Title VII Comparable Worth Claims: Analysis of Liability, Proof, Defenses, and Remedies for Sex-Based Wage Discrimination

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TITLE VII COMPARABLE WORTH CLAIMS: 
ANALYSIS OF LIABILITY, PROOF, 
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SEX-BASED WAGE DISCRIMINATION*

This Comment analyzes a new title VII claim of sex-based wage discrimination which requires a remedy for women or men based on the comparable worth of distinct work. Until recently, primarily women have been denied the full benefit of title VII protection because of judicial decisions, limiting compensation claims to equal work situations. Now, women suffering discrimination in unique work positions or in female-dominated work may find relief. Nevertheless, controversy continues over the theory for such a cause of action, the burden of proof, employer defenses, and remedies. This Comment examines these important issues which affect the future wage status of women workers and employer pay practices.

INTRODUCTION

Wage disparity between male and female workers is commonplace in the American civilian labor force.¹ A gap in earnings between the sexes adversely affects thirty-seven million women workers, the majority of whom need to work because of some economic necessity.² A contributing factor to the wage differential

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¹ Comparing the annual median income in 1977 of year-round full-time workers by sex, the women's income was 58.5% of the men's income. Women's Bureau, U.S. Dept. of Labor, The Earnings Gap Between Women and Men 19, 1-5 (1979) (source for statistics: U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, p. 60, No. 118). "The 15 million females living in poverty (in 1975) accounted for 3 out of 5 persons (58 percent) who were poor in the United States. . . . About one-third of all families headed by women were poor—more than five times the 5.8% rate for male-head families." Women's Bureau, U.S. Dept. of Labor, Women With Low Incomes 1-6 (1977).

² Women workers comprise two-fifths of the civilian labor force in the
between men and women is discriminatory behavior of employers. This problem was recognized and addressed by two congressional acts.

In 1963, the Congress, with heightened awareness of the adverse impact of sex discrimination in employment, enacted the Equal Pay Act (EPA). This Act requires employers to pay em-

United States. The profile of the average woman worker today is the 35 year old woman found in any of a great number of occupations. Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor, Women Workers Today 1 (1976). Women are employed for the same reasons as most men—to provide for the welfare of themselves, their families or others. In a recent government report, Women's Bureau, U.S. Dept. of Labor, Economic Responsibilities of Working Women 1 (1979), women workers are described in detail:

Over 40 percent of the women in the labor force in 1978 had never married, or were widowed, divorced, or separated. Most of the 10.2 million women workers who were never married were working to support themselves, and some had to support others as well. Nearly all of the 8.0 million women workers who were widowed, divorced or separated from their husbands—particularly the women with children—were working for compelling economic reasons. In addition, the 4.1 million married women workers whose husbands had incomes below $7,000 in 1977 almost certainly worked because of economic need. Finally, about 3.1 million women would be added if we take into account those women whose husbands had incomes between $7,000 and $10,000. In all, nearly two-thirds of the women in the labor force in 1978 worked to support themselves and their families, or to supplement low family incomes. Of course, all working women contribute to the well-being of themselves and their families.

Id. This modern reality contradicts outdated assumptions about women's reasons to work. See, e.g., N. Chamberlain & D. Cullen, The Labor Sector 5-7 (1971), for a description of the "family life cycle" which allegedly applies to 94% of the population. Three faulty premises are used to support this claim: 94% of the population is living in an economic "household"; households are synonymous with traditional families, comprised of a husband, wife, and children; and a working wife's primary purpose in life is to raise the children at home. Therefore, working wives presumably depict all working women, and their reasons for working are incidental compared to working men. Id. at 7-8.


4. See notes 30-42 and accompanying text infra.

5. The Equal Pay Act (EPA) provides in part:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to em-
ployees equal wages for identical or substantially equal work, regardless of sex. Male and female workers, however, are rarely employed in substantially equal work conditions. As a result, this congressional mandate does not apply to a majority of common situations involving sex-based wage inequities.

In 1964, title VII of the Civil Rights Act was passed as a broad prohibition against employment discrimination based on sex. Under title VII, claims of sex-based wage discrimination theoretically could have been allowed but were in fact limited by the courts to the narrow scope of the EPA equal work standard. The effect of requiring the equal work standard for a title VII claim was to make most forms of sex-based wage discrimination lawful.

In 1980, circuit courts divided over whether to recognize wage discrimination claims under title VII that went beyond the scope...
of the EPA. Then in 1981, the Supreme Court for the first time recognized such a claim. Claims beyond the EPA standard involve the "comparable worth" of jobs rather than "equal work." If a comparable worth claim is to be recognized by modern courts, major issues must be resolved concerning the claim's theory, burden of proof, defenses, and remedies under title VII.

Vigorous opposition to the comparable worth claim has arisen at every stage of a title VII suit against a major employer. Some large corporations, which depend upon a nonlitigious female work force, are threatened by a comparable worth challenge to their economic status quo. Major changes in female compensation are inevitable if title VII's prohibition of sex-based wage discrimination is applied to comparable worth type wage inequities, and the remedies will have far-reaching significance for millions of women workers and industrial pay practices. This Comment discusses the major issues surrounding a comparable worth claim under title VII and serves as a guide to understanding the comparable worth theory.

COMPARABLE WORTH DEFINITION

The theory underlying a comparable worth claim under title VII should be carefully defined. Otherwise, the application of a vague theory to a wide variety of wage situations easily leads to confusion, with opponents characterizing the comparable worth theory as rubric. Comparable worth is a relatively simple concept, cre-
ated as a necessary counterpart to the equal pay for equal work formula of the EPA. 17

The equal pay for equal work formula is applied when a male's job and a female's job are identical or substantially equal in function. 18 If the two jobs are "equal," then the pay must be equal. 19 Therefore, the equal work formula is useful in two ways: to determine illegal discrimination (by direct comparison of jobs); and to provide a remedy (by requiring the pay of the two jobs to be equal). 20

The modern function of the comparable worth standard under title VII is to provide flexibility by permitting review of discriminatory wage practices which do not have an equal work comparison. "Comparable worth" derives its name from the prescribed remedy for illegal wage discrimination: the determination of a fair wage by someone's job evaluation and by the comparison of different jobs' worths. 21 Contrary to the dual function of the equal work formula, comparable worth does not require comparison of the comparable worths of different jobs in order to determine liability under title VII.

A danger to avoid in defining comparable worth is the assumption that "comparable work" 22 is a substitute for "equal work" in the EPA's equal pay for equal work formula. The two standards serve two Acts which differ in substance and scope of liability.

Kahn, supra note 13, at 136 (comparable worth described as rubric); R. Livermash, COMPAREABLE WORTH: ISSUES AND ALTERNATIVES 1 (1980) (no definition exists).

17. See note 5 supra. The criteria for equal work include "the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ." 29 U.S.C. § 206(d) (2) (1976).


19. See 109 CONG. REC. 8914 (1963) (remarks of Senator McNamara, the chairman of the Senate Labor Subcommittee). Senator McNamara described the EPA as he introduced it on the Senate floor, as follows:

As we all know, the Fair Labor Standards Act provides that workers must be paid a decent minimum wage; that if employees must put in long hours, they must be paid at an overtime rate; and that children may only be employed under rigid conditions which protect their health and safety. The bill I now introduce would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex. 109 CONG. REC. 7294 (1963).

20. See note 19 supra.

21. For a discussion of who should evaluate job worth, see notes 163-77 infra.

22. For the historical background of this term, see notes 32-35 infra.
The EPA was devised to impose liability upon an employer who unequally paid employees for equal work, based on sex. In contrast, title VII was enacted as the first broad prohibition against all types of employment discrimination, including hiring, termination, promotion, and status, as well as compensation. Under title VII, a violation may occur when an employee's wage is adversely affected by any form of an employer's discriminatory practice or pattern of compensation, based on the employee's gender. No simple formula can cover every comparable worth claim which is possible under title VII and which requires evaluation of job worth for a remedy. Therefore, a comparable worth claim does not have the limited scope of the EPA standard, and the claim is not the equivalent of a "comparable work" formula.

