. 2010) (excluding sociologist William Bielby as an expert witness in an intentional discrimination case because his testimony made clear "that gender stereotyping can occur subconsciously when individuals—'without necessarily realizing it'—inhibit information that is inconsistent with the gender stereotype").

price-based competition as its preferred strategy to maximize profits and takes its former slogan "Always Low Prices" quite seriously.[18] Many scholars view Wal-Mart's stunningly successful "single-minded pursuit of sales volume and its accurate analysis of its own costs" as unique within the retail industry.[19] Unlike for many retailers, the overall volume of sales largely drives Wal-Mart's profits.[20] Wal-Mart forgoes possible gains from high markups in order to consistently offer lower prices on goods than its competitors do. Wal-Mart sustains its low prices and provides price rollbacks on already cheap goods by constantly seeking increased operational efficiencies.[21] By investing heavily in information technology,[22] Wal-Mart possesses superior logistics, distribution capabilities, and inventory control as compared to its competitors.[23]

In addition, Wal-Mart studiously avoids many of the excesses of other corporations. While it compensates upper-level management well, Wal-Mart is legendary for its cheapness across its operations. To take a few examples, Wal-Mart forces its executives to share hotel rooms when they travel[24] and allegedly outfitted the

18. *See Help: Always Low Prices*, WALMART.COM, http://www.walmart.com/cp/Always-Low-Prices/538350 (last visited Mar. 2, 2010) (explaining that the slogan "Always Low Prices" was Sam Walton's philosophy "when he opened the first Wal-Mart in 1962").

19. Burt & Sparks, *supra* note 3, at 1468–69. Wal-Mart did not invent low-cost leadership, but scholars suggest that it is peerless within the retail industry at effectively pursuing and maintaining it. *See, e.g.*, *id.*

20. *Id.* (noting that Wal-Mart is "seeking always to reduce . . . costs in order to lower prices to increase further the sales volume achieved").

21. *See* Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. URB. ECON. 203, 207 (2005). Its size also allows it economies of scale and access to capital markets that smaller retailers cannot capture. *See id.*

22. Basker, *supra* note 3, at 179. Wal-Mart computerized and connected all stores and distribution centers through a single network by the late 1970s, and used bar-code technology to massively reduce the labor costs of processing shipments. *Id.* It also introduced Retail Link in the 1990s, which connects stores, distribution centers, and suppliers. *Id.*

23. For instance, its transportation and support systems have eliminated various forms of waste. *See* SHANE HAMILTON, TRUCKING COUNTRY: THE ROAD TO AMERICA'S WAL-MART COUNTRY 121–22 (2008). It has also achieved substantial cost savings through areas such as design, packaging, and store stocking. *See* Charles Fishman, *The Wal-Mart Effect and a Decent Society: Who Knew Shopping Was So Important?*, ACAD. MGMT. PERSP., Aug. 2006, at 6, 11. Because of its enormous, potentially monopsonistic, buying power, Wal-Mart's pursuit of efficiency in all aspects of its business has not only forced innovations and waste cutting inside its own stores, but also encouraged similar measures by its suppliers, manufacturers, and producers. *Id.* at 13–14. Suppliers know that every year Wal-Mart expects either a higher quality good or, more likely, the same good for a cheaper price. Thus, they too are forced to make their operations more streamlined. *Id.* at 12.

24. LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 55 (2004); DON SODERQUIST, THE WAL-MART WAY: THE INSIDE STORY OF THE SUCCESS OF THE WORLD'S LARGEST COMPANY 130

Bentonville corporate headquarters with discarded goods from aspiring suppliers.[25] Wal-Mart stores display that same bare-bones décor, with goods stacked on pallets, bare floors, and crowded aisles.[26] Similarly, Wal-Mart often shifts business costs such as phone calls and transportation to third parties like suppliers.[27]

The decision to focus on costs as a business model is rational and one that a fully competitive market would likely reward if a company could maintain low-price leadership.[28] While retailers may compete on customer service, expertise, or a host of other factors, the choice to compete instead on prices and to use volume sales to drive profits is certainly within the norm for profit-maximizing behavior, particularly for retail markets, which are often dominated by such low-price leaders.[29] In fact, those who hold up Wal-Mart as a model suggest that Wal-Mart's unflagging focus and prioritization of its position as a low-price leader is largely responsible for its success in the retail market.[30]

Such a successful focus fits into Wal-Mart's overall strategy to behave much like the rational-choice ideal. Scholars laud Wal-Mart's management team as highly accurate cost-benefit calculators.[31] They view Wal-Mart management as single-mindedly devoted to maximizing the company's well-being and profits and as only mistakenly choosing courses of action or goods and services when systematically misled.[32]

While Wal-Mart's commitment to lowering costs for customers is not an unadulterated good, it provides some obvious and significant benefits.[33] Empirical studies show that Wal-Mart lowers prices significantly over the long term, particularly in smaller

(2005).

25. *See* CHARLES FISHMAN, THE WAL-MART EFFECT 225 (2006).

26. HARVARD BUS. SCH., CONSUMER MARKETING STRATEGIES 136 (1991).

27. *See* Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 36–37 (2004).

28. *See* Kyle Bagwell et al., *Dynamic Retail Price and Investment Competition*, 28 RAND J. ECON. 207, 207 (1997).

29. *Id.*

30. WILLARD N. ANDER & NEIL Z. STERN, WINNING AT RETAIL: DEVELOPING A SUSTAINED MODEL FOR RETAIL SUCCESS 9–10 (2004) ("[T]he drive for lower prices for the consumer defines every action that the company takes. It's at the heart of Wal-Mart's mission, its very reason for being."). Yet, many suggest that corporate culture is also responsible for its success. *See, e.g.*, Gregory Turner & Barbara Spencer, *Understanding the Marketing Concept as Organizational Culture*, 31 EUR. J. MARKETING. 110, 117–18 (1994).

31. *See, e.g.*, Richard McAdams & Tom Ulen, *Behavioral Criminal Law and Economics*, *in* CRIMINAL LAW AND ECONOMICS 1, 4 (Nuno Garoupa ed., 2009).

32. *Id.*

33. Wal-Mart's commitment to efficiency and innovation occasionally yields positive unintended consequences as well. For example, its computerized stocking system allowed it to respond to Hurricane Katrina with well-tailored relief. *See* Steven Horwitz, *Wal-Mart to the Rescue: Private Enterprise's Response to Hurricane Katrina*, 13 INDEP. REV. 511, 512–16 (2009).

cities.[34] Given that twenty percent of Wal-Mart customers have no bank account—a good indicator of dire poverty[35]—this price savings gives poor customers a meaningful boost in purchasing power for basic goods such as groceries, prescription drugs, and the like.[36] In addition to providing price savings across a wide variety of goods and now services, Wal-Mart also provides jobs and job opportunities. While much disagreement exists about Wal-Mart's net job creation,[37] Wal-Mart does provide entry-level jobs to those with no experience and is one of the few routes to management positions for those without college or graduate degrees.[38] Even those who do not shop

34. *See, e.g.*, Basker, *supra* note 21, at 228 (finding that the entrance of a Wal-Mart into a local market causes robust, long-term price effects). Of course, the benefits of lower pricing have to be reconciled with the fact that Wal-Mart seems also to create consumer demand—so one gets more for one's dollar, but one is not necessarily spending less, just getting more items. *See* FISHMAN, *supra* note 25, at 69–70.

35. *See* Liza Featherstone, *Down and Out in Discount America*, NATION, Jan. 3, 2005, at 11, 11.

