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Comparable Worth: The Bad Idea That Will Not Die
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COMPARABLE WORTH: THE BAD IDEA THAT WILL NOT DIE

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OVERVIEW

The most critical point to make about the concept of "comparable worth" is one that its proponents try very hard to hide, and it concerns what comparable worth is not. It is not about making sure that, when a man and a woman are performing the same job, they are paid the same amount. Equal pay for equal work has been the law for many years now, and there is a broad consensus that discrimination in this situation is wrong. No, what comparable worth is about is the government requiring that a man doing one job and a woman doing another, different job be paid the same amount, on the grounds that, in someone's opinion, the two different jobs have "comparable worth." It would, as the Supreme Court put it in *County of Washington v. Gunther*, [\[FN1\]](#) allow plaintiffs to "claim 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." There is a fundamental problem with this approach: it is flatly inconsistent with perhaps the lesson of the twentieth century, namely, that the free market is infinitely better at setting prices and allocating society's scarce goods and resources than is a centralized bureaucracy. Deciding what something "should" cost-including wage and salary levels-is not something that a few mandarins, no matter how wise and conscientious, can do.

There are simply too many variables to take into account.

The principal comparable worth bill pending in Congress-S. 74-contains more than just socialist economics. It would also do the trial bar's bidding by creating a whole new area for class action lawsuits seeking unlimited compensatory and punitive damages from hapless employers. This reflects a larger trend: increasingly, the plaintiffs' trial bar is insinuating itself into civil rights politics. It was no surprise when the NAACP announced recently that it was going to address the problem of crime in minority communities by-guess what?-suing gun manufacturers. [\[FN2\]](#) Unfortunately, the employment law arena is already rife with frivolous claims and proliferating litigation. [\[FN3\]](#)

The Clinton administration's endorsement of S. 74 is not its only support of the comparable worth approach. [\[FN4\]](#) As a report earlier this year by David Copus of Jones, Day, Reavis & Pogue discusses, the Labor Department's Office of Federal Contract

Compliance Programs (OFCCP) is applying its "compensation analysis" (for investigating possible pay discrimination) to jobs whose only similarity is their inclusion in the same pay grade-not jobs that are identical or substantially identical, as current law requires. The Equal Employment Opportunity Commission (EEOC) held a public meeting on "pay equity" in Philadelphia last spring. The Labor Department and EEOC recently signed two memoranda of understanding aimed at increased enforcement in this area. OFCCP has expanded its "requests" to businesses for comprehensive payroll data at the initial, or "desk audit," stage of a compliance review. [\[FN5\]](#) And, of course, the administration's support of the trial bar and passion for gender politics is well established. The federal comparable worth bill, then, is driven by a mixture of three bad impulses: continued belief in socialist economics; a penchant for demagogic appeals to women's votes; and eagerness to do the bidding of trial lawyers. It ignores the fact that the most essential ingredient for the continued progress of American workers is the strong economy that a free market brings. [\[FN6\]](#)

CURRENT LAW AND REALITY

In 1963, Congress passed the Equal Pay Act (EPA), "which added to sec. 6 of the Fair Labor Standards Act of 1938 the principle of equal pay for equal work regardless of sex." [\[FN7\]](#) The basic prohibition of the EPA [\[FN8\]](#) states:

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

A year later, Congress passed the Civil Rights Act of 1964. It barred discrimination in a variety of contexts, including, in Title VII of the act, private employment. This includes pay discrimination because of sex. The core prohibition of Title VII [\[FN9\]](#) states: 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 race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

So refusing to pay a woman what a man is paid for the same job is already doubly illegal, in violation of the EPA and Title VII.

There's no evidence that these laws are being ignored, and plenty of evidence that they are being followed. The reason for any remaining disparities between what men earn and what women earn is not discrimination, but different choices made by men and women about the jobs and hours they want. "[B]oth President Clinton and the activist groups that routinely use these statistics [i.e., "women earn about 75 cents for every dollar a man earns"] fail to adjust for such crucial factors in determining wages as occupation, position, age, experience, education, and consecutive years in the work force." When all these factors are controlled for, women "make about 95 to 98 cents to the man's dollar (according to studies by June O'Neill of the City University of New York and Jane Waldfogel of Columbia University)." [\[FN10\]](#)

Similarly, data from the National Longitudinal Survey of Youth show that, among people from 27 to 33 years old who have never had a child, women's earnings approach 98 percent of men's earnings, according to Diana Furchtgott-Roth's and Christine Stolba's invaluable Women's Figures: An Illustrated Guide to the Economic Progress of Women in America, published in early 1999. [\[FN11\]](#) The Democratic Policy Committee asserts that, from the early 1960s to the 1990s, "the earning power of women relative to men has not improved significantly." [\[FN12\]](#) But Women's Figures points out that, "Between 1960 and 1994, women's wages grew ten times as fast as men's wages." [\[FN13\]](#)

