> equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.[143]

Representative Goodell emphasized that the prime reason Congress had adopted the equal work standard in the EPA was to insure that employers would "have a maximum degree of discretion" in working out how much employees should be paid.[144] Professor Blumrosen's article glosses over the legislative history of the EPA, though it does note that the assumption "that Congress carefully drafted the EPA so that it would apply only to a narrow set of circumstances" has "considerable validity."[145]

2. *Title VII of the Civil Rights Act of 1964* — The care with which Congress limited intervention into alleged wage discrimination based upon sex in the EPA contrasts sharply with its cursory treatment of the entire subject of sex discrimination during the passage of Title VII. In fact, the legislative history of the sex discrimination provision of Title VII is almost nonexistent.[146]

The House bill[147] that was ultimately enacted as the Civil Rights Act of 1964 was intended primarily to secure the rights of blacks. The bill went to the House floor for debate without any consideration of a sex discrimination prohibition.[148] Debate on the House floor lasted almost two weeks, from January 31, to

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[143] 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell). Representative Goodell's remarks as a sponsor of the legislation are entitled to great weight. *See* NLRB v. National Woodwork Mfr's Ass'n, 386 U.S. 612, 629-31 (1967).

A dialogue between Representative Goodell and Representative Griffin further explained the concept of equal job content:

> Mr. GOODELL: We are talking about jobs that involve the same quality, the same size, the same number, where they do the same type of thing, with an identity to them.
>
> Mr. GRIFFIN: In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean they should necessarily receive equal pay.
>
> Mr. GOODELL: I agree with the gentleman.

109 CONG. REC. at 9198.

[144] *Id.* (remarks of Rep. Goodell).

[145] *Wage Discrimination*, *supra* note 1, at 475.

[146] The legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity." General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976). *See also Wage Discrimination*, *supra* note 1, at 477-81.

[147] H.R. REP. No. 7152, 88th Cong., 2d Sess. (1964).

[148] Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 310 (1968); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).

February 10, 1964. It was not until the final day that an amendment to prohibit sex discrimination was proposed as an attempt to thwart passage of the bill.[149] The amendment was passed by the House that same day, and the entire bill was approved two days later and sent to the Senate without any consideration of the effect of the amendment on the EPA.

The bill bypassed the Senate committee system and was presented to the full Senate for initial consideration. It was not until this time that concern was expressed about the relation of the Title VII sex discrimination ban to the EPA. In response, Senator Clark submitted a statement to the Senate which assured that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII."[150] Apparently not completely satisfied with this explanaton, Senator Bennett proposed an amendment to section 703(h). The proffered amendment was passed with very little debate, but Senator Bennett clearly stated that "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."[151]

During consideration by the House of the Senate amendments to the House bill, Congressman Celler was called upon to explain the purpose of the Bennett Amendment. He stated that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended [*i.e.*, the EPA] satisfies the requirements of the title [Title VII] banning discrimination because of sex."[152]

The rather barren legislative history of the sex discrimination provisions of Title VII evidences no intent by Congress to abandon the meticulously crafted, thoroughly debated limitations of the EPA, adopted by the same Congress one year earlier. To the contrary, the legislative history of the Bennett Amendment shows Congressional reluctance to extend governmental regulation of wage differentials beyond the equal work standard of the

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[149] Representative Howard Smith of Virginia, Chairman of the House Rules Committee and a powerful opponent of Title VII and of all civil rights legislation, proposed the amendment. For a discussion of Judge Smith's motives in proposing to amend Section 703(a) to prohibit sex discrimination, see Miller, *supra* note 148, at 880; Kanowitz, *supra* note 148, at 310-13; Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So. CAL. L. REV. 965, 968 (1973).

[150] 110 CONG. REC. 7217 (1964). For further discussion of Senator Clark's memorandum, see text accompanying note 162 *infra*.

[151] 110 CONG. REC. 13647 (1964).

[152] *Id.* at 15896 (1964).

EPA.[153] Thus, Professor Blumrosen's assertion that Title VII's prohibition of job segregation affects wage differentials between different jobs finds no support in the legislative history of Title VII.

Moreover, Professor Blumrosen's comparable worth theory ignores one of the fundamental policies of the EPA, often expressed in the legislative history of that statute, that federal intervention in wage setting must not extend beyond equal work situations. It should be added that a policy of limited governmental intrusion was operative in the enactment of Title VII as well, as was recently expressed by the Supreme Court in *United Steelworkers of America v. Weber*:[154] "Title VII could not have

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[153] 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 (29 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 carries 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.

Id. at 13647.

[154] ___ U.S. ___, 99 S.Ct. 2721 (1979).

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 their support that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible."[155] This policy of restricted federal intervention into the wage practices of employers would be eviscerated by the remedial approach proposed in *Wage Discrimination.* Virtually all employers and workers, and their families, would experience changes in their real incomes if the *Wage Discrimination* theory became the law.

Even if Title VII were susceptible to a broader interpretation than the EPA as regards sex-linked wage discrimination, the earlier statute should still control. Because the EPA is a specific law regulating a particular area of congressional concern, sex-based wage discrimination, it must prevail over a later statute, Title VII, of general application to the same subject area.[156] Under this well-established rule of statutory construction, and in view of the legislative record of the two statutes dealing with sex dicrimination passed by the Eighty-eighth Congress, federal efforts to review wage discrimination claims, by whatever theoretical underpinnings, are governed by the EPA. This conclusion is further supported by the statutory provision through which Congress linked Title VII to the EPA, the Bennett Amendment.

B. The Blumrosen Theory and the Bennett Amendment

1. The Bennett Amendment — The Bennett Amendment to Title VII states that it is not illegal for an employer to differentiate in compensation on the basis of sex "if such differentiation is authorized by the provisions of the [EPA]."[157] Professor Blum-

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[155] *Id.* at 2730 (citation omitted). For the pertinent legislative history, see H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963).

[156] *See, e.g.,* Morton v. Mancari, 417 U.S. 535 (1974), where the Court held that Title VII's race discrimination provision did not preclude enforcement of an earlier statute giving hiring preference to Indians and stated: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51. *Accord,* Radzanower v. Touche-Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); Brown v. General Servs. Admin., 425 U.S. 820, 834 (1976) ("[A] precisely drawn, detailed statute pre-empts more general remedies.").

[157] The Bennett Amendment provides:

> 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 wages or compensation paid or to be paid to employees of such employer *if such*

rosen concludes that the Bennett Amendment incorporates only the EPA's four affirmative defenses[158] into Title VII but does *not* also impose the EPA's "equal work" standard upon Title VII as the sole basis for sex-based compensation claims. In reaching this conclusion, she overlooks both the language of Section 703(h) and significant legislative history of Title VII and the EPA, and she misapprehends relevant court decisions.

2. The effect of section 703(h) on the purpose of the Bennett Amendment — The EPA contains four statutory exceptions or defenses. But Title VII's section 703(h), which the Supreme Court has recognized as a "definitional provision,"[159] already contained those defenses when Senator Bennett offered his "technical correction."[160] The opening sentence of section 703(h) protected differentials in compensation based on seniority, merit, or quantity or quality of production. These were three of the four EPA defenses. The fourth EPA defense, "a factor other than sex," was already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex. Thus, Professor Blumrosen's assertion that the purpose of the Bennett Amendment was to incorporate the EPA defenses is unpersuasive. The four defenses were already available under Title VII when Senator Bennett proposed his amendment. Under such an interpretation the amendment would be mere surplusage.

3. Applicability of the EPA standard to sex-based wage claims under Title VII — *Wage Discrimination*'s discussion of the Bennett Amendment is sparse and selective, especially in its use of legislative history surrounding that provision. The article

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differentiation is authorized by the provisions of Section 206(d) of Title 29 [Fair Labor Standards Act of 1938 (codified at 29 U.S.C. § 206(d)].

42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

[158] The Equal Pay Act's four affirmative defenses permit different compensation if the differential is made by way of (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) a differential based on any other factor than sex. 29 U.S.C. § 206(d)(1) (1976).

[159] *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 346-47 (1977); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 758 (1976).

[160] The first clause of § 703(h) states:

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

42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

also overlooks other legislative statements, made during consideration of Title VII, which recognized the potential conflict between Title VII and the EPA and which resolved that conflict in favor of the EPA's standards.

a. Senator Bennett's written interpretation. In the 1965 congressional session following passage of the Civil Rights Act, Senator Bennett read into the Congressional Record his interpretation of the amendment to section 703(h) that he had sponsored the previous year.[161] The Senator expressed his concern because a law review article had asserted, as does Professor Blumrosen, that there were two possible interpretations of the amendment.[162] Senator Bennett noted that the article suggested the possibility that the amendment merely incorporated into Title VII the EPA's affirmative defenses, and stated that: "[The language setting out the defenses] is merely clarifying language similar to that which was already in section 703(h). If the Bennett Amendment was simply intended to incorporate by reference these exceptions into subsection (h), the amendment would have no substantive effect."[163]

The author of the law review article had noted the "more plausible" interpretation to be that, if the amendment is to be given any effect, "it must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."[164] In order to resolve the matter, Senator Bennett offered his written interpretation:

> The amendment therefore means that it is not an unlawful employment practice: . . . (b) to have different standards of compensation for nonexempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.
>
> Simply stated, *the [Bennett] amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.*[165]

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[161] 111 CONG. REC. 13359-13360 (1965).

[162] Indeed, Professor Blumrosen posits three possible interpretations of the Bennett Amendment. *Wage Discrimination, supra* note 1, at 481-82. The law review article referred to in 111 CONG. REC. 13359 (1965) is Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964).

[163] 111 CONG. REC. 13359 (1965).

[164] *Id.*

[165] *Id.* (emphasis added). Senator Dirksen agreed that this interpretation was the one that he, Senator Humphrey, and their staffs had in mind when the Senate adopted the

b. The Clark memorandum. Following House passage of the bill which became the Civil Rights Act of 1964, including the sex discrimination provision, and after the bill had been debated for three weeks in the Senate, Senator Clark, one of the bill's floor managers, prepared a memorandum which was read into the Congressional Record to answer questions and respond to objections that had been raised concerning the meaning of Title VII. One of these explanations, memorializing a colloquy between Senators Dirksen and Clark, clearly states that Congress intended to preserve EPA standards under the Civil Rights bill:

> *Objection:* The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
> *Answer:* The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.*[166]

Professor Blumrosen cites this passage of the Clark memorandum as evidence that Congress recognized that the EPA does not cover most single-sex jobs.[167] As far as it goes, one cannot quarrel with her deduction. Clearly, however, the memorandum also demonstrates a congressional intent to treat job segregation and wage discrimination as separate problems. With respect to Title VII's proscription of "discrimination as to wages," Congress intended that Title VII not go beyond the limits of the EPA. Moreover, Senator Clark's explanation cannot be restricted, as Professor Blumrosen has argued, to mean that the EPA equal work standard would apply to Title VII only when conduct that would violate the EPA also was alleged to violate Title VII. The Clark

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Bennett Amendment. *Id.* at 13360 (1965). He added: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Id.*

[166] 110 CONG. REC. 7217 (1964) (emphasis added).

