University of Miami Law Review

Volume 40 | Number 4 — Article 7

5-1-1986

AFSCME v. Washington: The Death of Comparable Worth?

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Recommended Citation

Robert J. Arnold and Donna Ballman, *AFSCME v. Washington: The Death of Comparable Worth?*, 40 U. Miami L. Rev. 1039 (1986)

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AFSCME v. Washington: The Death of Comparable Worth?

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I. INTRODUCTION

Since 1960, the State of Washington has required that the salaries of its state employees correspond to the salaries that employees receive in the private sector.[1] In 1973, the state's largest public employee union, the American Federation of State, County, and Municipal Employees (AFSCME), concluded that allowing the free market to set the wages of state employees perpetuated "the discrimination against women in salary settings that permeates through the private sector and other governmental units."[2] AFSCME pressured then-Governor Evans into commissioning a private firm to study the state's salary structure and to "examine and identify salary differences that may pertain to job classes predominately filled by women, based on job worth."[3] To evaluate the worth of each job, the state estab-

1. WASH. REV. CODE § 28 B.16.100(16) (1983).

2. American Fed'n of State, County & Mun. Employees (AFSCME) v. Washington, 578 F. Supp. 846, 860 (W.D. Wash. 1983) (quoting Letter from Norm Schut, Executive Director of Washington Federation of State Employees, to Governor Daniel J. Evans (Nov. 20, 1973)).

3. *AFSCME*, 578 F. Supp. at 861. The state hired the firm of Norm Willis & Associates to conduct the comprehensive study. The firm examined sixty-two classifications in which at

lished an evaluation committee which consisted primarily of representatives of state agencies and institutions.[4]

The committee found that, between female and male job classes of "comparable worth," individuals in predominately male jobs received approximately twenty percent more salary than individuals in predominately female jobs.[5] When the state legislature failed to implement a plan to correct the wage disparities uncovered in the

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least seventy percent of the employees were female and fifty-nine classifications in which at least seventy percent of the employees were male. The firm calculated "job worth" or comparable worth by evaluating jobs under four criteria: knowledge and skills, mental demands, accountability, and work conditions. The firm then alloted a maximum number of points to each of the catagories: 280 for knowledge and skills, 140 for mental demands, 160 for accountability, and 20 for working conditions. The firm then assigned every job classification a numerical value under each of the four criteria. It then added these values together to determine a job's "worth." Those jobs with the same, or near the same, "worth" were considered to be jobs of comparable worth. AFSCME v. Washington, 770 F.2d 1401, 1403 (9th Cir. 1985).

For a general discussion of comparable worth and job evaluation studies, see Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 49 (E. Livernash ed. 1956). For a discussion of the shortcomings of job evaluations, see Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 59-76 (H. Remick ed. 1984).

4. *AFSCME*, 578 F. Supp. at 861.

5. *Id.* at 863. The firm's report stated that the "conclusion can be drawn that, based on the measured job content of the 121 classifications evaluated as part of this project, the tendency is for women's classes to be paid less than men's classes, for comparable job worth .... Overall... the disparity is approximately 20 percent." *Id.* For example, the study found that in the predominately female job of food service worker—a job valued at 93 points by the study—earned $472.00 a month, while the male dominated job of truck driver—valued by the study at 94 points—earned an average $792.00 per month. A nurse practitioner, a job held mainly by women, had a value of 385 points and received a salary of $832.00 per month, while boiler operators, a job performed almost solely by men, had only 144 value points but paid at the same salary as the nurse. *See* Remick, *Major Issues in* a priori *Applications*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 103 (H. Remick ed. 1984).

study,[6] AFSCME and the Washington Federation of State Employees filed charges with the Equal Employment Opportunity Commission (EEOC).[7] The unions claimed that the state's salary structure was in violation of Title VII of the Civil Rights Act of 1964 because it

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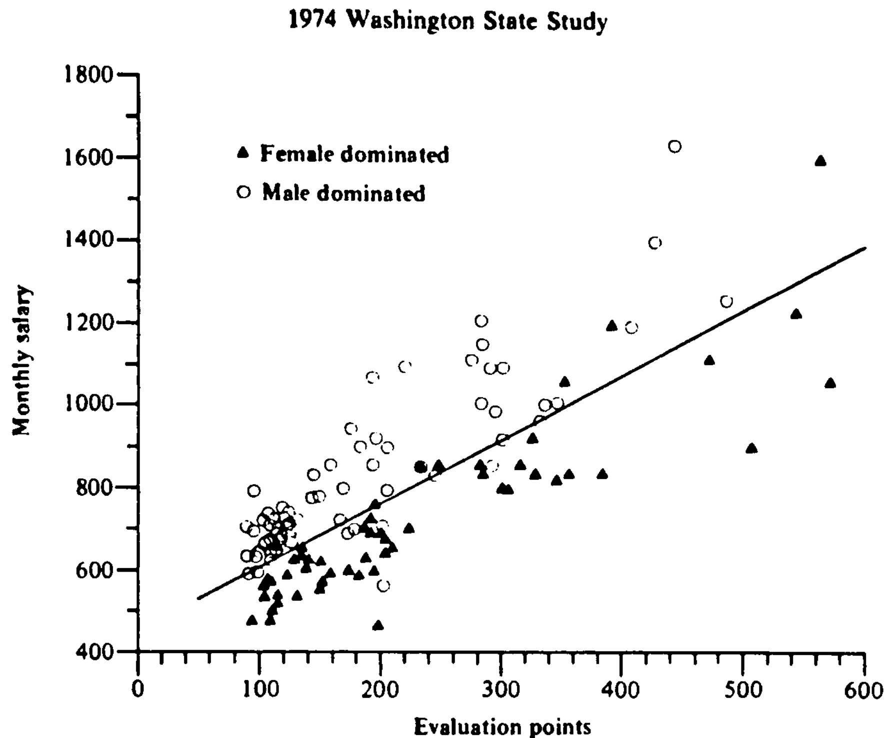
The distribution of jobs and salaries found by the study can be represented graphically as follows:



Id. at 103.

6. In 1976, Washington again hired the firm of Norman Willis & Associates to study the state's compensation system. This time, however, the state instructed the firm to develop a plan to correct the wage disparities between male and female employees that it had discovered in the first study. The resulting plan called for the use of a formula to adjust upward the salary of employees in predominately female jobs. This plan won the approval of Governor Evans, but was rejected by his successor, Governor Dixie Ray. Note, *The Comparable Worth Dilemma: Are Apples and Oranges Ripe for Comparison?*, 37 BAYLOR L. REV. 227, 248 (1985).

7. Title VII can be enforced either by the Equal Employment Opportunity Commission (EEOC) or by private parties. Title VII authorizes the EEOC to investigate employment practices, and when appropriate, file suit in the local district court. 42 U.S.C. § 2000e-5(b), (f) (1982). A private party wanting to challenge discriminatory employment practices under Title VII must first file a charge with the EEOC. *Id.* § 2000e-5(b), (e). If the EEOC finds to its satisfaction that there is in fact discriminatory employment practices taking place, it commences enforcement proceedings against the employer. If the EEOC dismisses the private party's charge or fails to act upon it within 180 days of its filing, the private party may bring suit against the employer. *Id.* § 2000e-5(f)(1).

unfairly discriminated against women employees.[8] After the EEOC declined to act on the charges, the United States Department of Justice issued right to sue letters to the two unions.[9] The unions then filed a class action on behalf of the women employees of the state.[10] The District Court for the Western District of Washington found that, under both disparate impact[11] and disparate treatment[12] analysis, the state's salary structure was in violation of Title VII.[13] The district court ordered back pay for the affected employees and injunctive relief to prevent continuation of the discriminatory compensation system.[14] On appeal, the United States Court of Appeals for the Ninth Circuit *held*, reversed: because the unions failed to prove that the state intended to use the market-based compensation system to discriminate against women employees, the state salary structure did not violate Title VII. *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985), *rev'g* 578 F. Supp. 846 (W.D. Wash. 1983).[15]

II. Wage Differentials and Comparable Worth

Fifty percent of all men work in over sixty occupations; fifty percent of all women work in only seventeen occupations.[16] Twenty-five percent of all women hold one of five jobs: secretary, domestic

8. In its complaint filed with the EEOC, AFSCME alleged that:

> The State of Washington has and is discriminating on grounds of sex in compensation against women employed in *state service* by establishing and maintaining wage rates or salaries for predominately female job classifications that are less than wage rates or salaries for predominately male job classifications that require equal or less skill, effort and responsibility. The State maintains these lower rates or salaries for predominately female classifications although a study commissioned by the State itself establishes that many predominately female jobs are discriminatorily underpaid.

Charge of Discrimination, AFSCME & AFSCME Council 28 v. Washington, Sept. 1981, *cited in* Remick, *supra* note 5, at 104.

9. *AFSCME*, 770 F.2d at 1403.

10. AFSCME and its fellow union, the Washington Federation of State Employees (WFSE), filed this action on behalf of some 15,500 state employees. The class was comprised of state employees "who have worked or do work in job categories that are or have been at least seventy percent female." *Id.*

11. *See infra* note 64 and accompanying text.

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

13. *AFSCME*, 578 F. Supp. at 864.

14. *Id.* at 867-71. The injunctive relief fashioned by the district court focused on accelerating a comparable worth plan that the state legislature already enacted, but not due to take full effect until 1993. *Id. See* 1983 Wash. Laws 2071.

15. The unions and the state reached an out of court settlement on December 31, 1985. The settlement called for the state to make annual comparable worth pay adjustments through July 1, 1992. State law requires full comparable worth implementation by 1993. The unions for their part agreed not to prosecute an appeal of the Ninth Circuit's decision. 24 Gov't Empl. Rel. Rep. No. 1145, at 13 (Jan. 6, 1986).

