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The Death of Comparable Worth: A Critical Analysis of the United States Supreme Court's Decision in Wards Cove Packing Co. v. Atonio

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THE DEATH OF COMPARABLE WORTH: A CRITICAL ANALYSIS OF THE UNITED STATES SUPREME COURT'S DECISION IN *WARDS COVE PACKING CO. v. ATONIO*

I. INTRODUCTION

A man and a woman enter college at the same time. She majors in nursing, he in pharmacy. Upon graduation, each accepts a job at a large hospital, she as a beginning nurse, he as a beginning pharmacist. Although these jobs have a comparable value to the hospital, the woman earns 32% less than the man.[1]

After finishing high school, a woman attends a junior college and obtains a two-year degree in secretarial science. Upon graduation, she accepts a job as a secretary in a trucking firm. Although her boss admits that he could not run the business without her, she is paid 27% less than an

1. *See* WOMEN'S LEGAL DEFENSE FUND, IT PAYS TO BE A MAN: AN OVERVIEW OF COMPARABLE WORTH 2 (1985) [hereinafter WOMEN'S LEGAL DEFENSE FUND]. The Women's Legal Defense Fund compiled the following statistics to illustrate that occupations dominated by women command a substantially lower salary than male-dominated occupations. The statistics show the type of wage discrimination which continues to affect working women in the United States. *See also* U.S. BUREAU OF THE CENSUS, SERIES P-70, NO. 10, MEAN HOURLY EARNINGS OF FEMALE FULL-TIME WORKERS 23-26 (1987).

Position	Average Annual Pay	Percentage of Females
Nurse	$17,000	96%
Pharmacist	25,000	16
Secretary	12,000	99
Truck Driver	16,300	2
Seamstress	8,200	97
Plumber	21,000	0
Registered Nurse	17,300	96
Airline Pilot	27,600	0
Housekeeper	5,600	95
Janitor	11,400	15
Child Care	7,900	87
Mail Carrier	21,100	12
Food Server	7,800	85
Butcher	16,400	7
Retail Sales Clerk	9,300	60
Sales Associate	15,000	12

WOMEN'S LEGAL DEFENSE FUND, *supra*, at 2.

entry level truck driver in the same firm.[2]

A woman decides to get a job after raising her family. She accepts a job as a hotel housekeeper. In the same hotel, several men are employed as janitors. The woman is responsible for cleaning the rooms, while the men must clean the grounds of the hotel. Even though their jobs are comparable, the woman earns 51% less than the men.[3]

Although outlawed by Congress over twenty years ago,[4] sex-based wage discrimination continues to be a persistent problem for working women in the United States.[5] Despite legislative efforts,[6] on the average, women still earn sixty-four cents for every dollar earned by men.[7]

Virtually every occupation has some degree of wage disparity between male and female employees;[8] however, wage disparities are greatest in occupations dominated by women.[9] In spite of this, federal law currently does not provide a remedy for pay inequities between jobs that are not identical, but merely comparable.[10] Title VII provides equal access to employment opportunities,[11] and once a person is employed, the Equal Pay Act assures that all employees performing equal work are paid the same wage.[12] However, neither Title VII nor the Equal Pay Act expressly prohibits an employer from paying employees in male-dominated job categories a higher salary than employees in female-dominated job categories, even if the female-dominated jobs have an equal, or greater,

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2. WOMEN'S LEGAL DEFENSE FUND, *supra* note 1, at 2.

3. *Id.* These three hypotheticals are based on statistics compiled by the Women's Legal Defense Fund, *supra* note 1, and are designed to illustrate the type of wage discrimination which continues to infect the work place.

4. 29 U.S.C. § 206(d)(1) (1988) (enacted in 1963); 42 U.S.C. § 2000e-2(a) (1988) (enacted in 1964).

5. Franklin, *Wage Gap Still Hasn't Been Bridged,* Chicago Tribune, Jan. 8, 1989, § C, at 2, col. 2.

6. 29 U.S.C. § 206(d)(1) (1988), commonly referred to as the Equal Pay Act, prohibits employers from discriminating on the basis of sex. The Act forbids employers from paying members of one sex less than members of the opposite sex performing the same work. *Id.* The anti-employment discrimination portion of Title VII makes it unlawful for employers to discriminate on the basis of race, color, religion, sex or national origin with respect to compensation, terms, conditions or privileges of employment. 42 U.S.C. § 2000e-2(a) (1988).

7. Franklin, *supra* note 5. *See also* Brogan, *Group Seeks to Close Pay Gap Between Sexes,* The Providence J. Bull., Aug. 29, 1988, § E, at 1, col. 2.

8. Quinn, *Comparable Pay for Comparable Work,* NEWSWEEK, Jan. 16, 1984, at 66 (accounting for experience, education and other factors which might command higher wage, women still earn less than men).

9. *See supra* note 1 and accompanying text.

10. The Equal Pay Act prohibits unequal pay for the same work. 29 U.S.C. § 206(d)(1) (1988). Although Title VII prohibits wage discrimination, it is unclear whether it includes claims for work which is merely comparable, but not equal. 42 U.S.C. § 2000e-2(a) (1988).

11. 42 U.S.C. § 2000e-2(a) (1988).

12. 29 U.S.C. § 206(d)(1) (1988).

value to the employer.[13]

The doctrine of "comparable worth" emerged as a way to bridge this gap in the existing federal law.[14] Comparable worth refers to a salary system based upon equal pay for dissimilar jobs that have an equal value to employers or society.[15] Claims based upon this doctrine cannot be brought under the Equal Pay Act, because the Equal Pay Act only prohibits wage discrimination among workers performing the same job.[16] Instead, comparable-worth claims must be brought under Title VII, which prohibits all forms of employment discrimination, without the requirement that the jobs in question be equivalent.[17]

Even though setting salaries according to their comparable worth is a way to equalize pay disparities between male-dominated and female-dominated jobs,[18] the doctrine has had little success as a litigation tool.[19] Many courts confronted with Title VII claims based on the doctrine of comparable worth have held that salary decisions are "subjective" rather than "objective" in nature, and because subjective employment decisions involve several complex factors, such decisions are not the kind of employment practices Title VII seeks to proscribe.[20] Therefore, these courts have held that such claims are not actionable under Title VII.[21]

In contrast, the United States Court of Appeals for the Ninth Circuit in *Atonio v. Wards Cove Packing Co.*[22] held that subjective employment decisions could form the basis of a Title VII claim, provided the plaintiff could prove that the defendant's subjective employment practices had a discriminatory impact upon employees protected by Title VII.[23] Although *Wards Cove* involved a claim of racial discrimination,[24]

13. The Equal Pay Act, codified at 29 U.S.C. § 206(d)(1) (1988), provides that employees performing equal work be paid equally. Title VII ensures that all employees have equal access to employment opportunities. 42 U.S.C. § 2000e-2(a) (1988).

14. *See generally* BUREAU OF NAT'L AFFAIRS, INC., PAY EQUITY AND COMPARABLE WORTH 1 (1984).

15. *Id.*

16. 29 U.S.C. § 206(d)(1) (1988).

17. 42 U.S.C. § 2000e-2(a) (1988). *See also infra* notes 29-58 and accompanying text.

18. Brogan, *supra* note 7. *See also* WOMEN'S LEGAL DEFENSE FUND, *supra* note 1, at 1.

19. *See infra* note 288 and accompanying text.

20. *See, e.g.*, Lemons v. Denver, 620 F.2d 228 (10th Cir. 1978), *cert. denied*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). *See also infra* notes 59-79 and accompanying text.

21. *Lemons*, 620 F.2d at 230; *Christensen*, 563 F.2d at 356-57.

22. 810 F.2d 1477 (9th Cir. 1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989).

23. *Id.* at 1485. Title VII prohibits discrimination based on race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1988). Therefore, if an individual falls into one of these categories, that individual is considered a member of a protected class. *Wards Cove*, 810 F.2d at 1480.

24. *Wards Cove*, 810 F.2d at 1479.

the circuit court did not limit its holding to the facts of the case. Therefore, because wage discrimination claims involve subjective employment practices, this pro-employee holding momentarily cracked open the door to Title VII claims based upon the doctrine of comparable worth.

Recently, the United States Supreme Court granted a writ of certiorari to review the Ninth Circuit's decision in *Wards Cove*.[25] Although the Supreme Court affirmed that subjective employment decisions could form the basis of a Title VII disparate-impact claim,[26] the Court extended the plaintiff's prima facie burden of proof so far that it virtually foreclosed the possibility of presenting a valid disparate-impact claim, particularly in cases based on the theory of comparable worth.[27]

This Note analyzes the United States Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*[28] and the effect this decision will have on Title VII disparate-impact claims in general. This Note will also analyze the effect of the *Wards Cove* decision on Title VII disparate-impact claims based on the doctrine of comparable worth and will determine whether *Wards Cove* has struck a death-blow to the use of the comparable-worth doctrine as a viable way to seek legal remedies for wage disparities between men and women.

II. BACKGROUND

A. Title VII of the Civil Rights Act

The Civil Rights Act of 1964 is a broad body of anti-discrimination legislation[29] consisting of ten titles which individually address voting rights, housing, education and employment.[30] Title VII of the Act addresses employment practices.[31] This title makes it unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin in hiring, promotions, discharge, compensation, or any other term or condition of employment.[32] Title VII also prohibits em-

25. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2121 (1989).

26. *Id.* at 2124 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 (1989), which recognized that subjective employment decisions could form basis of disparate-impact claim).

27. The Court does not say that a disparate-impact claim is foreclosed by this decision, but the rulings in *Wards Cove* will have that effect. *See infra* notes 189-96 and accompanying text.

28. 109 S. Ct. 2115 (1989).

29. H.R. REP. NO. 914, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393-94.

30. See *id.* at 4, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS, at 2394-409, for a general discussion of the Civil Rights Act of 1964 and its origins.

31. 42 U.S.C. § 2000e-2(a) (1988).

32. 42 U.S.C. § 2000e-2(a) (1988) provides:

ployers from limiting employment opportunities by segregating or classifying an employee based on race, color, religion, sex or national origin.[33]

Title VII does not prohibit all differences in compensation, terms, conditions or privileges of employment.[34] Differences based on a bona fide seniority or merit system, differences measured by quantity or quality of production, or differences based on work locations are sanctioned by Title VII, provided the employer is not intentionally discriminating against a category of employees protected by Title VII.[35]

Although Congress enacted the Civil Rights Act of 1964, which includes Title VII, primarily to protect blacks from racial discrimination, Title VII's reach extends far beyond protection from racial discrimination in the work place.[36] Even though Congress added gender to Title VII almost as an afterthought,[37] protection from gender discrimination enjoys the same level of protection under Title VII as does racial discrimination.[38]

B. Prima Facie Employment Discrimination Under Title VII

Plaintiffs alleging violations of Title VII may establish a prima facie case under either of two theories: disparate treatment or disparate im-

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It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

33. *Id.*

34. 42 U.S.C. § 2000e-2(h) (1988) provides in pertinent part:

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

Id.

35. *Id.*

36. Title VII also prohibits discrimination based on color, religion, sex or national origin. *Id.* § 2000e-2(a)(1).

37. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-82 (1967) (gender added on last day of House floor debates).

38. 42 U.S.C. § 2000e-2 (1988).

pact.[39] The critical element in a disparate-treatment claim is the employer's intent, while disparate-impact claims focus on the effects of a particular employment practice.[40]

1. Disparate treatment

Title VII claims based upon a disparate-treatment theory require the plaintiff to prove that the defendant intentionally chose certain employment practices to discriminate against employees who fall within a category protected by Title VII.[41] Under certain circumstances the court may infer a discriminatory intent,[42] but the mere fact that an employer knew of the discriminatory impact of particular employment decisions does not prove discriminatory intent.[43]

Once a plaintiff has proven discriminatory intent, the burden of producing contrary evidence shifts to the employer who must articulate some legitimate, non-discriminatory reason for the employment practice.[44] The employer need only produce evidence that the challenged employment decision serves a legitimate business purpose and is not based upon a desire to discriminate.[45] If the employer meets this burden, the

39. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1480 (9th Cir. 1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989).

40. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In *Teamsters*, the United States Supreme Court defined disparate treatment as, "simply treat[ing] some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* The Court stated that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.*

In the same opinion, the Court defined disparate impact as, "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." *Id.* The Court stated that proof of discriminatory motive is not required under a disparate-impact theory. *Id.*

41. *See, e.g.*, American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) (plaintiff must prove employer chose particular employment policy because of policy's effect on members of protected class).

42. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If a plaintiff: (i) belongs to a protected classification; (ii) applied and was qualified for the job in question; (iii) though qualified, was rejected for the job by the employer; and (iv) the defendant continued to seek applicants with the same qualifications as plaintiff, the court may infer that the employer intended to discriminate against the plaintiff, thereby allowing the plaintiff to prove a prima facie case of disparate-treatment discrimination. *Id.*

43. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979), *aff'd*, 445 U.S. 901 (1980) (to prove discriminatory intent, plaintiff must establish that particular employment practice was chosen *because* of its effect on protected class, not in spite of it). *See also American Fed'n*, 770 F.2d at 1405 (showing of employer's awareness of adverse consequences of chosen employment practices insufficient to prove intent under disparate-treatment theory).

44. *McDonnell Douglas*, 411 U.S. at 802.

45. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978) ("Title VII prohibits [the

plaintiff must prove that the employer's justification is merely a pretext for intentional discrimination.[46] Under the disparate-treatment theory, the plaintiff retains the burden of persuading the fact finder that the defendant's discriminatory conduct was intentional.[47]

2. Disparate impact

Plaintiffs may also make out a prima facie case of Title VII employment discrimination if the employment practice, though neutral on its face, proves discriminatory in application.[48] Under the disparate-impact theory, the plaintiff need not prove intent. Rather, courts will infer discriminatory intent from employment practices which disproportionately hurt employees who fall within a class protected by Title VII.[49] The United States Supreme Court has held that "good intent" or the absence of discriminatory intent does not redeem employment procedures which operate as "built-in headwinds" against minority groups.[50] The Court has held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[51]

To prove a Title VII violation under the theory of disparate impact, the plaintiff must first identify the employment practice claimed to have caused the harm.[52] Next, the plaintiff must establish that the employment practice adversely affected members of a suspect class.[53] Once the plaintiff has made this prima facie showing, the burden of *persuasion* shifts to the employer who must *prove* that the challenged practice was either not discriminatory, or was the result of an overriding business necessity.[54]

The burden on a defendant in a disparate-impact suit is substantially greater than in a disparate-treatment case. Under the disparate-treatment theory, an employer can rebut the plaintiff's prima facie showing

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employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

46. *McDonnell Douglas*, 411 U.S. at 804.

47. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 & n.6 (1981).

48. *Teamsters*, 431 U.S. at 335 n.15; *American Fed'n*, 770 F.2d at 1405.

49. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (statutory height and weight requirements had disproportionate impact on women applicants for positions as prison guards); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (diploma and intelligence test requirements had disproportionate impact on blacks).

50. *Griggs*, 401 U.S. at 432.

51. *Id.* at 431.

52. *Dothard*, 433 U.S. at 329.

53. *See id.* at 328-29; *Teamsters*, 431 U.S. at 336; *Griggs*, 401 U.S. at 431.

54. *See Dothard*, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 431.

by merely producing evidence of a business necessity.[55] However, under the disparate-impact model, once the plaintiff has made a prima facie showing, the burden of *persuasion* shifts from the plaintiff to the defendant.[56] Consequently, the defendant must *prove* that the chosen employment practice was not the result of prohibited employment discrimination, rather than merely producing evidence of a legitimate business interest.[57]

If an employer successfully rebuts the plaintiff's prima facie case, the plaintiff has one final chance to prevail under the disparate-impact model. To do so, the plaintiff must show that a less discriminatory employment practice would equally serve the employer's business needs. Such a showing would be evidence that the employer's chosen practice is merely a pretext for discrimination.[58]

C. *Disparate-Impact Claims and Subjective Employment Decisions*

Traditionally, plaintiffs have used subjective employment decisions as evidence of discriminatory intent in disparate-*treatment* cases.[59] Until recently, subjective employment decisions have had little to do with a disparate-*impact* analysis.[60] The disparate-impact model developed as a method to combat *objective* employment practices, such as standardized intelligence tests, height and weight requirements, or useless educational requirements which tended to disproportionately disadvantage minorities and women.[61] Over the last two decades, plaintiffs have attempted to use the disparate-impact model to challenge *subjective* employment decisions

55. *McDonnell Douglas*, 411 U.S. at 802; *Griggs*, 401 U.S. at 431.

56. *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425.

57. *See Burdine*, 450 U.S. at 252 n.5 (recognizing difference in proof for disparate-impact claim); *Dothard*, 433 U.S. at 329 (employer must "prove[] that the challenged requirements are job related"). The Ninth Circuit has held that the crucial difference between a disparate-treatment and a disparate-impact allegation is the burden on the employer. *Wards Cove*, 810 F.2d at 1485. To refute plaintiff's prima facie showing, the defendant-employer must do more than articulate a business reason; the defendant must prove the business necessity of the practice. *Id.*

58. *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425.

59. *See, e.g.*, O'Brien v. Sky Chefs, 670 F.2d 864, 866 (9th Cir. 1982) (plaintiff denied promotion); Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981) (panel denied plaintiff supervisory position).

60. *Bauer*, 647 F.2d at 1046 (use of subjective criteria not discriminatory where defendant articulates specific, legitimate reasons for decision).

61. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 427 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

as well.[62] These attempts have met with varying results.[63]

Subjective employment decisions take many forms and can encompass entire employment policies. Examples of subjective employment decisions include recruiting and hiring procedures,[64] promotion and termination policies,[65] and compensation systems.[66] The Ninth Circuit has even recognized an employer's failure to use objective employment procedures as a type of subjective employment practice which falls within the disparate-impact model.[67]

Lower federal courts have divided on the issue of whether subjective employment decisions can form the basis of a Title VII disparate-impact claim.[68] Circuit courts favoring the theory have relied on Title VII's legislative history which indicates that Congress expressly intended case law existing at the time of the congressional debates to govern Title VII's application.[69] Even though Congress did not expressly extend the disparate-impact model to subjective employment practices in these debates, case law at the time of the debates upheld disparate-impact challenges to subjective employment decisions.[70]

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62. *See* Regner v. Chicago, 789 F.2d 534 (7th Cir. 1986); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88 (6th Cir. 1982); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

63. *See infra* note 68 and accompanying text.

64. *See Rowe*, 690 F.2d at 93.

65. *See Regner*, 789 F.2d at 573.

66. *See Christensen*, 563 F.2d at 356.

67. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481 (9th Cir. 1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989).

68. The Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits have allowed Title VII disparate-impact claims to be based upon subjective employment decisions. *See Wards Cove*, 810 F.2d at 1478 (Ninth Circuit applied disparate-impact analysis to charges of word-of-mouth recruitment, nepotism, rehire preferences and promotion discrimination); *Regner*, 789 F.2d at 537 (Seventh Circuit held disparate impact theory applied in case challenging employer's promotion policies); Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985) (disparate-impact analysis applied to allegedly discriminatory promotion policy); Segar v. Smith, 738 F.2d 1249, 1273-88 (D.C. Cir. 1984) (disparate-impact cause of action applied to discriminatory performance reviews), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985); *Rowe*, 690 F.2d at 93 (Sixth Circuit allowed disparate-impact cause of action to be applied in case involving challenges to rehire practices).

The Fifth, Eighth and Tenth Circuits have not allowed subjective employment decisions to form the basis of a disparate-impact claim. Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801 (5th Cir. 1982) (court refused to allow disparate-impact cause of action in case involving alleged discriminatory promotion practice); Lemons v. Denver, 620 F.2d 228, 229 (10th Cir. 1978) (subjective decision to base salaries on competitive market not violation of Title VII), *cert. denied*, 449 U.S. 888 (1980); *Christensen*, 563 F.2d at 356 (Eighth Circuit held employer's subjective decision to base salaries on competitive market does not establish prima facie case of Title VII employment discrimination).

69. *See, e.g., Wards Cove*, 810 F.2d at 1482-83.

70. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-59 (2d Cir. 1971)

Circuit courts refusing to allow subjective employment decisions to form the basis of disparate-impact claims have reasoned that the effect of subjective employment decisions is unpredictable; therefore, plaintiffs cannot satisfactorily prove that these decisions detrimentally affected members of a protected class.[71] Also, these courts feared that allowing such a challenge might require employers to justify each stage in every employment process which could unduly burden businesses and vastly increase Title VII litigation.[72]

Recently, in *Wards Cove Packing Co. v. Atonio*,[73] the United States Supreme Court settled this debate by holding that subjective employment decisions could form the basis of a disparate-impact challenge under Title VII;[74] however, the majority diluted the pro-plaintiff effect of this ruling by substantially increasing a disparate-impact plaintiff's prima facie burden of proof. The Court held that in order to make out a prima facie case of disparate-impact discrimination challenging a subjective employment decision, a plaintiff must first prove a disparity within the employer's workforce.[75] Next, the plaintiff must identify the specific employment practices (subjective or objective) responsible for the alleged disparity, and prove that each practice had a significantly disparate impact.[76] Additionally, the Court altered the traditional burdens of proof by requiring a disparate-impact plaintiff to retain the ultimate burden of persuasion at all times throughout the case.[77]

Although *Wards Cove* involved a case of racial discrimination,[78] the decision applies to all Title VII disparate-impact claims.[79] This decision will have the effect of making it far more difficult to challenge any form of employment discrimination under the disparate-impact model, and will be particularly devastating to claims involving the doctrine of comparable worth. The following discussion sets forth the reasoning of the *Wards Cove* majority and dissenting opinions; analyzes these opinions as they relate to disparate-impact claims generally; and concludes by apply-

(court applied Griggs v. Duke Power Co., 401 U.S. 424 (1971), to invalidate subjective hiring practices, even though *Griggs* involved challenge to objective hiring criteria).

71. *See, e.g., Pouncy*, 668 F.2d at 801-02.

72. *Id.* at 802.

73. 109 S. Ct. 2115 (1989).

74. *Id.* at 2124 (applying holding in Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 (1988), which involved subjective employment decisions).

75. *Id.*

76. *Id.* at 2124-25.

77. *Id.* at 2126 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988), where Court evenly divided on this issue).

78. *Id.* at 2120.

79. *Id.* at 2121.

ing the majority's holdings to a Title VII disparate-impact claim based on the doctrine of comparable worth.

III. *WARDS COVE PACKING CO. V. ATONIO*

A. The Facts

Notorious for severe employment discrimination, the Alaskan salmon canning industry allowed discriminatory employment practices to infect its work place.[80] In *Wards Cove Packing Co. v. Atonio*,[81] cannery workers from several Alaskan salmon canneries filed a class action suit against their employers, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964.[82] They claimed that the canneries' use of separate hiring channels for cannery and non-cannery jobs,[83] word-of-mouth recruitment, nepotism, preferential rehire policies and the canneries' lack of objective job qualifications permanently relegated non-white workers to the lowest paying jobs with no chance for

80. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting). In his dissenting opinion, Justice Blackmun characterized the salmon industry's employment practices as "tak[ing] us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which . . . resembles a plantation economy." *Id.* (Blackmun, J., dissenting).

81. 109 S. Ct. 2115 (1989).

82. *Id.* at 2120. *See also* 42 U.S.C. §§ 1981, 2000e-2(a) (1988).

