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Essay: A Positive Perspective on Regulation of the Workplace Relationship

Dana M. Muir

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ESSAY: A POSITIVE PERSPECTIVE ON REGULATION OF THE WORKPLACE RELATIONSHIP

Dana M. Muir*

Positive Organizational Scholarship studies how business organizations and their employees excel and thrive. It takes the opposite perspective from the traditional organizational research that examines negative deviance and how that deviance inhibits organizational performance. Like traditional organizational scholars, legal scholars (as well as lawyers, legislators, judges, and regulators) typically focus on problems. Examples abound in the field of employment law. For example, to what extent does employment discrimination still exist and how can it be eliminated? And, what constraints prevent Americans from achieving retirement security and how can those constraints be eliminated? This Essay proposes that we examine the Positive Organizational Scholarship for insights on how a positive research lens can provide a new perspective on legal interventions in workplace relationships.

* Arthur F. Thurnau Professor of Business Law, Stephen M. Ross School of Business at the University of Michigan: dmuir@umich.edu. Professor Muir appreciates the research support provided by Michigan Ross.

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I. INTRODUCTION

As legal scholars, lawyer, legislators, judges, and regulators, we often focus our attention on problems. We argue whether a company has violated the applicable minimum legal standards.¹ We worry about exactly what is required by the relevant laws.² We fret about the costs of compliance.³ We quarrel about whether legal standards are over- or under-inclusive.⁴ All are important concerns, each deserving of the attention that we give to them.

This Essay proposes, however, that the “positive” movements in psychology and organizational scholarship provide an additional lens for our study of “employment-based interventions”⁵ by the legal system. I begin, in Part II, by explaining the history behind the development of Positive Organizational Scholarship—as the field has come to be known—and its basic theoretical underpinnings and research themes.⁶ Because of the importance of definitions in legal writing, and to anticipate the controversy that could arise about such a potentially value-biased term as “positive,” the Part explores the use of the term in the organizational literature. Finally, Part II explains how the Positive Organizational Scholarship intersects with the activities of organizations committed to the positive business movement.

Part III brings a positive business lens to the field of benefits and social welfare law somewhat indirectly through an examination of the Positive Organizational Scholarship’s

1. See, e.g., *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (deciding that plan sponsor did not violate ERISA by amending retiree lifetime benefit plans unless ordinary contract law principles precluded the amendment).

2. See, e.g., *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828-29 (2015) (holding that a claim for breach of fiduciary’s continuing duty of prudence occurs within the six year statute of limitations).

3. See, e.g., *Rush Prudential HMO v. Moran*, 122 S. Ct. 2151, 2167 n.11 (2002) (noting that the ERISA plan may bear the additional compliance costs imposed by the decision).

4. See, e.g., John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1351 (2003) (arguing that Justice Scalia erred by developing alternative statutory considerations that, alternatively, were either over- inclusive or under-inclusive).

5. This term appears to have been coined by Professor Brendan S. Maher. See generally Brendan S. Maher, *Regulating Employment-Based Anything*, Minn. L. Rev. (forthcoming 2016), available at <http://ssrn.com/abstract=2581329>.

6. KIM S. CAMERON ET AL., *Foundations of Positive Organizational Scholarship*, in POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE 3-4 (Kim S. Cameron et al., eds., 2003).

implications for organizational diversity practices. There is no Positive Organizational Scholarship specifically focused on employee benefit plans. As such, Part III uses diversity practices for my initial exploration of the intersection of positive practices and research with regulatory goals and approaches. The diversity context provides analogies for use in Part IV, where consideration is given to extending the reach of Positive Organizational Scholarship and to applying its lens to employee benefits.

II. POSITIVE BUSINESS SCHOLARSHIP

Traditional psychology research typically focused on mental illness and negative deviance, which allowed the profession to make strides in categorizing illnesses and developing treatments that have benefited untold numbers of people.⁷ However, by 1998, the psychology field had expanded its focus and recognized “positive psychology” as a new and very different—but legitimate—branch of research.⁸

Positive psychology studies deviance at the opposite end of the mental health spectrum from illness and negative deviance.⁹ Scholars categorize positive psychology into three subsets of research.¹⁰ One subset investigates “positive subjective experiences”—those emotions that most of us would describe as positive, including happiness and fulfillment.¹¹ The second subset studies the positive traits exhibited by individuals, such as talents and values.¹² The third, and most relevant subset for purposes of this Essay, is research on positive institutions, including businesses.¹³

Organizational scholars used and relied on the foundations established by positive psychology, particularly in its third subset, to build the field now known as “Positive Organizational Scholarship.”¹⁴ The term “Positive” in Positive Organizational

7. See CHRISTOPHER M. PETERSON & MARTIN E. P. SELIGMAN, *Positive Organizational Studies: Lessons from Positive Psychology*, in POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE 14-15 (Kim S. Cameron et al. eds., 2003).

8. *Id.*

9. See *id.* at 14-16.

10. *Id.* at 16.

11. *Id.*

12. *Id.*

13. *Id.*

14. CAMERON ET AL., *supra* note 6, at 3-4, 6-7.

Scholarship does not have a single accepted definition, but, generally speaking, it involves the study of how business organizations and their employees excel and thrive.¹⁵ As Positive Organizational Scholarship matures, the scholarship is converging on four approaches that apply positive concepts to business research and that provide a context for understanding the term, “Positive.”¹⁶

The first, and perhaps most intuitive, of the four approaches is to use a positive lens when thinking about business processes and dynamics.¹⁷ Second, similar to the approach of positive psychology researchers, some positive organizational scholars study the ways in which businesses are positively deviant—how they differ from the norm in some positive way.¹⁸ The third approach assumes that positive actions or situations provide benefits (such as increased resilience and capacity) to individuals, groups, and organizations.¹⁹ Positive organizational scholars study these positive actions and the benefits they generate.²⁰ Finally, the fourth approach of Positive Organizational Scholarship scholars for employment and benefits law studies the virtuousness in individuals, groups and organizations.²¹ While it does not consider the strand of Positive Organizational Scholarship that studies virtuousness, such a topic may be of interest to future authors.

Positive Organizational Scholarship has affected organizational practices and the study of those practices.²² One conceptualization of positive business practices explains that positive organizations “develop great products, are great places to work, and are great neighbors in their communities.”²³ In this

15. KIM S. CAMERON & GRETCHEN M. SPREITZER, *Introduction: What is Positive About Positive Organizational Scholarship?*, in *THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP*, 1, 1-2 (Kim S. Cameron & Gretchen M. Spreitzer, eds., 2012).

16. *Id.* at 2.

17. *Id.*

18. *Id.* at 2-3.

19. *Id.* at 3.

20. *Id.*

21. *Id.*

22. For example, the Stephen M. Ross School of Business (Ross) at the University of Michigan hosts an annual positive business conference. In addition to workshops for business participants, the conference identifies businesses with superlative positive business practices. Univ. of Mich. Stephen M. Ross School of Business, *About, POSITIVE BUSINESS CONFERENCE*, <http://positivebusinessconference.com/about/> (last visited May 29, 2015).

23. *Victors for Michigan: Victory for Ross*, STEPHEN M. ROSS SCHOOL OF

articulation, positive organizations fulfill the traditional for-profit role of providing value to shareholders. Beyond that, though, positive organizations are places where employees thrive. Much Positive Organizational Scholarship focuses on this aspect of organizations; it examines which characteristics of individuals, groups, and organizations contribute to an exceptionally positive workplace culture.²⁴ Finally, positive organizations are those that contribute to their communities—local, regional, and global.

It is beyond the scope of this Essay to address the implications of the extensive corporate law debates on the primacy of shareholders for positive business practices.²⁵ There may be a positive spillover effect when a positive business becomes a great place to work and successfully contributes to its community. But, the positive business practices intended to achieve those goals may not have the goal of increasing shareholder value.

For example, Professors Anjan Thakor and Robert Quinn, in their groundbreaking work on the third role of positive organizations (contributing to communities), used principal and agent concepts to develop a theory that organizations pursuing “higher purpose” projects complement the goal of building shareholder wealth.²⁶ In their model, an organization that pursues a higher purpose not only has a for-profit goal, but also an explicit social benefit that will be achieved in addition to the shareholder wealth that will be created.²⁷ To illustrate the way a positive business might contribute to its community, Professors Thakor and Quinn use the example of an organization that creates a way to increase global food production; it intends to earn a profit and, in addition, has the “higher purpose of feeding the world.”²⁸

BUSINESS,

http://michiganross.umich.edu/sites/default/files/documents/dx_give_your_gift_case_f or_support.pdf (last visited Nov. 6, 2015).