[167] *Wage Discrimination, supra* note 1, at 478.

memorandum plainly expressed the concern that Title VII might be construed as prohibiting unequal pay when different jobs were involved. Senator Clark's reply indicates that when different jobs were at issue, the EPA's legal standards would apply to limit the reach of Title VII. This limitation would be rendered meaningless if the *Wage Discrimination* theory were adopted and a prima facie case of wage discrimination could be made out on the mere showing that a plaintiff occupied a job traditionally held by women.

c. The Celler statement. After the Senate added amendments to the Civil Rights Act of 1964, including the Bennett Amendment, it returned the bill to the House. *Wage Discrimination* fails to note that during these House deliberations, Representative Celler, the bill's original sponsor and floor leader in the House, set out in the record the understanding of the House that sex-based compensation claims would not satisfy Title VII unless they met the EPA's standards. He stated that the Bennett Amendment: "[p]rovides that *compliance* with the EPA satisfies the requirement of the title barring discrimination because of sex — Section [703(h)]."[168] Representative Celler's statement that compliance with the EPA satisfies the requirements of Title VII recognized, as have the courts,[169] that differences in compensation that do not violate the EPA are "authorized" by the Bennett Amendment for purposes of Title VII.

d. The contemporaneous administrative interpretation. Consistent with Representative Celler's and Senator Bennett's interpretation of section 703(h), and Senator Clark's explanation of the intended interaction between Title VII and the EPA in the area of sex-linked wage discrimination, is the EEOC's contemporaneous interpretation of the amendment, published in 1965. The Commission stated at that time that:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. *Accordingly, the Commission interprets Section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.*[170]

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[168] 110 CONG. REC. 15896 (1964) (emphasis added).
[169] See text accompanying notes 175-77 *infra*.
[170] 29 C.F.R. § 1604.7 (1965) (emphasis added).

Although the 1965 EEOC interpretation of the impact of the Bennett Amendment was dropped in 1972, when the agency issued a new interpretation that the Bennett Amendment's purpose was only to incorporate the EPA's defenses in Title VII wage suits,[171] the Supreme Court has stated on several occasions that EEOC interpretations and guidelines which were promulgated contemporaneously with the enactment of Title VII should be accorded more weight than those issued in later years.[172]

Thus congressional history, even as interpreted by the EEOC in 1965, provides no support for the theory asserted in *Wage Discrimination* that the federal courts can be thrust into a massive reorganization of the American economy. Among Congress' reasons for adopting the "equal work" concept, in both Title VII and the EPA, were that it was less vague than the "comparable work" approach and that it would not inject federal regulators and the courts into these areas.[173]

4. The case law — Nearly every court that has addressed the issue has held that Title VII wage discrimination claims are coterminous with EPA claims. The "equal work" standard has been followed, as a limitation upon wage discrimination claims under Title VII, by the Supreme Court[174] and by seven federal

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[171] In 1972, the EEOC changed its interpretation to eliminate the language of the 1965 interpretation and substitute the following:

> (a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is co-extensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) *By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.*
>
> (c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

29 C.F.R. § 1604.8 (1979) (emphasis added).

[172] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76 n.11 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 142-45 (1976). It is likely that the courts will continue to give little weight to the 1972 EEOC guideline in wage comparability cases. As the Court noted in *Trans World Airlines, Inc.*, "[A]n EEOC guideline is not entitled to great weight where . . . it varies from prior EEOC policy and no new legislative history has been introduced in support of the change." 432 U.S. at 76 n.11.

[173] *See* text accompanying notes 142-43 *supra*.

[174] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). In *Gilbert* the Court held that an employer's exclusion of benefits for disability during pregnancy was not a violation of Title VII. One of the Court's grounds for its decision was a recognition that conduct that would otherwise violate § 703(a) of Title VII was protected by the Bennett Amendment because the conduct did not violate the EPA's prohibitions. *Id.* at 144-45.

The 1978 pregnancy disability amendment to Title VII amended § 701(k), 42 U.S.C. § 2000e-2(k), to state that discrimination because of sex would include the failure to pay female employees maternity-related disability payments. Significantly, the amendment also provided that "nothing in section 703(h) of this title shall be interpreted to permit otherwise." As the House report stated:

courts of appeals,[175] as well as by numerous trial courts.[176] These

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This disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett Amendment") which in effect provides that certain practices authorized by the [EPA] do not violate Title VII. The Court in *Gilbert* noted that a regulation issued under the Equal Pay Act [by the Wage and Hour Administration] provides that certain gender-based differentiations do not violate the [EPA] . . . . While the *Gilbert* opinion is somewhat vague as to the pertinence of this regulation, it does appear that the Court regarded the Bennett amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII.

Therefore, the committee determined that it was necessary to expressly remove the Bennett amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.

H.R. REP. No. 95-948, 95th Cong., 2d Sess. 7 (1978), reprinted in [1978] U.S. CODE CONG. & ADMIN. NEWS 4749, 4755.

[175] Lemons v. City & County of Denver, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980); Marshall v. Dallas Independent School Dist., 21 Fair Empl. Prac. Cas. 143 (5th Cir. 1979); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1976); Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); Orr v. Frank R. McNeill & Son, Inc., 511 F.2d 166 (5th Cir.) *cert. denied*, 423 U.S. 856 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

But see Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979). Although plaintiffs in *Gunther* were allowed to proceed under a Title VII wage discrimination theory, the court stated that absent a showing of "equal work" the burden of proof still remained on the plaintiffs to show on remand that "some of the discrepancy in wages was due to sex discrimination." *Id.* at 888.

Cases such as Los Angeles Dep't of Power & Water v. Manhart, 435 U.S. 702 (1978), and Laffey v. Northwest Air Lines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), relied upon by Professor Blumrosen to support the position that the Bennett Amendment is not a barrier to a broad application of Title VII to remedy residual wage differentials, are inapposite. In *Manhart*, the Supreme Court was concerned only with defining the "factor other than sex" defense of the EPA. In that case, male and female employees were "identically situated," Manhart v. Los Angeles Dep't of Power & Water, 553 F.2d 581, 583 (9th Cir. 1976), so the Supreme Court was not confronted with the issue that Professor Blumrosen raises, *viz.*, whether a Title VII wage discrimination claim is broader than the EPA. Similarly, in *Laffey* the actual jobs being compared were substantially equal (stewardesses and pursers). The Court of Appeals for the District of Columbia emphasized that Title VII was not intended to supplant the EPA in cases involving sex-based wage discrimination claims, stating:

> Although Title VII reaches farther than the Equal Pay Act to protect groups other than those sex-based classes and to proscribe discrimination in many facets of employment additional to compensation, nowhere have we encountered an indication that Title VII was intended either to supplant or be supplanted by the Equal Pay Act in the relatively small area in which the two are congruent. On the contrary, we are satisfied that the provisions of both acts should be read *in pari materia*, and neither should be interpreted in a manner that would undermine the other. In *Orr v. Frank R. McNeill & Son, Inc.*, the Fifth Circuit declared that "[t]he sex discrimination provision of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963." We agree, and we now so hold.

567 F.2d at 445-46 (footnote omitted).

[176] EEOC v. Ball Corp., Case No. C76-31 (N.D. Ohio 1979); Marshall v. A&M Consolidated School Dist., 21 Fair Empl. Prac. Cas. 134 (S.D. Tex. 1979); Johnson v. University

courts have ruled that Title VII and the EPA must be construed *in pari materia*. Although Congress limited the scope of sex-based compensation claims in the EPA, it guaranteed women equal access to jobs in Title VII by forbidding discrimination in hiring, job placement or classification, promotions, transfers, layoffs, and discharges.[177] The two statutes provide a balanced approach to sex discrimination, setting forth a scheme that guarantees qualified female employees access to all jobs while, at the same time, assuring that the courts and federal agencies will not become entangled in setting wage rates.

The theory that Title VII overrides the EPA would entangle the courts in a hopeless morass of wage claim litigation. The judicial entanglement would be exacerbated by the fact that labor law has left the substance of collective bargaining to the parties and not the government,[178] and so the courts have had little experience in setting wage rates. It should also be noted that al-

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of Bridgeport, 20 Fair Empl. Prac. Cas. 1766, 1769-70 (D. Conn. 1979); IUE v. Westinghouse Elec. Corp., 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), *appeal pending*, Nos. 79-1893 & 1894 (3d Cir.); Kohne v. Imco Container Co., 20 Empl. Prac. Dec. ¶ 30,168 (W.D. Va. 1979); Lemons v. City & County of Denver, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980); Wetzel v. Liberty Mutual Ins. Co., 449 F. Supp. 397, 407 (W.D. Pa. 1978); IUE v. Westinghouse Elec. Corp., 17 Fair Empl. Prac. Cas. 16 (N.D. W. Va. 1977); Molthan v. Temple Univ., 420 F. Supp. 448 (E.D. Pa. 1977); Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 795 (N.D. Ind. 1977); Patterson v. Western Development Labs, 13 Fair Empl. Prac. Cas. 772, 775-76 (N.D. Cal. 1976).

[177] The general policy considerations for regarding the EPA and Title VII *in pari materia* are cogently summarized by the court in Kohne v. Imco Container Co., 20 Empl. Prac. Dec. ¶ 30,168 (W.D. Va. 1979), as follows:

> Of course, sound policy underlies such a construction. Congress did not intend to put either the Secretary of Labor or the courts in the business of evaluating jobs and in determining what constitutes a proper differential for unequal work . . . . Sufficient remedies exist under Title VII to deal with discriminatory hiring and promotional practices, without the courts becoming embroiled in determinations of how an employer's work force ought to be paid.

Id. at 11,876 (citations omitted).

[178] *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). In *Porter*, the Court held that the National Labor Relations Board had exceeded its remedial powers by ordering the employer to grant to the union a contract clause providing for checkoff of union dues. The Court stated:

> The Board's remedial powers under § 10 of the Act [29 U.S.C. § 160] are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, *allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.*

Id. at 108 (emphasis added). Under the *Wage Discrimination* theory, the government would seek judicially mandated wage rates for most female workers in the economy, a momentous step from "governmental supervision of procedure alone" amounting to "official compulsion" of substantive contractual provisions.

though Congress adopted the "equal work" approach in the EPA because it was narrower and less vague than other alternatives, "the federal courts have had no small difficulty" in attempting to apply even this standard.[179] The adoption of the *Wage Discrimination* theory would make the federal courts' responsibility even more extensive and place upon the judicial system a significant burden not intended by Congress. In the words of Mr. Justice Rehnquist, in the recent case of *Furnco Construction Corp. v. Waters:*[180] "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."

III. THE *Wage Discrimination* THEORY AND STANDARDS OF PROOF

With respect to standards of proof, Professor Blumrosen's theory contains two fatal defects. The first defect is in the creation and the operation of the theory's "triggering mechanism," a presumption of wage discrimination which is established merely by showing that a plaintiff works in a job traditionally performed by women. The second defect is that the proposed method of proof contravenes the established methods of proof under Title VII as to the construction of a prima facie case and as to the available defenses.

A. *An Examination of the* Wage Discrimination *Presumption*

All proponents of the comparable worth movement agree that the law ought to prohibit wage discrimination. Professor Blumrosen goes beyond others in her unique proposal for the method of proof. She implicitly recognizes the difficulty — or impossibility — of demonstrating wage discrimination in any particular instance. To enable the plaintiffs to recover, she proposes that they *not be required* to prove wage discrimination. She argues that the plaintiffs need only show that they work in a job that is or was predominantly female. In such jobs wage discrimination is so nearly universal, Professor Blumrosen believes, that the law should draw the inference of wage discrimination from the bare fact of female predominance.

1. The presumption would be irrebuttable — The key to Professor Blumrosen's establishment of a prima facie case of wage discrimination is an "inference" — that is, a presumption — of

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[179] Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1170 (3d Cir. 1977).
[180] 438 U.S. 567, 578 (1978).

wage discrimination to be created by showing that the plaintiff's job has traditionally been female- or minority-intensive.[181] This inference supposedly follows from the historical, anthropological, sociological, and economic studies outlined in Part I of *Wage Discrimination.*[182] This article has concentrated predominantly on the problems associated with *the creation* of Professor Blumrosen's presumption of wage discrimination from the sexual identification of particular occupations in the American economy. As demonstrated in part II of the present article, this presumption would rest upon a very unstable foundation of social science evidence. As shown in part III, the presumption has no antecedents in Title VII's legislative history. Substantial problems would also exist, however, in *the operation* of this presumption in the courts.

