

THE EQUAL PAY ACT IN THE COURTS: A DE FACTO WHITE-COLLAR EXEMPTION

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The Equal Pay Act of 1963, though initially considered a victory for working women, has proven unsuccessful for women executives, administrative personnel, and professionals. This Note argues that plaintiffs bringing Equal Pay Act claims have faced courts whose interpretation of the law has effectively excluded women in higher level positions. Through an examination of the Act's history and the history of similar exemptions in New Deal legislation, this Note argues that ideas about work, imported from early conceptions of managers, executives, and professionals in New Deal legislation, continue to influence courts' interpretation of the Act. This Note offers two alternative solutions to this problem: The first prescription is to reexamine the history surrounding the Equal Pay Act with the aim of including workers who effectively have been excluded by judicial interpretation. The second is to reinstate in the Equal Pay Act the exemption as originally enacted so that the apparent inclusion of these groups does not discourage legislative attempts to correct the problem.

INTRODUCTION

“Nature has given woman so much power that the law cannot afford to give her less.”¹

Rosie the Riveter: saucy machinist, determined worker, one eyebrow raised, icon of patriotism. Of all the images of twentieth-century women, none is more enduring than hers. As part of a government-sponsored propaganda campaign encouraging women to join the war effort, Rosie stood for all American women who experienced World War II as an opportunity to break into industries previously closed to them. The federal government encouraged women to take part in the

* Copyright © 2004 by Juliene James. Law Clerk to the Honorable Charles R. Wilson, United States Court of Appeals for the Eleventh Circuit. A.B., Harvard University, 2000; J.D., New York University, 2004. I am grateful to the entire staff of the *New York University Law Review*, and particularly to the members of the 2003–2004 Senior Board who were great colleagues and even better friends. Special thanks are due to Michael Burstein and Stephen Yuhan, who helped me make my job look easy. I would also like to thank Nick Bagley, Hallie Goldblatt, and Jane B. O'Brien. I dedicate this piece to my family, to whom I owe an untold debt of gratitude, and especially to my mother, who showed me what it means to overcome. And, to Brian Petruska, who prefers the struggle to the easy road, any day of the week.

¹ *Equal Pay Act of 1963: Hearings on H.R. 3861 Before the House Special Subcomm. on Labor of the Comm. on Educ. and Labor*, 88th Cong. 215 (1963) [hereinafter *1963 Hearings*] (statement of Sonia Pressman, Att'y, on behalf of ACLU) (misquoting Samuel Johnson, who reportedly said, “Nature has given woman so much power that the law cannot afford to give her more”).

war effort by working in manufacturing positions that otherwise would have been filled by men. While women seized these opportunities, and the war effort resulted in an enormous economic recovery for the nation, this rebound did not result in job security for women. At the end of World War II, many voiced concerns that these women would either lose their jobs, or that the equal pay they had enjoyed during the war² would be taken away. Some women did lose their jobs and returned to the home.³ Other women kept their jobs, but earned less than the men who came home from the theaters of war and returned to the factories.

Since the late nineteenth century,⁴ the federal government has paid male and female employees equally.⁵ In the private sector, however, efforts to close the wage gap have met with less success.⁶ By the time Congress took up equal pay legislation in the post-World War II period,⁷ pressure for federal intervention had reached a tipping point.⁸

² See Louis Stark, *WLB Sets Principle of Equality in Pay to Men and Women*, N.Y. TIMES, Nov. 26, 1942, at 1 (reporting War Labor Board's order "allowing employers to make wage or salary adjustments to equalize the wages of women with those of men for comparable quality and quantity of work" and discussing similar order in World War I).

³ See DORIS KEARNS GOODWIN, NO ORDINARY TIME 622-24 (1994) (describing post-war job loss and "elevation of domestic virtues into an ideology").

⁴ See 1963 Hearings, *supra* note 1, at 30; see also John W. Ross, *The School Teachers' Pay: President Ross, of the School Board, States Some Facts*, WASH. POST, June 30, 1888, at 5 (pointing out problems with proposal for equal pay for Washington, D.C. teachers); *Schoolma'ams Want Men Teachers' Pay*, N.Y. TIMES, Apr. 30, 1905, at 8 (reporting first steps in campaign by Class Teachers' Association to achieve equal pay).

⁵ The government did not formally codify this practice until the Civil Classification Act of 1923. See Classification Act of 1923, Pub. L. No. 67-516, § 4, 42 Stat. 1488 (repealed 1949) ("In determining the rate of compensation which an employee shall receive, the principle of equal compensation for equal work irrespective of sex shall be followed.").

⁶ Except during the two world wars, no private employer was required to follow principles of pay equity. See Stark, *supra* note 2.

⁷ See *Equal Pay for Equal Work: Hearings on H.R. 8898 and H.R. 10226 Before the House Select Subcomm. on Labor of the Comm. on Educ. and Labor*, 87th Cong. (1962) [hereinafter 1962 Hearings]; *Equal Pay for Equal Work for Women: Hearings on H.R. 4273 and H.R. 4408 Before the House Subcomm. No. 4 of the Comm. on Educ. and Labor*, 80th Cong. (1948) [hereinafter 1948 Hearings]; *Equal Pay for Equal Work for Women: Hearings on S. 1178 Before the Senate Subcomm. on Educ. and Labor*, 79th Cong. (1945) [hereinafter 1945 Hearings].

