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Comparable Worth—Its Status in the Nation and Minnesota

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NOTES

COMPARABLE WORTH—ITS STATUS IN THE NATION AND MINNESOTA

Supported by staggering statistics, advocates of wage equality have brought the issue of comparable worth to the forefront of employment law. Not only is it an issue of great legal import but one of great political, economic, and social import as well. Notwithstanding the recognized importance of wage equality, countervailing interests have hindered the acceptance of comparable worth by the judiciary. This Note examines the judiciary's reluctance to address the issue and legislative responses.

I. INTRODUCTION

Congress enacted the Equal Pay Act and Title VII over twenty years ago, but two decades of technical equality have failed to adjust the gross disparities between men's and women's wages. Since 1939, a woman has earned roughly fifty-nine cents for every dollar earned by a man. Even

1. 29 U.S.C. § 206(d) (1976); see infra notes 28-34 and accompanying text (legislative history and judicial interpretations of Equal Pay Act).


in the same industry and occupation, with adjustments for experience and education, a woman's wages are, on the average, thirty percent less than those of her male counterpart. 4 One of the reasons for this disparity is the high concentration of women in lower paying, unskilled jobs. 5 More significant is the high percentage of women employed in female-dominated jobs. 6 The lack of male counterparts working in the same job precludes those women from the protection provided by the Equal Pay Act standards. 7

Comparable worth may be an answer to this dilemma. Instead of requiring equal pay for equal work, comparable worth seeks equal pay for comparable work. In other words, employees in different jobs requiring equal skill, effort, and responsibility should be paid equally since their jobs are of equal value to a common employer. 8

In recent years, comparable worth has become a controversial issue in the area of wage and sex discrimination. The issue arises in several contexts, including complaints, grievances, public debates, litigation, and

Sept. 30, 1982, at 10A, col. 1. In New York City, a public school teacher, typically female, with a master's degree earns an entry level salary of $12,979 while a sanitation worker, typically male, earns $14,075 without a high school diploma. A teacher with a bachelor's degree earns $10,981 in New York City while police officers and fire fighters earn $15,619, often with only a high school diploma. Labor: What's a Job Worth?, ATLANTIC, Feb. 1981, at 10. Approximately 22.2% of the civil service employees of the City of Minneapolis, Minnesota are women. Two-thirds of these women are clerical employees. Most men employed by the City of Minneapolis earn between $25,000 and $33,000 annually while most women earn between $16,000 and $19,900. The female-dominated job of emergency communications specialist pays from $637 to $907 bi-weekly while the male-dominated job of equipment dispatcher pays from $899 to $1139. See St. Paul Dispatch, Aug. 19, 1983, at 1B, col. 6.

4. St. Paul Dispatch, Dec. 30, 1982, at 7C, col. 1; see also Quinn, Comparable Pay for Women, NEWSWEEK, Jan. 16, 1984, at 66 (even after corrections for differences in tenure and training, women on the average earn less than men).

5. St. Paul Dispatch, Dec. 30, 1982, at 7C, col. 1. In the ten highest paying jobs for women, only 25% of the workers are female. In low-paying, female-dominated jobs such as cashier, women earn 90% of what a man earns. Id. at col. 3.


7. Id. at 916.

8. See generally Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 DUQ. L. REV. 453, 470 (1981) (issue is whether Congress intended Title VII to outlaw greater compensation of male jobs than female jobs if the reason for the pay differential is attributable to the sex of the employee); Schnebly, Comparable Worth: a legal overview, PERSONNEL AD., April 1982, at 43 (comparable worth defined: jobs having equal value to the organization should be equally compensated, whether or not the work content of those jobs is similar). Comparable worth is more complicated than the equal pay for equal work theory. If a job requires the same level of skill, education and responsibility as a different job, then workers in each job should be paid the same. See Nussbaum, Why pay secretary less than a go-fer?, USA Today, Sept. 30, 1982, at 10A, col. 3.
legislative initiatives. Those who support implementation of comparable worth believe it will help eradicate job segregation. Arguably, if the pay for female-dominated jobs were made equal to the pay for male-dominated jobs of comparable value, more men would pursue work in traditionally female jobs. Advocates of comparable worth contend that existing constitutional, statutory, and judicial protections are inadequate to ensure wage equality. Opponents of comparable worth argue that equal pay for equal worth is too difficult and costly to implement. An estimated one hundred and fifty billion dollars per year may be necessary to increase full-time female workers' wages to that of full-time male workers. These opponents charge that comparable worth will destroy the free market system.

10. See Norton, Women are trapped in low-paying jobs, USA Today, Sept. 30, 1982, at 10A, col. 6 (women are trying to fill traditional male jobs but few men want to enter traditionally female fields). Two-thirds of women workers are employed in sales, service, or clerical jobs where the pay is low, few skills are required, and opportunities for promotion are limited. This is known as occupational segregation. See Gasaway,Comparable Worth: A Post-Gunther Overview, 69 GEO. L.J. 1123, 1126 (1981).
11. See generally infra notes 23-27 and accompanying text. The effect of the proposed Equal Rights Amendment on women's wages may never be known. The ratification deadline was June 30, 1982. For a general background and history of the ERA, see Dow, Sexual Equality, the ERA and the Court—A Tale of Two Failures, 13 N.M.L. REV. 53 (1983).
12. See generally infra notes 28-59 and accompanying text.
13. See generally infra notes 60-133 and accompanying text.
14. Statistics illustrate the need for protecting working women. Recent figures indicate that 63% of Americans living below the poverty level are women. St. Paul Pioneer Press, Oct. 11, 1982, at 8A, col. 1. In recent years, more women have become single parents with little or no support from an ex-husband or absent father. Sixty percent of working women provide the sole or vital support for themselves and their families. Women head one of ten households and one-third of all households below the poverty level are headed by women. If working women are to be accepted socially as the sole providers for their families, then they should earn as much as a male head of household would earn for performing work of comparable value. See Gasaway, supra note 10.
15. See McDowell, Comparable worth opens Pandora's box, USA Today, Sept. 30, 1982, at 10A, col. 6. Douglas S. McDowell, a Washington lawyer specializing in equal employment law, argues, "Adoption of the comparable worth approach would involve the courts and the government in a tangle of issues that would be difficult to resolve, and almost impossible to manage." Id. at col. 7.
17. See Spelfogel, Equal Pay for Work of Comparable Value: A New Concept, 32 LAB. L.J. 30, 39 (1981). Opponents fear comparable worth could permanently damage market pricing concepts. They argue increased wages would result in increased costs. Increased costs would in turn require increased productivity through automation and job loss. Increased prices of goods and services would hamper America's ability to compete with foreign labor. Thus, it is claimed that comparable worth "would deal a devastating and perhaps fatal blow to collective bargaining and the free enterprise system as we know it." Id.
when it enacted legislation affecting pay equity.\textsuperscript{18}

In July 1983, Minnesota’s largest public employees’ union signed a two-year contract with the state of Minnesota to increase wages of thousands of state employees.\textsuperscript{19} Earlier in 1983, pursuant to Minnesota’s state employees-equitable compensation statute,\textsuperscript{20} the Minnesota Legislature appropriated nearly twenty-two million dollars to make this increase possible.\textsuperscript{21} By integrating comparable worth into its statutory scheme, Minnesota became a pioneer in the area of pay equity.\textsuperscript{22}

This Note explores the judicial and legislative sources of comparable worth, the theory’s status in the courts and state legislatures, and problems hindering its further implementation. A discussion of existing wage discrimination law is a necessary prerequisite to understanding the roots of comparable worth.

