

FINDING WORTH IN THE NEW WORKPLACE: THE IMPLICATIONS OF COMPARABLE WORTH'S REEMERGENCE IN THE GLOBAL ECONOMY

I. INTRODUCTION

Despite the success of civil rights laws over the last three decades to increase women's pay and workplace involvement, discrimination and other problems involving women in the workplace persist, presenting a necessity for new legislative solutions.¹ Although increased globalization and the impact of the knowledge economy² have brought

1. See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 157 (2004) [hereinafter STONE, WIDGETS TO DIGITS] (noting that as a likely result of U.S. civil rights laws "the pay of white women working full time relative to that of their white male counterparts increased from 57.9[%] in 1965 to 71.3[%] in 1995," but that discrimination "now often takes new forms"). Scholars have noted that women's participation in a number of high paying careers is generally lower than men's, and that the current disparity may result from a number of factors including discrimination in the form of exclusion. See Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 542 (2005) (noting that the "sex-segregated nature of work" is still "mostly intact," and that "[n]ot only are there barriers to entry, but stereotypes result in a system that continually pushes women toward certain types of (lower paying) jobs, and men toward certain types of (higher paying) jobs"); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 737-38 (2000) (noting that women workers are often excluded from higher paying jobs, and that it is rare for women to work in "gender-integrated jobs"); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460-61 (2001) (arguing that we have entered a "second generation" of employment discrimination in which exclusion of women and other minorities continues, but in more complex forms, including workplace behavior that results in exclusion of women from networking and other promotional opportunities).

2. WORKFORCE CHALLENGES AND OPPORTUNITIES FOR THE 21ST CENTURY: CHANGING LABOR FORCE DYNAMICS AND THE ROLE OF GOV'T POLICIES: U.S. GEN. ACCOUNTING OFFICE [NOW GOV'T ACCOUNTABILITY OFFICE], GAO-04-845SP, June 2004, in WORK LAW: CASES AND MATERIALS 52-53 (Marion G. Crain et al. eds., 2005) [hereinafter GAO REPORT] (defining the impact of the knowledge economy and noting that "[t]echnological change, particularly the spread of computer and information technology, contributes to changing skill demand on the part of employers," and that "growth of the knowledge-based economy and innovations in management systems . . . have also contributed to the need for increased skill levels in many industries," but that, "[a]ll of these changes have the potential to increase the wage gap between high- and low-skill workers, with significant socioeconomic implications for U.S. society").

cultural diversity and increased competition to U.S. labor markets,³ such changes have not served to increase women's participation in the U.S. workforce in recent years.⁴ From the 1960s to the end of the 1980s, women's involvement in U.S. labor markets had increased.⁵ However,

3. The advent of a more global workplace has been predicted to increase the number of minority groups, particularly Latino workers, employed in the U.S., and the impact of the knowledge economy has allowed for a boom in U.S. employment of knowledge workers from India, China, and other countries that did not normally obtain access to U.S. jobs. Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV. 15 (2002), in WORK LAW: CASES AND MATERIALS 53 (Marion G. Crain et al. eds., 2005) ("The Department of Labor's projections for the workforce of the future forecast that almost half of the workforce of 2050 will consist of . . . 'minority' groups. Twenty-four percent will be Hispanic, [fourteen percent] will be African-American, and [eleven percent] will be Asian or Pacific Islander in descent."). For a discussion of the boom in knowledge workers from India and China, see THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 30-31 (1st ed. 2005) (discussing the increase in American employees hired from India and China); Manjeet Kripalani, *The Education Gap: China and India*, BUS. WK., Aug. 22-29, 2005, at 92-100 [hereinafter Kripalani, *China & India*] (discussing how these countries are preparing their children to compete in the global work force, and particularly with a goal of entering the U.S. work force); accord Manjeet Kripalani, *Asking the Right Questions: China and India*, BUS. WK., Aug. 22-29, 2005, at 64-66 [hereinafter Kripalani, *Asking the Right Questions*] (showing examples of innovative Indian businesses stressing affordability and quality, and noting how their innovation has challenged and changed Western business models). For a more critical perspective of the impact of globalization, however, see William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 2 & n.5 (2005) (noting that the advent of globalization has only increased inequality both among nations and within nations, and that "[p]rogress is highly uneven across and within countries"); Robert C. Feenstra, *Introduction to THE IMPACT OF INTERNATIONAL TRADE ON WAGES* 1-11 (Robert C. Feenstra ed., 2000) (discussing the impact of increasing international trade and technological changes beginning in the 1970s on growing wage inequality, but noting that other factors may have contributed to this problem). See generally HORST SIEBERT, *Preface to GLOBALIZATION AND LABOR*, at V (Horst Siebert ed., 1999) (defining how globalization has increased competition within labor markets); GAO REPORT, *supra* note 2, at 54 ("As U.S. firms increasingly compete within the global marketplace, they seek to reduce costs, through either technological innovation or outsourcing of production, or increased use of temporary workers.").

4. GAO REPORT, *supra* note 2, at 54 ("[T]he dramatic rise in women entering the labor force appears to have leveled off, with women projected to hold steady at 48% of the labor force through 2050."); ELAINE L. CHAO, ET. AL., U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 8 (2005), available at <http://www.bls.gov/cps/wlf-databook-2005.pdf> (showing an increase in the number of and percentage of women not participating in the labor force between 2000 and 2005); Eduardo Porter, *Stretched to the Limit, Women Stall March to Work*, N.Y. TIMES, Mar. 2, 2006, at A1 (noting that despite the fact that for four decades women entered the workplace at a "blistering pace," that "since the mid-1990s, the growth in the percentage of adult women working outside the home has stalled, even slipping somewhat in the last five years and leaving it at a rate well below that of men").

5. Porter, *supra* note 4, at A1 (citing Bureau of Labor statistics showing the growth in women's workplace participation levels beginning in the 1960s); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 527 (2005) (statement of Diana Furchtgott-Roth, Senior Fellow, Hudson Institute) (noting statistics showing increased workplace participation levels of women workers in the 1980s); GAO REPORT, *supra* note 2, at 54 (describing the more recent

recent trends noted by the Government Accountability Office,⁶ and other reports, have suggested that this increase is leveling off.⁷ Scholars and commentators have offered a number of reasons for this “leveling” in workplace participation levels—including discrimination,⁸ lower wages,⁹ and personal choice.¹⁰

Furthermore, wage disparities still exist between men and women in the U.S. workforce. A group of legislators in Congress, including Senator Hillary Clinton (D-NY), have noted that women workers only receive seventy-six cents for every dollar made by men,¹¹ and they have argued that change is needed to place women on a more even footing with men in the workplace.¹² In an effort to correct this problem, referred to as the gender wage gap, these lawmakers have proposed legislation seeking to amend the Equal Pay Act’s “equal pay for equal work” standard by implementing changes that would effectuate an “equal pay for comparable work” standard—legislation typically entitled “comparable worth” or “pay equity” law.¹³

“leveling” of women’s workplace participation levels).

6. GAO REPORT, *supra* note 2, at 54.

7. *See supra* notes 4-5 and accompanying text.

8. *See, e.g.*, Selmi, *supra* note 1, at 707, 738; *see supra* note 1 and accompanying text.

9. *See generally* WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS: U.S. GEN. ACCOUNTING OFFICE [NOW GOV’T ACCOUNTABILITY OFFICE]: REPORT TO CONG. REQUESTERS, GAO-04-35, Oct. 2003 [hereinafter GAO WAGE REPORT] (examining the implications of differences in earnings between men and women in the U.S.); David Leonhardt, *Scant Progress on Closing Gap in Women’s Pay: For College Graduates the Disparity Widens*, N.Y. TIMES, Dec. 24, 2006, at 1 (examining the effects of wage differences between men and women with 4-year college degrees).

10. With respect to “personal choice,” this phenomenon among well-educated women has been described as the “Opt-Out Revolution.” Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42 (showing factors in addition to discrimination, including women’s choice, as reasons for opting out of the workplace).

11. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton). *See generally* GAO WAGE REPORT, *supra* note 9; *Gender Based Wage Discrimination: Hearing of the S. Comm. on Health, Education, Labor, and Pensions*, 106th Cong. 1-3 (2000) (“Almost any discussion of pay inequity seems to center around the gender pay gap. As some of our witnesses will testify, women today earn about [seventy-five] cents per every dollar a man earns.”).

12. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton). *See generally* Andrea Sachs, *Women and Money*, TIME MAG., Feb. 6, 2006, at 67 (noting that “87% of the impoverished elderly are women,” that “men are four times as likely as women to negotiate a first salary offer, resulting in more than half a million dollars in additional income by age 60,” and that “58% of women in the baby-boom generation have less than \$10,000 saved in a pension or 401(k) plan”).

13. *See, e.g.*, Paycheck Fairness Act, S. 841, 109th Cong. (2005) (seeking to amend the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1) (2000)); Fair Pay Act of 2005, S. 840, 109th Cong. (2005) (also seeking to amend the EPA). Although the proposed bills have not been introduced as legislation based on a comparable worth theory, scholars and commentators analyzing these bills

Although such proposed legislation may seem more theoretical than tangible for many in the legal community—most likely perceiving comparable worth as an issue from the 1980s¹⁴—to the contrary, the likelihood of enactment of comparable worth legislation is now a less-than-theoretical calculation.¹⁵ The relatively recent confirmation hearings of Chief Justice Roberts revived a comparable worth debate in the media,¹⁶ and more recently, the reemergence of Democrats in Congress,¹⁷ with wage legislation on their agenda,¹⁸ and the possibility of Senator Clinton becoming President,¹⁹ have made passage of a federal comparable worth bill more feasible and an issue worthy of revived legal attention.

Part II of this Note will seek to understand the cause of the wage gap—the most commonly cited reason for implementing comparable

have labeled them and interpreted them as comparable worth laws. *See, e.g.*, CHARLES V. DALE & LINDA LEVINE, CONG. RESEARCH SERV., REPORT FOR CONG.: PAY EQUITY LEGISLATION IN THE 109TH CONG. 8-12 (2005) [hereinafter DALE] (discussing both bills and noting that the Fair Pay Act of 2005 could “reawaken the comparable worth legal debate”); LINDA LEVINE, CONG. RESEARCH SERV., REPORT FOR CONG.: THE GENDER WAGE GAP AND PAY EQUITY: IS COMPARABLE WORTH THE NEXT STEP? 14-16 (2003) [hereinafter LEVINE] (analyzing earlier versions of the same bills as comparable worth legislation); *see also* Raphael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 122, 150-53 (2003). Furthermore, the provisions of the proposed legislation closely resemble comparable worth laws introduced in the states. *See, e.g.*, Minnesota Pay Equity Act, MINN. STAT. ANN. § 471.991 (West 2001); H.F. 313, 70th Gen. Assem. (Iowa 1983). For a general definition of pay equity legislation, see Questions and Answers on Pay Equity, Nat’l Committee on Pay Equity, <http://www.pay-equity.org/info-Q&A.html> (last visited Jan. 22, 2007) (defining pay equity legislation and noting how such legislation would amend the Equal Pay Act if enacted).

14. Brian Powers, Note, *AFSCME v. Washington: Another Barrier to Pay Equity for Women*, 9 HARV. WOMEN’S L.J. 173, 173 & n.2 (1986) (noting that comparable worth was once deemed the “women’s issue of the ‘80s” by the Equal Employment Opportunity Commission Chair, Eleanor Holmes Norton (quoting Daily Lab. Rep. (BNA) No. 211, at A-2 (Oct. 30, 1979))).

15. *See* Linda Chavez, Opinion, *Comparable Worth*, WALL ST. J., Aug. 24, 2005, at A10 (noting that comparable worth has enjoyed a reemergence in the media—one that it has not enjoyed since the 1980s); DALE, *supra* note 13, at 8-12; *see also* Diana Furchtgott-Roth & Christine Stolba, *Comparable Worth Makes a Comeback*, WALL ST. J., Feb. 4, 1999, at A22.

16. *See* Chavez, *supra* note 15; *infra* notes 107-09 and accompanying text.

17. Wage legislation is likely to come back on the congressional agenda with added force. *See* John M. Broder, *Jubilant Democrats Assume Control on Capitol Hill*, N.Y. TIMES, Jan. 5, 2007, at A6 (noting that “the Democrats plan a 100-hour blitz to raise the minimum wage”).

18. *Id.*

19. The presidential campaign of Senator Clinton, a strong supporter of comparable worth legislation, has received a great deal of media scrutiny. *See, e.g.*, Patrick Healy & Jeff Zeleny, *Clinton Enters ‘08 Field, Fueling Race for Money*, N.Y. TIMES, Jan. 21, 2007, at A1 (noting Clinton’s entry in the presidential race); *Hillary Clinton: ‘I’m in’ 2008 White House race*, CNN.COM, <http://www.cnn.com/2007/POLITICS/01/20/clinton.announcement/index.html> (last visited Jan. 20, 2007). For a more critical perspective of Clinton’s campaign, see Kate O’Beirne, *Me, A Centrist?*, NAT’L REV., Oct. 10, 2005, at 31 (arguing that Sen. Clinton pretends that she is a middle-of-the-road candidate).

worth legislation. It will also consider the historical and theoretical origins of comparable worth theory, comparable worth's relevance as a solution to this problem, and its relevance to the problem of women's decreased participation in the workforce. Part III will examine the two aforementioned 2005 bills, the Paycheck Fairness Act and the Fair Pay Act; both of which seek to amend the Equal Pay Act ("EPA").

Part IV of this Note will seek to identify alternate models for legislation seeking to help correct these problems of women's lower involvement and lower wages in the work force. Models from feminist legal theory, other federal legislation, and foreign legislation, will be discussed.

This Note recognizes that change is needed to place women workers on a more even footing, and that discrimination is still a significant problem in the workplace. However, this Note argues that new employment legislation, in order to effectively increase workplace participation levels *and* wages of women workers in the now-global, knowledge economy, should focus not on models that give exclusive discretion to an unelected agency to determine the relative worth of jobs, but rather, on models emphasizing the maximization of human capital.²⁰ Further, this Note argues that the recently proposed comparable worth legislation in the House and Senate, and similar bills promoting a "similar jobs" standard under the EPA, will likely yield the opposite of their intended effect—they will likely have the effect of minimizing opportunities for women in this new economy. As such, Part IV of this Note will propose a new legislative model designed to minimize the problem of the gender wage gap and women's decreased participation in the workforce.²¹

20. Models focusing primarily on wages, seniority benefits, or other similar terms and conditions of lifetime employment, are too closely related to the idea that one will work in the same profession and for the same employer for the duration of life. This notion is a relic of the hierarchical, goods-based economy, and as Professor Stone would suggest, it is a notion that is increasingly becoming outdated. *See generally* STONE, WIDGETS TO DIGITS, *supra* note 1 (discussing the effects of the transition from the goods-based to the knowledge-based economy, and suggesting that human capital, skills training, networking, and variety of work experience will become more important than increasing security within a single job). Instead, new legislation must consider the totality of work experience and focus on job skills, networking, and easing career transitions as the workplace becomes more mobile. *See id.*

21. This new model will incorporate elements of models and theories developed in various works. *See generally* THE HARMONIZATION OF WORKING LIFE AND FAMILY LIFE: BULLETIN OF COMPARATIVE LABOUR RELATIONS (R. Blanpain et al. eds., 1995) [hereinafter HARMONIZATION] (examining legislative solutions to the problem of women's lower involvement in the workforce in both the United States and abroad); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 731-37 (2002) [hereinafter Stone, *Knowledge at Work*] (emphasizing that legislative models for employment law in

II. EXAMINING COMPARABLE WORTH IN THE NEW ECONOMY

A. Problems: The “Wage Gap” and “Decreasing Participation”

1. The Wage Gap and its Causes

Legislators citing the need for comparable worth legislation ground such laws on the basis that they are necessary to correct the wage gap.²² Therefore, before understanding comparable worth, the origins of the wage gap must be understood.

The gender wage gap is particularly well-documented in the legal²³ and academic fields,²⁴ as well as fields which require many years of training or expertise.²⁵ Comparable worth advocates argue that because Title VII and the EPA have not done enough to level the playing field,²⁶

the future must emphasize growth of human capital over traditional incentives such as wages and seniority); Selmi, *supra* note 1, at 707, 760 (advocating for leave reform as a solution to correcting the gender pay gap); Christine A. Littleton, *Reconstructing Sexual Equality*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 35-52 (Katharine Bartlett & Rosanne Kennedy eds., Westview Press 1991) (1987) (proposing a theory for greater economic equality between the sexes).

22. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton).

23. See, e.g., Timothy L. O'Brien, *Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006, at 1 (“According to the National Association for Law Placement, a trade group that provides career counseling to lawyers and law students, only about 17 percent of the partners at major law firms nationwide were women in 2005, a figure that has risen only slightly since 1995.”). See generally JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 50-83, 181-87 (1995) (describing pay disparities and gender bias in law firms).

24. See, e.g., JUDITH GLAZER-RAYMO, *SHATTERING THE MYTH: WOMEN IN ACADEME* 65 (1999) (noting that “[t]he playing field is not yet level for women faculty, who fare better in obtaining entry-level positions than in being equitably compensated or in earning tenure,” and that making tenure is now “an illusory target for many qualified women who are now choosing alternative professional careers”); WORKING-CLASS WOMEN IN THE ACADEMY: LABORERS IN THE KNOWLEDGE FACTORY 3-24 (Elizabeth A. Fay & Michelle M. Tokarczyk, eds., 1993) (examining lower tenure rates, less prestige, and the sense of marginalization among female academics, and discussing how the patriarchal consciousness of academic institutions leads women, especially women from working-class backgrounds, into the feeling of being “the other”). See generally BETTY RICHARDSON, *SEXISM IN HIGHER EDUCATION* (1974) (discussing the “boys club” mentality of the academic profession in the 1970s).

25. See *supra* note 1 and accompanying text.

26. See, e.g., ELAINE JOHANSEN, *COMPARABLE WORTH: THE MYTH AND THE MOVEMENT* 1 (1984) (claiming that with the exception of some judicial rulings, “the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 have not offered women legal recourse to challenge sex-segregated occupations, market factors that may perpetuate inequity, or evaluation systems using factor weights that favor traditionally male occupations”); Pamela L. Perry, *Let Them Become*

comparable worth legislation is one of the best solutions to minimize the effects of the wage gap.²⁷ However, there is much dispute about the extent of the wage gap and its causes.²⁸

Economists, legislators, and legal scholars have offered a diverse array of potential causes of the wage gap.²⁹ Commentators have described two economic theories that are often used to explain the causes of the gap: the “human capital explanation” and the “institutional discrimination explanation.”³⁰

The human capital explanation has a supply-side focus, that is, it looks at the personal characteristics of working women and men. The sex-segregation-in-the-workplace or discrimination explanation has a demand-side focus, that is, it looks at the characteristics of the jobs in which women and men typically work.³¹

Professor Michael Gold of Cornell’s School of Industrial Labor Relations discusses the flaws in the human capital approach as a problem of “too many variables.”³² He suggests that wages do not reflect

Professionals: An Analysis of the Failure to Enforce Title VII’s Pay Equity Mandate, 14 HARV. WOMEN’S L.J. 127, 128 (1991) (arguing that the Equal Pay Act and Title VII are limited in scope and fail to enforce change in pay for America’s women).