83. The canneries have two general job classifications: cannery jobs and non-cannery jobs. *Wards Cove*, 109 S. Ct. at 2119. Cannery jobs are classified by the canneries as unskilled and non-cannery jobs are classified as skilled and semi-skilled. *Id.* The vast majority of unskilled cannery jobs are filled by Native Alaskans from Alaskan villages, or through a local chapter of the International Longshoremen's and Warehousemen's Union whose membership is heavily Filipino. *Id.* Non-cannery jobs are filled primarily by white workers hired through the companies' home offices in Washington and Oregon. *Id.* Salmon canneries operate only in the summer months during the salmon runs. *Id.*

Virtually all the cannery jobs paid less than the non-cannery jobs. *Id.* at 2119-20. Work on the cannery line is very intense. *Id.* at 2119. Because salmon are highly perishable, they must be processed soon after they are caught. *Id.* Independent fish companies catch the salmon and immediately sell them to cannery-owned boats which transport the fish to the canneries. *Id.* at 2119 n.2. Once the fish arrive at the canneries, cannery workers must eviscerate the fish, pull out the eggs, clean the fish and put them in cans. *Id.* Fish are canned at the rate of four cans per second. *Id.* The canned salmon are cooked within precise time and temperature requirements established by the FDA. *Id.* Cannery workers must also inspect the cans to ensure that they are properly sealed. *Id.*

Non-cannery jobs include machinists and engineers to maintain the cannery equipment, quality control personnel to oversee the FDA-required inspections and recordkeeping, crews to operate the vessels used to transport the salmon to the canneries, beach gangs for dock yard labor and construction, and other personnel to operate the cannery community, such as cooks, carpenters, store-keepers, and bookkeepers. *Id.* at 2119 n.3. These jobs were filled predominately with white employees and, in all cases, received a higher rate of pay. *Id.* at 2119-20. The canneries classified these positions as skilled or semi-skilled. *Id.* at 2119.

promotion.[84]

In addition to job stratification, the workers also claimed that the canneries required non-white workers to sleep in segregated bunkhouses and eat in segregated mess halls,[85] and that these facilities were vastly inferior to the sleeping quarters and food service provided to white employees.[86] The workers brought both disparate-treatment and disparate-impact causes of action against the canneries, claiming that the canneries' employment practices intentionally treated non-white workers in a disparate manner, and, where the discrimination was unintentional, had a disparate impact upon non-white workers.[87]

B. Procedural Background

The federal trial court rejected the workers' disparate-treatment claims, holding that they had failed to prove discriminatory intent.[88] The district court also rejected the workers' disparate-impact challenges for both objective and subjective employment practices.[89] The district court ruled that the workers had failed to prove that the canneries' objective employment practices had a discriminatory effect on non-whites.[90] The district court also rejected the workers' claim that the canneries' use of subjective standards to judge job qualifications had a disparate impact on minority applicants,[91] adopting the view that subjective employment practices could not be attacked under a disparate-impact theory.[92]

On appeal, the Ninth Circuit affirmed the trial court's decision;[93]

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84. *Id.* at 2120.

85. Due to the remote location of the canneries, employees are expected to live at the work location throughout the canning season. *Id.* at 2119. Canning companies transport employees to the canneries and provide them with sleeping quarters and meals. *Id.*

86. Brief for Petitioner at 4, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989). Plaintiffs bolstered this claim by producing written company records which referred to various employee facilities as the "Philippine Bunkhouse," "Native Galley Cook" and "Filipino Mess." *Id.* at 2-3. Plaintiffs also produced written evidence of an office mail slot labelled the "Oriental bunkhouse," and that company badge numbers were assigned along racial lines for ease of identification. *Id.* at 3. Even the salmon butchering machine reflected racial stratification by its nickname, the "Iron Chink." *Id.*

87. *Wards Cove*, 109 S. Ct. at 2120.

88. Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2115, 2120 (1989).

89. *Id.* (citing district court).

90. *Id.* (citing district court). The workers' disparate-impact claim challenged both subjective and objective employment practices. *Id.* The objective employment practices included an English language requirement, nepotism in hiring, failure to publicly post non-cannery job openings so that cannery employees could apply for those jobs, and a rehire preference. *Id.*

91. *Id.* (citing district court).

92. *Id.* (citing district court).

93. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985), *vacated*, 787 F.2d 462 (1987).

however, in a later en banc decision,[94] the circuit court held that subjective hiring practices could form the basis of a disparate-impact claim, thereby overruling the trial court's decision.[95] The Ninth Circuit also concluded that once a plaintiff met the prima facie burden under a disparate-impact theory of liability, the burden of proof shifted to the employer to prove that the challenged employment practices were motivated by a legitimate business necessity.[96] The United States Supreme Court granted certiorari to address the proper application of Title VII's disparate-impact theory of liability.[97]

C. *Reasoning of the Court*

1. The majority opinion

In an opinion written by Justice White and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy, the majority in *Wards Cove Packing Co. v. Atonio*[98] affirmed that subjective employment practices may be challenged under a Title VII disparate-impact analysis.[99] Even so, the workers still had to prove the existence of a disparity.[100]

a. statistical data

The *Wards Cove* majority stated that the workers may offer statistical proof to show the existence of a disparity within the employer's workplace, but held that statistics showing a high percentage of non-white workers in cannery jobs and a low percentage of non-white workers in non-cannery jobs, without more, failed to prove that the canneries' employment practices had a disparate-impact on non-white workers.[101] According to the Court, the proper statistical analysis compares the racial composition of the non-cannery jobs and the racial composition of qualified candidates in the relevant labor market.[102]

94. Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989).

95. *Id.* at 1485. The following year, the United States Supreme Court held that subjective employment decisions could form the basis of a disparate-impact claim. Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988).

96. *Wards Cove*, 810 F.2d at 1485-86.

97. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2121 (1989).

98. 109 S. Ct. 2115 (1989).

99. *Id.* at 2120 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988), where majority of Court agreed subjective employment decisions could form basis of Title VII disparate-impact claim, even though Court was evenly divided on all other issues).

100. *Id.* at 2121.

101. *Id.*

102. *Id.* (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).

The Court reasoned that the cannery work force did not reflect the relevant pool of qualified applicants for either skilled or unskilled non-cannery jobs.[103] Instead, the Court speculated that the low percentage of non-whites in non-cannery jobs could simply be the result of a "dearth of qualified nonwhite applicants for reasons that are not petitioners' fault."[104] If so, the Court stated that the canneries' employment practices did not have a disparate impact on non-whites.[105] To hold otherwise, reasoned the Court, would mean that any employer with an unbalanced work force could be haled into court and "forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select [its work force]."[106]

The Court further warned that such a decision might also force employers to adopt racial quotas to insure racial uniformity, a practice which Congress expressly rejected in the drafting of Title VII.[107] As long as no barriers existed to deter qualified non-whites from applying for non-cannery positions, and the percentage of non-whites hired into non-cannery jobs was not significantly less than the percentage of qualified non-whites in the relevant labor market, the majority held that the canneries' selection process "probably [did] not operate with a disparate-impact on minorities."[108]

The majority held that the workers' use of statistical data using presently employed Alaskan cannery workers as the relevant labor force for non-cannery jobs was both too narrow and too broad.[109] The Court held these statistics to be too narrow because a vast number of persons

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103. *Id.* at 2122. To bolster its holding, the majority cited jobs such as accountants, managers, boat captains, electricians, doctors and engineers as examples of the "skilled" non-cannery jobs in the cannery communities. *Id.* The Court failed to include in its analysis the other non-cannery jobs such as store clerks, cooks, mess hall staff, and cannery supervisors, which were also filled by predominately white workers. *See id.* at 2119 n.3.

104. *Id.* at 2122 (footnote omitted).

105. *Id.* In a footnote, the Court admitted that the analysis would be different if the "dearth" of qualified non-white applicants were due to employment practices which deterred non-white workers from applying for the positions. *Id.* at 2122 n.7.

106. *Id.* at 2122.

107. *Id. See also* H.R. REP. No. 914, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391.

108. *Wards Cove*, 109 S. Ct. at 2123. In a footnote, the Court recognized that "bottom-line racial balance is not a defense under Title VII." *Id.* at 2123 n.8. Therefore, the Court concluded that even if an employer could show that the percentage of qualified non-whites hired is not significantly less than the percentage of qualified non-whites who applied, a plaintiff could still make out a prima facie showing of racial discrimination under a Title VII disparate-impact theory if the plaintiffs could prove that a particular hiring practice had a disparate impact on members of a Title VII protected category. *Id.* (citing Connecticut v. Teal, 457 U.S. 440, 450 (1982)).

109. *Id.* at 2123.

qualified for non-cannery jobs were not employed by Alaskan salmon canneries.[110] The Court held that the data was also too broad because the plaintiffs had made no showing that a significant number of presently employed cannery workers would have applied for the non-cannery jobs had the challenged employment practices not existed.[111]

The Court noted that the *Wards Cove* facts themselves served as a good example of why a statistical comparison between the percentage of non-white cannery workers versus non-white non-cannery workers was not an adequate way in which to make out a prima facie case of disparate-impact discrimination.[112] The workers claimed one reason non-whites were overrepresented in cannery positions was that the canneries' main recruiting source was a local union comprised predominantly of Filipino members.[113] If the canneries ceased to use this union, presumably the racial disparity between cannery and non-cannery jobs might decrease to a statistically insignificant level.[114] As such, the canneries could defeat the workers' prima facie showing by merely seeking another recruiting source for cannery positions without changing its employment practices.[115]

The Court ultimately ruled that the workers had failed to meet their prima facie burden through their use of deficient statistical data, but the Court left unresolved the question of whether the record made in the trial court could support a prima facie case of employment discrimination on any other basis.[116] Consequently, the Court remanded the case to resolve this question.[117]

b. causation

Although the Supreme Court held that the workers in *Wards Cove* had failed to meet their prima facie burden,[118] the Court went beyond what was necessary to decide the case in order to set the standard by

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* The Supreme Court identified the Union as Local 37. *Id.* The Ninth Circuit went into more detail and identified the Union as the International Longshoremen's and Warehousemen's Union. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc), *rev'd*, 109 S. Ct. 2115 (1989). The Ninth Circuit also noted that the Union's membership is primarily Filipino. *Id.*
114. *Wards Cove*, 109 S. Ct. at 2123.
115. *Id.*
116. *Id.* at 2123-24.
117. *Id.* at 2124.
118. *Id.*

which lower courts must evaluate disparate-impact claims.[119] According to the majority, to meet their prima facie burden, disparate-impact plaintiffs must: (1) statistically prove a disparate-impact upon members of a protected category;[120] and, (2) identify the specific employment practices responsible for the alleged disparity.[121] Without this test, the Court warned, "employers [could] potentially [be] liable for 'the myriad of innocent [biases] that may lead to statistical imbalances in the composition of their work forces.' "[122]

The Court justified this onerous burden of proof by noting that, under its own precedent, employers cannot avoid Title VII liability by statistically showing that "at the bottom line" their work force is racially balanced.[123] By the same token, plaintiffs cannot establish Title VII liability by merely showing that, "at the bottom line," an employer's work force is racially imbalanced.[124] Thus, statistics alone will not suffice to prove a prima facie case of disparate-impact discrimination, no matter how probative.[125] Disparate-impact plaintiffs must also prove that each challenged employment practice has had a significantly disparate impact on employment opportunities.[126]

Applying this causation requirement to *Wards Cove*, the majority ruled that statistical proof that fewer minorities were employed in non-cannery jobs than were present in the relevant labor market would only half-way meet the workers' prima facie burden.[127] To fully meet their burden, the workers must also identify the specific employment practices responsible for the alleged discrimination, and prove that each practice caused its own significant disparate impact.[128] Proof that several employment practices collectively caused a disparate impact would not meet

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119. *Id.*

120. *Id.* According to the Court, the proper comparison is between the racial composition of the employer's work force and that of the relevant job market. *Id.* at 2121. *See also supra* notes 101-17 and accompanying text.

121. *Wards Cove*, 109 S. Ct. at 2124 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 (1988)).

122. *Id.* at 2125 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787 (1988)).

123. *Id.* at 2124 (citing Connecticut v. Teal, 457 U.S. 440, 450 (1982), which held that even though, statistically, employer's work force is racially balanced, if employer's practices have disparate impact on individual employees, this "bottom line" equality is no defense to Title VII liability).

124. *Id.*

125. *Id.* at 2125.