⁸ Those who testified in favor of the bill included unions, various women's groups, and religious groups. See, e.g., 1963 Hearings, *supra* note 1, at III-VII; 1962 Hearings, *supra* note 7, at III-V. Unions argued that while they had made some inroads in equalizing the wage gap, many of the largest private sector employers evaded union organizing. See 1963 Hearings, *supra* note 1, at 113 (statement of James B. Carey, Sec'y-Treas., Indus. Union Dep., AFL-CIO, and Pres., IUE, AFL-CIO) (noting pay equity clauses in General Motors contracts, but inability to win equal pay clauses in contracts with General Electric and Westinghouse, employers of thirty percent of IUE's members). *But see U.A.W. Adopts Equal Pay Plan*, L.A. TIMES, Mar. 31, 1946, at 12 (reporting that C.I.O. United Auto Workers affirmed its support for equal pay for women workers at their 1946 convention). Moreover, even though twenty-three individual states had passed legislation to combat pay

The wage gap itself appeared to be widening: In contrast to 1955's differential of sixty-four percent, in 1961 women made fifty-nine cents for every dollar made by men.⁹ Though it took almost twenty years, Congress attempted to respond to the concerns of women across the country with the passage of the Equal Pay Act of 1963 (EPA or the Act).¹⁰ The purpose of the EPA was to prohibit wage discrimination based on sex. As originally enacted, though, the EPA exempted workers employed in a "bona fide executive, administrative, or professional capacity."¹¹ Despite the lack of "generally accepted proof that women in high-level positions have higher labor turnover than men,"¹² these exemptions permitted employers to pay less for women executives than for men in the same positions. Thus, while the EPA benefited only the blue-collar workers conjured by Rosie's image¹³—assembly-line supervisors, machinists, and the like—the EPA did not have similar effects for white-collar workers.¹⁴

inequity, advocates of the bill showed that these states had difficulty equalizing pay. See 1963 *Hearings*, *supra* note 1, at 39–51 (analyzing state laws and their shortcomings). Finally, although the United States was a member of the International Labor Organization (ILO), it had not signed the ILO convention that required nations to pay equally for comparable work regardless of sex. See Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303. At the time of the EPA's enactment, the United States was not a signatory to Convention 100. See 1963 *Hearings*, *supra* note 1, at 55.

⁹ See 1963 *Hearings*, *supra* note 1, at 17.

¹⁰ Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (d)(1) (2000)).

¹¹ Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (codified as amended at 29 U.S.C. § 213(a)(1) (2000)). For purposes of this Note, and in the interest of brevity, this exemption will be called the "executive exemption." For specific definitions of these exemptions, see *infra* Part III.A.

¹² 1963 *Hearings*, *supra* note 1, at 17.

¹³ See *e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 204–05 (1974) (concerning factory workers).

¹⁴ The issue is far from a dead letter, however. Last year, women earned 79.4 percent of men's wages. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES, available at <http://www.bls.gov/cps/cpsaat39.pdf> (2003) (indicating that median weekly wages in 2003 were \$695 for men as compared with \$552 for women). Moreover, the gap between men's and women's wages has increased in recent years. In 1983, women earned 80.4 cents for every dollar earned by a man, and nearly twenty years later, in 2000, they earned 79.7. See U.S. GEN. ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 29 (2003), available at <http://www.gao.gov/new.items/d0435.pdf> ("[W]omen earned an average of about 20.3 percent less than men in 2000."); *id.* at 2 (noting "small, but statistically significant decline in the earnings difference over the time period" from 1983 to 2000); see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 952, HIGHLIGHT OF WOMEN'S EARNINGS IN 2000, at 1 (2001), available at <http://www.bls.gov/cps/cpswom2000.pdf>.

Commentators have speculated differently about the sources of the continued discrepancy. See, *e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra*, at 2–3 (concluding that work patterns accounted for most of differential, but that discrimination and choosing job flexibility over earnings, among other factors, might also contribute); June O'Neill, *The Trend in the*

Although EPA claims technically have been available to all workers since 1972, when the exemption was removed from the statute,¹⁵ white-collar workers generally have not prevailed on these claims. This result is contrary to the original vision of Congress, which intended for courts to construe the EPA—a remedial statute—broadly to effect its purpose.¹⁶ Instead, courts have interpreted the Act so narrowly as to make claims by white-collar women extremely difficult to win. Coupled with the fact so few women hold positions in which they could influence companies' compensation policies,¹⁷ the lack of success in the courtroom presents a serious impediment to the EPA's mandate of equal pay for equal work.

Male-Female Wage Gap in the United States, 3 J. LABOR ECON. S91-S116 (1985) (finding that women's increase in labor participation correlates with lesser skill levels); Lillian McCormick & Charlotte Shapiro, *Persistent Wage Gap*, N.Y. TIMES, Nov. 17, 1985, at E22 (arguing that EPA has been largely ineffectual because of occupational segregation).

This Note will not address occupational segregation, as it is well explored in a number of sources. See e.g., ROSEMARY CROMPTON & KAT SANDERSON, *GENDERED JOBS AND SOCIAL CHANGE* 32-35 (1990) (documenting horizontal and vertical segregation); ESCHEL RHOODE, *DISCRIMINATION AGAINST WOMEN* (1989) (noting international persistence of social, economic, and political discrimination against women in domestic law and in economic status of women as workers); WOMEN'S WORK, MEN'S WORK: *SEX SEGREGATION ON THE JOB* (Barbara F. Reskin & Heidi I. Hartmann eds., 1986) (noting that majority of women work in small number of occupations, and that those occupations are frequently ones where workers are predominantly women); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1920-21, 1960-62 (1994) (noting that EPA is ineffectual in occupationally segregated industries, but that unions who organize women can secure better benefits). Crain notes that sex discrimination and voluntary "choice" are two commonly cited causes of occupational segregation. *Id.* at 1915. By its own terms, the EPA limits its scope to women who can compare themselves to men who get paid more for doing the same work in the same establishment. See *infra* note 59 and accompanying text. Thus, women in occupationally segregated industries find no remedy in the EPA.