27. See, e.g., Jennifer M. Quinn, *Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay For Women*, 25 LAW & POL’Y INT’L BUS. 1403, 1405 (1994).

28. See, e.g., JAMES T. BENNETT, TAX-FUNDED POLITICS 41-42 (2004). Professor Bennett calls the wage gap a “mythical canyon” separating women’s earnings from men’s, and arguing, “[a]t last count, gapsters claimed that women made seventy-six cents for every dollar made by men The Gap is almost completely bunk, as every reputable economist knows. The difference between men’s and women’s earnings is a consequence of women taking time off for child-bearing and often working part-time after childbirth.” *Contra* JOHANSEN, *supra* note 26, at 15 (arguing that the wage gap is not a myth).

29. Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 361-63 (1995) (noting that causes of the “sex wage gap,” range from “differing expectations of labor force participation” to “[o]ccupational segregation [models],” which include the problems of sexual harassment and discrimination).

30. LEVINE, *supra* note 13, at 4, 6.

31. *Id.* at 4.

32. MICHAEL EVAN GOLD, A DIALOGUE ON COMPARABLE WORTH 35 (1983). Gold phrases the arguments of both sides of the comparable worth debate into a discussion, where the critic of comparable worth in the book argues that many of the human capital studies are flawed:

Turning now to the human capital studies, a number of economists reject the marginal productivity theory of wages on which the studies rely. It is plausible that custom, union strength, and the economic position of a firm or industry can affect wages. Another problem . . . is that wages may not reflect the entire compensation of a job. People often trade some take-home pay for a desirable community, a pleasant working environment, job security, opportunity for promotion

the entire compensation of a job; individual employees may desire to trade some benefits in pay for other benefits, such as vacation time and working environment—factors not always accounted for in every study.³³

Other commentators on the human capital explanation for the wage gap argue that the wage gap arises from different labor expectations between men and women about their participation in the workforce, and that such different expectations lead to different levels of human capital investment.³⁴ Professor Steven Rhoads, in his book, *Incomparable Worth*, discusses these differences in expectations,³⁵ as well as the failure of comparable worth studies to measure both the impact of a woman's choice of profession and the impact of the skills she chooses to obtain as a reflection of such expectations.³⁶

Rhoads, an opponent of comparable worth, argues that human capital explanation theorists, who are comparable worth advocates, utilize inadequate and non-predictive examples of personal experience and credentials to constitute economically relevant human capital, such as years of schooling completed and years of experience, and he notes that some economists have argued that this leads to "absurd conclusions."³⁷ This is because individuals involved in the studies could have vastly different characteristics that are not perceived by the statisticians. For example, the fields of study in which two individuals may have degrees could be as different as English and engineering.³⁸

Thus, human capital analysts evaluate the wide spectrum of economic justifications offered as causes for the wage gap. According to a number of economists, however, the accuracy of such conclusions, particularly the conclusion that the presence of women in an occupation automatically lowers wages, according to a number of economists, remains speculative.³⁹

Id. at 34.

33. *Id.*

34. See STEVEN E. RHOADS, *INCOMPARABLE WORTH: PAY EQUITY MEETS THE MARKET* 9-16 (1993).

35. *Id.*

36. *Id.* at 13-14.

37. *Id.* at 14 (quoting economist Robert Rector).

38. *Id.*; see also GOLD, *supra* note 32, at 35.

39. See, e.g., RHOADS, *supra* note 34, at 15.

Opponents also criticize the statistical studies that control for human capital variables and then ask how much of the wage gap is explained by the proportion of female workers in an occupation. They argue that so long as men make more than women for

The institutional discrimination explanation is also commonly cited as a theory for the cause of the gap.⁴⁰ This explanation argues that the wage gap is caused by actual discrimination in labor market opportunities.⁴¹ This leads to an oversupply of women in a limited number of occupations, resulting in the “positioning [of] women at or near the bottom of the existing job hierarchy.”⁴²

Scholars disagree with the institutional discrimination explanation primarily because statistical data cannot adequately prove that discrimination is a cause of the wage gap;⁴³ statistical evidence seemingly indicating evidence of discrimination could likely derive from other causes.⁴⁴ For example, Rhoads hypothesizes that researchers and analysts seeking a cause for the wage gap label their results as the product of discrimination, whereas discrimination might not be the real phenomena that they are experiencing.⁴⁵

any reason, the percentage of females in an occupation will be an indicator of lower wages. Economist James Smith points out that these job segregation studies also find that an increasing proportion of Asians in an occupation raises wages.

Id.

40. See, e.g., LEVINE, *supra* note 13, at 4-6; Libeson, *supra* note 29, at 361-62.

41. Libeson, *supra* note 29, at 362. *Contra* Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) (Justice Posner arguing that the wage gap is caused by economics—not discrimination).

42. Libeson, *supra* note 29, at 362; cf. Cherry, *supra* note 1, at 541. In arguing that an “overwhelming” system of sex segregation continues in the workforce today, Cherry cites an EEOC study reporting that “while women represented 51.7% of professional workers and 45.9% of technical workers, the three categories with the highest concentration of women were clerical, service, and sales workers, where women comprised 80.3, 57.7 and 56.4% of the workforce, respectively.” *Id.* She explains, “[t]his tendency toward occupational segregation is typically referred to as the ‘pink collar ghetto,’ that is, the concentration of women in certain lower-paid, lower-status workplace positions.” *Id.* Opponents of comparable worth argue that women are not underpaid for their work, but merely hold jobs that do not pay as well, and that those same jobs would not pay any better if they were held by men. See, e.g., GOLD, *supra* note 32, at 32 (the critic of comparable worth with this view suggested that the right solution “is to enforce existing law so as to open all job opportunities to all qualified workers, not to raise the pay of workers who occupy jobs that deserve low pay”). Although the Paycheck Fairness Act, and the Fair Pay Act of 2005, discussed *infra*, do not automatically raise pay of traditionally lower paying jobs, they are moving the EPA closer to a standard whereby “similar” jobs should be assessed as having the same pay according to the discretion of the Department of Labor. See, e.g., Paycheck Fairness Act, S. 841, 109th Cong. § 10 (2005).

43. See, e.g., RHOADS, *supra* note 34, at 13; Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1758 (1986).

44. RHOADS, *supra* note 34, at 10-13. Discussing occupational segregation resulting from the wage gap, Rhoads notes that “millions of workers’ wages are not even determined by employers, [whether such employers are] prejudiced or not,” and instead, that countless workers make their wages from “self-employment income, commissions, tips, piece rates, and other forms of compensation closely tied to personal performance.” *Id.* at 10.

45. *Id.* at 12. Rhoads notes that opponents of comparable worth disagree about the role of

Similarly, Professor Paul Weiler argues that a “free and competitive labor market serves an important function in allocating labor to its point of highest marginal productivity and in paying workers for what they are able to contribute to the goods and services that people want,” and he notes that although some might find the “relative market values” of labor “amoral, or even unfair,” there is no reason to assume that discrimination is the source.⁴⁶ Justice Posner, in *American Nurses’ Ass’n v. Illinois*, seems to summarize these economists’ arguments by noting that women’s lower wages do not inherently reflect discrimination, but rather correlate with years of human capital investment, and that many women, because they make the choice to take time off from work, do not invest as much human capital in their career.

However, it should be noted that such a viewpoint has been significantly challenged in more recent years.⁴⁷ And yet, even with these challenges, a compelling point is raised: considering that U.S. employment law traditionally regulates problems of discrimination, if the wage gap is not the product of discrimination, but rather, of market

discrimination in wage differences between men and women, and that “[o]pponents of comparable worth grant that instances of current labor market discrimination still occur, but many of them doubt that they are pervasive enough to be an important cause of either occupational segregation or the wage gap.” *Id.* at 12. *Contra* Libeson, *supra* note 29, at 361-62.

46. Weiler, *supra* note 45, at 1758.

47. 783 F.2d 716, 719 (7th Cir. 1986).

Economists have conducted studies which show that virtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of job[s], can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their “human capital” (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less.

Id. But see Marion Crain, *Where Have All the Cowboys Gone? Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L. J. 1877, 1877-78 (1999).

Dramatic changes have occurred in the traditional gender order over the last twenty-five years. One of the most striking is the increased presence of women in the waged labor market. This change in turn impacts upon the institution of marriage. The traditional male breadwinner/female homemaker model that once shaped duties and expectations in marriage is giving way to a model in which men and women function as coequal breadwinners. The shift to a coequal breadwinner model inevitably impacts family life and parenting. When mothers as well as fathers work full time, the job of homemaking-caretaking must be added on top of the demands of the waged job, reduced, or shared. Despite some progress toward gender equity in this area, women continue to perform the lion's share of the homemaking and caretaking duties.

Id. at 1877-78.

factors, or even of personal choice, the gap may arguably not even be a legal problem at all.⁴⁸ This position is much disputed, and this Note acknowledges that the wage gap exists and that discrimination likely plays a role in the gap, but it also recognizes that *various* factors may contribute to the gap's presence, and these factors must be considered in developing a new solution.

Another factor that may likely contribute to the presence of the wage gap is commonly referred to as the "work-family conflict."⁴⁹ Although discussed at greater length in Parts III and IV, scholars have sought to find a connection between the gender wage gap and family leave, noting that one of the reasons the statistics may show lower wages for women is that statistically women take on a greater share of responsibilities in the home, including housework and taking care of children.⁵⁰ Accordingly, Professor Michael Selmi and other scholars propose that the gender wage gap cannot be corrected until the United States proposes a "better, and different" family leave legislation—one that better accommodates workers returning to the workplace.⁵¹

2. Decreasing Participation: Intentional Discrimination, Choice, and Other Causes

Commentators and scholars have also noted a variety of reasons for the recent leveling or decrease in the number of women workers entering the workplace. As Eduardo Porter notes in *The New York Times*, "since the mid-1990s, the growth in the percentage of adult women working outside the home has stalled, even slipping somewhat in the last five years and leaving it at a rate well below that of men,"⁵² and as a recent GAO on workplace trends has noted, the numbers of women entering the workforce have "leveled."⁵³ Although intentional discrimination and discrimination in the form of exclusion are commonly cited causes for women's decreasing participation rates, the reasons for this decrease likely vary depending on a number of factors, including the level of

48. See *Am. Nurses' Ass'n*, 783 F.2d at 719; *supra* notes 36-38 and accompanying text; see also BENNETT, *supra* note 28, at 39-40.

49. The work-family conflict, generally speaking, deals with the inherent tension between taking care of family responsibilities and dealing with work life. See *infra* notes 282-89 and accompanying text.

50. Selmi, *supra* note 1, at 709, 728-29.

51. *Id.* at 707; see *infra* notes 282-89 and accompanying text.

52. Porter, *supra* note 4, at A1.

53. GAO REPORT, *supra* note 2, at 54.

education and circumstances in a woman's life.⁵⁴

Discrimination is likely a cause of women's decreased involvement in the workplace, particularly because of its effect on wages and occupational options. For example, Professor Miriam A. Cherry notes that stereotypical notions of women's expected roles in the workplace result in the undervaluing of women's wages.⁵⁵ Similarly, Professor Selmi, and other scholars, have noted that the effects of discrimination tend to lead to crowding or job segregation, where women are shuffled into certain jobs in which they can more easily avoid harsh discriminatory treatment, and which tend to pay less.⁵⁶ These scholars and others have noted that many of the "best jobs" go to white men, whereas jobs of lesser quality go to minorities and women, resulting in terms describing women's occupations as "women's work,"⁵⁷ or "the pink-collar ghetto."⁵⁸

Other commentators have portrayed a different picture of the causes of decreased participation in the workplace, particularly with respect to privileged women who have decided to leave the workplace. Lisa Belkin, of *The New York Times*, interviewed dozens of highly educated and successful women to determine why they opted out of the workplace, and concluded that, with respect to these privileged women, there may be more complexity and depth to the problem of women leaving the workplace.⁵⁹ Her article, *The Opt-Out Revolution*, reveals that the phenomenon of women choosing to opt out of the workplace is becoming increasingly common, and that many factors contribute to the decision to opt out in addition to reasons of discrimination and the work-family conflict.⁶⁰ In her article she discusses interviews with a number of women who formed some of the first classes of women allowed to attend

54. Compare Belkin, *supra* note 10, at 42 (discussing the reasons for why privileged women opt out), with Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1029-31 (discussing the hard choices and discrimination facing minority and poor women in the workplace).

55. See Cherry, *supra* note 1, at 542.

56. See *id.*; Selmi, *supra* note 1, at 737 ("[I]t is still relatively rare for men and women to work in gender-integrated jobs."); DONALD TOMASKOVIC-DEVEY, GENDER & RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION 3-7 (1993) (defining job segregation as "most men work in jobs only with other men, and most women work in jobs only with other women," and noting that society undervalues "women's work" or work considered to be a "minority position").

57. TOMASKOVIC-DEVEY, *supra* note 56, at 3.

58. Cherry, *supra* note 1, at 541.

59. See Belkin, *supra* note 10 *passim*.

60. It is significant because Belkin's article lends support to the idea that many factors influence or cause women to leave the workplace or opt out, including the factor of "choice." See Belkin, *supra* note 10, at 42.

Princeton University—women who claim to have made a conscious choice not to view their family as a conflict.⁶¹ As Belkin discusses the events of these women's lives, she notes that their choice not to "run the world," even when it was or seemed clearly possible for them to do so, has profound consequences.⁶²

These reasons offered by Belkin for decreased involvement signify a departure from the commonly cited legal reasons for women's lower pay and involvement in the work force—reasons primarily based on intentional discrimination.⁶³ In fact, lower pay is a likely reflection of lower involvement, and this lower involvement is likely based on a number of factors in addition to discrimination.⁶⁴ The aforementioned research shows that the problem of gaps in pay and in participation levels is more complex than just the problem of discrimination in the labor market, and that legislative solutions, based only on a discrimination-in-labor-markets model, like those offered in the proposed comparable worth laws, examine problems facing women in the workforce in terms too narrow to resolve the ends they seek.⁶⁵ Even though Belkin discusses well-educated women from a position of wealth, decreasing participation of women workers in the U.S. labor market is not a phenomenon exclusive to women of privilege, but rather a trend that affects all classes of female workers.⁶⁶ As discussed *infra*, enacting a federal comparable worth bill will only exacerbate the

61. *Id.*

62. *Id.*

63. A great deal of Title VII jurisprudence has been built upon the notion that women's lack of involvement, or lack of an opportunity to be involved, as well as lower salaries, are caused by intentional discrimination, and thus the existence of discrimination has been considered "the critical question." *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)) (noting that both the plaintiff and defendant in Title VII cases should be given fair opportunities to litigate "in light of common experience as it bears on the critical question of discrimination"). Relatively recently, however, the Title VII framework has changed to recognize that "mixed motives," which may include discrimination, may sway employment decisions. *See, e.g., Desert Palace Inc. v. Costa*, 539 U.S. 90, 101-02 (2003) (holding that the Civil Rights Act of 1991 changed the standard so that now when a plaintiff establishes that discrimination played a "motivating factor in the employer's decision," the plaintiff is entitled to a judgment); *see* 42 U.S.C. § 2000e-5(g) (2000 & Supp. 2004).

64. *See* RANDY ALBEDA, ROBERT W. DRAGO, & STEVEN SHULMAN, UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION 200-02 (2001) [hereinafter Albeda] (noting that the purpose of comparable worth has traditionally been "combating the effects of discrimination").

65. *See* Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 91-98 (1993) (examining statistical evidence of division of labor between men and women in the household evidencing a need for future models correcting the gender wage gap to move beyond the framework of the labor market).

66. *See* CHAO, *supra* note 4, at 8; Porter, *supra* note 4, at A1.

problems of exclusion and decreased participation of women workers.

B. Comparable Worth Theory Defined

Although it has been argued that comparable worth “cannot be operationally defined,⁶⁷” in general, comparable worth theory seeks to give equal pay to jobs of comparable worth, which generally means that such laws seek to give individuals working on jobs involving similar skills, training, work conditions, or other terms of employment, the same wages.⁶⁸ Comparable worth theory is also often referred to as “pay equity,”⁶⁹ and their meanings, when used in legislation, is usually synonymous.⁷⁰ It should be noted however, that even though the two terms may be similar when used in legislation, the National Committee on Pay Equity defines pay equity as something that seems broader than comparable worth, defining it as “a means of eliminating sex and race discrimination in the wage-setting system . . . pay equity means that the criteria employers use to set wages must be sex and race-neutral.”⁷¹

In the United States, comparable worth systems are usually implemented by employing a “points” analysis, *i.e.*, a system that assigns points to different job categories, conditions, skills, and other aspects of employment, an aggregate of which reflects a job’s “worth.”⁷²

67. JOHANSEN, *supra* note 26, at 11 (noting that comparable worth is a hard to define and controversial concept).

68. *See id.* at 1, 15-16 (defining comparable worth as a social doctrine with two politically relevant dimensions—ideological and methodological. Johansen argues that on one hand, the doctrine of comparable worth informs political action, creating ideological change by revaluing traditionally undervalued female work, and it allows for greater job evaluation criteria, helping agenda-setters better evaluate personnel and work policies with appropriate methods dictated by a job’s characteristics and conditions). *But see* RHOADS, *supra* note 34, at 4-5 (arguing that the methodological dimension of comparable worth is not objective, and that almost no kind of job evaluation can escape politicization).

69. Pay equity’s technical definition may be broader than comparable worth, but legislation employing the “pay equity” language is usually based on a comparable worth framework. *See, e.g.*, Minnesota Pay Equity Act, MINN. STAT. ANN. § 471.992 (West 2001). *See generally* RHOADS, *supra* note 34 (discussing this law as comparable worth legislation). A critic of comparable worth has argued that the “pay equity” language should not be conflated with “comparable worth” language, as the former is capable of being used as a mask for the ill effects of comparable worth legislation. *See, e.g.*, Anna S. Kondratas, Comparable Worth Is Not Pay Equity, Issue Bulletin 110 (July 31, 1981), available at <http://www.heritage.org/Research/Labor/IB110.cfm>.

70. *See supra* note 69 and accompanying text. *But see* Perry, *supra* note 26, at 129-30 (noting analytic distinctions between the two terms); *cf.* Kondratas, *supra* note 69 (noting that comparable worth legislation uses the term “pay equity” as a mask to hide the ill effects of comparable worth).

71. Questions and Answers on Pay Equity, *supra* note 13.

72. *See, e.g.*, Robert T. Michael & Heidi I. Hartman, *Pay Equity: Assessing the Issues*, in PAY EQUITY: EMPIRICAL INQUIRIES 1, 12-13 (Robert T. Michael et al. eds., 1989) (discussing the

Jobs that receive equal point scores, in theory, are then compensated equally.⁷³ While the proposed legislation discussed herein does not explicitly adopt a points system, it does adopt a comparable worth framework to allow the Department of Labor to better determine whether or not sex discrimination (in terms of pay) has occurred between similar jobs.⁷⁴ Commentators have noted that the most difficult part of implementation of any comparable worth system involves discretion, whether exercised in a point system, or in a system giving discretion to a government job evaluator, to decide the worth of jobs.⁷⁵ The problems of implementing comparable worth legislation will be discussed further *infra*.

