The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay

Deborah L. Brake

University of Pittsburgh School of Law, dlb21@pitt.edu

Follow this and additional works at: https://scholarship.law.pitt.edu/fac_articles

Part of the Civil Rights and Discrimination Commons, Family, Life Course, and Society Commons, Gender and Sexuality Commons, Health Law and Policy Commons, Inequality and Stratification Commons, Labor and Employment Law Commons, Law and Economics Commons, Law and Gender Commons, Law and Society Commons, Sexuality and the Law Commons, Social and Cultural Anthropology Commons, and the Workers' Compensation Law Commons

Recommended Citation


Available at: https://scholarship.law.pitt.edu/fac_articles/363

This Article is brought to you for free and open access by the Faculty Publications at Scholarship@PITT LAW. It has been accepted for inclusion in Articles by an authorized administrator of Scholarship@PITT LAW. For more information, please contact leers@pitt.edu, shephard@pitt.edu.
The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay

DEBORAH L. BRAKE*

TABLE OF CONTENTS

INTRODUCTION .................................................................................................................. 560

   A. TRACING THE IMPACT AND TREATMENT DIVIDE AND THEIR SEPARATE PROOF FRAMEWORKS ............................................................ 564
   B. THE MEANING OF DISCRIMINATORY INTENT: WHAT COURTS HAVE IN MIND .................................................................................... 569
   C. THE ROLE OF COMPARATORS IN PROVING DISPARATE TREATMENT ........ 574
   D. THE DASHED HOPES FOR A STREAMLINED FRAMEWORK .................. 575

II. A BREAK-OUT HYBRID: THE CURIOUS CASE OF YOUNG V. UPS .......... 579
   A. PRE-YOUNG PREGNANCY ACCOMMODATION CASES: THE ELUSIVE SEARCH FOR COMPARATORS AND DISCRIMINATORY INTENT ........ 580
   B. ENTER YOUNG V. UPS AND A SHIFT IN THE PARADIGM ..................... 581
   C. YOUNG’S FELLOW TRAVELERS: SOUNDING THE MINOR CHORDS OF DISPARATE TREATMENT LAW ......................................................... 586
   D. THE IMPLICATIONS OF YOUNG FOR EXPANDING THE BOUNDARIES OF DISCRIMINATORY INTENT IN THE PDA ............................... 590
   E. DEFENDING THE SHIFTED BOUNDARIES OF DISPARATE TREATMENT IN YOUNG ............................................................................. 593

* Professor of Law, John E. Murray Faculty Scholar, and 2016–2017 Buchanan, Ingersoll & Rooney Faculty Scholar, University of Pittsburgh School of Law. © 2017, Deborah L. Brake. This Article benefitted from comments received at a Faculty Workshop at the University of Minnesota Law School in November of 2015. I am also grateful for comments from friends and colleagues Joanna Grossman, Jules Lobel, and Lu-in Wang and for the excellent research assistance of Valerie Howell.
III. LESSONS FROM YOUNG: A PATH FORWARD FOR EQUAL PAY

CLAIMS ......................................................... 601

A. TITLE VII AND THE EQUAL PAY ACT: OVERLAPPING COVERAGE OF
SEX-BASED PAY DISCRIMINATION .......................... 601

B. THE LIMITS OF THE EQUAL PAY CLAIM: TIGHTLY CIRCUMSCRIBED
COMPARATORS AND OPEN-ENDED FACTORS OTHER THAN SEX .... 603

C. TIGHTENING THE "FACTOR OTHER THAN SEX" LOOPTHOLE BY
SCRUTINIZING THE EMPLOYER’S BUSINESS REASONS FOR PAYING
WOMEN LESS ............................................. 605

D. TAKING A PAGE FROM YOUNG: UNJUSTIFIED IMPACT AS THE PATH
TO DISPARATE TREATMENT IN PAY ...................... 607

CONCLUSION ................................................... 613

INTRODUCTION

In its first significant pregnancy discrimination case in nearly a quarter
century, the Supreme Court issued a decision in 2015 in Young v. United Parcel
Service, Inc. that cuts against the grain of entrenched employment discrimina-
tion doctrine. The starting point for employment discrimination law generally
proceeds from a sharp divide between the disparate impact and disparate
treatment theories of discrimination. Disparate treatment claims are character-
ized by courts’ requirement that plaintiffs bear the burden of establishing that
the employer acted with discriminatory intent, rigid reliance on proof frame-
works to frame the discriminatory inquiry, and insistence on a strict proximity
between comparators when discriminatory intent is inferred from differential
treatment. These features of employment discrimination cut across the various
protected classes enumerated in Title VII of the Civil Rights Act of 1964 and
the dominant federal statutes with employment discrimination protections mod-
eled on Title VII, such as the Age Discrimination in Employment Act (ADEA)
and the Americans with Disabilities Act (ADA).

Against this background, what the Court accomplished in Young appears
startling. Although styled as disparate treatment, the claim that the Court crafted
in Young under Title VII, as amended by the Pregnancy Discrimination Act (PDA), blurs the boundary between disparate impact and disparate treatment,
allowing the disparate treatment violation to rest upon proof of the unjustified burden that the employer’s accommodation policies place on pregnant women. In setting out the elements of the claim, the Court broadened the class of employees to which pregnant workers may compare themselves, made creative use of the foundational pretext framework adopted by the Court in its landmark 1973 decision, *McDonnell Douglas Corp. v. Green*, and designed a claim that is more suitable for capturing unconscious or implicit bias than one limited to employer actions based on a deliberate intent to discriminate. Even as it veered from the well-worn path of employment discrimination doctrine, the Court leaned heavily on the familiar architecture of *McDonnell Douglas* and waved the banner of disparate treatment.

This Article situates the Court’s decision in *Young* against the backdrop of employment discrimination doctrine to better understand what happened as a somewhat novel—although not entirely unprecedented—hybrid treatment-by-impact claim. After framing *Young* as an outlier that stretches the doctrinal mold, the Article considers what purpose the traditional doctrinal labels serve in the case and defends the Court’s doctrinal move as well-designed to reach the ingrained stereotypes against pregnant workers that too often underlie employer refusals to extend accommodations to pregnant workers. The Court’s embrace of this kind of PDA failure-to-accommodate claim corresponds to recent upticks in public concern about the harsh treatment of employees who become pregnant and the success of advocates for pregnant workers in broadening public understanding of what it means to unfairly discriminate on the basis of pregnancy.

The biggest unanswered question after *Young* is what, if any, implications this development has for other areas of employment discrimination law. What happened in *Young* does not likely forecast a more general upheaval of the boundary separating disparate impact and disparate treatment, nor an across-the-board reversal of the trend toward requiring ever-more similar comparators. Nor does it mark a broad reconceptualization of discriminatory intent as implicit bias in individual disparate treatment cases. I argue that it does, however, have the potential to usher in a more targeted shift in one particular area of discrimination law that, like PDA accommodation claims, relies on a comparator-driven unequal treatment model and has been the subject of a reinvigorated cultural engagement with the problem of discrimination. This Article contends that, properly understood, the *Young* framework can pave the way for a more robust equal pay claim challenging the unequal compensation paid to women and men performing substantially similar work. In singling out the equal pay claim to explore the implications of *Young*, I do not mean to foreclose the potential for the *Young* framework to make further incursions in other realms of employment discrimination law. Rather, there are two reasons why the pay claim is a particularly auspicious place to start. First, the pregnancy accommodation and equal pay claims both lean heavily on the different treatment of a class of

comparators to prove the violation—for pregnancy, other workers with health conditions that similarly affect their ability to work, and for pay, workers of the other sex performing substantially similar work. Second, social movement activism and heightened public sympathies for the workers subjected to these discriminatory practices have created opportunities for contesting the ideologies that support narrower interpretations of discrimination in these settings.

Over the last few decades, pay discrimination claims have floundered in the lower courts in a pattern that replicates the courts’ treatment of PDA claims prior to *Young*. In recent years, however, pay discrimination has emerged as a flashpoint for revitalized feminist advocacy and activism with the effect of renewing public concern about the gender wage gap and challenging popular assumptions about the prevalence of pay discrimination. At the same time, momentum is building to add a disparate impact-like test for employer justifications of pay disparities into the overarching framework of the disparate treatment pay discrimination claim. This development has already taken root in some lower courts and has been the focal point for legislative reform efforts to strengthen the Equal Pay Act.

Critics of these developments charge that testing the strength of employer justifications for pay disparities would turn a disparate treatment claim into a disparate impact claim, leaving it unmoored from the normative justifications for addressing pay disparities. Others question the value of an equal pay strategy focused on limiting the defense to equal pay claims when the threshold problem of finding close-enough comparators will likely continue to sound the death knell for such claims before courts ever inquire into the employer’s justification for the challenged pay disparity. This Article contends that developing the theoretical justifications in support of the *Young* framework can ease these concerns. The Court’s moves in *Young*, understood against the backdrop of employment discrimination law more broadly, can help chart a path for the equal pay claim to find its legs.

This Article begins in Part I with a brief survey of the state of employment discrimination law. After teasing out the architecture of the law and its supporting premises, the picture that emerges reveals an area of law bound by rigid proof frameworks—in which the sorting of evidence into discrete categories and shifting burdens of proof take center stage—and a sharp dichotomy separating disparate treatment and disparate impact claims. Within disparate treatment, as the empirical foundations for the proof models have weakened, the individual disparate treatment claim has become increasingly difficult to win. Courts apply the disparate treatment proof frameworks in search of a conception of discriminatory intent in which an individual decision maker consciously and deliberately decides to disfavor an employee because of his or her protected class status. Using this understanding of discriminatory intent, courts require an exceedingly close proximity between comparators in order to rule out what they would consider more likely explanations for the adverse treatment of a plaintiff. Although there is no separate element of the disparate treatment claim requiring
proof of deliberate and conscious bias, this conception of discriminatory intent shapes what courts are looking for and reduces the likelihood of finding intentional discrimination.

Against this background, Part II explores the ways in which the *Young* framework breaks from these strictures. The result is a PDA claim that is broad enough to reach not only employer policies that burden pregnant women because of antipregnancy animus or a deliberate desire to harm pregnant workers, but also those policies disadvantaging pregnant workers that are based on an implicit judgment that devalues workers on the cusp of motherhood and places a lower value on their retention. Making the case that the latter explanation, and not the narrower animus-based understanding, best explains the prevalence of pregnancy discrimination today, this Part concludes with a defense of the Court’s grounding of the claim in the disparate treatment, as opposed to disparate impact, category.

Part III turns to the implications of *Young* beyond pregnancy discrimination, contending that the Court’s central move, using unjustified impact to support a finding of disparate treatment, provides the foundation for a parallel move in the equal pay claim. It charts the similarities between the doctrine in pregnancy and pay discrimination that make the pay claim amenable to this development and points out parallels in the heightened social movement activism surrounding both of these gender justice issues. This Part argues that, as is true for pregnancy discrimination, much of the unfavorable treatment of women stems from implicit judgments devaluing women as workers rather than conscious decisions to disfavor women because of their sex. Importing the *Young* theory of unjustified impact into the pay claim would make it a more viable tool for reaching the kind of bias that more typically manifests as pay discrimination in the modern workforce. The move to incorporate unjustified impact into the disparate treatment pay framework has already begun in some lower courts and is a central feature of the primary focal point for legislative reform, the proposed Paycheck Fairness Act. The theory of *Young* developed and defended in this Article supports the parallel development that is on the cusp of taking hold in the equal pay claim.

The Article concludes with thoughts about why, notwithstanding the malleability of the treatment and impact categories, disparate treatment provides the preferable grounding for these developments. Doctrinal advantages aside, the disparate treatment framing of pregnancy and pay discrimination claims best resonates with the social movement work of contesting the ideologies at the heart of these injustices.


Understanding the import of the *Young* decision requires some familiarity with the doctrinal categories and proof frameworks that govern employment
discrimination law. This Section sets the table for the dissection of Young and the discussion of its implications that follows.

A. TRACING THE IMPACT AND TREATMENT DIVIDE AND THEIR SEPARATE PROOF FRAMEWORKS

As anyone who teaches employment discrimination can attest, courts’ reliance on rigid doctrinal categories and stultified proof frameworks have come to occlude more than illuminate the fundamental issues of workplace discrimination. Charles Sullivan, coauthor of a leading employment discrimination casebook, has bemoaned the “judicial and scholarly obsession with formal proof structures” that occupies the field.\(^7\) Other scholars have agreed, calling for the law’s reconstruction to escape the straitjackets that the proof frameworks impose on discrimination claims.\(^8\) Lower courts, too, have openly chafed under the confines of the categories and proof frameworks.\(^9\)

The starting point for understanding the byzantine edifice of employment discrimination law is the strict separation between the disparate treatment and disparate impact varieties of discrimination. The architecture of the law rests on a foundational assumption that disparate treatment and disparate impact represent entirely discrete and separate categories. Disparate treatment addresses intentional discrimination against members of a protected class—that is, the different treatment of persons on a statutorily prohibited basis, such as race, sex, national origin, religion, age, or disability.\(^10\) Disparate impact, on the other hand, reaches facially neutral employment practices that have a disparate impact, or disproportionate effect, on a protected class and lack a sufficient business justification that the practice is job-related and necessary for the employer’s business.

The proof frameworks for individual disparate treatment claims are by now well-worn and easily recited by students and practitioners alike. The classic

---

9. *See*, e.g., Paup v. Gear Prods., Inc., 327 F. App’x 100, 113 (10th Cir. 2009) (“[S]ome have criticized McDonnell Douglas as improperly diverting attention away from the real question posed by the ADEA—whether age discrimination actually took place—and substituting in its stead a proxy that only imperfectly tracks that inquiry. But McDonnell Douglas of course remains binding on us.” (citations omitted)).
10. Unlike constitutional law, which accords a higher level of scrutiny to race discrimination than sex discrimination and much less for nonsuspect classes, Title VII law does not vary in the level of protection afforded to race, sex, or the other specified classes. The sole exception is the statute’s bona fide occupational qualification (BFOQ) defense, which does not apply to discrimination based on race. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25–26 (1993) (Ginsburg, J., concurring) (noting that Title VII analysis does not differ for race and sex discrimination, except with respect to the statute’s BFOQ defense).
model for proving Title VII claims of individual disparate treatment requires the plaintiff to establish four cookie-cutter elements of a prima facie case designed to rule out the most obvious nondiscriminatory reasons for the challenged employment decision, thereby creating a rebuttable presumption of discrimination, at which point the burden to produce evidence shifts to the employer to articulate a legitimate, nondiscriminatory reason for the decision. With the employer’s burden satisfied, the presumption of discrimination drops out of the case and the plaintiff has the burden at the third and final stage to prove that the employer’s proffered reason is really a pretext for the actual discriminatory reason. The Court has applied this same framework, developed in Title VII cases, to individual disparate treatment claims for age and disability discrimination. Much ink has been spilled, by judges as well as commentators, attempting to sort out what exactly a plaintiff must prove in order to get to a jury or uphold a jury verdict under this framework.

More recently, another path to proving individual disparate treatment under Title VII has emerged in which the plaintiff proves that discrimination was a “motivating factor” for the employment decision. This establishes employer liability, but leaves the employer with an opportunity to avoid damages and limit injunctive relief by proving that the same decision would have been made even without the unlawful discriminatory motive. The motivating factor framework, known as the mixed-motive model, originated in a 1989 Title VII case, Price Waterhouse v. Hopkins, in which the plaintiff prevailed by proving that the plaintiff’s sex was one reason for the employment decision, even if a nondiscriminatory reason also motivated the decision. The model was refined and codified by statute in the 1991 Civil Rights Act, which added Section 11.

11. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 & n.13 (1973). The four elements that established the prima facie case in McDonnell Douglas are: (i) plaintiff is a member of a racial minority; (ii) plaintiff applied and was qualified for the job; (iii) plaintiff was rejected despite his qualifications; and (iv) the job remained open and the employer continued to seek applicants. Id. at 802. These four elements are not set in stone, but are designed to be tailored to the facts of any particular case. Id. at 802 n.13 (“The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”).

12. Id. at 805.


14. See Reeves, 530 U.S. at 147–48 (stating that courts may, “[i]n appropriate circumstances,” conclude that a reasonable jury could infer discrimination from the plaintiff’s proof of falsity of the defendant’s reason combined with proof of the prima facie case, but declining to proclaim that such proof will “always” be sufficient to survive a motion for summary judgment); see also Henry L. Chambers, Jr., Recapturing Summary Adjudication Principles in Disparate Treatment Cases, 58 S.M.U. L. Rev. 103 (2005).