Tangentially, statistics on women's employment issues have become a scarce commodity. According to a recent report from the National Council for Research on Women, the George W. Bush Administration has removed many helpful statistics from the Department of Labor (DOL) website, rendering research such as that conducted for this Note much more arduous. See THE NATIONAL COUNCIL ON RESEARCH FOR WOMEN, *MISSING: INFORMATION ABOUT WOMEN'S LIVES* (2004) (reporting that data and analyses on health, jobs, and violence against women have been obscured or withheld), available at <http://www.ncrw.org/misinfo/report.pdf>.

¹⁵ Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 213(a)(1) (2000)) (removing § 206(d)(1) from exemption).

¹⁶ See *Corning Glass Works*, 417 U.S. at 208.

¹⁷ See Linda Wirth, *Women in Management: Closer to Breaking Through the Glass Ceiling?*, in WOMEN, GENDER AND WORK 239, 243-44 (Martha Fetherolf Loutfi ed., 2001) (noting that, although women in the United States are relatively well qualified and comprise forty-six percent of the workforce, "a survey of the 500 largest companies (the 'Fortune 500') showed that in 1996 they only held 2.4 per cent of the highest-level management jobs and accounted for a tiny 1.9 per cent of the highest-paid officers and directors").

Informing this narrow interpretation is the courts' discomfort with issues of class in the labor context, providing just one example of broader societal hostility towards women executives. For these women, the wage disparity persists; worse, the EPA is of no help to them. Women in white-collar positions are rarely successful on claims that their pay is a result of sex discrimination. Putting aside for the moment the argument that the EPA does not sanction such differential treatment of white-collar women, however, these barriers to equal pay are symptomatic of a more general hostility to women executives. The lack of remedy for pay inequity sends a particularly pernicious message to white-collar women that society does not take them seriously. Given the increasing number of workers in the service sector¹⁸ and the pivotal role women will continue to play in the classroom, the boardroom, and the operating room, society cannot afford to take this problem lightly.

Part I of this Note discusses the history of the EPA and its intended scope. Next, Part II lays out the courts' approach to equal pay claims, first describing the plaintiff's *prima facie* showing and then discussing two specific decisions that demonstrate the difficulty faced by women executives in making out a *prima facie* case. The idea that certain jobs are "inappropriate" for regulation runs through courts' decisions, and indeed shares a long history with class line-drawing in other contexts, specifically in New Deal legislation.¹⁹ Part III thus discusses the history of exemptions in New Deal labor laws and the assumptions that surround exemptions of this type. Part IV takes the ideas developed in Part III and applies them to the EPA, analyzing how courts have freighted the EPA with the same kinds of normative assumptions at work in the New Deal context. This Part reanalyzes the structure of a plaintiff's *prima facie* case described in Part II and shows how New Deal-era normative assumptions have rendered EPA claims for formerly exempt positions extremely difficult to win. In conclusion, this Note suggests two alternative solutions. The first suggestion—that courts take a more nuanced approach to evaluating work—follows from the analysis below. The second, more radical, but possibly more effective suggestion calls for the repeal of the 1972 Education Amendments. That would restore the Act to its original form, in which it exempted administrative, professional, and executive

¹⁸ See Louis Uchitelle, *Surge in Jobs Mostly Bypasses the Factory Floor*, N.Y. TIMES, May 11, 2004, at C1.

¹⁹ See generally Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212 (1998) (examining historical role of New Deal legislation's "white-collar exemptions" in formation of American middle class).

workers. Repeal of the 1972 Education Amendments likely would generate the political momentum necessary to pass a new law, one that provides a better solution to the broader struggle for pay equity.

I

LEGISLATIVE HISTORY OF THE EQUAL PAY ACT

Faced with the serious wage gap between men and women,²⁰ Congress held hearings on the issue for eighteen years, yet failed to produce any legislation to address it.²¹ By 1963, many governmental actors agreed that federal action was needed, since voluntary employer compliance, collective bargaining, and state laws had not brought women's wages in line with men's.²² Finally, Congress enacted the Equal Pay Act of 1963.²³ Much of the testimony given at hearings for the Act focused on the economic necessity of equal pay legislation. For example, Esther Peterson, Assistant Secretary for the Department of Labor, noted that women were discouraged from entering the workforce because employers undervalued their work,²⁴ and consequently, this pay disparity resulted in the underutilization of a valuable and abundant source of labor. Casting the EPA in such terms was, by many accounts, necessary for its passage. Others, however, saw the real value of the EPA as dignitary in nature, sending the

²⁰ In 1961, women on average earned fifty-nine cents for every dollar earned by men. See 1963 *Hearings*, *supra* note 1, at 30.

²¹ See 1963 *Hearings*, *supra* note 1; 1962 *Hearings*, *supra* note 7; 1948 *Hearings*, *supra* note 7; 1945 *Hearings*, *supra* note 7; see also Ellen Mutari et al., *Implicit Wage Theories in Equal Pay Debates in the United States*, 7 *FEMINIST ECON.* 23, 28 (2001) ("At least one equal pay bill, more or less modeled on the [1945 bill] was introduced in every subsequent session of Congress until passage."). Interestingly, earlier bills would have granted relief in cases where a woman received less pay than a man employed in a *comparable* job. There are indications that this was one of the primary reasons equal pay legislation did not pass in 1945. See 1945 *Hearings*, *supra* note 7, at 21. For a discussion of the fate of comparable worth, see *infra* notes 130–39 and accompanying text.