PAST ATTEMPTS TO ADVANCE COMPARABLE WORTH

The basic ideas underlying the current comparable worth proposals are not new. Indeed, the approach was rejected when Congress passed the Equal Pay Act in 1963. [\[FN14\]](#) And years later, according to one textbook, "The debate began in earnest with an article in 1979 and a reply in 1980 ." [\[FN15\]](#)

The comparable worth theory has not fared well in court. The Equal Pay Act's legislative history strongly rejects the theory, and there is no evidence that Congress intended Title VII to allow comparable worth claims either. Accordingly, "The state of comparable worth as a legal theory seems precarious at best," [\[FN16\]](#) and "a majority of courts that have considered the issue have rejected the comparable worth theory, per se. Even some of those cases that accept its premises use it only as a basis for establishing a prima facie case of sex-based wage discrimination, and allow the employer to rebut such a case." [\[FN17\]](#)

On June 6 and 7, 1984, the U.S. Commission on Civil Rights sponsored a "consultation" in Washington, D.C., in which it heard from a variety of experts on the empirical basis and the legal and policy ramifications of comparable worth. It published the written and oral testimony and other submissions in a two-volume publication, *Comparable Worth: Issue for the 80's*. In June 1985, the Commission issued its own findings and recommended that the federal civil rights enforcement bureaucracy "reject comparable worth and rely instead on the principle of equal pay for equal work," and that "Congress not adopt legislation that would establish comparable worth doctrine in the setting of wages in the Federal or private sector." [\[FN18\]](#)

Given the unlikelihood of litigation success, however, proponents of comparable worth have had little choice except to pursue the legislative route. Frequently, in recent years, they have preferred to change the name of their crusade from "comparable worth" to "pay equity" or "fair pay" or "paycheck fairness," but the idea remains the same. Their successes in the legislative arena also have been limited, at least to date. [\[FN19\]](#) No state has imposed comparable worth on private employers, although many studies have been undertaken and even made some pay adjustments with respect to public employees. [\[FN20\]](#) These legislative efforts have recently been redoubled, in Congress and in the state legislatures, as discussed next.

CURRENT LEGISLATION

Congress

State of Play

On April 19 of this year, Senate Democratic Leader Tom Daschle, along with fellow Democratic Senators Harry Reid and Barbara Mikulski, sent to Republican Majority Leader Trent Lott a letter accusing Lott of "omit[ting] many critical priorities for working families that require the Senate's prompt attention." Among the "key priorities" that "deserve timely debate" and for which the Democrats "are seeking ... consideration after the Memorial Day recess" are S. 74, the Paycheck Fairness Act (the House version is H.R. 541). The letter warns that "we are strongly committed to ensuring timely, meaningful consideration of these important initiatives."

S. 74 had originally been introduced this year on January 19, but the revised version introduced on May 6 is significantly different-and more extreme-than the original bill. [\[FN21\]](#)

The Democratic Policy Committee had, on March 18, issued a "Special Report" on S. 74, *Pay Equity for All Americans*, asserting that "Women's pay does not accurately reflect the value of their work," and shrewdly arguing that "unequal pay is a family issue" and that "Equal pay helps men, too. Men in jobs usually or predominantly held by women-sales, service and clerical positions, for example-also are victims of pay bias." [\[FN22\]](#) On April 5, the Senate Republican Policy Committee issued its own release, headlined "Gore-Daschle 'Paycheck Fairness' Pays Off Trial Lawyers, Invites Wage Controls," and,

with some shrewdness of its own, quoted former Congressional Budget Office Director June O'Neill: " Because the higher pay in female jobs would raise costs, employers would reduce the number of jobs The ironic result of comparable worth is that fewer workers would be employed in traditionally female jobs." (Or, to put it slightly differently, "If employers had to pay women higher-than-market wages, fewer women would get hired in the first place." [\[FN23\]](#))

Senator James M. Jeffords, chairman of the Committee on Health, Education, Labor, and Pensions, which has primary jurisdiction of the comparable worth bill in the Senate, expressed his willingness in one meeting with the bill's proponents to have a hearing-but he declined to give a date, and did not say that the hearings would necessarily be favorable. It is also unclear whether the hearings would be before the full committee or one of its subcommittees, and whether the focus would be strictly on comparable worth or might include other issues, too.

