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Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters

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REVIVING PAYCHECK FAIRNESS: WHY AND HOW THE FACTOR-OTHER-THAN-SEX DEFENSE MATTERS

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Ever since the Supreme Court issued its short-lived and politically obtuse opinion in *Ledbetter v. Goodyear Tire & Rubber Company*,[1] the issue of equal pay has risen to the forefront of the national conversation about gender equality. The Court's decision ruled as time-barred Title VII claims challenging pay discrimination that originated outside of the statute's very short charge-filing period—even when the pay discrimination is ongoing and continues to produce discriminatory paychecks that the employee receives within the time limit for suing.[2] The ruling prompted a strong public outcry, bolstered by one of Justice Ginsburg's most impassioned and galvanizing dissents. Of the many scathing editorials excoriating the Court's opinion, my favorite was from the *New York Times*, which summed up the ruling succinctly with the title, "Injustice 5, Justice 4."[3]

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1. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).
2. *Id.* at 623–32.
3. Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, http://www.nytimes.com/2007/05/31/opinion/31thu1.html?_r=0. Other newspaper editorial boards joined in the fun. *See, e.g.*, Editorial, *Supreme Letdown; The High Court Finds a Way to Accept Discrimination*, PITTSBURGH POST-GAZETTE, June 6, 2007, http://www.post-gazette.com/opinion/editorials/2007/06/05/Supreme-letdown-The-high-court-finds-a-way-to-accept-discrimination/stories/200706050212; *see also* Clarence Page, Editorial, *Supreme Injustice on Worker Equality*, THE BALTIMORE SUN, June 5, 2007, http://articles.baltimoresun.com/2007-06-05/news/0706050128_1_justice-supreme-court-only-woman.

Congress responded with unusual speed, in time to present newly-elected President Obama with the opportunity to sign into law the Lilly Ledbetter Fair Pay Act (LLFPA) as the first new legislative enactment of his Administration. The Act essentially codified the approach advocated in Justice Ginsburg's dissent, overriding the majority ruling and correcting the time problem created by the *Ledbetter* Court. Under the LLFPA, each new paycheck that pays an employee less because of sex resets the clock for the limitations period for asserting the employee's Title VII rights.[4] The Act cured the immediate problem arising from the *Ledbetter* decision that ongoing pay discrimination beginning outside the limitations period was immunized from challenge, effectively grandfathered-in by the Court's ruling, even if the employee did not realize she was being paid less until much later.

The LLFPA was a needed corrective to the rights-claiming problem created by the Court. However, it did not affect the substantive law regulating pay inequality or do anything to alleviate the legal hurdles to succeeding on pay discrimination claims on their merits. The political movement for pay equality that was behind the Act has a much broader scope, however. With the sympathetic figure of the hardworking grandmother, Lilly Ledbetter, as the poster-child for the movement, equal pay has become a resurgent rallying cry for workers and politicians alike. Since the *Ledbetter* decision, there is a new energy and political resonance surrounding the gender wage gap and an urgency to fix it that has not been matched since the 1970's women's movement pressed the demand of equal pay for equal work.

At the level of public policy, the movement to close the gender wage gap has coalesced around the Paycheck Fairness Act as a key piece of the equal pay law reform strategy. The proposed Paycheck Fairness Act was introduced in Congress on the heels of the legislative success with the LLFPA as a needed reform to address the substantive shortcomings of the equal pay laws. It has been repeatedly introduced, in slightly varying iterations, in each legislative session, but has failed to gain enough support to pass both houses of Congress.[5]

The bill contains a multi-pronged approach to the problem, including measures to produce greater transparency in wages and enhanced protection from retaliation against employees for discussing or inquiring about employee pay.[6] As for strengthening the substantive rights against pay discrimination, the cornerstone of the bill is a provision that would tighten up the primary defense in the Equal Pay Act, the "factor other

4. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. §2000e-5(e)(3)(A).

5. *See* Irin Carmon, *Republicans Block Paycheck Fairness Act Once Again*, MSNBC.COM (Sept. 15, 2014), http://www.msnbc.com/msnbc/republicans-block-paycheck-fairness-act-again.

6. *See* Denise A. Cardman, *The Paycheck Fairness Act: Major Provisions*, AM. BAR ASS'N. (June 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015jun11_pfaprovisions.authcheckdam.pdf.

than sex" (FOTS) defense, which immunizes a pay disparity from challenge. Depending on how broadly the defense is construed, it has the potential to derail equal pay claims by allowing any facially neutral factor to justify paying women less than men for performing equal work. The proposed bill would rein in the defense by requiring the factor to be bona fide, job-related and consistent with business necessity.[7] The language borrows from the defense to Title VII disparate impact claims in an effort to require closer judicial scrutiny of the business reasons underlying facially neutrally reasons for paying workers of one sex less for doing substantially equal work.

The proposed change to the FOTS defense is the most controversial part of the bill. Critics charge that it would intrude too deeply into employer discretion and take issue with proponents' assertion that discrimination, as opposed to individual choice and market forces,explains the gender wage gap.[8] More legally-oriented critics charge that the move would turn the disparate treatment claim into a disparate impact claim, without justification for doing so.[9] Even supporters of closing the gender wage gap are less than enthusiastic about making the FOTS defense the centerpiece of the reform strategy.[10] They point out that most pay discrimination cases falter before even getting to the defense because of the strict approach courts take to determining whether employees are performing substantially equal work.[11] Unless courts moderate their approach to that threshold issue, reforming the factor other than sex defense will not make a difference in the success of equal pay claims in the courts.

This essay considers the proposed changes to the FOTS defense in light of lessons gleaned from the Supreme Court's innovative move in an employment discrimination case decided last year under the Pregnancy

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7. *See* Paycheck Fairness Act, S. 862, 114th Cong. (2015), https://www.govtrack.us/congress/bills/114/s862.

8. *See* David S. Joachim, *Senate Republicans Block Bill on Equal Pay*, N.Y. TIMES, Apr. 9, 2014, http://www.nytimes.com/2014/04/10/us/politics/senate-republicans-block-bill-on-equal-pay.html.

9. *See, e.g.*, Gary Siniscalco et al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward 50 Years After the Equal Pay Act*, 29 A.B.A. J. LAB. & EMP. L. 395, 419 (2014) (characterizing the PFA as adopting a disparate impact model for equal pay claims); *and see* Nicole Buonocore Porter, *Choices, Bias, and the Value of the Paycheck Fairness Act: A Response Essay*, 29 ABA J. LAB. & EMP. L. 429 (2014) (criticizing the PFA's allowance of unlimited compensatory and punitive damages).

10. *See, e.g.*, Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 206–08 (2011) [hereinafter Porter & Vartanian, *Debunking the Market Myth*] (contending that the PFA 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 on the ground that a partial solution is better than none).

11. *See, e.g.*, Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 S.M.U. L. REV. 17 (2010) (surveying the lower courts' case law and the demonstrating the strictness of the substantially similar work requirement in Equal Pay Act claims).

