



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 22 | Number 3

Article 2

---

4-1-1989

## Comparable Worth: An Impermissible Form of Affirmative Action

Kingsley R. Browne

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Kingsley R. Browne, *Comparable Worth: An Impermissible Form of Affirmative Action*, 22 Loy. L.A. L. Rev. 717 (1989).

Available at: <https://digitalcommons.lmu.edu/llr/vol22/iss3/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# COMPARABLE WORTH: AN IMPERMISSIBLE FORM OF AFFIRMATIVE ACTION?\*

*Kingsley R. Browne\*\**

## I. INTRODUCTION

Under the general principle of “comparable worth” or “pay equity,” the amount of compensation paid should be the same for employees performing work requiring “comparable skill, effort and responsibility under similar working conditions.”<sup>1</sup> In a recent article, Paul Weiler wrote that the issue of comparable worth has taken the place held by affirmative action in the 1970s as the most controversial civil rights issue of the decade.<sup>2</sup> While Professor Weiler’s statement may be true, he and other commentators have failed to recognize that most comparable worth systems, properly understood, are simply a species of affirmative action.<sup>3</sup> Although comparable worth is not necessarily a form of affirmative action, many comparable worth plans are, because they establish sex pref-

---

\* Copyright © 1989 by Kingsley R. Browne.

\*\* Partner, Morrison & Foerster, San Francisco, California; B.A., The George Washington University, 1975; M.A., University of Colorado, 1976; J.D., University of Denver, 1982.

The Author gratefully acknowledges the comments of Erica B. Grubb, David L. Slate, Timothy M. Tymkovich, and Thomas E. Wilson on an earlier draft of this article. The Author also thanks Suzanne Pope for valuable research assistance.

1. Bellak, *Comparable Worth: A Practitioner's View*, 1 COMPARABLE WORTH: ISSUE FOR THE 80's, 75, 75 (U.S. Civ. Rts. Comm'n ed. 1984).

Comparable worth has also been described as a “wage discrimination claim based on the employer’s use of different criteria in establishing the wage rates for male- and female-dominated jobs.” Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7, 9 (1986); see also Brown, Bauman & Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 129 (1986) (“‘Comparable Worth’ means that workers, regardless of their sex, should earn equal pay for work of comparable value to their common employer.”).

2. Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1728 (1986).

3. See Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1326, n.53 (1986) (arguing that both affirmative action and comparable worth are inconsistent with the principles of the civil-rights movement, but stating that “[c]omparable worth should stand or fall as a political issue, to be decided in political forums, and with regard to the changing social and economic position of women”); Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 941 (1985) (affirmative action now accepted by the body politic; “[t]he now and future issue is comparable worth”).

erences by entitling only workers in female-dominated occupations to wage increases based upon the "objective worth" of the occupation.

This Article suggests that comparable worth plans that condition their benefits on the sex composition of the occupational group constitute sex preferences that must meet the standards that have been established for affirmative action programs in order to survive scrutiny under Title VII of the Civil Rights Act of 1964<sup>4</sup> and the equal protection clause of the Constitution.<sup>5</sup> Most of the debate over comparable worth has centered on whether a failure to pay wages in accordance with comparable worth principles violates Title VII or the equal protection clause.<sup>6</sup> No consideration has been given to whether the *remedy* for the assumed violation is consistent with these laws. In fact, few sex-conscious comparable worth plans would satisfy affirmative action standards. It follows, then, that even voluntary comparable worth plans that reflect a political consensus or that are the product of an agreement between management and labor may be impermissible under present law.

## II. THE COMPARABLE WORTH DEBATE

A great deal has been written on comparable worth from both a legal and a policy perspective,<sup>7</sup> and it is not the purpose of this Article to address all issues raised by the debate. However, a brief overview of some of the arguments raised provides useful background.

Proponents of comparable worth suggest that jobs traditionally held by females—such as nurse, teacher and clerical worker—tend to be undervalued when compared to jobs traditionally held by males—such as garbage collector and electrician—"in part *because* they are held mainly by women."<sup>8</sup> They cite job-evaluation studies<sup>9</sup> that indicate equal levels of skill, effort, and responsibility between typical male- and female-dominated positions, such as electrician and nurse, and claim that the wage

---

4. 42 U.S.C. § 2000e (1982).

5. U.S. CONST. amend. XIV, § 1.

6. See *infra* text accompanying note 7.

7. See Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399 (1979); Weiler, *supra* note 2.

8. Excerpts from the National Academy of Sciences Study, "Women, Work, and Wages: Equal Pay for Jobs of Equal Value," *The Comparable Worth Issue*, [Supp. 433] Lab. L. Rep. (BNA) No. 935, at 120-21 (Nov. 7, 1981) [hereinafter *Women, Work, and Wages*].

9. The Hay system, employed by Hay Associates, assigns a point value to jobs based on four factors: (1) know-how; (2) problem solving; (3) accountability; and (4) working conditions. See Rothchild, *Overview of Pay Initiatives, 1974-1984*, in COMPARABLE WORTH: ISSUE FOR THE 80's 119, 124 (1984).

differentials observed must be due to sex discrimination.<sup>10</sup> They advocate, for example, increasing the wages of nurses to equal those of electricians.<sup>11</sup>

It is important to note that proponents of comparable worth do not necessarily contend that an employer who hires both nurses and electricians consciously undervalues the nurses' worth on the basis of sex.<sup>12</sup> Indeed, to the extent that an employer did so, it would be in violation of Title VII.<sup>13</sup> Rather, comparable worth proponents argue either that reliance on the market to set wage levels constitutes a practice with a "disparate impact" under Title VII,<sup>14</sup> which is invalid even in the absence of a showing of intentional discrimination,<sup>15</sup> or that reliance on the market constitutes "disparate treatment" because the market is itself discriminatory.<sup>16</sup>

Opponents of comparable worth maintain that comparable worth claims cannot be brought as disparate-impact claims under Title VII, because reliance on the market is a "factor other than sex," which is a defense under the Equal Pay Act<sup>17</sup> applicable to actions claiming discriminatory compensation under Title VII.<sup>18</sup> They further argue that the

---

10. Dowd, *The Metamorphosis of Comparable Worth*, 20 SUFFOLK U.L. REV. 833, 838 (1986) ("the gist of a comparable worth claim is that discrimination exists when workers in a job classification dominated by one sex are paid less than workers in a classification dominated by the opposite sex, where both job classifications are of equal value or worth to the employer, or the underpaid classification is of greater value to the employer").

Application of comparable worth principles is not necessarily limited to those instances where jobs are rated equally. Some advocates of comparable worth employ a multiple-regression model. See Nelson, Opton & Wilson, *supra* note 7, at 251-53. Under the multiple-regression model, all variables that the investigator deems relevant to compensation are analyzed. Then, after an analysis of all these variables, any differences in compensation are deemed to be a function of sex. See *id.*

11. See, e.g., Levit & Mahoney, *The Future of Comparable Worth Theory*, 56 U. COLO. L. REV. 99, 100 (1984).

12. *Id.*

13. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

14. Note, *Comparable Worth: The Next Step Toward Pay Equity Under Title VII*, 62 DEN. U.L. REV. 417, 436-42 (1985).

15. Under Title VII, employer practices may be challenged on two grounds. First, an action taken with the intent to discriminate may be challenged under the disparate-treatment theory. Second, an action taken with no intent to discriminate may be challenged under the disparate-impact theory if it has an adverse effect on a particular group. *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2783-84 (1988). A practice with a disparate impact may be sustained only if it is supported by "business necessity" or a "legitimate business" reason. *Id.* at 2790.

16. See Clauss, *supra* note 1, at 59-66.

17. 29 U.S.C. § 206(d) (1983).

18. See *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977), for examples of cases successfully invoking reliance on the market as a defense to compensation "disparities" under

market does not constitute the kind of specific employment practice that can be examined under the disparate-impact analysis.<sup>19</sup> Because it is possible to hire nurses for lower wages than electricians, an employer who sets wages consistent with the market price should not be considered to be engaging in sex discrimination.

Opponents of comparable worth also reject the argument that all unexplained differences between wages of male- and female-dominated positions can be attributed to sex discrimination.<sup>20</sup> Attributing all unexplained differences in wages to sex discrimination is merely an attempt to shift the burden of proof to the employer, who then must prove that differences were not caused by discrimination.<sup>21</sup> However, two facts must be demonstrated to warrant the conclusion that unexplained disparities are a function of sex discrimination. First, all major relevant variables contributing to the disparity must have been considered.<sup>22</sup>

---

Title VII. See also *Gunther*, 452 U.S. 161. The Equal Pay Act contains four affirmative defenses, one of which is that the challenged disparity is a result of a "factor other than sex." *Id.* at 167 (citing 29 U.S.C. § 206(d) (1983)). In *Gunther*, the Supreme Court held that the Equal Pay Act defenses are applicable in Title VII actions. *Id.* at 168-71.

19. See *American Fed'n of State, County, and Mun. Employees v. Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985).

20. See Nelson, Opton & Wilson, *supra* note 7, at 253 ("The most that multiple-regression analyses can tell us is that some of the gross earnings differences between the sexes are accounted for legitimately, while the remainder must result from unmeasured legitimate sources, and/or job separation, and/or from wage discrimination.").

21. See *id.* at 246 (pointing out that where discrimination is presumed, the employer's burden of proof will often be impossible to satisfy).

Some advocates of comparable worth acknowledge their desire to shift the burden of proof. For example, one student Note has argued that "[p]erhaps part of the problem with the advocates' position is that they have assumed the burden of proof in justifying their equal pay concepts." Note, *Comparable Worth and the Presumption of Equality: What Does "Justice" Require?*, 87 W. VA. L. REV. 837, 853 (1985). The Note presumes wage discrimination where 70% or more of the occupants of a job category are of one sex and where employees in that category receive lower wages than employees occupying comparable job categories that have a balanced sex composition or that are predominantly of the other sex. *Id.* at 838-40. The employer then would have the heavy burden of showing valid, nondiscriminatory reasons for the wage disparity, a burden that could not be satisfied by showing that the employer paid the market rate. Given that the Note proceeds from the premise that women's wages have been depressed because of an historic undervaluation of women's work, it is illogical to presume discrimination in a case in which a predominantly male job category is underpaid.

See also Levit & Mahoney, *supra* note 11, at 116 ("Since courts require comparable worth plaintiffs to raise much more than a mere inference of discrimination to establish a prima facie case . . . we conclude that . . . the ultimate burden of persuasion should shift to the employer."); TREIMAN & CHENG, CALIFORNIA COMPARABLE WORTH TASK FORCE, MINORITY REPORT 10 (1985) ("it is not unreasonable to say that if an employer can't demonstrate that a pay differential correlated with the sex or race composition of jobs is actually due to some legitimate difference between jobs, it is sex or race that is being paid for, which is discriminatory and must be corrected").

22. See Nelson, Opton & Wilson, *supra* note 7, at 251 n.85 (mathematical analysis "cannot

Since assessment of relevance is subjective and speculative, it is difficult to conclude that no variables were excluded from the analysis.<sup>23</sup> Second, and more critical, it must be demonstrated that the proper weight has been assigned to each variable. The multiple-regression analysis<sup>24</sup> relies on the assignment of numerical values to each variable. For example, in comparing the jobs of electrician and nurse, numerical values must be assigned to "amount of responsibility" and "quality of working conditions."<sup>25</sup> It is one thing to claim that persons performing jobs requiring comparable skill, effort, and responsibility under comparable working conditions should be paid equally; it is quite another to determine which jobs actually impose comparable demands.

Since, by definition, comparable jobs are not identical, some standard must exist by which comparability of jobs can be assessed. For example, how does one compare the working conditions of a nurse to those of a garbage collector, the necessary skills of an electrician to those of a bookkeeper, or the effort required of an engineer to that required of a

---

distinguish the effects of discrimination from the effects of legitimate factors that it was not possible to measure").

One commentator has questioned the existence of unexplained disparities that are not based upon sex, but her reasoning is difficult to follow. See Claus, *supra* note 1, at 55-56. She argues: "Significantly, the opponents to comparable worth are unable to suggest what this unidentified factor might be." *Id.* Aside from the obvious point that if opponents were able to identify the factor it would no longer be an "unidentified factor," the author fails to deal with the existence of within-sex disparities that exist even after controlling for job content. The author does acknowledge that such disparities exist. *Id.* at 20. Nonetheless, she suggests that the existence of non-sex-based factors that would explain between-sex disparities "is highly unlikely and certainly too speculative to rebut the prima facie showing of disparate treatment established by the regression analysis." *Id.* at 56.

23. For example, if the risk involved in a particular job is considered, much of the disparity that has been ascribed to sex disappears. Finn, *The Earnings Gap and Economic Choices*, EQUAL PAY FOR UNEQUAL WORK 101, 110 (1984). Similarly, a long history of collective bargaining may be correlated with higher wage rates. See Blumrosen, *Remedies for Wage Discrimination*, 20 U. MICH. J.L. REF. 99, 110-11 n.32 (1986). Blumrosen suggests that "the contention that wages in many men's occupations are higher because of collective bargaining often is another example of 'blaming the victim,' since predominantly female occupations such as teachers and nurses have been deprived of the opportunity to achieve higher wages through collective bargaining. *Id.* nn. 31-32. She argues that predominantly female occupations "were among [those] . . . that, almost universally, were prohibited from striking on the grounds that their work was so important to society that a cessation of their services would be unthinkable." *Id.* n.32.

