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THE PROTECTED-CLASS APPROACH TO ANTIDISCRIMINATION LAW: LOGIC, EFFECTS, REFORM

WAL-MART V. DUKES: TAKING THE PROTECTION OUT OF PROTECTED CLASSES

by
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Wal-Mart v. Dukes *is a major 2011 procedural decision changing the future path of class actions and maybe more. To decide the procedural issue, the Court found it necessary to look to the underlying substantive law—Title VII's systemic disparate treatment and disparate impact theories of discrimination. This article will explore the way the Court treated that substantive law to attempt to see if* Wal-Mart *is a foreshadowing of major changes in the substance of antidiscrimination law. To do that, it will first briefly develop the competing visions of the underlying purpose of antidiscrimination law—whether the aim of the law is to address subordination of classes of people protected by the law or is simply to prohibit classifications—and trace their development since Reconstruction through the Rehnquist Court. Next, it will develop the earlier Roberts Court decisions in* Parents Involved *and* Ricci v. DeStefano *leading up to* Wal-Mart. *These decisions show how the anticlassification purpose and corresponding absolute color-blind rule have come to predominate if not completely prevail. Finally getting to* Wal-

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Mart, *the article first sketches out how* Wal-Mart *would be analyzed under prior law and then describes how that substantive law was treated in the decision itself. Looking at the juxtaposition of prior law with the approach to substantive antidiscrimination law developed in* Wal-Mart, *the next Part sets out the possible impact of* Wal-Mart *on that law. In the best case,* Wal-Mart *would have no impact on Title VII's substantive law. In the worst case, the decision foreshadows a major contraction of the systemic theories of discrimination that were in place before the Roberts Court era.*

I. INTRODUCTION

"No wonder kids grow up crazy. A cat's cradle is nothing but a bunch of X's between somebody's hands, and little kids look and look and look at all those X's . . ." "And?" "No damn cat, and no damn cradle."[1]

The Civil Rights Movement and its success at getting civil rights legislation enacted is the paradigm for all antidiscrimination law.[2] Given that movement and those that followed channeling the Civil Rights Movement, it seems almost natural to describe the purpose these laws should serve as "protecting" the "class" whose organizational efforts finally brought some recognition of their plight and the enactment of protections.[3] With few exceptions,[4] however, antidiscrimination statutes

[1] KURT VONNEGUT, CAT'S CRADLE 165–66 (1963).

[2] Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 946 (2007).

[3] A search on Westlaw of the term "protected class" in Supreme Court cases resulted in 33 cases relevant to employment. These cases were also identified in terms of what protected class was at issue. This resulted in 14 cases involving the protected class of race, six cases for gender, seven for age, four for disability, and two cases that

are not drafted explicitly to protect only the members of those classes. Instead, these statutes are drafted in terms of the classifications of the characteristics which form the protected group. Thus, § 703(a) of Title VII of the Civil Rights Act of 1964 provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."[5] In important ways, the collision between two fundamentally competing purposes for these laws—antisubordination or anticlassification—has driven the debate about the scope and nature of the antidiscrimination project in this country.[6] If the anticlassification

were miscellaneous. These cases also differed in terms of whether the Constitution or anti-discrimination law was the basis for the claim seeking the protection of the particular protected class at issue. Of these cases, the Constitution was used eight times in arguing for a protected class. The Fourteenth Amendment was raised in six cases, the Fifteenth Amendment in two, and the Thirteenth Amendment in one case. In other cases, federal anti-discrimination law was the basis for claims involving protected classes. Title VII was relied on in eight cases, the Age Discrimination Employment Act (ADEA) in six, the Voting Rights Act of 1965 in six, the Americans with Disabilities Act (ADA) in four, and Title XI, the Equal Pay Act, § 1985(3) and § 1584, used the term in one case each. *See* Memorandum from Laura Hoffman to author, Summary of Protected Class Research 1 (May 11, 2011) (on file with author).

[4] The major exceptions include 42 U.S.C. § 1981(a), which provides: "*All persons* . . . shall have the *same right* . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens* . . . ." 42 U.S.C. § 1981(a) (2006) (emphasis added). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976) (holding that § 1981 protects everyone from race discrimination in contracts). Further, Title VII of the Civil Rights Act of 1964 in § 701(j) defines "religion" to require employers to reasonably accommodate the religious beliefs and practices of workers, 42 U.S.C. § 2000e(j) (2006), and the Americans with Disabilities Act of 1990 (ADA) requires employers to reasonably accommodate qualified workers with a disability, 42 U.S.C. § 12112(b)(5)(2006).

[5] 42 U.S.C. § 2000e-2(a) (2006). *See* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 657 ("The courts used to talk about the idea of a 'protected class,' people who were historically disadvantaged in a caste system with white men at the top. The constitutional principles and statutory laws against discrimination were to protect racial and ethnic minorities and women from policies and practices, both public and private, that would tend to keep this caste system going. [That is no longer true.] . . . While the notion that we are all in one big protected group, safe from discrimination, sounds comforting, what it really means is that white males can bring 'reverse discrimination' cases and that 'reverse civil rights' lawyers are on the ascendancy in attacking affirmative action."); *see also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 102–20 (2010) (arguing that the Supreme Court's recent interpretations of antidiscrimination law has turned it on its head—it protects whites but not the members of racial minority groups); Ann C. McGinley, Ricci v. DeStefano*: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. (forthcoming 2011), *available at* http://ssrn.com/abstract=1924533.

[6] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003). *See generally Equal Employment Opportunity (EEO) Terminology*, NAT'L ARCHIVES, http://www.archives.gov

purpose is adopted, it leads to a narrow scope of protection, with the legal rule being the simple prohibition of the classification, whether or not that helps the members of the groups who are supposedly protected by the law. The antisubordination approach would broaden the scope of protection in ways that should inure to the benefit of the groups that are the historic victims of discrimination.[7] Another way of stating the difference between the two is that the anticlassification approach focuses on individual perpetrators—the "few bad apples" in the barrel—while the antisubordination purpose looks to and helps to redress the plight the protected class suffers.[8]

After seesawing between the two for quite some time, the question now is whether the Roberts Court has firmly established the anticlassification purpose for equal protection and antidiscrimination statutes even if the resulting interpretations of those laws may have not yet fully implemented an absolute anticlassification rule.[9] We are all members of various protected classes. Express attempts to remedy the subordinating conditions that each group faces can be found to conflict

/eeo/terminology.html (noting that the Equal Employment Opportunity Commission (EEOC) defines "protected class" in a way that reflects, rather than resolves that tension). "Protected Class: The groups protected from the employment discrimination by law. These groups include men and women on the basis of sex; any group which shares a common race, religion, color, or national origin; people over 40; and people with physical or mental handicaps. Every U.S. citizen is a member of some protected class, and is entitled to the benefits of EEO law. However, the EEO laws were passed to correct a history of unfavorable treatment of women and minority group members." *Id.* Depending on how one counts, there are at least eight different protected classes pursuant to federal statutory law. The states generally protect the same classes as Title VII but, again, depending on how one counts, the states have expanded the protected classes to at least 25, including such things as political views and appearance. *See* Memorandum from Laura Hoffman to author, Federal Anti-Discrimination Laws (undated) (on file with author).

[7] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), is generally credited with articulating the two quite different ways of looking at equal protection and antidiscrimination laws. *See* Schwartz, *supra* note 5, at 665, for a distinction regarding what discrimination means using protected class theory ("Discrimination is not differential treatment per se, but differential treatment that arises from, and perpetuates, a caste system, a history of oppression, or exclusion of groups based on their group characteristics.").

[8] *See* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142–43 (2002) (since 1995, the Court has adopted an anti-antidiscrimination agenda that explains a series of decisions that cannot be understood under prior doctrine or precedent). For a classic discussion, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For an analysis that, because of "pluralism anxiety," the Court is moving away from its traditional equal protection jurisprudence toward a liberty-based dignity jurisprudence, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

[9] For a recent article that looks more closely at the doctrinal level that inexorably moved to the color-blind rule, see Ian Haney López, *Intentional Blindness* (UC Berkeley Public Law & Legal Theory Research Paper No. 1920418), *available at* http://ssrn.com/abstract=1920418.

with an anticlassification rule.[10] This Article develops that idea through the lens of the Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*.[11] While the decision most immediately involves class action law,[12] it appears to raise significant questions of substantive antidiscrimination law, which will be the focus of this Article.[13] Whether or not the Court's treatment of substantive antidiscrimination law is a restatement of the law as it stands today, that treatment may well foreshadow the direction that the lower courts and the Supreme Court will take in the future.

Part II traces the competition between the anticlassification and antisubordination views of antidiscrimination law since the ratification of the Reconstruction Amendments. Part III develops the earlier Roberts Court decisions in *Parents Involved*[14] and *Ricci v. DeStefano*,[15] leading up to *Wal-Mart*, showing how the anticlassification purpose and corresponding absolute color-blind rule have come to predominate, if not completely prevail. Part IV first sketches out how *Wal-Mart* would be analyzed under prior law and then describes how substantive law was treated in the decision itself. Looking at the juxtaposition of prior law with the approach to substantive antidiscrimination law developed in Part IV, Part V sets out the possible impact of *Wal-Mart* on that law, and Part VI concludes.

II. BRIEF OVERVIEW OF THE ANTICLASSIFICATION-VERSUS-ANTISUBORDINATION COMPETITON IN THE COURTS

A complete history of the tension between an anticlassification and an antisubordination purpose to redressing discrimination is beyond the scope of this Article. Briefly, the conflict arose in the very earliest interpretations of the Reconstruction Amendments that were enacted

[10] *See* Yoshino, *supra* note 8, at 747 ("pluralism anxiety"—over the extensive numbers of protected groups—is driving the retraction of antidiscrimination law). In a related area, the question of intersectionality claims of discrimination, the data compiled from federal court cases from 1965 to 1999 shows that plaintiffs who make claims of intersectional discrimination, as for example, a claim of discrimination because the plaintiff was an African-American woman, are only half as likely to win as plaintiffs alleging a single basis of discrimination. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992, 1009 (2011).

[11] 131 S. Ct. 2541 (2011).

[12] If this Article were to focus on the procedural law of class actions along with substantive antidiscrimination law, a more appropriate title might be "Wal-Mart v. Dukes*: Taking the Protection and the Class Out of Protected Classes."*

[13] Taking the procedural issues involving class action law out of the case would leave the case as if it had been brought by the EEOC under its pattern or practice authority. *See* 42 U.S.C. §§ 2000e-6(a), 2000e-6(c) (2006); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 328 n.1 (1977) (action to enforce Title VII brought by the government, with the jurisdiction to bring these suits now within the EEOC).

[14] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[15] 129 S. Ct. 2658 (2009).

following the Civil War.[16] In 1873, in the *Slaughter-House Cases*,[17] the Court rejected an argument that these amendments protected the right of white butchers to practice their profession. The basis for rejecting their claim was the finding that all three amendments were to be interpreted in light of the antisubordination[18] purpose of protecting freed slaves from race discrimination:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[19]

In light of this antisubordination purpose focusing on the plight of African-Americans, the Court adopted a substantive interpretation of the three amendments denying the claims of these white butchers seeking a constitutional right to practice their profession.[20]

Shortly thereafter, the Court interpreted equal protection to apply beyond what a strict anticlassification purpose or rule would reach. In *Yick Wo v. Hopkins*,[21] an ordinance requiring laundries to be in brick buildings was neutral on its face as to race yet had been applied to deny the applications of some 200 Chinese, while granting a variance from its operation to all 80 whites who applied:

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[16] This Article proceeds on the assumption that equal protection and disparate treatment discrimination jurisprudence are now, if not identical, substantially the same. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010).

[17] 83 U.S. (16 Wall.) 36 (1873).

[18] "Subordinate" means "placed in a lower order, class, or rank: holding a lower or inferior position . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2277 (Philip Babcock Gove ed., 2002) [hereinafter WEBSTER'S DICTIONARY].

[19] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71. While not denying the possibility of a more general application, the Court's purposive approach made that possibility remote: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. . . . [I]f other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Id.* at 72.

[20] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.2, at 626 (4th ed. 2011). Soon afterwards, however, the Court began to abandon that purpose and to interpret the Fourteenth Amendment, particularly its due process clause, to apply broadly to protect the right to contract. *Id.* at 627–28.

[21] 118 U.S. 356 (1886). In 1880, the Court had found that the explicit exclusion of African-Americans from juries violated equal protection. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . . [T]he conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.[22]

The basic statistical evidence—the "inexorable zero" of Chinese applicants allowed to operate laundries in wooden buildings—was sufficient to establish an equal protection violation. With no rebuttal by the defendants, it was appropriate to draw the inference that, without another explanation, discrimination was the most likely reason for the decisions that were challenged. "No reason whatever, except the will of the supervisors, is assigned why [the Chinese applicants] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood."[23]

Ten years later, in *Plessy v. Ferguson*,[24] the Court not only failed to follow its prior antisubordination-based precedent, but it failed to accept even an anticlassification-based challenge to a law explicitly requiring racially segregated railroad passenger cars. The Court's reason for not finding the law unconstitutional was the notorious "separate but equal" interpretation of equal protection: African-American and white passengers were treated equally in the sense that members of both races had a right to ride on the train and each was banned from riding in the same car with members of the other race.[25] The Court reduced racial subordination to a mere state in the mind of its victims.[26] The reign of de jure segregation had begun, and it lasted until the middle of the 20th century.

Justice Harlan's oft quoted dissent has been the basis used by both sides of the anticlassification-versus-antisubordination debate ever since:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no

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[22] *Yick Wo*, 118 U.S. at 373–74.

[23] *Id.* at 374. In the Warren Court years, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), channeled *Yick Wo*. Without any express use of race, Alabama had rezoned Tuskegee into an "uncouth twenty-eight-sided figure" that removed virtually all the black but none of the white voters from the city. *Id.* at 340. The Court viewed this as "tantamount . . . to a mathematical demonstration, that the legislation is solely concerned with . . . fencing Negro citizens out of town . . . ." *Id.* at 341.

[24] 163 U.S. 537 (1896).

[25] *Id.* at 537.

[26] *Id.* at 551. In answer to plaintiff's argument that "enforced separation of the two races stamps the colored race with a badge of inferiority," the Court said that if true, that was "solely because the colored race chooses to put that construction upon it." *Id.*

> caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[27]

From an anticlassification perspective, the key words are: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." This language is used to argue that the purpose of equal protection is anticlassification and so its scope should be limited to prohibiting explicit race classifications and not much more. In other words, the anticlassification color-blind purpose required a color-blind legal rule.