Discrimination Act, *Young v. United Parcel Services, Inc.*[12] The framework adopted in that case can help pave the way for the tightening of the FOTS defense, while still keeping the claim grounded as a disparate treatment claim. Part I examines the application of the FOTS defense in the courts. While some courts have been moving to apply a heightened judicial scrutiny of the employer's reasons for a pay disparity, others follow an anything-goes approach. Without careful scrutiny of the employer's facially neutral reasons for paying women less, the pay discrimination claim segues into a search for the employer's conscious intent to pay an employee less because of her sex, rendering the claim all but useless for remedying the gender wage gap. Part II explores the framework embraced in *Young*, in which unjustified impact supports an inference of intentional discrimination. It argues that the Equal Pay Act should take a page from the decision in *Young* and similarly move to scrutinizing employer justifications for the different treatment of comparators. Using insights from the *Young* decision, it responds to criticisms that tightening of FOTS defense would turn the equal pay claim into a disparate impact claim. Finally, Part III argues that the proposed framework for the FOTS defense is better designed to reach the kind of implicit bias that is at the heart of pay discrimination in the modern workforce. As important as preventing equal pay litigation from being derailed by an unconstrained FOTS defense is the contribution the proposed framework could make to the political dialogue about the roots of pay inequality and the justifications for employer practices that perpetuate it. By challenging the justifications for facially neutral reasons for paying women less, the change proposed to the FOTS in the Paycheck Fairness Act would make space for contesting the ideologies at the heart of the debate over the gender wage gap.

I. THE FOTS DEFENSE IN THE COURTS: THE CONTROVERSY OVER JUDICIAL SCRUTINY OF THE LEGITIMACY OF SEX-NEUTRAL REASONS

Enacted one year before Title VII, the Equal Pay Act of 1963 prohibits an employer from paying an employee less than it pays an employee of the other sex to perform substantially similar work, unless the employer can justify the disparity under one of the four statutory defenses.[13] Of these, by far the most important is the factor other than sex defense, which permits "a differential based on any factor other than sex."[14] Left unconstrained, the FOTS defense would immunize a pay

12. Young v. UPS, 135 S. Ct. 1338 (2015).

13. 29 U.S.C. § 206(d) (2012). *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 49 (1994) (tracing the origins of the Equal Pay Act to a 1945 decision by the National Labor Board that the pay practices of certain military contractors discriminated against women; although the War Board was subsequently dismantled, its ruling prompted unions and women's groups to agitate for greater protection from pay discrimination).

14. 29 U.S.C. § 206(d)(4) (2012).

disparity whenever any facially neutral reason, however insubstantial or irrational, could explain the gap in pay. An early amendment to Title VII of the Civil Rights Act of 1964, known as the Bennett Amendment, incorporated the defenses codified in the Equal Pay Act as defenses to Title VII as well.[15] Accordingly, while Title VII reaches sex-based discrimination in compensation, the Equal Pay Act's FOTS defense is also a defense to a Title VII claim for sex-based pay discrimination. So the scope of the FOTS defense matters for both Title VII and the Equal Pay Act.

Early Supreme Court case law seemed to require more than a merely gender neutral factor to assert the FOTS defense, suggesting that employers must at least demonstrate a legitimate reason. In *Corning Glass Works v. Brennan*,[16] which is, remarkably, still the only Supreme Court case decided squarely under the Equal Pay Act, the Court held that work performed on the day and night shifts involved similar working conditions since they occurred in the same surroundings and involved the same hazards. As a result, proof that the company paid male night shift workers a higher base wage (in addition to the premium paid to all workers on the night shift) than female workers doing the same job on the day shift established a prima facie violation of the Act.[17] Because the history at the plant showed that the men demanded a higher base wage to induce them to do what they regarded as "women's work," inspection jobs, at a time when women were prohibited by law from performing night work, and because the higher base wage remained even after the company added a pay differential to compensate all employees working the night shift, the employer failed to prove that the pay differential resulted from a factor other than sex.[18] In the course of discussing the defense, the Court cited legislative history describing differences in work conditions as a "legitimate" reason for a pay differential.[19] The quoted text implies that factors other than sex must at least be legitimate for purposes of the defense.

Four years later, in *City of Los Angeles Department of Water & Power v. Manhart*,[20] the Court again discussed the FOTS defense. The case involved a Title VII challenge to the company's practice of charging female employees higher pension premiums on the ground that women as

15. 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 or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]."); Cnty. of Wash. v. Gunther, 452 U.S. 161, 168–69 (1981) (interpreting the Bennett Amendment to incorporate into Title VII sex-based pay discrimination claims the affirmative defenses codified in the EPA).

16. 417 U.S. 188 (1974).

17. *Id.* at 203–05.

18. *Id.* at 191–92 n.3.

19. *Id.* at 201.

20. 435 U.S. 702 (1978).

a group live longer than men.[21] The Court found the premium differential violated Title VII. Responding to the employer's argument that the Bennett Amendment to Title VII excused any differential that satisfied the Equal Pay Act's FOTS defense, the Court explained that the factor other than sex could not itself be based on sex, so that the employer's use of sex as a proxy for longevity did not satisfy the defense.[22] Not every factor that is related to business qualifies as a factor other than sex, for purposes of the defense, the Court continued.[23] Again, the Court's language suggests that a factor other than sex must relate to the employer's business.

Finally, in another Title VII case decided a few years later, *County of Washington v. Gunther*,[24] the Court affirmed a lower court decision finding that the county's practice of paying women prison guards at a women's prison significantly less than male guards at a men's prison violated Title VII.[25] The jobs guarding male prisoners substantially differed from the jobs guarding female prisoners, so the employer argued that because the practice did not violate the Equal Pay Act, which only applies to similar jobs, the Bennett Amendment meant that it did not violate Title VII either.[26] The Court rejected this argument, holding that Title VII has a potentially broader scope than the EPA, since the EPA requires substantially similar jobs while Title VII is violated by paying an employee less because of his or her sex.[27] In the case at hand, even though the jobs were dissimilar, the county's failure to pay women guards at the level recommended by the county's own pay study served as evidence of the employer's discriminatory intent to pay the women less because of their sex. In dicta, describing the FOTS defense in the course of explaining how the Bennett Amendment interacts with Title VII, the Court stated that the FOTS exception was enacted by Congress as a response to the "legitimate needs of businesses" and is limited to "bona fide job evaluation systems."[28] This language too suggests some business-relatedness constraint on the FOTS defense.

