TOWARD GENDER EQUALITY: AFFIRMATIVE ACTION, COMPARABLE WORTH, AND THE WOMEN'S MOVEMENT

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INTRODUCTION

Affirmative action[1] seems to have become the most recognized strategy for integrating the sexes in the workplace. In fact, according to some scholars and activists, women are "widely assumed . . . [to] have been the primary beneficiaries of affirmative action in employment."[2] However, a study of the evidence indicates that "the actual results of affirmative action [for women] belie the rhetoric."[3] Moreover, the assumption that affirmative action was a major part of modern anti-discrimination policy and that women could not be without it is not clearly reflected in feminist practice. In addition to affirmative action, the women's movement has focused on a wide range of issues pertaining to employment rights, including the concept of comparable worth, or "equal pay for work of equivalent value."[4] This concept addressed the disparity in wages through a system of job evaluations that would require employers to pay female employees in female-dominated jobs the same salaries as males in male-dominated jobs of comparable value, and was used as part of a strategy aimed at broadening the feminist base by taking on the problem of the gender-based wage gap. This

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1. It is difficult to provide a precise definition of affirmative action, since scholars and policy analysts do not always agree about how it should be defined. Indeed, part of what makes affirmative action so volatile politically revolves around the fact that there is no single definition, and the definitions or understandings change over time. For purposes of this Article, Roberta Ann Johnson's definition of affirmative action may be most appropriate: "a generic term for program[]s which take some kind of initiative, either voluntarily or under the compulsion of law, to increase, maintain or rearrange the number or status of certain group members usually defined by race or gender, within a larger group." Roberta Ann Johnson, *Affirmative Action Policy in the United States: Its Impact on Women*, 18 POL'Y & POLS. 77, 77 (1990).

2. Heidi Hartmann, *Who Has Benefited from Affirmative Action in Employment?*, *in* THE AFFIRMATIVE ACTION DEBATE 77, 77 (George E. Curry ed., 1996). Similarly, others have described women as "the biggest gainers" of affirmative action. Kathy Sawyer, *Affirmative Action: Birth and Life of a 'Bugaboo,'* WASH. POST, Apr. 11, 1982, at A1. *See also infra* Part II.

3. LINDA M. BLUM, BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARABLE WORTH MOVEMENT 34 (1991).

4. FRANCES C. HUTNER, EQUAL PAY FOR COMPARABLE WORTH: THE WORKING WOMAN'S ISSUE OF THE EIGHTIES 1 (1986).

Article will address these two issues together, constituting a historical, legal, and sociological study of the actual and rhetorical roles of affirmative action on behalf of women, and an assessment of the controversial concept of comparable worth.[5]

To contextualize the discussion, Part I gives an overview of the women's movement that produced these two approaches. Part II traces the development of affirmative action out of the civil rights model as a promising strategy emphasizing the removal of barriers and the implementation of policies that would open up the traditionally male-dominated occupations to the benefit of society. However, unforeseen adverse consequences of job integration emerged, such as an increased opportunity for sexual harassment; moreover, most occupations remained segregated by sex, with low-status "women's jobs" earning significantly lower wages than "men's jobs." Thus, the claim that women were "the biggest gainers"[6] from affirmative action clearly distorts the evidence; in fact, this claim was used mainly as a rhetorical tool by feminists during times when the policy was in jeopardy.

Part III turns to the emergence of comparable worth in the early 1980s as a feminist response to affirmative action's limited accomplishments, and similarly tracks the later policy's own shortcomings. One of the drawbacks of affirmative action policies was that they were seen as expanding opportunities for individual mobility only for white, middle-class women, and seemed to have little effect on the vast majority of women who continued to work in the lower-paying women's jobs. Thus, the rise of comparable worth is situated against the backdrop of a weakened women's movement to explain the shift of attention to working-class women. Despite the importance of emphasizing women's sense of worth, however, a major drawback of the new model was that it did nothing to remove the barriers between men's and women's jobs, and thus visibly departed from the earlier feminist agenda that had accentuated women's abilities to perform traditionally male-dominated jobs.

Having illustrated the shortcomings of both approaches, Part IV questions if the women's movement ought to have focused its efforts on one strategy over the other. This Article will conclude that due to the inherent limitations of affirmative action and comparable worth, both strategies—while distinct in terms of purpose and timing—were necessary for the women's movement to be effective in the area of employment rights, and are best viewed as complementing each other in the feminist struggle for economic justice.

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5. While much of the early efforts and successes in the area of employment were in the fight against discrimination, this Article will focus on the employment landscape following these efforts, when feminists used two strategies—affirmative action and comparable worth—as means to establish equal employment opportunities and eliminate the gender-based wage gap. As this Article will demonstrate, the strengths and weaknesses of each of these strategies render them undeniably complementary in the feminist struggle for economic justice, and thus the women's movement's focus on both of them was properly placed.

6. Sawyer, *supra* note 2.

I.
THE WOMEN'S MOVEMENT

Before analyzing these two issues of economic justice that connected the women's movement, a brief word must be said on what is meant by "the women's movement." Termed in this Article and throughout much of the literature as one unified movement, it was in fact composed of a wide variety of groups of women coming from many different backgrounds and experiences. Although it covered a multitude of groups and mindsets,[7] its shared "fundamental principle" was that "all internal and external barriers to women attaining full personhood must be destroyed."[8]

The women's movement that was vibrant from the 1960s into the 1980s has been called "second-wave" feminism.[9] In the beginning, second-wave feminism "veered dangerously close to becoming a 'one-issue' movement [that focused on] the passage of the Equal Rights Amendment (ERA)."[10] However, it soon developed into a much more wide-ranging movement, whose impact has been broader and deeper than that of the first wave.

The origins of second-wave feminism are intricately linked to the black civil rights movement. Many women were active participants in the struggle for civil rights and thought that "the extension of civil rights to blacks would . . . enhance[] . . . their own status as women."[11] Yet when women expressed their own concerns within civil rights organizations, they were told that their interests were subordinate to the struggle for racial justice.[12] Moreover, women were often expected to perform in traditional sex roles, such as making coffee or answering the telephone; leaders such as Stokely Carmichael, chairman of the Student Nonviolent Coordinating Committee ("SNCC"), thought that "the only position for women in the SNCC [was] prone."[13] Similarly, women in the New Left movement of the 1960s were expected to take a back seat and wait until the radical political goals of the New Left were achieved.[14] Thus, while women did

7. *See* JUDITH HOLE & ELLEN LEVINE, REBIRTH OF FEMINISM 87 (1971) (describing the initial function of the National Organization for Women ("NOW") as "an umbrella group for women from extremely diverse backgrounds and with extremely diverse expectations").

8. BARBARA SINCLAIR DECKARD, THE WOMEN'S MOVEMENT: POLITICAL, SOCIOECONOMIC, AND PSYCHOLOGICAL ISSUES 389 (3d ed. 1983).

9. The "first wave" of the women's movement in the United States, which focused on women's suffrage, took place in the latter part of the nineteenth and early part of the twentieth centuries. *See* Barbara Epstein, *What Happened to the Women's Movement?*, 53 MONTHLY REV., Apr. 2001, at 1, 1–4.

10. RITA J. SIMON & GLORIA DANZIGER, WOMEN'S MOVEMENTS IN AMERICA: THEIR SUCCESSES, DISAPPOINTMENTS, AND ASPIRATIONS 4–5 (1991).

11. *Id.* at 3–4.

12. MYRA MARX FERREE & BETH B. HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS THREE DECADES OF CHANGE 54 (3rd ed. 1995).

13. HOLE & LEVINE, *supra* note 7, at 110 (quoting the comment by Stokely Carmichael); SIMON & DANZIGER, *supra* note 10, at 4.

14. *See* FERREE & HESS, *supra* note 12, at 69; SIMON & DANZIGER, *supra* note 10, at 4.

have opportunities to gain valuable skills and organizing experience as a result of these movements, it was essential that they form a movement of their own to pursue feminist goals.

Two major strands can be distinguished in the first decade of the development of second-wave feminism: the "women's rights" movement and the "women's liberation" movement.[15] The women's rights movement established formal national organizations to pursue primarily economic and legal issues through changes in legislation, the courts, and lobbying.[16] The National Organization for Women ("NOW") was the first such organization to be formed, out of which many splinter groups developed. It arose as a result of several factors, including the publication in 1963 of *The Feminine Mystique* by Betty Friedan and the establishment of a Presidential Commission on the Status of Women by John F. Kennedy in 1961.[17] Kennedy's Commission helped spawn a variety of governmental agencies, including the Citizens Advisory Council on the Status of Women, the Interdepartmental Committee on the Status of Women, and various state commissions.[18] These groups began to provide a forum for discussion of women's rights. Out of a conference of state commissions held in 1966 in Washington, D.C., NOW was born.[19]

The particular "spark"[20] that led to NOW's formation was the refusal of conference officials to allow a resolution to be introduced for a vote in which the Equal Employment Opportunity Commission ("EEOC") was called upon to enforce the sex provision of Title VII of the 1964 Civil Rights Act.[21] Women had become covered under Title VII "largely through the efforts of Representative Martha Griffiths" (Michigan) as well as the "unwitting help" of the conservative southern Congressman Howard Smith (Virginia), who was convinced that including women in the proposed Civil Rights Act would kill the bill.[22] Along with many liberal supporters of the bill, Smith believed that adding women as a protected class would cause the bill to be "laughed to death" by enabling legislators to vote against it on grounds other than racism.[23] Surprisingly, however,

15. Throughout this Article, however, the emphasis will be on "the women's movement" as a whole, unless otherwise specified, for the literature seldom distinguishes between the particular feminist strands or theoretical underpinnings underlying specific issues.

16. *See* FERREE & HESS, *supra* note 12, at 56; LINDA J. NICHOLSON, GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY 19 (1986).

17. *See* SIMON & DANZIGER *supra* note 10, at 56–57.

18. NICHOLSON, *supra* note 16, at 20; JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 52 (1975).

19. *See* FREEMAN, *supra* note 18, at 54–55. NOW was formed on June 30, 1966, at a luncheon meeting on the final day of the conference of state commissions. It held its first organizing conference on October 29–30, 1966. *Id.*

20. Betty Friedan, *N.O.W.—How It Began*, WOMEN SPEAKING, Apr. 1967, at 4, *quoted in* HOLE & LEVINE, *supra* note 7, at 81.

21. FERREE & HESS, *supra* note 12, at 64–65.

22. *Id.* at 63.

23. DECKARD, *supra* note 8, at 322.

the bill was passed in its entirety, leading the EEOC director to call it "a fluke . . . conceived out of wedlock."[24]

Under the leadership of its first president, Betty Friedan, NOW provided an effective means by which women could pressure the Agency.[25] On the day of its formation, NOW began by sending telegrams signed by twenty-eight women to each EEOC commissioner asking the EEOC to repeal its guidelines authorizing the publication of sex-segregated "want ads" in newspapers.[26] The EEOC claimed these ads simply "indicat[ed] that some occupations [were] considered more attractive to persons of one sex than the other";[27] however, persistent pressure from NOW finally led the EEOC to hold hearings on the sex discrimination guidelines in May 1967. These hearings also addressed the use of the bona fide occupational qualification ("BFOQ") exemption of section 703(e)(1) of Title VII, which permits an otherwise discriminatory hiring practice when it is "reasonably necessary to the normal operation of that particular business or enterprise."[28] NOW demanded that the BFOQ defense should not be interpreted so as to allow employers to use so-called "protective legislation" as a reason by which they could deny equal job opportunities to women.[29] Such "protective legislation," which had initially intended to improve sweatshop conditions around the turn of the century,[30] was primarily used to limit the hours women were allowed to work, and hence was attacked by NOW for denying, "in the guise of protectiveness, not only . . . opportunities but also foster[ing] in women self-denigration, dependence, and evasion of responsibility, undermin[ing] their confidence in their own abilities and foster[ing] contempt for women."[31] After further pressure from NOW, including a national day of picketing as well as the filing of a lawsuit against the EEOC "to force it to comply with its own governmental rules [i.e., Title VII],"[32] the EEOC declared the sex-segregated want ads illegal in August 1968; a year later, it ruled that Title VII superseded state protective laws.[33]

In subsequent years, NOW continued its efforts to lobby the government, especially the executive branch. Such lobbying efforts included testifying at EEOC hearings, participating in lawsuits against sex discrimination, interviewing EEOC commissioners and the Attorney General, writing letters to President

24. *Id.* at 323 (quoting the EEOC director).

25. *See id.* at 323–24.

26. *Id.* at 324; HOLE & LEVINE, *supra* note 7, at 84.

27. FREEMAN, *supra* note 18, at 77 (quoting EEOC guidelines).

28. 42 U.S.C. § 2000e-2(e)(1) (2005).

29. FREEMAN, *supra* note 18, at 76.

30. *See id.* at 76 n.7.

31. National Organization for Women, The National Organization for Women's 1966 Statement of Purpose (Oct. 29, 1966), *available at* http://www.now.org/history/purpos66.html (last visited Jan. 4, 2007), *quoted in* HOLE & LEVINE, *supra* note 7, at 86; *see also* FREEMAN, *supra* note 18, at 76.

32. HOLE & LEVINE, *supra* note 7, at 87 (quoting NOW's complaint).

33. DECKARD, *supra* note 8, at 398–99.

Johnson, and testifying against Supreme Court nominee G. Harrold Carswell because of his "anti-woman" position in *Phillips v. Martin-Marietta*,[34] an early employment discrimination case.[35] According to one of the founding members, during this period, "NOW scared the wits out of the government," as it was trying to "use every political tactic available to it to end sex discrimination."[36] Not surprisingly, disagreements developed during these early years, and its pro-ERA and pro-choice positions in particular (which it had announced during its second national conference in November 1967) led to the formation of splinter groups by both more conservative and more radical women.[37]

The second strand of second-wave feminism, the women's liberation movement, consisted of informal, loosely-structured, local networks of younger women who had been active in the protest movements of the 1960s and who struggled to promote feminist goals primarily through consciousness-raising and support groups.[38] The efforts to organize radical women as women first occurred in 1967 and 1968, when "[a]t least five groups in five different cities (Chicago, Seattle, Detroit, Toronto, and Gainesville, Florida) formed spontaneously, independently of each other."[39] While women's rights organizations such as NOW were characterized by "liberal" feminism, which stressed the autonomy of the individual and the importance of social policy in establishing access to equal rights and economic opportunity,[40] the women's liberation groups advanced a more "radical" feminism that objected to the dominant position of men in society and challenged prevailing beliefs about traditional family life.[41] Radical feminists believed that the liberal-feminist attack on male-female relations did not go far enough, and criticized NOW and other organizations as "fundamentally inconsequential" to the goal of eradicating sex-role differences.[42] Radical feminists viewed liberal feminism as having "no sense of the importance of gender" in organizing social life, and they were skeptical of its faith in the power of law to remedy inequalities.[43]

The twin branches of women's rights and women's liberation lent a struc-

34. 411 F.2d 1 (5th Cir. 1969) (holding that Title VII did not cover discrimination based on combination of plaintiff's sex and fact that she had pre-school-age children), *vacated*, 400 U.S. 542 (1971) (recognizing "sex-plus" theory of discrimination and holding that further evidence was necessary to determine whether employer's decision to refuse applications from women with pre-school-age children was bona fide occupational qualification necessary to employer's business).

