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Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate

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LET THEM BECOME PROFESSIONALS: AN ANALYSIS OF THE FAILURE TO ENFORCE TITLE VII'S PAY EQUITY MANDATE

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Most American women in the labor force work with other women doing "women's work."[1] As a consequence, most women work in jobs with low pay, low status, and few opportunities for advancement.[2] In practical terms, women, along with the depen-

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[1] *See* JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS (1989); WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB (Barbara F. Reskin & Heidi I. Hartmann eds. 1986) [hereinafter WOMEN'S WORK, MEN'S WORK]; Andrea H. Beller, *Trends in Occupational Segregation by Sex and Race, 1960–1981* in SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES 11, 12–14 (Barbara F. Reskin ed. 1984) (approximately 60% of workers would have to be redistributed among occupations to achieve integration of the sexes); William T. Bielby & James N. Baron, *A Women's Place Is With Other Women: Sex Segregation Within Organizations* in SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES 27, 35–53 (describing pervasive sex segregation within establishments); BUREAU OF LABOR STATISTICS, United States Dep't of Labor, Bulletin 2340, HANDBOOK OF LABOR STATISTICS, Table 18 (breakdown by detailed occupation, sex, race, and Hispanic origin, 1983–88), Table 19 (breakdown by detailed industry, sex, race, and Hispanic origin, 1983–88); NATIONAL COMMISSION ON WORKING WOMEN OF WIDER OPPORTUNITIES FOR WOMEN, WOMEN AND NONTRADITIONAL WORK (January 1990) (nine percent of working women work in jobs held by more than 75% males).

[2] *See* WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 33–38 (Donald J. Trieman & Heidi I. Hartmann eds. 1981) [hereinafter WOMEN, WORK, AND WAGES]; WOMEN'S WORK, MEN'S WORK, *supra* note 1, at 9–17; Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 & n.2 (1990).

The average full-time, year-round female worker in 1986 earned 65 cents for every dollar earned by a similarly employed male worker. Women's Bureau, United States Dep't of Labor, *20 Facts on Women Workers*, Fact Sheet No. 88-2, 3 (1988) [hereinafter *20 Facts*]. Moreover, the median weekly earnings for full-time wage and salary women workers has increased from 62.5% to only 70.2% of that for men workers between 1979 and 1988. BUREAU OF LABOR STATISTICS, *supra* note 1, at Tables 41 and 43. Undoubtedly women who work in the home are an even more underpaid labor group.

dents they support,[3] have more limited buying power, and, to the extent our society uses pay and job status to judge worth, women are judged to be worth less than men.[4]

There are two ways to increase the pay, prestige and opportunities for women workers: allow women to do "men's work" or change the consequences of doing "women's work." Although courts have been somewhat receptive to scrutinizing barriers to employment opportunities for women seeking traditionally male jobs, they have virtually stonewalled efforts to challenge pay-setting practices.

Several legal tools are available to realize pay equity: the Equal Pay Act of 1963,[5] and disparate treatment and disparate impact doctrines mandated by Title VII of the Civil Rights Act of 1964 ("Title VII").[6] Section I of this Article demonstrates that the first two schemes mandate pay equity in only a limited scope of employment situations but argues that disparate impact doctrine, by contrast, mandates a broader application of pay equity, notwithstanding consistent judicial resistance to this view.[7] Section

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[3] Sixty percent of the women in the labor force in March 1987 "were either single (25%), divorced (12%), widowed (4%), separated (4%), or had husbands whose 1986 earnings were less than $15,000 (15%)." *20 Facts, supra* note 2, at 2. *See* WOMEN'S BUREAU, UNITED STATES DEP'T OF LABOR, FACTS ON WORKING WOMEN, No. 89-3, 1 (August 1989) (In March 1988, "34 million children had mothers who were working or seeking employment"); WOMEN'S BUREAU, UNITED STATES DEP'T OF LABOR, FACTS ON U.S. WORKING WOMEN, No. 86-2, 1 (1986) (In March 1985 almost 17% of all families in the United States were principally supported by women).

[4] *Cf.* George P. Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (Equal Pay Act "sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it."); George P. Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 657–58 (5th Cir. 1969) (paying women lower wages for equal work "depressed the living standard of those who received" such wages); Remarks of President Kennedy at the Signing of the Equal Pay Act, June 10, 1963, XXI Cong. Q. No. 24, 978 (June 14, 1963) ("It is extremely important that adequate provision be made for reasonable levels of income to [women], for the care of the children . . . and for the protection of the family unit . . . . Today, one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50% have husbands who earn less than $5000 a year—many of them much less.")

[5] 29 U.S.C. § 206(d).

[6] 42 U.S.C. §§ 2000e to 2000e-17.

[7] *See, e.g.*, Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW) v. State of Mich., 886 F.2d 766, 769–70 (6th Cir. 1989); Equal Employment Opportunity Comm'n (EEOC) v. Sears Roebuck & Co., 839 F.2d 341, 343 (7th Cir. 1988); Equal Employment Opportunity Comm'n (EEOC) v. Madison Community Unit School Dist. No. 12, 818 F.2d 577, 587–88 (7th Cir. 1987); American Nurses' Ass'n v. State of Ill., 783 F.2d 716, 722–23 (7th Cir. 1986); American Fed'n of State, County and Mun.

II examines the four standard objections courts offer for refusing scrutiny to pay equity cases under disparate impact doctrine and concludes that denial of judicial review of pay practices raised in these cases is unjustified.

I. AN OVERVIEW OF LEGAL CONSTRAINTS ON PAY IN AMERICA

A free market system dictates that wages be settled privately between the employee and the employer, and that the government not interfere to set that rate. Although the American system is not purely free market, the government's intrusion into the wage setting process is limited.[8] The law does not dictate the substantive bases for setting pay; rather, it allows employers to set employees' wages based on any criteria or policy except those that discriminate on certain prohibited bases, including sex.[9]

Courts have been consistently hostile to cases challenging pay disparities between men's work and women's work. In part, this hostility may result from their mischaracterization of pay equity

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Employees (AFSCME) v. State of Wash., 770 F.2d 1401, 1405–06 (9th Cir. 1985); Margaret Spaulding v. Univ. of Wash., 740 F.2d 686, 705–08 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); Mary Lemons v. City and County of Denver, 620 F.2d 228, 229–30 (10th Cir. 1980); Pauline E. Christensen v. State of Iowa, 563 F.2d 353, 356–57 (8th Cir. 1977); American Fed'n of State, County, and Mun. Employees (AFSCME) v. County of Nassau, 609 F. Supp. 695, 708 (E.D.N.Y. 1985); Connecticut Employees Ass'n v. State of Conn., 31 Fair Empl. Prac. Cas. (BNA) 191, 193 (D. Conn. 1983); Jane Power v. Barry County, Mich., 539 F. Supp. 721, 726–27 (W.D. Mich. 1982). *But c.f.* American Fed'n of State, County and Mun. Employees (AFSCME) v. State of Wash., 578 F. Supp. 846, 863 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401, 1407 (9th Cir. 1985).

[8] *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1990) (setting minimum wage and overtime wages); National Labor Relations Act, 29 U.S.C. §§ 151–168 (1990) (requiring employers to bargain collectively with employees over wages); Equal Pay Act, 29 U.S.C. § 206(d)(1) (1990) (prohibiting sex-based wage discrimination for equal work); Title VII, 42 U.S.C. § 2000e-2(a) (1990) (prohibiting wage discrimination based on race, sex, religion, national origin or color of employee); Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1990) (prohibiting wage discrimination based on age of employee).

[9] Equal Pay Act, 29 U.S.C. § 206(d)(1); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

Although the focus of this Article is pay equity for women's work, concentrating on discrimination against women workers based on their gender, it also raises issues regarding pay discrimination based on the race of workers, male and female. *See* Judy Scales-Trent, *Comparable Worth: Is This a Theory for Black Workers?*, 8 WOMEN'S RTS. L. RPTR. 51 (1984) (exploring overlap and distinctions between discrimination against white women compared with Black men and women).

cases as "comparable worth" cases.[10] However, pay equity, or the policy against sex discrimination in pay, can be distinguished from the notion imprecisely labelled comparable worth. For the purposes of this Article, comparable worth refers to the requirement that employers pay male- and female- dominated jobs according to their "worth," regardless of the content of the jobs.[11] To date there is no federal law requiring employers to pay according to the worth of jobs.[12] By contrast, pay equity allows an employer to pay according to any factor, as long as it does not discriminate because of an individual's sex. Based on this view, pay equity is compatible with the concept of comparable worth. The demands of pay equity, for example, could be satisfied by a bona fide system of paying men and women according to the worth of their jobs. The two principles are not identical, however, and any criterion other than job worth can be used to achieve pay equity as long as no protected group is disparately impacted or the criterion is justified by business necessity.

This section examines the Equal Pay Act[13] and the disparate treatment and disparate impact doctrines under Title VII,[14] and

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[10] *See, e.g.*, UAW v. Mich., 886 F.2d at 769; EEOC v. Madison School Dist., 818 F.2d at 587; American Nurses' Ass'n v. Ill., 783 F.2d at 719–20; AFSCME v. Wash., 770 F.2d at 1404; Spaulding v. Univ. of Wash., 740 F.2d at 705–08; AFSCME v. County of Nassau, 609 F. Supp. at 708; Connecticut Employees Ass'n v. Conn., 31 Fair Empl. Prac. Cas. (BNA) at 192–93; Power v. Barry County, Mich., 539 F. Supp. at 722. *Cf.* County of Washington v. Alberta Gunther, 452 U.S. 161, 166, 180–81 (1981) (distinguishing comparable worth case); Diane Colby v. J.C. Penney Co. Inc., 811 F.2d 1119, 1125–26 (7th Cir. 1987) (distinguishing fringe benefit case from comparable worth case); Jeanine Wilkins v. Univ. of Houston, 654 F.2d 388, 405–06, n.26 (5th Cir. 1981) (distinguishing comparable worth case).

[11] *See, e.g.*, EEOC v. Madison School Dist., 818 F.2d 577, 587 (7th Cir. 1987) (defining comparable worth as "short-hand for the view that paying higher wages in jobs held mostly by men than in jobs held mostly by women is discriminatory and improper unless the difference is justified by demonstrable differences in skill, effort, responsibility and working conditions"); AFSCME v. Wash., 770 F.2d at 1404 (defining a comparable worth claim as one where "employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar"); County of Wash. v. Gunther, 452 U.S. at 166 (defining a comparable worth claim as one based on "a comparison of the intrinsic worth or difficulty of a worker's job with that of other jobs in the same organization or community").

[12] *Cf.* Patrick J. Cihon & Elizabeth Wesman, *Comparable Worth: The U.S./Canadian Experience*, 10 LOY. L.A. INT'L & COMP. L.J. 57, 67–73 (1988) (discussing comparable worth at state and local levels); A BUREAU OF NATIONAL AFFAIRS SPECIAL REPORT, PAY EQUITY AND COMPARABLE WORTH, 55–68 (1984) (reviewing comparable worth initiatives at state level).

[13] 29 U.S.C. § 206(d).

[14] 42 U.S.C. §§ 2000e to 2000e-17.

argues that all three schemes mandate pay equity, but over different ranges of employment situations. The Equal Pay Act covers pay disparities between jobs that are substantially equal. The disparate treatment doctrine of Title VII covers only pay disparities resulting from demonstrable conscious discrimination. The disparate impact doctrine, by contrast, is not so limited. It mandates both judicial scrutiny of any employer pay practice which impacts a protected group disproportionately as well as termination of such a practice if it cannot be justified by business necessity.

A. The Equal Pay Act of 1963

Congress first prohibited discrimination in wages on the basis of sex in 1963 with the Equal Pay Act. That legislation presumptively prohibits employers from paying unequal wages to employees of opposite sexes for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."[15]

Employees suing under this statute must prove that the employer paid different wages to an employee of the opposite sex for performing equal, or "substantially equal," work.[16] The substantially equal work requirement has been interpreted to prohibit unequal pay between the sexes for jobs whose content is equal as measured by the four statutory factors: skill, effort, respon-

[15] The Equal Pay Act of 1963 provides in pertinent part:

> No employer . . . shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1) (1990).

[16] *See* Mary P. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 449 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

sibility and working conditions required to perform the job.[17] If an employee succeeds in proving that an employer paid men and women different wages for equal work, the employer would have to defend by demonstrating that its wages were not paid pursuant to the sex of the employee, but pursuant to one of four affirmative defenses: a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.[18]

In sum, the Equal Pay Act is applicable to remedy disparity in pay between women's work and men's work only where the employees can prove that the content of work performed by both sexes is equal. Consequently, the Equal Pay Act provides no protection for the vast majority of pay equity claims, because most women's work is not substantially equal in content to men's work.

B. Title VII of the Civil Rights Act of 1964

In 1964 Congress enacted Title VII,[19] which also prohibits discrimination in wages because of sex.[20] Unlike the narrowly defined cause of action under the Equal Pay Act, however, Title VII generally prohibits discrimination in compensation "because of such individual's sex." The Supreme Court has articulated two

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[17] *See* 29 U.S.C. § 206(d)(1); Corning Glass Works v. Peter J. Brennan, 417 U.S. 188, 195 (1974).

[18] Corning Glass v. Brennan, 417 U.S. at 195 (reading 29 U.S.C. § 206(d)(1)).

[19] Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> (1) . . . to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

[20] Title VII not only prohibits discrimination "because of" sex but also prohibits discrimination "because of" race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a). This Article will limit its focus only to the factor of sex.

theories for establishing discrimination "because of" sex under Title VII: disparate treatment theory and disparate impact theory.

1. Disparate Treatment Discrimination

The first theory of discrimination under Title VII, disparate treatment, requires employees to establish that the employer intentionally discriminated against them because of their sex.[21] The distinguishing feature of this theory is that it requires proof of an employer's conscious intent to discriminate:

> It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on a protected group . . . . The plaintiff must show the employer chose the particular policy *because of* its effect on members of a protected class.[22]

On rare occasions, an employee will have direct evidence[23] of an employer's intentional wage discrimination. For example, in *County of Washington v. Gunther*,[24] the Supreme Court upheld plaintiff's cause of action where the employer paid female employees only seventy percent as much as male employees despite

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[21] Congress provided a defense to disparate treatment claims alleging discriminatory hiring or employment on the basis of religion, sex, and national origin. 42 U.S.C. § 2000e-2(e)(1). There is no defense for purposeful sex-based wage discrimination.

[22] AFSCME v. Wash., 770 F.2d 1401, 1405 (9th Cir. 1985) (emphasis added). *See also* UAW v. Mich., 886 F.2d 766, 770 (6th Cir. 1989) (plaintiffs' claim dismissed for failure to show "that the defendant depressed the wages of particular workers because most of the workers were female."); American Nurses' Ass'n v. Ill., 783 F.2d 716, 722, 726 (7th Cir. 1986) ("knowledge of a disparity is not the same thing as an intent to cause . . . it . . . . To demonstrate such [intent] the failure to act would have to be motivated at least in part by a desire to benefit men at the expense of women."). *Cf.* Personnel Adm'r of Mass. v. Helen Feeney, 442 U.S. 256 (1979) (Massachusetts law granting absolute preference for state jobs to military veterans not purposefully discriminatory under the equal protection clause of the fourteenth amendment to the United States Constitution despite the law's overwhelming and inevitable impact against women).

[23] With "direct" evidence, the finder of fact is charged to determine credibility only, *i.e.*, whether the employer in fact made the admission. With "circumstantial" evidence, the factfinder is charged to determine not only credibility, *i.e.*, whether the employer in fact did as plaintiff alleges, but also inferences, *i.e.*, even if the employer did those things, whether such acts prove intentional discrimination.

[24] 452 U.S. 161 (1981).

the contention that the employer evaluated the female jobs to be worth ninety-five percent as much as the male jobs.[25]

In the more usual case, however, employees must use circumstantial evidence to prove the employer's subjective intent. In these cases, employees must demonstrate that similarly situated female employees are treated differently from similarly situated male employees, thereby raising the inference that their different treatment was motivated by their different sexes in violation of Title VII.[26] Even where the employees demonstrate a pay discrepancy between similarly situated male and female job classifications, however, the employer can defend against disparate treatment discrimination by explaining that it set pay according to a facially neutral criterion, rather than the sex of its employees.[27] For instance, employers have defended against disparate treatment claims by explaining that they set pay by the market, rather than by the sex of the incumbents in similarly situated jobs.[28] Unless the employees can demonstrate the facially innocent explanation to be a pretext for a discriminatory purpose,

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[25] *Id.* at 180–81. The Court distinguished employees' alleged claim from suits requiring "a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates." *Id.* at 181.

[26] AFSCME v. Wash., 770 F.2d at 1405 (employer's job evaluation indicated equal job worth of female and male jobs, despite their unequal job content); Mary Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F. Supp. 800, 806 (W.D. Tenn. 1985) (employee proved purposeful pay discrimination by establishing similarities between her job, household cleaner, and male job, cleaning technician, by highlighting that some of the job duties were the same and that the jobs "had many similarities and included similar requirements of effort and responsibility"); Marsha Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982) (employees raised inference of wage discrimination by proving that female employees in a sex-segregated workplace were paid less than male employees where the two sex-segregated job classifications involved work that was similar in skill, effort, responsibility and working conditions). *Cf.* P.E. Bazemore v. William C. Friday, 478 U.S. 385, 400–01 (1986) (per curiam) (Brennan, J., joined by all Members of the Court, concurring in part) (multiple regression analysis may be used in Title VII claims to raise inference that pay disparities result from employer discrimination).