\section*{II. Federal Statutes and Judicial Decisions}

\subsection*{A. Congress and Wage Discrimination}

State action which discriminates on the basis of sex has only recently been recognized as unconstitutional. The fourteenth amendment,\textsuperscript{23} enacted in 1868, provides the constitutional authority for prohibiting various forms of discrimination. The amendment mandates that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{24} It was not until the early 1970’s that the Supreme Court determined that sex was an inherently suspect classification triggering

\begin{itemize}
\item \textsuperscript{18} See infra note 34.
\item \textsuperscript{19} See St. Paul Pioneer Press, July 26, 1983, at 1A, col. 5. The American Federation of State, County and Municipal Employees (AFSCME) bargains for 17,000 state government employees, including 85% of Minnesota’s female government employees. Consultants assigned a certain worth rating to each state government job category. Wages were increased 4% on July 1, 1983, and will be increased 4 1/2% in 1984 for female-dominated job categories with worth ratings similar to those of male-dominated job categories. Over 7000 employees, including over 5000 women, are affected. \textit{Id}.
\item \textsuperscript{20} See MINN. STAT. §§ 43A.01-.47 (1982). See generally infra notes 161-71 and accompanying text (examination of statute).
\item \textsuperscript{21} See Act of June 8, 1983, ch. 301, § 55, 1983 Minn. Laws 1558, 1622-24. Eighteen million dollars was targeted toward employees represented by AFSCME. Complete pay equity, however, is not expected unless a similar appropriation is made in 1985. See St. Paul Pioneer Press, July 26, 1983, at 1A, col. 5.
\item \textsuperscript{22} See St. Paul Pioneer Press, July 26, 1983, at 1A, col. 5. AFSCME negotiated pay equity adjustments in Hennepin County, Minnesota. \textit{See Quinn, Comparable Pay for Women, NEWSWEEK, Jan. 16, 1984, at 66.} In early 1984, AFSCME and other labor unions agreed with the City of St. Paul, Minnesota to conduct a study to determine whether men and women employees are being paid equally for comparable work. The results of the study could result in increased wages for the women represented by AFSCME. See St. Paul Pioneer Press, Jan. 6, 1984, at 1C, col. 6.
\item \textsuperscript{23} U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{24} \textit{Id}.
\end{itemize}
close judicial scrutiny under the fourteenth amendment. To be enforceable, any state classification based on sex must now be substantially related to the achievement of an important governmental objective. Since the fourteenth amendment applies only to state action, private discrimination is not prohibited.

Congress passed the Equal Pay Act of 1963 (EPA) approximately one hundred years after the enactment of the fourteenth amendment. The EPA, which is binding upon private employers, amended the Fair Labor Standards Act of 1938. A private employer subject to the EPA may not pay female employees less than male employees who work in the same or a substantially similar job. The Equal Pay Act defines equal

25. See Frontiero v. Richardson, 411 U.S. 677, 682 (1973). In Frontiero, the Court departed from traditional rational basis analysis and held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to close judicial scrutiny." Id. at 688; cf. Reed v. Reed, 404 U.S. 71, 76 (1971) (discriminatory statute struck down using rational basis standard, a test more easily satisfied than the standard in Frontiero).

26. See Craig v. Boren, 429 U.S. 190, 197 (1976) (differentiating between males and females regarding age at which they may buy 3.2% beer held not to meet standard); see also Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981).

27. See U.S. Const. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction equal protection of the laws." Id. (emphasis added).


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


30. To be subject to this act, an employer must fall under the criteria found at 29 U.S.C. § 203(s) (1976 & Supp. V 1981) (definition of enterprise engaged in commerce or in the production of goods for commerce).

31. See Equal Pay Act of 1963, supra note 28 (standard used in text of Equal Pay Act is equal pay for equal work).

32. Jobs need not be identical before the Equal Pay Act is applicable. Equal work means substantially equal. A wage differential is permissible only if it compensates for an appreciable variation in skill, effort, or responsibility between otherwise comparable job work activities. At the time of this publication, every circuit court of appeals that has decided the question has adopted the substantial similarity standard. See, e.g., Thompson v. Sawyer, 678 F.2d 257, 272 (D.D.C. 1982); Odomes v. Nucare, Inc., 653 F.2d 246, 250 (6th Cir. 1981); Equal Employment Opportunity Comm'n v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1225 (7th Cir. 1980); Horner v. Mary Inst., 613 F.2d 706, 713 (8th Cir. 1980); Gunther v. County of Washington, 623 F.2d 1303, 1309 (9th Cir. 1979),
work as "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." 33 Courts have interpreted the Equal Pay Act to apply only to employee allegations of unequal pay for equal or substantially similar work, not to employee allegations of unequal pay for comparable work.34

Soon after the enactment of the EPA, Congress passed Title VII of the Civil Rights Act of 1964,35 a comprehensive series of federal statutes prohibiting various forms of discrimination, including discrimination on the basis of sex. The Act was passed on July 2, 1964, during the height of the civil rights movement in the late 1950's and early 1960's. This legislation was prompted by the need to eradicate one hundred years of racial discrimination.36 The issue of sex discrimination was not addressed until the day before the Act's passage.37 The debate over inclusion of sex as a form of discrimination lasted two hours. Following the vote, the word "sex" was inserted in Title VII wherever the categories of "race, color, religion, or national origin" appeared.38

The inclusion of "sex" in Title VII, commonly referred to as the Smith Amendment,39 was not the only last-minute change. The Bennett

37. See 1964 U.S. CODE CONG. & AD. NEWS 2513-17 (legislative history and purpose of Title VII); see also Gold, supra note 8, at 462-68; Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 879-85 (1967). One of the main reasons "sex" was inserted was the fear that black women would have more rights than white women. Id. at 882.
38. See Miller, supra note 37, at 882.
39. See Gold, supra note 8, at 462-63; Miller, supra note 37, at 880-81.
Amendment 4° also was added to Title VII immediately before Senate approval and return of the bill to the House.41 It became another federal statute important to the evolution of comparable worth. The Bennett Amendment reads:

> 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 differentiation is authorized by the provisions of section 206(d) of Title 29.42

Federal wage discrimination claims led some courts to hold that the Bennett Amendment incorporated the entire EPA into Title VII. This conclusion meant that a woman’s Title VII wage discrimination claim would be limited by the EPA’s equal pay for equal work standards.43 In 1981, this interpretation was rejected by the Supreme Court in *County of Washington v. Gunther*.44 The Court declared that the Bennett Amendment merely incorporated into Title VII the four exceptions listed in the EPA.45 These exceptions allow an employer to differentiate between men’s and women’s wages “where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any . . . factor other than sex . . . .”46 According to the *Gunther* Court, Title VII wage discrimination actions were not limited by the equal pay for equal work standard of the EPA.47

Since the passage of the 1964 Civil Rights Act, the Court has developed three methods of establishing discrimination under Title VII: disparate treatment, disparate impact, and pattern or practice of discrimination.48 *McDonnell Douglas Corp. v. Green*49 set forth the four elements that a complainant must plead and prove to establish a prima facie disparate treatment claim. The complainant must show that she belonged to a class protected under Title VII; that she applied and quali-