An example of a comparable worth situation would be a female employed in a unique job position, and no equal position is held by a male. A comparable worth claimant would state that she was paid less than a man would have received in that job position solely because of unlawful sex discrimination. A violation under title VII would be demonstrated by testimony about the wage history of predecessors in that job, by disparate impact of company policy upon females and males, or by some type of discriminatory plan which worked against females. To remedy the injustice, the court cannot turn to an equal work position filled by a man because such a position does not exist. The remedy must be fashioned based upon an evaluation of the job's comparable worth.

Another comparable worth situation involves a company policy or practice which segregates female workers from male workers and reduces the pay of jobs dominated by the females.

23. For the text and a description of the EPA, see notes 5 & 8 supra. Also, the EPA coverage is limited to those employers subject to the Fair Labor Standards Act. S. Rep. No. 176, 88th Cong., 1st Sess. 2 (1963). Thus, as the Supreme Court distinguished the EPA from title VII, "the [EPA] does not apply, for example, to certain businesses engaged in retail sales, fishing, agriculture, and newspaper publishing." See 29 U.S.C. §§ 203(s), 213(a) (1976); County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4625 (1981).


25. If title VII claims had to satisfy the "equal work" standard of the EPA, the woman being underpaid in a unique job position would obtain no relief. See County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4628 (1981); Rinkel v. Associated Pipeline Contractors, 17 F.E.P. Cases 224, 226 (D. Alas. 1978).

26. See, e.g., notes 95-99 and accompanying text infra. In some circumstances, different jobs' wages may be directly compared to the jobs' equal worth to the employer. Liability may be rebuttably presumed from a pay inequity caused by discrimination. However, a "comparable worth formula" for liability like the EPA formula could again be used by the courts to exclude non-conforming, wage discrimination claims under title VII. For this reason, a comparable worth standard needs to be as inclusive as title VII itself.

type of policy was once openly practiced by some employers.\textsuperscript{28} Today this policy can continue through subtle variations such as job segregation, exploitation of a controlled supply of female workers, and manipulation of wages based on sex. The equal work formula of the EPA would deny a cause of action for any of these sex-based wage differentials, because equal work between the sexes is absent. Thus, a comparable worth standard is necessary for judicial review of all bona fide claims of sex-based wage discrimination under title VII.

\textbf{VALIDITY OF A COMPARABLE WORTH CLAIM: UNLAWFUL SEX-BASED WAGE DISCRIMINATION}

If comparable worth claims are to be validated, support must be drawn from the construction of title VII and Congress' intention to prohibit all sex-based wage discrimination. Arguments opposed to comparable worth claims raise two issues. First, did Congress seriously intend to prohibit sex discrimination, or was the sex classification in title VII insignificant; and second, did Congress intend the scope of title VII to include comparable worth claims, or was the EPA standard Congress' final word on sex-based wage discrimination? This section analyzes the relevant factors in an attempt to determine Congress' intent.

\textit{Statutory Authority}

All inquiries involving statutory construction should begin with the language of the statute.\textsuperscript{29} Title VII prohibits employment discrimination "because of such individual's race, color, religion, sex
or national origin. . ."\textsuperscript{30} The plain language of title VII seems to indicate that Congress intended to treat these various classifications equally. Nevertheless, an argument has been made that Congress implicitly excepted sex from title VII's strong prohibition because of the unique legislative histories of the EPA and title VII.\textsuperscript{31}

In 1963, one year prior to the passage of title VII, the EPA was enacted by the Eighty-eighth Congress, culminating eighteen years of legislative study of sex-based wage inequities.\textsuperscript{32} Congress rejected a "comparable work" formula for strict liability under the Fair Labor Standards Act as amended by the EPA. The debate in 1963, however, revealed that some legislators believed that "equal work" was a broader term than "comparable work."\textsuperscript{33} Also, inconsistent applications of a "comparable work" standard by the National War Labor Board had caused great confusion,\textsuperscript{34} and some legislators feared that strict liability would be imposed on an employer on a vague and subjective basis.\textsuperscript{35}

Then, in 1964, title VII was enacted by the same Eighty-eighth Congress.\textsuperscript{36} Only one day before approval of title VII, the word "sex" was added to the bill on the House floor, without prior hearings.\textsuperscript{37} Thus, very little information is available about Congress' intent.\textsuperscript{38}

Critics have attacked the application of title VII to comparable worth claims because of Congress' "cursory treatment" of the "sex" amendment.\textsuperscript{39} If the amendment had been adopted in a vacuum of time and thought, then the best conclusion about Congress' intent would be that we don't know. In fact, the Eighty-eighth Congress had only recently drawn upon tremendous quantities of information concerning sex discrimination in order to enact the EPA.\textsuperscript{40} Whereas the EPA was "one of the first steps toward an adjustment of balance in pay for women,"\textsuperscript{41} the amend-

\textsuperscript{31} Nelson, supra note 13, at 167-70.
\textsuperscript{33} Id. at 739-42.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} See id. at 742-49.
\textsuperscript{37} Id.
\textsuperscript{38} General Elec. v. Gilbert, 429 U.S. 125, 143 (1976). See Gitt, supra note 32, at 742-49. Supporters for the amendment carried the vote (168 to 133), 110 Cong. Rec. 2584 (1964), and also voted for title VII's passage (290 to 130) only two days later, 110 Cong. Rec. 2904 (1964).
\textsuperscript{39} See, e.g., Nelson, supra note 13, at 267-70.
\textsuperscript{40} See Gitt, supra note 32, at 739-39, 744.
\textsuperscript{41} 109 Cong. Rec. 9193 (1963) (Remarks of Rep. Bolton). The EPA was con-
ment of title VII to include sex, and its subsequent passage, can be viewed as an attempt during a period of heightened awareness and momentum to prohibit all discrimination in employment.\textsuperscript{42} Thus, arguments can be made on both sides because lack of legislative history for the "sex" amendment leaves intent open to interpretation.

Another argument attempts to diminish the significance of the sex classification in title VII compared to those classifications based on race, color, religion, and national origin. The congressional rejection of a "comparable work" standard for the EPA has been construed to imply a congressional intent to reject modern "comparable worth" claims.\textsuperscript{43} In addition, the claim is made that Congress implicitly promised the business community that no subsequent act would interfere with wages between the sexes unless the jobs were equal.\textsuperscript{44}

The mixed EPA history of legislative intent does not support or

\textsuperscript{42} The mood of the Country and the Congress was influenced by several events in 1963, as cited in Brief for Appellants, (IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980)), at 17 n.12:

\textsuperscript{43} E.g., Nelson, supra note 13, at 269-70.

refute these speculations. Because comparable work is distinguishable from modern comparable worth theory, the congressional action with the EPA does not seem applicable to a title VII comparable worth claim. In *United Steelworkers of America v. Weber*, the Supreme Court acknowledged the influence of the business community in the passage of title VII, for “Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for support that ‘management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible.’” The Court, in quoting Senator Humphrey, however, also noted that the EPA was triggered by a Nation’s concern over discrimination and was intended to aid its victims. It would be ironic if the EPA were to lead to the contraction, under title VII, of the rights of the very victims meant to be protected.

In *Franks v. Bouman Transportation Co.*, the Supreme Court apparently regarded all bases of discrimination as equally prohibited. In the absence of statutory language which excludes sex from title VII’s prohibition or a Supreme Court interpretation to the contrary, there is little reason to conclude that Congress intended to allow discriminatory behavior on the basis of sex which would be prohibited if done on the basis of race, religion, or national origin.

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46. Id. at 206.
47. Id. at 204.
49. The Court stated:

> We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, . . . and ordained that its policy of outlawing such discriminations should have the “highest priority” . . . .