²² See 1963 *Hearings*, *supra* note 1, at 9 (joint statement of Hon. W. Willard Wirtz, Sec'y, and Hon. Esther Peterson, Assistant Sec'y, U.S. Dep't of Labor) (noting failure of market to correct wage gap, and noting in particular that reliance on employers was misplaced, women were largely nonunionized, and state laws and state enforcement activities were insufficient).

²³ Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (d)(1) (2000)).

²⁴ See, e.g., 1963 *Hearings*, *supra* note 1, at 2. The Hon. Esther Peterson, Assistant Secretary of the DOL, stated:

If employers were required to pay the rate for the job without prejudice because of sex, they could more readily use men and women workers interchangeably. Women would have a real incentive to equip themselves with higher skills, and would thus be prepared to make their maximum contribution to the economic progress of our country.

Id.

message that gender equality was a priority for those at the highest levels of government.²⁵

Employers offered cost justifications for paying lower wages to women earning an hourly wage.²⁶ They explained that they paid women less because of high turnover rates related to family obligations and higher health care and welfare costs.²⁷ Additionally, employers pointed to state laws that barred women from lifting heavy weights and prohibited them from working too many hours or at night as economic justifications for paying them less.²⁸ But the costs of complying with protective legislation simply did not add up to the difference between men's and women's wages.²⁹ Supporters of the Act thus saw wage discrimination as a result of imperfect markets and premised the necessity of the EPA on this economic condition.³⁰ The Senate hoped that this legislation would alleviate an imbalanced wage structure that in "too many segments of American industry has been

²⁵ See, e.g., *1963 Hearings, supra* note 1, at 127 (statement of Mrs. Dorothy Haener, Int'l Rep., United Auto., Aerospace, and Agric. Implement Workers of Am.) ("[T]he bill cannot convey in its legalistic language the personal hurt and abuse which the victims of injustice feel.").

²⁶ See, e.g., *1963 Hearings, supra* note 1, at 96 (statement of W. Boyd Owen, Vice President, Pers. Adm'r of Owens-Illinois Glass Co.).

²⁷ See *id.* at 96-98.

²⁸ See, e.g., JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 42-69 (1978) (arguing that in *Muller v. Oregon*, 208 U.S. 412 (1908), Court suggests that women voluntarily submit to male physical dominance because of their own recognized need for protection and thereby concludes that women could not work as many hours per day as men); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 19-63 (2001) (discussing legislation specific to women that regulating working hours and night work under theory of protecting their maternal abilities); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 180-214 (1982) (describing development of protective labor legislation for women in United States during late nineteenth and early twentieth centuries and its effects on women's access to jobs and their pay); SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925*, at 41-93 (1987) (noting use of women's "physical and maternal functions" as argument for upholding laws against night work and "home work"); see also *Corning Glass Works v. Brennan*, 417 U.S. 188, 193 n.7 (1974) (noting that New York and Pennsylvania repealed their night-work prohibitions in 1969); *Radice v. New York*, 264 U.S. 292, 298 (1924) (upholding New York night-work prohibition for waitresses); *Bosley v. McLaughlin*, 236 U.S. 385, 396 (1915) (upholding California statute that limited women's weekly and daily hours of work); *Miller v. Wilson*, 236 U.S. 373, 384 (1915) (same); *Hawley v. Walker*, 232 U.S. 718, 718 (1914) (per curiam) (upholding Ohio maximum-hours law); *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (citing famous Brandeis brief, which listed nineteen state maximum-hours laws as examples).

²⁹ See *1963 Hearings, supra* note 1, at 104-05 (statement of W. Boyd Owen, Vice President, Pers. Admin. of Owens-Illinois Glass Co.). Representative Thompson pointed out that although Owen might have justified an additional cost of employing women at thirty cents per hour more than men, he paid them seventy-four cents less. *Id.* at 105.

³⁰ See *id.* at 77 (statement of Richard A. Lester, Vice Chairman, President's Comm'n on the Status of Women).

based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."³¹

The history of the equal pay bills indicates that their authors intended them to be free-standing legislation.³² However, as enacted, the EPA amended the Fair Labor Standards Act of 1938 (FLSA), which, among other things, set a minimum wage and established maximum hours restrictions and overtime premium payments.³³ Under the EPA, wage discrimination based on sex is a violation of the FLSA, except where an employer makes a differential payment pursuant to a seniority system, a merit system, a system based on productivity of workers, or "any other factor other than sex."³⁴ Despite the fact that the Act was tacked on to the FLSA, the substantive prohibitions of the Act remained the same.

Adding the EPA to the FLSA offered significant efficiency advantages because, instead of creating an entirely new administrative agency, the Act would be enforced by the already existing and respected Wage and Hour Division of the Department of Labor.³⁵ With this agency in charge of enforcement, duplicative effort would be diminished. Additionally, the agency would offer experience in cases like these and could refer to precedent decided under other labor laws.³⁶

³¹ S. REP. NO. 88-176, at 1 (1963).

³² See Women's Equal Pay Act of 1947, H.R. 4408, 80th Cong. (1947); Women's Equal Pay Act of 1945, S. 1178, 79th Cong. (1945).

³³ Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2000)); see also H.R. REP. NO. 88-309, at 2 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 688.

³⁴ The Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (codified as amended at 29 U.S.C. § 206(d)(1) (2000)), provides in relevant part:

No employer having employees subject to [the FLSA] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

Id.

³⁵ The DOL originally was charged with enforcement of the EPA. In 1979, pursuant to the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified as amended at 5 U.S.C. §§ 901-912 (2000)), and Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1979), the responsibility for the Act's enforcement was transferred to the Equal Employment Opportunity Commission to "centralize authority for enforcement of the various sex discrimination statutes." *EEOC v. Allstate Ins. Co.*, 467 U.S. 1232, 1233 (1984) (Burger, C.J., dissenting from denial of certiorari).

