ADDRESSING SEGREGATION IN THE BROWN COLLAR WORKPLACE: TOWARD A SOLUTION FOR THE INEXORABLE 100%

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Abstract

This article suggests a theoretical and analytical framework for rethinking the causes of and remedies for workplace segregation. Taking lessons from civil rights and women’s rights struggles to eradicate segregated workplaces through existing anti-discrimination frameworks, it reviews the historical paradigm approaches to segregation, and their limited ability to eradicate segregation completely, as is evident in the continued existence of workplace segregation. Despite public perceptions to the contrary, segregated workplaces exist in greater numbers today, mostly because of the influx of newly arrived immigrant workers in low-wage industries throughout the country. These “brown collar” workplaces provide a good testing ground for the implementation of a segregation framework in anti-discrimination law.

This article explores the historical trajectory of the inexorable zero inference in Title VII pattern and practice cases and analyzes its viability as the theoretical basis for a segregation framework. It then offers an alternative paradigm response to the problem of segregation, one which can provide an alternative remedy that arises out of a view of segregation as an expression of subordinated work conditions. This alternative response is based on the acceptance of an inference of discrimination wherever segregated workplaces – the inexorable 100% – exist. I suggest a simple, yet powerful doctrinal shift in Title VII law, and in the inferences that can be drawn from the inexorability of a segregated workplace. It asks the reader to imagine an inference created from the “inexorable 100”, the mirror image of the inexorable zero inference. The inexorable 100 is a shorthand description for the segregated job category or department within a workplace. In an ideal world, inexorable 100 evidence would allow a judge to impose remedial measures to dismantle the segregation. More importantly, recognition of an inexorable 100 concept should also open the way for a remedy that includes the improvement of conditions in segregated work environments.

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I. Introduction

This article explores the continuing problem of segregation in low-wage jobs in our society and suggests a Title VII segregation framework as a means of addressing it. As part of a segregation framework, this article analyzes the viability of an inexorable 100 inference of discrimination by analyzing the case law surrounding the inexorable zero inference in anti-discrimination law. It also draws from parallel paradigm responses to the segregation problem in
employment, as it explores the possibility of a segregation framework for today’s version of segregated environments: the brown collar workplace.¹

Despite popular perceptions that workplace segregation is a thing of the past, jobs and occupations are increasingly re-segregating throughout American workplaces. The immigrant nature of the brown collar workplace especially typifies the problems of the segregated workplace.² Employers carry out their preferences for brown collar workers by creating workplace structures that are unappealing to native born workers and then by hiring immigrants into them.³ The job conditions in these workplaces demonstrate the exploitative conditions reminiscent of past instances of segregation in our society. The Civil Rights Act of 1964 was enacted partly in response to similar types of exploitation evident in segregated conditions.⁴ It remains less clear whether today’s interpretation of the Act would, in fact, condemn segregation to the same degree.

Typically, plaintiffs facing today’s segregated workplaces claim they have been excluded from the opportunity to seek those positions. These are the victims of the “exclusionary” impact of discrimination, locked out of jobs that are created to attract a different demographic, namely, immigrant workers.⁵ The mirror-image “inclusionary” aspect of that same discriminatory practice targets immigrant workers for the segregated, less desirable jobs.⁶ Ironically, because

¹ For an explanation and in-depth discussion of the existence, development and maintenance of the brown collar workplace, see Leticia M. Saucedo, The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace, 67 Ohio St. L.J. 961 (2006).
³ Some of these structures include independent contractor arrangements that have been stripped of traditional employee benefits arrangements. See generally Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91, 100–04 (2003); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).
⁶ Id.
“job opportunities” are open to them, these workers are less readily acknowledged as discrimination victims. These workers are what some globalization scholars term the “weak winners,” in contrast to the “strong losers” who previously held these once more-desirable jobs. In this case, the weak winners may enjoy the benefits of a job, but they certainly do not enjoy a job with the elevated labor standards that existed before it became a brown collar – immigrant, low-wage – job. Segregation has been correlated to substandard job conditions in several studies, and is examined here as the foundational characteristic of discrimination in the brown collar workplace.

This article suggests a re-examination of segregation in the workplace and how courts have analyzed it within the anti-discrimination framework. It suggests the development of an instrumental mechanism for identifying the segregated workplace through the acknowledgment of an “inexorable 100%” state of affairs in the segregated workplace. This inexorable 100, the mirror image of the now-famous inexorable zero inference arising out of an absence of women or minorities in a targeted job opportunity, provides the starting point for a more refined inquiry into whether a segregated workplace is the result of discriminatory practices.

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7 See SHAHRA RAZAVI, ED., GENDERED POVERTY AND WELL-BEING, 21, 249, 259-60 (2000) (discussing women’s roles in export-oriented industries which arise out of off-shore operations once operating in developed countries. Razavi analyzes the effect of such operations on conditions and labor standards).
8 Razavi, ed., supra note 7, at 259-60.
Before continuing with the task at hand, a few words are necessary regarding the need to revisit anti-segregation strategies. In the current mythos, the immigrant nature of the workforce in brown collar jobs evokes an image of low-wage, often segregated, jobs as the natural starting point for a group of workers entering the workforce. The myth “portrays the system as open to those who are willing to work hard and pull themselves up over barriers of poverty and discrimination.”11 The structural aspect of segregation – the fact that it persists over time despite legal strategies attacking it – belies the individualist narrative of workers freely choosing the occupations they desire, as it is reflected in the immigrant worker myth. The fact of segregation may also reveal the existence of a workplace dynamic unaffected by and out of reach of anti-discrimination laws.

A few words about remedies are also in order. Although an initial impetus for Title VII was to eliminate the existence of segregated jobs, Congress, commentators, and the courts have, over the past 30 years, focused on providing opportunities for advancement rather than the improvement of the job that workers currently fill. Title VII of the Civil Rights Act of 1964 prohibits the segregation or classification of jobs on the basis of one or more of the protected categories.12 Because of their historical trajectory, however, neither the disparate treatment nor the disparate impact framework of anti-discrimination law is sufficiently adequate to target and eradicate the overrepresentation of workers in a particular job. Our current legal regime typically has remedied segregation by encouraging practices that break down barriers to entry or opportunity. This is true even though Title VII has a history of broad remedial power over

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discrimination in the workplace. In *Albemarle v. Moody*, for example, the Supreme Court focused on the injury as a means of forming the relief necessary to make the plaintiffs whole. The Court noted:

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief . . . Where racial discrimination is concerned, “the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”

This article posits that just such a broad remedy is necessary to definitively dismantle segregation. Today’s anti-discrimination frameworks best address workplace inequities resulting from an employer’s failure to provide equal employment opportunities on a clearly delineated job track. The frameworks are less effective at eliminating the conditions that characterize segregated jobs than they are at creating advancement opportunities for individuals relegated to segregated jobs.

This article suggests a theoretical and analytical framework for rethinking the causes of and remedies for segregated workplaces. This introduction lays out the problem of today’s segregated workplace. Taking lessons from civil rights and women’s rights struggles to eradicate segregated workplaces through existing frameworks, Part II reviews the historical approaches to segregation, and their limited ability to eradicate it completely, as is evident in the continued existence of workplace segregation. Part III reviews the trajectory of Title VII and other labor laws and assesses their effectiveness as the labor market has evolved from a stable, internal market to a contingent, segmented one. It explores the effects of legal developments on

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14 This is in part because of historical legal strategies aimed at eradicating segregated workplaces by focusing on legal impediments like Jim Crow laws, on the assumption that their eradication would naturally lead to desegregation in the workplace. See Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. Rev. 1393, 1442 (2005).
the remedies that plaintiffs can expect from current anti-discrimination law. Part IV reviews the effectiveness of the inexorable zero inference in traditional anti-discrimination cases. It establishes the zero as the foundational theoretical concept for its mirror-image inexorable 100 in the segregated environment. Part V analyzes the effectiveness of alternate paradigm responses to segregated conditions, such as wage inequity, conditions, affirmative action and national origin cases. Part VI offers the segregation framework as an alternative paradigm response to the problem of segregation, one which can provide an alternative remedy that arises out of a view of segregation as an expression of subordinated work conditions. The key component of this framework is the inexorable 100. In an ideal world, an inexorable 100 inference would allow a judge to impose remedial measures to dismantle the segregation. More importantly, recognition of an inexorable 100 concept should also open the way for a remedy that includes the improvement of conditions in segregated occupations.

II. A Historical Perspective on Segregation Litigation Strategies: The African American & Latino Experiences

A comparison of the paradigm responses to segregation in the African American and Latino communities both underscores the strategic nature of the responses and highlights the current need for a segregation framework to deal with continued segregation in low-wage brown collar workplaces.

Jim Crow segregation in all aspects of society, including employment, was an ill that the civil rights litigation arm of the NAACP targeted for elimination during the 1950's and 1960's.₁⁵ For the NAACP, the decision to focus on opportunity rather than on improving workplace conditions was a strategic one that involved experimentation with and eventual rejection of the

₁⁵ See generally, Goluboff, supra note 14.
substantive Due Process Clause as the vehicle to eradicate substandard workplace conditions. In post-Lochner era labor litigation, the NAACP had argued that the right to a discrimination-free work environment was a substantive due process right. Lawyers were able to marshal anti-discrimination arguments that were specifically based on the right to work. The arguments did not invoke the Equal Protection clause, which is currently the foundation of civil rights law. Instead, by attacking labor practices through the substantive due process clause, the NAACP was able to target both segregation in the workplace and the immunity of private actors from liability as non-state actors. The NAACP cases systematically dismantled the line between private and state employers. NAACP lawyers focused on unions, because they could garner arguments that linked union activity to state action, necessary under the Civil Rights Cases to a finding of a substantive due process violation. Legal historian Risa Goluboff notes that labor cases “were distinctively situated to enable the NAACP to attack both the sanctity of segregation under Plessy v. Ferguson and the constitutional immunity of private actors under the Civil Rights Cases. During World War II and immediately after, the NAACP expended considerable resources making arguments that work-related discrimination of all kinds could, and should, lead to a far broader liability than historically had been the case.” Goluboff notes, however, that as time passed, and the NAACP began to ally more with liberal, anti-Communist unions, its employment litigation on behalf of African American workers decreased.

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16 Goluboff, supra note 14, at 1429-31, 1474-75.
17 Goluboff, supra note 14, at 1442.
18 Goluboff, supra note 14, at 1442.
20 Goluboff, supra note 14, at 1451.
21 Goluboff, supra note 14, at 1459-1460.
The NAACP’s focus on closed unions and closed shops allowed African American workers entry into union jobs, even though the jobs within the workplace were still segregated. During this period, economic equality was a goal as much as desegregation. Segregation in the workplace was secondary to the opportunity for jobs during the World War II period. The postwar-related bust affected African American jobs, however. As Goluboff notes, “[t]he ability to work for an open-shop employer alongside the white union members of a segregated union meant little when employers had not only ceased hiring but had begun laying off workers in large numbers.”22 Moreover,

union discrimination cases that once had appeared promising looked institutionally problematic to the NAACP lawyers after the war in another, even more fundamental way. The most promising labor-related precedents on which the NAACP lawyers could build coming out of the war were those attacking unions for racial exclusion, discrimination, and segregation. The NAACP’s alliance with organized labor, and organized labor’s vulnerability, made such attacks politically problematic in the postwar era.23

Goluboff argues that the NAACP’s
determination that state-mandated segregation – rather than state-supported private segregation and discrimination – was the crux of American racial subordination stemmed from a discounting of the problems of working African Americans and of the fundamentally economic as well as racial hierarchies embedded in Jim Crow. . . . Once the NAACP as an organization embraced the anti-Plessy goal of demonstrating that segregation was inherently discriminatory, accepting segregation of any kind – even where economic advancement accrued – became anathema. During World War II, the NAACP lawyers had sometimes procured solutions to the economic but not the entire racial harm that African American workers faced. Thus, the African American boilermakers on the West Coast kept their jobs, but desegregation of their unions was a longer time coming. By the end of the decade, economic opportunities could not, according to the lawyers, compensate for the inherent discrimination of segregation.24

22 Goluboff, supra note 14, at 1460.
23 Goluboff, supra note 14, at 1468.
24 Goluboff, supra note 14, at 1478-79.
The NAACP’s early foray into labor cases meant that the right-to-work doctrine had a component of anti-discrimination and anti-subordination elements that would not have existed had the organization not pushed the notion of the right to work as including the right to be free from a nondiscriminatory environment. The right to work, based in the substantive Due Process Clause, was envisioned as encompassing both the right to an opportunity for good jobs and the opportunity to work in desegregated job environments. The legal strategy incorporated both elements. If the civil rights regime had arisen out of labor rather than education cases, the links between economic and racial subordination could have been more extensively pursued. The proposed segregation framework discussed here attempts to address some of the same problems that existed in the labor market at the time the NAACP changed direction to focus on state-mandated segregation, rather than state-supported private segregation.

In the Latino community, a similar dynamic between segregatory practices and segregation occurred. In the southwest, Jim Crow legislation often took the form of language or cultural restrictions, which were inevitably tied to race. Jim Crow practices were more subtly framed. In some cases, state and private practices classified by perceived language ability, which resulted in the segregation of Mexicans and Mexican Americans. In others, state actors implemented policies that excluded Latinos from participation without allowing them to claim discrimination. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the plaintiffs argued that state

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28 Gross, *supra* note 27, at 340-42 (arguing that Mexican Americans were “covered with the Caucasian cloak” in order to exclude them from participating on juries, on the theory that since they were considered white and whites served on juries, they could not claim equal protection violations); see also *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954) (the Court noted that while the challenged statute was neutral on its face, it could be applied in a discriminatory manner. Thus, “the petitioner’s initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class . . . distinct from ‘whites.’”)
policies alternately defined Mexicans as white or non-white, depending on the situation, in order to exclude. The plaintiffs presented evidence that Mexicans defined their identity as cultural more than racial. The plaintiffs suggested, and the Supreme Court acknowledged, that the issue in segregatory practices was not so much the categorization by race as the practices that “subordinate groups based on ideas of racial difference.” In the case of Mexicans, the fact that their “whiteness” was used against them to deny them participation on juries was an example of such subordination. As legal scholar Ian Haney Lopez has noted in his analysis of the importance of Hernandez in the struggle against segregation, “Hernandez unambiguously insists, in a way that Brown does not, that it is race as subordination, rather than race per se, that demands constitutional intervention.”