[27] Failure to rebut the inference of intentional sex discrimination by explaining the pay inequities between male and female employees, however, would result in liability for the employer. *See* Taylor v. Charley Brothers Co., 25 Fair Empl. Prac. Cas. (BNA) 602, 614 (W.D. Pa. 1981) (finding intentional sex based wage discrimination where company could not explain pay discrepancies for its purposefully sex- segregated jobs). *Cf.* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337–43 (1977) (unexplained discrepancy in workforce compared with population available for hire constitutes intentional discrimination).

[28] *See, e.g.*, AFSCME v. Wash., 770 F.2d at 1406–07 (employer may set wages according to market rates); Briggs v. City of Madison, 536 F. Supp. at 447–49 (employer may pay higher wages to men if necessary to recruit and retain male employees).

employees will lose despite the evidence of sex discriminatory pay.

Because disparate treatment discrimination under Title VII has been narrowly interpreted to require conscious intent to discriminate, employee challenges to lower pay awarded to women's work will succeed in only rare circumstances.

2. Disparate Impact Discrimination

The second theory of discrimination under Title VII, disparate impact, allows employees to challenge an employer's facially neutral policies, without proving the employer's conscious intent to discriminate. By that theory, whenever an employer's facially neutral policy[29] has a disproportionate impact on a group defined by sex, the employer must show that the policy is a business necessity.[30] If the employer cannot justify the policy by reference to business necessity, then the employer will be required to discontinue the policy and make whole those employees adversely affected by it.

The seminal case of disparate impact discrimination is *Griggs v. Duke Power Co.*.[31] In *Griggs*, the employer selected employees based on a high school diploma requirement and the results of a standardized test, both of which excluded substantially more African-Americans than other racial groups. Since the employer could not demonstrate that either graduating from high school or achievement on the test related to achievement on the job, disparate impact theory required elimination of the disparately impacting employment practices as unjustified preferences for non-African-Americans.[32]

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[29] A facially neutral policy is one that is not itself explicitly prohibited by Title VII—i.e., one that does not set pay by the sex of the worker—and one that is applied to all candidates regardless of their protected status.

[30] *See* Teamsters v. United States, 431 U.S. at 335–60 & n.15; Willie S. Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971).

The procedural and substantive standards for the business necessity defense under Title VII are subject to debate both within the Supreme Court and between the Supreme Court and Congress. *See* Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination under Title VII*, 12 INDUS. REL. L.J. 1 (1990) (forthcoming); notes 175–178, *infra*, and accompanying text.

[31] 401 U.S. 424 (1971).

[32] *Id.* at 431.

The disparate impact theory under Title VII provides the legal tool to challenge pay-setting practices that cause disparities between wages for women's work and men's work, regardless of whether the jobs in question are similar in content and regardless of the employer's conscious intent. Wherever an employer's facially neutral pay-setting practices are proved to be consequentially preferential to men, disparate impact doctrine requires the courts to examine the business justification for those policies.[33]

The courts, however, have strongly resisted this view. Only one court, the district court in *AFSCME v. Wash.*,[34] applied disparate impact analysis to challenge sex-based wage discrimination between jobs of different content. There the employees alleged that workers in female- dominated jobs were paid twenty percent less than workers in male-dominated jobs despite evidence that the male-dominated jobs were shown by the employer's study to require equivalent or less composite skill, effort, responsibility, and working conditions. The employer became liable on the claim when it failed to demonstrate that its wage setting process was justified by the needs of the business. The court of appeals, however, reversed, holding that disparate impact analysis was inapplicable to that case as a matter of law.[35] Once the Ninth Circuit rejected the application of disparate impact analysis, the employees were forced, under disparate treatment analysis, to prove that the state consciously intended to discriminate against them because of their sex. Not surprisingly, the employees' proof failed as a factual matter under that limited theory.[36]

Where courts and commentators have limited the definition of discrimination to conscious intent to discriminate based on sex,

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[33] The ability of the disparate impact theory to redress pay disparities between men's work and women's work depends, in part, on the outcome of the debate over the standard for business necessity in disparate impact doctrine. *See* Perry, *supra* note 30. Obviously the standard set for the employer's response to disparate impact claims will determine the success of those claims. *See infra* notes 226–230 and accompanying text (critiquing the current standard for business necessity as being so lenient as to practically undermine disparate impact analysis). Resolution of the debate over business necessity, however, implicates the future of disparate impact doctrine generally, and the outcome will have no unique impact on pay equity suits.

[34] 578 F. Supp. 846, 863 (W.D. Wash. 1983).

[35] *See* AFSCME v. Wash., 770 F.2d at 1405–06; *infra* notes 194–199 and accompanying text.

[36] *See* AFSCME v. Wash., 770 F.2d at 1406–08.

they have failed to uncover discrimination in wages between men's work and women's work.[37] This limited definition of discrimination ignores the discriminatory effects of facially neutral pay-setting practices,[38] contrary to all that has been learned through application of disparate impact theory.

The judiciary's refusal to enforce pay equity as mandated by Title VII's disparate impact theory must be challenged. There is nothing unique about claims of pay equity for women's work that would alter the usual analysis under disparate impact doctrine. Moreover, current debate regarding the theory of disparate impact discrimination,[39] while necessarily implicated in pay equity cases relying on the doctrine, does not account for the hostility to pay equity cases between men's work and women's work.[40] Indeed, regardless of the outcome of that debate, where an employer's pay setting practice results in pay disparities between women's work and men's work, disparate impact doctrine compels judicial scrutiny, at some level, of the employer's business justification for that practice.

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[37] *See* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1779–94 (1986); Bruce A. Nelson, Edward M. Opton, Jr. & Thomas E. Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233, 238–39, 251–60, 288 (1980).

[38] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 313–14 (3d ed. 1986); Paul N. Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing* County of Washington v. Gunther, 22 DUQ. L. REV. 65, 102–05 (1983).

[39] Disparate impact doctrine is currently subject to debate between the Supreme Court and Congress. *See generally* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. (1991) (forthcoming) (The majority on the Court would require an employer to articulate its business purpose to support continued use of facially neutral but disparately impacting practices, in order to ensure against pretextual use of a facially neutral practice. In contrast, Congress and a minority on the Court would require an employer to demonstrate its business need to support continued use of facially neutral but disparately impacting practices, in order to excuse the non-neutral consequences of those practices.). *Cf.* Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth*, 21 RUTGERS L.J. 269, 309–13, 347–48 (1990) (reading disparate impact doctrine under Title VII as insufficiently responsive to feminist concerns for wage equality based on view of disparate impact as limited to challenging only pretextual wage-setting practices).

[40] Moreover, others have documented the judiciary's unwarranted hostility to the more settled disparate treatment challenge to pay disparities between men's work and women's work. *See, e.g.*, Mack A. Player, *Exorcising the Bugaboo of 'Comparable Worth': Disparate Treatment Analysis of Compensation Differences Under Title VII*, 41 ALA. L. REV. 321, *passim* (1990); Diane Stone, *Comparable Worth in the Wake of* AFSCME v. State of Washington, 1 BERK. WOMEN'S L.J. 78, 92–101 (1985).

II. JUDICIAL OBJECTIONS TO APPLYING DISPARATE IMPACT DOCTRINE TO CHALLENGE PAY DISPARITIES BETWEEN MEN'S AND WOMEN'S WORK

Courts have interposed four objections to applying disparate impact analysis to pay equity cases between women's work and men's work.[41] From the general to the specific, the judiciary's objections are: (1) disparate impact doctrine is not applicable to challenge multiple employment practices; (2) disparate impact doctrine is not applicable to non-selection cases, such as decisions regarding compensation, terms, conditions, and privileges of employment; (3) disparate impact doctrine is not applicable to sex-based wage discrimination cases governed by the Bennett Amendment; and (4) disparate impact doctrine is not applicable to challenge employers' decisions to set pay according to the market value of jobs. On analysis, however, none of these objections justifies the judiciary's total rejection of disparate impact analysis for these pay equity cases.

A. Applicability of Disparate Impact for Challenging Multiple Practices

One controversial impediment to pay equity claims is the requirement that employees isolate which one of the employer's pay-determining practices caused the disparity in pay between men's work and women's work. This requirement of isolating the specific cause of the disparate impact within the employer's entire process is not unique to sex-based wage discrimination cases but applies to all disparate impact cases.[42]

The language of Title VII, important precedent, and the remedial goals of Title VII, however, all counsel against adopting such a requirement, particularly in cases challenging an employer's pay-setting practices. Moreover, two pay equity cases have

[41] Two additional objections—a procedural issue relating to time limitations for bringing such actions and a standing issue for male employees in female-dominated jobs—are beyond the scope of this Article.

[42] The debate over the validity of this impediment is one strand in the broader theoretical debate in disparate impact doctrine. *See* Perry, *supra* note 39.

seized improperly on this impediment to foreclose a disparate impact challenge to a single multi-component practice.[43]

The debate over how precisely employees must isolate the cause of the disparate impact within the employer's workplace breaks down as follows. Some courts would allow disparate impact challenges only where employees can isolate the particular practice causing the disparate impact, for fear that absent that requirement, employers might be held responsible for disparities resulting from practices beyond their control.[44] In contrast, others would allow disparate impact challenges if employees can prove that one or more of the employer's practices caused the disparity, even if the employees cannot isolate which of the employer's practices was the culprit.[45]

The Supreme Court entered this debate in its two most recent pronouncements on disparate impact doctrine. First, in *Watson v. Fort Worth Bank and Trust*,[46] in the context of ruling that disparate impact doctrine was applicable to challenge subjective selection criteria,[47] a plurality went on to articulate the standards

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[43] *See infra* notes 72–73 and accompanying text.

[44] *See, e.g.*, Wards Cove Packing Co. v. Frank Atonio, 490 U.S. 642, 657 (1989) (rejecting disparate impact based on evidence of imbalance between cannery and non-cannery workers because "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"); Clara Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance . . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."); Riley D. Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 801–02 (5th Cir. 1982) (abstract workforce imbalance insufficient to establish disparate impact).

[45] *See, e.g., Wards Cove*, 490 U.S. at 672–77 (Stevens, J., joined by Brennan, Marshall, and Blackmun, J.J., dissenting); *Watson*, 487 U.S. at 1010 n.10 (Blackmun, J., joined by Brennan and Marshall, J.J., concurring); Earnest Griffin v. Carl Carlin, 755 F.2d 1516, 1522–25 (11th Cir. 1985) (allowing disparate impact challenge to multi-component selection process); The Civil Rights Act of 1991, H.R. 1, 102d Cong., 2d Sess., 137 CONG. REC. H53, § 4 (daily ed. Jan. 3, 1991) (making employee responsible for proving which specific practice caused the disparate impact only if "the court finds that the complaining party *can* identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact") (emphasis added).

[46] 487 U.S. 977 (1988).

[47] *See id.* at 989–92, 999–1001, 1009–11 (unanimous decision on this ruling; Kennedy, J., did not participate in the decision). The Court reversed the lower court decisions that dismissed Watson's disparate impact claims as a matter of law and without any consideration of their evidentiary merit. *Id.* at 983–84, 999–1000.

for such a challenge, including the requirement that the employee isolate the particular criterion causing the disparate impact.[48] Second, in *Wards Cove Packing Co. v. Atonio*,[49] in the context of ruling that employees' proof of a racial disparity between cannery and non-cannery workers failed to establish a prima facie case of disparate impact,[50] a majority of the Court articulated standards for establishing disparate impact discrimination, including the causation standard first mentioned in *Watson*.[51] These pronouncements on the causation requirement have been challenged both on the Court and in Congress.[52]

Neither the language of Title VII nor Supreme Court precedent prior to *Watson* and *Wards Cove* requires an employee to isolate the specific practice causing the disparate impact. The antidiscrimination provisions of Title VII can be read to prohibit discrimination against individuals both during and at the end of an employer's process,[53] thereby implicitly rejecting the disputed causation requirement.

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[48] *Id.* at 993–94 (Chief Justice Rehnquist and Justices White, Scalia, and O'Connor). Justice Stevens, *id.* at 1010–11, and Justices Blackmun, Brennan and Marshall, *id.* at 1001 n.1, found it unnecessary for the Court to discuss the evidentiary standards for disparate impact cases in the context of the legal question before the Court.

[49] 490 U.S. 642 (1989).

[50] *See id.* at 653–55 (Chief Justice Rehnquist and Justices White, Scalia, O'Connor, and Kennedy).

[51] *Id.* at 656–57. The majority reiterated the standards from *Watson*, despite its recognition that discussion of causation issues was "pretermitted" by its ruling. *Id.* at 655.

[52] *See supra* note 45.

The language regarding disparate impact doctrine contained in Civil Rights Act of 1991 is virtually identical to the language contained in the Civil Rights Act of 1990. *Compare* Civil Rights Act of 1991, H.R. 1, 102d Cong., 2d Sess., 137 CONG. REC. H53, §§ 3–4 (daily ed. January 3, 1991) *with* the Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9966-67, §§ 3–4 (daily ed. July 18, 1990); H.R. 4000, 101st Cong., 2d Sess., 136 CONG. REC. H6746, §§ 3–4 (daily ed. August 3, 1990); H.R. CONF. REP. No. 856, 101st Cong., 2d Sess., §§ 3–4 (1990).

The Senate passed the Civil Rights Act of 1990, S. 2104, by a vote of 65 to 34. 136 CONG. REC. S9966 (daily ed. July 18, 1990). The House of Representatives passed the Civil Rights Act of 1990, H.R. 4000, by a vote of 272 to 154. 136 CONG. REC. H6769 (daily ed. August 3, 1990). Moreover, both Houses of Congress adopted the Conference Report which compromised the minor points of disagreement between S. 2104 and H. 4000. 136 CONG. REC. S15407 (daily ed. October 16, 1990) (voting 62 to 34); 136 CONG. REC. H9994 (daily ed. October 17, 1990) (voting 273 to 154). President Bush prevented the legislation from becoming law by exercising his veto power. Subsequently, the Senate could not override President Bush's veto. 136 CONG. REC. S16589 (daily ed. October 24, 1990).

[53] Section 703(a) makes it unlawful to discriminate at the bottom line with the language "to fail or refuse to hire or to discharge" and also makes it unlawful to discriminate during the entire employment process with the language "otherwise to discriminate" or "to limit,

Moreover, although Supreme Court precedent analyzing employees' prima facie case of disparate impact discrimination all focused on the disparate impact caused by one of an employer's practices,[54] the language of those decisions suggests a broader reading of the prima facie requirements. For example, in *Griggs v. Duke Power Co.*, although employees' evidence demonstrated the distinct impact from the high school diploma requirement and the standardized intelligence test, the Court described Title VII to prohibit disparately impacting "barriers" or "practices, procedures, or tests."[55] Finally, some proponents of isolating the cause of the impact rely on the Court's ruling in *Connecticut v. Teal.*[56] They argue that since *Teal* ruled that a lack of impact at the bottom line of the promotion process does not defeat an employee's disparate impact case based on impact caused by one of the employer's criteria within the process, proof of impact at the bottom line of an employer's decision-making process would not be sufficient to establish disparate impact discrimination.[57] There is no basis for this mutuality argument.[58] *Teal* held that where the employee establishes a prima facie case of disparate impact by isolating the cause of the impact to one practice within the employer's process, the lack of disparate impact at the bottom line would not either undercut that prima facie case or establish a defense to it.[59] Nothing in that holding or the rationale of the Court compels an employee to prove her prima facie case through reference to a specific, singular employer action.

Furthermore, given Title VII's remedial goals, the consequences of requiring employees to isolate the sole cause of the

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segregate, or classify . . . in any way which would deprive or tend to deprive." Section 703(a), 42 U.S.C. § 2000e-2(a).

[54] *See* Connecticut v. Winnie Teal, 457 U.S. 440, 443 (1982) (written examination); New York City Transit Auth. v. Carl A. Beazer, 440 U.S. 568, 571–72 (1979) (no methadone use); E. C. Dothard v. Dianne K. Rawlinson, 433 U.S. 321, 323–24 (1977) (minimum 120-pound weight and minimum 5-feet-2-inch height requirements evaluated separately); Albemarle Paper Co. v. Joseph P. Moody, 422 U.S. 405, 410–11 (1975) (Revised Beta Examination and Wonderlic Personnel Test); Griggs v. Duke Power, 401 U.S. 424, 425–28 (1971) (high school diploma and two professionally prepared aptitude tests evaluated separately).

[55] *Griggs*, 401 U.S. at 430–31 & n.6.

[56] 457 U.S. 440 (1982).

[57] *See Wards Cove*, 490 U.S. at 650–55; *Watson*, 487 U.S. at 993.

[58] *See* Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 830 (1985).

[59] *Teal*, 457 U.S. at 451, 453.

disparate impact counsel against such a requirement. Where the employees lack evidence to determine which one of the employer's practices caused the disparate impact, the employer's facially neutral but consequentially non-neutral practices would be immune from judicial scrutiny.[60] Failure to allow dispensation from the requirement to isolate the cause of the impact where no evidence exists would "shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect."[61] Requiring the employer to respond when a group of its practices are implicated in the disparate impact[62] most effectively insures that the suspect practices are either exonerated or justified because the employer has superior access to proof on these issues.[63] Moreover, employers' countervailing arguments that requiring the employee to isolate the cause of the disparate impact promotes fairness and provides notice to the employer[64] are particularly unpersuasive. The employer is both the one who selected and adopted the disparately impacting prac-

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[60] *See Wards Cove*, 490 U.S. 658, n.10; *id.*, at 673, n.20 (dissent); Larry Powers v. Ala. Dept. of Educ., 854 F.2d 1285, 1293–99 (11th Cir. 1988) (court allowed disparate impact where employee was unable to isolate cause of impact to particular criterion, but was able to limit it to employer's criteria); Wilkins v. Univ. of Houston, 654 F.2d 388, 402 (5th Cir. 1981) (salary determined by simultaneous operation of multiple factors which cannot be factored independently).