This argument is flawed for two reasons. First, the nurses and teachers who have been forbidden from striking have largely been in the public sector, where there has traditionally been a substantial limitation on the right to strike in all job categories. Second, occupations such as police and firefighters have been under an equal, if not greater, restriction on the right to strike, and these are clearly not female-dominated professions.

24. See *supra* text accompanying notes 10 and 20 for a discussion of the multiple-regression analysis.

25. See Claus, *supra* note 1, at 38-39.

high-school teacher?<sup>26</sup> Assigning an objective score for a job analysis is an extremely subjective process.<sup>27</sup> For example, suppose that there are two different jobs that are otherwise comparable in the required skill, effort, responsibility, and working conditions, but one job requires significant travel, while the other does not. The travel requirement makes these two jobs significantly different in terms of working conditions, but how will the travel requirement be assessed in the job evaluation?

Consider Employee *A*, who views the opportunity to travel in a job as a positive factor. In a point-based system, where additional compensation must be paid to overcome objectionable or difficult working conditions, Employee *A*'s evaluation should reflect travel as a positive factor. For Employee *A*, the job requiring travel would be lower paying than jobs not requiring travel. On the other hand, Employee *B* may view the same travel requirement negatively. Therefore, additional compensation may be required to make up for what Employee *B* considers adverse working conditions. Further complicating the issue under a comparable worth analysis is the fact that whether a travel requirement is viewed positively or negatively may be correlated with sex. For example, it may be that most women, particularly women with families, would be less willing to travel than most men, since for women with families travel may interfere with domestic responsibilities to a greater extent than it does for men. Therefore, the number of points assigned to this hypothet-

---

26. See Schwab, *Using Job Evaluation to Obtain Pay Equity*, 1 COMPARABLE WORTH: ISSUE FOR THE 80's 83, 89 (1984) ("Different forms of job evaluation . . . yield different job hierarchies . . . . Even within a single system, different evaluators score jobs differently." (footnote omitted)); Nelson, Opton & Wilson, *supra* note 7, at 256 (criticizing the Hay system because of its extreme subjectivity and pointing out that different job evaluation systems can produce very different evaluations of the worth of a given job).

27. See Nelson, Opton & Wilson, *supra* note 7, at 255 ("Job evaluation systems are basically methods for systematizing and recording subjective judgments, and at each stage in the process—job analysis, job description, selection of compensable factors, weighting of compensable factors, and the selection of the breadth of jobs to which a particular system will be applied—the necessarily subjective judgments inevitably incorporate individual and societal biases." (footnote omitted)).

See also H. AARON & C. LOUGY, *THE COMPARABLE WORTH CONTROVERSY* 28 (1986) ("Subjective evaluations enter at every step of the way: in determining what attributes to include in the job evaluation, in setting the point weights for each attribute, in deciding how many points each job should get for each attribute, and in calibrating the resulting point scores with pay."). Even proponents of comparable worth acknowledge the inherent subjectivity of job analysis. See, e.g., *Women, Work, and Wages*, *supra* note 8, at 123, which stated that:

[T]here are no definitive tests of the "fairness" of the choice of compensable factors and the relative weights given to them. The process is inherently judgmental and its success in generating a wage structure that is deemed equitable depends on achieving a consensus about factors and their weights among employers and employees.

*Id.* See also Levit & Mahoney, *supra* note 11, at 129 ("no bias-free evaluation technique exists").

ical job may vary depending upon whether travel is viewed positively, which may not be a sex-independent variable.

Because of their subjectivity, job-evaluation studies may easily be manipulated to reach any result. For example, after Ohio implemented a "pay-for-points" system for public employees, the median hourly wage for women remained thirteen percent less than that for men.<sup>28</sup> The problem was not that jobs with the same rating were unequally compensated; rather, the "problem" was that the work performed by men was rated more valuable under the "objective" system employed by the state than that performed by women.<sup>29</sup> Although it would have been logical to accept these disparities as a result of objective differences in the jobs themselves, the conclusion was that the evaluation system itself needed to be modified and updated in order to eradicate sex bias.<sup>30</sup> Such a decision seems inconsistent with a fundamental tenet of job evaluations—that they "deal[ ] with jobs, not their incumbents."<sup>31</sup> Under Ohio's approach, the results of job evaluations are considered biased unless overall parity in the level of compensation between males and females is accomplished. Thus, the apparent goal is equality of result between the sexes, rather than objectivity in compensation.<sup>32</sup>

Initially, proponents of comparable worth concentrated their efforts on litigation, arguing that disparities in compensation between female- and male-dominated jobs constituted sex discrimination under Title VII.<sup>33</sup> Although the Supreme Court of the United States has not ruled on the validity of comparable worth claims under Title VII, a series of

---

28. *Ohio Will Spend \$4.5 Million Annually to Eliminate Gender Bias from State Jobs*, Daily Lab. Rep. (BNA) No. 60, at A-2 (Mar. 28, 1986) [hereinafter *Ohio Gender Bias*].

29. *Id.* Although some proponents of comparable worth have speculated that job evaluators are biased against predominantly female jobs, experimental research does not support that suggestion. Schwab, *supra* note 26, at 89.

30. *Ohio Gender Bias*, *supra* note 28.

31. H. AARON & C. LOUGY, *supra* note 27, at 26.

32. Apparently applying similar reasoning, New Jersey has rejected the use of the "working conditions" factor, probably because most job evaluation systems "award no points to typical office work[,] because the office is defined as the standard of good working conditions." Blumrosen, *supra* note 23, at 129 n.80. As a result, the office work factor is labelled "discriminatory" to women, since most women work in offices. *Id.* Consequently, two people doing the same work in New Jersey, one in an air-conditioned office and the other in an abattoir, would be entitled to the same compensation.

33. See, e.g., *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 718 (7th Cir. 1986) (rejecting nurses' claim that state paid workers in predominantly male jobs are paid higher wages not justified by any difference in relative worth); *American Fed'n of State, County, and Mun. Employees*, 770 F.2d 1401 (state's decision to base compensation on the competitive market rather than on theory of comparable worth did not create liability under disparate-impact analysis); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980) (rejecting comparable worth claim by nurses); *Christensen*, 563 F.2d 353 (re-



lower court cases has rejected this attack.<sup>34</sup> However, these judicial setbacks for comparable worth should not be considered as portending the end of the doctrine. Rather, the cases should be regarded as reinforcing a trend away from litigation toward the adoption of legislation and collective-bargaining agreements incorporating the doctrine's principles.<sup>35</sup> The propriety of this developing trend is discussed in the remainder of this Article.

### III. COMPARABLE WORTH PLANS AS SEX-BASED CLASSIFICATIONS

Comparable worth plans generally fall into one of three categories: (1) one-way plans;<sup>36</sup> (2) two-way plans;<sup>37</sup> and (3) sex-neutral plans.<sup>38</sup> One-way plans adjust wages only of undervalued female positions but not undervalued male positions. A one-way plan has been adopted by the legislature in Minnesota.<sup>39</sup> Under the plan, the Commissioner of Employee Relations reports directly to the legislature every two years with a list of female-dominated job classes that are paid less than the average male-dominated classes with equal job-evaluation points.<sup>40</sup> One-way plans have also been adopted in a number of collective-bargaining agreements, such as a recent collective-bargaining agreement between Michigan and the United Auto Workers.<sup>41</sup> That agreement included a "pay equity adjustment for employees in classifications that are 70% or more

---

jecting claim by female clerical employees that they were paid less than male physical plant workers).

34. *American Nurses' Ass'n*, 783 F.2d at 720; *American Fed'n*, 770 F.2d at 1403; *Lemons*, 620 F.2d at 230; *Christensen*, 563 F.2d at 357.

35. Gertner, *Thoughts on Comparable Worth Litigation and Organizational Strategies*, 20 MICH. J.L. REF. 163, 176 (1986); Nelson, Book Review, 69 MINN. L. REV. 1199, 1204 (1985) ("Increasingly, advocates are looking to legislative rather than litigative strategies to achieve pay equity."). For an overview of state and federal legislative activity, see Comment, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth into Employer Liability Under Title VII*, 21 LOY. L.A.L. REV. 305, 355-85 (1987).

36. MINN. STAT. ANN. §§ 471.991-471.999 (West Supp. 1989).

37. IOWA CODE ANN. § 79.18 (West Supp. 1988).

38. OR. REV. STAT. §§ 240.190, 292.951-292.971 (Supp. 1988).

39. MINN. STAT. ANN. § 43A.01(3) (West 1988).

40. *Id.*; see generally Rothchild, *Pay Equity—The Minnesota Experience*, 20 MICH. J.L. REF. 209 (1986). Likewise, California has announced an intent "to establish a state policy of setting salaries for female-dominated jobs on the basis of comparability of the value of the work." CAL. GOV'T CODE § 19827.2(a) (West Supp. 1988). A "one-way" plan was also proposed in the Federal Pay Equity and Management Improvement Act of 1984, which defined "discriminatory wage-setting practices" as the setting of wage rates paid for jobs held predominantly by female workers lower than those paid for comparable jobs held predominantly by male workers. H.R. 5680, 98th Cong., 2d Sess. § 101(4) (1984).

41. *Auto Workers Negotiate First Pact for State Employees in Michigan*, Daily Lab. Rep. (BNA) No. 19, at A-3 (Jan. 29, 1986).

female."<sup>42</sup>

Two-way plans provide for an adjustment to both male-dominated and female-dominated positions if a position dominated by one sex is underpaid in comparison to comparable positions dominated by the other sex. A two-way scheme has been adopted by the Iowa legislature.<sup>43</sup> In Iowa, it is impermissible for a state employer to "discriminate in compensation for work of comparable worth between jobs held predominantly by women and jobs held predominantly by men."<sup>44</sup>

Sex-neutral plans set salaries for jobs without regard to their sex composition. Oregon has adopted such a plan by announcing its intent "to achieve an equitable relationship between the comparability of the value of work . . . performed by persons in state service and the compensation and classification structure within the state system."<sup>45</sup> Some sex-neutral plans have been adopted as a means of furthering sexual equality, while others may be motivated by a desire to implement a form of civil-service reform.

Both one-way and two-way plans constitute sex-based classifications. They accord benefits depending solely upon the sex of the persons in the particular job classifications. Under one-way plans, only those in underpaid female-dominated occupations are entitled to wage increases. Although both males and females in a given job are equally entitled to the pay increase, it is the sex of the persons occupying the jobs and the sex of the persons occupying comparable jobs that determine whether the incumbents in the position receive an increase in salary.<sup>46</sup>

Under two-way plans, an employee is entitled to a pay increase only

---

42. *Id.* Chicago and Los Angeles have also entered into such arrangements. *Los Angeles and AFSCME Settle on Three-Year Pay Equity Pact*, Daily Lab. Rep. (BNA) No. 91, at A-3 (May 10, 1985); *Demise of Patronage, Comparable Worth Adjustments Featured in Chicago Contract*, Daily Lab. Rep. (BNA) No. 244, at A-1 (Dec. 19, 1985).

43. IOWA CODE ANN. § 79.18 (West Supp. 1988).

44. *Id.*; see also *id.* § 602.1204 (state court administrator "shall not discriminate in the employment or pay between employees on the basis of gender by paying wages to employees at a rate less than the rate at which wages are paid to employees of the opposite gender for work of comparable worth"); D.C. CODE ANN. § 36-1101.4(A) (1988) (defining "discriminatory wage-setting practices" as a "situation where the rates of pay for positions or position classifications that are dominated (composed 70% or more) by members of 1 sex are lower than the rates of pay for positions or position classifications that are dominated (composed 70% or more) by members of the opposite sex, although the work performed is of comparable value as measured by the composite of the skill, effort, responsibilities, and working conditions normally required in the performance of the work.").

45. OR. REV. STAT. § 240.190(1) (1987).

46. A study by the State of Washington revealed that mental health specialists, 89% of whom were men, were underpaid to the greatest extent. H. AARON & C. LOUGY, *supra* note 27, at 32 n.44. Similarly, three predominantly female jobs—librarian, nursing care consultant,

if most of his or her colleagues are of one sex and most of the occupants of a comparable classification are of the opposite sex.<sup>47</sup> Under such plans, underpaid male positions are also entitled to a pay increase. Just as in one-way plans, the employee's own sex is generally not determinative of the right to a wage adjustment, but the entitlement cannot be determined without reference to sex.<sup>48</sup>

Generally, a sex classification is subject to scrutiny under anti-discrimination laws if it is based upon an individual's sex or the sex of the individual's associates. Numerous cases brought under the federal civil rights laws have extended protection to whites who have been adversely treated because of their association with blacks, or vice versa. An example is *Loving v. Virginia*,<sup>49</sup> where the Supreme Court of the United States held Virginia's anti-miscegenation laws invalid, even though the laws applied equally to blacks and whites.<sup>50</sup> The Court held that the laws were invalid because "Virginia's miscegenation statutes rested solely upon distinctions drawn according to race."<sup>51</sup> The Court rejected the state's argument that it was not discriminating since the law applied equally to blacks and whites.<sup>52</sup>

Similarly, in *Langford v. Texarkana*,<sup>53</sup> the Eighth Circuit held that a public employer's discharge of a black male employee and a white female employee due to their non-work-related association violated the equal protection clause.<sup>54</sup> In *DeMatteis v. Eastman Kodak Co.*,<sup>55</sup> the court held that a white employee's allegation that he was forced into

---

and school food services supervisor—were deemed overpaid. *Id.* A one-way system is perfectly content with such "inequities."