These early cases suggest, albeit in dicta, that courts should not simply defer to employer assertions of a sex-neutral factor, but should scrutinize them to ensure that they are at least legitimate and business related. However, a more recent pronouncement in Supreme Court case law suggests a more lax approach. In a case decided under the Age Discrimination in Employment Act (ADEA), *Smith v. Jackson*,[29] the Court held that disparate impact is actionable under the ADEA. In a part

21. *Id.*
22. *Id.* at 712.
23. *Id.*
24. 452 U.S. 161 (1981).
25. *Id.*
26. *Id.*
27. *Id.* at 168.
28. *Id.* at 170–71.
29. 544 U.S. 228 (2005).

of the opinion joined by only four Justices, the plurality discussed a provision in the ADEA known as the RFOA ("reasonable factor other than age") as an additional source of support for the ruling.[30] The plurality contrasted the language in the EPA's FOTS defense with the language in the RFOA, which permits an employment practice that is "otherwise prohibited" under the ADEA if it was based on "reasonable factors other than age" (RFOA).[31] In contrast, the plurality noted, in the FOTS defense, "Congress barred recovery if a pay differential was based 'on any other factor'—reasonable or unreasonable—other than sex."[32] This language assumes that the only criteria for the sex-neutral factor is that it not be based on sex.

This shift in the Court's tone toward the FOTS defense is in keeping with the Court's move away from legitimacy as a constraint on the employer's nondiscriminatory reason in the individual disparate treatment framework. In the Court's first articulation of the burden-shifting model for individual disparate treatment claims in *McDonnell Douglas Corp. v. Green*,[33] it described the burden on the employer as requiring a "legitimate" nondiscriminatory reason. Pointing out the strength of McDonnell Douglas's reason for not rehiring the plaintiff, who had engaged in an illegal and disruptive demonstration against it, the Court implied that weaker employer justifications might not be "reasonable" or "legitimate" enough to meet the employer's burden.[34] In its more recent case law, however, the Court abandoned any legitimacy constraint on the nondiscriminatory reason asserted by the employer. The clearest indication of this retreat is *Hazen Paper Company v. Biggins*,[35] an age discrimination claim, in which the Court held that firing an employee in order to prevent him from vesting in the company's pension benefits qualified as a legitimate nondiscriminatory reason despite its illegality under ERISA and despite the adverse impact such a rule had on older employees.[36] As long as the reason is nondiscriminatory—meaning only that it is "analytically distinct" from the protected class—it suffices to rebut the inference of discrimination.[37] While the *Biggins* holding does

30. *Id.*
31. 29 U.S.C. § 623(f)(1) (2012).
32. 544 U.S. at 239 n.11 (plurality opinion).
33. 411 U.S. 792 (1973).
34. 411 U.S. 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 ("[w]e need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusal to rehire"); *id.* at 806 n.21 (". . . 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 the 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).
35. 507 U.S. 604 (1993).
36. *Id.*
37. *Id.* at 611.

not govern the EPA's FOTS defense—it involves a different statute and the scope of the employer's burden to rebut the inference from the prima facie caserather than an affirmative defense—its approach is consistent with the plurality's description of the FOTS defense in *Smith*.

Meanwhile, lacking authoritative guidance from the Supreme Court on the scope of the FOTS defense, lower courts have taken a wide range of approaches on the strength of the sex-neutral reason required to establish the defense. At the most deferential end of the spectrum, some courts perceive absolutely no constraint on the sex-neutral factor that will support the defense and refuse to scrutinize the reasonableness of the employer's reason.[38] Other courts require the sex-neutral factor to at least be "legitimate," but apply this standard in such a way as to approve the asserted reason with little scrutiny of its relationship to the employer's business needs.[39] Other courts go well beyond this, however, and have ramped up their scrutiny of the business justifications behind the sex-neutral factor.[40] These courts apply a level of scrutiny that is effectively indistinguishable from that proposed by the Paycheck Fairness Act, that the employer demonstrate a "bona fide" factor other than sex that is "job-related with respect to the position in question" and "consistent with business necessity."[41]

The "anything goes" courts permit any sex-neutral factor, reasonable or not, to justify a pay disparity, with no scrutiny of the business justification for relying on it. Cases in the Fourth, Seventh and Eighth Circuits adopt this approach. For example, the Fourth Circuit has broadly construed the FOTS defense, requiring only that the employer's reason be sex-neutral; under this standard, the employer's process of considering the higher-paid male employee's resume and prior salary, and negotiating with him, met the requirement of a sex-neutral reason for paying him more than the plaintiff.[42] The Seventh Circuit put it more bluntly, explaining that all the statute asks is whether the employer's reason was or was not based on sex, "not whether it is a 'good' reason."[43] Accordingly, the court permitted paying a woman less for performing the same work where the employer had set pay for lateral hires based on prior salary, without inquiring into whether the employer had an "acceptable business

38. *See* discussion *infra* notes 43–47.

39. *See* discussion *infra* notes 49–56.

40. *See* discussion *infra* notes 57–70.

41. *See* The Paycheck Fairness Act, HR 1619, 114th Cong. (2015), https://www.govtrack.us/congress/bills/114/hr1619/text/ih.

42. Brinkley v. Harbour Rec. Club, 180 F.3d 598 (4th Cir. 1999); *see also* Maron v. Va. Polytechnic Inst. & State U., 508 Fed. Appx. 226 (4th Cir. 2013) (employer need only offer credible evidence, not the best possible evidence, that the sex-neutral factor explained the pay disparity).

43. Wernsing v. Dep't of Human Servs., 427 F.3d 466 (7th Cir. 2005); *see also* Looper v. U. of Wisc. Hosp. & Clinics Auth., 2015 U.S. Dist. LEXIS 62056 (explaining that the employer's reason for paying the female plaintiff less than a male comparator—her limited salary history with the company and their reliance on the pay grade system for setting benefit levels for employees with less than one year seniority—might not be a good business practice, but that such considerations are irrelevant under the statute).

reason" for doing so or whether the practice was "business-related."[44] Similarly, the Eighth Circuit has upheld an informal and subjective salary retention policy allowing some higher-paid employees to retain their pay when assigned lower pay-grade jobs, proclaiming no role for the court in evaluating the reasonableness or wisdom of such a policy.[45]

In this class of cases, the FOTS defense operates as a *de facto* requirement that the employer acted with discriminatory intent, albeit, with the burden on the employer to dispel an inference of discriminatory intent by showing a sex-neutral reason for its action, instead of putting the burden on the plaintiff to prove intent as an element of the plaintiff's proof. Without any constraint on the FOTS defense, the EPA is limited to reaching only those pay disparities found to stem from the employer's intent to pay women less because of sex. The anything-goes cases illustrate that broadly construing the FOTS defense effectively narrows the statute to reach only intentionally discriminatory pay gaps.[46]

Moving away from the anything-goes end of the spectrum, some lower courts—even some courts in the same circuits that have articulated the deferential approach—apply some degree of scrutiny to assess the strength of the employer's reasons for using the sex-neutral factor.[47] This can result in rejecting the defense, as in one Eighth Circuit case where the court affirmed a jury decision for the plaintiff and rejected the employer's reliance on education and special recruitment efforts as factors other than sex.[48] The court found the employer's reliance on education unpersuasive since the skills needed for the job were acquired on-site, and rejected the employer's explanation that it needed to pay the male comparator more in order to recruit him, explaining that external salary pressures are not a valid reason for paying a comparator more.[49] More recently, a district court in the Eighth Circuit found for the plaintiff in a bench trial, rejecting prior salary, salary negotiations, and the employer's effort to meet the salary demands of its top candidate as insufficiently valid reasons for paying the female plaintiff less to do substantially similar work.[50]

Sometimes courts purport to look into the legitimacy of the employer's reasons, requiring some showing of reasonableness and business justification, but find the employer's reason to be sufficiently business-related with minimal scrutiny. For example, in *EEOC v. J.C. Penney Co.*,[51] the Sixth Circuit upheld the lower court's grant of summary

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44. *Id.* at 467–68.