35. HOLE & LEVINE, *supra* note 7, at 86–87.

36. *Id.* at 87.

37. *Id.* at 88. *See* FERREE & HESS, *supra* note 12, at 66 (noting in particular reproductive rights as a divisive issue leading to the formation of Women's Equity Action League ("WEAL"), self-described as a "conservative NOW").

38. FERREE & HESS, *supra* note 12, at 56; NICHOLSON, *supra* note 16, at 19.

39. FREEMAN, *supra* note 18, at 59.

40. FERREE & HESS, *supra* note 12, at 50.

41. NICHOLSON, *supra* note 16, at 30.

42. *Id.* at 26.

43. *Id.* at 27.

tural diversity to second-wave feminism from which the early women's movement benefited: within a single broad movement, women with different experiences and expectations were empowered to fight for common goals.[44] The diversity of approaches contributed vigor and resilience to the emerging movement, generating an outburst of support in the early 1970s. Indeed, by that time "the feminist boast that 'we are everywhere' could no longer be taken lightly."[45] Yet despite the differences in organizational styles and theoretical perspectives, the demographic composition of the women's movement was fairly homogeneous, especially in its early years. It was "overwhelmingly young, white, college educated, heterosexual, and drawn from the post-Second World War middle class."[46] Movement leadership had included a few women of color from the beginning, including Aileen Hernandez, an attorney who became president of NOW.[47] The participation of working-class women was much rarer, however, and their lack of interest was in part due to the perception that the movement did not address their specific needs. Second-wave feminism most easily mobilized middle-class sympathizers, who had the time and energy needed to organize for the feminist cause. Yet while "the goal of representing all American women remains an elusive vision," conscious efforts toward greater inclusiveness have had a "visible impact" on the movement's organizational goals and strategies.[48]

II.
AFFIRMATIVE ACTION

As noted above, women—especially white women—are "widely assumed" in the literature to be the primary beneficiaries of affirmative action policies.[49] Indeed, in addition to critics in the academy, the *Washington Post* asserted this assumption as fact in 1982: "[w]hite women . . . are the biggest gainers . . . . [and b]lack women . . . also seem to have taken relatively good advantage of new openings."[50] Similar statements can be found in the more conservative literature as well. For example, intending to refute the claim, authors writing in the Heritage Foundation's publication *Policy Review* asserted that a "modern political mantra has it that white women have been the greatest beneficiaries of goal-based affirmative action,"[51] and an article in the *National Review Online* claimed that "women are the principal beneficiaries of preferential treatment."[52]

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44. FERREE & HESS, *supra* note 12, at 73.

45. *Id.* at 75.

46. Epstein, *supra* note 9, at 4.

47. FERREE & HESS, *supra* note 12, at 93.

48. *Id.* at 99.

49. Hartmann, *supra* note 2, at 77.

50. Sawyer, *supra* note 2.

51. Sally C. Pipes & Michael Lynch, *Smart Women, Foolish Quotas*, POL'Y REV., July–Aug. 1996, at 30, 31.

52. Stanley Kurtz, *Breaking the Silence: All About Women*, NAT'L REV. ONLINE, Sept. 10, 2001, http://www.nationalreview.com/contributors/kurtz091001.shtml.

Yet despite this assumption, one "irony" of affirmative action is that "women and other groups are conspicuously absent" in the popular debates over affirmative action, even though "much of the law applies equally to women."[53] This Part will evaluate the actual and rhetorical roles of affirmative action on behalf of women; before doing so, however, it will begin with a brief outline of the history of affirmative action policies as applied to women. This history will then lay the groundwork for properly assessing the validity of the claim that women were the principal beneficiaries of affirmative action.

A. Historical Overview of Affirmative Action

Just as Title VII was not initially intended to cover sex discrimination,[54] affirmative action policies were also not at first designed to include women. In 1961, President John F. Kennedy first introduced "affirmative action" policy with Executive Order 10,925, which established the President's Committee on Equal Employment Opportunity.[55] President Lyndon B. Johnson's Executive Order 11,246 on Equal Opportunity in Federal Employment, issued in 1965, "transformed the policy from equal opportunity to equal results" by barring discrimination on the basis of race, color, religion, or national origin by federal contractors and subcontractors and creating the Office of Federal Contract Compliance Programs ("OFCCP") in the Department of Labor to oversee enforcement.[56] Two years later, thanks to extensive lobbying efforts by the recently-created NOW and other private women's groups, as well as by the head of the Women's Bureau of the Department of Labor, the Order was amended by Executive Order 11,375 to add "sex" to the prohibitions against discrimination applicable to government contractors.[57]

In the beginning, however, NOW and other women's rights groups criticized the OFCCP for its "seeming lack of concern" about discrimination against

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53. JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 15 (1996).

54. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989) (noting "[t]he somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment—it was included in an attempt to *defeat* the bill" (citing C. & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (1985))).

55. *See* Johnson, *supra* note 1, at 78. Kennedy was the first president to use the term in his Executive Order 10,925, which was written by presidential advisors Arthur Goldberg and Abe Fortas, with the aid of the black attorney Hobart Taylor, Jr. It was Taylor who came up with the term, trying to find something that would give "a sense of positiveness to performance under that executive order." He was torn between the term "positive action" and "affirmative action," and chose the latter simply because of its alliteration. *See* DAVID K. SHIPLER, A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA 495 (1997).

56. Paul Ong, *An Overview of Affirmative Action*, *in* IMPACTS OF AFFIRMATIVE ACTION: POLICIES AND CONSEQUENCES IN CALIFORNIA 7, 12 (Paul Ong ed., 1999).

57. DECKARD, *supra* note 8, at 401–2; FREEMAN, *supra* note 18, at 75. For a good analysis of the scope of these Johnson executive orders, see BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR HOLMES NORTON & SUSAN C. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 509–59 (1975).

women and for its "unwillingness" to issue strict sex discrimination guidelines.[58] It was not until January 1969 that the OFCCP published proposed strict guidelines on sex discrimination, and not until eight months later that public hearings were held on them. Women's groups testified strongly in favor of the proposed guidelines, which were very similar to those already issued to combat racial discrimination. They argued that such rules were necessary to transform the Executive Order into a "viable weapon against sex discrimination."[59] A report by the President's Task Force on Women's Rights and Responsibilities, released in 1970, urged the immediate implementation and "vigorous enforce[ment]" of the "revised and updated guidelines."[60]

The Task Force called the guidelines just the "beginning" of the efforts needed to address "the needs of women in poverty";[61] yet most of the proposed guidelines were more in tune with the needs of middle- and upper-class women. They required recruiters to visit women's colleges and interview female students at co-educational colleges, urged "affirmative action" to eliminate "ghetto departments,"[62] and placed the burden on contractors to prove the justifications they proffered for refusing to hire women for particular jobs that purportedly involved bona fide occupational qualifications (BFOQs).[63] Moreover, the sex discrimination guidelines that were ultimately issued nearly seventeen months later were "so seriously watered down" that they became essentially ineffective.[64]

Women's groups called the new guidelines "useless,"[65] expressing disappointment with the continued failure to mention specific goals and timetables applicable to women. NOW complained that the guidelines did "not speak of affirmative action *programs* in regard to sex, just of affirmative action."[66] The groups particularly objected to the Labor Department's Implementing Order No. 4 of 1970, which outlined the requirements for affirmative action programs

58. HOLE & LEVINE, *supra* note 7, at 44; *see also* PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 19–20 (1970) [hereinafter PRESIDENT'S TASK FORCE].

59. FREEMAN, *supra* note 18, at 75.

60. PRESIDENT'S TASK FORCE, *supra* note 58, at 20 (urging that "revised and updated guidelines be issued immediately and the Executive Order vigorously enforced").

61. *Id.* at 19.

62. The term "ghetto department" was used to describe job environments where men and women performed similar jobs but were separated into single-sex departments, with the women earning less than the men. HOLE & LEVINE, *supra* note 7, at 45.

63. *Id.* For a discussion of the use of BFOQs under Title VII, see *supra* text accompanying note 28.

64. FREEMAN, *supra* note 18, at 75. They merely suggested, rather than required, that recruiters visit women's colleges, they did not require contractors to prove their justifications for excluding women, and they failed to address the abolition of "ghetto departments." HOLE & LEVINE, *supra* note 7, at 46.

65. HOLE & LEVINE, *supra* note 7, at 46.

66. *Id.* (quoting NATIONAL ORGANIZATION FOR WOMEN, BACKGROUND ON FEDERAL ACTION TOWARD EQUAL OPPORTUNITY FOR WOMEN (1970)).

for government contractors. This Order also failed to mention specific goals and timetables for women, resulting in considerable disagreement as to whether it even applied to them. When Secretary of Labor James D. Hodgson claimed that he had "no intention of applying literally exactly the same approach for women" as had been applied to racial minorities,[67] women's groups were outraged that "women ha[d] been left out again,"[68] and increased their pressure on the Secretary.

Ultimately in December 1971, Order No. 4 was revised to include women.[69] Feminists immediately put the Order to use, filing complaints against recipients of federal funds. For example, NOW filed a blanket sex discrimination complaint with the OFCCP against more than 1300 major U.S. corporations that received federal funds. With the Women's Equity Action League, NOW also filed complaints asking for compliance reviews directed at all educational institutions holding government contracts.[70] Additionally, in 1978, the OFCCP issued Sex Discrimination Guidelines[71] that provided specific recommendations to employers regarding the treatment of female applicants and employees. The subchapter on affirmative action was directed at better recruitment efforts, advertisements, and the inclusion of women in management trainee programs.[72] In time, affirmative action programs expanded beyond regulation of government contractors to include federal education and housing programs, state and local governments, and even, on a voluntary basis, private employers.[73]

The U.S. Supreme Court addressed gender-based affirmative action in employment only once, in *Johnson v. Transportation Agency*.[74] In that case, the Court upheld a voluntary affirmative action plan, calling it a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force."[75] The Court found that gender-based preferential hiring was appropriate because of a "manifest imbalance" in the percentage of women in specific job categories relative to their percentage in the local labor market.[76] Specifically, while women constituted 36.4% of the relevant labor market, they comprised only 22.4% of Agency employees, with most of these women working in clerical positions; none of the 238 skilled positions were held by women.[77]

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67. Christopher Lydon, *Role of Women Sparks Debate by Congresswoman and Doctor*, N.Y. TIMES, July 26, 1970, at 35.

68. *Id.* (quoting Dr. Ann Scott, Federal Compliance Coordinator for NOW).

69. FREEMAN, *supra* note 18, at 76.

70. *Id.*; IRENE L. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN: AGENDA AND STRATEGY FOR THE 70S, at 36–38 (1973).

71. 43 Fed. Reg. 49258 (Oct. 20, 1978) (codified at 41 C.F.R. § 60-20 (2006)).

72. *See* 41 C.F.R. § 60-20.6 (2006).

73. Ong, *An Overview of Affirmative Action*, *supra* note 56, at 12–13.

74. 480 U.S. 616 (1987).

75. *Id.* at 642.

76. *Id.* at 631–33.

77. *Id.* at 621.

Johnson was filed under Title VII of the 1964 Civil Rights Act; accordingly, the Supreme Court applied the principles of Title VII's race discrimination jurisprudence in its analysis of gender-based affirmative action. In contrast, for cases that challenge affirmative action under the U.S. Constitution rather than under Title VII, the Supreme Court has developed an Equal Protection framework that subjects race-based classifications to "strict scrutiny"[78] and gender-based classifications to a lower standard of "intermediate scrutiny."[79] For example, in *Contractor's Association v. City of Philadelphia*,[80] a federal district court applied strict scrutiny to the minority-preference component and intermediate scrutiny to the gender-preference component of the same local contract set-aside program.[81] The district court judge, in determining that intermediate scrutiny was the appropriate level of review for sex-based classifications, recognized that this produced an "anomalous result":

> In the non-affirmative action context the use of a three-tiered analysis for ordinances disadvantaging blacks, women or non-suspect classifications creates the result intended by the Supreme Court . . . . However, in the affirmative action setting the use of this three-tiered scheme means that laws disadvantaging whites . . . will be held to a stricter standard than laws disadvantaging men . . . . The flip-side of this is that under the sliding scale analysis, it becomes easier for a state legislature or a city council to pass [a gender-based affirmative action plan] than [a race-based one], because the former will be held to a lesser standard of scrutiny by the courts.[82]

Other courts have similarly employed different constitutional standards of review for race and gender preferences.[83]

B. Women as the Primary Beneficiaries of Affirmative Action?

As the above overview indicates, "[h]istorically, affirmative action for women is a by-product of affirmative action for African-Americans."[84] Yet paradoxically, as mentioned previously, as early as 1982 the *Washington Post* had noted that women—especially white women—were "the biggest gainers" from affirmative action policies, though the record of achievements was "a murky

78. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 493–98 (1989).

79. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–99 (1976); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 721–27 (1982).

80. 735 F. Supp. 1274 (E.D. Pa. 1990).

81. *See id.* at 1294–1307.

82. *Id.* at 1302.

83. *See, e.g.*, Assoc'd Gen. Contractors of Cal. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987). *See generally* K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 54–56 (1992).

84. ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EC AND INTERNATIONAL LAW 107 (1999).

one"[85] This section will challenge the validity of the claim that women were the primary beneficiaries of affirmative action. First, however, it is necessary to address some of the methodological problems with evaluating general affirmative action programs as well as those specific to women.