C. Examining Comparable Worth and Other Legislation as a Solution to the Gender Wage Gap and Women's Lower Workplace Participation

This section seeks to understand how comparable worth can improve women's work experience, particularly whether it may provide a solution to the wage gap and to the problem of women's lower participation in the U.S. work force. First, comparable worth will be examined in light of its legal historical framework, set out by the Supreme Court in *County of Washington v. Gunther*.⁷⁶ Next, comparable worth's potential reemergence will be considered,⁷⁷ followed by a

implementation of comparable worth legislation in Iowa and Minnesota). Placing determination of job worth in the hands of the government removes compensation discretion from free markets into the hands of government. See RHOADS, *supra* note 34, at 14-15 (noting that comparable worth determinations made in a free market are fundamentally different than those made by governments).

73. See Michael & Hartman, *supra* note 72, at 12-17.

74. See, e.g., Paycheck Fairness Act, S. 841, H.R. 1867, 109th Cong. § 3 (2005) (proposing changes in the EPA to allow more discretion for the Department of Labor to evaluate the relative worth of jobs for sex discrimination claims); see DALE, *supra* note 13, at 9-10 (discussing the comparable worth framework of the Paycheck Fairness Act and the Fair Pay Act of 2005); LEVINE, *supra* note 13, at 15-16 (analyzing earlier versions of these bills as comparable worth legislation). Increasing the discretion of a government official to determine the relative worth of jobs, as the proposed bills seek to do, is a tricky business, and can lead to government squabbles and inconsistencies. See, e.g., Hugh Winebrenner, *The Implementation of Comparable Worth in Iowa, in* COMPARABLE WORTH, PAY EQUITY AND PUBLIC POLICY, 213, 221-22 (Rita Mae Kelly & Jane Bayes eds., 1988) (noting political squabbles over comparable worth implementation in Iowa). Among other potential conflicts, the determination of whether job conditions should be weighted as heavily as other factors in a comparable worth system illustrates the sort of discretion given to political rather than market forces. See RHOADS, *supra* note 34, at 5. This exercise of government discretion has the potential to dampen employee morale, especially if exercised in biased or purely political ways. *Id.*

75. See, e.g., RHOADS, *supra* note 34, at 5.

76. 452 U.S. 161 (1981) (Rehnquist, J., dissenting).

77. See *infra* notes 105-09 and accompanying text.

discussion of whether the benefits of such legislation can realistically be implemented as a federal law in the now-global U.S. economy,⁷⁸ and in the now “boundaryless” workplace.⁷⁹

1. A Brief History: The *Gunther* Decision

Initially, in the 1970s, early attempts to create a cause of action for sex-based pay discrimination on the basis of comparable worth were unsuccessful.⁸⁰ The EPA required men’s and women’s work to be “substantially identical,” under an “equal pay for equal work” standard.⁸¹ Under the EPA, a plaintiff asserting a violation “must prove that the employer pays unequal wages for work that is substantially equal in terms of skill, effort and responsibility, and that is performed under similar working conditions.”⁸² If the plaintiff satisfies this burden, “the burden shifts to the employer to prove that one of the four exceptions in the [EPA] justifies the wage differential.”⁸³ An employer’s wage differential will be deemed “justified” under the EPA if they are based on a seniority system, a merit system, the quality or quantity of production, or any factor other than sex.⁸⁴

Alternatively, Title VII presented a more viable vehicle for bringing such claims. *Christensen v. Iowa*,⁸⁵ which is considered the first

78. For an overview of the broad variety of potential methods of implementation, see Michael & Hartman, *supra* note 72, at 12-17.

79. See Stone, *Knowledge at Work*, *supra* note 21, at 721-37. Stone discusses the precarious nature of work resulting from the dissolution of traditional job hierarchies, and defining this new type of employment model as the “boundaryless” career. Generally speaking interpretations of boundaryless can include: vertically (up and down the organization or firm), horizontally (commodification of employees at the same level), physically (technology allowing work anywhere), or politically (globalization allowing for a more free flow of labor capital); BARBARA EHRENREICH, BAIT AND SWITCH 3-6 (2005) (noting the precarious nature of work in white collar professions).

80. See generally FRANCES C. HUTNER, EQUAL PAY FOR COMPARABLE WORTH: THE WORKING WOMAN’S ISSUE OF THE EIGHTIES 21, 23-32 (1986) (discussing the history of the movement pushing for a comparable worth standard under the EPA).

81. HUTNER, *supra* note 80, at 23 (discussing the Fair Labor Standards Act of 1938, amended by 29 U.S.C. § 206(d)(1) (2000)). See generally 109 CONG. REC. 9182, 9197 (1963) (statements of Rep. Goodell and Rep. Griffin) (agreeing that it would be absurd to involve the Department of Labor in the business of ranking all jobs in the country); Am. Fed’n of State, County, and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1404, 1407 (9th Cir. 1985).

82. *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1467 (10th Cir. 1992) (quoting EEOC v. Cent. Kansas Med. Ctr., 705 F.2d 1270, 1272 (10th Cir. 1983)).

83. *Kenworthy*, 979 F.2d at 1467 (quoting *Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726, 728) (10th Cir. 1984)).

84. *Victory v. Hewlett-Packard Co.*, 34 F. Supp. 2d 809, 825 (E.D.N.Y. 1999)

85. 563 F.2d 353, 355-56 (8th Cir. 1977).

comparable worth case, illustrates this point.⁸⁶ In that case, two female clerical workers filed suit under Title VII, which has a standard considered to be a lower hurdle—it does not require the EPA’s “equal pay for equal work” standard.⁸⁷ The women argued that they were being paid less than male co-workers who were in the position of “physical plant workers.”⁸⁸ The plaintiffs lost at the trial level and their appeal was rejected for failing to show that sex discrimination was the reason they were paid less.⁸⁹

By the 1980s, after considerable setbacks, the debate over comparable worth reached national proportions, and proponents hoped that the Supreme Court would rule favorably upon claims based on a comparable worth theory.⁹⁰ In *Gunther*, the Supreme Court held that “claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or ‘any other factor other than sex.’”⁹¹ *Gunther* held that the Bennett Amendment should be construed as incorporating into Title VII *only* the four affirmative defenses of the EPA, and not the EPA’s standard of “equal pay for equal work.”⁹² As a result, Title VII is broader than the EPA, and equal pay for equal work is not a required showing for plaintiffs.⁹³

Although this may have appeared to be a victory for comparable worth advocates, after *Gunther*, however, it became much more difficult for plaintiffs to assert claims based on a comparable worth theory.⁹⁴ After *Gunther*, plaintiffs with such claims were required to show that the employer had an “intent to discriminate,” and that the intent must encompass an “actual desire to pay women less than men because they are women.”⁹⁵

86. *See id.* at 354-55. For a more in-depth analysis of the case, see ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 119-70 (1999).

87. *Christensen*, 563 F.2d at 355; *Grigoletti v. Ortho Pharm. Corp.*, 570 A.2d 903, 909 (N.J. 1990) (“Title VII, with its broader approach to discrimination, requires a less-exacting degree of job similarity than is necessary to bring an EPA action.”).

88. NELSON, *supra* note 86, at 119.

89. *Id.*

90. Weiler, *supra* note 43, at 1729.

91. *Washington v. Gunther*, 452 U.S. 161, 168 (1981) (Rehnquist, J., dissenting).

92. *Id.* at 168, 178-80.

93. *Id.* at 165, 168.

94. *See, e.g., Loyd v. Phillips Bros.*, 25 F.3d 518, 525 (7th Cir. 1994) (citing EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 587 (7th Cir. 1987)).

95. *Id.* at 525 (citing *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716 (7th Cir. 1986)).

The Ninth Circuit's decision in *AFSCME v. State of Washington* (*AFSCME*),⁹⁶ effectively limited the applicability of claims based on a comparable worth theory.⁹⁷ In *AFSCME*, a class of state employees, holding jobs filled at least seventy percent by females, brought a Title VII suit against the state alleging sex-based wage discrimination.⁹⁸ Prior to the commencement of the case, the state of Washington had commissioned a comparable worth study to determine the existence of any wage disparities between jobs dominated by women workers and those positions held by men.⁹⁹ The study revealed a twenty percent wage disparity to the disadvantage of women, and yet despite this purportedly successful showing by the plaintiffs—with the plaintiffs believing the disparity was caused by sex-based wage discrimination depressing women's wages—the Ninth Circuit, basing its decision on the legislative history of Title VII, held that “reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII”¹⁰⁰

2. The Reemergence of Comparable Worth Legislation

On the international stage, commentators have examined the benefits and burdens of pay equity statutes implementing comparable worth theory,¹⁰¹ but a federal law implementing such a theory has never succeeded in the U.S.¹⁰² Over the past ten years, legislation utilizing a

96. 770 F.2d 1401, 1404 (9th Cir. 1985).

97. *Id.* at 1406.

98. *Id.* at 1403.

99. *Id.*

100. *Id.* at 1403, 1408.

101. For an example of comparable worth's implementation in Canada, see Pay Equity Act, R.S.O., ch. 34 (1987) (Can.); Nancy K. Kubasek, Jennifer Johnson, & M. Neil Browne, *Comparable Worth In Ontario: Lessons the United States Can Learn From Canada*, 17 HARV. WOMEN'S L.J. 103, 106 (1994) (examining the Canadian statute, and analyzing the potential for such legislation in the United States). For an example of comparable worth in the U.K., see Equal Pay Act, 1970, c. 41, § 1(1)(a)-(b) (U.K.); Quinn, *supra* note 27, at 1422-1427 (comparing Ontario's pay equity law with the U.K.'s version). For a discussion of comparable worth in Europe, see Libeson, *supra* note 29, at 376-79.

102. Despite failed efforts at implementing comparable worth at the federal level, Minnesota has had a public sector pay equity statute for nearly twenty years, which has given scholars and commentators time to note its respective employment benefits and burdens on women workers. See Minnesota Pay Equity Act, MINN. STAT. ANN. §§ 471.991-99 (West 2001); Jean Hopfensperger, *Minnesota's Pay-equity Law Paying Off*, STAR TRIBUNE, Nov. 19, 2002, http://www.cebcglobal.org/Newsroom/News/News_111902.htm (noting that women who work for state government earn “97 cents to their male counterparts' dollar,” although failing to note women's relative participation in public sector employment compared with men's). *But see*

comparable worth framework has been introduced in both the House and Senate,¹⁰³ but only recently has the enactment of such legislation become a more tangible reality.¹⁰⁴

In addition to these legislative efforts, the debate over comparable worth continues. One of the most recent examples of the comparable worth debate in the media occurred at the confirmation hearings of Chief Justice John Roberts.¹⁰⁵ The debate concerned whether, because Roberts had derided comparable worth in legal memorandum, he would be insensitive to women's issues.¹⁰⁶ Much of the criticism was rebutted by arguments that Roberts understood the distinction between advocating as

RHOADS, *supra* note 34, *passim* (detailing Minnesota's history with comparable worth and showing its negative effects).

103. See, e.g., The Fair Pay Act of 1994, H.R. 4803, § 3(g)(4)(B), 104th Cong. (1994) (proposing the following amendment to the Equal Pay Act: "[t]he term 'equivalent jobs' means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions"); The Fair Pay Act of 2005, S. 840, H.R. 1697, 109th Cong. (2005); see LEVINE, *supra* note 13, at 15-16, 25-26 (analyzing the aforementioned proposed federal pay equity legislation as law based on a comparable worth theory); see also The Paycheck Fairness Act: Helping to Close the Wage Gap for Women, National Committee on Pay Equity & National Women's Law Center, <http://www.nwlc.org/display.cfm?section=employment> (follow "The Paycheck Fairness Act: Helping to Close the Wage Gap for Women (Updated April 2006)") (last visited Feb. 22, 2007) (showing support for such legislation in the House and Senate).

104. Particularly because Sen. Hillary Clinton, one of comparable worth's strongest proponents, has announced her intentions to run for president. See *supra* note 19 and accompanying text.

105. In his Senate confirmation hearings, Chief Justice Roberts drew national attention to his past by a memo he wrote criticizing comparable worth as being "pernicious" and against American economic policy. See, e.g., Jan Crawford Greenburg & Naftali Bendavid, *Roberts criticized equal pay decision; 'Comparable worth' theory ridiculed*, CHL. TRIB., Aug. 16, 2005, at A1 ("It is difficult to exaggerate the perniciousness of the 'comparable worth' theory," Roberts, then an associate White House counsel, wrote to White House Counsel Fred F. Fielding in early 1984. 'It mandates nothing less than the central planning of the economy by judges.'"); *The Situation Room* (CNN television broadcast Aug. 15, 2005) (noting that Roberts called comparable worth theory a "radical redistributive concept"). For editorial viewpoints on the comparable worth issue, mostly critical of comparable worth, see Edward Whelan, Editorial, *A Model of Restraint, not Activism; Roberts' Records Show Him to be a Strong and Principled Legal Conservative with Views Shared by Most Americans*, LOS ANGELES TIMES, Sept. 6, 2005, at B11 (noting that Roberts' "scathing critique" of comparable worth theory was appropriate because comparable worth theory would "require an army of bureaucrats to set the wages of all workers"); Carrie Lukas, *Incomparable Nonsense*, NAT'L REV. ONLINE, Aug. 17, 2005, <http://article.nationalreview.com/> (arguing that statistics that show a gap in pay between men and women fail to take into account the fact that men assume more high-risk jobs, with men accounting for 92 percent of occupational deaths, and that statistics show that women are less likely to take jobs involving relocation or grueling physical labor).

106. See, e.g., Amy Goldstein, R. Jeffrey Smith, & Jo Becker, *Roberts Resisted Women's Rights: 1982-86 Memos Detail Skepticism*, WASH. POST, Aug. 19, 2005, at A01 (noting that Roberts had urged President Reagan to refrain from legislation aimed at correcting the gender gap, finding that comparable worth theory was "anti-capitalist").

a lawyer for a president and acting as an impartial judge.¹⁰⁷ Other commentators agreed with Roberts' portrayal of comparable worth as a "radical" idea, and as something "pernicious" to the U.S. economy.¹⁰⁸ The recent media attention paid to the theory demonstrates that comparable worth is a debate which continues to evoke strong feelings by advocates and heated opponents throughout the country.¹⁰⁹

3. The Changing Workplace: How Globalization May Antiquate Comparable Worth Legislation

Despite the push for federal comparable worth legislation, and the increasing likelihood of new wage regulation efforts in Congress,¹¹⁰ the changing U.S. economy will likely render comparable worth laws obsolete. The growth of global labor markets will likely increase competition in the U.S. economy,¹¹¹ and with an increased international pool of employee candidates, firms of the future will likely be less

107. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. S10215 (2005) (statement of Sen. Harry Reid, (D-NV)). Reid remarked critically, "He wrote memos opposing legislative and judicial efforts to remedy race and gender discrimination." *Id.* "He derided the concept of comparable worth and questioned whether women actually suffered discrimination in the workplace The memos raised a real question for me whether their author would breathe life into the equal protection clause and the landmark civil rights statutes that come before the Supreme Court repeatedly." *Id.* But see *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 460 (2005) (statement of Jennifer Cabranes Bracerias, Comm'r, U.S. Commission on Civil Rights and Visiting Fellow, Independent Women's Forum). Commissioner Bracerias supported Roberts by saying, "[t]hese critics allege that Judge Roberts's confirmation to be Chief Justice will somehow be harmful to women or minorities. These charges are, at best, misplaced and, at worst, deliberately misleading attacks that would have been leveled against anyone nominated by this President," and noting that, "many of the specific criticisms of Judge Roberts [sic] record involve positions he advocated as a lawyer in the administrations of Presidents Ronald Reagan and George H.W. Bush . . . [that] are broadly consistent with the views of the American people and fully within the political mainstream." *Id.* at 460-61.

108. See *supra* note 105 and accompanying text.

109. See *id.*

110. For an analysis of Congress' current goals, see Broder, *supra* note 17, at A6 ("Next week, the Democrats plan a 100-hour blitz to raise the minimum wage").

111. If the U.S. economy fails to compete with China and India, the U.S. may be forced to assimilate the employment practices of such nations. Considering the lack of labor standards in China and other nations, this may yield a dangerous result. See generally William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 2-3 (arguing that the case for international labor standards is on relatively shaky ground, and that countries like China, which have been among the fastest developing countries, have also shown a "growing inequality"); Bruce Einhorn, *No Peasant Left Behind*, BUS. WK., Aug. 22-29, 2005, at 103-04 (documenting the rich-poor gap in China and noting the significant hurdles to educating the poor).

amenable to governmental wage regulation, or, if faced with such competition, will likely go elsewhere (outside of the U.S.) to satisfy hiring needs.¹¹² As more foreign firms compete with U.S. employers, employees in this new economy will be forced to adapt and improve their educational credentials to compete with workers from India, China, Israel, and other booming knowledge economies,¹¹³ and similarly, employers will have to understand that competing firms from these countries can undercut them with lower labor costs.¹¹⁴ On the other hand, scholars have argued that with increasing globalization, the need for international labor standards and workplace regulation is even more pressing, particularly with respect to globalization's effect on women.¹¹⁵ Thus, even though wage regulation may not be the best answer for our economy in times of increased workplace competition, some regulation may be necessary.¹¹⁶

Under Professor Katherine V.W. Stone's theory, the knowledge economy will require growth of human capital, and in this new workplace employees will have greater incentives to gain human capital over wages and traditional notions of job advancement.¹¹⁷ As such, legislators should reassess the significance of comparable worth's means to obtain its goals, and think beyond the narrow scope of wage regulation. Professor Stone suggests that the U.S. economy is shifting from a goods-based economy to a knowledge-based economy, and that jobs of the future are becoming "boundaryless."¹¹⁸ This transition, coinciding with the impact of globalization, means that workers will have to adjust by changing their expectations.¹¹⁹ They can no longer expect traditional hierarchical notions of workplace promotion such as gradual increases in wages and seniority benefits.¹²⁰ Under Stone's theory, and theories of the contingent workplace, the nature of job security and those fruits which so beneficially derive from it, including seniority, wages, and other like benefits, are becoming less secure in

112. See generally FRIEDMAN, *supra* note 3, at 237-75 (2005).

113. See *id.*

114. See *id.*

115. See generally Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 520-30 (2000) (discussing globalization's deleterious effect on women's income and labor market participation).