16. Staff Report, U.S. Commission on Civil Rights, Women and Poverty 7

worker, elementary school teacher, bookkeeper, or waitress.[17] At the same time, women earn fifty-nine cents for each dollar that a male earns.[18] The correlation between these realities is the result of a collision of social and economic forces. Studies have shown that every society has sexually segregated jobs. Every society values female dominated jobs less than jobs that males traditionally perform.[19] One society may make fishing a female job and weaving a male job, and another society may reverse the job assignments. Yet, both societies will give the male job more prestige and higher rewards.[20] Our society reflects this phenomenon through wage differentials; when women flood a previously "male" job, the market compensation rate for the job drops.[21]

Early legislation, which was paternalistically designed to protect the more "delicate sex," prohibited women from performing certain jobs, thereby making those jobs "men's work."[22] The resulting sex segregation remains although the legislation no longer exists. Women's work has become associated with jobs that require the skills which women traditionally have used in the home.[23]

Sex-based wage differentials have had a devastating economic impact on society. Although women are primary wage-earners in only one-tenth of all families, women head one-third of all families below the poverty line.[24] The market based wage structure is not only discriminatory, but also it harms society where society can least afford

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(1974); *see also* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, HANDBOOK ON WOMEN WORKERS 91 (Bull. No. 297, 1975) (two-fifths of women concentrated in ten jobs).

17. Hedges, *Women Workers and Manpower Demands in the 1970's*, 93 MONTHLY LAB. REV. 19 (June 1970); *cf.* L. HOWE, PINK COLLAR WORKERS, INSIDE THE WORLD OF WOMEN'S WORK 16 (1977) (two-thirds of female labor force work in sales, service, or clerical jobs).

18. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 6 (1979) (Table 1).

19. NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, JOB EVALUATION: AN ANALYTICAL REVIEW 52 (1979) (Interim Report to the EEOC).

20. K. MILLETT, SEXUAL POLITICS 224 (1970).

21. Bank tellers, telephone operators, school teachers, and clerks were once predominately male jobs and are now predominately female jobs. SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, WORK IN AMERICA 61 (1973); *see also* Blumrosen, *infra* note 27, at 408 (bank teller was once predominately a white male job).

22. For example, women were prohibited from mining, bartending, and certain job categories that required heavy lifting, night work, or overtime. *See, e.g.*, MASS. ANN. LAWS ch. 149, § 53 (Michie/Law Co-op 1976) (repealed 1980) (lifting); N.Y. LAB. LAW § 405 (McKinney 1965) (repealed 1973) (mining). For a discussion of protective legislation, see Gasaway, *infra* note 26, at 1127 (women barred from mining and heavy lifting).

23. J. LYLE & J. ROSS, WOMEN IN INDUSTRY: EMPLOYMENT PATTERNS OF WOMEN IN CORPORATE AMERICA 8 (1973).

24. Sommers, *Occupational Rankings for Men and Women by Earnings*, 97 MONTHLY LAB. REV., Aug. 1974, at 34, 41, 47; Gasaway, *infra* note 26, at 1123.

it: the pocketbook. Wage differentials that are based on the market rate force women and their families into poverty. Moreover, poverty level families cost society in welfare programs, medical programs, and other social programs.[25]

In order to overcome this historical and societal pattern of wage discrimination, proponents of pay equity have advocated the use of comparable worth analysis. There are three branches of the comparable worth theory: the judicial branch, the legislative branch, and the administrative branch. Under the "judicial branch,"[26] courts should permit women employees to bring Title VII sex-based wage discrimination actions against employers based on a comparison of the value

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25. TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT, EXPLOITATION FROM 9 TO 5 at 4 (1981). Factors other than discrimination justify about one-third of the earnings gap between men and women. R. TSUCHIGANE & N. DODGE, ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 49 (1974); *see* 18 CONG. REC. 14,753 (1962). For a general discussion of sex segregation and societal factors, see Blumrosen, *infra* note 27, at 402-08.

26. In addition to the judicial branch of the comparable worth theory, which focuses on the attempt to get the federal courts to recognize that Title VII requires equal pay for comparable work, there are also federal legislative and administrative branches, as well as a state branch.

The federal legislative branch of comparable worth attempts to get Congress to enact explicit legislation requiring equal pay for comparable work. For example, the House of Representatives' Post Office and Civil Service Committee recently approved H.R. 3008, 99th Cong., 1st Sess., the Federal Equitable Pay Practices Act of 1985. The bill calls for a study of federal wage and classification systems to see if they discriminate on the basis of sex.

The administrative branch of the theory calls for the EEOC and other federal agencies to take procomparable worth enforcement positions. The EEOC originally opposed the use of the comparable worth theory in pay discrimination cases, but in the late 1970's and early 1980's, it became more receptive to the concept. *See The Comparable Worth Issues*, Lab. Rel. Rep. (BNA) special report at 42 (Oct. 28, 1981). *See also* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233, 234 (1980) (In the 1970's, the EEOC chose to litigate the comparable worth issue.). Recently, however, the EEOC has chosen to oppose the use of the comparable worth concept. *See* 119 Lab. Rel. Rep. (BNA) 121 (June 17, 1985) (review of EEOC's current policy on sex-based wage bias claims postponed); *see also* 119 Lab. Rel. Rep. (BNA) 147 (June 24, 1985) (text of an EEOC decision denying a comparable worth claim). *See generally* Gasaway, *Comparable Worth: A Post-*Gunther *Overview*, 69 GEO. L.J. 1123, 1145-46 (1981) (outline of EEOC regulations).

The proponents of comparable worth have perhaps their greatest success on the state level. Well over a dozen states have enacted a state-wide comparable worth standard. *See* ALASKA STAT. § 18.80 220(5) (1981); IDAHO CODE § 44-1702 (1) (1977); KY. REV. STAT. § 337.423(1) (1983); ME. REV. STAT. ANN. tit. 26, § 628 (1974); MD. ANN. CODE art. 100, § 55A (1979); MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1982); NEB. REV. STAT. § 48-1221(1) (1978); N.D. CENT. CODE § 34-06.1-03 (1980); OKLA. STAT. tit. 40, § 198.1 (West Supp. 1982); OR. REV. STAT. § 652.220 (1981); S.D. CODIFIED LAWS ANN. § 60-12-15 (1978); TENN. CODE ANN. § 50-2-202(a) (1983); W. VA. CODE § 21-5B-3(1) (1985). It should be noted that while these state laws are important, they tend to be narrower in application than the federal statutes. For a general discussion of state comparable worth laws, see Dean, Roberts & Boone, *Comparable Worth Under Various Federal and State Laws*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 238-64 (H. Remick ed. 1984). For a discussion of one

of their jobs to those of male employees who perform dissimilar work which has the same intrinsic worth to the employer.[27] According to this theory, society has undervalued classes of jobs that women traditionally have performed. To break this tradition of sex segregation and undervaluation, Title VII discrimination cases must be free of the equal work standard of the Equal Pay Act of 1963 (EPA), which proponents of comparable worth see as ineffective in reaching the more fundamental forms of sex discrimination in the workplace.[28] *AFSCME* is the latest in a long line of recent cases that have questioned the viability of comparable worth as a judicial doctrine.[29] These court decisions seriously set back what proponents have called

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state's experience with its own comparable worth statute, see Note, *Comparable Worth — It's Status in the Nation and Minnesota*, 10 WM. MITCHELL L. REV. 559, 575-79 (1984).

On yet another level, comparable worth has come into being through private collective bargaining. *See* Northrup, *Wage Setting and Collective Bargaining*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 107 (E. Livernash ed. 1984).

27. For the seminal discussion on the use of Title VII to advance the comparable worth theory, see Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) (Because job segregation has prevented both Title VII and the Equal Pay Act from providing effective remedies for victims of wage discrimination, courts should construe Title VII to require pay in proportion to the worth of jobs.). For the classic criticism of the use of Title VII to advance comparable worth, see Nelson, Opton & Wilson, *supra* note 26, at 242-43,291 (construing Title VII to allow sex discrimination claims in compensation cases to be based on a comparable worth analysis would distort the economic principle of a free labor market).

28. *See infra* note 34 and accompanying text; Blumrosen, *supra* note 27, at 399-412; Reiman, *Comparable Worth: Will It Close the Earnings Gap or Widen the Gender Gap*, 59 FLA. BAR. J. 27, 28 (1984) ("The result of systematic job segregation has been to leave women without a remedy . . . .").

29. *See, e.g.*, Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.) (comparable worth not available in a Title VII disparate impact claim), *cert. denied*, 105 S. Ct. 511 (1984); Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (questioning whether wage disparity statistics alone could ever suffice to make a prima facie case for disparate treatment discrimination under Title VII); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir.) (statistics showing employment disparities are insufficient to meet the burden of showing disparate treatment under Title VII), *reh'g denied*, 662 F.2d 1156 (5th Cir. 1981); American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985) (Title VII did not authorize the courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth.); Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985) (state university did not discriminate against female physical education instructor by paying her less than male baseball and soccer coaches); Connecticut Employees Ass'n v. Connecticut, 31 FAIR EMPL. PRAC. CAS. (BNA) 191 (D. Conn. 1983) (Courts should not engage in a subjective comparison of the intrinsic worth of various dissimilar jobs.); Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982) ("There is no indication in Title VII's legislative history that the boundaries of the Act can be expanded to encompass the theory of comparable worth."); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982) (The employer's liability under Title VII extends only to its own acts of discrimination; the employer is not liable for market forces.); Blowers v. Lawyers Coop. Publishing Co., 27 FAIR EMPL. PRAC. CAS. (BNA) 1222 (W.D.N.Y. 1981) (In comparable worth cases, the court must be able to draw reasonable, nonarbitrary conclusions about the value of jobs.).

the most important women's issue of the 1980's.[30]

III. THE LEGISLATIVE BACKGROUND

A. *The Equal Pay Act*

The EPA, initially an amendment to the Fair Labor Standards Act,[31] requires employers to pay equal wages to men and women "for equal work on jobs the performance of which requires equal skill, effect, and responsibility, and which are performed under similar working conditions."[32] Congress enacted this seemingly simple measure only after a year and a half of intense debate.[33] The focus of this debate was whether the legislation would require equal pay for equal work or equal pay for comparable work.[34]

The EPA was originally part of the Kennedy Administration's civil rights program. Both the Administration's proposal and the committee version called for equal pay for jobs of "comparable character."[35] In this regard, the Secretary of Labor, Arthur Goldberg,

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30. *See, e.g.*, GOLD, A DIALOGUE ON COMPARABLE WORTH 1 (1983) ("Comparable worth is the EEO issue of the decade.").