126. *Id.*

127. *Id.*

128. *Id.*

this burden.[129] For example, the workers could not merely allege that nepotism, segregated eating facilities, and word-of-mouth hiring practices had collectively caused a disparate impact. Instead, the workers must prove that each challenged practice caused a significant disparate impact in its own right.[130] The Court failed to define what it meant by "significant."[131]

Anticipating complaints that this additional causation requirement would unduly burden Title VII plaintiffs, the majority rationalized its holding by stating that liberal civil discovery rules give plaintiffs broad access to an employer's records.[132] The Court believed that these "tools" would ameliorate any added burden the workers might experience as a result of the Court's holding.[133]

c. *shifting the burden of persuasion*

Once a plaintiff establishes a prima facie case of disparate-impact discrimination, the *Wards Cove* majority held that a defendant may rebut the plaintiff's prima facie case by producing evidence of a legitimate business interest justifying the use of the challenged conduct.[134] The Court referred to the defendant's rebuttal evidence as the "business justification" phase of a disparate-impact case.[135] If the defendant successfully rebuts the plaintiff's prima facie case, the Court held that the defendant may still be found liable if alternate business practices with a less discriminatory impact could be used to achieve the same business goals.[136] The Court referred to this as the "alternate practices" phase of a disparate-impact case.[137]

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129. *Id.* at 2124 n.9.

130. *See id.*

131. *Id.*

132. *Id.* at 2125. Specifically, the Court cited 29 C.F.R. § 1607.4 (Supp. 1989) as a rule which would aid plaintiffs' attempts to meet their prima facie burden. This regulation mandates that employers must "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex or ethnic group[s]." 29 C.F.R. § 1607.4(a) (Supp. 1989). Under this regulation, employers must include records concerning "the individual components of the selection process" where significant disparities exist between whites and non-whites for a particular job. *Id.* § 1607.4(c).

133. *Wards Cove*, 109 S. Ct. at 2125.

134. *Id.*

135. *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). *See also* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

136. *Wards Cove*, 109 S. Ct. at 2125 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

137. *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

i. business justification

The *Wards Cove* majority held that the dispositive issue at the business justification stage of a disparate-impact case is whether a challenged employment practice significantly serves the "legitimate" employment goals of the employer.[138] The Court held that the "touchstone" of this inquiry is "a reasoned review" of the employer's business justification,[139] but cautioned that the business interest justifying the defendant's conduct need not be "essential" or "indispensable" to rebut the plaintiff's prima facie case.[140]

In a break with Supreme Court precedent, the *Wards Cove* majority held that a defendant can rebut a disparate-impact plaintiff's prima facie case by simply producing evidence of a business justification, while the plaintiff retained the ultimate burden of persuasion "at all times" throughout the case.[141] Therefore, to rebut a plaintiff's case, the defendant need only produce some form of evidence indicating that the defendant's actions were motivated by a business interest, while the plaintiff retains the burden of proving that the defendant's asserted business interest does not justify the discriminatory conduct.[142]

The Court justified this holding by stating that it conformed to the rule in disparate-treatment cases,[143] ignoring the different purposes served by disparate-impact and disparate-treatment cases.[144] The Court acknowledged that its ruling might "appear" to conflict with earlier Supreme Court decisions which held that the burden of *proof*, not merely the burden of production, shifted from the plaintiff to the defendant in disparate-impact cases.[145] In response to this apparent conflict, the Court explained that "to the extent that those cases speak of an employ-

138. *Id.* at 2125-26 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787 (1988); New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

139. *Id.* at 2126.

140. *Id.*

141. *Id.* In *Albemarle Paper Co. v. Moody*, the Court stated that to rebut a prima facie showing of disparate impact, the employer had to do more than just articulate a business reason. 422 U.S. 405, 425 (1975). Rather, the employer had to *prove* the job relatedness or business necessity of the challenged employment practice. *Id. See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); *Griggs*, 401 U.S. at 431.

142. *Wards Cove*, 109 S. Ct. at 2126.

143. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981)). *See also supra* notes 41-47 and accompanying text.

144. Disparate-treatment claims provide a remedy for intentional acts of employment discrimination, while disparate-impact cases provide a remedy for acts which are facially nondiscriminatory, but which have a discriminatory impact on women or on racial and religious minorities. *See supra* notes 41-58 and accompanying text.

145. *Wards Cove*, 109 S. Ct. at 2126.

ers' 'burden of proof' with respect to a legitimate business justification defense . . . they should have been understood to mean an employer's production—but not persuasion—burden."[146]

ii. alternative employment practices

If the defendant successfully rebuts the plaintiff's prima facie case by producing evidence of a legitimate business justification, *Wards Cove* established that the plaintiff may still prevail by proposing another, less discriminatory employment practice which would equally serve the defendant's business goals.[147] The majority held that such a showing by the plaintiff would prove that the defendant's chosen employment practices were merely a pretext for discrimination.[148]

The majority, however, qualified this ruling by stating that any alternative employment practice offered by the plaintiff had to be equally effective in meeting the defendant's employment goals, and that factors such as cost were relevant to this determination.[149] Cautioning that "courts are generally less competent than employers to restructure business practices,"[150] the majority warned that the judiciary should "proceed with care" before requiring that an employer adopt an employment practice suggested by Title VII plaintiffs.[151]

2. The dissent

In a scathing dissent written by Justice Stevens and joined by Justices Brennan, Marshall and Blackmun,[152] the minority accused the majority of ignoring eighteen years of precedent, turning a blind eye to the meaning and purpose of Title VII, and indulging in judicial activism.[153]

a. altering the burdens of proof

The dissent disagreed that the burden of proof in a disparate-impact case remains at all times with the plaintiff.[154] While acknowledging that prior Supreme Court and lower federal court decisions had long recog-

146. *Id.* (citations omitted).
147. *Id. See also* Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2781 (1988); *Albemarle Paper*, 422 U.S. at 425.
148. *Wards Cove*, 109 S. Ct. at 2126 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).
149. *Id.* at 2127.
150. *Id.* (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).
151. *Id.*
152. *Id.* (Stevens, J., dissenting).
153. *Id.* at 2127-28 (Stevens, J., dissenting).
154. *Id.* at 2130 & n.14 (Stevens, J., dissenting).

nized that an employer's burden in a disparate-*treatment* case is simply one of producing evidence of a legitimate business purpose,[155] the dissent stressed that these same courts have repeatedly held that an employer's burden in a disparate-*impact* case is to *prove* a business necessity.[156]

The dissent explained that, when viewed from a plaintiff's initial burden of proof, it is easy to see why disparate-treatment and disparate-impact cases require different levels of evidence to rebut a plaintiff's prima facie case.[157] Under a disparate-treatment analysis there is no Title VII violation unless a plaintiff can prove an intentional act of discrimination.[158] Thus, the dissent observed, the plaintiff always retains the burden of proving discriminatory intent.[159] The dissent further explained that unlike disparate-treatment claims, intent is irrelevant to a disparate-impact case.[160] Instead, the focus is on whether an employment practice "has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice."[161] Once a plaintiff has met the prima facie burden in a disparate-impact case the plaintiff has established the violation. The defendant must then justify the challenged employment practice by proving that the chosen practice was motivated by a legitimate business necessity.[162] The dissent labelled this type of rebuttal evidence as "a classic example of an affirmative defense" which has always been considered a burden of proof.[163]

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155. *Id.* at 2130 (Stevens, J., dissenting).

156. *Id.* at 2130 & n.14 (Stevens, J., dissenting). To support its statement that both the United States Supreme Court and other federal courts have long recognized that an employer's rebuttal burden under a disparate-impact case is a burden of proof, the dissent cited New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that the narcotics rule . . . 'is job related' "); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer must "prov[e] that the challenged requirements are job related"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of proving that its tests are 'job related' "); McDonnell Douglas Corp. v. Green, 411 U.S. 792, n.14 (1973) ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question' "); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (employer has "burden of showing that any given requirement must have a manifest relationship to the employment"). *Wards Cove*, 109 S. Ct. at 2130 n.14 (Stevens, J., dissenting).

157. *Wards Cove*, 109 S. Ct. at 2131 (Stevens, J., dissenting).

158. *Id.* (Stevens, J., dissenting).

159. *Id.* (Stevens, J., dissenting).

160. *Id.* (Stevens, J., dissenting).

161. *Id.* (Stevens, J., dissenting).

162. *Id.* (Stevens, J., dissenting).

163. *Id.* & n.17 (Stevens, J., dissenting) (citing FED. R. CIV. P. 8(c) which states "in pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense). *Id.* (Stevens, J., dissenting).

b. *plaintiff's prima facie burden of proof*

The dissent also found troubling what it called the majority's "apparent redefinition" of what a plaintiff must prove to make out a prima facie case of disparate-impact discrimination.[164] Recognizing as "elementary" that plaintiffs must establish a causal link between the disparate impact and the challenged employment practices, the dissent stated that the challenged employment practices need not constitute the "sole" or "primary" cause of the plaintiff's harm.[165] Based on this, the dissent argued that numerous "questionable" employment practices should be viewed collectively to fortify a charge of employment discrimination.[166] The dissent further noted that liberal discovery rules which permit access to employment records will not lessen the difficulty the majority's added causation requirement will present to the *Wards Cove* workers, as the canneries did not preserve such employment records.[167]

c. *statistical data*

The dissent agreed with the majority's general premise that statistical evidence of discrimination should compare the racial composition of the "qualified . . . population in the relevant labor market" to the racial composition of the disputed jobs.[168] However, the dissent noted that this test failed to define what is meant by the "qualified population" or the "relevant labor market."[169] To make these terms meaningful, the dissent argued that the definition must account for the unique factual circumstances of each disparate-impact case.[170] The dissent cautioned that when using statistical evidence, a court "should not strive for numerical exactitude at the expense of the needs of the particular case."[171]

According to the dissent, the Alaskan salmon industry is a unique business with special circumstances.[172] The work is seasonal, and the

164. *Id.* at 2132 (Stevens, J., dissenting).

165. *Id.* at 2132-33 (Stevens, J., dissenting) (citing Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)).

166. *Id.* at 2133 (Stevens, J., dissenting).

167. *Id.* at 2133 n.20 (Stevens, J., dissenting).

168. *Id.* at 2133 (Stevens, J., dissenting) (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).

169. *Id.* (Stevens, J., dissenting).

170. *Id.* at 2134 (Stevens, J., dissenting).

171. *Id.* at 2133 (Stevens, J., dissenting). In a short dissent concurring with the dissent written by Justice Stevens, Justice Blackmun interpreted the majority's holding as "bar[ring] the use of internal workforce comparisons in the making of a prima facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless." *Id.* at 2136 (Blackmun, J., dissenting).

172. *Id.* at 2133 (Stevens, J., dissenting).

canneries are located in remote, sparsely populated areas.[173] Even though the skills required for the non-cannery jobs varied greatly,[174] the dissent predicted that many workers from the so-called "relevant geographic area" qualified for these jobs might not be willing to accept a job under these special circumstances.[175] The dissent reasoned that these special circumstances justified using existing Alaskan cannery workers to define the relevant labor market for non-cannery jobs.[176]

Although the district court defined the relevant labor market for cannery jobs as the general population of "Alaska, the Pacific Northwest, and California,"[177] the dissent called this characterization of the relevant labor market "not adequately founded."[178] The dissent reasoned that a fair characterization of the relevant labor market could not be based upon the general population in Alaska, the Pacific Northwest, and California because such figures do not identify the portion of the general population willing to accept employment under these unique circumstances.[179] Instead, the dissent insisted that the relevant market had to be narrowed to only those workers willing to perform seasonal work in a remote area of Alaska.[180]

Defining the relevant labor market as those individuals already employed by the Alaskan cannery industry narrowed the statistical data to workers willing to accept employment under these unique circumstances.[181] For this reason, the dissent concluded that statistics comparing the racial composition of cannery jobs to non-cannery jobs represented the more probative comparison,[182] and that the workers should have been allowed to use these statistics to establish their prima facie case.[183]

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173. *Id.* (Stevens, J., dissenting).

174. *Id.* at 2133-34 (Stevens, J., dissenting). The skills required ranged from "good health" and a "drivers license," to the ability to operate a seam micrometer. *Id.* (Stevens, J., dissenting).

175. *Id.* at 2134 (Stevens, J., dissenting).

176. *Id.* at 2134-35 (Stevens, J., dissenting). The dissent noted that some of the cannery workers who had been denied non-cannery jobs because they were considered "unskilled" later became architects, an Air Force officer and a graduate student in public administration. *Id.* at 2134 n.22 (Stevens, J., dissenting). The dissent thought it significant that some of the cannery workers had college degrees at the time they were employed by the canneries and considered unqualified for unskilled non-cannery jobs. *Id.* (Stevens, J., dissenting).

177. *Id.* at 2133-34 & n.23 (Stevens, J., dissenting).