24. See *supra* text accompanying notes 15-16 (describing the basic themes of Positive Organizational Scholarship).

25. See generally, e.g., Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1 (2015) (discussing the use of various corporate governance theories to establish corporate purpose).

26. See generally, Anjan V. Thakor & Robert E. Quinn, *The Economics of Higher Purpose* (European Corporate Governance Institute (ECGI), Finance Working Paper No. 395, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362454.

27. See *id.* at 2, 7.

28. *Id.* at 2.

III. METHODS OF ELIMINATING WORKPLACE DISCRIMINATION

Discrimination in employment has a long history in the United States.²⁹ The concept of employment “at will”—which permitted employers to make employment-based decisions based on any criteria they saw fit—enabled discrimination.³⁰ This Part concentrates on Title VII of the Civil Rights Act of 1964.³¹ Part A. assesses the extent to which Title VII’s goals have been realized. Next, Part B. is divided into three subparts. The first subpart describes more recent efforts by business organizations to increase workforce diversity. The second subpart evaluates the Positive Organizational Scholarship on the value of workforce diversity. The third subpart ends by assessing findings on the relative effectiveness of various practices intended to promote diversity.

A. EMPLOYMENT-BASED NONDISCRIMINATION INTERVENTIONS

Beginning with the New Deal’s regulation of the employer-employee relationship, federal law was starting to weaken the concept of “employment-at-will.”³² Of the primary federal statutes that intervened in the employment relationship, the federal Fair Labor Standards Act (FLSA), enacted in 1938, imposed a minimum wage, regulated child labor, and set standards requiring overtime pay under specified circumstances.³³ Twenty-five years later during the civil rights movement, Title VII prohibited discrimination against employees and job candidates based on race, color, religion, national origin,

29. See generally BENTON D. WILLIAMS, TITLE VII AND THE PRIVATE SECTOR ORIGINS OF AFFIRMATIVE ACTION: 1964-1996 (May 2005) (Ph.D. dissertation, University of Missouri-Columbia) (ProQuest Information and Learning Company, UMI Microform No. 3189961) (discussing history of U.S. discrimination law).

30. See Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653-54 (2000) (discussing the right of employers and employees to terminate the employment relationship at any time).

31. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2015).

32. Jean C. Love, *Retaliatory Discharge for Filing a Workers’ Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 553 (1986). In order to limit its scope, this Essay focuses only on federal law.

33. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2015); see Jessica Barclay-Strobel, *Shooting the Messenger: How Enforcement of FLSA and ERISA is Thwarted by Courts’ Interpretations of the Statutes’ Antiretaliation and Remedies Provisions*, 58 UCLA L. REV. 521, 551 (2011) (discussing FLSA).

or sex.³⁴ More recently, the Employee Retirement Income Security Act of 1974³⁵ (ERISA) imposed minimum standards, disclosure, and procedural claims requirements on the provision by private sector employers of benefit plans, including retirement and health care plans.³⁶

Professor Brendan Maher has developed a theory to evaluate whether, given a specific concern, the government should intervene in the employment relationship.³⁷ Professor Maher writes: “[r]egulatory interventions occur because the government concludes there is a problem . . . employment-based interventions occur because the government believes regulating the labor deal is an attractive way to fix [that problem].”³⁸ The problem Congress attempted to fix with its enactment of Title VII was that of discrimination—primarily, but not solely, racial discrimination—in employment.³⁹ In the words of the United States Supreme Court, the purpose of Title VII was “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”⁴⁰

Certainly, the struggle against discrimination in the United States has a long history that both pre- and post-dates the Civil Rights Act of 1964.⁴¹ In 1954, the Supreme Court struck down the concept of “separate but equal” in the landmark case of *Brown v. Board of Education*.⁴² Perhaps, as some, but not all, scholars have argued, the decision in *Brown* gave rise to the Civil Rights Movement.⁴³ Regardless of its triggers and whether the Civil

34. 42 U.S.C. § 2000e-2 (2015); see Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1207, 1210-11 (2014) (discussing basic Title VII concepts).

35. Employee Retirement Income Security Act (ERISA) § 1-4402, 29 U.S.C. §§ 1001-1461 (2015).

36. See Dana M. Muir, *Plant Closings and ERISA's Nointerference Provision*, 36 B.C. L. REV. 201, 204-05 (1995) (providing an overview of ERISA).

37. See generally Maher, *supra* note 5, at 3 (developing theory and explaining its application).

38. *Id.*

39. Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 224 (1995).

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

41. Williams, *supra* note 29, at 15, 303 (summarizing pre-Title VII anti-discrimination law).

42. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 495 (1954).

43. See generally James T. Patterson, *Brown v. Board of Education and the Civil Rights Movement*, 34 STETSON L. REV. 413, 415-16 (2005) (questioning the accepted

Rights Movement of the 1950s and '60s is viewed as "a triumphant, inspiring narrative,"⁴⁴ or as a more complex struggle with a varied political strategy and a shifting set of ideological foundations,⁴⁵ the Civil Rights Movement advanced equal rights in the United States.

It takes only a brief look at the employment practices of the 1950s and '60s to begin to understand the then state of affairs. Supreme Court Justice Ruth Bader Ginsburg has spoken about her experience in finding that "in the 1950s, law firms and some of the finest judges were upfront in saying they wanted no women [lawyers as employees]."⁴⁶ Professor Stephen Befort has succinctly explained the workplace demographic of the 1950s: "The typical American employee . . . was a white male with an education that did not exceed that of a high school degree. Women comprised only one out of three members of the civilian labor force at this time. Minorities made up only ten percent of the workforce."⁴⁷ Unions bore their own share of responsibility for discriminatory employment practices.⁴⁸ In 1968, the Equal Employment Opportunity Commission (EEOC) summarized such discriminatory practices:

Discrimination in employment is widespread and takes many forms; it can be in almost every occupation group, and industry; and it has a crushing impact. In short, it is a profound condition, national in scope, and it constitutes a continuing violation of the American ideal of fair play in the private enterprise system.⁴⁹

It is impossible to sort out the relative effects of state laws

wisdom that the *Brown* decision precipitated the Civil Rights Movement).

44. Reul Schiller, *Law, Liberalism, and the New History of the Civil Rights Movement*, 61 HASTINGS L.J. 1257, 1258 (2010).

45. *Id.* at 1260-61.

46. Annual John Paul Stevens Lecture, *A Conversation with Associate Justice Ruth Bader Ginsburg* (Sept. 19, 2012), 84 COLO.L. REV. 909, 912 (2013).

47. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 353 (2002).

48. Harry Hutchinson, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 124 (1997) ("This oppressive history continued through the 1950s and into the 1960s, as the combined 'AFL-CIO failed to compel some of its affiliates to stop discriminatory and segregationist practices.' In 1959, when A. Phillip Randolph, the only black member of the twenty-seven member executive council, raised the issue at the AFL-CIO convention, AFL-CIO President George Meany ridiculed him: 'Who the hell appointed you as the guardian of all the Negroes in America?') (citations omitted).

49. ROBERT SAMUEL SMITH, *RACE, LABOR, & CIVIL RIGHTS: GRIGGS VERSUS DUKE POWER AND THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY* 8-9 (2008) (citation omitted) (internal quotation marks omitted) (quoting EEOC Report No. 1, *Job Patterns for Minorities and Women in Private Industry* (1968), see *id.* at 193).

prohibiting discrimination, the Civil Rights Movement, the enactment of Title VII, and the other legal and social means being brought to bear against discrimination. Title VII, however, was unique among the legislative efforts in the breadth of its application⁵⁰ and establishment of a federal agency, the EEOC.⁵¹ One would expect employers to take notice and, over time, they have.