31. *See* Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-70*, 39 U. CIN. L. REV. 615, 619-21 (1970) (discussing the origins of the EPA).

32. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1982) (codified at 29 U.S.C. § 206(6)).

The EPA provides in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate . . . 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 . . . 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) 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.

29 U.S.C. § 206(d)(1) (1982).

33. *See* County of Wash. v. Gunther, 452 U.S. 161, 184 (1980) (Rehnquist, J., dissenting) (Congress passed the EPA "after 18 months of careful and exhaustive study.").

34. *See* Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475, 482 (1980).

35. County of Wash. v. Gunther, 452 U.S. 161, 184-85(1980) (Rehnquist, J., dissenting) (quoting H.R. 8898, 87th Cong., 1st Sess. (1961)). The original proposal stated in part:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of *comparable character* on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.

Id. (emphasis added).

emphasized that " '[c]omparable' is a key word in our proposal."[36] Because of the Kennedy Administration's support, the committee reported the EPA legislation with the comparable character wording still part of the bill.[37]

Once on the floor of the House of Representatives, however, several congressmen objected to the "comparable character" language.[38] To narrow the scope of the measure, Representative St. George proposed an amendment which changed the words "comparable character" to "equal work."[39] Representative St. George stated that the word " 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes."[40] Supporters of this amendment believed that the EPA had to provide an objective standard for sex-based wage discrimination to be effective.[41] Despite opposition from the Kennedy Administration, Congress finally passed the EPA, as modified by the St. George amendment.

After passage of the EPA, the courts found it difficult to define the term "equal work." The EPA itself offers no specific definition, although it does require equal pay when jobs are of "equal skill, effort, and responsibility, and which are performed under similar working conditions."[42] These provisions, however, are left over from the Kennedy Administration's "comparable character" proposal, which included them because they are the factors that job evaluation experts most often use to measure comparable worth.[43] In the final version of the EPA, Congress failed to clarify how these factors would impact the "equal work" standard. In the legislative history, the Senate indicated that it did not intend "equal" to mean "identical," but the House indicated that it intended a "virtually identical" standard.[44]

36. 108 CONG. REC. 14, 768 (1962) (Representative Zelenko quoting the Secretary of Labor's written response regarding whether "comparable" is the same as "equal"). The Kennedy Administration based its "comparable character" proposal on the wartime regulations of the National War Labor Board (NWLB). *Gunther*, 452 U.S. at 185, n.1 (Rehnquist, J., dissenting). The NWLB required equal pay for "comparable work." *See In re* General Elec. Co., 28 WAR LAB. REP. 666 (1945).

37. *Gunther*, 452 U.S. at 185 (Rehnquist, J., dissenting).

38. 108 CONG. REC. 14, 767-68 (1962).

39. *Id.*

40. *Id.*

41. *See* Comment, *supra* note 34, at 482.

42. 29 U.S.C. § 206(d)(1) (1982). For text of the EPA, see *supra* note 32.

43. *See* Murphy, *supra* note 31, at 620. For a discussion on the factors used in job evaluation studies, see Treiman, *Effect of Choice of Factors Weights in Job Evaluation*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 79-80 (H. Remick ed. 1984).

44. 109 CONG. REC. 8915 (1963) ("In making comparisons it has been shown that the factors affecting job content listed below may be useful: education, skill, experience, responsibility, quality and quantity of work, initiative, and ingenuity, physical effort, mental effort, hazardous or objectionable labor, and working conditions."); 109 CONG. REC. 9197

Thus, the legislative history merely adds to the confusion about Congressional intent.

Until the Supreme Court, in the 1974 decision of *Corning Glass Works v. Brennan*,[45] ended most of the confusion by holding "equal work" meant "substantially equal work,"[46] lower courts often were confused over how the EPA's comparable worth criteria related to its "equal work" standard.[47] Under this standard, any significant variation in skill, effort, or responsibility between jobs could justify a wage disparity. After *Corning Glass Works*, courts could apply the EPA only to jobs that are almost identical in nature.[48] In other words, the *Corning Glass Works* decision read out the last of the "comparable character" language in the EPA and effectively barred the use of the statute in cases where the jobs under scrutiny are only comparable in value to the employer.

In addition to providing a standard of proof for potential plaintiffs, the EPA provides several statutory defenses to such suits. Employers may maintain different wage rates for men and women in substantially equal jobs if payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quality or quantity of production, or a differential based on any factor other than sex.[49] An employee asserting an EPA claim, however, need not prove that the employer intended to discriminate,[50] but only that the employer paid one sex more than the opposite sex for equal jobs.[51] If the employee can satisfy this initial burden, then the burden of proof shifts to the employer to prove an affirmative defense or that the work is not equal.[52] Although the EPA protects women in "men's" jobs, many women cannot make use of the statute because they cannot

(1963) ("Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.").

45. 417 U.S. 188 (1974).

46. *Id.* at 203 n. 24.

47. *See, e.g.*, Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973) (jobs involved should be virtually identical); Hodgon v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972) (substantial identity of job functions); Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257 (D.C. Wis. 1970) (The EPA does not require that jobs performed by men and women be identical.).

48. *See* Brennan v. Price William Hosp. Corp., 503 F.2d 282 (4th Cir. 1974) (discussing the rigors of the "substantially equal" work standard), *cert. denied*, 420 U.S. 972 (1975).

49. 29 U.S.C. § 206(d)(1) (1982)

50. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

51. Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

52. *Corning Glass*, 417 U.S. at 196-97.

compare their jobs to jobs that men have traditionally performed.[53]

B. *Title VII*

Less than a year after enacting the EPA, Congress opened debate on the Civil Rights Act of 1964.[54] Proponents originally intended Title VII[55] of the Civil Rights Act to provide a comprehensive guarantee of equal employment opportunity to members of racial and religious minorities.[56] In the closing hours of the debate on Title VII, however, Representative Smith, an opponent of the Civil Rights Act, offered an amendment adding sex as a Title VII protected class.[57] Supporters of the Civil Rights Act viewed this as an attempt to defeat passage of the Civil Rights Act by adding what Representative Smith perceived as a radical and unpopular provision.[58] This legislative manuever failed, however, when the addition of sex as a protected class did not dissuade Congress from passing Title VII.[59] Sex, therefore, became one of Title VII's protected classes with little congressional discussion on the ramifications of such a classification.

Unlike the very narrowly written EPA, Title VII prohibits a wide variety of discriminatory employment practices.[60] For example,

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53. J. LYLE & J. ROSS, *supra* note 22, at 104.

54. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

55. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. § 2000e (1982)).

56. *See* Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implications for the Issues of Comparable Worth*, 19 DUQ. L. REV. 453, 454 (1981).

57. 110 CONG. REC. 2577 (1964). *See* County of Wash. v. Gunther, 452 U.S. 161, 185 n.1 (1980) (Rehnquist, J., dissenting) (discussing similar National War Board regulations). Because Representative Smith offered his amendment on the House floor, there was very little time for the House to debate the merits of the change. The Supreme Court would later comment that "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity." General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976).

58. *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 78-79 & n.31 (1964) (Congressman Smith and nine southern congressmen went on record in favor of the amendment, but voted against the bill.); Gold, *supra* note 56, at 454-63 (Supporters of the Civil Rights Act were concerned with whether the addition of sex would erode support for the measure.); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 883-84 nn.34 & 35 (1967) (Opponents of the Civil Rights Act were the strongest supporters of the addition of sex to the list of protected classes.). *But see* Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protection Under Title VII*, 8 LOY. U. CHI. L.J. 723, 743-45 (1977) (disputes the contention that inclusion of sex in Title VII was a diversionary tactic).

59. For text of Title VII, see *infra* note 59.

60. Title VII provides, in pertinent part, that:

(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex
. . . .

section 703(a) of Title VII outlaws gender discrimination in the areas of "compensation, terms, conditions or privileges of employment."[61] The statute also does not permit employers on the basis of sex to "limit, segregate, or classify his employees or applicants."[62] In other words, Title VII forbids sex-based discrimination in the hiring, compensating, promoting, transferring, or firing of employees.

Title VII prohibits employment discrimination in either of two ways. First, it prohibits disparate treatment, which is the intentional use of discriminatory employment standards.[63] Second, it prohibits disparate impact, which is the use of facially neutral employment practices which have an unduly harsh impact upon a class protected by Title VII.[64]

The courts have used disparate treatment analysis for fifteen years in wage discrimination cases.[65] To prove discrimination using the disparate treatment approach, the employees initially must prove that the employer intended to discriminate in setting the wage rates.[66] One may infer discriminatory motive from the mere fact of differences in treatment.[67] The employees may offer statistical evidence support-

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42 U.S.C. § 2000e-2(a) (1982).

See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Title VII requires the elimination of arbitrary and unnecessary barriers to employment that cannot be shown to have a significant relationship to job performance.).

61. 42 U.S.C. § 2000e-2(a) (1983).

62. *Id.*

63. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). In this footnote, the Court explained the difference between disparate treatment and disparate impact models of employment discrimination analysis. The Court stated that, under the disparate treatment model, an employer violates Title VII by intentionally treating some employees less favorably than others because of their race, color, religion, sex, or origin. *Id.* *See generally* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982).

64. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15; *Griggs*, 401 U.S. at 431 (stating that discrimination can arise nonpurposefully). In *Griggs*, the Court stated that, because Congress intended Title VII to reach "the *consequences* of employment practices, not simply the motivation," the employer's "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for protected classes and are related to measuring job capability." *Id.* at 432.

65. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

66. Texas Community Affairs v. Burdine is the seminal modern case on disparate treatment analysis. 450 U.S. 248 (1981). Under *Burdine*, a prima facie case established a legally mandatory, rebuttable presumption. *Id.* at 254 n.7. For a discussion of the standard of proof that employees are required to meet, see Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (a disparate treatment case grounded on circumstantial evidence raises an inference of discrimination because the court presumes otherwise unexplained acts "are more likely than not based on the consideration of impermissible factors").

67. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15. The plaintiff must show that, in the absence of any other explanation, it is more likely than not that the employer's actions

ing an inference of the employer's discriminatory intent.[68] If the employees prove a prima facie case of discrimination, that is, actual discrimination plus a discriminatory intent, then the burden shifts to the employer. The employer must show "some legitimate, non-discriminatory reason" for the salary disparities.[69] If the employer produces evidence of legitimate business reasons, then the burden of production shifts back to the employees to demonstrate that the legitimate reasons the employer offered were not the true reasons, but were merely a pretext for discrimination.[70]

Unlike disparate treatment analysis, the courts have not widely used disparate impact analysis in wage discrimination cases. Although the Supreme Court has never explicitly ruled against the use of disparate impact analysis in broad challenges to employment practices, most lower courts have confined the use of this analysis to cases that challenge a narrow, clearly defined employment practice.[71] The courts have been unwilling to use disparate impact analysis in wage discrimination cases because of the large liability which can result without ever showing intentional discrimination.[72] Disparate

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were based on discriminatory considerations. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

68. *See* Gay v. Waiters Union, Local 30, 694 F.2d 531, 553 (9th Cir. 1982) ("The best prima facie case utilizing statistical data, one allowing the strongest inference of intentional discrimination . . . is that in which the plaintiff's statistical proof is bolstered by other circumstantical evidence of discrimination bringing 'the cold numbers convincingly to life.' ").

For a critical discussion of the use of statistical evidence in Title VII cases, see Campbell, *Regression Analysis in Title VII Cases: Mimimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299 (1984).

69. *McDonnell Douglas*, 411 U.S. at 802 n.13. Under *Burdine*, the employer does not have to "persuade the court that it was actually motivated by the proferred reasons." *Burdine*, 450 U.S. at 254. The employer only has to produce evidence that there is "a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254-55.

70. *Furnco Constr. Co.*, 438 U.S. at 577.

71. *See* City of Los Angeles v. Manhart, 435 U.S. 702, 710-11 (1978) (different group insurance coverage for men and women employees); Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984) (use of disparate impact analysis inappropriate in comparable worth claims).

72. *Spaulding*, 740 F.2d at 708. For differing views on the use of disparate impact analysis in comparable worth cases, see Comment, *Comparable Worth and Title VII: The Case Against Disparate Impact Analysis*, 16 PAC. L.J. 833, 843-51 (1985) (disparate impact analysis should not be permitted in comparable worth claims); Comment, *Comparable Worth, Disparate Impact and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CALIF. L. REV. 730, 740-43 (1983) (disparate impact analysis may have some limited application in comparable worth cases).

In explaining disparate impact analysis under the Civil Rights Act, the *Griggs* Court stated that the "Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is *business necessity*. If an employment practice which operates to exclude [the protected class] cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).

impact claims involve proof of three elements. First, the employee must show employment practices which are facially neutral in their treatment of different groups. Second, the employee must show the practices in fact fall more harshly on one group than another. Third, the employee must show the employer cannot justify the practices by business necessity.[73] In contradistinction to disparate treatment analysis, a disparate impact plaintiff need not prove discriminatory motive.[74] Instead, the courts infer the discriminatory motive from the fact of adverse impact, thereby imposing a constructive intent standard on Title VII defendants.[75] The comparable worth cases, based on disparate impact, center on the issue of whether a failure to pay based on comparable worth instead of market rates is sufficient to constitute a prima facie case under Title VII.

C. *The Bennett Amendment*

Because of the inauspicious beginnings of the gender provisions of Title VII, considerable uncertainty existed in Congress over how sex-based wage discrimination cases analyzed under Title VII's two approaches would compare to cases analyzed under the language of the EPA.[76] Concerned with the possibility of a conflict between the two statutes, Senator Bennett introduced an amendment to Title VII just prior to its passage.[77] The purpose of the amendment was to make it clear to the courts that Congress did not intend Title VII to nullify the provisions or protections of the EPA.[78] The Bennett Amendment established that a defendant may assert the four statu-

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73. *International Bhd. of Teamsters*, 431 U.S. 336 n.15.

74. McDonnell Douglas v. Green., 411 U.S. 792, 802 (1973).

75. *Id.* at 804.

76. Senator Bennett, speaking on the Senate floor, voiced the concern of others when he stated:

> 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.

110 CONG. REC. 13,647 (1964).

77. *Id.* For a general discussion of the legislative history of the Bennett Amendment, see Comment, *The Bennett Amendment — Title VII and Gender Based Discrimination*, 68 GEO. L.J. 1169, 1172-77 (1979).

78. 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 the

tory defenses to an EPA claim as affirmative defenses to challenges under Title VII.[79]

Although the Bennett Amendment clarified that Title VII did not implicitly repeal the EPA, the amendment left unresolved the crucial issue of how Title VII and the EPA should otherwise interact. For years, the lower courts have wrestled with the question of whether the Bennett Amendment required the use of the EPA standards in sex-based wage discrimination cases brought under Title VII. After the Supreme Court's decision in *Corning Glass Works*, this controversy has focused on whether the "substantially equal work" standard of the EPA is applicable to Title VII wage discrimination cases.[80] This controversy created a great deal of turmoil in the lower courts until the Supreme Court's decision in 1981 of *County of Washington v. Gunther*.[81]

IV. THE *Gunther* DECISION

In the *Gunther* decision, the Supreme Court partially settled the controversy over the Bennett Amendment by holding that "intentional" sex discrimination in wages is properly the subject of a Title VII challenge without restriction by the "substantially equal work" standard of the EPA. In this narrowly drafted opinion, the Court recognized that Title VII represents a much more comprehensive vehicle for attacking discrimination than the EPA and that Congress intended the judiciary to broadly construe Title VII to prohibit the "entire spectrum" of practices that result in gender-based employment discrimination.[82]

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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 U.S.C. § 2000e-2(h) (1982).

79. When introducing the amendment, Senator Bennett stated: "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." 110 CONG. REC. 13,647 (1964).

80. *See, e.g.*, IUE v. Westinghouse, 631 F.2d 1094, 1100 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1985) (The Bennett Amendment did not require Title VII litigation to be bound by the equal work standard, to do so would allow employers to discriminate against women in ways they could not do to other Title VII protected classes.); Lemons v. City of Denver, 620 F.2d 228, 229-30 (10th Cir.), *cert. denied*, 449 U.S. 881 (1980) (Title VII did not cover the wage disparities that the comparable worth theory raised.); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (holding that employees had failed to prove that wage disparities grounded on the comparable worth concept were not caused by legitimate economic reasons and thereby avoiding any interpretation of the Bennett Amendment).

81. 452 U.S. 161 (1981).

82. *Id.* at 180. *See* Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominately Female Jobs*, 1984 U. ILL. L. REV. 1, 5-22 (general discussion of disparate treatment claims).

The plaintiff in *Gunther* was a female guard at a county jail. The jail in which she worked was divided into two sections: male guards guarded male prisoners, while female guards guarded female prisoners. The two sets of guards performed similar duties, except that the employer assigned female guards clerical duties that it did not give to the male guards and the male guards supervised more prisoners. Despite their otherwise similar duties, the female guards received substantially lower wages than the male guards.[83]

Gunther brought suit in district court and claimed that the county's salary structure violated Title VII because it discriminated against women employees.[84] Gunther alleged that she received lower wages for work "substantially equal" to work that the male guards performed. In the alternative, Gunther pleaded that, even if the court did not find that the work of the female and male guards was substantially equal, she still should have been able to recover under Title VII because the wage discrepancy was the product of intentional sex discrimination on the part of the county.[85] She based this claim on the county's failure to fully implement the recommendations of its own job evaluation study which determined that the county should pay female guards approximately ninety-five percent as much as male guards. In spite of these recommendations, the county continued to pay the female guards seventy percent as much as the male guards and paid the male guards their full evaluated worth.[86]

The district court found that the female guards' work was not substantially equal to that of the male guards.[87] The district court then dismissed Gunther's alternative intentional discrimination claim. The court held that the Bennett Amendment mandated that sex-based wage discrimination cases brought under Title VII conform to the EPA's substantially equal work standard.[88] Because it found that the jobs were not substantially equal, the court dismissed Gunther's Title VII intentional sex discrimination claim.

The United States Court of Appeals for the Ninth Circuit

83. County of Wash. v. Gunther, 20 FAIR EMPL. PRAC. CAS. (BNA) 788, 791 (D. Or. 1976). The district court found that while the female guard performed clerical duties not assigned to male guards, the male guards supervised more than ten times as many prisoners as did the female guards. *Id.*

84. *Gunther*, 452 U.S. at 164. Gunther and the other female guards could not sue under the EPA, because the EPA did not apply to municipal employees at the time Gunther brought her suit. *Id.* at 164 n.3.

85. *Id.* at 164-65.

86. *Id.* at 180-81.

87. *Id.* at 165.

88. *Gunther*, 20 FAIR EMPL. PRAC. CAS. (BNA) at 791.

reversed the dismissal of the intentional sex discrimination claim.[89] The court of appeals held that the Bennett Amendment did not prevent a female employee from using Title VII to challenge a discriminatory salary system merely because her job was not perfectly "equal" to the higher-paying male job. Noting the discrepancy in the wage structure, the Ninth Circuit concluded that a court reasonably could find that "a portion of the discrepancy between their salaries and those of the male guards could be ascribed only to sex discrimination."[90]

The Supreme Court granted certiorari to decide the narrow issue of "whether [Gunther's] failure to satisfy the equal work standard of the Equal Pay Act in itself precludes [her] proceeding under Title VII."[91] Before answering this narrow question, the Court went to extraordinary lengths to make it clear that it was not ready to address the broader issue of comparable worth. The Court noted that the female guards did not seek "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[92] The Court thus emphasized that Gunther's claim was "not based on the controversial concept of 'comparable worth.' "[93]

After stressing the limited nature of its inquiry, the Court analyzed the Bennett Amendment's impact on the EPA and Title VII. Initially, the Court noted that the "language of the Bennett Amendment suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII."[94] The Court found that this construction of the Bennett Amendment ensures that courts would adopt the same defenses to Title VII and the EPA, which is the only way to view the Bennett Amendment without making it superfluous.[95]

The Court also reviewed the relevant legislative history of the Bennett Amendment. Initially noting that Senator Bennett thought

89. Gunther v. County of Wash., 602 F.2d 882 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

90. *Gunther*, 602 F.2d at 891.