Under the *Wage Discrimination* theory "[t]o make a prima facie case of wage discrimination . . . a plaintiff should have to show only that the job has been and/or is presently identified as a minority or female job."[183] The article asserts that a showing of job segregation may be accomplished entirely by statistics, merely by showing that seventy percent or more of the occupants of the job are women or minorities,[184] and states: "Such a showing would demonstrate that a depressed wage was one of the ad-

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[181] "The establishment of present or past job segregation thus should create an inference of wage discrimination sufficient to constitute a prima facie case." *Wage Discrimination, supra* note 1, at 459.

[182] Impassable evidentiary barriers would prevent courts from drawing such an inference. As discussed in part I *supra*, the studies cited by Professor Blumrosen do not speak in a united voice regarding the causes of wage differences. Nor do these sources agree as to whether some fraction of the "earnings gap" between men and women is attributable to wage discrimination. Thus, *Wage Discrimination* and its sources are hardly subjects appropriate for judicial notice. *See* FRE 201. Under the Federal Rules of Evidence, facts appropriate for judicial notice must be (1) not subject to reasonable dispute, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(b). The studies cited in *Wage Discrimination* are neither. *See also* Alvary v. United States, 302 F.2d 790, 794 (2d Cir. 1962) (fact must be capable of ready verification); Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679, 684 (S.D.N.Y. 1969), *modified,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); 1 WEINSTEIN'S EVIDENCE ¶ 201[03] (1978).

Professor Blumrosen does not discuss how the courts might be persuaded that her key inference is valid. Certainly the proposition that job separation implies wage discrimination cannot be proved by introduction into evidence of her article or the materials cited in that article. Such documents would be inadmissible hearsay. FRE 801-806.

To persuade courts of the validity of Professor Blumrosen's proposed inference would require testimony by expert witnesses such as the economists, anthropologists, and other social scientists whom Blumrosen selectively cites. The fact that none of these social scientists has ever proposed the Blumrosen theory, much less claimed that the evidence exists to sustain it, suggests that the theory would have a dim future in the courts.

[183] *Wage Discrimination, supra* note 1, at 459.

[184] *Id.* at 460-62.

verse effects of job segregation prohibited by Section 703(a)(2). The demonstration of such a wage rate would also establish a violation of Section 703(a)(1)."[185]

Under this theory, a plaintiff would not need to show that his or her wage rate would have been higher in the absence of job separation.[186] The burden of proof would shift to the employer, who has "unique access to, possession of, and control over this evidence."[187] The employer's defense would be impossible in nearly all cases because *Wage Discrimination* prescribes that the employer may not defend a wage structure on the ground that the pay simply reflects the market value of jobs. *Wage Discrimination* specifies that, "absent a showing to the contrary, the market rate reflects discriminatory factors . . . ."[188] Nor can the employer rely on a job evaluation system to sustain its burden of proof unless a successful demonstration can be made that the system is free of discriminatory factors.[189] *Wage Discrimination*'s elaborate discussion of job evaluation systems makes a convincing case that such systems are by nature highly subjective. Hence, proof of freedom from bias would be impossible. As was discussed in part I of this article, economists are agreed that the marginal productivity of most jobs is indeterminable. Market rates, job evaluation systems, and marginal productivity analysis are the only possible scales an employer could use to defend its wage structure. Professor Blumrosen would rule out the first two as infected with bias, and the third does not exist except in the abstract calculus of microeconomic theory. The *Wage Discrimination* idea is thus a plaintiff's lawyer's dream: a simple counting of noses establishes the prima facie case, shifting the burden of proof to the employer, and all methods of defense by which the employer might attempt to meet its burden of proof are effectively ruled out. In reality, the presumption Professor Blumrosen has created would be an irrebuttable one.

2. *The presumption cuts too broadly* — Another problem with the presumption of wage discrimination concerns its application to a particular employer's workforce. It is well documented that many women, for personal and cultural reasons, lack interest in certain types of jobs. Their preferences contribute to the concentration of women in traditional occupations. When the percentage of women in a job approaches the seventy

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[185] *Id.* at 459.
[186] *Id.* at 466-68.
[187] *Id.* at 468.
[188] *Id.* at 488.
[189] *Id.* at 489.

percent standard that *Wage Discrimination* sets forth as establishing a prima facie case, should the employer refuse to hire any additional women? Should the employer discriminatorily assign women who seek a traditional women's job to a "non-segregated" (less than seventy percent female) job category? Even if Professor Blumrosen's inference that job separation equals wage discrimination is generally true, it may be quite mistaken in any specific case. *Wage Discrimination* gives the courts no way to discern when, if ever, the inference of wage discrimination is justified and when it is not.

B. The Wage Discrimination *Theory and Established Title VII Methods of Proof*

The undoing of the *Wage Discrimination* theory is the very ease with which it would establish a prima facie case. In effect, the theory mistakenly places the burden of proof upon employers to *disprove* discrimination. As shown below, this scheme is contrary to the established Title VII methods of proof.

Under Title VII, two primary theories of discrimination, and thus two methods of proof, are available to private party plaintiffs: disparate treatment and disparate impact.[190] The disparate treatment theory was first used, and is still primarily used, in individual actions. The disparate impact analysis, on the other hand, evolved from large-scale class actions in which plaintiffs alleged that particular employment selection criteria had a detrimental impact on a class of persons protected by Title VII.

A disparate treatment case focuses on discriminatory *motives* behind the employer's action. Although the focus is on motive, the plaintiff need not prove intent. Rather, the claimant must initially prove that certain factors exist that would lead one to infer that the employer's decision was illegally motivated.[191] The

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[190] A third method of proof, demonstration of a pattern or practice of discrimination, is available to the federal government in suits prosecuted under § 707 of Title VII. 42 U.S.C. § 2000e-6 (1976).

[191] In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court defined the disparate treatment method of proof as follows:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. at 335 n.15. Although it has not been held that the plaintiff proceeding under a disparate treatment theory is required to submit direct proof of an unlawful motivation, the plaintiff must present a prima facie case of discrimination from which one can reasonably infer that the result in question was intended. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a dis-

burden of proof is flexible, but the general principle is that the plaintiff must carry "the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."[192]

Once the plaintiff has established a prima facie case, the burden shifts to the defendant to present evidence of some legitimate, nondiscriminatory reason for its decision.[193] Following such a showing, the plaintiff must produce evidence that the defendant's claimed legitimate reasons are merely a pretext for an underlying discriminatory motive. If the supposed legitimate reasons are a pretext, the employer's action is illegal.[194]

Under the disparate impact theory, first enunciated in *Griggs v. Duke Power Company,*[195] a prima facie case is established by demonstration that an employment practice, neutral on its face, has an adverse impact upon one or more of the classes of individuals protected under Title VII. No showing of discriminatory intent or unequal treatment is required; instead the focus is upon the *consequences* of a particular employment practice.[196]

Once a disparate impact is established, the employer carries the burden of proving that the specific practice at issue is justified by business necessity.

1. Disparate treatment under the Wage Discrimination *theory* — Professor Blumrosen expects her theory to adhere largely to Title VII methods of proof under the disparate treatment standard in individual, non-class cases. She admits that "in a

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cussion of motive in Title VII cases, see generally A. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII,* 2 INDUS. REL. L.J. 519 (1978); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-54 (1976).

[192] International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

[193] *See, e.g.,* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

[194] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[195] 401 U.S. 424 (1971). In *Griggs,* the Court was faced with the question of whether an employer was prohibited by Title VII from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when: (a) neither standard was shown to be significantly related to successful job performance; (b) both requirements operated to disqualify blacks at a substantially higher rate than white applicants; and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. *Id.* at 425-26. In this landmark decision, the Court ruled that if an employment practice which operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited by Title VII. *Id.* at 431.

[196] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). For example, both *Griggs* and the later case of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), dealt with employment tests. In these cases, the Court held that in order to establish a prima facie case of discrimination, plaintiffs had only to establish that the tests in question, although facially neutral, caused the selection for hire or promotion in a racial pattern *significantly* or *substantially* different from the pool of available applicants. *See* note 195 *supra.*

non-class action individual case charging discrimination in compensation based only on a theory of disparate treatment, the plaintiff would have to show that the depressed wage was racially or sexually motivated."[197] Even in the individual disparate treatment case under Professor Blumrosen's theory, the plaintiff would have to make a statistical showing that his or her job is or once was race- or sex-segregated in order to activate the inference of wage discrimination. With respect to *Wage Discrimination*'s suggestion that statistical evidence alone could establish the necessary discriminatory motive under a disparate treatment theory, the article fails to take into account the lack of consensus under Title VII as to the extent to which classwide evidence should be considered probative in an action brought by a single person.[198]

2. Disparate impact and the Wage Discrimination *theory — Wage Discrimination* never explicitly states in one place that its theory that job segregation implies wage discrimination is merged with a disparate impact analysis. It is clear that a disparate impact approach is intended.[199] To mold the idea that job separation establishes a prima facie case of wage discrimination into disparate impact terms, it would have to be argued that the employer's wage structure is a facially neutral employment practice that promotes consequences violative of Title VII by its adverse impact upon the wages of women and minorities in female- or minority-intensive jobs.

The application of a disparate impact method of proof to the job segregation-wage discrimination theory is specious. Under past employment discrimination cases, a disparate impact approach has been applied to specific employment practices such as testing policies, college degree hiring requirements, hiring exclusions of applicants who had arrest records, and discharge rules based upon garnishments.[200] *Wage Discrimination* does not

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[197] *Wage Discrimination, supra* note 1, at 460.

[198] *See, e.g.*, Davis v. Califano, 21 Fair Empl. Prac. Cas. 272 (D.C. Cir. 1979) (statistical evidence may be used to establish an individual plaintiff's prima facie case). *But see* McFadden v. Baltimore Steamship Trade Ass'n, 5 Fair Empl. Prac. Cas. 300 (D.C. Md.), *aff'd*, 6 Fair Empl. Prac. Cas. 599 (4th Cir. 1973) (an individual plaintiff may not use statistics, but must present evidence of specific acts of racial discrimination against him in order to establish prima facie case); *accord*, Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412-14 (8th Cir. 1975); King v. Yellow Freight System, Inc., 523 F.2d 879, 882 (8th Cir. 1975).

[199] *Wage Discrimination, supra* note 1, at 463.

[200] *See, e.g.*, Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (employer policy requiring discharge for two garnishments within 12 months held a prima facie violation of Title VII); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (requirement of college degree for pilots is job related); Johnson v. Goodyear Tire & Rubber Co., 349 F.

propose a disparate impact analysis of a specific employer practice but rather a wholesale assault on the employer's wage structure.