1. Methodological problems

Many scholars, focusing largely on race-based affirmative action, have noted the difficulties in separating the effects of affirmative action from broader civil rights enforcement and from general social and economic changes.[86] As a result, the use of statistics to make any "definitive evaluation" on the impact of affirmative action may at best be inconclusive.[87] In order to accurately measure its success, the effects of other changes must be identified and statistically removed. Scholars have most often resorted to multiple regression analysis, a statistical method that uses one dependent variable and more than one independent variable, in order to "separate out and quantify the factors thought to determine the variable to be explained."[88]

For race-based affirmative action, there are several factors that are hard to isolate but that nonetheless influence the assessment of expanded employment opportunities for African Americans. Such factors include national economic growth, a decline in discriminatory attitudes and practices by whites, changes in educational opportunities, and black migration to the North.[89] In John J. Donohue and James Heckman's critical examination on the contribution of federal policies to black economic advancement, the scholars separately assessed supply and demand factors to conclude that "a considerable portion of the post-1964 black progress would appear to be unexplained by the usual supply-side sources, which may suggest that the role of governmental antidiscrimination efforts was substantial."[90]

Although Donohue and Heckman observed some correlation between the role of federal policies and black advancement, more conclusive evidence may be found through studies that statistically measure the effects of affirmative action by concentrating either on court-ordered remedies that grew out of litigation under Title VII, or on the implementation of President Johnson's 1965 Executive Order 11,246. Jonathan Leonard, a prominent researcher on affirmative action's

85. Sawyer, *supra* note 2.

86. *See, e.g.*, John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603, 1640 (1991).

87. Mary F. Radford, *The Affirmative Action Debate*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 343, 361 (Bruce E. Kaufman ed., 1997).

88. M.V. Lee Badgett & Heidi I. Hartmann, *The Effectiveness of Equal Employment Opportunity Policies*, *in* ECONOMIC PERSPECTIVES ON AFFIRMATIVE ACTION 57, 67 (Margaret C. Simms ed., 1995).

89. *See* Donohue & Heckman, *supra* note 86, at 1606–7.

90. *Id.* at 1640.

employment effects, has most extensively analyzed the effects of the enforcement mechanisms of the federal contract compliance program between 1974 and 1980. In his major studies, he controlled for such factors as total employment growth, establishment size, corporate structure, percentage nonclerical white-collar employees, industry, and region.[91] Yet, as other scholars have pointed out, although the studies generally found that having a government contract corresponded to relatively higher levels of black employment and, to a much lesser degree, white female employment, "some researchers doubt that this association necessarily reflects an increased demand caused by the affirmative action requirement," positing instead as a cause the "voluntary movement of workers between contractor . . . and non-contractor employment."[92] The debate over the sources of black advancement demonstrates the difficulties of screening out the effects of all other factors in order to ensure that the measured outcome reflects only the impact of affirmative action.

The results of these race-based studies are thus at best inconclusive; assessing the effect of affirmative action on women's access to jobs is further complicated by the fact that "the period in which the government implemented affirmative action regulations coincided with the rapid increase in women's labor force participation."[93] Indeed, statistical studies of OFCCP data for women "yield mixed results,"[94] largely explained by the massive influx of women in *both* contractor and non-contractor jobs. Thus, as Jonathan Leonard notes, the "well-known and substantial shift in the gender composition of the workforce" that occurred between 1960 and 1980 is "due more to a massive shift in female labor supply . . . than to the relatively small demand shifts induced by affirmative action."[95] As discussed further below,[96] Heidi Hartmann has also considered how the dramatic increase in women's labor force participation, as well as other economic and social factors, makes it difficult to pinpoint the effects of affirmative action.[97] She points to greater demand for women's labor as a result of economic growth in fields such as clerical work and health care with which women had come to be associated, as well as increases in college education. Consequently, since any statistical study can only imperfectly estimate the policy's record of achievements, it is difficult to make any exact pronouncements on the validity of the claim that women were its primary beneficiaries.

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91. Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439, 449 (1984).

92. Badgett & Hartmann, *supra* note 88, at 76.

93. BARBARA RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 47 (1998).

94. *Id.*

95. Jonathan S. Leonard, *Women and Affirmative Action*, 3 J. ECON. PERSP. 61, 64 (1989).

96. *Infra* text accompanying notes 110–16.

97. Hartmann, *supra* note 2, at 89.

2. Assessing the claim

Despite the difficulty in proving the claim, this section will try to analyze the reasons for the assertion that women—especially white women—were "the biggest gainers"[98] from affirmative action policies. The evidence indicates that during the early years of affirmative action women in fact seem to have been the "big losers." [99] In contractor companies between 1970 and 1972, for example, white women showed significant losses rather than employment gains,[100] and until 1980 the effects of affirmative action policies remained "mixed."[101] On the other hand, the coal mining industry, specifically targeted by the government, saw the number of female miners rise from 0% to 8.7% between 1973 and 1980.[102] Moreover, the *Washington Post* reported in 1982 that women represented 50% of editors and reporters, as compared to 5.7% for minorities, and among lawyers and judges women constituted 12.8% while minorities made up only 4.2%.[103] Statistics such as these, however, are hard to compare when it is unclear whether they take affirmative action into consideration.

Another study conducted by the OFCCP in 1983 showed that women made greater gains in jobs at companies doing business with the federal government, and thus subject to federal affirmative action requirements, than at other companies. After reviewing more than seventy-seven thousand companies with over twenty million employees, the study found that female employment increased by 15.2% between 1974 and 1980 for federal contractors, while it rose by only 2.2% in non-federal contract settings.[104] More recently, the U.S. Bureau of Labor Statistics reported in 1993 that women had moved in large numbers into previously male-dominated professional jobs: 47.6% of economists were women as compared to 13.1% in 1975; 22.8% of lawyers and judges were women as compared to 7.1% in 1975; and 18.6% of architects were women as compared to 4.3% in 1975.[105]

While these positive numbers appear to support the claim that women were the primary beneficiaries of affirmative action, there is also reason to dispute the policy's achievements. In part, the numbers do not reveal the full story, since evaluating the impact of affirmative action on women is a "difficult research task."[106] A report by Working Women, for instance, warned in the early 1980s

98. Sawyer, *supra* note 2.

99. Johnson, *supra* note 1, at 84.

100. *Id.*

101. *Id.*

102. Sawyer, *supra* note 2.

103. *Id.*

104. CITIZENS' COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY: A POLICY OF FAIRNESS AND COMPASSION THAT HAS WORKED 123–24 (1984).

105. Judy L. Lichtman, Jocelyn C. Frye & Helen Norton, *Why Women Need Affirmative Action, in* THE AFFIRMATIVE ACTION DEBATE 175, 179 (George E. Curry ed., 1996).

106. M.V. Lee Badgett & Jeannette Lim, *Promoting Women's Economic Progress Through Affirmative Action, in* SQUARING UP: POLICY STRATEGIES TO RAISE WOMEN'S INCOMES IN THE

that despite the fact that the number of female officials and managers increased substantially after the government began targeting the banking industry, such increases may also indicate that "banks [were] changing women's job titles, not their pay, duties or responsibilities."[107] Furthermore, notwithstanding the OFCCP's statistics mentioned above, Leonard found little positive effect of affirmative action on white women in jobs at firms contracting with the federal government between 1974 and 1980; the most consistent beneficiaries were African-American and other minority men, although the number of black women employed at such firms also increased.[108]

According to Leonard, part of the reason why the position of white women did not improve significantly as a result of affirmative action may have been the general dramatic increase in women's labor force participation throughout the economy, though Leonard has also noted that this participation may have been due in part to the use of viable threats to file Title VII actions.[109] Alternative explanations for this substantial supply shift make it difficult to measure accurately the extent to which affirmative action increased women's employment.[110] Hartmann points to many social and economic factors that independently led to increases in women's employment, including greater educational access and greater demand for women's labor in growing sectors of the economy.[111] Changing cultural values about childrearing as well as changing consumer standards also helped increase women's employment between the 1960s and 1990s: as consumer expectations grew, more married couples had both spouses working to be able to enjoy the higher standard of what is today considered necessary for a middle-class lifestyle.[112] Improved methods of birth control as well as the effect of the Pregnancy Discrimination Act of 1978[113] also influenced women's changing economic roles, as did the greater potential for marital instability through a rising divorce rate.[114] Thus, as Hartmann concludes, "from these fac-

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UNITED STATES 179, 193 (Mary C. King ed., 2001).

107. Sawyer, *supra* note 2 (quoting the report).

108. Leonard first compared contractor and non-contractor establishments, and found that between 1974 and 1980 members of protected groups advanced faster in contractor jobs: black males advanced by 3.8%, other minority males by 7.9%, black females by 12.3%, and white females by 2.8%. However, when he studied the effect of compliance reviews beyond contractor status alone, Leonard found that black males advanced by 7.9%, other minority males by 15.2%, and black females by 6.1%, while the effect on white females was "significantly negative." Leonard, *The Impact of Affirmative Action on Employment*, *supra* note 91, at 451.

109. Leonard, *Women and Affirmative Action*, *supra* note 95, at 64.

110. *See* Hartmann, *supra* note 2, at 90.

111. *See id.* at 87–89.

112. *Id.* at 89–90.

113. Hartmann and others have attributed the post-1978 increase of women—especially white women—who work after childbirth in part to the passage of the Pregnancy Discrimination Act, in which Congress extended protection against discrimination under Title VII to pregnant women. *See id.* at 89, 96 n.7 (citing sources).

114. *Id.* at 89–90.

tors alone there would have been substantial growth of women's employment even without affirmative action."[115]

Such changes were less significant for minority women and men, especially since African-American women had always worked outside the home more than white women had. In large part, this was because their husbands' wages were discriminatorily depressed.[116] Moreover, according to Leonard, the total employment of federal contractors only increased by 2% during this period while growing by 12% in the relatively more female-intensive non-contractor sector that included a greater share of service or retail trades than manufacturing jobs.[117] Leonard concludes that the "overall *direct* impact of affirmative action appears minor once we control for other variables,"[118] although all women may have benefited indirectly by the greater public scrutiny and the change in emphasis "from rhetoric to results."[119]

Thus it seems that while affirmative action has opened some doors to women in fields that were formerly closed to them, "the actual results of affirmative action belie the rhetoric."[120] At best, the data fail to clearly establish that the position of women improved as a result of affirmative action, begging the question as to why some say that women were "the biggest gainers"[121] from affirmative action policies. The claim that affirmative action disproportionately helps white women, or the most educated minorities who presumably need it less, is in part a way to discredit affirmative action for failing to help those who are "truly needy."[122] The literature indicates, however, that it has been principally feminists and the Left who have advanced arguments about affirmative action's effectiveness during times when these policies were in danger.[123] Emphasizing the benefits of affirmative action for women helps to buttress the notion that the need for it remains strong.[124]

In fact, according to Georgetown law professors Charles R. Lawrence and Mari J. Matsuda, "[i]f all women supported affirmative action, no politician would dare oppose it. The political power of women united, combined with men of color and progressive white men, would render any challenge to affirmative action futile. The current backlash against affirmative action is made possible, in part, by women's ambivalence."[125] Scholar Tim Wise qualifies this statement

115. *Id.* at 90.

116. *Id.*

117. Leonard, *Women and Affirmative Action*, *supra* note 95, at 64.

118. *Id.* at 65 (emphasis added).

119. *See* Johnson, *supra* note 1, at 85.

120. BLUM, *supra* note 3, at 34.

121. Sawyer, *supra* note 2.

122. Hartmann, *supra* note 2, at 77.

123. *See infra* Part II.C.

124. Lichtman, Frye & Norton, *supra* note 105, at 181–82.

125. CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 152 (1997).

by pointing out that it is primarily *white* women who exhibit such ambivalence.[126] Indeed, a 1992 survey by *Ms.*, a feminist magazine, found rather lukewarm support for affirmative action: only one in five white women thought they had benefited from the policy, while over one-half said they had not; in comparison, one-half of black women and Latinas said they had benefited, as opposed to only one-quarter who said they had not.[127] Such attitudes help explain why, particularly in times of jeopardy, feminists and the Left placed an emphasis on the success of affirmative action, with the hope that such a strategy would keep affirmative action alive.

Some of the reasons for women's ambivalence toward affirmative action are similar to those that make African Americans and other minorities ambivalent about affirmative action polices, such as the view that preferential treatment challenges the ideal of merit and stigmatizes its beneficiaries.[128] Women may find the idea that they benefited or could benefit from affirmative action disconcerting, since that seems to question their own achievements.[129] As Wise asserts, "[i]ronically, thanks to the successes of the women's movement, millions of white women now find themselves intellectually able to eschew the very policies that have fundamentally improved their professional life chances."[130] In addition, white women's views on affirmative action do not differ significantly from white men's views: not only are their racial attitudes similar, but as opposition by white men to race-based preferential hiring and promotion grew from 86% in 1986 to 90% in 1994, opposition by white women grew from 79% to 88%.[131] Wise explains these statistics in part by positing that white women are not appreciably less racist than white men when it comes to policies that would result in closer contact between whites and blacks.[132]

Just as white women's racial attitudes may not differ markedly from white men's attitudes, there is often an identification between the interests of the two sexes.[133] Thus, if heterosexual white women view affirmative action solely in racial terms, they may believe that they will be hurt by such policies to the same extent as white men.[134] According to Lawrence and Matsuda, since a heterosexual woman's identity is often closely intertwined with that of her male partner, if the "angry white man is painted as the victim . . . , then the white woman

126. Tim Wise, *Is Sisterhood Conditional? White Women and the Rollback of Affirmative Action*, NAT'L WOMEN'S STUDIES ASS'N J., Fall 1998, at 1, 1.

127. Helen Zia, *The* Ms. *Survey Results: How You Feel About Race*, MS., May 1992, at 20, 21.

128. *See* Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) ("When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.").

129. Wise, *supra* note 126, at 14–15.

130. *Id.*

131. *Id.* at 10.

132. *Id.* at 16.

133. *Id.* at 14.