Although the EEOC did not have enforcement authority in the first years after its creation, it began to convince employers in the late 1960s and early 1970s to voluntarily change their workplace practices. Such efforts to convince employers included pushing pharmaceutical companies to adopt a variety of practices that are still well known today, and that consist of expanding recruiting outreach, considering the potentially discriminatory effects of testing and other minimum job requirements, and implementing training programs.⁵² Employers were responsive and subsequently adopted at least some of the EEOC's recommendations.⁵³ Though far beyond the scope of this Essay, most readers will recognize that many businesses have used these and other practices in efforts to eliminate employment discrimination.

A look at the progress that has been made in increasing diversity and opportunity in the workplace, however, is disheartening. Progress has been made; but not enough. Because of the related research discussed in Part B., it is useful to consider the period from 1971 to 2002. The following table compares the percentage of management jobs (defined during that period as all management jobs) held by members of various demographic groups at the beginning and end of the time period:

50. 42 U.S.C. § 2000e(b) (2012) (applying Title VII to all employers with at least fifteen employees).

51. *Id.* § 2000e-4(a) (2012) (mandating creation of EEOC).

52. *See Williams, supra* note 29, at 84-86.

53. *See id.* at 86.

TABLE 1. MANAGEMENT JOBS⁵⁴

	1971	2002
White men	81.0%	61.0%
White women	16.0%	26.0%
Black men	1.0%	3.1%
Black women	0.4%	0.9%
Hispanic men	0.6%	2.5%
Hispanic women	0.1%	0.9%

Progress continued between 2002 and 2012,⁵⁵ however, workplace discrimination remains an issue. EEOC discrimination charge data confirms that employees still do not view their workplaces as free of discrimination.⁵⁶ In 2006, lawsuits alleging discrimination in employment accounted for approximately one-half of all civil rights filings in the United States district courts.⁵⁷ The much discussed “glass ceiling”⁵⁸ may be cracking, but it has not yet given way. To illustrate, as of early 2015, there was minimal racial and gender diversity in the CEO positions at Fortune 500 companies.⁵⁹ Of these companies, only

54. See Frank Dobbin et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOCIOLOGICAL REV. 1014, 1022-23 (2015), <http://asr.sagepub.com/content/80/5/1014.full.pdf+html>.

55. U.S. EQUAL EMP. OPPORTUNITY COMMISSION, *2002 EEO-1 Aggregate Report: NAC 551-Management of Companies & Enterprises*, <http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2002/nac3/551.html> (last visited Nov. 11, 2015); *Id.*, *2007 EEO-1 National Aggregate Report by NAICS-2 Code:55 – Management of Companies and Enterprises*, <http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2007/nac2/55-Management%20of%20Companies%20and%20Enterprises.html> (last visited Nov. 11, 2015); *Id.*, *2012 Job Patterns for Minorities and Women in Private Industry (EEO-1): 2012 EEO-1 National Aggregate Report*, http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2012/index.cfm#select_label (last visited Nov. 11, 2015). Effective with surveys done in September 2007, the category of managers reported in Table 1 above was split into two levels of managers. *Id.*, *Questions and Answers: Revisions to the EEO-1 Report*, <http://www.eeoc.gov/employers/eeo1/qanda.cfm> (last visited Nov. 11, 2015).

56. U.S. EQUAL EMP. OPPORTUNITY COMMISSION, *Charge Statistics FY 1997 Through FY 2014*, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 3, 2016).

57. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE SPECIAL REPORT: CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-2006 3-4 (Aug. 2008), available at <http://www.bjs.gov/content/pub/pdf/crcusdc06.pdf>.

58. See, e.g., Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN’S L.J. 1 (2002) (discussing glass ceiling debate in terms of limitations on advancement of women).

59. Jillian Berman, *Soon Not Even 1 Percent of Fortune 500 Companies Will Have Black CEOs*, HUFFINGTON POST, (Jan. 29, 2015, 3:41 PM),

five had black CEOs (one of which left his position in March 2015). As of June 2014, only twenty-four women held CEO positions.⁶⁰

Legal scholars have not given up hope for additional progress toward more diverse and fair workplaces. Proscriptive proposals include those that would require or establish strong incentives for employers to adopt a specified set of best practices;⁶¹ others would expand the number of protected categories to prohibit discrimination based on, for example, sexual orientation.⁶² Part B. uses the lens of Positive Organizational Scholarship to evaluate the relationship between organizational practices and Title VII's goals.

B. A POSITIVE ORGANIZATIONAL SCHOLARSHIP LENS ON ELIMINATION OF WORKPLACE DISCRIMINATION

There are three ways in which Positive Organizational Scholarship can contribute to a better understanding of improving diversity and fairness in workplaces. First, the Positive Organizational Scholarship research on which employer practices increase diversity can influence future public policy, court decisions, and court-mandated or court-approved remedial practices. Second, the Positive Organizational Scholarship provides a theoretical understanding of why particular practices work while others do not. Such theory can provide the basis for thinking about further refinements of existing effective practices and legal interventions. Third, Professors Thacker and Quinn's work on higher purpose provides a model for how a business's pursuit of diversity can complement the goal of building shareholder wealth.

The first subpart of this Part provides institutional background by considering the basic choices business organizations have when confronted with new employment-based legal interventions. The second subpart uses a positive lens to identify the value of diversity practices. Finally, the third subpart investigates the Positive Organizational Scholarship that has evaluated the effectiveness of employer practices intended to

http://www.huffingtonpost.com/2015.01/29/black-ceos-fortune-500_n_6572074.html.

60. *Id.*

61. *See, e.g.*, David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 970 (1993) (suggesting that any time female or minority applicant is not hired a review process should occur).

62. *See, e.g.*, Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 853-61 (2013) (arguing for legislation prohibiting discrimination based on sexual orientation).

increase diversity in employment, as well as the theoretical explanations for what does and does not work. Finally, the Part ends by circling back to the basic choices organizations have when faced with new employment-based legal interventions, and how an organizational quest for higher value may align with legislative values.

1. *Organizational Response to Employment-Based Legal Interventions*

When faced with a new legal intervention, whether employment-based or otherwise, employers have four potential responses. First, they can challenge aspects of the law either through litigation or through lobbying the relevant agencies or Congress.⁶³ Second, employers can take actions that may or may not be intended to evade the law but that, in any case, prompt agencies or Congress to consider whether the law is providing sufficient protection to meet its goal.⁶⁴ Third, employers may fail (either intentionally or inadvertently) to comply with the law, and enforcement may be necessary.⁶⁵ Or, fourth, they may change their practices and comply with the legal standards either by meeting the minimum requirements or going beyond those requirements.⁶⁶ This Essay focuses on the last set of employer actions—compliance—and the relationship of compliance with positive business concepts. The focus here, of course, does not negate the fact that some organizations may respond in one of the first three ways.

Consider the response of employers to Title VII's nondiscrimination mandate. As discussed above, some employers adopted robust programs to eliminate discrimination in their employment practices.⁶⁷ In this vein, some progress has been

63. See Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 139-41 (2015) (discussing invalidation of SEC's proxy access rule).

64. See Allison Ara, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255, 269-70 (2010) (discussing amendments intended to expand protections for those perceived as disabled).

65. See generally Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) (discussing class action suits involving alleged discrimination against major companies and resulting consent decrees).

66. See *supra* text accompanying notes 50-53.

67. See *id.*; see also Williams, *supra* note 29, at 73 (discussing new employment policies voluntarily initiated by employers).

made in increasing diversity and fairness in the workplace.⁶⁸ Many organizations have gone beyond the minimum mandates of federal legislation in pursuit of diverse workforces and practices that empower all employees to reach their maximum potential in an environment that values equality.⁶⁹ To be clear, the argument here is not that all discrimination in employment—or even all illegal discrimination in employment—has been eliminated. Much remains to be done to ensure that even currently protected categories of employees and applicants are free from discrimination.⁷⁰

2. *The Value of Diversity in Organization*

In my view, there are two ways to evaluate the success of organizational diversity programs. First, success may be measured by the extent to which diversity increases shareholder value.⁷¹ Second, success may be measured by the extent to which diversity has other positive effects within an organization.⁷² Positive Organizational Scholarship has considered each of these questions.