116. See *supra* note 115 and accompanying text.

117. See Stone, *Knowledge at Work*, *supra* note 21, at 721-22.

118. See *id.* at 721 n.1, 731-32.

119. See *id.* at 724, 728, 731.

120. See *id.* at 725-26.

today's economy.¹²¹

An example of the changing, and more temporary nature of the workplace, is the phenomenon recognized among scholars as "permatemps,¹²²" where employees are hired as independent contractors, usually to allow companies to save money on benefits, when, in reality, the workers work the same hours and do the same functions as regular, full-time employees.¹²³ Thus, workers of the future, cannot rely on traditional notions of advancement within the firm including traditional wage increases; rather, Stone suggests, workers must expect to increase their store of knowledge and job skills to better their lot as employees and to rise in the ranks of the workplace.¹²⁴ Similarly, as work has become more mobile and temporary, workers need to increase their variety of work experience to more easily transition from one job to the next.¹²⁵

The next section will examine the proposed legislation utilizing comparable worth theory and show that it fails to account for the changing workplace in the face of globalization. Part V will attempt to cure these ills and recognize the reality of the changing workplace in proposing a solution to the wage gap and the problem of decreased participation of women workers.

121. See, e.g., Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 503-06, 519-20 (1997) (noting that "[f]reedom of contract has always been the dominant principle in American employment law," and that in the U.S. and other industrialized countries, the "number of workers who do not fit the traditional model of full-time, continuous employment has greatly increased in the last twenty years"); Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 374-78, 380-89 (2003), in WORK LAW: CASES AND MATERIALS 69 (2004). See generally Katherine M. Forster, Note, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 565 (2001) (noting that contingent workers are treated differently in "legally insignificant but very visible aspects of the working environment" to differentiate these workers' status from that of permanent employees).

122. Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee For Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 83 (2005).

123. *Id.*; see, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008-12 (9th Cir. 1997) (holding that purported "independent contractors," hired by Microsoft to perform services "such as production editing, proofreading, formatting, indexing and testing," were common law employees entitled to participate in a stock option plan that excluded non-employees, after the plaintiff class had successfully argued that they were not truly "temporary employees," but rather, permanent employees);

124. See Stone, *Knowledge at Work*, *supra* note 21, at 733-35.

125. See *id.* at 728.

D. The Proposed Legislation

1. Minnesota and Iowa as Laboratories

Before considering the comparable worth legislation proposed in Congress in 2005, it may be useful to consider how comparable worth has worked on the state level. Minnesota, a state that has implemented legislation utilizing comparable worth theory for public employees since the early 1980s, should be considered as a focal point in determining the utility and value of a federal comparable worth legislation.¹²⁶ The proposed federal comparable worth legislation is an expansion of, or at the least, a step closer to, the Minnesota system—a system which has minimized the wage gap between men and women for public employees,¹²⁷ but has not yielded the same results for the state as a whole.¹²⁸ According to Professor Rhoads, the Minnesota system has decreased workers' sense of pride in their work, and, because of a need to stay on budget, it has led to a loss of jobs for women in the public sector.¹²⁹

Additionally, since the time of its enactment, commentators have noted that workers in gender-balanced and male-dominated job classes have felt that the system is unfair,¹³⁰ that workers have felt a loss of respect with regard to their value in the workplace,¹³¹ and on the local level, that there have been sizeable administrative difficulties.¹³² Examining the pay equity guidelines, one can readily see that proper application of a comparable worth system requires considerable

126. See, e.g., RHOADS, *supra* note 34, at 1, 3-4.

127. Jean Hopfensperger, *Minnesota's Pay-equity Law Paying Off*, STAR TRIBUNE, Nov. 19, 2002, available at http://www.cebcglobal.org/Newsroom/News/News_111902.htm.

128. See *id.* In 2003, it was reported that the wage gap for non-public employees was seventy-three cents on the dollar, which is a larger gap than the national average. Editorial, *Lawmakers Should Allow No Pay Equity Backsliding*, ST. PAUL PIONEER PRESS, Oct. 20, 2003, available at 2003 WLNR 14710611.

129. See RHOADS, *supra* note 34, at 54.

130. *Id.* at 44-45 (discussing the fact that employees in gender-balanced and male-dominated job classes whose wages fell below the state median were not adequately compensated by the state, despite the fact that employees in female-dominated job classes were).

131. *Id.* at 87 (discussing the difficult and sometimes painful process of surveying employees for the purpose of assessing their worth to their employer).

132. See, e.g., Editorial, *Pay equity Restore reporting requirement*, STAR TRIBUNE (Minneapolis-St. Paul), Oct. 30, 2003, at 18A, available at 2003 WLNR 14265522 [hereinafter STAR TRIBUNE] (noting that "about a third of the 500 local jurisdictions that report their pay patterns each year are still found to be out of compliance, [twenty] years after the first pay equity legislation passed").

professional expertise, and as such, comparable worth systems seem intrinsically difficult and costly to implement.¹³³ In sum, the two major problems with the comparable worth legislation proposed in Minnesota were that it stigmatized workers who felt upset about their particular job ranking,¹³⁴ and more importantly for the purposes of this Note, less women were hired after its implementation.¹³⁵

The state of Iowa, in 1983, also attempted to implement comparable worth legislation for public sector workers.¹³⁶ Commentators noted that, like Minnesota, Iowa also experienced difficulties with its implementation.¹³⁷

2. The Paycheck Fairness Act and the Fair Pay Act

The Paycheck Fairness Act¹³⁸ and the Fair Pay Act of 2005¹³⁹ have

133. See PAY EQUITY OFFICE, MINN. DEP'T. OF EMPLOYEE RELATIONS, GUIDE TO PAY EQUITY COMPLIANCE AND COMPUTER REPORTS (2006), <http://www.doer.state.mn.us/lr-peqy/images/pdf-file/peguide.pdf> (explaining multiple financial formulas and analyses that factor into a pay equity determination).

134. RHOADS, *supra* note 34, at 44.

135. *Id.* at 54.

136. Iowa passed H.F. 313, which required "that a state department, board, commission, or agency shall not discriminate in compensation for work of comparable worth between jobs held predominantly by women and jobs held predominantly by men." H.F. 313, 70th Gen. Assem. (1983). The statute defined comparable worth as "the value of work as measured by the composite of the skill, effort, responsibility, and working conditions normally required in the performance of work." H.F. 313.

137. See Winebrenner, *supra* note 74, at 213-18 (discussing the difficulties Iowa faced in implementing the law, including such problems as disagreements between the executive branch and legislative branches as to who would be in charge of implementing the comparable worth system, and problems of consolidating job classes into broad groups, overlooking job specifications that supported pay differences). Iowa still acknowledges comparable worth theory in its salary structure guidelines for public sector workers. IOWA CODE ANN. § 70A.18 (West 1999).

138. Paycheck Fairness Act, S. 841, 109th Cong. (2005); Paycheck Fairness Act, H.R. 1687, 109th Cong. (2005). The Paycheck Fairness Act, seeking to expand the coverage of the Equal Pay Act of 1963, and sponsored by Representative Rosa DeLauro and Senator Hillary Clinton, would amend the Equal Pay Act by allowing plaintiffs bringing claims under the Act to collect compensatory and punitive damages. Furthermore, the bill would authorize class action pay equity lawsuits, and it would direct the Department of Labor to develop and publish guidelines for comparing job categories based on criteria such as educational requirements, job skills, level of independence on the job, work conditions, and job responsibility. S. 841, §§ 3-7; H.R. 1687, §§ 3-7; see Fair Labor Standards Act (Equal Pay Act) of 1938, § 6(d)(1), amended by 29 U.S.C.A. § 206(d)(1) (2000) (stating that employers shall not discriminate on the basis of sex by paying different wages for jobs that require "equal skill, effort, and responsibility").

139. Fair Pay Act of 2005, S. 840, 109th Cong. (2005); Fair Pay Act, H.R. 1697, 109th Cong. (2005). The Fair Pay Act, sponsored by Representative Eleanor Holmes Norton and Senator Tom Harkin, would seek to remedy lower wages in what are considered to be traditionally female jobs, including such jobs as: teachers, nurses, and social workers. It would amend the Equal Pay Act by prohibiting wage discrimination among jobs that entail "work of equivalent value," including jobs

emerged as new solutions to the wage gap between men and women, proposing expanded coverage for the equal pay laws.¹⁴⁰ Among other proposed amendments to the EPA, these bills seek both to increase remedies against employers in wage discrimination claims, and to give the Department of Labor greater discretion in determining the similarity and comparability of different jobs for the purpose of bringing claims under the Act.¹⁴¹

This proposed legislation comes at a time of change in employment law. In recent years, the U.S. labor market has adjusted to the demands of increasing globalization, the knowledge-based economy,¹⁴² the effects of outsourcing,¹⁴³ what has been called “sluggish real wage growth,”¹⁴⁴

that may be deemed “dissimilar,” but that require equivalent skills, effort, responsibility, and working conditions. S. 840, §§ 1-8; H.R. 1697, §§ 1-8; *see* 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statement of Sen. Harkin).

140. These bills, particularly § 10(b)(1)(B) and § 10(b)(2) of the Paycheck Fairness Act, and § 3(a) of the Fair Pay Act, are seeking to amend the Equal Pay Act by attempting to change the standard of equal pay for equal work (the current standard for bringing claims under the Equal Pay Act) to the comparable worth standard of equal pay for comparable work, and to create a federal job-ranking system, to be used by the Department of Labor, which will allow the executive branch of government to determine the relative values or worth of different jobs for sex discrimination claims. *See* S. 841, § 10(b); H.R. 1687, § 10(b); S. 840, § 3(a); H.R. 1697, § 3(a). These changes, although under the name “pay equity,” represent a step closer to implementing a federal comparable worth policy. *See* DALE, *supra* note 13, at 10-11; LEVINE, *supra* note 13, at 14-16, 25-26.

141. *See generally* S. 841; H.R. 1687; S. 840; H.R. 1697.

142. *See* GAO REPORT, *supra* note 2, at 52-54. The report predicts increasing competition for U.S. firms within the global marketplace, resulting in pressures on employers to reduce costs and outsource employees. *Id.* at 52. As for the position of women in the workforce in the 21st century, the report notes that “the dramatic rise in women entering the labor force at the end of the century has leveled off, with women projected to hold steady at 48% of the labor force through 2050.” *Id.* at 54. The report also predicts increasing challenges with regard to the costs of caregiving for children. *Id.*; *see* FRIEDMAN, *supra* note 3, at 31-39, 48-173 (discussing the “ten forces that flattened the world” and that led our nation and others into a globalized marketplace, and offering solutions for working parents involved in both caregiving and active careers); *see, e.g.*, Kripalani, *Asking the Right Questions*, *supra* note 3, at 96, 99-100 (showing examples of how Indian companies have created an “innovation advantage,” stressing affordability and quality, and noting how they have changed western business models).

143. *See* GAO REPORT, *supra* note 2, at 52, 53; *see also* FRIEDMAN, *supra* note 3, at 4-11 (tracking the emergence and success of outsourcing in India and identifying three great eras of globalization and their effects).

144. *Danger Time for America*, *ECONOMIST*, Jan. 14, 2006, at 15. The article argues that the economy that Alan Greenspan handed over to Ben Bernanke was less healthy than popularly assumed, noting that “[a]s a result of weaker job creation than usual and sluggish real wage growth, American incomes have increased much more slowly than in previous recoveries.” *Id.* According to Morgan Stanley, “over the past four years total private-sector labour compensation has risen by only 12% in real terms, compared with an average gain of 20% over the comparable period of the previous five expansions.” *Id.* This factor, in light of the soaring costs of childcare, may contribute to an increase in the likelihood of one of two working spouses making the decision to stay at home to raise children.

and the rise of mobile or “boundaryless” careers.¹⁴⁵ As a result of these modifications, the number of American women in the workforce has decreased,¹⁴⁶ and the gender wage gap has not diminished significantly.¹⁴⁷ These facts show a need for new solutions to ensure that women are on a level playing field with men in the workplace.

However, the Paycheck Fairness Act and the Fair Pay Act do not propose reasonable solutions for both U.S. employers and employees in the 21st century’s global workplace. Such changes to the EPA will lead the U.S. economy down a dangerous path—placing heavy burdens on employers¹⁴⁸ and the tax-paying public,¹⁴⁹ resulting in minimized human capital incentives for workers,¹⁵⁰ potentially stigmatizing workers through government job evaluation and job ranking systems,¹⁵¹ and minimizing job opportunities for women—the opposite result of the intended effect.¹⁵²

145. See Stone, *Knowledge at Work*, *supra* note 21, at 731-32. Stone discusses the increased significance of employee knowledge and skills, particularly with the advent of the “boundaryless career,” which is defined as a career which “does not depend upon traditional notions of advancement within a single hierarchical organization,” but rather one that could involve employers in different geographical locales, and a career which is “unconstrained by clear boundaries around ‘job activities.’” *Id.* The dissolution of traditional job hierarchies should theoretically lead to more involvement of women in the labor market. See *id.* See generally DONALD F. KETTL, *THE GLOBAL PUBLIC MANAGEMENT REVOLUTION* (2005) (comparing two main models that exemplify how public sector management has changed to adjust to the demands of the knowledge economy).

146. CHAO, *supra* note 4, at 8; Porter, *supra* note 4, at A1.

147. See 151 CONG. REC. S3865, S3900-01 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton).

148. See, e.g., Paycheck Fairness Act, S. 841, 109th Cong. § 10 (2005) (creating a job evaluation system that will likely make it harder for employers to promote employees within the company without adjusting the pay of all female employees in similar positions).

149. See, e.g., RHOADS, *supra* note 34, at 53-54. The costs of implementing a Minnesota comparable worth program in 1986 added roughly 5 million dollars to the state’s 26 million dollars in public employee pay raises in order to remedy sex-based discrimination. *Id.*

150. See *id.* at 48 (“Comparable worth [has] raised the pay of almost every clerical job and over 70 percent of the health-care non-professionals.”). Scholars critical of comparable worth have argued that, in practice, it places additional compensation in the hands of employees who may not have worked, gained the necessary credentials, or otherwise competed for that economic advantage. See *id.* Therefore, the lack of having any incentive to try harder for better job benefits may lead to complacency. See *id.* Such a redistributive policy, therefore, will not help workers obtain human capital or social networking capital for additional compensation, but rather, it will promote a system of reliance on government subsidization. See Stone, *Knowledge at Work*, *supra* note 21, at 733-37 (arguing that in the knowledge economy, human capital, as well as social, networking capital, will become driving forces for U.S. employees).

151. See, e.g., RHOADS, *supra* note 34, at 86-88 (discussing the hurt feelings and damaged morale that Minnesota public workers felt by the government’s job evaluation of their particular occupation, as well as the sense of divisiveness that occurred in public offices as a result).

152. See *id.* at 1. Minnesota’s implementation of a comparable worth system led to fewer job opportunities for women. *Id.* at 54. Discussing the causes of this problem, Professor Rhoads notes that

These bills are a recent example of the push for a federally implemented pay equity law utilizing a comparable worth framework, and the proposals in these bills closely resemble elements of legislation implementing comparable worth on the state level.¹⁵³ If enacted, these laws will signify a significant step toward implementing comparable worth on the federal level.¹⁵⁴

The Paycheck Fairness Act (“PFA”) was introduced in 2003, and reintroduced in 2005, in both the House and Senate.¹⁵⁵ Much of the media attention associated with the Paycheck Fairness Act comes as a result of the fact that Senator Clinton introduced it and was a vocal proponent for it in the Senate.¹⁵⁶ In the congressional record, she made it clear that this bill was introduced as a remedy to the problem of the gender wage gap—an issue which is important, and which has not faded from public concern since the introduction of the Fair Pay Act of 1994.¹⁵⁷ However, the means this bill chooses in order to correct wage inequality is not the most reasonable and may yield the opposite result of its intended effect.¹⁵⁸

because comparable worth increases the cost of predominately female jobs, the state has hired fewer women than it otherwise would have While there is debate over the extent of disemployment, researchers agree that it has occurred to some degree. Elaine Sorensen calculates that women’s state employment declined 1.35 percent from what it otherwise would have been. Mark Killingsworth calculates the job losses for women as perhaps three times as high.

Id.

153. Compare Fair Pay Act of 2005, H.R. 1697, 109th Cong. § 3 (2005), Fair Pay Act of 2005, S. 840, 109th Cong. § 3, Paycheck Fairness Act, H.R. 1687, 109th Cong. § 10 (2005), and S. 841, § 10, with MINN. STAT. ANN. § 417.991-99 (West 2001).

154. See DALE, *supra* note 13, at 8-12; LEVINE, *supra* note 13, at 14-16.

155. Paycheck Fairness Act, H.R. 1687, 109th Cong. (2005); Paycheck Fairness Act, S. 841, 109th Cong. (2005); Paycheck Fairness Act, S. 76, 108th Cong. (2003); Paycheck Fairness Act, H.R. 1688, 108th Cong. (2003).

156. See 151 CONG. REC. S3865, S3900-01 (daily ed. Apr. 19, 2005) (statement of Sen. Clinton); see *supra* note 19 and accompanying text, for a discussion of the media attention surrounding Sen. Clinton’s presidential campaign.

157. Fair Pay Act of 1994, H.R. 4803, 103d Cong. (1994). Efforts to reduce the wage gap are a regular occurrence in the House and Senate. See, e.g., Fair Pay Act of 2003, H.R. 1695, 108th Cong. (2003); Paycheck Fairness Act, S. 76, 108th Cong. (2003); see STEVEN C. KAHN & BARBARA BERISH BROWN, LEGAL GUIDE TO HUMAN RES. § 16.71 (2006) (noting that “[i]ssues of pay discrimination have been receiving renewed attention in the last several years”).

158. In Minnesota, because less female public sector employees were hired as a result of similar legislation, it seems likely that the enactment of the proposed federal legislation will only add to the problem of discriminatory exclusion of women from the workplace. See RHOADS, *supra* note 34, at 52-54. In addition, enactment of such laws may present Constitutional problems under the Equal Protection Clause of the Fourteenth Amendment. Because implementation of comparable worth on the state level has yielded the opposite of its intended effects, see *id.* at 52, 54, it seems

Seeking to give teeth to the remedies in sex-based wage discrimination cases, and to correct the problem of the gender wage gap, this bill aims to amend the EPA in a number of ways. First, under proposed section 3, the PFA seeks to enhance enforcement of the EPA by 1) weakening the employer's affirmative defenses under the EPA, 2) making the EPA applicable to job applicants, 3) eliminating the "establishment requirement" in the EPA, 4) prohibiting retaliation by employers for discussing or seeking pay information as part of an investigation, 5) enhancing the penalties against employers to include "compensatory or punitive damages," 6) and allowing for class action lawsuits under the EPA.¹⁵⁹ Secondly, the bill will also provide additional funding for training EEOC employees, for other EEOC administrative purposes, negotiation skills training programs for girls and women, education and community outreach to help combat pay inequity, awards to recognize employers who eliminate pay disparities, and resources to conduct surveys with employers in order to issue regulations to better provide for the collection of pay information data from employers.¹⁶⁰ Finally section 10 of the bill will create a "pay equity" enforcement system by directing the Department of Labor to develop and publish guidelines for comparing job categories based on criteria such as educational requirements, skill requirements, level of independence, working conditions and responsibility.¹⁶¹ Any new regulations promulgated by the Department of Labor under section 10, require that "in establishing standards for similarly situated employees" with respect to "compensation discrimination cases," the Secretary of Labor shall include examples of "similar jobs," and therefore section 10 provides the framework for a job evaluation system to compare similar jobs.¹⁶² By evaluating different jobs to determine comparability, victims of sex

unlikely that the means of the proposed legislation is substantially related to the ends it seeks. U.S. CONST. amend. XIV; *see Craig v. Boren*, 429 U.S. 190, 197 (1976) (noting that legislative classifications by gender must serve "important governmental objectives and must be substantially related to achievement of those objectives," to avoid a violation of the Equal Protection Clause). Additionally, by excluding men from the negotiation skills training benefits of the Paycheck Fairness Act of 2005, the bill may reinforce stereotypes about women's inability to work alongside men in certain careers. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982); S. 841, § 5; H.R. 1687, § 5.