There is a lesson in Hernandez that goes beyond the jury exclusion context and which may inform the basis on which a segregation framework should lie. In Hernandez, Chief Justice Warren dealt with what was essentially race or national origin discrimination as a group subordination issue. The Hernandez opinion states, “community prejudices are not static, and from time to time other difference from the community norm may define other groups which need the same protection. Whether such a group exists is a question of fact.” Thus, in the words of Haney Lopez, the test to determine whether a group deserves constitutional protection is whether “in the context of the local situation, was the group mistreated?” In Hernandez, it was Mexicans’ subordination in the context of their mid-century lives, rather than their race, that required protection. Today it is subordination in the context of a restrictive immigration law

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30 Haney Lopez, supra note 29, at 62.
31 Hernandez, 347 U.S. at 478.
regime and a weak employment and labor enforcement framework. The Hernandez lesson should be applied, therefore, in the context of brown collar workplaces and in the implementation of a segregation framework that recognizes an accompanying inexorable 100 inference.

III. The Current Background: The Unsatisfactory Avenues in Current Labor and Anti-Discrimination Law to Eradicate Segregated Workplaces

A. The Current Perception of Immigrants in the Workplace

The impetus for the exploration in this article comes from two sources: the first is my frustration with the incomplete analysis in either current immigration or in employment discrimination debates about the role of immigrants in the American workforce, specifically their role as alternatively taking away jobs that others want, or taking jobs no one else wants. The uni-dimensional character of the debate masks the subordination that is many times evident in the segregated workplace. As described earlier, the general argument assumes that there is no discrimination violation if immigrants have opportunities to take the jobs that no one else will take.33 While the rhetoric responds to the argument that immigrants drain the economy and prevent others from taking jobs, it ignores the employer’s role in creating a set of isolated, dead-end jobs. The rhetoric also reflects the assumption that these sets of jobs are an inevitable part of American economic life. This line of rhetoric focuses on the worker’s role and choices, masking the intent of the employer in creating the segregated workplace.34 By focusing on the employee’s role, the debate draws attention away from the employer and from state policies that

33 This assumption itself contains two further assumptions: first, that by taking these jobs, immigrants are signaling a “preference” for them. Second, and relatedly, that the “choice” of immigrants to take these jobs should preclude any discrimination claim. See Leticia M. Saucedo, supra note 1, at 973-76. The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace, 67 Ohio St. L.J. 961, 973-76 (2006).
34 Saucedo, supra note 1, at 973.
have allowed for the creation of jobs with lower wages, no health insurance or other benefits, and lax safety regulations. Consequently, the public debate centers on workers competing against each other for the same job.  

My desire to get beyond what has become a debate about which workers should hold particular jobs is the second impetus for this article. I propose an alternative framework that does not require that employee groups be pitted against each other in an ever growing segmented labor market. Absent an alternative framework, employers will be able to avoid liability simply by pointing to the segmented nature of the market, much like employers have successfully done to explain wage disparities. Some concrete examples illustrate the limitations of an anti-discrimination regime that focuses on differential treatment, or even disparate impact. In Houston, a group of Latino workers filed suit against an air conditioning duct manufacturing company alleging discrimination in its hiring, assignment and promotion policies. The Latinos, the vast majority of whom were immigrants, worked in department 911, a segregated entry-level department that produced the coils for the air conditioning ducts. Another entry-level department, 910, produced the jackets for the ducts. It was populated mostly by Vietnamese workers. Department 911 employees performed the most difficult, dirty, back-breaking, and least paid work in the plant. Department 910 employees performed more desirable work, for better pay. Structural requirements such as a transfer policy that requires English to

35 See e.g., www.chicagopublicradio.org/848/series_features/848_immigrationstories.asp (ex-offender and activist Paul McKinley speaking out on immigrants taking jobs that African Americans are locked out of).
36 The narrative of groups taking each others’ jobs has been played out in various litigation arenas. See e.g., EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Leah Beth Ward, Global Horizons Labor Suit Granted Class-Action Status, YAKIMA HERALD-REPUBLIC, Aug. 1, 2006, available at http://www.yakima-herald.com/page/dis/288754083408967.
38 Colindres v. Quietflex, 427 F.Supp.2d 737 (2006) (denying plaintiffs motion for class certification on the discrimination claims; the plaintiffs have since settled the case).
transfer to the more desirable department (but not vice versa), a six month transfer requirement, and a policy/practice that forces transferees to transfer into less desirable shifts, kept the Latino workers segregated in department 911. Although, arguably, the Vietnamese workers were as segregated as the Latino workers in the sense that they, too, were isolated from other workers, the current discrimination frameworks required the Latino plaintiffs to articulate their legal claims in a manner that placed the Latino and Vietnamese workers on opposite sides of the legal action. The Latino plaintiffs had to show that their conditions were substantially worse, and their prospects for advancement limited by the employer’s structural requirements. It also meant that the Vietnamese workers could not easily join with the Latino workers to combat structural practices that affected both sets of workers, such as antiquated piece rate systems, seniority systems that kept both sets of workers in entry level positions, and intra-departmental promotion policies that kept workers in their own departments for years on end.

By effectively forcing the plaintiffs to focus on the employees’ situations vis-à-vis each other, the available anti-discrimination frameworks forced the employees to create a narrative that focused on the targeted jobs and the groups that held those jobs, rather than on the conditions that maintained the segregation and the exploitative conditions—some of which also existed in the Vietnamese department—in the first place. In other words, it was not enough to show segregation per se. The plaintiffs had to show the detrimental effects of the segregation by pointing to a comparator employee group that had more desirable work conditions. Employer policies and practices are simply a backdrop to the broader issue of whether one group or another holds the desired positions. In anti-discrimination law, the focus on the comparative position of employee groups inevitably leads to an inquiry about whether the challenging parties are

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39 See Marion v. Slaughter Co., 202 F.3d 282, 1999 WL 1267015, *5-6 (10th Cir. 1999) (segregation in itself was not sufficient to sustain a Title VII discrimination claim).
qualified for the targeted jobs, one element of an individual disparate treatment claim.\textsuperscript{40} Because of its anti-classification nature, this inquiry risks creating long-term animosity and tensions between groups of workers who perceive that jobs are in contention.\textsuperscript{41} The targeted job and its composition then becomes the relevant inquiry. In a legal culture increasingly ruled by color-blind, anti-classification equal protection principles,\textsuperscript{42} the focus on targeted jobs as the remedy for exploitative employer practices simply re-creates a zero-sum environment that can spiral into decades of litigation over the desired job.

The inability of the frameworks to hold employers accountable for the various methods they use to make working conditions exploitative – i.e., the “subordination as discrimination” theory that \textit{Hernandez} advances – deserve more, or at least different, scrutiny in the segregation context. In order to make the employer policies and practices the true focus of the inquiry into whether there is discrimination in the creation of an exploitative workplace environment, we need an alternative framework. The segregation framework proposed here would scrutinize the indicators of exploitation as a form of discrimination, despite whether there is a comparable set of similarly situated employees. This attempt has been made, although not explicitly, in conditions Title VII cases and in wage discrimination cases, as will be discussed later.

\textbf{B. The Effect of Segmented Markets on Labor Protection and on the Anti-Discrimination Frameworks}

The increasingly segmented labor markets in which Title VII and other labor laws must operate are problematic for labor protections. Title VII and the New Deal labor legislation were

\textsuperscript{40} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
\textsuperscript{41} This has been the case in the affirmative action cases, for example, in which employers responding to perceived exclusionary practices are then sued by Anglo plaintiffs. \textit{See} discussion, infra. Part V.D.
\textsuperscript{42} \textit{See generally}, Reva Siegel, \textit{Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown}, 117 Harv. L. Rev. 1470 (2004); \textit{see, e.g.}, Johnson v. Transp. Agency, Santa Clara County, California, 480 U.S. 616 (1987) (Promoting a female employee over a male employe with higher test scores did not violate title VII because sex was only one of many factors in the Agency’s affirmative action plan)
each debated and passed in an era where the predominant method of advancement was within a company over a long period of time. Jobs were considered stable and people did not move out of them. Segregation in that period was about excluding minorities from advancement tracks within a company, or from particular jobs in a company. Title VII architects may not have anticipated the trend toward segmentation. As legal scholar Katherine Stone succinctly argues:

The labor and employment laws we have inherited from the New Deal were built upon the template of an employment relationship characterized by internal labor markets – an employment system that offered long-term attachment between the employee and the firm in which the employee advances up the job ladder of a particular employer for most of his or her working life. Thus the labor law regime was compatible with and tailored to the job structures of the industrial era.

In sum, today’s employment and labor laws reflect the employment reality of a different era.


If the internal labor market system of labor relations has given way to more of a segmented model, as has been the case in low-wage industries, the old assumptions of protection through traditional union-type organizations within the workplace must also give way to the new reality. The traditional labor regulation protecting or strengthening the internal labor market has historically been closed to minorities and women. As Katherine Stone argues in her analysis of historical labor regulation trends, “[T]he labor laws and the employment practices of large firms


45 Goluboff, supra note 14, at 1478-80, 1482.

46 STONE, supra note 3, at ix.
reinforces a sharp divide between those inside and those outside the corporate family. Insiders benefited from the collective bargaining laws and the implicit job security of the internal labor market; outsiders had neither.

Laws protecting collective bargaining rights reflected the long-term employer-employee relationship of the internal labor market. Benefit negotiations centered on length of service, seniority and long vesting periods. Collective bargaining contracts included just-cause and seniority provisions in order to protect the long-term employment paradigm.

Other legislation, such as the Fair Labor Standards Act, The Occupational Health and Safety Act, the Worker Adjustment and Retraining Notification (WARN) Act, and similar state statutes have become the default protection for this set of workers in the absence of labor union protection. Employment discrimination laws are the other type of labor protection for individual workers facing workplace injustice. Title VII, the Equal Pay Act, the Age Discrimination in Act of 1967, and the Americans with Disabilities Act of 1990, have protected the rights of women and minorities in the workplace in ways that traditional labor regulation could not. As Katherine Stone notes, anti-discrimination laws “provided a mechanism for orderly, rule-based, and accountable decisions about such matters as hiring, promotions, and pay rates. These rule-based systems injected an external order into the otherwise private and often anarchic domain of the workplace. In particular equal employment laws provided rules by which women and minorities could break into workplaces that had been white, male, privileged clubs.” Thus, as the private forms of negotiation and protection through collective

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47 STONE, supra note 3, at 122-123.
49 STONE, supra note 3, at 121.
50 LICHTENSTEIN, supra note 48, at 206-11.
51 STONE, supra note 3, at 168.
52 STONE, supra note 3, at 168.
bargaining agreements have diminished in effectiveness in light of workplace changes, Title VII has filled the void of protection in the workplace. The Civil Rights Act of 1964 has, therefore, increasingly replaced labor law as the form of protection for individual workers.

Yet, today’s problem is not so much that minorities cannot break into the workplace, given the rules that have developed in employment and labor law. The problem is that they cannot break out of segregation—an old-style problem—because of new forms of organization in the workplace. In other words, while the individualist labor protection paradigm may help workers break into jobs, it does not provide the collective protections that have traditionally helped improve workplace conditions.

C. The Pressures on the Anti-Discrimination Paradigm

Similarly, the assumption of a stable career ladder has highly influenced the manner in which the disparate impact and disparate treatment discrimination frameworks developed and grew. The key remedy in a discrimination case was to provide for advancement opportunities because the assumption was that this remedy offered a way out of segregated conditions for minorities and women. These assumptions fell in line with the broader civil rights aspiration at the time to eradicate segregation at all levels of society. In the traditional civil rights models, civil rights enforcement efforts were initially directed at corporate hiring and compensation practices in order to obtain equal pay and access to jobs for women and minorities. But it quickly became apparent that women and minorities needed not simply jobs, but good jobs. . . . In an era of promotional ladders within firms, it was logical and appropriate for Title VII plaintiffs to seek remedies that gave women and minorities access to the upper rungs of the promotion ladders . . .

53 See, Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 461-62 (2001) (“Efforts to reduce the uncertainty of general and ambiguous legal norms by articulating more specific and detailed rules produce a different but equally problematic result. Specific commands will not really adapt to variable and fluid concepts. Inevitably, they will be underinclusive, overinclusive, or both.”).
55 Goluboff, supra note 14, at 1479-80.
Title VII remedies for employment discrimination were tailored to redress discrimination within firms that utilized internal labor markets. Affirmative action and requirements that firms promulgate goals and timetables for measuring their compliance with equal employment objectives helped numerous women and minorities gain access to previously segregated workplaces and helped them move up within the firm. However, the remedies assumed that there were identifiable job ladders that defined advancement opportunities within firms, and operated to move women and minorities up within them.56

Today, the advancement mechanisms within a company are not so clear. In addition to segmented job structures, companies have turned to multiple job categories and titles, contingent hiring and team-style work models— all of which affect how a discrimination lawsuit will fare under the traditional models.57 Katherine Stone describes the “new psychological contract” or “the new deal at work,” as one in which “the long-standing assumption of long-term attachment between an employee and a single firm has broken down.”58 The effect is that a worker’s identity is linked to skills, and employers discourage employees from expecting long-term job security. In the earlier industrial era of production, by contrast, clearly defined job ladders, and employer reliance on promotion tracks fostered internal labor markets and long-term job security.59 Labor regulation assumed that labor unions and employers were countervailing powers, and that collective bargaining in the shadow of the law protected individual workers. Laws establishing individual rights “provided a safety net for those left outside the internal labor market system.”60 Today, however, what was meant to be a safety net now provides the principle means of legal protection for workers.

Because of the evolving labor structures in our economy, we need to consider how discrimination may occur in these different scenarios and develop frameworks that will fit those

56 STONE, supra note 3, at 182-183.
57 STONE, supra note 3, at 2-4.
58 STONE, supra note 3, at 3.
59 STONE, supra note 3, at 5.
60 STONE, supra note 3, at 5.
situations. The one that affects brown collar workers the most is old-fashioned segregation manifested in this new form—the segmented labor market. Interestingly, in the transition remnants of the industrial era structures still exist in low-wage labor occupations, albeit with the philosophies and expectations that characterize the digital era. Some of these include insecurity about social welfare benefits, the expectation of job turnover, and the existence of job networks rather than internal promotional tracks for advancement opportunities.