As noted above, the original goal of Title VII was to eliminate employment discrimination against the categories of individuals protected by the statute.⁷³ In this author's view, to the extent that the statutory ideals encompassed increased employer profitability and productivity, those ideals have received far less discussion in the Title VII literature. In 1998, organizational scholars published a well-regarded study of forty years of research on diversity on organizations that focused on the questions of profitability and productivity.⁷⁴ The scholars found that the data were inconsistent on whether diversity, in terms of group performance, provided value.⁷⁵ In 2008, a similar study of diversity research came to the same conclusion.⁷⁶

68. *See supra* Table 1.

69. *See discussion infra* Part III.B.3.

70. *See supra* text accompanying notes 55-61.

71. *See infra* text accompanying notes 133-36.

72. *See infra* text accompanying notes 81-83.

73. *See supra* text accompanying notes 39-40.

74. Lakshmi Ramarajan & David Thomas, *A Positive Approach to Studying Diversity in Organizations*, in *THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP* 555, 560 (Kim S. Cameron & Gretchen M. Spreitzer eds., 2012).

75. *Id.* at 560.

76. *Id.* (citing D. CHUGH & A.P. BRIEF, *Introduction: Where the Sweet Spot is Studying Diversity in Organizations*, in *DIVERSITY AT WORK* 1-12 (Arthur P. Brief ed.,

More recently, Professors Lakshmi Ramarajan and David Thomas used the broader view of the potentially beneficial effects of diversity, and searched specifically for studies that have identified positive outcomes of diversity practices in organizations and the conditions that generated these outcomes.⁷⁷ The rubric the professors used provides a different window on whether and how diversity programs add value.

One type of positive outcomes that Professors Ramarajan and Thomas coded for, was “intergroup equality,” which they defined as: “evidence that members of a stigmatized or disadvantaged group are receiving more equal outcomes than stigmatized groups have received traditionally.”⁷⁸ This set of outcomes parallels the statutory goals of Title VII and similar federal legislation—to decrease discrimination against individuals in an employment setting.⁷⁹

Another way diversity programs could add value is through positive group outcomes.⁸⁰ Studies found that the existence of diversity “positively influenced outcomes for the larger group as a whole.”⁸¹ This appears to be the only effect that clearly and explicitly benefits the employer. The researchers refer to the third set of effects of diversity programs as “positive intergroup relations,” defined as situations “in which the relationships between members of stigmatized or disadvantaged groups and members of unstigmatized or advantaged groups are experienced as positive.”⁸²

The researchers first identified all of the diversity-focused research in management, psychology, and sociology journals published between January 1998 and April 2010 that fit within one of these three categories.⁸³ About 25% of those articles provided evidence on at least one of the three positive outcomes just described.⁸⁴ With respect to the first type of positive outcomes—more equal outcomes for stigmatized or disadvantaged group members—the research confirms what the EEOC statistics tell us: organizational workforces have higher proportions of

2008)).

77. *See id.* at 553.

78. *Id.*

79. *See supra* text accompanying notes 39-40.

80. Ramarajan & Thomas, *supra* note 74, at 553.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

women and members of traditionally underrepresented groups than they had in the past.⁸⁵ The research goes further to provide information on other factors of equality.⁸⁶ For example, in some settings, turnover rates of minority groups decrease.⁸⁷ While access to and staying in power in the workplace matters, so too does success. Professor Jim Westphal, in a co-authored work, documented that minority directors may be able to leverage certain factors to achieve more influence on corporate boards than that enjoyed by majority group directors.⁸⁸

Even if the research on diversity and organizational profit and productivity remains ambiguous, research indicates that diversity enables groups to improve their decision-making skills.⁸⁹ Scholars offer two models to explain that effect.⁹⁰ First, the majority of the research has concentrated on the information-elaboration model, which posits that diverse group members have different knowledge and perspectives.⁹¹ If the group setting is conducive, then the larger information set will be shared and a better result will follow.⁹² Second, more recent work suggests that, while the members in a diverse group are better at gathering and assessing available information, it is not necessarily the minority members who contribute unique information.⁹³

Finally, the research on positive intergroup relations may provide the sharpest example of the power of using a positive research lens. Social psychologists have long studied the interactions of minority and majority groups.⁹⁴ The hypothesis that contact between groups decreases prejudice can be traced to the 1950s.⁹⁵ A number of more recent studies confirm this hypothesis and have investigated which environments are conducive to decreased prejudice.⁹⁶

The studies, while useful in understanding the circumstances under which prejudice can be addressed, focus on

85. *See id.* at 554.

86. *See infra* text accompanying notes 88-89.

87. Ramarajan & Thomas, *supra* note 74, at 554.

88. *Id.*

89. *See infra* text accompanying notes 90-93.

90. *See infra* text accompanying notes 91-93.

91. Ramarajan & Thomas, *supra* note 74, at 555.

92. *See id.*

93. *Id.* at 555-56.

94. *See id.* at 554.

95. *See id.*

96. *See id.*

the problem itself—prejudice.⁹⁷ A positive approach evaluates ways to create more positive attitudes toward members of groups other than one's own.⁹⁸ Scholars pursuing that line of inquiry posit that improving attitudes is independent of decreasing negative attitudes.⁹⁹ If, in fact, those effects on attitude do operate independently, they may provide new ways to improve intergroup relations.

Title VII is premised on the belief that fairness of opportunity in employment is desirable.¹⁰⁰ Today, considerable scholarship confirms that diversity in organizations can have positive effects for individuals in the categories that the statute protects.¹⁰¹ The Positive Organizational Scholarship, however, highlights two additional benefits of diversity. Research shows that workplace diversity can contribute to better group decision-making and to more positive relationships between members of majority and minority groups.¹⁰² The next subpart turns to the Positive Organizational Scholarship on the kinds of diversity programs that work.

3. *Diversity Programs that Work*

Regulators and courts have long opined on optimal employment practices to increase diversity. As discussed above, during the late 1960s and early 1970s, the EEOC encouraged employers to adopt specific practices, including expanding outreach when recruiting and validating employment tests.¹⁰³ In 1997, a task force assembled by the EEOC completed a report on the best nondiscrimination practices used by employers.¹⁰⁴

97. *Id.* at 554-55.

98. *See id.* at 555.

99. *Id.*

100. *See supra* text accompanying notes 39-40.

101. *See, e.g.,* Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1453 (2009) (“Since Title VII was enacted, the American workplace has become markedly older, more nonwhite, and more female[.]”).

102. *See supra* text accompanying notes 89-96.

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

104. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS, at Executive Summary, A. Introduction and Procedure (Comm'n Task Force Rep.) (“Best Equal Employment Opportunity (EEO) Policies, Programs, and Practices in the Private Sector”), available at http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (last visited Nov. 13, 2015); *see also* Press Release, U.S. Equal Emp't Opportunity Comm'n, Commission Releases Task Force Report on “Best” Private Sector EEO Efforts (Dec. 22, 1997), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/12-22-97.html> (discussing details

Courts have relied on formal organizational practices, including performance evaluation systems, in evaluating discrimination complaints and in awarding relief.¹⁰⁵ This subpart discusses studies of those practices intended to increase diversity; while some work, others have had the opposite effect.

Recent research hypothesizes that theories on job autonomy and self-determination in the workplace are helpful in predicting which workplace programs will be successful in increasing diversity.¹⁰⁶ The idea behind these theories is that managers will resist programs designed to limit their discretion, but will support programs designed to engage managers.¹⁰⁷ The specific research (discussed below) covers the period between 1971 and 2002.¹⁰⁸ It derives diversity statistics from EEOC data, workplace practices from the authors' survey data, and labor market data from other federal sources.¹⁰⁹

The authors categorized testing, performance evaluations, and complaint mechanisms as discretion-limiting programs.¹¹⁰ Data on diversity between 1971 and 2002, which was studied in firms with the above-mentioned policies, confirmed the hypothesis that managers will resist a perceived interference with their decision making.¹¹¹ With the exception of Asian men, job qualification tests have a negative impact on the hiring of all nonmajority EEO categories.¹¹² In situations where managers will not be required to explain their choice of a job candidate, the effects on all nonmajority EEO categories are similar, whereas other research has shown significant variance across categories.¹¹³ This implies that, when making hiring decisions, managers are exercising discretion in ways that harm test takers who are members of nonmajority groups.¹¹⁴

Similarly, although performance evaluations based on objective criteria have become popular recommendations of management consultants and are widely used by employers,¹¹⁵

of Report and designated Task Force).