From an antisubordination perspective, those words must be read in the context of the entire paragraph that describes the antisubordination aspirations of equal protection and not as a limiting rule narrowly prohibiting racial classification. Thirteen years earlier, Justice Harlan articulated the antisubordination purpose for equal protection in his dissent in *The Civil Rights Cases*,[28] and he had not changed his mind in

[27] *Id.* at 559 (Harlan, J., dissenting). "The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned." *Id.* at 560–61.

[28] In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court, in interpreting the Civil Rights Act of 1975, held that Congress lacked authority under § 5 of the Fourteenth Amendment to reach private actors who discriminated on the basis of race in providing accommodations to the public. Discrimination in public accommodations also was not within the scope of the Thirteenth Amendment, which was limited to banning slavery. *Id.* at 24–26. Justice Harlan dissented because the purpose of equal protection was to overcome the refusal of the states to protect the rights denied to African-Americans that white citizens took as their birthright. In other words, the Act was aimed at ending the subordination of African-Americans: "My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. . . . What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. . . . The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained." *Id.* at 61 (Harlan, J., dissenting). The

Plessy. By saying there is no "dominant, ruling class" Justice Harlan was not making a factual claim. Indeed, it is clear Justice Harlan said this precisely because it was so counterfactual.[29] Because there clearly was a dominant ruling class in society, he used the statement as an aspiration, a goal, and not a legal rule for enforcing equal protection. That goal was to end the significance of race. Ending the salience of race in our society would mean that there no longer would be a ruling class based on race, a color-blind society would be established, and the goal of equal protection would be achieved.

In sum, three of these 19th century decisions—*Slaughter-House*, the *Civil Rights Cases*, and *Plessy*—can be seen as consistent, despite their conflicting statements of the purpose of equal protection, because the scope of application of the Reconstruction Amendments was diminished in each case. In other words, the Court articulated conflicting purposes of equal protection but appeared to use them instrumentally to achieve a common end, a restrictive interpretation of these amendments. While *Yick Wo* might be seen as consistent with *Slaughter-House* in terms of the announced purpose of equal protection, it cannot be synthesized with any of the three cases based on their outcomes. *Yick Wo* interpreted equal protection to reach beyond freed slaves to protect members of another racial minority, the Chinese, and found that a law neutral on its face as to race nevertheless violated the equal protection clause because of the way it was administered.

There followed the long period during which de jure and de facto segregation were an unfortunate fact of American life.[30] With the long and hard-fought drive of the NAACP's litigation efforts and the arrival of the Warren Court, the separate but equal doctrine of *Plessy* was first

Rehnquist Court later reaffirmed the holding of *The Civil Rights Cases* that Congress lacks power under § 5 of the Fourteenth Amendment to reach private action. United States v. Morrison, 529 U.S. 598 (2000).

[29] Whether or not race is still salient, and so Justice Harlan's aspiration for equal protection is still far from being achieved, is a debate that continues. For an example that race still has salience, one need look no further than the Court's recent decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), where the fact that African-Americans and Latinos had been excluded from the New Haven fire department for generations was not the subject of much public scrutiny or debate, but the white firefighters case was the subject of continuing media scrutiny from the moment the issue arose. *See* Justice Ginsburg's dissenting opinion, *id.* at 2690; Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41 (2009), *available at* http://www.law.harvard.edu/students/orgs/blj/vol25/41-56.pdf.

[30] For example, the New Deal of Franklin D. Roosevelt left race discrimination as it existed without redress. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96–100 (2011) (showing how the exclusion of agricultural and domestic workers from the protections of the newly enacted national labor law was the result of pressure from Southern Democrats who would not support a law that would protect African-Americans, who were concentrated in agricultural and domestic employment).

rejected as to public education in *Brown v. Board of Education*[31] and then repudiated generally in subsequent cases.[32] In *Loving v. Virginia*,[33] the Virginia miscegenation statute that prohibited marriage between a white and a "colored person" violated equal protection even though both parties to such a marriage would be punished equally: "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . ."[34] The miscegenation law was unconstitutional because it was emblematic of white supremacy and African-American subordination. "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[35]

The Civil Rights Movement had success in Congress as well as in the courts. Most importantly for this Article, in response to the Movement, Congress enacted the first meaningful antidiscrimination legislation in the 20th century with the Civil Rights Act of 1964.[36] The first major substantive decision by the Supreme Court interpreting Title VII of the Civil Rights Act came in the Burger Court era. In it, the Court adopted an aggressively antisubordination approach to Title VII and adopted a legal rule that reached beyond prohibiting classifications based on race, color, religion, sex, or national origin—and beyond intentional discrimination. In *Griggs v. Duke Power Co.*,[37] the Court was faced with the employer's adoption of employment prerequisites—a high school diploma requirement and a standardized test—that had a disparate impact on the job prospects of African-Americans.[38] The lower courts found that these prerequisites were neutral on their face as to race and had not been adopted with an intent to discriminate.[39] From the anticlassification viewpoint that the lower court adopted, the use of these prerequisites was no violation. Nevertheless, the Court, in an opinion by

[31] 347 U.S. 483 (1954).

[32] For a description of the litigation campaign of the NAACP Legal Defense Fund, see JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT (2004). For the development of the effect of social movements and their impact on Supreme Court jurisprudence, see Jack Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

[33] 388 U.S. 1 (1967).

[34] *Id.* at 8.

[35] *Id.* at 11.

[36] Pub. L. No. 88-352, 78 Stat. 241. The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, preceded Title VII but its narrow focus limited its impact, while Title VII was drafted very broadly. Shortly after adopting Title VII, Congress enacted the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

[37] 401 U.S. 424 (1971).

[38] *Id.* at 425–26.

[39] *Id.* at 428–29.

Chief Justice Burger, interpreted Title VII to be able to challenge employer practices that had continued to subordinate members of minority groups.[40] Employer practices or policies that had a disparate racial impact would violate Title VII absent proof by the employer that the practice was job related and necessary for business.[41] The key basis for such an expansive interpretation was the Court's focus on the historic victims of discrimination and not on the intentional acts of the perpetrators of discrimination:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . Congress has now required that the posture and condition of the job seeker be taken into account. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.[42]

Since *Griggs*, disparate impact theory has been an important focus of the debate over anticlassification versus antisubordination. "Reverse" discrimination and affirmative action is the other.[43]

The *Griggs* antisubordination-based theory of disparate impact discrimination potentially came into conflict with an anticlassification rule shortly thereafter in *McDonald v. Santa Fe Trail Transportation Co.*[44] Two white employees claimed that their right to equal treatment had been violated when they, but not an African-American employee who was also implicated, had been discharged for stealing.[45] The lower courts had found that Title VII did not protect white workers from race discrimination.[46] The Court, in an opinion by Justice Marshall, reversed, finding that, by its terms and by the intent of Congress, Title VII was enacted to protect all employees from discrimination without regard to

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[40] *Id.* at 430.

[41] *Id.* at 436.

[42] *Id.* at 429–31. The Court referred to one of Aesop's Fables to bolster the breadth of the interpretation it had adopted: "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. . . . It has . . . provided that the vessel in which the milk is proffered be one all seekers can use." *Id.* at 431.

[43] In the same time period, the Burger Court took an expansive view of how claims of individual disparate treatment should be treated. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Court adopted a way of proving individual disparate treatment discrimination using a procedural mechanism to allow drawing the inference of discrimination when other likely nondiscriminatory grounds for the adverse action had been eliminated. This process-of-elimination way of proving discrimination looked at discrimination from the viewpoint of the difficulties workers have proving discrimination where much of the potentially relevant information is in the hands of the employer.

[44] 427 U.S. 273 (1976).

[45] *Id.* at 276.

[46] *Id.* at 277.

their race. "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the allegedly more favorably treated employee] white."[47] And again, "[t]he Act prohibits *all* racial discrimination in employment, without exception for any group of particular employees."[48] Further, the Court also interpreted 42 U.S.C. § 1981, a survivor of post-Civil War civil rights legislation, which by its terms appeared to be aimed at protecting the contracting rights of African-Americans, and not of whites. It provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . *as is enjoyed by white citizens* . . . ."[49] The Court nevertheless interpreted § 1981 to protect whites against race discrimination because the broad purpose of the statute was to give everyone a right not to be discriminated against because of their race.[50]

While accepting that unexplained unequal treatment violated Title VII, *McDonald* is ultimately consistent with the antisubordination perspective of discrimination because it added a new way to prove intentional disparate treatment discrimination. *McDonald* did not limit the scope of Title VII, but expanded its application in a way that served its antisubordination purpose.

From the perspective of the systemic theories of discrimination, the zenith of the antisubordination perspective of Title VII came in 1977. The Court adopted the theory of systemic disparate treatment discrimination based on proof that the employer's standard operating procedure—its pattern or practice of operations—was to discriminate intentionally on the basis of race. In *International Brotherhood of Teamsters v. United States*,[51] the employer, a large trucking company, employed a significant number of African-American and Latino workers, including some working as city truck drivers, but there was an "inexorable zero"[52] of them assigned to the preferred job of over-the-road driver.[53] Even in the absence of any express policy that excluded minority workers from these more lucrative jobs, the Court, nevertheless, found the employer had

[47] *Id.* at 280.

[48] *Id.* at 283.

[49] *Id.* at 285 (emphasis added) (quoting 42 U.S.C. § 1981(a) (2006)).

[50] *Id.* at 286–87, 289. "[W]e cannot accept the view that the terms of § 1981 exclude its application to racial discrimination against white persons. On the contrary, the statute explicitly applies to '*all* persons' (emphasis added), including white persons. While a mechanical reading of the phrase 'as is enjoyed by white citizens' would seem to lend support to respondents' reading of the statute, we have previously described this phrase simply as emphasizing 'the racial character of the rights being protected.'" *Id.* at 287 (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).

[51] 431 U.S. 324 (1977).

[52] "Inexorable" means relentless, "not to be persuaded or moved by entreaty or prayer." WEBSTER'S DICTIONARY, *supra* note 18, at 1157.

[53] *Int'l Bhd. of Teamsters*, 431 U.S. at 328–35.

violated Title VII.[54] Bolstering the basic statistical showing[55] with anecdotes of the employer's discrimination against individuals, the Court found that the employer was liable because the exclusion was "because of race."[56]

In response to the employer's claim that statistical evidence could not be used to prove discrimination, the Court relied on the general-probability theory of statistics to uphold their use.[57] That African-Americans and Latinos were completely excluded from the more desirable over-the-road driver jobs even though they were available called for an explanation if the inference of discrimination was to be avoided. The employer tried to explain the absence of minority line drivers by claiming that its over-the-road the drivers had all been hired before Title VII became effective. The Court found no evidence in the record to support that claim.[58] Another explanation for the absence of minority over-the-road drivers might have been that few African-Americans and Latinos were available to fill the jobs. But the record foreclosed that explanation because it showed that the employer had assigned African-

[54] *Id.* at 342–43.

[55] The statistics were as follows: "[S]hortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation had commenced. With one exception—a man who worked as a line driver at the Chicago terminal from 1950 to 1959—the company and its predecessors *did not employ a Negro on a regular basis as a line driver until 1969*. And, as the Government showed, even in 1971, there were terminals in areas of substantial Negro population where all of the company's line drivers were white. A great majority of the Negroes (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the nonminority employees held jobs in those categories." *Id.* at 337–38 (footnotes omitted).

[56] *Id.* at 338–43. Other than some anecdotal evidence of individual discrimination, the Court in *Teamsters* did not focus on the acts of any of the agents of the employer, for whom the employer would be liable because of respondeat superior. It found the employer, *qua* employer, directly liable because of its pattern of discrimination. Section 701 of Title VII, 42 U.S.C. § 2000e(b) defines the term "employer" to mean "a person engaged in an industry affecting commerce . . . and any agent of such a person . . . ." "Person engaged in industry" includes natural persons but also corporations, partnerships, and the like. *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 423 & n.115 (2011).

[57] *Int'l Bhd. of Teamsters*, 431 U.S. at 339 & n.20. "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant . . . ." *Id.*

[58] *Id.* at 340–41.

Americans and Latinos to the less desirable city driver jobs and that the communities where the company operated included minority group members available to be truck drivers.[59]

The basic statistical evidence in *Teamsters* was simple, straightforward but powerful because it virtually eliminated any explanation for the "inexorable zero" of minority line drivers other than discrimination. In *Hazelwood School District v. United States*,[60] the basic statistics were less stark but the Court relied on a more sophisticated statistical technique—a binomial distribution[61]—that is based on probability theory and is used to analyze basic statistical data.[62]

Teamsters and *Hazelwood* set a high water mark for an antisubordination approach to systemic discrimination. The beginning of the turn away from the antisubordination perspective and towards the anticlassification view began in 1976 when the Court rejected a claim that proof that a governmental practice resulted in disparate impact violated equal protection.[63] In *Washington v. Davis*,[64] plaintiffs challenged on equal

[59] *Id.* at 337. In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579–80 (1978) (where the sample size too was small to be able to produce useful statistical analysis), the Court connected probability statistics with the process-of-elimination approach to proving discrimination. "[W]e are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Id.* at 577.

[60] 433 U.S. 299 (1977).

[61] Binomial distribution is a technique to compare the relationship, or lack thereof, of two variables. But other probability-based techniques, such as multiple regression, can also be utilized to analyze the influence of many more variables. *See* WAYNE C. CURTIS, STATISTICAL CONCEPTS FOR ATTORNEYS: A REFERENCE GUIDE 62–63, 165 (1983). In *Bazemore v. Friday*, 478 U.S. 385 (1986), for example, the plaintiffs used a multiple regression study comparing four variables—race, education, tenure, and job title—to determine whether there was continuing salary discrimination against some black workers. Holding all those variables constant, the study found that the null hypothesis that salary and race were unrelated should be rejected. The statistically significant relationship between race and pay was the basis for drawing the inference that the difference in salary between white and black workers was the result of discrimination. *Id.* at 398–99. The advantage of multiple regression is that any number of relevant variables can be compared to determine their effect; its disadvantage is that the variable against which the others are to be compared must be continuous, like dollars of salary. *See* CURTIS, *supra*, at 153–54, 159, 165.