36. In fact, Wal-Mart claims that its relentless devotion to low prices amounted to a 0.9% pay raise for customers in 2004. *See* GLOBAL INSIGHT, THE ECONOMIC IMPACT OF WAL-MART 5 (2005), http://www.ihsglobalinsight.com /publicDownload/genericContent/ 11-03-05_walmart.pdf. More broadly, Wal-Mart claims to have saved consumers over $250 billion between 1985 and 2004. *See id.* at 17. Some scholars dispute this number. *See generally* Jared Bernstein et al., *Wrestling with Wal-Mart: Tradeoffs Between Profits, Prices, and Wages* 3 (Econ. Pol'y Inst., Working Paper No. 276, 2006), *available at* http://epi.3cdn.net/974663bf961ffabb0c_vgm6bhjdb.pdf. However, no one doubts Wal-Mart-generated savings have been significant.

37. Many studies have concluded that Wal-Mart's job-creating function is close to neutral because of its negative effects on local retail establishments. *See, e.g.*, Emek Basker, *Job Creation or Destruction? Labor Market Effects of Wal-Mart Expansion*, 87 REV. ECON. & STAT. 174, 175, 181 (2005) (concluding that the introduction of a Wal-Mart "has a small positive effect on retail employment at the county level while reducing the number of small retail establishments in the county" along with a small negative effect on wholesale employment). At least one study concludes that the presence and addition of Wal-Mart stores contributed to greater increases in family poverty rates. Stephan J. Goetz & Hema Swaminathan, *Wal-Mart and County-Wide Poverty*, 87 SOC. SCI. Q. 211, 223 (2006) (suggesting various hypotheses to explain increased poverty rates, including the displacement of mom-and-pop businesses, less extensive and effective philanthropy than that of displaced local businesses, and the destruction of local leadership capacity through the displacement of local entrepreneurs).

On the other hand, Wal-Mart can also be essential to keeping some small businesses afloat as the scale of doing business with Wal-Mart provides a predictable stream of income to producers. *See* FISHMAN, *supra* note 25, at 58 (observing that "Wal-Mart literally pays to turn the factory on").

38. *See* RICHARD DROGIN, CIVIL RIGHTS LITIG. CLEARINGHOUSE, STATISTICAL ANALYSIS OF GENDER PATTERNS IN WAL-MART WORKFORCE 27 (Feb. 2003), http://www.clearinghouse.net/chDocs/public/EE-IL-0258-0003.pdf; Jason Furman, *Wal-Mart: A Progressive Success Story*, CTR. FOR AM. PROGRESS 6 (Nov. 28, 2005), www.americanprogress.org/kf/walmart_progressive.pdf (discussing in-store management).

at Wal-Mart benefit from its ability to dictate what other stores can charge.[39] Scholars have further suggested Wal-Mart's extreme cost efficiency creates economy-wide productivity gains and keeps inflation rates in check.[40]

Given this seemingly nearly single-minded devotion to lower prices, one might predict that Wal-Mart would only engage in employment discrimination to the extent that it serves efficiency goals. It is worth beginning by noting that sex discrimination is not a necessary means to keep labor costs and prices down. For instance, a company that prioritizes low prices might lawfully provide limited benefits[41] and pay low wages across the board.[42] Such a company might also commit widespread, nondiscriminatory labor violations if it thought that the benefits of such violations would outweigh the probability and costs of detection. Thus, the charges of overtime violations that led to Wal-Mart's federal and state settlements are fairly unsurprising.[43]

A company desiring low labor costs might also engage in so-called rational discrimination by excluding or disfavoring workers who are accurately forecasted to raise costs for the company. Some evidence suggests that Wal-Mart does in fact engage in such practices. In particular, Wal-Mart settled several disability discrimination cases in which it was charged with using pre-employment questionnaires to screen out employees with medical or other disability-related issues.[44] Even after the entry of a 2004 consent decree in a class action disability discrimination case, over one-hundred plaintiffs have filed new charges contending that Wal-Mart fails to provide reasonable accommodations, fires disabled employees, and uses a "leave of absence" bait-and-switch to force

39. *See* MICHAEL BERGDAHL, WHAT I LEARNED FROM SAM WALTON: HOW TO COMPETE AND THRIVE IN A WAL-MART WORLD 108 (2004); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart* 13–14 (Nat'l Bureau of Econ. Research, Working Paper No. 11809, 2005), *available at* http://www.nber.org/papers/w11809.

40. *See* Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003, at 100, 102.

41. Elena G. Irwin & Jill Clark, *Wall Street vs. Main Street: What Are the Benefits and Costs of Wal-Mart to Local Communities?*, 21 CHOICES 117, 118 (2006).

42. HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART'S VIOLATIONS OF U.S. WORKERS' RIGHT TO FREEDOM OF ASSOCIATION 5 (2007), *available at* http://www.hrw.org/en/reports/2007/04/30/discounting-rights (discussing Wal-Mart's low wages and inadequate provision of health care).

43. GEORGE MILLER, DEMOCRATIC STAFF OF COMM. ON EDUC. & THE WORKFORCE, EVERYDAY LOW WAGES: THE HIDDEN PRICES WE ALL PAY FOR WAL-MART 11 (2004), *available at* http://edlabor.house.gov/publications/WALMARTREPORT.pdf.

44. Press Release, EEOC, Comprehensive EEOC, Wal-Mart Settlement Resolves Disability Lawsuit (Dec. 17, 2001), *available at* http://www.eeoc.gov/press/12-17-01.html.

disabled employees out.[45] One could argue that the failure to pay for reasonable accommodations is linked to a belief either that these employees had lower productivity or that their productivity was not worth the additional expense of a reasonable accommodation.[46] Similarly, evidence suggests that Wal-Mart attempts to discourage unhealthy persons from applying for and accepting jobs.[47] A recently filed class action lawsuit contends that Wal-Mart may also be using similar strategies to discriminate against older workers.[48]

While a company concerned only with economic gains might discriminate in favor of younger, healthier workers,[49] economists do not suggest that pay and promotion discrimination against women as a class would fall within the rubric of rational discrimination. Although excluding women entirely might make sense as a way to reduce worker-preference variation[50] or eliminate the costs of pregnancy—such as accommodations and hiring temporary or permanent replacements—paying men and women different amounts for the same job does not reduce governance costs,[51] nor does failing to promote women once they are hired seem likely, on

45. WAL-MART WATCH, REASONABLE ACCOMMODATION DENIED: AN EMERGING TALE OF LAWSUITS, SETTLEMENTS, AND WAL-MART'S BROKEN PROMISES TO APPLICANTS AND EMPLOYEES WITH DISABILITIES 4 (2008), http://walmart.3cdn.net/2851551578dcac476e_jrm6iyd87.pdf.

46. *Id.* at 5.

47. Like other employers my coauthors and I described in our previous paper, Wal-Mart uses its benefits packages to get unhealthy workers to screen themselves out. *See* Gelbach et al., *supra* note 1, at 799. In particular, an internal Wal-Mart memorandum suggested "[u]sing health plans with high deductibles, low premiums, and health savings accounts (HSAs) as a means of discouraging the employment or continued employment of 'high utilizers' of health care services"; "[i]mposing physical activity requirements for all jobs, including those that have not required such activity, in order to avoid hiring 'unhealthy' individuals at all"; and "[r]educing 401(k) and profit-sharing investments and switching from a flat-contribution plan to a matching plan." Letter from George Miller, Representative, Cal., to David Walker, Comptroller Gen., GAO (2005), *available at* http://blog.wakeupwalmart.com/ufcw/2005/11/rep_george_mill_1.html; *see* Memorandum from Susan Chambers to the Wal-Mart Stores, Inc. Bd. of Dirs. 1–3 (2006) [hereinafter Chambers Memo], *available at* http://www.nytimes.com/packages/pdf/business/26walmart.pdf (stating that "[g]rowth in benefits costs is unacceptable" and discussing ways to cut costs in health-care plans).