One suspects that the difficulty Professor Blumrosen encounters in elucidating how this wage discrimination approach is to be applied under a disparate impact method of proof stems largely from her article's quicksilver use of the term "job segregation." On the one hand, she applies the term as it has historically been used in Title VII case law: the intentional segregation of occupations by sex or race. On the other hand, she uses "job segregation" to denote the lingering presence of traditional women's jobs or minorities' jobs, no longer intentionally segregated, but disproportionately populated by members of these groups. This phenomenon might be termed "transitional" job separation, no longer intentional in most cases, but unavoidable in a period in which "the time lag in wage rate revision means that for most of those jobs the wage structure still reflects the depressed rate which was associated with its segregated character."[201] Professor Blumrosen supports her argument by exploiting the ambiguity in this double-jointed definition of "job segregation." She buttresses her contention that the Title VII standard of proof (that a plaintiff need not prove the amount he or she would have earned in the absence of discrimination) should apply in wage discrimination suits by citing several cases in which discriminatory job assignments or the existence of segregated job classifications were held to establish a prima facie violation of Title VII without a demonstration of economic harm.[202] But in these cases the plaintiffs had clearly demonstrated that the defendants had discriminatorily assigned them to lower status positions. The courts have long held that plaintiffs in cases of discriminatory assignments do not have to submit evidence of lower pay as an element of their prima facie case.[203] These decisions, however, do not support the argument that, where "transitional job separation" is combined with *the absence of a discriminatory*

Supp. 3 (S.D. Tex. 1972), *aff'd*, 491 F.2d 1364 (5th Cir. 1974) (high school diploma not job related); Gregory v. Litton Systems, Inc., 316 F. Supp. 491, *aff'd*, 472 F.2d 631 (9th Cir. 1972) (policy of excluding applicants with arrest records violates Title VII).

[201] *Wage Discrimination, supra* note 1, at 460.

[202] *Id.* at 463-65. Among these cases are Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976) (discrimination in job assignments established prima facie case); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977) (discriminatory job assignments and segregated facilities violated Title VII); Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973) (maintenance of segregated job classifications established Title VII violation).

[203] Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976); Swint v. Pullman-Standard, 539 F.2d 77, 90 (5th Cir. 1976).

assignment, a wage discrimination plaintiff need not show economic disparity, but only that her job contains over seventy percent women, in order to demonstrate a prima facie violation of Title VII.

It is clear that Professor Blumrosen uses the term "job segregation," in both of its definitions, as a mechanism to pull wage discrimination into the remedial ambit of Title VII. Her article is unconcerned with past Title VII remedies for job segregation, *e.g.*, hires, transfers, and promotions into higher status jobs, which it terms inadequate; the article seeks more money for individuals who stay in the traditional jobs. Professor Blumrosen views the problem of wage discrimination as one of the "discriminatory radiations from job segregation."[204] The chief problem here is that Congress intended either to deal with these problems separately or, more charitably to Professor Blumrosen's view, never made the linkage between the problems at all. From the existing legislative history, it certainly appears that Congress intended to remedy wage discrimination through the EPA standards, whether suit is brought under that statute or under Title VII.[205] The result is that the disparate impact approach of Title VII is inapplicable to wage compensation suits.

3. Title VII wage discrimination cases — All Title VII wage discrimination decisions have placed the burden of proof upon the plaintiff to demonstrate that the wage inequity was the result of prohibited discrimination.

In the leading case in this area, *Christensen v. Iowa*,[206] the plaintiffs were female clerical workers who received less pay than physical plant workers, who were primarily male, for dissimilar work of equal value to their employer. The plaintiffs claimed that they were victims of sex-based compensation discrimination prohibited by Title VII. The Court of Appeals for the Eighth Circuit held that apart from considerations of the Bennett Amend-

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[204] *Wage Discrimination*, *supra* note 1, at 465.

[205] *See* part II *supra*.

[206] 563 F.2d 353 (8th Cir. 1977). *Christensen* is not cited in the text of *Wage Discrimination* (though it is cited in the footnotes, *see Wage Discrimination*, *supra* note 1, at 489 n.327 & 495 n.345), no doubt because the case was predicated on a Title VII job comparability theory of wage discrimination that Professor Blumrosen seeks to distinguish from a wage discrimination theory predicated upon job segregation.

The EEOC submitted an *amicus* brief in *Christensen*, taking the position that the university's maintenance of wage disparities between male and female jobs that it knew were of equal value amounted to unlawful discrimination under Title VII because (1) the university was aware that the wage disparities in the labor market were largely the result of societal discrimination, and (2) the university made no attempt to determine the extent to which the wage differentials were justified by economic factors or required by business necessity.

ment's applicability,[207] plaintiffs had failed to establish a prima facie case under Title VII because they had not shown that "the difference in wages paid to clerical workers and plant employees rested on sex discrimination and not on some other legitimate reason."[208] The evidence established that the employer paid higher wages to plant workers because higher wages were paid for such work in the local labor market.[209]

The *Christensen* court noted the plaintiffs' attempt to fit their complaint to the disparate impact method of proof.[210] The court then decisively rejected this theory on the basis that Title VII does not apply to wage scales at all. Title VII, *Christensen* holds, is directed at equal employment opportunities, not equal wages.[211]

In a second recent federal court decision, *Lemons v. City and County of Denver,*[212] the court held that the city had not violated Title VII despite the plaintiffs' contention that the defendants paid nurses, a female-dominated profession, less than it paid other employees for work of comparable value in male-domi-

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[207] The *Christensen* court explicitly left the Bennett Amendment issue unresolved. If the court had held that the Bennett Amendment applied, the plaintiffs would have had to demonstrate that the work of the clerical and plant workers was "substantially equal" in order to make out a prima facie case under Title VII.

[208] Christensen v. Iowa, 563 F.2d 353, 355 (8th Cir. 1977).

The decision in *Christensen* could equally well have been reached on an alternative ground that the court did not discuss. Even if the plaintiffs' evidence met the disparate impact criteria for a prima facie case, the employer rebutted that case by showing that its actions were required by business necessity. In a free market economy, the necessity to hold costs, including wages, down to those mandated by the market is the most pressing business necessity of all, the *sine qua non* of business survival.

[209] The court stated:

> Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

Id. at 356.

[210] Appellants contend the [defendant] UNI's policy violates Title VII by perpetuating wage differences resulting from past discrimination. . . . [The contention is that] UNI's reliance in part on prevailing wage rates in determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college.

Id. at 355-56.

[211] *Id.* at 356. Judge Miller disagreed with this basis of the court's opinion, but concurred because he found the Bennett Amendment applicable. *Id.* at 357 (concurring opinion).

[212] 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd* DAILY LAB. REP. (BNA), No. 81 at D-1 (10th Cir. April 24, 1980).

nated occupations. As in *Christensen,* the court stated that there had been no showing of wage differentials based directly or indirectly on sex discrimination except insofar as historical discrimination had created a lower pay scale for certain occupations traditionally performed by women. The court found that the city had simply relied on market forces in setting its pay scales.[213] The court had grave misgivings concerning an approach to wage discrimination that ignored labor market economics, stating: "Congress cannot, and never has been able, to repeal the law of supply and demand. And the situation, unfortunate that it may be, is that the supply of nurses is very large compared to the demand, and it puts the nurses in a somewhat disadvantageous negotiating position."[214]

It should be noted that even in *Gunther v. County of Washington,*[215] an appellate decision supporting the argument that the Bennett Amendment incorporates only the four affirmative defenses of the EPA into Title VII and that, therefore, a Title VII wage discrimination claim may be asserted when the pay differential is not between "substantially equal" jobs, *the burden to demonstrate sex discrimination remained on the plaintiff.* The court held that on remand plaintiffs should have an opportunity to show that "some of the discrepancy in wages was due to sex discrimination."[216]

These cases uniformly have held that the burden of proof is upon the plaintiffs in Title VII compensation cases to establish a prima facie case that an inequality in pay is based upon sex discrimination. Even more important, *Christensen* and *Lemons* emphatically indicate that the local labor market may be considered by the employer in setting wage rates. In the words of the *Christensen* court, to ignore such market rates "ignores economic realities."[217]

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[213] *Id.* at 913.

[214] *Id.* at 909. As Chief Judge Winner perceived the issue in *Lemons,* the acceptance of the plaintiffs' view that Title VII can reach wage discrimination not actionable under the EPA would open "the Pandora's box of restructuring the entire economy of the United States of America." *Id.*

[215] 602 F.2d 882 (9th Cir. 1979).

[216] *Id.* at 888, 894.

[217] Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977). *Wage Discrimination* cites Corning Glass Works v. Brennan, 417 U.S. 188 (1974), for the proposition that the market rate or "community wage structure" is not a defense to a Title VII wage discrimination claim. *Wage Discrimination, supra* note 1, at 488-89. The citation is inapposite. *Corning Glass* did not involve Title VII at all, but rather the EPA, and in that case the employer attempted to use "market price" as a defense for its practice of paying women less than men for substantially the same job. This was the very evil that the EPA was designed to remedy. The courts have long held that market forces will not justify a wage inequality when men's and women's jobs are substantially equal in job content. *See, e.g.,* Hodgson

IV. THE CONGRESSIONAL RESPONSE

Congress could, if it chose to do so, enlarge the EPA or Title VII to include "comparable worth." The law would then require that all "men's" and "women's" jobs be paid identically except for pay differences proportionate to the relative "worth" of jobs. By incorporating the comparable worth theory into the law, Congress would be mandating an entire scale of relative wages, leaving to the courts the formidable task of spelling out the details. This section will set forth several reasons why such a statute would be unwise.

A. The Measurability of Wage Discrimination

Professor Blumrosen has argued that the courts should adapt remedial statutes such as Title VII "to address those problems which come newly into focus."[218] The converse is no less true: the courts — and Congress — should refrain from attempting to address alleged problems that cannot be brought into focus. Despite Professor Blumrosen's exposition, wage discrimination remains an amorphous theory and an unmeasurable concept. We have explained in part I why it appears that wage discrimination cannot be dissected from other and legitimate sources of wage differentials. Even if advances in economic theory might someday change the situation, the experts agree that the necessary analytical methodology does not exist today.[219]

This is not the familiar problem of evaluating a damage that is by nature imprecise: the courts cope well enough with even such inexact quantities as the value of life itself. The problem with wage discrimination is of another magnitude altogether. Residual wage differentials *could* arise in part from wage discrimination, but they also *could* — and at least in part *do* — arise from other causes.[220] Any statute that attempted to require the courts to discern and measure such indeterminate quantities would only mire our legal machinery in judicial quicksand.

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v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970). The touchstone of the EPA is job content: when it is the same for men and women, market rates are irrelevant. *But see* Horner v. Mary Institute, DAILY LAB. REP. (BNA), No. 13, at A-4 (8th Cir. Jan. 18, 1980), in which the court stated in dictum that, if the plaintiff had shown that her job was substantially equal to that of a male colleague, his higher salary would still have been justified by his greater value in the job market.

[218] *Wage Discrimination, supra* note 1, at 502.

[219] *See* Kahne & Kohen, *supra* note 81, at 1258-61, who acknowledge that economic theory and analysis of male-female wage differentials are in a state of disarray. *See also* J. MADDEN, *supra* note 72, at 20-23; *and* Aigner & Cain, *supra* note 125, at 187-88.

[220] *See* part I *supra*.

B. *Equitable Enforcement of the Comparble Worth Theory*

The difficulty becomes apparent as soon as one descends from the abstractions of theory to outline how comparable worth theory could be applied to the realities of a wage structure. Suppose, for example, that a bias-free, universal job evaluation system has been developed and has been applied to the wage structures of the Shady Dell and Moderne nursing homes:

FIGURE 2

		Shady Dell		Moderne	
Job Evaluation System Points	Job Title	Sex	Salary	Sex	Salary
40	gardener	M	$8,000	M	$7,250
50	--	--	--	--	--
60	attendant	F	8,000	F	8,000
70	--	--	--	--	--
80	nurse	F	16,000	F	14,500
90	administrator	M	17,000	F	14,995
100	physician	M	40,000	--	--

If Title VII were amended to incorporate the comparable worth theory, to what salaries would the female employees be entitled? If "comparable" means "equal," they presumably would not be entitled to relief under Title VII: no male job is equal in "worth" (job evaluation systems points) to a female job. Suppose, then, that "comparable" is given a more expansive meaning: male and female jobs must be paid in proportion to their point value in the job evaluation system.