178. *Id.* at 2134 (Stevens, J., dissenting).

179. *Id.* (Stevens, J., dissenting).

180. *Id.* (Stevens, J., dissenting).

181. *Id.* (Stevens, J., dissenting).

182. *Id.* at 2134-35 (Stevens, J., dissenting).

183. *Id.* (Stevens, J., dissenting).

IV. ANALYSIS

The *Wards Cove Packing Co. v. Atonio*[184] case involved an extreme set of facts[185] and only challenged the employer's subjective employment decisions.[186] For these reasons, it is possible that the Court intended the *Wards Cove* decision to be confined to its facts, or to apply only in disparate-impact cases challenging subjective employment decisions. If the Court intended that its holdings apply to all disparate-impact claims[187] it is simply impossible to reconcile these rulings with prior Supreme Court case law. Even if the decision is confined to cases challenging subjective employment decisions, it contravenes congressional intent and represents, in the words of the dissent, a "sojourn into judicial activism."[188]

The majority made three significant rulings. First, the Court held that statistical disparities alone will not suffice to establish a prima facie case of a disparate-impact discrimination.[189] In addition to statistical proof of a disparity, the plaintiff must identify the specific employment practices responsible for the alleged disparity and demonstrate that each practice caused a significant disparate impact.[190] A collection of questionable employment practices alleged to have collectively caused a significant disparate impact does not meet this burden.[191]

Second, the Court held that once a plaintiff meets the prima facie burden, the defendant may rebut the plaintiff's case by producing evidence of a legitimate business interest justifying the defendant's conduct.[192] The Court held that the defendant's rebuttal burden is merely one of producing evidence, while the plaintiff retains the burden of persuading the trier of fact that the defendant's business interest is insubstantial.[193] The Court further held that the employer's business interest need not be "essential" or "indispensable" to rebut the plaintiff's prima

184. 109 S. Ct. 2115 (1989).

185. *Id.* at 2119-20.

186. *Id.* at 2120-21.

187. *Id.* at 2121 (Court states that it is addressing proper application of Title VII's disparate-impact theory of liability).

188. *Id.* at 2128 (Stevens, J., dissenting).

189. *Id.* at 2125.

190. *Id.* Justice Blackmun characterized this as "requir[ing] practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible." *Id.* at 2136 (Blackmun, J., dissenting).

191. *Id.* at 2124 n.9 (majority notes one flaw in court of appeals decision was that "the specific employment practices were challenged only insofar as they were claimed to have been responsible for overall disparity between number of minority cannery and noncannery workers. The Court of Appeals did not purport to hold that any specified employment practice produced its own disparate impact that was actionable under Title VII.").

192. *Id.* at 2125.

193. *Id.* at 2126.

facie case.[194]

Third, the Court held that if a disparate-impact defendant successfully rebuts the plaintiff's prima facie case, the plaintiff may still prevail by proposing alternative employment practices which would serve the employer's business interests equally well.[195] The Court warned that any alternative practices offered by the plaintiff must be *equally* effective in meeting the employer's business goals and that cost or other burdens to the employer are relevant considerations in this determination.[196] Each of these decisions, and the analytical errors committed by the Court in arriving at them are examined in the following sections.

A. Supreme Court Recognition of Disparate-Impact Claims

The history of Title VII disparate-impact litigation is replete with Supreme Court decisions recognizing that Congress intended plaintiffs to have two methods by which to prove a Title VII violation: disparate treatment and disparate impact.[197] Because Title VII is concerned with the consequences of employment discrimination, past Supreme Court decisions have required employers to choose employment practices that neither overly discriminate, nor "operate as 'built-in headwinds' " to minority employees.[198] The majority opinion in *Wards Cove Packing Co. v. Atonio*[199] disregards Supreme Court precedence and so severely toughens a disparate-impact plaintiff's burdens of proof, that it is doubtful whether this cause of action survives the *Wards Cove* decision.

In *Griggs v. Duke Power Co.*,[200] the United States Supreme Court recognized that Congress enacted Title VII as a way to remove all "artificial, arbitrary, and unnecessary" employment barriers which invidiously

194. *Id.*

195. *Id.*

196. *Id.* at 2127.

197. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). *See also* Johnson v. Transportation Agency, 480 U.S. 616 (1987); Connecticut v. Teal, 457 U.S. 440 (1982); Washington v. Gunther, 452 U.S. 161 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

198. *Griggs*, 401 U.S. at 432.

199. 109 S. Ct. 2115 (1989).

200. 401 U.S. 424 (1971). In *Griggs*, black employees at a generating plant sued their employer under Title VII, alleging that by requiring a high school diploma and a minimum score on an intelligence test as a condition of employment in non-labor job categories, the employer had caused a discriminatory effect on non-white applicants. *Id.* at 427. The United States Supreme Court ruled in favor of the plaintiffs, holding that Title VII not only proscribes overt discrimination, but also proscribes employment practices which are "fair in form but discriminatory in operation." *Id.* at 431.

discriminate on the basis of race, color, sex, religion or national origin.[201] The *Griggs* Court in 1971 held that "good intent" or the "absence of discriminatory intent" is not a defense to employment practices with a discriminatory effect.[202] The Court stated that "[C]ongress directed the thrust of Title VII to the *consequences* of employment practices, not simply the motivation."[203] Based on that policy, the Court allowed the plaintiffs to prove a prima facie case of Title VII discrimination by demonstrating the disparate consequences of the defendant's employment practices, without proving a discriminatory intent by the employer.[204]

Eleven years after the *Griggs* decision, the Supreme Court reaffirmed in *Connecticut v. Teal*[205] that Title VII prohibits both intentional discrimination and employment practices which are not intentionally discriminatory but which have discriminatory consequences.[206] In *Teal*, the Court augmented its earlier Title VII holdings by adding that the language of Title VII not only forbids discrimination which has a disparate impact against groups of employees protected by Title VII, but also forbids employment practices which "deprive[] any *individual* of employment *opportunities*."[207] According to the Court, Congress did not intend to give employers the ability to discriminate against individual employees, as long as the employer treated members of a protected category favorably as a whole.[208] Therefore, to comply with Title VII after the *Teal* decision, employers had to not only choose employment practices which did not have a discriminatory impact on protected groups of employees as a whole, as was proscribed by *Griggs*, but employers also had to choose employment practices which did not deprive individual employees within the protected class of "employment opportunities."[209]

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201. *Id.*

202. *Id.* at 432.

203. *Id.*

204. *Id.*

205. 457 U.S. 440 (1982).

206. *Id.* In *Teal*, four black women employed by the Department of Income Maintenance of the State of Connecticut sued the Department under a Title VII disparate-impact theory alleging that the Department's requirement that employees pass a written test as an absolute condition for promotions disproportionately excluded blacks. *Id.* at 444. One month before trial, the Department instituted what the court of appeals called an affirmative action program to ensure that a significant number of minorities were represented in the Department's various job classifications. *Id.* As a result of this action, 22.9% of those promoted were black and 13.5% of those promoted were white, which created a "bottom line" result more favorable to blacks than to whites. *Id.* Defendants argued that this favorable "bottom line" was an absolute defense to plaintiffs' claims. *Id.*

207. *Id.* at 453 (citing 42 U.S.C. § 2000e-2(a)(2) (1982)) (emphasis added).

208. *Id.* at 455.

209. *Id.* at 456.

The *Griggs* and *Teal* decisions made clear that all forms of employment discrimination, whether intentional or not, fell within the purview of Title VII. Together, the two cases created a broad range of disparate-impact claims, allowing plaintiffs to challenge employment practices that either had a disparate-impact against groups of employees protected by Title VII, or against individual members of those groups. After *Wards Cove*, it seems clear that a majority of the Court no longer holds this view.

B. Additional Prima Facie Burden

The *Wards Cove Packing Co. v. Atonio*[210] majority held that a disparate-impact plaintiff's prima facie burden goes beyond the need to prove a statistical disparity.[211] The plaintiff must also identify the specific employment practices responsible for the disparate impact, and prove that each challenged practice has caused its own significant disparity.[212] The Court called this the causation requirement.[213] This additional prima facie burden ignores the congressional intent behind Title VII and contradicts prior Supreme Court case law.

Disparate-impact claims aid Congress in its struggle to eradicate the consequences of employment discrimination.[214] Guided by this congressional intent,[215] the Supreme Court has repeatedly recognized that gross statistical disparities, without more, may constitute a prima facie case of Title VII discrimination.[216] Where the plaintiff is unable to prove a gross

210. 109 S. Ct. 2115 (1989).

211. *Id.* at 2124 (citing Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 (1988)).

212. *Id.* at 2124-25. The majority stated that " 'plaintiff must begin by identifying the *specific* employment practice that is challenged.' " *Id.* at 2124 (quoting Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 (1988)) (emphasis added). The majority also stated that "[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* In challenging the majority's holding, the dissent stated that "[a]lthough the causal link must have substance, the act need not constitute the sole or primary cause of the harm." *Id.* at 2132 (Stevens, J., dissenting).

213. *Id.* at 2124.

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

215. The majority in *Griggs* stated that Congress intended Title VII to "remov[e] . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]." *Griggs*, 401 U.S. at 431. *See also* H.R. REP. NO. 238, 92d Cong., 1st Sess. 14 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2164 (unrelenting broad-scale action against discrimination is critical in combating employment discrimination); S. REP. NO. 415, 92d Cong., 1st Sess. 1, 14-15 (1971) (corrective measures are urgently required for institutional discrimination).

216. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977). *See also generally* Arlington

statistical disparity, the Court has required that the plaintiff identify conduct by the employer responsible for the alleged disparity, but has held that such conduct need not constitute the sole or primary cause of the plaintiff's harm.[217] According to the Court, the challenged conduct need only be a contributing factor.[218]

The Court has also recognized that the facts in Title VII cases vary greatly.[219] Therefore, prima facie burdens of proof must be applied with flexibility to accommodate these varied claims.[220] Otherwise, rigidly applied rules could allow certain consequences of employment discrimination to go unchecked simply because a plaintiff failed to meet an onerous standard.[221]

Requiring a disparate-impact plaintiff to prove a statistical disparity, *and* practice-by-practice statistical causation,[222] places a harsh burden on disparate-impact plaintiffs, while "tipping the scales in favor of disparate-impact employers."[223] Proving a causal link between the alleged disparity and the employer's conduct is a reasonable requirement needed to ensure that the employer actually caused the plaintiff's injury; however, a gross statistical disparity within an employer's work force has historically been held by the Supreme Court to adequately establish this causal link.[224]

By requiring a plaintiff to prove that each challenged practice caused its own "significant" disparate impact, the Court has foreclosed the possibility of asserting that several questionable employment practices collectively caused a significant disparity. A disparate-impact plaintiff may simply be unable to prove that *each* challenged employment practice individually caused a significant disparate impact, even though it may be clear from a statistical evaluation of the employer's workforce that gross disparities do exist. In many cases, a discriminatory impact may be the result of numerous employment decisions tainted by discrimi-

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Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976).

217. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785-86 (1989).

218. *Id.* at 1785.

219. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978).

220. *Id.*

221. *Id.* at 579-80. In *Furnco*, the Court stated that "it is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579. Based on this, the Court believed that flexibility is needed to fight discrimination in the work place. *Id.* at 580.

222. *Wards Cove*, 109 S. Ct. at 2125; *id.* at 2136 (Blackmun, J., dissenting).

223. *Id.* at 2133 (Stevens, J., dissenting).