105. See Dobbin et al., *supra* note 54, at 1016-17.

106. *Id.* at 1015.

107. *Id.* at 1034.

108. See *id.* at 1021.

109. See *id.* at 1021-22.

110. See *id.* at 1015.

111. See text accompanying notes 113-15.

112. See Dobbin et al., *supra* note 54, at 1026.

113. See *id.* at 1026-27.

114. See *id.*

115. *Id.* at 1034-35.

these evaluations tend to disadvantage white women.¹¹⁶ Numerous studies show that managers “routinely assign higher ‘objective’ scores to workers who share their race, ethnicity, and gender.”¹¹⁷ Like testing and performance evaluations, grievance procedures are intended to constrain managerial behavior by providing an avenue for complaints and for the possible discipline of managers.¹¹⁸ And, like testing and performance evaluations, grievance procedures appear to backfire. Data show that grievance procedures disadvantage all nonmajority EEO categories, except Hispanic men.¹¹⁹

The research on discretion-limiting initiatives helps to explain other research on the effects of diversity programs. Specifically, earlier research discovered mixed effects from diversity training intended to help managers recognize and avoid bias.¹²⁰ As with the testing, performance evaluations, and grievance procedures, managers may view such training programs—targeted at their beliefs and behavior—as constraining, and, in resisting change, exhibit even more decision-making bias.¹²¹

In contrast, job autonomy and self-determination theory predicts that managers will support programs that actively engage them in their managerial roles.¹²² The two studied programs that fit within this category are college outreach programs and training programs, which are intended to enhance opportunities for the workforce.¹²³ Special recruitment programs increase the proportion of management jobs held by members of every nonmajority EEO group.¹²⁴ Training programs designed to increase access to management jobs show less robust, but still positive, effects for some groups, and decrease the proportion of management positions held by white men.¹²⁵

The researchers considered other types of diversity

116. *Id.* at 1026.

117. *Id.* at 1019.

118. *See id.*

119. *Id.* at 1026-27.

120. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 593 (2006).

121. *See supra* text accompanying notes 107-121 (discussing research on behavior constraining diversity efforts).

122. Dobbin et al., *supra* note 54, at 1026.

123. *See id.* at 1015.

124. *See id.* at 1026-27.

125. *See id.* at 1026.

programs, including those intended to increase the transparency of job opportunities (e.g., job posting and job ladders).¹²⁶ The effects of those programs are mixed in situations where managerial behavior is not otherwise monitored.¹²⁷ From a legal perspective, perhaps the most interesting finding is that monitoring, either by an organizational diversity expert or by regulators, has no significant effect on programs that rely on managerial engagement.¹²⁸ That type of monitoring, however, does moderate the negative effects of the programs that constrain management decision-making.¹²⁹ The theoretical explanation for the different effects of monitoring and constraints is that, when managers know that a diversity expert or regulator may review their decision making, the managers may be less likely to resist change and are more careful in considering their decisions.¹³⁰

The principles of Positive Organizational Scholarship support the development of workplace programs that are designed to engage managers in changing the workplace. And, these initiatives may be the most successful in increasing diversity. Constraints on managerial discretion discourage the development of positive deviance.¹³¹ The literature on positive organizational change—after all, an organization working to increase diversity is one that seeks positive change—suggests that internally-directed individuals are successful change agents.¹³² And, positive leadership theory argues that concentrating on an individual's abilities and strengths is more effective than looking for weaknesses or failure points.¹³³ Concentrating on abilities and strengths is consistent with programs intended to encourage managers to act as positive leaders and actively engage in promoting diversity.

In sum, the pursuit of increased diversity fits within all three

126. *See id.* at 1015.

127. *See id.* at 1029.

128. *Id.*

129. *See id.*

130. *See id.* at 1021.

131. *See* Gretchen M. Spreitzer & Scott Sonenshein, *Positive Deviance and Extraordinary Organizing*, in *POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE* 213, 214-15 (Kim S. Cameron et al. eds., 2003).

132. Robert E. Quinn & Ned Wellman, *Seeing and Acting Differently: Positive Change in Organizations*, in *THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP* 1-2 (Kim S. Cameron & Gretchen M. Spreitzer eds., 2012).

133. D. Scott DeRue & Kristina M. Workman, *Toward a Positive and Dynamic Theory of Leadership Development*, in *THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP* 2 (Kim S. Cameron & Gretchen M. Spreitzer eds., 2012).

prongs of positive business. It may increase shareholder value.¹³⁴ The research shows that it can make the workplace more favorable for individual employees. And, it improves both interactions among employee groups and for decision making.¹³⁵ Increased workplace diversity improves the larger community by promoting fairer access to employment and through broader social effects.

Positive Organizational Scholarship, albeit counter-intuitively, also indicates that some of the organizational programs favored by regulators and courts to counter discrimination and increase diversity actually have the opposite effect.¹³⁶ The goal here is not to have the final word on the optimal ways for regulators and courts to pursue the goals of Title VII. Instead, the goal is to provide a foundation for future work integrating theory and findings from Positive Organizational Scholarship with legal principles. The insights of these theories and findings may facilitate the evolution of organizational practices and legal principles in ways that enable them to achieve their shared goals: increased workplace opportunity and equity.

IV. METHODS OF SECURING WORKPLACE BENEFITS

This Part utilizes the approach established in Part III to consider ways in which the lens of Positive Organizational Scholarship might be applied to employment-based interventions intended to secure workplace benefits; specifically, benefits that enable employees to fund their retirement. This Part begins, in Part A., with a historical perspective on the regulation of employee benefit plans that explains why federal interventions occurred. It then discusses the enactment of ERISA, which remains the primary framework for protecting employee pensions and workplace-based retirement savings plans.¹³⁷ To some extent, ERISA's effects on retirement security parallel those of Title VII in addressing workplace discrimination. Some progress has been made, but much remains to be done.

Although there is no direct literature considering the implications of Positive Organizational Scholarship for

134. See *supra* text accompanying notes 70, 72-75.

135. See *supra* text accompanying notes 71, 76-81.

136. See *supra* text accompanying notes 102-05, 110-19.

137. See generally Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 137-45 (2009) (explaining how broadly courts have applied ERISA's preemption provision).

retirement security, Part B. tracks the discussion above on Positive Organizational Scholarship in the context of Title VII. First, Part B. analyzes organizational responses to benefits-related legal interventions. It then discusses the ways that a positive lens could be used to analyze the value of organizational programs to support employee retirement security. Finally, it considers how Positive Organizational Scholarship could assist in identifying and recognizing the importance of employer-initiated programs that are successful. Part B. employs the increased use of automatic settings in 401(k) plans as an example of such successful programs.

A. EMPLOYMENT-BASED INTERVENTIONS TO SECURE WORKPLACE BENEFITS

As United States employers voluntarily began to adopt pension programs in the late 1800s and early 1900s,¹³⁸ to the extent that any governing law existed at that time, it was at the state level and relied on trust law, contract law, employment law, and insurance law.¹³⁹ For various reasons, however, employees could not rely on these pension programs to deliver benefits in old age.¹⁴⁰ For example, some employers established the plans as gifts, rather than as enforceable promises, which permitted the employers to decide at a point in the future not to pay benefits.¹⁴¹ The enactment of a federal disclosure act for pensions and other benefit plans,¹⁴² coupled with the passage of time, still did not give rise to more secure retirement benefits.¹⁴³ The factors preventing benefit security during the mid-1960s included termination of plans or employer bankruptcy with insufficient funds to pay benefits, strict vesting rules that required employees to work to a certain age or for a long period of time prior to becoming entitled to any benefits, and fraud with regard to pension plan assets.¹⁴⁴

Although the problems with benefit plans, particularly pension benefit insecurity, were widespread, substantive federal

138. See Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 467-68 (2015).

139. See *id.* at 468.

140. See *infra* text accompanying notes 141-44.

141. See Muir & Stein, *supra* note 138, at 468.

142. Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1975).