But Senate Democrats do not need to have hearings in order to begin pressing the bill. The question is, when? If they believe that this is a good election-year club with which to beat Republicans over the head, they may wait until 2000 to push the bill in earnest. Another, even more extreme bill-S. 702; the House version is H.R. 1271-has been introduced by Senator Tom Harkin. [\[FN24\]](#) It would immediately mandate comparable worth pay systems, not only for sex but also for race and national origin; other provisions in the bill are similar to S. 74. But the "Fair Pay Act," as it is called, is clearly taking a backseat to S. 74. The White House has ignored Harkin's bill, for instance, preferring to endorse S. 74. [\[FN25\]](#) The principal purpose of the Harkin bill, then, seems to be to enable supporters of S. 74 to assert, rather disingenuously, that their bill is a "middle way" between Harkin's approach and no bill at all. In the House of Representatives, principal jurisdiction for a comparable worth bill lies with the Education and Workforce Committee. But this committee has made clear that it will not be acting until the Senate does so.

Text of S. 74

S. 74-the bill number, by the way, was chosen to reflect the canard that women make only 74 cents on every dollar earned by men-is filled with mischief. Titled the "Paycheck Fairness Act," the stated purpose of the bill is "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex." Its "Findings" assert that "women earn significantly lower pay than men for work on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions." The bill further asserts, "In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination." In S. 74's opinion, this disparity "prevents the optimum utilization of available labor resources," "constitutes an unfair method of competition in commerce," and "interferes with the orderly and fair marketing of goods in commerce." "Unfair," of course, does not mean "unequal," but the bill cites "unfair pay disparities" and "unfairly low wages"; it announces that the bill will "promot[e] stable families by

enabling all family members to earn a fair rate of pay." It declares that, once the bill is passed, "women will be better able to recognize and enforce their rights to equal pay for work on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions."

The substantive amendments to the Equal Pay Act begin in section 3 of S. 74. Section 3(a) changes the critically important fourth affirmative defense of the EPA to read: a differential based on a bona fide factor other than sex, such as education, training, or experience, except that this clause shall apply only if-

(I) the employer demonstrates that-

(aa) such factor-

(AA) is job-related with respect to the position in question; or

(BB) furthers a legitimate business purpose, except that this item shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice; and

(bb) such factor was actually applied and used reasonably in light of the asserted justification; and

(II) upon the employer succeeding under subclause I, the employee fails to demonstrate that the differential produced by the reliance of the employer on such factor is itself the result of discrimination on the basis of sex by the employer.

An employer that is not otherwise in compliance with this paragraph may not reduce the wages of any employee in order to achieve such compliance.

The net effect of this change is to stack the deck against defendants in EPA claims. The EPA is already unusual in that it shifts a burden of persuasion, not just production of evidence, to the defendant. This is contrary to the general rule in civil litigation. [\[FN26\]](#) At a minimum, S. 74 will add to employers' problems by narrowing the sorts of evidence that may be considered as a "bona fide factor other than sex."

Worse, these changes apparently are designed to convert EPA claims into a particularly onerous species of "disparate impact" litigation. The Supreme Court has never said that disparate impact claims may be brought under the EPA, [\[FN27\]](#) but much of the language in S. 74 is borrowed from the disparate-impact section of Title VII, giving plaintiffs a leg up in making this claim. Moreover, S. 74's incorporation of disparate impact into the EPA is done in a context that will make a market-rates defense precarious at best. Thus, not only will claims involving the same jobs be more difficult for employers to win, but it will be easier for plaintiffs' lawyers to try again to incorporate comparable-worth theories of liability into the law. This issue is discussed further at pages 19-21.

Section 3(c) of S. 74 eliminates the EPA's present requirement that the claimed disparity be between jobs in the same "establishment" of a business. [\[FN28\]](#) Thus, it will now be possible for a woman in Alabama to complain that she is being paid less than a man in

Alaska. It will be up to the employer to prove to the satisfaction of the plaintiff, the federal civil rights bureaucracy, and the federal courts that this disparity is justified. Section 3(d) of S. 74 would amend current "retaliation" protections. Under most federal civil rights statutes, employees are protected from retaliation by an employer when they assert their rights under the statute. This makes perfect sense, since few employees would be willing to assert their rights if they knew they could be fired for doing so. If discrimination is illegal, then discrimination against someone for claiming discrimination should be illegal, too.

But the new amendment in S. 74 goes well beyond this. It would make it illegal for an employer to take disciplinary action against an employee who "has inquired about, discussed, or otherwise disclosed the wages of the employee or another employee" Apparently, the idea is that employees ought to be encouraged to tell each other what they are earning, the better to uncover wage discrimination. But employers might legitimately conclude that such disclosures-which may or may not be true, incidentally-are a real threat to morale. And the disclosure of other employees' salaries raises, in addition, privacy concerns. S. 74 would give an employee working in the payroll office the "civil right" to copy the company's payroll information and post it on the Internet. Section 3(e) of S. 74 also makes employers who violate the Equal Pay Act liable "for such compensatory or punitive damages as may be appropriate" Doubtless the bill's proponents will claim that they are simply "conforming" the Equal Pay Act with Title VII. But the damages available under Title VII are subject to caps, which vary according to the company's size; [\[FN29\]](#) section 3(e) of S. 74 provides for no caps at all. One suspects that, if this bill passes, the civil rights lobby will return and claim that the caps must now be removed from Title VII, in order to conform it to the Equal Pay Act. This is not at all far-fetched. Damages were inserted into Title VII by Congress in the 1991 Civil Rights Act because the lobby claimed Title VII had to be conformed to 42 U.S.C. sec. 1981-a statute, incidentally, that was never intended to apply to the private sector to begin with. [\[FN30\]](#)