224. *See Hazelwood*, 433 U.S. at 307-08; *Teamsters*, 431 U.S. at 339.

nation, but which can not be proven to have caused a significant disparity in their own right.[225] The disparate-impact cause of action was meant to address this type of elusive discrimination by focusing on the effects of employment discrimination, rather than the intent.[226]

The majority's ruling will allow employment discrimination to survive in cases where the plaintiff can prove a gross statistical disparity, along with a collection of questionable employment practices, but is unable to prove that any one of the practices individually produced a significant disparate impact. This disserves the congressional intent that Title VII eradicate *all* consequences of employment discrimination.[227]

Proof of a statistical disparity alone should not be sufficient to establish a prima facie case of employment discrimination. Such a standard would expose employers to potential liability for " 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.' "[228] Proof of a statistical disparity, plus a collection of questionable employment practices may also be insufficient to protect employers from unfounded litigation. But, where the plaintiff can prove a *gross* statistical disparity, the Court should allow the requisite causal link to be established by identifying a collection of questionable employment practices which collectively caused a significant disparate impact.[229] Extending the *Wards Cove* holding in this way would protect employers from senseless litigation, while recognizing that Title VII was meant to be applied with flexibility in order to eradicate all forms of em-

225. *See Wards Cove*, 109 S. Ct. at 2132 n.19, 2133 (Stevens, J., dissenting). For instance, in *Wards Cove* the workers alleged gross disparities within the canneries' work force, and alleged that these disparities were caused by nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within. *Id.* at 2120. The majority reversed the court of appeals' decision that this established prima facie disparate-impact discrimination because the lower court had not "purport[ed] to hold that any specified employment practice produced its own disparate impact that was actionable under Title VII." *Id.* at 2124 n.9.

226. *See Griggs*, 401 U.S. at 431 (stating, by analogy, that Title VII "provide[s] . . . [that] the vessel in which the milk is proffered be one all seekers can use" and that Title VII goes beyond proscribing acts of "overt discrimination").

227. *See* H.R. REP. NO. 238, 92d Cong., 1st Sess. 19, 24 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2164 (unrelenting, broad-scale action critical in combating discrimination); S. REP. NO. 415, 92d Cong., 1st Sess. 1, 14-15 (1971) (corrective measures are urgently required to combat institutional discrimination).

228. *Wards Cove*, 109 S. Ct. at 2125 (quoting Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787 (1988)).

229. This position is supported by the *Wards Cove* dissent, in which Justice Stevens states "in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities." *Id.* at 2132-33 (Stevens, J., dissenting).

ployment discrimination.[230]

C. Altered Burdens of Proof

According to the *Wards Cove Packing Co. v. Atonio*[231] majority, to rebut a plaintiff's prima facie disparate-impact case, the defendant must assert a legitimate business interest justifying the challenged employment practice.[232] The Court acknowledged that the "touchstone" of this inquiry is a "reasoned review" of the defendant's business justification,[233] but shattered its own case law by holding that the burden of persuasion in this analysis remains at all times with the plaintiff.[234] After *Wards Cove*, the defendant need only produce evidence of a business justification,[235] while the plaintiff must persuade the trier of fact that the justification is not significant.[236]

The Court explained that requiring the plaintiff to retain the burden of proof conforms with the rule in disparate-treatment cases.[237] This justification ignores the fact that the Supreme Court has always considered disparate-impact and disparate-treatment cases to be different theories of Title VII liability, with different sets of rules.[238] Rather than overrule prior case law, the Court chose to simply redefine a few key terms by curtly stating that where prior cases spoke of a defendant's burden of persuasion, this language really meant "an employer's production—but not persuasion—burden."[239] This is simply not true. As far back as 1973, the Supreme Court recognized that, in disparate-impact cases, plaintiffs have the burden of *proving* their prima facie case, and defendants must *prove* a business justification to rebut a plaintiff's prima facie

230. *Furnco*, 438 U.S. at 575-76.

231. 109 S. Ct. 2115 (1989).

232. *Id.* at 2125-26.

233. *Id.* at 2126; New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

234. *Wards Cove*, 109 S. Ct. at 2126. This was first held by a plurality of the Court in Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988). The decision to shift the burden of persuasion to the plaintiff in a disparate-impact case sharply divided the Court in *Watson*. *Id.* Chief Justice Rehnquist, Justice O'Connor, Justice White and Justice Scalia held that the ultimate burden of proving that Title VII employment discrimination had occurred against a protected group of workers remained at all times with the plaintiff. *Id.* *Watson*'s plurality decision has become the majority opinion in *Wards Cove*. *See Wards Cove*, 109 S. Ct. at 2126.

235. *Wards Cove*, 109 S. Ct. at 2126.

236. *Id.*

237. *Id.*

238. *See, e.g., Griggs*, 401 U.S. at 424; *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

239. *Wards Cove*, 109 S. Ct. at 2126.

evidence.[240] For the past sixteen years, this standard has been applied to disparate-impact cases.[241]

Disparate-impact and disparate-treatment claims are based on distinct theories intended to serve separate functions; therefore, claims based on these distinct theories should not be made to conform to the same rules. Unlike a disparate-impact claim, disparate-treatment cases require that the plaintiff prove the defendant acted with discriminatory intent.[242] Without evidence of discriminatory intent, no Title VII violation has occurred.[243] Because of this, it makes sense that a disparate-treatment plaintiff retain the burden of persuasion on the issue of intent at all times throughout the case.[244] Unlike disparate-treatment claims, intent is not an element of a disparate-impact case;[245] therefore, no such justification exists for applying the disparate-treatment standards to these cases.[246]

In addition to altering the burdens of proof, the majority also changed the standard by which the defendant's rebuttal evidence will be evaluated. In the past, disparate-impact plaintiffs have had to show that the challenged practice "manifestly" served a legitimate employment goal.[247] *Black's Law Dictionary* defines manifest as "unmistakable" and "indisputable,"[248] setting a high standard for a defendant's rebuttal evidence. In disparate-treatment cases, the Court has held that as long as an employer's business practices are "reasonably related to the achievement of some legitimate [business] goal," the defendant has met its rebut-

240. *See* McDonnell Douglas v. Green, 411 U.S. 792, 802 n.14 (1973) (plaintiff must first prove prima facie case; burden then shifts to employer to articulate business justification which is "shown to bear a demonstrable relationship to successful performance of the jobs"); *see also* Connecticut v. Teal, 457 U.S. 440, 446 (1982) ("employer must . . . demonstrate" that rebuttal evidence has a strong relationship to challenged employment practice); New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (employer successfully rebutted plaintiff's prima facie case by "demonstrating" that employment practice was job-related); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer must "prove" that the challenged job requirements are job-related); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of proving" that employment practices are job-related); *Griggs*, 401 U.S. at 432 (employer has burden of "showing" that screening test is job-related).

241. *See, e.g.*, Bunch v. Bullard, 795 F.2d 384, 393-94 (5th Cir. 1986); Lewis v. Bloomsburg Mills, 773 F.2d 561, 572 & n.18 (4th Cir. 1985); Hawkins v. Anheuser-Busch, 697 F.2d 810, 815 (8th Cir. 1983).

242. *See Teamsters*, 431 U.S. at 335-36 n.15. *See also supra* notes 41-47 and accompanying text.

243. *Wards Cove*, 109 S. Ct. at 2131 (Stevens, J., dissenting).

244. *Id.* (Stevens, J., dissenting).

245. *See Teamsters*, 431 U.S. at 335 n.15. *See also supra* notes 48-58.

246. *Wards Cove*, 109 S. Ct. at 2131 (Stevens, J., dissenting).

247. *Griggs*, 401 U.S. at 432; *see also Albemarle Paper*, 422 U.S. at 425.

248. BLACK'S LAW DICTIONARY 495 (5th ed. 1983).

tal burden.[249] The *Wards Cove* majority offered a third standard by which to evaluate a defendant's rebuttal evidence. According to the Court, the dispositive issue at the justification stage of a disparate-impact case is whether the challenged employment practices serve "in a significant way" the employer's legitimate business goals.[250]

After *Wards Cove*, the rules governing the justification stage of disparate-impact and disparate-treatment cases now conform.[251] It is unclear if the Court simply meant that the ultimate burdens of proof now conform, or if the standard governing the defendant's rebuttal evidence in a disparate-treatment case should also be applied to disparate-impact claims. The standard used in disparate-treatment claims requires that the challenged employment practices be reasonably related to a legitimate business goal.[252] This standard suspiciously resembles the highly deferential "rational basis" test used in other constitutional contexts.[253] Normally, constitutional claims involving racial discrimination invoke the Court's "strictest scrutiny."[254] Although not all Title VII claims involve racial discrimination, many do. After *Wards Cove*, courts may be allowed to evaluate an employer's rebuttal evidence for both disparate-treatment and disparate-impact claims under a standard resembling the "rational basis" test, including those Title VII claims challenging racial discrimination.[255] At least in the past this standard was confined to disparate-treatment claims.

By stating that the business justification stage of disparate-impact

249. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978). In *Furnco*, the Court stated that the employer need only "articulate some legitimate, nondiscriminatory reason for the employer's [conduct]." *Id.* at 578.

250. *Wards Cove*, 109 S. Ct. at 2125.

251. *Id.* at 2126.

252. *Furnco*, 438 U.S. at 577-78.

253. Traditionally applied, the "rational basis" test allows courts to defer to Congress or state legislatures when evaluating certain laws. If the court defers to the legislature, it still must determine whether the law serves a legitimate interest. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (deference to Congress on equal protection challenge to social and economic legislation where classification system has some "reasonable basis"); Railway Express Agency v. New York, 336 U.S. 106 (1949) (deference to municipality's judgment in managing traffic problems where ordinance claimed to violate due process).

254. *See* Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265-66 (1977); Hernandez v. Texas, 347 U.S. 475, 478 (1954).

255. Under this form of cursory judicial scrutiny, courts may merely determine whether the defendant's business justification is legitimate, and defer to the employer's assessment as to whether the challenged employment practice substantially furthers this legitimate business interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1440 (2d ed. 1988). *See also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (legislature "could have rationally believed" packaging regulation would further environmental objectives). Such a standard has never before been used in cases involving racial discrimination.

and disparate-treatment claims now conform to the same rules, the Court may have simply meant that these claims now conform to the same burdens of persuasion, while maintaining separate standards for evaluating the defendant's rebuttal evidence.[256] Although the Court cites *Griggs v. Duke Power*[257] as authority for its articulation of the proper standard,[258] the Court weakens the *Griggs* standard in the defendant's favor by holding that the defendant's challenged conduct need not be "essential" or "indispensable" to pass constitutional muster.[259] This suggests that the Court may have wished to establish a new standard which will fall somewhere between the "manifest relationship" test of prior disparate-impact cases, and the "rationally related" test used in cases involving a disparate-treatment analysis. It remains to be seen which standard the Court will apply.

D. Alternative Business Practices

In addition to increasing the causation requirements and reallocating the burdens of proof, the *Wards Cove Packing Co. v. Atonio*[260] majority dealt one final blow to the disparate-impact cause of action. The majority affirmed its own case law by holding that if a disparate-impact plaintiff is unable to persuade the finder of fact on the question of the defendant's business justification, the plaintiff may still prevail if able to propose alternative business practices which would reduce the discriminatory impact of the defendant's conduct.[261] The Court augmented this standard by stating that factors such as "cost" or "other burdens" are relevant to this determination.[262] The Court further held that the proposed practices must serve the employer's interest equally well, and that courts are less competent than employers to "restructure" business practices[263] and should proceed with care before requiring an employer to adopt a plaintiff's proposed alternative.[264]

Requiring that the plaintiff's proposed employment practices serve the employer's business goals "equally" well, and cautioning courts to "proceed with care" before adopting a plaintiff's proposed alternatives

256. *Wards Cove*, 109 S. Ct. at 2126.
257. 401 U.S. 424 (1971).
258. *Wards Cove*, 109 S. Ct. at 2126. *Griggs* states that the defendant's employment practice must bear a "manifest" relationship to legitimate business goals. *Griggs*, 401 U.S. at 432.
259. *Wards Cove*, 109 S. Ct. at 2126.
260. 109 S. Ct. 2115 (1989).
261. *Id.* at 2126.
262. *Id.* at 2127.
263. *Id.* (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).
264. *Id.*

toughens the standard previously applied by the Supreme Court. In the past, the Supreme Court has held that once a disparate-impact defendant rebuts the plaintiff's prima facie case, "it remains open to the complaining party to show that other [employment practices] without a similarly undesirable racial effect, would also serve the employer's legitimate interest."[265] Such a showing was deemed sufficient to prove that the defendant's chosen employment practices were a mere pretext for discrimination.[266]

The goal of Title VII is to prevent employment discrimination.[267] While condoning unsubstantiated claims of employment discrimination would undermine this goal, it also disserves this goal to make it virtually impossible for a plaintiff to prevail unless able to affirmatively prove an overt act of intentional discrimination. If "cost" or "other burdens" are relevant in determining whether a proposed practice equally serves the employer's interests,[268] coupled with a strong statement that courts should proceed with care before mandating the adoption of an alternative employment practice,[269] disparate-impact plaintiffs have little chance of ever successfully offering an alternative practice which will be adopted by the court.