45. Taylor v. White, 321 F.3d 710 (8th Cir. 2003).

46. *See, e.g.*, Warren v. Solo Cup Co., 516 F.3d 627 (7th Cir. 2008) (explaining that the FOTS need not be a good reason as long as it is gender-neutral and applied in good faith).

47. *See* discussion *infra*, notes 49–53.

48. Simpson v. Merchs. & Planters Bank, 441 F.3d 572 (8th Cir. 2006).

49. *Id.* at 574, 579.

50. Ewald v. Royal Norwegian Embassy, 82 F. Supp. 3d 871 (D. Minn. 2014).

51. 843 F.2d 249 (6th Cir. 1989).

for the employer based on its assertion of a head of household requirement for spousal medical insurance coverage. The court rejected the employer's argument that any sex-neutral factor could support a disparity in compensation, insisting that the factor must at least be based on a legitimate business reason.[52] The court went on, however, to accept the head of household requirement, despite its correlation with sex, as resting on the employer's legitimate belief that the requirement was an appropriate non-sex based incentive to provide the greatest level of benefits to those employees most in need and to retain and attract employees.[53] The court did so despite the employer's inability to prove that it could not have accomplished these business goals by using a rule with a less discriminatory effect on women.[54]

Courts occupying this middle ground take a compromise position on the use of prior salary history to support the FOTS defense. Rather than flatly barring prior salary or whole-sale accepting it, these courts permit reliance on prior salary but only if it is combined with some other sex-neutral factor. Reliance on prior salary combined with the comparator's greater relevant experience, for example, suffices to establish the FOTS defense under this approach.[55]

In the past few years, a spate of cases have come down the pike taking a tougher stance, placing more meaningful constraints on the sufficiency of the employer's business reasons in support of the factor other than sex. While not a wholesale departure from earlier precedents scrutinizing the legitimacy of employer reasons, these cases strike a notably critical stance toward broad uses of the defense. In one of the tougher FOTS cases, *Sandor v. Safe Horizon*,[56] the court actually granted the employee summary judgment on the EPA claim, rejecting the employer's attempt to justify the pay disparity based on the greater experience of the male comparator and the employer's immediate need to fill the position when the plaintiff went on maternity leave. As to experience, although the comparator did have greater experience, the court noted that it was not in a comparable position; a difference in experience must be a job-related qualification for the position in question, the court explained.[57] The court similarly scrutinized the employer's immediate need and salary-matching reasons, finding them lacking force in this case.[58]

In another tough scrutiny case, the court rejected several factors commonly asserted under the FOTS defense, prior salary, inducement,

52. *Id.* at 253.
53. *Id.* at 253–54.
54. *Id.* at 253.
55. *See, e.g.*, Irby v. Bittick, 44 F.3d 949 (9th Cir. 1995); Balmer v. HCA, Inc., 423 F.3d 606 (6th Cir. 2005); EEOC v. Home Depot U.S.A., Inc., No. 4:07CV0143, 2009 U.S. Dist. LEXIS 11596 (D. Ohio 2009); Rexroat v. Ariz. Dep't of Educ., No. CIV. 11-1028-PHX-PGR, 2013 U.S. Dist. LEXIS 3515 (D. Ariz. 2013).
56. No. 08-CV-4636 (ILG), 2011 U.S. Dist. LEXIS 3346 (E.D. N.Y. 2011).
57. *Id.* at 10.
58. *Id.* at 14.

and negotiation. In *Dreves v. Hudson Group Retail*,[59] the court insisted on a bona fide business-related reason for any sex-neutral factor, and rejected the employer's explanation that it needed to pay more to induce the male comparator to relocate his family and take the job; the court found this reason to be insufficiently related to the characteristics of the job in question. The court also rejected negotiation as a reason, finding that a male comparator's ability to negotiate for a higher salary lacked a legitimate business justification.[60] Notably, this court too granted summary judgment to the plaintiff.[61]

These two cases are outliers to some degree, given how rarely courts ever grant summary judgment to plaintiffs in employment discrimination cases.[62] But they are not alone in their rigorous review of the business justifications for a sex-neutral factor to explain a gender wage gap. Other courts have applied a similarly tough substantive standard, requiring a bona fide, job-related business justification, to support the defense. Applying this standard, courts have rejected employers' assertions of many commonly used, facially gender-neutral explanations for paying women less, including job reclassification systems,[63] subjective evaluations of employee worth,[64] and retention policies that hold current employees at their pre-existing, higher rate of pay when they are assigned to lower-paying job duties.[65]

Some courts have also begun to take a critical look at employers' reliance on "market" factors such as the need to pay more to attract a male candidate, the use of prior salary to set pay, and the male comparator's more aggressive negotiation for higher pay. While there is a wide range of judicial reactions to market-based arguments, some recent decisions reflect a skepticism of market-based criteria such as these. For example, in *Sauceda v. University of Texas*,[66] the court rejected "salary compression"—in which the university paid more to attract new hires from an outside university while paying less to existing faculty members—as a factor other than sex, equating the employer's "supply and demand" argument to the kind of stereotyped, sex-based assumptions embedded in the employment market that Congress sought to correct

59. No. 2:11-CV-4, 2013 U.S. Dist. LEXIS 82636 (D. Vt. 2013).

60. *Id.* at 8–9.

61. *Id.* at 13.

62. *See* Nancy Gertner, *Loser's Rules*, 122 YALE L.J. ONLINE 109 (Oct. 16, 2012) (discussing the one-sidedness of employment discrimination litigation).

63. *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191 (10th Cir. 2015) (rejecting gender-neutral classification system where it was not based on legitimate business-related differences in work responsibilities and qualifications for the positions at issue).

64. *See* Siler v. First State Bank, No. 04-1161-T-AN, 2005 U.S. Dist. LEXIS 46200 (D. Tenn. 2005) (employer could not rely on its subjective evaluation of greater interpersonal skills of male comparator without objective evidence); Cole v. N. Am. Breweries, No. 1:13-CV-236, 2015 U.S. Dist. LEXIS 6157 (S.D. Ohio 2015) (employer's "experience-driven" salary model was too amorphous to serve as a factor other than sex).

65. *See, e.g.*, Glenn v. Gen. Motors, 841 F.2d 1567 (11th Cir. 1988).