1. The Weaknesses of the Current Anti-Discrimination Paradigm

The argument that segregation is discriminatory has long existed, yet is still rejected even in traditional workplace segregation fact patterns. A relatively recent case, Marion v. Slaughter provides a good example.\(^{61}\) In that case, a female assembler sued her employer because she was consigned to a segregated department and did not have opportunities for advancement.\(^{62}\) She attempted to show that the employer’s practices had a disparate impact on women simply by showing the fact of segregation.\(^{63}\) The circuit court affirmed the district court’s dismissal of her argument by pointing out that Title VII requires more than a showing of the mere fact of segregation in order to make out a prima facie case of discrimination.\(^{64}\) Even though the statute prohibits “classification or segregation” of positions, the frameworks require more. As the court noted,

> the fact, standing alone, that [the company] has all men in sheet metal positions and all women in assembly is not a per se violation of Title VII; nor is it self-proving as to the existence of a policy or practice, lawful or otherwise. The section of the statute to which the plaintiff refers . . . refers to segregation or classification that tends to deprive protected individuals of employment opportunity or otherwise adversely affects employment status. Thus, it is not the

\(^{62}\) Id. at *2.
\(^{63}\) Id. at *2.
\(^{64}\) Id. at *6.
fact of separate genders in departments that is prohibited, it is the deprivation of
opportunity or adverse effect on status that is prohibited.65

This analysis, of course, ignores the strong historical correlations between segregated workplaces
and inferior conditions for minorities and women. The case is exceptional only in that it is
stripped of the traditional assumptions behind Brown v. Board of Education and Hernandez v.
Texas and their progeny that segregation is a per se equal protection violation because of its
subordinating aspects. A new assumption of nondiscrimination, in the absence of clear evidence
to the contrary, exists.

The segregation framework and inexorable 100, therefore, must be developed as concepts
that encompass the symptoms of either deprivation of opportunity or of adverse effect on status.
These concepts in turn, encompass characteristics of discrimination that include subordination.
A focus on the adverse effect on status, moreover, may lead to injunctive relief that improves the
lot of the employees relegated to the segregated, less-desirable positions.

2. The Traditional Disparate Impact Paradigm

Under the doctrinal framework of disparate impact theory the plaintiff must show that
some facially neutral employment practice has a significantly disproportionate impact on a
protected class.66 Many of the disparate impact cases that challenge segregation in the
workplace focus on employer practices that prohibit the advancement of protected groups from
one job or occupation to another.67 In many cases, the employer successfully relies on the

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65 Id. at *6.
67 See e.g., Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (2007) (affirming district court’s grant of class certification to
female employees of Wal-Mart alleging sex discrimination); Butler v. Home Depot, Inc., 984 F. Supp. 1257 (N.D.
Cal. 1997) (plaintiffs prevailed on subjective promotion and channeling policy challenge); Jenkins v. Wal-Mart
Stores, Inc., 910 F. Supp. 1399 (N.D. Iowa 1995) (allowing plaintiffs to proceed to trial on a disparate impact
subjective decision making promotion claim; plaintiffs argued that the employer’s subjective process resulted in an
underrepresentation of Blacks in targeted positions); Banks v. City of Albany, 953 F. Supp. 28 (N.D.N.Y. 1997)
argument that no one else is interested in the job, and that the employer is not responsible for the
interest of employees in certain jobs, particularly when the interest is influenced by societal
factors. The argument—and the dominant view that an employer is not responsible for societal
discrimination—ignores the possibility that the workplace is a series of structures established
through an employer’s hiring and assignment policies, and that the ensuing segregation is at least
an indication of discriminatory practices. For example, an employer may act on a
preconception that Latinos are more desirable for service jobs because of their work ethic. As
a result, Latinos are hired and assigned to entry level service jobs. Other requirements, such as
language proficiency, hinder their promotion opportunities. Latinos are very quickly
overrepresented in entry level service jobs, and underrepresented elsewhere. While the
“inexorable zero” inference may help a plaintiff focus on policies that prevent Latinos from
moving into more desirable jobs, it does not necessarily help improve conditions in the
overrepresented, segregated job.

3. The Traditional Disparate Treatment Paradigm

The disparate treatment model requires proof of intentional, differential treatment. Under
the traditional framework developed by the Supreme Court in *McDonnell Douglas v. Green*, the
plaintiff can bring forward direct evidence of employer intent or can prove it circumstantially by
introducing evidence that the plaintiff sought an opportunity, was denied that opportunity on
account of her or his membership in a protected category, and that the employer continued to

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ORGANIZATION OF LABOR* 159 (2003).
offer the opportunity to others.\textsuperscript{71} If the plaintiff meets the \textit{McDonnell Douglas} burden, the employer can introduce evidence of a legitimate nondiscriminatory reason for the employer action.\textsuperscript{72} The plaintiff has an opportunity to show that the employer’s business reason is a pretext for discrimination. Under this model, the focus of the inquiry remains on the employer’s intent, which is difficult to prove, especially through circumstantial evidence.

The disparate treatment model allows employers to frame the absence of a protected group in a particular job or occupation as the result of a lack of interest.\textsuperscript{73} Commentators have addressed the lack of interest defense and the rhetoric of choice and have introduced sociological and empirical studies to show that an employee’s choice is much more structured and circumscribed by employer practices than is typically believed.\textsuperscript{74} Presumably, under the traditional disparate treatment model, the overrepresentation of a particular group in a particular job may reflect the employee’s choice as much as anything else. If we consider, however, that employers have the power to circumscribe worker’s choices, then the employer’s response to a differential treatment allegation—that the market dictates labor composition—carries less weight.

A plaintiff may also challenge disparate treatment in job terms and conditions. In these cases, the plaintiff challenges an employer’s intentional practices or actions that result in minorities or women (or other protected group) getting worse treatment because of their protected status. In the classic example, an employer maintains a weight cap for stewardesses

\begin{footnotes}
\item[72] Id. at 802.
\item[73] See, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 354-55 (7th Cir. 1988) (court credited defendant’s argument that employees chose jobs according to their interests).
\end{footnotes}
because all of the employees in the category are women. The segregated status of the stewardess position is a secondary consideration. In the inexorable analysis, the plaintiff would provide evidence of segregation as principal evidence of employer disparate treatment. Other workplace conditions would provide the rest of the prima facie case for a plaintiff.

IV. The Pattern and Practice Paradigm, the Inexorable Zero, and the Initial Impetus for a Segregation Framework

Courts have accepted a model of proof in class action disparate treatment and disparate impact cases that allows the plaintiff to show, through a combination of statistical and anecdotal evidence, that the employer’s standard operating practice is discriminatory. In the pattern and practice case, the plaintiff shows that the employer’s targeted practice affects a protected group. The statistics can show, for example, that members of a protected class are excluded from a targeted position. The plaintiffs must typically supplement the statistical evidence with anecdotal evidence of animus, in the disparate treatment case.

The Supreme Court recognized the pattern and practice concept in employment discrimination in Teamsters v. United States. The concept was necessary to capture the types of practices that employers and unions developed to continue excluding minorities from desirable jobs despite the passage of the Civil Rights Act of 1964.

In Teamsters, the government, on behalf of a group of Blacks and Latinos employed as short haul drivers, challenged several employment practices that resulted in their denial of access to the more desirable long haul driving routes. White drivers held these positions. The employer and the Teamsters union maintained a lock on those jobs through a seniority system,

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75 Frank v. United Airlines, Inc., 216 F3d 845 (9th Cir. 2000). An analysis of this and other conditions cases in segregated workplaces and their effectiveness are discussed in Section V.C. below.
77 Teamsters, 431 U.S. 324.
together with a word-of-mouth hiring system. The Supreme Court held that the employer maintained a discriminatory hiring system as a matter of practice, or as a standard operating procedure. It based its ruling on both statistical and anecdotal evidence.

Possibly the most damning evidence in the case was the fact that virtually no minorities held the more desirable line driver positions. Justice O’Connor noted that fact, in response to the employer’s challenge to the plaintiffs’ statistical evidence:

The company’s narrower attacks upon the statistical evidence – that there was not precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs, etc. – are equally lacking in force. At best, these attacks go only to the accuracy of the comparison between the composition of the company’s work force at various terminals and the general population of the surrounding communities. They detract little from the Government’s further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs. Such employees were willing to work, had access to the terminal, were healthy and of working age, and often were at least sufficiently qualified to hold city-driver jobs. Yet they became line drivers with far less frequency than whites (of 2,919 whites who held driving jobs in 1971, 1,802 (62%) were line drivers, and 1,117 (38%) were city drivers; of 180 Negroes and Spanish-surnamed Americans who held driving jobs, 13 (7%) were line drivers and 167 (93%) were city drivers). In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company’s inability to rebut the inference of discrimination came not from a misuse of statistics but from “the inexorable zero.”

This opinion spawned the “inexorable zero” as a rule of inference that commands deeper scrutiny in discrimination cases.

A. The Focus on and Meaning of the “Inexorable Zero” as a Rule of Inference

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78 Id. at 324. 
79 Id. at 324. 
80 Id. at 336-37.  
81 Int’l Bhd. of Teamsters, 431 U.S. at 342, n.23 (citations omitted). 
In many of the cases alleging workplace discrimination, plaintiffs must rely on statistics to show a pattern and practice of discrimination, in the absence of direct evidence. Disputes surrounding the validity of statistical methods, the definition of available labor pools, and the meaning of the statistics dominate typical pattern and practice cases. In one specific instance, however, the focus on statistical evidence in a case—and on its strengths and flaws—has historically yielded to common sense. In the case of the “inexorable zero” the plaintiff demonstrates an absence of members of a protected category in a targeted job or occupation. The zero itself is, at least, some evidence that the employer may have some policy or practice that results in an absence of opportunity or has an adverse effect in job status for a protected group.83 The “inexorable zero” thus became its own rule of inference, independent of any statistics introduced in a case.84

The inexorable zero concept has arisen in litigation ranging from employment discrimination to segregation to higher education.85 It has been invoked in various employment contexts, including hiring, firing, assignment and promotion, to demonstrate the effects or outcomes of discriminatory practices.86

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83 Id. at 1216.
The dominant view of the inexorable zero inference in case law is one in which the zero represents an employer’s intent to keep a protected group out of a particular job category.87 In a subset of cases, the inexorable zero carries an inference because the zero, in addition to its common sense meaning, also represents a statistically significant disparity from the compared-to numbers.88 In the minority view, the zero represents a mere absence, requiring additional evidence for an inference of discrimination.89 These cases reflect the split among the circuits over how far the courts should carry the inference in evaluating employer motive in discrimination cases.90

Courts have not recognized an inexorable 100 inference for cases in which segregation characterizes a job, despite similarly onerous effects (consignment to a dead-end, exploitable job), and a similar use of race or national origin to identify employees as particularly suited for a given job.91 This is the case even though, as social science research shows, the more segregated the occupation, the more it experiences wage disparities, less desirable work tasks and

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88 See, e.g., EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994); Hill v. Ross, 183 F.3d 586 (7th Cir. 1999).

89 See, e.g., Carter v. Ball, 33 F.3d 450 (4th Cir. 1994) (requiring a comparison to the qualified labor pool); Jordan v. Shaw Indus. Inc., 1996 WL 1061687, at *10 (M.D.N.C. 1996) (“without evidence of the relevant labor pool, Jordan’s “inexorable zero” evidence is insufficient, standing alone, to show discriminatory motive on the part of Shaw Industries.”); Frazier v. Ford Motor Co., 176 F.Supp.2d 719, 734 (W.D. Ky. 2001) (requiring evidence of numbers of African Americans in the qualified labor pool); EEOC v. Turtle Creek Mansion Corp., 1995 WL 478833, at *9-11 (N.D. Tex. 1995) (because the total number of hiring decisions was small, the court found that inexorable zero evidence does not in itself require a finding of discrimination).

90 See Note, The Inexorable Zero, supra note 82, at 1225-1227; compare EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994) (inexorable zero helped plaintiffs prove discrimination by a preponderance of the evidence) with Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494 (8th Cir. 1984) (noting that zero is not inexorable without a showing of statistical significance).

91 This use of race and national origin is similar to the first generation discrimination that legal scholar Susan Sturm describes in her article. Sturm, supra note 53, at 466. The fact that it is used so openly to track people into jobs rather than keep them out of opportunities makes the inexorable 100 concept both salient and necessary in today’s workplace.
assignments, and deteriorating pay over time. That such conditions deserve anti-discrimination protection is a tenet of the Civil Rights Act of 1964. As I will review, the majority of segregated workplace issues have been addressed within the current framework, some successfully, because of the overt nature of the discrimination. However, as employer practices have become more multi-faceted and subtle, capturing the effects of discriminatory practices becomes more difficult. Lessons from the application of the inexorable zero inference could be helpful, therefore, in the development of an inexorable 100 model. Ideally, the inexorable 100 would be the shorthand common sense method of signaling a discriminatory employer preference in the evolving labor market. At the very least it would signal to an employer – in much the same way that the inexorable zero currently does – that it should review its practices to avoid future liability. By focusing on the racial and ethnic composition of employees in the substandard job, the hope is that the framework can lead to a remedy that improves conditions in the substandard job as much as it eliminates its segregated status.

B. Interpreting the Inexorable Zero in Employment Cases: Lessons for the Inexorable 100

Fact Pattern

Over eighty cases have discussed or made use of the inexorable zero in a variety of contexts, from employment to grand jury selection mechanisms to immigration policy.

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92 See, supra note 9.
94 Examples include the restructuring of industries so that jobs are more decentralized, specialized, de-skilled and segmented.
96 See e.g., Ching v. Runnels, 343 F.Supp.2d 891 (N.D. Cal. 2004) (although denying writ of habeas corpus, court noted that a complete absence of Hispanics, Chinese or Filipinos forepersons over a thirty year period merited close scrutiny, including scrutiny into possible unconscious biases preventing their selection).
challenges since the Supreme Court used the term in Teamsters. In employment, the inexorable zero is invoked in segregation cases, as well as in hiring, firing, and assignment cases. An analysis of some of the majority holdings and their fact patterns in the employment discrimination context will provide a backdrop for the types of cases in which the inexorable could also provide adequate inferences of discrimination, or, at the very least, signal the need for further inquiry.