91. *Gunther*, 452 U.S. at 166 n.8. In the same footnote, the Court stated that it was not "called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII . . . or to lay down standards for further conduct of this litigation." *Id.*

92. *Id.* at 166.

93. *Id.*

94. *Id.* at 168.

95. *Id.* at 169. The "superfluous" argument was based on the idea that Title VII actions would be subject to the four affirmative defenses even without the Bennett Amendment. Because Title VII was already subject to these defenses, opponents of comparable worth argued that Congress must have wanted to incorporate more than the four defenses or it would not have passed the provision. The Court flatly rejected this argument. *Id* at 169-71.

his amendment was purely "technical" in nature and designed to resolve possible conflicts between Title VII and the EPA,[96] the Court concluded its narrow reading of the provision was consistent with this intended purpose.[97] Beyond this, the Court seemingly acknowledged that the congressional history of the Bennett Amendment failed to make clear that the amendment's sole purpose was to incorporate the EPA's four affirmative defenses into Title VII.

Finding the legislative history of the Bennett Amendment inconclusive, the Court examined the congressional debate for all of Title VII. Because inclusion of the EPA defenses would narrow the scope of Title VII, the Court found that a narrow reading of the Bennett Amendment was consistent with the broad remedial purpose of Title VII.[98] The Court further emphasized the expansive wording of Title VII and cited a congressional statement that declared a " 'broad approach' to the definition of equal employment opportunity is essential" if the goals of Congress in enacting Title VII are to be achieved.[99] In order for Title VII to provide a remedy for all victims of sex-based employment discrimination, as Congress intended, the Court concluded that a narrow interpretation of the Bennett Amendment was necessary.[100] The Court therefore affirmed the court of appeals and concluded that Gunther's allegation of intent based on failure to pay the female guards their full evaluated worth was sufficient to state a prima facie case under Title VII disparate treatment analysis.[101]

In its disparate treatment analysis, the Court used the defendant's own evaluation of job worth.[102] The county failed to pay its employees in accordance with the values it assigned to their jobs; therefore, the Court found that there was a prima facie case of intentional discrimination.[103] The Court noted that it did not have to make its own assessment of the value of the jobs "or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates."[104] This was the crucial factor the Court used to distinguish *Gunther*'s facts from a comparable worth

96. *Id.* at 171-76.

97. *Id.* at 174-75.

98. *Id.* at 178.

99. *Id.* (citing S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964)). The Court stated "[w]e must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Gunther*, 452 U.S. at 178.

100. *Gunther*, 452 U.S. at 178-80.

101. *Id.* at 180-81.

102. *Id.*

103. *Id.* at 181.

104. *Id.*

case. The Court relied heavily upon the plaintiff's allegations of intent based on "setting 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."[105]

Justice Rehnquist filed a biting dissenting opinion in which three other Justices concurred.[106] Justice Rehnquist stated: "the flaw with today's decision is not so much that it is so narrowly written as to be virtually meaningless, but rather that its legal analysis is wrong."[107] Justice Rehnquist complained that the Court's holding was so limited that it would give almost no guidance to the lower courts in deciding what types of compensation systems would violate Title VII.[108]

The bulk of Justice Rehnquist's dissent was an examination of the congressional history of the EPA and Title VII. Justice Rehnquist concluded:

> In adopting the "equal pay for equal work" formula, Congress carefully considered and ultimately rejected the "equal pay for comparable worth" standard . . . . As the legislative history of the Equal Pay Act amply demonstrates, Congress realized that the adoption of the comparable-worth doctrine would ignore the economic realities of supply and demand and would involve both governmental agencies and courts in the impossible task of ascertaining the worth of comparable work, an area in which they have little expertise.[109]

Not surprisingly, Justice Rehnquist found the congressional history of Title VII dealing with the comparable worth question very brief.[110] Because Congress was nearly silent on the issue, Justice Rehnquist reasoned that Congress retained its concern over the dangers of comparable worth. Justice Rehnquist concluded that the Bennett Amendment, by implication, should prohibit development of a comparable worth doctrine under Title VII.[111]

Although pay equity proponents hailed the *Gunther* decision as a partial victory, they have made little advancement toward recognition of a pure comparable worth cause of action since this landmark decision in 1981.[112] By so closely tailoring its opinion and relying upon the employer's failure to pay employees according to its own evalua-

105. *Id.* at 166.

106. *Id.* at 181 (Rehnquist, J., dissenting). Chief Justice Burger, and Justices Stewart and Powell joined Justice Rehnquist in dissent. *Id.*

107. *Id.* at 183-84 (Rehnquist, J., dissenting).

108. *Id.* at 183 (Rehnquist, J., dissenting).

109. *Id.* at 184 (Rehnquist, J., dissenting).

110. *Id.* at 188-98 (Rehnquist, J., dissenting).

111. *Id.* at 192 (Rehnquist, J., dissenting).

112. Reiman, *supra* note 26, at 29.

tions of the employee's worth, the *Gunther* Court refrained from directly reviewing the merits of a case in the context of the theory of comparable worth.[113] In strictly limiting its holding, the *Gunther* Court left unresolved a number of key issues, including: the nature of the proof required to prove intent in a Title VII sex-based wage discrimination claim under disparate treatment theory, the role of market conditions in a Title VII case, and the very existence of a Title VII comparable worth cause of action.[114]

V. THE AFTERMATH OF *Gunther*

A. *Comparable Worth Is Wounded*

So far, the lower courts have been unwilling to accept the comparable worth theory as a judicial doctrine.[115] For example, in the early post-*Gunther* case of *Blowers v. Lawyers Cooperative Publishing Co.*,[116] the District Court for the Western District of New York dismissed a comparable worth claim by female employees which challenged a job classification system which placed predominately female jobs at the bottom of the pay scale. The district court dismissed the claim because the employees failed to provide "any quantitatively-oriented expert testimony or evidence from which . . . to draw a reasonable nonarbitrary conclusion"[117] about the "worth" of the job under scrutiny.

Similarly, in *Plemer v. Parsons-Gilbane*,[118] the Fifth Circuit dismissed a comparable worth claim because it "asks too much";[119] it would compel the court to make an "essentially subjective assessment of the value"[120] of two jobs and to determine whether the women employees received less than the social value of their positions merely because they are female. The *Plemer* court interpreted *Gunther* as concerning only "blatant cases of sex discrimination in which the only

113. For scholarly comment on *Gunther* and its impact, see Note, *Proving Title VII Sex-Based Wage Discrimination After* County of Washington v. Gunther, 4 CARDOZO L. REV. 281 (1983); Note, *Women, Wages and Title VII: The Significance of* County of Washington v. Gunther, 43 U. PITT. L. REV. 467 (1982); Note, County of Washington v. Gunther: *Sex-Based Wage Discrimination Extends Beyond the Equal Pay Act*, 16 LOY. L.A.L. REV. 151 (1983); Comment, *Sex-Based Wage Discrimination Claims After* County of Washington v. Gunther, 81 COLUM. L. REV. 1333 (1981).

114. *See* Williams & Bagby, *The Legal Framework*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 232-33 (R. Livernash ed. 1983).

115. For a listing of some recent comparable worth cases, see *supra* note 29.

116. 27 FAIR EMPL. PRAC. CAS. (BNA) 1222 (W.D.N.Y. 1981).

117. *Id.* at 1223.

118. 713 F.2d 1127 (5th Cir. 1983).

119. *Id.* at 1134.

120. *Id.*

stumbling block to underpaid females' causes of action [sic] was the fact that the victimized women did not hold similar jobs to those held by men."[121] The comparable worth claim, the *Plemer* court stated, demonstrated "no transparently sex-biased system of wage determination"[122] by the employer and thus was not covered by the *Gunther* decision. The court concluded that absent direct statistical evidence as to how the employer valued jobs, it was "not the province of the courts to value the relative worth of . . . [employees with] differing duties and responsibilities."[123]

In *Briggs v. City of Madison*,[124] female city nurses claimed that the employer set their salaries intentionally lower than those of comparable male health professionals. A job evaluation expert, testifying on behalf of the nurses, offered statistical evidence that the two positions were comparable in value to the city.[125] The city did not refute this expert testimony. Instead, the city raised the defense that market forces necessitated the wage differential between men and women.[126] The district court accepted this defense and held that, under "Title VII, an employer's liability extends only to its own acts of discrimination."[127] The court concluded that "[n]othing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create."[128] In accepting the so-called marketplace defense, the court rejected the view that such a defense only perpetuates the historically ingrained wage discrimination against women.[129]

After *Gunther* and the lower federal court cases interpreting it, plaintiff employees must make two showings to succeed under comparable worth analysis. First, the employee must prove that the employer knew the jobs were of equal value. Second, the employee must prove that the employer intentionally paid its female employees at a lower rate.[130] Because courts will not make their own assessment of the value of different duties, they insist that the employer already have evaluated the job's worth.[131]

Although courts are particularly reluctant to compare com-

121. *Id.* at 1133.

122. *Id.*

123. *Id.* at 1134.

124. 536 F. Supp. 435 (W.D. Wis. 1982).

125. *Id.* at 440-41.

126. *Id.* at 446.

127. *Id.* at 447.

128. *Id.*

129. *Id. See* Reiman, *supra* note 28, at 30.

130. *Gunther*, 452 U.S. at 180-81.