Shady Dell's nurses file suit for an injunction to raise their salary from the present $16,000 to $32,000, their rightful proportion (80%) of the physicians' salary. The nursing home owner argues that the nurses are fairly paid: their job is "worth" twice as much as the (male) gardeners' job and is paid proportionately more, $16,000 as compared with $8,000. Further, the employer argues, the job most nearly comparable to the nurses' in "worth" is the administrators' job. Administrators are "worth" one-eighth more than nurses but earn only one-sixteenth more. Meanwhile, the attendants demand $24,000 (60% of the physicians' salary), and the employer must pay them that amount, or at least $12,000 (150% of the gardeners' salary), or $11,333 (66-2/3% of the administrators' salary) or something in between. Comparable worth theorists have not discussed *which* "male" jobs would be

used for comparison purposes. It would take the wisdom of Solomon to solve this conundrum. But even Solomon could not do equity as between Shady Dell and Moderne. Moderne has no physicians on its staff; it contracts out for their services. Its nurses have no comparable worth claim, for they are paid twice as much as Moderne's only male employees, the gardeners, and their job is "worth" twice as much. Moderne's attendants, however, do have a claim: their job is "worth" 50% more than the gardeners', so perhaps they will have to be paid $10,875.

If the outcome is that Shady Dell must pay its nurses $32,000 and Moderne must pay its attendants $10,875, a further development is reasonably foreseeable. Shady Dell and Moderne will likely succumb to competitors that contract out for the services of physicians and gardeners.[221]

The difficulty of doing equity by mathematics at the hypothetical Shady Dell and Moderne would be far more complicated — and still more impossible — in the far more complex real world.

C. *Financial Burdens on Government and Business*

1. Direct costs — Among the direct costs of comparable worth theory would be the regulatory expenses of agencies in the Executive Branch, expenses of the courts, and litigation costs of employers and employees. These costs would be a great deal larger than for Title VII because Professor Blumrosen's proposed standard of proof would give a winning case to the great majority of all female employees.[222] Employers would also bear the consid-

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[221] For examples of analogous actual developments in the equal pay area, see Glucklich, Hall, Povall & Snell, *Equal Pay: Time to Go Back to the Drawing Board*, 9 PERSONNEL MANAGEMENT 16 (No. 1 January 1977).

[222] *See* part III *supra*. Moreover, an employer's potential liability under a Title VII wage discrimination action would, in most cases, be far greater than under a corresponding Title VII-EPA wage claim, which requires that a plaintiff demonstrate a prima facie case under EPA standards. For example, assume that a large manufacturing enterprise, which encompasses several plants located in a dozen states, faces a class action liability under Professor Blumrosen's theory that it has underpaid clerical employees, who are primarily women, on a company-wide basis. Under the Blumrosen approach to Title VII job comparability, the plaintiffs could seek damages for wage discrimination *on a company-wide basis*. However, under the existing Title VII-equal pay cases, the plaintiffs would be restricted by the EPA's standards, which require a plaintiff to demonstrate that a wage differential existed for equal work *within the same establishment*. Orr v. Frank R. McNeill & Son, Inc., 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975). *But see* Wetzel v. Liberty Mutual Ins. Co., 449 F. Supp. 397, 16 Empl. Prac. Dec. ¶ 8343 (W.D. Pa. 1978) ("establishment" requirement of EPA not a limitation on Title VII-equal pay claims). Because a Title VII wage discrimination case under Professor Blumrosen's theory would no longer be circumscribed by any EPA standards — including the establishment requirment — an employer's potential liability would be explosively expanded.

erable cost of installing and maintaining job evaluation systems.

2. *Indirect costs* — One of the largest costs of the comparable worth theory would be a distortion of the economy as employers struggle to pay market rates rather than rates dictated by a universal job evaluation system. Adoption of the comparable worth theory would not relieve employers of the constraints of the market. The costs of raw materials and capital and the prices that could be charged would still depend on market forces. Employers would, of course, attempt to find loopholes through which they could pay market prices for labor. The history of the Internal Revenue Code is instructive in this respect. The efflorescing of section upon section, the piling of regulation upon regulation, is largely the natural result of taxpayers' ingenuity in finding ways to comply with the letter of the law while avoiding the taxes that the law intended to impose. Some of the tactics for avoiding comparable worth theory are outlined below:

a. Export of jobs. Large numbers of "women's" jobs are suitable for export. Clothing, for example, can be manufactured as readily in Hong Kong and Seoul as in New York City. This is why the union with the highest proportion of female members of any major union, the International Ladies Garment Workers Union, is so vehemently opposed to the comparable worth movement. The president of that union has stated: "I'll be damned if I know a way to get the women more money . . . . The value of their work isn't set by theoretical principles but on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour."[223]

b. Contracting out. Businesses already contract out for services whose wage structures fit awkwardly with the primary enterprise. For example, many businesses contract for the services of attorneys and physicians at the high end of the scale, and for food service workers and janitorial services at the low end. Contracting out large numbers of traditionally "female" or "male" jobs would be expensive, both for the individual enterprise and for the economy as a whole. For a company faced with enormously increased labor costs, however, even large sacrifices in efficiency would be economically attractive. Consider, for example, an appliance retailer who employs office workers, a sales force, and repairmen. Almost all the office workers are female; almost all the others are male. Assume that Congress had adopted the comparable worth theory and mandated the use of a job evalua-

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[223] Address by S. Chaikin, President, ILGWU, AFL-CIO Annual Convention, Washington, D.C. (Nov. 15-20, 1979), *quoted in The New Pay Push for Women*, BUS. WEEK, Dec. 17, 1979, at 69.

tion system developed by the NAS as the standard by which "worth" must be assessed. According to this system, the "worth" of the salesmen is forty-three percent more than that of the office workers, and the "worth" of the repairmen is twenty-seven percent more than that of the office workers. The company has been paying both salesmen and repairmen ninety percent more than office workers.

The company is in a dilemma. It cannot afford to raise the office workers' salaries as high as the job evaluation system mandates, because the profit margins in its business are too low. It cannot cut the men's salaries, both because the law prohibits it and because the market value of the men's skills would enable them to move to the greener pastures of self-employment or other employment rather than take large pay cuts. In the long run it is likely that the salesmen and the repairmen will move to independent, self-employed jobs, or will organize themselves in business enterprises which are too small to come under the jurisdiction of Title VII, or which consist of all male repairmen and/or all male salesmen. These men will then be able to earn "market" recompense for their efforts. Such an atomized fragmentation of business organizations is probably quite inefficient and would raise the costs of goods and services to the entire society.

c. Overturning congressional determination of the minimum wage. Setting the minimum wage rate requires a balancing of competing considerations.[224] The balancing of complex, unquantifiable factors is the sort of decision-making that is best suited to the legislature, not the judiciary. To a large extent, Professor Blumrosen's proposal would take the minimum wage decision away from Congress and the states. For affected occupations, the courts would be required to set the wages, and to decide without reference to the many legitimate factors that economists and interest groups place before national and state legislatures.[225] In-

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[224] The interests affected by the minimum wage are far more complex than those of employers versus workers. Increases in minimum wages benefit not only low-wage employees, but also medium-wage employers, who are freed of competition from low-wage employers. Some low-wage employees benefit from higher wages, but others suffer recurrent or even permanent unemployment, as their jobs are lost to automation, imported goods, and/or illegal alien workers. *See, e.g.*, C. STEWART, JR., LOW-WAGE WORKERS IN AN AFFLUENT SOCIETY (1974); Falconer, *The Minimum Wage: A Perspective*, 3 FEDERAL RESERVE BANK OF NEW YORK QUARTERLY REV. 3 (Autumn 1978); Kosters & Welch, *The Effects of Minimum Wages by Race, Sex, and Age*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE, *supra* note 80, at 103; Moore, *The Effect of Minimum Wages on Teenage Unemployment Rates*, 79 J. POL. ECON. 897 (1971); Weintraub, *A Comment on Regional Differentials in the Differential Between Nonwhite and White Unemployment Rates*, 79 J. POL. ECON. 200 (1971).

[225] *See, e.g.*, L. WEINER, FEDERAL WAGE AND HOUR LAW 14-19 (1977), for a discussion of

stead, the courts would have to set wages according to inferences from abstract theory.

The occupations affected would be those that are female-intensive and are paid at or near the minimum wage. A number of such jobs, employing many thousands of people, are likely to be among those affected by comparable worth theory.[226] Wages set by reference to only one factor — comparable worth — would likely be much further from the optimum than wages set by legislative bodies, which are free to attend to all factors.[227]

Illegal immigration is one example of the serious problems that would be exacerbated if minimum wages were set by a comparable worth theory formula rather than by legislative decision. The higher the minimum wage, the more displacement of legal workers by illegal aliens. This is no mere marginal problem; for example, an estimated sixty to seventy percent of garment workers employed in the United States are illegal aliens.[228] If garment worker minimum wages are raised by application of comparable worth theory, it is logical to expect that still more citizens and legal aliens will be replaced by illegal aliens.[229]

d. Inflation. Implementation of comparable worth theory would increase the wages of many women, but it would not increase productivity at all. The result would be massive inflation.[230] Excessive inflation harms the entire economy by encouraging immediate consumption at the expense of savings and

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the policy and purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976) (FLSA), the principal federal statute prescribing minimum wage and overtime coverage. With respect to both minimum wage and overtime, the FLSA contains a complex array of industry exemptions. *Id.* at 109-45.

[226] Jobs likely to be affected include garment trades, entry level clerical jobs, food service workers, and hospital and nursing home attendants. *See, e.g.*, M. WITT & P. NAHERNY, WOMEN'S WORK — UP FROM .878 (Univ. of Wis. Extension, Madison 1975).

[227] Congress cannot satisfy all the diverse interests, but it can take many interests into account in setting minimum wages. The comparable worth theory would take account of *no* interests, but would operate on the basis of its theory alone.

[228] *AFL-CIO Adamant Against Illegal Aliens*, S. F. Chronicle, Feb. 26, 1980, at 23, col. 1.

[229] Illegal aliens impose substantial costs on the economy. Some of the most important costs, such as welfare payments to unemployed legal residents who are displaced, are difficult to estimate. At least one cost item can be determined: the cost of apprehending and expelling illegal immigrants. The Immigration and Naturalization Service expelled 1,430,902 illegal aliens in 1977 alone, an activity that must have cost a very substantial amount. CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION LAW AND POLICY 1952-1979 at 34, Table 2 (1979).

[230] It has been estimated that the total dollar amount required annually to achieve pay parity between full-time working women and men in the United States would be $150 billion. Smith, *supra* note 134, at 58-59. The addition of this staggering sum to employee wages would generate an enormous inflationary reaction within the economy.

investment.[231]

D. The Effect of the Comparable Worth Theory on Women

The inflationary consequences of implementation of the comparable worth theory would affect different groups unequally. Women working in traditionally female jobs would be protected, provided their employers also have traditionally male jobs and fill them with men. The comparable worth law would raise such women's wages. These women's husbands and children would also benefit, as would their ex-spouses.[232] But other groups, probably including the large majority of women, would suffer disproportionate losses of purchasing power. These groups include: most married women and their dependents, for the majority of married women are not employed outside the home;[233] all non-employed single women and their dependents (especially mothers on welfare to the extent that welfare allowances lag behind inflation); all non-employed widows and retired women;[234] all women working in traditionally "mixed" jobs and in traditionally "men's" jobs; and all women working in traditionally "women's" jobs, but in all-female work forces, *e.g.*, nursery schools and child care centers, or for employers too small to be covered by Title VII. This last group includes the most poorly paid of all employees, private household workers.

Thus, the income redistributed by comparable worth theory would flow mainly to single women and to families without young children. The additional real income to those groups would be taken largely from families in which one or more women were not working because of age, illness, or the need to care for young children. We doubt that a convincing case could be made that such a redistribution of real income would be beneficial to the nation as a whole.