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41. *See* Gold, supra note 8, at 471.
42. 42 U.S.C. § 2000e-2(h) (1976). *Section 206(d) of Title 29 is the Equal Pay Act, supra note 28.*
43. *See, e.g.,* Nulf v. International Paper Co., 656 F.2d 553, 560 (10th Cir. 1981) (citing Ammons v. Zia Co., 448 F.2d 117, 119 (10th Cir. 1971)) (Bennett Amendment made equal pay for equal work standard applicable to Title VII); Lemons v. City of Denver, 620 F.2d 228, 229-30 (10th Cir.), *cert. denied,* 449 U.S. 888 (1980) (same result as *Nulf*).
45. *See id.* at 168-71.
48. *See infra* notes 49-59 and accompanying text.
49. 411 U.S. 792 (1973). The issue in *McDonnell* was the “order and allocation of proof in a private, non-class action challenging employment discrimination.” *Id.* at 800.
fied for a job for which the employer was seeking applications; that she was rejected; and that the position remained open while the employer accepted more applications from people with the complainant's qualifications. According to the Supreme Court in *International Brotherhood of Teamsters v. United States*, disparate treatment occurs when an employer treats some people less favorably than others on the basis of gender. Proof of a discriminatory motive is essential, although it is sometimes inferred from differences in treatment.

Disparate impact claims arise in situations where employment practices are fair in form, but discriminatory in practice. Once the complainant proves that a practice neutral in appearance has, in effect, significantly harsher consequences for women, the burden shifts to the employer to prove that the discrimination is necessary to serve a legitimate business purpose. Evidence of a discriminatory motive is not essential to proving such claims.

When a complainant pleads a claim based on a pattern or practice of discrimination, the issue is whether such a pattern or practice of disparate treatment indeed existed and, if so, whether the discrimination was sexually premised. Once a complainant establishes the existence of a disparate, sexually premised pattern or practice, a presumption arises that the complainant was discriminated against and thus may be entitled to relief. The burden then shifts to the employer to prove that the practice was not based on a policy of discrimination.

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52. *Id.* at 335 n.15.

53. *See id.* "[D]isparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.* (citations omitted).


56. *See Teamsters*, 431 U.S. at 335 n.15; *Griggs*, 401 U.S. at 432.

57. *Cf. Teamsters*, 431 U.S. at 335 (*Teamsters* involved a claim of racial discrimination).


59. *Id.* (citing *Teamsters*, 431 U.S. at 362).

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The use of comparable worth to establish sex discrimination is a relatively new trend in the federal courts. Although the number of comparable worth cases has increased significantly in the last few years, plaintiffs generally have not fared well.60 The lack of acceptance of comparable worth in the courts is attributable largely to the absence of favorable case law and the difficulties faced by plaintiffs in proving their claims.61

1. Early Comparable Worth Cases

Only a handful of landmark United States circuit court cases provide any precedent for comparable worth. In response to a charge of wage discrimination under Title VII, the Eighth Circuit in Christensen v. Iowa62 stated that Title VII was not intended to abrogate the laws of supply and demand or to ignore economic realities.63 The plaintiffs in Christensen were a class of female clerical workers employed by the University of Northern Iowa (UNI) who sued the Iowa State Board of Regents and the state of Iowa for violations of Title VII.64 They contended that the defendants paid UNI's all female clerical staff less than the largely male physical plant workers.65 The plaintiffs asserted that these jobs were of equal value to UNI.66

The defendants argued that, because of the Bennett Amendment, any wage discrimination claim under Title VII must be brought under an


61. In Oaks v. City of Fairhope, 515 F. Supp. 1004 (S.D. Ala. 1981), the court refused to adopt comparable worth. The court noted that the Fifth Circuit had neither accepted nor rejected the theory and that an almost identical claim had been considered and rejected in Lemons v. City of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980). See Oaks, 515 F. Supp. at 1040; see also infra notes 73-80 and accompanying text (discussion of Lemons case). The Oaks court went on to state that even if it were to adopt comparable worth, plaintiff's claim would fail because her position as a librarian was not comparable to the city department head positions as she had contended. 515 F. Supp. at 1040.

62. 563 F.2d 353 (8th Cir. 1977). For further discussion of Christensen, see Comment, Sex-Based Wage Discrimination Claims After County of Washington v. Gunther, 81 COLUM. L. REV. 1333, 1343 (1981).

63. 563 F.2d at 356; see also infra notes 190-213 and accompanying text (discussion of marketplace as defense to comparable worth claims).

64. 563 F.2d at 354.

65. Id.

66. Id. at 354-55.
equal pay for equal work theory. The court, however, did not reach this argument because the plaintiffs failed to establish a prima facie sex discrimination case under Title VII. UNI based its wage scales on local labor market factors such as the supply of workers, the ability of workers to unionize, the value of the job, and the wage scales of similar workers in the community. According to the court, any disparity in wages was due to the nature of the job and not to the sex of the employee. The plaintiffs also were unable to use Equal Pay Act standards to show a substantial similarity between their jobs and those with higher pay.

In Lemons v. City & County of Denver several female nurses employed by the city of Denver alleged sex discrimination in violation of Title VII. The plaintiffs argued that, historically, nurses have been underpaid due to sex discrimination. Thus, Denver's effort to pay nurses the same wages as other nurses in the community incorporated historical discrimination into the city's salary standard. The plaintiffs contended that the city should pay its nurses the same as other jobs that were of internal equal worth to the city of Denver.

Following Christensen, the Tenth Circuit found in Lemons that "plaintiffs did not show that the work in the classification they sought was equal to that in which they found themselves." The court held that Denver was merely required to provide equal opportunities to anyone seeking employment with the city. As long as Denver acted in good faith, no violation could be found. Denver's pay scales reflected condi-

67. Id. at 355.
68. Id.
69. Id. at 354.
70. Id. The evidence showed UNI paid physical plant workers more than necessary under the Board of Regent's pay scheme, the Hayes System, which was based on internal job worth. UNI justified higher pay to physical plant workers with the wages paid in the local labor market. Id. at 354-55.
71. Id. at 355.
72. Id. at 356.
73. 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980).
74. Id.
75. Id. at 229.
76. Id. at 230. The court found that the parity sought was not an available remedy under existing case law, statutory law, or the Constitution. Id. at 229-30.
77. Id. at 230. The goal of the pay plan was to equalize the city worker's pay with pay for identical jobs in the community. Therefore, the complainant city nurses were paid the same as other nurses in the area. This method was used for all city job classifications. Id. at 229.
78. Id. at 229. The court stated it could only consider wage discrimination claims involving disparate pay for equal work because the Bennett Amendment applied the equal pay for equal work standard to Title VII. Id. at 229-30. But see supra notes 40-47 and accompanying text.
tions in the community,\textsuperscript{79} and any relief for a comparable worth claim was beyond the court's power.\textsuperscript{80}

In \textit{International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.},\textsuperscript{81} a federal appeals court almost sanctioned a comparable worth action. The plaintiffs, female workers at Westinghouse, claimed that since the 1930's, the defendant had deliberately set lower wage rates for predominantly female jobs.\textsuperscript{82} The 1930's wage structure classified jobs by sex. Westinghouse paid female workers less than male workers in jobs with the same point rating.\textsuperscript{83} In 1965, Westinghouse established the contested wage structure which eliminated the sex classifications but retained the same point ratings.\textsuperscript{84} The Third Circuit found Westinghouse's wage structure to be intentional wage discrimination violative of Title VII.\textsuperscript{85}

The Third Circuit was unconcerned that \textit{Westinghouse} did not involve an equal pay for equal work claim. Unlike the Tenth Circuit in \textit{Lemons}, the \textit{Westinghouse} court held only that the Bennett Amendment incorporated the four Equal Pay Act standards into Title VII.\textsuperscript{86} The court distinguished the wage structure used in \textit{Lemons}, which was based on job classifications rather than sex classifications.\textsuperscript{87} In \textit{Westinghouse}, the court found that the wages for different jobs were determined solely by the sex of the employees.\textsuperscript{88}

2. County of Washington v. Gunther

The recent increase in litigation of comparable worth cases is due mainly to the Supreme Court's decision in \textit{County of Washington v. Gunther}.\textsuperscript{89} The respondents in \textit{Gunther} were four female prison guards in the

\textsuperscript{79} 620 F.2d at 229. Traditionally lower pay for nurses was found to be the likely consequence of past attitudes, practices, and supply and demand. \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981).