17. 490 U.S. 228 (1989).
703(m) to Title VII.\textsuperscript{18} Unlike the classic \textit{McDonnell Douglas} model, this proof framework is not available under the ADEA because this provision of the 1991 Act only amended Title VII.\textsuperscript{19} It is not yet clear whether this proof framework is available for individual disparate treatment claims under the ADA.\textsuperscript{20}

Despite the relative ease of stating the parties’ respective proof burdens under the classic \textit{McDonnell Douglas} formula and the more recent motivating factor method, determining which of these two proof frameworks applies in any given Title VII individual disparate treatment case, and discerning how the two models interrelate, remains a muddled mess.\textsuperscript{21}

Disparate impact claims under Title VII follow a different track altogether. To establish a disparate impact claim, the plaintiff has the burden of identifying a particular employment practice used by the employer and proving that the practice caused a disparate impact on the plaintiff-class.\textsuperscript{22} If the plaintiff satisfies this burden, the employer has the burden of proving that the challenged practice is job-related and consistent with business necessity.\textsuperscript{23} If the employer meets its burden, the plaintiff has one more crack at winning the case by proving that the employer refused to use an alternative practice that would have avoided the disparate impact while still meeting the employer’s business needs.\textsuperscript{24}

Disparate impact claims are available for age-based impact under the ADEA, but are not governed by the disparate impact provisions codified in the 1991 Civil Rights Act, which amended only Title VII.\textsuperscript{25}

\begin{itemize}
\item 21. \textit{See, e.g.}, Rapold v. Baxter Int’l Inc., 718 F.3d 602, 612–13 (7th Cir. 2013) (upholding trial court’s refusal to give a motivating factor instruction where each party contended that the adverse employment decision was caused by a single motive); Sandra F. Sperino, \textit{Nassar’s Hidden Message}, \textit{Law Professor Blogs Network} (Apr. 24, 2014), http://lawprofessors.typepad.com/laboprof_blog/2014/04/nassars-hidden-message.html [https://perma.cc/YF3F-Y2DV] (contending that the \textit{McDonnell Douglas} and motivating factor approaches are not alternative theories of liability, but merely different ways of proving a violation of the statute’s core ban on discrimination, such that the motivating factor approach to proof should be available in every individual disparate treatment case under Title VII); \textit{see generally} Michael J. Zimmer, Charles A. Sullivan \\& Rebecca Hanner White, \textit{Cases and Material on Employment Discrimination} 86–90 (8th ed. 2013) (describing a dizzying array of possibilities for piecing together, substituting, or integrating the newer “motivating factor” model and the classic \textit{McDonnell Douglas} model).
\item 25. \textit{See} Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 87 (2008) (employer’s burden, once plaintiff establishes disparate impact, is to prove “reasonable factor other than age” defense, not business necessity); Smith v. City of Jackson, 544 U.S. 228, 232, 240 (2005) (recognizing disparate impact claims under the ADEA, but holding plaintiffs to tougher pre-1991 requirements for proving
Although a given fact pattern might conceivably give rise to either or both disparate treatment and disparate impact theories, the two claims are conceptually independent of one another. The Supreme Court articulated a clear-cut distinction between impact and treatment claims in one of its early Title VII cases, \textit{International Brotherhood of Teamsters v. United States}:

“Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . . Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.26

Subsequent developments have only solidified this distinction. The Court has repeatedly emphasized that in disparate treatment cases, an employer’s reason for the adverse action qualifies as nondiscriminatory even if it has a disproportionate impact on the plaintiff’s class and even if it is not a good reason. For example, regarding an age discrimination claim in \textit{Hazen Paper Co. v. Biggins}, the Court ruled that firing an employee to prevent his pension benefits from vesting was a legitimate, nondiscriminatory reason despite its illegality under the Employment Retirement Income Security Act (ERISA) and regardless of the adverse impact such a rule had on older employees.27 As the Court put it, an employee’s proximity to vesting and the employee’s age are “analytically distinct.”28 Underscoring the law’s distinction between treatment and impact claims, the Court rebuked the lower court in that case for allowing disparate impact analysis to infect its consideration of the disparate treatment claim, with the reminder that “[w]e long have distinguished between ‘disparate treatment’ and ‘disparate impact’ theories of employment discrimination.”29

The force of the impact–treatment dichotomy reverberates throughout the Court’s case law. In an ADA case, \textit{Raytheon Co. v. Hernandez}, the Court reiterated that the business justification for an employer’s nondiscriminatory reason—despite its disproportionate impact on a protected claim—has no relevance to a disparate treatment claim because impact and treatment claims are separate theories of discrimination.30 In that case, the plaintiff challenged the employer’s refusal to rehire him, arguing that the employer’s purportedly neutral reason, that the plaintiff violated a company misconduct rule, operated

\textit{such claims). Disparate impact claims are likewise available for disability-based impact under the ADA. See Raytheon Co. v. Hernandez, 540 U.S. 44, 53–54 (2003).}\n
\textit{27. 507 U.S. 604 (1993).}\n
\textit{28. \textit{Id.} at 611.}\n
\textit{29. \textit{Id.} at 609.}\n
to bar the rehire of recovering addicts who were fired for drug or alcohol dependency. Because the company’s policy was disability-neutral, covering other kinds of personal misconduct besides drug and alcohol abuse, the Court classified this as tantamount to a disparate impact claim, which the plaintiff had not brought. Although the company’s rule might adversely affect persons with certain disabilities, such impact was irrelevant to proving the plaintiff’s disparate treatment claim.\textsuperscript{31} Moreover, the company was not required to establish any business justification for its facially neutral policy because the case was brought as a disparate treatment claim.\textsuperscript{32}

The Court has also policed the line separating disparate treatment and disparate impact by refusing to allow disparate treatment claims to be defended using the business necessity defense—the defense to a disparate impact case. The Seventh Circuit made this mistake in \textit{United Automobile Workers v. Johnson Controls, Inc.}, a case brought under Title VII and the PDA.\textsuperscript{33} Because the employer policy challenged in that case treated fertile women differently from fertile men—giving rise to a disparate treatment claim—the Supreme Court chastised the circuit court for its “incorrect” acceptance of the employer’s business necessity defense.\textsuperscript{34} Congress underscored this point in a subsequently enacted provision of the Civil Rights Act of 1991, amending Title VII by proclaiming: “A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.”\textsuperscript{35}

In keeping with the Court’s rigid separation of impact and treatment cases, the Court has also emphasized that proof of disparate impact is not required to establish disparate treatment. In \textit{City of Los Angeles Department of Water & Power v. Manhart}, the employer argued that its pension plan, which charged female employees higher premiums than male employees, was not discriminatory because women as a group live longer than men, such that women as a class did not pay more for the benefits they received.\textsuperscript{36} Responding to this argument, the Court again raised the disparate treatment flag and refused to permit the absence of any proof of disparate impact on women as a class to affect the disparate treatment analysis. As the Court explained, the touchstone of a disparate treatment claim is the unfavorable treatment of the individual on the basis of sex.\textsuperscript{37}

As this discussion shows (belabors, even), the separation of disparate treatment from disparate impact is the foundation on which employment discrimina-

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 54–55.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{499 U.S. 187 (1991)}.
\item \textsuperscript{34} \textit{Id.} at 198.
\item \textsuperscript{35} \textit{42 U.S.C. § 2000e-2(k)(2) (2012)}.
\item \textsuperscript{36} \textit{435 U.S. 702, 703 (1978)}.
\item \textsuperscript{37} \textit{Id.} at 711.
\end{itemize}
The shifting sands of employment discrimination doctrine is built. The distinction turns fundamentally on whether proof of discriminatory intent is required or not. As the Court stated so crisply in *Teamsters*, “[p]roof of discriminatory motive is critical” in a disparate treatment claim but “is not required under a disparate-impact theory.” When an employer’s policy facially discriminates on the basis of a protected class status, the intent to treat employees differently for a discriminatory reason is apparent in the terms of the policy itself; in that set of cases, no further proof of discriminatory intent is necessary. In the more common scenario where no policy discriminates on its face—that is, in individual disparate treatment claims—the plaintiff must demonstrate that the employer acted with a discriminatory intent.

### B. THE MEANING OF DISCRIMINATORY INTENT: WHAT COURTS HAVE IN MIND

Although the case law is clear that disparate treatment requires the plaintiff to establish discriminatory intent whereas disparate impact does not, it is less clear on the question of what exactly courts mean by discriminatory intent. One of the biggest controversies in employment discrimination law today is whether disparate treatment law reaches only the decision maker’s conscious reliance on a discriminatory motive or whether it also encompasses employment decisions that in fact rely on a discriminatory reason but without any conscious desire to do so by the decision maker. The latter type of discrimination is sometimes referred to as “implicit bias” or unconscious discrimination. Legal scholars have called attention to this phenomenon, and the need for discrimination law to come to terms with it, for decades. As social science research has developed more sophisticated methods for discerning and documenting implicit bias, it has increasingly sparked discussion and debate in legal scholarship.

---

38. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see also Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (recognizing the disparate impact claim to reach “practices, procedures, or tests neutral on their face, and even neutral in terms of intent”).

39. See, e.g., UAW v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991). In that set of cases, the facially discriminatory policy itself reveals both causation—that an individual is treated differently because of membership in a protected class—and the employer’s conscious intent to do so because the employer knows the terms of its own policies.


There is now abundant evidence from the field of social psychology that implicit bias exists and is more common than many people realize. More controversial than the proposition that implicit bias exists is the conclusion that widespread implicit bias translates into real-world biased decision making in the workplace. Despite disagreement over the real-world effects of implicit bias, few would deny that it sometimes motivates real-world behavior, and a number of studies suggest that implicit sex-based and race-based bias infects actual decision making quite often. Among the prominent findings supporting the latter point: white NBA referees disproportionately make “calls” favoring white players; job applicants whose resumes list names perceived as belonging to African-Americans get callbacks for interviews less often than otherwise identical resumes with names that do not trigger strong racial associations; and female musicians are more often selected for the symphony when tryouts are conducted behind a screen that blocks the interviewer’s view of the musician.

In the wake of this burgeoning literature, two related questions have sparked academic interest. The first is whether employment discrimination law currently reaches employment decisions based on implicit bias but not a conscious intent to disfavor the protected class. The second is whether it should reach such decisions.

44. See, e.g., Amelia M. Wirts, Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination, 57 B.C. L. REV. (forthcoming 2017); Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. REV. 465 (2010). But see Michael Selmi, Statistical Inequality and Intentional (Not Implicit) Discrimination, 79 L. & CONTEMP. PROBS. 199 (2016) (arguing that much of what scholars label “implicit bias” has a conscious element to it and should be regarded as intentional discrimination). Although Selmi takes a different path to situating so-called “implicit bias” as intentional discrimination—by emphasizing the consciousness of actors who see racial disparities but choose to ignore them—his approach ultimately lands in the same place as the unjustified impact disparate treatment model elaborated herein.
48. For an argument that it does, see Krieger & Fiske, supra note 40, at 1052–56. For an argument that it does not, see MAURICE WEXLER ET AL., IMPLICIT BIAS AND EMPLOYMENT LAW: A VOYAGE INTO THE UNKNOWN 2 (Bloomberg BNA 2013); see also Melissa Hart, Subjective Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741, 743–44 (2005) (arguing that, properly interpreted, Title VII “holds out more promise for remedying unconscious discrimination than has previously been recognized,” but acknowledging that most courts engage in a search for conscious discriminatory intent in deciding individual disparate treatment claims).
On the first question, my reading of the case law is that the proof frameworks courts use to decide disparate treatment claims—both the *McDonnell Douglas* burden-shifting model and the newer motivating factor model—are designed and used by courts to search for a conscious intent by the decision maker to rely on a discriminatory reason and not merely the unintentional reliance on a discriminatory reason. In taking such a narrow reading of the case law, I should emphasize that this understanding is not dictated by the text of Title VII itself. The statute could plausibly be read otherwise. Nowhere does the text limit the statute’s reach to intentionally biased decision making in codifying the unlawful employment practices. Rather, the statutory language simply bars employers from discriminating “because of such individual’s” race or sex. If “because of” denotes causation-in-fact, an employment decision that is made based in whole or in part on the employee’s sex or race would violate the statute regardless of whether the actor deliberately relied on the discriminatory reason, as long as that is in fact what occurred.

And yet, this is not the only plausible reading of the statutory text. An alternative reading is that the term “discriminate” in 703(a)(1), the basis for the disparate treatment claim, implicitly incorporates a requirement that the decision maker acted intentionally, so that discrimination is understood to involve the actor’s conscious awareness of the reason for the decision. A slightly different path to the same result would read into the “because of” language a type of proximate cause restriction as an additional requirement to supplement the requirement of causation-in-fact. Such an interpretation would enable employers to avoid liability for employment actions that accidently treat employees differently based on their membership in a protected class. Although importing proximate cause-type limits into the statutory law of employment discrimination is a highly questionable enterprise, the Court has shown some appetite for this project in other areas of employment discrimination doctrine.


51. Id.


Although the statute’s language of causation lends itself to arguing against a requirement of conscious bias by the decision maker in a disparate treatment claim, the text is, alas, malleable enough to support the alternative view.

Setting aside the statutory ambiguity, the Court has become, in recent years, increasingly wedded to a conception of the disparate treatment claim as predicated on the decision maker’s conscious reliance on a discriminatory reason. In its recent decision denying class certification in *Wal-Mart Stores, Inc. v. Dukes*, for example, the Court’s skepticism of the plaintiffs’ assertion of a common policy of discrimination was fueled by an implicit understanding of discrimination as a conscious, and thereby rare, phenomenon.54 The Court’s operative assumption that discrimination is a deliberate phenomenon is reflected in its statement that “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”55 Justice Scalia’s opinion for the Court contrasted the group of managers described in that statement with a presumptively smaller group of managers who are “guilty of intentional discrimination.”56 Similarly, the Court’s ill-fated decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,57 which adopted a strict approach to Title VII’s statute of limitations for pay discrimination claims (and which was subsequently overridden by Congress in the Lilly Ledbetter Fair Pay Act),58 equated pay discrimination with the employer’s deliberate decision to pay a woman less because of her sex.59 The Court’s underlying assumption in *Ledbetter*, reflected in its rejection of the “paycheck accrual rule,” which would treat the paycheck that pays a woman less because of sex as the unlawful employment practice, is that the pay violation consists of a conscious decision to pay a woman less because of her sex.60

Neither of these two cases marks a sharp break with the past, however. Even the Court’s original disparate treatment proof framework in the landmark *McDonnell Douglas* case is predicated on a working assumption that the employer knew regardless of whether it relied on a discriminatory reason.61 In this framework, proof of the falsity of the employer’s legitimate, nondiscriminatory reason supports an inference of discrimination because it supports an inference that the employer knowingly lied to cover up its real (and by

55. Id. at 355.
56. Id.
59. Ledbetter, 550 U.S. at 634.
implication, deliberate) discriminatory reason. That is why, when an employer’s action is based on an honest belief in a nondiscriminatory reason, even if it turns out to be factually incorrect, the falsity of the employer’s reason does not in that instance support a finding of discrimination.

But the best evidence that the Court conceives of intentional discrimination as involving a conscious discriminatory motive lies in its explanations for why statutory discrimination law recognizes the disparate impact theory. The Court has justified the disparate impact claim as being necessary to reach the kind of discrimination that the disparate treatment claim fails to capture, including actions resting on unconscious bias rather than a conscious discriminatory motive. As Justice O’Connor explained in her plurality opinion in Watson v. Fort Worth Bank & Trust, defending the applicability of disparate impact doctrine to subjective decision making practices, even if the disparate treatment theory could adequately capture all instances of intentionally discriminatory decision making, “the problem of subconscious stereotypes and prejudices would remain.”

More recently, Justice Kennedy’s opinion for the majority in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc. makes a similar point in explaining the justification for recognizing disparate impact claims under the Fair Housing Act: without disparate impact claims, biased decision making resting on implicit and unconscious bias would remain unaddressed. This justification for the disparate impact claim necessarily understands such discrimination as outside the proper scope of the disparate treatment claim.

Notwithstanding this pessimistic take on Supreme Court case law, some scholars have persuasively argued that employment discrimination law does reach implicit bias, pointing out that the proof models themselves do not require the plaintiff to demonstrate a conscious intent in order to prevail. Of course, that is entirely correct. Plaintiffs can use circumstantial evidence to carry the burden of proving intentional discrimination without any “smoking gun” proof that the decision maker deliberately decided to discriminate on the basis of a

63. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (“The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer’s reasons are pretexts for discrimination.”).
64. 487 U.S. 977, 990 (1988).
67. See Melissa Hart, supra note 48, at 757, 771; Selmi, supra note 49, at 1237; see also Christopher Cerullo, Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII, 82 Fordham L. Rev. 127 (2013) (summarizing the current state of employment discrimination in its capacity to reach implicit bias).
protected class, such as sex or race. And yet, the question of the proof that suffices to establish intentional discrimination is separate from the question of what intentional discrimination means to the courts deciding these claims. My reading of the case law is that courts typically understand intentional discrimination to mean a conscious discriminatory intent, although the proof model does permit plaintiffs to prevail without specifically demonstrating that intent at a conscious level. As a result, the ability of the disparate treatment claim to reach implicit bias is hampered by judges’ understandings of what it means to intentionally discriminate. Courts view their job in a disparate treatment claim as determining whether the plaintiff carried the burden to support an inference of conscious discriminatory intent. That understanding of intent fuels courts’ reluctance to find—or to empower a jury to find—that the employer engaged in intentional discrimination.

C. THE ROLE OF COMPARATORS IN PROVING DISPARATE TREATMENT

It is the courts’ conception of intentional discrimination as a conscious phenomenon that is driving another hallmark of disparate treatment law—the stringent approach courts take toward proving discrimination through the use of comparators. The trend in the case law is to require increasingly close comparators in order to establish a disparate treatment claim. The reason for insisting on the close proximity of comparators is that otherwise courts will assume that the differences between the plaintiff and the comparator are more likely to have motivated the adverse treatment of the plaintiff than an intentionally discriminatory reason. Even small differences between the comparator and the plaintiff may prompt a court to infer that it is more likely than not that the decision maker was thinking about something other than the plaintiff’s sex or race in making the decision to treat the plaintiff unfavorably. Courts’ understanding of discriminatory intent as a conscious phenomenon is the animating force behind their insistence on a high degree of similarity between comparators.

68. See, e.g., Thomas v. Eastman Kodak Co., 183 F.3d 38, 58–62 (1st Cir. 1999) (permitting plaintiff to prevail on employer’s motion for summary judgment without any proof that the employer’s intent operated at a conscious level).

69. See Sullivan, supra note 7, at 223 (“The ultimate basis for the elaborate legal rules the courts have developed must be the belief that random fluctuations are more likely than discrimination in the American workplace, and thus any differences are more likely attributable to a host of rational and irrational factors than they are to an intent to discriminate.”).

70. See, e.g., Hooker v. City of Toledo, 644 F. App’x 675, 678 (6th Cir. 2016) (comparators must be “similarly situated” in all respects); Floyd-Gimom v. Univ. of Ark. for Med. Sci., 716 F.3d 1141, 1150 (8th Cir. 2013) (test for similarly situated employees is rigorous, requiring similarity “in all relevant respects”); Dickinson v. Springhill Hosps., Inc., 187 F. App’x 937, 939 (11th Cir. 2006) (requiring comparators in “nearly identical” circumstances); Okoye v. Univ. of Tex. Hous. Health Sci. Ctr., 245 F.3d 507, 514 (5th Cir. 2001) (same); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997) (comparators must be “similarly situated in all material respects,” such as having the same supervisor, job duties, and disciplinary standards); Sullivan, supra note 7, at 214–16 (discussing the problem of requiring nearly identical comparators in individual disparate treatment cases).
In recent years, some circuit courts have ramped up the stringency of this requirement, insisting that plaintiffs identify a “similarly situated” comparator outside the protected class who is treated more favorably “under nearly identical circumstances.”71 As Suzanne Goldberg has pointed out, this increasing stringency comes at a time when workplaces are increasingly departing from a model of work reliant on cookie-cutter, fungible employees—which is the kind of workplace that the comparator heuristic presumes.72 Adding to the difficulty presented by the strict proximity required for comparators, some courts have begun applying this standard at the McDonnell Douglas prima facie case stage instead of the pretext stage of the case, granting summary judgment to the employer even if the plaintiff has enough evidence to rebut the employer’s legitimate, nondiscriminatory reason at the pretext stage.73 Other courts are imposing this hurdle at the pretext stage, permitting the plaintiff to survive the prima facie case, but then granting summary judgment because they view the lack of a sufficiently similar comparator as undercutting the plaintiff’s ability to prove that the employer’s reason was a pretext for discrimination.74 Whether occurring at the prima facie case or the pretext stage, courts’ insistence that plaintiffs identify nearly identical comparators has emerged as a significant roadblock to bringing successful, individual disparate treatment claims.