[62] The basic statistics showed that over 15% of the teachers in the labor market were African-Americans, but less than 2% of the defendant's teachers were African-Americans. Even excluding the teacher population of the City of St. Louis, the 5.7% population versus 1.8% of the Hazelwood's teachers was sufficient to reject the null hypothesis that race and employment were not related. That evidence would support drawing the inference that the shortfall of minority teachers was because of race. *Hazelwood*, 433 U.S. at 308 & n.14.

[63] Politics had begun to include pushback against civil rights for minority group members in the latter part of the 1960s. *See* López, *supra* note 9, at 9 ("[E]qual

protection grounds a pen-and-pencil personnel test that had an adverse impact on African-American applicants to the D.C. police academy. The Court distinguished the use of equal protection from Title VII's disparate impact theory because the Constitution reached only purposeful discrimination: "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[65] In 1979, in *Personnel Administrator of Massachusetts v. Feeney*,[66] the Court adopted a very stringent approach to proving discriminatory purpose: "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group."[67] Mere knowledge of the extreme gender consequences of its action was not sufficient to trigger equal protection.[68]

The next move towards an anticlassification purpose and rule was taken in response to attacks by whites claiming voluntary affirmative action, undertaken to redress the historic subordination faced by members of racial minority groups, violated their right to equal protection. At the constitutional level, the change started with *Regents of the University of California v. Bakke*,[69] which involved a challenge to an affirmative action plan designed to enhance minority enrollment at a state medical school. With the Court split 4–4, the opinion of Justice Powell became the opinion for the Court, even though no other Justice joined it.[70] He rejected the idea that reserving a specific number of seats

protection's transmogrification since the 1970s follows most fundamentally from a broad backlash against civil rights that resulted in the election of presidents, and in turn the appointment of justices, hostile toward racial progress."); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1521–22 (2004) ("In 1968, Richard Nixon ran for office by campaigning against the Warren Court on issues of race. . . . Nixon and his audience understood the tacit racial reference" when he focused on "busing" and "law and order.").

[64] 426 U.S. 229 (1976).

[65] *Id.* at 239.

[66] 442 U.S. 256 (1979).

[67] *Id.* at 279 (emphasis added) (footnotes omitted) (citation omitted). In *Davis*, the evidence did show that a higher percentage of African-Americans failed the test than whites, nevertheless, "44% of new police force recruits had been black . . . ." *Washington*, 426 U.S. at 235. In contrast, in *Feeney*, the absolute veterans preference virtually excluded all women applicants for a job because 98% of veterans at that time were male. *Id.* at 270. Thus, any time a veteran—and veterans were overwhelmingly male—applied for a job, that excluded all nonveterans, including almost all women.

[68] *Feeney*, 442 U.S. at 279–81. "It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable." *Id.* at 278. *See also* Yoshino, *supra* note 8, at 764.

[69] 438 U.S. 265 (1978).

[70] *Id.* at 269, 271.

in medical school for members of racial minorities was justified by the subordination those groups suffered: "[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[71] But, the race of an applicant could be considered as a "plus" in considering the applicant's overall qualifications to achieve the non-racial objective of educational diversity and as long as all the applicants were considered for all of the available seats in the school.[72] In essence, race could be used to serve compelling governmental interests but redressing the racial subordination minorities face in society in general was not one of them. Thus, the antisubordination purpose of equal protection was insufficient to trump a claim by a white person based on an anticlassification rule.

Finding the efforts to redress the social subordination suffered by minority group members to be in conflict with equal protection is an echo of the Court's approach in *Plessy*. There, racial subordination could not be reached by law because the subordination was said to exist only in the minds of its victims and was beyond the reach of the law. In *Bakke*, the effects of societal discrimination and racial subordination could not be directly addressed by the use of race to aid those who were subordinate. Along with attacks on the disparate impact theory of discrimination, these affirmative action or "reverse" discrimination cases have been the locus of the move toward an anticlassification purpose and general color-blind rule of equal protection.[73]

After *Feeney* and *Bakke*, equal protection law divided in two, with all race classifications, even those used to help the historic victims of

[71] *Id.* at 310.

[72] *See id.* at 318. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment . . . ." *Id.* Subsequently, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court, in a challenge to an affirmative action requirement in a public contract, held that all racial classifications, even for antidiscrimination purposes, are judged by strict scrutiny, with the only compelling governmental interests being remedying the past discrimination of the party using affirmative action, as well as educational diversity, pursuant to *Bakke*. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court, in a case challenging the affirmative action plan of the University of Michigan, reaffirmed the approach Justice Powell had articulated in *Bakke*.

[73] *See* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 847 (2011) (noting that with the exception of the Michigan Law School affirmative action plan, "the Supreme Court has invalidated every single [voluntary] racial-classification scheme that benefited a racial minority").

discrimination, subject to strict scrutiny, while actions neutral on their face could only be challenged with proof of animus or malice of the decisionmakers. Since express racial classifications had come to be only those that aided members of racial minority groups, the white challengers had relatively easy cases. Because explicit race classifications disadvantaging minority groups had become much less common, minority group challengers faced an extremely difficult rule of proof to show an equal protection violation.[74]

Following *Bakke*, the Court, in *United Steelworkers of America v. Weber*,[75] dealt with a voluntary affirmative action plan adopted by a private employer and its union that was challenged as violating Title VII. Because a policy requiring that craft jobs be filled with outside applicants who had prior craft experience resulted in no African-American craft workers in the plant,[76] the employer and the union, under pressure from the government, established an internal training program for craft jobs. Unskilled incumbent workers were selected for the program, using a one-African-American for one-white basis. An unskilled white worker, who had greater seniority than some African-American workers who were being selected for the craft training program, brought a Title VII claim based on an equal treatment theory of discrimination. In rejecting Weber's claim, the Court did not take the step taken the year before in *Bakke* of finding efforts to address racial subordination to be in conflict with the purposes of antidiscrimination law. Instead, the Court looked to the antisubordination purpose underlying the enactment of Title VII to reject plaintiff's anticlassification argument.[77] In light of that purpose, voluntary affirmative action plans do not violate Title VII because employers and unions were expected to take race conscious efforts to end the exclusion of blacks from good jobs:

> The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious

[74] López, *supra* note 9, at 36–37.

[75] 443 U.S. 193 (1979).

[76] *Id.* at 198 (noting that the craft unions in the area excluded African-Americans from membership, and therefore from the union-run apprenticeship programs).

[77] The Court said: "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'" *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). "Before 1964, blacks were largely relegated to 'unskilled and semi-skilled jobs.'" *Id.* (quoting same). "Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs 'which have a future.'" *Id.* at 202–03 (quoting 110 CONG. REC. 7204 (remarks of Sen. Clark)). "Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve." *Id.* at 204.

> page in this country's history" cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.[78]

In 1988, two years into the Rehnquist Court era, the Court decided *Watson v. Fort Worth Bank & Trust*.[79] The decision sent messages in two ultimately conflicting directions. First, the Court held that subjective employment policies and practices as well as objective ones could be challenged using the disparate impact theory of discrimination:

> [D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. . . . It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed

[78] *Id.* at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). In *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987), the Court reaffirmed *Weber* in a case involving an affirmative action plan benefitting women.

Weber shows that race was quite salient in 1979. Weber challenged this craft training program that would not have existed but for the push by the government to get its contractors to take affirmative action to expand the employment opportunities for members of racial minority groups. If Weber's suit had been successful, the employer and union would have no reason to continue the craft training program. If the program was abolished, that would leave Weber in his unskilled job. To put this into the terms of the salience of race, Weber valued challenging a program because it benefitted African-Americans over his own self interest of ultimately moving into a craft job.

Demographic statistics demonstrate the continuing economic differences between African-Americans and Latinos and whites, but the general public is now more likely to attribute those differences to reasons other than race. *See* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 427–28 (2010) ("In 2009, the poverty rate for African-Americans and Latinos is more than double that of Whites. The median income of African-American and Latino families is less than two-thirds that of white families. African-Americans and Latinos tend to disproportionately occupy lower-paying and lower-status jobs, and their unemployment rate is substantially higher than Whites. In addition, African-American and Latino men and women earn less than three-quarters of white men's median annual earnings, and African-Americans and Latinos are almost twice as likely as Whites to drop out of high school. Although the statistical evidence of racial inequality is almost as alarming today as it was in 1963 and 1978, the inference drawn from the data is vastly different. Instead of identifying discrimination as a likely cause of observed disparities, some contemporary Americans seem more inclined to look for other justifications or explanations.").

[79] 487 U.S. 977 (1988).

> through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.[80]

Recognizing that subjective decisionmaking is susceptible to discrimination and that stereotypes do affect decisionmaking expands the scope of application of antidiscrimination law by looking at how those decisions can be discriminatory even in absence of an express policy of discrimination or of evidence sufficient to infer an intent to discriminate.

Second, dicta in *Watson* pointed in another direction and foreshadowed a substantial retrenchment of the underpinnings of disparate impact theory. Instead of looking at how disparate impact law could reach unjustified practices that caused an impact on protected groups—the antisubordination perspective—the Court expressed fear that the potential of disparate impact liability could be an incentive for employers to use racial quotas to avoid the risk of disparate impact liability. This resonates with the anticlassification perspective.[81] To reduce the incentive to use quotas, Justice O'Connor suggested moving the burden of proving business necessity from the employer to a burden on the plaintiffs to prove the absence of job relatedness and business necessity.[82]

A year later, the Court decided the most notorious of a number of decisions in which it narrowed civil rights protections: *Wards Cove Packing Co. v. Atonio*.[83] In *Wards Cove*, the Court adopted Justice O'Connor's proposal of putting the burden of persuasion on the plaintiff to prove that the challenged employer practice was not job related or not justified by business needs, thereby watering down the rule from one of necessity to "business justification."[84] In effect, this decision narrowed disparate impact law significantly by folding disparate impact law into disparate treatment law. That would make Title VII's disparate impact theory equivalent to the rational basis test used in equal protection analysis of laws that are neutral on their face as to race.

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[80] *Id.* at 990. The Court analogized a practice with disparate impact to intentional discrimination because the consequences on the workers is the same in both: "If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Id.* at 990–91.

[81] *Id.* at 993 ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted.").

[82] According to Justice O'Connor, the *Griggs* "formulation [of business necessity] should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 997.

[83] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[84] *Id.* at 657–59.

Congress responded to the Rehnquist Court's sharp turn away from the antisubordination-based interpretations of antidiscrimination law of the Warren and Burger Courts[85] by enacting the Civil Rights Act of 1991.[86] Specifically in response to *Wards Cove*, Title VII was amended to move the disparate impact theory from a judicially based interpretation of the basic prohibition of discrimination in § 703(a) to an express codification in § 703(k).[87]

In sum, over the history of the judicial interpretation of the equal protection concept in constitutional law and of antidiscrimination statutes up until the Roberts Court, the Court has shifted focus from antisubordination to anticlassification views. The Warren Court set the highpoint of the antisubordination view of antidiscrimination law in equal protection, but the Burger Court generally maintained and, in some ways, expanded that approach in interpreting antidiscrimination statutes. When faced with claims by whites challenging affirmative action plans,[88] the Burger Court moved toward the anticlassification perspective for equal protection but continued to focus on the antisubordination perspective for interpreting Title VII. In terms of antidiscrimination statutes, the attempt by the Rehnquist Court to move the law toward a narrow, anticlassification rule was rebuffed by Congress in its enactment of the Civil Rights Act of 1991.

[85] This is not to say that the Burger Court consistently followed the antisubordination approach of the Warren Court. *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* created a way for individual plaintiffs to prove discrimination without evidence of admissions against interest by agents of the defendant. It allowed plaintiffs to prove discrimination through a process of elimination of possible nondiscriminatory explanations thereby creating a basis for inferring the employer's intent to discriminate. On the other hand, the Court then cabined *McDonnell Douglas* by leaving the ultimate burden of proving discrimination on the plaintiff and only imposing a burden on the employer to introduce evidence of "legitimate, nondiscriminatory reasons" in response to plaintiff's prima facie case. Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[86] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[87] *Id.* §§ 3(2), 105(a). Section 703(k) is a compromise of the pre-*Wards Cove* law with the Court's decision in *Wards Cove*. The burden of persuasion on the defense was returned to the employer but the standard for that defense was softened. Instead of the job related and *necessary for business* standard of *Griggs*, the standard was to show that "the challenged practice is job related for the position in question and *consistent with business necessity*." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). A surrebuttal to that affirmative defense that was established in *Wards Cove* was carried over into the new approach so the plaintiff could still win by proving the existence of "an alternative employment practice [that the employer] refuses to adopt." 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[88] López, *supra* note 9, at 36, marks the Court's decision in *Feeney* as the turning point away from the use of antidiscrimination law to protect the historic victims of discrimination toward the protection of the white majority.

III. THE ROBERTS COURT AND ANTICLASSIFICATION THEORY BEFORE *WAL-MART*

Since 2005, the Roberts Court has moved both equal protection and antidiscrimination statutory law further toward the anticlassification perspective by moving toward, if not as yet expressly adopting, a general "color-blind" rule of what constitutes discrimination. Two cases that demonstrate that movement and set the context for discussing *Wal-Mart* are *Parents Involved*[89] and *Ricci v. DeStefano*.[90]

Parents Involved, decided in 2007, involved the issue of the constitutionality of the use of the race of individual students by school boards as part of a system of assigning students to their respective schools.[91] The purpose of using race was to avoid the resegregation of the schools.[92] While two school districts were involved, they both used a modified "student choice" approach to assign students to their schools.[93] If the parents' choices would lead to the school of choice being overcrowded, students with siblings at the desired school were chosen ahead of others.[94] If the assignment of siblings would still leave the school overcrowded, then a third step used the race of the individual students to make the assignment.[95] Parents challenged these assignment policies because of the use of race at the final step, even though few assignments ever reached that step.[96] Chief Justice Roberts wrote for the Court, finding that this use of race violated equal protection because it was not justified by the compelling governmental interest required by the strict scrutiny rule.[97] Avoiding the return of *de facto* segregation was not a compelling governmental interest so it could not justify the use of the race of individual students for school assignments, even though resegregation of schools would likely result in harm to minority communities.[98] In Part IV, which was not the opinion of the Court because only four Justices joined it, the Chief Justice claimed to rely on *Brown v. Board of Education* for the dramatic proposition that he used to close his opinion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[99]

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[89] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[90] Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

[91] *Parents Involved in Cmty. Sch.*, 551 U.S. at 709–11.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 711–12.