134. *Id.*

who defines self-fulfillment as loving that man may hesitate to support affirmative action," even when it would clearly help her.[135] Lawrence and Matsuda make this point from a feminist perspective of gender oppression, through which women are said to identify their own interests only within male-dominating power relations that create the patriarchal structure that has kept women subordinated.[136] However, opponents of affirmative action have also used this perspective to explain why women should *reject* race- and sex-based affirmative action. Sally C. Pipes and Michael Lynch, for instance, in a 1996 article for the conservative Heritage Foundation, argued that women do not need affirmative action because, as mothers, wives, daughters, and sisters, "[n]o one is better placed than a woman to see the double-edged nature of racial and gender preferences. It is clear to a mother that an institutional preference for her daughter is institutional discrimination against her son."[137] More recently and in the same vein, proponents of the misleadingly-named Michigan Civil Rights Initiative stated that "[t]he groups allegedly representing the best interest of women refuse to comment on the destructive effects of preferences that attempt to pit the interests of wives against husbands and brothers against sisters."[138]

The perceived opposition or ambivalence among women toward affirmative action helps to explain why, in the debates over affirmative action in the mid-1990s, feminists and the Left attempted to identify women as the primary beneficiaries of affirmative action. During this period, conservatives were trying to "racialize" the debate by "remov[ing] women *as women* from the affirmative action picture" and instead equating affirmative action with minority beneficiaries.[139] By framing the debate in terms of race, the Right hoped "to create in white men and women a shared sense of victimization at the hands of people of color,"[140] taking advantage not only of white women's inherent self-interest, but also of their identification with their husbands and sons—males "whom they [could] feel [were] be[ing] discriminated against because of affirmative action."[141] At the same time, much of the pro-affirmative action campaign focused on women for the "obvious reason" that women constitute a larger voting bloc than racial minorities, and "if most women can be convinced that race- and sex-based preferences are fair, that could decide the battle."[142] Moreover, although not directed at winning over men in large numbers, a gender-based strat-

135. LAWRENCE & MATSUDA, *supra* note 125, at 161.

136. *See id.*

137. Sally C. Pipes & Michael Lynch, *Women Don't Need Affirmative Action*, HERITAGE FOUNDATION, July 25, 1996, http://www.heritage.org/Press/Commentary/ED072596a.cfm.

138. Press Release, Michigan Civil Rights Initiative, Some Women's Groups Show Inconsistency on Race/Gender Preferences Issue, MCRI (Sept. 8, 2004), http://www.michigancivilrights.org/media/womensgroup-press-release.pdf.

139. Wise, *supra* note 126, at 8.

140. *Id.*

141. *See* ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSESSED WORLD 171–72 (1997).

142. Pipes & Lynch, *Women Don't Need Affirmative Action*, *supra* note 137.

egy was viewed as a means of simultaneously attracting support among at least some men who might perceive that affirmative action could help their wives, whereas a strategy emphasizing affirmative action for racial minorities would do nothing to further white men's self-interest. Consequently, as is discussed below, feminists and the Left emphasized the gains for women as a result of affirmative action policies in order to attract women's votes and also in the hope that "women would be seen as more deserving [than racial minorities] and white males would not want to kill a policy that could benefit their wives, sisters, mothers, or daughters."[143]

C. Feminist Use of the "Biggest Gainer" Claim: A Case Study

As the above section indicates, the validity of the claim that women were "the biggest gainers"[144] from affirmative action does not seem to be clearly established by the evidence. Nevertheless, the assumption has survived mainly through its use as a rhetorical tool by feminists and the Left during times when affirmative action policies were in jeopardy. As this section will illustrate, it was during such times that women's improved position in the workforce was most strongly linked to affirmative action policies by advocates hoping to garner the necessary support to keep affirmative action alive.

Nowhere was it more apparent how feminists tried to frame the affirmative action debate around women in order to acquire their support than during the campaign against Proposition 209, the California Civil Rights Initiative ("CCRI"),[145] in the mid-1990s. While efforts to defeat Proposition 209 were ultimately unsuccessful, it is nonetheless appropriate to discuss the CCRI campaign as an example of how feminists exploited the claim as an important rhetorical tool.

Co-authored by two conservative activists, Professors Glynn Custred and Tom Wood,[146] Proposition 209 provided the Right with an opening to attack affirmative action at a time when Democrats controlled both houses in the California State Assembly. With the backing of Republican Governor Pete Wilson and Ward Connerly, an African-American businessman who led the 1995 drive ending affirmative action at the University of California, the campaign to put the initiative on the 1996 ballot became a potent and divisive issue in California.[147] Strategists on the Right took advantage of the nationwide uneasiness over the notion of "preferential treatment" by avoiding the use of the term "affirmative

143. SKRENTNY, *supra* note 53, at 229.

144. Sawyer, *supra* note 2.

145. The California Civil Rights Initiative, which was adopted as article I, section 31, of the California State Constitution, prohibits government agencies from discriminating or granting preferential treatment based on race, sex, color, ethnicity, and national origin in public employment, education, and contracting. *See* CAL. CONST. art. I, § 31.

146. M. ALI RAZA, A. JANELL ANDERSON & HARRY GLYNN CUSTRED, JR., THE UPS AND DOWNS OF AFFIRMATIVE ACTION PREFERENCES 147 (1999).

147. *Id.* at 152–53.

action" at all costs.[148] Indeed, even polls conducted for the Feminist Majority Foundation revealed that when voters were asked directly about banning "preferential treatment," 81% said they supported it, while the number dropped to 29% when the question used the term "affirmative action."[149] Thus the first clause of the initiative merely stated: "The state shall not discriminate against, or *grant preferential treatment* to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[150]

Just as excluding the term "affirmative action" from the CCRI comprised a conscious effort to win votes, the growing anti-affirmative action movement sought to appeal to California voters by keeping the debate "racialized," limiting the campaign's focus to race, not gender. For example, Professor Wood, CCRI's co-author, tried to keep the spotlight on race by pointing out that although many believed white women to be the primary beneficiaries of affirmative action, they were rarely mentioned in the debates because they were just as troubled with affirmative action as were white men; indeed, according to Professor Wood, a NOW member had complained to him that her son had been rejected from medical school despite the fact that his grades were excellent.[151]

In contrast to the Right's racialization of the debate, feminists and the Left began to pursue a gender-based strategy as the campaign evolved. They realized that the anti-affirmative action initiative would likely succeed if it were seen only as a minority issue, whereas if understood as a measure that "dramatically affects laws governing treatment of women," the fact that women constituted half of the voting population meant that there might be "a good chance of beating it back."[152] Although a March 1995 poll showed that women supported the CCRI in the same numbers as men, leaders of NOW and the Feminist Majority, the two major women's rights groups opposed to the initiative, believed that women could be organized to vote as a bloc against the Proposition.[153] These same feminist leaders thought that the poll numbers would change if they "could make women understand how much they would lose if affirmative action were shelved."[154]

Accordingly, the opposition began to "frame the debate around women, who voted more regularly than men."[155] It did so largely through a $5 million adver-

148. *Id.* at 150.

149. Melinda L. Shelton & Diane Minor, *Poll Supports NOW's Affirmative Action Position*, NATIONAL NOW TIMES, May–June 1995, http://www.now.org/nnt/05-95/poll.html.

150. *See* RAZA, ANDERSON & CUSTRED, *supra* note 146, at 153 (emphasis added).

151. COSE, *supra* note 141, at 172.

152. Cathleen Decker, *Bid to Fight Affirmative Action Ban Announced*, L.A. TIMES, Feb. 23, 1996, at B1.

153. LYDIA CHÁVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION 95 (1998).

154. *Id.*

155. *Id.* at 95–96.

tising and educational campaign focusing on CCRI's impact on women; this campaign helped shift media attention from race to gender by early 1996.[156] The "Women Won't Go Back" campaign to defeat the initiative, composed of more than seventy national and state women's and civil rights groups, began "sounding the alarm" by warning that "the CCRI [would] not only gut affirmative action for women and minorities in California, but [would] also destroy the very foundation of California women's rights law."[157] This assertion was based on Clause C of the CCRI, which read: "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."[158] Dubbed the "stealth"[159] or "skeleton"[160] clause, Clause C was said to extinguish protections against sexual discrimination by lowering the legal standard for evaluating gender discrimination claims under the California Constitution from a "compelling need" to a "reasonableness" test.[161]

According to Lydia Chávez's well-documented and comprehensive research on the campaign, proponents of the initiative became worried about this gender-based strategy. Arnold Steinberg, CCRI's campaign manager, recognized that "ultimately the campaign for CCRI could lose if the opposition could use Clause C to impeach the message of the initiative."[162] Thus, he told his colleagues, "we would rather, in the limited attention span afforded by a campaign, focus on race, than gender."[163] Yet despite his concerns and the efforts of women's rights groups, polls continued to show women's support for the CCRI.[164]

By early 1996, California's intellectuals began joining the public debate: for example, in an op-ed piece in the *Los Angeles Times*, law professors Erwin Chemerinsky and Laurie Levenson argued that sex discrimination would become legal under Proposition 209.[165] In response, a number of legal scholars signed a petition, entitled "An Open Letter to the People of California," that debunked the attacks on Clause C.[166] They pointed out that since the "bona fide qualifications" language in that clause was taken directly from Title VII's bona fide occupational qualification language, there was no reason for concern, because

156. *Id.* at 136–37.

157. Press Release, Feminist Majority Foundation, Women's Campaign to Defeat "CCRI" Launched (Dec. 1, 1995), http://www.feminist.org/news/newsbyte/uswirestory.asp?id=5298 (quoting Eleanor Smeal).

158. *See* RAZA, ANDERSON & CUSTRED, *supra* note 146, at 153 (quoting the text of CCRI).

159. CHÁVEZ, *supra* note 153, at 137.

160. Linda Chávez, *The Elusive Clause [C]*, 1 NEXUS 42, 45 (1996).

161. Decker, *supra* note 152.

162. CHÁVEZ, *supra* note 153, at 137 (quoting Arnold Steinberg).

163. *Id.* (quoting Arnold Steinberg).

164. *See id.*

165. Erwin Chemerinsky & Laurie Levenson, Op-Ed., *Sex Discrimination Made Legal*, L.A. TIMES, Jan. 10, 1996, at B9.

166. *Open Letter to the People of California* (June 17, 1996), *available at* http://www.publicaffairsweb.com/ccri/open.htm (last visited Jan. 4, 2007) [hereinafter *Open Letter*].

under Title VII this language had been given a very narrow interpretation by the Supreme Court.[167] Thus, they claimed that Clause C would permit only such sex-based classifications that satisfied both the California Constitution and the "very narrow area of bona fide qualifications."[168] Feminists and the Left reacted by organizing a "Freedom Summer '96" that brought more than seven hundred students from fifty-four college campuses nationwide to California to inform voters, especially women, about CCRI's "sneak attack" against sex discrimination laws and affirmative action programs.[169]

Nevertheless, summertime polls indicated that women were still not convinced that Proposition 209 would negatively affect them,[170] "largely because of the complexity of explaining legal issues like 'standards of review' to laypersons."[171] Still, as the election drew near in the fall of 1996, NOW and the Feminist Majority continued to make gender the central focus of their campaign. A series of radio advertisements featured well-known female entertainers who gave gender-focused reasons for opposing Proposition 209, such as Candice Bergen's advertisement, which cautioned that "[a]nyone who depends on a working woman's wage should listen carefully. If 209 passes, we could lose maternity benefits. . . . Don't make a permanent change to the constitution that will hurt young girls, women, and minorities."[172] Similarly, a television advertisement released a few days before the election showed male hands taking away a woman's diploma, stethoscope, medical lab coat, hard hat, police cap, and business suit, while a chorus of men chanted, "take it off, take it all off." In the final scene of the commercial, a female voice declared, "Don't strip away our future . . . . Save affirmative action for women."[173]

Despite all of these efforts, however, Proposition 209 was passed by 54% of California voters,[174] with 58% of white women supporting the initiative.[175] It appears that in spite of the emphasis on the gender-based benefits of affirmative action as a means to garner support, "white women largely ignored the overtures made by opponents of Proposition 209."[176] Feminists attributed the failure of their efforts in part to a lack of money;[177] indeed, the president of California's

167. *Id. See, e.g.*, Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly.").

168. *Open Letter*, *supra* note 166.

169. Feminist Daily News Wire, *Freedom Summer '96 Kicks Off*, FEMINIST MAJORITY FOUNDATION ONLINE, June 1, 1996, http://www.feminist.org/news/newsbyte/uswirestory.asp?id=5297.

170. CHÁVEZ, *supra* note 153, at 232.

171. Wise, *supra* note 126, at 13.

172. CHÁVEZ, *supra* note 153, at 230.

173. *Id.* at 232–33.

174. Paul Ong, *Proposition 209 and Its Implications*, *in* IMPACTS OF AFFIRMATIVE ACTION: POLICIES AND CONSEQUENCES IN CALIFORNIA 197, 197 (Paul Ong ed., 1999).

175. CHÁVEZ, *supra* note 153, at 239.

176. Wise, *supra* note 126, at 2.

177. *See* CHÁVEZ, *supra* note 153, at 249–50.

NOW chapter claimed she felt "greatly encouraged" by the grassroots coalitions that had successfully narrowed the gap on Proposition 209 from twenty-five points to only eight points by election day.[178] Tim Wise, however, argues that the gender-based strategy was itself a failure, in part because, ironically, "[t]he successes of the women's movement have put white women in a position where it is harder for them to see—or more painful to acknowledge—the ongoing and potential problem of gender bias limiting their opportunities."[179]

Whatever the reasons for losing in California, women's groups across the nation were not deterred from using the same gender-based rhetoric in fighting against anti-affirmative action initiatives in other states. In Washington, for example, where a similarly worded Initiative 200 was placed on the ballot in 1998 (and passed by 58%[180]), NOW once again focused on the benefits of affirmative action to underscore why women should continue to support it.[181] More recently, in 2004, women's groups in Michigan organized to fight against Ward Connerly's Michigan Civil Rights Initiative ("MCRI"), which its proponents hoped to place on the ballot in 2006. Following in the footsteps of the earlier gender-based campaigns, in spite of their failure, Michigan feminists likewise emphasized that while "[o]ftentimes, affirmative action is viewed as a tool that solely benefits people of color, . . . [i]n fact, women are the most frequent beneficiaries of and will lose most if affirmative action is lost."[182] Although the MCRI was initially approved for placement on the ballot, after a six-month investigation the Michigan State Civil Rights Commission concluded that petition signatures needed to place the MCRI on the ballot were obtained through racially-targeted fraud and deception.[183] Signature collectors had intentionally misled

178. Elizabeth Toledo, *California Repeals Affirmative Action, Sets Stage for Copycat Attempts*, NATIONAL NOW TIMES, Jan. 1997, http://www.now.org/nnt/01-97/prop209.html.

179. Wise, *supra* note 126, at 19. *See also* DISCRIMINATION RESEARCH CTR. & EQUAL RIGHTS ADVOCATES, PROPOSITION 209 AND THE DECLINE OF WOMEN IN THE CONSTRUCTION TRADES 1 (2004), http://www.impactfund.org/publications/public_contractors_report.pdf (finding that after Proposition 209 was passed, the number of women who worked in California's construction industry—a field that had just begun to open up as a result of affirmative action—declined, while the number of men with construction jobs increased by 23.7% (although this statistic includes the period of 1995 before Proposition 209 had passed)); RALPH J. BUNCHE CTR. FOR AFRICAN AMERICAN STUDIES AT UCLA, ADMISSIONS AND OMISSIONS: HOW "THE NUMBERS" ARE USED TO EXCLUDE DESERVING STUDENTS: 2005–2006 CAPAA FINDINGS 3 (2006), http://www.bunche.ucla.edu/publications/Bunche%20Research%20Report-June%202006.pdf (noting the dramatic consequences of abolishing affirmative action at the University of California schools: in the last decade, African-American representation has dropped by 46% at UC Berkeley and 57% at UCLA).