\textsuperscript{82} \textit{Id.} at 1096.

\textsuperscript{83} \textit{Id.} at 1097. There were three steps to Westinghouse's point-rating system. First, the company assigned a numerical value to jobs based on the knowledge, required training, responsibilities, and demands of the job. Second, the company graded jobs according to the point rating. Third, the company set hourly wages at each labor grade. \textit{Id.}

\textsuperscript{84} \textit{Id.} The district court granted defendant's motion for partial summary judgment reasoning that sex-based discrimination in compensation violates Title VII only if it also violates the Equal Pay Act of 1963. \textit{Id.} at 1098. On appeal, the Third Circuit Court of Appeals rejected the district court's reasoning and remanded the case for a new trial. \textit{Id.} at 1108.

\textsuperscript{85} \textit{Id.} at 1097.

\textsuperscript{86} \textit{Id.} at 1101. The court based this finding on the plain language of the statute. \textit{Id.} at 1100-01. The court also concluded that this incorporation did not limit wage discrimination claims under Title VII. \textit{Id.} at 1101.

\textsuperscript{87} \textit{Id.} at 1107.

\textsuperscript{88} \textit{Id.} at 1097.

\textsuperscript{89} 452 U.S. 161 (1981). \textit{Gunther} has received extensive discussion. \textit{See, e.g.}, \textit{Note, Proving Title VII Sex-Based Wage Discrimination After County of Washington v. Gunther}, 4
women's section of the petitioner's county jail. The women alleged that they were paid less than their male counterparts in the men's section of the jail in direct violation of Title VII. They maintained that their work was substantially equal to that of the male guards and, alternatively, that this pay differential was due to intentional discrimination.

The Court addressed the issue of whether the respondents' comparable worth claims were barred by the Bennett Amendment. The Court held that the pay differentials falling within one of the four exceptions listed in the EPA were not actionable under Title VII. Although the Court stressed that Gunther was not a comparable worth case, it briefly discussed the issue. According to the Court, a comparable worth claim is present under Title VII if plaintiffs allege "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their jobs with that of other jobs in the same organization or community." By holding that wage discrimination charges under Title VII need not be limited to EPA standards, the Court did not preclude comparable worth actions under Title VII.


90. 452 U.S. at 164. 91. Id. The lower courts held that the plaintiffs were not entitled to equal pay because their work required less prisoner supervision and more clerical work than the male guards' work. 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (1976). This finding was not appealed. The Ninth Circuit held, 602 F.2d 882, 891 (9th Cir. 1979), reh'g denied, 623 F.2d 1303, 1317 (1980), and the Supreme Court agreed, 452 U.S. at 165-66, that part of the wage differential was due to sex discrimination in violation of Title VII.

92. 452 U.S. at 164. 93. Id. at 166; see also supra notes 40-47 and accompanying text (background and text of Bennett Amendment).

94. Gunther, 452 U.S. at 171; see supra note 46 and accompanying text (four exceptions to Equal Pay Act).

95. Gunther, 452 U.S. at 166. The court stressed that it was not deciding whether the plaintiffs had established a prima facie case of sex discrimination under Title VII. Id. at 166.

96. Id. at 166 (footnote omitted).

97. See Bartelt v. Berlitz School of Languages, Inc., 698 F.2d 1003, 1006-07 (9th Cir. 1983) (Gunther read to mean that Title VII covers sex-based wage discrimination claims despite coverage under Equal Pay Act standards); Francoeur v. Carroon & Black Co., 552 F. Supp. 403, 408 (S.D.N.Y. 1982) (applies Gunther to hold that Title VII wage discrimination claim need not be determined on finding of equal or substantially equal work); Note, Proving Title, supra note 89, at 318 (since Gunther, prima facie Title VII wage discrimination claim not limited to proof of man receiving higher wages for equal work); cf. Kahn, Bennett Amendment—Reaching beyond equal pay to encompass the doctrine of comparable worth, 56 Fla. B.J. 843 (1982) (analysis of differences between wage discrimination claims under Equal Pay Act and Title VII in light of Gunther).
The Court based its holding for respondents on a finding of intentional discrimination by the petitioner.98 The Court observed that the county had determined female guards should be paid ninety-five percent as much as male guards. Nevertheless, the women were paid only seventy percent as much as the male guards.99 This disparity was found to be due to intentional sex discrimination.100

3. Post-Gunther Cases

Since the Supreme Court decided Gunther, most comparable worth claimants have been unsuccessful in the relatively small number of cases that have reached the federal courts.101 In Briggs v. City of Madison,102 eighteen female public health nurses sued the city of Madison alleging that the city had discriminated against them in violation of Title VII by paying them less than the city’s all male public health sanitarians.103 The court found that the plaintiffs had made a prima facie case of sex discrimination.104 The plaintiffs proved that:

(1) they [were] members of a protected class (2) occupying a sex-segregated job classification (3) that [was] paid less than a (4) sex-segregated job classification occupied by men and (5) that the two job classifications at issue [were] so similar in their requirements of skill, effort, and responsibility, and working conditions that it [could] reasonably be inferred that they [were] of comparable value to an employer.105

The city, however, successfully rebutted the plaintiffs’ prima facie

98. Gunther, 452 U.S. at 180-81.
99. Id. at 180.
100. Id. at 180-81. The dissenters argued that Title VII guarantees equal pay for men and women in the same jobs. The dissent contended that the Bennett Amendment was unnecessary because Congress intended the equal work standard to be used in Title VII cases as well as in Equal Pay Act cases. Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Powell in a lengthy dissent. Id. at 181-204.
101. See generally Recent Developments, Comparable Worth, 6 HARV. WOMEN'S L.J. 201, 202-06 (1983) (courts are unwilling to recognize comparable worth because of difficulties in formulating standards and reluctance to interfere with labor market); Thomas, supra note 34, at 6-7 (comparable worth claims are harder to prove than traditional sex discrimination claims because they involve sophisticated and expensive analyses).
102. 536 F. Supp. 435 (W.D. Wis. 1982).
103. Id. at 437. The duties of public health nurses included providing nursing services in the community, educating the public, and enforcing certain local and state health rules. The duties of sanitarians included inspection of public establishments such as restaurants, supermarkets, hotels and schools for compliance with the applicable health and safety rules, review of plans for private sewage systems, and investigation of complaints regarding the environment and food-related illnesses. Id. at 438.
104. Id. at 445. The court noted that plaintiffs’ claim was not brought under the Equal Pay Act, 29 U.S.C. § 206(d) (1976), since plaintiffs did not allege equal or substantially similar work. Instead, plaintiffs’ disparate treatment claim alleged wage discrimination in sex-segregated jobs of comparable content. Id. at 442.
105. Id. at 445 (emphasis added). In the alternative, plaintiffs alleged that evidence of (1) through (4) was a sufficient prima facie showing. In rejecting this alternative, the court concluded that no inference of an unlawful employment practice under Title VII could be
showing with proof that it needed to pay the sanitarians more to compete with salaries of sanitarians in the local labor market.\textsuperscript{106} The court found that under Title VII an employer was liable only for its own discriminatory acts and not the discriminatory acts of the marketplace.\textsuperscript{107} The plaintiffs then failed to prove that the city's reasons for the pay differentials were pretextual.\textsuperscript{108} The court granted judgment on the merits for the city.\textsuperscript{109}