66. 958 F. Supp. 2d 761 (S.D. Texas 2013).

through the EPA.[67] The Eighth Circuit took a similarly dim view of reliance on market value to set pay in a recent case, *Drum v. Leeson Electric Company*,[68] cautioning that courts must take care to ensure that they do not permit employers to pay women lower wages simply because the market will bear it. The *Dreves* court, mentioned above, in granting summary judgment to the employee, was particularly scathing about the employer's reliance on the comparator's negotiation skill to justify his higher pay, admonishing that a pay disparity is no more justified when it is the result of a single negotiation than when it is the result of a market-wide phenomenon in a market that differently values the work of men and women.[69]

The rigorous approach taken by these courts is not without controversy, not least of all from courts taking the opposite view and finding sex-neutrality alone to satisfy the defense. The Seventh Circuit's decision in *Wernsing* served up the fiercest criticism of the business justification strand of case law. Critiquing the case law that requires a job-related business reason for the sex-neutral factor, the court characterized the EPA as depending on an employer's discriminatory intent to pay different wages because of sex.[70] Since unequal pay for equal work is an intentional wrong, the court continued, and markets are impersonal, an employer's reliance on the market cannot be discriminatory.[71] Those courts that require merit-based, job-related factors, instead of simply deferring to the employer's assessment of supply and demand, are heading into the forbidden territory of "comparable worth," the Seventh Circuit warned.[72] Responding to the counter-argument that such deference to the market locks in the gender wage gap since women's wages are less than men's, the court tipped its hand by revealing the gender ideology behind its deferential approach to the market. Wages rise with experience, the court explained, and the reason for the disparity between men's and women's wages is that "women spend more years in child-rearing."[73] Against that default assumption, scrutinizing the business justification behind market explanations stood out as an unjustified intrusion into employer prerogatives, taking the claim away from its disparate treatment roots and into the forbidden land of disparate impact.[74]

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67. *Id.* at 778–80.

68. 565 F.3d 1071 (8th Cir. 2009).

69. No. 2:11-CV-4, 2013 U.S. Dist. LEXIS at 27. *But see, e.g.*, Underwood v. Sears & Roebuck & Co., 343 F. Supp. 2d 259 (D. Del. 2004) (accepting male comparator's negotiation for a higher salary as a factor other than sex); Weber v. Infinity Broad. Corp., No. 02-74602, 2005 U.S. Dist. LEXIS 40724 (E.D. Mich. 2005) (same); Schultz v. Dep't of Workforce Dev., 752 F. Supp. 2d 1015 (W. Dist. Wis. 2010) (same).

70. *Wernsing*, 427 F.3d at 469.

71. *Id.*

72. *Id.* at 470.

73. *Id.*

74. *Id.*

The turn in some of the more recent court decisions toward careful examination of the business justifications behind an employer's reason for paying different wages finds support in an unexpected place. The Supreme Court's recent pregnancy discrimination decision makes a similar move.[75] Understanding the theory behind that decision can help support the parallel move to tighten up the FOTS defense and respond to criticism that doing so would transform the pay claim from a disparate treatment claim for intentional discrimination to a disparate impact claim.

II. LESSONS FROM *YOUNG V. UPS*: UNJUSTIFIED IMPACT AS PROOF OF DISCRIMINATORY INTENT

The Supreme Court's 2015 decision in *Young v. United Parcel Services, Inc.*[76] was the first major pregnancy discrimination case to reach the Court in nearly a quarter century.[77] Peggy Young sued her employer, UPS, after it denied her request for light-duty work in response to a lifting restriction from her doctor during her first trimester of pregnancy.[78] Under its formal policies and past practices, UPS liberally granted such requests—except for workers whose need for light-duty accommodation stemmed from a pregnancy.[79] The record showed that if Peggy Young had been injured at work, lost her driver's license (she was an air driver for UPS), or had a disability for purposes of the Americans with Disabilities Act, UPS would have granted her request for a light-duty assignment for the duration of her lifting restriction.[80] Instead, UPS forced Young to take an unpaid leave from work and she lost her health insurance—a result that appeared particularly harsh given that her job actually required little to no lifting in excess of the medical restriction and her coworkers had offered to help her with whatever heavy lifting was required.[81]

The Court took the case to clear up the confusion in the lower courts over how to apply the Pregnancy Discrimination Act (PDA) when an employer favors some, but not all, workers with a similar work capacity over a pregnant employee.[82] The issue required the Court to interpret clause two of the PDA, which states: ". . . women affected by pregnancy,

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75. *See generally Young*, 135 S.Ct. 1338.

76. 135 S.Ct. 1338 (2015).

77. *See* Int'l Union, UAW v. Johnson Controls, 499 U.S. 187 (1991) (rejecting the BFOQ defense to the company's exclusion of pregnant women from jobs with high lead exposure risks). In the interim, the Court issued a narrow ruling under the Pregnancy Discrimination Act, finding a challenge to the continuing effects of pre-Act discrimination to be time-barred. AT&T Corp. v. Hulteen, 556 U.S. 701 (2009).

78. *Young*, 135 S.Ct. at 1344.

79. *See id.*

80. *See id.*

81. *Id.*

82. *Id.* at 1348 (citing "lower court uncertainty" about how to apply the Act in this setting).

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. . . ."[83] The Court found this language ambiguous. Does it "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?"[84] "Or does it mean that courts, when deciding who the relevant 'other persons' are, may consider other similarities and differences as well" and "[i]f so, which ones?"[85]

Significantly, the Court began from the premise that Peggy Young's challenge to UPS's failure to accommodate her lifting restriction while pregnant was a disparate treatment claim.[86] Indeed, the Court took pains to note that Young did not bring a disparate impact claim, explaining the critical difference between the two categories as follows: disparate treatment requires proof of discriminatory intent while disparate impact focuses on "the effects of an employment practice . . . irrespective of motivation or intent."[87]

Finding no clarity from the text of clause two as to how this disparate treatment claim should work, the Court turned to the foundational individual disparate treatment case of *McDonnell Douglas* to construct a similar burden-shifting model for pregnancy discrimination when an employer disfavors pregnant workers compared to some (but not all) other employees with a similar ability or inability to work. The Court outlined the modified *McDonnell Douglas* framework for this setting as follows. First, the plaintiff can establish a prima facie case by showing that she is within the protected class (affected by pregnancy or related medical condition) and sought an accommodation which her employer denied, despite accommodating "others 'similar in their ability or inability to work.'"[88] Once the plaintiff meets the prima facie case, the employer "may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation."[89] In a departure from the classic *McDonnell Douglas* framework, in which any nondiscriminatory explanation meets this burden, the Court in *Young* set limits on the kind of pregnancy-neutral

83. 42 U.S.C. § 2000e(k) (2015).
84. *Young*, 135 S.Ct. at 1348.
85. *Id.* at 1349.
86. *Young*, 135 S.Ct. at 1344.
87. *Id.* Young actually had sought, unsuccessfully, to amend her complaint to add a disparate impact claim. Young v. UPS, 2010 U.S. Dist. LEXIS 30764 (D. Md. Mar. 30, 2010) (denying plaintiff's motion to amend the complaint and add a disparate impact claim for failure to exhaust her administrative remedies by filing a disparate impact charge with the EEOC).
88. *Id.* at 1353–54.
89. *Id.* at 1354.