Compensation "inequities" within male- and female-dominated job classifications are quite common. For example, the average wage for architects is less than that for engineers, even though the educational and skill requirements for these two male-dominated positions are very similar. Clauss, *supra* note 1, at 20. Similar disparities exist for female-dominated positions. *Id.* However, these "inequities," which may well be the result of the processes that created disparities across sex classifications, would not be affected by a sex-conscious comparable worth plan.

47. See *supra* notes 37 and 43-44 and accompanying text.

48. It could be argued that the same is true under the Equal Pay Act, which prohibits a sex-based wage differential among workers performing the same work. 29 U.S.C. § 206(d)(1) (1982). However, the Equal Pay Act's exception for "any factor other than sex," *id.*, ensures that the Act requires modification of wages only when the wage disparity is actually based upon sex.

49. 388 U.S. 1 (1966).

50. *Id.* at 12.

51. *Id.* at 11.

52. *Id.* at 10.

53. 478 F.2d 262 (8th Cir. 1973).

54. *Id.* at 266-67.

55. 511 F.2d 306, *aff'd on rehearing*, 520 F.2d 409 (2d Cir. 1975).

early retirement because he sold his house to a black family stated a claim for relief under the 1866 Civil Rights Act.<sup>56</sup> In all of these cases, the critical element was that individuals were disadvantaged because they associated with someone of a different race.

People who doubt that one-way and two-way comparable worth plans establish sex classifications should consider whether they would similarly conclude that no racial classification is established by an employer who grants a pay increase to all job categories in which 70 percent of the employees are white or to all employees who happen to sit next to white people. An employer who conditions entitlement to a salary adjustment under a comparable worth plan upon the sex of the incumbents of a position has erected the same kind of classification.<sup>57</sup>

---

56. *Id.* at 312 (citing 42 U.S.C. § 1981 (1982)).

57. There are cases raising questions about who has standing to raise a challenge to this kind of classification. For example, in *Patee v. Pacific N.W. Bell Tel. Co.*, 803 F.2d 476 (9th Cir. 1986), the court held that males in predominantly female positions had no standing to raise the claim that they were underpaid because they occupied predominantly female positions. *Id.* at 479. The court reasoned that the male plaintiffs were simply claiming that they were being treated like women, rather than being treated adversely because they were men. *Id.* at 478; *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1187 (E.D.N.Y. 1979) (male plaintiff lacked standing to challenge discriminatory employment practices against women). *But cf.* *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553 (N.D. Ind. 1986) (male employees had standing in Title VII action against employer who closed plant allegedly due to sex discrimination against female employees); *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690, 692 n.2 (5th Cir. 1981) (nonminority may sue based upon discrimination against minority members where personal right to work in an environment unaffected by racial discrimination is asserted).

Ironically, *Patee*, 803 F.2d at 478, relied on *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), which took a *broad* view of standing in holding that the standing provision of the Fair Housing Act (which is identical to that of Title VII) demonstrates "congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). In *Trafficante*, the Court ruled that white tenants had standing under the Fair Housing Act to bring an action for discrimination against non-whites. *Id.* at 209-10. They alleged injury to themselves—the loss of an important benefit of association—due to the exclusion of minority persons from the apartment complex. *Id.*

The *Patee* court viewed *Trafficante* as providing the exclusive factual setting in which an action challenging discrimination directed against others could be brought. *Patee*, 803 F.2d at 479. The court stated that because the male employees were not alleging that they had been deprived of associational rights, they were not "persons aggrieved." *Id.*

The *Patee* court's reliance on *Trafficante* was unjustified. In *Trafficante*, the Court was willing to permit a suit to be brought by persons only indirectly harmed by discrimination. *Trafficante*, 409 U.S. at 212. However, the *Patee* court relied upon *Trafficante* to reject claims by males that they had been *directly* harmed by salary discrimination against females. *Patee*, 803 F.2d at 478-79. Thus, in *Patee*, the Ninth Circuit refused to allow the males to challenge *their own* salary, which was allegedly lower because of illegal discrimination, because the discrimination was aimed primarily at others, *id.* at 478—a very strange result, indeed, for the court to reach.

Presumably if the female occupants of the job in *Patee* were to prevail on a comparable

Identifying comparable worth plans as sex classifications does not render them impermissible; it simply means that they are subject to scrutiny under Title VII and the equal protection clause. Given that the ostensible purpose of most comparable worth plans is to remedy some sort of perceived discrimination against women, even if only by society in general, then the standards to be applied to determine the validity of comparable worth plans should be the same constitutional and statutory standards used to determine the validity of affirmative action plans.

#### IV. COMPARABLE WORTH PLANS AND TITLE VII

##### A. Title VII Standards Applicable to Affirmative Action Plans

The two leading cases dealing with voluntary affirmative action plans challenged under Title VII are *United Steelworkers of America v. Weber*<sup>58</sup> and *Johnson v. Transportation Agency*.<sup>59</sup> In *Weber*, the Supreme Court of the United States addressed the legality of an affirmative action plan established by Kaiser Aluminum.<sup>60</sup> The plan reserved fifty percent of the openings in an in-plant craft-training program for black employees until the percentage of black craft workers in the plant equalled the percentage of blacks in the local labor force.<sup>61</sup> Although the affirmative action plan was held lawful under Title VII, the Court declined "to define in detail the line of demarcation between permissible and impermissible affirmative action plans."<sup>62</sup> However, the Court identified certain features of the Kaiser plan that it favored, without stating whether they were necessary attributes of a permissible affirmative action plan. These factors included: (1) whether there is a "conspicuous racial imbalance" in "traditionally segregated job categories";<sup>63</sup> (2) whether the

---

worth theory and achieve an adjustment of their wages, then the males could raise an Equal Pay Act claim if their wages were not equally raised, unless the court would hold that the adjustment to female wages was based upon "a factor other than sex." 29 U.S.C. § 206. In such a case, the males would not be entitled to an adjustment. See *infra* notes 168-75, and accompanying text for a discussion of *Ende v. Board of Regents of Regency Univ.*, 757 F.2d 176 (7th Cir. 1985) (University's application of "affirmative action equity adjustment formula" to salaries of female faculty members did not violate male faculty members' rights).

In any event, even under the holding in *Patee*, males in predominantly male occupations who were not entitled to an adjustment in wages would have standing to challenge a comparable worth plan. *Patee*, 803 F.2d at 478. Females in the same occupation, however, would lack standing because they would not be permitted to claim that they were being treated like men. *Id.* at 478.

58. 443 U.S. 193 (1979).

59. 480 U.S. 616 (1987).

60. *Weber*, 443 U.S. at 197-98.

61. *Id.* at 199.

62. *Id.* at 208.

63. *Id.* at 208-09.

plan “unnecessarily trammels” the rights of non-minorities;<sup>64</sup> and (3) whether the plan is “temporary.”<sup>65</sup>

Eight years later, in *Johnson v. Transportation Agency*, the Court refined the *Weber* standards.<sup>66</sup> In *Johnson*, a male employee challenged a voluntary affirmative action plan that led to the promotion of a less-qualified woman to the position of road dispatcher.<sup>67</sup> At the time of the promotion, women held none of the 238 skilled-craft positions.<sup>68</sup> The district court found that the Agency had not engaged in prior discrimination and the finding was not disturbed on appeal.<sup>69</sup> Nonetheless, the Ninth Circuit held that notwithstanding the absence of prior discrimination by the Agency, the affirmative action plan was appropriate to remedy “societal discrimination.”<sup>70</sup> The Supreme Court affirmed the Ninth Circuit ruling, holding that the plan was a permissible method of “remedying underrepresentation.”<sup>71</sup>

1. Justification: manifest imbalance in traditionally segregated job categories

The most significant of the three *Weber* factors—that the plan be “designed to eliminate conspicuous racial imbalance . . . in traditionally segregated job categories”<sup>72</sup>—must be satisfied if any form of preference is to be justified. This requirement appears to encompass both the scope of the racial imbalance and its causes. In *Weber*, only 5 of the 273 skilled-craft workers at the plant were black, while the local work force was approximately thirty-nine percent black.<sup>73</sup> The Supreme Court labelled the racial imbalance “manifest,”<sup>74</sup> but gave no clue concerning the required magnitude of the imbalance. In *Johnson*, the Court stated that the imbalance “need not be such that it would support a prima facie case against the employer . . . .”<sup>75</sup> Apparently, the only requirement is that the imbalance be large or obvious to the naked eye without the need for a complex statistical analysis.

In its ruling in *Weber*, the Court also failed to define the phrase

---

64. *Id.* at 208.

65. *Id.* at 208-09.

66. 480 U.S. 616 (1987).

67. *Id.* at 623-26.

68. *Id.* at 621.

69. *Johnson v. Transportation Agency*, 770 F.2d 752, 758 n.4 (9th Cir. 1984).

70. *Id.* at 759.

71. *Johnson*, 480 U.S. at 641.

72. *Weber*, 443 U.S. at 209.

73. *Id.* at 198-99.

74. *Id.*

75. *Johnson*, 480 U.S. at 632.

"traditionally segregated job categories." Lower courts were uncertain after *Weber* whether the phrase meant that only employers who had engaged in prior discrimination may implement an affirmative action program.<sup>76</sup> In *Weber*, there had been no finding that Kaiser or the union had discriminated in the past, but the Court observed that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."<sup>77</sup> However, it did not indicate whether the inference to be drawn was that Kaiser had itself discriminated, or whether instead it was suggesting that in light of this pervasive discrimination throughout the industry that it did not matter whether Kaiser had participated in that discrimination.

In *Johnson*, the Supreme Court resolved the question of whether prior discrimination is required before an employer may adopt an affirmative action program.<sup>78</sup> The Court held that the sex-based preference in *Johnson* was validly adopted "for the purpose of remedying underrepresentation."<sup>79</sup> The Court, however, did not address the issue of why underrepresentation, by itself, warranted a remedy. Moreover, the Court's use of the word "remedy" is ambiguous, since ordinarily a remedy is thought of as an action taken to correct a wrong.<sup>80</sup>

Although the Court's language could be read to suggest that a desire to "balance the numbers" is justification for a racial or sexual preference, the Court added that "[t]he requirement that the 'manifest imbalance'

---

76. See, e.g., *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985) (statistical disparities combined with city's admission of past discrimination in consent decree sufficient), *aff'd*, 478 U.S. 501 (1986); *Johnson*, 770 F.2d 752, 758 (9th Cir. 1984) ("It is sufficient for the employer to show a conspicuous imbalance in its work force."), *aff'd*, 480 U.S. 616 (1987); *Janowiak v. Corporate City of S. Bend*, 750 F.2d 557 (7th Cir. 1984) (rejecting proposition that statistical imbalance is sufficient), *vacated*, 107 S. Ct. 1620 (1987), *on remand*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.) (all that need be shown is "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities' ") (quoting *Detroit Police Officer's Ass'n v. Young*, 608 F.2d 671, 694 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc) ("employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden"), *cert. denied*, 454 U.S. 1064 (1981); *Local Union No. 35 of the Int'l Bhd. of Elec. Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980) (no findings of past discrimination by each union required; sufficient that there be finding of discrimination in industry as whole), *cert. denied*, 453 U.S. 913 (1981).

77. *Weber*, 443 U.S. at 198 n.1.

78. *Johnson*, 480 U.S. at 634.

79. *Id.*

80. See, e.g., WEBSTER'S NEW INTERNATIONAL DICTIONARY 1920 (3d ed. 1966) (defines "remedy" as "[t]hat [which] corrects or counteracts an evil" and as "[t]he legal means to recover a right, or to prevent or obtain redress for a wrong").

relate to a 'traditionally segregated job category' provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating *the effects of employment discrimination*."<sup>81</sup>

Given that the Court has expressly rejected the view that a lack of proportional representation by itself offends Title VII, and Section 703(j) of the statute itself is clear that it does not,<sup>82</sup> it is difficult to understand how achieving proportional representation bears any relation to "Title VII's purpose of eliminating the effects of employment discrimination."<sup>83</sup> Moreover, if proportional representation were in fact a permissible goal under Title VII, there would be no reason to limit affirmative action plans to "traditionally segregated" job categories.

The only reading of *Johnson* that makes sense is that the phrase "the effects of employment discrimination" is very broad and includes not only the effects of the employer's discrimination or, for that matter, *any* employer's discrimination, but also the effects "of *societal attitudes* that have limited entry of . . . a particular sex, into certain jobs."<sup>84</sup> Thus, the phrase must include situations where the job in question "has not been regarded *by women themselves* as desirable work."<sup>85</sup> Of course, that leads us back to the question of whether Title VII was intended to influence voluntary choices by minorities and women. The *Johnson* majority posits no clear answer but the opinion implies that it was.<sup>86</sup>

In spite of the confusion from *Weber* and *Johnson* over the interpretation of " 'manifest imbalance' . . . [in a] traditionally segregated job category,"<sup>87</sup> some conclusions may be drawn. First, the " 'manifest imbalance' " requirement means that the imbalance must be large, or at least not trivial. Second, the restriction to "traditionally segregated job cate-

---

81. *Johnson*, 480 U.S. at 632 (emphasis added).

82. Codified as 42 U.S.C. § 2000e-2(j) (1982).

83. *Johnson*, 480 U.S. at 632.