In \textit{Power v. Barry County, Michigan},\textsuperscript{110} the court flatly rejected comparable worth as a valid theory under Title VII.\textsuperscript{111} The court found that the Supreme Court did not sanction comparable worth in \textit{Gunther}\textsuperscript{112} and that since that decision, federal courts have either adopted \textit{Gunther}'s intentional discrimination theory or adhered to traditional Title VII analysis.\textsuperscript{113} The court expressed its inability and unwillingness to evaluate the worth of jobs when presented with a wage and sex discrimination claim under Title VII or the Equal Pay Act.\textsuperscript{114}

In \textit{Equal Employment Opportunity Commission v. Hay Associates},\textsuperscript{115} the court drawn because this formulation did not eliminate a common nondiscriminatory reason for pay disparities: differences in skill, effort, and responsibility. \textit{Id.} at 443-44.

\textsuperscript{106} \textit{Id.} at 446-47. At trial, the city had produced evidence of other government employers in the state paying higher wages to their sanitarians. To combat recruitment and retention problems and to be competitive in the state's labor market, the city twice raised the pay for its sanitarians. \textit{Id.} at 446.

\textsuperscript{107} \textit{Id.} at 447. The court stated that an abundance of qualified applicants for certain jobs and a shortage of qualified applicants for other jobs was not the responsibility of a particular employer. \textit{Id.}

\textsuperscript{108} \textit{Id.} at 448-49. The court suggested that plaintiffs might have countered defendant's proof with evidence regarding the general supply of sanitarians and public health nurses in the labor market during the years in question. Specifically, plaintiff might have produced evidence of the number of potential sanitary recruits, the number of applicants for vacant sanitary positions, and the length of time it took to fill a vacant sanitary position. \textit{Id.} at 448.

\textsuperscript{109} \textit{Id.} at 450.

\textsuperscript{110} 539 F. Supp. 721 (W.D. Mich. 1982). Plaintiffs were a group of women employed by the Barry County Sheriff's department as "matrons" for county prisoners. Plaintiffs alleged that defendants had discriminated against them by paying them less than the county's all-male staff of "correction officers." Plaintiffs contended that both jobs were of comparable worth to Barry County and that both jobs required equal work. \textit{Id.} at 721-22.

\textsuperscript{111} \textit{See id.} at 726-27. The court found no federal court decisions that sanctioned comparable worth and no supportive legislative history in the area of wage discrimination. \textit{Id.} at 722-26.

\textsuperscript{112} \textit{Id.} at 724. The court based this finding on the Supreme Court's caveat in \textit{Gunther} that the respondents' allegations were not based on comparable worth. \textit{Id.; see supra notes 89-100 and accompanying text (discussion of \textit{Gunther} decision).}

\textsuperscript{113} 539 F. Supp. at 724.

\textsuperscript{114} \textit{Id.} at 726-27. The court stated that it would be too difficult to subjectively evaluate the intrinsic worth of different jobs. \textit{Id.} The court granted defendants' motion to dismiss the portion of plaintiffs' complaint alleging a cause of action based on comparable worth. \textit{Id.} at 727.

\textsuperscript{115} 545 F. Supp. 1064 (E.D. Pa. 1982). The EEOC brought this action under Title VII alleging various instances of sex discrimination by defendant against Joann Bay. Bay
found that comparable worth claims were valid under Title VII in light of *Gunther*.\textsuperscript{116} The court found it unnecessary to define the elements of a comparable worth claim because the claimant did not present enough evidence for the court to infer that her job was comparable to the male employees' jobs.\textsuperscript{117}

In December 1983, a United States district court judge in Washington ruled in favor of the complainants in the first successful comparable worth case decided in federal court.\textsuperscript{118} The plaintiffs in *American Federation of State, County, and Municipal Employees v. State of Washington*\textsuperscript{119} (AFSCME) were a class of male and female state employees who had worked or were working in positions that were at least seventy percent female.\textsuperscript{120} The plaintiffs challenged the state of Washington's failure to compensate women according to the state's own determination of their worth.\textsuperscript{121} In 1974, the state hired a consulting firm to study the wages paid to state government employees.\textsuperscript{122} The study concluded that women employed by the state were paid twenty percent less than their worth in comparison with wages paid to men employed by the state.\textsuperscript{123} The state legislature did nothing to remedy this acknowledged disparity until after the plaintiffs filed the lawsuit.\textsuperscript{124} The court held that the state of Washington was maintaining a compensation system which discriminated on the basis of sex.\textsuperscript{125} The court awarded the relief requested by

\textsuperscript{116} *Id.* at 1085. The court offered no discussion of comparable worth beyond a cursory recognition of such claims. *Id.*

\textsuperscript{117} *Id.*; see *supra* note 116.


\textsuperscript{119} *Id.*

\textsuperscript{120} *Id.* at 871.

\textsuperscript{121} *Id.* at 865.

\textsuperscript{122} *Id.* at 861. The purpose of the study was "to examine and identify salary differences that may pertain to job classes predominantly filled by men compared to job classes predominantly filled by women, based on job worth." *Id.*

\textsuperscript{123} *Id.*

\textsuperscript{124} *Id.* at 867. In 1976, the state retained the same consulting firm to do an update of the 1974 study. The purpose of the 1976 study was to "establish a program leading to implementation of the comparable worth study completed in September 1974." *Id.* at 861. In 1976, Washington's former Governor Evans appropriated seven million dollars to begin implementation of comparable worth. In 1977, his successor, Governor Ray took the appropriation out of the budget. *Id.* at 862.