180. Ong, *Proposition 209 and Its Implications*, *supra* note 174, at 198.

181. Position Paper, Washington State Chapter of National Organization for Women, Affirmative Action (Jan. 1998), http://www.wanow.org/pp/affirmative_action.html. For an analysis of the behavior of white women voters in Washington, see Sumi Cho, *Commentary: Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 U.M.K.C. L. REV. 399 (2002).

182. Press Release, Civilrights.org, Michigan Women Leaders Support Affirmative Action (July 6, 2004), http://www.civilrights.org/issues/affirmative/details.cfm?id=23949 (quoting Anita Bowden of the Michigan Council of the YWCA).

183. MICHIGAN CIVIL RIGHTS COMMISSION, REPORT REGARDING THE USE OF FRAUD AND

African-American voters into believing that by signing the petition, they would be protecting affirmative action.[184] The case was brought to federal court by a large group of plaintiffs that included Operation King's Dream and Detroit Mayor Kwame Kilpatrick; however, while the MCRI circulators were found to have "engaged in systematic voter fraud," the district court judge held that there had been no violation of the Voting Rights Act of 1965 because "minority and non-minority voters had equal access to a deceptive political process."[185] Despite the court urging deceived voters to vote against the proposal,[186] 58% of voters approved Proposition 2, thereby banning race- and gender-based preferences in Michigan public employment, education, and contracting.[187]

In sum, then, despite the lack of evidence, the claim that women primarily benefited from affirmative action policies nevertheless has been important to feminists as a rhetorical tool that shaped the conceptualization of their approach to affirmative action. If it were "widely assumed"[188] that women benefited most, then these same women would surely not abandon the policy when it was in jeopardy. Unfortunately, this strategy was not entirely effective. As the California example illustrates, the majority of white women did not enthusiastically defend affirmative action and failed to use their voting power to ensure its continuation.[189] However, that the claim has outlasted the evidence to the contrary reveals the true power of rhetoric.

III.
COMPARABLE WORTH

Only a decade after affirmative action was first introduced for women in the early 1970s, it was evident to many that the actual results of affirmative action

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DECEPTION IN THE COLLECTION OF SIGNATURES FOR THE MICHIGAN CIVIL RIGHTS INITIATIVE BALLOT PETITION 1 (2006), *available at* http://www.michigan.gov/documents/PetitionFraudreport_162009_7.pdf.

184. *Id.*

185. Operation King's Dream v. Connerly, No. 06-12773, 2006 WL 2514115, at *1, *17 (E.D. Mich. Aug. 29, 2006). To establish a violation of section 2 of the Voting Rights Act, a plaintiff must show that "'the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied *equal* access to the political process.'" *Id.* at *15 (citations omitted) (emphasis added).

186. *See id.* at *19 (noting that "voters who were induced by fraud into signing the petition still have an opportunity to participate in the political process by voting against the proposal in the general election").

187. Peter Slevin, *Court Battle Likely on Affirmative Action*, WASH. POST, Nov. 18, 2006, at A2.

188. Hartmann, *supra* note 2, at 77.

189. That the feminist rhetoric was not sufficiently persuasive in making the majority of women support affirmative action may also be explained by an analogy to Derrick Bell's theory of interest convergence. Bell's theory encompasses the idea that whites will only support advances for African Americans when doing so will also benefit themselves. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (explaining that under the interest convergence theory the "interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

did not live up to the rhetoric. Mary C. Segers described the situation in 1983 as discouraging when she pointed out that "for women as a whole . . . it may be the case that affirmative action has not made for much progress."[190] Partly because the policy's accomplishments did not meet its expectations, and due to a political backlash under the Reagan administration as well as a weakened women's movement, the early 1980s witnessed changes in feminist strategies, the most significant of which was comparable worth.

A. Movement of the 1980s

Initially, the women's movement had followed the civil rights model, emphasizing integration through the elimination of barriers to women's employment in traditional men's jobs; however, this strategy brought only limited success. The *New York Times* reported in 1989 that "[a] quarter-century after the start of the women's rights movement, American women say that despite their gains, it is still a man's world."[191] One of the main reasons for such a statement was that although affirmative action and non-discrimination laws opened some doors, occupations remained segregated by sex, and most women continued to hold low-status women's jobs where they earned much lower wages than men. According to U.S. Department of Labor statistics from the mid-1990s, six out of ten women were employed in occupations that were at least 70% female, while eight out of ten men worked in jobs that were at least 70% male.[192] This occupational segregation resulted in a persistent gender-based wage gap—"one of the more durable features of the wage structure in North America"[193]—that has been attributed in part to the undervaluation of women's jobs.[194] Indeed, throughout the 1960s and 1970s, the ratio of average earnings of women relative to men hovered around 60%, and by 1995 it was only about 75%.[195] More recent census data analysis conducted by the Institute for Women's Policy Research showed that in 2004 full-time working women still made only 76.5% of what men earned.[196]

While affirmative action was one strategy for integrating the workplace and reducing the wage gap by moving women into the higher-paid, male-dominated

190. BLUM, *supra* note 3, at 34.

191. Lisa Belkin, *Bars to Equality of Sexes Seen as Eroding, Slowly*, N.Y. TIMES, Aug. 20, 1989, at 1.

192. DEBORAH M. FIGART & PEGGY KAHN, CONTESTING THE MARKET: PAY EQUITY AND THE POLITICS OF ECONOMIC RESTRUCTURING 20 (1997).

193. Margaret Hallock, *Pay Equity: Did It Work?*, *in* SQUARING UP: POLICY STRATEGIES TO RAISE WOMEN'S INCOMES IN THE UNITED STATES 136, 139 (Mary C. King ed., 2001).

194. *See id.* at 136–37.

195. Mark R. Killingsworth, *Comparable Worth and Pay Equity: Recent Developments in the United States*, 28 CAN. PUB. POL'Y S171, S173 (2002); FIGART & KAHN, *supra* note 192, at 20.

196. INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE RATIO: WOMEN'S AND MEN'S EARNINGS (2006), *available at* http://www.iwpr.org/pdf/Updated2006_C350.pdf.

jobs, it did not directly address those jobs that remained segregated.[197] Thus it had little effect on the vast majority of women who continued to work in traditionally female occupations. Moreover, its successes were limited mainly to women in professional or managerial jobs and those who were able and willing to change jobs.[198] Indeed, the dominant perception of affirmative action in general was that it mainly benefited those with cultural and social advantages. As affirmative action opponent Justice Thomas so clearly articulated in his dissent in *Grutter v. Bollinger*, "[i]t must be remembered that . . . [affirmative action] does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."[199]

According to Jennifer Roback, a self-identified "skeptical feminist," the women's movement's focus on integrating male-dominated jobs "[made] sense for women from middle-class or professional families" who could more easily imagine themselves as "equal partners with their men," whereas working-class women found it much harder to envision themselves doing the more "physically demanding" blue-collar work that the men in their lives did.[200] Additionally, some of these women preferred to stay in women's jobs due to lack of training or confidence, reluctance to do "unfeminine" work as a result of years of "socialization," and current job satisfaction.[201] Child-care obligations also made some women unwilling or unable to "handle" what they thought would be an increased workload or responsibility,[202] although this may also have been the result of societal discrimination and stereotyping of women. Moreover, many women in traditional women's jobs who did not want men's jobs were concerned that "the women's movement threaten[ed] their freedom to choose a 'woman's job.'"[203] To these women, affirmative action supported the message of the labor market—"that their jobs [were] not valued and that they should change jobs if they want[ed] to earn a decent income."[204]

Consequently, feminists began to shift their focus in the early 1980s, as they recognized that "[e]conomic equality for women requires not just women's having an opportunity to enter into previously male jobs, but also the upgrading [in pay] of traditionally female jobs."[205] The decline of second-wave feminism dur-

197. Hallock, *supra* note 193, at 139–40.

198. *See id.* at 140; Donna Lenhoff, *Equal Pay for Work of Comparable Value as a Strategy*, WOMEN'S NEWSLETTER (National Lawyers Guild), Feb. 1978, *reprinted in* MANUAL ON PAY EQUITY: RAISING WAGES FOR WOMEN'S WORK 57, 57 (Joy Ann Grune ed., 1981).

199. 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting).

200. JENNIFER ROBACK, A MATTER OF CHOICE: A CRITIQUE OF COMPARABLE WORTH BY A SKEPTICAL FEMINIST 12 (1986).

201. *See* Lenhoff, *supra* note 198, at 57.

202. *Id.*

203. *Id.* at 58.

204. Hallock, *supra* note 193, at 140.

205. DECKARD, *supra* note 8, at 410.

ing these years, which coincided with the rise of a right-wing attack on feminism,[206] encouraged the women's movement to become more inclusive by embracing strategies that were more clearly directed at working-class women. Indeed, the limitations of the efforts of NOW's primarily white, well-educated female constituency in the 1970s "to bring women into full participation in the mainstream of American society,"[207] as well as the rising anti-feminist backlash and a changing family economy, prompted the women's movement to become "more sensitive to the women it previously marginalized."[208] Thus, feminists sought issues that would have more widespread appeal, such as comparable worth, and this shift in emphasis became apparent with the arrival of NOW's new president, Eleanor Smeal, in 1977. According to Ms. Smeal:

> What we did innocently was to get ourselves into a trap. We talked so much about opening new doors—and we want those doors open—that we didn't talk enough about the women in traditional jobs. . . . If our basic goal is economic equality, if we are trying to improve the economic conditions of the majority of the American women, we have to start upgrading the jobs they do.[209]

B. Defining and Debating Comparable Worth

The women's movement thus turned to comparable worth in an attempt to make dissimilar male- and female-dominated jobs of comparable worth equal in pay. Equity was to be accomplished through a system of job evaluations that would rate jobs within a particular firm on the basis of a number of factors.[210] As an example, a Minnesota study found that the skills, efforts, responsibility, and working conditions of clerk typists were comparable to that of delivery van drivers, yet the (mostly female) typists received $267 per month less than the (mostly male) drivers.[211] Comparable worth policies would eliminate such pay inequities by requiring employers to pay employees in comparable jobs the same salary.

Known as "the women's issue of the 1980s,"[212] comparable worth had begun to receive national attention in the late 1970s, especially with the arrival of Eleanor Holmes Norton as the chair of the EEOC under the Carter adminis-

206. *See* Epstein, *supra* note 9, at 2.

207. BLUM, *supra* note 3, at 41 (quoting NOW's original charter).

208. *Id.* at 46.

209. Ellen Goodman, *Equal Pay for Work of Equivalent Value*, WASH. POST, May 21, 1977, at A11 (quoting Eleanor Smeal).

210. For a description of various types of job evaluation systems, see HUTNER, *supra* note 4, at 16.

211. ELAINE SORENSEN, COMPARABLE WORTH: IS IT A WORTHY POLICY? 3 (1994).

212. Carol Lawson, *NOW Focuses on Pay Equity for Women*, N.Y. TIMES, Apr. 29, 1985, at C11 (quoting NOW president Judy Goldsmith).

tration.[213] Ms. Norton described it as a "true sleeping giant" at the 1979 National Conference on Pay Equity.[214] The concept itself was not a new idea: in 1951, comparable worth was codified into the International Labor Organization Convention 100, which—although not ratified by the United States—represented an international consensus on the principle.[215] Earlier, during World War II, the U.S. National War Labor Board had regulated wartime wages by requiring equal pay for equal work.[216] This wartime focus on pay equity heightened women's awareness of the gender-based wage gap, and in the post-war period Congress was consistently pressured to introduce bills mandating equal pay for "comparable work."[217] In fact, the 1962 bill that would become the Equal Pay Act one year later required equal pay for "work of comparable character on jobs the performance of which requires comparable skills."[218] However, Congress ultimately rejected this approach and replaced the statutory language with a requirement of equal pay for "equal work." As Representative Goodell of New York explained, "[w]e do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal."[219]

In fact, the idea that pay equity adjustments would require government involvement with wage-setting was largely what made comparable worth such a controversial issue, and opponents have relied mainly on economic arguments to question the concept.[220] It was considered a radical policy—much more so than affirmative action, which embodied a more mainstream view of the labor market[221]—because it departed from free-market principles and raised fundamental questions about wage setting.[222] The concept recognized that "women have been segregated into female occupations where wages have been discriminatorily depressed";[223] consequently, its aim was to remedy the gender-based wage

213. *See* BLUM, *supra* note 3, at 49.

214. HUTNER, *supra* note 4, at 1 (quoting Eleanor Holmes Norton).

215. *See* Judy Fudge & Patricia McDermott, *Introduction: Putting Feminism to Work*, *in* JUST WAGES: A FEMINIST ASSESSMENT OF PAY EQUITY 3, 3, 17 n.1 (Judy Fudge & Patricia McDermott eds., 1991); ELAINE JOHANSEN, COMPARABLE WORTH: THE MYTH AND THE MOVEMENT 14 (1984).

216. Karen Shallcross Koziava, *Women and Work: The Evolving Policy*, *in* WORKING WOMEN: PAST, PRESENT, FUTURE 374, 378–79 (Karen Shallcross Koziava, Michael H. Moskow & Lucretia Dewey Tanner eds., 1987).

217. *See* HUTNER, *supra* note 4, at 26–27.

218. *Id.* at 27 (quoting *Hearings on H.R. 8898 and H.R. 10266 Before the Select Subcomm. of Labor of the H. Comm. on Educ. and Labor*, 87th Cong. 2–10 (1962)).

219. Koziava, *supra* note 216, at 379 (quoting Representative Charles Goodell).

220. *See* ELLEN FRANKEL PAUL, EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE 39 (1989) (noting, for example, opponents' use of "precisely the neoclassical economics traditions that the comparable worth forces scorn" to counter proponents' claim of inherent market discrimination).

221. BLUM, *supra* note 3, at 15.

222. *See* JUDITH A. BAER, WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT 73 (3d ed. 2002).