48. *See* Complaint and Jury Trial Demand, Crowell v. Wal-Mart Stores, Inc., No. 10 Civ. 01116 (S.D.N.Y. Feb. 11, 2010), *available at* http://www.scribd.com/doc/27028300/Wal-Mart-Age-Discrimination-Class-Action-Complaint.

49. Whether the costs of litigation under Title VII and other antidiscrimination statutes make this an ultimate cost is debatable, but certainly it would prove to be cost saving in the absence of litigation.

50. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 66–67 (1992).

51. Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1787–88 (1990).

balance, to be a cost-saving approach.[52] Some might plausibly argue that discrete forms of sex discrimination, such as pregnancy discrimination, are rational,[53] but the current class action lawsuit contends that Wal-Mart discriminates against most female workers for reasons unrelated to pregnancy costs and employee turnover.

As explained in more detail in Part II below, such behavior seems at first blush to be irrational. Wal-Mart loses the economic gains that come along with having the most qualified worker promoted into any given job. Moreover, other companies could seemingly hire away those quality female workers that Wal-Mart refuses to pay at an equal rate or promote commensurate with their abilities. As these women leave the Wal-Mart workforce, or those fearing discrimination refuse to enter it, Wal-Mart would have a smaller, less qualified pool from which to draw. Its retail competitors should gain as Wal-Mart loses. Given this idealized explanation, it seems puzzling that Wal-Mart might engage in widespread sex discrimination.[54]

B. Alleged Sex Discrimination

This Subpart provides a brief background of the facts alleged in *Dukes v. Wal-Mart*,[55] as well as a description of the pathways by which Wal-Mart's organizational structure and corporate culture may have allowed and even encouraged discriminatory behavior.[56] This primer to the plaintiffs' claims is not meant to serve as persuasive evidence of widespread discrimination, but just as a sufficient introduction to the plaintiffs' claims in order to discuss why the market may have failed to eliminate the alleged behavior. The plaintiffs alleged that as a class, women "(1) are paid less than men in comparable positions, despite having higher performance

52. William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 790–91 (1986).

53. For a general discussion of gender discrimination as it relates to market efficiency, see Edward J. McCaffery, *Slouching Toward Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993). *But see* John J. Donohue, III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1613–14 (1992) (expressing concern regarding specific aspects of antidiscrimination law).

54. Before discussing the claims, it is worth noting that Wal-Mart has never contended that such discrimination is rational, as it has in the case of unhealthy workers. *See supra* note 44. Rather, it has argued that to the extent discrimination occurred, it was the result of a few bad apples engaging in unsanctioned behavior. *See* Brad Seligman, *Patriarchy at the Check-Out Counter*, NEW LAB. F., Spring 2005, at 40, 41.

55. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *cert. granted*, 79 U.S.L.W. 3128 (Dec. 6, 2010) (No. 10-277).

56. Rather than delve into the statistical analysis, this Subpart simply lays out the plaintiffs' basic charges. For a lengthier discussion, see Aaron B. Lauchleiner, *A Classless Act: The Ninth Circuit's Erroneous Class Certification in* Dukes v. Wal-Mart, *in* EMPLOYMENT CLASS AND COLLECTIVE ACTIONS 287, 328 (David Sherwyn ed., 2010).

ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men."[57] Plaintiffs' experts conducted a statistical analysis showing that women in hourly positions made one thousand dollars less per year than did similarly situated male employees.[58] They also submitted evidence showing that women comprise 92.5% of the lowest-paid workers (cashiers) and 65% of the hourly workers, while they fill only 33% of all managerial positions.[59] The gender gap widens as one investigates further up the managerial chain.[60] The plaintiffs contended that such numbers are particularly troubling in a company with an over 70% within-store promotion policy, which is consequently drawing from a largely female labor pool.[61]

Relatedly, many, though not all, departments are sex-segregated, with women comprising over 90% of sales associates in domestic goods, beauty aids, and menswear, and with men comprising over 75% of sales associates in hardware and food departments.[62] Though segregation is a distinct phenomenon from discrimination,[63] plaintiffs allege that the two practices work hand in hand as those in the female-segregated departments receive lower pay for comparable work and are provided fewer pathways to promotion.[64]

Few workers at Wal-Mart are well paid,[65] but if plaintiffs

57. *Dukes*, 603 F.3d at 577.

58. Steven Greenhouse, *Wal-Mart Faces Lawsuit over Sex Discrimination*, N.Y. TIMES, Feb. 16, 2003, at A22.

59. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 146 & n.8 (N.D. Cal. 2004) (citing Declaration of Richard Drogin, Ph.D, in Support of Plaintiffs' Motion for Class Certification, ¶¶ 19, 26 tbl.10, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ)) [hereinafter Drogin Declaration]. As the plaintiffs submitted in Drogin's declaration, female staffing position percentages are as follows: *Salaried Positions:* Store Manager—14%; Co-Manager (only in larger stores)—23%; Assistant Manager—36%. *Hourly Positions:* Management Trainee—42%; Support Manager—50%; Department Manager—78%; Customer Service Manager—85–90%; Other hourly positions—70%. Drogin Declaration, *supra*, ¶¶ 23 tbl.7, 25 tbl.9, 26 tbl.10. For a more detailed statistical analysis, see Drogin Declaration, *supra*.

60. William T. Bielby, *Applying Social Research on Stereotyping and Cognitive Bias to Employment Discrimination Litigation: The Case of Allegations of Systematic Gender Bias at Wal-Mart Stores*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 395, 397 (Laura Nielsen & Robert Nielsen eds., 2005).

61. Drogin Declaration, *supra* note 59, ¶ 40 ("Wal-Mart has a strong 'promote from within' policy, as shown by its statement that '72% of all Salaried Management started as hourly Associates.'") (citation omitted).

62. *Id.*

63. Stewart J. Schwab, *Employment Discrimination*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 296, 299 (Kenneth G. Dau-Schmidt et al. eds., 2009).

64. Wage discrimination can occur even with full labor integration. *See* Cain, *supra* note 10, at 700.

65. JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE

correctly assert the existence of sex-based disparities, what explains why Wal-Mart's women are so much worse off than the men?[66] Plaintiffs allege that a variety of organizational mechanisms and societal preferences contribute to pervasive workplace discrimination.[67] Plaintiffs contend that Wal-Mart strove to create a highly uniform corporate culture and that part of that culture includes gender stereotyping.[68] These alleged stereotypes include a belief that customers want men in traditionally male jobs (such as hardware sales associates) and women in traditionally female jobs (such as jewelry sales associates), and a comparable conviction on the part of Wal-Mart managers who assign work that women and men themselves prefer to work in the appropriately gender-segregated departments.[69] Plaintiffs suggest that other stereotypes are pervasive as well. For instance, many Wal-Mart managers seem to share the belief that men either are or should be the primary breadwinners and that women serve in the workforce simply to earn extra cash.[70]

Such stereotypes seem more consistent with a status-production model of discrimination than with a purely taste-based model.[71] Professor Richard McAdams introduced this status account to explain why whites excluded blacks from employment opportunities even when individual white employers might gain by not discriminating and hiring cheaper minority labor.[72] He contends that whites elevated their status by subordinating blacks and that those who refused to do so faced sanction from those within their group.[73] I modify this insight by applying it to gender.[74] In other

POVERTY AND INEQUALITY 250–51 (2007) (noting Wal-Mart's low wages even as compared to other retailers and discussing employees' reliance on public benefits).