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[231] P. SAMUELSON, *supra* note 46, at 273.

[232] Former husbands would benefit from reductions in the need for child support and alimony.

[233] In May 1979, 46.4% of married women were employed, 2.1% were unemployed, and 51.6% were not in the labor force. U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: SOME NEW DATA SERIES 5, Table 6 (Report No. 575, 1979). *But see* 102 L.R.R.M. 98 (1979) (prediction that by 1990 "the stereotype of the wife as one who stays home with the children will apply to about a quarter of all married women," *citing* THE SUBTLE REVOLUTION: WOMEN AT WORK (H. Barrett ed. 1979)).

[234] Widowers, retired men, and the wives of retired men would also suffer a loss of purchasing power, but because of women's longer life span, the group of older persons is primarily female. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) ("[W]omen, as a class, do live longer than men").

E. The Effect of the Comparable Worth Theory on Job Integration

The ultimate goal of Title VII is the achievement of equality of employment opportunities.[235] This goal is attainable in the workplace only through job integration. The adoption of a comparable worth appraoch to wage discrimination would inhibit, perhaps even imperil, the attainment of job integration.

The legislative histories of Title VII and its 1972 amendments demonstrate that Congress' principal motivation for the enactment of these statutes was to remedy pervasive exclusionary discrimination in employment, especially against blacks.[236] The primary intent of Congress was to end job segregation or, more broadly stated, to end the segregation of employment opportunities.[237] With respect to sex discrimination, Congress was chiefly, and almost exclusively, concerned with the problem of job segregation resulting from discrimination in hiring, promotion, recruitment, and job assignment. For example, the Senate Report reviewing the administration of the sex discrimination provisions of Title VII during the enactment of the Equal Employment Opportunity Act of 1972[238] stated: "Despite the large increase in the numbers of women in the work force, women continue to be relegated to low paying positions and are precluded from high paying executive positions. Similarly, the rate of advancement for women is slower than for men in similar positions."[239] The House Report echoed the same concern: "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less

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[235] "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 . . . . " Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

[236] 110 CONG. REC. 6548 (1964)(remarks of Senator Humphrey); *id.* at 7204-05 (remarks of Senator Clark); United Steelworkers of America v. Weber, __ U.S. __, 99 S. Ct. 2721, 2729 (1979).

[237] 110 CONG. REC. 6547-48 (1964) (remarks of Senator Humphrey); *id.* at 6552 (remarks of Senator Kennedy). *See also* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968), in which Professor Alfred Blumrosen, who is the husband of the author of *Wage Discrimination*, stated: "Discrimination in recruitment and hiring is the chief measurable evil against which the modern law of employment discrimination is directed. . . . The elimination of minority differential in unemployment rates will be a true signal that equal employment opportunity does in fact exist." *Id.* at 465-66.

[238] 42 U.S.C. §§ 2000e to 2000e-16 (1976).

[239] S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 416 (Comm. Print 1972) [hereinafter cited as LEGISLATIVE HISTORY OF EEO].

responsible and the less remunerative positions on the basis of their sex alone."[240]

The legislative record is bereft of any reference to comparable worth or wage discrimination, so Professor Blumrosen's assertion that Congress dealt with wage discrimination as one of the "discriminatory radiations of job segregation"[241] has no basis in fact. Instead, the legislative focus was upon job segregation itself and the removal of discriminatory barriers barring women from more challenging, responsible, and remunerative positions.

A comparable worth approach to residual wage differentials would not bring our society closer to the goal of job integration. Such an approach would quash perhaps the most powerful incentive for women to enter occupations historically held by men: the prospect of higher pay. If employers are required to pay higher wages for traditional "women's" jobs, women holding those jobs will have substantially less incentive to become pioneers in integrating the predominantly male jobs. Almost certainly the result would be a decrease in the movement of women into "men's" jobs.

Another and even more deleterious consequence of the implementation of comparable worth theory is the fact that it would give employers large incentives to segregate their work forces. Under a comparable worth theory, particularly under Professor Blumrosen's variant,[242] it is impossible for an employer to know whether or not it is in compliance with Title VII. Even the most well-intentioned of employers would face substantial liability in "comparable worth" back pay awards. The necessity of remaining competitive in the marketplace would spawn employer avoidance techniques. In order to reduce the uncertainty of compliance and minimize exposure to large damage awards, as well as compete in the marketplace, employers would seek to escape comparable worth problems by contracting out work. In many cases the subcontractors would be single-sex organizations that would not be affected by Title VII wage discrimination liability.[243]

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[240] H.R. REP. No. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY OF EEO, *supra* note 239, at 64.

[241] *Wage Discrimination, supra* note 1, at 465.

[242] Under Professor Blumrosen's theory, employers would be virtually precluded from a defense of pay differentials on the basis that the differences reflect the external labor market or that they conform to an internal job evaluation system. *See* text accompanying notes 188-89 *supra*.

[243] *See* 42 U.S.C. § 2000e-2(h) (1976). Under this section of Title VII "[i]t shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . to employees who work at different locations . . . . " Because this section

Finally, Professor Blumrosen's approach would inhibit job integration by imposing liability on those employers who actively pursued job integration as well as on those who did not.[244] Employers then surely would neglect their affirmative action and equal employment opportunity efforts because they would see that no matter how much financial investment they made, they would still face very large liabilities.

F. Existing Remedies

Rejection of the comparable worth theory by no means implies acceptance of wage discrimination. The statute books already contain a formidable armamentarium of laws whose impacts are reducing the wage differentials between the sexes. The EPA[245] and many similar state statutes[246] prohibit the most direct form of sex discrimination in wages, unequal pay for equal work. Substantial awards have been granted under the EPA,[247] and its effects spread far beyond the cases that have gone to judgment. As with most statutes, cases that go to trial are only a small fraction of the cases that are settled, and the cases that are settled are only a fraction of the cases that might have been brought were it not for widespread voluntary compliance with the law.

The EPA does not reach allegations of wage discrimination involving dissimilar jobs, but Title VII and similar state statutes in the large majority of states are powerful indirect forces against

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restricts Title VII's application to one "location" of a single employer, it is implausible that Congress intended Title VII wage comparisons to be made between *different* employers at *different* locations.

[244] The employer who brought men into what had been "women's" jobs would be no less liable than the employer who maintained a segregated work force. *Wage Discrimination, supra* note 1, at 498-99. Nor could the employer decrease its liability by increasing the wage for the traditional women's job. Under the *Wage Discrimination* presumption, the mere fact of a job that is *or was* female-intensive creates an inference of illegal wage discrimination—no matter what wage the employer actually pays. *See* text accompanying notes 183-84 *supra*.

[245] 29 U.S.C. § 206(d) (1976).

[246] Thirty-seven states presently have statutes, similar to the EPA, proscribing unequal pay for equal work. 8A FAIR EMPL. PRAC. MAN. (BNA) 499, 503 (1980). *See, e.g.*, CAL. LAB. CODE § 1197.5 (Deering Supp. 1979).

[247] *See, e.g.*, 2 EQUAL EMPLOYER (FED.) ¶ 2 (Jan. 2, 1978) (Smith College agreed to pay $136,000 in back wages to 143 female custodial employees in settlement of EPA action brought by the Department of Labor (DOL)); 1 EQUAL EMPLOYER (FED.) ¶ 297 (Aug. 29, 1977) (Iowa school district agreed to settle EPA action filed by DOL on behalf of 27 women custodial employees for "over $100,000"); 1 EQUAL EMPLOYER (FED.) ¶ 147 (Apr. 25, 1977) (Cambridge, Massachusetts, settled DOL-initiated EPA cases involving 283 present and former nurse's aides for $257,000 in back wages).

During the fiscal year ending September 20, 1979, the DOL recovered $10.3 million in settlements and awards in EPA cases. 102 LAB. REL. REP. (BNA) 290 (1979). The DOL statistics do not include amounts recovered in private EPA actions.

wage discrimination. These anti-job-segregation statutes protect workers' rights to integrate traditionally single-sex jobs. Since wage discrimination cannot survive the end of job separation, the integration of the workforce means the end of such wage discrimination as may exist. The force of Title VII is augmented by Executive Order No. 11,246 and its amendments[248] and its many state and municipal analogs, together with associated regulations and guidelines.[249] These laws place the weight of federal and state regulatory authority behind job integration; they use the power to withhold government contracts to impel employers to action; and they require employers to take the initiative to integrate their workforces. As with many governmental regulatory activities (or for that matter, private regulatory activities), the enforcement of Executive Order No. 11,246 has been uneven in vigor and effectiveness. But recent events make it clear that Executive Order No. 11,246 is no paper tiger.[250] The goals of governmental regulation are more likely to be achieved by improving the internal efficiency of the enforcement agencies than by generating entirely new responsibilities, together with the corresponding multiplication of rules, regulations, guidelines, and procedures,[251] for the agencies and courts.

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[248] Exec. Order No. 11,246, 3 C.F.R. 1964-1965 Comp. 339 (1967), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976), *as amended by* Exec. Order No. 11,375, 3 C.F.R. 1966-1970 Comp. 684 (1971) and Exec. Order No. 11,478, 3 C.F.R. 1966-1970 Comp. 803 (1971).

[249] *See, e.g.*, 29 C.F.R. §§ 1600.735-1643.707 (1979) (EEOC rules and regulations), 8 CAL. ADMIN. CODE §§ 295-296.4 (rules and regulations of California Fair Employment Practices Commission) (1979).

[250] For example, on June 28, 1979, Uniroyal, Inc., was debarred by the OFCCP and declared ineligible to receive government contracts or subcontracts. 3 EQUAL EMPLOYER (FED.) ¶ 270 (July 16, 1979). Uniroyal is the largest firm to date to be debarred because of discrimination under Exec. Order No. 11,246. At the time it was cut off from new government business, Uniroyal had more than $36 million in federal government contracts. Uniroyal subsequently agreed to settle its debarment case by paying $5.2 million to 750 female current and former employees and restoring their pension and seniority status. This backpay award is the largest settlement in such a case since 1973, when American Telephone & Telegraph Co. agreed to pay $52 million. Under the terms of the Uniroyal settlement, the OFCCP agreed to reinstate Uniroyal as an eligible government contractor. 3 EQUAL EMPLOYER (FED.) ¶ 445 (Nov. 5, 1979); 102 LAB. REL. REP. (BNA) 178 (1979). Uniroyal was the eighth government contractor to be debarred during the past two years for violating the requirements of Exec. Order No. 11,246. In April 1979, the Labor Department debarred Loffland Brothers Co., one of the world's largest oil drilling companies, for failing to maintain an affirmative action plan pursuant to its responsibilities as a government contractor under Exec. Order No. 11,246. 3 EQUAL EMPLOYER (FED.) ¶ 178 (May 7, 1979).

[251] The feminist economist Francine Blau has made recommendations for more effective enforcement of sex discrimination law. F. BLAU, EQUAL PAY IN THE OFFICE 108-11 (1977). Her recommendations, based on a very detailed statistical analysis, are for deployment of enforcement resources in the "traditional" areas of hiring and promotion. *Id.* at 103-04. Blau's analyses show that it is in hiring and promotion, and not in equal pay,

In response to these considerations, supporters of the comparable worth idea say that the law as it is does not work: they claim that jobs remain largely segregated and that the wages of women and minorities are not rising.[252] The first part of this response is a *non sequitur*, for sex segregation in the workplace is already a prime focus of Title VII, and no new force against sex segregation would be created by implementation of the comparable worth idea. Indeed, comparable worth would tend to inhibit the movement of women into non-traditional jobs.[253]

The argument that the relative wages of minorities and women are not increasing is mistaken. Wages of blacks relative to those of whites have risen in recent years, and the relative wages of black women have risen more than those of any other group in American society for whom figures are available.[254] For women generally, both black and white, the proportion of women in traditionally male jobs increased greatly in the 1970's.[255] Although

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that the major problem resides. *Id.* at 24, 103-04. Like most economists, Blau does not even discuss wage discrimination in the sense that Professor Blumrosen uses the term.