[95] *Id.* at 712.

[96] *Id.* at 713.

[97] *Id.* at 730–32.

[98] *Id.* at 736–37. And majority communities as well, if one believes that ending the salience of race is desirable.

[99] *Id.* at 748.

Since Justice Kennedy's vote was necessary to the decision, his concurring opinion limited the scope of the Court's decision short of an absolute ban on the express use of race. He objected to the broad finishing flourish of Chief Justice Robert's opinion: "[P]arts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[100] Justice Kennedy divided the use of race into two categories.[101] First, school boards violate equal protection if they use the race of individual students when assigning them to schools.[102] Thus, he joined the first part of the Chief Justice's opinion to the extent it found the use of the race of individual students to make school assignments violated equal protection. Second, school boards are not prohibited from using race in the planning stages of operating a school district that take place before the individual students are assigned to their schools.[103] It is this second use of race that parts company with the Chief Justice's articulation of an absolute color-blind rule. At this earlier stage of organizing the district, school boards may use the projected racial composition of the district to avoid resegregation in siting schools and drawing assignment zones for them.

The basis for applying the anticlassification-based color-blind rule when children were being assigned to schools but not the use of race before it was used individually is based on Justice Kennedy's adoption of the antisubordination purpose of equal protection first articulated by Justice Harlan in *Plessy*. For Justice Kennedy, the statement that "[o]ur Constitution is color-blind" is "an aspiration" that "[i]n the real world . . . cannot be a universal constitutional principle."[104] For him, school boards can act to achieve a racially diverse student body by using race at the

[100] *Id.* at 787–88 (Kennedy, J. concurring). Because school boards can act to provide equal opportunity to all students, they cannot be denied the use of race to avoid the resegregation of the schools. "The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,' is not sufficient to decide these cases. Fifty years of experience since [*Brown*] should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken." *Id.* at 788 (alteration in original) (citations omitted).

[101] Justice Kennedy does not appear to accept or apply conventional strict scrutiny analysis of race classifications.

[102] *Parents Involved in Cmty. Sch.*, 551 U.S. at 788–89.

[103] *Id.* at 789.

[104] *Id.* at 788 (alteration in original) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

aggregate, planning level without violating equal protection.[105] Using race in the planning process to achieve a diverse student body in order to provide equal opportunity to all students may prevent resegregation, while using the racial identity of individual students is a "[c]rude" measure that threatens "to reduce children to racial chits valued [to be] traded according to one school's supply and another's demand."[106] Justice Kennedy's analysis in *Parents Involved* in some, but not all, ways echoes Justice Powell's approach in *Bakke*. Acting on the basis of an individual's race alone violates equal protection but race can be used when it is not individualized but is part of a mix of factors relevant to a governmental decision. What is different is that Justice Powell puts his approach into the rubric of strict scrutiny analysis and Justice Kennedy does not. Further, Justice Kennedy accepts a race-related objective—providing equal opportunity for all by preventing resegregation—that Justice Powell would reject because it addresses societal discrimination. For Justice Powell, the governmental purpose must be non-racial, thus, he accepts the use of race to achieve educational diversity but not racial diversity. In other words, Justice Kennedy accepts the use of race to address the subordination of members of racial minority groups as long as that use stops short of its use as to individuals.

In *Parents Involved*, four Justices—Chief Justice Roberts and Justices Scalia, Thomas and Alito—by joining in the Chief Justice's flamboyant statement at the end of Part IV of his opinion, appear ready for the Court to move beyond the strict scrutiny standard to adopt an absolute prohibition on the use of race by the government in all circumstances. Since he does not follow the strict scrutiny test for those uses of race he finds acceptable, Justice Kennedy's general rule seems to be that the government can use race in the aggregate to achieve integrative goals with the exception that race cannot be used to identify and act upon individuals because of their race.

[105] *Id.* at 788–89. "If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races . . . ." The scope of the permissible use of race includes the "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.*

[106] *Id.* at 798. In contrast, using race in the district's planning process is not such a crude measure. "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.* at 789.

In 2009, the Court decided the New Haven firefighters' case, *Ricci v. DeStefano*.[107] It involved a Title VII claim that the City had committed intentional disparate treatment discrimination when it decided not to use the results of a civil service promotion test because, if used, the results would result in a disparate impact on minority test takers.[108] Plaintiffs were 17 whites and one Hispanic who would have been eligible for promotion if the test results were used.[109] The City's defense was its fear of Title VII disparate impact liability if it used the test scores.[110] In an opinion by Justice Kennedy, the Court decided that, as a matter of law, the City committed disparate treatment discrimination by deciding not to use the test scores.[111] In finding that disparate treatment discrimination could occur when an employer acted to avoid potential disparate impact liability, the Court for the first time recognized a conflict between the two main theories of discrimination.[112] By knowing the racial consequences, at least in the aggregate,[113] of using the test scores would result in an adverse affect on the minority test takers, the City, according to the Court, committed disparate treatment discrimination.[114] Needing to find a way to resolve the new conflict it had created between the disparate impact and disparate treatment provisions of Title VII, the Court

[107] 129 S. Ct. 2658 (2009). For an interesting discussion of *Ricci* in context of the social movement that led to the creation of the disparate impact theory, see Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011).

[108] *Ricci*, 129 S. Ct. at 2664.

[109] *Id.* at 2671.

[110] *Id.*

[111] *Id.* at 2681.

[112] *See* Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 223–24 (2010) ("Although Title VII's separate disparate treatment and disparate impact prohibitions had long been considered complementary tools for addressing barriers to equal opportunity, the *Ricci* majority interpreted them for the first time as potentially antagonistic."). Finding a conflict reveals how far the Court has moved away from the antisubordination purpose of antidiscrimination law. Antisubordination theory would "be understood to bar those government actions that have the intent *or* the effect of perpetuating traditional patterns of hierarchy." *Id.* at 206. *See also* Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 413 (2010) (framing the statutory question after *Ricci*: "[D]oes an employer who rejects an employment practice that disparately impacts blacks (thus jumping out of the disparate impact pan) necessarily intentionally discriminate against whites (thus landing in the disparate treatment fire)?").

[113] The City did not know the scores of the individual test takers when it was making its decision. Nor did the test takers know their scores when the City made its decision.

[114] *See* Norton, *supra* note 112, at 229 ("The Court now . . . appears to treat a decision maker's attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antisubordination ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification. *Ricci* may thus reflect a dramatic shift to a new, zero-sum understanding of equality.").

established a defense to the disparate treatment claim if, when the employer acted, it had a "strong basis in evidence" that it would violate the disparate impact provisions of Title VII by using the test scores for promotions.[115] Reversing summary judgment for the City, the Court granted, as a matter of law, summary judgment for the plaintiffs.[116] It found that the City did not have sufficiently strong evidence that it would be liable to the minority test takers if the test scores were used.[117]

The test results had an impact on all the members of the three different racial groups of test takers—whites, Hispanics and African-Americans.[118] Some members of each racial group would be promoted (or be promotable) if the test scores were used, but each racial group also included some test takers who would not be promoted and who would get another chance for promotion in whatever procedure the City adopted to replace the test.[119] Correspondingly, the City knew that by not using the test scores there would be an adverse effect on the white test takers. Based on the City's knowledge of the aggregate results on all three racial groups, the Court found that, "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify

[115] *Ricci*, 129 S. Ct. at 2675–76.

[116] *Id.* at 2681. *See* Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 262–64 (2009) (characterizing the decision to reverse summary judgment for the City and grant it to the plaintiffs as one among a number of examples of the Court's "procedural extremism").

[117] *See Ricci*, 129 S. Ct. at 2677.

[118] *Id.* at 2677–78.

[119] The Court summarized the results of the tests as follows: "Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant. Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics." *Id.* at 2666 (citations omitted).

The Court held that as a matter of law the tests resulted in a disparate impact by looking just at the pass rates, which did not tell the whole story of that impact since simply passing the test would not necessarily lead to promotion during the two-year life span for using the tests: "The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities . . . were approximately one-half the pass rates for white candidates . . . ." *Id.* at 2677–78.

the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates."[120] Since the race of the individual test takers was not known to the City (or the test takers) when the decision was made, it is difficult to conclude that acting on that information alone would constitute intentional discrimination unless acting with mere knowledge of the racial consequences sufficed to establish intent.[121] Nevertheless, the Court insisted that the City committed a prima facie case of disparate treatment discrimination but only against the white test takers: "Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."[122]

The Court took a substantial leap from finding that the intent of the City when it made its decision was to avoid an adverse impact on the minority test takers to finding that the decision not to use the test scores was intentional discrimination only against those white test takers who would be promoted if the test scores were not used[123]: It did not explain why the decision was "*solely* because the higher scoring candidates were white" when the group of test takers who had scored high enough to be promoted or promotable included two Hispanics, one of whom was a plaintiff in the case, and several African-Americans. Further, those test takers who did not score highly enough to be promoted or be promotable also included whites, African-Americans, and Hispanics. What is different from Justice Kennedy's position in *Parents Involved* is that in *Ricci*, the City did not individually identify the test takers when it made the decision not to use the tests the way the school districts in *Parents Involved* did. If the governmental actor need not know the racial identity of the individuals it acts upon in order to trigger disparate treatment—if acting with knowledge of the racial consequences in the aggregate is disparate treatment discrimination—that appears to move the position of Justice Kennedy toward an absolute color-blind rule.

Knowledge by those affected by the decision that their race is implicated in the decision also does not appear necessary to establish a

[120] *Id.* at 2673.

[121] *See* Norton, *supra* note 112, at 223 (characterizing it as a "deeply contested" change in the law because the Court "newly defined an employer's culpable mental state for Title VII purposes, concluding that an employer's attention to its practices' racially disparate impact is itself evidence of its racially discriminatory intent"); *see also* Michael J. Zimmer, Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257.

[122] *Ricci*, 129 S. Ct. at 2674.

[123] The leap is from the finding that the decision not to use the scores would have an adverse impact on all the test takers—white, African-American and Hispanic—who would have been either promoted or promotable if the test were used, to a finding that the City committed intentional disparate treatment discrimination to a subset of that group, the white test takers.

prima facie case of disparate treatment discrimination. In *Parents Involved*, it did not appear that either the parents or the children who would be assigned to schools because of their race knew that. Once a student's first choice of school was not honored, then (if they knew the assignment policy) the parents and the child knew that there was a chance that their race would be used to make the school assignment. In *Ricci*, all the test takers knew that they faced the risk, depending on how they did on the test, that they would be either better or worse off if the test scores were used or not. Also, once the issue of whether or not to use the test became public because it had an impact on minority test takers, then the white test takers knew that, as a group, they faced an increased risk of being worse off if the test scores were not used.[124] With that limited knowledge—that their chance for promotion either went up or down—it is hard to synthesize *Ricci* with *Parents Involved*'s emphasis on the harm of individualizing the use of race unless the mere risk of discrimination suffices.[125] This risk analysis seems quite removed from Justice Kennedy's language in *Parents Involved* about the "crude" use of individual students as "racial chits" that appeared so important to him.[126]

Like his position in *Parents Involved*, Justice Kennedy indicated that not all action taken when its racial consequences are known to the actor constitutes disparate treatment. Using race when planning what employment practices to adopt is not disparate treatment:

> [We do not] question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. . . . Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.[127]

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[124] Another way of saying this is that the white test takers knew that the decision not to use the test scores would have a disparate impact on them.

[125] There is authority that the risk of harm suffices to establish an interest sufficient to bring a claim of discrimination. *See* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (finding that an association of contractors can challenge an affirmative action plan even though its members faced only a risk of harm if the plan was implemented). If this risk analysis holds, presumably the minority test takers in *Ricci* suffered an adverse employment action when the City first announced that it would use the test, since the risk that the test would have a disparate impact was real at that point. That risk was realized when the City finally did use the test scores.

[126] Norton, *supra* note 112, at 226 ("Nowhere [in *Ricci*] do we see any sign of [Justice Kennedy's] impassioned rejection in *Parents Involved* of post-racial claims that downplay the strength of ongoing antisubordination concerns in light of discrimination's continuing legacy.").

[127] *Ricci*, 129 S. Ct. at 2677.

Justice Kennedy's approach for the Court in *Ricci* is similar to the position he took in *Parents Involved* in several ways. In both, he divides the analysis in two. During the planning stages for school siting or for employment practices, the general consideration of race would not violate equal protection or disparate treatment. In contrast, the use of individualized race in *Parents Involved* and the frustration of the reliance of test takers in *Ricci* is disparate treatment discrimination that violates Title VII. Thus, a defense in *Parents Involved* that the school board was acting to provide equal opportunity for all, or in *Ricci* that the City was ensuring a fair opportunity for all the test takers, was unavailing because the use of race in both—individualized to the students in *Parents Involved* and known at an aggregate level in *Ricci*—fell on the impermissible side of the line that Justice Kennedy had drawn. In neither case did it seem important that the victims did not know they were individually affected.[128]

Justice Scalia's concurrence in *Ricci* suggests that the violation of an absolute color-blind rule, even in defense of a claim of disparate impact discrimination, is unconstitutional. Thus, for him, Title VII's disparate impact provision in § 703(k) appears to violate equal protection precisely because it requires that employers know and take account of the racial consequences of their policies and practices to comply with the law:

> Title VII not only permits but affirmatively *requires* [employer] actions when a disparate-impact violation *would* otherwise result. . . . Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.[129]

For Justice Scalia, the anticlassification underpinnings of his color-blind rule of equal protection conflict with the antisubordination basis for

[128] *See generally* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (articulating a principled basis for the middle ground positions of Justices Powell, O'Connor and Kennedy as a color-blind limit on the use of race in ways that would otherwise balkanize the nation along racial lines, but that stops short of proscribing all uses of race). *But see* Mark S. Brodin, Ricci v. DeStefano*: The New Haven Firefighters Case & The Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161 (2011); Yoshino, *supra* note 8, at 775 (tracing to Justice Powell the development of the present color-blind rule plus the narrow view requiring proof of malice when there is no express discrimination).