[61] *Watson*, 487 U.S. at 1010 n.10 (dissent). *Cf.* Paul N. Cox, *The Future of Disparate Impact Theory of Employment Discrimination After* Watson v. Fort Worth Bank and Trust, 1988 B.Y.U. L. REV. 753, 782 (1988); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1340 (1987) (moderating requirement to isolate criterion by allowing employee to prove connection between multiple criteria).

[62] *See* Powers v. Ala., 854 F.2d at 1299 (employer must respond to employees' proof of impact resulting from a group of employer's practices "either that the requirements did not have such an effect or that they were necessary for the agency to operate"); the Civil Rights Act of 1991, H.R. 1, *supra* note 52, at § 4 (requiring employer either to demonstrate that its practice(s) either did not contribute to the impact or were justified by business necessity). *Cf.* Price Waterhouse v. Ann B. Hopkins, 490 U.S. 228 (1989) (employer bears burden of disproving discrimination in multiple causation disparate treatment case).

[63] *See* Elbert G. Green v. USX Corp., 843 F.2d 1511, 1524 (3d Cir. 1988), *vac. and remanded for reconsideration in light of Wards Cove*, 490 U.S. 1103 (1989), *reinstating relevant part on remand*, 896 F.2d 801, 804–05 (3d Cir. 1990) ("the employer has better access and opportunity than the plaintiffs to evaluate critically the interrelationship of the criteria that it uses in its hiring practice, and to determine which aspects actually result in discrimination"); Willborn, *supra* note 58, at 829–30.

[64] *See* Pouncy v. Prudential Ins., 668 F.2d 795, 800–01 (5th Cir. 1982); Rutherglen, *supra* note 61, at 1340.

tices and the one responsible for monitoring the results of those practices.[65]

The application of the multiple-practices impediment to wage discrimination cases is particularly inappropriate. Although evidence of disparate impact in the composition of an employer's workforce may not always implicate the employer's hiring process, pay inequities within an employer's workforce necessarily do implicate the employer's pay-setting process.[66] In the *hiring* context, candidates from underrepresented groups might not apply with an employer for reasons unrelated to the employer's barriers. For example, geographical or job-related qualification constraints might deter potential employees.[67] But in the *pay-setting* context, inequities are attributable to the employer. Indeed, pay inequities can only occur among individuals who in fact perform work for the employer, thereby eliminating such factors as geographical or job-qualification deterrents to higher pay. Moreover, the argument that employees are not interested in higher pay seems illogical.[68] Consequently, the danger of holding an employer responsible for instances where the employer's process did not in fact cause disparate impact is minimal in the

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[65] *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1604.4(A), 1607.15(A).

[66] *Cf. supra* note 44 and accompanying text (describing rationale for causation requirement).

[67] *See Wards Cove*, 490 U.S. at 651–52 ("If the absence of minorities holding such skilled positions is due to a dearth of qualified non-white applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites."); *id.* at 677 n.25 (dissent) ("Absent any showing that the 'underrepresentation' of whites in this [lower paying] stratum is the result of a barrier to access, the 'overrepresentation' of nonwhites does not offend Title VII."); The Civil Rights Act of 1991, H.R. 1, *supra* note 52, at § 4B(4) ("The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."); Joint Explanatory Statement of the Committee on Conference to Conference Report to S. 2104, *supra* note 52, at 2–3 (explaining Section 4B(4) of the Conference Report as requiring evidence of statistical imbalances between the number of protected individuals selected and the number of protected individuals in the relevant, qualified labor market to prove disparate impact in hiring or similar selection). *Cf.* Section 703(j), 42 U.S.C. § 2000e-2(j) (immunizing preferential treatment based on evidence of workforce imbalance).

[68] Of course an employee might choose to take a job that provides non-monetary benefits which outweigh the disparity in pay, but even in that instance, the employer ultimately decides how to structure the job and its pay. Title VII makes the employer responsible for those decisions.

context of pay inequities. Requiring isolation of the particular pay-setting practice that causes the disparate impact would not reduce the risk to employers of liability without fault, but would allow employers to avoid liability for their own disparately impacting pay practices.

Despite the policy against it, however, to the extent *Wards Cove* and *Watson* are interpreted to be binding authority[69] and absent legislation to reverse them,[70] disparate impact doctrine will not be available to challenge the discriminatory effects of multiple employment practices, even in the pay-setting context. Employees waging pay equity cases, like other cases raising disparate impact claims, will be required to establish which one of the employer's practices caused the disparate impact.[71]

Even where employees have been required to isolate the cause of the impact to one employer practice, courts have consistently distinguished between multiple practices resulting in disparate impact, which would be barred by this requirement, and a single employment practice having multiple components, which would not be barred by this requirement.[72] The Ninth Circuit has confused this distinction in two pay equity cases. That court twice interpreted an employer's decision to set pay according to the market value of the job as a non-singular practice protected from disparate impact analysis by the multiple-practices impediment.[73]

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[69] *See supra* notes 47–48, 50–51 and accompanying text.

[70] *See supra* notes 45, 52.

[71] *See* California State Employees' Ass'n. v. State of Cal., 45 Empl. Prac. Dec. (CCH) ¶ 37,584 (N.D. Calif. 1987) (employees survive summary judgment but must demonstrate connection between identified practice and impact to succeed at trial); AFSCME v. County of Nassau, 609 F. Supp. 695, 711–12 (E.D.N.Y. 1985) (dismissing sex-based wage discrimination claims under disparate impact because of failure to isolate single policy causing disparate impact); Joseph P. Loudon & Timothy D. Loudon, *Applying Disparate Impact to Title VII Comparable Worth Claims: An Incomparable Task*, 61 IND. L.J. 165, 172–74 (1986); Nelson, Opton, & Wilson, *supra* note 37, at 283–84.

[72] *See* Connecticut v. Teal, 457 U.S. 440, 443 (1982) (multi-question examination constitutes one practice); Albemarle Paper v. Moody, 422 U.S. 405, 410–11 (1975) (same); Griggs v. Duke Power, 401 U.S. 424, 425–28 (1971) (same); Clyde J. Arnold v. United States Postal Service, 863 F.2d 994, 999 (D.C. Cir. 1988) (employer's Career Path Policy, consisting of three steps, counted as one selection criterion); Issiah Ross, Jr. v. Buckeye Cellulose Corp., 53 Empl. Prac. Dec. (CCH) ¶ 39,933 (M.D. Ga. 1989) (challenging racial impact of multi-step Pay and Progression System).

[73] AFSCME v. Wash., 770 F.2d 1401, 1405–06 (9th Cir. 1985) ("A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated [by disparate impact precedent] . . . ; such a compensation system, the result of complex market forces, does not constitute a single practice that suffices to support a claim under disparate impact the-

An employer's decision to use the market rate to set pay at its business, however, is not distinct from its decision to use the results of multi-question examinations to hire at its business.[74] Like the multi-question examination, the decision to set pay according to the market value of work might be complex and take several steps to implement.[75] Even so, the employer's decision to use the results of that complex operation constitutes the type of single practice that is amenable to disparate impact analysis.[76] Just as standard disparate impact doctrine requires evaluation of an employer's decision to use test results,[77] it should also require evaluation of its decision to use the results of the market. The Ninth Circuit's decisions to exempt from disparate impact analysis an employer's practice of using the market to set pay, therefore, singles out one subset of pay equity cases for singular, and unwarranted, distinction.[78]

B. Applicability of Disparate Impact to Non-Selection Claims

Another impediment to equalizing pay between women's and men's work arises from the view that disparate impact analysis is available only in selection cases such as hiring, assignment, transfer, and promotion, and not in cases challenging employer decisions regarding compensation, terms, conditions, and privileges of employment.[79] This view does not single out sex-based

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ory."); Spaulding v. Univ. of Wash., 740 F.2d 686, 708 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

[74] *See* STEVEN L. WILLBORN, A COMPARABLE WORTH PRIMER 54–55 (1986).

[75] *See* AFSCME v. Wash., 770 F.2d at 1406 ("the compensation system in question resulted from surveys, agency hearings, administrative recommendations, budget proposals, executive actions, and legislative enactments.").

[76] *See* Stone, *supra* note 40 at 106.

[77] *See supra* note 72.

[78] The Ninth Circuit's distinction is consistent with the judiciary's hostility to subjecting market-based pay-setting practices to disparate impact analysis. In Section II(D), I argue that use of the market to set pay should qualify as one of the practices subject to judicial review under disparate impact analysis.

[79] *See, e.g.*, County of Wash. v. Gunther, 452 U.S. 161, 202 (1981) (Rehnquist, J., joined by Burger, C.J., Stewart, Powell, J.J., dissenting) ("In short, if women are limited to low paying jobs against their will, they have adequate remedies under Title VII for denial of job opportunities even under what I believe is the correct construction of the Bennett Amendment."); EEOC v. Madison School Dist., 818 F.2d 577, 587 (7th Cir. 1987) (absent barriers to entry or proof of intentional discrimination, Title VII provides no additional remedy for pay equity case); Mary Lemons v. Denver, 620 F.2d 228, 230 (10th

wage discrimination for different treatment under Title VII; rather it denies disparate impact analysis of discrimination in the terms, conditions, and privileges of employment as well as compensation where the discrimination is based on race, color, religion, sex, or national origin as well as where it is based on sex.

Supporters of this distinction rely on three main arguments. First, they point to differences in language between Sections 703(a)(1) and 703(a)(2) of Title VII and maintain that disparate impact analysis is available only under the latter and then only in selection cases. Second, requiring substitution of more neutral standards for disparately impacting standards in non-selection cases, *e.g.* cases involving employment benefits and working conditions, has been characterized and rejected as requiring special treatment or benefits for the disparately impacted group. Finally, some argue that disparate impact doctrine is not available to employees in non-selection cases because the business necessity defense, narrowly conceived, is meaningless in such cases and hence unavailable to employers. These "technical" distinctions, however, are without foundation and upon analysis prove illusory. Moreover, persuasive arguments from public policy demand equal protection for both selection and non-selection claims. Consequently, inferior treatment of pay equity cases cannot be justified under this impediment.

Cir. 1980) (pre-*Gunther* case, *see infra* Section II(C)) (equal pay for equal work and equal opportunity to perform higher paying work is what Title VII requires); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (pre-*Gunther* case, *see infra* Section II(C)) ("The federal policy embodied in Title VII is that individuals shall be entitled to equal *opportunities* in employment on the basis of fitness and without discrimination because of" protected status. "Equality of opportunity is not at issue here" where female employees challenge the employer's use of the facially neutral, but disparately impacting market to set pay for jobs.); Nelson, Opton & Wilson, *supra* note 37, at 284–86 (pre-*Gunther* article, *see infra* Section II(C)). *But cf.* Ruth Gerber Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 397, 491–92 (critiquing job opportunity remedies); Judith D. Brown, Phyllis T. Baumann, & Elaine M. Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 166 (1986) (critiquing distinction between pay and job selection). *But see* Equal Employment Opportunity Commission v. J.C. Penney Co., Inc., 843 F.2d 249, 252 (6th Cir. 1988) (adopting the reasoning of *Colby* finding "no reason why a wage discrimination claim should not receive the same strict scrutiny as a claim of discrimination in hiring or promotion"); Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1127 (7th Cir. 1987) ("the statute would make little sense if a rule, test, or criterion received careful judicial scrutiny if it affected hiring or promotion but not if it affected compensation.").

1. Distinctions Between Sections 703(a)(1) and 703(a)(2) of Title VII

Some courts have either ruled[80] or opined[81] that disparate impact theory is applicable only to claims raised under Section 703(a)(2) of Title VII, and cannot be raised under Section 703(a)(1).[82] Furthermore, they interpret Section 703(a)(2) as applying only to cases involving selection for a job, and not to cases involving working conditions or wages for that job.[83] Despite these judicial interpretations, Sections 703(a)(1) and 703(a)(2) cannot be distinguished either by legal theory or by factual context.

Comparison of Sections 703(a)(1) and 703(a)(2) does reveal differing language in the first two clauses of each. Those who would distinguish between the subsections have relied on the language unique to Section 703(a)(2) to support disparate impact doctrine, although they differ among themselves about which

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[80] *See* Georgia M. Seville v. Martin Marietta Corp., 638 F. Supp. 590, 594 (D. Md. 1986).

[81] *See* Nashville Gas Co. v. Nora D. Satty, 434 U.S. 136, 144 (1977); General Electric Co. v. Martha V. Gilbert, 429 U.S. 125, 137 (1976); Connecticut v. Teal, 457 U.S. 440, 448 (1982). *But see* Gilbert, 429 U.S. at 146 (Blackmun, J. dissenting); *id.* at 153–54 n.6 (Brennan and Marshall, J.J., dissenting).

[82] Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

[83] *See, e.g. Nashville Gas*, 434 U.S. at 144–45 (claims for sick-leave or disability payments allowed under Section 703(a)(1) only); *Gilbert*, 429 U.S. at 137 (same); Eileen Lynch v. S. David Freeman, 817 F.2d 380, 390 (6th Cir. 1987) (dissent); *Colby*, 811 F.2d at 1126–27 (fringe benefits claims arise under Section 703(a)(1) only); *Seville*, 638 F. Supp. at 593–94 (failure to provide fringe benefits not contemplated by Section 703(a)(2)). *Cf.* Willborn, *supra* note 58, at 828 (1985). *But see Nashville Gas*, 434 U.S. at 143 & n.5 (applying Section 703(a)(2) to leave policy claims); *Lynch*, 817 F.2d at 387 (claims for disparately impacting working conditions allowed under Section 703(a)(2)). *But cf. Wards Cove*, 490 U.S. at 655 n.9 (suggests challenge to segregated dormitories and eating facilities may be brought under Section 703(a)(2)).

language within that section supports the doctrine. For example, some focus on Section 703(a)(2)'s language forbidding employers "to *limit, segregate, or classify* [candidates] . . . in any way which would . . . deprive . . . any individual of employment *opportunities*" as supporting an interpretation forbidding the use of non-job-related barriers that have a significant adverse effect based on race, color, religion, sex, or national origin.[84] Others focus on the "tend to deprive" language in Section 703(a)(2) as supporting an interpretation prohibiting not just employment decisions based on the prohibited factors but also employment decisions resulting in an impact based on the prohibited factors because such decisions "tend to deprive any individual of employment opportunities . . . because of race, color, religion, sex, or national origin."[85] Similarly, some commentators "anchor" disparate impact theory in the distinct language of Section 703(a)(2), without necessarily limiting disparate impact theory to that section.[86] Conversely, some proponents of limiting the applicability of disparate impact rely on Section 703(a)(1)'s unique language focusing "upon direct acts of discrimination"[87] as forbidding only disparate treatment discrimination.

The operative language allowing disparate impact claims, however, appears in both Sections 703(a)(1) and (a)(2).[88] Under each provision, an employer is forbidden to discriminate in a variety

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[84] *See, e.g., Teal*, 457 U.S. at 448. *Cf. Seville*, 638 F. Supp. at 594.

[85] *See, e.g., Colby*, 811 F.2d at 1127. *Cf. Seville*, 638 F. Supp. at 594.

[86] *See* Martha Chamallas, *Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. REV. 305, 325 (1983) ("This section prohibits actions that 'in any way deprive or tend to deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee or as an applicant for employment.' This language potentially encompasses practices that are not animated by an intent to deprive and paves the way for use of disparate impact analysis in which proof of group adverse impact supplies the causal tie to race."); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 74 (1972) ("The 'adversely affect' language . . . suggests that a court's focus of attention should be more on the consequences of actions than on the actor's state of mind.")

[87] *See Seville*, 638 F. Supp. at 594. *Cf. Colby*, 811 F.2d at 1127.

[88] *Cf.* Willborn, *supra* note 58, at 827 (disparate impact model fits within both statutory subsections). *But see* Rutherglen, *supra* note 61, at 1301 (language of neither section 703(a)(1) nor section 703(a)(2) supports disparate impact discrimination, they both support only disparate treatment discrimination); Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 567–78 (1985) (same).

of ways against an individual "because of such individual's race, color, religion, sex, or national origin." Where an employer uses a facially neutral criterion resulting in disproportionate exclusion of a candidate's protected group, that individual, along with disproportionate numbers of her group, is harmed because of her group-based characteristic. In that instance, the criterion can be said to discriminate against that individual "because of" her protected status.[89]

Further evidence that Sections 703(a)(1) and (a)(2) both mandate disparate impact analysis is found in the language of Section 703(h).[90] Section 703(h) specifically protects an employer's use of certain facially neutral criteria, when used to "apply different standards of compensation, or different terms, conditions, or privileges of employment," as long as "such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."[91] This language implicitly distinguishes between acts of intentional discrimination and acts giving rise to claims of disparate impact discrimination. While it maintains the ban on intentional discrimination, Section 703(h) does provide an employer with defenses against certain claims of *disparate impact* discrimination explicitly mentioned in Section 703(a)(1).[92] If Section 703(a)(1) contemplated only disparate treatment discrimination, then Section 703(h) would not be necessary.

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[89] That overlapping language also supports disparate treatment theory: where an employer consciously uses a candidate's race, color, religion, sex, or national origin, the employer would be discriminating against that candidate "because of such individual's race, color, religion, sex, or national origin."

[90] Section 703(h), 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

[91] 42 U.S.C. § 2000e-2(h).