159. H.R. 1687, § 3(a)-(e); S. 841, § 3(a)-(e); *see* The Paycheck Fairness Act: Helping to Close the Wage Gap for Women, Nat'l Comm. on Pay Equity: Nat'l Women's Law Center, <http://www.pay-equity.org> (last visited Feb. 22, 2007) (discussing how the establishment provision limits claims of different pay to workers in the same establishment).

160. H.R. 1687, §§ 4-9; S. 841, §§ 4-9.

161. H.R. 1687, § 10; S. 841, § 10.

162. H.R. 1687, § 10; S. 841, § 10.

discrimination who hold a lesser paying job can recover the same amount of money as a higher paying job (or vice versa), so long as the jobs are deemed by the Secretary of Labor to be “similar jobs.” This means that for some jobs that currently pay less than others, employees discriminated against in those jobs (the lesser-paying jobs), will be more likely to obtain greater recoveries against employers if the Secretary of Labor finds them to be similar.¹⁶³

3. The Fair Pay Act

The Fair Pay Act (“FPA”), introduced in the House and Senate in 2005,¹⁶⁴ seeks to amend the EPA by remedying underpayment of workers in more traditionally female occupations, such as teaching, nursing and social work.¹⁶⁵ The Act also aims to prohibit wage discrimination based on sex, race, and national origin among jobs that entail “work of equivalent value,” which is defined as jobs that “may be dissimilar,” but that require equivalent skills, effort, responsibility and working conditions.¹⁶⁶ The bill was introduced as a means of correcting the pay between jobs that “should” be paid the same—even if the jobs are in dissimilar occupations that nonetheless are deemed to have equivalent skills, effort, responsibility, and working conditions.¹⁶⁷ For example, Senator Tom Harkin of Iowa, the bill’s sponsor, noted that parole officers, who are mostly male, and social workers, generally female, are called upon to do many of the same tasks but do not receive the same pay.¹⁶⁸ The bill would also require employers to keep records that document their methods in establishing, adjusting, and determining the wages paid to employees.¹⁶⁹

163. See H.R. 1687, § 10; S. 841, § 10.

164. Fair Pay Act of 2005, H.R. 1697, 109th Cong. (2005); Fair Pay Act, S. 840, 109th Cong. (2005).

165. See 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statement of Sen. Harkin); Press Release, U.S. Sen. Tom Harkin of Iowa, Harkin Fights for Pay Equity Introduces the Fair Pay Act on Equal Pay Day (Apr. 19, 2005), <http://www.harkin.senate.gov/news.cfm?id=236573> [hereinafter Harkin].

166. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statement of Sen. Harkin); *Washington v. Gunther*, 452 U.S. 161, 184-86 (1981) (Rehnquist, J., dissenting) (providing a history of unsuccessful legislative attempts to amend the EPA to incorporate a comparable worth standard); see ROBERT S. SHWARTS & ALEXANDER M. SPERRY, PRACTISING LAW INST., EMPLOYMENT LAW YEARBOOK § 5:3.5 (2006).

167. 151 CONG. REC. S3865, S3900-01 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton).

168. Harkin, *supra* note 165.

169. H.R. 1697, 109th Cong. § 6(a)(2) (2005); S. 840, 109th Cong. § 6(a)(2) (2005).

4. The Paycheck Fairness Act Does Not Propose a Reasonable Solution to Minimizing Gaps in Pay and Participation.

The following analysis of the proposed legislation will focus more specifically on the PFA, although both bills will be discussed. Even though the PFA provides for some reasonable measures that will likely benefit working women, many measures within the bill, however, do not propose a reasonable means to obtain the goals desired. While discussed more at length *infra*, the main arguments against enactment of the PFA are briefly outlined below.

First, section 10's implementation of a "similar jobs" standard for future EPA regulations is a step toward loosening the "substantially equal" jobs requirement under the EPA, and this is inconsistent with the purpose of the EPA.¹⁷⁰

Secondly, the potential effect of the proposed employer inquiries and increased authority given to the Department of Labor to evaluate and determine the relative merit or difficulty of jobs will likely stigmatize workers who were already discriminated against.¹⁷¹ If enacted, this law may force some discriminated-against workers to reduce their claims as a result of the new system.¹⁷² For example, the government would be forced to tell some employees that their jobs are worth less than they had previously believed for purposes of such claims.¹⁷³ Along these lines, employers seeking to comply with the new law could be forced to adjust future pay systems to pay some workers less who had thought, due to the market, that their jobs were worth more.¹⁷⁴

The third problem is that weakening affirmative defenses and eliminating the establishment provision of the EPA will make it very difficult for employers, particularly smaller employers, to compete in the global and knowledge-based economy.¹⁷⁵

The fourth problem is that enactment of the PFA will likely mean

170. Compare Paycheck Fairness Act, H.R. 1687, 109th Cong. § 10(b)(C)(2) (2005), and Paycheck Fairness Act, S. 841, 109TH Cong. § 10(b)(C)(2) (2005), with 109 CONG. REC. 9182, 9197-98 (1963) (statements of Rep. Goodell and Rep. Griffin).

171. See H.R. 1687, §§ 6-7, 9-10; S. 841, §§ 6-7, 9-10.

172. See H.R. 1687, §§ 6-7, 9-10; S. 841, §§ 6-7, 9-10.

173. See H.R. 1687, §§ 6-7, 9-10; S. 841, §§ 6-7, 9-10.

174. It should be noted that, because of section 3(a) of the PFA, this salary diminution would likely only happen with respect to increases in wages that were to occur in the future as employers would be prohibited from "reducing the wages of any employee in order to achieve compliance." See H.R. 1687 § 3(a).

175. See H.R. 1687, § 3(a), (c); S. 841, § 3(a), (c); *supra* notes 111-14 and accompanying text.

higher costs to employers seeking to hire women, likely resulting in less hiring of women, and only adding to the problem of discrimination in the form of exclusion and the problem of recent decreasing participation levels of women workers in the U.S. economy.¹⁷⁶

Furthermore, enactment may lead to problems of judicial interpretation, as there is considerable ambiguity in the language of the PFA.¹⁷⁷ Although references are made in the PFA to pay equity and to solving the problems of the gender wage gap, the language referring to how this bill seeks to change the EPA is unclear.¹⁷⁸ For example, the PFA gives the Department of Labor the discretion to promulgate regulations based on a “similar jobs” standard.¹⁷⁹ The language is ambiguous because the use of the phrase “similar jobs” is likely intended to create a lower standard than “substantially equal,” the current EPA standard, but no further definitional clarification is given.¹⁸⁰

Similarly, the PFA has been interpreted by commentators as comparable worth legislation,¹⁸¹ and yet, when introducing the PFA, Senator Clinton announced that the bill would “build on the promise of the Equal Pay Act”¹⁸² even though the EPA’s drafters explicitly precluded consideration of comparable worth.¹⁸³ Although the words “comparable worth,” are never explicitly invoked in the statute, the job comparison and evaluation system and other elements of the bill seem based on a comparable worth framework, and the bill can be easily interpreted as urging an “equal pay for comparable work” standard.¹⁸⁴

5. Problems of the Proposed Legislation

Both bills, the PFA and the FPA (“the proposed legislation”), fail to provide reasonable solutions to the problems of the gender wage gap and women’s decreasing workplace participation. First, the bills are

176. See H.R. 1687, §§ 3, 6-7, 9-10; S. 841, §§ 3, 6-7, 9-10; RHOADS, *supra* note 34, at 54.

177. See H.R. 1687, §§ 6-7, 10; S. 841, §§ 6-7, 10.

178. See H.R. 1687, §§ 2, 6-10; S. 841, §§ 2, 6-10.

179. H.R. 1687, § 10(b)(C)(2); S. 841, § 10(b)(C)(2).

180. H.R. 1687, § 10(b)(C)(2); S. 841, § 10(b)(C)(2); 109 CONG. REC. 9182, 9197-98 (1963) (statements of Rep. Goodell and Rep. Griffin); see HUTNER, *supra* note 80, at 23, 30-32 (discussing the meaning of the current Equal Pay standard and its history).

181. SHWARTS, *supra* note 166; LEVINE, *supra* note 13, at 14-16, 25-26 (analyzing an earlier version of the Paycheck Fairness Act as comparable worth legislation); see DALE, *supra* note 13, at 8-16.

182. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statement of Sen. Clinton).

183. 109 CONG. REC. 9182, 9195-98 (1963) (statements of Rep. Goodell and Rep. Griffin).

184. See H.R. 1687, §§ 9-10; S. 841, §§ 9-10; SHWARTS, *supra* note 166; LEVINE, *supra* note 13, at 14-16, 25-26; DALE, *supra* note 13, at 8-12.

ambiguous. The proposed legislation, on its face, closely resembles comparable worth legislation enacted in the states,¹⁸⁵ and it has been interpreted as such,¹⁸⁶ and yet, with the exception of references to pay equity, the legislation does not explicitly mention implementing comparable worth.¹⁸⁷

As discussed earlier, in the congressional record of the proposed legislation, the proponents of both bills attempt to argue that these bills comport with the EPA's intent, even though, in fact, the legislative history of the EPA explicitly refuses adopting a comparable worth standard.¹⁸⁸ This creates ambiguity which will likely confuse judges interpreting the proposed legislation.¹⁸⁹ For example, although Senator Harkin states that the FPA's goal is to promote and to better enforce "equal pay for equal work,"¹⁹⁰ an examination of its proposals, particularly section 3's provision on comparing the worth of "dissimilar jobs," reveals its likely aim of effectuating "equal pay for comparable work."¹⁹¹

Even if proponents of the proposed legislation intended solid consistency with the EPA, enactment will only send mixed messages to judges charged with deciding wage-based sex discrimination claims. As

185. Compare S. 840, §§ 3, 6, and S. 841, §§ 9-10, with MINN. STAT. §§ 471.991-99 (West 2001).

186. See *supra* note 181 and accompanying text.

187. The proposed legislation, on its face, does not mention "comparable worth." See generally H.R. 1687 §§ 1-11; S. 841 §§ 1-11; H.R. 1697 §§ 1-9; S. 840 §§ 1-9.

188. Compare 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statements of Sen. Harkin and Sen. Clinton), with 109 CONG. REC. 9182, 9197-98 (1963) (statements of Rep. Goodell and Rep. Griffin).

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 We expect this to apply only to jobs that are substantially identical or equal.

109 CONG. REC. 9182, 9197 (1963) (statement of Rep. Goodell).

189. See ABNER J. MIKVAH & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4-16 (1997) (discussing the scope and power of judicial discretion in interpreting legislation).

190. 151 CONG. REC. S3865, S3900 (daily ed. Apr. 19, 2005) (statement of Sen. Harkin).

191. See H.R. 1697, § 3(a)(4)(B); S. 840, § 3(a)(4)(B). "The term 'equivalent jobs' means jobs that may be dissimilar but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." H.R. 1697, § 3(a)(4)(B); S. 840, § 3(a)(4)(B). Even though the proposed legislation is entitled "pay equity" legislation, legislation using the name "pay equity" often incorporates comparable worth theory. See, e.g., Minnesota Pay Equity Act, MINN. STAT. ANN. §§ 471.991-92 (West 2001); Pay Equity Act, R.S.O., ch. 34 (1987) (Can.); Equal Pay Act, 1970, c. 41, § 1(1) (U.K.).

Professors Abner J. Mikvah and Eric Lane explain, when language of a statute is unclear, courts are confronted with the difficult task of providing meaning to a provision of a statute without clear direction from its language.¹⁹² In essence, these scholars suggest, when confronted with such a dilemma, judges are asked to make policy choices.¹⁹³ Although this ambiguity exists in both bills, the FPA is less ambiguous and more likely to be interpreted as a comparable worth bill because it indicates that the FPA will promote evaluation of “dissimilar jobs,” whereas the PFA only mentions “similar jobs.”¹⁹⁴

Furthermore, both bills are ambiguous for not adequately defining the word “similar.” Section 10 of the PFA impliedly leaves interpretation of this standard up to the discretion of the Department of Labor.¹⁹⁵ Similarly, the FPA uses the terms “dissimilar jobs,” but no attempt is made to place limits on this terminology, or even to define what “dissimilar” means within that phrase.¹⁹⁶

The problem is that in EPA lawsuits, these bills, if enacted, could be interpreted by a judge to mean that employees with very different jobs, with very different pay structures, could be entitled to the same recovery from an employer in a lawsuit.¹⁹⁷ Under the proposed legislation, it is possible that a judge could decide that a highly trained nurse should be paid the same as a doctor if, for example, they had similar work experience, similar working conditions, similar skills, or other similarities in the conditions of their employment,¹⁹⁸ because specific limits as to how the job comparer will be able to decide on such things, are notably absent in both bills.¹⁹⁹ In general, the proposed legislation lacks specific delineations as to employee skill requirements.²⁰⁰

Under the PFA, a conclusion by the Secretary of Labor that a dissimilar job should be deemed “similar” would be unfair to employers who may want to promote someone by providing a higher salary, say a worker who has demonstrated superior ability in attaining sales commissions, but as a consequence of this law, may feel precluded from

192. See MIKVAH & LANE, *supra* note 189, at 8-16.

193. *Id.* at 5.

194. Compare H.R., 1697 § 3(a)(4)(B), and S. 840, § 3(a)(4)(B), with H.R. 1687, § 10, and S. 841, § 10.

195. See H.R. 1687, § 10; S. 841, § 10.

196. See H.R. 1697, § 3(a)(4)(B); S. 840, § 3(a)(4)(B).

197. See H.R. 1697, § 3(a)(4)(B); S. 840, § 3(a)(4)(B).

198. See H.R. 1697, § 3(a)(4)(B); S. 840, § 3(a)(4)(B).

199. See H.R. 1687; S. 841; H.R. 1697; S. 840.

200. See H.R. 1687; S. 841; H.R. 1697; S. 840.

initiating such a promotion because it would require promoting all female positions that are deemed comparable to avoid potential litigation.²⁰¹

There are other problems associated with implementing these proposed laws. Consider statements made about the purpose of the FPA in its legislative history. Senator Harkin noted that across the country social workers and parole officers do similar work and are not paid the same, but should be paid equally.²⁰² The major problem with this assessment, however, is that it is hard to objectively evaluate different occupations in terms of pay. For example, some parole officers may face more risk of death or substantial injury than social workers, and some social workers may have more grueling hours, or even more risk than parole officers, making it difficult for the government to consider all of these elements.²⁰³ In other words, although it is true that a social worker and parole officer may have similar job duties, why should the government be able to decide that these jobs should pay the same, and how should the government realistically assess the comparability of such duties and work conditions when such things differ drastically across different regions of the United States?²⁰⁴

Thus, enforcement is another problem. Even if the Secretary of Labor under the PFA, a government comparer, was equipped with the best researchers and management studies in the world, he or she could not adequately measure what would be relevant, and what would not, with respect to each individual occupation's particular educational requirements, skills, working conditions, and other factors of employment in every region of the United States.²⁰⁵ In addition to the fact that such legislation seems unlikely to be effectively and fairly implemented across the nation, such legislative attempts to move our society in this direction place a great deal of power in unelected administrative agencies²⁰⁶—setting a dangerous precedent—making

201. See H.R. 1687, § 10(b)(C)(2); S. 841, § 10(b)(C)(2).

202. 151 CONG. REC. S3865, 3900 (daily ed. Apr. 19, 2005) (statement of Sen. Harkin); Harkin, *supra* note 165; see also Diane E. Lewis, *Compensation Bid to Narrow Gender Wage Gap Faces Fight*, BOSTON GLOBE, Apr. 24, 2005, at G2.

203. See Weiler, *supra* note 43, at 1733 (presenting compelling arguments for why the market should determine wages); Lukas, *supra* note 105 (noting that jobs with increased risk generally pay more).

204. Such legislation seems to dramatically expand the power of government over private economic actors.

205. In light of the implementation difficulties of comparable worth systems on the state level, federal implementation seems to present even larger problems. For an example of the administrative difficulties of comparable worth implementation, see Winebrenner, *supra* note 74, at 213-19.

206. See, e.g., S. 841, § 10(b)(C)(2); S. 840, § 3(a)(B); see also Lukas, *supra* note 105

government interference with the market easier in the future.²⁰⁷

There are other potential pitfalls as well. Those hired by the government to compare could become corrupt, accepting bribes to rate a particular job with higher points in order for a group of employees to obtain a higher judgment.²⁰⁸ Even without such corruption, the discretion granted to the Department of Labor alone may allow for favoritism and bias, thereby undermining market-based expectations of the value of work within occupational hierarchies as well as undermining individuals' sense of pride in their work.²⁰⁹ For these reasons, legislative steps toward a federal comparable worth policy will likely result in undermining employee incentives to gain additional educational credentials.²¹⁰ In sum, even if the potential for corruption is small, the potential for governmental bias and favoritism seems rather great,²¹¹ and when considering the dangers this can create, any steps toward legislative maneuvering with employees' sense of worth in their work will only decrease employee morale.²¹²

In addition, other amendments under the PFA, including the proposal for weakening employer affirmative defenses and the elimination of the establishment provision in the EPA, will both make it harder for employers to compete in the global workplace.²¹³ When discussing the EPA and the PFA, the National Committee on Pay Equity ("NCPE") noted that the proposed amendments would relax the standards for claims against employers by allowing jobs of comparable value in different locations of the same firm (through the elimination of the establishment provision) to be treated the same for purpose of sex discrimination claims under the EPA.²¹⁴

(discussing the disastrous consequences of empowering the government to make determinations of comparable worth).

207. Cf. *AFSCME v. State of Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985) (recognizing the importance of free market forces in determining wages); see also Lukas, *supra* note 105, at 5 (noting that an "army of government bureaucrats" may be required if comparable worth bills are passed).

208. See generally GOLD, *supra* note 32, at 47-48 (discussing different types of biases that can occur in job evaluation); RHOADS, *supra* note 34, at 82-86 (discussing problems with bias in comparable worth legislation already implemented in Minnesota and other localities).

209. See, e.g., S. 841, § 10(b).

210. See RHOADS, *supra* note 34, at 48.

211. *Id.* at 82-86.