³⁶ See H.R. REP. NO. 88-309, at 2 (1963), reprinted in 1963 U.S.C.C.A.N. 688; see also 1963 *Hearings*, *supra* note 1, at 140-41 (statement of John G. Wayman, Esq., Partner in law firm of Reed, Smith, Shaw & McClay, Pittsburgh, Pa.).

However, merely adding the Act as an amendment to the FLSA had serious effects on the scope of the EPA. One result was that the same exemptions that applied to the FLSA also applied to the Act. The writers and supporters of equal pay legislation had fully expected that professional, administrative, and executive workers would be included,³⁷ but their expectations were frustrated when, without much discussion of these negative consequences,³⁸ Congress enacted the EPA as an amendment to the FLSA in 1963.³⁹ Although differences in pay were not confined to wage workers and afflicted top management as well as professionals,⁴⁰ women workers employed in a “bona fide executive, administrative, or professional capacity”⁴¹ were exempted from the scope of the Act.⁴²

No economic reason was offered to justify this differential treatment.⁴³ The only arguments offered in favor of the white-collar exemption ranged from the practical to the indefensible. Representative Taft, on the one hand, noted the difficulties of evaluating the work of professional, executive, or administrative workers.⁴⁴ On the other hand, an employer argued against the application of the

³⁷ See *Discrimination Against Women: Hearings Before the House Special Subcomm. on Educ. of the Comm. on Educ. and Labor*, 91st Cong. 9–10 (1970) [hereinafter *1970 Hearings*] (statement of Mrs. Myra Ruth Harmon, President, Nat’l Fed. of Bus. and Prof’l Women’s Clubs, Inc.). Mrs. Harmon testified:

[T]he original administration proposal . . . did not attach the equal pay bill to the [FLSA].

Accordingly the supporters of equal pay had no intention of eliminating executive, administrative, and professional positions from coverage.

That was a result of the fact that in the interest of getting equal pay legislation passed the proponents agreed to attach the bill as an amendment to the [FLSA]. . . .

The discrimination in pay that women suffer at administrative, executive, and professional levels continues

Id.

³⁸ See generally *1963 Hearings*, *supra* note 1; *1962 Hearings*, *supra* note 7.

³⁹ In fact, some Congresspeople indicated that they would have opposed the Act’s passage if the exemption had not been in place. See *supra* note 37.

⁴⁰ See *1963 Hearings*, *supra* note 1, at 2 (statement of Frank Thompson, Jr., Chairman, Subcomm. on Labor of the Comm. on Educ. and Labor) (“[T]he traditional bias affects the pay scale of women even at [the top management and executive] level. The problem is not confined to wage earners alone.”).

⁴¹ Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (codified as amended at 29 U.S.C. § 213(a)(1) (2000)).

⁴² *Id.*

⁴³ See *1963 Hearings*, *supra* note 1, at 17 (statement of Hon. Esther Peterson, Assistant Sec’y, U.S. Dep’t of Labor) (noting lack of proof that professional women had higher turnover rate than professional men).

⁴⁴ *Id.* at 276–77 (statement of Rep. Taft) (noting that determination of comparable work for professionals “becomes so difficult that it is meaningless,” thereby justifying exclusion of teachers from scope of Act).

Act to professionals because of his experience in miscalculating the "risk" that his personnel director would become pregnant.⁴⁵

The exemption was eliminated from the Equal Pay Act in 1972 as part of the Education Amendments.⁴⁶ Although pressure to remove the exemption came largely from the education sector,⁴⁷ the impact of the Amendments reached far beyond education. Removal of the exemption allowed courts to entertain EPA claims by women employed as supervisors,⁴⁸ pharmacists,⁴⁹ attorneys,⁵⁰ and in other administrative and executive positions.⁵¹ Although the Education Amendments of 1972 removed formal barriers to equal pay for women in executive, professional, and administrative jobs, more subtle barriers remain.

II

THE EQUAL PAY ACT IN THE COURTS

The Supreme Court has asserted that "[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."⁵²

⁴⁵ See *id.* at 164 (statement of William Miller, Vice President, Stewart-Warner Corp., Chicago, Ill., on behalf of U.S. Chamber of Commerce). In response, Mr. Findley, an attorney whose proposal for the exemption eventually resulted in the Act's attachment to the FLSA, asked Miller, "Would it be helpful if women in professional categories such as the personnel director or perhaps the entire salaried categories were excluded from this act? Would that make it more workable?" *Id.* Findley's 1963 proposal resulted in the first committee discussion of the exemptions to the Act.

⁴⁶ See Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 213(a)(1) (2000)) (removing operation of FLSA exemption from EPA); see also H.R. REP. NO. 92-554 (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2566-67. For earlier attempts at amendment, see 1970 Hearings, *supra* note 37, at 9-10 and Omnibus Post-Secondary Education Act of 1970, H.R. 16,098, 91st Cong. (1970).

⁴⁷ See 1970 Hearings, *supra* note 37, at 2-3 (statement of Rep. Green). Though support for this amendment did come from the education sector, one might rightly question why it was buried in an omnibus bill nine years after the EPA's enactment, the purpose of which was to promote the advancement of postsecondary education through subsidies to institutions and "for other purposes." See Education Amendments of 1972, 86 Stat. at pmb1.

⁴⁸ See, e.g., *Alford v. Cosmyl, Inc.*, 209 F. Supp. 2d 1361 (M.D. Ga. 2002); *Derouin v. Louis Allis Div.*, 618 F. Supp. 221 (D. Wis. 1985).

⁴⁹ See, e.g., *Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979).

⁵⁰ See, e.g., *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857 (W.D. Va. 2001).

