ABSTRACT. This article examines the legal, economic, and ethical arguments supporting and opposing comparable worth. The co-authors advance opposing views on the wisdom of adopting comparable worth as a public policy, and those views are not reconciled within the limits of this essay.

The Egyptians do practically everything backwards from other people, in their customs and laws – among which the women go to market and make deals, whereas the men stay at home and weave; and other folk weave by pushing the weft upwards, but the Egyptians push it down.
Men carry burdens on their heads, whereas women do it on their shoulders.
The women piss standing up, and the men sitting down.

– Herodotus, Histories, 2.35–36
(cited in Elizabeth Wayland Barber, Women’s Work: The First 20,000 Years 185 (1994))

I. Introduction

Pay equity is a concept that encompasses both equal pay and comparable worth. Comparable worth is the more controversial of the two measures, but the thrust of both these efforts is to narrow, if not eliminate, wage disparity across gender lines. In context with other measures of equity in the workplace, comparable worth addresses the wage effects of labor market segregation, while affirmative action and “color/gender/ethnic blind” civil rights programs address the problem of segregation itself.

In its initial effort to address pay equity, Congress passed the Equal Pay Act. This act requires that men and women working in equivalent positions receive equal compensation. The wage-gender disparity, however, turned out to be a persistent one notwithstanding the effect of the Equal Pay Act. This led some legal scholars to contend for a stronger antidote – comparable worth.

In order to correct this market failure, comparable worth proponents argue that the value of these jobs – specifically the contribution that
these jobs make to the success of the firm – should be closely tied to employee compensation. To phrase the matter differently, comparable worth advocates pose an ethical question – why should women be expected to subsidize employers with their time, effort, and skill while men, who contribute no more to the firm's success, are compensated at a higher rate.

The primary attack on comparable worth is based on economic efficiency. In a free market, it is argued, fairness follows from efficiency. Supporters of comparable worth contend that it will lend effective support to the effort of title VII in combatting discrimination against women, and that the elimination of gender-based discrimination will enhance both the distributional fairness and efficiency of the market system. Comparable worth advocates believe that they are addressing a market failure and that, in conjunction with other such efforts, comparable worth advances an approach to wage determination that is preferable to the current market-based approach.

This paper explores legal, economic and ethical arguments for and against the doctrine of comparable worth. The authors contend for conflicting positions in order to bring the perspective of advocates to a issue of enduring controversy.

II. The legal status of comparable worth

Legal efforts to eliminate the historical wage gap between men and women began at the state level. It moved to the federal level in 1942 when the War Labor Board issued an order requiring changes to equalize “the wages or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations.” Congress eventually addressed the wage discrepancy in 1963 with the passage of the Equal Pay Act (EPA). The EPA provides that an employer must provide workers of both sexes equal pay for equal work, and provides four affirmative defenses for pay differentials. Although the EPA’s “equal work” requirement has been interpreted as requiring equal pay for “substantially equal” work, this standard is not wide enough to encompass a comparable worth evaluation of dissimilar jobs.

At the same time that courts were interpreting the parameters of the EPA, wage differences began to be addressed under Title VII of the Civil Rights Act of 1964. A preliminary question arose between the interaction of the EPA and Title VII. The Bennett amendment attempted to address these questions by allowing pay differentials under Title VII if payment was based on the affirmative defenses found in the EPA. The question remained however, whether a comparable worth claim was actionable under Title VII. The Ninth Circuit Court of Appeals seemed to answer this question affirmatively in the case of Gunther v. County of Washington.

The issue in Gunther was whether workers could bring a suit under Title VII alleging sex-based wage discrimination for jobs that were not equal. The court of appeals held that Title VII did not preclude such a claim. The Supreme Court affirmed holding that the Bennett Amendment merely incorporated the EPA’s four affirmative defenses, and that it did not preclude claims of sex-based wage discrimination under Title VII where the jobs at issue are not equal. However, the majority carefully avoided the comparable worth issue, stating that the respondent’s claim was not based on the “controversial concept of ‘comparable worth’.”

After Gunther, lower courts were reluctant to extend title VII to include comparable worth claims, and the Ninth Circuit’s decision in AFSCME v. State of Washington, dealt a crippling blow to comparable worth. In AFSCME, the Ninth Circuit held that plaintiffs cannot bring a Title VII comparable worth claim under the disparate impact theory. The court found that reliance on the market to set wages “does not constitute a single practice that suffices to support a claim under disparate impact theory.” Judge (now Justice) Kennedy dismissed the plaintiff’s disparate treatment claims as well saying that discriminatory intent could not be inferred from the fact that the state’s comparable worth study revealed a wage disparity between genders. Thus, after AFSCME, the only theory a comparable worth plaintiff may rely on is disparate treatment, and proving discriminatory intent is made