D. THE DASHED HOPES FOR A STREAMLINED FRAMEWORK

After the Court’s 2003 decision in Desert Palace, Inc. v. Costa,75 some commentators believed that the more straightforward approach to proving discrimination codified in Section 703(m) of the 1991 Civil Rights Act—establishing an unlawful employment practice where the plaintiff “demonstrates” that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the

---

71. See, e.g., Paske v. Fitzgerald, 785 F.3d 977, 985 (5th Cir. 2015); EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000).
72. See Goldberg, supra note 8, at 755–59. As Professor Goldberg points out, the judicial insistence on close comparators to prove discrimination also functions poorly for workplaces that are stratified along the lines of the protected class. Id. at 759–61.
74. That is what happened in Ash v. Tyson Foods, Inc., where the Eleventh Circuit articulated its curious standard that the plaintiff’s superior qualifications must be such that “the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.” 129 F. App’x 529, 533 (11th Cir. 2005). The Supreme Court curtly rejected that colorful standard as unhelpful, but left intact, without endorsing or rejecting, various alternative—and also strict—standards for proving pretext through the relative qualifications of comparators. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456–58 (2006). Despite having been taken to the woodshed, the Eleventh Circuit reached the same result on remand under its nominally more inclusive (or at least less ridiculous) standard. Ash v. Tyson Foods, Inc., 190 F. App’x 924, 927 (11th Cir. 2006) (formulating the standard in terms of a reasonable person exercising impartial judgment).
75. 539 U.S. 90 (2003).
practice"—would supersede the McDonnell Douglas framework. So far, that promise has not materialized. Despite the Supreme Court’s decision in Desert Palace holding that “direct evidence” is not required to entitle the plaintiff to a “motivating factor” instruction to the jury tracking the proof framework in 703(m), lower courts have continued to sort cases on separate tracks depending on whether they are classified as “inferential” or “direct,” and restrict plaintiffs to McDonnell Douglas if their proof method is deemed inferential.

Although courts have stopped short of announcing an overt rule requiring direct evidence for “direct” cases under 703(m), which Desert Palace forbids, they have continued to take a stingy approach to the sufficiency of evidence needed to show that discrimination was a motivating factor, in some cases tantamount to a de facto requirement of the kind of statements that lower courts had been calling direct evidence before the Desert Palace decision. For example, one Eleventh Circuit decision, Bell v. Capital Veneer Works, limited the plaintiff, an African-American woman suing for race discrimination, to the McDonnell Douglas proof model. The court then granted the employer’s motion for summary judgment because the plaintiff failed to identify a sufficient comparator to make out a prima facie case—notwithstanding her allegation that the decision maker had commented prior to discharging her, “if I could run the mill myself, I would fire everyone [sic] of these niggers.”

---

78. 539 U.S. at 99–102.
79. See, e.g., Guimaraes v. SuperValu, Inc., 674 F.3d 962, 972–73 (8th Cir. 2012); Burnett v. Gates Rubber Co., 647 F.3d 704, 708–09 (7th Cir. 2011); Twiggs v. Hawker Beechcraft Corp., 659 F.3d 987, 998 (10th Cir. 2011). For a recent decision bucking this trend, see Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765 (7th Cir. 2016) (castigating lower courts in the circuit for separately applying “direct” and “indirect” methods of proof, even as the court “accept[ed] its share of the responsibility” for fomenting this dichotomy “because even as some panels were disparaging the ‘direct’ and ‘indirect’ approaches, other panels were articulating them as governing legal standards”). It is too early to tell if the court’s strong rebuke in that case will prompt other circuits to similarly reject the bifurcation of “direct” and “indirect” approaches to proving discrimination. Although helpful in jettisoning the direct/indirect formula, however, the decision does nothing to clarify the interrelation between the McDonnell Douglas and motivating factor proof models. Id. at 766 (“Today’s decision does not concern McDonnell Douglas or any other burden-shifting framework, no matter what it is called as shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled ‘direct’ and ‘indirect,’ that are evaluated differently.”).
82. Id. at *2 n.5.
Explaining away the comment, the court concluded that the plaintiff failed to establish that the comment was “direct evidence” of discrimination because it was unclear how close in time the comment was to the firing. The court held there was insufficient evidence of discrimination to entitle the plaintiff to a mixed motive instruction under 703(m). The court further opined that the comment would fail to prove pretext under the McDonalds Douglas framework even if the plaintiff had established a prima facie case, because a discriminatory comment unrelated to the adverse action is not enough to demonstrate pretext. Thus, the plaintiff’s failure to make out a prima facie case for want of a sufficient comparator was not salvaged by the possibility of proceeding under the 703(m) motivating factor model, despite the incendiary racist comment.

This case and others like it show that the Desert Palace decision has not triggered the earthquake in disparate treatment law that some commentators predicted. Instead, it has produced no more than a ripple, and not enough to free plaintiffs from the strictures of the McDonalds Douglas framework. Even in cases that include evidence of biased comments, courts lean toward describing the comments as “stray” and then filtering the evidence through the McDonalds Douglas framework rather than the motivating factor framework. As with the McDonalds Douglas framework, courts’ stringency in applying the motivating factor model traces back to a belief that discriminatory intent requires conscious reliance on a discriminatory reason. Although there was plenty of room for uncertainty about whether the discriminatory motive had to be conscious or not in the plurality’s opinion in Price Waterhouse v. Hopkins, the Court has since applied this model so as to make clear its premise that the motivating factor operates at a conscious level. Moreover, lower court rulings like Bell—dismissing the significance of “stray remarks” for proving that discrimination

83. Id.
84. Id. at *2 n.6.
85. Id. at *2.
86. See Sullivan, supra note 7, at 202 (“Despite Price Waterhouse and Desert Palace, the overwhelming majority of individual disparate treatment cases are still litigated under the McDonalds Douglas proof structure . . . .”).
87. For example, despite comments that could be understood to be racially biased—a white supervisor referring to the African-American male plaintiffs as “boy”—the discrimination claim in Ash v. Tyson Foods, Inc. was decided under the McDonalds Douglas framework. 129 F. App’x 529, 533 (11th Cir. 2005). The Supreme Court did remand, however, holding that insofar as the Court of Appeals ruling required a modifier such as “black” or “white” for the word “boy” to be considered discriminatory, it was incorrect. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006).
88. Compare Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (“We take these words to mean that gender must be irrelevant to employment decisions.”), and id. at 251 (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”), with Staub v. Proctor Hosp., 562 U.S. 411, 413, 418 (2011) (describing the requisite motive as “discriminatory animus” and the analogous motive in tort law as “the malicious mental state”), and id. at 418–19 (contrasting the mental state of the agent who acts with “unlawful animus” with the mindset of the decision maker who relies on “a report prompted [unbeknownst to that agent] by discrimination” and finding only the former motive to support employer liability for disparate treatment).
was a motivating factor—reveal an assumption that the discriminatory motive must consciously influence the adverse decision.

How courts conceptualize what it means to intentionally discriminate explains much of the stringency with which judges apply the doctrine and their reluctance to find for plaintiffs. Applying the proof frameworks requires courts to make empirical judgments about the likelihood that discrimination, instead of something more benign, explained what happened. Naturally, if judges hold a narrow view of what it means to intentionally discriminate, that understanding will shape their assessment of the likelihood that discrimination occurred. If judges view intentional discrimination as a rare phenomenon, even randomness and idiosyncratic reasons as the basis for the decision—rather than any rational or articulable reason—may have more persuasive pull than a discriminatory explanation for what happened. The ability of the proof frameworks to capture real-world discrimination thus turns on judicial impressions of the continuing prevalence of discrimination in today’s workplace. In the five decades that have transpired since the passage of Title VII, judges seemingly have become more skeptical of the empirical proposition that discrimination is widespread. This is a product of the courts’ understanding of discrimination as a conscious phenomenon and a reflection of an ideological outlook that views American society as largely postracial and postsexist. The skepticism judges exhibit toward plaintiffs in discrimination claims dovetails with research findings about majority-group members’ disbelief in the veracity of discrimination claims (with the exception of reverse discrimination claims). This shift in background

89. See, e.g., Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 282–83 (1997) (arguing that the Court’s empirical judgment about the extent of discrimination shapes it application of the discriminatory intent standard); Sullivan, supra note 7, at 197 (contending that judges’ “own worldviews” underlie their strict approach to comparator proof in individual disparate treatment claims).


92. See Sumi Cho, Post-Racialism, 94 IOWA L. REV. 1589, 1594 (2009) (discussing the current socio-political historic moment as one of “post-racialism,” characterized by an ideology of racial progress and the retreat from race as an organizing principle of justice); Green, supra note 60, at 356 (identifying and discussing the trend in the courts to see employment discrimination as an individual, aberrational practice engaged in by consciously bad actors); Angela McRobbie, Post-Feminism and Popular Culture, 4 FEMINIST MEDIA STUD. 255, 255 (2004) (discussing the rise of post-feminism as the prevailing cultural ideology of gender and comparing and contrasting it to 1980s-style backlash).

93. See, e.g., Deborah L. Brake, Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias, 16 COLUM. J. GENDER & L. 679, 714 n.148
assumptions makes it unsurprising that so many scholars have found that employment discrimination claims tend to fare worse in the courts than other legal claims. The low success rate of employment discrimination claims, combined with the burgeoning literature on the prevalence of implicit bias, suggests that disparate treatment claims are unlikely to reach all but the most overt and conscious forms of discriminatory bias.

II. A Break-Out Hybrid: The Curious Case of Young v. UPS

Against this backdrop, the Supreme Court has recently shaken up the disparate treatment and disparate impact categories, along with the solidity of the proof frameworks that govern them, in one area of employment discrimination law: the PDA. In its 2015 opinion in Young v. United Parcel Service, Inc., the Court crafted a hybrid treatment-by-impact model that smudges the edges of the categories and holds greater promise for reaching unconscious and implicit bias than the classic individual disparate treatment model. This Section begins with a brief sketch of pregnancy accommodation cases in the lower courts prior to the Supreme Court’s intervention. It then dissects the majority and dissenting opinions in Young, exploring how the decision represents a break from the structures and frameworks of employment discrimination law elaborated in Part I. Having shown how Young unsettles the canon of employment discrimination law previously described, the Part then situates the decision within other doctrinal exceptions to the norm that breach the impact-treatment divide. Rather than an isolated mistake, Young should be seen as one of several aberrations that cut against the grain of the dominant structure of employment discrimination law. The Part concludes with a defense of the Court’s newly crafted disparate treatment claim for pregnancy, supporting the law’s move beyond a conception of discriminatory intent as conscious bias and potentially reaching a broader range of employer policies that implicitly undervalue pregnant workers.


A. PRE-YOUNG PREGNANCY ACCOMMODATION CASES: THE ELUSIVE SEARCH FOR COMPARATORS AND DISCRIMINATORY INTENT

An appreciation of what the Court did in Young requires some exposure to the state of pregnancy accommodation cases in the lower courts prior to that decision. By now, this story will have a familiar ring. Parallel to the trends discussed above, the PDA case law in the lower courts took a stringent approach to comparator proof and devolved into a search for a consciously discriminatory intent by the employer, making it extraordinarily difficult to prove pregnancy discrimination when employers provided accommodations to some workers but not to pregnant women.96 What makes this particularly notable in the pregnancy discrimination cases is that in addition to a ban on discriminating on the basis of pregnancy, which occupies the first clause of the PDA, the statute also contains a second clause in which the class of comparators is identified only by their similarity in ability or inability to work. This clause requires “women affected by pregnancy, childbirth, or related medical conditions” to “be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”97

In many of the PDA cases leading up to Young, the plaintiff challenged the employer’s policy of accommodating employees with on-the-job injuries but not offering similar accommodations to employees who became pregnant, despite the similarity of their work restrictions. Lower courts rejected these challenges, faulting the women’s claims for failing to identify nonpregnant comparators with similar work restrictions from off-the-job conditions and concluding, as a result, that the plaintiffs failed to establish discriminatory intent.98 Plaintiffs were dealt similar results even when the challenged employer policies swept more broadly than on-the-job injury accommodations, extending accommodations to a larger class of employees through collective bargaining agreements and to employees who qualified as disabled under the ADA, while still omitting pregnant women. Lower courts upheld these policies too, finding that the employees who benefitted from these accommodations were not proper comparators for the pregnant plaintiffs and that the employers’ reasons for extending accommodations to those employees negated any inference of discriminatory intent underlying the refusal to extend similar accommodations to pregnant workers.99

99. See, e.g., Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698, 702–03 (7th Cir. 2012); Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011); Reeves, 446 F.3d at 641–43.
Such was the Fourth Circuit’s reasoning in the Young case, which the Supreme Court granted certiorari to review. The Fourth Circuit had found United Parcel Service’s (UPS) distinctions for accommodating some groups of workers, but not pregnant employees, to be “pregnancy blind” and not based on a discriminatory intent because the justification for the more favorable treatment of the preferred group of workers was articulated in a pregnancy-neutral fashion. The characterization of such policies as pregnancy-neutral reflects a view of pregnancy discrimination as requiring a state of mind akin to animus, a conscious desire to disfavor pregnant workers because they are pregnant. The search for antipregnancy animus doomed all but the most blatant pregnancy discrimination claims—such as where the employer inexplicably denied pregnant workers the accommodations that it gave to others of similar work capacity without a plausible nondiscriminatory rationale for doing so. The whittling away of possible comparators in the search for discriminatory intent doomed most such claims, however, with plaintiffs unable to show that the employer adopted the policy to deliberately harm pregnant women.

B. ENTER YOUNG V. UPS AND A SHIFT IN THE PARADIGM

The Supreme Court’s decision in Young broke from this approach and toppled some pillars of disparate treatment law along the way. The Court’s opinion began with the text of the PDA, identifying what the majority viewed as an ambiguity in the language of the Act. Clause two of the PDA states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”102

The Court discerned ambiguity in the statute’s failure to specify the level of treatment required for pregnant women in a workplace that grants favorable treatment to some, but not all, nonpregnant workers. Because the PDA’s language does not tie the treatment of pregnant women to “all” or “any” employees similar in ability to work, the Court found the text more open-ended.103 Does it, the Court asked, “mean that courts must compare workers only in respect to the work limitations that they suffer” and “ignore all other similarities or differences between pregnant and nonpregnant workers?”104 “Or does it mean that courts, when deciding who the relevant ‘other persons’ are, may consider other

---

100. Young v. United Parcel Serv., Inc., 707 F.3d 437, 446 (4th Cir. 2013) (finding that “UPS has crafted a pregnancy-blind policy” that is “at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers”).
101. See Lochren v. Cty. of Suffolk, No. CV 01-3925(ARL), 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008), vacated, 344 F. App’x 706 (2d Cir. 2009).
104. Id. at 1348.
similarities and differences as well" and "[i]f so, which ones?"\footnote{105}

The Court began with the premise that Peggy Young’s challenge to UPS’s failure to accommodate her lifting restriction while pregnant was a disparate treatment claim.\footnote{106} Indeed, the Court took pains to note that Young did not bring a disparate impact claim, highlighting the difference between the two in that disparate impact focuses on “the effects of an employment practice, determining whether they are unlawful irrespective of motivation or intent.”\footnote{107}

Having posited a sharp division between treatment and impact claims, the Court proceeded to the heart of the dilemma in clause two. “Suppose the employer would not give [a pregnant employee] the ‘same accommodations’ as another employee,” but its reason fell within a “facially neutral category,” such as favoring on-the-job injuries—“[w]hat is a court then to do?,” Justice Breyer asked plaintively.\footnote{108} The Court’s labeling of such a policy as facially neutral is somewhat puzzling because under the terms of the PDA, a policy that treats work restrictions caused by pregnancy differently than those caused by other conditions is not neutral. Because pregnancy by definition is not an on-the-job injury, such a policy differentiates based on the source of the condition causing the work restriction. A policy that favors classes of workers that by definition omit pregnant workers (along with some nonpregnant workers) could be characterized as overtly discriminatory on the basis of pregnancy.\footnote{109} The Court rejected this view, however, terming it a “most-favored-nation status” for pregnant workers, a result it found Congress could not have intended.\footnote{110} Rejecting the plaintiff’s proposed source-of-condition rule and the employer’s bright-line rule denying any independent obligation on employers from clause two, the Court forged a middle path. It set out to craft a disparate treatment claim for pregnancy discrimination based on the unfavorable treatment of pregnancy compared to some—but not all—other conditions causing a similar effect on work. But the Court struggled with how to fashion disparate treatment doctrine in this setting. It recognized that “disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory,

\footnote{105} Id. at 1348–49.
\footnote{106} Id. at 1345.
\footnote{107} Id. Young sought permission to amend her complaint in the district court to add a disparate impact claim, but the court denied her motion for failure to exhaust administrative remedies because she did not file a disparate impact charge with the EEOC. See Young v. United Parcel Serv. of Am., Inc., No. DKC-08-2586, 2010 U.S. Dist. LEXIS 30764, at *6–7 (D. Md. Mar. 30, 2010).
\footnote{108} Young, 135 S. Ct. at 1349.
\footnote{109} See Michael C. Harper, Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in Young v. UPS and EEOC v. Abercrombie & Fitch, Inc., 96 B.U. L. Rev. 543, 545–46 (2016) (arguing that the Court erred in failing to recognize the UPS policy as overt discrimination against pregnant workers and analogizing it to the no-hats policy struck down in EEOC v. Abercrombie & Fitch, Inc., which also drew facially discriminatory lines that disfavored the class of protected workers along with disfavoring some workers outside of the protected class).
\footnote{110} Young, 135 S. Ct. at 1350.
nonpretexntual reason for doing so.' And it found “no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach.” And yet, the Court went on to deviate significantly from the classic disparate treatment framework.