\textsuperscript{125} *Id.* at 867. The court noted that:

[It is indeed ironic and tragic that the State of Washington is in the eighth decade of the Twentieth Century attempting to use the American legal system to sanction, uphold and perpetuate sex bias. Defendants are struggling to maintain
the plaintiffs which included issuance of a declaratory judgment, injunctive relief, increased wages, back pay, and fringe benefits.\textsuperscript{126}

The AFSCME decision will affect approximately 15,000 state employees holding "women's jobs."\textsuperscript{127} It has been estimated that the total settlement could reach one billion dollars.\textsuperscript{128} In response to this decision, the president of AFSCME estimated that 83,000 public jurisdictions in the United States could be affected.\textsuperscript{129} The state of Washington, however, predicted that the effect of the court's order would devastate the state's economy.\textsuperscript{130} An appeal is expected to delay the implementation of the court's order.\textsuperscript{131}

The foregoing cases appear to have established a trend in the federal courts of cautious, reluctant progress toward recognizing the validity of comparable worth. Further impetus may come from congressional action or from the growing number of state employment laws that contain some form of comparable worth standard. More than a dozen states have adopted a state-wide comparable worth standard based upon the federal Equal Pay Act or Title VII.\textsuperscript{132} In addition, several states have comprehensive comparable worth laws applicable to various classifications of government employees.\textsuperscript{133}
III. MINNESOTA LAW AND WAGE DISCRIMINATION

A. Minnesota Statutes

Title VII allows states to enact employment discrimination statutes that are more comprehensive than the federal laws. Nevertheless, Minnesota’s employment discrimination laws are generally equivalent to the federal law. The state’s version of Title VII, the Human Rights Act (HRA), was enacted in 1955. Following the lead of Congress, the 1969 State Legislature amended the act to prohibit sex discrimination. The HRA’s section on employment discrimination is almost identical to the language in Title VII. If the alleged violation occurs in a state such as Minnesota, which has its own substantive and procedural employment discrimination laws, the EEOC must first notify the appropriate state agency and then allow the state agency roughly sixty days to act before proceeding on its own. Not only did Minnesota follow Title VII in enacting the HRA, in 1969 the Minnesota Legislature enacted the Minnesota Equal Pay Act, which duplicates the federal EPA’s require-

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134. See 42 U.S.C. § 2000e-7 (1976). Title VII is a minimal standard which states may exceed so long as state laws are not inconsistent with the federal law. Pursuant to section 2000e-7:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Id.


137. See MINN. STAT. § 363.03, subd. 1 (1982 & Supp. 1983). The statute reads in part: “Except when based on a bona fide occupational qualification, it is an unfair employment practice . . . [for an employer, because of . . . sex . . . to discriminate against a person with respect to his . . . compensation . . . .]” Id. § 363.03, subd. 1 (2)(c); see also supra note 35 (comparable text of Title VII); cf. MINNEAPOLIS, MINN., CODE § 139.40 (1976) (municipal code analogous to Title VII and Chapter 363).

138. See 42 U.S.C. § 2000e-5(d) (1976). In Minnesota, an aggrieved party may either file a claim with the Human Rights Commissioner or bring a civil suit directly in state district court. See MINN. STAT. §§ 363.06, .14 (1982); Wille, Impact Of Equal Employment Laws, HENNEPIN LAW., Jan.-Feb. 1976, at 4, 6 (it is most efficient to file state and federal charges simultaneously and to request the EEOC to assume concurrent jurisdiction after a 60-day period).
ment of equal pay for equal work. 139

B. Minnesota Case Law

Although Title VII provides a minimal standard that states may surpass, 140 the Minnesota Supreme Court has chosen to abide by the existing federal standards. In Danz v. Jones, 141 the court construed the relationship of Title VII to the Human Rights Act. 142 The plaintiff in Danz sued her employer for alleged sex discrimination in employment practices in violation of section 363(1)(2)(c) 143 of the HRA. The plaintiff alleged that her wages were not equal to those of a male employee with an identical job. 144

The central issue in Danz was the proper allocation of the burden of proof in a wage discrimination case under the HRA. 145 The court stated that “Chapter 363 appears to be modeled after Title VII. . . . The language of [Title VII] is remarkably similar to that of [Chapter] 363.” 146 The court noted that it previously had referred to decisions construing Title VII as proper guidelines for decisions under chapter 363, 147 and

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139. Act of Apr. 17, 1969, ch. 143, 1969 Minn. Laws 228 (current version at MINN. STAT. §§ 181.66-68 (1982)). This act provides in part:
   No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex. MINN. STAT. § 181.67, subd. 1 (1982). Compare id with 29 U.S.C. § 206(d)(1) (1976) (text at supra note 28).
140. See supra note 134.
141. 263 N.W.2d 395 (Minn. 1978).
142. See id. at 398-99.
143. See supra note 137 (containing partial text of § 363.03, subd. 1(2)(c)).
144. Danz, 263 N.W.2d at 397. The defendant in Danz was engaged in the business of developing, constructing, and managing apartments. Id. at 398. In 1973, the defendant hired Robert Drake as a rental agent. Id. Drake’s compensation was a salary of $75 per week, a $25 commission for each apartment rented, and the choice of one of defendant’s apartments at a particular complex. Id. Later in the same year defendant hired plaintiff as another rental agent. Her compensation was the same as Drake’s except the $75 per week salary. Id. at 398.
145. See id. at 398. The trial court held that the plaintiff had the initial burden of proving by a preponderance of the evidence that the defendants had violated chapter 363. Id. The plaintiff argued, however, that the initial burden should only consist of proof that defendant paid a male employee more than the plaintiff for “substantially equal work.” Id.
146. Id. at 398-99.
147. Id. at 399 (citing Brotherhood of Ry. & Steamship Clerks v. State, 303 Minn. 178, 188, 229 N.W.2d 3, 9 (1975); see also Hubbard v. United Press Int’l, Inc., 330 N.W.2d 428, 441 (Minn. 1983) (principles developed under Title VII by federal courts are instructive for interpreting chapter 363); Continental Can Co. v. State, 297 N.W.2d 241, 246 (Minn. 1980) (same proposition as Hubbard).
that federal courts had used the criteria contained in the federal EPA to adjudicate wage discrimination cases brought under Title VII. Therefore, the *Danz* court adopted the four *McDonnell Douglas Corporation* requirements for establishing a federal prima facie case.

According to the United States Supreme Court, a prima facie case occurs when "an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" The plaintiff in *Danz* was granted relief after proving that she received less pay than a male for equal work under equal conditions. Plaintiff's employer was unable to rebut her prima facie case. Therefore, when a wage discrimination case is brought in Minnesota under chapter 363, the requisite prima facie showing will be the same as that in the federal courts for a wage discrimination case brought under Title VII.

**C. Minnesota Comparable Worth Law**

The most significant action at the state level on comparable worth has come from the legislatures, not from the courts. Several state legislatures, including California and Minnesota, have recently passed comparable worth laws binding on state employees. The California statute,
the first of its kind in the United States, was intended "to establish a state policy of setting salaries for female-dominated jobs on the basis of the comparability of the value of the work."157 Relying on the 1980 United States Department of Labor statistics, the California Legislature concluded that most women work today because of economic necessity; that women's wages traditionally have been less than those of men because of job segregation; that sixty percent of women aged eighteen to sixty-four are working; that two-thirds are either the head of a household or married to men who earn less than $10,000 per year; and that historically women have earned less than men because of lack of education and employment opportunities, segregation, and underevaluation.158 To alleviate these pay inequities, the California Legislature instructed the state government to reassess the criteria used to set state employees' wages.159

The California statute directs the Department of Personnel Administration to compare the value of state jobs within a class or salary range to the value of other state jobs within another class or salary range.160 If the skill, effort, responsibility, and working conditions of the jobs are identical, then the salaries must be equal.161

In 1982, the Minnesota Legislature approved a comparable worth/equitable compensation statute applicable to state employees in the executive branch.162 The statute amended chapter 43A of the Minnesota Statutes, entitled "Department of Employee Relations."163 Prior to the enactment of the statute, the Legislature established a task force to examine ten male-dominated jobs and ten female-dominated jobs. Using a point system to measure job worth, the task force found overall that female-dominated jobs in state government received significantly lower salaries.164

The Minnesota statute is structurally similar to the California statute.165 Both legislatures have outlined a policy of establishing equitable compensation among female-dominated, male-dominated, and balanced classes of employees in the executive branch.166 Female-dominated jobs

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states had begun or had completed pay equity studies. See Lauter, Pay Bias Enters a New Age, Nat'l L.J., Jan. 2, 1984, at 1, col. 1.