⁵¹ See, e.g., *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681 (7th Cir. 1998) (implicitly acknowledging application of Act to vice president of administration but ultimately rejecting claim); *Maxwell v. City of Tucson*, 803 F.2d 444 (9th Cir. 1986) (affirming district court's decision in favor of city administrator); *Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726 (10th Cir. 1984) (affirming lower court's award of damages to director of travel department).

⁵² *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

Though the remedy is admittedly a narrow one, addressing only equal pay for equal work, courts have narrowed it further so that winning a claim is nearly impossible. Plaintiffs in formerly exempt positions—administrative, professional, and executive workers—often are unable to make their *prima facie* case and lose at the summary judgment stage.⁵³ Before examining the source of the difficulties these women face in Part III, Part II.A lays out the framework of an EPA claim as established by the Supreme Court in *Corning Glass Works v. Brennan*.⁵⁴ Part II.B describes two cases that exemplify the problems created by interpreting the EPA narrowly—problems which tend to reveal themselves in the context of executive positions. Though these two cases occur in this context, the observations drawn from them are not so limited.

A. Plaintiff's *Prima Facie* Case

The EPA prohibits employers from discriminating between employees on the basis of sex by paying employees of one sex “at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”⁵⁵ The Supreme Court provided its first, and only, interpretation of the Act in *Corning Glass Works v. Brennan*. In that case, though the Court did not require a plaintiff making an EPA claim to prove intent, the Court adopted a burden-shifting analysis analogous to the *McDonnell Douglas*⁵⁶ scheme employed in Title VII cases.⁵⁷ In the first stage of the scheme,

⁵³ See, e.g., *Howard v. Lear Corp. EEDS and Interiors*, 234 F.3d 1002 (7th Cir. 2000) (human resources coordinator); *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999) (tax department manager); *Houck v. Va. Polytechnic Inst.*, 10 F.3d 204 (4th Cir. 1993) (professor); *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797 (11th Cir. 1989) (insurance agents); *Arthur v. Coll. of St. Benedict*, 174 F. Supp. 2d 968 (D. Minn. 2001) (professors); *Campana v. City of Greenfield*, 164 F. Supp. 2d 1078 (E.D. Wis. 2001) (city treasurer).

⁵⁴ 417 U.S. 188.

⁵⁵ 29 U.S.C. § 206(d)(1) (2000).

⁵⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

⁵⁷ The analyses differ in some important aspects that might affect a plaintiff's litigation strategy. Whereas the burden of proof shifts to the employer in an EPA claim, the burden of persuasion remains with the plaintiff in a Title VII case. See *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989). Another procedural advantage EPA claims have over Title VII claims is that no proof of discriminatory motive is required to prevail on an EPA claim, whereas such proof is necessary for a disparate-treatment Title VII case. See, e.g., *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 n.17 (4th Cir. 1994).

which is the only stage with which this Note is concerned,⁵⁸ a plaintiff must come forward with evidence that supports her claim. For a plaintiff to make out her prima facie case, she must prove first that she is performing work that is “equal” to or “substantially equal” to that of a male comparator in the same establishment.⁵⁹ The factors considered in determining whether the work is “equal” or “substantially equal” are skill,⁶⁰ effort,⁶¹ responsibility,⁶² and working conditions.⁶³

⁵⁸ What follows is a brief discussion of the rest of the proof structure under Title VII. If a plaintiff meets her prima facie burden, an employer may offer rebuttal evidence that the pay differential is justified on one of the statutory grounds. See *McDonnell Douglas Corp.*, 411 U.S. at 802–03 (setting up burden-shifting proof structure); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that burden of persuasion remains with plaintiff); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (holding that proof of pretext does not entitle plaintiff to verdict as matter of law and that ultimate question is still discrimination vel non); see also Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995) (tracing development of Title VII disparate treatment proof structure from *McDonnell Douglas* through *Hicks*). The statutory exceptions to liability are when “such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . based on any other factor other than sex.” 29 U.S.C. § 206(d)(1) (2000); see also *infra* note 81 (citing sources that discuss defense of “any other factor other than sex”).

Since few cases advance to the rebuttal stage, it is difficult to know how far the analogy to the *McDonnell Douglas* framework may extend. Theoretically, at least, if the defendant rebutted the presumption of discriminatory pay created by the prima facie case, the plaintiff would have an opportunity to show that the defendant’s stated reason was pretextual. See *Burdine*, 450 U.S. at 256. That is, the plaintiff could present evidence that a pay differential was not due to the operation of a seniority system, a merit system, production measures, or any other factor other than sex, but rather that it was in fact based on sex.

⁵⁹ *Corning Glass Works*, 417 U.S. at 195; see also *Waters*, 874 F.2d at 799. “Establishment” is defined as follows: “[‘Establishment’] refers to a distinct physical place of business rather than to an entire business or ‘enterprise’ which may include several separate places of business.” Equal Pay Act, 29 C.F.R. § 1620.9 (2003).

⁶⁰ See 29 C.F.R. § 1620.15(a) (2003) (“Skill includes consideration of such factors as experience, training, education, and ability.”).