C. Segregation and Barriers to Opportunity: Finding Support for the Inexorable 100 in the Inexorable Zero Cases

In Ewing v. Coca Cola Bottling Co., the court accepted the inexorable zero as proof of some barrier to opportunity caused by the employer’s practices. There, the plaintiffs, Black and Latino production workers at a New York Coca Cola bottling plant, alleged that they were assigned to the least desirable jobs and the most onerous conditions in the plant. Plant management also failed to train the plaintiffs to advance into the semi-skilled jobs in the plant. The Anglo workers in the plant, on the other hand, were trained early and often so that they would not have to perform the most onerous assignments for very long. The plaintiffs focused on the inexorable zero in the more skilled positions as evidence of the segregated nature of the plant, and of the employers’ intentional disparate treatment of minority workers. The court denied the defendant’s motions to dismiss, noting that the inference of discrimination resulted from the

99 Id. at *1-5.
100 Id. at *5.
101 Id. at *5.
102 Id. at *6.
plaintiffs’ allegation that Black and Hispanic production workers are assigned to work exclusively at the most onerous dead-end jobs, while similar situated white production workers are given the more desirable, and possibly career enhancing machine jobs. While this is not the case of the strict “inexorable zero” . . . the allegations of significant segregation of the production workforce at the Elmsford plant is a sure sign of discrimination.103

One can easily imagine that in the case of the inexorable 100, given the segregated nature of the jobs, a court could create opportunity by allowing for a remedy that reversed the onerous conditions in the least desirable jobs. In other words, the employer’s practice could be remedied either by improving work conditions or by creating advancement opportunities. Arguably, as this case demonstrates, the inexorable 100 condition is recognized in the case law. Its explicit articulation could result in an advancement of segregation theory within anti-discrimination law because it addresses the intentional targeting of a group of workers into dead-end jobs and allows anti-discrimination law to remedy those job conditions.

In Loyd v. Phillips Bros.,104 the court’s language forecasts the viability of the inexorable 100 as an inference of discrimination. The plaintiffs challenged the structures utilized by the employer to maintain a sex-segregated workforce.105 The plaintiff, a female J-2 bookbinder, challenged the employer’s practice of tapping male employees on the shoulder for higher level positions.106 Under a tap on the shoulder system, the company targets or recruits individual males for promotion, sometimes without posting or otherwise making the position publicly available either internally or externally.107 The company maintained three positions: J-1 was the highest level and the better paying position. J-2 and GPW (general production worker) positions

103 Id. at *6.
104 Loyd v. Phillips Bros., Inc., 25 F.3d 518 (7th Cir. 1994).
105 Id. at 521.
106 Id. at 521.
were equivalent positions from which the company recruited for J-1 apprentice positions. The company maintained a segregated workforce, in that the J-1 positions were all male, the J-2 positions were all female, and the GPW positions were all male. Consequently, women were never promoted into the J-1 positions. The plaintiff challenged the practice because she sought a position in the J-1 unit. The court noted that the segregated nature of the workplace was evident in the inexorable zero in the J-1 position. The court also noted that the segregation itself should be cause for scrutiny: “the 100% sex-segregated workforce is highly suspicious and is sometimes alone sufficient to support judgment for the plaintiff.” The Court focused its inquiry on the ultimate effect of the segregation, which resulted in no women in the higher-paying positions. As the court noted, “that Phillips’ promotional procedure inexorably maintained the existing zero is strong evidence that it was intended to do so.” Presumably, although not explicitly discussed in the case, the corollary would be true. In other words, the segregated nature of the plant would also demonstrate discrimination through policies that maintained the existing inexorable 100.

*Barner v. City of Harvey* involves the use of the inexorable zero in the context of firing. The plaintiffs, a group of African Americans, claimed that the City of Harvey laid off a
hugely disproportional number of African Americans after the election of a new mayor.\footnote{Id. at *9.} One hundred percent of those laid off for budgetary reasons were African American.\footnote{Id. at *9.} The parties disagreed as to the value of the statistics presented by each side, and much of the evidence at trial centered on the numbers.\footnote{See id. at *10-23.} The court held that the plaintiffs overcame a summary judgment challenge with a showing of the skewed numbers. As the court noted, “[i]n the end, the tremendous drop in African-American presence in Harvey’s workforce, both in general and across the board, and the ‘inexorable zero’ means that Plaintiffs, despite their lack of statistical sophistication, have successfully shown a prima facie case both of disparate impact and disparate treatment.”\footnote{Id. at *50.} 

The court examined both sides of the inexorable zero in its analysis:

The “inexorable zero” argument is augmented by the simple fact that the proportion of African-Americans in Harvey’s employ dropped drastically, both overall and in every department at issue in this case. Prior to the Graves Administration taking office, there were 338 Harvey employees, including 241 African-Americans (71%). By October of 1995, after the class period closed, there were 324 Harvey employees, including 193 African-American (60%). . . . These drops are significant, especially when compared to the City of Harvey’s population, which, by contrast, is 85.5% African-American.\footnote{Id. at *50.} 

The court’s emphasis on effects on either side of the inexorable zero signals the existence of an inexorable 100 concept, even if it was not clearly articulated. The court stressed the importance of statistics in demonstrating racial and ethnic imbalances that are, in turn, a sign of discrimination.\footnote{Id. at *50.} The inexorable zero—one extreme of the statistical spectrum—fulfills the same role as more the sophisticated statistical tests in establishing a prima facie discrimination case. This analysis can also be useful in assignment and tracking cases because it re-articulates that there is a problem with either extreme of imbalance when it is caused by employer actions.
The analysis of the imbalance from an inexorable perspective serves a dual purpose: it re-emphasizes the power of the extreme imbalance in establishing a prima facie case; and it highlights the wrongs of an imbalance and the need to insert discrimination analysis into remedying the substandard and subordinating conditions that result from segregated workplaces. For a court, it is equally accurate to describe the effects of the discrimination from either extreme.

In *EEOC v. O&G Spring and Wire Forms Specialty Company*, a case involving immigrant workers, the EEOC sued a spring and specialty wire forms manufacturer for its failure to hire either African Americans or employees over 40 in its Chicago-based plant. The company employed approximately 35 of its workers into a low-skill department. Over a six year period the company made 87 hires into the department. None of them were African Americans. The inexorable zero in its hiring decisions provided the trial court with the evidence for a prima facie case of hiring discrimination. The circuit court reviewed the company’s arguments regarding the flaws in the plaintiffs’ statistics, especially their choice of the general population as the relevant labor market. The Court concluded that the percentage of African American availability in the labor market would have to be much lower than the EEOC’s experts projected in order to yield a zero percent hiring percentage. This means that the low-skill market should have yielded more African American workers for these jobs.

123 38 F.3d 872 (7th Cir. 1994).
124 *Id.* at 874.
125 *Id.* at 874.
126 *Id.* at 874.
127 *Id.* at 874.
128 *Id.* at 874.
129 *Id.* at 878.
130 *Id.* at 876-77.
131 *Id.* at 878
Because this case involves the hiring of immigrant over African American workers, we can analyze it to draw lessons from the characterization of the practice as having inexorable subordinating effects. Under a segregation framework, the EEOC could very well have brought this case on behalf of the immigrant workers.

In this case, the district court considered and rejected without further analyzing adverse effects on the immigrants, the company’s argument that its relevant labor market was composed mostly of Polish immigrants “since O&G offered poor working conditions and low pay, but as a compensating factor, did not require English.” The court affirmed the district court’s conclusion that this rationale was unpersuasive “particularly in light of testimony from O&G staff and application data indicating that African-Americans represented about 20% of the walk-in applicant pool.” Under an inexorable analysis, the focus would have been slightly different. The employer’s argument that limited language ability created the inexorable would not explain away the existence of poor working conditions or pay because limited English proficiency is not a factor that compensates for bad working conditions, nor is it a business necessity for the job in question. It is simply a communication issue that an employer can choose to work around. It is, in facts, one of the methods that an employer utilizes to structure a job for a particular group of workers. An inexorable inference would not only reject the employer’s interest argument, it would allow the court to further scrutinize the practices that keep immigrants working in substandard conditions.

The court also dismissed the employer’s argument – based on assumptions – that African Americans would not be interested in working in a place where Polish or Spanish were spoken.

\[131\] Id. at 877.
\[132\] Id. at 877.
The court found the argument had no support in evidence. The court rejected this formulation of the interest argument, emphasizing that it should not matter whether others were interested in working with other minorities. An inexorable inference would likely scrutinize the defendants’ interest arguments in this context and allow courts to evaluate evidence regarding interest in the context of the effect of the interest assumption on workplace composition. This case shows the potentially broad effects of a segregation framework for capturing discriminatory practices.

In *Pegues v. Mississippi State Employment Service of Mississippi Employment Security Commission*, we can see the treatment of segregated hiring and assignment practices through the lens of the inexorable zero. The plaintiffs challenged the Mississippi State Employment Service’s practice of honoring employer preferences for females to fill lower paying, less desirable positions, and males to fill more desirable positions, each of which required no skills. The plaintiffs claimed that the MSES disproportionately classified Blacks and women into less desirable, lower paying occupations. Specifically, the plaintiffs showed evidence of sex-segregated referrals to a major local employer, Travenol Laboratories. Women were referred exclusively to lower paid assembler jobs, while men were referred exclusively to higher paid material handler jobs. Neither job required special skills. The court held that the fact of the imbalance was insufficient if it was not also statistically significant.

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134 *O & G Spring and Wire*, 38 F.3d at 877.
135 699 F.2d 760 (5th Cir. 1983).
136 Id. at 762.
137 Id. at 768.
138 Id. at 768.
139 Id. at 770-71.
The plaintiffs must still overcome any evidence that the imbalance results from other factors.140 Here, the circuit court gave little weight to evidence showing the level of disproportionate classifications because the plaintiffs failed to introduce evidence that work preferences, experience, education and the state of the job market did not cause the imbalances.141 The court then reviewed the evidence of the inexorable zero in terms of statistical significance. Although it did not simply accept the inexorable zero as a clear inference of discrimination, it held that the evidence met the standards of statistical significance for a prima facie case.142 Under an inexorable 100 inference, the court could still require the plaintiffs to demonstrate the absence of other factors explaining the segregation. Although the burden would not change for the plaintiffs, the case for subordinating structures that create the segregation would be stronger if the focus were on conditions in the segregated low-paying departments, rather than on lack of opportunity for advancement.

In a similar line of cases, the inexorable zero evidence is sufficient to establish a prima facie case of discrimination. Sometimes, courts acknowledge an inference of discrimination from the inexorable zero evidence even though there is disagreement about its strength or significance in statistical terms. For example, in U.S. v. Gregory the federal government initiated a claim against the Sheriff’s office in Patrick County, Virginia, claiming that the department treated women less favorably than men.143 Specifically, the federal government claimed that the Sheriff’s office maintained a pattern and practice of discrimination, evidenced by its refusal to hire women as deputies.144 The government provided evidence that the county

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140 Id. at 767.
141 Id. at 766-767.
142 Id. at 768-69.
144 Id. at 1240.
had never hired a female deputy.\textsuperscript{145} The federal government showed that over a four year period, thirty deputy hires were made and none was awarded to a woman.\textsuperscript{146} Moreover, the sheriff had opportunities to promote women into deputy positions nineteen different times and failed to do so.\textsuperscript{147} The court held that general population statistics were appropriate in situations like this, where no special skills were required for the job.\textsuperscript{148} Because the sheriff had failed to produce any evidence to rebut the inexorable zero inference, the circuit court reversed the district court’s finding of no liability.\textsuperscript{149}

Likewise, in Grant v. Bethlehem Steel Corp., Blacks and Hispanics sued Bethlehem Steel for its failure to select minorities as iron work foremen.\textsuperscript{150} The selection system for foreman positions was a word of mouth system based on subjective criteria.\textsuperscript{151} The circuit court held that the district court erred in finding no prima facie case of discriminatory impact or treatment, in part because the numbers approaching the inexorable zero were sufficient in this case to establish the plaintiffs’ burden. As the court noted “the district court’s ruling runs counter to the principle that a prima facie case may be made by showing that blacks are concentrated in the ‘lower paying, less desirable jobs . . . and were therefore discriminated against with respect to promotions and transfers.’”\textsuperscript{152} Here, the courts focused on the barriers to opportunity for the plaintiffs, even as it acknowledged the segregation.\textsuperscript{153}

\begin{thebibliography}{99}
\bibitem{145} Id. at 1240.
\bibitem{146} Id. at 1243.
\bibitem{147} Id. at 1245.
\bibitem{148} Id. at 1245-46.
\bibitem{149} Id. at 1245, 1247.
\bibitem{150} Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1010 (2d Cir. 1980).
\bibitem{151} Id. at 1011.
\bibitem{152} Id. at 1018 (citing Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 329 (1977)).
\bibitem{153} Id. at 1016.
\end{thebibliography}

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In *Capaci v. Katz & B’esthoff, Inc.*, the EEOC sued Katz & B’esthoff, a pharmacy chain in Louisiana, for discrimination in its promotion practices. The individual plaintiff in the case was a female pharmacist who unsuccessfully sought promotion to management within the company. The EEOC alleged, and the appellate court agreed, that the company discriminated against women by failing to promote them to management trainee positions. All 267 trainee positions were awarded to men. Much of the trial centered on testimony about whether the numbers were statistically significant. The evidence also indicated that the company advertised for management positions in the “males wanted” section of newspaper classified ads. While acknowledging the strength of the statistics in this case, the court left the impression that the zero is a much more powerful signal of discrimination:

> We cannot escape the fact that during these seven and one-half years, there were hundreds of male manager trainees chosen and not a single woman. The hiring record demonstrates not just disparities in hiring, but *total exclusion* of women from the entry level management position. We differ with the defendant’s suggestion that “zero is just a number.” To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes. Evidence of two or three acts of hiring women as manager trainees during this period might not have affected the statistical significance of the test performed by the experts, but it would indicate at least some willingness to consider women as equals in firm management. Perhaps for this reason, the courts have been particularly dubious of attempts by employers to explain away “the inexorable zero” when the hiring columns are totalled [sic].

In this case, the zero was used to dismantle a promotion structure that left women stranded in lower level positions within the pharmacy structure. A similar focus on the 100% would have

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155 *Id* at 651.
156 *Id* at 651.
157 *Id* at 651.
158 *Id* at 651-656.
159 *Id* at 659.
160 *Id* at 662 (emphasis in original) (citations omitted).
found the positions into which women were tracked and the less-than-desirable conditions in which they operated. The remedy may have been different, in this case, however, especially if the training and workplace conditions in the targeted jobs could have improved both wages and opportunities for women.