158. Id.

159. Id. § 19827.2(b).

160. Id. § 19827.2(c)(2).

161. See id. § 19827.2(c)(3)-(6) (definitions of skill, effort, responsibility, and working conditions).

162. See Act of Mar. 23, 1982, ch. 634, §§ 1-9, 1982 Minn. Laws 1559-61 (current version at MINN. STAT. §§ 43A.01, .02, .05, .08, .18 (1982)).


165. Compare supra notes 158-62 and accompanying text with supra notes 162-64, infra notes 166-67 and accompanying text.

166. See MINN. STAT. § 43A.01(3) (1982); supra notes 157-61 and accompanying text.
contain over seventy percent women; male-dominated jobs are over eighty percent male. A balanced class is no more than eighty percent male and no more than seventy percent female.

The new Minnesota statute uses the same comparison criteria as the California statute. These factors aid in determining the value of different jobs. The pay scale for each job requiring the same skill, effort, responsibility, and working conditions should be equal. For a job requiring skill, effort, responsibility, and working conditions proportionate to another job, the pay scale too should be proportionate.

The acceptance of comparable worth by Minnesota and other states should have a significant impact on future federal court decisions addressing comparable worth claims. The private sector has begun to grapple with the possibility of implementing comparable worth and may ultimately be moved by notions of pragmatism and equity to adopt comparable worth as well. In spite of this growing recognition, however, comparable worth has yet to achieve nation-wide acceptance. The federal courts remain hesitant to interfere in the valuations determined by free market enterprise. Perhaps the AFSCME decision represents the first major step toward legitimizing a plan for fairness.

IV. Barriers Remaining to the Progress of Comparable Worth

Two principal obstacles to implementing comparable worth in the federal courts remain. First, courts do not want to determine a job's worth
to an employer. 175 Second, courts do not want to interfere with the marketplace. 176 The reluctance of the federal courts, however, has failed to silence the many commentators who have offered insights into solving these problems. One of the most notable discussions on job evaluations is contained in an often-cited 1979 article by Ruth G. Blumrosen. 177 Blumrosen suggested a method for measuring a job’s worth. Using a job evaluation system, an employer can internally classify categories of jobs by common elements. 178 Jobs in categories with different contents that require similar skill, effort, responsibility, and working conditions are graded to objectively determine wage scales. 179 The compensable factors in each job category are weighted and totaled. 180 The totals are ranked in terms of value to the organization. 181 Jobs with equal ranking are paid equally. 182

Many employers in both the public and private sectors use job evaluations of some kind. 183 Nevertheless, courts have not treated them consistently. If a job evaluation plan is available, it may be much easier for a comparable worth claimant to prove her claim. 184 For instance, if an employer compensates male workers but not female workers according to the plan, the plan may be admissible as evidence of job discrimination. 185 On the other hand, if an employer compensates all workers according to the plan, the plan may be challenged as discriminatory. 186 Generally, comparable worth claimants encounter more problems when an employer has not conducted a job evaluation. In such a case a court

175. See supra note 101.

176. See infra notes 189-213 and accompanying text.

177. Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J.L. Reform 397 (1979). Blumrosen’s thesis is that job segregation and wage discrimination are related problems. The same forces that determine that certain jobs will be female-dominated determine the low economic value of those jobs. Id. at 401. Blumrosen believes that the most prevalent characteristic of women’s work is job segregation. It is because of job segregation that women are paid less than men. Id. at 415.

178. See id. at 429. According to Blumrosen, there are two steps involved in evaluating jobs: classifying families of jobs with common elements and grading jobs with similar skill, effort, and responsibility that have different contents. Id.

179. Id.

180. Id. at 431. Compensable factors are parts of a job that combine to define a job and determine its value. Id. The basic premise of compensation systems is that the job and not the worker is evaluated. Id. at 430.

181. Id. at 433.

182. Id. at 429.


184. Id. at 509. “The most valuable tool for proving sex discrimination in compensation is, perhaps, the employer’s own job evaluation plan.” Id.

185. Id. at 510.

186. Id. at 510-11.
may be hesitant to conduct its own evaluation. On the other hand, an employer's failure to use an evaluation could work to the company's detriment. In 1981, a Pennsylvania federal district court inferred intentional discrimination from an employer's failure to perform an evaluation.

In addition to judicial criticism, job evaluation plans have also been challenged by legal scholars. An article written in response to Blumrosen's article advanced the theory that job evaluation systems were too susceptible to the individual biases, prejudices, and perceptions inevitably reflected in the weighing process to be objective.189 The controversial nature of job evaluations negates the important role of comparable worth in adjudicating claims of pay equity.

The second and most troublesome obstacle to acceptance of comparable worth is an employer's use of the marketplace as a defense. The market value of a job is that which an employer is willing to pay for the performance of a specific task and an employee is willing to accept in payment of that performance. Employers usually establish the worth or value of a job through the interaction of many factors already present in the workplace: the market, collective bargaining, economic conditions and employer policies, technology, societal norms and customs, and discrimination.191 The employer in Christensen v. Iowa first used the concept of market value to successfully defend against allegations of pay inequity in a comparable worth context. Many courts since Christensen have recognized this argument as a valid defense.

187. See, e.g., Power v. Barry County, 539 F. Supp. 721, 726-27 (W.D. Mich. 1982) (court expressed its inability and unwillingness to evaluate different jobs and determine their worth to an employer or society and then to determine whether there has been wage discrimination solely on that basis).
189. See Nelson, Opton & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. MICH. J.L. REF. 231, 255 (1980). Job evaluations are crucial to wage discrimination claims. If the job's worth can not be established, then wage discrimination loses its meaning. Id. at 254. According to Nelson, market value is of no use in detecting wage discrimination, id. at 254, and for purposes of evaluating job worth, neither of the following theoretical methods is viable: Marginal productivity analysis—measuring the worth of a job by the value it adds to an enterprise's total output—is too difficult to manage, id. at 257, and job evaluations are too subjective. Id. at 255. The only effective alternative to measuring the worth of a job is to use its market value. Id. at 254-57.
190. Id. at 254.
191. See Milkovich & Broderick, Pay Discrimination: Legal Issues and Implications for Research, 21 INDUS. REL. 309, 313 (1982). It is difficult to exclude the market from an operational definition of value. The value of a job partly depends on its use and what it can bring in return. A job's value will always be related to the values of the parties who determine wage scales. Id.
192. 563 F.2d 353 (8th Cir. 1977); supra notes 62-72 and accompanying text.
193. See, e.g., Horner v. Mary Inst., 613 F.2d 706, 714 (8th Cir. 1980) (employer may consider market value of skills of employee when determining salary); Oaks v. City of Minneapolis, 563 F.2d 353 (8th Cir. 1977); supra notes 62-72 and accompanying text.
The legal justification for an employer's use of the marketplace to defend against charges of wage discrimination is found in the fourth EPA exception. This exception, incorporated into Title VII by the Bennett Amendment, allows an employer to differentiate between men and women in the payment of wages when the differentiation is based on a "factor other than sex." In *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that an employer's use of an employee's prior salary to determine starting salary was a "factor other than sex." The impact of this ruling is significant because historically women were paid less than men. Many reasons, including the low market value attached to women's work, account for this disparity. The *Kouba* decision allows this wage discrimination to continue.