[92] Absent Section 703(h), an employer's use of seniority, merit, quantity or quality of production or work location resulting in a disparate impact based on race, color, religion, sex, or national origin would constitute disparate impact discrimination. *See* American Tobacco Co. v. John Patterson, 456 U.S. 63, 64–65 (1982); Teamsters v. United States, 431 U.S. 324, 349 (1977).

Aside from direct examination of the text of Title VII, those who support distinguishing between the subsections cite the fact that disparate impact precedent tends to rely on Section 703(a)(2) and disparate treatment precedent tends to rely on Section 703(a)(1).[93] Although several Supreme Court cases analyzing disparate impact claims do cite to Section 703(a)(2),[94] and the classic case analyzing disparate treatment claims does cite to Section 703(a)(1),[95] the Court has not limited each discrimination theory to only the one subsection cited.[96]

Finally, the legislative history of Title VII does not support an argument for limiting disparate impact theory to Section 703(a)(2). Indeed, the legislative history suggests that Congress enacted both subsections of Section 703(a) to ensure full and complete compliance with its not then fully defined anti-discrimination mandates,[97] not to create two separate and distinct legal theories of discrimination.[98]

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[93] *See Gilbert*, 429 U.S. at 137; *Nashville Gas*, 434 U.S. at 144; Frances Wambheim v. J.C. Penny Co., Inc., 705 F.2d 1492, 1494 (9th Cir. 1983); *Seville*, 638 F. Supp at 594. *But cf. Gilbert*, 429 U.S. at 153–54 n.6 (Brennan and Marshall, J.J., dissenting).

[94] *See Teal*, 457 U.S. at 448; Griggs v. Duke Power, 401 U.S. 424, 426 n.1 (1971). *But cf.* Dothard v. Rawlinson, 433 U.S. 321, 328 n.10 (1977) (citing both sections).

[95] *See* McDonell Douglas v. Percy Green, 411 U.S. 792, 800, 802–05 (1973) (developing standards for proving disparate treatment discrimination using circumstantial evidence to prove discriminatory subjective intent in a private, non-class action).

[96] *See Green*, 411 U.S. at 806 (distinguishing disparate treatment case of Green from disparate impact case based on the facts, not the statutory subsection on which Green relied); *Gilbert*, 429 U.S. at 146 (Blackmun, J., concurring in part) (although exclusion of pregnancy does not constitute a per se violation of Section 703(a)(1), plaintiffs may still demonstrate disparate impact, which they failed to do); *id.* at 153–55 (Brennan and Marshall, J.J., dissenting) ("a prima facie violation of Title VII, whether under § 703(a)(1) or § 703(a)(2), also is established by demonstrating that a facially neutral classification has the *effect* of discriminating against members of a defined class."). *Cf.* EEOC v. J.C. Penney, 843 F.2d 249, 251 (7th Cir. 1987); Wambheim v. J.C. Penney, 705 F.2d at 1494. *But cf. Gilbert*, 429 U.S. at 137.

[97] *See* Rutherglen, *supra* note 61, at 1302–04; Willborn, *supra* note 58, at 827. *Cf.* Gold, *supra* note 88, at 568–78 (Section 703(a)(2) originated in language applicable only to labor unions, but was subsequently adopted to constrain employers as well as to avoid blame shifting between unions and employers for discrimination by the other).

[98] Congress could not have intended to restrict the scope of disparate impact discrimination to cases under Section 703(a)(2) because it did not specifically contemplate disparate impact discrimination when it passed Title VII. *See* Gold, *supra* note 88, *passim*. *But cf.* Chamallas, *supra* note 86, at 326–28 (support for disparate impact as well).

It was during its deliberations on the 1972 amendments to Title VII that a subsequent Congress affirmatively endorsed disparate impact theory. *See Teal*, 457 U.S. at 447 n.8; George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 719–20 nn.186–87 (1980); Katherine J. Thompson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L.J. 105 *passim* (1986); Alfred W. Blumrosen, Griggs *Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L.J. 443 (1986);

Even if there were a legal distinction between Section 703(a)(1) and 703(a)(2), delineating the distinct employment settings for which each subsection would be applicable would be far from simple.[99] In the pay equity context, for example, reducing women's pay because of their sex could be said "otherwise to discriminate . . . with respect to [her] compensation" under Section 703(a)(1) or "otherwise [to] adversely affect [her] status as an employee" under Section 703(a)(2).[100]

In sum, the arguments for refusing to equalize pay between women's and men's jobs based on distinctions between Sections 703(a)(1) and 703(a)(2) are unconvincing.

2. The Special Treatment/Different Treatment and Benefit/Burden Distinctions

Some argue that disparate impact analysis must be denied in cases regarding terms and conditions of employment where all parties enjoy the same treatment. They maintain that a facially neutral criterion that sets working conditions for *both* men and women can only signify equal treatment; there is no hidden unequal treatment to be unearthed by disparate impact analysis. On this view, disparate impact analysis of consequentially non-neutral employee benefits or working conditions might, absent sufficient justification, require the employer to provide special treatment or a benefit to the complaining group. For example, in *General Electric Co. v. Martha V. Gilbert*,[101] the Court refused to examine General Electric's exclusion of pregnancy, an obviously sex-related criterion, from its nonoccupational sickness and accident benefit policy under disparate impact doctrine because, in its view, the benefit policy treated all employees the

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Chamallas, *supra* note 86, at 328–29. *But see* Michael Evan Gold, *Reply to Thompson*, 8 INDUS. REL. L.J. 117 (1986) (absent amendment or reenactment of pertinent provisions of Title VII, 1972 legislative history did not "ratify" disparate impact theory).

[99] *See* Diane Colby v. J.C.Penney, 811 F.2d 1119, 1127 (7th Cir. 1987); Eileen Lynch v. S. David Freeman, 817 F.2d 380, 387 (6th Cir. 1987) ("the language of § 703(a)(2) is clearly broad enough to include working conditions").

[100] Indeed, an increase in pay typically accompanies, and may be the only distinguishing feature of, a promotion.

[101] 429 U.S. 125 (1976).

same.[102] As the Court stated, "'there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'"[103] The Court found that to examine the exclusion for its disparate impact would require the employer to accord women special treatment:

> [P]regnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.[104]

Similarly, the dissenting judge in *Lynch v. Freeman*[105] refused to use disparate impact doctrine to evaluate an employer's workrule prohibiting use of inside toilets, despite the fact that the rule caused a disproportionate number of women to become ill from use of the outside, unsanitary toilets. He characterized the majority's call either to justify or to remedy that disparately impacting practice as a kind of special treatment. He could see no reason "to enact a requirement that working conditions for all must be upgraded to some unstated standard before women can have full access to the workplace."[106] By this reasoning, in any case where the same working conditions apply to both men and women disparate impact doctrine would not be applicable.[107]

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[102] *Id.* at 127, 138–39. Subsequently, Congress reversed *Gilbert* by adopting The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (defining sex to include pregnancy in Section 701(k) of Title VII).

[103] *Gilbert*, 429 U.S. at 138, citing Dwight Geduldig v. Carolyn Aiello, 417 U.S. 484, 496–97 (1974). Moreover, the Court refused to find disparate impact discrimination because, despite the exclusion of pregnancy, women already received benefits of at least equivalent worth to those received by men. *Id.* The argument that disparate impact based on one employment practice, exclusion of benefit coverage based on pregnancy, is excused by equal benefit coverage when total benefit coverage is considered, was subsequently rejected by the Supreme Court in *Teal*, 457 U.S. at 450. *But cf.* EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734, 744 (E.D. Pa. 1985) (distinguishing *Gilbert*, where no individual was harmed at bottom line, from *Teal*, where identified individuals were harmed at bottom line).

[104] *Gilbert*, 429 U.S. at 139 (emphasis added).

[105] 817 F.2d at 389.

[106] *Id.* at 391. *See id.* at 390 ("Sanitary napkin dispensers would clearly be a convenience for women only, which TVA chose not to provide.")

[107] *Id.* at 390 ("But a working condition applicable to all—by hypothesis people who already are employed and are paid equally if they do the job—is not a limitation or classification of employees" subject to disparate impact doctrine).

Advocates for restricting the scope of disparate impact analysis distinguish selection cases, however. Subsequent to *Gilbert*, the Court in *Nashville Gas Co. v. Nora D. Satty*,[108] ruled that the Gas Company's exclusion of pregnancy from a disability policy *would* constitute disparate impact discrimination based on gender because that policy burdened women's employment opportunities.[109] The Court distinguished *Gilbert*:

> We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the 'scheme of human existence,'" . . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.[110]

By contrast, advocates for disparate impact analysis in non-selection cases reject the special treatment/different treatment[111] and benefit/burden[112] distinctions. These distinctions are clearly illusory.

Analyzing employment benefits and working conditions under disparate impact doctrine does not necessitate special treatment for women, rather it exposes the male-biased standards accepted as the norm in both instances. In *Gilbert* pregnancy constitutes an "additional" risk only from a male perspective, not from a perspective that includes both males and females. Similarly, the "unstated standard" rejected by the *Lynch* court would have been a standard that considered women's, as well as men's, needs. Indeed, requiring women to labor under standards appropriate

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[108] 434 U.S. 136 (1977).

[109] *Id.* at 139–43. *Cf.* The Pregnancy Discrimination Act, *supra* note 102 (Congress subsequently amended Title VII to expressly prohibit distinctions based on pregnancy).

[110] *Nashville Gas*, 434 U.S. at 142. *See id.* at 144–45. *See also* Lynch, 817 F.2d at 391 (distinguishing bathroom facilities that cause medical problems for women from employment qualifications that tend to exclude women from the job "given its conditions").

[111] *See Gilbert*, 429 U.S. at 147–48, 155, 160 (Brennan, J., joined by Marshall, J., dissenting).

[112] *See Nashville Gas*, 434 U.S. at 154 & n.4 (Stevens, J., concurring) (distinction is illusory); *Gilbert*, 429 U.S. at 158 (Brennan, J., joined by Marshall, J., dissenting); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. LAW & SOC. CHNG. 325, 347 (1984–85).

only for men constitutes the unequal treatment that disparate impact analysis is designed to uncover.

Likewise, whether the employer's practice constitutes a benefit or a burden also depends on one's perspective. Returning to our examples, the failure to insure women against all risks of disability, including female specific ones, while insuring men against all risks of disability, including male specific ones, is clearly a burden to women, and, conversely, a benefit to men. Likewise, failure to provide adequate bathroom facilities for women, while providing facilities appropriate for men is also a burden on women, or a benefit to men. Thus, requiring provision of facilities suitable for both men and women is not an added "benefit" for women, but the removal of a burden to provide truly equal treatment. Consequently, whether disparate impact doctrine is used to analyze an employer's decisions either to employ or to pay, the result is not improper preference, but rather equal treatment in accordance with the mandates of Title VII.

3. Distinctions Regarding the Applicability of Business Necessity

Some argue that disparate impact analysis is not available in non-selection cases because the defense to the prima facie claim, business necessity, is not available to employers. They maintain that the business necessity defense, as they define it, would not make sense in the context of non-selection decisions.[113] In order to win on a defense of business necessity, in their view, employers must justify disparately impacting criteria by reference to job performance, a standard that might not be appropriate to justify disparately impacting criteria used in non-selection decisions such as benefits, compensation or working conditions.[114]

This argument is not persuasive. The business necessity defense has been read more broadly than requiring job-relatedness.[115] Consistent with the term "business necessity," courts

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[113] *See Lynch*, 817 F.2d at 390–91 (dissent).

[114] *See* EEOC v. J.C. Penney, 843 F.2d 249, 253–54 (7th Cir. 1987) ("By definition a fringe benefit is not directly related to job performance").

[115] *See* UAW v. Johnson Controls, Inc., 886 F.2d 871, 888–90 (7th Cir. 1989), *rev'd on other grounds*, 59 U.S.L.W. 4209 (U.S. March 20, 1991); Sylvia Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1984); Theresa Williams Wright v. Olin Corp., 697

have permitted employers to justify disparately impacting criteria based on any business need, not simply job performance.[116] Moreover, the Civil Rights Act of 1991, if it becomes law,[117] will specifically contour the business necessity defense to such non-selection cases.[118]

4. Policies Against Distinguishing Selection and Non-Selection Decisions

Interpreting Title VII to provide reduced protection for employment decisions regarding compensation, terms, conditions, or privileges of employment compared with the protection afforded selection decisions has detrimental policy ramifications. First, such an interpretation does not realize the broad remedial goals of Title VII because either it allows women the benefits of men's work only at the cost of adapting to terms and conditions of employment designed primarily for men and unjustified by business necessity or it requires women to resign themselves to the inferior conditions accompanying women's work. Barring

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F.2d 1172, 1186 & n.21 (4th Cir. 1982); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 672, 692–98 (1981); Perry, *supra* note 30; *infra* note 116. *But see* Reginald O. Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974) (employee productivity only proper purpose excusing disparate impact); Edward L. Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495–96 (C.D. Calif. 1971) (same).

[116] *See Nashville Gas*, 434 U.S. at 143 & n.5 (Court would permit the company to continue disparately impacting practice, despite its burden on women, if it could be justified as a business necessity. In fact, the policy conflicted with the company's economic and efficiency interests.); *Lynch*, 817 F.2d at 388 (to establish business necessity, employer must prove "that the practice of furnishing unsanitary toilet facilities at the work site 'substantially promote[s] the proficient operation of the business'"); Colby v. J.C. Penney, 811 F.2d at 1127 (Penney could defend its practice "by showing a good business justification for the rule"); Max Liberles v. County of Cook, 709 F.2d 1122, 1132 (7th Cir. 1982) (company bore burden to justify discriminatory assignment and compensation policies, by showing them to be "necessary to the safe and efficient operation of the business"); Frances Wambheim v. J.C. Penney, 705 F.2d 1492, 1495 (9th Cir. 1983) ("Penney must 'demonstrate that legitimate and overriding business considerations provide justification'" for disparately impacting benefit rule); Joaquin Moreles Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303–04 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984) (company was required to "demonstrate that legitimate and overriding business considerations provide justification" for disparately impacting practice).

[117] *See supra* note 52.

[118] The Civil Rights Act of 1991, H.R. 1, *supra* note 52, at § 3(o)(1)(B) (defining business necessity: "in the case of employment practices that do not involve selection, the practice . . . must bear a significant relationship to a significant business objective of the employer").

judicial review of non-selection practices unacceptably relieves employers from having to adopt either neutral workplace standards or disparately impacting standards justified by business necessity. Such an interpretation undercuts the comprehensive antidiscrimination mandate in Title VII.[119]

Second, the policy of denying scrutiny to the terms and conditions of employment will inevitably perpetuate both the sex segregation of jobs and the inferior conditions in women's work. Superficially, one might argue that promoting equality of job opportunities is more important than promoting equality of the pay, benefits, or conditions of that job.[120] In reality, however, they are intertwined.

Although women are permitted to do men's work, the rules and working conditions in that environment are shaped by typical male expectations and characteristics. Without disparate impact analysis of non-selection cases, there would be no requirement to examine the work standards of higher-paying male jobs to see if they accommodate equally *all* members of the workforce. Consequently, those women who aspire to perform men's work would find some protection in Title VII, but only if they are willing to assimilate to the work environment and conditions created for the predominantly male workers that preceded them.[121] This par-

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[119] *See Lynch*, 817 F.2d at 388 ("Title VII is remedial legislation which must be construed liberally to achieve its purpose of eliminating discrimination from the workplace." Thus, disparate impact doctrine should be applied to facially neutral working conditions.); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1306–08 (1987) (advocating focus on changing institutions, not women, to achieve equality); Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1400–01, 1411–17 (1988) (advocating use of disparate impact doctrine to challenge male bias in workplace standards). *Cf.* Corning Glass v. Peter J. Brennan, Secretary of Labor, 417 U.S. 188, 208 (1974) ("If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated [under the Equal Pay Act] to pay the women the same base wage as their male counterparts . . . . To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends.").

[120] *Cf.* Willborn, *supra* note 58, at 828.

[121] *See* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 967 (1983) ("assimilation into existing predominantly male social structures is an inadequate definition of equality between the sexes and one that robs equality of much of its transformative potential"); Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, *passim* (1981) [hereinafter "Harv. Note"] (critiquing assimilation).

tial protection seems quite shallow, however, where women are denied basic necessities such as sanitary bathroom facilities or disability protection to cover risks affecting their ability to work.

Equally disconcerting, this limited interpretation of Title VII would provide no protection for that segment of the work force who either would not choose to or cannot perform in traditional men's jobs,[122] because the sex-linked, and detrimental consequences of being in a job where women predominate would be immunized from judical scrutiny. In sum, this failure to examine on-the-job conditions, except those erected with conscious intent to discriminate based on the prohibited factors, encourages perpetuation of a status quo that often burdens women's participation in the workforce.

At present, neither legal nor policy arguments support restricting the scope of disparate impact analysis to an employer's practices involving selection decisions. Moreover, should the Civil Rights Act of 1991 become law, it would undercut such a restriction explicitly. That legislation explicitly defines a prima facie case of disparate impact discrimination to occur where "an employment practice results in a disparate impact" without distinguishing whether the discrimination occurs in a selection or nonselection decision.[123] Even more specifically, the bill excuses such practices if the employer "demonstrate[s] that such practice is required by business necessity," where business necessity has distinct meanings depending on whether the practice involves selection.[124] Consequently, there is no justification for shielding an employer's practices involving *compensation*, terms, conditions, and privileges of employment from judicial scrutiny under disparate impact doctrine.