The Court turned to the familiar McDonnell Douglas three-stage, burden-shifting approach but ended up modifying it significantly. First, the plaintiff must make out a prima facie case, the heart of which requires showing that the employer refused to accommodate the plaintiff’s pregnancy but accommodated “others ‘similar in their ability or inability to work.’” The employer “may then seek to justify its refusal to accommodate the plaintiff by relying on ‘legitimate, nondiscriminatory’ reasons for denying her accommodation.”

Here is where the trip through McDonnell Douglas gets strange: saving money and/or maximizing convenience are not, the Court cautioned, legitimate, nondiscriminatory reasons for refusing to accommodate pregnant workers. If they were, the Court explained, the employer’s benefit plan in General Electric Co. v. Gilbert—the very case that provoked Congress to enact the PDA to change the result in that case—would be permissible. Regardless of whether the Court is correct in that assessment, the disallowance of cost as a legitimate, nondiscriminatory reason marks a major departure from the McDonnell Douglas framework. The Court has previously made clear that any reason that is analytically distinct from the protected class suffices to discharge the employer’s burden to assert a legitimate, nondiscriminatory reason, including cost. Indeed, if cost is dispensed with, it is hard to know what plausible nondiscriminatory reason an employer might assert for why it accommodates some workers but leaves out pregnant workers. Nevertheless, the Court clarified, to discharge the employer’s burden at this stage, the employer must offer some reason other than cost or administrative convenience for not grouping pregnant women with the classes of workers whose similar work restrictions are being accommodated.

111. Id.
112. Id.
113. Id. at 1354.
114. Id. (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
117. It is not obvious that the Court is correct about this. The plan challenged in Gilbert, as the Court points out elsewhere, singled out pregnancy for exclusion while accommodating virtually all other conditions. Id. at 1353. UPS’s plan, as the Court repeatedly observed, treated pregnant workers worse than some favored employees, but the same as others. See id. at 1347. Indeed, it is because UPS treated pregnant workers the same as some classes of other disfavored workers that the Court saw the need to turn to McDonnell Douglas in the first place. See id. at 1345, 1354.
118. See, e.g., Hazen Paper Co. v. Higgins, 507 U.S. 604, 611–12 (1993) (holding that an employer’s practice of terminating employees right before they vest in pension benefits that would cost the employer money is a legitimate, nondiscriminatory reason under the ADEA because, even if it has a disproportionate effect on older workers, it is analytically distinct from age).
Things became stranger still when the Court turned to the pretext stage of the *McDonnell Douglas* framework. The plaintiff may prevail at this stage by exposing the employer’s legitimate, nondiscriminatory reason as a pretext for discrimination. The court explained:

[T]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.119

In other words, the weakness of the employer’s business justification for treating some nonpregnant employees more favorably than pregnant women may establish that the reason was a pretext for discrimination.120 The Court did not elaborate on what kinds of business justifications might stand up to this scrutiny or how courts should measure the strength of the employer’s business justification.

Two points are worth noting about this newly minted variation on *McDonnell Douglas*. First, it is the burden on pregnant women as a class—the adverse effects of the employer’s policies—that, when left unexplained by a sufficiently strong business justification, creates an inference of intentional discrimination.121 This move rips the seams out of the traditional understanding of what separates impact from treatment claims. Time and again, the Court has reiterated that proof that a practice has a disparate impact does not establish proof of intent to discriminate.122

Second, the burden on the plaintiff to rebut the employer’s justification differs substantially from the typical proof of pretext. In the usual case, the

---

120. Id. Justice Alito, concurring in the judgment, would have adopted a narrower approach than the majority. He agreed that cost alone could not justify the differential treatment of pregnant women, but opined that other than disallowing cost-based justifications, courts should not probe the strength of employer justifications for “a truly neutral rule.” *Id.* at 1359 (Alito, J., concurring). Justice Alito’s acceptance of neutrality would reinscribe the core error of *Gilbert*. If a “neutral reason” could justify treating pregnant workers differently, plans like the one at issue in *Gilbert* could likely survive challenge. *See id.* at 1360 (describing UPS’s desire to comply with the ADA as a “neutral reason” for accommodating workers with disabilities but not pregnant workers).

121. The opinion leaves some uncertainty as to what kind of burden the plaintiff must show and what kind of evidence will demonstrate it. *See id.* at 1354 (“The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.”). The uncertainties include what percentage of accommodated nonpregnant workers suffices, what percentage of unaccommodated pregnant workers suffices, and whether the percentages should be established through the number of actual employees requesting accommodations or some other metric, such as the number of conditions accommodated under the employer’s policies.

plaintiff must show that the employer’s reason was not the “true” reason—that is, that the employer’s reason was knowingly offered as a cover-up for the real reason, intentional discrimination.\(^{123}\) The employer’s deceit in proffering a false reason may be inferred from the plaintiff’s proof of its falsity, but the ultimate burden is on the plaintiff to support the inference that the employer’s “real” reason was intentional discrimination. In the newly configured PDA claim, however, the plaintiff need not prove that the employer’s reason was not its genuine motivation for acting. Rather, the plaintiff need show only that it was not a “strong” enough reason “to justify the burden” on pregnant women.\(^ {124}\)

This retooling of the McDonnell Douglas model unsettles the disparate treatment apple cart. Proof of unjustified impact now serves to establish discriminatory intent in a disparate treatment pregnancy discrimination claim.

Predictably, this paradigm shift prompted scathing criticism from the dissent. Accusing the majority of “bung[ling] the dichotomy between claims of disparate treatment and claims of disparate impact,” the dissenting Justices, in an opinion authored by Justice Scalia, lambasted “the topsy-turvy world created by” the majority in which “a pregnant woman can establish disparate treatment by showing that the effects of her employer’s policy fall more harshly on pregnant women than on others . . . and are inadequately justified.”\(^ {125}\) The resulting mish-mash, the dissent continued, “can thus serve only one purpose: allowing claims that belong under Title VII’s disparate-impact provisions to be brought under its disparate-treatment provisions instead.”\(^ {126}\)

Troubled by the dissent’s cajoling, the majority repeatedly proclaimed its faithfulness to traditional disparate treatment doctrine.\(^ {127}\) However, the Court’s best effort to maintain a distance between the two categories amounts to a feeble declaration that “the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of intentional discrimination avoids confusing the disparate-treatment and disparate-impact doctrines.”\(^ {128}\) And yet, the “sufficient evidence” needed to support the inference of intentional discrimination is precisely the unjustified impact on pregnant women. Moreover, the intentional discrimination that the Young framework purports to find may exist as a matter of law even if the employer genuinely believed its factually correct—albeit (as determined by a court) insufficiently weighty—justification for having a policy that burdens pregnant women. As Justice

---


\(^{124}\) Young, 135 S. Ct. at 1354.

\(^{125}\) Id. at 1365 (Scalia, J., dissenting).

\(^{126}\) Id. at 1366 (Scalia, J., dissenting).

\(^{127}\) See id. at 1355 (“This approach . . . is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate, nondiscriminatory reasons . . . .”); id. (“[I]t is hardly anomalous (as the dissent makes it out to be) that a plaintiff may rebut an employer’s proffered justifications by showing how a policy operates in practice.” (internal citation omitted)).

\(^{128}\) Id.
Kennedy pointed out in his less caustic dissent, there was no evidence of “animus or hostility to pregnant women” in the Young case itself—an observation the majority did not attempt to refute, despite ruling for the plaintiff on the employer’s motion for summary judgment.\textsuperscript{129} Although the majority did not convincingly answer the dissent’s objection that it had blurred the lines between disparate impact and disparate treatment, it might have pointed out that this was not the first time the Court had done so.

C. YOUNG’S FELLOW TRAVELERS: SOUNDING THE MINOR CHORDS OF DISPARATE TREATMENT LAW

Although Young marks a departure from the traditional categories and proof frameworks of employment discrimination law, a closer look at this body of law reveals that there is more porosity along the treatment–impact border than the dissenters in Young and the Court’s canonical cases acknowledge. In Young, the unjustified burden on pregnant women of accommodating other conditions with a similar effect on work establishes a disparate treatment claim. At first glance, Young stands out as an anomalous hybrid—a disparate treatment-by-proof-of-impact claim. A deeper probe into the margins of disparate treatment law, however, finds other instances of blurred boundaries in which insufficiently explained impact serves to establish disparate treatment.

Harassment claims, for example, have long been difficult to situate as simple disparate treatment—although it is well-settled doctrinally that harassment claims fall on the disparate treatment side of the line.\textsuperscript{130} Disparate treatment’s grasp on harassment is particularly tenuous where the harassment is not targeted at a particular individual, but permeates the environment for all workers. The same is true for harassment claims based on conduct by coworkers and customers, as opposed to supervisors acting as agents of the employer, where liability is predicated on the employer’s poor excuse for not responding more effectively.\textsuperscript{131} Other discriminatory practices besides harassment have also occasionally registered as intentional discrimination based on the employer’s insufficient reasons for burdening the protected class.\textsuperscript{132}

\textsuperscript{129} Id. at 1366 (Kennedy, J., dissenting).


\textsuperscript{132} See, e.g., EEOC v. Dial Corp., 469 F.3d 735, 743 (8th Cir. 2006) (concluding that a weak justification for employee strength test with a marked disparate impact on women supported disparate treatment verdict for the EEOC); Maldonado v. City of Altus, 433 F.3d 1294, 1306–08 (10th Cir. 2006)
Indeed, even the paragon of disparate treatment, *McDonnell Douglas*, was not initially clear about the boundary separating disparate treatment and disparate impact claims when it came to scrutinizing the sufficiency of employer justifications for discriminatory treatment. Even as the Court criticized the court below for invoking the *Griggs* job-relatedness standard to test the sufficiency of the employer’s legitimate, nondiscriminatory reason in the individual disparate treatment case before it, the Court’s own separation of the two theories was less than crisp. The Court instructed that *Griggs* was inapplicable to the present case because *Griggs* involved challenges to qualifications “neutral on their face” that “operated to exclude many blacks who were capable of performing effectively in the desired positions.”\(^{133}\) Accordingly, the Court concluded, the lower court had been wrong to insist that the company’s reason for not rehiring the plaintiff must be based on demonstrably objective criteria instead of its subjective evaluation of unfitness due to the plaintiff’s participation in the illegal stall-in. And yet, the Court’s opinion elsewhere suggests that the weight of the employer’s reason may be relevant in the ultimate determination of whether the rehire decision was motivated by a discriminatory intent. In emphasizing the strength of the defendant’s actual reason for refusing to rehire the plaintiff who had engaged in an illegal and disruptive demonstration against it, the Court suggested that some employer justifications may not be “reasonable” or “legitimate” enough to dispel an inference of discriminatory intent.\(^{134}\) Although, as discussed above, the Court’s subsequent cases took a different path, refusing to test the sufficiency of the employer’s justification in an individual disparate treatment claim, it is worth remembering that the Court’s foundational disparate treatment case was itself ambiguous about the precise boundaries of the treatment and impact categories.

A 2009 decision reveals that establishing disparate treatment by way of unjustified impact is not unheard of in the Court’s modern case law—nor is it always a progressive move. The reverse discrimination case of *Ricci v. DeStefano* also blurred the boundaries of disparate treatment and disparate impact, despite

---


\(^{134}\) *Id.* at 802–03 (“We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire.”); *id.* at 803 n.17 (noting that, because in the instant case the employer’s reason was the plaintiff’s unlawful activity against the employer, the Court needed “not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire”); *id.* at 806 n.21 (acknowledging uncertainty about whether past participation in unlawful conduct predicts future such conduct, but stating that “in this case, given the seriousness and harmful potential of respondent’s participation in the ‘stall-in’ and the accompanying inconvenience to other employees, it cannot be said that petitioner’s refusal . . . lacked a rational and neutral business justification”); *id.* at 804 (citing the employer’s “reaction, if any, to [the plaintiff’s] legitimate civil rights activities” as evidence relevant to showing pretext).
the Court’s failure to acknowledge that it did so.\textsuperscript{135} In this Title VII disparate treatment challenge to New Haven’s decision to discard the results of a standardized promotion test because the test had a disparate impact on minority firefighters, the Court found that the city’s actions were intentionally discriminatory toward the beneficiaries of the test, a group of predominantly white firefighters.\textsuperscript{136} It did so despite the absence of any proof that city officials acted with a discriminatory intent to harm whites. The Court never openly acknowledged that the city’s actions were facially neutral; the city discarded the test results for all of the firefighters and denied promotions to all of them.\textsuperscript{137} Although the city’s motive of avoiding a disparate impact suit by minority firefighters necessarily meant that it was willing to block promotions that would otherwise disproportionately benefit white firefighters, this established only that discarding the test results had a disparate impact on white test-takers. Instead of requiring proof that the city acted with a deliberate intent to harm white firefighters because they are white, the Court focused on the lack of a sufficient justification for burdening the high-performing test-takers.\textsuperscript{138} Because the Court found the test used to be job-related, it concluded that the city had an insufficient basis to believe that it would have faced disparate impact liability for making promotions based on the test.\textsuperscript{139} In other words, the unjustified burden on a group of predominantly white test-takers formed the crux of the disparate treatment violation.

The \textit{Ricci} Court’s reliance on the significant burden on the plaintiffs, combined with the employer’s insufficient justification for the burden, parallels the Court’s approach in \textit{Young}. Albeit at different ends of the political spectrum, \textit{Young} and \textit{Ricci}—along with other outliers at the margins of disparate treatment law—serve as examples of cases where insufficiently explained harm to the protected class can establish a disparate treatment claim.

Notably, the dissenting Justices in \textit{Young} who accused the majority of obliterating the distinction between disparate treatment and disparate impact—Justices Kennedy, Thomas, and Scalia—were in the majority in \textit{Ricci}. Although these Justices viewed New Haven’s decision to throw out the test results for all firefighters to avoid a disparate harm to minority firefighters—without sufficient justification for doing so—as intentionally discriminatory, they rejected unjustified impact as a method for teasing out a discriminatory intent behind the impact on pregnant women under UPS’s policies. Justice Alito, who concurred

\textsuperscript{135} 557 U.S. 557 (2009).
\textsuperscript{136} \textit{Id.} at 579.
\textsuperscript{137} \textit{See id.} at 562, 574.
\textsuperscript{138} \textit{Id.} at 579–80. Contrast the Court’s approach to the equal protection challenge brought by women against Massachusetts’ absolute veterans’ preference in public employment statute: despite the state’s knowledge that the benefiting class was over 98% male, and the known effect of practically shutting women out of employment opportunities, the Court found the plaintiffs failed to prove that the state adopted the preference “because of” rather than “in spite of” the reduced employment opportunities for women. Pers. Adm’r v. Feeney, 442 U.S. 256, 270, 279 (1979).
\textsuperscript{139} \textit{Ricci}, 557 U.S. at 587, 592–93.
on a narrower ground in Young, was also quicker to find disparate treatment in Ricci than in Young.140 Concurring with the majority in Ricci, Justice Alito did not accept the city’s asserted motive of complying with Title VII’s disparate impact law as a neutral justification for the burden it imposed on white officers.141 In Young, however, Justice Alito found it “obvious” that UPS had a “neutral” reason for accommodating persons with nonpregnancy disabilities in its motive to comply with the ADA.142 To Justice Alito, UPS’s “neutral reason”—compliance with the law—belied any inference of intentional discrimination that could arise from the different treatment of pregnant women and persons with disabilities.143 And yet, New Haven’s desire to comply with the law did not dispel the inference of discrimination the Court found from the unjustified impact on white firefighters.

These Justices’ different approaches to inferring discriminatory intent in Ricci and Young reflect the influence of contested baselines going to the heart of discrimination law. Judged by an implicit baseline that places pregnant workers in a different class than the employees whose conditions are accommodated, the UPS practice appeared neutral. In contrast, New Haven’s discarding of test results that would have benefitted a group of largely white firefighters looked suspicious and intentionally discriminatory when viewed against an implicit baseline of white privilege—the expectation that when white employees excel on a test, it is a reflection of their merit. Underlying the Justices’ approaches in both cases are empirical and normative judgments about the prevalence of discrimination (race discrimination against whites in Ricci and sex discrimination against pregnant workers in Young) and what counts as discriminatory (taking unjustified action known to benefit minorities in the former and imposing an unjustified burden on pregnant workers in the latter). To the Justices in the Ricci majority, the predominantly white test-takers had earned their high scores, so the city’s actions denying them promotion appeared intentionally discriminatory. For the dissenters in Young, the nonpregnant workers were more deserving of accommodations, so the company’s failure to extend accommodations to pregnant workers was not intentionally discriminatory.144

Young may be aberrational, but it is not without peers in straddling the boundary between disparate treatment and disparate impact. Instead of being dismissed as a stand-alone mistake, the Young framework should be mined for

---

140. Justice Alito’s citation of Ricci as standing for the proposition that claims of discrimination “require proof of discriminatory intent” glosses over the extremely expansive approach that Ricci takes to proving the employer’s discriminatory intent. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1356 (2015) (Alito, J., concurring).
142. Young, 135 S. Ct. at 1360 (Alito, J., concurring).
143. Id. at 1359–60 (Alito, J., concurring).
144. Similarly, in Feeney, the Court viewed veterans as deserving of the employment practice; hence, the Court’s determination that any whiff of discriminatory intent from the gender impact on women was dispelled by the “legislative policy” behind the veterans preference “that has in itself always been deemed to be legitimate.” Pers. Adm’r v. Feeney, 442 U.S. 256, 279 n.25 (1979).
its potential to spark a more robust and transformative approach to pregnancy discrimination in the workplace.