223. Rita Mae Kelly & Jane Bayes, *Comparable Worth and Pay Equity: Issues and Trends*, *in* COMPARABLE WORTH, PAY EQUITY, AND PUBLIC POLICY 3, 4 (Rita Mae Kelly & Jane Bayes eds., 1988) (quoting National Committee on Pay Equity).

gap, which its proponents attributed to a marketplace permeated by discrimination. Critics of the policy, however, challenged the significance of the wage gap itself, asserting that it was both smaller than comparable worth advocates claimed and closing on its own.[224] They pointed out that the wage differential referenced by comparable worth advocates was flawed because it compared full-time male and female annual earnings and thus ignored the fact that women worked fewer hours per week and fewer weeks per year than did men.[225] Moreover, according to critic June O'Neill, not only had the gap narrowed considerably by the 1980s, but significant progress was evident from the fact that women in their early twenties were earning approximately 89% of the income of their male peers.[226] As for the remaining wage gap, O'Neill conceded that discrimination might still play some role and that "the residual itself might underestimate discrimination if some of the quantifiable factors themselves [were] affected by discrimination."[227]

Opponents of comparable worth further believed that artificially inflating wages for women would embody an inappropriate deviation from the fundamental capitalist principle of the free-market economy. They believed that equalizing wages would constitute unnecessary government interference with individual freedoms.[228] Although proponents of the policy agreed that comparable worth deviates from free-market principles, they questioned the benefits of the free-market system.[229] They also pointed out that many other regulatory laws, such as those prohibiting minors from buying alcohol, represent departures from free-market principles, and numerous regulations, including those against drug use, reflect already existing government interference with many individual freedoms.[230]

Comparable worth critics also disagreed as to the extent of discrimination in the marketplace.[231] They argued that in a free market, wages are determined on the basis of supply and demand, and thus they insisted that the market was not inherently discriminatory since it simply "mirror[ed] the free choices of individuals about how they will spend their limited resources."[232] They emphasized the different roles of men and women in the family, and maintained that many women *chose* occupations, such as nursing or teaching, that were relatively easy to reenter, albeit lower paying than traditional men's jobs.[233]

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224. STEVEN E. RHOADS, INCOMPARABLE WORTH: PAY EQUITY MEETS THE MARKET 9 (1993); PAUL, *supra* note 220, at 46–47.

225. RHOADS, *supra* note 224, at 9.

226. PAUL, *supra* note 220, at 46.

227. *Id.* at 47.

228. BAER, *supra* note 222, at 75.

229. *Id.*

230. *Id.*

231. RHOADS, *supra* note 224, at 14–15.

232. PAUL, *supra* note 220, at 41.

233. RHOADS, *supra* note 224, at 13.

In response, advocates of comparable worth asserted that the disparity in wages between the sexes could only be explained by discrimination on the part of employers. They pointed to many economists who studied the gendered wage gap and found that a "sizable portion" of it could not be explained by differences in job characteristics, amount of education, or experience.[234] In fact, since the gap was particularly pronounced between female-dominated and male-dominated occupations, the existing labor market could not be inherently neutral in the way it set wages.[235] Instead, the gap could only be explained by forces operating in the market that systematically discriminated against women.[236]

Comparable worth supporters relied on objective measures to show that women's jobs were underpaid when compared to men's jobs.[237] The National Academy of Sciences ("NAS"), which was commissioned by the EEOC to conduct a study of the issue in 1978, confirmed this undervaluation when it reported that "in many instances jobs held mainly by women . . . pay less at least in part *because* they are held mainly by women."[238] Led by Donald J. Treiman and Heidi Hartmann, a committee of the National Research Council of the NAS spent several years studying the issues involved in using job evaluation techniques to measure comparable worth, investigating the extent to which discrimination accounted for the gap in earnings and whether any remedies were possible.[239] After reviewing evidence on the extent and causes of wage differentials, the committee suggested that the main reason for women's lower relative earnings was that women were trapped in low-paying, sex-segregated occupations.[240] Although the evidence was "not complete or conclusive," the NAS committee determined that:

> the consistency of the results in many different job categories and in several different types of studies, the size of the pay differentials (even after worker and job characteristics have been taken into account), and the lack of evidence for alternative explanations strongly suggest[ed] that wage discrimination [was] widespread.[241]

The committee further concluded that factors such as labor market segmentation, job segregation, and employment practices permitted the continua-

234. BLUM, *supra* note 3, at 5.

235. *See* Kelly & Bayes, *supra* note 223, at 6 ("Statistical studies of the wage gap suggest that no more than 50% of the wage disparity . . . can be attributed to free market supply factors.").

236. *See* PAUL, *supra* note 220, at 16 (noting that after the wage gap statistically shrank as a result of regression analysis, supporters of comparable worth would "typically attribute to discrimination whatever wage gap they [could not] explain away as due to other factors").

237. *See* BLUM, *supra* note 3, at 4–5; PAUL, *supra* note 220, at 19.

238. COMM. ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, NAT'L RESEARCH COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 93 (Donald J. Treiman & Heidi I. Hartmann eds., 1981) [hereinafter WOMEN, WORK, AND WAGES].

239. *See id.* at 7–8.

240. *Id.* at 42.

241. *Id.* at 93.

tion of the gender-based wage disparity, and it questioned the notion that women's choice primarily caused the segregation in jobs.[242] These conclusions rested in part on the historic prevalence of wage differences between the sexes and the fact that pay differentials persisted even when job characteristics and employee qualifications were held constant.[243] Cases where previously male-dominated jobs, such as bank tellers or secretaries, were transformed into women's work with lower pay most clearly evidenced the lower value attributed to women's jobs.[244] The NAS committee thus endorsed comparable worth as "an alternative policy of intervention in the pay-setting process wherever women are systematically underpaid,"[245] and proposed that efforts be made to improve job evaluation tools by focusing on identifying and correcting any existing bias as well as developing new procedures to remove bias statistically.[246]

According to comparable worth advocates, since the labor market continues to be overwhelmingly segregated by sex—a factor that affirmative action cannot address on a systematic scale—comparable worth would cause the wage gap to largely disappear, for it would require employers to pay female employees in female-dominated jobs the same salaries as males in male-dominated jobs of comparable value.[247] The method for implementing comparable worth is job evaluations, in which experts rate jobs within a firm by giving them points on the basis of skills, efforts, responsibility, and working conditions. Dissimilar jobs that receive similar points are defined as being of comparable value, and thus should be given similar wages.[248] Critics of the comparable worth model argued that the technique is too subjective and unrealistically compares "apples and pumpkins and cans of worms."[249] Of course, job evaluations are far from perfect, for the manner of weighing the different factors and the judgment of the experts greatly affect the outcome. Although proponents agreed that job evaluation tools needed to be refined in order to make them free from sex bias, they emphasized that the problems were not insoluble, especially since job evaluators would still be replacing the subjective determinations of "mercurial employers with their personal tastes and prejudices."[250]

Critics of comparable worth also warned that increasing the wages of traditionally female-dominated occupations relative to the wages of male-dominated jobs would reduce the incentives for women to enter the male-dominated fields, and that therefore "the relative gain for women from entering

242. *See id.* at 49, 52–55, 63–64.

243. *Id.*

244. PAUL, *supra* note 220, at 22.

245. WOMEN, WORK, AND WAGES, *supra* note 238, at 66.

246. *Id.* at 70.

247. *See* PAUL, *supra* note 220, at 13.

248. Kelly & Bayes, *supra* note 223, at 8–9. *See also* PAUL, *supra* note 220, at 23 (describing the system in terms of "weighted scores").

249. HUTNER, *supra* note 4, at 15 (quoting Washington Governor Dixy Lee Ray in 1977).

250. PAUL, *supra* note 220, at 23, 27.

one of the male dominated fields declines."[251] They argued that if the free (supposedly non-discriminatory) market resulted in men's jobs paying better, then women workers should be attracted to those jobs, thus creating more gains for the women's movement than the implementation of comparable worth would.[252] However, advocates of the policy argued that where comparable worth had been implemented, women had not been discouraged from entering the male professions. In Minnesota, for instance, which was the first state to initiate and fully fund pay equity for its employees,[253] the number of women employed in female-dominated jobs increased by only 5% between 1982 and 1985, while the gain for women employed in male-dominated jobs during the same period was 19%.[254] Advocates also suggested that raising the wages of traditionally female-dominated occupations could encourage men to enter women's jobs,[255] which would help lead to occupational desegregation in the long run.

Unfortunately, however, the women's movement was never able to respond to all of the arguments against comparable worth. Nevertheless, feminists turned to comparable worth as a policy that intended to resolve the problem of the gender-based wage gap. Although only partially successful, as the next section will discuss, the focus on comparable worth was still an effective means of strengthening the weakened women's movement. In fact, some authors have attributed the widening of the movement's narrow base by the late 1980s in part to comparable worth,[256] as the issue enabled second-wave feminism to attract a broader base through its emphasis on the common oppression of all women.

C. Issues and Implementation

At the same time that the theory of comparable worth engendered much intellectual debate, an unlikely alliance of feminist and labor groups was at the forefront of the struggle to get comparable worth policies accepted in the political and legal arenas and implemented throughout the nation. While labor unions historically were not known as woman-friendly organizations,[257] the labor movement turned to the concept of comparable worth for similar reasons as had the women's movement: it, too, had "fallen on hard times" as its membership declined and the economy was changing.[258] Hence, in the early 1980s labor unions began to pay attention to women, who constituted an increasing percentage

251. ROBACK, *supra* note 200, at 34.

252. *See* BAER, *supra* note 222, at 75.

253. For a fuller discussion of Minnesota's pay equity adjustments, see *infra* text accompanying notes 309–16.

254. Kelly & Bayes, *supra* note 223, at 7.

255. BLUM, *supra* note 3, at 154.

256. *Id.* at 197.

257. *See id.* at 8–9.

258. ROBACK, *supra* note 200, at 12.

of the labor force, and began to embrace comparable worth in the hope of attracting "a previously untapped resource" and "regain[ing] some of the moral high ground they used to occupy as defenders of the working class."[259] Labor groups consequently teamed up with feminists and civil rights groups to form the National Committee on Pay Equity in 1979, which became an important umbrella organization that would lobby for the implementation of comparable worth.[260]

On the federal level, comparable worth advocates declared an early victory when Eleanor Holmes Norton became chair of the EEOC in 1977.[261] Under her leadership, the aforementioned report by the National Academy of Sciences was commissioned in 1978 to explain the persistence of the gender-based wage gap.[262] However, before the EEOC could use this information to develop any guidelines, President Reagan took office. The new administration seemed determined to discredit comparable worth; indeed, the President himself denounced it as a "cockamamie idea . . . [that] would destroy the basis of free enterprise,"[263] and the chair of the U.S. Commission on Civil Rights, Clarence M. Pendleton, Jr., called it "the looniest idea since Looney Tunes came on the screen."[264] The EEOC, with Clarence Thomas as its new chair, echoed the administration's sentiments on comparable worth, and all five EEOC commissioners agreed in 1985 that "Congress never authorized the Government to take on wholesale restructuring of wages that were set by non-sex-based decisions of employers, by collective bargaining, or by the marketplace."[265] Additionally, even though Congress was more supportive of the concept than the executive branch, none of the bills calling for comparable worth studies of the federal bureaucracy that were introduced in Congress throughout the 1980s were passed by both Houses.[266]

The courts, too, have not generally been sympathetic to comparable worth claims, usually declining to act when Congress had not yet done so. As the Court of Appeals for the Tenth Circuit explained in *Lemons v. City and County of Denver*,[267] it was unwilling to require the city "to reassess the worth of services in each position in relation to all others . . . in total disregard of conditions in the community," and "until some better signal from Congress is received we cannot venture into [comparable worth]."[268] The Court of Appeals for the Eighth Circuit was just as reluctant, declaring in *Christensen v. Iowa*[269] that

259. *Id.* at 13.

260. BLUM, *supra* note 3, at 49.

261. *Id.*

262. For the report's findings, see *supra* text accompanying notes 238–46.

263. SORENSEN, *supra* note 211, at 10 (quoting President Reagan).

264. *Concept of Pay Based on Worth is the 'Looniest,' Rights Chief Says*, N.Y. TIMES, Nov. 17, 1984, at 15.

265. BAER, *supra* note 222, at 73 (quoting Clarence Thomas).

266. SORENSEN, *supra* note 211, at 12.

267. 620 F.2d 228 (10th Cir. 1980).

268. *Id.* at 229.

269. 563 F.2d 353 (8th Cir. 1977).

"[w]e find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work."[270] Similarly, the Court of Appeals for the Seventh Circuit stated in *American Nurses' Association v. Illinois*[271] that "the issue of comparable worth . . . is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution."[272]

Nevertheless, there have been some small victories in the courts for the policy's advocates, for whom the principal legal hurdle was whether wage discrimination involving dissimilar jobs could be analyzed under Title VII of the 1964 Civil Rights Act without being limited by the Equal Pay Act standards. Under the Equal Pay Act, jobs must be equal or "substantially equal"[273] before differing pay rates can be evaluated for discrimination. Generally speaking, Title VII is broader in scope than the Equal Pay Act and prohibits discrimination in any of the terms and conditions of employment. However, the Bennett Amendment,[274] which added the last sentence now found in section 703(h) of Title VII, states that any disparity in wages that is authorized by the Equal Pay Act is not a Title VII violation.[275] The meaning of this amendment has been argued by comparable worth litigants on both sides. Opponents of the concept claimed that Title VII's equal pay prohibitions and defenses were limited to the "equal work" standard of the Equal Pay Act, while advocates maintained that Congress only intended to incorporate the Equal Pay Act's four exceptions into Title VII.[276] The fate of comparable worth claims hinged upon the resolution of the question of whether the "equal work" standard explicitly narrowed the scope of Title VII: since pay equity claims are based upon comparisons between dissimilar jobs of comparable value, then if Title VII was limited by that standard, comparable worth lawsuits would never succeed.

In 1981, the Supreme Court finally decided the Title VII question in *County of Washington v. Gunther*,[277] in which a county in Oregon paid its female prison guards substantially lower wages than its male guards. The district court dismissed the action because it found that the two types of jobs were not "substantially equal," thus ending the equal pay inquiry.[278] The Ninth Circuit Court of

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270. *Id.* at 356.

271. 783 F.2d 716 (7th Cir. 1986).

272. *Id.* at 720.

273. EEOC v. Madison Cmty. Unit School, Dist. No. 12, 818 F.2d 577, 582 (7th Cir. 1987).

274. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-2(h) (2000)). *See, e.g.*, Gunther v. County of Washington, 623 F.2d 1303, 1311–12 & n.8 (9th Cir. 1979) (discussing the legislative history of what is "commonly known as the Bennett Amendment").