explanations that suffice.[90] The mere desire to save money and/or maximize convenience by withholding accommodations from pregnant workers are not, the Court cautioned, legitimate nondiscriminatory reasons for refusing to accommodate pregnant workers.[91]

If the defendant meets its burden, the plaintiff may then attempt to show that the employer's legitimate nondiscriminatory reason is really a pretext for discrimination. Here's where things become interesting. The Court explained this stage of the burden-shifting framework as follows:

> [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.[92]

Under this PDA pretext model, the weakness of the employer's business justification for treating pregnant workers worse than some favored workers with a similar work capacity establishes that the employer's reason was really a pretext for discrimination. The plaintiff need not show any separate proof of discriminatory intent; she need show only that the employer's reason was not "strong" enough "to justify the burden" on pregnant women.[93]

Predictably, the dissenting Justices, led by Justice Scalia, accused the Court of "bungling the dichotomy between claims of disparate treatment and claims of disparate impact" and bemoaned "the topsy-turvy world" 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."[94] In response to the dissent's charge of blurring the treatment-impact boundary, the Court emphasized "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."[95] As a matter of law, however, under the *Young* framework, the intentional discrimination that the model purports to discern may exist even when the employer genuinely believed the

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90. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (employer's nondiscriminatory reason need only be analytically distinct from the protected class, it need not be "legitimate" in any substantive sense).

91. *Young*, 135 S.Ct. at 1354. As the Court explained its rationale for this limitation, a cost- or convenience-based justification for excluding pregnancy from the class of conditions covered might have justified even the benefit policy at issue in *General Electric v. Gilbert*, 429 U.S. 125 (1976), the very case that prompted Congress to enact the PDA. *Id.*

92. *Id.* at 1354.

93. *Id.*

94. *Id.* at 1365 (Scalia, J., dissenting).

95. *Id.* at 1355.

factually correct, albeit (as determined by a court) insufficiently weighty reason for disfavoring pregnant women. This marks an innovation from the traditional *McDonnell Douglas* framework in which an honest belief in a nondiscriminatory reason dispels an inference of intentional discrimination, even if the employer's reason was not just poor in its rationale but incorrect in its factual premises.[96]

Although not fully elaborated, the *Young* opinion contains the seeds of a defense of the bridge from unjustified impact to disparate treatment. The model the Court crafted proceeds on the theory that the burden on pregnant women from the employer's policies, when insufficiently justified by a good enough business rationale, reflects the employer's insufficient concern for pregnant workers and their employment opportunities. The question at the heart of the model is, as the Court phrases it, "Why, when the employer accommodated so many, could it not accommodate pregnant women as well?"[97] Answering truthfully with a nondiscriminatory explanation is not enough if the explanation is not weighty enough to justify the harm.

While admittedly, it tugs at the boundary of the disparate treatment category to infer discriminatory intent from unjustified impact, it is hardly unprecedented. In a case decided the same term as *Young*, *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*,[98] the Court similarly broadened the disparate treatment framework, this time for religious discrimination, to encompass an employer's facially neutral rule that burdens members of a religious group along with nonreligious workers. In that case, the store's "Look Policy" prohibiting caps and other head coverings had the effect of excluding Muslim women who wear head scarfs for religious reasons, even as it excluded other applicants who wear caps and other head coverings for nonreligious reasons. Instead of requiring the EEOC to prove that the store's policy was adopted with the discriminatory purpose of excluding Muslim women, or applied with a discriminatory intent to exclude Muslim applicants, the Court upheld the suit, overturning the lower court's grant of summary judgment to the employer. The court found the employer had engaged in disparate treatment because it assigned Muslim applicants to a larger group of disfavored applicants without a sufficiently strong reason for not exempting religious applicants from the general ban.[99] The Court resoundingly rejected the employer's argument that this should

96. *See, e.g.*, 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.").

97. *Young*, 135 S.Ct. at 1355.

98. 135 S.Ct. 2028 (2015).

99. *See* Michael C. Harper, *Distinguishing Disparate Treatment from Disparate Impact: Confusion on the Court*, Oct. 30, 2015, SSRN (on file with author).

have been brought as a disparate impact claim, situating it firmly within a disparate treatment framework.[100]

A greater stretch of the disparate treatment boundary occurred in the politically charged case of *Ricci v. DeStefano*,[101] a Title VII action brought by a group of mostly white firefighters (excepting the one Latino named plaintiff) challenging the city of New Haven's decision to discard the results of a standardized test for promotion that would have had a disparate impact against minority firefighters. The Court found that the plaintiffs succeeded in establishing that the city engaged in race-based disparate treatment when it decided not to make promotions based on the test results without a sufficient basis in evidence for believing that using the test would subject it to disparate impact liability. The key to understanding how the decision expands disparate treatment doctrine is that the city's action was neutral on its face—it discarded the test results for everyone and made no promotions—and the plaintiffs offered no proof that the City acted with a deliberate discriminatory intent to harm white firefighters because of their race. Although the city clearly knew that discarding the test results would mean that the firefighters who performed well, a group that was disproportionately white, would not be promoted, mere knowledge of disproportionate harm is usually not tantamount to a discriminatory racial intent.[102] 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, mostly white, test-takers. Because the Court found that the promotion test actually was 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. In other words, the unjustified burden on the group of predominantly white test-takers formed the crux of the disparate treatment violation.

Although they lie at the margins of employment discrimination law, these cases share space with others relying on a significant burden to the plaintiff class, combined with the employer's insufficient justification for it, to support a claim for disparate treatment.[103] An applicant strength test known to reduce female applicants' chances for employment and adopted with weak justification, for example, was the basis for a judgment of disparate treatment, in addition to disparate impact, against

100. *Abercrombie*, 135 S.Ct. at 2033.

101. 557 U.S. 557 (2009).

102. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (rejecting women's equal protection challenge to state's veterans preference in public employment; even though the state knew that the class of veterans benefited was over 98% male and would have the effect of shutting women out of state jobs, plaintiffs must prove the state adopted the preference "because of" and not "in spite of" the harm to women).

103. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 776 n.266 (2006).

the employer adopting it.[104] Likewise, an English-only policy with a predictably harsh effect on Latino employees, adopted without weighty business reasons, has supported disparate treatment liability against the employer.[105] And harassment has always difficult to classify as purely disparate treatment, especially when it does not target particular individuals or when it is perpetrated by persons not acting as agents of the employer.[106] Nevertheless, it is well-settled that harassment is a species of disparate treatment.[107]

All that is to say, there is more porosity along the treatment/impact border than the Court and many commentators often acknowledge. In the *Young* PDA framework, the unjustified burden on pregnant women from the employer's accommodation of other conditions with a similar effect on work establishes a disparate treatment claim. This path to disparate treatment has implications for the recent efforts, both judicial and legislative, to more carefully evaluate the strength of the business reasons behind an employer's asserted sex-neutral factor in equal pay claims. Contrary to critics' charges, tightening 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.