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[122] Freedman, *supra* note 121, at 967 ("The principle that only women whose life patterns, skills, and experiences are virtually identical to those typical of men will be accorded high status and rewards will, as a practical matter, doom most women to continued subordination."); Schultz, *supra* note 2, at 1841 (demonstrating how employers "create the workplace structures and relations" that discourage women from seeking nontraditional employment); Scales-Trent, *supra* note 9, at 52–53.

[123] The Civil Rights Act of 1991, H.R. 1, *supra* note 52, at § 4(k)(1)(A).

[124] *Id.* at § 3(o)(1) ("The term 'required by business necessity' means—(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training . . .) . . . ; or (B) in the case of employment practices that do not involve selection . . . .").

C. Applicability of Disparate Impact to Cases Governed by the Bennett Amendment

A third impediment to equalizing pay between women's and men's work is based on the Bennett Amendment to Title VII.[125] The Bennett Amendment, by its terms, singles out sex-based[126] wage discrimination[127] for different treatment under Title VII.

Courts have relied on the Bennett Amendment to bar disparate impact challenges in sex discrimination cases focusing on unequal pay for unequal work.[128] Upon analysis, however, the Bennett Amendment, a technical amendment to Title VII offered to eliminate potential inconsistencies and to coordinate between Title VII and the Equal Pay Act, has no such far-reaching effect on Title VII cases. At most, it requires employers to defend against disparate impact challenges based on the "factor other than sex" defense from the Equal Pay Act, rather than the more traditional business necessity defense.[129]

1. The Equal Work Requirements

One, now settled, debate regarding the interpretation of the Bennett Amendment focused on whether that amendment limited

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[125] The Bennett Amendment provides:

> It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of . . . [the Equal Pay Act].

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

[126] *See* Joan Rance Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 282 (N.D. Tex. 1980) (Bennett Amendment inapplicable to race-based wage discrimination).

[127] *See* Colby v. J.C. Penney Co., 705 F. Supp. 425, 430 (N.D. Ill. 1989) ("If health benefits were not compensation, then an employer could not claim a defense under the Bennett Amendment for discriminatory provision of them.")

[128] *See* UAW v. Mich., 886 F.2d 766, 769 (6th Cir. 1989); Lynda Fallon v. State of Ill., 882 F.2d 1206, 1211 n.4, 1215 (7th Cir. 1989); EEOC v. Sears, 839 F.2d 302, 343 (7th Cir. 1988); EEOC v. Madison School Dist., 818 F.2d 577, 587 (7th Cir. 1987) (dictum); Colby v. J.C. Penney, 811 F.2d 1119, 1127 (7th Cir. 1987) (dictum); American Nurses' Ass'n v. Ill., 783 F.2d 716, 721, 723 (7th Cir. 1986) (dictum); Power v. Barry County, Mich., 539 F. Supp. 721, 726 (W.D. Mich. 1982).

[129] In that instance, however, the employer's obligation under "factor other than sex" would be more burdensome than the current standards for business necessity under Title VII. *Compare infra* notes 149, 168–173 and accompanying text *with infra* notes 175–176 and accompanying text.

sex-based wage discrimination cases under Title VII to cases satisfying the narrow prima facie case requirements of the Equal Pay Act. To establish a prima facie case under the Equal Pay Act, an employee must establish that an individual of the opposite sex receives unequal pay for substantially equal work,[130] a requirement that would have precluded all pay equity suits except those alleging unequal pay for equal work.

The Supreme Court, in *County of Washington v. Gunther*,[131] rejected such a far-reaching interpretation of the Bennett Amendment, ruling that the Bennett Amendment does not bar a claim of sex-based wage discrimination merely because the employees failed to establish the equal work requirement of the Equal Pay Act. The Court construed the Bennett Amendment to incorporate into Title VII only the affirmative defenses of the Equal Pay Act.[132]

Nevertheless, the Bennett Amendment has proven to be a barrier to many sex-based wage discrimination cases that rely on the disparate impact doctrine of Title VII. Some courts would limit *Gunther* to its facts: allowing suits challenging sex discriminatory pay between unequal jobs to proceed under Title VII's disparate treatment theory, but not Title VII's disparate impact theory,[133] or, even more narrowly, allowing such suits only when based on proof of direct evidence of disparate treatment.[134] This reading of *Gunther*, however, is too broad. The Court in *Gunther* merely overruled the dismissal of a cause of action challenging a pay disparity between unequal jobs where employees alleged

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[130] *See supra* notes 16–17 and accompanying text.

[131] 452 U.S. 161, 168 (1981).

[132] *Gunther*, 452 U.S. at 168, 170–71. Moreover, sex-based compensation cases under Title VII would not be constrained by the differing procedures for bringing suit, the employers covered, and the damages available under the Equal Pay Act. *Id.* at 168, 175, 179–80. *See id.* at 202 (dissent). *Compare* Sections 701, 706 of Title VII, 42 U.S.C. § 2000e-1, 5 (1990) *with* Section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 (1990) and Sections 6, 7, 11 of the Portal to Portal Act, 29 U.S.C. § 255, 256, 260 (1990).

[133] *See* UAW v. Mich., 886 F.2d at 769 (citing *Gunther* dissent); American Nurses' Ass'n v. Ill., 783 F.2d at 721 (quoting *Gunther* dissent); Power v. Barry County, 539 F. Supp. at 726 ("A review of the legislative history of Title VII leads me to conclude that the Supreme Court's recognition of intentional discrimination may well signal the outer limit of the legal theories cognizable under Title VII.").

[134] EEOC v. Sears, 839 F.2d at 343 (*Gunther* allows cause of action for unequal work only in direct evidence, intentional discrimination cases); Cox, *supra* note 38, at 108, 139 (limit *Gunther* to direct evidence of motive except where equal work).

direct evidence of disparate treatment,[135] it did not limit such claims to that proof.[136]

Moreover, the Court's rationales in *Gunther* for limiting the Bennett Amendment's effect on Title VII cases counsel against restricting any sex-based wage discrimination cases, including those involving unequal jobs, beyond what is required by incorporation of the Equal Pay Act's four affirmative defenses. First, the *Gunther* Court focused on the language of the Bennett Amendment, finding that "[t]he Amendment bars sex-based wage discrimination claims under Title VII where the pay differential is 'authorized' by the Equal Pay Act."[137] The Court also found that only the four affirmative defenses of the Equal Pay Act provide such authorization for wage discrimination.[138] Since the equal work restriction was not found to *authorize* pay differentials under the Equal Pay Act, it should not be incorporated into cases raised under Title VII.

Second, the Court recognized that the legislative history of the Bennett Amendment is extremely brief.[139] The Court noted that the amendment adding sex as an additional prohibited factor under Title VII and, more particularly, the Bennett Amendment itself were introduced extremely late in Congress' consideration of Title VII.[140] Consistent with this brevity, the Court recognized

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[135] *Gunther*, 452 U.S. at 166 & n.8, 171, 181. The Supreme Court affirmed the Ninth Circuit's decision to reverse the district court's dismissal of employees' pay equity suit challenging pay disparities between unequal jobs. The Ninth Circuit clarified:

> All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII.

Gunther v. County of Wash., 623 F.2d at 1318, 1319, 1320 (9th Cir. 1979) (Supplemental Opinion on Denial of Rehearing).

[136] *Cf.* American Nurses' Ass'n v. Ill., 783 F.2d at 721 ("*Gunther* suggests the type of evidence that is sufficient but perhaps not necessary to establish sex discrimination in wages for different work"); Cox, *supra* note 38, at 112 ("the Court's references to the intentional discrimination claim at issue in *Gunther* and to the plaintiff's anticipated use of 'direct evidence' merely reserved the question of comparable worth theory for the future.").

[137] *Gunther*, 452 U.S. at 168–69.

[138] *Id.* at 169.

[139] *Id.* at 141–42.

[140] During the first session of the 88th Congress, the Equal Pay Act was enacted. During the second session of that Congress, Title VII was enacted. Until two days before the House vote on Title VII, the proposed Act covered only discrimination based on race, color, religion, and national origin. It was not until the eve of its enactment that the House of Representatives amended Title VII to proscribe discrimination based on sex.

the Bennett Amendment to be merely a "'technical amendment' designed to resolve any potential conflicts between Title VII and the Equal Pay Act."[141] More specifically, Senator Bennett explained: "'The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.'"[142] Thus, the Court concluded that this legislative history was consistent with a more limited incorporation of "the restrictive features of the Equal Pay Act."[143]

Third, the Court interpreted the Bennett Amendment narrowly in order to give Title VII a broader reading.[144] The Court endorsed such a broad reading of Title VII's remedial purposes in order to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."[145] Limiting the Bennett Amendment's protection of sex-based wage discrimination also furthers this purpose.

Aside from the *Gunther* Court's rationales, narrow interpretation of the Bennett Amendment minimizes the distinction between sex discrimination and discrimination based on race, color, religion, or national origin.[146] Although Congress explicitly distinguished race and color discrimination from discrimination based on religion, sex, or national origin in the defense to disparate treatment claims,[147] Congress only distinguished discrimination based on sex from discrimination based on religion or national origin in the Bennett Amendment. To read the Bennett Amendment expansively would distinguish sex-based wage discrimination from all other forms of discrimination prohibited by Title VII

Moreover, it was not until the House version of the Act was in its final consideration on the floor of the Senate that concern arose regarding possible inconsistencies between the Equal Pay Act and the proposed Title VII. In an effort to respond to any potential inconsistencies and to coordinate Title VII with the Equal Pay Act, Senator Bennett offered his Amendment to Title VII. *Gunther*, 452 U.S. at 171–73. *See* 110 CONG. REC. 13310, 13647 (1964).

[141] *Gunther*, 452 U.S. at 170.

[142] *Id.* at 173.

[143] *Id.* at 174.

[144] *Id.* at 178.

[145] *Gunther*, 452 U.S. at 178.

[146] *See* Int'l Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., 631 F.2d 1094, 1099–1100 (3rd Cir. 1980); Delores Gerlach v. Mich. Bell Telephone Co., 501 F. Supp. 1300, 1308, 1319 (E.D. Mich. 1980); Laffey v. Northwest Airlines, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[147] *See* Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (bona fide occupational qualification exception to disparate treatment discrimination under Title VII not applicable to race or color).

based on merely a "technical amendment" which had virtually no contemporaneous interpretative history.

In sum, the rationales of *Gunther* and the general aims of Congress demand giving the Bennett Amendment limited effect. Employees raising pay equity challenges for disparities in unequal jobs should be permitted to proceed under both the disparate treatment and the disparate impact theories under Title VII, subject only to the Equal Pay Act's four affirmative defenses.

2. The Affirmative Defenses

The Equal Pay Act's four affirmative defenses, incorporated into Title VII by the Bennett Amendment, excuse pay disparities:

> where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .[148]

Procedurally, the employer bears the burden of persuasion on the affirmative defenses under the Equal Pay Act.[149]

The Equal Pay Act "authorizes" a pay disparity only when the employer establishes one of the Act's affirmative defenses.[150] When traditional Title VII doctrine also "authorizes" or allows that pay disparity, the Bennett Amendment does not affect Title VII cases. For example, where the employer satisfies its weightier burdens under the Equal Pay Act, the employer would also prevail under Title VII and the Bennett Ammendment would not

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[148] 29 U.S.C. § 206(d)(1).

[149] Corning Glass v. Brennan, 417 U.S. 188, 196 (1974). *See Gunther*, 452 U.S. at 169; *Laffey*, 567 F.2d at 448 (employee bears "onus of demonstrating that the work unequally recompensed was 'equal' within the meaning of the Act" and in response the "employer asserts as an affirmative defense that the wage differential is justified under one of the four exceptions").

[150] *See supra* notes 137–138. Even though pay disparities in jobs that are not substantially equal would not be governed by the equal work standard of the Equal Pay Act, such disparities would be "authorized" by the Equal Pay Act where the employer could prove that they met the standards of the four affirmative defenses of that Act.

effect any change.[151] When traditional Title VII doctrine does not allow that pay disparity, however, the Bennett Amendment requires alteration of the Title VII result. Indeed, if employees could recover under Title VII for a pay practice "authorized" by the Equal Pay Act, the Equal Pay Act would be "nullified" because employees would pursue their claims under Title VII to circumvent the employer's Equal Pay Act defense.[152] It was to avoid this conflict that the Bennett Amendment was enacted.[153] The Bennett Amendment, therefore, alters usual Title VII doctrine only where procedural and/or substantive obligations of the four affirmative defenses to the Equal Pay Act are interpreted to be more lenient to an employer than their obligations under traditional Title VII doctrine.

Comparison of an employer's obligations under the affirmative defenses of the Equal Pay Act with its obligations under Title VII's disparate treatment and disparate impact doctrines reveals the latter to be more lenient to the employer under current law. That same comparison, however, reveals an employer's obligations under disparate impact doctrine to be more burdensome under the law of the proposed Civil Rights Act of 1991. Thus, the Bennett Amendment requires no alteration of traditional Title

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[151] Patricia Covington v. S. Ill. Univ., 816 F.2d 317, 321 (7th Cir. 1987) (where employer proves factor other than sex, employee loses under both Equal Pay Act and Title VII); Carol D. Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985); Betty Lou Strecker v. Grand Forks County Social Service Bd., 640 F.2d 96, 99 n.1 (8th Cir. 1980); Betty Sowers v. Kemira, Inc., 701 F. Supp. 809, 822 (N.D. Ga. 1988); Sheila D. Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 938 n.10 (D. Md. 1982). *Cf.* Mary Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F. Supp. 800, 806 (W.D. Tenn. 1985) (where plaintiff wins even under Title VII burdens, *Gunther* does not alter Title VII's standards).

[152] Reconciling employers' conflicting obligations under Title VII and the Equal Pay Act is distinct, however, from reconciling the conflict between the more restrictive coverage of the Equal Pay Act and the broader coverage, including pay disparities between unequal jobs, of Title VII. Regarding the latter issue, the employer is not met with conflicting obligations. *See* Regina Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 953 n.2 (10th Cir. 1980) (rejecting use of equal work requirement: "This is not a case in which a discriminatory activity is specifically sanctioned under the Equal Pay Act exceptions and liability is, nonetheless, sought under Title VII. Here a finding of discrimination under Title VII does not conflict with the provisions of the Equal Pay Act.").

[153] *See supra* notes 141–142.

Requiring adoption of the Equal Pay Act defenses when they are more broadly interpreted than the usual Title VII defenses, however, undercuts the broad remedial purposes of Title VII and creates a distinction between sex-based wage discrimination cases and all other Title VII actions. *See supra* notes 144–147 and accompanying text. Even a narrow interpretation of the Bennett Amendment requires this sacrifice to insure that the Equal Pay Act is not nullified.

VII doctrine under current law, but would require substitution of the fourth affirmative defense of the Equal Pay Act for traditional employer obligations under disparate impact doctrine if the Civil Rights Act of 1991 were to become law.

The first three affirmative defenses under the Equal Pay Act have direct substantive counterparts in Section 703(h) of Title VII.[154] Moreover, the Supreme Court interpreted the Bennett Amendment to require consistent substantive interpretations of these defenses in both statutes.[155] The procedural burdens on the employer, however, differ between the two statutes. Under the Equal Pay Act, the employer bears the burden of proving that its employment practice operates according to one of the exceptions authorized by the three defenses as well as the "bona fides" of that system. Under Title VII, by contrast, the employer need only show that its employment practice operates according to one of the exceptions, and the employee bears the burden of

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[154] Section 703(h), 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

[155] *See Gunther*, 452 U.S. at 170.

Thus, the seniority system defense has been interpreted to require a "*bona fide* seniority system that is uniformly applied." EEOC v. Shelby County Gov't, 707 F. Supp. 969, 983 (W.D. Tenn. 1988) (no uniform system of raises based on seniority). *See also* Peter J. Brennan v. Victoria Bank and Trust Co., 493 F.2d 896, 901 (5th Cir. 1974) (standard annual longevity raises permitted).

The merit system defense requires "a systematic, formal system guided by objective, written standards." *Victoria Bank and Trust*, 493 F.2d at 901 (merit system defense accepted). *See also* William E. Brock v. Georgia S.W. College, 765 F.2d 1026, 1036 (11th Cir. 1985) (informal, unsystematic, ad hoc decisions based on subjective, personal, and ill-informed judgments not a merit system); EEOC v. Aetna Insurance Co., 616 F.2d 719, 725 (4th Cir. 1980) (absent writing, merit system "must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria," employees must be aware of it, and it must not be based on sex); EEOC v. Shelby County, 707 F. Supp. at 984 (rejecting merit system defense where no organized system and criteria are subjective).

Finally, the defense for systematic measurement of production, an incentive system defense, requires a system that awards higher pay for producing more of a uniform item or for producing a more difficult or better quality item. Denise Bence v. Detroit Health Corp., 712 F.2d 1024, 1029 (6th Cir. 1983) (no incentive system defense where women paid less for selling equal numbers of spa memberships). *See* EEOC v. Shelby County, 707 F. Supp. at 984 (no system); Frances Beall v. John R. Curtis, 603 F. Supp. 1563, 1579 (M.D. Ga. 1985) (no system).

challenging the "bona fides" of that practice.[156] The Bennett Amendment does not affect these procedural burdens, since Title VII does not override the Equal Pay Act with more onerous burdens.