[129] *Ricci*, 129 S. Ct. at 2682 (Scalia, J. concurring). He further elaborates, "[t]o be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level." *Id.*

disparate impact law. Since the Constitution trumps statutes, the disparate impact provisions of Title VII are unconstitutional because of that conflict.[130] "[R]equiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes" would result in § 703(k)'s unconstitutionality.[131]

Rather than face the issue of the constitutionality of the disparate impact provisions of Title VII, the Court made a strained interpretation of the relationship between the disparate treatment provision in § 703(a) and the disparate impact provision in § 703(k).[132] Finding that complying with the disparate impact law violates disparate treatment is unprecedented.[133] The Burger Court in *Griggs v. Duke Power Co.* interpreted Title VII to include the disparate impact theory and could not be charged with creating a tension between that theory and disparate treatment theory. After the Rehnquist Court folded disparate impact theory into disparate treatment theory in *Wards Cove Packing Co. v. Atonio*,[134] Congress rejected that by amending Title VII when it enacted the Civil Rights Act of 1991. In doing so, Congress obviously did not recognize any tension between the two theories.

Ricci shows how far the Roberts Court has moved from its immediate predecessor Courts. Until *Ricci*, the two bases for Title VII liability are easily read in conjunction and not in conflict: First, an employer is prohibited from engaging in intentional discrimination, for example, firing someone because she is black or never assigning Latinos to over-the-road truck driving jobs, and second, the employer is also prohibited from using employment practices resulting in an adverse impact on groups protected by Title VII, such as pen-and-pencil tests, that have not been validated. Justice O'Connor in *Watson v. Fort Worth Bank & Trust*[135] and the Court in *Wards Cove* viewed the two provisions as acting in concert, not in conflict: Disparate impact liability is "functionally

[130] It is interesting that in 1989, the Rehnquist Court decided to interpret Title VII's disparate impact law to basically fold it into disparate treatment law. When Congress codified disparate impact law by adding § 703(k) to Title VII, the only way the Court could get rid of disparate impact law, and its basis in an antisubordination perspective on discrimination, is to find it unconstitutional. Justice Scalia' concurrence in *Ricci* suggests, if not completely endorses, finding § 703(k) unconstitutional under a color-blind rule of equal protection. *See* Lawrence Rosenthal, *Saving Disparate Impact* (unpublished article) (on file with author) (arguing that § 703(k) is constitutional).

[131] *Ricci*, 129 S. Ct. at 2682 (Scalia, J. concurring).

[132] While acknowledging the background question of the constitutionality of § 703(k), the Court made no reference to the doctrine of constitutional avoidance to justify its interpretation of the relationship between § 703(a) and § 703(k).

[133] *See* Siegel, *supra* note 128, at 1285 n.14 ("*Ricci* asserts, for the first time since the Court first recognized the disparate impact cause of action . . . that there are potential conflicts between the disparate treatment and disparate impact liability frameworks under Title VII.").

[134] 490 U.S. 642 (1989).

[135] 487 U.S. 977 (1988).

equivalent to intentional discrimination."[136] Until *Ricci*, simply knowing the racial consequences of a practice and acting to avoid disparate impact liability was not disparate treatment. In *Price Waterhouse v. Hopkins*,[137] Justice O'Connor made it clear in her concurring opinion that knowing the gender consequences of an action was not by itself disparate treatment. "Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware . . . but [that] by no means could support a rational factfinder's inference that the decision was made 'because of' sex."[138] Because of *Ricci's* new interpretation of disparate treatment discrimination as being triggered when an employer simply takes action knowing its racial consequences, the Court created the tension with the disparate impact theory that it then resolved with its "strong basis in evidence" affirmative defense.[139]

In sum, in *Parents Involved* the Court held that the defendants violated equal protection because the third step of their student choice systems used the race of individual students to assign them to their schools. It did not matter that the school districts did this to avoid the return of de facto segregation. Whether or not the parents or the children ever knew that their race had been taken into account in the school assignment of individual students, the public knowledge that there was some risk that some students would be identified by race sufficed to trigger the school districts' liability under equal protection. In *Ricci*, the defendants took action to avoid the risk of disparate impact liability; that action violated Title VII's disparate treatment basis for liability even though, at the time the decision to act was made, the defendants knew only the aggregate, but not the individual, results of the test.[140] While not knowing their own scores, all the test takers knew that they had a risk of being promoted or not if the test scores were used and the correlative risk if the scores were not used. What they did not know was their actual risk. Both *Parents Involved* and *Ricci* involved claims by

[136] *Id.* at 987.

[137] 490 U.S. 228 (1989).

[138] *Id.* at 277.

[139] Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009). "Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation." *Id.* at 2676 (citations omitted).

[140] For an argument that *Ricci* creates a new defense to disparate impact claims, see Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181 (2010).

whites, as had all prior cases pushing the law toward an absolute color-blind rule.[141]

The stage is now set to begin to discuss *Wal-Mart* to see if the Court has moved antidiscrimination law even further from its antisubordination purposes.

IV. THE *WAL-MART V. DUKES* DECISION

Wal-Mart is the largest retailer and the largest employer in the United States. It is known for having highly developed data collection and analysis systems that allows the headquarters and central management in Bentonville, Arkansas, to keep close tabs on every aspect of its operations at every one of its thousands of locations.[142] Using this highly developed system, which keeps costs to a minimum while operating at the highest level of efficiency, is the basis for Wal-Mart's remarkable success. This system also means that Wal-Mart puts pressure on all parts of its operations to keep costs down, including labor costs.[143] A putative class of over one and a half million women workers claimed that this system discriminated against them in pay and promotions by granting store managers unstructured and unchecked discretion to make these decisions, while Wal-Mart had the aggregated data showing that women were paid less than men and were not promoted as quickly as men.[144] The Court refused to certify this as a class action under Rule 23 of the Federal Rules of Civil Procedure.[145] As a backdrop to the discussion of

[141] *See* López, *supra* note 9, at 36 ("After [*Personnel Administrator v.*] *Feeney*, the 'neutral' laws leniently assessed under intent doctrine never involved government action that *helped* minorities; those laws were examined skeptically under colorblindness. And these 'neutral' laws never involved whites. There have been no cases alleging the use of race-neutral devices to discriminate against whites.").

[142] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 600–01 (9th Cir. 2010) (describing Wal-Mart's operational structure as follows: "As factual evidence, Plaintiffs presented evidence of the following: (1) uniform personnel and management structure across stores; (2) Wal-Mart headquarters's extensive oversight of store operations, company-wide policies governing pay and promotion decisions, and a strong, centralized corporate culture; and (3) consistent gender-related disparities in every domestic region of the company. Such evidence supports Plaintiffs' contention that Wal-Mart operates a highly centralized company that promotes policies common to all stores and maintains a single system of oversight. Wal-Mart does not challenge this evidence."); *see also* Nelson Lichtenstein, *Wal-Mart and the New World Order: A Template for Twenty-First Century Capitalism?*, NEW LAB. F., Spring 2005, at 22 (Wal-Mart has seemingly perfected "the most efficient and profitable relationship between the technology of production, the organization of work, and the new shape of the market."); Lesley Wexler, Wal-Mart *Matters*, 46 WAKE FOREST L. REV. 95, 95–96 (2011).

[143] Wexler, *supra* note 142, at 103. *See also* Nelson Lichtenstein, *Wal-Mart's Authoritarian Culture*, N.Y. TIMES, June 22, 2011, at A21.

[144] *Dukes*, 603 F.3d at 577–78, 578 n.3, 601, 606.

[145] Looked at as a procedural decision, *Wal-Mart* radically diminishes the ability to bring private class action claims of either disparate treatment or impact discrimination.

what impact *Wal-Mart* might have on substantive antidiscrimination law, the following subsection will lay out how the case would play out if pre-*Wal-Mart* law applied. That will then be juxtaposed with what the Court said in *Wal-Mart*.

A. The Application of the Conventional Systemic Theories to Wal-Mart

Both systemic disparate treatment and systemic disparate impact theories of discrimination theoretically apply to the way Wal-Mart made its pay and promotion decisions.[146] Disparate treatment will be discussed first because it is the broader of the two theories, followed by disparate impact.[147]

1. The Pre-Roberts Court Systemic Disparate Treatment Law

Disparate treatment law involves proof that the employer engaged in intentional discrimination in the sense that the factfinder is asked to draw the inference that the employer's action was "because of" discrimination.[148] The first question is whether the employer has express policies of discrimination.[149] Two policies were scrutinized in *Wal-Mart*. One was an express policy prohibiting discrimination[150] and the other was Wal-Mart's policy of giving unstructured discretion to the managers of individual stores to set pay and to make promotions. While both were express, neither was discriminatory on its face.[151] The information

[146] *See* Green, *supra* note 56, at 407 n.45 ("It is not unusual for plaintiffs in lawsuits involving allegations of bias carried out in systems of subjective decision making to allege both systemic disparate treatment and disparate impact claims.").

[147] There is a right to a jury trial in disparate treatment cases as well as the availability of compensatory and punitive damages, neither of which is available in a disparate impact action. Further, at least as to a pattern or practice action of disparate treatment, no affirmative defense is available. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 (1977).

[148] Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 487 (2011) ("In a pattern or practice claim . . . there [is] no agent or explicit policy at issue, but rather intent [is] reflected in the identified pattern that [is] attributable to the institution as a whole."); *see also* Green, *supra* note 56, at 442 ("To succeed on a systemic disparate treatment claim, plaintiffs much prove that employment decisions within the defendant organization were regularly based on a protected characteristic. . . . [P]laintiffs who rely on statistics to prove systemic disparate treatment must convince the fact finder than an observed statistical disparity was due to internal disparate treatment . . . rather than to . . . factors external to the organization.").

[149] For an example of an employment policy that was expressly discriminatory, see UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (finding that prohibiting fertile women but not fertile men from jobs involving exposure to lead is an express policy of sex discrimination).

[150] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) ("Wal-Mart's announced policy forbids sex discrimination.").

[151] *See* Green, *supra* note 56, at 409 n.63 (criticizing reliance on the mere existence of a formal employer nondiscrimination policy to rebut statistical evidence of a pattern or practice of disparate treatment discrimination).

regarding how discretion was used was part of the data collected, retained, and analyzed in Bentonville. A policy of unstructured decisionmaking is the type of subjective decisionmaking the Court, in *Watson v. Fort Worth Bank & Trust*,[152] found to be subject to potential disparate impact liability. While *Watson* was a disparate impact case, presumably the policy of using discretion can also be the focus of a disparate treatment claim if it could be shown that its operation or administration constitutes a pattern or practice of discrimination. While the pay and promotion decisions were made by the local store managers, the focus of the systemic disparate treatment claim would be against Wal-Mart itself. In other words, the case would not be directly about the actions of the store managers and whether they individually discriminated. Instead, it would be based on what Wal-Mart itself did when the aggregation of all those individual decisions raised a strong suspicion that discrimination was occurring at the local level in some stores and regions.

The evidence, which was unchallenged, showed that women filled 70% of the hourly jobs but only 33% of management jobs, with most promotions coming from the pool of hourly workers. Further, it took women longer than men to rise into the management ranks and the higher in the management hierarchy the fewer the women. Finally, women were paid less than men in every region and that salary gap widened over time, even for men and women hired into the same jobs at the same time.[153] Thus, women employees were adversely affected by the pattern of operation of the discretion policy. Whether or not any individual woman was a victim of pay or promotion discrimination because of decisions made by her store manager, all women working at the local stores faced the risk that their managers would discriminate against them and Wal-Mart would do nothing about the actions of its agents. In a systemic disparate treatment claim, the question is whether this pattern was "because of" discrimination.

The basic statistical evidence of how women did compared to men in pay and promotions would be the first step toward challenging the way the discretion policy, neutral on its face, nevertheless operated as a pattern or practice of systemic disparate treatment discrimination.[154] Like the mere existence of the subjective discretion policy, these statistics may

[152] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.").

[153] The opinion of the Court in *Wal-Mart* did not mention these statistics that start the analysis of a systemic disparate treatment challenging an employer's pattern or practice of discrimination, but Justice Ginsburg did quote the district court's finding of facts. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2562–63 (Ginsburg, J. dissenting). *See also supra* note 142.

[154] Green, *supra* note 56, at 403 ("Discrimination is one reasonable inference to be drawn . . . from a disparity in pay or promotion that is unlikely to occur by chance.").

not be, by themselves, sufficient to support a finding of systemic disparate treatment discrimination. While the extreme nature of the simple statistics in *Teamsters*—the "inexorable zero"—was sufficient to support drawing the inference that the employer's standard operating procedure was to discriminate, the basic statistics in *Wal-Mart* were not quite so extreme. The clear and uncontested shortfall for women in pay and promotions, while certainly suspicious, may not by itself undermine alternative, non-discriminatory explanations in the way that evidence of an "inexorable zero" does.[155]

More evidence would likely be needed to support a finding that the shortfall for women in pay and promotions was "because of" discrimination. *Hazelwood* and *Bazemore* established that sophisticated statistical techniques can be used to help isolate whether discrimination is implicated, even where the basic statistical evidence is less stark than the "inexorable zero" in *Teamsters*. Given the huge data pool in *Wal-Mart*—pay and promotion data for all the workers in all the stores of the largest employer in the country—these techniques become increasingly useful since their power increases as the size of the data pool increases. For the issue of the promotion of women versus men, binomial distribution, the technique used in *Hazelwood*, could be used to determine whether the null hypothesis that sex and promotions were unrelated should be accepted or rejected. This involves the comparison of the total number of men and women in the labor pool for the job with their representation among those promoted. If there is a statistically significant relationship between sex and promotions, that relationship makes it extremely unlikely to be the result of chance. Finding such a relationship does not, as a matter of probability statistics, prove the shortfall in promotions was "because of" sex. But finding such a statistically significant relationship can be the basis for drawing the inference of discrimination.

Multiple regression analysis, the technique used in *Bazemore*, is ideal for the question of pay discrimination since a continuous variable, like pay, is needed. Multiple regression analyzes the effect of all the variables that are thought to be relevant to pay—time in service, relevant experience in other employment, job evaluations, education, etc.—along with gender. Holding all the variables other than sex constant, the

[155] *Furnco Construction Corp. v. Waters* explains why evidence of an "inexorable zero" in the face of workers who were available to do the job supports drawing the inference of intentional discrimination. "[W]e are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." 438 U.S. 567, 577 (1978) (finding a sample size too small to be able to produce useful statistical analysis).

technique shows whether there is a statistically significant relationship between pay and sex. If there is, the null hypothesis that sex and pay are unrelated should be rejected. That sex and pay are shown to be related can be the basis for drawing the inference of discrimination that the pay differences between women and men are "because of" sex.