131. *Id.* at 181.

pletely dissimilar jobs, they will compare somewhat dissimilar jobs.[132] Yet, even if a plaintiff makes a prima facie case for intentional discrimination, the employer may show a valid reason for the pay disparity under the EPA defenses.[133] The plaintiff must then show that the asserted reasons were a pretext for paying discriminatory wages.[134] Thus, if a plaintiff can get past a motion for summary judgment on the prima facie case, intentional discrimination claims based on comparable worth will take the same form as any other Title VII claim.[135]

B. Spaulding: *A Mortal Blow*

Two years after *Briggs*, in an apparent rejection of the comparable worth theory as a cause of action under Title VII, the Ninth Circuit refused to accept the proposition that wage disparities between jobs held predominately by men and those held predominately by women constitute evidence of sex discrimination. In the 1984 case of *Spaulding v. University of Washington*,[136] the court stated that to accept the comparable worth theory "would plunge us into uncharted and treacherous areas."[137]

In *Spaulding*, the predominately female faculty of the University of Washington School of Nursing, using comparable worth analysis, alleged sex-based wage discrimination between themselves and the predominately male faculties of the other schools of the university. To support its claim, the nursing faculty cited a study by the administration of the university which indicated that the salaries of the nursing faculty were considerably less than those of comparable other faculties.[138] Yet, the nursing faculty could not produce any evidence which demonstrated that the wage disparities were the result of an

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132. Spaulding v. University of Wash., 740 F.2d 686, 701 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984) ("*Gunther* allows a 'comparison of somewhat dissimilar jobs.' ").

133. *See supra* notes 93-94 and accompanying text.

134. EEOC v. Affiliated Foods, 34 FAIR EMPL. PRAC. CAS. (BNA) 943, 959 (W.D. Mo. 1984). *Cf.* Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982) (employer may show business justification where different skills are required for the performance of jobs). For a discussion of the EPA defenses, see *supra* note 49 and accompanying text.

135. *See* American Nurses Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985); Cox v. American Case Iron Pipe Co., 585 F. Supp. 1143 (N.D. Ala. 1984). Not all courts recognize comparable worth-like claims under a disparate treatment theory, even where intent is fairly clear. The courts that reject such claims ignore the intentional aspect of the claims and label them as pure comparable worth claims. Some plaintiffs denied that they were basing their claims on comparable worth, contending that they were seeking relief under a more traditional theory. *See, e.g.*, Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (classic claim of unequal pay for equal work).

136. 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

137. *Id.* at 706.

138. *Id.* at 692.

intentional effort on the part of the university to discriminate against its women employees.

In examining the nursing faculty's Title VII claim, the Ninth Circuit first used disparate treatment analysis.[139] Because there was no direct proof of a discriminatory motive, the court scrutinized the statistical evidence to determine if it supported an inference that the wage differentials were the result of intentional sex discrimination. The fact that pay rates are different, the court stated, was "insufficient alone to establish"[140] the necessary element of intent. To infer intent, the court held, the plaintiffs would have to couple the statistical evidence with either some direct evidence of intentional discrimination or some showing of bad faith by the employer when confronted with reports of sex-based wage disparities. Because the nursing faculty only offered statistical evidence of intent, the Ninth Circuit found that the comparable worth claim failed to prove a Title VII cause of action under disparate treatment analysis.[141] As the statistics were inaccurate, the Ninth Circuit rejected the nurses' use of statistics in *Spaulding*.[142] The court stated that the plaintiffs could use properly authenticated statistics to prove intent, but it warned of statistics' "inherently slippery nature."[143] The court was particularly concerned with the use of comparative, as opposed to general, statistics. Because the statistics were inaccurate and misleading, the Ninth Circuit rejected their use to prove a prima facie case of disparate treatment.[144]

The *Spaulding* court then examined the nursing faculty's claim under Title VII's disparate impact analysis.[145] The nursing faculty alleged that the university's facially neutral practice of paying market-based salaries had an adverse impact on female employees.[146] The court refused to reach the merits of the nursing faculty's claim because the court questioned whether "the disparate impact model is available to plaintiffs who . . . make a broad-ranging sex-based claim of wage discrimination, based on comparable worth."[147] Judicial management was the court's major concern in *Spaulding*. The court cited lack of precedent, vagueness, and administrative difficulties as

139. *Id.* at 700.
140. *Id.*
141. *Id.* at 703-04.
142. *Id.* at 704.
143. *Id.* at 703 (citing Wilkins v. University of Houston, 654 F.2d 388, 395 (5th Cir.)).
144. *Id.* at 704.
145. *Id.* at 705.
146. *Id.*
147. *Id.*

reasons to reject the comparable worth theory. After reviewing prior cases,[148] the court found that most lower federal courts had ruled against the use of disparate impact analysis in broad-based wage discrimination cases. The Ninth Circuit stated that it was unwilling to go against this tide of decisions in comparable worth cases, because "evidence of a pay disparity between jobs that are only comparable says very little about discrimination."[149]

Moreover, the court noted that even if it were to allow the nursing faculty to use disparate impact analysis, the university's policy of paying the prevailing market rate was not a facially neutral practice subject to Title VII attack.[150] In defining "facially neutral practice" in its disparate impact analysis, the court found that "practices" involve conscious policy-making: intelligence test requirements,[151] height and weight requirements,[152] pregnancy leave policies,[153] policies which exclude applicants based on arrest records,[154] or fringe benefits policies.[155] By contrast, the court found that employers are generally "price-takers," those who accept a market price, who could not have a meaningful market "policy" because they lack an opportunity to control the market in which they operate.[156] Every employer, the court stated, has to look to the marketplace to set wages. To

148. *Id.* at 705-08.

149. *Id.* at 704. The *Spaulding* court cited the following cases: Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982) (recognition of intentional discrimination may signal the other limit of legal theories cognizable under Title VII), *cited with approval in Spaulding,* 740 F.2d at 706; Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982) (the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices is disparate treatment analysis), *cited with approval in Spaulding,* 740 F.2d at 707. *See also* Note, *Sex-Based Wage Discrimination Under The Title VII Disparate Impact Doctrine,* 34 STAN. L. REV. 1083 (1982) (surveying cases and presenting arguments why courts should not use disparate impact analysis in comparable worth cases) *cited with approval in Spaulding,* 740 F.2d at 706.

150. *Spaulding,* 740 F.2d at 709.

151. *E.g.,* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (intelligence testing).

152. *E.g.,* Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements).

153. *E.g.,* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980) (pregnancy leave policies).

154. *E.g.,* Gregory v. Litton Systems, 472 F.2d 631 (9th Cir. 1972) (arrest records).

155. *See, e.g.,* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (fringe benefits).

156. *Spaulding,* 740 F.2d at 708. The court concluded:

> Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the disparate impact analysis . . . .
>
> Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, "price-takers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense . . . . Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would

impose liability solely on the basis of this practice, the court concluded, would punish the employer for economic forces outside its control.[157]

One might question at this point the validity of the argument that a price-taker does not make a conscious policy decision. Proponents of comparable worth argue that the employer makes a policy decision when he pays an employee according to the prevailing market prices rather than a statistical evaluation of the job's value to the employer.

Spaulding was a crushing defeat for advocates of the comparable worth theory. Not only did the Ninth Circuit explicitly rule against the use of the disparate impact analysis in comparable worth claims, but also the court heightened the employees' burden of proof under disparate treatment analysis. After *Spaulding*, employees not only have to provide statistical evidence of a wage disparity to prove intentional discrimination, but they also must show employer bad faith or produce direct evidence of the employer's intent to discriminate. The result of this heightened standard of proof is that employees will be able to prove a comparable worth claim only in the most blatant instances of sex discrimination.

VI. *AFSCME*

A. *The District Court Opinion*

The District Court for the Western District of Washington rendered its decision in *AFSCME*[158] more than a year *before* the Ninth Circuit's condemnation of comparable worth in *Spaulding*.[159] Yet, even if the district court had decided *AFSCME* after *Spaulding*, it still could have found in favor of the female employees because the court did not characterize *AFSCME* as a classic comparable worth case.[160] Because the state already had commissioned the private study in 1974,[161] the court did not have to do its own evaluation of the intrinsic value of public sector jobs. In an attempt to more closely parallel

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> subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment.

Id.

157. *Id.*

158. AFSCME v. Washington, 578 F. Supp. 846, 860 (W.D. Wash. 1983). Despite the district court's contention that *AFSCME* did not present a comparable worth case, most commentators in the area consider it to be the classic comparable worth decision because the court compared dissimilar jobs. *See, e.g.*, Reiman, *supra* note 28, at 31.

159. *Spaulding*, 740 F.2d at 706.

160. *AFSCME*, 578 F. Supp. at 865.

161. *Id.* at 866.

the *Gunther* case and thus avoid the post-*Gunther* precedents which challenged the validity of the comparable worth concept, the district court apparently refused to recognize that AFSCME's complaint presented a comparable worth claim.

Instead of a comparable worth case, the district court viewed AFSCME's claim as presenting a case of "failure to pay"[162] admittedly earned wages. From this unique perspective, the court stated that the case involved the question of whether "the Defendant's failure to pay the Plaintiffs their evaluated worth, under the provisions of the Defendant's comparable worth studies, constitutes discrimination in violation of provisions of Title VII."[163] Before answering this question, the court noted that "there has been historical discrimination against women in employment in the State of Washington, and that discrimination has been and is manifested by direct, overt and institutionalized discrimination."[164] Because it found that "there is no credible evidence in the record that would support a finding that the State's practices and procedures were based on any factor other than sex,"[165] the district court held that AFSCME had established a prima facie case of sex-based wage discrimination under both the disparate treatment and disparate impact approaches of Title VII.[166]

The court found evidence of disparate treatment in the state's failure to pay its women employees the salaries which its own job surveys mandated. The court held that the plaintiffs established discriminatory intent by showing:

> (a) the deliberate perpetuation of an approximate 20% disparity in salaries between predominately male and predominately female job classifications with the same number of job evaluation points; (b) other statistical evidence including the inverse correlation between the percentage of women in a classification and the salary for the classification; (c) application of subjective standards which have a disparate impact on predominately female jobs; (d) admissions by present and former state officials that wages paid to employees in predominately female jobs are discriminatory; and (e) the Defendant's failure to pay the Plaintiffs their evaluated worth as established by the Defendant.[167]

The court also noted, as further proof of sex discrimination, the state's use of newspaper "help wanted" ads in separate male and

162. *Id.* at 865.
163. *Id.* at 866 (footnote omitted).
164. *Id.* at 864.
165. *Id.* at 866.
166. *Id.* at 864.
167. *Id.*

female columns.[168] Consequently, the court inferred the state's discriminatory intent from these examples of the state's disparate treatment of its employees. Because the state did not rebut AFSCME's prima facie case at trial, AFSCME did not have to show that the state's explanation for the wage disparities was a mere pretext for discrimination.[169]

The district court also held the state's salary system had a disparate impact on employees in predominately female job classifications because of the documented wage disparities between female and male jobs of comparable value. The court found that the state's salary structure could constitute a facially neutral practice and concluded that the job evaluation studies, which showed a twenty percent difference between comparably valued male and female jobs, established a prima facie case of disparate impact.[170] The district court's analysis was as follows: the state intentionally implemented its system of compensation; the market reflects a historical pattern of wage discrimination against women; to base wages on the market is to perpetuate the historical pattern of discrimination; therefore, the state intentionally discriminated against women through its wage structure.