E. Wards Cove Packing Co. v. Atonio *and Comparable Worth*

The *Wards Cove* decision will severely limit all Title VII disparate-impact claims, but its effect will be particularly harsh on disparate-impact claims based upon the doctrine of comparable worth. Without the doctrine of comparable worth, victims of wage discrimination will be deprived of a viable way to challenge pay disparities among jobs which are not equal, but merely comparable.[270] In recent years, comparable worth seemed to be gaining acceptance as a legal doctrine.[271] Unfortunately, the *Wards Cove* decision will impede this acceptance by rendering it virtually impossible to prove a prima facie case of Title VII wage discrimination based on the theory of comparable worth.

The legal basis for a comparable-worth claim is limited. Compara-

265. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

266. *Id.*

267. Griggs v. Duke Power, 401 U.S. 424, 429-30 (1971).

268. *Wards Cove*, 109 S. Ct. at 2127.

269. *Id.*

270. *See* WOMEN'S LEGAL DEFENSE FUND, *supra* note 1, at 1; Brogan, *Group Seeks to Close Pay Gap Between Sexes*, The Providence J. Bull., Aug. 29, 1988, § E, at 1, col. 2; Franklin, *Wage Gap Still Hasn't Been Bridged*, Chicago Tribune, Jan. 8, 1989, § C, at 2, col. 2.

271. *See, e.g.*, MINN. STAT. ANN. § 43a.01(3) (1986); WASH. REV. CODE ANN. §§ 41.06.150-.155; 28B.16.166 (1986).

ble-worth claims cannot be brought under the Equal Pay Act, because the act only provides a remedy for wage discrimination among jobs that are equivalent.[272] Under Title VII, plaintiffs cannot base a comparable-worth claim on a disparate-treatment cause of action because disparate-treatment claims require proof that the defendant's conduct was motivated by a discriminatory intent.[273] Courts generally have reasoned that an employer's decision to base salaries on the competitive market, rather than on their comparable worth, is not the result of an intent to discriminate, but is merely an economic decision.[274] Therefore, comparable-worth suits must be based on a disparate-impact cause of action. By severely restricting the applicability of disparate-impact claims in general, the *Wards Cove* majority has virtually eliminated a plaintiff's ability to challenge sex-based wage discrimination under Title VII.

1. Supreme Court recognition of the comparable-worth doctrine

In 1981, the United States Supreme Court held in *County of Washington v. Gunther*[275] that claims of sex-based wage discrimination were not limited to suits brought under the Equal Pay Act.[276] Such claims were held to also be actionable under Title VII.[277] This ruling opened the door to wage discrimination claims which would fail under the Equal Pay Act's standard of equal work. Although the *Gunther* Court was not

272. 29 U.S.C. § 206(d)(1). *See also supra* note 12 and accompanying text.

273. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). *See also supra* notes 41-47 and accompanying text.

274. *See* American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985) (employer's decision to base salaries on open market not evidence of discriminatory intent, since employer did not create market disparity); Spaulding v. University of Wash., 740 F.2d 686, 700 (9th Cir.) (discriminatory intent will not be inferred from wage differences between jobs that are merely comparable but not substantially equal), *cert. denied*, 469 U.S. 1036 (1984).

275. 452 U.S. 161 (1981).

276. *Id.* at 179-80. *See also* 29 U.S.C. § 206(d)(1) (1982). This statute is commonly referred to as the Equal Pay Act and provides in relevant part:

> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. (emphasis in original).

277. *Gunther*, 452 U.S. at 181.

confronted with a comparable-worth claim,[278] the Court acknowledged that the theory of comparable worth existed and did not rule out the possibility of a Title VII comparable-worth claim.[279]

Not all members of the *Gunther* Court agreed that wage discrimination claims should be allowed to go beyond the standard set by the Equal Pay Act. In a dissenting opinion, then Justice Rehnquist stated that all

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278. *Id.* at 166. In *Gunther*, female prison guards filed suit under Title VII alleging that the County of Washington intentionally paid female guards employed in the women's section of the county jail less than male guards employed in the men's section. *Id.* at 164. In response to the plaintiffs' allegation, the County argued that the Bennett Amendment, 42 U.S.C. § 2000e-2(h) (1988), incorporated into Title VII the Equal Pay Act's requirement of "substantially equal work" for claims based upon sex-based wage discrimination. *Gunther*, 452 U.S. at 165. Therefore, the County argued that in order to claim a violation of Title VII wage discrimination, the plaintiff had to prove that an employee of the opposite gender was paid a higher wage for the same work. *Id.* at 168.

The Supreme Court held that the Bennett Amendment, passed the same year as Title VII, was merely a way to rectify any possible inconsistencies between Title VII and the Equal Pay Act. *Id.* at 173; *see also* 42 U.S.C. § 2000e-2(h) (1988); 29 U.S.C. § 206(d)(1) (1988). The Court held that the amendment simply incorporated into Title VII the affirmative defenses contained in the Equal Pay Act, without incorporating the Equal Pay Act's requirement that the challenged salary disparity involve jobs requiring equal skill, equal effort, equal responsibility and that the jobs be performed under similar working conditions. *Gunther*, 452 U.S. at 170. In support of its decision, the Court reaffirmed that "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'" *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). The Court held that to restrict a Title VII plaintiff's claim of wage discrimination to suits of unequal pay for equal work would conflict with Congress' intent to supply a cause of action for all forms of employment discrimination related to compensation, terms, conditions or privileges of employment based on sex. *Id.* at 170-71.

The Court concluded that to read the Bennett Amendment as requiring Title VII sex-based wage discrimination claims to be restricted to the equal work standard of the Equal Pay Act would mean that a woman who is discriminatorily underpaid would have no right to relief unless her employer also employed a man in the same job, within the same company, at a higher rate of pay. *Id.* at 178. If, the Court observed, an employer hired a woman into a unique position, or if an employer used a sex-biased system for wage determination for positions not equal to those held by men, a woman might be denied the right to prove that the employer had committed a violation of Title VII. *Id.* at 179. According to the *Gunther* majority, "Congress surely did not intend . . . to insulate such blatantly discriminatory practices from judicial redress under Title VII." *Id.*

279. *Gunther*, 452 U.S. at 181. Although the Court did not openly endorse the doctrine of comparable worth, *id.* at 166, the Court showed support for the doctrine in a footnote criticizing the dissent for its "attempts to minimize the significance of the Title VII remedy . . . on the ground that the Equal Pay Act already provides an action for sex-based wage discrimination by women who hold jobs not *currently* held by men. . . . But the dissent's position would still leave remediless all victims of discrimination who hold jobs *never* held by men." *Id.* at 179 n.19. (emphasis in original). The majority stated that its ruling did not "decide . . . the precise contours of lawsuits challenging sex discrimination in compensation under Title VII" suggesting that the Court would allow a Title VII wage discrimination claim to be based on a theory of comparable worth. *Id.*

wage discrimination claims must meet the Equal Pay Act's requirement of equal work.[280] According to Justice Rehnquist, Title VII, together with the Equal Pay Act provide a "balanced approach to resolving sex-based wage discrimination claims."[281] Justice Rehnquist reasoned that Title VII guarantees female workers equal access to all jobs, and the Equal Pay Act assures that men and women performing equal work are paid the same wage.[282] Justice Rehnquist admitted that his narrow reading of Title VII would eliminate a remedy for situations in which women are paid less than men for comparable work.[283] However, he reasoned that Title VII was only intended to protect workers from overt discrimination.[284] Although this statement contradicted prior Supreme Court case law,[285] it was nonetheless prophetic. Indeed, the current Court's severe restriction on disparate-impact claims in *Wards Cove* implies that a majority of the Court agrees with Chief Justice Rehnquist that Title VII should only prohibit overt discrimination.

2. Comparable-worth claims after *Wards Cove Packing Co. v. Atonio*

Prior to the *Wards Cove* decision, disparate-impact plaintiffs could allege a prima facie case of employment discrimination by proving that a facially neutral employment practice fell more harshly on members of a protected category and was not justified by a business necessity.[286] In the comparable-worth context, the plaintiff had to prove membership in a protected category; that they held a sex-segregated job; that they were paid less than a sex-segregated job classification held by men; and that the two job classifications involved work that was similar in skill, effort, and responsibility.[287]

After *Wards Cove*, comparable-worth plaintiffs will be unable to prove a prima facie case of disparate-impact discrimination.[288] First, to

280. *Id.* at 181 (Rehnquist, J., dissenting).
281. *Id.* at 200 (Rehnquist, J., dissenting).
282. *Id.* (Rehnquist, J., dissenting).
283. *Id.* at 202 (Rehnquist, J., dissenting).
284. *Id.* at 201 (Rehnquist, J., dissenting).
285. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
286. *See Teamsters*, 431 U.S. at 336-37 n.15.
287. *See Gunther*, 452 U.S. at 171; Manuel v. W.S.B.T., 706 F. Supp. 654, 658-59 (N.D. Ind. 1988); Crockwell v. Blackmun-Mooring Steamatic, 627 F. Supp. 800, 802 (W.D. Tenn. 1985); Briggs v. City of Madison, 536 F. Supp. 435, 437 (W.D. Wis. 1982). *But see* American Nurses Ass'n v. Illinois, 783 F.2d 716, 721-22 (7th Cir. 1986); *see also infra* note 288.
288. Although evolving, the doctrine of comparable worth has had limited success in the lower federal courts. In the past, plaintiffs have been allowed to allege that disparities in wages between male and female-dominated job classifications have had a disparate impact on women, provided the plaintiff could prove the defendant's decision to set salaries according to the open

establish a prima facie case, a comparable-worth plaintiff must statistically prove the existence of a wage disparity between the salaries paid to men and those paid to women for comparable work.[289] This statistical comparison must be based on a comparison between the employer's work

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market was the result of an employment policy involving the employer's independent business judgment. *Spaulding*, 740 F.2d at 705 (Ninth Circuit).

If the employer could prove that this salary decision was the result of reliance on the open market, a plaintiff's comparable worth claim was usually held to be outside the scope of Title VII. *Id. See also American Fed'n*, 770 F.2d at 1406 (under disparate-impact analysis, employer's decision to base wages on competitive market, rather than theory of comparable worth did not violate Title VII since such decision "involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate-impact analysis"); Lemons v. Denver, 620 F.2d 228, 229 (10th Cir. 1978) ("we do not interpret Title VII as requiring employers to ignore the market in setting wage rates for genuinely different work classifications"), *cert. denied*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) ("Title VII [does not intend] to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work.").

In addition to overcoming this "market defense," a comparable-worth plaintiff would also need to be in a jurisdiction which allowed subjective employment decisions to form the basis of a disparate-impact claim. The First, Second, Third, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits allowed subjective employment decisions to form the basis of a disparate-impact claim. *See, e.g.*, Atonio v. Wards Cove Packing Co., 810 F.2d. 1477 (9th Cir. 1987) (challenge to hiring, promotion and rehire policies), *rev'd*, 109 S. Ct. 2115 (1989); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (promotion practices challenged); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (standardless promotion system challenged); Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (challenge to prior experience requirements for female staff); Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984) (challenge to layoff procedures); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) (performance review system challenged), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985); Wilmore v. Wilmington, 699 F.2d 667 (3d Cir. 1983) (promotion procedure challenged).

The Fourth Circuit only allowed objective employment decisions to form the basis of a disparate-impact claim. *See, e.g.*, E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 639 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); Lilly v. Harris-Teeter Supermarkets, 720 F.2d 326 (4th Cir. 1983) (unrestricted discretion of managers not actionable under disparate-impact theory), *cert. denied*, 466 U.S. 951 (1984).

The Fifth, Seventh and Eighth Circuits were split on this issue. *See, e.g.*, Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986) (impact analysis applied to promotion practices); Griffin v. Board of Regents, 795 F.2d 1281 (7th Cir. 1986) (impact analysis not applied to system classifying employees as regular or temporary employees); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) (impact analysis applied to disciplinary system); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1983) (impact analysis not applied to hiring policies), *cert. denied*, 464 U.S. 1073 (1984); Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983) (impact analysis applied to promotion practices), *cert. denied*, 466 U.S. 972 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (impact analysis not applied to discharge policy).