Id. at 763 (citations omitted). Also, in *Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978), the Court stated:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid. It is now well recognized that employment decisions cannot be predicted on mere “stereo-typed” impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

The second major issue is whether Congress intended to limit the scope of title VII's coverage of sex-based compensation claims to the narrow reach of the EPA's equal pay for equal work standard. This issue arises from the equivocal language and history of the Bennett Amendment. This amendment was attached to title VII and stated that differentiations “authorized” by the EPA are not unlawful under title VII. The plain language of the Bennett Amendment seems to indicate that title VII is diluted only to the extent that it incorporates the four exceptions of wage differentials permitted by the EPA. Because of its unusual wording and brevity, however, the possibility of an alternative construction exists.

A narrow interpretation of the Bennett Amendment is that any behavior not addressed by the Equal Pay Act is not unlawful under title VII. In effect, title VII and the EPA would be coextensive, and any compensation claim under title VII would be governed by the EPA equal work standard or invalidated. Because the language of the amendment does not easily yield this narrow construction, legislative history is debated to support this interpretation.

When Senator Bennett introduced his amendment to the Sen-

51. The Bennett Amendment states in part:
   It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].


53. County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4625 (1981); IUE v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099 (3d Cir. 1980). Both courts referred to dictionary definitions of the word “authorize” which connotes an affirmative enabling action. BLACK’S LAW DICTIONARY 122 (5th ed. 1979) defines “authorize” as “[to] empower, to give a right or authority to act.” As the Supreme Court reasoned, the EPA's definition of a violation (the equal work standard) “can hardly be said to ‘authorize’ anything at all: it is purely prohibitive.” On the other hand, the four exceptions “in essence ‘authorize’ employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex. . . . It is to these provisions, therefore, that the Bennett Amendment must refer.” County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4625 (1981). See also Blumrosen, supra note 3, at 482-83.

54. See, e.g., Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); notes 65-69 infra.

55. Id.
ate, he explained: "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified. I understand that the leadership in charge of the bill [has] agreed to the amendment as a proper technical correction of the bill." Senator Dirksen responded that the pending amendment only recognized the EPA exceptions and carried them into the basic act. The amendment passed on the basis of these explanations to the congressional body.

Representative Celler explained to the House certain changes made by the Senate, including the Bennett Amendment. He said: "[The Senate amendment] provides that compliance with the Fair Labor Standards Act as amended, satisfies the requirement of the title barring discrimination because of sex—section

56. The complete history of the Bennett Amendment is set forth below:
Mr. BENNETT. Mr. President, I yield myself 2 minutes. . .
The PRESIDING OFFICER. The amendment will be stated.
The legislative clerk read as follows:
On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (19 U.S.C. 206(d))."
Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.
Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
Mr. DIRKSEN. Mr. President, I yield myself 1 minute. We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carried out certain exceptions.
All that the pending amendment does is recognize those exceptions, that are carried in the basic act. Therefore, this amendment is necessary, in the interest of clarification.
The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question)
The amendment was agreed to.
57. Id.
58. Id.
This might mean that title VII was no broader than the EPA. But title VII proscribes a broad range of gender-based discrimination which is not barred by the EPA, such as discriminatory promotions, transfers, and firing. A plausible construction of Celler's remark is that compliance with the EPA met the title VII's requirement on equal work issues alone.

Considering these remarks and the quick handling of the "technical correction" by Congress, the Supreme Court concluded, "only differentials attributable to the four affirmative defenses of the Equal Pay Act are 'authorized' by that Act within the meaning of . . . [the Bennett Amendment]." Comparable worth opponents refute this conclusion by citing Congressional memoranda which were submitted to Congress two months before and one year after the amendment was introduced. These statements, however, do not indicate the intent of Congress when the amendment was passed and should be accorded little, if any, weight.

The language of title VII and the legislative histories of the EPA, title VII, and the Bennett Amendment seem to indicate a harmonious relationship between title VII and the EPA, whereby

60. "If taken literally, . . . not only would it confine wage discrimination claims to those actionable under the Equal Pay Act, but it would block all other sex discrimination claims as well. We can only conclude that Representative Celler's explanation was not intended to be precise. . . ." County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4627 (1981). See also IUE v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099 (3d Cir. 1980).
62. Two months before the Bennett Amendment was introduced, Senator Clark introduced into the Congressional Record a memorandum which contained the statement: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 Cong. Rec. 7217 (1964) (remarks of Senator Clark). This could mean either that title VII is constrained by the EPA or that the EPA is controlling in equal work challenges under title VII, and the comment does not prove later intent. The only purpose served by this record is to suggest some interest of Congress in the interrelationship of the two acts.
63. The Supreme Court has warned, "[t]he views of the members of a later Congress, concerning different sections of title VII, enacted after this litigation was commenced, are entitled to little if any weight." International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977); IUE v. Westinghouse Elec. Corp., 631 F.2d at 1103, 1104 (3d Cir. 1980).
the limited EPA applies to equal work claims and broader title VII coverage includes all other claims of discrimination in compensation.⁶⁴

Case Authority

In the past, some courts have assumed without analysis that the Bennett Amendment restricted the scope of sex-based wage discrimination cases under title VII to the scope of the EPA.⁶⁵ If a claim did not involve equal work, the courts dismissed it and ignored the comparable worth issue.⁶⁶ In an early EPA case, the court commented that the Bennett Amendment mandated the construction of title VII in pari materia with EPA, although a method of harmonizing the statutes was not suggested.⁶⁷ Then in deciding EPA claims involving equal work, two circuit courts went beyond the issues presented to them and mandated a requirement of equal work to establish any wage discrimination claim under title VII.⁶⁸ Later, relying on this precedent, most courts which heard EPA claims summarily dismissed the question of title VII coverage of a claim where substantially equal work was not proven.⁶⁹ Recently in contrast, some courts have accepted compensation claims under title VII which could not be brought under the EPA; and in each case, some type of compara-

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⁶⁵ E.g., Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Orr v. MacNeill and Sons, Inc., 511 F.2d 166 (8th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1977).

⁶⁶ See cases cited in note 65 supra.


Recently, this doctrine was again applied to title VII through the Bennett Amendment by the argument that the more specific EPA should control claims of sex-based wage discrimination brought under the general title VII. County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4631 (1981) (Rehnquist, J., dissenting). The doctrine is inapposite to the two Acts, however, because the more specific EPA is not being controlled or nullified by an application of title VII. Title VII simply allows different claims to arise than are possible under the EPA’s narrow coverage. Justice Rehnquist’s application of the doctrine is arguably possible only if the EPA was enacted in order to limit the relief available to employees suffering wage discrimination because of their sex. This supposed intent is contrary to the overall purpose of the EPA. See notes 5, 19 and 23 supra.

⁶⁸ Orr v. MacNeill and Sons, Inc., 511 F.2d 166 (6th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

ble worth evaluation was necessary.\(^70\)

These various judicial decisions can be characterized by their utilization of two, alternative approaches to comparable worth-type claims. Under the first approach, the court first examines the remedy being sought by the plaintiff. If the imposition of this remedy is too burdensome on the court, no right or liability is found. Conversely, if the remedy is not perceived as too difficult for the court to fashion, the plaintiff's right and employer's liability are reviewed. The second approach taken by some courts is to apply the relevant statutory and case authorities to the facts of the case. If the employer violated title VII, then a remedy is fashioned in accord with the circumstances.

The first approach emphasizes the institutional and economic consequences of a remedy which adjusts wages. While one court may have no difficulty mandating a job evaluation plan to correct unlawful wage disparities affecting a large class of employees, another court may balk at the magnitude of the wage adjustment and instead prefer to fashion a remedy only for an individual plaintiff. Varying degrees of expertise and preference among the courts create uncertainty about the validity of a comparable worth claim.

For example, in *Rinkel v. Associated Pipeline Contractors*,\(^71\) the Ninth Circuit permitted a comparable worth claim when an individual plaintiff sought relief from discrimination in her unique job position. The remedy involved only evaluation of one job's worth. On the other hand, in the complex job segregation case of *Christensen v. Iowa*,\(^72\) the court focused on the burden of fashioning a


\(^{71}\) 602 F.2d 882 (9th Cir. 1980).