66. As mentioned earlier, Wal-Mart denies that, evaluated properly, statistical evidence of discrimination is present. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 607–08 (2010); sources cited *supra* note 16. Rather, Wal-Mart contends that whatever evidence of discrimination exists is merely the product of a few bad apples acting independently of Wal-Mart culture and policy. Seligman, *supra* note 54, at 41. It is also likely to argue that whatever statistical disparity exists is due to lack of interest on the part of its female employees.

67. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145–66 (N.D. Cal. 2004).

68. *Id.* at 145.

69. *Id.* at 165–66.

70. LIS W. WIEHL, THE 51% MINORITY: HOW WOMEN ARE STILL NOT EQUAL AND WHAT YOU CAN DO ABOUT IT 27–28 (2007).

71. *See generally* Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995). Part II of McAdams' article "considers the particular problem of race discrimination" and "the superior ability of a status-production model to explain many race-related phenomena." *Id.* at 1008.

72. *See id.* at 1048–53, 1076.

73. *Id.* at 1048–51.

words, Wal-Mart's preferences do not prevent it from hiring women nor do Wal-Mart's managers generally oppose working with women. They just prefer to have women work in lower-status positions and at a lower pay. Such status production may be particularly appealing to Wal-Mart managers who often lack other means of achieving elevated status such as through greater educational attainment or objectively high salaries.

These stereotypes that employees bring to work are then reinforced and reified by a corporate culture that values conformity.[75] Credible evidence suggests that Wal-Mart engages in corporate-culture screening for upper-level management hired from outside the company.[76] Moreover, it encourages those managers and executives who do not "fit in" to leave.[77] These attempts to control the corporate culture trickle down and are likely to yield homogenous employees at all levels who strongly share the same values, preferences, and biases that the company has embraced as part of its corporate culture.[78]

Plaintiffs also argue that these stereotypes may have influenced decision makers in a variety of ways. For instance, plaintiffs allege that Wal-Mart's provision of broad discretion to decision makers allows stereotypes to infect salary decisions.[79] Low-level managers have discretion to determine, within a range, both starting salaries

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74. Professor Mary E. Becker made a similar point quite forcefully in noting:

> The desire for subordination, rather than aversion, may be a greater part of discrimination against women than against racial minorities. Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as having women as secretaries and dependent wives.

Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1668 (1991).

75. *See* Gary Gereffi & Michelle Christian, *The Impacts of Wal-Mart: The Rise and Consequences of the World's Dominant Retailer*, 35 ANN. REV. SOC. 573, 580 (2009).

76. *See* FISHMAN, *supra* note 25, at 28, 38–40.

77. SODERQUIST, *supra* note 24, at 42.

78. BERGDAHL, *supra* note 39, at 65–67 (discussing Wal-Mart's significant investment in culture training and dissemination).

79. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 148–51 (N.D. Cal. 2004). Even though managers exercised significant discretion, the plaintiffs also argued that Wal-Mart still retained substantial central control over pay and promotion practices and thus, discriminatory practices could not be attributed to just a few rogue managers. *Id.* at 152–53. The District Court for the Northern District of California agreed that the combination of centralized policies and substantial discretion could constitute company-wide discrimination, holding that "Wal-Mart's systems for compensating and promoting in-store employees are sufficiently similar across regions and stores to support a finding that the manner in which these systems affect the class raises issues that are common to all class members." *Id.* at 149.

and exceptional performance raises for hourly employees;[80] similarly, higher-level managers possess a broad range of discretion for the compensation structure for all in-store salaried management positions.[81] The plaintiffs also provided evidence suggesting both that pay differentials for similar jobs were often based on whether one was in a hardline (male) department or softline (female) department and that the original placement decision was itself steeped in discriminatory stereotypes.[82]

The promotion structure is also fraught with discretion—the promotion guidelines set out relatively low minimum standards that most candidates will satisfy.[83] This means that managers need not winnow down candidates based on productivity and other quality-based metrics. In addition, Wal-Mart failed to require the posting of management positions.[84] The plaintiffs alleged that while many women should have been eligible to apply for promotions, a "tap-on-the-shoulder" system prevailed instead.[85] Men learned of such positions through socializing,[86] and decision makers had few criteria to direct them away from either preexisting or Wal-Mart-reinforced stereotypes.[87] By allowing subjectivity and word of mouth to dictate the management process, the plaintiffs alleged, Wal-Mart managers shut women out of the process.[88]

The plaintiffs also identified the relocation requirement, which was ostensibly required to move up in the management ranks, as another way in which Wal-Mart's practices allowed stereotypes to

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80. *Id.* at 146–47.
81. *Id.* at 147–48.
82. *Id.* at 145–46, 156 n.24.
83. *Id.* at 148–49.
84. *See id.* at 149.
85. *Id.* at 148, 153–54.
86. *See id.* at 148, 152 (indicating that Wal-Mart's social corporate culture and tap-on-the-shoulder system of promotion supports the assertion) (citing Declaration of William T. Bielby, Ph.D, in Support of Plaintiffs' Motion for Class Certification, ¶ 21, Dukes v. Wal-Mart Stores, Inc, 222 F.R.D. 137 (N.D. Cal. 2004) (Co. C-01-2252 MJJ)) [hereinafter Bielby Declaration].
87. *See id.* at 153 & n.18 (citing Bielby Declaration, *supra* note 86, ¶¶ 30, 34, 37–41.
88. *Id.* at 145. In affirming class certification, the appellate court lauded the district court for its rigorous analysis, which led to a finding for the plaintiffs based on:

> (1) facts supporting the existence of company-wide policies and practices that, in part through their subjectivity, provide a potential conduit for discrimination; (2) expert opinions supporting the existence of company-wide policies and practices that likely include a culture of gender stereotyping; (3) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (4) anecdotal evidence from class members throughout the country of discriminatory attitudes held or tolerated by management.

Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 600 (9th Cir. 2010) (citing *Dukes*, 222 F.R.D at 145–66).

infiltrate the system.[89] Such a policy may have operated to discriminate against women in several ways. First, managers may have wrongly assumed that many women were less willing to accept jobs or career paths that required several relocations and accordingly overlooked them for such positions. In addition, it is at least plausible that a greater percentage of women would self-select out of such positions because of family and other caregiving commitments.[90] If such a policy does not enhance the productivity of managers or otherwise contribute to the improvement of the workforce, economists (as well as the law) may view it as a discriminatory barrier, even if it relies on self-selection. Moreover, and most damningly, the plaintiffs alleged that Wal-Mart managers may have discriminatorily applied the relocation requirement by allowing men, but not women, to bypass it.[91]

Scholars suggest that Wal-Mart coupled these alleged discriminatory practices with poor enforcement of fairly limited antidiscrimination measures.[92] Wal-Mart was a very late adopter of corporate sexual-harassment policies—it lacked any substantial

89. *Dukes*, 222 F.R.D. at 153 (citing Bielby Declaration, *supra* note 86, ¶ 45). Wal-Mart defended such a policy as a way to avoid the workplace strife created when an employee ascends to manage his former coworkers. FEATHERSTONE, *supra* note 24, at 109.

90. Such self-selection may not amount to actionable discrimination under Title VII, though it might if Wal-Mart failed to show a business necessity for the practice. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining that the business necessity exemption is the "touchstone" of Title VII). Regardless, if the practice discouraged the best employees from moving up the ranks without a countervailing stronger benefit, one would expect Wal-Mart to eliminate such a practice.

91. *Dukes*, 222 F.R.D. at 145, 148, 153 (citing Bielby Declaration, *supra* note 82, ¶ 45). While these two main observations about highly centralized corporate control and wide managerial discretion in employment practices seem to be at odds, the plaintiffs suggested that

> [I]n-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district-level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system. These subjective decisions are not, however, made totally in isolation. Rather, the company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion over in-store personnel decisions. The evidence suggests that the company relies also on its strongly imbued culture to guide managers in the exercise of their discretion.