In Babrocky v. Jewel Foods Co., another example of the potential power of an inexorable 100 inference in a Title VII case, the circuit court examined all the effects of the inexorable zero in determining that summary judgment was inappropriate. Here, the court considered sex-segregated job categories in a meatpacking plant. The employer laid off a group of meat wrappers – from a mostly female meat wrapping department – and did not similarly lay off meat packers from the predominantly male meat packing department. The plaintiffs alleged that “Jewel violated Title VII by maintaining sex-segregated job classifications, by failing to recruit, train, transfer, or promote females, by paying plaintiff women less than men who performed comparable work, by discharging women because of their sex, and by instituting a seniority and promotional system to further those practices.” The plaintiffs also alleged that “Jewel violated Title VII by misusing an employment ratio of one meat wrapper to four meat cutters to justify the discriminatory layoff of female employees.” The court held that the sex-segregated nature of the job required more scrutiny, and required an analysis of the employer practices outside of the traditional McDonnell Douglas framework. The court noted the differences in hiring patterns between the meat wrapping and meat cutting jobs, observing that 100% of meat cutters were male and 100% of the meat wrappers were female. This difference was sufficient for the court.

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161 Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985).
162 Id. at 860.
163 Id. at 860.
164 Id. at 860.
165 Id. at 867-869.
166 Id. at 868 n.7.
to hold that the plaintiffs presented a prima facie case of discrimination.\(^{167}\) While the court centered on lack of opportunity for women, it also noted the segregation as a symptom of that lack of opportunity.\(^{168}\)

Each of the inexorable zero cases discussed here provides an analysis that is just as forceful in the context of the inexorable 100. At bottom, the inexorable 100, just like the inexorable zero, presents a picture of an extreme, which courts have accepted as demonstrating a prima facie case for plaintiffs – one that defendants will need to rebut with solid evidence explaining away the existence of the extreme imbalance. The analysis has not been presented, except in limited cases, from the point of view of the inexorable 100 in part because of a historical focus on employment opportunity as a goal or remedy.\(^{169}\) An alternative focus on the inexorable 100 on the other hand could improve conditions in segregated workplaces, as a first step toward their eradication.

\section*{D. Potential Problems for the Inexorable 100: The Weakening of the Inexorable Zero Inference}

The inexorable zero inference has transformed since its introduction, experiencing some dilution over time.\(^{170}\) There is currently a circuit split regarding the significance of the zero in discrimination cases. Some of the circuits have retreated from the strong inference of discrimination in the case of the zero, and have attempted to merge it into current statistical disparity analysis, focusing on the diagnostic value of the zero in comparison to some other,

\begin{footnotesize}
\begin{itemize}
\item \(^{167}\) Id. at 868 n.7.
\item \(^{168}\) Id. at 865 n.3.
\item \(^{170}\) See e.g., Carter v. Ball, 33 F.3d 450, 457 (4th Cir. 1994) (“the mere absence of minority employees is not enough to constitute a \textit{prima facie} case of discrimination”); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494 (8th Cir. 1984) (“Z/zero is not always inexorable.”).
\end{itemize}
\end{footnotesize}
more sophisticated form of statistical analysis. The transformation does not detract from the value of the zero as, at the very least, some evidence of discrimination requiring a response from the employer. In the majority of cases, the inexorable zero still remains a powerful inference. Nonetheless, a comparison between the inexorable zero inference and other responses to the conditions underlying segregation bears review.

See Note, “The Inexorable Zero”, supra note 82, at 1226-27; see also GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE, 59-60 (2001) (describing the inexorable zero as a common sense test used where the court finds “no need to rely on even elementary tests of statistical significance.”); Capruso v. Hartford Fin. Serv. Group, Inc., 2003 WL 1872653, at *6 (S.D.N.Y. 2003) (trial court refused to allow plaintiff to rely on inexorable zero inference with respect to a subgroup of a protected group, in this case women with children. Court instead focused on statistical evidence and flaws in comparator categories); Jordan v. Shaw Industries, Inc., 1996 WL 1061687, at *10 (M.D.N.C. 1996) (“Without evidence of the relevant labor pool, Jordan’s “inexorable zero” evidence is insufficient, standing alone, to show discriminatory motive on the part of Shaw Industries.”); EEOC v. Turtle Creek Mansion Corp., 1995 WL 478833, at *10-11 (N.D. Tex. 1995), aff’d 82 F.3d 414 (5th Cir. 1996) (court found that inexorable zero evidence was insufficient to establish a prima facie case of discrimination because defendant’s hiring numbers were too small, and employer testified that women were underrepresented in the waitstaff profession in the area); Csicsery v. Bowsher, 862 F.Supp. 547, 573-74 (D.D.C. 1994) (court found that inexorable zero evidence of employer’s failure to appoint anyone over age 50 to high level positions was outweighed by evidence of few appointments); EEOC v. National Broadcasting Co., Inc., 753 F.Supp. 452, 466-67 (S.D.N.Y. 1990) (inexorable zero inference weakened by limited number of openings for sports director positions, which female employee sought); Presseisen v. Swarthmore Coll., 442 F.Supp. 593, 625 (female professor failed to show existence of inexorable zero when she did not provide adequate labor pool numbers); EEOC v. Andrew Corp., 1989 WL 32884, at *19-21 (N.D. Ill. 1989) (while the inexorable zero was relevant for Black clerical workers compared to their labor force numbers, the same was not true for Hispanic clerical workers, whose labor force numbers were much smaller).


See Veazie v. Greyhound Lines, Inc., 1983 WL 677, at *8 (E.D. La. 1983) (Plaintiffs showed through inexorable zero evidence that Greyhound had maintained black and white departments in its terminals and garages); Monroe v. United Airlines, Inc., 1981 WL 268, at *5 (N.D. Ill. 1981) (court denied summary judgment motion because evidence of inexorable zero in transfer rates for pilots over age 60 provided sufficient evidence to present case, despite paucity of other statistics); United States v. San Diego County, 1979 WL 269, at *4 (S.D. Cal. 1979) (“The gross disparity between the number of positions filled by white males as compared with minorities and women supports plaintiffs’ prima facie case and creates an inference of discrimination especially where the historic figures for promotion of blacks, Mexican-American/Latinos and even women, approach the ‘inexorable zero’.”); Jordan v. Wilson, 649 F.Supp. 1038, 1060 (M.D. Ala. 1986) (court accepted evidence of inexorable zero in promotions to higher ranks in police force as prima facie evidence of discrimination); EEOC v. Local 798, United Ass’n of Journeymen and Apprentices of Plumbing and Pipefitting Indus., AFL-CIO, 646 F.Supp. 318, 325 (N. D. Okla. 1986) (court found that union failed to rebut evidence of inexorable zero women or minorities in union local’s
V. Paradigm Responses to Segregated Conditions

In each of the traditional frameworks, the ultimate focus of the inquiry is on whether the employer denied an opportunity or created a barrier through its practices that, in effect, denied an opportunity for employment to a member of a protected class. The focus of these frameworks is to prove a nexus between the challenged employer action and the harm to the plaintiffs. Plaintiffs who are already hired must overcome the initial perception that they have not been denied opportunity. In other words, the plaintiffs must overcome the assumption that they suffered no harm if they were selected for the position. One of the purposes of anti-discrimination law initially was to eliminate segregated workplaces and the terms and conditions of employment that surround them. The existing frameworks, however, do not easily or directly capture the harm to plaintiffs of working in segregated environments. Instead, plaintiffs have historically used the traditional frameworks to attack segregated conditions indirectly.

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176 See e.g., Alfred W. Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 RUTGERS L. REV. 465, 471-74 (1968) (explaining that Title VII was initially directed at recruitment and hiring practices that excluded or segregated minorities); United Steelworkers of America v. Weber, 443 U.S. 193, 202-03 (1979) (reviewing Title VII of the Civil Rights Act of 1964 and concluding that “the crux of the problem was to open employment opportunities for Negroes in occupations which have been traditionally closed to them . . . .”); Johnson v Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 632 (1987) (Title VII was designed to dismantle segregated workplaces, including those based on sex); see also, Vicki Schultz & Stephen Petterson, Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073, 1075 (1992) (analyzing the success rate of employer arguments that certain groups are underrepresented in some occupations because they choose not to work in those occupations).

In this section, I will analyze how plaintiffs have attacked conditions in segregated workplaces utilizing the existing frameworks, and the extent of their success. In most cases, the plaintiffs have had to identify some harm, other than the segregation itself, to succeed in their discrimination claims. In some cases, the plaintiffs point out channeling practices; in other cases, non-hired plaintiffs make the claims, indirectly pointing out the fact of segregation. In still other cases, with mixed success, plaintiffs make the segregation and its conditions the focus of the claim.

The current frameworks rely in large part on statistics to reveal discrimination when direct evidence is not available. The statistical tests explore the possibility that an underrepresentation of workers in targeted jobs occurred by chance. Plaintiffs may rely on statistical analysis in the absence of direct evidence to establish a prima facie case of discrimination in hiring, assignment, promotions, and other terms and conditions of employment. Because the frameworks focus on denial of opportunity, the statistics themselves typically focus on the underrepresentation of the protected class of workers in the labor pool of qualified workers. The frameworks have evolved to require a focus on underrepresentation in the jobs outside of the segregated occupation, so the fact of segregation in a particular job is virtually irrelevant to a hiring, promotion or wage discrimination claim, unless it is linked to adverse employment conditions. Because the fact of segregation does not in itself require an explanation, it need not necessarily be eliminated as part of the remedy, even if a discrimination claim is successful. The assumption in the successful Title VII case may be that

the remedy – e.g., promotion into a more desirable position – will eventually dismantle the segregated workplace. Under that assumption, based in anti-classification principles, there is no need to address the conditions that make the job substandard, presumably because the equality and anti-discrimination principle does not necessarily encompass the right to be free from substandard working conditions.

A. *Wards Cove Packing v. Atonio*\(^\text{181}\): The Anti-Inexorable Zero Case

*Wards Cove* is an example of the classic plaintiff challenge to segregated workplaces. It is addressed here because its outcome provides challenges to plaintiffs working in segregated jobs and occupations today, even though Congress passed the Civil Rights Act of 1991 to ameliorate its most harmful effects. In *Wards Cove*, minority employees in cannery jobs challenged the job structure and composition of the cannery and noncannery jobs in a packing plant. The cannery jobs – unstable, lower paying, less desirable—were held by Filipino, Hispanic, Asian, and Eskimo employees.\(^\text{182}\) The noncannery jobs – stable and more desirable—were held by Anglos.\(^\text{183}\) The plaintiffs challenged the employer’s practice of hiring minorities for the cannery jobs and nonminorities for the noncannery jobs, utilizing both the disparate impact and disparate treatment theories to make their claims. They introduced statistical evidence showing the racial composition of the workers in each job category, which demonstrated that the underrepresentation of workers in a targeted job was not likely the result of chance.\(^\text{184}\) The employer responded with the interest defense, alleging that minority workers simply were not interested in or skilled enough for the more desirable jobs.\(^\text{185}\) It also argued that


\(^{182}\) *Id.* at 647.

\(^{183}\) *Id.* at 647.

\(^{184}\) *Id.* at 650.

\(^{185}\) *Id.* at 652.
the statistical evidence was both overinclusive and underinclusive.\textsuperscript{186} It was overinclusive because it included people who may not have been interested in the jobs.\textsuperscript{187} It was underinclusive because the numbers did not include the composition of the local labor pool.\textsuperscript{188} According to the employer, the numbers were inaccurate because they did not include the external labor pool, even though the plaintiffs demonstrated that the company used its internal labor market as the pool for transferring from one job to another.\textsuperscript{189} The Court held that because the plaintiffs failed to produce adequate statistical evidence that measured the status of similarly situated employees, the plaintiffs did not meet their causation burden.\textsuperscript{190}

The \textit{Wards Cove} Court framed the issue in a way that prevents plaintiffs from demonstrating the harmful effects of segregated workplaces as part of a claim. Specifically, the subordinated conditions in the lower paying jobs were not the focus of the Court’s inquiry. Instead, the Court simply looked at the classification of groups into different jobs or occupations and failed to examine the causes of over and under-representation. Although this narrow review may have been doctrinally sound in a strict sense for a hiring case, it did not do justice to the general claim that minorities were relegated to the least desirable jobs. As Justice Stevens’ dissent noted:

The Court points out that nonwhites are “overrepresented” among the cannery workers. Such an imbalance will be true in any racially stratified work force; its significance becomes apparent only upon examination of the pattern of segregation within the work force. In the cannery industry nonwhites are concentrated in positions offering low wages and little opportunity for promotion. Absent any showing that the “underrepresentation” of whites in this stratum is the result of a barrier to access, the “overrepresentation” of nonwhites does not offend Title VII.\textsuperscript{191}

\begin{thebibliography}{99}
\bibitem{186} Id. at 653-54.
\bibitem{187} Id. at 653-54.
\bibitem{188} Id. at 653-54.
\bibitem{189} Id. at 653-54.
\bibitem{190} Id. at 654-55.
\bibitem{191} Id. at 678 n.25 (Stevens, J., dissenting) (citations omitted).
\end{thebibliography}
What the Court did not address was whether the condition of segregation itself can or should be reviewed for its adverse employment effects. Instead the Court assumed none. A more comprehensive analysis would focus on the mechanisms that keep low-wage workers in their place.192 This is what the inexorable 100 could accomplish. It would allow the court to focus on the structures that keep protected groups in their segregated place, and for the development of remedies to fix those conditions. Justice Stevens’ concerns demonstrate both the need for an inexorable 100 inference to attack segregation and the assumptions that exist in its absence. The underrepresentation of whites is articulated as a barrier to access for minorities rather than a more structured barrier that keep minorities in their segregated place. Justice Blackmun’s dissent in *Wards Cove* sets out the dilemma for future plaintiffs:

This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis. Sadly this comes as no surprise.193

1. The Civil Rights Act of 1991194

The Civil Rights Act of 1991 superseded many of the *Wards Cove* holdings. The plaintiff must continue to show a causal connection between the adverse employment conditions and specific employer conduct.195 However, the plaintiff can point to a constellation of factors if they cannot be unbundled.196 Most notably, in response to a prima facie disparate impact case, the defendant must now establish that a challenged employment practice is “job related for the

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192 Id. at 662 (Blackmun, J., dissenting).
193 Id. at 662 (Blackmun, J., dissenting).
position in question and consistent with business necessity."\textsuperscript{197} The defendant has both the burden of proof and persuasion on this element of the defense. Congress left an ambiguity in the structuring of the defendant’s burden, however, when it embraced both the “job related” and “business necessity” interpretations of the defendant’s burden.\textsuperscript{198} Congress’ reference to cases before \textit{Ward’s Cove} for direction on the defendant’s burden provides little guidance, since courts were just as ambiguous about what the defendant had to demonstrate to overcome a showing of disparate impact.\textsuperscript{199}

The Act did not, however, provide clear guidance on whether a segregated workplace, by itself, created an inference of discrimination. Litigators bringing cases in the wake of the 1991 Act took their cues from \textit{Wards Cove} and refrained from attacking segregated workplaces head on. Instead, most of the cases have been tried within the existing frameworks, either through channeling, subjective criteria theories, or by challenging word-of-mouth or other mechanisms.\textsuperscript{200} In earlier generations, pay equity and comparable worth cases, conditions cases, affirmative action programs and national origin cases have served a similar purpose of attacking the conditions of segregated workplaces. This section analyzes examples from four sets of cases that have addressed the effect of segregated workplaces.