\(^{72}\) 563 F.2d 353 (8th Cir. 1977). In a class action, female clerical employees at a state university alleged illegal sex discrimination in compensation under title VII. The university instituted a pay scheme, known as the Hayes System, under which compensation was to be based on an objective evaluation of each job's relative worth to the employer regardless of the market price. The system was designed to establish "internal equity" among university jobs. However, because the local job market paid higher wages for physical plant jobs than the beginning pay under the school system, the university paid the physical plant employees, mostly men, more than the clerical employees, all females, despite equivalent seniority and jobs in the same labor grade. Plaintiffs argued that long-standing discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an over-supply of workers and depressed
remedy which would adjust the wages of a class of employees and affect the local market rate for labor. The court believed there was no need to resolve the conflict over the Bennett Amendment, EPA, and title VII. The plaintiffs failed to establish their case because they had ignored "economic realities." Basing a decision upon the economic impact of a proposed remedy has led to contradictions within the same court. In March, 1980, the Tenth Circuit in Fitzgerald v. Sirloin Stockade was confronted with proof of an employer's discriminatory practice against an individual employee. Plaintiff conceded that she did not perform the same work as her predecessor but asserted a title VII claim. The court found the discriminatory wage behavior to be a violation of title VII; and because plaintiff was no longer an employee of the defendant, the remedy did not involve any adjustment of her present wage. One month later in Lemons v. City of Denver, the Tenth Circuit decided that the plaintiffs' rights to challenge wage discrimination in a job segregation claim were curtailed by the remedial problems perceived by both district and circuit courts. With protest of "Big Brother" and incredulous reference to congressional intent, the district court refused to take on the task of changing the City's reliance on low market rates for the wages of nurses. Contradictions within the same wages in those jobs. The district court rejected plaintiffs' claim and the court of appeals held that plaintiffs failed to establish a prima facie case of illegal sex discrimination in compensation, solely because higher wages were paid to one but not another job of equal value to the employer. See the discussion of the labor market competition arguments at notes 136-54 and text accompanying infra and statutory exemptions at notes 129-35 and text accompanying infra.

73. Christensen v. Iowa, 563 F.2d at 355.
74. Id. at 356.
75. 624 F.2d 945 (10th Cir. 1980).
76. Id. Plaintiff was an employee of Sirloin Stockade. She showed a history of being denied pay equal to that of a predecessor. Her opportunity for advancement was denied, and the company retaliated against her when she filed a complaint in the state office. She left that position, and a return to employment at Sirloin Stockade was not possible because of the hostility directed toward her.
77. Id. "Here a finding of discrimination under Title VII does not conflict with the provisions of the Equal Pay Act. It was found that the plaintiff was discriminated against solely because of her sex in a manner which is not within the scope of the Equal Pay Act." Id. at 953 n.2.
78. 17 F.E.P. Cases 908 (D. Col. 1978), aff'd, 620 F.2d 228 (10th Cir. 1980), cert. denied, 101 S. Ct. 244 (1980). Plaintiffs were in the nursing profession (female dominated) and contended that the City was illegally discriminating by paying nurses at their market rate, which was less than what comparable work in the male-dominated occupations earned. Plaintiffs showed a history of being underpaid by the City's reliance on the labor market scale.
79. The judge said in an oral opinion:
I think that to structure the classification system in the way plaintiffs seek to structure it would be unrealistic. . . . If we are to have, in this country, the legendary 1984 as expressed in the book, the Big Brother looking over our shoulder who is going to dictate our day-to-day ways of life, it's going
court are possible under the first approach, where the validity of each comparable worth claim depends on the court's informal preliminary judgment of the difficulty of fashioning a remedy.

On the other hand, the second approach has been to consistently apply title VII to each case. For example, in 1980, the Ninth Circuit was the first court to inquire into the statutory construction for a claim of discrimination by job segregation of the sexes.80 Later in the same year, the Third Circuit held in favor of a plaintiff's class action for sex-based wage discrimination under title VII after analyzing the relationship between title VII, the Bennett Amendment, and the EPA.81 Then in 1981, the Supreme Court affirmed the Ninth Circuit's decision, based on statutory construction of the Acts.82

In County of Washington v. Gunther,83 four female matrons of a prison sued to recover compensation equivalent to that of the male guards in the prison. Plaintiffs contended that the County "evaluated the worth of their jobs; that the County determined that they should be paid approximately ninety-five percent as much as the male correctional officers; that it paid them only seventy percent as much, while paying the male officers the full evaluated worth of their jobs . . . "; and that a history of intentional sex-based discriminatory wage practice resulted in an unlawful wage disparity under title VII.84 The district court rejected plaintiffs' alternative claim of equal work as insufficient to meet the standard of the EPA, and the court dismissed the case without considering the title VII argument. The court of appeals reversed this decision on the ground that a theory might exist which could establish a violation of title VII based on wage discrimination.85

... to have to come from the Congress. It's not going to come at least from this Court.

Id. at 914. The courts were persuaded by some of the labor market competition arguments, discussed in notes 135-54 and accompanying text infra.

80. Gunther v. County of Wash., 623 F.2d 1303 (9th Cir. 1980).
83. Id. Four women, formerly jail matrons, challenged the disparate pay between the matrons and male guards, and their firing in retaliation for demanding equal pay under title VII. Matrons guarded female prisoners and performed some clerical work. Male guards guarded male prisoners in another section of the prison.
84. Id. at 4628. A comparable worth theory per se was not argued, although the claim required a comparable worth remedy. Id. at 4624-25.
85. Gunther v. County of Wash., 623 F.2d 1303, 1311 (9th Cir. 1980). Plaintiffs failed to prove equal work because the matrons performed some clerical work in
To allow dismissal, the court reasoned, would insulate certain discriminatory practices from judicial review.\textsuperscript{86} The Supreme Court affirmed the judgment of the court of appeals, holding that "respondents' claims of discriminatory undercompensation are not barred by \textsection{703(h)} [Bennett Amendment] of Title VII merely because respondents do not perform work equal to that of male jail guards."\textsuperscript{87} This decision consisted of an analysis of language, legislative histories, and the remedial purposes of title VII and the EPA. The Court found no clear congressional mandate to deprive victims of discrimination of a remedy under title VII.\textsuperscript{88} On the other hand, "Congress surely did not intend the Bennett Amendment to insulate . . . blatantly discriminatory practices from judicial redress under Title VII."\textsuperscript{89}

The Court heard the argument that "the pay structures of virtually every employer and the entire economy . . . [would be] at risk and subject to scrutiny by the federal courts."\textsuperscript{90} The merits of this argument, however, were found inapplicable here because the County, not the courts, had already evaluated the worth of the jobs in question; thus a court need not make its own assessment of the value of jobs or impact of discrimination.\textsuperscript{91} The entire impact of the Court's decision on future comparable worth claims was avoided because of a vague distinction that "[r]espondents' claim is not based on the controversial concept of 'comparable worth,' . . . [but] [r]ather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination. . . ."\textsuperscript{92} Liability for sex-based wage discrimination was established by \textit{Gunther}, but the Court evaded a general discussion of comparable worth claims because the remedy was clearly available without judicial involvement. Nevertheless,

\begin{footnotesize}
\begin{itemize}
\item To guard the prisoners, and the district court distinguished the rigors of guarding female or male prisoners. The district court followed the judicial precedent of restricting title VII compensation claims to the EPA standards. \textit{See} Diehl, \textit{Civil Rights: Relationship of Title VII & the Equal Pay Act—New Muscle for the Struggle Against Sex Discrimination}, 19 \textit{Washburn L.J.} 554, 560-64 (1980); Note, \textit{The Bennett Amendment—Title VII and Gender Based Discrimination}, 68 \textit{Geo. L.J.} 1172 (1980).\textsuperscript{86}
\item Gunther v. County of Wash., 623 F.2d 1303, 1313 (9th Cir. 1980).\textsuperscript{87}
\item County of Wash. v. Gunther, 49 U.S.L.W. 4623, 4629 (1981).\textsuperscript{88}
\item Id. at 4628.\textsuperscript{89}
\item Id.\textsuperscript{90}
\item Id.\textsuperscript{91}
\item Id. at 4628-29.\textsuperscript{92}
\item Id. at 4624-25. This case is deficient in the area of comparable worth theory, because no guidance is given to what theory under title VII is acceptable. The introduction of an "intent" requirement for proving a title VII violation is a dangerous limitation as discussed in notes 105-15 \textit{infra} and accompanying text.
\end{itemize}
\end{footnotesize}
it should only be a matter of time before an individual's claim can prove liability without offering a simple remedy to the Court.