D. THE IMPLICATIONS OF YOUNG FOR EXPANDING THE BOUNDARIES OF DISCRIMINATORY INTENT IN THE PDA

It is unclear just how far this newly minted, hybrid disparate treatment claim will go in eradicating the kind of employer policies at issue in Young. The Court reversed the Fourth Circuit’s decision that Peggy Young failed as a matter of law to make out a prima facie case, but it did not decide whether her evidence was sufficient to get to a jury on the issue of pretext. The case settled soon after the Court issued its decision. The implications for future claims are further obscured by the Court’s muddled opinion. In kitchen-sink fashion, the majority listed the facts in favor of Young without identifying which ones were crucial to its conclusion that her claim survived summary judgment. Fans of minimalism will note that this kind of fact-specificity leaves room for the law to develop incrementally. But some of the facts the Court recites are so idiosyncratic that there is room to distinguish all subsequent PDA cases. Still, the early returns are promising for plaintiffs.

Despite uncertainty about the reach of the Young opinion, the Court’s unconventional approach holds promise for easing the difficulties created for employees by the current employment discrimination regime. First, it loosens the

145. Young, 135 S. Ct. at 1355–56.
147. See Young, 135 S. Ct. at 1346–47 (reciting facts favorable to Young in the record below); id. at 1355 (denying summary judgment based on the facts Young entered into the record).
148. Id. at 1346 (including specific statements by a UPS manager in the list of facts).
149. See, e.g., Luke v. CPlace Forest Park SNF, L.L.C., 608 F. App’x 246 (5th Cir. 2015) (reversing district court’s grant of summary judgment to employer in PDA case alleging discriminatory refusal to accommodate plaintiff’s pregnancy and remanding in light of the Supreme Court’s decision in Young); Gonzales v. Marriott Int’l, Inc., 142 F. Supp. 3d 961 (C.D. Cal. 2015) (relying on Young to deny employer’s motion to dismiss PDA claim alleging discriminatory failure to accommodate lactating employee’s need for breaks to express breast milk); Martin v. Winn-Dixie La., Inc., 132 F. Supp. 3d 794 (M.D. La. 2015) (denying employer’s motion for summary judgment in PDA failure-to-accommodate claim where plaintiff identified two arguably, but not indisputably, similar comparators who were accommodated); LaSalle v. City of New York, 2015 U.S. Dist. LEXIS 41163, at *8 (S.D.N.Y. Mar. 30, 2015) (denying employer’s motion to dismiss plaintiff’s pregnancy discrimination claim alleging discriminatory refusal to grant request for light duty work and stating “[t]he Supreme Court recently dispelled any doubt that a plaintiff may bring a PDA claim based on her employer’s failure to accommodate her pregnancy,”); McQuistion v. City of Clinton, 872 N.W.2d 817 (Iowa 2015) (relying on Young to reverse lower court’s grant of summary judgment to employer in employee’s state law pregnancy discrimination claim for discriminatory failure to accommodate pregnancy).
tightness of the requisite comparator proof that was endemic in the pre-Young case law. Pregnant employees may now compare themselves to other workers similarly affected in their ability or inability to work, as the PDA demands, without proving perfect similarity in all respects, such as in the employer’s reason for conferring accommodations.\textsuperscript{150} This greater leniency on the relevant comparators for purposes of making out a prima facie case should help plaintiffs clear a significant hurdle that had blocked these claims in the lower courts. Describing the burden of the prima facie case as “not onerous,” the Young opinion emphasized, “[n]either does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways.”\textsuperscript{151}

The greater flexibility in the comparator proof available to pregnant workers goes hand-in-hand with another important feature of the new PDA model: the Court’s use of impact-type proof to establish intentional discrimination. Whereas the burden of comparator proof in the typical disparate treatment case is to support an inference of discriminatory intent behind the employer’s unfavorable treatment of the plaintiff, the unjustified impact on pregnant workers performs the work of establishing intentional discrimination in the PDA claim crafted in Young. This would not make sense if the plaintiff’s ultimate burden were to expose a subjective state of mind on the part of the employer to deliberately disadvantage pregnant women. Rather, the Court’s theory behind inferring intentional discrimination in the PDA claim must be that the burden on pregnant women, when insufficiently justified by a business rationale, reflects insufficient concern for the harmful effects on pregnant workers’ employment. The question at the heart of this model is, as the Court asks, “why, when the employer accommodated so many, could it not accommodate pregnant women as well?”\textsuperscript{152}

The employer’s proffer of a legitimate, nondiscriminatory answer to that question is not enough to prevent the court from finding discriminatory intent if the answer is not persuasive enough—in the assessment of the reviewing court—to justify the harm to pregnant workers.\textsuperscript{153}

In revamping the classic disparate treatment framework, which searches for a deliberate intent to discriminate, this hybrid model is well-designed to reach the

\textsuperscript{150} Young, 135 S. Ct. at 1355 (“[T]here is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young’s.”). Justice Alito’s concurring opinion takes a somewhat more stringent approach to the comparator question, interpreting the second clause “to mean that pregnant employees must be compared with employees performing the same or very similar jobs.” Id. at 1357–58 (Alito, J., concurring). Justice Alito’s approach would leave open the possibility that a plaintiff’s proof might fail if there were no one else in the company who held the plaintiff’s same job. See id. at 1358 (Alito, J., concurring). Under the majority’s approach, such an obstacle could be overcome if it were clear that a similarly impaired nonpregnant worker in that same job would have been accommodated. See id. at 1354.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 1355.

\textsuperscript{153} See id.
negative treatment of pregnant workers by an employer who acts not with a conscious antipregnancy animus, but with an implicit or unconscious bias that values pregnant workers less than workers affected by other conditions. Policies like those of UPS stem not as much from an overt animus against pregnant workers as from a failure to consider the needs of pregnant workers, or, when considering them, to implicitly value those needs less than those of workers encumbered by other conditions. Research on bias against working mothers supports this understanding of employer intent, documenting “an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework.”

It is not pregnancy per se that triggers negative reactions, but the combination of paid work and pregnancy that triggers negative stereotypes. Cognitive bias that associates pregnancy and motherhood with less competence at work and reduced commitment to the workplace shape employer judgments about the worth of pregnant workers and working mothers. This bias may exist not as a conscious assessment in the minds of decision makers, but as a stereotyped assumption about the value of pregnant women as employees in relation to the burdens their impending motherhood places on employers.

Employers have often overestimated the disruption to the workplace caused by accommodating pregnant women, while underestimating the value of those women as employees. Biased assessments of the costs and value of accommodating and protecting various classes of workers contributed to the very legal landscape to which the PDA was responding. As Deborah Dinner has shown, stereotypes and gendered ideologies about pregnant workers underlay the cost assessments used to justify excising pregnancy from a broad range of labor protections, such as unemployment insurance, disability insurance, and worker’s compensation. Biased cost-benefit analyses based on stereotypes about pregnant workers have continued to shape the scope of worker protections.

---

155. See Michelle R. Hebl et al., Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles, 92 J. APPLIED PSYCHOL. 1499, 1504 (2007) (finding store employees reacted positively to pregnant customers but negatively to pregnant job applicants).
159. See Deborah A. Widiss, Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act, 46 U.C. DAVIS L. REV. 961, 984–89, 1028 (2013) (discussing the history of laws and private policies extending generous protection to a broad class of workers but omitting pregnant workers based on biased cost-benefit assessments and interpreting the PDA as ensuring that such cost-benefit analysis would be “conducted without the overlay of still
the *Young* case itself, for example, the employer held fast to its policy of not accommodating pregnancy even though Peggy Young’s coworkers volunteered to help her on the rare occasions that her job required any heavy lifting of packages that would have been forbidden by her medical restriction. Any disruption from permitting her to continue in her job with her lifting restrictions would have been negligible or nonexistent.

After *Young*, employer policies reflecting such biased judgments about pregnant workers are more likely to be actionable under this hybrid disparate treatment model than they would have been under the classic *McDonnell Douglas* framework, in which the plaintiff must prove that the employer intentionally proffered a false reason for its actions. Admittedly, the *Young* opinion still uses the nomenclature of intentional discrimination. However, the proof that the Court accepts to support the inference of intentional discrimination does not align with a conclusion that the employer was consciously aiming to burden pregnant women. Instead, the proof model is well-designed to capture implicit bias. Describing the inference created by its newly minted prima facie case, the Court invoked the language of causation rather than intent. The Court explained that “an individual plaintiff may establish a prima facie case by ‘showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under’ Title VII.”

Although the Court leaves the PDA claim in the category of individual disparate treatment, a form of intentional discrimination, the contours of the category are expanded in the process.

**E. DEFENDING THE SHIFTED BOUNDARIES OF DISPARATE TREATMENT IN *YOUNG***

Setting aside Justice Scalia’s caustic tone, the dissent’s critique of blurring the boundary between disparate treatment and disparate impact aptly raises the question of whether disparate impact would be the better avenue for challenging employer policies based on implicit judgments about pregnant workers instead of pushing the boundaries of disparate treatment. Before delving into that question, it is worth noting that there is some lingering uncertainty about how disparate impact doctrine intersects with the PDA. The majority pointedly noted

---

161. *Id.* at 1345.
162. *Id.* (stating that “liability in a disparate-treatment case depends on whether the protected trait actually motivated the employer’s decision” (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003))).
163. *Id.* at 1354 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978)).
164. *Id.* at 1364 (Scalia, J., dissenting) (“It takes only a couple of waves of the Supreme Wand to produce the desired result. Poof!”).
165. *Id.* at 1365–66 (Scalia, J., dissenting).
that Peggy Young did not bring a claim for disparate impact—an observation that seems to indicate the Court’s assumption that she could have done so.166 Justice Scalia’s dissent, castigating the majority for treating as disparate treatment what should have been brought as a disparate impact claim, likewise implicitly presumes the availability of disparate impact doctrine to challenge facially neutral policies that have a disparate impact on pregnant workers. Justice Kennedy’s dissent goes further and explicitly acknowledges the availability of disparate impact challenges under the PDA.167 Justice Alito’s concurring opinion is more circumspect but might be read to mean that only disparate treatment claims are available under the PDA.168 The strongest suggestion from a Justice that the disparate impact theory does not apply to pregnancy came from Justice White in his dissent in a 1987 PDA case. According to Justice White, clause two of the PDA forecloses disparate impact claims that would otherwise prohibit an employer from using a facially neutral practice that treats pregnant workers the same as other employees with similarly limiting conditions.169 A few lower courts have subscribed to this view, reading clause two to require no more than the same treatment of pregnant workers compared to others with similar work ability.170 Even those courts that have applied disparate impact doctrine to pregnancy claims have done so sparingly, invoking various doctrines to cabin the claim and keep it from requiring a restructuring of the workplace that would raise the level of treatment

166. Young, 135 S. Ct. at 1345.
167. Id. at 1367 (Kennedy, J., dissenting) (“The PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits ‘practices that are not intended to discriminate but in fact have a disproportionate adverse effect.’” (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009))).
168. See id. at 1356 (Alito, J. concurring) (stating that “[c]laims of discrimination under [clause one of the PDA] require proof of discriminatory intent” and “all that matters is the employer’s actual intent”).
169. See Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 298 n.1 (1987) (White, J., dissenting) (“The same clear language preventing preferential treatment based on pregnancy forecloses respondents’ argument that the California provision can be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers. Whatever remedies Title VII would otherwise provide for victims of disparate impact, Congress expressly ordered pregnancy to be treated in the same manner as other disabilities.”).
170. See, e.g., Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861 (5th Cir. 2002) (refusing to apply disparate impact to claims “in which the plaintiff’s only challenge is that the amount of sick leave granted to employees is insufficient to accommodate the time off required in a typical pregnancy” because “[t]o hold otherwise would transform the PDA into a guarantee of medical leave for pregnant employees”); Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (describing disparate impact as a “permissible” theory for pregnancy discrimination claims as long as it is not applied to grant pregnant workers “favoritism” or interfere with the ability of employers to treat pregnant workers “as badly as they treat similarly affected but nonpregnant employees”); Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50, 867 F.2d 974, 978, 983 (7th Cir. 1988) (rejecting disparate impact challenge to employer’s generally applicable leave policy and referencing amicus brief of the United States arguing that the PDA’s equal treatment mandate was intended to “eliminate the need for employees to rely on disparate impact analysis to support their Title VII claims” (citation omitted)); Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988) (reversing lower court’s finding that employer’s leave policy had a disparate impact based on pregnancy because the policy was entirely discretionary).
for pregnant employees.\footnote{171 See, e.g., Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 584 (7th Cir. 2000) (rejecting disparate impact claim under PDA because employers are not required to excuse pregnant employees from satisfying legitimate requirements); Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997) (rejecting pregnancy-based disparate impact claim for failure to establish prima facie case); Lang v. Star Herald, 107 F.3d 1308, 1314 (8th Cir. 1997) (same); Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440, 444 (7th Cir. 1991) (rejecting disparate impact claim because evidence failed to show disproportionate impact on “teachers who experienced pregnancy-related disability”); Wilson v. O’Grady-Peyton Int’l (USA), No. 407CV003, 2008 U.S. Dist. LEXIS 24394, at *32–33 (S.D. Ga. Mar. 26, 2008) (finding plaintiff failed to offer sufficient evidence of a disproportionate impact on pregnant woman concerning a policy requiring an overseas trip to earn commission); see also Selmi, supra note 66, at 749–51 (summarizing disparate impact case law under the PDA). \textit{But see} L. Camille Hébert, \textit{Disparate Impact and Pregnancy: Title VII’s Other Accommodation Requirement}, 24 J. Gender, Soc. Pol’y & L. 107, 109 (2015) (“It is the disparate impact theory, rather than the disparate treatment theory, in which Title VII’s requirement to accommodate pregnancy is most likely to be found.”).} Beyond the doctrinal hurdles of proceeding under a disparate impact theory, the question of how to classify challenges to the unfavorable treatment of pregnant workers goes to the heart of the dispute over what neutrality means when it comes to pregnancy. The disparate impact claim was designed to reach neutral practices with the unintended effect of disproportionately harming a protected class absent a sufficiently strong justification. Conceptually distinct from disparate impact theory, disparate treatment is the model for reaching non-neutral practices that single out members of the protected class for unfavorable treatment. Pregnancy discrimination has never been easy for the Court to classify in these categories because men are not encumbered by pregnancy and no condition that affects men is precisely comparable to pregnancy. It is that analogic crisis, and the Court’s daft response to it in \textit{Gilbert}, that prompted Congress to enact the \textit{PDA}.\footnote{172 See \textit{Young}, 135 S. Ct. at 1353.} Even after the enactment of the \textit{PDA}, parsing what neutrality means in this context requires a judgment about baselines: to whom must the nondiscriminatory employer compare pregnant workers—to those workers favored by the employer or to those workers disfavored by the employer? The majority’s approach in \textit{Young}, fashioning the proof framework under the rubric of disparate treatment, best identifies the need for discrimination law to probe what neutrality means in this setting. In contrast, putting the claim under the disparate impact umbrella would mean accepting as pregnancy-neutral any unfavorable treatment of pregnancy as long as its justification could be articulated in a facially neutral way—including even the policy in \textit{Gilbert} favoring workers with illnesses and injuries. As the \textit{Young} majority recognized, rules that sound pregnancy-neutral are not necessarily neutral in their real-world treatment of pregnant workers.\footnote{173 \textit{Id.} (describing the ability of even the employer in \textit{Gilbert} to describe its policy of accommodated illnesses and accidents in pregnancy-neutral terms).} Disparate treatment best captures this understanding of pregnancy discrimination—that policies that selectively accommodate numerous other conditions besides pregnancy are not in fact “neutral,” but
rest on biased judgments about the worth of pregnant workers and the value of retaining them.

Nonetheless, as the dissent correctly observed, then-existing disparate treatment doctrine did not dictate this result.\(^{174}\) What prompted the Court’s newfound flexibility with \textit{McDonnell Douglas} and its willingness to remodel the disparate treatment claim in PDA claims? The Court’s decision should be understood as reflecting a shift in the contest over competing understandings about what it means to discriminate on the basis of pregnancy and the circumstances under which it is unjust to treat pregnant workers worse than other workers. The model that the Court crafted reflects a more expansive understanding about the meaning and prevalence of discrimination against pregnant workers. The majority’s approach supplants the lower courts’ narrow conception of pregnancy discrimination as requiring pregnancy-based animus and the accompanying assumption that such discrimination is a rare and unusual phenomenon. That perspective led lower courts to be skeptical of the likelihood that employers’ refusals to accommodate pregnant workers reflected intentional discrimination. The more flexible framework crafted by the majority in \textit{Young} reflects a more expansive conception of pregnancy discrimination as encompassing unconscious bias—an understanding that invites a different expectation about the likelihood of discerning pregnancy discrimination in today’s workplace.\(^{175}\)

This change in the baseline view of what pregnancy discrimination is and its prevalence in the workplace corresponds to heightened advocacy and activism around the plight of pregnant workers. Women’s rights groups have made the treatment of pregnant workers a focal point in recent years, and new advocacy groups have sprung up with singular focus on the treatment of pregnancy in the workplace.\(^{176}\) Through compelling narratives of sympathetic women who want to work but are forced out of their jobs upon becoming pregnant, often for lack of minimal but necessary accommodations, the public dialogue about what employers owe pregnant women has shifted. This advocacy has directly challenged the prevalent lens of “choice” that suggests that women’s lower rates of

\(^{174}\) See id. at 1364–65 (Scalia, J., dissenting).

\(^{175}\) And yet, there are limits to the Court’s embrace of a more progressive cultural understanding of the rights of pregnant workers. The use of aberrational examples of employees who are more deserving of favorable treatment—for example, an employee who demonstrates extraordinary heroism and is injured in the process—reflects the stronghold of social norms that view having children as an individual choice instead of a public good. See id. at 1349–50 (using such an example to argue against a mechanical rule conferring “special treatment” and “most favored employee” status on pregnant workers). This comparison implicitly views the workplace hero as acting for the good of others, in contrast to the pregnant woman who made an individual choice in her private life to have children. \textit{Cf.} Nicole Buonocore Porter, \textit{Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers}, 58 U. KAN. L. REV. 355 (2010) (discussing and critiquing cultural norms that see women’s childrearing and childbearing efforts as a product of individual choice instead of as a public responsibility and a societal good).

employment and pay after having children is a result of their own desires to prioritize having children over paid employment. At the national level, a focal point for this advocacy has been a proposed Pregnant Workers Fairness Act (PWFA) that would require employers to offer reasonable accommodations for pregnancy, modeled after the reasonable accommodation mandate in the ADA. Although the bill has not generated enough support to have a realistic chance of passing in the near future, it has drawn attention to the plight of pregnant women and provided a vehicle for raising public awareness, spawning op-eds in traditional media and dialogue in other media outlets. At the state level, proposals modeled after the PWFA found a receptive audience in some state legislatures, and a few states and localities now have laws guaranteeing such protections. These successes reflect the growing strength of a revitalized social justice movement centered on the rights of pregnant workers and set the stage for the Court’s more expansive understanding of pregnancy discrimination in Young.