84. *Id.* at 664 (Scalia, J., dissenting) (emphasis added).

85. *Id.* at 668 (Scalia, J., dissenting) (emphasis in original).

86. The Court in *Johnson* failed to cite any legislative history for the proposition that Congress in 1964 viewed Title VII as a means of changing not only the discriminatory forces exerted by employers but the attitudes and actions of employees. The Court also failed to provide any policy justification for compelling women to alter their traditional attitudes concerning the desirability of particular jobs. A policy of permitting individuals to make their own value choices concerning what is desirable work is certainly more consistent with notions of individual freedom than are attempts by the government to channel these choices. Only where a clear societal consensus exists should the law be used as a tool of "consciousness raising." It is doubtful that a societal consensus exists that women *should* move into traditionally male jobs; the extent of the consensus is probably that women should be permitted to move into these positions *if* they wish to do so.

87. *Id.* (Scalia, J., dissenting).



gories" means that the employer may not rely simply on a numerical imbalance and automatically implement a preference any time a protected class is underrepresented.<sup>88</sup> Rather, the employer must show that the underrepresentation is long-standing and is the result of discrimination by either the employer itself or by society.<sup>89</sup> Although not an onerous requirement, since the Court appears willing to take judicial notice of long-standing imbalances, it is nonetheless *a* requirement that must be met before an employer may impose a voluntary affirmative action program.

## 2. Scrutiny of the means

### *a. unnecessary trammeling*

Once the initial requirements for implementing an affirmative action plan are established, the propriety of the plan will depend upon whether it satisfies the other *Weber* requirements.<sup>90</sup> The additional requirements are designed primarily to ensure that an undue burden is not placed upon members of groups that are not favored by the plan. In the words of the *Weber* Court, the plan must not "unnecessarily trammel the interests of [other] employees."<sup>91</sup> The Court held that the plan in *Weber* did not unnecessarily trammel, since it neither required the discharge of white employees nor created an "absolute bar" to their advancement.<sup>92</sup> The Court considered the plan adopted in *Johnson* as even more moderate than the *Weber* plan since it did not set aside any positions but merely considered race and sex as "plus" factors.<sup>93</sup>

It is not clear exactly what constitutes unnecessary trammeling. A one-hundred percent minority set-aside would surely meet this criterion, and a plan that required the termination or layoff of existing employees to make room for members of a protected group would probably constitute unnecessary trammeling as well.<sup>94</sup> Perhaps the permanent passing over of an employee for a promotion would also qualify.<sup>95</sup>

---

88. This calls into question the methods adopted by the Office of Federal Contract Compliance Programs, under which "a statistical imbalance is tantamount to a finding of discrimination." See *Abram*, *supra* note 3, at 1320.

89. *Johnson*, 480 U.S. at 630-37.

90. *Weber*, 443 U.S. at 208.

91. *Id.*

92. *Id.*

93. *Johnson*, 480 U.S. at 638.

94. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 (1984) (Court refused to uphold court-ordered modification of consent decree that would have allowed employer to lay off non-minority employees before minority employees).

95. In assessing whether an affirmative action plan results in unnecessary trammeling, a distinction between quotas and goals is often drawn. *Johnson v. Transportation Agency*, 480

*b. temporariness*

A valid affirmative action plan must also be “temporary,”<sup>96</sup> although in application this requirement is not an onerous one. In *Weber*, the Court stated that the plan was temporary because it was “not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.”<sup>97</sup> Moreover, the racial preference would end “as soon as the percentage of black skilled craft workers in the . . . plant approximate[d] the percentage of blacks in the local labor force.”<sup>98</sup> The Court gave no consideration to the fact that at the rate blacks were moving into craft positions, it would have taken a minimum of twenty years to achieve that goal.

Similarly, in *Johnson*, the Court stated that the lack of an “explicit end date” did not constitute a defect, since the “Agency’s flexible, case-

---

U.S. 616, 636 (1987); *United States v. Paradise*, 480 U.S. 149, 177-79 (1987). However, the basis for that distinction is less than clear in the context of voluntary affirmative action where the focus is the burden on the unsuccessful non-minority. Whether the successful candidate was slightly less qualified, only marginally qualified, or even unqualified, the harm to the non-minority is the same if race was the “but for” cause of his rejection. See *Logue v. International Rehabilitation Assoc.*, 837 F.2d 150 (3d Cir. 1988) (applying “but for” test in determining whether decision that was partially based on discriminatory considerations violated Title VII); *Haskins v. United States Dept. of Army*, 808 F.2d 1192 (6th Cir.) (same), *cert. denied*, 108 S. Ct. 68 (1987); *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977) (same).

The quota-versus-goal distinction is more relevant in the context of court-ordered affirmative action programs, since equitable concerns require a more flexible approach. For example, a court should not establish an inflexible quota that would cause an employer to sacrifice its business by hiring substantially less qualified workers. On the other hand, where the employer voluntarily implements a program, it is not clear why the lack of flexibility should invalidate an otherwise permissible program.

96. *Weber*, 443 U.S. at 208 (“the plan [must be] a temporary measure, not designed to maintain racial balance, but to ‘eliminate manifest racial imbalance’ ”); *Johnson*, 480 U.S. at 630 (quoting *Weber*, 443 U.S. at 208).

97. *Weber*, 443 U.S. at 208. In cases other than those involving layoffs, the distinction between attaining and maintaining balance is not clear. For example, consider an employer who has achieved a racially or sexually balanced work force under a voluntary affirmative action plan. Due to unforeseen economic circumstances, the employer is forced to lay off a substantial number of employees. Protecting the employees hired under the voluntary affirmative action plan against layoffs may be impermissible under the reasoning of *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *see supra* notes 78-82 and accompanying text, because of the impermissible burden placed on non-minority employees. As a result, a disproportionate number of persons hired under the voluntary plan may be laid off. If they are able to find other employment or are otherwise unavailable when business picks up, the question arises whether the employer may engage in affirmative action to restore balance to its work force.

If a new plan is adopted, it could be argued that the employer is not maintaining balance, because balance does not exist, but rather that the employer is attempting to attain balance. On the other hand, it could be argued as forcefully that the employer seeks to “maintain balance” under *Weber* whenever it employs preferences after balance has been achieved, even though the balance is later destroyed.

98. *Weber*, 443 U.S. at 208-09.

by-case approach was not expected to yield success in a brief period of time."<sup>99</sup> The Court also stated that "[e]xpress assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers."<sup>100</sup> However, since the remedy in *Johnson* was designed not simply to overcome the effects of past discrimination, but to overcome the effects of private choice on the part of women, it is doubtful that the long-term goal of the Agency—the same proportion of women in skilled-craft positions as in the general work force—would ever be met in the absence of radical social changes.

Lower courts that have addressed the temporariness requirement have demonstrated that it is an insignificant hurdle. For example, the voluntary affirmative action plan adopted by the Detroit Police Department in 1974 was deemed temporary, even though it was not scheduled to terminate until 1990.<sup>101</sup> In another case, *EEOC v. Local 638*,<sup>102</sup> the Second Circuit stated that "'temporary' in the context of the imposition of affirmative action remedies means that the remedies will be in place only until the effects of past discrimination have been eliminated."<sup>103</sup>

In *Johnson*, the Ninth Circuit reversed a lower court's conclusion that a plan was not temporary because it had no end date, largely on the ground that the plan did not expressly state that it was to be permanent.<sup>104</sup> Other courts have found the temporariness requirement satisfied when the plan was contained in a collective-bargaining agreement, because the plan would expire when the agreement expired.<sup>105</sup>

### c. narrow tailoring

There appears to be an additional requirement that the Court has not yet explicitly labelled as a "factor," but is implicit in the reasoning of both *Weber* and *Johnson*. This requirement, which has been recognized

---

99. *Johnson*, 480 U.S. at 639. Thus, paradoxically, the Court seems to imply that the plan satisfied the temporariness requirement because it was expected to remain in place for a long time.

100. *Id.*

101. *Bratton v. City of Detroit*, 704 F.2d 878, 882, 892 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

102. 753 F.2d 1172 (2d Cir. 1985).

103. *Id.* at 1187; *see also* *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.) ("temporary" plan is one that "endures only so long as is reasonably necessary to achieve its legitimate goals"), *cert. denied*, 454 U.S. 1124 (1981).

104. *Johnson v. Transportation Agency*, 770 F.2d 752, 758 (9th Cir. 1985), *aff'd*, 480 U.S. 616 (1987).

105. *See, e.g., Britton v. South Bend Community School Corp.*, 593 F. Supp. 1223, 1232 (N.D. Ind. 1984), *rev'd on other grounds*, 819 F.2d 766 (7th Cir.), *cert. denied*, 108 S. Ct. 288 (1987); *Breschard v. Directors Guild of Am.*, 34 Fair Empl. Prac. Cas. (BNA) 1045 (C.D. Cal. 1984).

by some lower courts, is that *the preference itself*, not just “some remedy,” be *necessary* to achieve the goal sought to be furthered by the preference. For example, in a post-*Johnson* decision invalidating an affirmative action plan adopted by the District of Columbia Fire Department, the District of Columbia Circuit expressly recognized that there is a “well-settled requirement that alternatives to race-based measures be considered and, if possible, employed.”<sup>106</sup> The court rejected the argument that such alternatives need not be considered “as long as no equally efficacious remedies are apparent.”<sup>107</sup> This requirement parallels the “narrow-tailoring” requirement under the equal protection clause.<sup>108</sup>

The narrow-tailoring requirement is consistent with the concerns of the *Weber* Court. In *Weber*, the Court was concerned that rigid application of Title VII principles would thwart attempts to “abolish traditional patterns of racial segregation and hierarchy.”<sup>109</sup> As emphasized in Justice Blackmun’s concurrence, if Title VII were to be read literally, employers would be confronted with the dilemma of facing lawsuits by blacks or women when they were substantially underrepresented, or of facing reverse-discrimination lawsuits if the employers attempted to eliminate the underrepresentation.<sup>110</sup> On the other hand, where equally effective non-discriminatory methods of eliminating disparities exist, the employer is not confronted with this dilemma because it can avoid reverse-discrimination lawsuits by adopting a neutral method of achieving the desired result, while at the same time reducing the risk of traditional discrimination actions.

In affirmative action cases that deal with hiring and promotion, the

---

106. *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988); *see also* *J.A. Croson v. City of Richmond*, 822 F.2d 1355, 1362 (4th Cir. 1987) *aff’d*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989) (“*Wygant* . . . limit[s] racial preferences to what is necessary to redress a practice of past wrongdoing.”); *Britton*, 819 F.2d at 772 (striking down plan because it “goes further than necessary to preserve blacks’ gains”); *Rutherglen & Ortiz, Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 U.C.L.A. L. REV. 467, 501 (1988) (“Whether the case involves a voluntary or court-ordered preference or a Title VII or equal protection claim, this part of the test remains the same: the preference must be necessary and the alternatives ineffective.”).

107. *Hammon*, 826 F.2d at 81 n.12.

108. *See id.* at 81 (“[T]he ‘tailoring’ requirement [is] embodied in a plethora of Title VII law.”); *see also* *Rutherglen & Ortiz, supra* note 106, at 483 (in assessing burden on white employees, the Supreme Court has “relied on essentially the same reasoning under either standard”).

109. *Weber*, 443 U.S. at 204.

110. As Justice Scalia pointed out in his dissent in *Johnson*, amicus briefs by employers uniformly supported the legality of voluntary affirmative action, largely because by engaging in affirmative action an employer can decrease the prospects of Title VII actions by minorities and women even though at the expense of non-minorities and males. 480 U.S. at 677 (Scalia, J., dissenting).

option of achieving the same result in the same amount of time without preferences is not available. Because the purpose of such plans is to accelerate integration of the work force beyond the rate that would prevail simply by removing artificial barriers, and because there is generally a finite number of positions available, the only way to achieve the goal is to grant a preference. However, where effective non-discriminatory methods of achieving the desired goals exist, the justification for preferences provided by the Court in *Weber* and *Johnson* no longer exists. Consequently, there is nothing to overcome the presumption against race and sex classifications.

One could view the requirement of an absence of nondiscriminatory options in several ways. First, it could be seen as a predicate for an affirmative action plan; that is, a preference is justified where there are manifest imbalances in traditionally segregated job categories that cannot be remedied effectively without a preference. Second, it could be seen as a restriction on the means by which an affirmative action plan may be implemented; thus, an affirmative action plan must be the least discriminatory plan that could be devised.

If the second analysis were adopted, the requirement could either be an additional *Weber* requirement or, more simply, be regarded as part of the unnecessary trammeling requirement. Even a modest burden on males or non-minorities would be an unnecessary one in the absence of a need to employ a preference.<sup>111</sup> It may make little difference which of the analyses is adopted, but if the justification for affirmative action is that racial or sexual preferences are a necessary evil,<sup>112</sup> a showing that they are "necessary" is a threshold issue.<sup>113</sup>

---

111. See *Hammon*, 826 F.2d at 80-81.

112. See Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986).

113. It is also argued that affirmative action plans need not be subjected to rigorous scrutiny if they do not impose a stigma on non-minorities. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 356-62 (1978) (Brennan, J., concurring in part and dissenting in part); *Valentine v. Smith*, 654 F.2d 503, 511 (8th Cir.), cert. denied, 454 U.S. 1124 (1981) ("members of the majority group are rarely, if ever, stigmatized by operation of a racial preference"). See also Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986) ("injury suffered by white 'victims' of affirmative action does not properly give rise to a constitutional claim, because the damage does not derive from a scheme animated by racial prejudice"). The Court rejected this analysis under the equal protection clause in *J.A. Croson v. City of Richmond*, 57 U.S.L.W. 4132 (U.S. Jan. 24, 1989). See *infra* text accompanying note 195.