The addition of damages to the EPA is inconsistent with Title VII in two other ways. S. 74 leaves intact the availability of liquidated damages under the EPA, notwithstanding the fact that they are unavailable under Title VII. Moreover, compensatory and punitive damages are available under Title VII only in cases of intentional discrimination. S. 74, as discussed below, makes it easy to bring claims under the EPA that assert only disparate impact discrimination, where intent is irrelevant. So much for conformity. Turning the Equal Pay Act into a lawyer's bonanza is, of course, exactly what the plaintiffs' bar wants-but it is of dubious value to the cause of nondiscrimination. The threat of huge damage awards turns every employee-and especially female employees-into potential catastrophes for employers. What employer wants to hire a lawsuit? Why risk having an employee whom it would be suicidal to fire or fail to promote down the road?

Section 3(e) also makes it easier to bring class actions under the Equal Pay Act. Currently, plaintiffs must follow the procedures of the Fair Labor Standards Act-of which EPA is a part-when bringing class actions, which require potential members of a class to "opt in" to the lawsuit if they wish to participate. [\[FN31\]](#) Under S. 74, however, all such individuals will be treated as part of the class unless they affirmatively "opt out." [\[FN32\]](#) Sections 5, 6, and 7 of S. 74 are designed to get the Department of Labor's nose into the wage-setting tent: with its big, fat "comparable worth" posterior not far behind. In section 5, the Secretary of Labor is directed to "conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women." Specifically, the Secretary is to "recogniz[e] and promot[e] the achievements of employers, labor organizations, and professional associations that have worked to eliminate the pay disparities." He also is supposed to "conven[e] a national summit to discuss, and consider approaches for rectifying, the pay disparities."

In section 6, the Secretary is told to "develop guidelines to enable employers to evaluate job categories based on objective criteria such as educational requirements, skill requirements, independence, working conditions, and responsibility, including decisionmaking responsibility and de facto supervisory responsibility." These guidelines are "designed to enable employers voluntarily to compare wages paid for different jobs to determine if the pay scales involved adequately and fairly reflect the educational requirements, skill requirements, independence, working conditions, and responsibility for each such job with the goal of eliminating unfair pay disparities between occupations traditionally dominated by men or women."

Section 6 also instructs the Secretary to establish a program for recognizing "employers who, pursuant to a voluntary job evaluation conducted by the employer, adjust their wage scales (such adjustments shall not include the lowering of wages paid to men) using the guidelines developed [above] to ensure that women are paid fairly in comparison to men." But not, note well, vice versa. This is no accident, since the "purpose of this subsection [is] to emphasize the importance of, encourage the improvement of, and recognize the excellence of employer efforts to pay wages to women that reflect the real value of the contributions of such women to the workplace."

This creates a problem for the Paycheck Fairness Act under the Equal Protection Clause of the Fourteenth Amendment (the guarantees of which apply to the federal government, the Supreme Court has held). Passing a law that protects whites from discrimination but not blacks, or Hispanics but not Asians, or men but not women, is the very definition of a "deny[ing] ... the equal protection of the laws," to quote the Clause. There is some irony in this, since in its findings S. 74 had twice (sections 2(3)(H) and 2(4)(B)(v)) asserted a concern with equal protection as a basis for the bill. Indeed, comparable worth is itself discriminatory insofar as it requires employers to set pay scales with an eye on a job category's gender makeup-precisely the evil it is supposedly addressing.

Finally, the Secretary is given the authority and told to "promulgate such rules and regulations as may be necessary to carry out" section 6.

At this point, S. 74, which already seems to have been written by ex-staffers of The Daily Worker, descends to self-parody, establishing in section 7 "the Robert Reich National Award for Pay Equity in the Workplace, which shall be evidenced by a medal bearing the inscription 'Robert Reich National Award for Pay Equity in the Workplace.'" This prestigious award "shall be of such design and materials, and bear such additional inscriptions, as the Secretary of Labor may prescribe." To qualify, a company must, "at a minimum," demonstrate that it "has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence." Section 8 brings the EEOC into the picture. The EEOC is required to complete a survey of data currently available to the federal government relating to employee pay and, in consultation with other federal agencies, "identify additional data collections that will enhance the enforcement" of laws prohibiting pay discrimination. Having done so, the Commission will then "issue regulations to provide for the collection of pay information data from employers as described by the sex, race, and national origin of employees."