AFSCME was the first, and so far the only, case in which advocates of pay equity have been able to convince a court to accept the doctrine of comparable worth although the court characterized the issue as "failure to pay." For more than a year, *AFSCME* stood as a bold precedent which comparable worth proponents were able to cite as the paradigm for future Title VII actions.[171] Then came the Ninth Circuit's decision in *Spaulding*, which suddenly transformed *AFSCME* into a decision subject to reversal.[172]

B. *The Ninth Circuit's Opinion*

On appeal, the Ninth Circuit had to decide between the district court's embrace of comparable worth and its own nearly complete

168. *Id.* at 860.
169. *Id.* at 863.
170. *Id.* at 864.
171. *See, e.g.*, Reiman, *supra* note 28, at 31.
172. The Ninth Circuit was almost certain to at least partially overturn the district court, because the district court based its use of disparate impact analysis on Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983) (per curiam), *cited with approval in AFSCME*, 578 F. Supp. at 856. The *Wambheim* opinion involved a class-action attacking the employer's "head-of-household" rule which limited medical and dental insurance coverage. The *Wambheim* court found that the employees had successfully established a prima facie case under the disparate impact approach. *Id.* at 1494. The *Spaulding* court later limited the holding in *Wambheim* by stating it "specifically dealt with a particular employer policy rather than a full-scale assault on the employer's salary practices." *Spaulding*, 740 F.2d at 708.

rejection of the theory in *Spaulding*. The court of appeals refused to retreat from its decision in *Spaulding*. Instead, the court used *AFSCME* as an opportunity to further limit the possible use of the comparable worth concept in Title VII cases.[173] Initially, the court limited the impact of comparable worth analysis by striking down the district court's use of disparate impact analysis to prove the state's compensation system was discriminatory.[174] Citing *Spaulding*, the *AFSCME* court held that "the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis."[175] The court emphasized that a compensation system that is the result of complex market forces is not "a single practice that suffices to support a claim under disparate impact theory."[176]

After finding disparate impact analysis inappropriate for comparable worth claims, the *AFSCME* court reviewed the district court's use of disparate treatment analysis. The Ninth Circuit rejected the district court's analysis of intent for purposes of disparate treatment, attacking that court's analysis on two fronts. First, the court found that intent is logically linked to culpability. This notion of wrongdoing, the court stated, would be undermined if the "payment of wages according to prevailing rates in the public and private sectors is an act which, in itself, supports the inference of a purpose to discriminate."[177] Refusing to find "the free market system a suspect enterprise,"[178] the court found that the "economic reality" was "that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job."[179] As examples of other considerations that may influence the salary an employer is willing to pay, the court cited "the availability of workers willing to do the job and the effectiveness of collective bargaining in a particular industry."[180] This expansion of the market-rate defense casts doubt on whether any claim brought under the comparable worth theory can ever be successful because the employer can always assert that some market force caused the pay differential. Furthermore, the language of

173. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
174. *Id.* at 1403-06.
175. *Id.* at 1406 (citing *Spaulding*, 740 F.2d at 708).
176. *Id.*
177. *Id* at 1407.
178. *Id.*
179. *Id.*
180. *Id.*

Title VII and its legislative history indicate no congressional intent to "abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market."[181]

The court's second justification for not applying comparable worth analysis was that AFSCME's statistics were insufficient to establish the inference of discriminatory intent absent corroborative evidence. Attacking the district court's reliance on the private firm's study, the Ninth Circuit stated that "job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory."[182] The court held that the use of discriminatory newspaper advertisments failed to provide enough nonstatistical evidence to support a finding of intentional wage discrimination.[183]

In light of *Spaulding*, the court's decision in *AFSCME* is far from surprising. Pay equity advocates ostensibly lost, at least in the Ninth Circuit, the Title VII comparable worth battle in *Spaulding*. The *AFSCME* decision, however, is still significant in two important respects. First, the decision reversed the only major decision recognizing a comparable worth claim under Title VII and thereby left pay equity advocates without any precedent on which to base future comparable worth actions. Second, it stated with unmistakable clarity the almost insurmountable burden of proof any future comparable worth claimant will have to carry. After *AFSCME*, comparable worth claimants not only will have to produce statistical evidence, but also direct evidence of the employer's intent to discriminate against classes of employees in setting salaries. Moreover, even if future plaintiff employees are able to meet this heavy burden of production, they also will have to be able to refute any "marketplace defenses" that the employer is certain to raise.

VII. *AFSCME*'s Shortcomings

Although the Supreme Court's refusal in *Corning Glass Works* to require equal pay for comparable work was justified in light of the EPA's legislative history,[184] the *AFSCME* court's same narrow inter-

181. *Id.* One commentator noted that, by making this argument, courts implicitly recognize the pervasive nature of discrimination manifested in the market rate: it is not that courts believe there is no discrimination, but that there is too much discrimination to grant relief. *See* Blumrosen, *Wage Discrimination and Job Segregation: The Survival of a Theory*, 14 U. Mich. J.L. Ref. 1, 5 (1980).

182. *AFSCME*, 770 F.2d at 1407.

183. *Id.* at 1407-08.

184. *See supra* notes 31-53 and accompanying text.

pretation of Title VII is plainly inconsistent with Congress's intent in enacting Title VII to provide a remedy for all forms of discrimination in the workplace.[185] Moreover, because of *Gunther*'s narrow construction of the Bennett Amendment, Title VII's broad prohibition against discriminatory compensation practices clearly includes other types of discrimination than unequal pay for equal work. Because the language of Title VII is directed expressly toward wage discrimination, and not just discriminatory hiring practices, courts should construe the statute broadly to reach all forms of wage discrimination. Thus, this broad prohibition and the far-reaching remedial purpose of Title VII should enable female workers to use the concept of comparable worth to challenge sex-based wage discrimination.

In enacting Title VII, Congress sought to guarantee equal employment opportunities to members of groups that traditionally have been the victims of discrimination. To provide this guarantee, Congress drafted Title VII to reach "all aspects of discrimination in employment."[186] In 1972, while studying amendments to other provisions of Title VII, Congress discovered, to its disappointment, that "a profound economic discrimination against women workers" still existed in salary settings.[187] Because Title VII was supposed to have remedied this type of discrimination, Congress found this situation "particularly objectionable."[188] Congress then reiterated its view that "discrimination against women is no less serious than other forms of prohibited employment practices."[189] These statements, coupled with the broad sweep of Title VII, indicate that Congress already has endorsed the concept of comparable worth.

Nonetheless, the court of appeals in *AFSCME* effectively barred the use of Title VII to prohibit unequal pay for work of comparable worth. The court employed two mechanisms to frustrate congressional intent. First, it substantially heightened the burden of proof required of women employees in comparable worth cases.[190] By requiring women employees to come forward with both statistical proof and substantial direct evidence of discriminatory intent, the *AFSCME* court drew a sharp and ill-founded distinction between sex and other Title VII protected classes.[191] Courts long have recognized

185. *See supra* notes 54-75 and accompanying text.

186. S. REP. NO. 867, 88th Cong., 2d Sess. 10 (1964).

187. H.R. REP. NO. 238, 92d Cong., 1st Sess. 4 (1972). *See* Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 670 (1981).

188. H.R. REP. NO. 238, 92d Cong., 1st Sess. 4 (1972).

189. *Id.* at 5.

190. *AFSCME*, 770 F.2d at 1405.

191. *Id.* at 1405-07. In determining the burden of proof standard, the court relied most

comparable worth-like claims by members of other Title VII protected classes without requiring both substantial direct evidence of discriminatory intent and statistical data of discriminatory impact.[192] The Ninth Circuit's decision to require this heightened standard of proof for women plaintiffs in comparable worth claims not only runs counter to prior case law, but also contradicts Congress's desire that the courts treat all Title VII protected classes equally.[193]

Second, the court of appeals defeated Congress's intent by expanding the market-rate defense to a comparable worth claim. The Ninth Circuit found nothing in Title VII to indicate Congress intended to authorize judicial interference with "economic reality" and "the laws of supply and demand."[194] Thus, Title VII did not prohibit unequal pay for comparable work where market forces set the wage rate. In addition, the court of appeals found that disparate impact analysis did not apply to employment decisions and practices solely based on market factors or economic considerations.[195] This argument is, of course, wrong. The purpose of Congress in enacting Title VII was to guarantee equitable, not efficient, employment practices. Judicial intervention in the free market to end discriminatory employment practices is exactly why Congress passed Title VII. Moreover, Congress recognized that, although market intervention may cause short-term inefficiency, the long-term removal of discriminatory employment practices by opening up the labor market to more workers would promote a freer and more efficient marketplace.[196] Thus, the Ninth Circuit's recognition of a "market-rate defense" not only defeats congressional intent, but also economic efficiency.