143. See *infra* text accompanying note 144.

144. See Muir & Stein, *supra* note 138, at 470-71.

legislations to address the problems did not come easy—debates and negotiations took more than ten years.¹⁴⁵ The resulting legislation (ERISA) is detailed and complex.¹⁴⁶ It requires plans to provide disclosure to plan participants, to beneficiaries of those participants, and to the federal government.¹⁴⁷ For traditional defined benefit (DB) plans—those that promise to pay a benefit for a participant’s lifetime¹⁴⁸—ERISA sets minimum plan funding standards,¹⁴⁹ maximum vesting periods to limit forfeiture by participants who work for employers for less than their entire career,¹⁵⁰ and establishes a mandatory system of plan termination insurance to ensure payment of at least a minimum level of benefits if a DB plan terminates with insufficient funds to pay all promised benefits.¹⁵¹

By using the paradigm established above, in the context of federal employment interventions intended to address workplace discrimination, the question becomes: has ERISA achieved its goals? In the answer to that question, we see some parallels with Title VII, but also some differences. In the more than forty years since ERISA’s enactment,¹⁵² the technical terms of DB plans (e.g., “vesting”) tend to conform to the statutory standard.¹⁵³ The

145. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMP. LAB. L. & POL’Y. J. 5, 25 (2011); see generally JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004) (providing detailed analysis of ERISA’s political history).

146. See generally Andrew Morrison Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649, 670-71 (2013) (“[N]ot even tax law seems to have quite the same reputation for complexity as that which the author’s own specialty, employee benefits law, has acquired during the relatively brief period of its existence.”).

147. See EMPLOYEE BENEFITS LAW 4-30 to 4-31 (Jeffrey Lewis et al. eds., 2012) (introducing disclosure requirements).

148. Dana M. Muir, *The Dichotomy Between Investment Advice and Investment Education: Is No Advice Really the Best Advice?*, 23 BERKELEY J. EMP. & LAB. L. 1, 4-5 (2002) (explaining basic operation of defined benefit plans).

149. See EMPLOYEE BENEFITS LAW, *supra* note 147, at 5-63 to 5-65 (discussing various minimum funding requirements).

150. See *id.* at 5-26 to 5-35.

151. See *id.* at 9-6.

152. Compare Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, §§ 1-4082, 88 Stat. 829 (1974), with Employee Retirement Income Security Program, 29 U.S.C. §§ 1001-1461 (2012).

153. See generally Dana M. Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions: What Types of Watch Dogs are Necessary to Keep the Foxes out of the Henhouse?*, 53 AM. BUS. L.J. (forthcoming 2016) (manuscript at 21-24, 36-37) (on file with author) (explaining that the nature of the sanctions for noncompliance with the qualification requirements mean that most compliance issues are resolved by

defined benefit insurance system has paid benefits up to the statutory maximum for those DB plans that have terminated with insufficient assets to pay benefits.¹⁵⁴ In short, ERISA eliminated a number of the problems that created pension insecurity prior to its enactment. That is not to say, however, that all United States workers can look forward to a financially secure retirement. Title VII was followed by improvements in terms of the workplace arrangement between employers and employees; much remains to be done before discrimination is eliminated. Similarly, with respect to ERISA, much remains to be done to ensure worker's retirement security.

Following a statutory amendment to ERISA (as well as subsequent regulations), the basic paradigm of employer-sponsored retirement plans changed.¹⁵⁵ At the time of ERISA's enactment, most employers that sponsored a pension plan sponsored a DB plan¹⁵⁶ (the kind discussed above).¹⁵⁷ Whether due to the extensive regulatory requirements and increased costs, the competitive pressure of a globalized business environment, increased worker mobility, or other factors, DB plans have become increasingly rare.¹⁵⁸ Instead, employers that sponsor retirement plans now most frequently adopt 401(k) plans.¹⁵⁹ These plans operate as a tax-favored investment account.¹⁶⁰ Employees, and perhaps employers, contribute assets to accounts established for each employee, the assets are invested, and the employee ultimately is entitled to the balance in the account.¹⁶¹ Beyond the value of 401(k) plans as a recruiting and retention tool, employers arguably have few incentives to sponsor such plans—and even less incentive to encourage employees to participate. In fact,

compliance).

154. See generally Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 *FORDHAM URB. L.J.* 867, 896-97 (2014) (explaining U.S. pension guarantee system).

155. See generally Muir, *supra* note 148, at 6-7 (discussing growth of 401(k) plans).

156. See generally Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 *SETON HALL L. REV.* 909, 925 (2013) (as of 1975, DBs had 27 million participants; DCs had 11 million).

157. See *supra* text accompanying note 148.

158. See Gelter, *supra* note 156, at 929-35.

159. See *id.* at 925 (stating that as of mid-1990s, DC plans hold more assets than DB plans).

160. See *EMPLOYEE BENEFITS LAW*, *supra* note 147, at 6-15 (discussing various minimum funding requirements).

161. See *id.* at 6-16 ("The essential feature of a 401(k) plan is the employee's ability to make elective contributions on a tax-deferred basis.").

when employers match employee contributions, the employers' incentive would seem to be to discourage employees from contributing.

The type of retirement plan being offered by employers would matter little if all employees participated in a plan that provided sufficient retirement income security. That, however, is not the case. Coverage by any combination of pension plans in the United States has, for many years, been stuck in the range of about 50% of the overall workforce.¹⁶² Furthermore, many researchers conclude that the assets being accumulated in 401(k) plans are inadequate to support workers in their retirement.¹⁶³ And, the individual account nature of 401(k) plans leaves the owners of those accounts subject to inflation, investment risks (particularly those associated with volatility in the financial markets), and longevity risks.¹⁶⁴ Positive Organizational Scholarship tells us to look for employers with positively deviant plans that improve outcomes for retirement savers.¹⁶⁵

Legal scholars, myself included, have not given up hope that the United States employer-based plan system can be improved. I have advocated a new type of retirement investment product, Safe Harbor Automated Retirement Products (SHARPS), to encourage more employers to sponsor 401(k) plans and to realign fiduciary responsibility for investment products.¹⁶⁶ Others argue that employer-based plans should be mandatory.¹⁶⁷ In my view, rather than relying on government intervention, recent evidence suggests that the greatest improvements might be driven through Positive Organizational Scholarship.

162. TERESA GHILARDUCCI, *WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM* 66 (2008).

163. See, e.g., Alicia H. Munnell et al., *Are Retirees Falling Short? Reconciling the Conflicting Evidence* 2 (Ctr. for Ret. Research at Bos. Coll., Working Paper No. 16, 2014) (stating that after assessing conflicting research, "our best assessment is that retirees are falling short and will fall increasingly short over time.") available at http://crr.bc.edu/?s=are+retirees+falling+short&cat=45&crr_author=0&year=&submit=Search.

164. Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353, 1365. ("[401(k)] plans place all of the respective risk (i.e., risk of longevity, risk of investment return, and risk of inflation) on the employee.").

165. See, e.g., *supra* text accompanying notes 131-36 (by analogy to Positive Organizational Scholarship on diversity programs).

166. Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 7, 49-50 (2013).

167. See, e.g., GHILARDUCCI, *supra* note 162, at 262-74 (advocating a mandatory system with investments to be managed by government board).

**B. A POSITIVE ORGANIZATIONAL SCHOLARSHIP LENS ON
ENHANCING RETIREMENT SECURITY**

None of the Positive Organizational Scholarship literature directly addresses efforts by business organizations to aid their employees in planning for and achieving retirement security. This does not mean, though, that no information exists on those efforts. As discussed in Part A., the facts show a clear paradigm shift from DB plans to defined contribution (primarily 401(k)) plans.¹⁶⁸ DB plans offer many advantages over 401(k) plans for employees; however, for a mobile workforce, some commentators argue that 401(k) plans have some advantages.¹⁶⁹ This Essay treats the shift to 401(k) plans as a given. In this Part, I first use a positive lens to evaluate the types of responses organizations made to ERISA. I next consider how a positive lens might focus research on the value that results from organizational sponsorship of retirement-related plans. Finally, I analyze a way in which employers have improved, and continue voluntarily to improve, those plans beyond the legally mandated minimum requirements—what Positive Organizational Scholarship recognizes as positively deviant behavior.¹⁷⁰

*1. Organizational Response to Legal Interventions Intended
to Increase Retirement Security*

Employers had the same four choices in responding to ERISA that they usually have in the wake of a new employment-based intervention.¹⁷¹ They could have challenged the law, attempted to evade the law, failed to comply, or changed their practices to comply with the law. When an employer chose to follow the law, they had two additional options. First, employers could amend their pension plans to comply with the statute's requirements.¹⁷² Or, because the United States employer-based system is one of voluntary plan sponsorship,¹⁷³ employers could have terminated

168. See *supra* text accompanying notes 157-61.

169. See Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179, 1195 (2010) ("In short, 401(k) plans make good economic sense for a mobile labor force.").