⁶¹ See 29 C.F.R. § 1620.16(a) (2003) (explaining that effort includes mental or physical exertion, and “jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs”). The DOL regulations give an example of two jobs that require equal effort exerted in different ways:

[S]uppose that a male checker employed by a supermarket is required to spend part of his time carrying out heavy packages . . . whereas a female checker is required to devote an equal degree of effort during a similar portion of her time to performing fill-in work requiring greater dexterity—such as rearranging displays of spices or other small items. The difference in kind of effort required of the employees does not appear to make their efforts unequal in any respect which would justify a wage differential

29 C.F.R. § 1620.16(b).

⁶² See 29 C.F.R. § 1620.17(a) (2003) (“Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”). Examples of responsibilities which would justify a pay differential include the assumption of supervisory duties by a “relief” supervisor in the supervisor’s

The plaintiff must prove each of these elements, and a showing that the work is merely “comparable” will not satisfy the plaintiff’s burden.⁶⁴ In considering a plaintiff’s prima facie evidence, the court must always keep in mind the “broad remedial purpose” of the EPA, and that “equal” does not mean “identical.”⁶⁵ A plaintiff is required, essentially, to “prove” that her work falls somewhere on a vague spectrum whose outer limits are defined only by “comparable” and “identical.” Where “equal” ought to lie between these two points is by no means clear and will depend on the subjective interpretation of judges who have not been given clear guidance.

Basing a claim’s survival on such amorphous terms thwarts a plaintiff from the beginning as she seeks to meet her prima facie burden. Without more, these terms do not give useful guidance to courts, and consequently courts seeking to thin out their dockets can dispose of claims at the summary judgment stage and rule in favor of employers. Equal pay claims are rejected because in comparing the work of female and male white-collar workers, courts often make assumptions that, in effect, increase the burden of making out a prima facie case.⁶⁶ This Note discusses the origins and continued influence of these assumptions in Parts III and IV. Because this Note focuses on such assumptions, it necessarily limits discussion to the prima facie case—that is, the question of whether work is “substantially equal.”

To identify the normative judgments that inform courts in evaluating and comparing work, it is essential to turn to specific decisions of courts interpreting the EPA. One cannot claim that these cases would necessarily turn out differently if judges held more enlightened views about work. Rather, the hope is that with more information judges (and the litigators before them) will be able to evaluate work more

absence and the authorization of a sales clerk to accept personal checks. 29 C.F.R. § 1620.17(b)(1)–(2) (2003). On the other hand, minor responsibilities are not of sufficient consequence to justify a finding of unequal responsibility. 29 C.F.R. § 1620.17(b)(3) (2003).

⁶³ Working conditions need only be similar. See 29 C.F.R. § 1620.18(a) (2003) (noting that EPA adopted “flexible” standard that takes account of “whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels”); see also *Corning Glass Works*, 417 U.S. at 200 (citing with approval 109 Cong. Rec. 9195 (1963) (statement of Rep. Frelinghuysen) (“The concept of equal pay for jobs demanding equal skill has been expanded to require also equal effort, responsibility, and similar working conditions.”) (emphasis added)). To compare working conditions, a court should look at relative job hazards and physical surroundings. See 29 C.F.R. § 1620.18(a).

⁶⁴ See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993).

⁶⁵ 29 C.F.R. § 1620.14(a) (2003); see also *Lambert*, 10 F.3d at 56.

⁶⁶ A plaintiff may bring a Title VII claim for inadequate compensation when she has difficulty finding an appropriate comparator. See *Orahood v. Bd. of Trs. of the Univ. of Ark.*, 645 F.2d 651, 656 (8th Cir. 1981). However, Title VII presents more difficult procedural hurdles in other aspects. See *supra* note 57.

fairly and more in accord with congressional intent than they currently do.

B. Courts' Reasoning Obscures the Requirements of the EPA

First consider one example in which a female plaintiff payroll manager brought an EPA claim, comparing the wages she was paid to those paid to three other managers. In *Cavuoto v. Oxford Health Plans, Inc.*,⁶⁷ the district court listed in its decision granting summary judgment to the employers the job descriptions of the plaintiff and of her three comparators.⁶⁸ After detailing the tasks of these four individuals with some specificity,⁶⁹ the court stated simply that it was “beyond peradventure that the core responsibilities of these jobs are not comparable under the standards set forth above and [p]laintiff has failed to make her *prima facie* case as to the EPA.”⁷⁰ Rather than recognizing general commonalities—for example that each manager had supervisory duties over a small staff—the court looked to the “core responsibilities” of the jobs. That is, the court took a checklist-type approach, encouraged by the mechanical test, comparing tasks in name only. This case demonstrates that when presented with a detailed job task list, a judge can easily dismiss a claim based on superficial differences in jobs. The decision’s summary comparison suggests that the “core responsibilities” test, as applied by this court, was underinclusive.

The court instead might have relied on the Department of Labor (DOL) regulations to engage in a deeper analysis. For example, it might have found that the jobs require “equal skill,” the first factor prescribed by the DOL’s test to determine equality of jobs.⁷¹ Applying this factor, the court might have concluded that since the payroll manager and the accounts-payable manager were both involved in customer service, though in different settings, these positions required the same ability to deal with people. Or if the payroll manager did not have an advanced degree, but did have significantly more experience than the accounts-payable manager, who did have such a degree, the court might have deemed the skills required for the job equal. On the “equal effort” prong, the court might have inquired into the number of hours worked or the amount of stress caused by

⁶⁷ No. 399CV00446, 2001 WL 789316 (D. Conn. June 13, 2001).

⁶⁸ *Id.* at *6–*7.

⁶⁹ One such task was described as “[d]evelops and implements [Accounts Payable] trade accounts procedures.” *Id.* at *7.

⁷⁰ *Id.*

⁷¹ See *supra* note 60 and accompanying text.

customer service interactions.⁷² Finally, a court might have asked whether the third factor, “equal responsibility,” was satisfied because similar staff sizes indicated equal managerial responsibility between the two jobs.⁷³

The court, however, did none of these things, preferring instead to rely on its intuition that EPA claims involving managerial jobs (albeit managers of minimally different departments) cannot be sustained. Courts ought not limit their analyses to the lists of job responsibilities provided by plaintiffs because the DOL regulations mandate that they compare the substance of jobs with respect to certain factors, including whether a woman’s job requires equal skill, effort, and responsibility. More specifically, a consideration of skill should compare experience, training, education, and ability.⁷⁴ An analysis of effort should look to the level of mental or physical exertion, while keeping in mind that effort may be equal even if exerted in a different manner.⁷⁵ Examining the levels of responsibility entailed in two jobs should include considering the degree of accountability required for each responsibility and comparing them accordingly.⁷⁶ The court in *Cavuto* did not even gesture towards this type of analysis.