One of the more puzzling facets of the Young decision is why the Court remained so superficially attached to the formalities of the proof models in reaching its interpretation of the PDA—an attachment that is particularly puzzling given that the Court ultimately departed from the classic proof framework in significant ways. The majority began with the premise that Young’s case was based on “indirect evidence” and hence belongs on the McDonnell Douglas side of the disparate treatment track. Consistent with the trends in the lower courts described above, the Court’s opinion reads as if it had never decided Desert Palace and as if “direct evidence” were still the gatekeeper separating 703(m) motivating factor claims from the McDonnell Douglas proof framework.


181. Young, 135 S. Ct. at 1345 (describing two distinct methods by which Young could prevail: “(1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in McDonnell Douglas”); id. at 1347 (attempting to separate Young’s evidence into “direct evidence” and “evidence that she had made out a prima facie case under McDonnell Douglas”).
After labeling Young’s case “indirect,” the majority segued into *McDonnell Douglas*, latching onto the familiar incantation of the three-stage, burden-shifting framework. It proceeded to apply *McDonnell Douglas* in a novel way, but maintained a veneer of consistency with the reminder that the *McDonnell Douglas* prima facie case was “not intended to be an inflexible rule.”

It is curious that the Court leaned so heavily on *McDonnell Douglas* instead of engaging in a more straightforward comparison between pregnant workers and workers with similar work restrictions, particularly because the prima facie case adds so little to the analysis. Although it is the nature of judicial decision making to reconcile new decisions with established precedents, the Court might have done better to set *McDonnell Douglas* aside as not well-designed for the kind of comparative approach that the text of the PDA requires. Instead, the Court held fast to *McDonnell Douglas* like a child with a favorite blanket.

And yet, reliance on *McDonnell Douglas* may have helped the Court see its way clear to embrace a broader understanding of pregnancy discrimination. To be sure, the *McDonnell Douglas* precedent did not resolve the conflict between the majority and the dissent over how to define discrimination against pregnant women when the employer accommodates some workers’ conditions but not pregnancy. But calling on the well-worn *McDonnell Douglas* mantra lent an aura of familiarity and legitimacy to the Court’s project of fashioning a more flexible disparate treatment claim. More substantively, fastening the *McDonnell Douglas* label onto the Court’s carefully crafted PDA claim allowed the Court to tap into the key sociological facts underlying the *McDonnell Douglas* proof framework. As other scholars have pointed out, the *McDonnell Douglas* model rests on a sociological judgment that ruling out some nondiscriminatory explanations (through the prima facie case) and the employer’s proffered reason (through proof of pretext) creates an inference of discrimination; the power of this inference rests on judges’ implicit, unstated assumptions about what discrimination is and its prevalence in the modern workplace. Judges, including the Justices in the *Young* majority, might be less comfortable if they had to explicitly articulate and justify these assumptions outright. And yet, courts’

---

182. *Id.* at 1345; *see also id.* at 1353 (“In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework.”).

183. *Id.* at 1353 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978)).

184. *See id.* at 1354 (describing the elements of the prima facie case as follows: “that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work’”); *see also Ann McGinley, Young v. UPS, Inc.: A Victory for Pregnant Employees?, HAMILTON & GRAFFIN ON RIGHTS* (Mar. 29, 2015), http://hamilton-griffin.com/guest-blog-ann-mcginley-young-v-ups-inc-a-victory-for-pregnant-employees/ [https://perma.cc/SN4E-SKY9] (criticizing the Court for unnecessarily importing the *McDonnell Douglas* framework into the PDA claim in *Young*).

185. *Cf. Young*, 135 S. Ct. at 1353 (insisting that its interpretation “is consistent with longstanding interpretations of Title VII”).

decisions in discrimination cases and the proof frameworks on which they rely cannot be fashioned without underlying normative and empirical judgments about what discrimination looks like and the likelihood of its existence. On the need for such judgments, perhaps even the dissenting Justices in Young might agree.

Although a critic might question whether judicial assumptions about the prevalence of discrimination should be embedded in the fashioning of doctrinal rules—in instead of judges articulating their underlying commitments more transparently—legal doctrine has long served this function and it is not at all clear that our legal system would have greater integrity if it were otherwise.

By relying on McDonnell Douglas, albeit in a novel way, the Court constructed a bridge of continuity in the development of employment discrimination law. Borrowing the empirical judgments that have been at the foundation of Title VII's individual disparate treatment claim since McDonnell Douglas was decided in 1973, the Young framework bears a kinship with an established proof structure with a respectable pedigree, even if it is in actuality a distant cousin instead of a close sibling. The formality of the four-part prima facie case, followed by the burden-shifting framework heading toward the ultimate question of pretext, calls forth a familiarity that gives courts permission to find discrimination through inferential proof. Although the Court treads new ground in adapting this disparate treatment proof framework to the pregnancy accommodation setting, it hoists the PDA claim onto the shoulders of its most venerable proof framework, reminding us in the process that McDonnell Douglas too was once a novel judicial invention.

This new PDA model will not, in itself, determine the outcomes of the pregnancy discrimination cases to follow, but its assemblage and embrace by the majority in Young both reflects and reinforces an increased judicial receptivity to viewing the different treatment of pregnant workers as a form of intentional discrimination—broadly understood to encompass unconscious stereotyping and implicit bias—and to remedying it through disparate treatment law. It is this development in Young—the Court’s more expansive understanding of what it means to intentionally discriminate against pregnant workers—that marks the decision’s most significant contribution.

---

187. Justice Scalia’s opinion for the Court in Wal-Mart Stores, Inc. v. Dukes rested explicitly on assumptions about the meaning and prevalence of discrimination. See 564 U.S. 338, 355 (2011) (“[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”).

188. For an argument that legal doctrine plays a valuable role in our legal system despite its indeterminacy and obfuscation of judicial choices and judges’ underlying assumptions, see Jessie Allen, Empirical Doctrine, 66 CASE W. RES. L. REV. 1, 47–48 (2015) (contending that even if doctrine is indeterminate, it may have positive “psychological and social effects on decision makers” by “bracketing their ordinary subjective perspectives” and enhancing “what psychologists call ‘theory of mind’”).

189. Cf. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 102 n.14 (1994) (concluding, from his case studies of the pay equity movement, that the
The big question after Young is what potential, if any, the decision holds for the development of employment discrimination law outside of the PDA. To be sure, the Court itself stopped short of suggesting any such implications. After fashioning its new PDA proof framework, the Court quickly cabined it as “limited to the Pregnancy Discrimination Act context.”190 And yet, other than this bare assertion, it is not clear why the logic of the Young framework should remain wholly encapsulated within the PDA. The PDA’s distinctively comparator-driven text in clause two, mandating the same treatment as a set of specified comparators, might have provided a basis for interpreting the PDA differently from the rest of Title VII. But the Court foreclosed that possibility when it fell back on McDonnell Douglas and the individual disparate treatment framework as the structure for housing the PDA claim. Moreover, although the language of clause two does not appear elsewhere in Title VII in that precise form, the PDA’s comparator-driven logic is not unique to the PDA. As discussed previously, the treatment of otherwise similarly situated comparators is often central in individual disparate treatment cases. Indeed, the importance of comparator-driven proof in establishing intentional discrimination was endorsed by the Court in McDonnell Douglas itself.191

Although logic does not support limiting the Court’s reasoning to the PDA setting, it would require a much bolder reading of Young than I am prepared to give to discern in the case a general endorsement of inferring discriminatory intent from impact-style proof, or of easing up on the strictness of comparator proof, or of equating discriminatory intent with implicit bias in the run of cases. The argument that this Article puts forward is more modest: for reasons that will be elaborated below, the equal pay claim is an auspicious area for a disparate treatment claim to develop along parallel lines to those drawn by the Court in Young. In making this argument, I do not mean to foreclose or in any way discourage planting the seeds of Young more broadly or in other discrete areas of employment discrimination.192 Rather, I argue below that there are similarities between the structure of the pregnancy and pay claims, and the social support for broadening the understanding of the kinds of discrimination that the claims reach, that make the equal pay claim fertile ground for the Young hybrid to take root. Like the PDA claim, proof of discrimination in an equal pay claim is established by the different treatment of a circumscribed class of comparators. And, as with pregnancy discrimination, recently reinvigorated advocacy and activism are successfully contesting traditional gender ideologies about the

---

190. Young, 135 S. Ct. at 1355.
191. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (“Especially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired.”).
192. Such an agenda is, however, outside the scope of this Article.
meaning of pay discrimination and the extent to which it occurs in the modern workplace.

III. LESSONS FROM YOUNG: A PATH FORWARD FOR EQUAL PAY CLAIMS

This Part explores the possibilities for borrowing from the Young framework in fashioning the equal pay claim, whether through judicial construction or legislative enactment of the Paycheck Fairness Act, by importing a business justification test into the “factor other than sex” (FOTS) defense. It points out that such a move in pay discrimination case law has already begun to take hold in some lower courts and discusses the similarities between the pay and pregnancy discrimination claims that make this a promising turn. It then defends stretching the boundaries of disparate treatment in pay discrimination claims along the lines of the Court’s refashioned disparate treatment claim in Young. Before any of this, however, some background on the state of employment discrimination law as it regulates pay discrimination, and the recent controversies that are reshaping the field, is in order.

A. TITLE VII AND THE EQUAL PAY ACT: OVERLAPPING COVERAGE OF SEX-BASED PAY DISCRIMINATION

Pay discrimination is prohibited by two federal statutes that overlap significantly in their coverage of sex-based pay discrimination. Title VII of the Civil Rights Act of 1964 prohibits, among other types of discriminatory employment practices, discrimination in compensation, a ban that applies to all of the statute’s protected classes: race, color, sex, national origin, and religion. Enacted one year earlier, the Equal Pay Act of 1963 (EPA) prohibits paying an employee less than an employee of another sex for performing substantially the same work under similar work conditions unless it falls within one of four statutory defenses. So although the EPA is limited to sex discrimination, Title VII protects a broader range of protected classes. However, because Title VII incorporates by amendment the EPA defenses (explained below), Title VII’s treatment of sex-based pay discrimination largely tracks that of the EPA, although its treatment of pay discrimination against other protected classes does not.

The EPA codified four affirmative defenses to pay disparities that would otherwise violate the Act. Of these, the most relevant today is known as the FOTS defense, which authorizes a pay disparity that would otherwise violate

194. See 29 U.S.C. § 206(d) (2012). The EPA grew out of a 1945 ruling by a federal administrative board overseeing the payment of military contractors that the pay practices of General Electric and Westinghouse discriminated against women. Although the board was dismantled soon after this ruling, the decision sparked activism by unions and women’s groups for greater legal protections from pay discrimination. See McCANN, supra note 188, at 49.
195. The EPA authorizes a pay differential that would otherwise violate the Act if “such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by
the Act if it was made pursuant to “a differential based on any other factor other than sex.” After the House passed the bill that became the Civil Rights Act of 1964, the Senate passed a floor amendment to Title VII known as the Bennett Amendment, which was intended to reconcile the Title VII and the EPA in their coverage of sex-based pay discrimination. It did so by incorporating the EPA’s defenses into Title VII claims for sex-based pay discrimination. It states that it is not an unlawful employment practice under Title VII “to differentiate upon the basis of sex” in determining wages or compensation “if such differentiation is authorized by” the EPA. As a result, unlike Title VII’s treatment of pay discrimination based on protected classes other than sex, Title VII gives employers a defense for paying otherwise discriminatory wages where the differential is based on a factor other than the employee’s sex. Hence, the FOTS defense applies to sex-based pay discrimination claims under both Title VII and the EPA.

There is one difference in the two statutes’ coverage of sex-based pay discrimination, although this difference sounds more consequential in theory than it is in practice. The EPA prohibits only the paying of unequal wages to a man and woman performing substantially equal work. The EPA does not cover pay discrimination that undervalues women for a discriminatory reason without proof of a male comparator who is paid more for doing substantially the same work. Title VII, on the other hand, does not limit its coverage of pay discrimination to the unequal-pay-for-equal-work set of facts. It is possible to prevail on a Title VII pay discrimination claim by proving that the plaintiff was paid less for a discriminatory reason, even if no opposite-sex comparator was paid more for doing that work. Under Title VII, regardless of whether there was unequal pay for equal work, the plaintiff must prove discriminatory intent. Under the EPA, there is no separate proof of intent required beyond proof of unequal pay for equal work. This difference in the required showing of discriminatory intent

quality or quantity of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1)(i).
196. Id. § 206(d)(1)(iv).
198. 42 U.S.C. § 2000e-2(h) (2012) (“It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].”); Cty. of Wash. v. Gunther, 452 U.S. 161, 168–69 (1981) (interpreting the Bennett Amendment to incorporate the affirmative defenses codified in the EPA into Title VII sex-based pay discrimination claims).
200. See Gunther, 452 U.S. at 163–66, 180–81 (holding that Title VII prohibits intentional pay discrimination without requiring proof of equal work, whereas the EPA requires proof of substantially similar work; female prison guards bringing Title VII pay discrimination claim were not required to prove that they performed the same job as higher-paid male prison guards where the county had ignored its own market data in setting the female guards’ lower wages, supporting an inference that they were paid less because of their sex).
is often heralded as a significant divergence in the two statutes. In practice, however, it is less significant than it appears on first blush, for two reasons.

First, although Title VII has a potentially broader reach than the EPA because it is not limited to the unequal pay for equal work framework, the difficulty of proving discriminatory intent without a higher-paid comparator doing essentially the same job makes Title VII’s application to pay discrimination outside of that framework limited in practice. The Supreme Court’s decisions in Ledbetter and Wal-Mart reflect an implicit assumption that the discriminatory intent in a Title VII pay claim means a conscious decision by the employer to pay a woman less because of her sex. Where the employer pays a woman less than a man for doing equal work, courts may infer the discriminatory intent from the unexplained difference in pay. But without proof of unequal pay for equal work, proof of discriminatory intent will be more elusive. The bottom line is that, although Title VII reaches a potentially broader range of discriminatory pay practices, in practical effect both statutes cover largely the same ground because Title VII’s discriminatory intent requirement limits it from having much of an impact outside of the unequal pay for equal work setting.

Second, although the EPA is a “strict liability” statute in the sense that the proscribed pay differential violates the statute without any proof of the employer’s intent to discriminate, in practice the FOTS defense, when applied broadly by courts to allow any sex-neutral factor to justify a pay gap, functions as tantamount to a discriminatory intent standard. So, although Title VII’s coverage of sex-based pay discrimination is potentially both broader in that it is not limited to unequal pay for equal work fact patterns and narrower because it requires proof of discriminatory intent, in practice the two statutes are more similar in scope than they are different. Both statutes are also plagued by the same doctrinal hurdles, which are discussed next.

B. THE LIMITS OF THE EQUAL PAY CLAIM: TIGHTLY circumscribed comparators and open-ended factors other than sex

Pay discrimination cases often falter in courts for reasons similar to those that bedeviled the pre-Young PDA cases: courts require strict similarity of comparators and allow employers to assert a neutral reason for the different treatment to dispel any inference of discrimination. The first obstacle is reflected in courts’ strict approaches to determining whether jobs are similar enough for the differ-

201. See Brake, supra note 60, at 662–63 (interpreting the Ledbetter decision as equating pay discrimination with a conscious intent to pay a woman less because of her sex); Deborah Thompson Eisenberg, Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay, 46 New Eng. L. Rev. 229, 232 (2012) (explaining the Court’s theory of pay discrimination in the Wal-Mart case as requiring a search for a conscious intent to pay women less because of sex).

202. See Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting) (explaining that although Title VII pay discrimination claims require proof of intentional discrimination and the EPA does not, the “practical effect” of the difference is merely that under Title VII the plaintiff has the burden to prove gender was the reason for the pay disparity, whereas under the EPA the employer has the burden to prove that it was not by asserting the FOTS defense).
ent payment of women and men holding them to establish a violation. Legal scholar Deborah Eisenberg has so thoroughly mined this dimension of the equal pay case law that I will not attempt to add to her analysis here, but will reiterate her finding that equal pay claims are often derailed by courts’ requirement of strict similarity between jobs or even identical jobs. 203

The second challenge to successfully bringing pay discrimination claims comes from the FOTS defense. Depending on how broadly it is construed, this defense has the potential to unravel altogether the comparator-driven model of the pay discrimination claim. When broadly interpreted, the defense severely restricts the scope of the equal pay claim even when comparators hold similar enough jobs to otherwise establish a violation. If any factor other than sex, however flimsy, can justify paying women less, then the defense effectively turns the claim into a search for discriminatory intent.

The Supreme Court’s early case law took a narrow enough approach to the defense to permit redress under the EPA without becoming hamstrung by the employer’s motivation for paying women less. 204 However, in the intervening decades, some lower courts have expansively applied the FOTS defense without any meaningful scrutiny of the business justification behind the employer’s reason or even any assurance that the employer had any business-related reason at all. 205 More recently, the Supreme Court, in dicta in a case dealing with age discrimination but referencing the EPA by analogy, appeared to back off from its earlier, narrower approach to the FOTS. 206 The effect of such an unconstrained FOTS defense is to exonerate any pay disparity that can be explained in sex-neutral terms. Under such a broad application of the defense, even the

203. See Deborah Thompson Eisenberg, Shattering the Equal Pay Act’s Glass Ceiling, 63 SMU L. Rev. 17, 39–41 (2010) (surveying the lower courts’ case law and demonstrating the strictness of the substantially similar work requirement in EPA claims).

204. See Corning Glass Works v. Brennan, 417 U.S. 188, 200–01 (1974) (dictum) (describing the FOTS defense as requiring a “legitimate” justification for a pay disparity (citation omitted)).