Id. at 152–53.

92. *See, e.g.*, Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1629 (2007). *Compare* FEATHERSTONE, *supra* note 24, at 21–22, 46–47 (describing Wal-Mart's reluctance to address sexual-harassment claims), *with* WALMART: STATEMENT OF ETHICS 12–13 (2008), http://walmartstores.com/media/cdnpull/statementofethics/pdf/U.S_SOE.pdf ("Walmart will not tolerate discrimination in employment, employment-related decisions, or in business dealings on the basis of . . . sex . . . or any other legally protected status.").

policy prior to the mid-1990s.[93] Predictably, many employees believe they were harassed or fired as a result of utilizing Wal-Mart's internal complaint mechanism, the "open door" policy.[94] Hence, these particular internal mechanisms were unlikely to eliminate stereotypes that were also driving pay and promotion discrimination.

Ultimately, others will debate whether these practices occurred and whether they constituted discrimination as defined by Title VII. For the purposes of this Article, if presumed to be true, these practices satisfy economists' more lay sense of discrimination that they suggest should be driven from the market. In other words, regardless of whether the aforementioned behavior is legally actionable, economists should expect perfectly rational companies and competitive markets to eliminate such "discriminatory" behavior.[95]

II. MARKET FAILURE: PERSISTENT AND PERVASIVE DISCRIMINATION

While evidence of widespread discrimination in large companies is hardly surprising,[96] one might conjecture that Wal-Mart's commitment to efficiency in virtually all aspects of its business would yield nondiscriminatory pay and promotion strategies. If widespread pay and promotion discrimination did occur, why has this problem not been self-correcting? Economists often suggest two mechanisms that might drive such discrimination from the market.[97]

93. FEATHERSTONE, *supra* note 24, at 21.

94. *See id.* at 46–47 (describing the experiences of employees who attempted to complain via the "open door" policy and were subsequently disciplined); *Open Door*, WALMARTSTORES.COM, http://walmartstores.com/aboutus/286.aspx (last visited Mar. 2, 2010) (promoting and explaining the policy).

95. In fact, Wal-Mart seems quite sensitive to discrimination and other problematic working conditions when dealing with both its global and domestic suppliers. For instance, Wal-Mart's global *Standards for Suppliers* require suppliers to "comply with all applicable national and/or local laws and regulations, including but not limited to those related to labor, immigration, health and safety, and the environment." *Standards for Suppliers*, WAL-MARTSTORES.COM (Oct. 2009), http://walmartstores.com/download/2727.pdf.

Relatedly, Wal-Mart's domestic Supplier Diversity Program, initiated in 1994, is designed to expand Wal-Mart's business with minority- and women-owned suppliers. To qualify, the company must be "51 percent owned, controlled, and operated by" minorities or women. *Supplier Diversity Certification*, WAL-MARTSTORES.COM, http://walmartstores.com/Diversity/256.aspx (last visited Mar. 2, 2010).

96. *See generally* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) (describing successful employment class action suits against large and well-known employers such as Shoney's, Home Depot, Texaco, Mitsubishi, and Coca-Cola).

97. Schwab, *supra* note 63, at 300 (noting that "many scholars have asserted that . . . in the long run competitive markets will eliminate firms with a taste for discrimination").

First, if the internal preference for efficiency is high enough, one would expect the preference for discrimination to yield.[98] Traditional law-and-economics scholars suggest this outcome is particularly likely if the preference to discriminate was ill-informed and sensitive to the introduction of new information.[99] For example, if managers initially believed that women were less capable workers or less suited to management positions, comparatively high performance evaluations should persuade them otherwise. In addition, these same scholars suggest that the increasing number of working women will give employers a better sense of the average qualities of female workers; they contend that husbands with working wives and daughters are less likely to hold misogynistic preferences (and so as the number of working women increase, the number of men with working wives will likely increase as well); and misogynistic employers will face higher labor costs and thus a competitive disadvantage.[100] Accordingly, Richard Posner concludes that "there is no strong theoretical reason to believe that sex discrimination, even if not prohibited by law, would be a substantial source of inefficiency in American labor markets today."[101] Though law-and-economics scholars recognize that individual firms are often not perfectly rational,[102] one would expect a company that leads and innovates in so many areas to understand the benefits of nondiscrimination, even absent government intervention and litigation.

In fact, as the relevant litigation concerns pay and promotion rather than hiring, economists would suggest most employers would maintain sufficient data to identify more productive workers.[103] As an obsessive record keeper and data miner, Wal-Mart certainly possesses the means to acquire, assess, and act on massive amounts of information.[104] In particular, Wal-Mart knows the labor costs of every employee down to the "wages, hours, break time, and benefits

98. *See* KENNETH J. ARROW, APPLIED ECONOMICS 148–49 (1985) (observing that if tastes for discrimination vary among employers, competitive forces would only allow the least discriminatory firms to survive).

99. *See, e.g.*, Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1323 (1989).

100. *Id.* at 1321–23.

101. *Id.* at 1321.

102. EPSTEIN, *supra* note 50, at 35.

103. *See* Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972) (explaining that statistical discrimination is rational when the employer has limited information to use to distinguish superior workers and the cost of better information is excessive). Professor Phelps goes on to note that employers may also view test scores or other evidence as more reliable for one group than for another. *Id.* at 661; *see also* EPSTEIN, *supra* note 50, at 33.

104. FISHMAN, *supra* note 25, at 12–13. For instance, Retail Link allows Wal-Mart to keep track of every item sold in every store for the past two years. *Id.* at 75.

of each sales clerk in each store."[105] Given that knowledge, one would expect Wal-Mart to act decisively as it has in other business situations requiring reinvention, experimentation, and the ability to learn from failures.[106]

Second, even if Wal-Mart as an entity or many of its employees possess strongly held preferences for discrimination, economists would normally suggest that nondiscriminating competitors could then make employee and consumer gains vis-á-vis Wal-Mart, which in turn would either encourage Wal-Mart to change its behavior or drive it out of business.[107] Regardless of litigation under antidiscrimination statutes,[108] one would assume Wal-Mart should fear losing good workers and consumers with antidiscrimination preferences and would impose a top-down solution. Given that high-level Wal-Mart executives seemed to be aware of the data suggesting discrimination at least as early as the early 1990s,[109] why did Wal-Mart largely fail to meaningfully change its pay and promotion strategies for the next two decades? I identify a variety of important factors, including limited employee leverage, limited market competition, and limited consumer pressure that resulted in a market failure to drive discrimination from the Wal-Mart workplace.

A. Limited Worker Leverage

First, internal pressures on Wal-Mart to attract, reward, and promote quality workers in many positions are lower than one might initially expect.[110] As mentioned above, some retail businesses rely

105. Lichtenstein, *supra* note 6, at 26.

106. Burt & Sparks, *supra* note 3, at 1471. Of course, Wal-Mart may engage in just this sort of learning behavior regarding its employment practices if it loses the certiorari petition at the Supreme Court level or loses its summary judgment motion at the district court level.

107. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1421–23 (1986). In fairness, Professor Gary Becker recognized that competitive markets would only eliminate discrimination under certain conditions. BECKER, *supra* note 17, at 44 & n.4, 45 (discussing a shortage of entrepreneurial skill and firms with a taste for nepotism).

108. I leave aside the question of litigation because I want to explore the market incentives in the absence of government intervention. Even though Wal-Mart is not a perfect example since it operates in a world of federal and state antidiscrimination law, Wal-Mart could have rationally calculated that the chance of losing or having to settle suits does not outweigh the benefits of continuing its employment strategy. Making such a determination simply pushes the discussion of many relevant factors back an additional level. Accounting for lawsuits should not substantially change the analysis here.