Blau points out that inefficient patterns of enforcement have serious consequences:

> [T]he current structure appears to militate against uniform and timely enforcement of the law. Under the present system, it is possible that some employers will be deluged by investigators from different agencies, subjected to conflicting compliance requirements, and forced to defend themselves against the same discrimination charge in a seemingly endless number of forums. Other employers (one suspects the majority) may not be subjected to any serious pressure to conform to the antidiscrimination statutes and regulations. At the same time, victims of discrimination languish as their complaints remain unprocessed.

Id. at 107.

[252] *Wage Discrimination, supra* note 1, at 402-415. *See* address by EEOC Commissioner J. Clay Smith, *supra* note 9, at E-2.

[253] *See* part III *supra.*

[254] Between 1960 and 1970,

> [b]lack female hourly earnings, adjusted for age and schooling, rose 82 percent compared with 68 percent for black males and 53 percent for white females. By 1969, hourly earnings of black females were only 15 percent less than those of white females of comparable age and schooling, while for women with more than twelve years of schooling the adjusted color differential had practically disappeared.

Fuchs, *Women's Earnings: Recent Trends and Long-Run Prospects,* MONTHLY LAB. REV., May 1974, at 23.

[255] For example, between 1970 and 1978, the proportion of accountants who are women rose from 25.3% to 30.1%, a 19% increase; for engineers the corresponding increase was 75%; for lawyers and judges, 100%; physicians and osteopaths, 27%; and nonfarm managerial-administrative officials, 41%. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: SOME NEW DATA, SERIES 3 at Table 4 (Report No. 575, 1979). One indirect but impressive index of women's rising status in business is the recent increase in airline business travel by women. In 1979, business travel by women accounted for 17% of all U.S. airline revenue from business travel, an increase from 13% in 1977 and from only 1% in 1974. *Women Travelers Find Safety and Harassment Can be Major Problems,* Wall St. J., March 5, 1980, at 1, col. 1. The progress shown in these figures contrasts with the stasis conveyed by the statistics cited in *Wage Discrimination* because that article is

the overall ratio of female to male earnings has remained almost constant, in recent years that ratio has been maintained in the face of a very large influx of women entering the labor force for the first time. After adjustments for the temporarily large proportion of *new* women workers, the relative wages of women have risen.[256]

Thus, changes *are* occurring in the status and the wages of women and minorities. No doubt Title VII and the EPA have contributed to those changes. But such changes are of a magnitude much greater than can be attributed to the law alone. If the fundamental arrangements within human society — arrangements such as the institution of the family itself and the division of labor within the family — are of glacial solidity, it is apparent that late in the twentieth century the United States is experiencing an increasingly rapid thaw of the glacier. With or without comparable worth theory, the rationalizations for discrimination against women in the workplace are moribund. Implementation of Professor Blumrosen's drastic remedies would do little to hasten those epochal changes in our society. Rather, the result would be enormous inflationary stresses on the economy, with attendant real losses for the majority of women as well as men.[257]

CONCLUSION

This article has demonstrated that wage differences between different jobs performed by men and women are not subject to the remedial framework of Title VII. The argument that a Title VII remedy should be judicially mandated because wage discrimination is an inevitable consequence of the sexual or racial identification of particular occupations should be rejected for two principal reasons. First, no evidence exists that residual wage differentials resulting from discrimination can be detected or quantified by any present social science technique. Second, no basis exists under equal employment opportunity statutes or case law for such a remedy.

This article has asserted that not only the courts but also Congress should refrain from fashioning a "comparable worth" approach to wage differentials. The adoption of a comparable

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almost entirely based on older statistics. The changes in the period 1970-1978 generally were greater than in the entire period 1950-1970. *Id.*

[256] For example, in the 1960's the female-male earnings ration for whites, adjusted for hours, age, and schooling, increased by 4.8%. Fuchs, *supra* note 254, at 23. *See Economic Report of the President, 1974, quoted in* MONTHLY LAB. REV., May 1974, at 22.

[257] *See* part III *supra*.

worth theory would result in inequitable enforcement, impose crushing economic burdens upon employers and the economy as a whole, reduce the real incomes of more women than it would benefit, and impede the attainment of the ultimate goals of equal employment opportunity.

DOCUMENT NO. 085415 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 8/10/82 ACTION/CONCURRENCE/COMMENT DUE BY: 8/16/82

SUBJECT: Comparable Worth Literature

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☒	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☒	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

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BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

Please give me a brief summary of the factual basis of discrimination in the attached article.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: EDWIN L. HARPER

FROM: WILLIAM P. BARR WPB

SUBJECT: Comparable Worth Literature
(Ref. 085415)

I have been in touch with both the Equal Employment Advisory Council and the National Commission on Pay Equity.

You asked to see some literature published by these groups.

EEAC has provided me with the attached materials. I also have in my files the legal briefs that they have filed in key comparable worth cases, some of which are excellent.

NCPE said they would send some material, but I have not yet received any. When I do receive it, I will forward it to you.

Please give me a brief summary of the factual basis of discrimination in the attached article.

ZI

DOCUMENT NO. 085415 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/27/82 **ACTION/CONCURRENCE/COMMENT DUE BY:** 8/1/82

SUBJECT: Comparable worth: the equal pay issue of the '80's.

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
✓ UHLMANN	☒	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

Are you or someone in OPL in touch with both Equal Employment Advisory Council and National Commission on Pay Equity? I'd like to see some literature from each group.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

Comparable worth: the equal-pay issue of the '80s

While advocates of the comparable-worth concept believe it would help rectify wage discrimination against women, opponents of the idea believe its application across the job market would be devastating to the economy.

By Deborah Churchman
Special to The Christian Science Monitor

In Montgomery County, Md., a teacher entering the system for the first time with a bachelor's degree receives a starting salary of $13,253. A liquor store clerk with no college education in the same county starts at $14,731.

Apples and oranges, or plain inequities? That's the question behind the "comparable worth" concept that is said to be the equal-employment issue of the 1980s. The idea that employees should be paid for work that is not exactly equal, but comparable in worth, has been around the courts and bargaining tables since the late 1960s. But last summer the Supreme Court gave a cautious, limited go-ahead to a case which some say set a precedent for using Title VII of the Civil Rights Act in "comparable worth" cases, and the issue began to snowball.

landmark case

That case, Gunther v. County of Washington, was a classic: Matrons at an Oregon prison argued that, although they had fewer inmates to guard and more clerical work to do, they were doing work comparable to that of male deputy sheriffs who guarded males within the state system. The court described the case as having proved, "by direct evidence, that wages were depressed because of intentional sex-discrimination, consisting of fixing the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted."

A key piece of evidence in the case was an

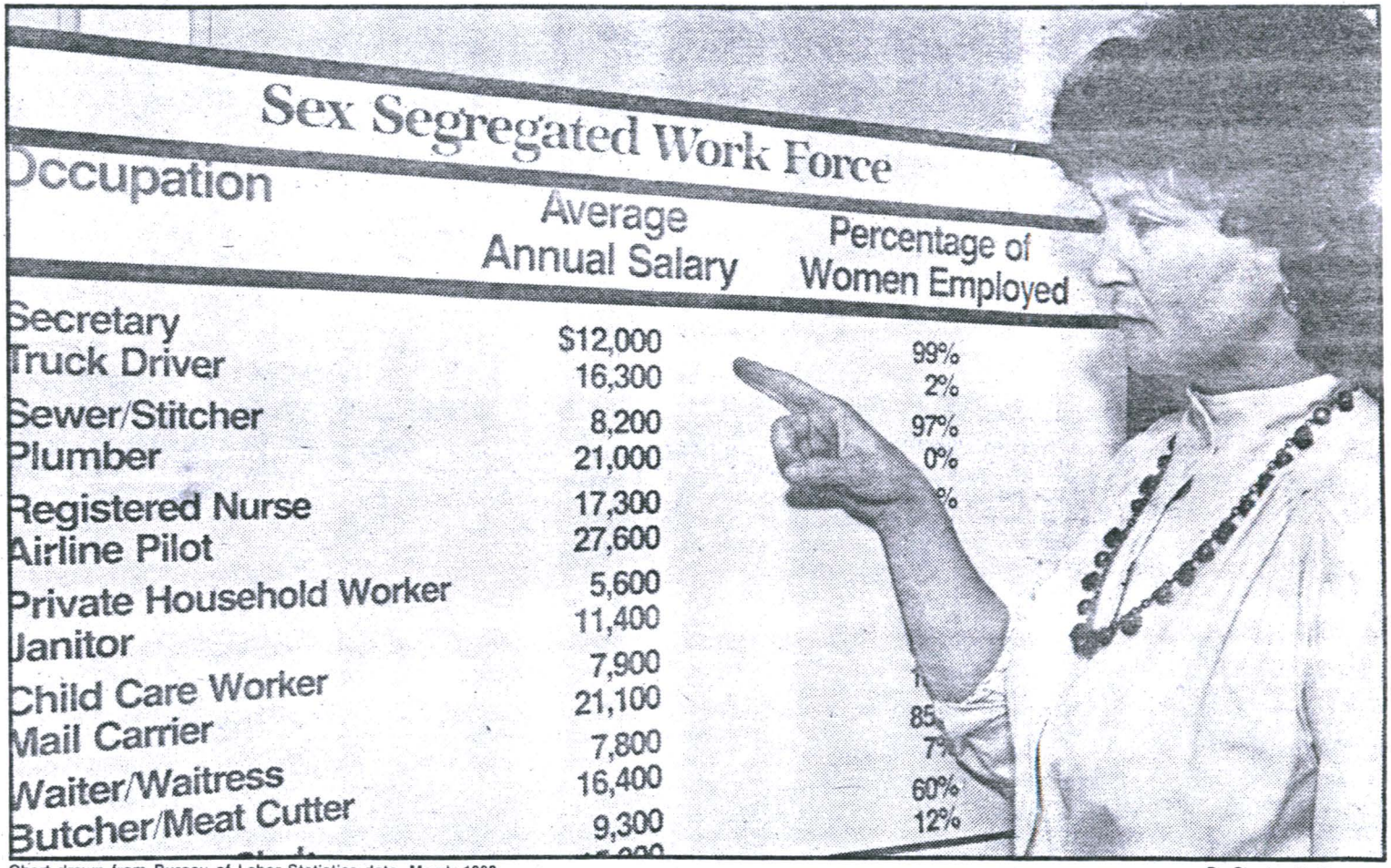

Chart drawn from Bureau of Labor Statistics data, March 1982 By Charles K. Crockett

Joy Ann Grune uses a chart to illustrate pay differences between jobs and the percentage of women holding those jobs

messengers."

She observes some companies have "different standards of evaluation for blue collar, white collar, and clerical workers. And then some firms will hire an outside evaluator, discover they have been consistently paying women less than men, and then decide to ignore the findings because they think it's too expensive to upgrade women's pay."