205. See, e.g., Maron v. Va. Polytechnic Inst. & State Univ., 508 F. App’x 226, 232–33 (4th Cir. 2013) (holding that employer carries its burden on FOTS by proving that any factor other than sex more likely than not motivated the pay disparity); Wernsing v. Dep’t of Human Servs., 427 F.3d 466, 468–70 (7th Cir. 2005) (rejecting plaintiff’s argument that court should scrutinize the legitimacy of the employer’s reason and holding that the FOTS permits any non-sex reason, not just good business reasons, as a defense); Taylor v. White, 321 F.3d 710, 718 (8th Cir. 2003) (accepting salary retention policy as a FOTS and refusing to examine employer’s business justification for the policy because any sex-neutral factor will establish the defense); Brinkley v. Harbour Recreation Club, 180 F.3d 598, 614–15 (4th Cir. 1999) (construing the FOTS defense to permit any sex-neutral factor to justify a wage gap); Looper v. Univ. of Wis. Hosp. & Clinics Auth., No. 12-CV-393-WMC, 2015 U.S. Dist. LEXIS 62056, at *27–28 (W.D. Wis. May 12, 2015) (holding that whether employer’s reason is a good business practice is irrelevant as long as it is sex-neutral).

206. See Smith v. City of Jackson, 544 U.S. 228, 239 & n.11 (2005) (plurality opinion) (holding in ADEA case that the “reasonable factor other than age” (RFOA) provision supports recognition of disparate impact age claims and noting that in contrast to the RFOA, in the EPA, “Congress barred recovery if a pay differential was based ‘on any other factor’—reasonable or unreasonable—‘other than sex’”).
employer’s own mistake in setting pay can suffice as a factor other than sex.\textsuperscript{207} The upshot is, left unconstrained by any scrutiny of the employer’s business justification for paying women less, the FOTS defense operates as a backdoor requirement of discriminatory intent in order to establish a violation of the Act.

With a broad and unconstrained FOTS defense, the EPA—and Title VII, by extension, because of the Bennett Amendment—will continue to fail to reach the core of the problem of discriminatory pay: the devaluation of women’s work and the infiltration of implicit bias into discretionary pay-setting decisions.\textsuperscript{208} Rather than a deliberate decision to pay women less, women’s lower pay often stems from implicit judgments devaluing the worth of women workers.\textsuperscript{209} Men tend to be evaluated more highly—even when men and women perform equally well—for tasks that align with masculine stereotypes such as competence and leadership.\textsuperscript{210} Moreover, when women perform in ways counter to gender stereotypes, such as by attempting to negotiate pay, they are penalized more harshly than men for the same behaviors.\textsuperscript{211} Unless the equal pay claim sweeps broadly enough to capture paying women less for the same work, whether or not traceable to a conscious intent to discriminate, it will do little to narrow the gender wage gap.

C. TIGHTENING THE “FACTOR OTHER THAN SEX” LOOPHOLE BY SCRUTINIZING THE EMPLOYER’S BUSINESS REASONS FOR PAYING WOMEN LESS

The harsh effects of the FOTS defense have been the focal point of recent advocacy to reshape the EPA, and by extension Title VII, into a better vehicle for addressing pay discrimination. The reform that has gained the most traction would alter the defense so that not just any sex-neutral factor will work, but only those supported by a sufficiently weighty business justification. A key provision in the proposed Paycheck Fairness Act (PFA), which has been repeatedly introduced in Congress in recent years, would narrow the FOTS defense by incorporating a business necessity standard that would permit only those sex-


\textsuperscript{208} See LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 98–100, 119–20 (2007) (reviewing literature and concluding that employers place a lower value on women workers and pay them less without realizing that they are doing so).

\textsuperscript{209} See Melissa J. Williams, Elizabeth Levy Paluck & Julie Spencer-Rodgers, The Masculinity of Money: Automatic Stereotypes Predict Gender Differences in Estimated Salaries, 34 PSYCHOL. OF WOMEN Q. 7 (2010); see also Eisenberg, supra note 200, at 234; Schultz, supra note 157, at 1004 (identifying sex stereotypes underlying unequal pay).


neutral factors that are job-related and consistent with business necessity to justify a pay disparity.\textsuperscript{212} Even without passage of the PFA, some lower courts and the Equal Employment Opportunity Commission (EEOC) have moved in that direction, interpreting the FOTS defense to require judicial scrutiny of the business reasons behind an asserted sex-neutral reason for the pay disparity, effectively incorporating a version of a business necessity analysis into the pay discrimination claim.\textsuperscript{213}

This move to tighten up the FOTS defense is not without controversy. Whether the focus is on the proposed PFA, or the judicial opinions interpreting the defense to require a sufficiently strong business justification for the explanatory factor, the criticism falls into two camps. First and most prominently, critics contend that scrutinizing the employer’s business justification for the FOTS blurs the boundary between disparate treatment and disparate impact, effectively transforming the equal pay claim into a disparate impact claim.\textsuperscript{214} Second, some supporters of strengthening equal pay claims have questioned the usefulness of an equal pay strategy that fixates on the FOTS defense. They contend that tightening up the FOTS defense will likely accomplish little, given how tightly courts rein in comparators in equal pay cases before even reaching


\textsuperscript{213} See, e.g., Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015) (rejecting job reclassification as FOTS unless employer demonstrates it is rooted in “legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue” (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992))); Belfi v. Prendergast, 191 F.3d 129, 136–39 (2d Cir. 1999) (requiring FOTS to demonstrate a legitimate business reason); Dreves v. Hudson Grp. (HG) Retail, LLC, No. 2:11-CV-4, 2013 U.S. Dist. LEXIS 82636, at *23–27 (D. Vt. June 12, 2013) (rejecting inducement, negotiation, and family dislocation as insufficiently business-related to meet the FOTS defense); Sandor v. Safe Horizon, Inc., No. 08-CV-4636 (ILG), 2011 U.S. Dist. LEXIS 3346, at *43–44 (E.D.N.Y. Jan. 12, 2011) (requiring employer asserting experience as a FOTS to show both that the experience is job-related for the position in question and that the employer actually based the comparator’s higher salary on this factor); Siler v. First State Bank, No. 04-1161-t-An, 2005 U.S. Dist. LEXIS 46200, at *6–9 (W.D. Tenn. July 28, 2005) (rejecting employer’s subjective evaluation of male comparator as having greater potential to enhance the business, interpersonal skills, and prior salary history as factors other than sex, and requiring a FOTS “at a minimum” to rely on a legitimate business reason (citation omitted)); see also Eisenberg, supra note 201, at 261 (“A majority of federal circuits and the [EEOC] have held that [the FOTS] defense must be job-related and adopted for a legitimate business reason.”).

\textsuperscript{214} See, e.g., Nicole Buonocore Porter, Choices, Bias, and the Value of the Paycheck Fairness Act: A Response Essay, 29 ABA J. LAB. & EMP. L. 429, 443 (2014) (criticizing the PFA’s allowance of unlimited compensatory and punitive damages because “it would be the only federal employment discrimination statute” allowing damages for a claim “akin to disparate impact”); Gary Siniscalco et al., The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act, 29 ABA J. LAB. & EMP. L. 395, 419 (2014) (characterizing the PFA as adopting a disparate impact model for equal pay claims).
the FOTS defense. In both instances, insights from the Young decision can help respond to these objections.

D. TAKING A PAGE FROM YOUNG: UNJUSTIFIED IMPACT AS THE PATH TO DISPARATE TREATMENT IN PAY

Probing the shifting sands of disparate treatment and disparate impact in Young and its fellow travelers can clear a path for expanding the disparate treatment model’s reach in equal pay claims. Contrary to critics’ assertions, refashioning the FOTS defense to incorporate a more rigorous scrutiny of purportedly sex-neutral justifications would not represent an unprecedented merger of disparate treatment and disparate impact claims. Rather, it would remodel the disparate treatment claim to better capture unconscious stereotyping and implicit bias in pay-setting decisions instead of restricting equal pay law to a narrower ban of only those pay disparities that can be attributed to a deliberate intent to pay women less. Without this move, a broad and open-ended FOTS defense functions to turn the disparate treatment pay claim into a search for a conscious discriminatory intent. If any FOTS, however insubstantial, can justify paying women less than men for doing the same work, the FOTS operates as a backdoor intent requirement, prohibiting only those pay disparities that cannot be explained by any sex-neutral motive, however lacking in a plausible business rationale.

A more narrowly drawn FOTS defense that requires courts to scrutinize the business justifications behind the employer’s sex-neutral explanation would better enable the EPA to capture pay disparities that reflect unconscious stereotyping and implicit bias that devalue women and not just the conscious intent to pay women less because they are women.

Although the debate continues over the extent to which women’s pay is suppressed by discrimination—and this Article can just barely scratch the surface of that debate—the evidence unequivocally shows that at least some portion of the gender wage gap is attributable to women being paid less than men for substantially similar work. Even after accounting for sex-neutral factors such as job type, qualifications, age, industry, hours worked, and attach-

---

215. See, e.g., Deborah Thompson Eisenberg, Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases, 57 N.Y.L. SCH. L. REV. 815, 835 (2012–2013) (observing that amending the FOTS defense does nothing to solve biggest problem in equal pay cases: proving the prima facie case); Nicole Buonocore Porter & Jessica R. Vartanian, Debunking the Market Myth in Pay Discrimination Cases, 12 GEO. J. GENDER & L. 159, 206–08 (2011) (contending that the PEA will not provide a remedy for unequal pay for most women, including and especially professional women, because of the tightness of the comparators required to prove a violation, but nevertheless expressing tepid support for the PFA because a partial solution is better than none).

216. This is consistent with the understanding of the EPA claim that Justice Ginsburg articulated in her Ledbetter dissent, in which she identified the key difference between Title VII and the EPA as which party carries the burden of proving that an identified pay disparity is or is not intentionally discriminatory—the plaintiff in Title VII and the defendant, through the FOTS defense, in the EPA. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting).

217. See Marianne DelPo Kulow, Beyond The Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap, 50 HARV. J. ON LEGIS. 385,
ment to the labor force, a significant gender wage gap remains.218 The plain-
tiffs’ experts in the nationwide lawsuit against Wal-Mart used the data in that
case to tell a similar story: controlling for seniority, weeks worked during the
year, full-time or part-time work, job position, job review rating, and numerous
other factors, women at all levels and in all regions received significantly less
pay.219 Much research suggests that gender stereotyping plays an important role
in explaining the gender wage gap.220 Studies have shown, for example, that
subjects set pay at a higher rate when presented with resumes containing male
names and at a lower rate when shown otherwise identical resumes with female
names.221 There is no evidence suggesting that all or even most of these
subjects consciously decided to set a lower wage for the women candidates or
were aware they were doing so.

Detractors of the gender wage gap cite the widening of the gap during
women’s prime childbearing and parenting years, pointing out that the wage gap
is smaller when women first enter the labor market and widens over time.222 In
light of this progression, they conclude that the wage gap reflects women’s
choices to step back from the wage labor market and prioritize childrearing and
family responsibilities.223 And yet, the gender wage gap is greatest for those
women who “lean in”—women with the highest education and professional

218. See, e.g., Nat’l Equal Pay Task Force, Fifty Years After the Equal Pay Act: Assessing the
Past, Taking Stock of the Future 6 (2013); Christianne Corbett & Catherine Hill, Am. Assoc. of
Univ. Women, Graduating to a Pay Gap: The Earnings of Women and Men One Year After College
Graduation 20–21 (2012) (finding a 7% unexplained pay gap after accounting for factors such as
occupational choice and hours worked); see also Joyce S. Sterling & Nancy Reichman, Navigating the
Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession, 8 F.I.U. L. Rev.
515, 532–33 (2013) (examining data from the longitudinal study of lawyers’ pay in the “After the JD”
study and finding it unable to explain the gender pay disparity for lawyers by the number of hours
worked or other non-gender variables).

219. See Eisenberg, supra note 200, at 240–41. The gap also increased over the worker’s career; for
example, among new hourly wage workers, men earned $0.35/hour more when hired, but the gap grew
to $1.16/hour five years later. Id. at 241.

220. See Sterling & Reichman, supra note 217, at 533 (discussing research showing that gender-
linked “cultural schema profoundly influence the assessment of competence, commitment, and perfor-
ance” that affect lawyer’s pay).

221. See Rhea E. Steinpreis et al., The Impact of Gender on the Review of the Curricula Vitae of Job

222. See, e.g., Siniscalco et al., supra note 213, at 407–13. Although the gap widens over time, a
substantial gender wage gap is present even in entry-level hiring. See, e.g., Council of Economic
sites/default/files/docs/equal_pay_issue_brief_final.pdf [https://perma.cc/M7AK-KK57]; Anthony T. Lo
Sasso et al., The $16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend of Men
Earning More than Women, 30 Health Aff. 193, 196 (2011) (finding this gap while accounting for
numerous other variables likely to affect wages).

223. See generally Joan C. Williams, Reshaping the Work-Family Debate: Why Men and Class
Matter 2 (2010) (responding to arguments attributing women’s lower earnings to the “choices” women
make about balancing work and family life).
status and who work the greatest number of hours. The many wage gap studies that account for hours worked and labor force attachment—comparing only full-time paid work over a period of years—tell a different story from the “women choose family over work” narrative: that the childbearing and childrearing years are a flashpoint for bias against women that affects pay. Researchers have found that women with families are subjected to a double standard that judges mothers more harshly than fathers on amorphous criteria like commitment to work, for example. Under such a double standard, men who leave work during the workday for family or personal reasons are assumed to have gone to a meeting, while women’s temporary absences are presumed to stem from family obligations that interfere with their work. In discretionary pay-setting regimes, such biases—which may be deeply ingrained and not necessarily conscious—have free reign. Even seemingly neutral explanations for pay disparities may actually be the product of biased schemas; for example, a woman might be paid less ostensibly because of her lower billable hours, but the lower billing might itself be a product of a reduction in work assignments resulting from her manager’s stereotyped predictions about her lesser availability and commitment to work.

Another common and ostensibly neutral explanation for pay disparities is to point to “the market” to justify how employers value their employees. However, employer suppositions about the market are frequently based on assumptions about employee worth rather than rigorous market research. Allusions to the market often mask embedded preconceptions about marketability that place a higher value on male workers. Although rationales relying on

227. See, e.g., Sterling & Reichman, supra note 217, at 529 (discussing the gendered nature of “impression management” of a lawyer’s availability in the legal profession).
228. See id. at 529–30.
229. See McCann, supra note 188, at 40–41 (discussing the ease with which employers defend pay discrimination claims by invoking “a ‘free market’ defense at every turn” and how that argument resonates with judges’ assumptions that “discrimination is the rare exception rather than the norm”).
230. See Martha Chamallas, The Market Excuse, 68 U. Chi. L. Rev. 579, 599 (2001); see also Eisenberg, supra note 223, at 990 (“In the absence of a professional compensation survey, analyzed by a professional compensation consultant, ‘market’ wages are simply an employer’s hunch about what the position is worth.”).
231. See Porter & Vartanian, supra note 214, at 184–95 (discussing the schemas that lead employers to undervalue the market worth of their female employees and cause women workers to undervalue their own worth).
market value may sound gender-neutral, they can incorporate gender-biased evaluations of employee worth.\textsuperscript{232} Unless the FOTS defense is reined in to scrutinize the business justifications behind allusions to market value, acceptance of such explanations will place pay decisions reflecting implicit bias and unconscious stereotypes outside of the law’s reach.\textsuperscript{233} Insights from the framework adopted in \textit{Young} can help explain the need for courts to scrutinize the weight of the employer’s reasons for using a pay-setting factor that disfavors women.

At the other end of the political spectrum, a more progressive critique of the FOTS reform strategy would question the usefulness of incorporating a business necessity test for the employer’s justification because the claim may well falter for lack of a sufficient comparator before the court even turns to the FOTS defense. On this point, there is genuine reason for concern. Like the PDA, the heart of the equal pay claim is proving discrimination through the different treatment of comparators. Lower courts have approached job comparisons in equal pay claims with notorious rigidity, requiring proof of unequal payment of persons in virtually identical jobs in order to meet the plaintiff’s burden of proof.\textsuperscript{234} Judicial anxiety about comparable worth seems to haunt the courts’ approach to defining the appropriate comparators for unequal pay, causing them to allow even minute differences in the jobs performed to undermine the pertinence of the comparison.\textsuperscript{235}

Here too, lessons from \textit{Young} can help respond to this concern. The shift away from the search for a conscious intent and toward an unjustified burden analysis could nudge courts away from a rigid approach to comparators. Tightening the FOTS defense by directing courts away from focusing on the motive behind a pay differential could signal to judges that total similarity between comparators is beside the point.\textsuperscript{236} Tightening the FOTS defense to require

\textsuperscript{232} See McCANN, supra note 188, at 241 n.14 (detailing how wage-setting practices are often insulated from market pressures of supply and demand and that market justifications often lack empirical support).

\textsuperscript{233} See Porter \& Vartanian, supra note 214, at 162–66 (exposing the gender bias in the most common “market excuses” employers use to justify a pay disparity—reliance on prior salary, matching of an outside offer, and differences in employees’ willingness to negotiate pay—and explaining why greater scrutiny of these business justifications under the PEA is needed).

\textsuperscript{234} See Eisenberg, supra note 202, at 39–41 (discussing and critiquing the strictness with which courts approach the determination of substantially equal work under the EPA).

\textsuperscript{235} See, e.g., Birch v. Cuyahoga Cty. Probate Court, 392 F.3d 151, 170 (6th Cir. 2004) (explaining that courts refuse to broaden comparator-jobs if it would require “a subjective assessment of different positions with different duties” (citing EEOC v. Sears, Roebuck \& Co., 628 F. Supp. 1264, 1333 (N.D. Ill. 1986))); Allowing plaintiffs to use hypothetical comparators might be one way out of this problem—an approach that some other legal systems have experience implementing. See Goldberg, supra note 8, at 805 (noting that England and the European Union allow this); see also Sandra Fredman, Reforming Equal Pay Laws, 37 \textit{Indus. L.J.} 193, 200 (2008) (explaining the use of data and experts in UK law to determine hypothetical male comparators’ pay); Iain Steele, Note, Beyond Equal Pay?, 37 \textit{Indus. L.J.} 119, 123 (2008).