275. 42 U.S.C. § 2000e-2(h) (2000).

276. PAUL, *supra* note 220, at 67–68.

277. 452 U.S. 161 (1981). For a good overview of the procedural history of the decision, see PAUL, *supra* note 220, at 68–79.

278. Gunther v. County of Washington, No. 74-581, 976 WL 648, at *4–5 (D. Or. Sept. 3,

Appeals affirmed the district court's ruling,[279] and the female plaintiffs did not seek further review on that specific issue.[280] The Supreme Court's decision was therefore limited to whether the female prison guards were paid less than the male guards due to intentional discrimination; the district court had reasoned that this claim was precluded by the Bennett Amendment but the Ninth Circuit disagreed.[281] In a five-to-four decision, the Supreme Court held that the Bennett Amendment simply incorporated the Equal Pay Act's four affirmative defenses,[282] without limiting Title VII to the Act's "equal work" standard.[283]

For comparable worth advocates, *Gunther* was an important decision. They believed that by refusing to limit Title VII, the Court implicitly approved of the comparable worth standard. Supporters such as Joy Ann Grune, a former Executive Director of the National Committee on Pay Equity, maintained that the Supreme Court "has decided that wage discrimination involving jobs that are comparable though not equal is illegal."[284] Notwithstanding such enthusiasm, the case was decided very narrowly on grounds of intentional wage discrimination.[285] In fact, the Court explicitly denied that the decision could be interpreted as endorsing the concept of comparable worth as a source of liability under Title VII:

> We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is *not based on the controversial concept of "comparable worth,"* under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community. Rather, . . . [t]he narrow question in this case is

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1976).

279. Gunther v. County of Washington, 623 F.2d 1303, 1310 (9th Cir. 1979).

280. PAUL, *supra* note 220, at 76. *See also Gunther*, 452 U.S. at 163 ("The question presented is whether § 703(h) . . . restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.").

281. 623 F.2d at 1321.

282. The Equal Pay Act's affirmative defenses permit an employer to differentiate in pay, even if it would otherwise violate the Act, on the basis of: (i) seniority; (ii) merit; (iii) quantity or quality of production; or (iv) other factors other than sex. *See* 29 U.S.C. § 206(d)(1) (2006).

283. 452 U.S. at 170–71.

284. PAUL, *supra* note 220, at 69 (quoting Joy Ann Grune).

285. *See* 452 U.S. at 165. *Gunther* did not make clear what standards of proof could be used in sex-based wage discrimination cases under Title VII. *Gunther* was a disparate treatment case, and the Supreme Court did not rule on whether a showing of disparate impact would have been enough to establish a prima facie case of sex-based wage discrimination under Title VII. The lower courts that have decided this issue have generally rejected the use of a disparate impact standard in sex-based wage discrimination cases. *See, e.g.*, AFSCME v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985) (holding that "a compensation system that is responsive to supply and demand and other market forces . . . does not constitute a single practice that suffices to support a claim under disparate impact theory"). For a good discussion of whether disparate impact analysis can be applied to a sex-based comparable worth claim, see Joseph P. Loudon & Timothy D. Loudon, *Applying Disparate Impact to Title VII Comparable Worth Claims: An Incomparable Task*, 61 IND. L.J. 165 (1986).

> whether . . . a claim [of intentional wage discrimination] is precluded by the last sentence of § 703(h) of Title VII, called the "Bennett Amendment."[286]

Yet although the Court expressly refrained from endorsing comparable worth, it kept a window open for further litigation by allowing wage discrimination claims that go beyond the "equal work" standard to be tried under Title VII. Despite the decision, however, subsequent cases have revealed the uncertain legal status of comparable worth as a source of liability under Title VII, for "there has not been a real change of heart on the true comparable worth claims."[287]

In one well-known case, *American Federation of State, County, and Municipal Employees (AFSCME) v. Washington*,[288] a district court judge appears to have been encouraged by *Gunther* to allow a comparable worth-type of claim to be brought under Title VII. In that case, two unions filed suit on behalf of Washington employees to remedy a wage differential of about 20% between the pay for jobs predominantly held by women and the compensation for men in male-dominated jobs of equivalent value.[289] The district court had to determine whether the state's failure to pay the plaintiffs appropriate salaries, as established by the state's own comparable worth studies, constituted sex discrimination. The court found that Washington had violated Title VII under both disparate impact and disparate treatment theories.[290]

Two years later, the Ninth Circuit reversed, refusing to accept the plaintiffs' argument that the state's practice of basing pay rates on the market discriminated against women.[291] Rejecting comparable worth theory, then-Judge Anthony Kennedy wrote for the court: "We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market."[292]

Thus, as these cases indicate, the courts have not been great supporters of the concept of comparable worth. Yet, "[w]hile disappointments abound[ed] for comparable worth's supporters in the courts and at the federal level, such [was] not the case in the states."[293] Beginning in 1981, comparable worth advocates focused their energies on state and local government employment.[294] At the state level, the feminist-labor alliance was again the principal advocate of comparable worth implementation. Women's organizations within state govern-

286. 452 U.S. at 166 (emphasis added).
287. PAUL, *supra* note 220, at 79.
288. 578 F. Supp. 846 (W.D. Wash. 1983).
289. *Id.* at 861.
290. *Id.* at 866–67.
291. *See* AFSCME v. Washington, 770 F.2d 1401, 1408 (9th Cir. 1985).
292. *Id.* at 1407.
293. PAUL, *supra* note 220, at 92.
294. *Id.*

ments played leading roles in bringing the comparable worth concept to the forefront and on the public policy agenda,[295] and labor unions were also important "in either conducting comparable worth studies of their own or in lobbying for the enactment of comparable worth legislation."[296]

By the late 1980s, forty-five out of the fifty states had begun taking some action on the question of pay equity, usually in the form of legislation authorizing comparable worth or job evaluation studies.[297] In 1989, the National Committee on Pay Equity identified fourteen states[298] that had implemented some type of comparable worth policy in selected occupations, and it found six more states[299] that had fully implemented comparable worth policies, as these states had evaluated the wages for a broad range of jobs and made pay increases in accordance with their assessments.[300] On average, implementation of comparable worth policies in these states reduced the gap in pay by about 20%.[301] The results among the states varied widely, however, depending in part on the amount of money the states were willing to spend, the relative number of women affected, and the level to which women's wages were increased.[302]

The impetus for implementation differed among states and localities. In San Jose, California, for example, after a study indicated considerable pay disparities among the city's employees, non-management municipal employees led a nine-day strike that led to major wage adjustments.[303] Washington State was motivated to address pay inequities when AFSCME demanded comparable worth in a letter to the governor in 1973 prior to bringing the above-mentioned case to court.[304] Republican Governor Dan Evans responded by ordering the first comparable worth study in the country, which found that predominantly female state jobs were paid about 20% less than male-dominated jobs of equivalent value.[305] Over the next several years, the state legislature continued to study the issue but did not provide funding to implement comparable worth; consequently in 1981, "after many years of frustration," AFSCME filed suit.[306] Though they ulti-

295. Keon S. Chi, *Comparable Worth in State Government*, *in* COMPARABLE WORTH, PAY EQUITY, AND PUBLIC POLICY 109, 112 (Rita Mae Kelly & Jane Bayes eds., 1988).

296. PAUL, *supra* note 220, at 92.

297. Rita Mae Kelly & Jane Bayes, *Conclusion* to COMPARABLE WORTH, PAY EQUITY, AND PUBLIC POLICY 239, 239 (Rita Mae Kelly & Jane Bayes eds., 1988).

298. California, Connecticut, Florida, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Dakota, and Vermont.

299. Iowa, Minnesota, New York, Oregon, Washington, and Wisconsin.

300. Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, a Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69, 72–73 (1994).

301. *Id.* at 75.

302. *Id.* at 69.

303. BLUM, *supra* note 3, at 55, 85. *See* HUTNER, *supra* note 4, at 59.

304. Hartmann & Aaronson, *supra* note 300, at 72.

305. HUTNER, *supra* note 4, at 156–57.

306. *Id.* at 159.

mately lost in the courts,[307] the unions and the state negotiated a settlement whereby the state "gave nearly $500 million to women workers in order to achieve pay equity by 1992."[308]

While Washington and San Jose implemented pay equity through negotiation and strike, respectively, Minnesota was the first state to initiate and fully fund pay equity for its employees. After conducting job evaluation studies, the state legislature passed the State Employees Pay Equity Act in 1982,[309] the purpose of which was to "establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in the executive branch."[310] As a result of this law, over the four-year implementation period (1983–1987), the average wage increased by $2200.[311] Approximately eighty-five hundred people working in two hundred female-dominated job categories benefited from the Act, with workers in the clerical or health-care fields receiving the majority of the raises.[312]

In 1984, the Minnesota state legislature was also the first to pass a Local Government Pay Equity Act,[313] which required all local governments to develop and implement comparable worth plans for their employees.[314] To ensure compliance with the Act, the Department of Employee Relations, the state agency responsible for enforcing the Act, has since 1992 compiled reports from local governments and submitted those reports to the state legislature annually.[315] The success of the movement in Minnesota has led advocates to call it "the shining example of how to do pay equity right."[316]

Despite these successes in the states, however, by the early 1990s the comparable worth movement had tapered off.[317] In part, this resulted from a shift in outlook by its advocates, who began to realize that the extent of pay equity adjustments was less than what they had hoped for.[318] The original expectation of the movement had been to "correct the gender-based wage gap";[319] yet after a

307. See *supra* text accompanying notes 288–92 for the legal basis of the decisions.

308. PAUL, *supra* note 220, at 83.

309. 1982 Minn. Laws 634 (codified as amended at MINN. STAT. §§ 43A.01–43A.18 (West 2000 & 2006 Supp.)).

310. *Quoted in* Sara M. Evans & Barbara J. Nelson, *Translating Wage Gains into Social Change: International Lessons from Implementing Pay Equity in Minnesota*, *in* JUST WAGES: A FEMINIST ASSESSMENT OF PAY EQUITY 227, 229 (Judy Fudge & Patricia McDermott eds., 1991).

311. *Id.* at 230.

312. *Id.*

313. 1984 Minn. Laws 651 (codified as amended at MINN. STAT. §§ 471.992–471.993 (West 2001 & 2006 Supp.)).

314. Evans & Nelson, *supra* note 310, at 233.

315. MINN. STATE DEP'T OF EMPLOYEE RELATIONS, MINN. LOCAL GOV'T PAY EQUITY COMPLIANCE REPORT (2006), *available at* http://www.doer.state.mn.us/lr-peqty/payequity.pdf.

316. RHOADS, *supra* note 224, at 4 (quoting Marilyn De Poy, coordinator for women's rights at AFSCME).

317. Hallock, *supra* note 193, at 138.

318. *See* Killingsworth, *supra* note 195, at S183.

319. Hartmann & Aaronson, *supra* note 300, at 71.

decade of initiatives, "the disappointments seem[ed] to tip the scales."[320] In retrospect, advocates "realized that some of [the] early initiatives had established precedents that narrowed the scope of subsequent work."[321] Accordingly, by the early 1990s, "assessments of pay equity accomplishments were much less positive."[322]

Furthermore, although equal pay remained a priority among women workers, feminist efforts weakened during the 1990s as the women's movement was "forced to defend gains in other areas."[323] At the end of the decade, there was a brief resurgence of activity at both the state and national level, with the introduction of the Fair Pay Act by Eleanor Holmes Norton (D.C.) in the House of Representatives and Tom Harkin (Iowa) in the Senate, as well as similar efforts in many of the states.[324] As a whole, however, "comparable worth has progressed (if that is the word) from a controversial proposal to a dead one."[325]

IV.
AFFIRMATIVE ACTION AND COMPARABLE WORTH: A COMPARISON

As this Article has discussed, in the fight for economic justice, feminist energies were spent on both affirmative action and comparable worth as means to establish equal employment opportunities and eliminate the gender-based wage gap. Although these two strategies were distinct in purpose as well as timing, it is useful to compare their advantages and disadvantages in order to assess the effectiveness of each approach. Moreover, facing a weakened women's movement, current feminist activists may be able to obtain valuable insights from the successes and failures of the two strategies, as contemporary feminism continues to seek ways to restrengthen the movement and reunite women in the fight for gender equality.

Through affirmative action, the women's movement addressed the problem of integrating the workplace. Its potential societal benefits made this strategy worthwhile, despite the relatively small scope of success. However, as Jennifer Roback points out, its benefits were limited by the fact that many women continued to experience "psychological barriers" to entering male-dominated jobs, as men would stop certain conversations when women approached, and in white-collar jobs women would often be excluded from such informal bonding activities as golf or racquetball that added to the workplace's social network.[326] In

320. Hallock, *supra* note 193, at 137.
321. Killingsworth, *supra* note 195, at S183–84.
322. *Id.* at S184 (quoting R.J. Steinberg).
323. Hallock, *supra* note 193, at 138.
324. Judy Mann, *Waiting for the Equal-Pay Ship to Dock*, WASH. POST, Mar. 3, 1999, at C15.
325. BAER, *supra* note 222, at 73.
326. ROBACK, *supra* note 200, at 37.

such an environment, "women naturally [felt] they must struggle just to be taken seriously."[327]

In fact, a serious setback to affirmative action's efforts to integrate the workplace was the hostility of male co-workers to women's presence on "their turf" and the increased opportunity for sexual harassment;[328] if this occurred mostly in blue-collar jobs, it would help explain why it was harder to recruit women for these jobs than for non-traditional white-collar jobs.[329] Indeed, by the late 1980s, at least 30% of women who had entered previously male blue-collar jobs reported harassment, and there were many more who suffered silently.[330] As Catherine MacKinnon discussed in her path-breaking 1979 study, *Sexual Harassment of Working Women*, hostile environment harassment occurred both to "token women"—those "whose visibility as women is pronounced and who often present a 'challenge' to men"—as well as to "women in traditional 'women's jobs' who are defined as accessible to such incursions by the same standard that gives them the job at all."[331]

The concept of sexual harassment came to the forefront primarily as men began to come into more frequent contact with women at work and used sexual harassment as a "deliberate attempt to keep women out of non-traditional jobs."[332] The *New York Times* reported in 1977 that many of the victims of sexual harassment had recently become "uppity" and needed a "warning signal not to overstep what men have considered to be women's traditional boundaries."[333] Moreover, according to one scholar:

> [H]arassment is a central process through which the image of nontraditional work as "masculine" is sustained. If there are no women in the job, then the work's content can be described exclusively in terms of the "manly" personal characteristics of the men who do it. . . . By driving women out of nontraditional jobs, harassment reinforces the idea that women are inferior workers who cannot meet the demands of a "man's job."[334]

As a 1976 *Redbook Magazine* questionnaire concluded, sexual harassment was

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327. *Id.* at 38.