Meanwhile, successful cases seem to present circumstances where computation of fair wages is not a judicial problem. In *International U. of Elec. (IUE) v. Westinghouse Electric Corp.*, plaintiffs' argument strongly emphasized the openly discriminatory purpose behind the company's compensation practices and depicted the remedial job evaluation process as a secondary and manageable matter for the court. Although the claim was not expressly characterized as "comparable worth," the allegation of a discriminatory plan for compensation raised a comparable worth issue.

The Westinghouse plant opened in 1917; and prior to 1965, all of the jobs at the plant were segregated as to sex. In the late 1930's, Westinghouse adopted a job evaluation procedure for establishing a rate structure. The first two steps involved calculating the inherent value of each job, regardless of the employee's sex. A labor grade was assigned to each job. Then the company's Industrial Relations Manual instructed plant officials to compensate women's jobs at a lower wage than men's jobs which had received the same point rating. In 1965, the separate wage scales


94. Reply Brief for Appellant at 25 n.21.

95. The court adopted the plaintiffs' version of the facts. IUE v. Westinghouse Elec. Corp., 631 F.2d at 1097 n.3 (3d Cir. 1980).

There were "male" jobs and "female" jobs, but no jobs in which both men and women worked. The female jobs were assembly line jobs, "sub-assembly" jobs...and "quality control" jobs.... The male jobs included various material handling jobs...janitor, forklift operator, warehouseman, machine attendant and craft jobs. The substantial majority of the employees in the plant have always been women.

96. The Manual stated:

**WAGE RATES FOR WOMEN**

The gradient of the women's wage curve...is not the same for women as for men because of the more transient character of the service of the former, the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, extra help needed for the occasional heavy work, and the general sociological factors not requiring discussion herein.

The rate or range for Labor Grades do not coincide with the values on the men's scale. Basically then, we have another wage curve or Key Sheet for women below and not parallel with the men's curve.
by sex were united into one scale with no sexual designation. The women's jobs labor grades were generally placed below those of the male jobs that had been at the same labor grade level before the merger. Subsequently, the male-female rate disparities were maintained or enlarged, and women remained clustered in their traditional lower-paying jobs through the company's job placement.97

The comparable worth issue is central in IUE as the court explained: "The problem here is that Westinghouse allegedly used a system which set the wage rates lower for any classification if the group covered within that category was predominantly female."98 The burden upon the court to compare jobs' worth was not heavy since the existing job grade levels set by Westinghouse made the comparison relatively simple.99 In these circumstances, the court analyzed the problem primarily in terms of the statutory violation, and a practical concern with the economic outcome of the decision was not evident in the determination of a title VII violation.

Liability for a claim of sex-based wage discrimination under title VII has been established by the Supreme Court in Gunther, which held that a claim is not barred merely because claimants do not perform work equal to that of an employee of the opposite sex.100 No guidelines, however, were provided in Gunther for the theory and scope of such a cause of action under title VII. Prior to Gunther, those courts which approved claims involving a comparable worth remedy under title VII tended to emphasize statutory construction of language, legislative history, and the underlying policy prohibiting sex-based discrimination consistent with other forms of discrimination. Those courts which denied comparable worth claims under title VII were primarily concerned with the economy, difficulty, and costs of change to non-discriminatory practices. While the earlier courts reflected a refusal to go beyond an equal work standard for any compensation-type claims, recent courts have demonstrated a willingness to find a remedy for a discriminatory injury rather than immunize certain discriminatory acts from liability.

Brief for Appellant at 7 (Emphasis added).
97. Id. at 9-11.
98. IUE v. Westinghouse Elec. Corp., 631 F.2d 1094, 1096-97 (3d Cir. 1980). The court appropriately described the problem as use of a system which discriminated. Evidence of intent is rare, and Congress emphasized the consequences of employment discrimination under title VII. See notes 105-15 and accompanying text infra.
99. Yet the unique facts surrounding this case and the lack of comparable worth language in the claim make the future application of this decision uncertain.
Establishing a Comparable Worth Claim

Stating a Cause of Action

No court has yet suggested a comprehensive theory for stating a comparable worth cause of action. Until a theory develops, notice to the employer of the action will probably utilize Title VII's language. Title VII states that,

[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would . . . adversely affect his status as an employee, because of such individual's . . . sex . . . .

A cause of action alleging an injury from the consequences of a discriminatory practice should be sufficient in those courts which base the validity of the cause of action upon an examination of the relationship and meaning of Title VII, EPA, and the Bennett Amendment.

Burden of Proof

The survival of a valid comparable worth claim under judicial review depends upon the burden of proof imposed on the plaintiff. Generally in a Title VII case, the plaintiff must prove an adverse or disparate impact on wages because of discriminatory practices, which then shifts the burden to the employer to justify the behavior. If a court imposes on the plaintiff the additional burden of proving an employer's subjective intent to discriminate, establishing a prima facie case becomes virtually impossible except in rare circumstances where there is extraordinary evidence of discrimination. Resolving what constitutes a prima facie case is critical for the future of comparable worth litigation.

102. As noted by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the language of Title VII places primary emphasis upon the consequences of an employer's practice. For a proposed action based on sex segregation and wage discrimination, see Blumrosen, supra note 3, at 475-87.
In *Griggs v. Duke Power Co.*, the Supreme Court considered the burden of proof for a prima facie case under Title VII and held that facially neutral employment policies which disparately affect a protected class constitute unlawful discrimination. The absence of intent to discriminate is irrelevant; “good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as ‘built-in headwinds’ for minority groups and are unrelated to job capacity.” A disparate impact analysis of a comparable worth prima facie case would require that the wage differential between a female's and male's compensation exists because of sex discrimination and not a factor other than sex. This analysis becomes important when blatant, discriminatory policies are abandoned in favor of subtle forms of discrimination.

If a prima facie case must demonstrate a discriminatory intent or purpose, subtle discriminatory acts will be impossible to prove. Comparable worth proponents have feared that recent decisions of the Supreme Court requiring proof of intent in equal protection cases would be applied to Title VII issues of proof. Certain language in *Gunther* might reinforce these fears, because the respondents sought to prove intentional discrimination, and the Court was content to limit its decision to that question of intent. The dissenting opinion stated: “[a]ll we may conclude is that even absent a showing of equal work, there is a cause of action under Title VII where there is direct evidence that an employer has intentionally depressed a woman's salary because she is a woman.” The dissent's conclusion does not account for the majority opinion's quote of *Griggs*, that title VII proscribes “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” A reasonable conclusion is that the Court has not directly addressed the question of whether intent is required in all Title VII compensation claims.

The Court has two reasons to make a distinction between the Title VII standard of proof and the constitutional issue of equal protection. First, in *Washington v. Davis*, the Court itself distinguished a constitutional claim from a claim under Title VII by

106. Id. at 432.
107. See “statutory exemptions” notes 129-35 and accompanying text infra.
110. Id. at 4635.
111. Id. at 4626.
noting that a title VII claim deserved Court deference to the congressional emphasis upon discriminatory consequences.\textsuperscript{113} This deference has not lost its basis in sound reasoning over recent years. Requiring discriminatory intent in a title VII case would debilitate the congressional prohibition of discriminatory consequences.\textsuperscript{114}

Second, the language of the statutory defenses indicates that the employer may justify a wage differential with one of several lawful exceptions to discriminatory practices.\textsuperscript{115} Congress provided exceptional, lawful practices as protection for the employer, in the face of a proven wage differential. If Congress intended to require proof of intent, the wage differential would have little significance by itself, and Congress would have allowed any reasonable, good faith defense to a claim of invidious purpose. A review of the statutory provisions supports the conclusion that proof of a discriminatory intent was not required by Congress.