\textsuperscript{236} For a relatively generous interpretation of the substantial similarity of jobs along these lines, see Cullen \textit{v. Ind. Univ. Bd. of Trustees}, 338 F.3d 693, 699–700 (7th Cir. 2003) (focusing on similarities
scrutiny of employer business justifications would broaden the law’s conceptualization of pay discrimination to encompass stereotyping and implicit bias, not just the conscious intent to pay women less because they are women. This shift should change the ultimate inference courts seek to find through their reliance on comparators. If the comparison’s purpose is to prove a conscious intent to discriminate, any dissimilarity between the comparators could defeat that inference. But if the proof framework is tilted away from a focus on conscious intent, the comparison might be more flexibly applied. In other words, if the different treatment of comparators no longer must support an inference of conscious intent to under-pay women because they are women, courts might ease up on the degree of similarity required for comparators. By incorporating a business justification test into the FOTS, the equal pay model would move away from a narrow view of pay discrimination as the conscious underpayment of women. Refashioning the claim at the back-end by tightening up the FOTS defense should prompt courts to ease up on the comparison at the front end by reshaping their understanding of what the comparator-driven model is looking for.

Importantly, and similar to the PDA claim in Young, refashioning the FOTS defense to incorporate a business justification analysis should not be understood to push the equal pay claim over the edge of disparate treatment and into disparate impact terrain. Despite the tightening of the FOTS defense to scrutinize the employer’s reasons for paying women less, the equal pay claim still registers in our doctrinal categories—fuzzy though they are—as a disparate treatment claim. The different treatment of a defined class of similarly situated comparators remains the starting point, followed by testing the business justification behind an employer’s sex-neutral explanation so that the claim reaches beyond conscious intent to capture unconscious stereotyping and implicit bias. Scrutinizing the business necessity for the employer’s explanation would serve the same function in equal pay claims as it did in Young.

As with the PDA claim that the Court refashioned in Young, it is fair to ask whether disparate impact doctrine would be a better vehicle for reaching practices based on implicit bias instead of reconfiguring the disparate treatment equal pay claim as advocated here. Without in any way dismissing disparate impact as a viable theory for challenging pay inequality, I believe that disparate treatment is the better approach for claims challenging unequal pay for substantially similar work and that the claim should still code as disparate treatment even after incorporating business justification scrutiny into the FOTS.

At the outset, in thinking about the viability of disparate impact theory for pay, it bears remembering that the doctrinal hurdles to disparate impact in this area are substantial. A disparate impact claim would have to be brought under Title VII alone, and not the EPA, and Title VII’s amenability to using disparate
impact is complicated by the Bennett Amendment, which incorporated the FOTS defense into Title VII sex-based pay discrimination claims. A broad reading of this amendment would view it as effectively rejecting disparate impact challenges to facially neutral practices with a disparate impact on women’s pay because the FOTS defense permits pay disparities that are justified by sex-neutral criteria. The proposal advocated here, incorporating a business justification test into the FOTS defense, should alleviate this objection. If the FOTS defense permits pay disparities only when based on sex-neutral criteria that can withstand business necessity scrutiny, the defense could be reconciled with the availability of disparate impact pay claims. But this change would not overcome other more daunting doctrinal hurdles. The FOTS defense would come into play only after the plaintiff established that a particular employment practice had a disparate impact on women’s pay. This has been a challenge in disparate impact pay cases. For pay disparities that courts attribute to market forces, the overarching structure of the workplace, or choices and characteristics that are presumed to be internal to women and within their control, disparate impact doctrine will likely not succeed. Most likely, courts will continue to balk at permitting disparate impact pay claims for the same reasons that they have been hostile to claims sounding in comparable worth. Indeed, the Court in Wal-Mart was notably hostile to the disparate impact theory, refusing to see any particular employment policy or practice at issue in the impact claim, despite the plaintiffs’ proof that the company-wide discretionary pay-setting practices had a disparate impact on women’s pay.

Even if the doctrinal thicket could be cleared to make disparate impact challenges more effective in pay cases, framing the demand for equal pay as a disparate treatment claim best engages the heart of the battle over pay equality. Critics who deny the significance of pay discrimination ground their skepticism.

237. See Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (holding that, in ADEA disparate impact pay challenge, plaintiffs failed to identity a particular employment practice causing the alleged pay disparity, despite plaintiffs’ allegation that defendant used practice of benchmarking officers’ pay to other nearby police forces); see also Chamallas, supra note 229, at 609 (discussing courts’ resistance to treating complex pay-setting systems as particular employment practices subject to disparate impact law); Michelle A. Travis, Recapturing the Transformative Potential of Employment Discrimination Law, 62 WASH. & LEE L. REV. 3, 36–46, 77–91 (2005) (discussing courts’ reluctance to treat organizational systems and structures as particular practices subject to disparate impact challenge).

238. See Travis, supra note 210, at 910–11 (discussing how causal narratives attributing gender pay gaps to women’s choices, market forces, and gender differences in negotiating have derailed disparate impact pay claims).

239. See, e.g., McCann, supra note 188, at 39–40 (discussing lower courts’ gutting of disparate impact claims to challenge pay disparities and their refusal to find employers’ payment of a “general” market rate to be a specific employment practice subject to disparate impact challenge); Eisenberg, supra note 200, at 259 (concluding that despite sounding “powerful in theory,” disparate impact for pay claims “has been less potent in practice”).

240. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355–59 (2011) (holding that plaintiffs failed to identify a particular employment practice causing the pay disparity and explaining that disparate impact doctrine does not permit plaintiffs to merely show a pay disparity, nor is alleging a policy of allowing unchecked managerial discretion in setting pay a sufficiently specific employment practice).
in assumptions about women’s choices. They claim that the gender wage gap is not the product of discrimination, but of women’s own selection of lower paying career tracks and/or decisions to pull back from the labor market.\textsuperscript{241} By conceding the neutrality of the challenged practices that disparately affect women’s pay, disparate impact does not resist this framing of the reasons why women earn less; nor does it question the neutrality of the market as a reason for paying women less the way a disparate treatment claim does.

The hybrid disparate treatment claim endorsed here, which would tighten the FOTS defense by incorporating a business necessity test, can better challenge the gender ideologies behind paying women less for equal work by scrutinizing the strength of the employer’s justification for burdening women. Although testing the strength of the employer’s reasons admittedly brings the disparate treatment claim one step closer to disparate impact, it still homes in on the different treatment of men and women instead of conceding the neutrality of the market and other explanations for paying women less. When women and men are paid differently for performing the same work, there is a distinctively non-neutral pay structure at work, more so than for other neutrally-framed practices with a disparate impact, such as paying part-time workers lower pro-rated rates than full-time employees or paying a premium for prior experience in an industry that includes fewer women. This is not to suggest that disparate impact is not a potentially viable strategy for challenging sex-neutral pay practices that contribute to the gender wage gap. My claim is more modest: for challenges to women’s unequal pay that can be fashioned as disparate treatment claims, there are advantages to using disparate treatment rather than disparate impact as the vehicle of choice, and those advantages persist even with the retooled disparate treatment-by-way-of-impact model.

**CONCLUSION**

Legal scholars are currently engaged in an important debate about the possibilities for using employment discrimination law to address implicit bias and the normative case for doing so.\textsuperscript{242} Rather than wade into that debate at the global level, this Article has identified two areas of employment discrimination law that are primed for using disparate treatment claims to reach beyond conscious discriminatory intent and into the realm of implicit bias. The PDA has

\textsuperscript{241} See Schultz, supra note 157, at 1010–11.

\textsuperscript{242} Compare Bartlett, supra note 49, at 1924–30 (arguing against a de-emphasis on conscious discriminatory intent), and Wax, supra note 49, at 1226 (arguing against expanding discrimination law to reach implicit bias), with Bagenstos, supra note 49, at 480 (descriptive reading and normative defense of the law’s coverage of implicit bias), and Selmi, supra note 49 (critiquing Professor Wax’s argument on implicit bias). For efforts to restructure employment discrimination to incentivize the adoption of de-biasing strategies to minimize implicit bias, see generally Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HAW. C.R.-C.L. L. REV. 91 (2003); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001).
already taken this path thanks to the Court’s decision in Young.\textsuperscript{243} The equal pay claim is now poised to move in a similar direction, through judicial construction, as some lower courts apply closer scrutiny to the reasons behind a pay differential and possibly through legislative action that would codify such scrutiny in the proposed PFA. In both pregnancy and pay, the path to reaching implicit bias is paved by the use of unjustified impact to infer bias in a disparate treatment claim.

Pregnancy and pay are particularly auspicious places in the law for such a shift to take place for two reasons. First, both claims rely on the unequal treatment of a circumscribed class of comparators to prove discrimination. Although all disparate treatment claims fundamentally involve unequal treatment based on a protected class status, and the different treatment of comparators is a commonly required element of proving discrimination, the PDA and equal pay claims specifically delineate the class of relevant comparators whose differential treatment establishes disparate treatment. For pregnancy, the comparator class is defined as persons with other medical conditions that similarly limit the ability to work; for pay, it is persons of the other sex who are paid more to do substantially the same job. With the relevant class of comparators specified, these claims are less vulnerable to strict rules requiring that comparators also be similar on additional nonspecified dimensions. Requiring near-perfect similarity of comparators derails the baseline for finding differential treatment, which is the entry point for determining whether the reason for different treatment can be justified. The structure of the comparator-driven model in both pregnancy and equal pay claims is particularly hospitable to the unjustified impact move because these claims define the relevant terms on which comparators must be similar.

Second, both pregnancy and pay discrimination have been the subject of social activism and heightened public attention. The shape that discrimination law takes depends on the strength of social norms and popular beliefs about the prevalence and wrongfulness of discrimination.\textsuperscript{244} In the case of the PDA, concerted activism around pregnant workers’ rights raised the profile of this issue, generating heightened public concern over the unjust treatment of pregnant workers. Similarly, recent years have seen a resurgence of political advocacy and grassroots mobilization around the issue of equal pay for equal work, suggesting that a similar moment is at hand for equal pay claims. Although activists’ efforts have moved the dial on public support for the antidiscrimination project in these two areas, the populist case for using employment discrimination law more broadly to root out implicit bias in the workplace is still being made.\textsuperscript{245}

\textsuperscript{243} 135 S. Ct. 1338 (2015).
\textsuperscript{244} See Schultz, supra note 157, at 1003 (discussing the significance of women’s rights activism in strengthening and broadening sex discrimination law).
\textsuperscript{245} See Goldberg, supra note 8, at 751–52 (noting that second-generation structural theories of discrimination have “not achieved the same popular traction” as first-generation claims).
Although the unjustified impact analysis now taking hold in pregnancy and equal pay claims is borrowed from disparate impact doctrine, this Article still locates these claims on the disparate treatment side of the divide. Retaining the disparate treatment label is important for reasons beyond the doctrinal rules that accompany the categories. How doctrine is fashioned matters not just for its effect on litigation, but also for how it interacts with the social movements and politics surrounding discrimination. Disparate treatment most easily connects with the social and judicial understandings of what discrimination is and the normative case for prohibiting it. The beauty of the disparate treatment claim is that it does not concede the neutrality of the practice being challenged. Through pregnancy and pay disparate treatment claims, pregnant workers and lower-paid women can challenge the non-neutrality behind their employers’ unfavorable treatment of them, even if that treatment is the product of unconscious bias and stereotyping instead of a deliberate intent to disfavor them as women. These claims enable plaintiffs to contest the employer’s assertion that it acted neutrally by relying on a reason other than pregnancy to favor another class of workers or “the market” to pay a woman less for doing equal work. Framing these claims as disparate treatment claims, even when softened around the edges so that unjustified impact is used to tease out the inference of discriminatory intent, produces a distinct set of meanings and symbols. The disparate impact claim, on the other hand, concedes employer neutrality and focuses on the happenstance of harm. This is not to concede a lack of normative justification for disparate impact theory. My point is more modest: between the two theories, the disparate treatment claim resonates more strongly with society’s understanding of discrimination and offers the most promising frame for contesting the non-neutrality behind employer practices that treat pregnant workers worse than similarly situated others and pay women less to do the same job as men.

One possible objection to retaining the disparate treatment moniker in refashioning pregnancy and pay claims to better capture unconscious bias is that the shift away from conscious discriminatory intent as the touchstone for disparate treatment dilutes the moral justification for it as a theory of discrimination. As Charles Sullivan has pointed out, broadening disparate treatment to reach implicit bias tempers the moral outrage that disparate treatment claims engender: an employer is viewed as less morally blameworthy if it unintentionally

246. McCann, supra note 188, passim (discussing the symbolic capital of antidiscrimination doctrine and describing rights-claiming as a social practice that enables social activists to draw on legal resources in advocacy with legislatures and employers).

247. See Selmi, supra note 44, at 200 (discussing the challenges in gaining public support for the disparate impact model and stating that “in the United States, as a matter of policy, we are committed to remedying discrimination, not inequality”).

248. Cf. Selmi, supra note 66, at 767–82 (arguing that disparate impact as a theory of discrimination never succeeded in mobilizing public support behind it and never crossed over from a legal theory to a social justice rallying cry).
and unknowingly discriminated than if it acted with conscious animus or a deliberate intent to discriminate.\textsuperscript{249} Although the presence of a deliberate discriminatory intent surely adds to the normative case for privileging disparate treatment as a theory of discrimination, another key pillar of moral outrage remains: the unfairness of treating a person differently than similarly situated peers without justification. This part of the normative pull of the disparate treatment theory remains even if the discriminator’s intent to treat the target differently operates at an unconscious level.

To illustrate the role of different treatment—as distinct from conscious intent—in supporting the moral foundation for disparate treatment theory, consider the Black Lives Matter movement.\textsuperscript{250} The strength of the social justice claim behind this movement does not depend on any assumptions about the conscious intent of the police officers who take the lives of black persons more callously than those of whites; joining in the moral outrage over the treatment of African-Americans in interactions with the police does not require a belief that the police officers consciously reacted to African-Americans differently than they would have reacted to white persons under similar circumstances. It is the different treatment of black persons by the police, consciously or not, that delivers the moral punch of injustice. On the other hand, the power of the claim of injustice does depend on the non-neutrality of what the police are doing. At the core of the injustice is that African-Americans are being treated differently than a white person would be in the same or similar situation. That is not in any way to deny that there are also great injustices that accrue from race-neutral rules with a racial impact. But it is the non-neutrality of police action at the heart of Black Lives Matter—the singling out of African-Americans for harsher treatment because they are black—that supports the moral outrage behind the movement, regardless of whether the discriminatory actions by the police stem from a conscious racist intent or implicit bias.

Moving the law beyond conscious discriminatory intent to reach discriminatory treatment that stems from implicit bias should not drain the moral reserves of the disparate treatment claim. Although proof that an employer consciously acted with intent to discriminate adds to society’s moral outrage, it does not bear the full brunt of it.

Related to the issue of moral outrage is the question of appropriate remedies for discriminatory treatment that stems from implicit bias rather than a conscious intent to discriminate. One possible objection to retaining the disparate


\textsuperscript{250} In making this analogy, I do not intend in any way to analogize the Black Lives Matter movement to the movement for equal pay or pregnant workers’ rights or make any broader point about the equivalency of these issues. Rather, my point in referencing this distinctive social movement is to illustrate that the moral salience of discriminatory treatment as an injustice does not depend on the conscious intent of the wrongdoer (here, the police), but is supported by unjustified different treatment in fact, whether based on a conscious intent or implicit bias.
treatment classification for the pregnancy and equal pay claims discussed in this Article goes to the difference in remedies for disparate treatment and disparate impact. When Congress added compensatory and punitive damages as remedies under Title VII, it provided them only for disparate treatment and not for disparate impact. That distinction, however, says nothing about how to define the limits of these categories. As argued above, using unjustified impact to infer discriminatory intent—even a broader version of intent that encompasses implicit bias—does not necessarily transform these claims from disparate treatment into disparate impact. Moreover, if the moral punch of disparate treatment retains its power when a protected class is unjustly treated worse than similarly situated persons, regardless of the consciousness of this bias, then the make-whole relief afforded by compensatory damages is fully supportable. Punitive damages, on the other hand, are already limited by the conscious intentions of the employer. The Supreme Court has limited punitive damages in Title VII cases to employers that violate the law recklessly or in bad faith. Similarly, the EPA reserves its strongest financial penalty for willful violations of the Act. As a result, retaining the disparate treatment designation would allow for compensatory awards that remedy the harm of the differential treatment, but would require some further showing of intentionality to support more punitive forms of relief. This calibration of remedies corresponds nicely to the added societal outrage that attaches to the deliberate discriminator.

Because the bulk of the Article explains how the newly revitalized PDA claim blurs the boundary between treatment and impact claims, and advocates for a parallel development in equal pay claims, it may seem odd to end on an argument about the relative superiority of disparate treatment over disparate impact as the preferable doctrine for housing these claims. But although Young teaches that the treatment and impact categories are blurrier around the edges than the Court’s case law admits, these categories continue to structure courts’ approaches to discrimination cases. They also shape the politics of antidiscrimination law and the social justice claims surrounding them. The core lesson from Young is that elements of the impact claim can be a useful tool for proving discrimination within a disparate treatment framework, not that the categories themselves have collapsed. By permitting proof of unjustified impact to support an inference of discrimination, the Young decision has broadened the disparate

251. Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(a)(1), (b)(3) (authorizing compensatory and punitive damages under Title VII “against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact),” subject to limitations based on the employer’s size).
252. Cf. Selmi, supra note 44, at 216–18 (arguing that it is a “mistake . . . to treat implicit bias as beyond one’s control” and summarizing research on interventions to prevent and correct for unconscious bias).
254. The EPA does not authorize damages per se; employees may recover only their unpaid wages and an amount equal to that sum in liquidated damages. 29 U.S.C. § 216(b). The statute has a two-year statute of limitations generally, but a three-year recovery period for willful violations. Id. § 255(a).
treatment claim in a way that makes it better suited to reach the unconscious stereotyping and implicit bias that underlie employer policies to treat pregnant women less favorably than other workers. A similar structure holds promise for equal pay claims. Although drawing on impact elements in this way expands the traditional model for proving disparate treatment, there is still value in conceptualizing these claims as disparate treatment. For both the pregnancy and pay claims, the heart of the challenge centers on the unjust different treatment of the plaintiff-class. As a social justice claim, this strikes a chord on a different register than challenges to neutral practices with disproportionate effects.