Big industry, faced with overregulation and spiraling labor costs, will take their companies to cheap labor markets overseas, Mr. Connolly says, while the increases in pay will have a "significant inflationary effect. The

mission promises to uphold is seen as the cure for anyone's low wages by a corporate lobbying group called the Equal Employment Advisory Council (EEAC), which has published a book arguing against the concept of comparable worth. With access to all types of employment opening up, it sees a woman's decision to stay in a low-paying, traditional female job

Chart drawn from Bureau of Labor Statistics data, March 1982

By Charles K. Crockett

Joy Ann Grune uses a chart to illustrate pay differences between jobs and the percentage of women holding those jobs

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key piece of evidence in the case was an ide job evaluation, which showed the ıen doing 95 percent of what the men were g, while each woman received $200 less a ıth than her male counterpart. Job evalu-ns like this one are the main bone of con-ion between advocates and opponents of parable worth, with opponents believing worth should be determined by the mar-ıace (or prevailing wage scales) and ad-ates wanting a systematic comparison of s, education, experience, and responsibil-or each job.

lthough methods for evaluating jobs may from company to company and from sit-on to situation, the determination of sala-tends to fall into these same categories. November, for example, the San Fran-o Board of Supervisors established a cy of pay for city employees, saying that city charter requires jobs to be paid at ailing wage scales, according to Virginia gard Dean, co-coordinator of the Compa-e Worth Project in Oakland, Calif.

aries based on current wage scales

ler organization maintains that job evalu-ns based on current wage scales almost ays discriminate against women, "since ıen and women's occupations were paid as a matter of policy before Congress sed the Equal Pay Act of 1963 and the Civil ıts Act of 1964, which made sex and race rimination in wages illegal. Prevailing e systems perpetuate this historic bias."

But Joy Ann Grune, executive director of National Committee on Pay Equity in hington, D.C., says some of the job evalu-ns that look at skills, experience, and re-sibility still tend to undervalue women's k. "They leave out factors in female jobs the manual dexterity required for assem-g certain items," she says. "Or they as-e that because a woman heads up a pool erk typist, she has less responsibility than eone who heads up a group of messengers."

She observes some companies have "different standards of evaluation for blue collar, white collar, and clerical workers. And then some firms will hire an outside evaluator, discover they have been consistently paying women less than men, and then decide to ignore the findings because they think it's too expensive to upgrade women's pay."

The high cost of equal treatment

The high cost of equal treatment is often cited by opponents of the comparable-worth idea who believe its application across the job market would be devastating to the economy. Michael Connolly, the new general counsel of the Equal Employment Opportunity Commission – the government agency primarily responsible for moving the Gunther case to the Supreme Court under the last administration – is one of these.

He cites a 1978 EEOC study that says it would cost civilian employers $150 billion a year to raise women's pay to parity men's. "If the comparable-worth can of worms gets opened in the country, and the law of supply and demand and the free market doesn't apply," he says, "it will be doing a great disservice to females and minorities and the country."

Big industry, faced with overregulation and spiraling labor costs, will take their companies to cheap labor markets overseas, Mr. Connolly says, while the increases in pay will have a "significant inflationary effect. The trick in supply-side civil rights, like supply-side economics," he says, is not to give any group a larger piece of the same economic pie, "but to make the pie larger."

"We need women and minorities in the work force," he says, pointing out that the baby-boom employees who have taken jobs at the starting end of the pay scale are now moving up through that scale, and others must be found to take lower-paying jobs.

The EEOC will continue to work "vigorously to enforce the [1963] Equal Pay Act and Title VII," Mr. Connolly says, referring to the two pieces of federal legislation commonly used in equal-pay court cases, "particularly in cases where upward mobility is being threatened."

The upward mobility Mr. Connolly's commission promises to uphold is seen as the cure for anyone's low wages by a corporate lobbying group called the Equal Employment Advisory Council (EEAC), which has published a book arguing against the concept of comparable worth. With access to all types of employment opening up, it sees a woman's decision to stay in a low-paying, traditional female job is "a matter of choice," says one of the organization's lawyers. "She could always change jobs."

'Profit and prejudice'

Advocates of comparable worth, on the other hand, place much of the blame squarely on discrimination. "There are two main reasons this practice [of assigning lower wages to jobs traditionally held by females] exists – profit and prejudice," says Day Creamer, executive director of Women Employed in Chicago.

Organizations like hers, in partnership with many unions, are working through collective bargaining as well as the courts and state and local legislative bodies across the country to establish laws and legal precedents for this concept.

Identifying wage discrimination in the workplace

Joy Ann Grune, executive director of the National Committee on Pay Equity in Washington, D.C., advises employees who think they may be the victims of discrimination based on comparable worth to "talk to other women on the job, and find out if they, too, are upset. Find out if the men are making more money, and see what you can do to generate support for the idea."

She cautions such employees to "work with your union, if you have one, or at least get in touch with us or the Comparable Worth Project in Oakland, Calif., for support."

The project has a 30-page booklet designed to prepare employees for the collective-bargaining approach to this issue, entitled "First Steps to Identifying Sex and Race-Based Pay Inequities in a Workplace." It advises employees to start a Comparable Worth Committee to determine the following:

- Number of workers employed, broken down by numbers of men and women.
- Average salary earned by all workers.
- Average salary earned by men and by women, the dollar figure wage gap between men and women, and the percentage wage gap.
- Total number of occupations in the workplace, and the number and percentage of these occupations segregated exclusively or predominantly by gender.
- The average earnings of each of these categories, and the dollar and percentage wage gap between the categories.

Employees should also take a look at the job evaluation system used by their employer:

- How are wages determined in the workplace?
- If jobs are ranked according to the presence of compensable factors, what are these factors, and how is their presence in the job measured?
- If there are different methods of determining wages for different groups of jobs, how are the methods different, and what is the gender composition of each group?
- How long has the present wage-setting system been used, and what system or systems were used before?
- If prevailing wage rates are used to set salaries, how are those rates determined, which employers are surveyed, and how are the results of the survey used in the salary-setting process? If some jobs are not surveyed, how are they assigned to benchmark groups?

One note of caution: A lawyer with the Equal Employment Advisory Council, a corporate lobbying group that frequently litigates against pay equity cases, says that "anyone who doesn't have evidence of intentional discrimination or an employer's job evaluation backing up their claim is going to have a tough case."

— Deborah Churchman

THE WHITE HOUSE
WASHINGTON

Date/# 7/26

TO: R. Porter
D. Boggs
R. Carleson
D. Kass
M. Uhlmann

FROM: Edwin L. Harper

ACTION: ☒ FYI: ☐

Comment: _____

_____

Background: _____

Draft response for: _____

For your handling: _____

File: _____

Set up meeting: _____
With: _____

REMARKS: Are you or some one in OPL in touch with both Equal Employment Advisory Council & National Com on Pay Equity? Id like to see some literature from each group

Due Date: _____

Action Completed: _____

University of Michigan Journal of Law Reform

Volume 13 Winter 1980 Number 2

Wage Discrimination and the "Comparable Worth" Theory in Perspective

Bruce A. Nelson
Edward M. Opton, Jr.
Thomas E. Wilson

HON. PATRICIA SCHROEDER
Chairwoman
Subcommittee on Civil Service
209 Cannon HOB
Contact: Andrew Feinstein
202/225-4025

HON. GERALDINE FERRARO
Chairwoman
Subcommittee on Human Resources
406 Cannon HOB
Contact: Andrew Feinstein
202/225-2821

HON. MARY ROSE OAKAR
Chairwoman
Subcommittee on Compensation
608 HOB Annex #1
Contact: Tom DeYulia
202/226-7546

FOR IMMEDIATE RELEASE September 21, 1982

EEOC CHAIR THOMAS AND OPM HEAD DEVINE TO TESTIFY AT PAY EQUITY HEARINGS ON SEPTEMBER 30

Clarence Thomas, Chairman of the Equal Employment Opportunity Commission (EEOC), and Dr. Donald J. Devine, Director of the Office of Personnel Management (OPM), will testify on Thursday, September 30, on pay equity for women and the activities of the Reagan Administration relating to this issue.

Thomas and Devine will testify on the third day of landmark pay equity hearings being jointly conducted by Chairwoman Pat Schroeder (D-CO) of the Civil Service Subcommittee, Chairwoman Geraldine Ferraro (D-NY) of the Human Resources Subcommittee, and Chairwoman Mary Rose Oakar (D-OH) of the Compensation and Employee Benefits Subcommittee. The hearings start at 9:30 a.m. in the Post Office and Civil Service Committee hearing room, 311 of the Cannon House Office Building.

Also testifying on the 30th will be representatives from the State of New York and the City of Colorado Springs, Colorado, on their own efforts to implement pay equity for women. Testifying about the New York experience will be Meyer Frucher, Director, Governor's Office of Employee Relations; William McGowan, President, Civil Service Employees Association (AFSCME); and a representative of the Center for Women in Government. Testifying about the Colorado Springs experience will be Richard Zickefoose, Director of Personnel.

The balance of the hearing will focus on pay equity in the Federal government's own workforce. Testifying on the subject will be:

De Burton, President, Federally Employed Women
James Peirce, President, National Federation of Federal Employees
Vincent Connery, President, National Treasury Employees Union
Barbara Hutchinson, Director of Women's Bureau, American Federation of Government Employees (AFL-CIO)
Elizabeth W. Stone, President, American Library Association

A fourth day of hearings later in the fall will be scheduled to hear from other experts in the field of equal pay for work of equal value.

A STATEMENT

TO: THE PRESIDENT OF THE UNITED STATES

FROM: THE EXECUTIVE COMMITTEE OF THE

NATIONAL FEDERATION OF REPUBLICAN WOMEN

March 9, 1983

National Federation of Republican Women
310 First Street, S.E., Washington, D.C. 20003 (202) 484-6670

MRS. BETTY RENDEL, PRESIDENT

March 9, 1983

Mr. President, we, the Officers of the National Federation of Republican Women, consider it an honor and a privilege to meet with you.

We want to share with you our belief and concern that the perception women across the country have of your administration is more important than the facts -- more important than the record. The perception is that this administration falls somewhere between being apathetic about women's concerns to being anti-women.

The answer to the problem lies more in public relations than in arguing the facts. The positive achievements this administration has made have not been properly packaged and have been only half-heartedly sold.

We applaud the great appointments you have made -- Sandra Day O'Connor, Jeanne Kirkpatrick, Margaret Heckler, Elizabeth Dole. All of your actions to place women in your administration in visible and policy making positions are commendable.

Of primary concern to us is a desire to have some tangible evidence of concern for women -- the "average woman." Women's roles in society have changed and women do have special needs.

Well publicized policy and legislative actions should be taken to demonstrate Republican sensitivity to special needs and to actually address and meet these needs.

The message in your State of the Union address was right on target.

Action from your middle-management team on substantive programs of concern to women can change the overall perception to one we can all publicize.

The National Federation of Republican Women suggests:

* Endorsement of the Economic Equity Act, which will be re-introduced in both the House and Senate on March 14. (Equal pay, equal pension provisions and other financial inequities are some of the few situations that can be changed by positive legislative action.)

* Investigation of proposals that would indicate an awareness of the working woman's needs for private/public day care centers.

* Displaying a sensitivity to poor women who cannot hope to educate their children without financial assistance.

* Offering concrete proof of progress of your 50 States Project.

* Supporting Congressman John McCain's proposed Joint Select Committee on Women's Rights.

We support your administration whole heartedly, Mr. President. We believe we are better off today than we were before your election. We have faith in your economic recovery program. And, if it is allowed to work, as we believe it is beginning to, America will recover from her economic woes and we will have a strong economy. A strong economy is the answer to almost all of our problems.

The National Federation of Republican Women can provide a forum for your messages, Mr. President. Please let us help you.

Betty Rendel of Indiana, President
Betty Heitman of Louisiana
Judy Lamora of Colorado
Huda Jones of Kentucky
Charlotte Mousel of California
Connie McGregor of New York
Claudine Mansfield of Iowa
Norene Bunker of North Dakota
Kathie Miller of Georgia
Mary Jo Arndt of Illinois
Fleur Bresler of Maryland