The argument that stigma is the *sine qua non* of invidious discrimination is simply an attempt to define affirmative action categorically as non-invidious. If the stigma argument is accepted, all affirmative action is permissible, so the existence *vel non* of stigma cannot be used to separate valid affirmative action plans from invalid ones. Moreover, it is not clear what the

### B. Application of Title VII Standards to Comparable Worth Plans

Few comparable worth plans would measure up to even a generous interpretation of *Weber* and *Johnson*. Even if an employer could demonstrate that proper justification for a comparable worth program exists, it would be unlikely that it could also demonstrate that a sex-conscious system is needed to correct the disparity.

#### 1. Justification

The typical sex-conscious comparable worth plan does not satisfy either of the two underlying purposes of the requirement that there be "‘manifest imbalance’ . . . in ‘traditionally segregated job categories.’"<sup>114</sup> Sex-conscious comparable worth programs fail to ensure that: (1) sex-based preferences are established only when major disparities exist, so that they do not become a mechanism for perpetual social engi-

---

term "majority" means to advocates of the stigma argument, since women constitute a majority of the population of the United States, yet there is no indication that the "stigma" proponents question the legitimacy of sex-based affirmative action. Moreover, when predominantly black cities such as Washington, D.C., Detroit, and Richmond implement preferences favoring blacks, it is not a majority giving preference to a minority, but rather, the majority creating a preference for itself. See *J.A. Croson v. City of Richmond*, 57 U.S.L.W. 4132 (U.S. Jan. 24, 1989) (noting that a majority of seats on the Richmond City Council were held by blacks).

Furthermore, stigma is in the eyes of the beholder. In assessing the validity of other forms of "benign" discrimination, such as protective laws for women, courts have not found persuasive the argument that these laws did not stigmatize. Undoubtedly, those opposing such laws would argue that the assumption that women need protection that men do not need is stigmatizing. However, if this view of stigma is accepted, affirmative action plans also stigmatize since they imply that minorities require preferences to succeed.

The concept of stigma is relied upon only when someone wants to argue in favor of an affirmative action plan. One rarely hears of stigma when assessing the validity of a program that has an adverse impact on women or minorities. For example, employer practices that are not shaped by an intent to discriminate may nonetheless be declared illegal under Title VII if they result in a disparate impact against a protected class regardless of whether the practices are viewed as stigmatizing. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For example, employers' policies against beards have been held to violate Title VII when they resulted in excluding black workers suffering from the condition known as *pseudofolliculitis barbae*, a skin condition suffered by blacks at disproportionate rates that is exacerbated by shaving. *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 56 (D. Colo. 1981). But see *EEOC v. Greyhound Lines, Inc.*, 494 F. Supp. 481 (E.D. Pa. 1979), *rev'd*, 635 F.2d 188 (3d Cir. 1980) (judgment reversed against employer with no-beards policy because no adverse impact on black male employees shown). Yet, no one has argued that blacks are stigmatized by a no-beard policy. The argument is simply that they are excluded from jobs at a disproportionate rate. Similarly, height and weight requirements have been struck down without any finding that they stigmatize women. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Also, requiring higher pension contributions from women because they live longer has been held unlawful, even though the conclusion that women live longer than men cannot be viewed as stigmatizing women. See *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

114. *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987) (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979)).

neering; and (2) preferences are implemented only when there is a long-standing, perhaps structural, problem that is caused by discrimination of either employers or society-at-large, that will likely persist without some intervention.

Typical sex-conscious plans allow for salary adjustments on a purely mathematical basis without regard to whether the disparities in compensation are manifest or conspicuous. Moreover, adjustments are made whenever a wage imbalance for a particular job exists and are based solely upon whether the job in question is female-dominated at that moment. There is no separate consideration of any possible underlying reasons for the disparity sought to be corrected; instead, the decision to make an adjustment is purely a mathematical one—the type the Court in *Johnson* suggested would not be permissible.<sup>115</sup>

If adjustments are based solely upon an imbalance in male and female wages, there seems little reason not to conclude that almost any far-reaching, statistically suspect scheme would be considered permissible. For example, consider an employer's grant of a fifty percent across-the-board increase to all female employees. If women make sixty-six cents for every dollar earned by males, a fifty percent increase also yields equality.<sup>116</sup>

---

115. *Id.* at 636 (“had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question”).

116. Proponents of comparable worth may argue that by raising the wages of female-dominated occupations to equal the wages of male-dominated occupations, the same standard is being applied equally to both occupations. However, the comparable worth adjustment will result in a benefit to occupants of female-dominated jobs that is not available to occupants of male-dominated jobs. For example, assume that there are four male-dominated occupations, paying \$18,000, \$20,000, \$20,000, and \$22,000, respectively, and four comparable female-dominated occupations, paying \$16,000, \$18,000, \$20,000, and \$22,000 respectively. Males in this example average \$20,000 per year, and females average \$19,000 per year for comparable work. This is a situation where most comparable worth advocates would call for a remedy.

The remedy under a one-way comparable worth plan would probably be that occupants of each of the underpaid, female-dominated fields would be entitled to the average wage for comparable male-dominated occupations (\$20,000 per year). Thus, one female would be entitled to a \$4,000 raise, and another would be entitled to a \$2,000 raise. The other two females, whose salaries equal or exceed the male average, would not be entitled to an increase. After the adjustment, the average male salary is the lowest that an occupant of a female-dominated occupation could be paid, which causes the female average to be increased above the male average. Under a two-way plan, the male who earns \$18,000 would also be entitled to a remedy—either \$1,000 to raise his salary to equal the pre-adjustment female average, or \$2,000, to equal the post-adjustment female average. However, if there were employees occupying balanced classifications doing comparable work but earning only \$18,000, they would not be entitled to any increase.

Another suggestion for remedying the underpayment of females has been to “raise the [compensation] rate of each female-dominated job by a fixed percentage, equal to the percent

It may not matter a great deal in principle, as opposed to doctrine, whether the imbalance in compensation is large or small. If the disparity is one that truly should be remedied, the fact that the appropriate remedy is a small amount is of little concern, unless it is so small that it is *de minimis*. However, it does matter whether the compensation imbalance and the sex-segregated nature of the jobs are long-standing since proponents of comparable worth rely in large part on "the long history of direct discrimination in the establishment of wage rates for women" prior to implementation of the Equal Pay Act.<sup>117</sup>

The majority in *Johnson* recognized that the propriety of an affirmative action program depends upon whether it attempts to remedy structural problems in the work force, even if the employer is not responsible for the imbalance.<sup>118</sup> A comparable worth plan that provides a remedy for employees in positions that have only recently come to be dominated by a single sex or to be underpaid does not remedy a structural problem; rather, it provides a windfall to the occupants of female-dominated positions. Applying a comparable worth plan to employees in jobs that reflect recent changes in compensation or in sex composition gives a class of employees—defined by sex—an opportunity to increase its salaries, while at the same time achieving none of the societal benefit that the Court has identified as the purpose of affirmative action programs.<sup>119</sup>

Applying the "traditionally segregated job categories" criterion to two-way comparable worth plans—those in which male-dominated occupations obtain an increase if they are underpaid as compared to comparable female-dominated occupations—demonstrates that such plans are even more suspect than one-way plans. The primary argument of proponents of comparable worth is that it is necessary because society values a woman's work less than it values a man's. Proponents do not argue that the purpose of comparable worth plans is to equalize male and female salaries; instead, they argue that they wish to eliminate the portion of the compensation differential that is due to sex discrimination, although they generally assume that whenever a female job is underpaid it is because of sex discrimination.<sup>120</sup> There is no reason to believe, however, that two-

---

differential between the average rate of the female-dominated jobs and the average rate of the male-dominated and integrated jobs." Clauss, *supra* note 1, at 87. Although such a method may be preferable to raising the salary of each woman to the average male salary, it will result in salary increases to women who are already paid more than the male average and deny increases to males whose wages may be below the minimum female salary.

117. *Id.* at 56.

118. *Johnson*, 480 U.S. at 627-30.

119. *Id.* at 632.

120. See TREIMAN & CHENG, *supra* note 21, at 7.



way plans have been adopted out of a belief that wages in certain male-dominated jobs are lower simply because the jobs are held by males. Two-way plans then—even more than one-way plans—appear to be vehicles for achieving societal balance for its own sake, similar to the “blind hiring by the numbers” approach condemned in *Johnson*.<sup>121</sup>

In sum, in order to satisfy the “traditionally segregated job categories” requirement of *Weber*,<sup>122</sup> a comparable worth plan should be limited to apply only to those positions traditionally held by females that are historically and manifestly underpaid. Otherwise, it must be concluded that the sex preference is merely “discrimination for its own sake.”<sup>123</sup>

## 2. Means

Whether a sex-conscious comparable worth plan results in an “unnecessary trammeling” of the interests of males is subject to debate. The purpose of the unnecessary trammeling requirement is to minimize the burden borne by innocent third parties due to the implementation of a race or sex preference.<sup>124</sup> However, only an unnecessary burden is forbidden, since the Supreme Court has recognized that some burden is allowed.<sup>125</sup> As discussed previously, in affirmative action plans dealing with hiring and promotion, the burden on innocent third parties arises when the plan establishes quotas for hiring or promotions or when the plan stands as an absolute bar to non-minority hiring or promotion.<sup>126</sup>

---

121. See *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *vacated*, 107 S. Ct. 1620 (1987), *on remand*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (U.S. Feb. 27, 1989).

If the employer has intentionally engaged in illegal sex discrimination in setting wages, discrimination may be remedied even if the remedy affects positions that are neither traditionally female nor traditionally underpaid. However, the remedy should be limited to employees who have actually been discriminated against, rather than being applied to all employees. It is unlikely that many comparable worth plans could be supported by a showing of employer discrimination considering the number of unsuccessful plaintiffs raising comparable worth claims under Title VII. Moreover, most plans apply to all job classifications, not merely those for which discrimination can be shown. This overbreadth is likely to be fatal to the plan even if there is evidence of discrimination in some job categories. See *City of Richmond v. J.A. Croson*, 57 U.S.L.W. 4132, 4142 (U.S. Jan. 23, 1989) (“overinclusiveness of Richmond’s racial preference strongly impugns the City’s claim of remedial motivation”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (rejecting “prior discrimination” justification in part because plan favored racial groups for whom no showing of prior discrimination was even attempted).

122. *Weber*, 443 U.S. at 203.

123. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

124. See *Weber*, 443 U.S. at 208.

125. *Id.*

126. See *supra* notes 90-95 and accompanying text for a discussion of “unnecessary trammeling.”

The burden placed on occupants of male-dominated positions by a sex-conscious comparable worth plan seems to be of a smaller magnitude than the burdens found acceptable in *Weber* and *Johnson*.<sup>127</sup> The direct costs of comparable worth adjustments are paid by the employer rather than the employees who are not eligible for an adjustment. Occupants of male-dominated or sex-balanced positions simply fail to receive the same pecuniary benefit that female employees receive.<sup>128</sup>

Affirmative action plans dealing with hiring and promotions, arguably unlike plans dealing with compensation, are essentially zero-sum games. One applicant for the position will win; the other will lose. In programs involving compensation, however, the game is only indirectly between different employees. An employee is not harmed by the fact that another employee is being compensated differently, as long as his or her wage is not affected by a decrease in the fund from which the employer might grant an increase.

The requirement that the employee's wage not be affected may seldom be met, so employees not eligible for pay adjustments may in fact bear the burden of the comparable worth plan after all. Substantial increases for certain employees may result in smaller general wage adjustments for other employees, since there would be an accompanying reduction in the fund from which wage increases would come. It would be the unusual case, at least in the private sector, where substantial pay increases could be made to a large number of employees that would not affect wage increases of others. Even in the public sector, if wage increases come out of a general fund, there is likely to be a substantial effect on individuals not entitled to an increase. Moreover, in the private sector, competitive pressures may prevent the employer from implementing a substantial overall increase in wages.

If legislation requiring comparable worth were adopted for private-sector employees, it would be necessary also to consider whether the *employer's* interest is unnecessarily trammled. For example, if the legislation required that no wages be lowered to achieve equality, an employer may be harmed substantially more by being required to implement com-

---

127. See *supra* notes 58-89 and accompanying text for a discussion of *Johnson* and *Weber*.

128. Although some might argue that these people lack standing to challenge the classification because they are not harmed, it is unlikely that those making the argument would endorse it as a generally applicable principle. Certainly, no one would argue that an employer who granted an across-the-board wage increase exclusively to its white employees would be insulated from challenges by its black employees because the black employees were not harmed. Moreover, no one could seriously argue that the employer could defend its action by providing that if it had not limited its wage increases to white employees, it would not have granted increases to anyone.

parable worth than it would by being required to implement a more traditional plan. The zero-sum character of hiring and promotion plans means that apart from the inefficiencies that may result from hiring or promotion not based solely on merit, and aside from any opposition the employer may have in principle to affirmative action, it does not matter to the employer whether applicant *A* or applicant *B* is hired. The employer will spend the same amount on salaries and benefits for approximately the same amount of work.