The burden of proof is heavy enough without imposing an intent requirement. This burden was practically met in successful wage discrimination cases by a variety of strategies. One strategy was to demonstrate employer practices which were openly discriminatory at some point in history.\textsuperscript{116} Also successful were strategies which focused on one woman's struggle against open discrimination\textsuperscript{117} or an on-going plan which furthered a once openly discriminatory practice.\textsuperscript{118} Finally, some courts have shown sensitivity to the seriousness of wage discrimination when the alternative to a remedy was insulation from review\textsuperscript{119} or permitting the same behavior prohibited on the basis of race, religion, or national origin.\textsuperscript{120}

\textsuperscript{113} Id. at 239, 246-47.
\textsuperscript{114} In Gilbert v. General Elec., 419 U.S. 125 (1976), the Court utilized equal protection standards in deciding a title VII action. "Since the intermediate scrutiny standard adopted for claims of unconstitutional sex discrimination legitimizes some sex-based discrimination, . . . incorporation of those standards into title VII would dilute the definition of discrimination that the courts had evolved." Berger, Litigation on Behal of Women, Lib. of Cong. Cat. No. 80-66022 31 (1980).
\textsuperscript{115} See "statutory exemptions" notes 129-35 and accompanying text infra.
\textsuperscript{116} IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980).
\textsuperscript{117} Cf. Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980) (showed a history of being denied equal pay to a predecessor, denial of opportunity and retaliation for filing a complaint).
\textsuperscript{118} IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980) (demonstrated a past discriminatory plan which was perpetuated).
\textsuperscript{119} Id., Gunther v. County of Wash., 623 F.2d 1303 (9th Cir. 1980).
\textsuperscript{120} IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980).
Specific evidence that a gross injustice is occurring and that something must be done about it is a strong form of persuasion in a comparable worth situation. Without the open history, a specific account of an individual, or a high degree of seriousness, the plaintiff must rely on statistics and expert witnesses to underscore the importance of the case's theory.

Ample statistics are available to demonstrate historical and contemporary job segregation by sex, the major employment of women in the workforce, and women's career and financial responsibilities related to employment. These statistics cannot directly prove or disprove an employer's discriminatory practices; but showing pervasive statistical disparities in positions between females and males, bolstered by testimony of specific instances of discrimination, might support a claim of a systemwide pattern or practice of employment discrimination.

In particular, estimates of wage differentials by sex, derived from multiple regression analysis, are used in matters of proof. A statistician estimates what earnings would have been if employees were identical in every respect measured except sex. Controlling factors vary, such as race, age, education, experience, seniority, earnings, parental income, geographical regions, labor market conditions, geographic mobility, seasonal employment, marital status, absenteeism, etc. The studies themselves are not readily available, but the results are often well-publicized in terms of percentage (i.e., women earn only 58% of wages earned by men).

**Defenses**

Title VII contains exemptions which protect the interests of

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126. See Blumrosen, *supra* note 3, at 455-56, n.220 (citing Oaxaca, Theory & Measurement in the Economics of Discrimination in Equal Rights and Industrial Relations 26 (1977)). Table 1 on estimates of wage differentials by sex and race lists 8 studies, some of which are unpublished.

those charged with discrimination. If a discriminatory practice is not exempt, an employer may argue that "reality," based upon a classical economic theory, undermines the sex-based wage discrimination allegations. Finally, an employer may decide that the best defense is an offense, in the form of reasons why the court should permit discriminatory practices to continue.

Statutory exemptions

Section 703(a) of title VII permits classification on the basis of sex, religion or national origin (but not race) where sex, religion or national origin are bona fide occupational qualifications. Section 703(h) provides that it shall not be unlawful for an employer to use seniority, merit or testing systems in order "to apply different standards of compensation, or different terms, conditions or privileges of employment," provided that such a system is not designed or used to discriminate.

The Bennett Amendment serves to incorporate the EPA exceptions into title VII for claims of unlawful wage differentials. These exceptions are similar to title VII's exemptions, with one important addition. "No employer . . . shall discriminate, . . . except where such payment is made pursuant to . . . (iv) a differential based on any factor other than sex." The Supreme Court in Gunther noted that "incorporation of the fourth affirmative defense could have significant consequences for title VII litigation." Whereas the title VII prohibition extends to subtle discrimination in operation, the EPA exception was designed to limit employer liability and to prevent courts and ad
ministrative agencies from judging practices causing disparate impact, as long as the practices were not based on sex.\textsuperscript{134} This problem remains unresolved, for the Court declined to decide "how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act. . . ."\textsuperscript{135}

Many legitimate factors can cause a wage differential, sex being the only unlawful factor. The employer may be able to demonstrate that adjustment for a legitimate factor would eliminate the wage differential originally attributed to sex or that a legitimate factor may cause the same effect upon the wages of an analogous group of workers who are not segregated by sex. The regrettable problem in this unresolved area is that no one yet knows whether this defense will swallow up the liability or will become ineffective in operation.

Labor market competition arguments

Employers have attempted unsuccessfully to argue that they should pay women less than men because of the market rate.\textsuperscript{136} But some courts have taken judicial notice of "economic realities" involving the market rate and stressed practical considerations in determining wages.\textsuperscript{137} Two common defensive rationales for a sex-based wage differential are that women workers' rates of pay are (1) determined by what other employers pay women workers in the community or (2) a reflection of the jobs' values based on a classical competition theory of the labor market involving supply and demand.

First, the determination of wages by large employers is more complicated than a simple referral to other employer practices. A worker's rate is composed of two elements.\textsuperscript{138} One element is the

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Brookhaven General Hosp., 439 F.2d 719, 726 (5th Cir. 1970). This argument is distinct from the remedial problem facing a court which is concerned about affecting the market rate. See Lemons v. City of Denver, 17 F.E.P. Cases 906 (D. Col. 1978), aff'd, 620 F.2d 228 (10th Cir. 1980), cert. denied, 101 S. Ct. 244 (1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). Concern over impact on the marketplace is not shared by all comparable worth opponents. "If the 'comparable worth' theory is widely adopted, eventually the discrepancy between marketplace wages and wages developed in accordance with an unbiased rating system should be sharply reduced, if not eliminated. The short-term impact of comparable worth, however, presents rather complex questions of statutory construction and public policy." Kahn, supra note 13, at 141 n.17.
\textsuperscript{137} See Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Lemons v. City of Denver, 17 F.E.P. Cases 906 (D. Col. 1978), aff'd, 620 F.2d 228 (10th Cir. 1980), cert. denied, 101 S. Ct. 244 (1980).
\textsuperscript{138} N. CHAMBERLAIN & D. CULLEN, THE LABOR SECTOR 295 (1971).
average wage "level" of the company in comparison with other companies in the same industry or the same community. The other element is the wage "structure" within a company; jobs are sorted out and assigned specific wage rates in relation to each other. The combination of these two elements leads to wage differentials within the firm and between firms. In any local labor market, some firms are known as high-paying and others as low-paying, and the wage spread between firms for the same work may be considerable.

While no wage is determined with complete disregard for external market forces, the company's wage structure usually demands higher priority for the maintenance of an internal hierarchy of wages per job worth and status. The intrafirm wage structure is principally based on the functional worth of one job relative to another. In an unusual situation, this structured wage may give way to a higher wage in order to compete with other firms for a highly desirable employee. But in that circumstance, the external market rate for the desirable employee requires a higher minimum wage offer than the firm had evaluated originally for the job. The reverse argument that a low community market rate for female workers should lower the wages paid to females fails to be a "business necessity" and constitutes exploitation of one sex's classification in the market.

Given the many factors involved in wage determination, the market rate is significant as a mirror of the practices and needs of large employers in the community. Reliance, then, on the market rate as a justification for reducing female workers' wages lacks substance as defense and promotes circular reasoning contrary to the statutory mandate of title VII.