109. FEATHERSTONE, *supra* note 24, at 32–33 (describing several letters signed by over one hundred Wal-Mart managers and addressed to company executives that "described a pattern of discrimination against women in promotions and of retaliation against women who complained," and noting the lackluster response).

110. Of course, internal pressures are to some extent dependent on external

on customer service or other employee-based skills to achieve market gains, but Wal-Mart's strategy for success depends largely on low-price leadership.[111] Therefore, Wal-Mart subjects managers to a vigorous carrot-and-stick approach to encourage them to keep labor costs low.[112] In turn, this low cost, mostly low service, approach means that Wal-Mart is relatively indifferent to differences in worker quality in many hourly positions. Though Wal-Mart may lose some customers and some sales because of poor customer service, Wal-Mart customers generally shop in Wal-Mart because of low prices and the convenience of one-stop shopping. Some laud the company for its customer service, but most customers care more about low prices than good service.

As a pure market decision,[113] Wal-Mart's relative indifference to worker quality may be rational. Wal-Mart estimates the margin of profit for an hourly worker at a mere three dollars per hour.[114] In such a system, Wal-Mart's failure to reward managers for giving raises to the most deserving hourly workers and for promoting the best workers into the positions most likely to lead into or within management makes sense. This relationship alone does not explain the reasons why discrimination in pay and promotion occurs, but it helps suggest why Wal-Mart has taken so few actions over time to ameliorate it.

Relatedly, female employees' threats of exit, particularly at the lower levels, is a matter of little significance to Wal-Mart. At first, this seems puzzling, as many, perhaps most, employers want stayers. The costs of retraining and low worker morale can be substantial and, as a result, employers often design generous benefit packages to entice workers to stick around. Yet Wal-Mart emphasizes other priorities for lower-level positions, such as conformity and passivity.[115] While Wal-Mart management claims to reward hard work and loyalty, it also strongly discourages

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market conditions. I discuss them separately in order to highlight different mechanisms. This is a useful simplification, but it is worth remembering that the two are related.

111. *See supra* notes 28–32 and accompanying text.

112. Steven Greenhouse, *Suits Say Wal-Mart Forces Workers to Toil Off the Clock*, N.Y. TIMES, June 25, 2002, at A1.

113. I am suggesting that absent whatever sex-discrimination litigation workers may pursue, Wal-Mart may have correctly calculated that it loses little by not placing or promoting the best workers to a given position or by not rewarding the best workers in a given position with the highest pay.

114. FISHMAN, *supra* note 25, at 15; *see also* Furman, *supra* note 38, at 13 (estimating that Wal-Mart only earns about six-thousand dollars a year per employee).

115. *See* IAN AYRES, SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART 28 (2007); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 124–25 (2001); BOB ORTEGA, IN SAM WE TRUST: THE UNTOLD STORY OF SAM WALTON AND HOW WAL-MART IS DEVOURING AMERICA 210 (1999).

individualism.[116] While these values need not be in tension, and in fact, loyal workers are often stayers, Wal-Mart does not want to hire or retain the workers most likely to push for internal labor improvements, especially if such employees are probable stayers.

In other words, Wal-Mart is least likely to hire or retain those interested in unionizing or otherwise agitating about working conditions. This concern about workforce composition is less directly motivated by concerns about sex discrimination, and instead is part of Wal-Mart's integrated strategy to avoid compliance with the larger regulatory framework designed to protect workers. For obvious reasons concerning labor costs,[117] Wal-Mart is deeply committed to preventing unionization of its domestic stores.[118] Wal-Mart has forestalled unionization through lawful strategies such as disproportionate siting in right-to-work states, mandatory indoctrination meetings, and anti-union training sessions for managers.[119] Other Wal-Mart behavior that impacts the passivity of the workforce includes the refusal to hire experienced help into certain positions and the administration of personality tests to sort in those most likely to support Wal-Mart's hierarchical structure and to exclude those most likely to oppose it.[120] Most troubling from a legal perspective, Wal-Mart has also fired associates thought to be unionizing, asked associates to sign nonunionization pledges, and eliminated unionized departments.[121]

Thus, many of those whom Wal-Mart does hire are often those least likely to perceive and complain about discrimination through either internal mechanisms or external options.[122] Furthermore, a pervasive lack of information exacerbated this passivity regarding unfair treatment. For a long time, Wal-Mart forbade the discussion of salaries and few employees subsequently learned that the National Labor Review Board struck down this policy.[123] As a result,

116. Gereffi & Christian, *supra* note 75, at 581.

117. To make one relevant comparison, unionized grocery-store workers in major U.S. cities make 20–40% more than Wal-Mart workers. Furman, *supra* note 38, at 5.

118. Wal-Mart is rabidly anti-union in its U.S. stores, though it seems more willing to tolerate the presence of unions in stores outside the United States. Gereffi & Christian, *supra* note 75, at 581.

119. Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1939 (2007); Gereffi & Christian, *supra* note 75, at 580.

120. SANDRA S. VANCE & ROY V. SCOTT, WAL-MART: A HISTORY OF SAM WALTON'S RETAIL PHENOMENON 163 (Edwin J. Perkins ed., 1994); Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1506 (2008); Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1489–90 (2008).

121. *See* Gereffi & Christian, *supra* note 75, at 581.

122. Similarly, men who are likely to vocally object to such practices are also unlikely to be hired in the first instance. *See* VANCE & SCOTT, *supra* note 120, at 163; Lichtenstein, *supra* note 120, at 1463, 1487–91.

123. Wal-Mart Stores, Inc., 340 N.L.R.B. 220, 234 (2003).

at least some women did not know and believed they could not find out what their male counterparts were being paid.[124] While they may have suspected they were ill-treated, such feelings may have remained mere suspicions. Moreover, even with some information about her coemployees, any individual woman would be ill-positioned to identify the systematic nature of pay and promotion discrimination.

That said, many female Wal-Mart employees threaten to, and do in fact, leave, but the cost of their exit is much less significant for Wal-Mart than for many businesses. Evidence demonstrates that Wal-Mart workers are easily replaced.[125] Even before the economic downturn, the company's labor pool seemed unusually large, perhaps because Wal-Mart often sites in distressed areas with few other employment opportunities.[126] In addition, Wal-Mart positions require little skill or experience, particularly at the bottom rungs.

Most interestingly, leaked memos suggest that Wal-Mart may prefer a relatively high level of exit.[127] Wal-Mart believes long-term employees do not enhance productivity while using greater resources in benefits and wages.[128] Regardless of whether this is in fact true, so long as Wal-Mart believes it to be true, the company will be somewhere between indifferent and pleased to see steady worker turnover. Thus, even high-quality but unhappy female workers who threaten to quit seem unlikely to successfully leverage Wal-Mart into creating better working conditions.

B. Limited Market Competition

Relatedly, external market pressures did little to change Wal-Mart's employment behavior. I posit a few reasons. First, in many markets, Wal-Mart acts as a monopsonistic employer by driving out smaller competitors.[129] In fact, many studies suggest that Wal-Mart on balance shrinks the number of available jobs.[130] This means that

124. *See* Bhatnagar, *supra* note 16, at 255.

125. Basker, *supra* note 3, at 183 ("Depending on local market conditions, the number of applicants is frequently five, ten, or even 25 times larger than the number of positions advertised.").

126. *Id.* at 183; Lichtenstein, *supra* note 120, at 1479.

127. *See, e.g.*, Chambers Memo, *supra* note 47, at 1, 5.