On the other hand, when an employer is forced to adopt a comparable worth plan, the employer is directly burdened, since the plan requires an increase of wages to some of its employees and thereby increases total labor costs. Of course, if the employer is permitted to offset the wage increases by decreasing future wage increases to others, the employer itself may escape the burden, though it might have to bear a cost in terms of lower employee morale. In such a case, the financial burden is placed on employees who do not receive the comparable worth adjustment.

Even if some employees are financially harmed by the comparable worth plan, it is unlikely that the burden would be considered unduly onerous, since here, unlike in other kinds of affirmative action programs, the burden would be diffused among numerous employees.<sup>129</sup> Each employee who does not receive an increase may suffer a reduction in the amount his wages might have increased, although probably not a reduction in the amount of current wages. Moreover, any reduction will be speculative, except in the rare case where the employer cancels a previously announced increase in order to make the comparable worth adjustment. In sum, depending upon the nature of the comparable worth plan, it may be appropriate to consider whether the interests of *either* the employee or the employer are trammelled. However, it is doubtful that many comparable worth plans would be invalidated as being excessively burdensome.

### 3. Temporariness

Unlike hiring and promotion plans, it is not clear that the need for comparable worth will ever end. The theory behind hiring and promotion preferences is that the end result would eventually be achieved without adoption of the preference, but achievement of the desired goal is

---

129. However, the burden may be considered unnecessary, since a preference may not have been necessary. See *supra* notes 106-13 and accompanying text for a discussion of the Supreme Court's narrowly tailored requirement in Title VII cases.

accelerated.<sup>130</sup> Such plans create skilled minority and female workers who theoretically, at some point, will no longer need preferences. The goal sought by comparable worth advocates, however, suggests that the desired result might never be achieved. A quarter of a century after implementation of the Equal Pay Act and Title VII and eradication of the majority of overt sex discrimination in employment and compensation, advocates of comparable worth argue that little progress has been made in raising the overall wages of females to a level equal to that of males.<sup>131</sup>

Typical comparable worth plans call for continual adjustments. For example, the Minnesota plan requires reassessment of compensation every two years.<sup>132</sup> Whenever a new assessment reveals a compensation disparity between jobs that someone has declared comparable, a wage adjustment is required.<sup>133</sup> Because the system focuses on outcome, rather than on process, the system could continue in perpetuity.

If the goal of a comparable worth plan were simply to *attain*, rather than *maintain*, the desired equality of compensation—a distinction that the Supreme Court has repeatedly declared important in hiring and promotion cases<sup>134</sup>—all that would be necessary is a one-time adjustment to wages and the goal would be accomplished. After the adjustment, the market would simply take over.<sup>135</sup> If the Court's decisions require cessation of affirmative action once the goal is met, then comparable worth plans requiring continual reevaluation and readjustment should be considered invalid.

Proponents of comparable worth would likely argue that a one-time adjustment to wages that resulted in balance between male- and female-dominated occupations would not be an adequate solution. They would claim that there is a difference between comparable worth plans and

---

130. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (Kaiser plan adopted to "hasten the elimination" of the vestiges of discrimination).

131. Johnson & Solon, *The Attainment of Pay Equity Between the Sexes by Legal Means: An Economic Analysis*, 20 U. MICH. J.L. REF. 183, 183 (1986).

132. See *supra* notes 39-40 and accompanying text for a discussion of the Minnesota Plan.

133. For example, the San Francisco city charter requires an annual salary survey for the purpose of making comparable worth adjustments to the wages of women and minorities. San Francisco Charter § 8.407-1 (1988).

134. *Johnson*, 480 U.S. at 639; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 448 (1986); *Weber*, 443 U.S. at 208; see also *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1102 (2d Cir.) (use of "ceiling quotas" by subsidized private apartment complex to avoid "white flight" and remain racially integrated improper attempt at "maintaining racial balance"), *cert. denied*, 109 S. Ct. 376 (1988).

135. In *Weber*, 443 U.S. at 208-09, the Court held that an affirmative action plan designed merely to attain a racial balance was valid. The Court stated that "[p]referential selection" of trainees would end once the imbalance was eliminated, implying that anti-discrimination requirements would suffice thereafter to maintain equality. *Id.*

other kinds of affirmative action plans, since typical affirmative action plans also prohibit discrimination. Once discrimination in hiring and promotion has been eradicated and work forces have achieved the desired balance, then there is no reason *not* to let the market take its course, because the market has been corrected. However, proponents of comparable worth plans would argue that elimination of a comparable worth plan after the desired equality of compensation is achieved would probably result in the reestablishment of the *status quo ante*, because the societal attitudes that created the disparities will remain largely unchanged.

The proponents' argument has some validity, but its validity is established only by demonstrating a substantial flaw in the concept of comparable worth, which is that it is entirely a symptomatic treatment for a largely undiagnosed, and perhaps undiagnosable, problem. Comparable worth plans do nothing to alter whatever it was that produced the compensation patterns that prevail today; neither according to its advocates, do existing laws that ban sex discrimination in compensation.<sup>136</sup> Therefore, the effect of comparable worth plans is similar to the effect that would be achieved by implementation of hiring and promotion goals without prohibiting discrimination.

According to many advocates of comparable worth, one of the primary causes of the wage gap is that the activities of women are generally accorded less respect by society than the activities of men.<sup>137</sup> Although their conclusion may be true as a generalization, the phenomenon of greater respect for male activities is certainly not confined to our society, or even Western society. Instead, as anthropologist Margaret Mead has pointed out, the phenomenon has been present in virtually all societies.<sup>138</sup> To the extent that this phenomenon is rooted in something in "human nature" that encourages such value judgments, it is unlikely that a sys-

---

136. See Johnson & Solon, *supra* note 131, at 183.

137. It has been argued that the influx of women into a job category results in fewer and smaller pay increases and removal of the category from the "promotion ladder." Blumrosen, *supra* note 7, at 408 (position of bank teller formerly entry-level high-paying position; now held by women as low-paying dead-end position); see also Carter & Carter, *Women's Recent Progress in the Professions, or Women Get a Ticket to Ride After the Gravy Train Has Left the Station*, 7 FEMINIST STUDIES 477, 480-98 (1981) (professions to which women have recently gained access have become low-paying, routine positions lacking their former social status).

138. Margaret Mead has written:

In every known human society, the male's need for achievement can be recognized. Men may cook, weave, dress dolls, or hunt hummingbirds, but if such activities are appropriate occupations of men, then the whole society, men and women alike, votes them as important. When the same occupations are performed by women, they are regarded as less important.

M. MEAD, *Male and Female* 159 (1949); see also Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617, 628-30 (1984).

tem of comparable worth implemented for a finite period will permanently change it.

It is likely that the only way to achieve the goal of comparable worth advocates is to eliminate occupational segregation, which is the tendency of females to be clustered in female-dominated occupations and males to be clustered in male-dominated occupations.<sup>139</sup> Although some measure of contemporary occupational segregation is a consequence of prior, or even present, intentional sex discrimination, that form of discrimination is already prohibited by the civil rights laws.<sup>140</sup> However, a great deal of occupational segregation is due to voluntary choice on the part of men and women concerning what kind of work is desirable and to sex-based differences in aptitude and interest.<sup>141</sup> It is safe to assume that in our lifetime, and probably in the lifetimes of our children and grandchildren, most auto mechanics and theoretical physicists will be men, and most nurses and child-care workers will be women, for reasons that transcend invidious discrimination. Ironically, if comparable worth has any effect on occupational segregation, it may be to increase, or at least entrench, it. By raising wages in female occupations, the financial incentive for women to seek employment in male-dominated fields will be substantially reduced.<sup>142</sup> While some males may move into female occupations because of higher salaries, it is questionable whether the number of such males will equal the number of females enticed into staying in the

---

139. One commentator argues that data from a 1987 study of the economic effect of the comparable worth program adopted by San Jose, California, suggest that women were not discouraged from entry into male-dominated positions. Clauss, *supra* note 1, at 95. The study indicated that after implementation of comparable worth programs, women entered male-dominated positions at an increasing rate. *Id.* However, it is likely that San Jose's affirmative action plan, rather than its comparable worth plan, was responsible for that result.

It is doubtful that raising the compensation of female-dominated positions will raise their level of prestige in society in a way that is sufficiently enduring to prevent a market-driven decline in wages after the comparable worth plan is eliminated. Prestige levels of particular occupations constantly change, and there is no reason to think that whatever caused a particular job to be poorly paid prior to implementation of a comparable worth program would not also lead to low wages after the comparable worth plan is no longer in place.

140. See *supra* notes 4 and 12-13 and accompanying text for a general discussion of the Civil Rights Act.

141. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (accepting district court finding that men and women differ substantially in extent of interest in commission selling); see also Shattuck, *Sex-Based Wage Discrimination: A Management View*, 62 DEN. U.L. REV. 393, 399-400 (1985); Fischel & Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 896-98 (1986).

142. See, e.g., Jonung, *Patterns of Occupational Segregation by Sex in the Labor Market*, SEX DISCRIMINATION AND EQUAL OPPORTUNITY: THE LABOR MARKET AND EMPLOYMENT POLICY 44, 63 (1984).

newly well-paid female-dominated occupations.<sup>143</sup>

Finally, the sex composition of jobs changes over time, as do the jobs themselves and the value at which they are rated. What is now a predominantly female occupation may become predominantly male, or equally balanced, and its place in the comparable worth scheme will change. Similarly, changes in job content, such as those caused by automation, will alter the demands of particular jobs in the future. Therefore, in order to fulfill the goal of comparable worth, the jobs and their sex composition will have to be continually reevaluated, with corresponding adjustments made to compensation. This suggests that the primary beneficiaries of comparable worth are not women, but the compensation analysts who will be conducting the studies.

The foregoing comments should not be interpreted to suggest that comparable worth plans will not satisfy the temporariness requirement of *Weber*.<sup>144</sup> As noted previously, the requirement is relatively easy to satisfy,<sup>145</sup> since it seems to be the particular plan, not the need for affirmative action in general, that must be temporary.<sup>146</sup> Any plan contained in a collective-bargaining agreement will, presumably, expire at the end of the agreement's term,<sup>147</sup> and any plan mandated by statute could easily provide for periodic review and reevaluation. If so, the standard of temporariness will likely be satisfied.

#### 4. Narrow tailoring

The final requirement under the Title VII analysis is that an affirmative action plan be "narrowly tailored."<sup>148</sup> The "narrowly tailored" requirement means that the sex classification must be a more effective means of achieving the goal than would be a sex-neutral method.<sup>149</sup>

This requirement presents a more substantial hurdle for comparable

---

143. For example, in San Jose, while wage rates for female-dominated jobs were increasing faster than those for male-dominated jobs, the number of women entering male-dominated jobs increased greatly; however, the number of men entering female-dominated jobs did not. Clauss, *supra* note 1, at 95. Although affirmative action programs and anti-discrimination requirements have resulted in a significant movement of women into men's jobs, "there has been almost no change in the female composition of women's jobs." *Id.* at 69 n.259. See *supra* note 139 and accompanying text.

144. 443 U.S. at 208.

145. See *supra* notes 96-105 and accompanying text for a discussion of the Supreme Court's "temporariness" requirement in Title VII cases.

146. See *Weber*, 443 U.S. at 208.

147. See, e.g., *Britton v. South Bend Community School Corp.*, 775 F.2d 794 (1985) ("The provision was necessarily temporary because it was incorporated in a collective bargaining agreement of limited duration.").

148. See *supra* notes 46-49.

149. *Weber*, 443 U.S. at 208-09; *Johnson*, 480 U.S. at 637.

worth plans than it does for hiring or promotion plans. As discussed previously, the purpose of an affirmative action plan governing hiring is to accelerate the process of integrating the work force beyond the pace at which integration would normally proceed. There is no effective non-discriminatory method of achieving this acceleration because of the limited number of positions available. However, a non-discriminatory method of eliminating wage disparities for jobs of comparable worth is available, since a system of comparable worth could be made applicable to all jobs and to all employees. Comparable worth systems do not have to be sex-conscious; as previously discussed, some comparable worth systems are sex-neutral.<sup>150</sup> Moreover, sex-blind systems are less burdensome to administer than sex-conscious systems, since one less variable needs to be considered, and changes in sex composition do not require modification of the system.

A sex-blind approach to comparable worth is apparently inconsistent with the goals of most comparable worth proponents, who seek only an adjustment of women's wages; they do not seek to affect any differentials existing between male-dominated jobs, between female-dominated jobs, or between integrated jobs.<sup>151</sup> Comparable worth proponents are willing to attribute the latter differentials to "market forces" or "long-standing custom" or "random wage structure,"<sup>152</sup> which, for some reason, are deemed inadequate explanations when female jobs are paid less than male jobs. Thus, although "[b]ureaucrats and judges would not . . . be authorized to determine what the fair wage should be for any male-dominated or integrated job," they would be authorized to determine the wages for female-dominated jobs.<sup>153</sup>

The justification for this different treatment is the assertion that where differences exist between male- and female-dominated jobs of equivalent worth, the differences exist only because of sex; differences *within* male-dominated or female-dominated classifications cannot, by definition, be due to sex. This highlights a serious problem with the fundamental assumption of comparable worth proponents—that differences between compensation for male- and female-dominated positions must be attributed to discrimination.<sup>154</sup> Even proponents of comparable worth acknowledge that differences exist between jobs with identical sex com-

---

150. See *supra* note 45 and accompanying text for a discussion of sex-neutral comparable worth plans.

151. Clauss, *supra* note 1, at 22-23.

152. *Id.* at 23.