State Legislatures

Proponents of comparable worth have not limited their efforts to Congress. Indeed, at least for the time being, state-passed comparable worth bills are the greater danger. A major reason for this threat is the effort being made by the AFL-CIO to push such legislation in the state legislatures. [\[FN33\]](#) On April 7, 1999, it announced: "In 26 states, unions have joined forces with women's, civil rights, religious, and community organizations to introduce equal pay legislation that will close the gap between women and men." The AFL-CIO has targeted Alabama, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. In many of these states, legislation has been introduced and is moving. Five comparable worth bills have so far passed one house in three states-Illinois (passed house on March 18), Indiana (passed house on February 24), and New York (three different versions have passed the assembly).

The Commerce and Economic Development Task Force of the American Legislative Exchange Council (ALEC), an association of conservative state legislators, passed a resolution rejecting comparable worth legislation at its annual meeting in August 1999. (A copy is attached as Appendix D.) The resolution is now pending before ALEC's governing board, and is expected to become final in September.

The AFL-CIO's model legislation is titled the "Fair Pay Act of 1999." [\[FN34\]](#) It is important to note that the AFL-CIO bill would apply the comparable worth principle not only in the context of gender disparities but also for racial and national origin disparities.

In the bill's summary, it is stated at the outset that its purpose is to "Prohibit pay differentials ... in jobs that are equal within the meaning of the federal Equal Pay Act or that, though dissimilar, are nevertheless equivalent in their overall composite of skills, effort, responsibility, and working conditions" The core prohibition in the bill would make it "an unlawful employment practice ... for an employer to discriminate" by:

- (1) paying wages to employees at a rate less than the rate paid to employees of the opposite sex or of a different race or national origin for work in equivalent jobs; and/or
- (2) paying wages to employees in a job that is dominated by employees of a particular sex, race, or national origin at a rate less than the rate at which such employer pays employees in another job that is dominated by employees of the opposite sex or of a different race or national origin, for work on equivalent jobs.

The term "equivalent jobs" is defined in section 3(d) of the bill as "jobs or occupations that are equal within the meaning of the Equal Pay Act of 1963, [29 U.S.C. 206\(d\)](#), or jobs or occupations that are dissimilar but whose requirements are equivalent when viewed as a composite of skills, effort, responsibility and working conditions."

For an employer charged with violating these core prohibitions, "wage differentials based on varying market rates for equivalent jobs or the differing economic benefits to the employer of equivalent jobs shall not be considered differentials based on bona fide factors other than sex, race or national origin." In other words, the market-rate defense is explicitly barred.

Section 4(e) of the AFL-CIO bill requires the "State Department of Labor or other appropriate agency" to "promulgate [guidelines or regulations] specifying the criteria for determining whether a job is dominated by employees of a particular sex, race, or national origin." Section 4(e) continues:

Criteria shall include, but not be limited to, factors such as whether the job has ever been formally classified as or traditionally considered to be a "male" or "female" or "white" or "minority" job; whether there is a history of discrimination against women and/or people of color with regard to wages, assignment or access to jobs, or other terms and conditions of employment; and the demographic composition of the work force in equivalent jobs (e.g., number or percentages of women, men, white persons and people of color). The [guidelines or regulations] shall not include a list of jobs.

Section 5(a)(2) contains a "retaliation" provision similar to S. 74's, making it illegal to: discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere with any employee or any other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages or the wages of any other employee, or because the employee exercised, enjoyed, aided, or encouraged any other person to exercise or enjoy any right granted or protected by this act.

Section 6(a) of the bill requires every employer subject to the act to provide to each employee a "written statement" explaining "how the [employee's] wage is calculated." Section 6(b) then provides:

Every employer subject to this act shall make and preserve records that document the wages paid to employees and that document and support the method, system, calculations, and other bases used to establish, adjust, and determine the wage rates paid to said employer's employees. Every employer subject to this act shall preserve such records for such periods of time and shall make such report from the records as shall be prescribed by regulation or order

Similar to S. 74 is the AFL-CIO bill's section 7, which provides for uncapped compensatory and punitive damages for any violation of the legislation's prohibitions. The AFL-CIO bill would, in short, explicitly require private employers to set pay scales according to comparable worth principles and to document their compliance to both employees and the government. It also would give all employees a "civil right" to disclose not only their own but any other employee's wage or salary, and encourage litigation by holding out the possibility of unlimited compensatory and punitive damages.

LEGAL AND POLICY IMPLICATIONS OF COMPARABLE WORTH IN S. 74

It is a perversion of language to characterize as "discrimination" a decision that is made for neutral reasons. Paying someone less because that person is black, Hispanic, or female is discrimination because of race, national origin, or sex, respectively. Paying someone less for some other reason—because the person is less qualified, because the person is unwilling to work overtime, or simply because of the market's supply and demand—is not discrimination. As a general matter, the law of supply and demand determines what employers will pay a particular employee. To call sensitivity to supply and demand "discrimination" is ridiculous.