Second, arguments are made that female wages reflect what their labor is worth, determined by the classical theory of supply

139. Id. at 387, 391.
140. Id.
141. Id. at 322. "[T]he necessity to maintain some relationship within [a company's] own wage-ratio structure transcends any pressure to maintain a relationship with the labor market as a whole for the particular grade of labor." Id. at 392.
142. Id. at 296.
143. Id.
and demand in a free society. A premise of the classical theory is a perfectly competitive labor market which assumes the following factors to be true on the supply-side of the market: "workers have full and perfect knowledge of the market, including information on opportunities available and wage rates; . . . labor is not organized; and each laborer makes [her] own decisions on accepting jobs and wages." On the demand-side of the market, some of the necessary conditions would be: "each employer represents a small enough share of the total demand for labor that his decision will not influence the market as a whole; . . . [and] employers act individually, and not in concert, in determining their wage and employment levels." The classic competitive system ignores unions and large companies which can control the supply of labor and set the wages. While supply and demand creates a theoretical "system," in fact the theory has not worked for predicting results with sub-groups of "secondary workers" (including women). Assumptions about workers are required for the theory to "work" and reflect preferences of the theoreticians about labor participation.

When women workers in low-paying jobs are uninformed about wage rates and depicted as temporarily working for pin money, or when mobility is hampered by economic responsibility for others, or when female-dominated jobs are unrepresented by unions and informally devalued by large employers, the individual woman is not in an equal position to bargain. Business, government, and other organizations in this country have a high demand for cer-

147. Id. at 178.

In many small towns and rural areas, for instance, a wife may be lucky to hold down any job, and the notion of prospecting for a better job is rather fanciful. In such situations, it can even be said that a firm which employs primarily women can in effect create its own labor supply by moving into the area . . . . If a firm leaves such an area, just the reverse may occur as previously employed wives withdraw from the labor force.

Id. at 351.
149. Clearly, these assumptions reflect the theory of a free individual in an equal bargaining position with an employer in a free society, where other employment opportunities exist if the "bargain" is unsatisfactory to the potential employee. The pure competition theory is the basis for attacking comparable worth. A free society where no one is a slave and everyone bargains "equally" with employers has been asserted. See R. Livernash, Comparable Worth: Issues & Alternatives 85 (1980). Yet, "we can hardly conceive of 75 million different rates flying off in all directions, each one pursuing its independent course without reference to any other rate that workers in the labor force are receiving." N. Chamberlain & D. Cullen, The Labor Sector 359 (1971).
tain work positions filled mostly by females, such as secretaries, clerks, nurses, certain factory workers, and domestic/service workers. The possibility of controlling this female labor supply should not be relegated to historical acts of discrimination when subtle control is within the ability of multinational corporations and large employer “wage-setters.”

Critics of the competition theory also point out other weaknesses in the theory, such as the importance of social status in setting wages, the wage differentials that exist both intra- and inter-firm, the employer’s “taste for discrimination” which limits the employee’s bargaining position, and outright prejudice which operates especially when the employer believes he has the legal right to discriminate. The labor market competition theory as a system to justify wages has failed to account for many factual results in the United States economy.

Theories justifying sex-based wage differentials

The labor market competition theory implicitly assigns fault to the individual woman worker who bargained poorly and found herself underpaid. In contrast, other theories focus on either supply or demand influences to explain why there should be a sex-based wage differential.

On the supply-side, a human capital theorist might argue that most women wish to be wives and mothers full-time and to be devoted for years to home and child care. After working briefly to “pad the nest,” the typical woman is expected to retire to home and participate minimally if at all in the labor force. Even if she returns later, this intermittent pattern of labor force activity reduces the rate of return to human capital investment. Women

151. Status relationships of deference and obligation are present in economic organizations, and upper rungs on the organization chart represent superior positions. “In most economic pursuits, women are regarded as inferior to men,” and this status consideration can operate in the determination of wages. Id. at 385-87.
152. Id. at 385; F. MARSHALL, A. KING & V. BRIGGS, JR., LABOR ECONOMICS 507 (1980).
154. “[E]mployers often have worker preferences and will pay more or less depending on the kind of workers that satisfies them. Often these preferences are in the nature of prejudices (of race . . ., sex . . .) without necessary relation to work ability.” N. CHAMBERLAIN & D. CULLEN, THE LABOR SECTOR 371 (1971).
would predictably train less for work, lose their skills in retirement, and be attracted to jobs requiring little training.156

This theory does not conform to real-life facts. Women do not all marry or have children, do not necessarily stop work upon bearing a child, and do not begin work with less training than their male counterpart who is offered more money.157 Women earn less than men at the start of their careers and the gap widens as the men and women age, even as work experience and training level increase.158 Finally, the fact that some women “drop out” of the labor force to care for their children could also be explained by labor market discrimination. Discouraging dead-end work lowers the cost of nonparticipation.159

On the demand-side, employers might depict all women as poor risks for employment. Higher quitting rates than men and short career spans seem to support statistical discrimination.160 This theory suggests that employers treat each woman as a member of this high risk, statistical group, including career-minded women with separate attributes. Excluding women from training ladders and the best-paying jobs for this theoretical reason is greatly unfair to many individuals; women workers are employed an average twenty-three years in the labor force.161 Quitting and low expectations are reinforced by this treatment.

Finally, the existing wage differentials are justified by outrageous cost estimates to change employment practices. The actual correction of wage inequities is negotiable by degree and makes the estimates of cost vary greatly. In addition, alarming cost estimates can be produced by incorporating costs for a massive regu-

157. Id.
159. F. MARSHALL, A. KING & V. BRIGGS, JR., LABOR ECONOMICS 511 (1980). The theory as a set of principles continues to have limited value, for instance, as only one factor in the wage-setting process.
160. See WOMEN'S BUREAU, U.S. DEPT. OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 5-6 (1979). The theory of statistical discrimination is that most employers will perceive a woman as a member of a high-risk group (higher overall quitting rate than men) in considering an employee for specific training. Employers will be unwilling to acquire costly information to distinguish one woman from another, and consequently, women in general, including the career-minded, are excluded from training ladders and advancement in pay. See, e.g., F. MARSHALL, A. KING & V. BRIGGS, JR., LABOR ECONOMICS 262-91, 511 (1980).
latory bureaucracy (which is not proposed by anyone except comparable worth opponents). 162

No cost analysis is complete until the benefit has also been analyzed. The producers of work who would receive higher wages are also the consumers who would spend that money in the economy. Those workers would no longer be discriminated against because of their sex; and instead of discouragement, higher productivity would be a reasonable result. The integration of “female” work into a bias-free wage structure would boost morale and incentive to invest in the organization’s growth and future.

**COMPARABLE WORTH REMEDIES**

Once a wage violation of title VII is found, attention turns to the determination of fair wages. At this point, several arguments might arise in an attempt to defeat the remedial comparison of pay and job values. These opposing arguments are eclectic; they question the court’s remedial power, express alarm at government regulation, insist that the best remedy is employment transfer, or stress the unreasonableness of the remedial burden upon the court or society. In the early stage of developing comparable worth remedies, all parties should take responsibility for developing fair methods of correcting wage inequity and be prepared to assist the court in its consideration of remedial options.

Courts have broad remedial power under title VII and “may enjoin the respondent from engaging in such unlawful employment practice, and other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring

162. *E.g.*, “[T]o raise the aggregate pay of the country’s 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls.” Smith, The EEOC’s Bold Foray Into Job Evaluation, FORTUNE 58-59 (Sept. 11, 1978).

Scenarios of disaster have not been included in this discussion of cost. In Nelson, *supra* note 13, at 291-94, the following predictions threaten women’s participation in the work force: rather than correct wage inequities, companies will eliminate women’s jobs through automation; the law will be ingeniously avoided, analogous to IRS regulation manipulation; women’s jobs will be exported to overseas competition, i.e., where garment workers make 30 cents per hour; illegal aliens will be imported to work for menial sums; and inflation will increase, affecting investments and savings poorly (although this is the least concern for low-paid women workers).