212. See *id.* at 83-84.

213. See S. 841, § 3(a), (c); H.R. 1687, § 3(a), (c); *supra* notes 111-14 and accompanying text.

214. The Paycheck Fairness Act: Helping to Close the Wage Gap for Women, Nat'l Comm. on Pay Equity: Nat'l Women's Law Center, <http://www.pay-equity.org> (last visited Jan. 19, 2007) ("[T]he Act clarifies that a comparison need not be between employees in the same physical place of business.").

To understand how this would work, it may be helpful to consider the case of *Rapson v. Development Authority of Peachtree City*,²¹⁵ in which the court considered a comparable worth claim involving unequal pay between two very different occupations among two different locations of the same firm.²¹⁶ Although the court considered wage differences between a theater director and a tennis center sports store manager in two different locations of the same firm, the court acted reasonably when it dismissed the comparable worth claims under the EPA and Title VII for failure to establish either “equal pay for equal work” or the requisite level of discrimination.²¹⁷ If such bills were enacted in the future, in similar cases, the court may be forced to more deeply scrutinize such a claim, and further entertaining cases like this, where very different jobs are compared, in different locations, and with little evidence of discrimination, would be a significant waste of time and money for the judicial system, for employers, and the tax-paying public.²¹⁸

Another consideration, increased employee reporting measures under section 9, would additionally burden employers seeking to comply with the EPA.²¹⁹ If enacted, employers would have the additional burden of closely regulating pay differentials between different occupational titles, and in different locations, and small employers may be faced with the costs of hiring professional staff to keep up with the additional compliance requirements.²²⁰

It also should be noted that under the PFA—only women—and not other similarly disadvantaged minorities would be entitled to the benefits of the legislation. For example, in addition to the other benefits of the bill, section 5 of the PFA would offer negotiation skills training programs, but only for “girls and women.”²²¹ As such, this bill resembles

215. No. 3:02-CV-7-JTC, 2004 WL 1944846, at *1-2, 5 (N.D. Ga. Mar. 31, 2004) (holding that there was insufficient evidence of discrimination where plaintiff amphitheater director alleged a violation of the EPA and sex discrimination under Title VII against employer after the employer paid higher compensation to a male director of a tennis center operated at a different location).

216. *Id.* at *1-2.

217. *Id.* at *4-5.

218. *See id.*

219. S. 841, § 9; H.R. 1687, §9; *see DALE, supra* note 13, at 12-18.

220. *See* S. 841, § 9; H.R. 1687, §9. Not all employers will likely be able to comply without cost. Compliance with comparable worth systems implemented by administrative agencies likely require expert or professional guidance. *See* PAY EQUITY OFFICE, MINN. DEP’T. OF EMPLOYEE RELATIONS, GUIDE TO UNDERSTANDING PAY EQUITY COMPLIANCE AND COMPUTER REPORTS (2006), <http://www.doer.state.mn.us/lr-peqty/images/pdf-file/peguide.pdf>.

221. *See* S. 841, § 5; H.R. 1687, § 5 (providing “negotiation skills training for girls and women”).

a government-imposed affirmative action program where benefits only flow toward a status based on sex and not to other minorities who may be equally or more discriminated against in the workplace.²²² Enactment of the proposed legislation would in essence create a preference for women over other minorities who may be equally or more disadvantaged, and such a preference may also reinforce stereotypical notions about women's role in the workplace.²²³

In addition to these problems, as noted earlier, in a more global economy, where even a small firm may have offices in two or three different countries, there are sizeable compliance difficulties that employers will likely face. Employers pay employees differently based on location for a number of reasons, including market rates for labor, cost of living, and a host of other costs.²²⁴ Such bills therefore present a significant hurdle to firms working abroad as they would be forced to consider a diverse array of information about international living expenses, currencies, and other cost considerations in addition to the difficulty of understanding the public finance know-how required just to interpret such systems.²²⁵ These labor costs only add to the reasons U.S. employers hire from abroad.²²⁶

Furthermore, the PFA does not directly address the problem of decreasing workplace participation of women workers, a problem that

222. Although this concern should be saved for another article, it is a relevant consideration. See U.S. CONST. amend. XIV; *Grutter v. Bollinger*, 539 U.S. 306, 306-08 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 289-90 (1978).

223. See *supra* note 222 and accompanying text; see also *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2004) (discussing the problem of stereotypes about women in the workplace); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, (1978) (J. Powell noting the impact of affirmative action legislation).

224. Weiler, *supra* note 43, at 1758.

225. See, e.g., PAY EQUITY OFFICE, MINN. DEP'T. OF EMPLOYEE RELATIONS, GUIDE TO PAY EQUITY COMPLIANCE AND COMPUTER REPORTS (2006), <http://www.doer.state.mn.us/lr-peqy/images/pdf-file/peguide.pdf> (explaining pay equity guidelines for public sector employers); Employer Pay Equity Self-Audit, National Committee on Pay Equity, <http://www.pay-equity.org/cando-audit.html> (last visited Jan. 19, 2007) (explaining pay equity guidelines for private sector employers).

226. See Marley S. Weiss, *Two Steps Forward, One Step Back-Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 701-03 (2003) (noting that in recent years the increase of international labor agreements with minimal labor protections, have allowed employers to more easily hire in other countries like Mexico). Outsourcing of jobs to the South and to other countries with cheaper labor has become a more common phenomenon for U.S. employers in the global workplace. WORK LAW: CASES AND MATERIALS 39 (Marion G. Crain, et al. eds., 2005) (noting that globalization of labor markets and "outsourcing of manufacturing and other low-skilled jobs to the south or to western states where union density is low and more recently to low-waged foreign countries" is leading to a decline in union membership).

would likely become worse if the proposed legislation were implemented. In Minnesota, because of the increased costs of hiring women after enactment of the comparable worth legislation, fewer women were hired.²²⁷

6. Equal Pay Act, Title VII, and National Economic Policy

The proposed legislation is not only inconsistent with the current laws it seeks to expand, but also with our national economic policy reflected in those laws. The Equal Pay Act of 1963 ("EPA"),²²⁸ and Title VII of the Civil Rights Act of 1964 ("Title VII"),²²⁹ are both designed to protect employees from discrimination in pay, but at the same time, both statutes refuse to entertain claims based on a comparable worth theory because such a theory is inconsistent with a U.S. economic policy grounded in free market principles.²³⁰

Both the EPA and Title VII allow claims for sex discrimination on the basis of wages, however, Title VII's standard with respect to wage discrimination claims is less defined.²³¹ The Bennett Amendment to the

227. RHOADS, *supra* note 34, at 54.

228. 29 U.S.C. § 206(d)(1) (2000). The Act provides:

No employer . . . 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

§ 206(d)(1).

229. 42 U.S.C. § 2000e-2(a) (2000). Title VII states, in relevant part:

Employer practices 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.

§ 2000e-2(a).

230. See *AFSCME v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985); 109 CONG. REC. 9182, 9195-98 (1963) (statements of Rep. Goodell and Rep. Griffin).

231. *AFSCME*, 770 F.2d at 1404-05 (discussing the fact that Title VII's legislative history is

EPA,²³² discussed in *Gunther*,²³³ was designed to “relate Title VII to the Equal Pay Act . . . and eliminate any potential inconsistencies between the two statutes.”²³⁴ It allows defendants in Title VII suits to use the affirmative defenses listed in the EPA.²³⁵ The Bennett Amendment, interpreted in conjunction with the legislative history of the EPA, has allowed courts to dismiss comparable worth claims where an employer has paid women less than men working in comparable, but dissimilar jobs as a result of market factors.²³⁶

In *Grigoletti v. Ortho Pharmaceutical Corp.*,²³⁷ a case distinguishing equal from comparable work, the court discusses the purpose of the EPA.

The protections of the EPA were significant in the context of labor and employment law, and its special concern was for the status of women in the work force. Although the EPA ‘was intended as a broad charter of women’s rights in the economic field . . . [and] sought to overcome the age-old belief in women’s inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it . . . its focus is sharp.’²³⁸

The court, looking at the legislative history of the EPA, affirmed the supposition that even though legislators were seeking to level the playing field between men and women, the standard remains equal pay for equal work and not equal pay for comparable work.²³⁹

Both the EPA’s “substantially equal” work standard,²⁴⁰ and Title VII’s “substantially similar” work standard, as discussed in the case law interpreting them, are a reflection of our national economic policy—a

brief); see Weiler, *supra* note 43, at 1732-43 (discussing the broader standard of Title VII, and noting that both statutes allow recovery for proof of discrimination even if comparable worth evidence is dismissed).

232. 42 U.S.C. § 2000e-2(h) (2000).

233. *Washington v. Gunther*, 452 U.S. 161, 167-80 (1981).

234. *AFSCME*, 770 F.2d at 1404 (citing *Gunther*, 452 U.S. at 173-76).

235. § 2000e-2(h) (providing a defense under the Bennett Amendment to Title VII where the wage differential was based on factors other than sex).

236. *AFSCME*, 770 F.2d at 1408.

237. 570 A.2d 903 (N.J. 1990).

238. *Id.* at 908.

239. *Id.* (“Unlike Title VII, the EPA concentrates exclusively on assuring ‘equal pay’ in certain situations where members of the opposite sex are performing ‘equal work.’”).

240. 29 U.S.C. § 206(d)(1) (2000); Weiler, *supra* note 43, at 1733 (noting that this standard is interpreted as equal pay for “substantially equal” work).

policy shaped by free-market principles.²⁴¹ Although not completely adopting Smith's invisible hand, the cases in this section show that the United States has long emphasized competition, risk-taking, and other free market ideas as valuable principles, and similarly, ideals and personal goals involving elements of risk and competition attract attention in American popular culture.²⁴² Stories of financial risk-taking have even sold bestsellers.²⁴³ Such free market principles are reflected in other areas of our legal doctrine. For example, both the use of state action doctrine in will administration,²⁴⁴ and the freedoms provided to corporate decision-makers under the abstention doctrine conception of the business judgment rule give consideration to such principles.²⁴⁵

III. EXPLORING VARIOUS MODELS TO EFFECTUATE THE GOALS OF COMPARABLE WORTH THEORY

A. Examining Feminist Legal Theories Promoting Economic Equality

Although generally unified in a commitment to sexual equality, feminist legal theorists suggest different models to achieve this equality with men in the workplace. This section will examine proposed models to effectuate social and legal change. Furthermore, these models will be explored to evaluate their utility in improving women's wages and participation levels in the workplace. This section will also attempt to

241. *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719 (7th Cir. 1986); *AFSCME*, 770 F.2d at 1405, 1407; *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 697, 708 (9th Cir. 1983).

242. *See supra* note 241 and accompanying text; GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 24 (1980) (discussing the significance of the American metaphor "time is money").

243. *E.g.*, DONALD J. TRUMP & TONY SCHWARTZ, *TRUMP: THE ART OF THE DEAL* (1987) (national bestseller glamorizing risk taking); ROBERT G. HAGSTROM, *THE WARREN BUFFETT WAY: INVESTMENT STRATEGIES OF THE WORLD'S GREATEST INVESTOR* (1995).

244. *See, e.g., In re Estate of Wilson*, 452 N.E.2d 1228, 1235 (N.Y. 1983) (allowing a decedent to administer trust assets to male students as a preference over female students with no finding of the requisite state participation to fall under the purview of the Equal Protection Clause of the Fourteenth Amendment).

245. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (noting that directors are elected for their business judgment and that courts can not interfere with, or disregard, their decisions simply because of the fact that others may disagree); *A.P. Smith Mfg. Co. v. Barlow*, 97 A.2d 186, 191-92 (N.J. Ch. 1953) (upholding a corporate board's decision to donate money to local universities as a valid exercise of the business judgment rule even though the corporation was formed before the New Jersey statute authorizing corporate donations was enacted); *Kamin v. Am. Exp. Co.*, 383 N.Y.S.2d 807, 810-11 (N.Y. Sup. Ct. 1976); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 83, 95 (2004).

develop a more persuasive legislative model than comparable worth.

Professor Christine Littleton developed a persuasive model to establish social and legal change for women—a model that argues that differences between men and women should not be ignored, and that such differences are not “problematic per se,” rather, it is important to focus on the ways in which differences are “permitted to justify inequality.”²⁴⁶ In other words, the law should focus not on trying to make men and women act and behave equally, but rather, it should outlaw injustices that result from their differences.²⁴⁷ She calls her model, which she defines as an “asymmetrical model,” the model of “equality as acceptance.”²⁴⁸

Littleton describes her model through both a sporting arena and workplace analysis,²⁴⁹ and suggests challenging overvalued male skills and undervalued female skills by allocating resources equally for male and female sports programs.²⁵⁰ Although this model may sound like a comparable worth theory, Littleton distinguishes her model from comparable worth by arguing that her model is broader and applies to all “behavioral forms,” not just those of the workplace.²⁵¹ In this respect, her model is more of a shift toward appreciating difference—valuing men’s and women’s distinct skills rather than forcing them to be the same.²⁵² Her approach, like a comparable worth approach, would discard models using asymmetrical fund allocation for more popular male programs over less popular female programs.²⁵³ However, unlike comparable worth models, Littleton’s model is not a symmetrical model, and therefore allows for recognition of biological difference between men and women, even though it rightfully challenges discriminatory treatment which results from such differences.²⁵⁴ Thus, Littleton’s model is more comprehensive and more inclusive of the totality of work experience, than models based entirely on intentional discrimination.

In application, Littleton’s model suggests that resources be devoted equally to separate male and female athletic programs, regardless of the

246. Littleton, *supra* note 21, at 36-37.

247. *Id.* at 37.

248. *Id.* “Asymmetrical approaches to sexual equality take the position that difference should not be ignored or eradicated. Rather, they argue that any sexually equal society must somehow deal with difference, problematic as that may be.” *Id.* at 36.

249. *Id.* at 44.

250. *Id.*

251. *Id.*

252. *See id.*

253. *Id.* at 45.

254. *See id.* at 44-46.

current rate of participation in these sports, in order to counteract the depressed rates of female participation in certain sports.²⁵⁵ In this way, women's sports programs would be given a chance to flourish without forcing men and women to play on co-ed teams when co-ed participation in the sports in question may reasonably be expected to lead to serious injury.²⁵⁶ In other words, Littleton's model accepts the fact that men and women are not exactly the same, but still tries to promote as much sex equality as possible.²⁵⁷

1. New Legislation Should Adopt a "Person" Standard Rather Than a "Male" Standard

Symmetrical models,²⁵⁸ as applied toward developing a new legislative theory, are not as likely to minimize wage and workplace participation gaps as Littleton's acceptance model.²⁵⁹ Assimilation, a symmetrical model, asserts that females should be treated just like males, and insists that female workers sacrifice the types of relationships that males have been forced to sacrifice.²⁶⁰ Littleton explains that the assimilation model compels women to conform to socially male forms of behavior, and if they conform, they achieve equality as social males.²⁶¹ This model reinforces female subordination by forcing women to achieve sexual "equality" by meeting male standards.²⁶² This model shows phallogocentric bias because the male sets the standard for equality, as opposed to the androgynous "person," and if the new model were to adopt a "male" standard, this would likely discourage women from working.²⁶³ Under symmetrical models, if female workers feel restricted by the workplace because they are expected to conform to male norms, this is likely to discourage women from participating in the workplace.²⁶⁴

Androgyny, another symmetrical model, encourages women and

255. *Id.* at 45.

256. *See id.* at 44-45.

257. *See id.* at 44-46.

258. Symmetrical models reject the generally accepted differences between males and females and instead view such purported differences as "illusions" that may be eliminated through "behavioral modification." *Id.* at 35.

259. *See id.* at 35-36, 40-45.

260. *Id.* at 35-36.

261. *Id.* at 40.

262. *Id.*

263. *Id.* at 36-45.

264. *Id.* at 35-37, 40-45.

men to meet half way and to treat both sexes as “androgynous people.”²⁶⁵ This model, according to Littleton, would require social reconstruction and could make both females and males unsatisfied in achieving a hypothetical middle ground.²⁶⁶ The androgynous model thus risks perpetuating sex inequality, and not solving it, by creating unrealistic standards.

Like the symmetrical models discussed above, asymmetrical models,²⁶⁷ other than Littleton’s acceptance model, are also not as persuasive for use in a new legislative model. For example, the asymmetrical model of accommodation acknowledges differences on a biological level, but ignores differences that may exist on a cultural level between females and males.²⁶⁸ As Littleton suggests, rather than discarding cultural differences between females and males, such differences should be confronted as a realistic factor in any workplace.²⁶⁹

Consistent with an acceptance model, legislative solutions should examine the origins of law, and discriminatory laws in society must change in order for society to reach the roots of sex inequality. At the same time, however, all of society should not be subjected to the consequences of expecting men and women to make the same choices, and legislative models attempting to increase gender equity should recognize difference.

2. Examining Gender Differences

A published conversation with Professors Carol Gilligan and Carrie Menkel-Meadow illustrates a need to examine differences between women and men.²⁷⁰ Professor Gilligan writes about a voice of care not heard in our society, a society guided by male dominated justice.²⁷¹ She provides an example of her care model when she asks us to consider a hypothetical involving two children. Amy and Jake, two children, are asked at both ages eleven and age fifteen whether a man should steal

265. *Id.* at 36.

266. *Id.*

267. Asymmetrical models acknowledge differences that exist between males and females. *See id.*

268. *Id.* at 37.

269. *Id.*

270. *See* Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values and the Law - A Conversation*, 34 *BUFF. L. REV.* 1, 36-63 (1985).

271. *See id.* at 36-49.

medication he cannot afford for his ailing wife.²⁷² Amy replies that the drug should be stolen at age fifteen, but at age eleven she did not reply with that response.²⁷³ Menkel-Meadow explains that Amy did not see the problem as a bi-polar choice, which is a justice approach.²⁷⁴ Amy fights with the hypothetical and wants to know more facts, while Jake analogizes the hypothetical to math problems.²⁷⁵ Amy moves up on the Kohlberg scale²⁷⁶ of development because at fifteen she replied that Heinz should steal the drug.²⁷⁷ These authors would suggest that it is troubling that the scale did not value compromise between Heinz and the pharmacist as the better answer.²⁷⁸

In sum, these scholars suggest that society at large, and the legal system in particular, may have been unduly swayed by the historical dominance of men in positions of power.²⁷⁹ Although they do not advocate that the justice system should be changed completely, the aforementioned authors are suggesting that compromise and mediation should rise to a new prominence over adversarial methods of problem-solving, and that the prevalence of males as the ones who made the laws may have narrowed the range of viable options for legal problem-solving.²⁸⁰ There are differences between men and women aside from biological differences, which could be recognized by the law, and which could be used to improve the narrow focus of current legislative models.²⁸¹

3. Addressing Child Care Concerns and the Work-Family Conflict

Child care concerns are an important factor to be considered in legislation seeking to deal with inequality in the workplace between men and women. Professor Mary Becker considers such concerns in *Care and Feminism*.²⁸² Professor Becker argues that caring for children is important to our economy because of the necessity to create and raise a

272. *Id.* at 40.

273. *Id.* at 41.

274. *Id.* at 51.

275. *Id.*

276. *Id.* at 41. (referring to a scale used to measure a child's psychological development).

277. *Id.* at 41.

278. *See id.* at 40-42, 51-53 (acknowledging that compromise is the better solution and that there is no mention of compromise on the Kohlberg scale).