\textbf{B. The Wage Inequity Cases}

\begin{footnotesize}
\textsuperscript{197} Pub. L. No. 102-166, § 105 (codified at 42 U.S.C. § 2000e-2(k)).
\textsuperscript{198} See Pub. L. No. 102-166 § 3.
\end{footnotesize}
The wage inequity cases challenged the devaluation of jobs held predominantly by women and minorities, long considered a symptom of segregated workplaces.\(^{201}\) The theory attacked the systems that result in undervalued jobs and in pay inequities between male and female or between Anglo and minority jobs. Framed early on as a comparable worth theory, a wage inequity claim involved comparing male and female pay rates through job evaluation studies.\(^{202}\) A job evaluation study demonstrates the internal worth of a particular job, regardless of who holds it.\(^{203}\) A job that is underpaid in comparison to a job evaluation study is said to be affected by market forces that adversely affect a particular group, usually females.\(^{204}\)

Wage inequity claims were developed as a response to segregated workplace conditions. They advance the goal of eliminating the wage differences reflected in segregated status.\(^{205}\) The implicit assumption behind the theory is that dismantling wage structures results in more desirable jobs for the people who hold the jobs.\(^{206}\) The dismantling of segregated conditions seemed a secondary goal. In *EEOC v. General Telephone Co. of Northwest, Inc.*, for example, the court held that female plaintiffs could claim that they were relegated to lower paying jobs because they were women, without having to carry the burden of ruling out all nondiscriminatory factors for the pay differences.\(^{207}\) There the plaintiffs showed through regression analyses that they were denied access to the higher paying jobs.\(^{208}\) The court held that the EEOC did not have to account for differential interest in the jobs as part of its proof burden.\(^{209}\) Thus, the employer

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\(^{202}\) *NELSON & BRIDGES*, *supra* note 37, at 25.

\(^{203}\) *NELSON & BRIDGES*, *supra* note 37, at 50.


\(^{205}\) Blumrosen, *supra* note 43, at 401.

\(^{206}\) Blumrosen, *supra* note 43, at 466-68.

\(^{207}\) EEOC v. General Telephone Co. of Northwest, Inc., 885 F.2d 575, 579-583 (9th. Cir. 1989).

\(^{208}\) *Id.* at 577.

\(^{209}\) *Id.* at 581.
could not benefit from an inference of nondiscrimination simply because the EEOC failed to account for lack of interest in its analysis.\textsuperscript{210}

The more typical wage inequity claim, however, forced plaintiffs to account for all possible nondiscrimination factors for pay inequities. Often nondiscrimination factors were considered outside the employer’s control. In \textit{Spaulding v. University of Washington}, for example, the court held that market forces were not considered a “specific employment practice,” a necessary element of an adverse impact claim.\textsuperscript{211} Likewise, in \textit{EEOC v. Hartford Ins. Co.}, the court held the plaintiffs had to demonstrate that other factors, such as education, seniority or experience did not explain the wage differential.\textsuperscript{212} Other courts reach similar conclusions. The comparable worth theory was, therefore, shortlived because the disparate impact and disparate treatment theory made too many allowances for the power of the market to explain wage difference.\textsuperscript{213} To the extent that courts were reluctant to attribute power to employers in wage setting, plaintiffs failed to succeed in their claims.\textsuperscript{214} One of the major problems with the comparable worth theory, therefore, was its reliance, and at the same time rejection of the market: “It accepted the orthodox economic view that pay differentials originated in the “market,” but it also entailed the intractable position of rejecting markets as a valid basis for wage setting.”\textsuperscript{215}

\textbf{County of Washington v. Gunther: The Limited Use of Pay Equity Theory to Dismantle Segregation}

\textsuperscript{210} \textit{Id.}
\textsuperscript{213} \textit{NELSON & BRIDGES, supra} note 37, at 3.
\textsuperscript{214} \textit{NELSON & BRIDGES, supra} note 37, at 49; \textit{Blumrosen, supra} note 43, at 488.
\textsuperscript{215} \textit{NELSON & BRIDGES, supra} note 37, at 3.
A similar line of cases attacked pay inequalities by demonstrating that the employer intentionally devalued jobs held by women. The focus of the intentionality was on differential treatment—and in the language of disparate treatment theory—rather than on subordinating conditions. The Supreme Court reviewed the theory in *County of Washington v. Gunther*. In *Gunther*, female jail wardens alleged that the County of Washington, Oregon intentionally paid female wardens, but not male wardens, less than what a county survey of equal jobs commanded in the market. These were clearly segregated jobs, and the employer had several rationales for their continued segregation. The district court dismissed the wage discrimination claim and the circuit court reversed. The Supreme Court granted certiorari. At the outset of the opinion Justice Brennan noted that this case was not a “comparable worth” case, “under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.” Instead, the Court noted, “respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted.”

The Court deemed that the specific situation in which the employer accepted the results of a job survey for male employees, paying them the full value of their worth, while at the same time rejecting job evaluation studies for female employees, paying women 70% the value of their


218 *Id.* at 164-65.

219 *Id.* at 165-66.

220 *Id.* at 166.

221 *Id.* at 166.

222 *Id.* at 166.
worth according to a job survey could lead to an inference of intentional discrimination.\textsuperscript{223} This differential treatment, the Court noted, did not require the Court to evaluate statistical or other subjective methods of wage discrimination proof.\textsuperscript{224}

The Court decided that Title VII covered compensation discrimination in cases like the plaintiffs’ where the jobs being compared were not substantially similar. The case is instructive, in that it tries to address the consequences of segregated workplaces through the intentional discrimination framework, even though the actual physical conditions of the workplace were not directly addressed. The remedy involved changing the pay structure to reflect a more equitable wage system.\textsuperscript{225} The theory works, however, only if the litigants can point to some employer practice which is intentionally applied differentially or has differential effects. Even then, moreover, it is as vulnerable to market-based defenses as is the traditional comparable worth theory.

\textit{AFSCME v. County of Nassau}\textsuperscript{226}: The Problem with Controlling for Nondiscriminatory Factors

This case shows the difficulty of bringing a \textit{Gunther}-type claim in light of defense arguments about how employees choose jobs and how they follow the market in wage setting, even in the wake of the Civil Rights Act of 1991. It signals the weakness of the pay equity strategy for eradicating segregation. In this case, the plaintiffs, in an attempt to eliminate the effects of segregatory practices in county government, sued Nassau County, alleging that the County discriminated “in compensation on the basis of sex by paying historically female job classifications less than historically male classifications which require an equivalent or less

\textsuperscript{223} \textit{Id.} at 180.  
\textsuperscript{224} \textit{Id.} at 181.  
\textsuperscript{225} \textit{Gunther}, 452 U.S. at 165-66.  
composite of skill, effort, or responsibility and working conditions.”  

The term “historically female sex-segregated job classifications” was defined in the lawsuit as job classifications in which females comprised 70% or more of the classification.

The plaintiffs challenged the initial job evaluation process which established the pay scales for each job within the county structure. The court, however, did not find intentional discrimination in the initial establishment of the process. The court refused to credit the testimony of the plaintiffs’ expert that the job evaluation process produced lower salary grades for female-dominated job classifications that had the same evaluated worth as those of male-dominated jobs.

On the one hand, the court credited the County’s market variable approach. It found the employer’s market argument for setting wage rates sufficient to explain differential treatment of segregated job categories. This precluded any finding of intentional discrimination.

The court also found that the plaintiffs’ segregation evidence was insufficient to support their intentional wage discrimination claims. It found that while the sex segregation in county jobs was higher than the national average, it found no evidence of intent by the defendants to create such segregation. Segregation was instead presumed a natural occurrence, requiring additional evidence to support a finding of discrimination. The court acknowledged that the county had historically created barriers to participation for women in some jobs. The court then

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227 Id. at 1372.
228 Id. at 1372.
229 Id. at 1378.
230 Id. at 1379.
231 Id. at 1380.
232 Id. at 1401-02.
233 Id. at 1401-02.
234 Id. at 1404.
235 Id. at 1405.
236 Id. at 1404-05.
credited the lack of interest defense for the contemporary existence of sex segregated jobs: “the better explanation for the existing sex segregation in Nassau County job titles is that which was agreed upon by all the experts who testified on this case: that men and women do not, on the whole, seek the same positions.” The court attributed the segregation to the choice of employees, rather than any choices made by employers. The comparable worth job evaluation theory could not counter that argument. The court noted that “the mere fact that most Nassau County employees work in job titles that are either female-dominated or male-dominated does not in itself support an inference of discriminatory intent.”

The Court’s analysis indicates that it may be irrelevant that the job conditions of a particular position that happens to be female-dominated are less than adequate, as long as there are adequate vehicles for advancing from the position. Moreover, segregation under the current frameworks is not enough to support a discrimination finding. The comparable worth cases exemplify the need for a segregation framework to target conditions in segregated workplaces.

C. The Conditions Cases: The Anti-Subordination Paradigm Response

In the conditions cases, courts address other indicators of exploitation in segregated environments as examples of unlawful discrimination. In a disparate treatment framework, courts analyze exploitative conditions as possible evidence of differential treatment. This line of cases initially arose out of the comparable worth theory’s premise that women’s work is devalued, and that the jobs are treated as “women’s jobs” rather than the people in the jobs being

237 Id. at 1404-05.
238 Id. at 1405.
treated discriminatorily. The prototype cases are *Gerdom v. Continental Airlines*[^239] and *Frank v. United Airlines, Inc.*[^240]

In *Gerdom*, a group of airline stewardesses sued Continental Airlines for maintaining a strict weight requirement for its stewardesses[^241]. No other job category, including the male attendant category, was subject to the weight requirement[^242]. Stewardesses who did not stay within the weight limit were suspended or fired[^243]. The plaintiffs alleged that Continental imposed the requirement – a condition of work – precisely because women were overrepresented in the stewardess job category[^244]. In other words, the requirement existed because the job was considered a “woman’s job.” The court held that the policy was discriminatory because it relied on the composition of the workforce[^245]. Had men been in the position, the weight requirement would not have been implemented, as evidenced by the fact that the weight requirement did not exist in any of the other positions[^246].

This case alludes to the theory accepted in *Gunther* that the differential application of a policy (there, the implementation of a job worth study) can be proof of discrimination[^247]. The *Gunther* line of cases illustrates the breadth of the doctrine when an anti-subordination principle undergirds its operation. Because the *Gunther* court focused on the jobs involved, rather than the people holding the jobs, it targeted the cognitive biases that surround employer decisions about

[^239]: 692 F.2d 602 (9th Cir. 1982).
[^240]: 216 F.3d 845 (9th Cir. 2000).
[^241]: *Gerdom*, 692 F.2d at 603.
[^242]: Id. at 604.
[^243]: Id. at 604.
[^244]: Id. at 605.
[^245]: Id. at 607-08.
[^246]: Id. at 610.
[^247]: Like *Gunther*, it was not a comparable worth claim in the sense that it did not seek a remedy based on a comparison between the worth of the job and that of other jobs in the company or in the community. See *County of Wash. v. Gunther*, 452 U.S. 161, 166 (1981).
jobs perceived as belonging to one group or another. The Gerdom opinion follows a similar line of reasoning.

Frank v. United Airlines, Inc.\(^{248}\) describes the case in which the formerly segregated job classification becomes integrated, yet the job conditions for female workers remain worse than the job conditions for male workers. In Frank, a group of female flight attendants sued United Airlines for its discriminatory weight requirement policies.\(^ {249}\) The plaintiffs showed that even though United imposed maximum weight requirements on both female and male flight attendants, the weight requirements were more onerous for women than for men.\(^ {250}\) The plaintiffs claimed disparate treatment in the way that United formulated its weight restrictions. United required maximum weight limits for men that corresponded to large frame males on the MetLife height/weight charts.\(^ {251}\) For women, United required weight maximums that corresponded to medium frame females on a Continental height/weight chart.\(^ {252}\) The Ninth Circuit court held that United’s differential treatment of weight restrictions was facially discriminatory because it was more onerous for women than for men.\(^ {253}\) Frank takes the Gerdom analysis one step further by recognizing that the same requirements can affect work conditions differentially for men and women. While the existing frameworks adequately remedy this type of differential treatment, however, they do little to remedy the conditions that have created the traditionally male and female jobs. Frank demonstrates that because the underlying conditions were not dismantled, the conditions that were created before integration continued to be perpetuated. If the underlying conditions in the previously segregated occupation were

\[^{248}\text{216 F.3d 845 (9th Cir. 2000).}\]
\[^{249}\text{Id. at 848.}\]
\[^{250}\text{Id. at 848.}\]
\[^{251}\text{Id. at 848.}\]
\[^{252}\text{Id. at 848.}\]
\[^{253}\text{Id. at 855.}\]
remedied simply through integration rather than improvement of the condition, the women were forced to rely on an unequal treatment claim to achieve redress. Even then, such a claim could still limit the remedy to redress of the specific areas of unequal treatment rather than the general improvement of conditions in the traditionally segregated occupation.