These threats are shocking because they are intended to discourage the congressional intent of title VII and frighten judges into submission. They indicate the seriousness of comparable worth opponents, implying the law is no restraint.
of employees, with or without pay . . . , or any other equitable relief as the court deems appropriate . . . .”\footnote{163} The remedial goal is to “make persons whole for injuries suffered on account of unlawful employment discrimination.”\footnote{164}

Title VII remedies for non-wage violations have caused major changes in business and institutional practices.\footnote{165} Opponents to comparable worth claims suggest that a Title VII remedy for sex-based wage discrimination will usher in a Big Brother state of government control.\footnote{166} While major changes of some employers’ methods are possible, the idea of a new government bureaucracy to regulate wages has no basis in comparable worth theory \textit{per se} or in the statutory language of Title VII. First, the law is a prohibition of illegal discriminatory practices and does not impose a federal system of wages. Affirmative action by the court must be appropriate to each case’s particular facts, and the court has equitable alternatives to consider according to the circumstances.\footnote{167} For instance, the employers, not the courts, performed evaluations of job worth in both \textit{Gunther} and \textit{IUE}.\footnote{168} Second, relief is available now for wage discrimination based on race, color, religion, or national origin; the arguments apply only to denial on a sex-basis. Therefore, the speculative prediction of a unitary system of wage control serves primarily to alarm the court and encourage retreat.

Another argument to defeat a comparable worth remedy is that


\footnotetext[164]{Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The Court held that an individual who suffered illegal discrimination is presumptively entitled to an award of back pay. Also, back pay could be awarded to class members who did not personally file a charge. \textit{Id.} at 418.

\footnotetext[165]{It has upset recruitment procedures which were time-honored, such as ‘word of mouth’ recruiting; it has struck down employment selection procedures such as pre-employment tests which were viewed as essential to the operation of industry; it has required changes in seniority systems which were the fruit of national policy favoring the collective bargaining process; and it has required psychological adjustments by millions of workers and thousands of employers who have had to abandon the application of their beliefs concerning the place of minorities and women. It has worked a major revision in our industrial relations systems. Furthermore, this heavy impact on traditional ways of doing business was known to the Congress which in 1972 expanded Title VII and strengthened the EEOC. Thus, the suggestion that Title VII was not intended to interfere with the operation of the wage setting process is without foundation. Blumrosen, \textit{supra} note 3, at 468-69.

\footnotetext[166]{See note 79 and accompanying text \textit{supra}.

\footnotetext[167]{Under title VII, the court may take “such affirmative action as may be appropriate. . . .” 42 U.S.C. § 2000e (1976).

women workers always have the opportunity to transfer from a low to a higher paying job.\textsuperscript{169} To support this theory, title VII is characterized as a strictly limited prohibition against denial of employment opportunity.\textsuperscript{170} This argument ignores large portions of the statutory prohibition concerning discriminatory practices in compensation or practices which adversely affect the status of the employee based on sex.\textsuperscript{171} Also, the possibility for a worker to transfer jobs does not always exist.

Consider a hypothetical town with two or three principal employers. The female secretaries in town were underpaid solely because of their sex, and they won a class action suit under title VII. A remedy requiring their transfer into different and better paying jobs in the next town would involve factors of re-training, mobility, and actual job opportunities in a bad economy. This "opportunity" remedy would be no remedy at all. As an argument against any comparable worth remedy, it serves as an evasion of responsibility.

The responsibility for correcting wage inequities can be imposed by the courts or assumed by an employer in several alternative forms. First, the employer could be ordered to prepare and submit a compensation system that does not take sex into account.\textsuperscript{172} Proceedings would be limited to litigation of objections to the plan. The plan may include back pay, a common remedy in title VII cases, and relief from on-going discriminatory practices.\textsuperscript{173} Positions could be upgraded according to their relative functional value or restructured in accord with a non-discriminatory plan.

Second, if the employer refuses to develop an intrafirm wage

\textsuperscript{169} See Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977), Kahn, \textit{supra} note 13, at 140. This argument assumes that title VII is limited in scope, analogous to \textit{Exec. Order} 11478: "It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin." 3 C.F.R. § 207 (1974).

\textsuperscript{170} See note 169 \textit{supra}.

\textsuperscript{171} See note 8 \textit{supra}.

\textsuperscript{172} A general principle for affirmative relief under title VII is that the remedy must "so far as possible eliminate the discriminatory effects of the past as well as for like discrimination in the future." Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975). See Grubb, \textit{Title VII Remedies} in \textit{FEDERAL CIVIL RIGHTS LITIGATION} 295, 306-08, 314-16 (1977).

structure system or refuses to adjust a defective system, each job in question could be examined in detail; and remedial proceedings could be handled by a Special Master.\textsuperscript{174} A variety of evaluation systems have been and are being devised to classify jobs by their functional value, and the general approach taken is either job ranking or factor comparison.\textsuperscript{175} The theories, applications, experts, and general experience with job evaluation are at the disposal of the courts.\textsuperscript{176}

Third, a simpler alternative would be for the parties to agree on an appropriate remedy.\textsuperscript{177} The woman worker might be able to bargain with her recalcitrant employer if the employer is in violation of title VII and appreciates the benefit of a bargain. Integration of sex-segregated jobs may also be agreed upon, and the employer might decide to re-structure the jobs themselves to increase incentive among both male and female employees.

CONCLUSION

The correction of most unlawful, sex-based wage inequities requires some type of comparable worth remedy. Under title VII, Congress intended to include these compensation claims which do not come under the Equal Pay Act. Title VII's prohibitory and remedial powers are broad enough to support comparable worth claims. Circuit courts have split, however, over recognizing a comparable worth claim, and judicial decision-making has reflected a tension between the scope of title VII rights and potential economic impact of a remedy. In \textit{Gunther}, liability under title VII for a non-EPA claim of wage discrimination has been estab-

\textsuperscript{174} \textit{Id.} Equal pay cases under EPA sometimes require job evaluators, and the same process could occur in comparing job criteria in comparable worth cases.

Complex title VII cases are regularly bifurcated. \textit{See} United States v. United States Steel Corp., 520 F.2d 1043, 1053-54 (5th Cir. 1975), \textit{cert. denied}, 429 U.S. 817 (1976).

\textsuperscript{175} The impetus to rationalize a firm's wage structure (by each job's value) has come largely from union demands for the adjustment of wage inequities. \textit{See} N. \textsc{Chamberlain} & D. \textsc{Cullen}, \textsc{The Labor Sector} 298 (1971).

The EEOC has commissioned a major study by the National Academy of Sciences (NAS) on the feasibility of bias-free job evaluation systems. \textit{See} County of Wash. v. \textsc{Gunther}, 49 U.S.L.W. 4623, 4624-25 n.6 (1981) (noting D. \textsc{Treiman}, \textsc{Job Evaluation: An Analytic Review} (1979) (interim report)). The development of an unbiased method is important to serve as a model option to those who have found no solutions of their own.

\textsuperscript{176} Ideally, the development of a model, bias-free job evaluation system would be invaluable as an option for companies needing to correct their inter-firm wage structure. The involvement of top management and the development of the new system(s) is assured, however, only if the law's prohibitions are enforced. Without enforcement, no serious investment by business and government can be expected to result.

\textsuperscript{177} \textit{See} \textsc{Grubb}, \textsc{Title VII Remedies} in \textsc{Federal Civil Rights Litigation} 333-39 (1977) (settlement via consent decree).
lished, but theory, proof, defenses, and remedies remain unresolved.

Resolution of the comparable worth controversy involves judicial enforcement of statutory mandates and remedial developments of bias-free evaluation systems, wage negotiation, and possible restructuring of work positions by employers. Comparable worth remedies for wage inequities will be developed when unlawful sex-based wage discrimination is no longer tolerable. The alternative is to insulate discriminatory wage practices from review and perpetuate unjust wage exploitation of a large class of employees.

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