That this move finds support in the case law, however, does not necessarily make it normatively defensible. For that, we need to consider what purpose it serves to infer discriminatory intent from insufficiently justified harm to the protected class. Here too, the *Young* case contains helpful insights. The model the Court adopted is well-suited to capturing the kind of bias and devaluation of pregnant workers that leads employers to deny pregnant employees the same accommodations that are broadly granted to others. Requiring additional proof of an intent to discriminate against pregnancy would leave the Act unable to reach the kinds of biased implicit judgments about pregnant workers that underlie selective accommodation policies like the one at issue in *Young*.

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104. *See* Equal Emp't Opportunity Comm'n v. Dial Corp., 469 F.3d 735 (8th Cir. 2006) (discussing weak justification for employee strength test with a marked disparate impact on women supported disparate treatment verdict for the EEOC).

105. *See* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (noting insufficient business justification for strict English-only policy supported employees' disparate treatment claim).

106. *See, e.g.*, Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) (explaining the difficulty of situating sexual harassment within classic disparate treatment theory).

107. *See, e.g.*, Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037, 1044–45 (1993) (explaining that the 1991 Act's addition of a damages remedy for "intentional discrimination," as opposed to disparate impact, means that sexual harassment claimants will now be able to seek damages under the statute); *see also* Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (treating sexual harassment as intentional discrimination for purposes of the 1991 Civil Rights Act). *But cf.* Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341 (2004–05) (arguing for a disparate impact approach to sexual harassment).

The refusal to accommodate pregnant workers, even while granting accommodations to many other employees, is likely not the product of a deliberate, conscious animus against pregnant workers.[108] It more likely reflects the employer's relative lack of concern for pregnant workers and the lesser value the employer places on retaining them in the workplace.[109] Research on the maternal wall has documented "an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework."[110] The implicit assumption that pregnancy marks a detachment from the labor force and prioritization of family over work shapes employer evaluations about how much to invest in retaining of pregnant workers. Viewing workers through the lens of prospective motherhood, employers overestimate the disruption that would result from accommodating pregnant workers and under-estimate the business value of retaining them.[111] In the *Young* case itself, for example, the employer held fast to its refusal to accommodate pregnancy despite the fact that Peggy Young's coworkers volunteered to help her with any lifting that exceeded the medical restriction, so that any disruption would have been negligible or nonexistent.[112] Whether consciously or not, stereotyped judgments about the worth of pregnant workers shape employers' decisions about whether and how much to invest in them as employees.[113]

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108. *See* Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. OF GENDER L. & POL'Y 67, 102–03 (2013) (discussing the complexity of cultural reactions to mothers, which include a reverence for pregnancy and idealized motherhood and an ambivalence about working mothers).

109. *Cf.* Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649 (1993) (reporting results of study finding male reviewers engaged in stereotyping against pregnant workers, resulting in significantly more negative performance appraisals).

110. *See, e.g.*, Joan C. Williams & Stephanie Bornstein, The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias, 59 HASTINGS L.J. 1311, 1327 (2008).

111. For a sampling of the research documenting bias in how pregnant workers are evaluated, see Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497 (2007); Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES 215 (2002); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 INT'L J. MGMT. REVS. 97, 98–100 (2011); Barbara Masser et al., *'We Like You, But We Don't Want You'—The Impact of Pregnancy in the Workplace*, 57 SEX ROLES 703 (2007); Liisa Mäkelä, *A Narrative Approach to Pregnancy-related Discrimination and Leader-follower Relationships*, 19 GENDER, WORK & ORG. 677 (2011); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1306 (2007).

112. *See Young*, 135 S. Ct. at 1344.

113. *See* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 476–79 (2014) (explaining that employer estimates of the cost of pregnancy leave contained biases about the expected return on employer investments in workers and assumptions about conflicts between work and pregnancy); 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, 1028, 1032 (2013) (discussing the role of stereotype-driven estimates of cost and "still

The searching review of employer justifications for less generous policies toward pregnancy, as mandated in *Young*, is well-designed to reach this kind of bias.[114]

This justification for *Young*'s reliance on unjustified impact to infer discriminatory intent—that it is necessary to reach the stereotyping and implicit bias behind the different treatment of the protected class—also supports extending this hybrid treatment-by-impact model to the equal pay claim. The next section considers what is to be gained from tightening up the FOTS defense to scrutinize the employer's business reasons for paying women less.

III. THE CASE FOR TIGHTENING THE FOTS DEFENSE: CONTESTING MARKET NEUTRALITY AND UNCOVERING IMPLICIT BIAS IN SETTING PAY.

At its broadest, without any inquiry into the business case for paying a woman less, the FOTS defense threatens to turn the disparate treatment equal pay claim into a search for a conscious discriminatory intent to pay a woman less because of her sex. If any factor other than sex, however slight, can justify paying a woman less to do the same work as a man, then the FOTS defense will serve to narrow the scope of actionable pay discrimination to include only those pay disparities that cannot be explained by a sex-neutral motive. Requiring courts to scrutinize the business justification behind the employer's sex-neutral explanation for the pay disparity—as the Paycheck Fairness Act would mandate and as some lower courts are already doing—would make the equal pay claim more likely to capture pay disparities reflecting implicit bias and stereotyped judgments about employee worth, and not just the much narrower class of pay decisions stemming from a conscious intent to pay women less.

Rather than reflecting a deliberate decision to take sex into account in setting pay—the theory of pay discrimination reflected in the majority's controversial *Ledbetter* ruling—unequal pay for equal work is more likely a reflection of subconscious stereotypes about women's worth as workers.[115] The literature on the pay gap suggests that employers assess women's pay at lower levels without realizing they are doing so.[116] A more likely scenario than an employer making a deliberate decision to take sex into account in setting pay is that employers rely on

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prevalent stereotypes and bias about the capacity of pregnant employees or the likelihood that pregnant employees return to work after childbirth" underlying employer policies that accommodate some favored conditions while omitting pregnancy).

114. *See Young*, 135 S. Ct. 1338.

115. *See* Deborah L. Brake, *What Counts as "Discrimination" in* Ledbetter *and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657, 671 (2008) (explaining that the *Ledbetter* decision proceeds from the definition of pay discrimination as a conscious intent to pay a woman less because of her sex).

116. *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).

discretionary pay systems that open the door to implicit bias, resulting in paying women less. That was the story told by the plaintiffs' experts in the nationwide lawsuit against Wal-Mart, where, controlling for seniority, number of 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 less pay than men in the same jobs.[117] Lab experiments support this theory, finding that subjects set pay at a higher rate for male candidates than for equally qualified female candidates.[118] It is unlikely that all or most of these subjects consciously decided to set lower wages for the women candidates.