Beginning with the decision in *Watson v. Fort Worth Bank & Trust Co.*, subjective employment decisions can form the basis of a disparate-impact claim. 108 S. Ct. 2777, 2786-87 (1988).

289. *Wards Cove*, 109 S. Ct. at 2121 (statistics generally form proper basis for initial inquiry in disparate-impact case).

force and the relevant labor market.[290] A comparable-worth plaintiff will only be able to meet this prima facie burden if allowed to define the relevant labor market as the plaintiff's own work place. If the plaintiff is required to define the relevant labor market as including women outside the plaintiff's own work place, the plaintiff will be unable to prove a statistical disparity. The competitive labor market is the source of the discrimination in a comparable-worth suit by placing a lower value on work performed by women.[291] Therefore, a statistical comparison between the salaries paid to women within the defendant's work force, and those paid to women in the same jobs in the relevant labor market will never yield a disparity.

In addition to proving a statistical disparity, a comparable-worth plaintiff must identify the specific employment practices responsible for the alleged discrimination, proving that each practice caused its own significant disparate impact.[292] Courts have generally held that the decision to base wages on the competitive market, rather than on a system of comparable worth, cannot be classified as a specific employment practice.[293] Instead, courts have held that such a decision involves the assessment of many complex, multifaceted factors such as salary surveys, administrative recommendations, budget proposals, and profit motivations, which collectively culminate in a salary system.[294] Therefore, comparable-worth plaintiffs will be unable to identify the specific employment practices responsible for an employer's decision to implement a salary system based on the competitive market, much less prove that any one of those decisions caused a significant disparate impact.

The *Wards Cove* majority stated that liberal discovery rules which give plaintiffs broad access to employment records will balance any undue burden this specific causation requirement will have on Title VII plaintiffs.[295] In the *Wards Cove* case itself, liberal discovery rules had

290. *Id.*

291. *See* Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, 10 J. WOMEN CULTURE & SOC'T 313 (1984).

292. *Wards Cove*, 109 S. Ct. at 2124-25.

293. *See American Fed'n*, 770 F.2d at 1406 (employer's decision to base salaries on competitive market instead of theory of comparable worth requires assessment of complex factors; therefore, comparable worth not appropriate to Title VII disparate-impact analysis); *Lemons*, 620 F.2d at 228 (Title VII does not require employers to ignore market in setting wage rates for different job classifications); *Christensen*, 563 F.2d at 353 (plaintiffs may not establish prima facie case of Title VII discrimination on fact employees of different sexes receive different wages for work of equal value to employer if such wages do not command higher wage in competitive labor market).

294. *See, e.g., American Fed'n*, 770 F.2d at 1406.

295. *Wards Cove*, 109 S. Ct. at 2125.

little effect, since it was undisputed that the canneries did not preserve employment records.[296] In the comparable worth context, liberal discovery rules will likewise have little effect in helping plaintiffs establish their prima facie case. Any records the employer may have kept will simply show that women in certain job categories are paid less than male employees in *other* job categories. Such records will provide no help in establishing that the lower wages paid to women are the result of employment discrimination.

To rebut a plaintiff's prima facie case, *Wards Cove* allows a defendant merely to produce evidence of a business interest justifying the alleged discriminatory employment practice.[297] According to the Court, this challenged practice need not be "essential" or "indispensable" to the defendant's business goals to pass constitutional muster.[298] Furthermore, the plaintiff must prove that the defendant's business justification is insignificant.[299] Based on the Court's holding that the challenged employment practices need not be essential or indispensable to the defendant's business goals, a defendant can easily meet its rebuttal burden, regardless of the basis for the plaintiff's disparate-impact claim.

Even if a defendant rebuts a plaintiff's prima facie case, the plaintiff may still prevail if able to propose an alternative business practice which will serve the employer's business interests equally well,[300] but, according to the *Wards Cove* majority, cost and other burdens to the employer are relevant considerations in this determination.[301] Proposing an alternative salary system based upon the theory of comparable worth rather than the competitive labor market will always involve increased costs to the employer in the form of increased wages.[302] Furthermore, the *Wards Cove* majority explicitly cautioned that courts are less competent than employers to restructure business practices, warning that the judiciary should proceed with care before mandating the use of an employment practice offered by a disparate-impact plaintiff.[303] Considering these fac-

296. *Id.* at 2133 n.20 (Stevens, J., dissenting).

297. *Id.* at 2125-26. According to the *Wards Cove* majority, the burden of persuasion in a disparate-impact case remains at all times with the plaintiff. *Id.* at 2126. This means the employer can rebut the plaintiff's prima facie case by merely producing evidence of a business necessity, whether or not such rebuttal evidence persuades the trier of fact that the articulated business necessity was the employer's real motivation behind the challenged employment practice.

298. *Id.* at 2126.

299. *Id.*

300. *Id.* at 2126-27.

301. *Id.* at 2127.

302. *Id.*

303. *Id.*

tors, a court is unlikely to mandate the adoption of a comparable-worth salary system to replace one based on the competitive market.

V. PROPOSAL: CONGRESS MUST AMEND TITLE VII TO ENSURE THE FUTURE VIABILITY OF DISPARATE-IMPACT CLAIMS

As the United States Supreme Court stated in earlier cases, Title VII's prohibition against employment discrimination was intended to proscribe both overt discrimination, and employment practices that are fair in form but discriminatory in application.[304] By the Court's own admission, Congress directed the thrust of Title VII at the *consequences* of employment discrimination, not merely the *motivation*.[305]

Griggs v. Duke Power Co.,[306] which gave birth to the disparate-impact theory of liability, was decided in 1971. Title VII was amended in 1972.[307] The amendment process gave Congress an opportunity to legislate against the disparate-impact cause of action if lawmakers disagreed with the *Griggs* opinion. The 1972 changes made by Congress to Title VII were slight and did not address the disparate-impact cause of action.[308] Therefore, the nearly two decades of congressional silence since the *Griggs* decision should be interpreted to mean that Congress endorses the disparate-impact cause of action.

Additional indications that Congress endorses the disparate-impact cause of action come from the congressional discussions surrounding the 1972 amendment to Title VII. During these discussions, both houses of Congress acknowledged that existing case law would continue to govern Title VII's implementation.[309] Decisional law at the time of the 1972 amendment included *Griggs*, as well as other cases involving disparate-impact claims.[310]

The majority's decision in *Wards Cove* judicially eliminates the disparate-impact cause of action by placing an unusually harsh burden of proof on disparate-impact plaintiffs, while significantly lessening the bur-

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

305. *Id.* at 432.

306. 401 U.S. 424, 431 (1971).

307. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-2 (1988)).

308. The 1972 amendment to Title VII merely added "applicants for employment" following "his employees" in § 8(a), and added "or applicants for membership" following "membership" in § 8(b). 42 U.S.C. § 2000e-2 (1982) (historical note).

309. *See, e.g.*, H.R. REP. NO. 238, 92d Cong., 2d Sess. 19, 24, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137.

310. *Griggs*, 401 U.S. at 424. *See also* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

den placed on disparate-impact defendants. It is simply impossible to reconcile the *Wards Cove* decision with prior Title VII case law or a fair reading of the congressional intent behind the enactment of Title VII.[311] By collapsing disparate-impact and disparate-treatment theories into one analysis, the Court has interpreted Title VII in the narrowest possible manner.[312] Congress must act to remedy the harm this decision will inevitably do. Congress must either amend Title VII to include a disparate-impact cause of action or, at the very least, add a policy statement which makes it unquestionably clear that Title VII is not merely intended to prevent overt acts of intentional discrimination. For example, Congress could amend Title VII to state:

> All forms of employment discrimination, whether or not intentional, are prohibited by this Title. This includes any form of wage discrimination which favors one gender over another, or any other form of discrimination which is facially neutral but has a disparate-impact on workers protected by this Title. Remedies developed to implement this Title should be applied flexibly, so as not to undermine its remedial goals.

Presently, a bipartisan coalition exists to overturn *Wards Cove* through the passage of a bill entitled the Civil Rights Act of 1990.[313] This bill seeks to restore the burdens of proof in disparate-impact cases,

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311. *See supra* notes 197-209 and accompanying text.

312. Title VII states that it is unlawful for an employer to discriminate against any individual in the employment context on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1988). This Title does not specifically state that it prohibits the consequences of unintentional as well as intentional discrimination. *Id.* The narrowest interpretation of Title VII is to limit its reach to overt acts of employment discrimination only.

313. S. 2104, 101st Cong., 2d Sess. (1990). The portion of the bill pertaining to *Wards Cove* states:

> SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.
>
> Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:
>
> (k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—
>
> (1) An unlawful employment practice is established under this subsection when—
>
> (A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or
>
> (B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that—
>
> (i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall

impliedly endorsing the disparate-impact cause of action. The bill sends a clear message to the Supreme Court that the type of judicial activism demonstrated in *Wards Cove* will not go unnoticed. Without such a clear message, the Court might continue to use its power of judicial review to construe Title VII so narrowly that it becomes an ineffective tool.

VI. CONCLUSION

Current federal law does not explicitly provide a way to remedy pay inequities between men and women for comparable work. While Title VII provides equal access to the job market,[314] and the Equal Pay Act ensures that men and women performing the same work receive equal pay,[315] these laws do not remedy the low value society places on work performed predominantly by women.[316] Recognizing Title VII challenges based on the doctrine of comparable worth is a viable way to remedy this gap in the law. Admittedly, it is difficult to accurately affix a value to work which is not equal, but merely comparable. Even so, some states have surmounted this problem and currently set salaries for state employees based on a system of comparable worth.[317]

A majority of the Supreme Court has never squarely addressed the comparable-worth issue. Chief Justice Rehnquist has stated that all wage discrimination claims should be judged by the Equal Pay Act's standard of equal pay for equal work.[318] He has expressed the belief that Title VII was not meant to remedy all forms of employment discrimination,[319] and that some types of wage discrimination are acceptable, to lessen the bur-

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not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

Id.

314. 42 U.S.C. § 2000e-2 (1988).

315. 29 U.S.C. § 206(d)(1) (1988). *See also* Washington v. Gunther, 452 U.S. 161, 200 (1981) (Rehnquist, J., dissenting).

316. *See supra* note 7 and accompanying text.

317. *See* American Fed'n of State, County and Mun. Employees v. Washington, 770 F.2d 1401, 1403 (9th Cir. 1985). *See also* WASH. REV. CODE ANN. §§ 41.06.150-.155, 28B.16.116 (1989).

318. *Gunther*, 452 U.S. at 200 (Rehnquist, J., dissenting).

319. *Id.* at 203 (Rehnquist, J., dissenting).

dens associated with governmental intervention into business.[320] Although none of the other current Supreme Court Justices overtly subscribe to this view, a majority of the Court has taken the more indirect approach of so limiting the disparate-impact cause of action that only overt acts of discrimination can survive the prima facie burden imposed by the *Wards Cove* decision.

The *Wards Cove* decision establishes a highly formalistic standard for disparate-impact claims. This standard is inconsistent with the nature of most disparate-impact claims, particularly those based on the doctrine of comparable worth. The very nature of a comparable-worth claim requires that courts reject an overly formalistic approach to Title VII, in favor of a realistic look at the persistent problem of wage discrimination against women.[321] Pay equity is more than just a salary issue. In our society, money means power, and until women receive a wage equal to that received by men, women will continue to remain in an inferior power position within the workplace.[322]

Nancy L. Tetreault *

320. *Id.* (Rehnquist, J., dissenting). Rehnquist believes that the Equal Pay Act should provide the only remedy for sex-based wage discrimination. *Id.* (Rehnquist, J., dissenting).

321. *See supra* notes 286-87 and accompanying text.

322. Steinberg, *A Want of Harmony: Perspectives on Wage Discrimination and Comparable Worth*, in JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE: PERSPECTIVES ON COMPARABLE WORTH 24 (1984).

* In Memory of my father, Richard C. McWhinnie, 1926-1990. Special thanks to my husband Paul, my mother Lorraine, and my sisters, Kimberly, Kerry and Liann.