In a very real sense, then, comparable worth is a species of "disparate-impact" claim. Under the disparate-impact approach, a decision made by an employer that is nondiscriminatory on its face and not motivated by discriminatory animus can nonetheless be challenged as illegal if it has a "disparate impact" on minorities or women. The classic example is a requirement that any person hired have a high school diploma.

Not only is "disparate-impact" discrimination not discrimination in any true sense of the word, it can actually coerce potential defendants into discriminating. The internal contradiction at the heart of disparate-impact theory is that it forces employers or other potential defendants to consider the racial, ethnic, and gender bottom line in choosing selection criteria—a motivation that would be considered illegal, and rightly so, in any other context. For instance, if a college deliberately chose to deemphasize SAT scores in order to cut back on the number of Asians and Jews admitted, this would violate Title VI

of the Civil Rights Act of 1964. Why, then, should the same college be told that, if its use of the SAT unintentionally results in a disproportionate number of blacks and Hispanics not being admitted, then it must choose another selection device-with the deliberate result and intent, once again, of keeping out more Asians and Jews?

The comparable worth approach has the same problem. An employer is told that it must look at its job classifications and determine (a) which ones are predominantly female and (b) if those jobs are paid less than other jobs of "comparable worth." This means that the employer is treating female-dominated jobs more favorably than male-dominated jobs-an action that would normally, and correctly, be considered discrimination because of sex. [\[FN35\]](#) Put slightly differently: comparable worth requires employers to consider the gender-composition of a job classification when setting its pay-precisely the evil that it is supposedly preventing. [\[FN36\]](#)

The drafters of S. 74 are clearly trying to sneak the disparate-impact approach into the Equal Pay Act, notwithstanding the fact that this is inconsistent with the language of the original act. The Supreme Court has never recognized a disparate-impact cause of action under the EPA, and, indeed, in *County of Washington v. Gunther*, [\[FN37\]](#) indicated that it would not. Requiring the employer to prove that any wage differential is "job-related" and allowing an employee to win if she can point to an "alternative employment practice" that would serve the employer but that it "has refused to adopt" is taken from the part of Title VII that codifies disparate-impact causes of action. [\[FN38\]](#)

The principle of equal opportunity is a valid one. Existing law guarantees that anyone can seek any job, regardless of his or her sex. If a particular job is underpaid, in the eyes of an applicant, the solution is for them to look for a better job, perhaps even one that is, in the person's eyes, overpaid. But there is nothing sinister about some positions being female dominated and others being male dominated. The fact of the matter is that, in the aggregate, men and women have different preferences when it comes to work. Comparable worth also commits a fundamental economics error. Economists identified long ago the "diamond-water paradox." Water is much more necessary to human beings than are diamonds, and yet people are willing to pay much more for the latter than the former. Likewise, it is frequently lamented that rock stars are paid more than schoolteachers, despite the latter's greater contribution to society. The answer to the paradox is that price is determined by both supply and demand. Yes, water and schoolteachers are in great demand, but the supply is great, too-greater, indeed, than the supply of diamonds and rock stars.

Requiring that employers set wages by considering only the requirements of the position, and not also the number of people who are willing and able to fill it, is therefore at odds with Economics 101-but this is precisely what comparable worth would do. Even for a "bleeding-heart" liberal, there are problems with the comparable worth approach. Suppose that a job category is disproportionately female (but also

disproportionately white), and that a "comparable" category is disproportionately male (but also disproportionately minority). Is a company obliged to shift resources from black male truck drivers to white female secretaries? The Harkin and AFL-CIO bills would explicitly put employers into this damned-if-you-do-damned-if-you-don't position. And the problem is implicit in S. 74, too.

Finally, requiring employers to pay artificially high wages will result in fewer of those jobs being available. Thus, comparable worth will cause unemployment for some positions and unfairly depress wages in others-an odd result for "progressive" legislation. [\[FN39\]](#)

CONCLUSION

S. 74 is not only bad in itself, but it lays the groundwork for still more mischief. The next step will be for the administration to sign an executive order in which it bars from federal contracting those who do not satisfactorily participate in the Secretary of Labor's "voluntary" scheme of setting comparable-worth pay scales. [\[FN40\]](#) And, of course, those companies that do not participate in this "voluntary" scheme will soon find themselves targeted by various civil rights and feminist organizations for boycotts and other abuse.