128. *Id.* at 5.

129. *See* Panle Jia, *What Happens When Wal-Mart Comes to Town: An Empirical Analysis of the Discount Retailing Industry*, 76 ECONOMETRICA 1263, 1271–72 (2008) (explaining that Wal-Mart faces two major types of competitors—local, generally small businesses and larger retail chains like Kmart and Target); *see also* Alessandro Bonnano & Rigoberto A. Lopez, *Is Wal-Mart a Monopsony? Evidence from Local Labor Markets*, 2009 INT'L ASS'N AGRIC. ECON. CONF. 3, 16–18, http://ageconsearch.umn.edu/bitstream/51289/2/476BonannoLopez.pdf (finding monopsony or oligosony power in nonmetro and rural counties in south-central and north-central states). *But cf. id.* at 18 (arguing against legal intervention).

130. David Neumark et al., *The Effects of Wal-Mart on Local Labor Markets*,

weakly positioned, nondiscriminating firms cannot effectively challenge Wal-Mart for a substantial number of highly desirable female employees. As local competitors often fail to compete with Wal-Mart's lower prices,[131] many Wal-Mart employees might be wary of jumping ship since jobs with these competitors may not be secure over the long term. Moreover, even for those willing to risk job insecurity, Wal-Mart often drives down the wages at those other retailers, making exit a less attractive alternative.[132] Even if one were not persuaded by these studies, Wal-Mart tends to build in low-growth areas, which means those other local employers often have limited positions available and little ability to exploit Wal-Mart's labor policies for their own gain.[133] As for the retailers and other relevant employers that survive Wal-Mart's presence, those that are nondiscriminatory[134] may poach some of Wal-Mart's better female employees. That being said, size matters. Wal-Mart is as big as its next six competitors combined.[135] Even successful competitors simply cannot hire away enough better-quality employees to hurt Wal-Mart. While Target can drive a local discriminatory retailer out of business, Wal-Mart is still capitalizing on enough other efficiency gains that its competitors simply will not cause it to suffer significantly.

Interestingly, even those competitors that challenge Wal-Mart's unfriendly labor policies may not have thought to redress those structures that allow discrimination to flourish. For example, Costco, which competes most directly with Sam's Club[136]—a Wal-

63 J. URB. ECON. 405, 405 (2008).

131. Thomas O. Graff, *Unequal Competition Among Chains of Supercenters: Kmart, Target, and Wal-Mart*, 58 PROF. GEOGRAPHER 54, 55 (2006) (noting that Wal-Mart currently has the lowest cost structure in the retail industry).

132. ARINDRAJIT DUBE ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH & EDUC., A DOWNWARD PUSH: THE IMPACT OF WAL-MART STORES ON RETAIL WAGES AND BENEFITS 1, 8 (2007), *available at* http://laborcenter.berkeley.edu/retail/walmart_downward_push07.pdf.

133. Scott Drewianka & Dain Johnson, Wal-Mart and Local Labor Markets, 1990–2005, at 3 (2010) (unpublished manuscript), *available at* https://pantherfile.uwm.edu/sdrewian/www/walmartandlocallabormarkets.pdf.

134. While the underlying discriminatory stereotypes may arise for a variety of reasons, empirical evidence suggests that other competing employers may do no better in avoiding decisions that cause discrimination in original job-placement decisions and influence the prospects for promotion. *See* Michael Ransom & Ronald L. Oaxaca, *Intrafirm Mobility and Sex Differences in Pay*, 58 INDUS. & LAB. REL. REV. 219, 235 (2005).

135. FISHMAN, *supra* note 25, at 7 ("Wal-Mart is as big as Home Depot, Kroger, Target, Costco, Sears, and Kmart combined.").

136. Costco also lacks the quasi-monopolistic market power of Wal-Mart. Despite its successes in adopting an alternative approach to warehouse retailing, Costco acknowledges that it was forced to substantially shave its prices and profit margin when Sam's Club "began to pare prices aggressively several years ago." Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES, July 17, 2005, at B1.

Mart-owned membership-based warehouse retailer—allows unionization of its labor force and pays much more generous wages and benefits.[137] Costco claims that its employee-friendly policies prevent theft and save money by encouraging low labor turnover.[138] Regardless of whether Costco has ultimately chosen a more cost-efficient labor strategy, three important caveats suggest that Costco and similar competitors present no market threat likely to drive out Wal-Mart's alleged sex discrimination. First, Costco, unlike Wal-Mart more generally, specifically aims for upscale customers who might be willing to pay for such amenities as better wages and benefits, even as they seek discounted goods.[139] Second, Costco sells a larger volume of higher-margin goods, and, as a result, "sales per employee are considerably larger at Costco."[140] This means that the profit per employee is substantially higher and therefore the difference in quality among employees doing the same job should be much more important to Costco than it is to Wal-Mart.

Finally, some evidence suggests that Costco may use the same discriminatory structures as does Wal-Mart.[141] Like in suits against Wal-Mart, merely filing a class action is not sufficient to prove discrimination, but Costco is subject to a similar gender discrimination class action lawsuit.[142] Though Costco may differ from Wal-Mart on many employment issues,[143] it would be unsurprising if it and many other retailers adopted Wal-Mart's mechanisms for assigning jobs, and if discriminatory preferences also infiltrated their systems.[144]

C. *Limited Consumer Pressure*

Even if workers' complaints and competitors' labor practices exert little influence on Wal-Mart, one might suspect that

137. *See* Liza Featherstone, *Wage Against the Machine*, SLATE (June 27, 2008, 7:29 AM), http://www.slate.com/id/2194332 (comparing starting wages, wage growth, bonuses, and health benefits between Wal-Mart and Costco).

138. Greenhouse, *supra* note 136, at B1.

139. *See* Furman, *supra* note 38, at 14–15; *see also infra* Part IIC.

140. Furman, *supra* note 38, at 15; *see also infra* Part IIC.

141. This includes other class action lawsuits, one of which is a large wage-and-hour case. *See* Stiller v. Costco, No. 09-CV-2473-H, 2010 WL 5597272 (S.D. Cal. Dec. 13, 2010) (order granting class certification).

142. *See* Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2007); *see also Costco Gender Discrimination Class Action Lawsuit*, COSTCO CLASS WEBSITE, http://genderclassactionagainstcostco.com/costco94.pl (last visited Mar. 2, 2011). Unsurprisingly, the Ninth Circuit ordered that the Costco suit be put on hold until the Supreme Court resolves *Dukes v. Wal-Mart*. Ellis v. Costco, No. 07-15838 (9th Cir. Dec. 8, 2010) (order deferring submission of suit).

143. That being said, one might expect different internal and consumer pressures to influence Costco and like-minded retailers before they influence Wal-Mart.

144. Ransom & Oaxaca, *supra* note 134, at 235.

consumers or other third parties[145] would drive out discriminatory practices. Yet, Wal-Mart faces little pressure from its own consumers worried about sex discrimination or about labor policies more generally. A variety of associated factors work together to limit consumer influence on these issues.

First, many consumers simply do not know enough about possible sex discrimination to boycott Wal-Mart or to otherwise call for a change in its behavior. Acquiring information about a company's discriminatory practices can be costly.[146] Since most of the workers one encounters in the shopping areas and checkout lines at Wal-Mart are likely to be women, evidence of alleged discrimination is not immediately visually obvious. Nor is it easy to inform Wal-Mart customers of discriminatory policies. Wal-Mart's siting practices make it difficult for unions or other employees to enter Wal-Mart parking lots, and Wal-Mart prefers to site itself away from other stores so that customers cannot walk from one store to another. In fact, it seems likely that the best and most visible source of information about Wal-Mart's discrimination comes from the class action lawsuit. But such evidence is generated by a legal intervention, not by the market. It is possible that in the absence of Title VII, some other quality information mechanism would have surfaced, but the failure of the market to provide substantial evidence prior to the class action suggests otherwise.