D. The Affirmative Action Cases: Voluntary Desegregation, Manifest Imbalance and the Equal Protection Paradigm Response

The historical premise of the affirmative action cases lies in the inexorable zero arising out of exclusion of opportunities for minorities and women. Courts have largely been inconsistent in their treatment of voluntary desegregation plans in the workplace, especially when such plans are not directly tied to historical segregation in the workplace. Lessons drawn from these cases may provide the contours for a new segregation framework based on the inexorable 100.

The affirmative action cases challenge employer attempts to voluntarily desegregate traditionally segregated job categories from which women and minorities have been denied access. The Supreme Court has held that the employee challenging employer affirmative action decisions bears the burden of proving the invalidity of the challenged practices. More recently, the Supreme Court’s Grutter decision gives some impetus for employers to implement voluntary affirmative action practices and policies that seek to desegregate their workforces for diversity-related reasons. The following cases demonstrate the power of the argument protecting affirmative action strategies to eliminate segregated workplaces.

In *United Steelworkers v. Weber*, the Supreme Court reviewed the validity of an affirmative action plan inserted into a collective bargaining agreement.\(^{256}\) The plan called for a 50% quota that would allow minority workers access to the company’s on-the-job-training program.\(^{257}\) The plan was implemented in part to remedy longstanding company policies that excluded minorities from craft jobs – which were almost exclusively white –within the company.\(^{258}\) A white employee sued the employer and the union, claiming that his rights under Title VII had been violated.\(^{259}\)

The Court held that not only did the plan in the collective bargaining agreement not violate Title VII, it complied with Title VII’s purpose of eradicating practices that created workplace barriers for minorities.\(^{260}\) Moreover, because the plan was a temporary measure aimed at attaining a racial balance and at eliminating a manifest imbalance, the plan did not interfere with the rights of white employees.

Justice Brennan’s opinion describes the broad Title VII mission to create the opportunity to escape from segregated working conditions:

> Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with the “plight of the Negro in our economy. Before 1964, blacks were largely relegated to ‘unskilled and semi-skilled jobs.’ Because of automation the number of such jobs was rapidly decreasing. As a consequence, “the relative position of the Negro worker was steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher.” . . . Congress feared that the goals of the Civil Rights Act – the integration of blacks into the mainstream of American society – could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs “which have a future.” . . . [I]t was clear to Congress that “the crux of the problem was to open employment opportunities for

\(^{257}\) *Id.* at 197.
\(^{258}\) *Id.* at 198.
\(^{259}\) *Id.* at 199.
\(^{260}\) *Id.* at 208-09.
Negroes in occupations which have been traditionally closed to them,” and it was to this problem that Title VII’s prohibition against racial discrimination in employment was primarily addressed.\(^{261}\)

The Court went on to hold that the contested plan “falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”\(^{262}\) At the time of the ruling, the reach of Title VII was wide and deep. The “racial imbalance in traditionally segregated categories” language described both sides of segregation as problematic, even though it limited its remedy to opportunities rather than fixing the segregated job. A segregation framework would push beyond this opportunity strategy. It would target conditions in the unskilled and semi-skilled jobs that scholars argue are now structured into segmented labor markets with little or no opportunity for advancement.\(^{263}\)

In a similar case, Johnson v. Transportation Agency,\(^{264}\) Paul Johnson sued the Santa Clara County Transportation Agency after he was passed over for promotion in favor of a female employee who, although as qualified as Johnson, was chosen in part because of the employer’s affirmative action plan aimed at remedying the underrepresentation of women and minorities in traditionally segregated jobs.\(^{265}\) Johnson claimed that the employer violated Title VII by purposely using sex as a factor in its decision to promote a female employee, rather than Johnson, to a dispatcher position.\(^{266}\) The Court held that the agency could take sex or race into account as part of a plan to remedy past discriminatory practices.\(^{267}\) The Court also noted that

\(^{261}\) Id. at 202-03.  
\(^{262}\) Id. at 209.  
\(^{263}\) STONE, supra note 3, at 3, 8.  
\(^{265}\) Id. at 619.  
\(^{266}\) Id. at 625.  
\(^{267}\) Id. at 641-42.
the employer’s affirmative action plan was made in the context of a manifest imbalance that was reflected in the absence of women in the skilled craftworker job that was targeted for scrutiny.\textsuperscript{268}

The Court specifically addressed the argument that the imbalance in the skilled craftworker category was due to women’s lack of interest in these jobs. The Court upheld the voluntary affirmative action plan in this case, even though the employer was attempting to remedy underrepresentations that were ostensibly not of the employer’s doing, but also were the makings of societal conditions.\textsuperscript{269} The Court thus held open the door for a more flexible plan that goes beyond remedying employer practices to reaching societal discrimination.\textsuperscript{270} This case provides an early and viable model for inexorable 100 cases that show the imbalance between jobs within a workplace.

\textbf{E. The National Origin Cases}

Although not strictly segregation cases, the national origin cases provide some guidance on how to target segregation in brown collar workplaces. They are important because they capture possible employer practices that use immigration status to cloak discrimination based on national origin. These cases can address exploitation of workers who may or may not have proper immigration status.

Under traditional doctrine, cases alleging discrimination based on immigration status do not fall within the rubric of national origin discrimination.\textsuperscript{271} In the seminal case, \textit{Espinoza v. Farah Mfg.},\textsuperscript{272} the Court reviewed an employer policy that prohibited the hiring of noncitizens

\begin{itemize}
  \item \textsuperscript{268} \textit{Id.} at 634. The majority noted that the statistical disparity that defined the “manifest imbalance” need not reach the level required for a prima facie case of discrimination against the employer. \textit{Id.} at 632.
  \item \textsuperscript{269} \textit{Id.} at 634. n.12, 642.
  \item \textsuperscript{270} \textit{See id.} at 657 (White, J., dissenting) (Justice White objected to defining the term “traditionally segregated job” “to mean nothing more than a manifest imbalance between one identifiable group and another in an employer’s labor force.”)
  \item \textsuperscript{271} \textit{See Espinoza v Farah Mfg. Co. Inc., 414 U.S. 86, 95-96 (1973).}
  \item \textsuperscript{272} 414 U.S. 86.
\end{itemize}
for manufacturing jobs.\textsuperscript{273} The plaintiff sued, claiming she had been discriminated against on the basis of national origin. The court held that alienage, or immigration status, was not a necessary characteristic of national origin.\textsuperscript{274} National origin means the country of descent, or, ancestry.\textsuperscript{275} An employer could make distinctions between immigration status without running afoul of the prohibition on national origin discrimination.\textsuperscript{276} The court did note that if an employer utilized alienage distinctions as a proxy for national origin discrimination, it could face liability.\textsuperscript{277} As the court noted, “a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination”, or “an employer might use a citizenship test as a pretext to disguised what is in fact national-origin discrimination.”\textsuperscript{278}

The warning in \textit{Espinoza} that employer practices distinguishing between immigration status can nonetheless signal national origin discrimination has resulted in successful challenges to employer treatment of immigrants. In a recently filed case, the EEOC has applied the theory to employment practices that intentionally target immigrant workers for less desirable, lower paying positions – essentially, the segregated, “inexorable 100” jobs. In \textit{EEOC v. Technocrest Systems, Inc.},\textsuperscript{279} the EEOC sought information from a technology firm during an investigation of national origin discrimination based on charges filed by a group of Filipino workers. The charges claimed that the company intentionally recruited Filipino workers for manufacturing

\begin{flushright}
\textsuperscript{273} Id. at 87.
\textsuperscript{274} Id. at 88-89.
\textsuperscript{275} Id. at 89.
\textsuperscript{276} See Id. at 89.
\textsuperscript{277} Id. at 92.
\textsuperscript{278} Id. at 92.
\textsuperscript{279} EEOC v. Technocrest Systems, Inc., 448 F.3d 1035 (8th Cir. 2006).
\end{flushright}
jobs and subjected them to lower pay and less desirable working conditions than other workers.\textsuperscript{280}

According to the EEOC’s allegations, Technocrest is an electronics and computer repair company in Missouri that employs approximately 100 technical employees, all of whom are in the United States from the Philippines on non-immigrant H-1B visas.\textsuperscript{281} The charging plaintiffs claimed that Technocrest specifically recruited them in the Philippines, and then subjected them to worse working conditions and wages than promised.\textsuperscript{282}

During its investigation, the EEOC issued an administrative subpoena seeking work history information and immigration status of all workers who had filled the same positions as the Filipino workers, namely, electronics engineers, field service representatives, and systems analysts.\textsuperscript{283} The district court narrowed the subpoena’s scope to information about the six charging parties.\textsuperscript{284} It required the company to submit work history information in spreadsheet form for all other employees.\textsuperscript{285} Both sides appealed the decision to the Eighth Circuit Court of Appeals.\textsuperscript{286}

Technocrest argued that it should not be required to submit information about all employees in the charging parties’ job categories because the information encompassed nonrelevant information about employees who were not similarly situated.\textsuperscript{287} Technocrest also objected to submission of information regarding immigration and citizenship status because such

\textsuperscript{280} Id. at 1037.
\textsuperscript{281} Id. at 1037.
\textsuperscript{282} Id. at 1037.
\textsuperscript{283} Id. at 1037.
\textsuperscript{284} Id. at 1037.
\textsuperscript{285} Id. at 1037.
\textsuperscript{286} Id. at 1037-38.
\textsuperscript{287} Id. at 1037-38.
\textsuperscript{288} Id. at 1037-38.
\textsuperscript{289} Id. at 1038.
\textsuperscript{290} Id. at 1039.
information was not relevant to national origin discrimination. \textsuperscript{288} Technocrest acknowledged that its technical employee job category was, in essence, segregated, but complained that the EEOC could not make out a prima facie case of discrimination where “all the technical employees of Technocrest are Filipino.”\textsuperscript{289} In other words, proof of the inexorable 100 could not, without more, provide the inference of discrimination that plaintiffs sought. Moreover, if all the employees were members of the same protected category, they could not allege differential treatment within the same job category.\textsuperscript{290} The Eighth Circuit court left the door open to an inexorability inference, however, when it observed that

the Supreme Court also recognized in Espinoza that in some instances “a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination” and that Title VII “prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”\textsuperscript{291}

The circuit court broadened the scope of the district court’s order, allowing the EEOC to collect information about working conditions as well as immigration status of all Technocrest employees in the relevant job categories in order to develop the case for national origin discrimination.\textsuperscript{292} An inexorable 100 inference within a segregation framework would, however, make the EEOC case much easier to prove. It would allow the agency to scrutinize practices as a matter of course whenever an inexorable 100 existed.

National origin cases could become crucial in the brown collar worker context because segmentation structures are increasingly masked by the publicly accepted argument that a category of second-class jobs, with fewer rights attached, can co-exist with other jobs in the U.S.

\textsuperscript{288} Id. at 1039.
\textsuperscript{289} Id. at 1039. Technocrest attempted to use Espinoza v. Farah Mfg. to its advantage, arguing that because national origin did not extend to citizenship requirements, the Filipino charging parties could not make claims based on their immigration status.
\textsuperscript{290} Id. at 1039.
\textsuperscript{291} Id. at 1039. (citations omitted).
\textsuperscript{292} Id. at 1040.
labor market. The temporary worker proposals of the current legislative session, for example, condone segregation and create a legal mechanism through which employers can exploit groups based on their alienage. Such treatment, in turn, based on foreignness, masks what many commentators consider discrimination based on national origin or some form of subordinated group status.293 Several scholars have addressed the alienage/national origin distinction, finding that alienage classifications tend to legitimize unlawful ethnic discrimination.294 What makes alienage distinctions so dangerous, and yet so attractive, is that they are a socially acceptable way of distinguishing the majority from the “other.” They appeal both to nativist and protectionist tendencies without necessarily invoking allegations of racism. The case law surrounding alienage distinctions supports the dominant view that such distinctions are both benign and tolerated, in and out of the workplace.295 The case law distinguishes between alienage and national origin and tends to condone different treatment based on alienage. To the extent that immigration status differences serve as a proxy for national origin discrimination, however, they are prohibited.296 English language requirements, for example, that affect long-term residents working alongside guest workers, are scrutinized for possible national origin


295 DeCanas v. Bica, 424 U.S. 351 (1976) (Court held that a California statute prohibiting an employer from knowingly hiring undocumented workers was not preempted by federal law); Espinoza v Farah Mfg. Co., Inc., 414 U.S. 86 (1973) (the Court accepted employer rules that distinguished on the basis of alienage); Mathews v. Diaz, 426 U.S. 67 (1976) (The Court held that federal discrimination against permanent residents was valid under a rational basis review); but see Plyler v. Doe, 457 U.S. 202 (1982) (the Court held that, with respect to primary education, states could not discriminate against children based on immigration status); Graham v. Richardson, 403 U.S. 365 (1971) (the Court held that state welfare laws conditioning benefits on citizenship and residency requirements violated the Equal Protection clause).

discrimination. This small window of opportunity offers some protection for brown collar workers. Thus, to the extent that jobs populated by temporary workers and others lose wage status, exhibit higher wage differentials, and deteriorate in terms and conditions over time, their structures deserve scrutiny.\footnote{Saucedo, supra note 1, at 964-65.}

Policy makers, legislators, and administrative agencies routinely scrutinize employment-based immigrant and nonimmigrant programs to determine how much they create entry or advancement barriers for otherwise willing native-born workers.\footnote{The labor certification process determines whether there are not sufficient workers who are able, willing, qualified and available at the time of the visa application, and ensures that the employment of an immigrant will not adversely affect the wages and working conditions of native born workers. I.N.A. § 212(a)(5)(A). Similar provisions exist for nonimmigrant workers. I.N.A. § 101(a)(15)(H)(i), (ii).} Such scrutiny results in public policy debates that continue to pit workers against each other, even if in theory they enforce employment laws to protect all workers. A segregation framework could, in fact, allow challenges from all workers – native-born or not – willing to take the job to ensure adequate working conditions.