The final defense under the Equal Pay Act, "any factor other than sex," has no direct counterpart under Title VII.[157] Nonetheless, courts have interpreted the "factor other than sex" defense consistently with Title VII's antidiscrimination provisions to include those factors that do not discriminate "because of an individual's sex," meaning factors which have neither a discriminatory purpose nor an unnecessary discriminatory effect.[158]

First, the defense has been construed to be consistent with disparate treatment doctrine under Title VII. By definition, a factor "other than sex" cannot be sex on its face.[159] In addition,

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[156] California Brewers Ass'n. v. Abram Bryant, 444 U.S. 598, 610–11 (1980); American Tobacco v. Patterson, 456 U.S. 63, 69–70 (1982); Teamsters v. United States, 431 U.S. 324, 349–50, 353 (1977); Firefighters, Inc. v. Ted Bach, 611 F. Supp. 166 (D. Colo. 1985); Note, *Teamsters, California Brewers, and Beyond: Seniority Systems and Allocation of the Burdens of Proving Bona Fides*, 54 ST. JOHN'S L. REV. 706, 721, 723–24 (1980).

[157] The factor other than sex defense was intended to encompass a variety of practices:

> As it is impossible to list each and every exception, the broad general exclusion has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available for their former jobs.

H.R. REP. NO. 309, 88th Cong., 1st Sess., 3 *reprinted in* 1963 U.S. CODE CONG. & ADMIN. NEWS 687, 689.

[158] *Cf. Gunther*, 452 U.S. at 169–70 (fourth affirmative defense "is implicit in Title VII's general prohibition of sex-based discrimination.").

[159] *See* City of Los Angeles Dep't of Water & Power v. Marie Manhart, 435 U.S. 702, 712–13 (1978) (accepting district court's determination "that one cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.'").

In addition, unexplained use of subjective factors would not be sufficient to dispel the inference that sex was the determinative factor in setting pay. *See* EEOC v. Aetna, 616 F.2d at 726 & nn.11–12; Ray Marshall v. Security Bank & Trust Co., 572 F.2d 276, 279 (10th Cir. 1978) ("Subjective evaluations by the employer do not take the place of a bona fide training program and, standing alone, cannot form the basis for salary discrimination based on sex."); Marilyn A. Schulte v. Wilson Indus., Inc., 547 F. Supp. 324, 341 (S.D. Tex. 1982) ("defendant failed to even articulate any legitimate reason for these disparities").

the factor other than sex defense does not protect *all* facially neutral factors.[160] Those factors which are a pretext for purposefully discriminatory criteria are not protected by this defense.[161] For example, courts have rejected employers' attempts to justify unequal pay for equal work based on management training programs that, in actuality, were a pretext for sex discrimination. "These vague, almost illusory, training programs that were applied in a discriminatory manner may have been 'a better reason' than the maleness or femaleness of employees for the inequality in pay. But, they were not 'factors other than sex' within the meaning of the EPA."[162] In addition, courts have found that facially neutral standards applied differently to men and women were a pretext for discrimination based on sex and were therefore not encompassed within the protection of the fourth defense.[163] In sum, consistent with disparate treatment discrimination under Title VII, the factor other than sex defense requires the employer to set pay by a factor that is not explicitly or pretextually based on sex.[164]

Although courts have construed the substantive standard for the factor other than sex defense to be consistent with the employers' obligations in a Title VII disparate treatment case, the employer bears a lighter *procedural* burden under Title VII than that required by the Equal Pay Act. In the usual Title VII dis-

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[160] *See* Lola Kouba v. Allstate Insurance Co., 691 F.2d 873, 876 (9th Cir. 1982) (rejecting interpretation that factor other than sex means "any factor that either does not refer on its face to an employee's gender or does not result in all women having lower salaries than all men.").

[161] *See* Peter J. Brennan v. Sears Roebuck & Co., 410 F. Supp. 84, 100–01 (N.D. Iowa) (Equal Pay Affirmative Action Plan infected with sex bias and therefore not factor other than sex).

[162] Schultz v. First Victoria Nat'l Bank, 420 F.2d 648, 659 (5th Cir. 1969). *See also* EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 400–01 (9th Cir. 1985) (training program defense rejected); Frankie Odomes v. Nucare, Inc., 653 F.2d 246, 251, 252 (6th Cir. 1981) (training program was an "'illusory,' 'post-event justification' for unequal pay for equal work.").

[163] *See, e.g.*, EEOC v. Bank of Billings, 758 F.2d at 401; Dorothy M. Thompson v. Danford L. Sawyer, Jr., 678 F.2d 257, 276–77 (D.C. Cir. 1982) (traditional industry practices conceal sex discrimination); Brennan v. Victoria Bank and Trust, 493 F.2d 896, 902–03 (5th Cir. 1974); EEOC v. Shelby County, 707 F. Supp. 969, 984–86 (W.D. Penn. 1988); Loretta S. Parker v. James Burnley, 693 F. Supp. 1138, 1150–51 (N.D. Ga. 1988). *Cf.* Patricia Ray Brownlee v. Gay and Taylor, Inc., 642 F. Supp. 347, 361 (D. Kan. 1986) (uniform use of Salary Administration Program, itself based on factors other than sex, would justify sex-based pay disparity).

[164] *See* Cox, *supra* note 38, at 73.

parate treatment case, the employer bears only the burden of production to show that it acted based on a non-discriminatory reason (i.e. not sex), while the employee must pursuade the court that the employer consciously intended to discriminate.[165] Under the Equal Pay Act, however, the employer bears the burden of persuasion to prove that any pay disparity between employees of different sexes is not based on explicit or pretextual use of sex.[166] Thus, the Bennett Amendment does not alter usual Title VII doctrine alleging disparate treatment discrimination because the standards for the employer's obligation under disparate treatment doctrine are more lenient than its obligations under the Equal Pay Act's affirmative defenses.[167]

Second, like disparate impact doctrine, standard interpretation of the factor other than sex defense requires justification for pay-setting practices that are discriminatory in *effect*.[168] Where cri-

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[165] *See* Texas Dept. of Community Affairs v. Joyce Ann Burdine, 450 U.S. 248, 254–56 (1981) (employer bears burden of production that it acted "for a legitimate, nondiscriminatory reason"); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (employer bears burden of production "to articulate some legitimate, nondiscriminatory reason" for its decision).

[166] *See supra* note 149.

[167] Even in the context of cases challenging pay disparities between equal jobs, many courts have refused to incorporate the more stringent defense of the Equal Pay Act into Title VII, thereby allowing employees to recover under the Equal Pay Act but not under Title VII. *See, e.g.*, Fallon v. Ill., 882 F.2d 1206, 1213, 1214–18 (7th Cir. 1989); Karen D. Peters v. City of Shreveport, 818 F.2d 1148, 1154, 1162 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101–02 (1988); Joyce H. Brewster v. George F. Barnes, 788 F.2d 985, 992–93 (4th Cir. 1986); Judith E. Manuel v. WSBT, Inc., 706 F. Supp. 654, 657–58 (N.D. Ind. 1988); Keith B. Grimes v. District of Columbia, 630 F. Supp. 1065, 1069–70 (D.D.C. 1986), *vac. on other grounds*, 836 F.2d 647, 652 (D.C. Cir. 1988); EEOC v. Sears, 628 F. Supp. 1264, 1330 & n.88, 1331–32 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). *But see* 29 C.F.R. 1620.27 (1988); Sheila J. Korte v. Ronald Diemer, 54 Empl. Prac. Dec. (CCH) ¶ 40,152 (6th Cir. 1990); Birdie C. McKee v. Bi-State Development Agency, 801 F.2d 1014, 1019 (8th Cir. 1986); Player, *supra* note 40, at 358–60 (advocating incorporation of Equal Pay Act burdens for all equal work wage discrimination cases, including those based on race, color, religion, or national origin).

[168] *See* Corning Glass v. Brennan, 417 U.S. 188, 209–10 (1974) ("We therefore conclude that on the facts of this case, the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, [here red circling,] nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work. *Cf.* Griggs v. Duke Power, 401 U.S. 424, 430 (1971)."); Peters v. Shreveport, 818 F.2d at 1161 ("We do not read the 'but for' requirement of the Act's fourth defense as equivalent to a requirement of discriminatory intent; the good faith of an employer, by itself, does not constitute a defense under the Act"); EEOC v. Aetna, 616 F.2d 719, 726 (4th Cir. 1980) (defense established where differential had neither discriminatory purpose nor effect); James D. Hodgson v. American Bank of Commerce, 447 F.2d 416, 423 (5th Cir. 1971) ("The Act forbids all discriminations between male and female employees not based on factors other

teria are found to perpetuate sex discrimination, courts have allowed their use only when justified by business necessity.[169] Thus, factors resulting in a disparate impact based on sex that were found to be job-related or required by legitimate business reasons would constitute factors other than sex. For example, experience and education constitute factors other than sex when they are related to the duties performed by the employee receiving the pay differential.[170] On the other hand, the mere expectation of economic benefit to a business may be found insufficiently related to business need to justify paying males more than females.[171] It is not essential that factors other than sex be job-

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than sex, not just those intended to be based on sex."); Rhonnie J. Molden v. United States, 42 Empl. Prac. Dec. (CCH) ¶ 36,832 at 45,919 (U.S. Ct. Cl. 1987) (disparate effect based on gender, that was known and not remedied within reasonable time, rendered classification system not a factor other than sex, despite its gender-neutral design); Sheila D. Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 934 (D. Md. 1982) (rewarding drafted veterans for their service could not constitute factor other than sex where women are excluded from the draft); Christine Herman v. Roosevelt Fed. Savings & Loan Ass'n., 432 F. Supp. 843, 851 n.3 (E.D. Mo. 1977) (bona fide merit program was not discriminatory, regardless of non-binding criteria, where it had no adverse impact on women).

[169] *See* Kouba v. Allstate, 691 F.2d 873, 876 (9th Cir. 1982) (employer may use factor that perpetuates historical sex discrimination where employer "use[s] the factor reasonably in light of" its stated business purpose); Patkus v. Sangamon-Cass, 769 F.2d 1251, 1261–62 (7th Cir. 1985) (employers are not required to forego legitimate organizational planning in order to avoid differentiating pay between former female employee and newly hired male employee). *Cf.* Loudon & Loudon, *supra* note 71, at 186 (equating factor other than sex with business necessity). *But see* Blumrosen, *supra* note 79, at 488–89 (demanding neutrality, without regard to necessity); Note, *"Market Value" as a Factor "Other Than Sex" in Sex-Based Wage Discrimination Claims*, 1985 U. ILL. L. REV. 1027, 1050–56 (1985) (employer must demonstrate neutrality of market). *But cf.* EEOC v. Green County, 618 F. Supp. 91, 94 (W.D. Wisc. 1985) (neither collective bargaining agreement nor state laws that allow perpetuation of pay disparity constitute factors other than sex).

[170] *See, e.g.*, Fallon v. Ill., 882 F.2d 1206, 1212 (7th Cir. 1989) (awarding higher pay to war-time veterans found "reasonable" where such veterans will have better rapport with those needing the department's services); Jacqueline R. Piva v. Xerox Corp., 654 F.2d 591, 599 (9th Cir. 1981) (awarding higher pay to men who had degrees in business or management); Jocelyn Mary Handy v. New Orleans Hilton Hotel, 532 F. Supp. 68 (E.D. La. 1982) (previous managerial experience enhanced job performance). *Cf.* James D. Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1985) (qualifications at time of hire do not constitute factors "other than sex" where "hospital failed to demonstrate the relevance of such factors as formal education to the duties the employees were called on to perform"); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 401 (9th Cir. 1985) (since education only "marginally related to the job" it could not justify pay differential); Schulte v. Wilson Indus., 547 F. Supp. 324, 341 (S.D. Tex. 1982) ("Moreover, to whatever small extent the college education factor may have been used, the Court finds that factor does not meet the test of job-relatedness set forth in [*Griggs*, 401 U.S. at 424.]"); EEOC v. Hay Assoc., 545 F. Supp. 1064, 1084 (E.D. Pa. 1982) (prior business experience was not related to present duties).

[171] *See* Wanda Pearce v. Wichita County, 590 F.2d 128, 134 (5th Cir. 1979) (increased revenue generated by male explained greater raises, but not gap between female's final

related, but they must relate to legitimate business objectives.[172] Thus, consistent with the substantive requirements of disparate impact doctrine under Title VII, standard interpretation of the factor other than sex defense requires the employer to set pay by a factor that is either neutral in effect or justified by business needs.[173]

Comparison of the substantive and procedural standards for the factor other than sex defense with the employer's obligations in a Title VII disparate impact case is complicated because of the debate surrounding disparate impact doctrine and, particularly, the business necessity response to disparate impact.[174] That debate focuses on two issues: how to define the substantive defense of "business necessity," and what burden of proof to place on the employer.

Recent Supreme Court decisions interpreting Title VII's business necessity response have opted for lighter burdens on the employer in each case. This standard requires only that the use

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salary and male's starting salary); Schultz v. Wheaton Glass, 421 F.2d 259, 267 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (company must demonstrate economic benefit to justify pay differential); EEOC v. Hay Assoc., 545 F. Supp. at 1084 ("Hay cannot use economic benefits to justify the payment of unequal salaries to Bay and Hyde for the performance of the same work unless it proves that Hyde's work actually was more profitable."). *Cf.* James D. Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 597 (3d Cir. 1973) (economic benefit of department justified disparity in pay for employees in department); Alexandra (Sasha) Futran v. Ring Radio Co., 501 F. Supp. 734, 739 (N.D. Ga. 1980) (extra revenue generated by higher-paid male cannot justify such wide pay differential).

[172] *See* EEOC v. J.C. Penney, 843 F.2d at 253 ("legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense"); Covington v. S. Ill. Univ., 816 F.2d at 322 (improving employee morale); Russell S. Ende v. Bd. of Regents of Regency Univs., 757 F.2d 176, 181–83 (7th Cir. 1985) (one-time salary adjustment for women to remedy past sex discrimination); Kouba v. Allstate, 691 F.2d at 877; Bernice P. Goodrich v. Int'l Bd. of Electrical Workers, 39 Empl. Prac. Dec. (CCH) ¶ 35,813 (D.D.C. 1985) (union membership qualification for higher paying position justified by expertise for extra job duties and incentive to other members; both found to be legitimate business judgments). *Cf.* Section II(B)(3), *supra* (non-selection decisions may be justified by legitimate business needs even if they are not job related); EEOC v. J.C. Penney, 843 F.2d at 254–56 (dissent) (challenging application of factor other than sex to head of household classification); Grove v. Frostburg Nat'l Bank, 549 F. Supp. at 934 (questioning whether "military service could be a proper reason for a wage differential").

[173] *See* Charles A. Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 582, 586–87 (1978). *But see* Janice R. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 686 (1984). *But cf.* Cox, *supra* note 38, at 66, 73, 79–84, 140 (while recognizing Equal Pay Act's scrutiny of market-based pay setting practices is consistent with disparate impact analysis, Professor Cox, nonetheless, argues that Equal Pay Act is only concerned with disparate treatment discrimination).

[174] *See* Perry, *supra* note 30.

of a disparately impacting criterion be *rationally* related to accomplishing a *reasonable* business purpose, and that the employer bear only a burden of production on this point.[175] This standard for business necessity places a lighter procedural and substantive burden on the employer than the Equal Pay Act's factor other than sex defense.[176] Consequently, the Bennett Amendment does not alter disparate impact doctrine under current law.

Previous Supreme Court decisions interpreting business necessity under Title VII placed higher burdens on the employer. Those decisions defined the business necessity standard to require that use of a disparately impacting criterion be *substantially* effective in achieving an *important* business purpose. They also placed the burden of persuasion on the employer.[177] Moreover, if the Civil

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[175] *See* Wards Cove Packing v. Atonio, 490 U.S. 642, 657–59 (1989) (dictum to discuss defense to prima facie case after holding that employees failed to establish prima facie case) (Court required employer to bear only burden of production on whether the challenged practice "serves, in a significant way, the legitimate employment goals of the employer"); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 997–98 (1988) (plurality) (dictum to discuss defense to disparate impact case after reversing lower court's decision to dismiss disparate impact case as a matter of law) (employer has burden of production to prove that criterion is "based on legitimate business reasons"); New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (Court excused employer's blanket application of no-methadone rule even though only a more specific application of the no-methadone rule, one that either excluded those successfully maintained for one year or limited the rule's application to safety-sensitive positions, was found rational to the district court, 399 F. Supp.1032, 1058 (S.D.N.Y. 1975); Dothard v. Rawlinson, 433 U.S. 321, 339–40 (1977) (intuition and arguments of counsel establishing some correlation between criterion and job was sufficient for business necessity) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., concurring); Walter E. Washington v. Alfred E. Davis, 426 U.S. 229, 236 n.6, 238 n.10, 247, 250–52 (1976) (dictum because Title VII inapplicable to case) (applying rational basis standard after articulating stricter standard); Albemarle Paper v. Moody, 422 U.S. 405, 449 (1975) (tests must be "fairly related to the job skills or work characteristics desired") (Blackmun, J., concurring).

[176] *Compare* Peter J. Brennan v. Owensboro-Davies County Hosp., 523 F.2d 1013, 1031 (6th Cir. 1975) (in an Equal Pay Act case the court stated that "the burden of proving that a factor other than sex is the basis for a wage differential is a heavy one."); Ray Marshall v. J.C. Penney Co., Inc., 464 F. Supp. 1166, 1194–95 (N.D. Ohio 1979); *supra* notes 149, 168–173 and accompanying text *with supra* note 175 and accompanying text.

[177] *See Wards Cove*, 490 U.S. at 668–71 (Stevens, J., joined by Brennan, Marshall, and Blackmun, J.J., dissenting) (employer's burdens on business necessity are "weighty"); *Watson*, 487 U.S. at 1000–01 (Blackmun, J., joined by Brennan and Marshall, J.J., concurring) (employer must persuade that criterion is "necessary to fulfill legitimate business requirement"); Connecticut v. Teal, 457 U.S. 440, 446–47, 451 (1982) (quoting *Griggs*); New York City Transit v. Beazer, 440 U.S. at 602 (business necessity requires proof that criterion "results in a higher quality labor force, that such a labor force is necessary") (White, J., joined by Brennan and Marshall, J.J., dissenting); Dothard v.