In the end, every employer will be vulnerable-even some very unlikely ones. U.S. News & World Report recently obtained payroll records from Vice President Gore's office showing that "for every \$1 earned by a guy, a woman makes 86 cents. And there's even a difference between those doing the same job. Female 'staff assistants' make 93 cents for every dollar pulled down by the guys. But that's nothing compared with the president's aides: the average salary for women is \$49,500, compared with \$62,500 for men." [\[FN41\]](#)

The strong and growing economy that comes with a free market is good for everyone, male and female, white and black, Hispanic and Asian, immigrant and Native American. Proliferating lawsuits and wage-setting central planning will kill the goose that lays these golden eggs. Those who promise greater "equity" and "fairness" by taking power from entrepreneurs and giving it to trial lawyers and bureaucrats are cheating American workers.

[\[FN1\]](#). 452 U.S. 161, 166 (1981).

[\[FN2\]](#). Michael A. Fletcher, NAACP Says It Will Sue Gunmakers: Strict Controls Sought on Selling Firearms, WASH. POST, July 13, 1999, at A13; Frank J. Murray, NAACP will sue makers of firearms, WASH. TIMES, July 13, 1999, at A1.

[\[FN3\]](#). See generally WALTER OLSON, THE EXCUSE FACTORY (1997).

[\[FN4\]](#). President Clinton adverted to S. 74 in his State of the Union Address this January and later in the month explicitly endorsed it in one of his weekly radio addresses. See

RADIO ADDRESS BY THE PRESIDENT TO THE NATION (Jan. 30, 1999, White House press release); Clinton Proposes Equal Pay Initiative, WASH. POST, Jan. 31, 1999, at A5; see also John Berlau, Is Comparable Worth Returning?: Unions, Pols Revive Longtime Feminist Demand, INVESTOR'S BUSINESS DAILY, Apr. 22, 1999, at A1. He had endorsed an earlier version of S. 74 last year (S. 71 and H.R. 2023). See Clinton Pushes Equal Pay Bill, WASH. POST, June 11, 1999, at A5; Robert Burns, Clinton backs new act to end pay disparity, WASH. TIMES, June 11, 1999, at B11.

[FN5]. See Federal Contractors Face Enhanced DOL and EEOC Enforcement Initiatives (May 1999) (Ogletree, Deakins, Nash, Smoak & Stewart's EMPLOYMENT AND LABOR LAW: LEGAL ALERT; the same firm also presented a comprehensive "Comparable Worth Update" to the National Association of Manufacturers on June 9, 1999); see also Editorial, The return of "comparable worth," WASH. TIMES, Apr. 13, 1998, at A16.

[FN6]. A much shorter piece on this topic by the author was published in the Legal Times on July 19, 1999. Other recent columns criticizing comparable worth include: Linda Chavez, Feminists Don't Get the Meaning of Job Satisfaction, CHI. TRIB., Apr. 7, 1999; George F. Will, Lies, Damned Lies and ..., NEWSWEEK, Mar. 29, 1999; Kate O'Beirne, Equal Time, NAT'L REV., Apr. 5, 1999, at 26; Mona Charen, Pay equity chorus in recital, WASH. TIMES, Mar. 22, 1999, at A18; Randel Johnson, Equal pay balance sheet, WASH. TIMES, Apr. 11, 1999, at B3 (Mr. Johnson is vice president for labor policy at the U.S. Chamber of Commerce, which sent a letter on April 6, 1999 to Senate Majority Leader Trent Lott opposing S. 74); and Evan Gahr, Pay Equity Iniquity, AM. SPECTATOR, Aug. 1999, at 56.

The most comprehensive analysis of the current comparable worth debate is the Labor Policy Association's (LPA) 36-page paper, Pay Equity Legislation Seeks Expansion of Civil Rights Law Not Experienced Since Debate over Civil Rights Act of 1991 (July 8, 1999) [hereinafter "LPA paper"].

[FN7]. [Corning Glass Works v. Brennan, 417 U.S. 188, 190 \(1974\)](#).

[FN8]. [29 U.S.C. sec. 206\(d\)\(1\)](#).

[FN9]. [42 U.S.C. sec. 2000e-2\(a\)](#).

[FN10]. FURCHTGOTT-ROTH & STOLBA, *infra* note 11, excerpted in Equal Pay for Equal Work, AM. ENTERPRISE, July/Aug. 1999, at 15. See also Diana Furchtgott-Roth & Christine Stolba, "Comparable Worth" Makes a Comeback, WALL ST. J., Feb. 4, 1999, at A22 ("When adjustments are made for age, experience, education, occupation and position, women earn approximately the same as men.").

[FN11]. DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA xvii (1999).

[FN12]. PAY EQUITY FOR ALL AMERICANS (Mar. 18, 1999, "Special Report").

[FN13]. FURCHTGOTT-ROTH & STOLBA, *supra* note 11, at xvii.

[FN14]. See note 16, *infra*, and accompanying text.

[FN15]. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 1032 (1997) (citing Ruth Blumrosen, Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964, 12 U. MICH. J.L. REF. 397 (1979), and Bruce A. Nelson, Edward M. Opton & Thomas E. Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. MICH. J.L. REF. 233 (1980)).