In an example of the potential of such a framework to bring together all workers, immigrants’ rights groups recently sued a hotel owner in New Orleans on behalf of both African Americans and immigrant guest workers from Peru, Bolivia and the Dominican Republic.\footnote{SPLC Exposes Exploitation of Immigrant Workers, August 16, 2006, available at https://secure.splcenter.org/legal/news/article.jsp?aid=205&site_area=1.} The lawsuit claims that hotel owners violated the Fair Labor Standards Act and other labor laws when they lured immigrant workers to take jobs at lower pay and in worse conditions than existed when they were held by native Louisianans.\footnote{Id.} Lawyers for the workers explained that the “lawsuit illustrates how U.S. businesses systematically recruit and exploit vulnerable
immigrants to drive down wages and undercut worker rights.”

The suit alleges that the hotel owners lured workers to New Orleans through labor recruiters, who promised high wages in the United States. The recruiters charged workers $3,000 to $5,000 each to transport them to New Orleans and secure their visas through the H-2B temporary worker program. In order to qualify to receive these workers, hotel owners had to certify that they could not find U.S. workers to take these jobs. The hotel claimed in its certification that it offered jobs to Katrina evacuees but no one applied. Once they arrived in New Orleans, the guest workers questioned the absence of African Americans in their workplaces. Hotel owners claimed that “black people don’t like to work.” By seeking enforcement of whatever rights they have under current law, these workers aim to ally with African American workers for just wages in the reconstruction effort. The development of an inexorable inference and a segregation framework will surely advance that effort. The inference can complement the efforts of immigrants’ rights advocates to highlight the dangers of segregating any workers—including immigrant or temporary workers—into low-status jobs.

The paradigms discussed in this section provide some examples of plaintiffs challenging segregationist practices through the existing frameworks. Because there is no adequate segregation model that directly ferrets out segregation, they have only partially resolved a problem that has many components. The hiring cases create employment opportunities as a remedy; the conditions cases attempt to eradicate some of the terms and conditions that occur in segregated workforces; the affirmative action cases attempt to dismantle segregation through

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301 Id.
302 Id.
305 Id.
306 Id.
employment structures that focus on subordinating practices; the pay inequity/comparable worth cases deal with some of the symptoms of segregation; the national origin cases attempt to target employer assignment practices. A segregation model would unite each of these aspects of litigation in order to more effectively attack segregation. The inexorable inference is a proper first step in establishing such a model.

VI. Toward a Segregation Framework

A. Why a Segregation Model?

The segregation narrative that describes the discrimination harm as exclusion from opportunity cannot respond to the discrimination that results in targeting a protected group for low wage jobs. This is in part because the traditional approach to segregation in Brown – that segregation is a harm in and of itself violative of Equal Protection principles – has been transformed over time into a classification principle. Under this paradigm, segregation is defined as a type of classification based on race, which is itself violative of the Equal Protection clause. Legal scholar Reva Siegel argues that this transformation occurred in part because the harm analysis was susceptible to corruption by those who could argue that integration was, in fact, more harmful than segregation. Classification thus became a way of “insulating a body of constitutional law concerned with status harm inflicted on blacks against unremitting charges of jurisprudential illegitimacy.” More importantly, the classification principle undermines the anti-subordination principles on which Brown, Hernandez, and similar cases were based. Siegel points out that in the decade after Brown was decided, “questions of anticlassification and questions of group status harm were not bifurcated frames of analysis, as they would later come

307 Haney Lopez supra note 29, at 69-74; Siegel, supra note 42, at 1499.
308 Siegel, supra note 42, at 1499.
309 Id.
310 Siegel, supra note 42, at 1473 n.10.
to be. Anticlassification discourse acquired this new significance only as it was asked to solve a variety of new questions that arose out of eventual bifurcation of the concepts. As the Supreme Court began to address issues like anti-miscegenation statutes, for example, the equal protection framework began to focus more on classification than on the harm of segregation. In fact, a series of arguments attacked both the anticlassification and harm frameworks, so that “when courts justified disestablishment of segregation in the language of harm, critics attacked judicial decrees in the language of harm. As judges began to justify disestablishment of segregation in the language of classification, opponents of desegregation decrees and policies expressed their objections in terms of the anticlassification principle itself.” Siegel sums up the eventual bifurcation of the anticlassification and harm principles as follows:

[I]n the years after the Supreme Court first announced the presumption that state action classifying on the basis of race was unconstitutional, courts applied that presumption in accordance with an understanding, sometimes implicit and sometimes explicit, that its purpose was to dismantle segregation and other practices that enforced racial hierarchy. In this period, segregation was understood as wrongful both because it failed to treat members of a group as individuals and because it treated one group as inferior to another, and there was little felt sense that expressing segregation’s harm in terms of a presumption that racial classification was unconstitutional amounted to a choice between the accounts of the harm. But in time, as the struggle over desegregation unfolded and shifted away from the question of whether courts would intervene in segregation to the question of when and how, the meaning of the presumption came to be increasingly contested.

The question, then, for a segregation framework and the inexorable inference is whether it can once again bring together the anti-classification and anti-subordination principles into one unified theory. The brown collar workplace provides the opportunity to test the theory in practice.

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311 Id. at 1500.
312 Id. at 1502.
313 Id. at 1519.
314 Id. at 1534.
B. The Proposed Framework

A first step in moving toward a segregation frameworks involves creating an inference of discrimination from the inexorable 100. This section discusses how such an inference would work.

The inexorable 100 inference of discrimination has the potential to move anti-discrimination law toward the development of a segregation proof framework. The inference, part of a broader discrimination framework that treats segregation with suspicion, especially at the low-wage level, would carry substantial weight in an analysis of specific employer practices in a given workplace. That framework could fulfill any commitment by the legal system to rid itself of the effects of segregation which, as illustrated in the brown collar context, is all too real. Typically, as has been described earlier, the fact of segregation itself bolsters other elements of discriminatory practice. Evidence of indicators of discrimination can bolster the inference even further. For example, evidence of working conditions, wage rates based on who holds the jobs, and substandard safety conditions can all support the prima facie segregation case. A showing of severe overrepresentation, or, the inexorable 100, would lead to scrutiny of an employer’s practices to determine whether a historically protected class was suffering discrimination. In the brown collar context, the fact finder would be able to use the inference created by the inexorable 100 to evaluate whether an employer has illegally targeted brown collar workers for “unwanted” jobs.

In the inexorable zero context, courts pay particularly close attention to the fact of an absence of minorities among the targetted job, regardless of the type of claim. In a promotion claim, the focus of the inquiry is on the promotion job category. In a termination case, the focus

\[315\] See discussion, supra notes 89-90.
of the inquiry is on the employees who were not terminated. The inexorable zero carries powerful probative value in each of these scenarios. The inexorable 100 can and should perform the same function in today’s workplace. In order to avoid claims that it would provide too much of an incentive to find in favor of plaintiffs or toward developing quotas, the inference can be supplemented with specific facts that point to employment structures that create the segregated workplace.

A focus on the inexorable 100 will require the employer to explain workplace dynamics underlying the segregated workplace. The inexorable 100 inference can serve a dual purpose: (1) it can hold an employer accountable for its practice of hiring immigrants or brown collar workers because it does not want to hire native born workers; and (2) it can focus attention on conditions within the segregated occupation, and provide the groundwork for a remedy that involves improving conditions in the segregated position.

One possible problem with the inexorable 100 concept is whether the evidence holds sway in the statistical world in the same way that the zero does. There is some indication that courts would dismiss the concept out of hand. In *Woodson v. Pfizer*, for example, the 7th Circuit court was faced with the argument that a company that targeted minority communities to sell its pharmaceuticals intentionally hired African Americans exclusively as its sales agents. The African American who sued the company claimed that it engaged in a practice that amounted to the “flip side of the inexorable zero.” The court dismissed the argument as

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317 *Id.* at 492-93.
318 *Id.* at 492.
illogical because it credited the company’s explicit goals of providing scholarships and job opportunities to disadvantaged minorities.\textsuperscript{319}

In order to address arguments that an inexorable 100 inference may overreach, this article proposes that additional elements of theory with an inexorable 100 at its core include the following:

1. The Existence of an Inexorable 100

   Just as with the inexorable zero, an inexorable 100 inference relies on common sense, rather than statistical tests. Plaintiffs would need to address both the inexorability of the situation and the degree of the segregation in order to meet the requisites of the inference.

   Inexorability is defined as something “not to be persuaded or moved by entreaty; relentless.”\textsuperscript{320} Arguably, just as with the zero, not every 100% is inexorable.\textsuperscript{321} Proof of inexorability may require a review of longitudinal data in order to establish that a practice is

\textsuperscript{319}Id. at, 493.
\textsuperscript{321}See Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494-95 (8th Cir. 1984) (“The plaintiffs argue that the women candidates' loss in all five of these elections constitutes the ‘inexorable zero’ found so damning in Teamsters, 431 U.S. at 342 n. 23, 97 S.Ct. at 1858 n. 23. But zero is not always ‘inexorable.’ The Teamsters zero was observed after hundreds of hiring decisions, id. at 341 n. 21, 97 S.Ct. at 1857 n. 21, a result that was surely statistically significant. The disparity observed in this case, by contrast, is not statistically significant. The candidates in the five elections included fifty men and eight women. If all of these candidates were pooled and chance were the sole determinant of outcome we would expect women to win .69 of the five positions; the standard deviation is 2.63; and the observed outcome—zero—is .26 standard deviations from the expected outcome. The probability that the observed outcome occurred purely by chance is about 40% under a one-tailed test, or about 80% under a two-tailed test--far higher than the level at which a social scientist would become suspicious so as to deem the result statistically significant. In reality, of course, there was not simply a single pool of fifty-eight candidates for five positions; in some of the individual contests the women candidates were not as outnumbered as in others. Even if we assume, however, that each of the elections was a contest between one man and one woman the results would not be startling. In that case we would expect women to win 2.5 of the positions; the standard deviation would be 1.58; and the observed outcome would be 1.58 standard deviations from the expected. The probability of the observed outcome occurring by chance would be between 5% and 10% under a one-tailed test, or between 10% and 20% under a two-tailed test. Thus, even if we focus only on the contested elections in which women competed against men, rather than on all contested elections, as the magistrate did and as the majority finds improper we do not observe enough statistical disparity to make us suspect discrimination.”)
Context in terms of historical data is important in establishing inexorability. Longitudinal analyses of wage determinations may provide some of the historical context needed to prove inexorability. Inexorability may also require evidence of the numbers affected by the employer’s decisionmaking. Plaintiffs must be careful with small numbers, as they may tend to counterbalance the inexorability of the situation. Other indicators of inexorability may include anecdotal evidence of employer bias, and evidence of employer power in the labor market.

1. Supplemental evidence of employer discrimination: Other indicators of exploitation as evidence of actionable segregation

Even in a jurisdiction where evidence of an inexorable zero constitutes weak evidence of discrimination, it can combine with anecdotal evidence of employer bias to strengthen the inference.

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324 *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337 (1977); see also, EEOC v. O&G Spring and Wire Forms Specialty Co., 38 F.3d 872, 889 (7th Cir. 1994) (Manion, J., dissenting) (“Where a zero may be inexorable when such a large work force is involved, it is not when the work force is so small. Moreover, where, as here, the 100% work force is statistically explainable, the absence of a certain race or gender is alone insufficient to support a finding of intentional discrimination.”). Some courts have also held that the inexorable zero cannot be used in individual cases. See e.g., Davis v. Precos Metals, 328 F.Supp.2d 847 (N.D. Ill. 2004); Clark v. ALFA, Ins. Co., 2002 WL 32366291 (N.D. Ala. 2002).
325 See Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982) (court held in sex discrimination suit that a small numbers of decisions made it more difficult to infer discrimination, especially since a number of the positions were awarded to women); Davis v. Precos Metals, 328 F.Supp.2d 847 (N. D. Ill. 2004) ( finding that in the absence of a pattern and practice case, and with evidence of only three instances of disparate impact, plaintiffs could not rely on inexorable zero to provide inference of discrimination; in comparing the case to *Barner v.City of Harvey*, 1998 WL 664951 (N.D. Ill. 1998), the court noted, “unlike Barner, this case involves a difference between zero and three, not zero and 68.”)
326 See Ortiz-Del Valle v. National Basketball Ass’n, 42 F.Supp.2d 334 (S.D.N.Y. 1999) (evidence that no women were hired as basketball referees over a period of time, combined with testimony of regarding differential treatment of women could support a discrimination finding).
inference. It is increasingly required in inexorable zero cases. The same should be expected in the inexorable 100 case. In other words, other indicators of exploitation, such as lower pay rates, substandard safety conditions, longer hours, and increased productivity requirements should be introduced as evidence to bolster the allegations of discrimination.

2. The employer should have the opportunity to show that it does not operate through bias factors.

This element is similar to a business necessity defense in a disparate impact case, or a legitimate business reason in a disparate treatment claim. Alternatively, an employer can show that it has not restructured a particular job to fill a Latino profile. It can also show that it has a relative lack of power in the market to control wage rates or conditions in a job category.

VII. Conclusion

Policy makers, social scientists, litigants, and courts must re-evaluate the assumptions that underlie judicial remedies in employment cases. Under current paradigms, decision makers tend to assume that the remedy for problems like segregated workplaces lies in ordering the compensation, training, and job placement opportunities that plaintiffs have been denied. In an evolving labor market, anti-discrimination law must play a broader role. The segregated workplace – still alive and thriving – requires revisiting to avoid the re-establishment of the conditions that Title VII meant to eradicate. It is time for a segregation framework that can focus on improving conditions in segregated jobs. This principle of broad remedial relief in the Title VII context provides the foundation upon which a court should be able to order changes in

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327 See Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989); Maryland Troopers Ass’n, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993); Brown v. Cost Co., 2006 WL 544296, at *4 (W.D. Pa. 2006) (“We do not view Teamsters as necessarily eliminating a foundational requirement in a disparate treatment case where there are no members of the plaintiff's protected class in the relevant workforce. In fact, there was evidence in Teamsters that members of the plaintiffs' class were available for work, had access to the job site, and were qualified.”).
employment structures that lead to the segregated workplace. In other words, under a segregation framework, a court need not limit relief to promotional opportunities or to relief that simply provides advancement opportunities to segregation victims.\textsuperscript{328} As a corollary, the inexorable 100 inference, just as its predecessor, the inexorable zero inference, can bridge the gap in Title VII law as the labor market and employment structures continue to evolve. Without such an inference, segregation in the workplace and its effects will remain a problem in anti-discrimination law, even as the workplace moves away from long-term job stability to contingent workplace structures for its employees.

\textsuperscript{328} Ruth G. Blumrosen, supra note 43, at 492.