Expert statisticians are able, given the constraints of the available data, to apply these techniques, variations of them, and additional ones to analyze the data.[156] In litigation, both sides typically use statistical experts, which results in a battle of experts. In *Wal-Mart*, plaintiffs' experts concluded that sex and pay and promotions were related at a statistically significant level in every region and across all regions of the company.[157] In contrast, Wal-Mart's expert sliced and diced the aggregated data into separate subsets, each made up of the small pool of data from a particular department at a particular store. Doing this reduced or eliminated the power of the technique used since the smaller the data pool the less power the technique has. With the data sliced and diced into such small pools, it is no surprise that she found there was no statistically significant relationship found between sex and pay. Therefore she accepted the null hypothesis that sex and pay and promotions were unrelated.[158] While dividing the company-wide data into these very small data sets may have been the only way to find that there was no statistically significant relationship between sex and pay, doing so rendered the studies neither relevant nor probative of what the aggregated data showed. It was the aggregated data that was the basis for deciding whether or not Wal-Mart was liable for disparate treatment discrimination.

Finding that sex and pay and promotion have a statistically significant relationship supports, but may not require, drawing the inference of discrimination. To further support drawing the inference of

[156] For an interesting explanation of how a variety of statistical techniques could be used in *Wal-Mart*, see Joseph L. Gastwirth et al., *Some Important Statistical Issues Courts Should Consider in Their Assessment of Statistical Analyses Submitted in Class Certification Motions: Implications for* Dukes v. Wal-Mart, 10 LAW, PROBABILITY & RISK 225 (2011). *See generally* Steven L. Willborn & Ramona L. Paetzold, *Statistics Is a Plural Word*, 122 HARV. L. REV. F. 48 (2009), *available at* http://www.harvardlawreview.org/media/pdf/willborn_paetzold.pdf.

[157] *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 604 (9th Cir. 2010) (describing plaintiffs' expert statistical testimony as follows: "Dr. Richard Drogin, Plaintiffs' statistician, analyzed data at a regional level. He ran separate regression analyses for each of the forty-one regions containing Wal-Mart stores. He concluded that 'there are statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotions, that these disparities are widespread across regions, and that they can be explained only by gender discrimination.' Dr. Marc Bendick, Plaintiffs' labor economics expert, conducted a 'benchmarking' study comparing Wal-Mart with twenty of its competitors, concluding Wal-Mart promotes a lower percentage of women than its competitors." (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 154 (N.D. Cal. 2004))).

[158] *Dukes*, 603 F.3d at 604–05.

discrimination, the plaintiffs in *Wal-Mart* introduced more expert testimony, based on "social framework" theory. That testimony looked to the structure and corporate culture of Wal-Mart that led individual store managers as well as management up at the top to more readily engage in unconscious and stereotyped discrimination.[159] Wal-Mart could have, but did not, respond with its own expert testimony that, for example, their women employees in hourly positions are less interested in the type of jobs one gets promoted into even though they are higher paying jobs, and that this lack of interest[160] better explains the shortfall of women in terms of pay and promotions than does a finding of sex discrimination.[161]

Anecdotal evidence can also be useful in deciding whether or not to draw the inference of discrimination. In *Teamsters*, the Court referred to the claims of individual employees that they were victims of the defendant's race discrimination, but held that such evidence was not always necessary. Such evidence has now appeared to be more significant because of the later decision in *EEOC v. Sears*, where the absence of any anecdotal evidence in a pay and promotion case appeared to be crucial.[162] While relatively sophisticated statistical techniques become more powerful as the size of the data pool increases, the power of the story of discrimination by any one individual decreases.[163] So, while presumably necessary to tell a good story by giving context to a large scale pattern or practice action, anecdotal evidence works best to bolster testimony to show that what the social framework literature suggests would happen, actually did happen to some individuals.[164]

Particularly useful for plaintiffs is the juxtaposition of the tight control Wal-Mart exercised over every aspect of its operations at every one of its locations with its policy of leaving pay and promotion decisions to local managers, and then not acting to control the exercise of that discretion when the data showed such a significant impact on women. Presumably, if Wal-Mart could show that it had a good reason for

[159] *See id.* at 601. As to social framework evidence, the Court of Appeals set forth the conclusions of plaintiff's expert: "Dr. Bielby concluded that: (1) Wal-Mart's centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice; (2) there are significant deficiencies in Wal-Mart's equal employment policies and practices; and (3) Wal-Mart's personnel policies and practices make pay and promotion decisions vulnerable to gender bias." *Id.*

[160] *See* EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (finding this kind of expert testimony significant).

[161] Since the case focused on whether the plaintiffs had established the basis to certify a class action and did not directly focus on the substantive liability of Wal-Mart, it would not be foreclosed from introducing such evidence if the case went to trial on the substantive issues.

[162] *Sears, Roebuck & Co.*, 839 F.2d at 310–11.

[163] *See* Selmi, *supra* note 148, at 506 ("Plaintiffs need to craft a story, a narrative, that explains how stereotyping has, in fact, affected the defendants' workplace.").

[164] *Sears, Roebuck & Co.*, 839 F.2d at 311–12.

exercising tight control over everything else, but also a good reason not to exercise any control over pay and promotion decisions, such a showing would make it more difficult to draw the inference that the shortfall of women's pay and promotions was "because of" sex.[165] The existence of another, nondiscriminatory explanation makes it more difficult to convince the factfinder that this was a pattern of discrimination. Correspondingly, the failure of Wal-Mart to explain the difference in how it managed every other aspect of its operation down to the local level and how it managed pay and promotions would bolster the case for drawing the inference of discrimination. Basically, the claim is that Wal-Mart's policy of discretion took advantage of the conscious and unconscious bias of the store managers to lower the labor costs by discriminating in pay and promotions for women. That is discrimination.

Assuming the factfinder draws the inference that Wal-Mart had engaged in systemic disparate treatment discrimination—the standard operating pattern of its system of delegated discretion resulted in discrimination against women in pay or promotions—then there is no need to go to the alternative systemic theory: disparate impact discrimination.[166] But if the record does not support finding that intentional discrimination caused the substantial shortfall of pay and promotions for women, that result does not foreclose taking the next step of applying systemic disparate impact theory to the case.

2. Systemic Disparate Impact Law

There are two primary differences between the two systemic theories of discrimination.[167] First, disparate treatment turns on the issue of whether the employer acted "because of" discrimination, a finding not necessary to make out a disparate impact case. Second, disparate impact turns on the identification of a specific employer practice that has an

[165] Since the impact was admitted, a way of looking at the question is whether "Wal-Mart would only engage in employment discrimination to the extent that it serves efficiency goals." Wexler, *supra* note 142, at 103. The argument would be that, if Wal-Mart acted "because of" efficiency, it did not act "because of sex." But Wal-Mart has "relative indifference to worker quality . . . . In such a system, Wal-Mart's failure to reward managers for giving raises to the most deserving hourly workers and for promoting the best workers . . . makes sense. This relationship alone does not explain the reasons why discrimination in pay and promotion occurs, but it helps suggest why Wal-Mart has taken so few actions over time to ameliorate it." *Id.* at 114.

[166] While the Bona Fide Occupational Qualification (BFOQ) defense, 42 U.S.C. § 2000e-2(e)(1), is available as an affirmative defense to policies that expressly discriminate against women, the establishment of systemic disparate treatment discrimination by showing that the standard operating practice is a practice of discrimination leaves no defense because the employer, having denied it discriminated, would be hard pressed once a pattern or practice of discrimination is established to subsequently argue that the discrimination was so necessary that it was a BFOQ.

[167] In *Watson v. Fort Worth Bank & Trust*, the Court recognized that the ways of proving disparate treatment discrimination are different from proving disparate impact discrimination. 487 U.S. 977, 987 (1988).

adverse impact, while a pattern or practice case of disparate treatment is not so limited; it can focus on the bottom line result of all of the employer's practices.[168]

The first question is whether the employer's policy of granting local store managers unstructured and uncontrolled discretion to make pay and promotion decisions is an employment practice. *Watson v. Fort Worth Bank & Trust* established that a policy of subjective decisionmaking is also an employment practice subject to disparate impact.[169] The next question is whether this practice produced a disparate impact on a class protected by Title VII.[170] Even if the evidence is insufficient to support a finding of disparate treatment discrimination, the rather dramatic shortfall for women revealed in the basic statistics supports a finding that Wal-Mart's discretion policy operated as an employment practice resulting in disparate impact against women. Such a showing shifts the burden of persuasion to Wal-Mart to demonstrate that this practice was job related and consistent with business necessity.[171] Since some discretion is arguably involved in making most employment decisions, Wal-Mart's practice of granting store managers' discretion as to pay and promotions might be found to be job related unless its unstructured and uncontrolled discretion undermined that conclusion.[172] Even if the policy

[168] 42 U.S.C. § 2000e-2(k)(1)(B)(i) does provide that, with a certain showing, plaintiffs can challenge the bottom line statistics of the result of all of employer's employment practices: "With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."

[169] 487 U.S. at 990.

[170] Wal-Mart could try to prove that the practice of unstructured discretion did "not cause the . . . impact," in which case, Wal-Mart "shall not be required to demonstrate that such practice is required by business necessity." 42 U.S.C. § 2000e-2(k)(1)(B)(ii). Since the impact is still present, the next question would be whether other, related practices caused it. Two of them might be "that pay differentials . . . were often based on whether one was in a hardline (male) department or softline (female) department . . . ." Wexler, *supra* note 142, at 109. Another practice that may have caused the impact in terms of promotions was Wal-Mart's requirement that, to be promoted, the worker would have to be ready to relocate. *Id.* at 109–10.

[171] 42 U.S.C. § 2000e-2(k)(1)(A) sets out the requirement for a prima facie case as well as the affirmative defense standard if a prima facie case is established: "An unlawful employment practice based on disparate impact is established under this subchapter only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . ."

[172] *See* Richard Thompson Ford, *Discounting Discrimination:* Dukes v. Wal-Mart *Proves that Yesterday's Civil Rights Law Can't Keep Up with Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 78 (2011) ("State-of-the-art management science suggests that giving

as it operates is found to be job related, Wal-Mart must still prove that it is consistent with business necessity. Since there are many alternatives to the unstructured discretion used by Wal-Mart—from completely objective practices such as tests, assessment systems that involve structured scoring by trained observers, or simply imposing a structure to the exercise of that discretion—it would seem to be difficult to conclude that a practice of unstructured and unchecked discretion is actually "necessary" to the operation of Wal-Mart's business.[173]

In sum, the law of systemic disparate treatment discrimination would apply to challenge Wal-Mart's policy of granting store managers unstructured discretion to set pay and promotions because it operated as a pattern or practice of discrimination. Whether the challenge would be successful depends on whether, looking at all the evidence in the record, such evidence supports drawing the inference that the pattern was "because of" sex. Disparate impact theory would also be available because the operation of the discretion policy is an employment practice. That would leave the question whether the evidence supports a finding that the employer's practice resulted in an adverse impact on women—which was not in dispute—and that the unstructured policy of discretion was either not job-related or not consistent with business necessity.

B. How the Court Appeared to Apply the Systemic Theories in Wal-Mart

The thrust of this Article is that in *Wal-Mart* the Roberts Court did not simply apply the law of systemic discrimination but that it changed that law or, at least, foreshadowed changes that the Supreme Court and the lower courts will make in subsequent cases. In indicating how to analyze the class action question, the Court indicated that it was necessary to look to the underlying substantive law. That law frames the claims that can raise questions of law or fact common to the class. Deciding whether or not to certify the class, the Court said:

> Frequently that . . . will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' . . . In this case, proof of commonality necessarily overlaps

local managers, who are closest to the specific challenges, the latitude to respond to them often leads to dramatic improvements in productivity and efficiency. [But] [t]hese innovations . . . may be more 'vulnerable' to bias than formal and objective job criteria . . . .").

[173] Even if Wal-Mart could succeed in proving job relatedness and business necessity, the plaintiffs could try to establish an alternative that Wal-Mart could have used that would serve its purposes without causing disparate impact. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) provides: "the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice."

> with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.[174]

Articulating substantive law when deciding a class action question is, of course, not the same as actually deciding what the substantive law is. If, however, the substantive law is important to deciding the class action question, it would seem necessary for that substantive law to be accurately set forth and applied.

At any rate, the Court proceeded to quote a footnote in *General Telephone Co. of the Southwest v. Falcon*,[175] a class action decision, where substantive antidiscrimination law proved important to the determination of the class action issue.[176] Falcon tried to bring an "across the board" class action to challenge not only the employer's hiring discrimination but also its discrimination in promotions. The Court rejected the "across the board" approach to class action and emphasized the need of an underlying question of fact or law common to all claims. It did indicate two instances in which both hiring and promotion discrimination could be challenged in one class action because they shared common questions of law or fact. One was if the employer used the same employment test for hiring as promotion and the other was where the employer used "entirely subjective decisionmaking processes" for its employment decisions. While *Falcon* involved two possible exceptions to the new rule banning "across the board" class actions, the Court in *Wal-Mart* appeared to view these exceptions as the only ways in which discrimination cases could be brought as class actions, an approach not at issue in *Falcon*. Because no "testing procedure" was involved in *Wal-Mart*, the Court found that, "[t]he first manner of bridging the gap obviously has no application here . . . ."[177] *Falcon* involved two very different claims of discrimination—hiring discrimination and promotion discrimination—so there was no common question of fact and law since claims of promotion discrimination generally are quite different from claims of hiring discrimination. In *Wal-*

[174] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982)).

[175] 457 U.S. 147 (1982).

[176] "*Falcon* suggested two ways in which that conceptual gap [between the individual plaintiff's claim and the existence of a class of persons who suffered the same injury] might be bridged. First, if the employer 'used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).' Second, '[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.'" *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2553 (alteration in original) (quoting *Falcon*, 457 U.S. at 159 n.15).

[177] *Id.* at 2553.

Mart, the pay and promotion claims were closely related to each other because all the store managers had been granted the same unstructured discretion for both pay and promotion decisions. Further, those promoted came from the pool of hourly employees, and a promotion typically included a raise in pay. The bridge between pay and promotion was the common question of how the policy of unstructured and unchecked discretion was administered and controlled as to both pay and promotion. It might be argued that by his way of describing the first use of a common test exception in *Falcon*, Justice Scalia meant to limit class action claims of disparate impact discrimination to challenges of tests—a procedural decision—or to limit disparate impact cases to test issues—a substantive law decision. Because § 703(k) describes the scope of disparate impact claims broadly to cover challenges to all "employment practices," not just the subset of those practices involving employment testing, arguing that *Wal-Mart* changed the substantive law of Title VII would be such a stretch that would not likely be accepted by lower courts.