Second, many Wal-Mart shoppers are either largely indifferent to or share a belief in the stereotypes that underlie the alleged discrimination in the first instance. Wal-Mart has been spectacularly successful at convincing members of its mainly low income, blue-collar consumer base that Wal-Mart shares their values.[147] This emphasis on a shared culture is prevalent in Wal-Mart's advertisements and has encouraged shoppers to decouple

145. Other sources of external pressure, such as suppliers, and sources of internal pressure, such as shareholders, are unlikely to push harder than employees and consumers. For instance, some shareholders have begun campaigns to change Wal-Mart's behavior, but these progressive proposals were defeated by healthy margins. These proposals were to amend equal employment opportunity policy (only six percent support); establish human rights committee (only two percent support); and pay for superior performance (only thirteen percent support). *Wal-Mart Announces Preliminary 2008 Annual Shareholders' Meeting Voting Results*, WALMARTSTORES.COM (June 9, 2008), http://investors.walmartstores.com/phoenix.zhtml?c=112761&p=irol-newsArticle&ID=1163901&highlight=.

146. *See* George A. Akerlof, *Discriminatory, Status-Based Wages Among Tradition-Oriented, Stochastically Trading Coconut Producers*, 93 J. POL. ECON. 265, 267–68 (1985) (indicating that as consumers become more aware of discriminatory practices by a retailer, and therefore refuse to purchase from the retailer, the retailer must spend more money to find new consumers and must absorb these costs by raising prices).

147. Burt & Sparks, *supra* note 3, at 1469 (noting the success of Wal-Mart's aggressive hospitality and the deployment of symbolic and community acts to create goodwill with its consumers).

Wal-Mart from its bad corporate press. Instead, many of its customers see Wal-Mart as frugal, patriotic, family oriented, and sympathetic to the Christian religious community.[148] Furthermore, most Wal-Mart consumers believe that the company outperforms its competitors at community involvement, and this has helped create trust and acceptance.[149] Thus, few loyal customers perceive or are likely to be persuaded that Wal-Mart systematically mistreats its workers.

Finally, many of those who do care and who might otherwise push for change believe they cannot afford to stop shopping at Wal-Mart. Even many fired employees or those seeking to unionize continue to shop at Wal-Mart.[150] This phenomenon is related to the lack of competition as Wal-Mart's size has allowed it to push others out of business. Customers may have a preference for nondiscrimination, but it is not as strong as their preference for low prices. Those middle-class and wealthy consumers who both care deeply about sex discrimination and feel they can afford to shop elsewhere likely already do so.[151]

Even if a lot of Wal-Mart consumers knew and cared deeply about sex discrimination in employment, the collective-action problems involved in consumer boycotts makes them difficult to initiate and maintain.[152] This is not to say that a consumer boycott would inevitably fail to change Wal-Mart's behavior,[153] but merely

148. Stephen J. Arnold et al., *Hometown Ideology and Retailer Legitimation: The Institutional Semiotics of Wal-Mart Flyers*, 77 J. RETAILING 243, 244 (2001).

149. *Id.* at 257–58.

150. FISHMAN, *supra* note 25, at 220–21 (stating that conflicted shoppers who actively dislike Wal-Mart are the second most frequent shoppers at the store).

151. *See* Graff, *supra* note 131, at 54 (identifying the different target classes of consumers).

152. *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 562 (2009).

Of course, motivated consumers will boycott retailers they believe do offend their values, as exemplified by the recent Target boycott for political contributions to an antigay candidate. Katrina vanden Heuvel, Citizens United *Aftershocks*, WASH. POST (Aug. 25, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082405642.html. Institutional shareholders also called for a comprehensive revamping of Target's political-contribution strategy. Jennifer Martinez & Tom Hamburger, *Target Faces Investor Backlash; Large Shareholders Demand the Retailer Revamp Its Political Contribution Process*, L.A. TIMES, Aug. 20, 2010, at A1.

153. In fact, Wal-Mart consumer boycotts have succeeded in restoring the phrase "Merry Christmas" in stores and holiday advertising. *See* Ryan Cooper, *Christmas, Holiday Greetings Shouldn't Be Taken as Offensive*, SPRINGFIELD NEWS LEADER, Dec. 23, 2008, at 2B. Boycotts have also curbed contributions to gay-rights groups. *See* Adam Parker, *Unclear If Call for Wal-Mart Boycott Contributed to Sales Slip*, POST & COURIER, Dec. 3, 2006, at G1. Boycotts have also led to Wal-Mart removing *Maxim*, *Stuff*, and *FHM* from its shelves and changing its displays of women's magazines. *See* Richard Barnett, *Morality*

that a sustained campaign on behalf of female workers did not emerge prior to litigation. Moreover, if Wal-Mart values the ability to discriminate, it is unclear whether a boycott is likely to exert enough economic bite to change Wal-Mart's practices.[154]

CONCLUSION

This Article dissects a real-world example in which the market seems to have failed to punish significant and widespread employment discrimination. The explanation for that failure speaks to a larger question about whether highly rational behavior can coexist with discriminatory preferences. More importantly, it suggests that many economists and legal scholars are simply too sanguine about the rarity of quasi-monopsonistic hiring power and the value of worker productivity. Thus, even if many concede that noncompetitive markets would allow discrimination to persist, this Article shows that the possibility of such market failure is much more significant than the literature predicts. The depressing lesson of Wal-Mart is that highly rational and efficient companies need not always sacrifice the bottom line in order to maintain a preference for discrimination. Such an observation provides important reinforcement for the often-questioned justifications for continued government intervention in this area.

Fund Sells Wal-Mart Stock To Protest Magazine Displays, ORLANDO SENTINEL, Aug. 17, 2002, at C1.

154. Keep in mind that all of the successful boycotts were ostensibly appeals for Wal-Mart to return to Sam Walton's values rather than to adopt new values. Of course, one could frame an antidiscrimination boycott as consistent with Wal-Mart's values, but it is less clear that most Wal-Mart consumers or executives would be persuaded of the accuracy of such a campaign.

Moreover, even the recent Target boycott over antigay campaign contributions had at best an indeterminate effect on Target's profits and policies. *See* Tom Webb, *Target's Sales Disappoint, But Boycott Effect Inconclusive*, ST. PAUL PIONEER PRESS, Sept. 3, 2010, at C1; *MoveOn Target*, INVESTORS BUS. DAILY, Aug. 24, 2010, at A10; *see also* Matt Jarzemsky, *Target Shares Tumble as December Same-Store Sales Disappoint*, WALL ST. J. (Jan. 6, 2011, 8:59 AM), http://online.wsj.com/article/BT-CO-20110106-706023.html (noting that Target's third-quarter 2010 profit grew 23%, beating analysts' predictions, but that its December 2010 sales were sluggish). With over 80,000 consumers pledging a boycott, Target has yet to apologize, nor has it offered to give money to pro-gay-rights candidates. *Boycott Target Until They Cease Funding Anti-Gay Politics*, FACEBOOK, http://www.facebook.com/pages/Boycott-Target-Until-They-Cease-Funding-Anti-Gay-Politics/147077835306202 (last visited Mar. 2, 2011) (noting the Facebook group "Boycott Target Until They Cease Funding Anti-Gay Politics" now boasts over 83,000 members); Nicole Russell, *Bullseye*, AM. SPECTATOR (Aug. 25, 2010, 6:07 AM), http://spectator.org/archives/2010/08/25/bullseye (discussing Target's policies).