It is ironic that past wage discrimination represents a possible defense to a wage discrimination claim brought under Title VII. One commentator has stated that "[i]t is an exercise in futility to outlaw sex-based wage discrimination and then permit reliance on the market, which has institutionalized such discrimination, to justify wage disparities between men and women." At least one lower federal court recognized the incongruous *Kouba* rationale. In *Futran v. Ring Radio Co.*, the court rejected *Kouba*, holding that an employee's previous rate of pay was not a "factor other than sex" because such a characterization would perpetuate past discrimination against working women. The *Futran* court also stated that paying women lower wages because of the depressed market

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194. See supra notes 45-47 and accompanying text.

195. See supra note 28 (text of Equal Pay Act).

196. 691 F.2d 873 (9th Cir. 1982). Lola Kouba represented a class of all new female insurance sales agents. *Id.* at 875. Allstate determined the minimum salary of new agents "on the basis of ability, education, experience, and prior salary." *Id.* at 874. Kouba alleged that it was unlawful sex discrimination for an employer to use a new employee's prior salary to determine starting salary. *Id.* at 875. Allstate successfully rebutted this allegation of sex discrimination by providing two business justifications for using prior salaries to determine starting pay: motivation to increase sales and indication of future performance. *Id.* at 877-78. The court remanded on the issue of whether Allstate's business reasons sufficiently explained the use of prior salary to determine starting pay. *Id.* at 878.

197. *Id.* at 878.

198. See Note, Prowning Title, supra note 89, at 321. Since employers pay their employees as little as possible and women are willing to accept less in the labor market, women are paid less than their true worth. *Id.*

199. See Note, Prowning Title, supra note 89, at 327.

200. *Id.*


202. *Id.* at 739.
The value of their work was impermissible under the EPA and Title VII.203

The United States Supreme Court recently affirmed a Ninth Circuit decision holding that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context."204 The plaintiffs in Arizona Governing Committee v. Norris205 were a class of all females employed by the state of Arizona who were or would be enrolled in Arizona's deferred compensation plan.206 The issue in Norris was whether an employer violated Title VII by offering retirement benefits from companies it selected that permitted smaller monthly annuity payments to female employees than to male employees contributing the same amount.207 The Court held that this practice violated Title VII.208 The employer's responsibility for wages, terms, conditions, and privileges of employment did not justify the adoption of a benefit plan that discriminated among its employees on the basis of sex regardless of third parties' involvement in the discrimination.209 Norris may provide ammunition for an employee to combat an employer's use of the "marketplace defense" in comparable worth cases.

Blumrosen offers another argument against wage discrimination based on the premise that women have traditionally held a low status within society. As a consequence of this lower status, both sexes value men's activities more highly than women's activities and cause women's wages in female-dominated areas to be lower.210 According to Blumrosen, a plaintiff claiming wage discrimination under Title VII should have to prove only that she works in a female-dominated area,211 thereby creating a presumption that her wages have been discriminatorily suppressed.212 The burden of proof would then shift to the plaintiff's

203. Id.
205. 103 S. Ct. at 3492.
206. Id. at 3493.
207. Id.
208. Id.
209. Id. at 3501 (Marshall, J., concurring in part). But see supra note 107 and accompanying text (employer not liable for discriminatory acts of marketplace). The Norris Court in part based its holding on City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). In Manhart, the Court held that it was unlawful sex discrimination for an employer to require higher pension fund contributions from women simply because on the average women live longer than men. Id. at 711.
210. See Blumrosen, supra note 177, at 416.
211. Id. at 459.
212. Id. at 490. Classic economic theory holds that wage discrimination in a free competitive market is impossible. Numerous studies show, however, that wage discrimination is an imperfection in this system. When community wage scales are used to determine wages in a female-dominated area, discrimination is probably a negative influence on the value given to that job. Id. at 446, 459.
employer who must either rebut the inference or justify the lower wage as a business necessity. In other words, an employer violates Title VII by adopting a wage scale based on the marketplace since the marketplace reflects past discrimination. If, according to Norris, it is unlawful sex discrimination for an employer to choose a retirement plan that treats women differently because they are women, then it should be an unlawful act of sex discrimination for an employer to choose a wage scale, such as the marketplace, that treats women differently because they are women. Notwithstanding persuasive arguments to the contrary, however, the marketplace defense remains controversial.

The future of comparable worth is plagued by an obstacle beyond the difficulties inherent in using job evaluations and in overcoming the marketplace defense: the high monetary cost of implementing comparable worth. As noted previously, it has been estimated that it would cost one hundred and fifty billion dollars per year to increase the wages of full-time women workers to the level of the average full-time male workers' salaries. The tremendous economic implications of such a policy could cripple the economy. If comparable worth were accepted nationwide, private employers and the government would have to bear heavy financial burdens including regulatory expenses and litigation costs. In addition, the payment of higher wages to women in the absence of increased productivity would result in massive inflation. Conceivably, employers would opt to avoid increased labor costs by exporting many women's jobs.

The economic effects of increased pay equity could also prove detrimental to female employees. Only women who worked for an employer with both female-dominated and male-dominated job categories would benefit from increased wages. Non-working women and women performing male-dominated jobs would not benefit economically. It is questionable whether such a redistribution of income would have a great positive impact on either the economy or society.

213. Id. at 490. A later article noted Blumrosen's thesis and channeled her prima facie Title VII comparable worth claim into three steps. A plaintiff is required to show that: (1) her job is comparable to a predominantly male job; (2) there is a pay disparity; and (3) this disparity adversely affects women employees as a group or that women are intentionally paid less than men. See Note, Equal Pay, Comparable Work, and Job Evaluation, 90 Yale L.J. 657, 677 (1981).
214. See supra note 16 and accompanying text.
215. See supra note 17 and accompanying text.
216. See supra note 189 and accompanying text.
217. See Nelson, Opton & Wilson, supra note 189, at 293.
218. Id. at 291-92. Many female-dominated jobs, such as clothing manufacturing, can be performed overseas at a much lower cost. Id. at 291.
219. Id. at 294.
220. Id. This group's purchasing power would suffer. Id.
221. Id. Nelson, Opton, and Wilson believe that income would be largely redistributed to single women without small children. Id.
tion of comparable worth also threatens to impair job integration. Women would no longer be motivated to enter traditionally male fields by the prospect of higher pay rates. In summary, it is uncertain whether the economic cost of full-scale implementation of comparable worth would outweigh the benefit to be gained from pay equity.

V. CONCLUSION

Comparable worth remains one of the most controversial employment questions of the 1980's. The Gunther decision allows federal courts to reach beyond Equal Pay Act standards in wage discrimination cases. Although few courts since Gunther have upheld wage discrimination challenges based on notions of comparable worth, the need for timely and consistent action is apparent.

Legislative implementation of comparable worth in the public sector has served to stimulate public awareness of the problems inherent in pay equity issues. Legislative enactments may ultimately cause the private sector to adopt wage scales that more accurately reflect the comparable worth of female employees, if only to compete with the higher wages paid in the public sector.

Comparable worth will continue to be an issue of major political, economic, and social import. Many private employers may voluntarily implement comparable worth to avoid the cost of inevitable litigation. Despite the problems and obstacles that comparable worth has confronted, a slow but favorable wave of recognition seems to be pushing comparable worth toward greater acceptance.

222. Id. at 297.