279. *See id.* at 53; *see supra* notes 270-78 and accompanying text.

280. *See supra* notes 270-78 and accompanying text.

281. *See* Dubois, *supra* note 270, at 49, 51 (encouraging the American legal system to consider a method of problem-solving based on both male and female characteristics).

282. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 57-84 (2002).

new generation of “workers, citizens, and taxpayers,” and that despite these important considerations, children’s caregivers are generally “under- or uncompensated” for their labor.²⁸³ Further, she notes that the “costs of raising children and developing their capabilities are disproportionately borne by women,” even though all of society benefits.²⁸⁴ Becker proposes that greater support for “caretaking leave should be funded by an insurance fund like Unemployment Insurance.”²⁸⁵ She argues that society currently fails to adequately assess the value and importance of children because only a small percentage of our society’s resources are distributed to the caretaking of children.²⁸⁶

Child care concerns also play a significant role in the work-family conflict, which is confronted in both privileged and underprivileged homes, although the nature of the conflict is quite different in each. When this conflict occurs in single-parent homes receiving welfare, women are not presented with a choice of opting for either family or work.²⁸⁷ Even if torn between adequate care for their children and going to work, these women have no other choice but to go to work.²⁸⁸ Dorothy Roberts urges the need for economic freedom for poor women on welfare.²⁸⁹ Roberts advocates a welfare policy promoting economic freedom with a guaranteed income, support for postsecondary education and expanded subsidized child care.²⁹⁰ Although such a proposal would value the contribution that such women workers could provide to the workplace—and although this approach would probably muster support amongst theorists like Becker—there are still significant questions about implementing such a model for new employment legislation, particularly because such models may conflict with free-market principles inherent within U.S. national economic policy.²⁹¹ A focus on compliance with current anti-discrimination laws and making the public and employers aware of the effects of discrimination would be a valuable first step.

Privileged women, in contrast, endure an internal conflict between work and family involving the choice between staying at home and

283. *Id.* at 62.

284. *Id.*

285. *Id.* at 81.

286. *Id.* at 63.

287. Dorothy Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1029-31 (2004).

288. *Id.* at 1030.

289. *Id.* at 1059.

290. *Id.* at 1059-62.

291. See Becker, *supra* note 282, at 94 (stating that poor mothers have a greater need for support than other mothers and suggesting several ways that support could be gathered).

choosing a career.²⁹² Privileged women, like those described in Lisa Belkin's article, *The Opt-Out Revolution*,²⁹³ possess economic freedom to work and the financial means to provide quality child care, and as such, unlike poor women, they are faced with the problem of choice.²⁹⁴

In addition to these problems associated with the work-family conflict, Professor Becker also discusses the problem of free riding husbands—men who force the caretaker role onto their wives and who reject additional housework responsibilities.²⁹⁵ This phenomenon may likely be a cause of the decreased participation of women workers noted earlier.²⁹⁶ Professor Selmi, noting that women suffer financially because of their high probability of taking leave, suggests a solution to the work-family conflict, and a method of increasing women's worth in the workplace.²⁹⁷ He argues that society must work toward promoting an egalitarian family view with respect to childcare and housework,²⁹⁸ and that more flexible parental leave laws would help fix the gender wage gap, in addition to both men and women sharing caretaking and household responsibilities.²⁹⁹

Finally, Professor Vicki Schultz presents an inspirational ideal of what work could mean for women workers and for all workers. In her essay, *Life's Work*, she describes what she calls her utopian vision of the workplace—a vision in which “all women and men from all walks of life . . . would have a right to train for and pursue work of their own choosing, and each of us would earn a living wage by doing that work.”³⁰⁰ In this utopia, everyone would have the opportunity to “participate fully in family, friendship, politics, and civic life,” and child care and other needs would be subsidized by the state, along with periodic publicly-financed sabbaticals for all workers to engage in public service and to fulfill “caregiving commitments.”³⁰¹

Understanding women's diverse work experiences, as well as the different economic theories promoting equality in the workplace, facilitates minimization of wage gaps and gaps in workplace participation between men and women. It is imperative that lawmakers

292. Becker, *supra* note 282, at 91-92.

293. Belkin, *supra* note 10, at 42.

294. Compare Belkin, *supra* note 10, at 42, with Roberts, *supra* note 287, at 1029-1035.

295. Becker, *supra* note 282, at 93.

296. See *id.*; *supra* note 4 and accompanying text.

297. Selmi, *supra* note 1, at 708-12, 728-30, 781-82.

298. *Id.* at 709-09, 710, 714, 725-735, 738.

299. *Id.* at 709, 710.

300. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1883, 1939 (2000).

301. *Id.* at 1939.

make an expanded inquiry into women's needs in the workplace, and to consider the whole spectrum of women's issues before proposing any kind of legislation seeking to level the playing field between men and women.

B. Harmonization Labor Legislation: Models From Abroad

The problem of unequal pay, creating the need for comparable worth, has not gone away in this decade.³⁰² Certainly, discrimination against women in the workplace has also not disappeared.³⁰³ However, alternate solutions to these problems exist, and we need not alter or expand the Equal Pay Act to effectuate change for women.³⁰⁴

It should be noted that perhaps one of the problems with proposed comparable worth legislation is that it focuses only on solving the quantitative value of work, on the goal of closing-in the wage gap, and potentially increasing integration of female workers as a result of this. Considering the countries with radically different labor laws, perhaps this seemingly near-sighted problem, of focusing almost exclusively on wages, is uniquely American.³⁰⁵

If, however, the globalized marketplace "flattens the world," as one commentator has suggested,³⁰⁶ and makes communications and opportunities more readily available, our laws will likely have to change from pay-adjustment laws into what some have deemed "harmonization laws." These are laws which support and advise women about the job search, and then help them reemerge into the workforce—laws that do not function exclusively in the realm of wages—but rather, with a realistic understanding of the totality of a woman's circumstances, and laws which, ideally, will help her to be competitive in the global marketplace.³⁰⁷

302. See *supra* note 11 and accompanying text.

303. See *supra* note 1 and accompanying text.

304. New solutions may be found if legislators attempted to focus less on the narrow area of wages and more on access and opportunity to work—considerations which reflect the totality of the work experience.

305. For example, linguists have noted that the metaphor "time is money" is wholly integrated into the American perspective of work. LAKOFF & JOHNSON, *supra* note 242, at 8-9.

306. See generally FRIEDMAN, *supra* note 3, at 48-172 (discussing ten factors that have contributed to making the international marketplace more homogenous).

307. See *Preface* to HARMONIZATION, *supra* note 21, at ix.

The issue of harmonizing working life and family life is one which has recently come to the forefront of labour relations in many countries around the world. Probably the most significant single factor to explain this evolution is the dramatic increase of women in

1. Valuing Women's Work

Recent international statistical data has shown that with increasing numbers of women in the workforce since the 1960s, "the reality has been that family responsibilities fall disproportionately upon women and they must now try to juggle more professional responsibilities with their family responsibilities."³⁰⁸ Similarly, both women and men face discrimination in the workplace for taking family leave, making it hard for parents to care for children and work at the same time.³⁰⁹ Family leave issues and the work-family conflict likely contribute significantly to the wage gap and workplace participation levels in the United States.³¹⁰

2. Lessons from Abroad

Instead of comparable worth models, legislators in the United States should consider improving opportunities for employment and access to sources of employment, particularly after workers have taken a period of leave. Incentives could be created, for example, for employers who help ease the transition from unemployment to employment, thereby minimizing participation gaps.

According to Michiro Kurokawa, describing such legislation in the recent article, *The Characteristics of Employment of Women in Japan*, one way of doing this would be to follow the European and Japanese "harmonization legislation" model, whereby a government supports women by advising them in their career search, and by helping them reemerge into the workforce after their decision to raise, or take care of, a family.³¹¹ However, because Japan has similar problems of lower

the workforce since the 1960s. As women continue to work and achieve higher status in the workforce, these issues will remain salient. And why should it be that the issue of harmonizing working and family life depends so much on the presence of women in the workforce? Because the reality has been that family responsibilities fall disproportionately upon the women and they must now try to juggle more professional responsibility with their family responsibilities.

Id.

308. *Id.*

309. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against On The Job*, 26 HARV. WOMEN'S L.J. 77, 77-80 (2003) (discussing the discrimination facing both mothers and fathers who face stereotyped notions of being inauthentic workers as a result of their decision to stay at home).

310. See, e.g., Selmi, *supra* note 1, at 707, 738.

311. See Michiro Kurokawa, *Japan*, in THE HARMONIZATION OF WORKING LIFE AND FAMILY

involvement of women in high-paying executive jobs, it may not be the best model to follow for solving the problems of the wage gap and decreased involvement.³¹²

In Belgium, legal scholars have noted that a legislative focus on pay without a focus on opportunity and access to work, has had minimal consequences for women.³¹³ Chris Engels, in discussing harmonization legislation in Belgium, discusses how it has provided positive change for women in the workplace.³¹⁴ He notes that legal protections specifically aimed at producing “conditions for participation” in employment, promoted greater equality for women, and led to an increase in female employment.³¹⁵ In contrast to legislation focusing primarily on wages, Engels notes a number of different areas of legislation in Belgium where lawmakers have enacted programs or regulated an employer’s discriminatory practices, in order to achieve greater work access and opportunity for women,³¹⁶ including paternity leave provisions.³¹⁷ Such changes, he notes, have led to increasing participation levels for women, even though they do not provide a “guarantee of access to employment.”³¹⁸ Some of these areas included pregnancy discrimination, maternity leave and benefits, flexible work patterns, and part-time

LIFE 53 (R. Blanpain et al. eds., 1995) [hereinafter Kurokawa].

312. See, e.g., Ginny Park Woods, *Japan’s Diversity Problem*, WALL ST. J., Oct. 24, 2005, at B1, B4 (noting that women are 41% of the work force in Japan, yet they only command a small percentage of Japan’s management positions, and noting that in addition to the fact that men are hesitant to hire female managers, women, not seeing many role models, and believing it is “psychologically easier” not to be in charge, are reluctant to rise to the challenge); cf. Kurokawa, *supra* note 311, at 72-79 (citing statistics revealing how negative stereotypes about women’s role in the workplace have been reported to be statistically high).

313. Chris Engels, *Belgium, in* THE HARMONIZATION OF WORKING LIFE AND FAMILY LIFE 1-18 (R. Blanpain et al. eds., 1995) [hereinafter Engels]. Legislative efforts in Belgium aimed at addressing discrimination against women in the workplace also seem broader in scope than in the U.S. See generally FRANCIS HERBERT, JEAN JACQMAIN, CAMILLE PICHULT, & DOMINIQUE DE VOS, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY: BELGIUM 21-29 (noting many types of indirect discrimination, including “head of the household” status).

314. Engels, *supra* note 313, at 1-18. The Economic Reform Act, much resembling Title VII sex discrimination legislation in the U.S., was a significant historical step for Belgium’s push for equality between genders. *Id.* at 1-2 (citing Title V, Economic Reform Act, Aug. 4, 1978). Discussing Belgium’s harmonization law, Engels notes: “The provisions of the Economic Reform Act are an important step towards the realization of equal opportunities for both sexes. However, its actual scope is rather restricted. It does not provide a guarantee of access to employment . . .” *Id.* at 2. Further, Engel notes that not all causes of action provided by the legislation are sought by female plaintiffs. *Id.*

315. *Id.* at 1.

316. See *id.* at 3-6.

317. *Id.* at 5.

318. *Id.* at 2.

employment.³¹⁹ One down side that Engels noted, however, was that some of the government advertising for the part-time work portrayed women in stereotypical roles.³²⁰

If the United States were to adopt such legislation, it would not necessarily expand the EPA or Title VII, but it may have the effect of expanding the Family Medical Leave Act (“FMLA”).³²¹ Like the FMLA, such laws seem consistently family-focused, in that they seek to end employment discrimination against women for taking time off of work for care-giving and other household responsibilities.³²² Furthermore, harmonization legislation, like the FMLA, also allows for paternity leave, and therefore does not reinforce negative stereotypes about women’s role in the workplace, however, the legislation discussed as harmonization legislation seems to offer more flexibility to employees than the current FMLA.³²³

Although some elements of the harmonization legislation benefits to employees resemble comparable worth, the main purpose of such provisions is to realistically increase a woman’s opportunity and access to work.³²⁴ U.S. legislators should not automatically view such legislation as only a burden to employers, rather, they should also look to its benefit—the benefit of more accessible labor.³²⁵ The harmonization legislation of both Japan and Belgium, even if in some ways inconsistent with U.S. policies, provides valuable insights into how U.S. legislators can craft a more successful employment legislation aimed at minimizing pay and participation gaps.³²⁶

Other legislative models to promote equal pay and to increase participation levels of women workers from abroad, particularly those of the European Union (“EU”), provide similar valuable insights.³²⁷ Even if

319. *See id.* at 3-18.

320. *Id.* at 11 (noting a down-side to the part-time employment campaign was that it portrayed women in stereotypical roles, attending to family needs, when it began offering employment benefits for part-time work).

321. Family Medical Leave Act, 29 U.S.C. § 2601(b) (2000) (noting the purposes of the Family Medical Leave Act).

322. *See id.*

323. *Compare* 29 U.S.C. §§ 2601(b), 2611(2), *with* Engels, *supra* note 313, at 17-18, *and* Kurokawa, *supra* note 311, at 49-59.

324. *See* Engels, *supra* note 313, at 1-18; Kurokawa, *supra* note 313, at 49-59.

325. *See supra* notes 311, 313-20 and accompanying text.

326. *See supra* notes 311, 313-20 and accompanying text.

327. *See* Nicklas Bruun, *The New Legal Framework for Equality in the European Union*, in *THE CHANGING FACE OF EUROPEAN LABOUR LAW AND SOCIAL POLICY* 83 (Alan C. Neal ed., 2004) (discussing recent developments in the EU equal opportunity laws and rules of non-discrimination, and predicting greater transparency between employers and employees in sex discrimination matters with the adoption of three new Directives in recent years).

EU legislation has similarities to U.S. comparable worth models, EU gender equity legislation is markedly different from U.S. comparable worth legislation in that it is more comprehensive, *i.e.* not focused almost entirely on wages, but rather the totality of women's work experience and more specifically, increasing the flexibility of women's work.³²⁸ Generally speaking, employment laws incorporating the totality of work experience and recognizing the more temporary nature of work, are more compelling models for employment law reform than laws focusing only on wages, because they consider the increased employee flexibility that will likely be increasingly demanded by the knowledge economy.³²⁹

The aforementioned examinations into leave reform provide compelling insights into a new legislative model that would be more narrowly tailored than comparable worth legislation toward fixing the realistic nature of the wage and participation gaps facing women workers in the global economy.³³⁰ In addition, the millions of dollars of federal tax money currently directed toward pay equity studies, and other lobbying organizations, spent to accomplish gender wage equity, could be redirected toward an initiative with a more direct effect on women's progress in the labor market.³³¹

328. *Id.* at 85-86 (highlighting developments in European Union law seeking to promote methods to integrate women into the workforce, to minimize the negative consequences of the work-family conflict, and to combat a broad variety of types of discrimination, including measures to prohibit "discrimination on grounds of the type of employment contract [part-time and fixed-time work]").

329. *See generally* Stone, *Knowledge at Work*, *supra* note 21, at 721, 733-37 (discussing the changing nature of the employment relationship and analyzing competency-based organization, skill-based organization, and compensation systems that peg salaries and wages to meet market rates that reflect differential talents and contributions).

330. *See supra* notes 309-28 and accompanying text.

331. For a critical perspective on the federal government's irresponsible fiscal involvement with the wage gap, see BENNETT, *supra* note 28, at 13-53 (describing the millions of federal tax dollars given to lobbying groups that conduct pay equity and wage gap studies, and also noting how such groups irresponsibly use the money—one group, for example, funds abortion education programs in Ireland with U.S. tax dollars). One of the reasons Professor Bennett argues for the elimination of federal funding to these groups is that they try to push women into traditionally male-dominated jobs, regardless of the woman's choice of profession. *Id.* at 37-40. Bennett notes that one lobbying group that advocates for economic equality between the sexes received \$2.86 million from 1996-2000 in government grants. *Id.* at 39.

IV. PROPOSING GAP-FLATTENING LEGISLATION: A LEGISLATIVE SOLUTION FOR THE UNITED STATES

A. Theories that Best Address the Problems of the Wage Gap and Women's Lower Workplace Participation

Scholars agree that division of household labor between men and women plays a significant role in the economic theories underlying the gender wage gap, and that to find a solution to this problem, legislators must think beyond the boundary of the labor market and consider the economic impact of work at home.³³² Professor Gillian K. Hadfield, for example, notes that there are “really only two types of economic models of the gender gap: those that posit differences due to discriminatory preference and those that posit difference due to the reality or the perception that women are committed to household work.”³³³ In fact, all workers, both male and female, who choose to take leave, are likely burdened by stereotypes about what it means to be an “authentic worker.”³³⁴

For these reasons, as well as those stated earlier, legislation easing the burdens associated with leave may contribute to minimizing wage gaps and to increasing participation levels of women workers.³³⁵ In response to the wage discrimination and human capital dilemmas

332. See, e.g., Selmi, *supra* note 1, at 707, 738 & n.114; *infra* note 333 and accompanying text.

333. Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 89, 95-96 (1993) (examining statistical evidence of division of labor between men and women in the household, evidencing a need for future models correcting the gender wage gap to move beyond the framework of the labor market); cf. Sharon M. Oster, *Is There a Policy Problem?: The Gender Wage Gap*, 82 GEO. L.J. 109, 109, 118 (1993) (noting similar evidence to Hadfield, but posing the question, “[s]uppose the reason women have undertaken most of the childcare responsibilities in our society is precisely because they have historically earned less in the marketplace, even with comparable skills”); see also Becker, *supra* note 282, at 60-62.

334. Williams & Segal, *supra* note 309, at 77, 98, 101-02; see also Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 310-14, 322 (2004) (analyzing evidence of the difficulties associated with the work-family conflict, and arguing that employers' expectations are distinct from the realities of parenthood, creating workplace disadvantages for women workers and their employers); see also Sarah Stewart Holland, *Comment: Pregnancy in Pieces: The Potential Gap in State and Federal Pregnancy Leave*, 27 BERKELEY J. EMP. & LAB. L. 443, 465-67 (2006) (emphasizing the policy problems of inadequate family leave law, and more particularly, arguing that that current law leaves pregnant workers uniquely vulnerable to termination when they need time off from work because of the difficulty in making the various stages of pregnancy and childbirth fit into the rigid requirements of medical and parental leave laws).