153. *Id.* at 23-24.

154. See *id.* at 55-56.



positions.<sup>155</sup> They then must posit that some unknown, but sex-neutral, factors explain those differences, while rejecting the possibility that unknown sex-neutral factors may explain differences between male- and female-dominated positions.

A number of affirmative-action cases decided under the Equal Pay Act have addressed the legitimacy of sex-conscious adjustments to salaries, with varying conclusions. For example, in *Board of Regents of the University of Nebraska v. Dawes*,<sup>156</sup> the United States Court of Appeals for the Eighth Circuit examined the legality of a pay system adopted by the University of Nebraska that was purportedly intended to equalize male and female salaries.<sup>157</sup> The University identified certain factors—education, specialization, experience, and merit—that may have contributed to the higher salaries of male professors.<sup>158</sup> It then assigned point values to each variable to develop a formula describing the average male's salary and then compared the salaries of individual females to the salaries predicted by the formula.<sup>159</sup> The University concluded that thirty-three of one hundred twenty-five females were receiving less than the formula salary and increased their salaries accordingly.<sup>160</sup>

The University's salary modification had two effects.<sup>161</sup> First, it established the male *average* salary as the female *minimum* salary, a wind-fall to females.<sup>162</sup> Second, it left ninety-two of two hundred seventy-two males with salaries less than the formula salary.<sup>163</sup> These males argued that the formula should have been applied to them as well and that the

---

155. *Id.* at 20, 54; see also Blumrosen, *supra* note 23, at 119 (citing Commission on the Economic Status of Women, *Pay Equity: The Minnesota Experience* (1985) (Minnesota study identified male job assigned 134 points paid more per year than male job assigned 154 points, and male job assigned 238 points paid \$100 less per month than male job rated 206)).

There are many examples where the market value of a job does not reflect the job's "objective measure"; yet in many cases no plausible claim of sex discrimination can be made. For example, clergymen earn about 30 percent less than brickmasons. Yet the clergy are largely college graduates; the brickmasons are not. See O'Neill, *A Consultation of the U.S. Commission on Civil Rights*, in 1 COMPARABLE WORTH: ISSUE FOR THE 80'S 177, 178 (1984). Both occupations are more than 95 percent male. If clergymen were largely women, this would no doubt be given as an example of sex discrimination. Yet, because they are both male jobs, something else must be at work.

156. 522 F.2d 380 (8th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976).

157. *Id.* at 381.

158. *Id.*

159. *Id.* at 382.

160. *Id.*

161. *Id.* at 382-83.

162. *Id.*

163. *Id.* Interestingly, a greater proportion of males (92/272 or 33.8%) fell below the formula salary than females (33/125 or 26.4%).

University's failure to do so violated the Equal Pay Act.<sup>164</sup> The Eighth Circuit agreed, concluding that once the University had established a formula for determining a minimum salary schedule, it was a violation of the Equal Pay Act to apply it solely to one sex.<sup>165</sup>

The *Dawes* court's analysis is equally applicable to a Title VII challenge to a comparable worth plan. If an employer sets the salaries of female-dominated occupations on the basis of skill, effort, and responsibility, failure to apply those same standards to the employer's other job classifications is a form of sex discrimination.<sup>166</sup>

Although one would have thought it clear that application of different standards to determine the compensation of males and females constitutes sex discrimination, the Seventh Circuit endorsed such a practice<sup>167</sup> in *Ende v. Board of Regents of Regency Universities*.<sup>168</sup> In *Ende*, the court approved payment by Northern Illinois University of an "affirmative action equity adjustment" to female faculty members based upon a formula that compared mean male salaries, adjusted for length of service and rank, with the salaries of individual females.<sup>169</sup> Women then received a salary adjustment based upon the comparison with the male mean salary. Male professors challenged the adjustment by filing complaints with the Equal Employment Opportunity Commission, arguing that their salaries would have been increased had the formula been applied to them.<sup>170</sup>

The court rejected the challenge, accepting the University's argument that the adjustment was a valid remedial measure to equalize sala-

---

164. *Id.* at 383.

165. *Id.* at 384.

166. See also *Lyon v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 543 F. Supp. 1372 (E.D. Pa. 1982), in which the University compared the salaries of females and minorities to salaries of males, and, in some cases, raised them. White males were not eligible for wage adjustments, with the result that some female professors received higher salaries than their male counterparts, solely because of their sex. *Id.* at 1373. The court invalidated the plan, concluding that the University had made no showing of a "need to discriminate against men in order to remedy any previous wage discrimination against female Temple professors." *Id.* at 1375. The court held that the University would have to show that redress of past discrimination could not have been accomplished "without creating new salary inequities." *Id.* at 1378.

The University of Colorado has recently implemented a similar policy by conducting salary reviews of all women and minority faculty members, and increasing salaries that were below the salaries of comparable males. *U. of Colorado to Raise Salaries of 154 Professors to Correct Inequities Due to Race & Sex Bias*, *The Chronicle of Higher Educ.*, Nov. 19, 1986, at 15, col. 3.

167. *Dawes*, 522 F.2d at 383-84.

168. 757 F.2d 176 (7th Cir. 1985).

169. *Id.* at 178.

170. *Id.* at 179.

ries of males and females.<sup>171</sup> The court held that the University was not obligated to apply the formula to the salaries of male professors, because the formula did not represent a "rate of pay" for women but rather an "incremental adjustment to females' salaries necessary to remedy the effects of past sex discrimination and eliminate sex as a determiner of salary."<sup>172</sup> The court was not swayed by the fact that some of the male professors' salaries were considerably lower than the salaries of similarly qualified female professors and also significantly lower than the salary they would have received had the salary formula been applied to them.<sup>173</sup>

Although the court in *Ende* did not reach the question of whether *Weber* applied to Equal Pay Act cases,<sup>174</sup> the *Weber* analysis does not support the kind of affirmative action involved in *Ende*. First, the desired goal in *Ende*—equal pay for equal work—could have been achieved by a sex-neutral compensation system. Second, the means adopted did not achieve equal pay for equal work across the board, but instead simply gave one class of employees an opportunity for a wage increase to which another class of employees was not entitled.

The plan at issue in *Ende* and sex-conscious comparable worth plans are equally incompatible with the philosophy of Title VII. The overriding purpose of Title VII is to ensure that employers apply the same terms and conditions of employment to all employees without regard to race or sex.<sup>175</sup> Any deviations from that goal should be the exception, rather than the rule, even if the differences favor groups that have been discriminated against in the past. Only when the goal of equality in the work place cannot be effectively achieved without racial or sexual preferences, should abandonment of the principle of equal treatment for all individuals even be considered. Because the philosophy of comparable worth, whether or not derived from Title VII, can be effectively implemented without race or sex preferences, no such preferences are permissible under the statute.

---

171. *Id.* at 181.

172. *Id.* The court stated that it was "undisputed . . . that before the 1975 adjustment the salaries paid female faculty members resulted from discrimination against them." *Id.* at 178. However, it appears that the basis for concluding that an individual female faculty member was a victim of discrimination was to assume that she was if she was paid a salary less than the formula salary.

173. *Id.* at 182.

174. *Id.* at 183.

175. 42 U.S.C. § 2000e-2(a)(1) (unlawful employment practice for an employer "to limit, segregate, or classify his employees in any way . . . because of such individual's race, color, religion, sex, or national origin").

## V. COMPARABLE WORTH PLANS AND THE EQUAL PROTECTION CLAUSE

### A. *Equal Protection Standards Governing Voluntary Affirmative Action Plans*

As described below, the constitutional standard applied to voluntary affirmative action programs for public employers is a more stringent standard than under Title VII. Thus, it is more difficult for a public-sector employer to adopt an affirmative action plan without violating the equal protection clause than it is for it to adopt a plan consistent with Title VII.<sup>176</sup>

The only Supreme Court case dealing with voluntary affirmative action in employment that has been decided on equal protection grounds<sup>177</sup> is *Wygant v. Jackson Board of Education*.<sup>178</sup> *Wygant* addressed a challenge to a provision in a collective-bargaining agreement governing public school teachers, requiring that, in the event of layoffs, seniority be ignored if seniority-based layoffs would decrease the percentage of minority teachers.<sup>179</sup> The purpose of the provision was to prevent the last-hired/first-fired principle from eroding the effects of the school district's affirmative action plan dealing with hiring.<sup>180</sup> In determining whether the layoff provision violated the equal protection clause of the fourteenth amendment, Justice Powell, writing for a four-member plurality, employed the "strict scrutiny" test.<sup>181</sup> Under strict scrutiny, the provision must be narrowly tailored to achieve a compelling state interest in order to be constitutional.<sup>182</sup>

The plurality initially addressed whether the provision was adopted

---

176. The Supreme Court in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), stated: "[W]e do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans." *Id.* at 632.

177. Although *Johnson* involved a public employer, *id.* at 620 n.2, the plaintiff had not raised a constitutional challenge to the affirmative action plan.

178. 476 U.S. 267 (1986).

179. *Id.* at 270.

180. *Id.*

181. *Id.* at 274.

182. *Id.* It is unlikely that the same analysis would be applied to sex classifications, since the standard generally applied to sex classifications is "heightened scrutiny," rather than "strict scrutiny." See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). This could mean that sex-based affirmative action will be easier to justify than race-based affirmative action, which would be ironic since the justification for the application of strict scrutiny to racial classifications is the long history of discrimination against blacks. One would not think that the greater wrong would be more difficult to remedy.

Ultimately, it may not matter whether heightened or intermediate scrutiny is applied to sex-based classifications because the result is likely to be the same under either form of scrutiny. That is, to the extent that strict scrutiny is applied to racial classifications because of the

to further a compelling governmental interest,<sup>183</sup> rejecting several arguments raised by the Board of Education. First, the Board had suggested that the provision was warranted to remedy societal discrimination<sup>184</sup> similar to the kind involved in *Johnson v. Transportation Agency*.<sup>185</sup> The plurality stated that such a showing did not satisfy a compelling governmental interest.<sup>186</sup> Rather, the school district needed to show that it had engaged in prior discrimination, because “[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”<sup>187</sup>

Second, the plurality rejected the Board’s argument that the beneficial effects of having minority teachers as role models for minority students justified the provision.<sup>188</sup> According to Justice Powell, the role-model theory did not properly limit affirmative action to remedying the effects of prior discrimination since it required a “year-to-year calibration” to adjust to the percentage of minority students.<sup>189</sup>

Finally, Justice Powell rejected the Board’s claim that the affirmative action provision was enacted as a response to its own prior discrimination against blacks.<sup>190</sup> He stated that before a public employer embarks on an affirmative action plan, it must have “convincing evidence that remedial action is warranted.”<sup>191</sup> He concluded that the Board did not explain why its affirmative action plan included Orientals, American Indians, and persons of Spanish descent, since there was no evidence of prior purposeful discrimination against members of these groups.<sup>192</sup>

The Court’s recent decision in *City of Richmond v. J.A. Croson Co.*<sup>193</sup> relied heavily on the plurality opinion in *Wygant*. *J.A. Croson Co.* involved a challenge to a city ordinance requiring all prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to “Minority Business Enterprises” anywhere in the country.<sup>194</sup> In striking down the ordinance, a majority

---

history of egregious wrongs against blacks, the state interest in remedying racial discrimination will be more compelling than in cases seeking to remedy sex-based discrimination.

183. *Wygant*, 476 U.S. at 274.

184. *Id.*

185. *Johnson*, 480 U.S. at 627-30.

186. *Wygant*, 476 U.S. at 276.

187. *Id.*

188. *Id.*

189. *Id.* at 275.

190. *Id.* at 277.

191. *Id.*

192. *Id.* at 284 n.13.

193. 57 U.S.L.W. 4132 (U.S. Jan. 24, 1989) (No. 87-998).

194. *Id.* at 4134.

of the Court for the first time held that strict scrutiny applies to all government racial classifications irrespective of "the race of those burdened or benefited by a particular classification."<sup>195</sup> Applying strict scrutiny to the ordinance, the Court concluded that it was not supported by a compelling interest, because it was designed to remedy "past discrimination in the construction industry" in general, rather than discrimination in the city of Richmond.<sup>196</sup> The Court found further support for its conclusion in the inclusion of minorities other than blacks, such as Eskimos and Aleuts, despite the fact that "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen."<sup>197</sup> The Court concluded that "[t]he gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation."<sup>198</sup>

In sum, before a public-sector employer may adopt an affirmative action plan, it must have "convincing evidence that remedial action is warranted."<sup>199</sup> Although the Court has not yet determined the amount of evidence that will be needed to make such a showing, Justice O'Connor suggested in her *Wygant* concurrence that evidence sufficient to constitute a prima facie case of discrimination would satisfy the requirement.<sup>200</sup>

After determining that the Board in *Wygant* failed to establish the requisite compelling interest, the Court next examined the means employed.<sup>201</sup> Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, stated that even if the Board on remand could demonstrate prior discrimination and thereby establish a compelling governmental interest in support of its plan, it could not show that the means were narrowly tailored to remedy that discrimination.<sup>202</sup> Justice Powell relied primarily on the unnecessary-trammeling analysis of *United Steelworkers of America v. Weber*<sup>203</sup> to reach this conclusion.<sup>204</sup>

Although Justice Powell acknowledged that it is sometimes necessary to take race into account when remedying the effects of prior discrimination,<sup>205</sup> he viewed the layoff provisions as substantially different

---

195. *Id.* at 4139; *see id.* at 4146 (Scalia, J., concurring).