Rights Act of 1991 becomes law, this previously accepted standard will be reinstated.[178] On this standard, Title VII would require the employer to bear the same procedural burden as under the Equal Pay Act, but would require a more rigorous substantive burden.[179] In sex-based wage discrimination cases, the Bennett Amendment would shield the employer from this higher substantive burden. The Amendment would require substitution of the more lenient factor other than sex defense from the Equal Pay Act for the more burdensome interpretation of business necessity under disparate impact doctrine to avoid condemning pay practices which would be authorized by the Equal Pay Act.

The Supreme Court recognized that the Bennett Amendment's incorporation of the factor other than sex defense into Title VII might require alteration of disparate impact doctrine consistent with that described above. Indeed, when the Supreme Court decided *Gunther*, the standard for business necessity under disparate impact doctrine was the more burdensome standard set under prior Supreme Court precedent. Recognizing that the factor other than sex defense from the Equal Pay Act was more lenient

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Rawlinson, 433 U.S. at 331 n.14 (business necessity requires employer to prove the criteria are "necessary to safe and efficient job performance"); Washington v. Davis, 426 U.S. at 247 (employer bears burden of persuasion); Albemarle Paper v. Moody, 422 U.S. at 425, 431 (relying on the EEOC's Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1970), *superseded by* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1978), "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'"); Griggs v. Duke Power, 401 U.S. 424, 431–32 (1971) (to establish business necessity, company must show that its criteria "had a manifest relationship to the employment in question" or bore "a demonstrable relationship to successful performance on the jobs for which they were used"); United States v. S.C., 445 F. Supp. 1094, 1112 (D.S.C. 1977) (three-judge district court decision), *aff'd mem.*, United States v. S.C., 434 U.S. 1026 (1978) (employer bears burden of persuasion).

[178] *See* The Civil Rights Act of 1991, H.R. 1, *supra* note 52, at §§ 3–4 (an unlawful employment practice based on disparate impact is established when plaintif "demonstrates that an employment practice results in a disparate impact on the basis of . . . sex, and [employer] fails to demonstrate that such practice is required by business necessity"; "'demonstrates' means meets the burdens of production and persuasion" and "'required by business necessity' means—(A) in the case of employment practices involving selection (such as hiring . . .), the practice . . . must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice . . . must bear a significant relationship to a significant business objective of the employer.").

[179] *Compare supra* notes 149, 168–173 and accompanying text *with supra* notes 177–178 and accompanying text.

than the then-standard business necessity defense, the Court suggested that the more lenient standards of the factor other than sex defense would govern.[180]

Several lower courts have misinterpreted *Gunther* regarding the effect of incorporating the factor other than sex defense as required by the Bennett Amendment. For example, the Seventh Circuit has intimated that *Gunther* interpreted the Bennett Amendment to authorize the use of disparately impacting practices to set pay.[181] This interpretation assumes that all disparately impacting practices constitute factors other than sex. Standard interpretation of the Equal Pay Act's fourth affirmative defense belies such an assumption.[182] Moreover, the Supreme Court in *Gunther* did not purport to give its own interpretation to the factor other than sex defense. Rather, while explicitly refusing to decide how to incorporate the factor other than sex defense into Title VII litigation,[183] it reiterated the legislative history from the

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[180] The Court's discussion of the fourth defense stated in full:

> More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 . . . (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. HR Rep No. 309, 88th Cong, 1st Sess, 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal Exponent of the Act).

County of Wash. v. Gunther, 452 U.S. at 170–71 (footnote deleted). *See* EEOC v. Sears, 628 F. Supp. 1264, 1329–30 & n.87 (N.D. Ill. 1986) (rejecting *Gunther* as requiring Equal Pay Act analysis for Title VII cases: "If this passage implies anything at all, it implies only that incorporation of the fourth affirmative defense may alter the structure of Title VII disparate impact cases, because the 'any other factor other than sex' defense is different from and broader than the 'business necessity' defense established in *Griggs*.") *But see* Loudon & Loudon, *supra* note 71, at 186.

[181] *See* Fallon v. Ill., 882 F.2d 1206, 1211 n.4, 1215 (7th Cir. 1989); EEOC v. Madison School Dist., 818 F.2d 577, 587 (7th Cir. 1987) (dictum); Colby v. J.C. Penney, 811 F.2d 1119, 1127 (7th Cir. 1987) (dictum); American Nurses' Ass'n v. Ill., 783 F.2d 716, 723 (7th Cir. 1986) (dictum).

[182] *See supra* notes 168–173.

[183] *See Gunther*, 452 U.S. at 166 n.8, 171, 181.

Equal Pay Act merely to illustrate that the fourth affirmative defense was intended to excuse "'a bona fide job evaluation system,' so long as it does not discriminate on the basis of sex" regardless of whether such a system would also be excused under the then-accepted business necessity defense to disparate impact discrimination under Title VII.[184]

In addition, while relying on *Gunther*, several lower courts have incorporated the Equal Pay Act defenses into Title VII cases governed by the Bennett Amendment regardless of whether employers' obligations under Title VII were more burdensome than their obligations under the Equal Pay Act.[185] Although the *Gunther* Court interpreted the Bennett Amendment to incorporate into Title VII the more lenient factor other than sex defense,[186] it did not address the question whether the Equal Pay Act defenses would alter Title VII cases in any other circumstances. Indeed, its rationale for giving the Bennett Amendment limited effect[187] counsels against incorporating the Equal Pay Act defenses except where necessary to avoid nullifying the Act, such as where the Equal Pay Act authorizes pay practices otherwise forbidden by Title VII.

Interpreting the Bennett Amendment to require incorporation of the Equal Pay Act's defenses into Title VII only when they are interpreted to be more lenient than the usual Title VII defenses is also consistent with the substantive foundations of the various causes of action. The theoretical foundation for both the Title VII disparate treatment case[188] and the Title VII disparate

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[184] *See supra* note 180.

[185] *See* Kouba v. Allstate, 691 F.2d 873, 875 (9th Cir. 1982); Marilyn Denny v. Westfield State College, 669 F. Supp. 1146, 1155–56 (D. Mass. 1987); Schulte v. Wilson Indus., 547 F. Supp. 324, 339–40 (S.D. Tex. 1982).

[186] *See supra* note 180.

[187] *See supra* Section II(C)(1).

[188] *See* Fallon v. Ill., 882 F.2d 1206, 1213 & n.5 (7th Cir. 1989) (prima facie case under Equal Pay Act is one of strict liability, without intent, whereas a prima facie case under Title VII's disparate treatment theory requires showing of intent); Peters v. Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987) ("Unlike the showing required under Title VII's disparate treatment theory, proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act"); Strecker v. Grand Forks Social Serv. Bd., 640 F.2d 96, 99 n.1 (8th Cir. 1980) (although Equal Pay Act creates strict liability, Title VII disparate treatment case requires intent); Grimes v. D.C., 630 F. Supp. 1065, 1069 (D.D.C. 1986), *vac. on other grounds*, 836 F.2d 647, 652 (D.C. Cir. 1988) (Unlike an Equal Pay Act claim, "'[p]roof of discriminatory motive is *critical*'" for Title VII disparate treatment claim).

impact case defined by current law[189] focus on pretextual discrimination, albeit by distinct means. By contrast, the theoretical foundation for both the Title VII disparate impact case proposed by Congress[190] and the Equal Pay Act case[191] focus strictly on the effects of and justifications for employers' practices. Incorporation of the defenses from the effects-focused theory of the Equal Pay Act into the pretext-focused theories of either the disparate treatment doctrine or the currently-defined disparate impact doctrine appears illogical. In contrast, incorporation of the Equal Pay Act defenses into the more compatible disparate impact case proposed by Congress, which also focuses on excusing the effects of employers' practices, would be appropriate.

The foregoing analysis has shown that, under current law, the Bennett Amendment does not affect sex-based wage discrimination cases under Title VII because employers' obligations under Title VII are more lenient than their obligations under the Equal Pay Act's affirmative defenses. Moreover, even if the more stringent business necessity standards were restored through legislation like the Civil Rights Act of 1991, the Bennett Amendment would only require that disparate impact challenges under Title VII be governed by the more lenient substantive standard of the factor other than sex defense.

D. Applicability of Disparate Impact to Challenge Market-Based Pay

One final impediment to pay equity claims is the judiciary's refusal to allow disparate impact challenge where the employer sets pay according to the market.[192] This argument singles out

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[189] *See* Perry, *supra* note 39.

[190] *See* Perry, *supra* note 39.

[191] *See supra* note 188. *But see* Cox, *supra* note 38, at 66–73 (while recognizing that limited scope of Equal Pay Act—scrutinizing only pay disparities in equal work—allows some disparate treatment discrimination to go unremedied, Professor Cox, nonetheless, argues that Equal Pay Act incorporates disparate treatment discrimination).

[192] *See, e.g.*, UAW v. Mich., 886 F.2d 766, 770 (6th Cir. 1989) ("Without discriminatory motive, defendant's reliance on the market to guide its classification and compensation system is not actionable under Title VII."); American Nurses' Ass'n v. Ill., 783 F.2d 716, 719–20 (7th Cir. 1980); AFSCME v. Wash., 770 F.2d 1401, 1405 (9th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); Lemons v. Denver, 620 F.2d 228, 229 (10th Cir. 1980); Christensen v. Iowa, 563 F.2d 353,

from among sex-based wage discrimination cases those challenging the market as the facially neutral factor causing disparate impact.[193] The widely varying rationales used to support singular treatment for this subset of pay equity claims are inconsistent with the mandates of Title VII. This section argues that even an employer's use of the market must be subjected to meaningful judicial scrutiny.

The Ninth Circuit in *American Federation of State County and Municipal Employees (AFSCME) v. State of Washington*[194] reversed the only court to apply disparate impact analysis to a pay equity case after identifying the facially neutral practice causing the disparate impact on women to be consideration of the market value of the job. It rejected disparate impact analysis in that context for two reasons. First, it held that the market "does not constitute a single practice that suffices to support a claim under disparate impact theory."[195] As more fully described in Section II(A), however, that interpretation is faulty.[196] Even if disparate impact doctrine requires that the cause of the impact be isolated to one single employment practice, an employer's decision to set pay according to the market value of a job constitutes a single employment practice.

Second, the *AFSCME* Court found it inappropriate to subject an employer's use of the market to disparate impact analysis because the market involves "the assessment of a number of complex factors not easily ascertainable."[197] Indeed, the Ninth Circuit previously concluded that the market was not a "clearly delineated neutral policy" and that disparate impact analysis,

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356 (8th Cir. 1977). *Cf.* Brown, Baumann, & Melnick, *supra* note 79, at 145–56, 168 (explaining trend to reject disparate impact theory as based on "the outmoded rhetoric of laissez-faire economics"); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 765–68 (1986) (criticizing trend to exempt market from disparate impact analysis).

[193] Courts have distinguished challenges to practices affecting fringe benefits. *See* Colby v. J.C. Penny, 811 F.2d 1119, 1126 (7th Cir. 1987) (distinguishing head of household limitation on eligibility for fringe benefits across distinct jobs from use of market to set pay across distinct jobs); *Spaulding*, 740 F.2d at 707–08 (distinguishing discretionary fringe benefit policy from market). *Cf.* American Nurses' Ass'n. v. Ill., 783 F.2d at 722–23 (failing to recognize use of market to set pay as analogous to using high school diploma to hire).

[194] 770 F.2d at 1405–06.

[195] *Id.* at 1405–06.

[196] *See supra* notes 72–77 and accompanying text.

[197] AFSCME v. Wash., 770 F.2d at 1406.

when used to challenge the market, "becomes so vague as to be inapplicable."[198]

This second rationale is also not persuasive. When the Supreme Court had to decide whether to apply disparate impact analysis to subjective criteria, which could certainly be characterized as not "clearly delineated," the Court unanimously held that disparate impact doctrine was applicable.[199] Similarly, disparate impact doctrine should be applicable to an employer's decision to set pay according to the market. Indeed, an employer's use of the market, like its use of subjective criteria, are precisely the types of practices which shield the bias and preferences Title VII was enacted to eliminate, or in the context of disparate impact challenges, to justify as necessary to the business.

Courts have also rejected the application of disparate impact doctrine to challenge an employer's use of the market by maintaining that employers were merely "price-takers" who "deal with the market as a given."[200] By this reasoning, an employer's use of the market would be exempted from disparate impact challenge both because the employer was not "culpable" for the discriminatory effects of the market[201] and because the employer was economically bound to use market rates.

The first point, whether the employer could be judged culpable, misconstrues disparate impact analysis. An employer's decision to use any disparately impacting factor to set wages in its workplace constitutes a prima facie case of disparate impact discrimination, regardless of the underlying cause or causes for that impact.[202] Use of the market as a pay-setting factor is precisely the type of policy disparate impact doctrine was designed to examine because it tends to perpetuate the discrimination and depressed wage levels in the market.[203] Although Title VII does

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[198] *Spaulding*, 740 F.2d at 708.

[199] *See Watson*, 487 U.S. at 989–90, 998–99, 1009–10 (disparate impact doctrine allows challenge to bank's practice of leaving promotion decisions to the unchecked discretion of lower level supervisors). The Court was unanimous regarding this point, despite its theoretical disputes over disparate impact doctrine.

[200] *Spaulding*, 740 F.2d at 708. *See also* Elaine Beard v. Whitley County REMC, 656 F. Supp. 1461, 1469–70 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988).

[201] *Cf.* AFSCME v. Wash., 770 F.2d at 1406 (rejecting disparate treatment claim in part because "State did not create the market disparity").

[202] *See* Chamallas, *supra* note 192, at 768.

[203] *See* Covington v. S. Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987) (distinguishing use of prior salary set by another employer and University's internal salary retention policy);

not make an employer responsible for the discrimination of the market,[204] it does make an employer responsible for using such a discriminatory factor to set pay at its business.[205]

The second point, that the employer is economically bound to pay the market wages, is similarly unpersuasive. Where the employer chooses to deviate for certain male-dominated jobs from its usual pay system based on job worth,[206] the employer has exercised discretion to use the market. In addition, some employers are "not so much prisoner[s] of the market that [they] cannot alter [their] wages."[207] In those instances, the choice to pay according to the market cannot be distinguished from other employer decisions requiring business justification under disparate impact theory. Of course, where the employer can support its decision to pay according to the market by business necessity, disparate impact doctrine excuses the disparate impact resulting from that decision.

Still other courts make several social policy arguments to support exempting use of the market from judicial scrutiny under disparate impact doctrine. In their view, the market is a superior mechanism for determining wages because it is more value neutral than other pay-setting practices.[208] They also believe that the discriminatory effects of the market are self-correcting and there-

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Lemons v. Denver, 620 F.2d 228, 229 (10th Cir. 1980) (challenging employer's use of the market to set pay because it brings sex discrimination from the market into employer's place of business).

[204] *See* Briggs v. City of Madison, 536 F. Supp. 435, 445, 447 (W.D. Wisc. 1982).

[205] *See* Stone, *supra* note 40, at 106.

The theoretical debate surrounding disparate impact doctrine does not alter employer's responsibility to justify any disparately impacting criterion. Under one theory, disparate impact doctrine demands scrutiny to determine whether the employer adopted the discriminatory practice pretextually; under the second, the doctrine requires justification merely because of its discriminatory effect. *See* Perry, *supra* note 39.

[206] *See* Christensen v. Iowa, 563 F.2d 353, 354–55 (8th Cir. 1977); Loudon & Loudon, *supra* note 71, at 186.

[207] American Nurses' Ass'n v. Ill., 783 F.2d at 722 (referring to public employers like the State of Washington in AFSCME v. Wash.); Weiler, *supra* note 37, at 1761 ("The inescapable fact is that, far from being simply a 'price taker' in the labor market, most employers are to some extent 'price setters.'"); WOMEN, WORK AND WAGES, *supra* note 2, at 45–47; Loudon & Loudon, *supra* note 71, at 186.

[208] *Cf.* Albemarle Paper v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring) (preferring employer's use of objective tests to select employees "because of its unique capacity to measure all applicants objectively on a standardized basis"). *But cf.* Weiler, *supra* note 37, at 1761 ("rarely will a single wage rate be dictated by the operation of an impersonal market. Rather, the outcome inevitably rests on someone's all-too-human judgment.")

fore either unimportant or transitory. Finally, some have questioned whether equalizing pay between men's work and women's work would actually benefit women.[209]

Congress, however, answered the first argument when it rejected the notion that the market is always the preferable way to set wages by enacting Title VII. Congress made the policy decision to intervene and, absent business necessity, to correct the discriminatory effects of the market.[210] The decision to intervene was appropriate because the market is not value neutral. Rather, an employer's demand for workers necessarily incorporates notions of value.[211] To the extent employers value female workers less than male workers, either because of their tastes for discrimination[212] or because of their perceptions regarding productivity of the two groups,[213] use of the market manifests precisely the type of practice Title VII was designed to regulate.

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[209] *See* Colby v. J.C. Penney, 811 F.2d 1119, 1126 (7th Cir. 1987) (supporting decisions rejecting disparate impact analysis for pay equity cases because remedial order that would raise wages for women's work and lower wages for men's work "would both hurt women who held 'men's jobs' and encourage more men to compete for jobs at present held by women," while allowing disparate impact challenge for head of household rule even though it would result in "redistribution of wealth among women as a group; and probably the better-off women will do the best—possibly . . . at the expense of the others"); American Nurses' Ass'n v. Ill., 783 F.2d at 719–20; Nelson, Opton & Wilson, *supra* note 37, at 294; R. Posner, *supra* note 38, at 314.