Falcon's second exception to the general rule that a plaintiff claiming promotion discrimination cannot represent victims of hiring discrimination in a class action is where a policy of "entirely subjective decisionmaking" was used both for promotions and hiring. It was not contested that Wal-Mart used the same policy of unstructured discretion for both pay and promotion decisions. Yet, Justice Scalia found there was no "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[178] That is true if he means by "general policy of discrimination" an express policy of discrimination. While the policy of using unstructured discretion by store managers was a general policy, it was not expressly discriminatory. Instead the thrust of plaintiffs' case is on the "operation" of a policy that authorized "entirely subjective decisionmaking" in both pay and promotion decisions. In other words, the common question was whether the way the policy of discretion worked amounted to a pattern or practice of discrimination.

Judge Ikuta, in her dissent below, would narrow systemic disparate treatment claims to express policies of discrimination and to situations where a policy neutral on its face was shown to have been adopted by top management with an intent to discriminate.[179] If adopted, that would undermine the use of statistical and other evidence to establish direct

[178] *Id.* at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15).

[179] This approach would limit Wal-Mart's direct liability to express policies that discriminate and, under respondeat superior, to the intentionally discriminatory actions of its top managers in establishing a neutral policy that operated to discriminate. *See* Green, *supra* note 56, at 408, 410 ("Justice Scalia [like Judge Ikuta] . . . frames systemic disparate treatment theory as imposing entity liability only for individual moments of disparate treatment . . . .").

employer liability for a pattern or practice of discrimination.[180] In none of the prior systemic disparate treatment or impact cases—from *Griggs* and *Teamsters* and *Hazelwood* to *Watkins* and *Wards Cove*—was there any mention that employers were not directly liable for their discrimination. The Court did not expressly adopt Judge Ikuta's elimination of an employer's direct liability for pattern or practice cases of disparate treatment or impact.[181] But the confusing organization of the Court's opinion and its unclear discussion of substantive discrimination law may make Judge Ikuta's narrow view in fact what the Court has done, or will do, to systemic disparate treatment law. Justice Scalia starts his analysis by saying that the "only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters."[182] He then characterized this policy as "just the opposite of a uniform employment practice . . . it is a policy *against having* uniform employment practices."[183] This conflates the policy that was uniformly applicable at all of Wal-Mart's stores with the way individual store managers exercised that discretion and whether the data aggregated from all those individual decisions established a pattern of discrimination. Then he characterizes this policy as "a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'"[184] The Court in *Watson*, which is the source for saying the existence of a subjective decisionmaking process is not by itself discriminatory, went ahead and held that such a process could be the basis of disparate impact liability. *Watson* did not accept that subjective decisionmaking was a "presumptively reasonable way of doing business" if the practice had a disparate impact and was not shown to be job related and consistent with business necessity. This suggests that *Watson* has been, if not overruled, undermined.

Justice Scalia then changed direction from plaintiffs' case aimed at Wal-Mart's potential direct liability to focus on whether or not the individual store managers had engaged in discrimination:

> [L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce

[180] This evidence might still be used to prove intentional discrimination of top level managers for which Wal-Mart would be liable under respondeat superior.

[181] She would limit pattern or practice actions to evidence of "a company-wide policy of discrimination . . . implemented by discretionary decisions at the store and district level." Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 637 (9th Cir. 2010) (Ikuta, J., dissenting). While not accepting the extreme position of Judge Ikuta, Justice Scalia later quotes her opinion favorably. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2555.

[182] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554.

[183] *Id.*

[184] *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988)).

> disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.[185]

Justice Scalia gives no authority for these factual assertions, but the various ways he describes that individual store managers might exercise the discretion the company's policy gave them is beside the point. What is important is the aggregate data reflecting all of the individual decisions made by the store managers when they all exercised the discretion Wal-Mart gave them. The question common to all the women plaintiffs claiming to represent the class was whether they each faced the risk of discrimination in pay and promotions because of the way this whole system operated; that is, it was systemic disparate treatment by Wal-Mart, not just a collection of claims of individual instances of discrimination by individual store managers. Through his obscure analysis, Justice Scalia avoided discussing the real issues in the case.

An argument might be made that this approach means that Title VII only redresses individual disparate treatment claims, and no systemic claims can be brought except for those challenging express policies of discrimination.[186] In other words, the argument would be that *Teamsters*, *Hazelwood*, and *Bazemore* all have been *sub silentio* overruled, thereby abolishing the theory of pattern or practice disparate treatment.[187] Some support for that substantial change in the law might be found in Justice Scalia's quote from Chief Judge Kozinski's dissenting opinion below, that the members of the class "*have little in common but their sex and this lawsuit.*"[188] It is simply not true that the only thing the class members had in common was their sex and this lawsuit. They all also had in common that they all faced the risk of discrimination in pay and promotions because of Wal-Mart's policy of giving store managers unfettered discretion.

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[185] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554 (citation omitted).

[186] Limiting Title VII to individual claims reduces the enforcement of it to a minimum. For example, proving individual claims of discrimination against Wal-Mart can be problematic: "Wal-Mart . . . exhibits all of the defining features of the contemporary service-sector employer in exaggerated form: it has a large low-wage workforce, high turnover, a decentralized management structure, and it evaluates its employees based on highly subjective criteria. . . . These features . . . make it hard to apply the individual civil rights model . . . ." Ford, *supra* note 172, at 76.

[187] Title VII expressly includes pattern or practice cases. 42 U.S.C. § 2000e-6(a) (2006). *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 3–4 (2010) (describing how the Roberts Court has overruled cases *sub silentio*).

[188] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557 (emphasis added) (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (Kozinski, C.J., dissenting)) (internal quotation marks omitted).

After all that confusion and misdirection, Justice Scalia finally recognized that "giving discretion to lower-level supervisors can be the basis of Title VII liability."[189] He characterizes the basis of that claim as being "under a disparate-impact theory," referring to *Watson*.[190] Then, rather than developing the disparate impact claim, that is, whether the record supported a finding that this discretion was an employment practice that resulted in an adverse impact on women, he again shifted focus back to view the case as a systemic disparate treatment case. But he does so in a way that is radically different from prior law.

Not only does Justice Scalia not start with the basic statistics that showed the shortfall of pay and promotions for women, he never mentions this uncontested evidence that triggers a pattern or practice disparate treatment or disparate impact case. Nor does the opinion start by looking to the more sophisticated statistical analyses of the aggregate data about pay and promotions. The pre-*Wal-Mart* authority would have started a pattern or practice case with all of this statistical evidence.[191] Instead, he initially approaches the issue from the viewpoint of the "social framework" testimony of one of plaintiffs' experts. He rejects that evidence as a basis for establishing a prima facie case of discrimination because the expert could not calculate whether "0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking" that results from the structure of Wal-Mart's operations.[192] This reveals a complete failure to understand what social framework is and why it can be relevant to pattern or practice cases of systemic disparate treatment discrimination. Social framework evidence is not a technique used to show the statistical significance of data because it is not a statistical technique based on probability theory. Instead, it is used to describe how certain employment structures and corporate cultures can lead to stereotyping and other forms of unconscious discrimination. In other words, evidence showing the existence of these structures and cultures at a particular employer is relevant and probative because that supports drawing the inference of discrimination based on all the evidence in the record, including all the statistical evidence.[193]

With his treatment of the social framework evidence, Justice Scalia appears to be suggesting that to be probative each item or type of

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[189] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2555.

[190] *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

[191] *Cf.* Selmi, *supra* note 148, at 481 ("[I]t is no longer acceptable to rely on statistics without providing a context to establish a pattern or practice claim . . . .")

[192] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554 (internal quotation marks omitted). Further, the Court strongly suggested, without deciding, that in determining whether to certify a class action such testimony was subject to the standards for expert testimony that had been established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), at the class certification stage and not just at trial. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2553–54.

[193] *See* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009).

evidence must, by itself, be sufficient to prove discrimination. In other words, he seems to be slicing and dicing the evidence in the record to eliminate the relevance of any evidence that by itself does not prove discrimination.[194] He avoids looking at the evidence in the whole record, which is the only way that an inference of discrimination could ever be drawn. The question, at least before *Wal-Mart*, was whether, reviewing all the evidence in the record, including the statistical, anecdotal, and other evidence, it is reasonable to draw an inference that Wal-Mart engaged in a pattern or practice of pay and promotion discrimination. Social framework testimony can be relevant and probative on that ultimate question of fact because it can help to explain how some corporate structures and cultures, like Wal-Mart's, are prone to allow discrimination.

Having not even mentioned the basic statistical evidence showing a substantial shortfall for women in terms of pay and promotions, Justice Scalia does then move to the sophisticated statistical analysis of that data. He concedes that the multiple regression studies prove that "there are statistically significant disparities between men and women at Wal-Mart."[195] Nevertheless, he rejects this as probative because the studies are "insufficient to establish that [plaintiffs'] theory can be proved on a classwide basis. . . . A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[196] Further, assuming this evidence established "a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. . . . Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[197]

This analysis fails to address plaintiffs' actual claim. They do not claim that there is a uniform, store-by-store disparity in pay and

[194] To reach the conclusion, for class action purposes, that there were no common questions of law or fact, Justice Scalia may have thought he needed to slice apart the evidence to undermine commonality that would be found in the record as a whole.

[195] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2555 (quoting the conclusion of the statistician who did the multiple regression studies, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 604 (2009)) (internal quotation marks omitted). Another expert "compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart 'promotes a lower percentage of women than its competitors.'" *Id.* (quoting same).

[196] *Id. But see* Selmi, *supra* note 148, at 508–09 ("The primary point of a regression analysis is to measure the importance of variables that are relevant to the underlying decisions, and the significance of the variables cannot be readily identified by focusing solely on isolated or individual cases.").

[197] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2555–56. This final sentence is as close as the Court gets to referencing the basic statistical showing of that disparity.

promotions where each store manager discriminated in the same way for all women. Instead, the claim is that the operation of the policy of granting store managers unfettered discretion produced substantial impact on women in pay and promotions that continued unchecked. To say this from the point of view of the harm to the women employees, it is that all the women in all the stores uniformly faced the risk that the managers of the stores in which they worked would discriminate against them without any review mechanism. That not all of them had the risk realized does not support the conclusion that the way the discretion policy was implemented was not probative and relevant to the question of a pattern or practice of systemic disparate treatment discrimination by Wal-Mart.[198]

Based on all of this, the Court concluded that the plaintiffs had failed to establish the underlying substantive basis of a claim of systemic disparate treatment discrimination that would justify finding, as required by Rule 23(a), the existence of "questions of law or fact common to the class." In the process of reaching that conclusion as to plaintiffs' systemic disparate treatment discrimination claim, the Court touched on the disparate impact claim twice, with neither discussion developing the theory in any full way. Justice Scalia first adverted to disparate impact discrimination by acknowledging that "in appropriate cases, giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory."[199] But rather than determining whether the exercise of this discretion in the aggregate had a disparate impact on the pay and promotion of women employees, the Court cut off that analysis because a claim of disparate impact discrimination "does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common."[200] This conclusion is directly at odds with the nature of a disparate impact claim—impact, by definition, means that some, but not all, members of the group are adversely affected by the challenged employment practice. This may be

[198] *See id.* at 2556. The Court next dealt with the anecdotal evidence, indicating that it was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Id.* To reach this conclusion, it used a novel approach: The Court compared the ratio of specific accounts of racial discrimination to the size of the class—here, it was about 1-in-12,500—with the 1-in-8 ratio in *Teamsters*, and concluded that the anecdotal evidence was inadequate since the ratio was too low. *Id.* One wonders whether this 1-in-8 ratio will become a requirement before any anecdotal evidence will be considered probative. If so, that would substantially increase the burden on plaintiffs seeking to represent classes. The Court recently adopted an economic substantive due process limit on punitive damages using a ratio with compensatory damages. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[199] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554 (internal quotation marks omitted).

[200] *Id.*

suggesting that disparate impact claims can never be brought as class actions.[201]

The second reference to the disparate impact theory of discrimination comes later in the opinion when the Court concludes that a "discretionary system [that] has produced a racial or sexual disparity *is not enough*. '[T]he plaintiff must begin by identifying the specific employment practice that is challenged.'"[202] *Watson* had held that a policy granting discretion to make employment decisions was an employment practice that was subject to disparate impact attack. Nevertheless, Justice Scalia finds that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[203] The only way that this can be true is by finding that, despite *Watson*, a policy of discretion cannot be an employment practice for purposes of disparate impact analysis without regard to how much adverse impact the operation of the policy produces—the existence of an employment policy which is neutral on its face shelters a challenge to the operation of it because the policy is not a practice. This is puzzling, especially since Justice Scalia gives no authority or reason for it. It does, however, put the continuing viability of *Watson* in jeopardy.

V. DOES *WAL-MART* CHANGE THE SYSTEMIC THEORIES OF DISCRIMINATION?

An argument can be made that *Wal-Mart* did not change the substantive systemic theories of discrimination because the case only decided whether or not to certify a class action, making it exclusively a procedural, not a substantive, decision. While the underlying substantive law is implicated in deciding the class action question, the decision as to its impact on the class action questions might be taken as having nothing to do with substantive antidiscrimination law *qua* substantive law. Juxtaposing *Wal-Mart* with prior substantive law reveals such a substantial difference that it is hard to accept that the decision has changed the law so radically. To the extent Justice Ginsburg, in her dissent, discussed substantive law, the discussion was in the context of the class action questions and was consistent with extant law. She did not suggest that the majority was changing the law, but that it had misapplied it. Since *Wal-Mart*, the Ninth Circuit has applied it to deny class certification without indicating that there was a substantive law dimension to *Wal-Mart*.[204]

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[201] Given his position in his concurring opinion in *Ricci* that 42 U.S.C. § 2000e-2(k) is unconstitutional, *see supra* text accompanying note 129, perhaps Justice Scalia is suggesting that disparate impact cases cannot be brought at all. Thus, disparate impact is not worthy of much discussion.

[202] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2555 (alteration in original) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

[203] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2556.

[204] Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011).