[FN16]. ZIMMER ET AL., *supra* note 15, at 1048. See also, U.S. COMMISSION ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS (1985) at 41- 43 (summarizing legislative history of EPA).

[FN17]. COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 51.

[FN18]. *Id.* at 72. On August 15, 1985, the Justice Department's Civil Rights Division filed an amicus brief opposing the comparable worth approach in *American Nurses Ass'n v. Illinois*, No. 85-1766 (7th Cir.). The year before the Civil Rights Commission's consultation, the Eagle Forum Education & Legal Defense Fund held a conference on comparable worth. The proceedings of that conference were published in *EQUAL PAY FOR UNEQUAL WORK* (1984).

[FN19]. Abroad, "the most comprehensive comparable worth statute is the 1990 Ontario Pay Equity Act which covers both public and private employers in Ontario, Canada." ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW* 391 (6th ed. 1999). Australia's federal tribunal adopted a standard requiring "equal pay for work of equal value" in 1972, but "has stopped short of fully adopting the comparable worth concept." ZIMMER ET AL., *supra* note 15, at 1059- 60.

[FN20]. ZIMMER ET AL., *supra* note 15, at 1062-65.

[FN21]. S. 74 is set out in Appendix A.

[FN22]. Page 6.

[FN23]. Diana Furchtgott-Roth & Christine Stolba, "Comparable Worth" Makes a Comeback, *WALL ST. J.*, Feb. 4, 1999, at A22. There is, in fact, evidence that comparable worth has led to higher unemployment in the jurisdictions that have experimented with it, like Minnesota, San Jose, and Australia. See LPA paper, *supra* note 6, at 16.

[FN24]. S. 702 is set out in Appendix B.

[FN25]. Nonetheless, according to the LPA paper, *supra* note 6, at 29, the administration also "supports" the Harkin bill, although it does not "endorse" it.

[FN26]. See [Fed. R. Evid. 301](#).

[FN27]. ZIMMER ET AL., *supra* note 15, at 1016.

[FN28]. Current EEOC regulations define "establishment" as "a distinct physical place of business rather than ... an entire business or enterprise which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment." [29 C.F.R. sec. 1620.9](#).

[FN29]. See [42 U.S.C. sec. 1981a](#). The Supreme Court recently explicated the standards for the award of punitive damages under Title VII in *Kolstad v. American Dental Association*, No. 98-208 (June 22, 1999).

[FN30]. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Supreme Court's decision in [Runyon v. McCrary, 427 U.S. 160 \(1976\)](#), extending the statute to private conduct, prompted separate opinions by Justices Powell and Stevens and a dissent by Justice White joined by then-Justice Rehnquist. See also [Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 \(1989\)](#).

[FN31]. [29 U.S.C. sec. 216\(b\)](#).

[FN32]. See [Fed. R. Civ. P. 23](#).

[FN33]. The AFL-CIO relies on a study it recently published with the Institute for Women's Policy Research. See <[http:// www.aflcio.org/women/exec99.htm](http://www.aflcio.org/women/exec99.htm)>. But the methodology of that study has been criticized by the Employment Policy Foundation in *AFL-CIO Study's Estimates of Losses from "Unequal Pay" Are Meaningless* (June 1999 issue of FACT & FALLACY).

[FN34]. The model bill is set out in Appendix C. It also appears in the February 25, 1999, Daily Labor Report (BNA), at E36.

[FN35]. Cf. [Smith v. Virginia Commonwealth Univ., 84 F.3d 672 \(4th Cir. 1996\)](#) (en banc); see generally ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW 390-91* (6th ed. 1999) ("Title VII Challenges to Pay Equity Schemes").

[\[FN36\]](#). Nor is this problem avoided if the employer is required to correct "underpayment" for male-dominated jobs as well as female-dominated jobs. This means that employees who choose jobs that are neither male nor female dominated are being treated less favorably than employees who don't. Companies will be encouraged to discriminate by pushing some people into some positions because of their sex and other people into other positions because of theirs. Any law that requires or encourages classifications to be made on the basis of sex, and that results in different treatment for individuals because of those classifications, is problematic.

[\[FN37\]](#). [452 U.S. 161, 170-71 \(1981\)](#).

[\[FN38\]](#). See [42 U.S.C. sec. 2000e-2\(k\)](#).

[\[FN39\]](#). See also note 23, *supra*, and accompanying text.

[\[FN40\]](#). This is the approach the administration took with respect to striker replacements, notwithstanding the fact that their use was perfectly legal, too.

[\[FN41\]](#). Washington Whispers: Almost equal, U.S. NEWS & WORLD REPORT, July 12, 1999, at 7, quoted in Pay inequity, WASH. TIMES, July 6, 1999, at A6.
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