196. *Id.* at 4140.

197. *Id.* at 4142.

198. *Id.*

199. *Wygant*, 476 U.S. at 284.

200. *Id.* at 292 (O'Connor, J., concurring).

201. *Id.* at 279-84. The Court addressed this issue to avoid a determination on remand whether the Board had engaged in prior discrimination. *Id.* at 278.

202. *Id.* at 283.

203. 443 U.S. 193, 208 (1979).

204. *Wygant*, 476 U.S. at 282 n.9.

205. *Id.* at 280.

from hiring goals.<sup>206</sup> Hiring goals, he stated, often foreclose only one of several opportunities, while layoffs impose the entire burden on particular individuals.<sup>207</sup> Furthermore, modifying a seniority-based layoff system disrupts "settled expectations in a way that hiring goals do not."<sup>208</sup> Justice Powell concluded that less intrusive, yet equally effective means, such as hiring goals, were available to the Board to achieve its asserted goal.<sup>209</sup>

Although Justice O'Connor joined Justice Powell's opinion concluding that no compelling interest justified the layoff provision,<sup>210</sup> she did not adopt his analysis of the means employed to implement that interest.<sup>211</sup> In her view, since the layoff provision was tied to a hiring goal that was based on the percentage of minority students and therefore unrelated to remedying discrimination, it was not narrowly tailored to achieve a legitimate goal.<sup>212</sup>

The Court in *J.A. Croson* again followed the lead of *Wygant* in assessing the means by which the goal was intended to be achieved.<sup>213</sup> The Court first observed that it could not be said with confidence whether the Richmond set-aside plan was "narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."<sup>214</sup> The Court then emphasized two facts that it found determinative. First, no consideration was given by the city to the use of race-

---

206. *Id.* at 282.

207. *Id.* at 283. Justice Powell's view that hiring goals diffuse the burden of preferences throughout society is not necessarily accurate. Awarding a minority a job through an affirmative action plan denies a non-minority that same job simply because of race. We may pretend that such action spreads the burden throughout non-minority society, but each non-minority does not bear a proportional share of the burden. What allows us our illusion is that the burdened non-minority is difficult to identify, and therefore difficult to empathize with; however, he or she is burdened nonetheless.

208. *Id.*

209. *Id.* at 283-84. This provides a less than satisfying alternative, however, since the Board's reason for adopting the layoff plan was to ensure that the gains achieved through hiring goals would not be wiped out through seniority-based layoffs. Thus, although hiring goals may be less intrusive than layoff protection, under these circumstances, they were less effective when measured against the goal of increasing the level of minority employment.

210. *Id.* at 285-86 (O'Connor, J., concurring).

211. *Id.* at 291 (O'Connor, J., concurring).

212. *Id.* at 293 (O'Connor, J., concurring). Justice White, the fifth Justice voting against the layoff provision, concurred only in the judgment. *Id.* at 295 (White, J., concurring). He suggested that the layoff plan had the same effect as a requirement that whites be discharged and blacks be hired until blacks constituted a suitable percentage of the work force. *Id.* (White, J., concurring). He believed that such a plan would be invalid regardless of the legitimacy of hiring goals or quotas. *Id.* (White, J., concurring). Thus, the Court did not need to address the constitutionality of the plan. *Id.* (White, J., concurring).

213. *J. A. Croson*, 57 U.S.L.W. at 4142.

214. *Id.*

neutral means of increasing minority participation in city contracting.<sup>215</sup> Second, the thirty percent quota was unrelated to any goal "except perhaps outright racial balancing," since "[i]t rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."<sup>216</sup> Moreover, because Richmond's scheme created an absolute preference for a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country, it could not be said that the ordinance was narrowly tailored to remedy the effects of past discrimination against blacks in Richmond.<sup>217</sup>

As can be seen from the foregoing discussion, the "narrowly tailored" analysis under the equal protection clause is similar to the "unnecessary trammeling" and temporariness requirements of *Weber*<sup>218</sup> and *Johnson*.<sup>219</sup> However, what is only implicit under Title VII is made explicit in the equal protection analysis: sex-based preferences are justified only when there is no way of furthering the same interest as effectively without preferences.

### B. *Application of Equal Protection Standards to Comparable Worth Plans*

The most common justification for comparable worth plans—"societal discrimination"—is an inadequate justification for a sex preference under the equal protection clause. Therefore, the question becomes whether public-sector employers will be able to justify the implementation of comparable worth plans based upon their own prior discrimination, which requires employers to have "convincing evidence that remedial action is warranted."<sup>220</sup> Under *Weber* and *Johnson* the Supreme Court has adopted a broad definition of "remedy," allowing "remedies" even in the absence of a wrong. The Court's equal protection analysis, on the other hand, adopts a more traditional and restrictive definition, viewing "remedy" as a means to correct a wrong.<sup>221</sup>

Under the equal protection clause, an employer must show more than the mere existence of sex-based wage differentials before implementing a sex-based comparable worth plan, just as it must show more than a

---

215. *Id.*

216. *Id.* at 4143 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

217. *Id.*

218. *Weber*, 443 U.S. at 208.

219. *Johnson*, 480 U.S. at 630.

220. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986).

221. *Id.* at 274-76.



statistical imbalance in its work force before implementing hiring preferences. In either case, it must show that its own prior *wrongful* conduct is responsible for the perceived disparity.<sup>222</sup> Except in rare cases, that requirement raises an insurmountable hurdle to the creation of public-sector comparable worth plans.

Even if a public-sector employer could demonstrate its own prior discrimination, it would still have to demonstrate that a sex-conscious comparable worth plan was necessary to redress the compensation inequity, unless it limits the remedy to the victims of the prior discrimination. As discussed above in connection with Title VII, it will be unlikely that such a showing could be made.<sup>223</sup>

### C. Sex-Neutral Plans Benefitting Women

This Article has argued that sex-conscious comparable worth plans are invalid under both Title VII and the equal protection clause, in part because sex-blind plans constitute a more narrowly tailored solution. This is not to suggest, however, that Title VII or equal protection concerns are not implicated by adoption of sex-neutral plans. A comparable worth system that is neutral on its face but implemented because of beneficial consequences for women, would be subject to scrutiny under the disparate-treatment analysis of Title VII and the equal protection clause.<sup>224</sup>

The manner of implementation of a sex-neutral plan may be determinative of its validity. For example, a decision to conduct a pay study and implement the results because of a belief that the existing compensation system was irrational or discriminatory would probably raise no serious issues. However, suppose a number of job evaluations were performed, and the employer consciously decided to use the evaluation system that most benefited women simply because it had that result. Because sex would have been a consideration in adopting the plan, it would be necessary to evaluate the plan under the *Weber*<sup>225</sup> and *Wygant*<sup>226</sup> standards. Similarly, if an objective evaluation of jobs revealed disparities between the sexes, and the employer decided to alter the objective

---

222. See *id.* at 277-78.

223. See *supra* notes 148-175 and accompanying text for a discussion of the "narrowly tailored" requirement in Title VII cases.

224. Although facially neutral policies with disparate impact are not invalid under the equal protection clause, see *Washington v. Davis*, 426 U.S. 229 (1976), policies that are adopted at least in part *because* of their disparate impact—not merely *in spite of* their disparate impact—may be invalid. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

225. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

226. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1987).

evaluation to benefit one sex, as in the Ohio example discussed earlier,<sup>227</sup> that is no longer a sex-neutral plan and should also be subjected to closer scrutiny.<sup>228</sup>

## VI. CONCLUSION

Although the requirements of Title VII and the equal protection clause as they relate to voluntary affirmative action plans are not identical, there is substantial overlap. Given that public-sector employers are governed by Title VII in addition to the fourteenth amendment, all affirmative action plans and laws must at least satisfy the requirements of *United Steelworkers of America v. Weber*<sup>229</sup> and *Johnson v. Transportation Agency*.<sup>230</sup> However, many comparable worth plans do not satisfy these standards.<sup>231</sup>

The failure of most comparable worth plans to satisfy the requirements of Title VII and the equal protection clause, together with the ready availability of a nondiscriminatory method of achieving the same goal, raises the question of why proponents of comparable worth favor sex-based comparable worth plans. The answer appears to be grounded in pragmatic political considerations.

First, many people will accept without reservation a policy with the goal of equality between the sexes or races. A comparable worth policy not based upon sexual equality would lose much of its appeal. Although many people might favor civil-service reform in the abstract, it does not enjoy the same political cachet as sexual equality.

Second, a sex-neutral plan only eliminates discrimination; it does not guarantee equality of result. If forced to choose, many people would choose the principle of equality of result over the anti-discrimination

---

227. See *supra* text and accompanying notes 28-32 for a discussion of the Ohio plan.

228. See *County of Washington v. Gunther*, 452 U.S. 161 (1981) (upholding claim that employer followed salary survey for male employees but not for female employees); *International Union of Elec. Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981) (deviation along sex-based lines from the results of job evaluations violates Title VII).

229. 443 U.S. 193 (1979).

230. 480 U.S. 616 (1987).

231. It should be emphasized that some of the "wage gap" can be remedied under existing law. For example, an employer who channels female employees into low-paying jobs violates Title VII. *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 626 (5th Cir. 1983). A violation of Title VII also occurs when an employer intentionally compensates female-dominated positions less than male-dominated positions simply because they are female positions. *Gunther*, 452 U.S. at 178-80. Finally, an employer who, on the basis of sex, pays females less than males for the same work violates the Equal Pay Act. 29 U.S.C. § 206(d)(1) (1982).

principle, and would therefore prefer a sex-conscious plan to a sex-neutral one.

Third, viewing undercompensated employees as victims of discrimination leads to the conclusion that the "victims" should be given a pay increase to put them in their "rightful place" in the compensation structure.<sup>232</sup> Needless to say, the aggregate amount paid out in wages by employers would increase substantially,<sup>233</sup> but no doubt that is a price that many wage *earners* are willing to see paid. On the other hand, equality could as easily be achieved by lowering the wages of those in higher paying jobs to the level of those in lower paying jobs, or by raising the pay of those in lower paying jobs and decreasing the pay of those in higher paying jobs until they are equal. Then, of course, the desired equality would cost something, and those in higher paying jobs who may favor increasing other employees' wages may suddenly lose their fervor for equality. Only when the cost is paid by a third party may they be willing to participate in a system of wage equality.

These considerations are no doubt a major reason that unions have endorsed the concept of comparable worth,<sup>234</sup> since in many instances, adoption of a comparable worth plan results in an overall increase in the compensation of the bargaining unit. It is predictable that unions would

---

232. For example, the majority report of the California Comparable Worth Task Force has recommended that the California Fair Employment and Housing Act be amended to require implementation of comparable worth in both the private and public sectors, with the added requirement that "[n]o job classes shall be downgraded or reduced in compensation in order to accomplish the purposes of this act." TREIMAN & CHENG, *supra* note 21 at 13. The minority report, on the other hand, while supporting the concept of "pay equity," states: "Since the claim of proponents of comparable worth is that some jobs are undervalued relative to others, it follows as a matter of logic that some jobs are overvalued relative to others." *Id.*

One commentator has gone so far as to suggest that it would violate Title VII for an employer to freeze or reduce the wages of overpaid employees in implementing a comparable worth plan, because to do so would constitute disparate treatment. Clauss, *supra* note 1, at 94. *See also* Blumrosen, *supra* note 23, at 118 (it is appropriate, and perhaps required by Title VII, to raise women's wages, not to lower men's). However, it is difficult to take such suggestions seriously. An employer's decision to implement a sex-neutral comparable worth plan across the board seems to be the antithesis of disparate treatment under Title VII.

233. It is not clear how great the increase in labor costs would be, but the argument that it would not be a substantial amount is unpersuasive. If the amount is insubstantial, this would indicate that women are not now underpaid by a large amount. Proponents of comparable worth cannot have it both ways. If the violation is large, the remedy also will be large. *See also* Johnson & Solon, *supra* note 131, at 206-07 (overall, implementation of comparable worth law would negatively affect status of women in labor market, in large part because increase in wages would result in reduced employment). One comparable worth advocate has suggested that employers could offset the increased cost by reducing health care and other benefits. Clauss, *supra* note 1, at 91.

234. *See* Levit & Mahoney, *supra* note 11, at 130-31 (encouraging union activity in comparable worth area).

look with less favor upon comparable worth plans that result in a restructuring of wage rates with the same overall level of compensation. In that case, there would be happy members occupying the positions targeted for a pay increase, but there would also be disgruntled members whose wages would be decreased.

The debate over comparable worth has assumed that the only question under Title VII and the equal protection clause is whether an employer's compensation system can be challenged under those laws as being inconsistent with the principle of comparable worth. The debate has also assumed that the decision to implement a voluntary comparable worth system raises only political issues, not legal ones. Yet, as the foregoing analysis indicates, sex-conscious comparable worth schemes can be considered valid only in relatively few circumstances. The fundamental question that advocates of comparable worth must now address is whether alteration of market-based wage rates is desirable if comparable worth cannot be used as a basis for distributing spoils on the basis of sex.