Of course, not everyone agrees that any kind of pay discrimination, conscious or not, lies behind the gender wage gap. Skeptics claim that the disparity in men's and women's wages is due to women's own choices and the neutral market forces that respond to them.[119] This article is not the place for an exhaustive review of the literature on the gender wage gap or to rehash the debate over its sources. Suffice it to say that some significant portion of the wage gap is not explained by the nondiscriminatory variables that researchers have thought to account for.[120] The lure of market justifications as an explanation for paying women less is precisely why courts need to carefully look at the strength of the justifications underlying employers' appeals to the market as a factor other than sex.[121]

More careful scrutiny of what lies behind market-based explanations as a factor other than sex can reveal the paucity of the employer's

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117. *See* Deborah Eisenberg, Wal-Mart Stores v. Dukes*: Lessons for the Legal Quest for Equal Pay*, 46 N. ENG. L. REV. 229, 234, 240–41 (2012). The gap increased over a worker's career; for example, among new hourly wage workers, men earned thirty-five cents more per hour when hired, but the gap grew to $1.16/hour five years later. *Id*. at 241.

118. *See, e.g.*, Rhea E. Steinpreis et al., *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509 (1999); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 (2007).

119. *See, e.g.*, Gary Siniscalco et al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward 50 Years After the Equal Pay Act*, 29 A.B.A. J. LAB. & EMP. L. 395, 400–13 (2014).

120. *See, e.g.*, 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. 404–06 (2013) (summarizing the literature and demonstrating the inability of nondiscriminatory explanations to explain away the gender wage gap); *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, NAT'L EQUAL PAY TASK FORCE (June 2013), https://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf; Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap; The Earnings of Women and Men One Year after College Graduation*, AAUW (2012), http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf (finding a 7% unexplained pay gap after accounting for factors such as occupational choice and hours worked).

121. *See* MCCANN, *supra* note 13, 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").

justification for relying on "the market" to set pay. Employer suppositions about the market are often based on nothing more than stereotyped assumptions about employee worth.[122] Allusions to the market mask embedded preconceptions about marketability that place a higher value on male workers.[123] While market-based explanations such as prior salary, negotiating for pay, or market worth may sound gender-neutral, they often incorporate implicitly biased evaluations of employee worth.[124] Unless courts scrutinize the business justifications behind assertions of market value, they risk turning the FOTS defense into an open door to implicit bias in setting pay.[125]

Even if the anything-goes approach to the FOTS defense were replaced with a job-relatedness and business necessity standard, however, the problem would remain that many courts will never reach the defense because of the strict approach to the similarity required to make out a prima facie case of unequal pay for substantially equal work. Doctrinally, increasing judicial scrutiny of the strength of the employer's reason will not help clear this hurdle. And yet, shifting the equal pay claim away from a search for deliberate discriminatory intent may, indirectly, lead courts to view this threshold issue differently. The current strictness in comparator proof stems from courts' conception of disparate treatment as requiring a conscious discriminatory intent.[126] Only by eliminating all nontrivial differences between the comparators can courts assure themselves that the reason for disfavoring the plaintiff was more likely than not the employer's discriminatory intent instead of some benign difference in circumstances.[127] In other words, a narrow view of disparate treatment as requiring proof of a conscious discriminatory

122. *See* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001); *see also* Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 990 (2011) ("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.").

123. *See* Porter & Vartanian, *Debunking the Market Myth*, *supra* note 10, at 184 (discussing the schemas that lead employers to undervalue the market worth of their female employees, and cause women worker to undervalue their own worth). *See also* Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867 (2016) (discussing how gender bias underlies market justifications for paying women law faculty less compared to their male peers).

124. *See* MCCANN, *supra* note 13, at 241 (detailing how wage-setting practices are often insulated from market pressures of supply and demand and that market justifications often lack empirical support).

125. *See* Porter & Vartanian, *supra* note 10, at 162–63 (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).

126. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 778–79 (2011).

127. *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 223 (2009) ("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.").

intent is what lies behind the requirement of strict proximity between comparators. If that understanding were to shift, so that disparate treatment also encompasses implicit bias in setting pay, the reason for insisting on strict similarity between comparators would weaken. Of course, doctrinally, it is a long way from toughening up the FOTS defense to easing up on the similarity of comparators in the prima facie case. But it is not so far-fetched to think that changing the theory of discrimination embodied in the FOTS defense would have an influence on how courts conceive of discrimination at the prima facie case stage too. Substantially similar work would still be the touchstone for the equal pay claim, but perhaps courts will view that inquiry less rigidly if their understanding of what pay discrimination is broadens to encompass implicit bias.

Even if reshaping the FOTS doctrine does not significantly change the outcome of many cases in litigation, it could still have an important effect on the political and institutional struggles for pay equality. Michael McCann's important book, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, documents a dynamic relationship between formal legal rights, political mobilization and institutional change. Even when strengthening legal rights, as with the early Supreme Court cases interpreting the equal pay laws, did little to change losing outcomes in litigation, it still inspired collective action and provided resources on which equal pay advocates could draw in making demands on employers.[128] Strengthening formal legal rights raises expectations about what is possible and mobilizes activists and advocates working for equal pay. Even when lawsuits lose, activists may succeed in pressing for institutional change, using the language of legal rights as a resource to rally supporters and get the attention of employers.[129] In McCann's terms, strengthening the doctrine of the equal pay claim enhanced the symbolic capital of legal rights.[130] The fashioning of doctrinal rules for equal pay claims is important not just for its effect on litigation, but also for its influence on the social movement and politics of equal pay.[131]

Strengthening the FOTS defense as advocated here would invite critical scrutiny of the market rationalizations that go to the heart of the political and legal battle over equal pay. Enabling the doctrine to expose the weaknesses behind these rationales would reveal the implicit gender bias in discretionary pay systems that results in paying women less for substantially equal work. At the heart of the debate over the proper scope

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128. MCCANN, *supra* note 13, *passim* (situating rights-claiming as a social practice that enables advocates and activists to draw on legal resources in a political dialogue with legislatures and employers).

129. *Id.* at 138 (arguing that law can be a "club" for employees and a resource for social movements even without victory in court, and recognizing "the discursive power of rights discourse").

130. *Id. passim* (discussing the symbolic capital of legal rights-framing).

131. *Id.* at 88–91, 137 (articulating a dynamic relationship between law and social change in which law facilitates collective action by citizens).

of the FOTS defense is a contest over the legitimacy of market explanations for paying women less. By engaging in this debate, the FOTS reform strategy could have a feedback effect on litigation outcomes by strengthening the social norms in support of pay equality.[132] As was true for the *Ledbetter* ruling and the legislative response to it, more is at stake in the scope of the FOTS defense than a narrow doctrinal change. The issue at the heart of the controversy is the legitimacy of the gender wage gap.

132. *See* Goldberg, *supra* note 126, at 795 (arguing that the likelihood of judges finding discrimination in employment discrimination cases increases when social norms support widely held beliefs in the prevalence and wrongfulness of discrimination).