328. FERREE & HESS, *supra* note 12, at 166.

329. BLUM, *supra* note 3, at 150 n.19.

330. *Id.*

331. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 40 (1979).

332. Barbara A. Gutek, *A Psychological Examination of Sexual Harassment, in* SEX ROLE STEREOTYPING AND AFFIRMATIVE ACTION POLICY 131, 160 (Barbara A. Gutek ed., 1982).

333. Ann Crittenden, *Women Tell of Sexual Harassment at Work*, N.Y. TIMES, Oct. 25, 1977, at 60.

334. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1836–37 (1990).

"pandemic—an everyday, everywhere occurrence"[335] to which the courts had failed to respond effectively; thus it had the effect of hindering the smooth integration of the workplace.

Another possible adverse consequence of affirmative action's emphasis on job integration was resegregation, as the entry by women into traditionally male jobs created the "potential for new female job ghettos."[336] Linda Blum demonstrates this emergence of new divisions of labor within previously male-only jobs by pointing to several instances of resegregation: for example, the position of sheriff's dispatcher in California's Contra Costa County, formerly a better-paying male-dominated job, had become 89.2% female by 1983.[337] Moreover, affirmative action efforts sometimes pushed women into jobs that were more vulnerable to elimination, especially during times of economic contraction when newly-integrated women with the least seniority were often the first to be terminated.[338] In the steel industry, for instance, any progress made during the first five years of the 1974 affirmative action consent decrees was completely eliminated as a result of the economic climate of the early 1980s.[339] Such evidence supports the notion that "while some women moved up, more moved out";[340] thus, it may have been "less risky . . . for women to remain in pink-collar work."[341]

The possibility that the implementation of affirmative action for women could at times lead to resegregation or even job loss brings to light the advantages of comparable worth, especially considering the fact that affirmative action did little to help those women who continued to work in the traditionally lower-paying female jobs. In fact, many women disliked the pejorative quality they perceived in affirmative action, and many did not want men's jobs since women's jobs held for them non-economic rewards.[342] Some feminists responded to this by advocating comparable worth, which disputed the assumption that men's jobs are intrinsically more satisfying.[343] Establishing the principle that women's work must be given respect and recognition, both financially and psychologically, was particularly valuable in a society where occupational segregation remained high and the ratio of average earnings of women relative to men stayed around 60% throughout the 1970s and early 1980s.[344] Moreover, in-

335. Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK MAGAZINE, Nov. 1976, at 149, 217.

336. BLUM, *supra* note 3, at 141.

337. *Id.* at 139.

338. *See id.* at 141.

339. *Id.* at 142.

340. *Id.* (quoting Sally L. Hacker, *Sex Stratification, Technological and Organizational Change: A Longitudinal Case Study of AT&T, in* WOMEN AND WORK: PROBLEMS AND PERSPECTIVES (R. Kahn-Hut, A.K. Daniels & R. Colvard eds., 1982)).

341. BLUM, *supra* note 3, at 142.

342. Lenhoff, *supra* note 198, at 57–58.

343. *See* BLUM, *supra* note 3, at 143.

344. FIGART & KAHN, *supra* note 192, at 20–21.

creasing the wages of traditionally female-dominated occupations was expected to encourage men to enter women's jobs.[345] However, some studies conducted during the 1970s and 1980s suggested that the entry of men into women's work may have resulted not in real occupational desegregation but instead in the possible formation of new gendered job hierarchies within the predominantly female jobs.[346] These studies showed that "gender-based hierarchies of power, expertise, and status that are irrelevant in an all-female work site will be replicated with the entry of even a few men."[347] Thus, encouraging men to enter women's jobs may have had adverse consequences alongside the positive challenge to the gendered division of labor.

Despite the inherent advantages of emphasizing women's value, a major shortcoming of the comparable worth model was that its reinforcement of occupational segregation and gender stereotyping—by valorizing traditional preferences and openly acknowledging gender differences—may in the long run have been anti-feminist. Unfortunately, in practice, comparable worth did nothing to change sexist attitudes or reduce the view that women should stay in subordinate roles.[348] It thus stood in stark contrast to the earlier feminist agenda that emphasized women's ability to perform the traditional male jobs, and "instead of encouraging women to engage in new ventures, it concede[d] that they will be secretaries, nurses, and teachers for a long time to come and only ask[ed] that they be paid more."[349]

In fact, in retrospect comparable worth may not have been the best strategy to pursue in the long term for the women's movement both theoretically and practically, since it moved away from the recognized goal of workplace integration. Initially, as this Article has shown, the women's movement followed the civil rights model with its emphasis on integration through the elimination of barriers to women's employment in traditional men's jobs. The debate over affirmative action, however, left out the question of whether the race model was the right one for women to follow or whether there was a better alternative. The women's movement conceded that it would not succeed in completely desegregating the workplace, and thus within a decade it began to address the gendered workplace through comparable worth. Yet women were alone in adopting this strategy; the black civil rights movement never picked up on comparable worth for black jobs, having in fact specifically rejected a strategy of simultaneously seeking equalization and integration.[350] As Thurgood Marshall noted in the

345. BLUM, *supra* note 3, at 153–54.

346. *See id.* at 151.

347. *Id.* at 153.

348. *See* ROBACK, *supra* note 200, at 38.

349. PAUL, *supra* note 220, at 57.

350. In the struggle over segregated education that triumphed with *Brown v. Board of Education*, 347 U.S. 483 (1954), black leaders strongly disputed whether to focus on improving the quality of black schools or to attack segregation altogether. Thurgood Marshall, as chief counsel for the National Association for the Advancement of Colored People ("NAACP"), played a key

struggle over *Brown v. Board of Education*, "[y]ou cannot have a little segregation; you cannot rationalize on the necessity of segregation at all."[351]

These arguments can be echoed in the debate over comparable worth, for it too can be said to have implicitly accepted sex segregation as "legally tolerable."[352] Yet the analogy is not perfectly congruent, especially in light of the fact that in the 1980s occupational segregation was more prevalent between the sexes than between the races.[353] Therefore, women's different experience may explain why feminists turned to comparable worth to address a gender-specific problem in the workplace. Moreover, while it may have been politically unpopular to assume that the transition from a sex-segregated to an integrated workforce would take a very long time to complete, this does not mean that comparable worth was the wrong route to pursue while this transition was taking place. As Blum notes, although it may have kept in place the barriers between men's and women's work, the limited benefits and potential risks produced by affirmative action policies meant that in the 1980s, comparable worth probably offered "low-paid women more progress toward gender equality . . . with less risk of adverse consequences, than [did] policies of formal equal treatment."[354]

Additionally, as noted above, comparable worth was noteworthy as a means by which the weakened women's movement could be strengthened, as it could attract a broader base by becoming "more sensitive to women it previously marginalized."[355] While such issues as affirmative action or the Equal Rights Amendment spoke more to the interests of middle-class and professional women, comparable worth had "the potential to greatly increase the effectiveness of the feminist movement."[356] Indeed, by drawing attention to women's common oppression, it may have been "more significant politically and symbolically in directing attention to the economic plight of women than it [was] in directly remedying the injustices which it expose[d]."[357]

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role in moving the legal strategy from "separate but equal" to wholesale desegregation of public schools. Although the movement was gradual—not until 1950 did the NAACP staff officially decide to challenge segregation directly instead of seeking to equalize facilities—the reasons for rejecting an equalization strategy were both organizational and ideological. Not only would the investigation into inequalities be costly and time-consuming, but relief in the form of equalization was seen to implicitly support segregation as "legally tolerable." MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 109 (1987). *See also* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 147 (1994).

351. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, *supra* note 350, at 108.

352. *Id.* at 109.

353. *See* SAMUEL COHN, RACE, GENDER, AND DISCRIMINATION AT WORK 23–24 (2000).

354. BLUM, *supra* note 3, at 135.

355. *Id.* at 46.

356. *Id.*

357. Kelly & Bayes, *Conclusion*, *supra* note 297, at 244.

CONCLUSION

In sum, then, affirmative action and comparable worth were each subject to certain limitations, and are therefore best viewed as complementary strategies in the feminist struggle for economic justice. Unfortunately, as the histories of these two policies have shown, each faced substantial obstacles in terms of acceptance and effectiveness, and, therefore, neither has lived up to its lofty expectations. Indeed, the widely-held assumption that affirmative action primarily benefited women has never been proven true; nor, for that matter, was comparable worth ever to become—in the words of a feminist and labor activist—"the issue of the nineties . . . here to stay."[358] In the end, however, by capturing national attention, affirmative action legitimated a gender-based discourse, which in turn made comparable worth possible.[359] Thus, the two were undeniably complementary. As Heidi Hartmann correctly points out: "Pay equity, or equal pay for work of equal value, and an end to discrimination in pay for women [were] needed as much as expanded job opportunities for women."[360]

Consequently, from the perspective of the 1970s and 1980s, the feminist focus on both affirmative action and comparable worth appears to have been properly placed. Today's feminists, however, may find that comparable worth's theoretical and practical failures and especially its reinforcement of occupational segregation and sex stereotyping no longer make it a desirable strategy for the women's movement. Moreover, conflicted views about affirmative action and increasing public ambivalence over its fairness make it challenging for feminists to continue to defend its use in the future. Yet despite their present-day unpopularity, a discussion of both avenues of social change in one article provides a more complete picture of second-wave feminism's approach to workplace equality, as they were the two major strategies by which the women's movement sought to establish equal employment opportunities and eliminate the gender-based wage gap. Indeed, the unique marriage of affirmative action and comparable worth in this Article permits those attempting to continue the struggle for workplace equality in the twenty-first century to take away useful lessons that will help shape an appropriate and effective strategy for the future.

The perception of comparable worth as a failure is in part due to feminists' consideration of the strategy vis-à-vis affirmative action; desegregating the workplace is commonly seen as the better and more widely-accepted route. Yet, as this Article has demonstrated, comparable worth may have been a noble strategy to pursue at the time, as it aimed at widening the feminist base by focusing more directly on the problems facing working-class women. It was, arguably, an appropriate short-term approach in the fight for economic justice that arose out of the backlash against affirmative action and the weakening of the women's

358. BLUM, *supra* note 3, at 202 (quoting Lee Finney, of Contra Costa County, California).

359. *See id.* at 20.

360. Hartmann, *supra* note 2, at 94.

movement.

The need to strengthen the contemporary women's movement shows why feminists can still use the story of comparable worth to their advantage. Not only has gender equality not yet been achieved—despite widespread social acceptance of the goal itself—but the women's movement has been greatly weakened by a "loss in confidence in the possibility that collective action can bring about social change."[361] To combat this decline, feminists should pay attention to the earlier shift toward a more inclusive agenda, especially since the movement as a whole seems to have gradually "lost its critical distance from its own middle and upper middle class position."[362] As this Article has suggested, a similar critique raised during the movement's early years led feminists to turn to comparable worth, which was a first effort—albeit ultimately unsuccessful—of the women's movement to expand and become more inclusive by embracing strategies that were more clearly directed at working-class women.

Thus, for those attempting to continue the struggle for workplace equality, the side-by-side analysis of second-wave feminism's two major strategies for economic justice may provide some valuable lessons. In particular, any goal of the movement to regain vibrancy and become politically relevant again in the area of workplace equality must be accompanied by a search for strategies that help to expand the feminist base. While the limited success of affirmative action for women encouraged second-wave feminism to become more attentive to working-class women, the limits of a policy of comparable worth that reinforces occupational segregation and radically alters free-market principles show that it may be more effective to focus future efforts on addressing such problems as the gendered wage gap through strategies that would receive wider support. Indeed, class-specific strategies such as minimum wage legislation and increased unionization that would raise the earnings of workers at the bottom of the labor market would be less vulnerable to attack politically, legally, and practically, since they are directed at a much broader constituency. Even though race- or gender-neutral, such broader policies aimed at raising the earnings of those "at the bottom of the labor market . . . are necessary to substantially eliminate race and gender disparities" in the labor force.[363] Crucially, such strategies have the advantage of increasing the feminist base at the same time that they reduce employment inequities.

Additionally, today's feminists need to focus on strategies that guarantee equality of access and pay at all levels of employment. As women become more integrated in the labor force—the goal that affirmative action and anti-discrimination laws have tried to attain—glass ceilings remain major barriers to career advancement, and thus to wage parity, for women. In the corporate

361. Epstein, *supra* note 9, at 6–7.

362. *Id.* at 10.

363. ROBERT CHERRY, WHO GETS THE GOOD JOBS? COMBATING RACE AND GENDER DISPARITIES 232 (2001).

world, for example, only 15.7% of the officers of Fortune 500 companies are female and only 7.9% of the highest-ranking corporate officers are women.[364] Similarly, women attorneys represent 44.12% of associates in the nation's major law firms but represent only 17.29% of the partners in these firms.[365] Although affirmative action does partially address these problems by seeking to remove barriers to women's employment in the traditionally male-dominated occupations, this Article has demonstrated that the accomplishments of affirmative action policies for women have not lived up to their expectations. Moreover, public ambivalence to affirmative action is making it—like comparable worth was in the 1980s—politically problematic for the women's movement to continue to defend.

Accordingly, the contemporary women's movement needs to find appropriate new strategies for the future that effectively address the problems of gender inequality still present in today's workplace. While both affirmative action and comparable worth had practical and political goals that continue to be relevant, the need for a new broad-based approach that is committed to guaranteeing equality of access is particularly necessary considering that today "there is no longer a mass women's movement."[366] Instead, there are many separate groups working for women's equality, and the various women's organizations that once had large participatory memberships seem to have "lost concern with the conditions of women's lives," as they have been replaced by bureaucracies managed by paid staff.[367] Yet since the future of American feminism depends on the next generation of women, the women's movement should continue to aspire toward greater inclusiveness through the merger of class and gender issues. Indeed, without such conscious efforts, the feminist "goal of representing all American women remains an elusive vision."[368]

364. CATALYST, WOMEN IN BUSINESS: A SNAPSHOT (2001), *available at* http://www.catalyst.org/files/fact/Snapshot%202004.pdf.

365. Press Release, National Association for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), *available at* http://www.nalp.org/press/details.php?id=57.

366. Epstein, *supra* note 9, at 2.

367. *Id.*

368. FERREE & HESS, *supra* note 12, at 99.