Based on that and the fact that *Wal-Mart* is a class action, lower courts may well reject an argument that the discussion of the substantive law in *Wal-Mart* reflects what the law is. A recent example of a lower court doing that is the Second Circuit's decision in *Briscoe v. City of New Haven*,[205] a disparate impact case arising out of the same promotion test that was at issue in *Ricci*. In *Ricci*, Justice Kennedy included an enigmatic paragraph that could be read as precluding any subsequent actions against the City, such as Briscoe's, arising out of the test that was at issue in *Ricci*.[206] While the district court dismissed Briscoe's suit based on that language in *Ricci*, the Second Circuit reversed, finding that, given the complexity of preclusion law, the Court could not have meant to change it with a single, undeveloped and enigmatic paragraph in a decision that involved no preclusion issues.[207] As to the substantive law of systemic discrimination, the *Wal-Mart* opinion is so confused and oddly organized that it may be viewed as having no effect on the law.[208] From the viewpoint of those concerned with an antisubordination view of the purpose of antidiscrimination law, treating *Wal-Mart* as not implicating substantive discrimination law would be good news.

The less good news is if the approach the Court took is treated as impacting substantive systemic discrimination law. Justice Scalia could have, but did not, simply indicate that the substantive law discussed was necessary to decide the class action issues but did not reflect all of the substantive law. At a minimum, *Wal-Mart* can be viewed as a foreshadowing of the undermining of the litigation structure of systemic discrimination law.[209] By the way the Court slices and dices the evidence in the record, it appears to require that each item or type of evidence must by itself support drawing the inference of discrimination, independent of whether the record as a whole supports drawing that inference.[210] Doing this allowed the Court to undercut the relevance both of social framework and anecdotal evidence. This new approach appears to reject prior law that disparate treatment discrimination is an ultimate

[205] Briscoe v. City of New Haven, 654 F.3d 200 (2d Cir. 2011).

[206] The paragraph in *Ricci* is: "Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

[207] *Briscoe*, 654 F.3d at 200–03, 208–09.

[208] That the organization of the opinion may have focused on the class action issues supports the conclusion that substantive law was unaffected.

[209] *See* Friedman, *supra* note 187, at 3–4 (describing how the Roberts Court has overruled cases *sub silentio*).

[210] The separation of the evidence into separate, unrelated types or items may be explained by the need, for purposes of the class action issues, to try to show that there were no common issues of law or fact for purposes of the Rule 23(a) determination.

question of fact based on all the relevant and probative evidence in the record.[211] Absent the type of statistical evidence of an "inexorable zero" in *Teamsters* or an admission against interest by a high company official that might, by itself, support drawing the inference of discrimination, it would be rare to find one piece or type of evidence that independently proves systemic disparate treatment discrimination. If taken seriously, that interpretation of *Wal-Mart* would eliminate most systemic disparate treatment pattern or practice cases. This is at odds with Justice Scalia's prior approach in *Oncale v. Sundowner Offshore Services, Inc.*, the same-sex harassment case, where he explored various types of arguments and evidence that same-sex harassment might be found to be discrimination because of sex and concluded: "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct . . . actually constituted '*discrimina*[*tion*] . . . because of . . . sex.'"[212] The organization and structure of the *Wal-Mart* opinion, which from the point of view of substantive discrimination law appears almost random, suggests either that the Court did not mean it to have any effect on substantive law, or if it did, the result would be to undermine by stealth pre-existing disparate treatment law. Leaving open that second possibility means that systemic disparate treatment law is vulnerable.

In addition to possibly undermining the litigation structure underpinning systemic disparate treatment law, the Court may have overturned or undermined the Burger Court decisions in *Teamsters*, *Hazelwood*, and *Bazemore* dealing with the use of statistical evidence in pattern or practice cases by not even referring to the basic statistical evidence and by undercutting the more sophisticated statistical techniques that it did discuss. The Court did not expressly adopt Judge Ikuta's approach of limiting the scope of systemic disparate treatment to proof that the employer adopted an express policy of discrimination[213] or proof that the top employer officials intended to discriminate when they adopted an employment policy that was neutral on its face. If the way the Court treated statistical evidence reflects what the law is now, that would seem to come quite close to adopting Judge Ikuta's position. The lack of clarity in the opinion makes it difficult to determine what courts might take it to mean in subsequent cases.

The backdrop for undermining the logic and rationale for systemic disparate treatment law, at least as to pattern or practice cases, is the repeated focus of the Justices on individual acts of discrimination by the store managers as if that was the only way discrimination occurred.

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[211] It is also at odds with the general approach to factfinding.

[212] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (alteration in original) (quoting 42 U.S.C. § 2000e-2(a)) (finding that sexual orientation is not protected by Title VII, but same-sex harassment could be the basis of drawing the inference of sex discrimination).

[213] Justice Scalia does appear to hint that the mere existence of a formal policy prohibiting discrimination may limit pattern or practice cases.

Justice Scalia did not see the link the policy of discretion had to its operation that resulted in a substantial impact on women as shown by the data aggregating all the individual pay and promotion decisions. The apparent failure of some of the Justices to understand that discrimination can occur beyond individual employment decisions becomes clear from some of the questions that were asked during the oral argument[214]:

> *Chief Justice Roberts*: How many examples of abuse of the subjective discrimination delegation need to be shown before you can say that flows from the policy rather than from bad actors?[215]
>
> *Justice Kennedy*: [I]t's hard for me to see that the—your complaint faces in two directions. Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on. Then in the next breath, you say, well, now these supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is.[216]
>
> *Justice Scalia*: I don't—I'm getting whipsawed here. On the one hand, you say the problem is that they were utterly subjective, and on the other hand you say there is a—a strong corporate culture that guides all of this. Well, which is it? It's either the individual supervisors are left on their own, or else there is a strong corporate culture that tells them what to do.[217]
>
> *Justice Scalia*: What do you know about—about the unchallenged fact that the central company had a policy, an announced policy, against sex discrimination, so that it wasn't totally subjective at the managerial level? It was, you make these hiring decisions, but you do

[214] Recently, the Chief Justice has been quoted as saying that he thinks that scholarship is not "particularly helpful for practitioners and judges," and "[w]hat the academy is doing as far as I can tell . . . is largely of no use or interest to people who actually practice law." Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. (forthcoming 2012) (manuscript at 2) (citation omitted) (internal quotation marks omitted), *available at* http://ssrn.com/abstract=1884462. His approach, and the approach of the other Justices in the majority in *Wal-Mart*, appears to confirm that they do not read legal scholarship—but that perhaps they should. As to the underpinnings of discrimination, "scholars have developed models of organizational misconduct that adopt a more situationist approach to wrongdoing and acknowledge that wrongdoing can be driven by context and can occur even absent individual, amoral actors." Green, *supra* note 56, at 435.

[215] Transcript of Oral Argument at 25, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

[216] Transcript of Oral Argument, *supra* note 215, at 27–28. *But see* López, *supra* note 9, at 23–24 (criticizing the Manichean approach the Court uses to analyze discrimination cases).

[217] Transcript of Oral Argument, *supra* note 215, at 29. This either/or approach exhibits a fundamental lack of understanding of pattern or practice cases of systemic disparate treatment by Justice Kennedy. Social framework testimony would be relevant to this question. Further, it appears that the existence of a formal policy prohibiting discrimination in some way insulates the operation of other policies from challenge as patterns or practices of discrimination.

> not make them on the basis of sex. Wasn't that the central policy of the company?[218]
>
> *Chief Justice Roberts*: This company has a thousand stores, and sure enough in a thousand stores you're going to be able to find a goodly number who aren't following the company's policy [to not discriminate], who are exercising their subjective judgment in a way that violates the right to equal treatment.[219]
>
> *Justice Alito*: So, you have the company that is absolutely typical of the entire American workforce, and let's say every single—there weren't any variations. Every single company had exactly the same profile. Then you would say every single company is in violation of Title VII?[220]
>
> *Justice Scalia*: [What] your answer assumes is if there is a disparity between the advancement of women and the advancement of men, it can only be attributed to sex discrimination[?][221]

While Justices may ask questions to probe the position of an advocate that do not reveal anything about the position they actually hold, these questions seem to reveal exasperation at their inability to understand plaintiffs' case and may be premised on a strongly held but unexpressed assumption that discrimination occurs only at the level of individual decisionmaking. The law has for a long time been otherwise, so this is curious. A possible explanation is that these Justices fear that looking beyond individual discrimination to find broad scale discrimination would result in employers having too great an incentive to use quotas to guarantee a racial or gender balance, echoing Justice O'Connor in *Watson* and the Court in *Wards Cove*.

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[218] *Id.* at 30. This question may suggest that for Justice Scalia unconscious bias and actions based on stereotypes do not occur because the individual store managers follow the nondiscrimination policy by not discriminating. This is at odds with *Watson*.

[219] *Id.* at 35–36. This question appears to be based on a fear of racial or gender balancing—a fear that has been at the base of the anticlassification approach since *Bakke* and *Watson*. For a call to interpret antidiscrimination law to keep up with today's workplace, see Ford, *supra* note 172, at 69 ("[W]e often can't pinpoint discrimination accurately enough to blame a specific individual perpetrator, or to identify a specific individual victim, even though we can identify more general patterns of discrimination.").

[220] Transcript of Oral Argument, *supra* note 215, at 41–42. *But see* Green, *supra* note 56, at 413 (arguing that limiting systemic disparate treatment claims to proof that the employer's women workers "suffer significantly more discrimination than they would suffer in the [labor] market as a whole" is a fundamental change to prior law). This is similar to the argument the Court rejected in *Hazelwood*, that the statistical comparison of the representation of African-American teachers was to be made to the students at the school and not at the labor market for teachers.

[221] Transcript of Oral Argument, *supra* note 215, at 42. A showing of disparity, such as the basic statistics in *Wal-Mart*, is only the start of the analysis absent evidence of the "inexorable zero," as in *Teamsters*. The question is whether, looking at the record as a whole, this impacted women because of sex.

As to systemic disparate impact law, the refusal of the Court to treat the operation of a neutral employment policy as an employment practice subject to disparate impact analysis would limit rather severely the type of practices that could be challenged using disparate impact theory. Further, there is an argument that the Court may have *sub silentio* overruled *Watson*. On one hand, Justice Scalia acknowledges that an employer policy of subjective decisionmaking can be challenged as disparate impact discrimination. On the other hand, he appears to block looking at the operation of the policy by finding that an employer policy is not an employment practice. Without being able to introduce evidence of how a policy operates, it is impossible to show that the operation results in impact.

A question the Court did not deal with at all was the implication that *Ricci* has for this case. In *Ricci*, the Court found the City had committed systemic disparate treatment by deciding not to use the test scores because it knew the consequences in terms of the three racial groups of whatever decision it made. *Ricci* is at odds with *Feeney*, where the establishment of purposeful discrimination—that the challenged action was "because of," rather than "in spite of," discrimination—required much more evidence than mere knowledge of the gender consequences. The fact that in *Feeney* "the [l]egislature . . . could [not] have been unaware that most veterans are men [or that] the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable,"[222] was not sufficient to prove purposeful discrimination. Yet knowing the racial consequences of the action it took sufficed to establish disparate treatment discrimination in *Ricci*.[223] Wal-Mart aggregated the data about pay and promotions, so it is chargeable with knowing the gender consequences of the way its system of unstructured discretion operated. If the approach the Court took in *Ricci* applies, such "knowledge" would, without more, suffice to establish disparate treatment because of sex. Yet the Court does not explain why *Ricci* does not apply to *Wal-Mart*. It may

[222] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278 (1979).

[223] Before *Ricci*, the color-blind rule made it easy for whites to challenge actions expressly undertaken to address the subordination of racial minority groups, while the high threshold to prove that actions neutral on their face were the result of purposeful discrimination made it difficult for members of groups that have been subordinated since the social mores now inhibit admissions against interest by the governmental actors. With the ease with which the Court in *Ricci* found the City liable for purposeful discrimination by the mere showing that it knew the racial consequences of its actions, it is now much easier to prove discrimination where the act is neutral on its face. Indeed, the color-blind and the purposeful discrimination rules may be merging in the sense that it is still easy for whites to challenge affirmative efforts to help racial minorities, but it is also easy for members of subordinated groups to prove discrimination based on the easily established fact that the actor knew the racial consequences of its action. If the *Ricci* approach only applies when whites sue, that would appear to violate the color-blind rule of law the Court claims to apply both in equal protection and statutory antidiscrimination law.

be that while *Ricci* was a race case, *Wal-Mart* involved a claim of gender discrimination and the Court is not ready to treat the knowledge of the gender consequences the same way it treats knowledge of the racial consequences of an action. Perhaps the fact that the dispute in *Ricci* had become a hot public topic very early in the dispute—and did not in *Wal-Mart*—makes a difference. Further, it may be that the Court is intent on maintaining the preexisting dichotomy between the easy proof when whites challenge actions explicitly taken to address racial subordination and the difficult proof when members of racial minority groups challenge actions that are neutral on their face. This, of course, stands antidiscrimination law on its head, but that had been happening well before *Ricci* and *Wal-Mart*. Finally, it may be that the obvious empathy the Justices in the majority felt toward the white plaintiffs in *Ricci* and the absence of any indication of empathy for the women in the Court's opinion in *Wal-Mart* made the Court stretch well beyond preexisting law to decide in favor of the white plaintiffs in *Ricci*, but also to recast the law to find against the women in *Wal-Mart*.

VI. CONCLUSION

It may be that the Court in *Wal-Mart* meant "only" to render class action claims of discrimination extremely difficult, if not impossible, to bring. The decision, however, does include intimations that the systemic theories of discrimination law are heading toward a major change curtailing their application.

The way to know what the real impact *Wal-Mart* has on the two systemic theories of discrimination would be to bring an action raising these substantive questions but not to bring it as a class action. While the individual plaintiffs in *Wal-Mart* can do this on remand, a more likely advocate would be the EEOC.[224] If it would now bring a pattern or practice case along the lines of *Wal-Mart*, claiming that a policy of unstructured discretion operated as a pattern or practice of disparate treatment discrimination or as an employment practice that produced a disparate impact on the pay and promotion of women, the class action dimensions of *Wal-Mart* would not be implicated, so the case would turn on whether the precedent preceding *Wal-Mart* is still good law or whether *Wal-Mart* had actually changed the law. It may be that the EEOC does not want to find out the answer.

If such a hypothetical case decided that *Wal-Mart* set forth the substantive law of systemic discrimination, then, in conjunction with the decision's decimation of class actions, there would be as to protected classes, "no damn cat, no damn cradle."

[224] The EEOC has authority to bring pattern or practice actions. 42 U.S.C. § 2000e-6(a), (c) (2006).