The court of appeals did not need to examine the more esoteric aspects of Title VII analysis relating to comparable worth. Using disparate treatment analysis, the court could have decided more narrowly in favor of AFSCME. Although the district court's analysis of intent was correct in light of the Supreme Court's analysis in *Gunther*, in several crucial aspects *AFSCME* is no more a comparable worth case than *Gunther*. That the state evaluated the worth of its employees, yet failed to pay the female employees according to the evalua-

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heavily on two other sex discrimination cases. *See* Personal Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

192. *See, e.g.*, Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 509-10 (E.D. Va. 1968) (unequal wage for comparable work because of racial reasons violates Title VII).

193. *See supra* note 186 and accompanying text.

194. *AFSCME*, 770 F.2d at 1407.

195. *Id.*

196. *See* Note, *supra* note 187, at 672-73.

tions, is sufficient to state a prima facie case of disparate treatment. One has difficulty imagining a more blatant instance of intentional wage discrimination than that in *AFSCME*. In *AFSCME*, the State of Washington actually formed a committee to determine the inherent value to the state of various public sector jobs. Having found that particular dissimilar jobs were of equal value, the state then commissioned a study to find out whether these jobs of admittedly equal values received the same salaries or wages. When the study revealed that predominately female jobs garnered significantly less remuneration than predominately male jobs of equal value, the state chose to ignore the study. Even though the state's own study had determined that various jobs had the same inherent value, the state refused to pay them equally. Although the district court used this discrepancy in finding intent, the court of appeals did not even consider these facts in its analysis. The court of appeals could have equated *AFSCME* with the facts in *Gunther* and used the Supreme Court's analysis in *Gunther* to find in favor of plaintiffs on the narrow issue of disparate treatment. It need not have made the decision a frontal attack on the comparable worth theory.

VIII. BEYOND *AFSCME*

After *AFSCME*, because the Ninth Circuit found that Title VII analysis precluded disparate impact theory for comparable worth cases altogether, the only way an employee may assert a Title VII comparable worth claim is to prove disparate treatment. *AFSCME*, through incorrect analysis,[197] has made it virtually impossible to prove discriminatory intent in a comparable worth case. Where an employer evaluates job classifications as equal in value, realizes the sexual wage disparities, yet continues to use the same compensation system, the plaintiff should be able to show a prima facie case of disparate treatment. Although the *Gunther* Court's analysis probably would allow employees to state a prima facie case under disparate treatment analysis where the employer evaluates the classifications himself or enacts only partially the recommendations of a study, *AFSCME* would not allow this.

A. *Voluntary Job Segregation*

Do women choose their professions freely and have the option to choose between lower and higher-paying jobs? Courts, including the Ninth Circuit, apparently think so, because if the employer causes the

197. *See supra* Section VII.

job segregation, the employer clearly would be guilty of intentional discrimination. There are several problems with this assumption. First, women predominate in entry-level positions because of the recent rise in their labor force participation.[198] Because the job market is difficult to enter, many women must start in traditionally female jobs. Second, once in a traditionally female job, women have little upward mobility. Third, people in sexually segregated classifications tend to remain in those classifications. Even if employers hire women in managerial positions, women already employed as clericals will remain clericals.[199] Women in low-paying job classifications do not necessarily remain there by choice. The lack of on-the-job training, increasing skills, promotional opportunities, and respect keep women in the same classifications.[200]

B. *The Free Market Excuse*

Employers claim that supply and demand, rather than bias, influence the job market. Although courts have accepted this defense, one also may conclude that if the free market is inherently discriminatory, then an employer's choice of free market prices must necessarily be a consciously discriminatory practice. Yet, even courts that have recognized discrimination as an influence on the free market have taken the stance that it is not the employer's fault that the free market discriminates.[201] This is a circular argument. First, comparable worth statistics clearly show that the free market is discriminatory as applied to women.[202] Second, employers as participants in the free market help set the market rates. Therefore, because the purpose behind Title VII is to eliminate discrimination in the work force, courts should hold employers responsible for discriminatory actions, including their decision to do nothing to change the free market's inherent discrimination. In *AFSCME*, for example, the employer historically segregated job classifications by separate advertising for men and women in classified ads. Because Washington did nothing to integrate already segregated job classifications,[203] the policy behind Title VII dictates that the Ninth Circuit should have found the state

198. Blumrosen, *supra* note 27, at 412-13.

199. *Id.*

200. *Id.*

201. *See, e.g.*, *AFSCME*, 770 F.2d at 1407.

202. *Release of New Study on Comparable Worth*, LAB. REL. YEARBOOK (BNA) 320 (1981). *See* J. LYLE & J. ROSS, *supra* note 23, at 104-05; Blumrosen, *supra* note 27, at 410-14; Gasaway, *supra* note 26, at 1126. *Contra* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980).

203. *AFSCME*, 578 F. Supp. at 861, 862.

liable under disparate treatment analysis.[204]

C. *Value and the Market Rate*

The Ninth Circuit necessarily believes that the market is the true measure of a job's value; if an employer pays other than the true value of a job, then he is guilty of intentional discrimination. In the cases where employers evaluated various job classifications, the jobs with the same value to the employer were not necessarily paid the same.[205] Employers paid holders of predominately female jobs much less than holders of predominately male jobs. The market rates, then, do not always reflect the true value of a particular job to an employer.

In a case like *AFSCME*, where the employer knowingly and intentionally paid women less than men,[206] Title VII should provide a remedy. Even when an employer knows, or should know, that in a particular situation the market rates or market classifications are discriminatory, the conscious and deliberate act of adopting the market rates or classifications should be violative of Title VII under disparate treatment.

D. *The Open Wound*

Will job segregation heal itself? Comparable worth opponents assume it will be based on the above assumptions: if women segregate themselves voluntarily, and if the free market is neutral, then the solution to the problem is simply voluntary integration, not comparable worth. Even as some men and women move into traditionally sexually segregated jobs, some will remain in the same jobs. Furthermore, as employers hire more women in traditionally male jobs, history indicates the market will begin to devalue these jobs.[207] If left alone, the market may ascribe the same value to the lawyer of tomorrow as it does to the telephone operator of today.

One could argue that, in light of Title VII's broad purposes, Congress authorized any action necessary to eliminate discrimination in the work force. Comparable worth opponents, however, argue that Congress did not intend to interfere with the free market system. This argument ignores the legislative history of Title VII. Because

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204. *See supra* notes 65-70, 102-04 and accompanying text.

205. County of Wash. v. Gunther, 452 U.S. 161 (1981); International Union of Elec., Radio, & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1097-98 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981).

206. *AFSCME*, 578 F. Supp. at 863.

207. *See supra* note 20 and accompanying text.

Congress intended Title VII to have a broad scope, it is possible that comparable worth already may be within Title VII's intended scope.

E. *The Best Case or the Last Opportunity: The Philadelphia Story*

Shortly after the Washington case settled out of court, AFSCME filed a much stronger case against the city of Philadelphia.[208] AFSCME has alleged a pattern and practice of discrimination based on several employment practices: "[p]aying female employees less than male employees performing substantially equivalent job duties; [i]ntentionally engaging in a pattern and practice of paying employees in traditionally female jobs less than employees in traditionally male jobs which require an equivalent or lesser composite of skill, effort, responsibility and working conditions on the basis of sex; and [d]iscriminating in compensation by providing for disparate terms and conditions for promotion and advancement for traditionally male and traditionally female job classifications."[209] These disparate terms and conditions include imposing tests and other requirements for promotion to traditionally female jobs that are not required for promotion to traditionally male jobs, denying job training for employees in traditionally female jobs, and establishing career ladders for traditionally female jobs that are shorter than career ladders for traditionally male jobs.[210]

AFSCME appears to have learned several lessons from the Washington case about alleging intentional discrimination. The Philadelphia allegations are much stronger because they address specific incidents of intentional discrimination.[211] AFSCME also has alleged practices that more strongly support a disparate impact claim.[212] Should AFSCME win the Philadelphia case, it will be not only a victory for comparable worth proponents, but also for Title VII analysis in general.

IX. CONCLUSION

The doctrine of comparable worth represents an attempt to produce equality in wages between men and women. Title VII and the EPA provide a two-prong attack against sex-based salary discrimination.[213] Since the 1970's, the courts, almost without exception, have

208. District Council 33 v. City of Philadelphia, No. 85-7418 (E.D. Pa. filed Dec. 26, 1985) (available Jan. 6, 1986, on LEXIS, Labor library, BNALAB file).
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *See supra* notes 31-75 and accompanying text.

narrowed the scope of these statutes through interpretation and expansion of employer defenses.[214] *AFSCME* further limited the protection women have against pay discrimination by increasing a plaintiff's proof requirements and the number of defenses to comparable worth claims.[215] These barriers have all but eliminated the viability of a Title VII comparable worth cause of action. By implicitly rejecting the comparable worth concept, the Ninth Circuit defeated Congress's intent that Title VII provide a remedy for all forms of sex discrimination. Because it incorrectly assumes that the market is nondiscriminatory, *AFSCME* effectively insulates from attack the more fundamental and ingrained aspects of wage discrimination.[216]

To fulfill the broad, remedial purpose of Title VII, courts should reject the market defense when the employer's use of the market rates is coupled with the employer's knowledge of the market's discriminatory nature. Use of market rates accompanied by knowledge of the market's discriminatory nature, or where the employer knows the true value of jobs, is intentional discrimination within the scope of Title VII. In this regard, *AFSCME* is inconsistent with the Supreme Court's ruling in *Gunther* to the extent that *Gunther* was based on the employer's own evaluation of the job's worth.[217] So far, courts have interpreted *Gunther* so narrowly as to render the decision meaningless. In the future, courts should look long and hard before interpreting the unambiguous language of Title VII to defeat Congress's intent.

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214. *See supra* notes 45-48, 65-75, 81-114 and accompanying text.
215. *See supra* notes 90-96 and accompanying text.
216. *See supra* notes 100-203 and accompanying text.
217. *See supra* notes 102-04 and accompanying text.

* I would like to dedicate this note to my parents. I would also like to thank Charlene M. Carres for her extremely kind help in the writing of this note.

** I would like to dedicate this article to the people who provide me with motivation, support, and love: my parents, Earl and Florine Ballman.