Some have also questioned whether the gains for women would be at the expense of other protected groups. *See* Nelson, Opton & Wilson, *supra* note 37, at 236 n.15. *But see* Scales-Trent, *supra* note 9, at 56–57; MARK ALDRICH & ROBERT BUCHELE, THE ECONOMICS OF COMPARABLE WORTH 133–53 (1986).

[210] *See* Brown, Baumann & Melnick, *supra* note 79, at 140–42, 169; Blumrosen, *supra* note 79, at 471–72; Judith Anne Pauley, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" In Title VII Disparate Impact Litigation*, 86 W. VA. L. REV. 165, 186–87 (1983). That intervention also affected the market's allocation of labor.

[211] *See* Spaulding v. Univ. of Wash., 740 F.2d 686, 708 (9th Cir. 1984) ("the market may embody social judgments as to the worth of some jobs"); Stone, *supra* note 40, at 110–11 (people are not fungible).

[212] *See* Blumrosen, *supra* note 79, at 446 - 47; WOMEN, WORK AND WAGES, *supra* note 2, at 63–64; GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

[213] *See* Willborn, *supra* note 58, at 818–19 ("The statistical theory of discrimination is based on an assumption of market imperfection. This model assumes that employers lack sufficient information to evaluate at a reasonably low cost the productivity potentials of workers. Employers, therefore, substitute readily available proxies such as race, sex, education, or experience for precise, but costly, productivity information"); Blumrosen, *supra* note 79, at 447–54; WOMEN, WORK AND WAGES, *supra* note 2, 44–68; Edmund Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972) (cost of gaining information about individuals is sufficiently high that employers select based on stereotypes); Kenneth J. Arrow, *The Theory of Discrimination* in DISCRIMINATION IN LABOR MARKETS 3–42 (Orley Ashenfelter & Albert Rees eds. 1973); Kenneth J.

In addition, many commentators have identified imperfections in the market for labor that cause it to operate in a manner inconsistent with theoretical predictions of self-correction.[214] Indeed, the persistence of discrimination in wages, as well as in selection cases,[215] contradicts classic theories of the market.[216] Finally, as to those who question the wisdom of pay equity, it is for Congress, not the courts, to weigh the costs and benefits of responding to social problems, such as sex-based wage discrimination. It is inappropriate for the courts to second-guess that judgment.[217]

Some courts recognize that use of the market fits within the type of practice constrained by Title VII, but nevertheless remain hostile to regulation of the market through Title VII. They reason that Congress did not intend to "abrogate the laws of supply and demand or other economic principles that determine wage rates."[218]

This view, that the market is of such paramount importance that its sex-discriminatory effects are either impossible or inappropriate to correct, has been neither explicitly nor implicitly

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Arrow, *Models of Job Discrimination, and Some Models of Race in the Labor Market* in RACIAL DISCRIMINATION IN ECONOMIC LIFE (Anthony Pascal ed. 1972).

[214] *See* American Nurses' Ass'n v. Ill., 783 F.2d at 720; Weiler, *supra* note 37, at 1759–61; Blumrosen, *supra* note 79, at 448–54; WOMEN, WORK AND WAGES, *supra* note 2, at 44–68; *supra* notes 212–213.

[215] Discrimination in selection cases affects the supply and demand for labor.

[216] *See* American Nurses' Ass'n v. Ill., 783 F.2d at 719; R. Posner, *supra* note 38, at 616; Blumrosen, *supra* note 79, at 445–46; WOMEN, WORK AND WAGES, *supra* note 2, at 44–45; LLOYD GEORGE REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 159 (7th ed. 1978) (only least discriminatory firms would survive in competitive market); LESTER C. THUROW, GENERATING INEQUALITY 160–62 (1975) (discriminatory firm would not survive in competitive market); Arrow, *Models of Job Discrimination*, *supra* note 213, at 83, 90 (competitive forces would allow only least discriminatory firms to survive).

[217] *See* Connecticut v. Teal, 457 U.S. 440, 455–56 (1982) (upholding disparate impact challenge to examination that impacted African-Americans even where it ultimately would discourage employer's affirmative efforts that favored African-Americans); Colby v. J.C. Penney, 811 F.2d 1119, 1128 (upholding disparate impact challenge to head of household rule despite the court's assessment that such an action would benefit more prosperous women at the expense of other women). *Cf.* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (Title VII prohibits use of sex in determining pension rates regardless of its accuracy in measuring longevity between groups).

[218] Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977). *See Colby*, 811 F.2d at 1126 (Posner) (rejecting disparate impact challenge to an employer's use of the market because it would "seriously impair the efficiency of the labor markets" and, in the opinion of the court, would not benefit women in the long run); Lemons v. Denver, 620 F.2d 228, 229 (10th Cir. 1980); Walter Fogel, *International Sex-Based Pay Discrimination: Can It Be Proven?*, 37 LAB. L.J. 291, 298 (1986) (looking for Congress to single out market for prohibition); Nelson, Opton & Wilson, *supra* note 37, at 286–87.

adopted by Congress. To the contrary, Congress did not exempt the market from disparate impact analysis in Title VII. When Congress has intended to exempt specific practices from disparate impact analysis, it has done so expressly.[219] Absent such an exemption, an employer is not permitted to use the market to set pay if it results in a disparate impact upon a protected class unless that use is justified by a business necessity.

Finally, other courts exempt the market from disparate impact analysis out of concern that if they were to find the use of the market discriminatory, then they would have to determine the appropriate pay for jobs in an employer's workplace.[220] Citing institutional competence concerns,[221] courts have declined, therefore, to even begin the disparate impact analysis.

Concerns with government regulation of business decisions, however, are not unique to compensation cases. Indeed, courts are not any more suited to make hiring decisions when they determine that the employer's qualifications for employment are discriminatory under disparate impact doctrine.[222] Disparate impact doctrine, however, does not require that courts dictate either who employers may hire or how much they may pay. It simply dictates that employers may not discriminate in hiring or compensation because of an individual's protected status. Courts are merely called upon to enjoin further use of a disparately impacting criterion. It is the *employer* who must make future employment and compensation decisions based on other non-discriminatory criteria.[223] Thus, in both selection and compensation cases, the

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[219] *See* Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h) (quoted in pertinent part in note 90, *supra*); Teamsters v. United States, 431 U.S. 324, 353 (1977) (exempting seniority from usual disparate impact challenge).

[220] *See Colby*, 811 F.2d at 1126 (Posner); Cox, *supra* note 38, at 74–75, 95–100, 114. *Cf.* Brown, Baumann, & Melnick, *supra* note 79, at 151, 155–56.

[221] This concern that courts would be required to evaluate the worth of jobs caused many to reject claims imprecisely labelled as comparable worth claims, *see supra* notes 10–11. *See, e.g.*, County of Wash. v. Gunther, 452 U.S. 161, 166, 180–81 (1981) (distinguishing comparable worth case); *Spaulding*, 740 F.2d at 706–07; Wilkins v. Univ. of Houston, 654 F.2d 388, 405 n.26 (5th Cir. 1981) (distinguishing comparable worth case); AFSCME v. County of Nassau, 609 F. Supp. 695, 708 (E.D.N.Y. 1985); Power v. Barry County, Mich., 539 F. Supp. 721, 726 (W.D. Mich. 1982); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 284 (N.D. Tex. 1980).

[222] *Cf.* Cox, *supra* note 61, at 778, 797 (equating one strand of disparate impact theory with governmental regulation of hiring).

[223] *Cf.* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 710–11 & nn.17–18 (1978) (decision to forbid use of sex-segregated actuarial tables would require examination and application of neutral criteria such as drinking, smoking, or eating habits, or marriage to determine longevity); Blumrosen, *supra* note 79, at 492–96 (shift risk to employer).

employer would have to make future decisions based on consequentially neutral or business-related practices.[224]

To date, courts have uniformly exempted the market from judicial scrutiny in cases challenging pay disparities between unequal jobs. The foregoing analysis reveals, however, that the judiciary's hostility even to scrutinize an employer's market-based pay-setting practices is inconsistent with the mandates of Title VII. Consequently, when an employer uses a facially neutral criterion, including the market, any resulting pay disparities between women's work and men's work must be subjected to judicial scrutiny and justified by business necessity.[225]

Although no courts have required an employer to justify its use of the market under the standards of business necessity, examination of employer's justification obligations is appropriate to avoid allowing such deferential review as to render judicial scrutiny tantamount to exemption from scrutiny. Under current standards for business necessity,[226] employers must only bear the burden of production that their disparately impacting practices are rationally related to accomplishing a reasonable business purpose.[227] Query whether that standard would allow an employer to take advantage of the sex-discriminatory market rate of pay for women's work because it is cheaper to undercompensate women.[228] By that reasoning, an employer might equally take advantage of the market rate of pay when it resulted in lower wages for jobs held predominantly by people of color or other ethnic or religious minorities.[229] This light standard of business necessity would immunize employers' use of the market to set pay for discriminatorily undervalued work, just as it would immunize most disparately impacting practices. Concern that such a lenient standard for business necessity effectively undermines disparate impact analysis has prompted legislative action to res-

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[224] *See infra* notes 226–238.

[225] *See* Stone, *supra* note 40, at 108.

[226] It is at the business necessity stage of disparate impact analysis that the debate in disparate impact doctrine becomes most critical. *See* Perry, *supra* note 30; Perry, *supra* note 39.

[227] *See supra* note 175.

[228] The employer would lose this justification when adopting the market rate of pay for men's work, which tends to *raise* the wages for male-dominated jobs.

[229] *But cf.* Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224, 284 n.76 (N.D. Tex. 1980) ("Of course, the employer cannot rely on the market to pay members of one race less than another.")

urrect the previous, more stringent standard of business necessity.[230]

Aside from the more general concern about such a lenient standard for business necessity, it would be inappropriate to allow employers to take advantage of the sex discrimination in the market, regardless of the fact that it is in the employer's business/economic interest to use the market in this way. Such an interpretation of the factor other than sex defense was uniformly rejected under the Equal Pay Act:

> The differential . . . reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[231]

Perpetuation of discriminatory pay disparities under the guise of the market also became illegal once Congress enacted Title VII's prohibitions against sex discrimination into law.[232]

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[230] *See* Perry, *supra* note 30; Perry, *supra* note 39.

[231] Corning Glass v. Brennan, 417 U.S. 188, 205 (1974). *See, e.g.*, Sheila Ann Glenn v. General Motors Corp., 871 F.2d 1567, 1570 (11th Cir. 1988) (prior salary); Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 726 (5th Cir. 1970) ("Clearly the fact that the employer's bargaining power is greater with respect to women than with respect to men is not the kind of factor Congress had in mind. Thus it will not do for the hospital to press the point that it paid orderlies more because it could not get them for less."); Schulte v. Wilson Indus., 547 F. Supp. 324, 340 (S.D. Tex. 1982) ("Utilization of a so-called 'market rate' where the market rate reflects discrimination against women is an insufficient justification of wage disparities under the Equal Pay Act."); James D. Hodgson v. Maison Miramon, 344 F. Supp. 843, 849 (E.D. La. 1972) (rejecting defense "simply that there was an abundance of female labor available to work at the minimum wage, but that it was almost impossible to find men to work at the minimum wage"); Carole Supowitz Katz, *Wage Discrimination Claims: Employee's Prior Salary Fails the "Factor Other Than Sex" Test*, 15 COL. HUM. RTS. L. REV. 207, 215–19 (1984); Sullivan, *supra* note 173, at 586–87, 598–600.

[232] *See* Note, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CALIF. L. REV. 730, 755 (1983) [hereinafter Calif. Note]; Pauley, *supra* note 210, at 184–86; Winn Newman & Jeanne M. Vonhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of Gunther*, 1981 ILL. L. REV 269, 314 (1981); Willborn, *supra* note 58, at 56–57 (competitive disadvantage resulting from compliance with antidiscrimination laws is not excused); Stone, *supra* note 40, at 111–12; Vuyanich, 505 F. Supp. at 284 n.76 ("Of course, the employer cannot rely on the market to pay members of one race less than another.").

Some authors are reluctant to scrutinize employers' use of the market in the context of pay disparities between unequal jobs. *See* Loudon & Loudon, *supra* note 71, at 185; Note, *Use of the Market Wage Rate in Employment Discrimination Suits: Equal Work*

Consequently, whether employers must defend their use of the disparately impacting market based on the lenient standard of business necessity under current law, or based on the "factor other than sex" defense should the Civil Rights Act of 1991 become law,[233] the employer must establish that its use of the market effects a business purpose independent of taking advantage of discriminatorily depressed wages for women.[234] Employers have met this burden in several cases where market rates, despite their disparate impact, were allowed as necessary to employers' recruitment efforts.[235] Employers' justifications may not always pass judicial scrutiny, however. In *Kouba v. Allstate Insurance Co.*,[236] Allstate argued that its disparately impacting practice of using prior salary to set pay during an employee's initial training period was justified to create a sales-incentive program and to predict a new employee's sales performance, rather than to take advantage of depressed prior salaries of women. The court expressed skepticism,[237] however, regarding the reasonableness of Allstate's use of prior salary for these proper purposes.[238]

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as the Key to Application, 61 NOTRE DAME L. REV. 513, 519–24 (1986). That distinction is not well founded. First, nothing in Title VII or the Bennett Amendment distinguishes pay disparities between equal and unequal jobs. Second, bona fide evaluation of job worth more appropriately reflects distinctions in job content, without also incorporating discriminatory biases in the market. Finally, even though an individual employer may not have contributed to the sex-discriminatory bias of the market, it becomes responsible for that discrimination, reflected in pay disparities between men's work and women's work, when it adopts the market as one of its pay-setting practices, *see supra* notes 202–205, without legitimate justification, *see infra* notes 234–238 and accompanying text.

[233] *See* Section II(C)(2), *supra*.

[234] *See* Cleatrice B. Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988); Glenn v. Gen. Motors, 841 F.2d at 1571 & n.9; Chamallas, *supra* note 192, at 768 ("Refusing to classify an employer's market reliance as a policy susceptible to a disparate impact challenge only evades the more important question whether market reliance is justified in the circumstances of individual cases"); Loudon & Loudon, *supra* note 71, at 185–87 (analyzing when market might be legitimate defense where jobs unequal); Katz, *supra* note 231, at 219–25 (distinguishing between legitimate criteria and illegitimate use of prior salary to satisfy factor other than sex defense under Equal Pay Act).

[235] *See* William E. Brock v. Ga. S.W. College, 765 F.2d 1026, 1037 (11th Cir. 1985); Christine Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1137 (5th Cir. 1983); Kouba v. Allstate, 691 F.2d 873, 877 n.7 (9th Cir. 1982); Arlene Horner v. Mary Inst., 613 F.2d 706, 714 (8th Cir. 1980); Brennan v. Victoria Bank, 493 F.2d 896, 902 (5th Cir. 1974); Futran v. Ring Radio Co., 501 F. Supp. 734, 739 (N.D. Ga. 1980); Calif. Note, *supra* note 232, at 755–56; Loudon & Loudon, *supra* note 71, at 187.

[236] 691 F.2d at 877–78.

[237] The Ninth Circuit remanded the case.

[238] With regard to using prior salary as a minimum to motivate sales, the court questioned its use during the training period when employees are not making sales, the

Thus, Title VII does not require per se rejection of an employer's use of the market to set pay. Rather, where an employer can demonstrate that it used the market reasonably to further a business need, independent of discrimination, Title VII would allow the employer to set pay based on the market.

In sum, none of the rationales for immunizing the market from disparate impact analysis is acceptable. Consequently, pay disparities between women's work and men's work, even when based on the market, must be subjected to judicial scrutiny and justified by business need.

III. CONCLUSION

When courts judge pay equity claims, they tend to deviate from standard Title VII analysis. Indeed, they tend to become result-oriented, ruling that the claim must fail.[239] This unique and second class treatment is not warranted. As demonstrated in this Article, applying standard Title VII disparate impact doctrine to any claim of sex-based wage discrimination should result in analysis which is indistinguishable from that done in other disparate impact claims. The only legal impediment which might affect the case, the requirement that the employee single out the specific employer practice causing the disparate impact, is an impediment to any disparate impact case.[240] The other purported barriers, that disparate impact is inapplicable to non-selection claims, to cases governed by the Bennett Amendment,[241] or to challenge an employer's use of the market to set pay, are legally unfounded.

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regularity of adjustments to that minimum, and the frequency with which Allstate paid by commission or by the minimum. With regard to using prior salary to judge ability, the court questioned whether Allstate also used other predictors of ability, substituted on-the-job predictors when available, and evaluated the similarity between prior employment and the job at issue. *Id.* at 878.

[239] *See* Brown, Baumann, & Melnick, *supra* note 79.

[240] Another practical impediment to pay equity cases, current interpretation of business necessity, *see supra* notes 33, 226–230, has not been cited by the pay equity courts and would be applicable to all disparate impact cases.

[241] In the event legislation like the Civil Rights Act of 1991 becomes law, the Bennett Amendment impediment would become applicable only to the limited extent that the employer's response to sex-based wage discrimination claims raising a disparate impact challenge would be governed by the more lenient substantive standard of the factor other than sex defense from the Equal Pay Act, rather than the proposed standard for business necessity. Incorporation of the factor other than sex standard, however, would result in more stringent scrutiny of employers' disparately impacting practices than required under current law. *See supra* notes 175–176.