335. See Selmi, *supra* note 1, at 707, 738, 767; Becker, *supra* note 282, at 62-65; *supra* notes 333-34 and accompanying text.

associated with the wage gap, as well as the problems of the work-family conflict, the aforementioned scholars' theories could be interpreted or utilized to mean that legislators should focus on a new goal: deemphasizing the focus on wages, (a relic of the hierarchical, internal-ladder model of employment from the goods-based economy) and instead, emphasize models focusing on methods to help workers more easily emerge into new work.³³⁶ In other words, legislation providing incentives for skills training and flexible working arrangements could yield benefits to both workers who have had to take time off for leave and workers increasingly making transitions into the more mobile or "boundaryless" workplace.³³⁷ Focusing on the goal of increasing skills training and workplace flexibility may result in leveling the playing field between male and female workers and perhaps eliminating leave discrimination, if such a change in focus also changes expectations with regard to the increased importance of part-time work and more flexible work.³³⁸

Professor Cherry is more doubtful about the ability of this "shift in focus" to part-time work to eradicate the discrimination against women that permeates the workplace and which presents real barriers, particularly in higher-paying professions.³³⁹ In a critique of Stone's work, *From Widgets to Digits*, Professor Cherry notes:

Existing efforts to make work more flexible, however, have had only mixed results. For example, some large law firms allow workers with child care or other care-giving obligations to work part-time. Although this direction was hailed as the sign of a progressive work environment, anecdotally it appears that it is mostly female associates who are taking the part-time work option. Indeed, male associates would rarely even take minimal leave after the birth of a child. In addition, studies have shown that female associates often sacrificed pay while still working forty hours a week and, at the same time, were

336. See generally STONE, WIDGETS TO DIGITS, *supra* note 1 (arguing that we are in the midst of a major change in the way employment law will function in the knowledge economy).

337. See *id.* at 156-57.

338. See *id.*; Stone, *Knowledge at Work*, *supra* note 21, at 731-37.

339. Miriam A. Cherry, *No Longer Just Company Men: The Flexible Workforce and Employment Discrimination*, 27 BERKELEY J. EMP. & LAB. L. 209, 210-11 (2006) [hereinafter Cherry, *Company Men*]; cf. Michael Selmi & Naomi Cahn, *Women in the Workplace, Which Women, Which Agenda?* 13 DUKE J. GENDER L. & POL'Y 7, 7-17, 19 (2006) [hereinafter Selmi & Cahn] (arguing that solutions promoting part-time work are still not attainable for most working women in the reality of today's workplace).

viewed as not being serious about making partner.³⁴⁰

Although there are many criticisms of solutions to making work more flexible,³⁴¹ as discussed *infra*, there are a number of models to explore in the realm of increasing workplace flexibility.³⁴²

1. Providing Incentives for “Homesourcing”

Incentivizing “homesourcing” would be a creative solution to increasing workplace flexibility, and it would help ease the rising costs of childcare.³⁴³ Discussed in Thomas Friedman’s book *The World is Flat*, “homesourcing” is an emerging employment model involving corporations hiring workers to work at home.³⁴⁴ Similarly, under Professor Stone’s theory, other types of more flexible working arrangements will likely increase as more workers obtain what she calls the “boundaryless career.”³⁴⁵ Also, according to a report by the Government Accountability Office, predicting changes in the nature of workplace participation in the twenty-first century, flex-time, and flex-pace scheduling, and similar arrangements created by employers to make it easier for employees to work at home, will likely increase in years to come.³⁴⁶

Federal funding or tax incentives for employers implementing such measures could contribute to minimizing the gender wage gap and increasing participation levels of female workers.³⁴⁷ Such benefits to workers, however, should, initially, be temporary in order to curb excessive spending and misuse,³⁴⁸ and to ensure that such a program

340. Cherry, *Company Men*, *supra* note 339, at 216-17. Professor Cherry also notes that the precarious nature of work could lead to the devaluing of workers to the point where all workers are perceived as “temporary,” and this status will mean that all workers will be treated as women workers have in the past. *Id.* at 217.

341. *See generally* Selmi & Cahn, *supra* note 339, at 7-17, 19.

342. *See infra* notes 343-46 and accompanying text. *See generally* Selmi & Cahn, *supra* note 339, at 18-30.

343. Homesourcing, an employment model recently employed by the Jet Blue corporation, is a way for women and men to work at home by answering telephone calls and doing other work as employees of their corporation, typically in a home office. FRIEDMAN, *supra* note 3, at 38. The term was coined by the CEO of Jet Blue. *Id.*

344. *Id.*

345. *See* Stone, *Knowledge at Work*, *supra* note 21, at 731-32.

346. *See* GAO REPORT, *supra* note 2, at 54 (discussing increased flextime and flex-pace scheduling, as well as increased telecommunications and other new innovations that employers in the global economy will likely increasingly devise for women and men working at home).

347. *See* Selmi & Cahn, *supra* note 339, at 23-24.

348. For a model that may provide insights into how to make future legislative models more fiscally responsible, see KETTL, *supra* note 145, at 8-18 (discussing the “Westminster Approach,” a

works well in the future.³⁴⁹ If such legislation providing incentives for “homesourcing” is enacted, it should be consistent with Professor Littleton’s equality as acceptance model, and as such, should be open and available to both men and women, with the same opportunities for benefits given to both genders equally.³⁵⁰ This would also ensure that “homesourcing” does not reinforce negative stereotypes about the role of women in the workplace.³⁵¹

2. Proposing a New Solution

As communications and technological innovations bring humans together from other parts of the world for new forms of trade, and for the purpose of making the earth more “flat,”³⁵² future employment legislation should be aimed at making employees *and* employers more competitive in the knowledge economy, and not at correcting economic problems by making taxpayers spend more on job evaluations conducted by unelected administrative agencies to determine the “worth” of careers.³⁵³

Instead, a better model would provide tax incentives to employers who successfully utilize leave policies for both men and women without discrimination, and that would provide incentives to employers who help employees obtain skills training, career advisement, and other means of improving employees’ human capital near or at the end of a leave term. This type of solution, consistent with the current FMLA, and based on the connections Professor Selmi and others have drawn between leave and the gender wage gap, would be a more narrowly tailored way of correcting the wage gap and workplace participation gaps, and a less

legislative model used in public management theory to curb excessive government spending).

349. *Id.*; see Cherry, *Company Men*, *supra* note 339, at 108-09 (showing faults of temporary work programs after implementation).

350. See Littleton, *supra* note 21, at 44-45.

351. Aside from being consistent with Littleton’s equality as acceptance model, benefits like those granted in the proposed comparable worth legislation, i.e., negotiation skills training for girls and women only under section 5 of the PFA, are more likely to be constitutionally suspect than programs providing benefits to both genders equally. See U.S. CONST. amend. XIV; *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113 (2d Cir. 2004) (holding that stereotyping about mothers’ role in the workplace is a type of gender discrimination); Paycheck Fairness Act, S. 841, 109th Cong. § 5 (2005); Paycheck Fairness Act, H.R. 1687, 109th Cong. § 5 (2005); Littleton, *supra* note 21, at 44-45.

352. See generally FRIEDMAN, *supra* note 3.

353. See H.R. 1687, § 10; S. 841, § 10; Fair Pay Act of 2005, S. 840, 109th Cong. § 3 (2005); Fair Pay Act, H.R. 1697, 109th Cong. § 3 (2005). See generally Stone, *Knowledge at Work*, *supra* note 21; STONE, WIDGETS TO DIGITS, *supra* note 1, at 156.

costly solution than implementation of legislation utilizing a comparable worth framework.³⁵⁴ Such leave-based legislation, appropriately entitled gap-flattening legislation, would provide human capital and needed flexibility to workers, and as such, would be more appropriate for the needs of workers in the global, knowledge economy.³⁵⁵

However, given the fact that this new legislative model would be building on Stone's theory of the importance of human capital, and the fact that it may be based on models broader than the intentional discrimination model used as support for comparable worth, its introduction should not preclude future legislators from acknowledging that discrimination against women is a real and significant problem.³⁵⁶

B. The Proposed Model: Gap-Flattening Legislation

Adopting lessons from abroad used in harmonization legislation, and incorporating Littleton's equality as acceptance model, as well as ideas from other aforementioned models, gap-flattening legislation—a new U.S. model—would be based on a theory whereby lawmakers would choose to minimize wage and workplace participation gaps by giving tax incentives to employers for providing programs that promote training and re-entry into the workplace, after an employee has had to take time off to care for themselves, a family member, or for any reason recognized by the current FMLA, and who now seeks to return to work.³⁵⁷ Such a legislative model, based on the current FMLA, but focusing on the growth of human capital, would have significant benefits for working women making a transition from a period of non-work to work.³⁵⁸ In addition, certain time limits or windows would be set in

354. See Selmi, *supra* note 1, at 707, 735-38, 770, 773.

355. See Stone, *Knowledge at Work*, *supra* note 21, at 731-32.

356. Thus, sometimes pointing fingers is necessary. See Cherry, *supra* note 1, at 548 (noting that despite some advancements, "women who do break into male-dominated professions are denied advancement when they find themselves up against glass ceilings").

357. See 29 U.S.C. §§ 2611(2)(A) (i)-(ii) (2000) (defining "eligible employee" as an employee who has been employed for at least 12 months and who has worked at least 1,250 hours during the preceding 12 month period); § 2612 (a)(1) (A)-(D) (allowing leave for an employee to care for the birth of a child; for the adoption of a child; to care for a spouse, child, or parent or for the employee with a serious health condition or for an employee's own serious health condition); § 2611(11) (establishing that a serious health condition is an "illness, injury, impairment, or physical or mental condition . . .").

358. Gap-flattening legislation would involve a two prong means and a two prong ends. The ends would seek minimizing wage gaps and gaps in workplace participation between men and women. The means would entail some form of government incentives to employers that would assist in job skills training, and potentially career advisement for individuals, male or female, moving from non-work to work, whether because of sickness, childbirth or any other legitimate

place to curb excessive government spending, and to provide for adequate evaluation of the effects of such a policy, although such details are left for another article.³⁵⁹

Although gap-flattening legislation's purpose is similar to that of the current FMLA,³⁶⁰ in that gap-flattening legislation would focus specifically on career reemergence for both *men and women* when moving from a period of non-work to work for any of the reasons provided under the current FMLA's eligibility requirements, it would differ by providing incentives to leave-friendly employers, and therefore, it would slightly reform the FMLA to help alleviate the burdens implicit in the transition back to work.³⁶¹ Furthermore, by providing incentives for skills training, it would help workers remain competitive with the increasing demands of the knowledge economy.³⁶²

Such a legislative model would likely be less expensive than other government programs, because it would 1) add to workers' human

FMLA condition. This career advisement and training would be a short-term "transition or reemergence period" granted to workers prior to returning from any leave period, in which the employee could learn the skills necessary to return to his or her former job, and in which the employee could acclimate gradually into the new workplace by, for example, working a reduced or part-time schedule. The result would be a more educated worker, knowledgeable about the career upon which he or she is returning, and a worker more valuable to his or her employer. Employers who discriminated against the leave-taking individual would not be entitled to any benefit. This model is consistent with the lessons of harmonization legislation and Stone's theories on the future workplace, and, with its emphasis on employee knowledge, it would provide, in theory, a more effective model than comparable worth for dealing with the wage gap and workplace participation levels in the global economy.

359. See generally KETTL, *supra* note 145, at 10-11 (discussing a legislative model entitled the "Westminster Approach," used in public sector management to curb fiscal waste, and which can serve as a legislative model to ensure that gap-flattening legislation become effects or output-based, and therefore more fiscally responsible).

360. The purpose of the FMLA was to help women in the workplace, but its benefits are open to both men and women. See § 2601(b); WORK LAW: CASES AND MATERIALS at 669 (Marion G. Crain et al. eds., 2005):

The Family Medical Leave Act of 1993 ("FMLA") was designed to provide relief to working parents by allowing those who qualify unpaid leave to take care of a new child, sick children, spouses or parents, or for one's own serious illness. Although the FMLA is not an antidiscrimination statute in a traditional sense, one of its primary purposes was to alleviate discriminatory barriers women encounter in the workplace.

Id.

361. For a discussion of such burdens, see Williams & Segal, *supra* note 309, at 77-102.

362. A gradual return to the workplace with additional skills training will likely yield two benefits: 1) increased knowledge of the employee's particular occupation (important in the knowledge economy), and 2) gradual acclimation into the old setting which may help to ameliorate tensions by allowing the leave-taking individual to ease into the former job. See generally Stone, *Knowledge at Work*, *supra* note 21.

capital, making for a more intelligent and efficient work force—workers more able and competent to compete in a knowledge economy, thereby increasing the output of our domestic economy, and 2) it would provide for government checks to curb excessive spending.³⁶³

Similarly, such a legislative model may help minimize the social and economic costs of discrimination under the theory that increased training at the end of a leave period can only boost job security and increase the range of viable employment opportunities for women, and with increased work opportunities and job mobility, it may rationally follow that women would experience more freedom from workplace discrimination.³⁶⁴

V. CONCLUSION

The proposed federal pay equity legislation, however, has the potential to minimize the human capital of workers by decreasing incentives for employees to learn new skills.³⁶⁵ Similarly, in the global economy, its proposals for government-mandated job evaluation, and other proposals based on a comparable worth framework, will likely make hiring domestically more costly, and therefore, it will make hiring abroad more desirable for our nation's employers.³⁶⁶ Thus, passage of comparable worth laws may mean that even more jobs will be sent overseas as smaller domestic employers—unable to ship work overseas—may be forced to shut down.³⁶⁷

363. *Id.*; see *supra* note 359 and accompanying text.

364. See generally STONE, WIDGETS TO DIGITS, *supra* note 1, at 1-20, 157; Stone, *Knowledge at Work*, *supra* note 21, at 1730-38; Cherry, *Company Men*, *supra* note 339, at 215-17. However, some scholars have noted that even if the knowledge economy provides benefits to women workers, the discrimination against women may still exist in a more subtle form, and scholars like Professors Cherry and Sturm have noted that discrimination persists as a significant hurdle to integration of female workers in today's economy. See Cherry, *Company Men*, *supra* note 339, at 215-18; Sturm, *supra* note 1, at 360.

365. To summarize arguments made earlier, an employee's level of education and experience should count for something, and the proposed legislation likely minimizes employers' incentives to increase pay based on these factors. See *supra* note 150 and accompanying text.

366. See Weiss, *supra* note 226, at 701-03; see also Joyce P. Jacobsen, *The Economics of Comparable Worth; Theoretical Considerations*, in COMPARABLE WORTH; ANALYSES AND EVIDENCE 36-50 (Manne Hill & Mark R. Killingworth eds., 1989) (arguing that, in theory, comparable worth reduces everyone's pay).

367. Globalization has been criticized for being the product of "a concerted effort of a number of powerful actors on the global scene to ensure not only that globalization continues as a process but that it does so to their advantage." Rex Honey, *An Introduction to the Symposium: Interrogating the Globalization Project*, 12 TRANSNAT'L. L. & CONTEMP. PROBS. 1 (2002); cf. Weiss, *supra* note 226, at 702 (noting the political dimension involved in global labor treaties, particularly with respect to outsourcing); see also FRIEDMAN, *supra* note 3, at 136-40, 276-77 (describing how globalization

Even though the new legislative theory of gap-flattening might involve large expenditures of money, it would be results-oriented, it would create human capital valuable to employers and the U.S. economy, and it would likely be less costly than other legislative and policy efforts aimed at correcting gender wage disparity and decreased participation of female workers in the workplace—less costly than the federal tax money spent on similar efforts.³⁶⁸

In summary, legislation based on a gap-flattening theory would better resolve the problems that comparable worth seeks to fix. Such a theory builds upon the lessons of harmonization legislation enacted abroad, Littleton's acceptance model, as well as Stone's theory of the increasingly mobile workplace and the importance of human capital.³⁶⁹ Additionally, it would help eliminate wage inequities by creating outlets for women to obtain greater skills training and access to work after a period of leave, but without following the path of the Paycheck Fairness Act and other comparable worth bills—the path of increased government job evaluation and comparison.³⁷⁰

However, although this new legislative theory will be based on a model promoting human capital,³⁷¹ and may increase women's wages and participation in the workplace, it will only be effective as a viable remedy to these problems if workplace discrimination against women in the current labor market subsides.³⁷² The additional knowledge and skills that workers could gain would be rendered meaningless by employers who would continue to discriminate.³⁷³

In sum, enactment of federal comparable worth legislation will not

and outsourcing has had an impact on U.S. companies forcing them to discount on labor conditions as well as prices, and in a broader sense, advocating for a "thoughtful national discussion" to consider how we, as Americans, need to reconsider how we are living in the globalized age).

368. See, e.g., BENNETT, *supra* note 28, at 38-42 (discussing how a lobbying group promoting gender equity used federal tax dollars to teach about abortion rights to children in Ireland). For an example of a results-oriented model of which gap-flattening legislation would be based, see KETTL, *supra* note 145, at 11.

369. See *supra* notes 355-62 and accompanying text.

370. For examples of such government job evaluation and job comparison in the Paycheck Fairness Act, see H.R. 1687, § 9; S. 841, § 9.

371. See generally Stone, *Knowledge at Work*, *supra* note 21; STONE, WIDGETS TO DIGITS, *supra* note 1.

372. See Cherry, *supra* note 1, at 542-45 (noting that even though a lot has changed since the 1950s, discrimination against women is pervasive in the workplace).

373. The success of this Note's theory depends in part on a decrease in the level of discrimination against women in the workplace. For example, if an employer is planning on excluding or otherwise discriminating against a woman prior to the commencement of her employment, her added credentials and job skills, even if extraordinary, could potentially be rendered meaningless.

provide a reasonable solution to the problems of the wage gap and women's decreased workplace participation levels, and it will likely lead the U.S. economy down a wrong path, particularly as workers adjust to new demands of global competition.³⁷⁴ Enactment of the Paycheck Fairness Act and other federal comparable worth bills may do more than change the standard of the Equal Pay Act—they may also reduce jobs for women,³⁷⁵ dramatically change worker-management and co-worker relations,³⁷⁶ and perhaps, significantly alter the relationship between individual and government.³⁷⁷

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374. See *supra* note 3 and accompanying text.

375. See, e.g., RHOADS, *supra* note 34, at 54 (noting that the Minnesota government hired less female workers after the implementation of its comparable worth law).

376. In light of the effects of pay equity statutes in Minnesota, particularly the sense of loss of morale that workers felt in Minnesota after comparable worth's implementation, a federal law utilizing a comparable worth framework presents significant questions. See *id.* at 44-45, 52-55, 80-88.

377. Deviations in the Equal Pay Act's standard of equal pay for equal work represent increased government intrusion not only on the free market generally, but on the value and worth of an individual's work. See *AFSCME v. State of Washington*, 770 F.2d 1401, 1406-08 (9th Cir. 1985) (noting that the state employer should not have been forced to pay higher wages to some workers to account for free-market principles not of its making); RHOADS, *supra* note 34, at 54-56. Such intrusions could change the way we view our work, and quite possibly, by allowing the government to decide what our job is worth, this will significantly erode our ability to independently value our work. Further, preferential wage programs not only create a disservice to employers competing in the free market, but such legislation may also serve to limit women's potential and sense of worth in this new workplace. As noted by Justice Powell in *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 298 (1978), in a point relevant to the comparable worth debate, "there are serious problems of justice connected with the idea of preference itself. Preferential programs may [reinforce] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Id.* (citing *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting)).

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