170. See discussion *infra* Part IV.B.3.

171. See *supra* text accompanying notes 64-67.

172. See *supra* text accompanying notes 150-53 (discussing the funding, vesting, and guarantee provisions).

173. See Susan J. Stabile, *Is it Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 321 (2007) (discussing voluntary

their plans, leaving employees to rely on Social Security¹⁷⁴ benefits and individual savings for retirement resources.

The legal scholarship evaluating employers' post-ERISA practices has followed the typical path of identifying problems and proposing solutions. As an example, through the mid-1990s, some eminent commentators focused on what they argued were ineffective provisions addressing the balance of benefits provided to highly compensated, as compared to non-highly compensated, employees.¹⁷⁵ More recently, discussions bemoaning the decline of the DB plan system permeates legal scholarship.¹⁷⁶

Such serious issues deserve serious consideration. However, evaluating the response of employers to ERISA with a positive lens highlights two other types of employer responses. First, following the enactment of ERISA, employers not only elected to continue their DB plans, by and large, the number of those plans increased.¹⁷⁷ Between 1975—the first year of reporting under ERISA—and 1983, the number of DB plans sponsored by private-sector employers increased from 103,346 to 175,143.¹⁷⁸ Second, after the plan paradigm shifted to 401(k) plans, employers voluntarily and actively sought ways to encourage employees to participate in the 401(k) plans and ways to assist in making good investment decisions.¹⁷⁹

nature of ERISA).

174. See generally Moore, *supra* note 147, at 25 (providing overview of old age Social Security system in United States).

175. See, e.g., Daniel I. Halperin, *Special Tax Treatment for Employer-Based Retirement Programs: Is it "Still" Viable as a Means of Increasing Retirement Income? Should it Continue?*, 49 TAX L. REV. 1, 49 (1993) ("Tax expenditures for qualified plans are not the best way to increase savings or to enhance retirement security for low and moderate earners."); Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 471 (1984) ("The discrimination rules enacted by Congress have not prevented plans from benefiting high-income employees and may have discouraged employers from establishing plans, which would benefit at least some low-paid workers").

176. See generally, e.g., GHILARDUCCI, *supra* note 162, at 58-115; see also THOMAS J. MACKELL JR., WHEN THE GOOD PENSIONS GO AWAY: WHY AMERICA NEEDS A NEW DEAL FOR PENSION AND HEALTH CARE REFORM, 47-60 (2008); Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 302-04 (2007); Jack VanDerhei & Craig Copeland, *The Changing Face of Private Retirement Plans*, EBRI Issue Brief No. 232, 1, 5-6 (2001), <http://www.ebri.org/pdf/briefspdf/0401ib.pdf>.

177. U.S. DEP'T OF LABOR, PENSION AND WELFARE BENEFITS ADMIN., ABSTRACT OF 1995 FORM 5500 ANNUAL REPORTS, PRIVATE PENSION PLAN BULLETIN NO. 8, TABLE E1. NUMBER OF PENSION PLANS BY TYPE OF PLAN, 1975-2013 (1999), available at http://www.dol.gov/ebsa/publications/bullet1995/e_1.htm.

178. *Id.*

179. See *infra* text accompanying notes 193-206.

In my view, the use of a positive lens to review employer responses to federal interventions intended to improve retirement security reminds scholars and policymakers that employers contribute to legislative policy goals not just through minimum compliance, but also by undertaking voluntary actions in pursuit of those same goals. Of course, enforcement remains important to provide incentives for compliance and to ensure a level playing field for all regulated employers.¹⁸⁰ In addition, policymakers, scholars, and other rightly examine the effects of legislative and regulatory action to assess their effectiveness and efficiency and to promote improvements, where appropriate. It is useful, though, to pay attention to successes as well as failures.

2. *The Value of Retirement Security Plan Sponsorship*

As discussed in the first subpart, positive organizational scholars have considered the various ways that organizational diversity programs provide value.¹⁸¹ In addition to increasing opportunity and equality for individuals in categories protected by Title VII, they find that diversity enables groups to make better decisions and facilitates enhanced interpersonal relationships.¹⁸² Undertaking this type of literature for review for all benefit plan-related research in management, psychology, sociology, and other journals is beyond the scope of this Essay. It is useful, though, to consider the types of value that such an investigation might find.

Just as diversity programs may increase shareholder value,¹⁸³ so might DB or 401(k) plan sponsorship. When evaluating whether a DB plan sponsor has met its fiduciary obligation of loyalty to plan participants, courts have long recognized that sponsors may, consistent with that obligation, reap “incidental benefits.”¹⁸⁴ A variety of perspectives exist on other types of value that may flow from DB or 401(k) plan sponsorship. For example, neoclassical economists assume that the value of the labor function is fixed and that any increase in benefits decreases wages, such that overall compensation remains

180. See generally Muir, *supra* note 153 (providing values-based analysis of ERISA’s decentralized enforcement system).

181. See *supra* Part III.B.2.

182. See *supra* text accompanying notes 134-35.

183. See *supra* text accompanying notes 68-70.

184. See, e.g., *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (referring to original plaintiff’s understanding that plan sponsor is entitled to reap incidental benefits).

unchanged.¹⁸⁵ Further, the Supreme Court has evidenced concern about the trade-off between encouraging plan sponsorship and participant protection.¹⁸⁶ A broad assessment of the literature on these and other approaches to valuing retirement-related plans would inform public policy and could encourage plan sponsorship.

3. Retirement Plan Initiatives that Work

Behavioral economics research, not legal requirements, gave rise to what arguably is the most important set of improvements that employers have made to 401(k) plans. Research insights, including those of Professors Richard Thaler and Shlomo Benartzi, showed that employees do not always follow the traditional economics model of value maximization.¹⁸⁷ Instead, when making decisions on important 401(k) matters, they sometimes behave irrationally. For example, these employees may spend very little time reviewing investment alternatives or making allocation decisions.¹⁸⁸ Further, they may fail to make a decision that they know, or should know, is important, such as enrolling in a plan or rebalancing investments.¹⁸⁹ As such, the investment decisions these employees do make are subject to various biases and heuristics.¹⁹⁰

Philips Electronics responded to published behavioral

185. Jonathan B. Forman, *Making Universal Health Care Work*, 19 ST. THOMAS L. REV. 101, 147 (2006) (“According to standard economic theory, employee compensation is tied to productivity, and employers only care about total compensation, not about the mix between wages and . . . benefits.”).

186. See *Mertens v. Hewitt Assocs.*, 408 U.S. 248, 262-63 (1993) (referring to tradeoff between employees and limiting benefit costs).

187. See, e.g., Shlomo Benartzi & Richard H. Thaler, *Risk Aversion or Myopia? Choices in Repeated Gambles and Retirement Investments*, 45 MGMT. SCI. 364, 375 (1999) (discussing investor risk aversion).

188. See *infra* text accompanying notes 189-190.

189. See Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. OF POL. ECON. S164, S168 (2004). Similarly, a study by a large consulting firm found that in 2014 only 15% of plan participants rebalanced their 401(k) portfolios. Press Release, Aon Corp., *Despite Record-High 401(k) Plan Balances, Few Workers Are Actively Managing their Portfolios* (May 28, 2015), <http://www.prnewswire.com/news-releases/despite-record-high-401k-plan-balances-few-workers-are-actively-managing-their-portfolios-300089764.html>.

190. Shlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans*, AM. ECON. REV. 79, 79 (2001) (discussing decision making heuristics); Benartzi & Thaler, *supra* note 187, at 380 (discussing risk aversion).

economics research by actively seeking the opportunity to test Professors Thaler and Benartzi's theories on the Philips 401(k) plan; an example of positively deviant organizational action.¹⁹¹ In the pilot program at Philips, employees already saving in the 401(k) elected to have their rates of savings automatically increased in the future.¹⁹² Over the pilot period of less than one year, the test group's savings rates increased by 36%.¹⁹³

The Philips results are an example of the power of automatic settings in 401(k) plans. The theory underlying automatic plan settings as structured to increase participation and savings of employees in 401(k) plans is based on overcoming the biases and inertia identified by behavioral economics as undermining rational participant behavior.¹⁹⁴ The Internal Revenue Service (IRS) had authorized the use of auto-enrollment defaults for use by 401(k) plans in 1998¹⁹⁵ and 2000.¹⁹⁶ Plans that include auto-enrollment provisions default employees into plan participation, but these employees may still make an express decision to decline participation (to "opt out").¹⁹⁷ Like the automatically increasing deferral in the pilot program at Philips, data indicate that auto-enrollment provisions work—in this case, to increase the percentage of employees who participate in a 401(k) plan. One model predicts that prior to the use of automatic enrollment, 66% of eligible workers participated in 401(k) plans.¹⁹⁸ And, immediately after introduction of automatic enrollment, participation increased to 92%.¹⁹⁹ Perhaps most importantly, from a policy perspective, the cohort that is most likely to increase its participation rates due to automatic enrollment is the cohort that is most at risk for retirement income inadequacy: low-income

191. Janet Aschkenasy, *Philips Gets "SMarT": Behaviorist Theory Pumps Up 401(k) Savings Rates Among Philips' Non-HCEs*, PLANSPONSOR, Mar. 2003, available at <http://www.plansponsor.com/MagazineArticle.aspx?id=6442462682&magazine=6442455710>.

192. *Id.*

193. *Id.*

194. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 108-11 (2008) (discussing the application of behavioral economics to influence the design of retirement plans).

195. Rev. Rul. 98-30, 1998-1 C.B. 1273.

196. Rev. Rul. 2000-8, 2000-1 C.B. 617.

197. Moore, *supra* note 147, at 21.

198. Sarah Holden & Jack VanDerhei, *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, 11 INV. CO. INST. PERSP. 4 (July 2005), <https://www.ici.org/pdf/per11-02.pdf>.

199. *Id.*

workers.²⁰⁰

Despite the formal approval of the use of auto-enrollment provisions by the IRS, and the apparent power of those provisions to encourage employers to participate in 401(k) plans, few employers initially adopted the provisions.²⁰¹ For technical reasons, even with IRS approvals, employers assumed some legal risk by using auto-enrollment.²⁰² McDonald's was one of the employers to accept that risk and take the positively deviant action of amending its 401(k) plan to use auto-enrollment.²⁰³ As a result, 93% of eligible employees participated in the McDonald's 401(k) plan in 2002.²⁰⁴

The use of default settings intended to increase employee retirement savings does more than provide examples of employers proactively adopting positively deviant plan terms; it also illustrates the synergies between those positive employer actions and the evolution of legal principles. The success of the early auto-enrollment plans became so clear that Congress eventually amended ERISA to encourage other employers to adopt auto-enrollment plans, and made available certain liability protections to those adopting employers.²⁰⁵ To illustrate, the Vanguard Group, an investment management company, reported in 2014 that among its large and mid-sized Vanguard plans, more than one-half (six in ten) have adopted automatic enrollment.²⁰⁶

The narrative on how 401(k) plan terms came to leverage the findings of behavioral economics is one of positive business action. The organizations that were early adopters of improved plan default settings had a positive purpose: to improve the retirement

200. See Jack VanDerhei, *What Do You Call a Glass That is 60–85% Full?*, EMP. BENEFIT RES. INST. (July 7, 2011), <https://ebriorg.wordpress.com/2011/07/07/what-do-you-call-a-glass-that-is-60-85-full/>.

201. See Steven D. Cohen, *Autoenrollment and Annuitization: Enabling the 401(K) "DB-Ation,"* 5 N.Y.U. J.L. & BUS. 281, 300-01 (2009) (discussing early use of auto-enrollment).

202. See *id.* (explaining risks of auto-enrollment).

203. *Id.* at 301.

204. See *id.* However, McDonald's experiment at the cutting edge of employee benefit plans was not an unmitigated success. The high administrative costs of the resulting small accounts was among the reasons that McDonald's subsequently abandoned auto-enrollment. *Id.*

205. See generally Muir, *supra* note 153, at 10, 20-23 (discussing legislative provisions that enabled regulations permitting qualified default investment alternatives(QDIAs)).

206. VANGUARD GROUP, HOW AMERICA SAVES 2014: A REPORT ON VANGUARD 2013 DEFINED CONTRIBUTION PLAN DATA 19 (2014), https://pressroom.vanguard.com/content/nonindexed/How_America_Saves_2014.pdf.

prospects of their workforce. Those organizations adopted these plan provisions in a positively deviant way. The plan amendments required an investment in legal services and revised administrative procedures and employee communications. Such amendments were neither legally required nor common among their competitors. Ultimately, not only did they benefit their own employees, their proactive concern for their employees resulted in legislation to encourage other employers to invest in similar plan changes. Now, many more employees benefit from improved automatic 401(k) plan settings.

In sum, Congress enacted ERISA to improve retirement security. The legislation successfully eliminated many of the problems that had, prior to ERISA's enactment, prevented employees from being able to rely on pension representations.²⁰⁷ Still, too few United States employees have access to employer-sponsored, retirement-related plans, and many employees who do have access build too little wealth to ensure a financially secure retirement.²⁰⁸ Applying a positive lens to the issues will not solve all of the problems. It can, however, serve as a reminder that many of the voluntary actions employers have taken post-ERISA have improved their plans and the prospects for the employees' retirement. Positive Organizational Scholarship should also encourage more attention to the value provided by DB and 401(k) plans, which may, in turn, encourage more employers to sponsor plans or to enhance the plans they already sponsor.

V. CONCLUSION

Organizations and the United States common law system share important similarities: both are dynamic and constantly evolving organisms. As organizations and legal frameworks adapt and redefine themselves, their goals intersect. For-profit businesses want to provide an appropriate return to shareholders²⁰⁹ and efficient regulation provides more benefits than costs.²¹⁰ Positive businesses want to provide employees with a great place to work,²¹¹ and employment-based legal

207. *See supra* text accompanying notes 138-54.

208. *See supra* text accompanying notes 155-64.

209. *See supra* text accompanying note 27.

210. *See generally* Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 589-91 (2014) (discussing introduction of retrospective cost-benefit analysis of existing regulation as well as the challenges of conducting any such analysis).

211. *See supra* text accompanying notes 23-24.

interventions attempt to address situations where the existing deal between employees and employers fails to meet minimum criteria acceptable to society.²¹² Finally, positive businesses want to contribute to the welfare of their communities.²¹³ And, by improving the workplace relationship, employment-based legal interventions provide spillover effects that include, safer, wealthier, better compensated, and more empowered citizens.²¹⁴

Using a positive lens to evaluate employment-based legal interventions is an additional tool in the continued search for effective and efficient ways of achieving legislative and regulatory goals. An analysis that fully considers the value of organizational actions intended to further goals established by public policy provides a rationale for a broader adoption of those practices, as has been the case with both diversity programs²¹⁵ and automatic settings in 401(k) plans.²¹⁶ Studies of positively deviant business practices intended to further goals institutionalized by public policy provide an understanding of the types of initiatives that organizations are willing to undertake. And, evaluating the success of those practices can confirm their usefulness or—as appears to be the case with some widely used practices intended to increase diversity—can provide evidence of their failure.

In short, business organizations currently have such a central place in United States society that they are indispensable to the achievement of public policy goals—particularly when legislation or regulation intervenes in the employment relationship. Changing business and workforce dynamics increasingly challenge the ability of traditional employment law to keep up with the needs of businesses and workers—sometimes in ways that seem intractable.²¹⁷ A positive lens serves as a reminder of the extent to which organizational goals align with public policy goals and acknowledges that, to be successful, both businesses and society need excellent workplaces to thrive.

212. See Maher, *supra* note 5, at 21-22.

213. See *supra* text accompanying notes 23-38.

214. See generally Muir, *supra* note 153, at 24-25 (discussing positive effects on public values resulting from enforcement of ERISA).

215. See *supra* Part III.B.3.

216. See *supra* Part IV.B.3.

217. See, e.g., Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1078-79 (2009) (considering challenges of applying traditional employment-related laws in virtual environment).