Another case, *Georgen-Saad v. Texas Mutual Insurance Co.*,⁷⁷ compared the work of a plaintiff Senior Vice President of Finance with other senior vice presidents in the company. The court made no effort to look into the substance of the jobs, instead saying that “[t]he assertion that any one of these jobs requires ‘equal skill, effort, and responsibility’ . . . cannot be taken seriously.”⁷⁸ No analysis preceded this conclusion, and nothing but bald assertions followed: “These are Senior Vice Presidents in charge of different aspects of Defendant’s operations; these are not assembly-line workers or customer-service representatives.”⁷⁹ The implication is that only certain types of jobs should be subject to comparison, thereby *exempting* this manager from the scope of the EPA. The court continued:

In the case of . . . lower-level workers, the goals of the Equal Pay Act can be accomplished due to the fact that these types of workers

⁷² Since the examples in the DOL regulations only describe jobs that require physical effort, *see* 29 C.F.R. § 1620.16(b) (2003), it is unclear what a court might consider to be “equal effort” when it compares mental exertions. The regulations do mention “fatigue,” “stress,” and “mental effort,” however. 29 C.F.R. § 1620.16(a) (2003).

⁷³ *See supra* note 62.

⁷⁴ *See supra* note 60.

⁷⁵ *See supra* note 61.

⁷⁶ *See supra* note 62.

⁷⁷ 195 F. Supp. 2d 853 (W.D. Tex. 2002).

⁷⁸ *Id.* at 857.

⁷⁹ *Id.*

perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims. In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc. Requiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale.⁸⁰

The court's analysis here is revealing. First, the court ignores the fact that an employer cannot excuse its violation of the EPA by reference to the market.⁸¹ Second, far from being "beyond the pale" of the EPA, requiring corporations to justify the way they compensate their professional, administrative, and executive workers is exactly what the EPA demands. Again, if the court had adopted different standards in this case, it is not certain that the result would have been different. However, when standards for a prima facie case are overly burdensome for a large class of plaintiffs, the purpose of remedial legislation is frustrated.

Perhaps the mindset exhibited in *Georgen-Saad* is not so surprising. After all, the DOL regulations consistently refer to manufacturing jobs (jobs requiring the use of "machines" or "equipment,"⁸²) or retail jobs.⁸³ As a result, the regulations help to narrow the focus

⁸⁰ *Id.*

⁸¹ The "market defense" is prohibited. Though the market may undervalue women's labor, an employer is not permitted to justify wage differentials on this basis. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974). Commentators have noted, however, that the market defense has come through the back door; the catch-all defense "any factor other than sex" permits consideration of prior salaries, which may serve simply to sanction former employers' wage discrimination. See also *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982) (recognizing that employer's use of prior salary in setting wages might serve as pretext for unlawful sex discrimination and requiring that such use be reasonable in light of employer's practices). See generally Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999)); L. Tracee Whitley, "Any Other Factor Other Than Sex:" *Forbidden Market Defenses and the Subversion of the Equal Pay Act of 1963*, 2 NU FORUM 51 (1997).

⁸² See, e.g., 29 C.F.R. § 1620.14(c) (2003) ("If the difference in skill or effort required for the operation of . . . equipment is inconsequential, payment of a higher wage rate to employees of one sex because of a difference in machines or equipment would constitute a prohibited wage rate differential.").

⁸³ *Id.* In retail establishments,

unless a showing can be made by the employer that the sale of one article requires such higher degree of skill or effort than the sale of another article as to render the equal pay standard inapplicable, it will be assumed that the salesmen and saleswomen concerned are performing equal work.

of the inquiry but are distractingly preoccupied with jobs in menial labor. Unfortunately, no guidance is forthcoming from other sources either. *Corning Glass Works v. Brennan*, the sole Supreme Court decision on the EPA, only concerned factory-floor jobs.⁸⁴ Thus, to discover the root of why executive jobs are treated differently from factory-floor jobs, this Note returns to first principles and examines whether in fact these positions are so inherently dissimilar as to warrant different treatment for purposes of the EPA.

III

CLASS AND THE WHITE-COLLAR EXEMPTION

Although the exemption for administrative, professional, and executive workers has been eliminated from the EPA, normative assumptions about this kind of work have made it difficult for white-collar women to prevail on EPA claims. Professor Deborah Malamud provides an illuminating framework through which to analyze these judgments. She observes that New Deal labor legislation exempted white-collar workers, much like the EPA originally did.⁸⁵ This Part analyzes the historical roots of the white-collar exemption on the theory that the law encoded the normative judgment that white-collar jobs could not and should not be compared to blue-collar jobs. The message was that these white-collar jobs were too different, too independent, and too prestigious to be measured against their blue-collar counterparts. Part III.A looks at New Deal exemptions as first drafted and interpreted and then explores some of their social consequences. Part III.B identifies the various justifications offered for exemptions.

A. *Context for Exemptions: New Deal Labor Legislation*

Although exemptions of executive, administrative, and professional workers made many appearances in pre-New Deal and New Deal labor legislation,⁸⁶ discussion of value-free rationales for sepa-

Id.; see also *id.* § 1620.13(e) (2003) (“[T]he facts may show that equal skill, effort, and responsibility are required in the jobs of male and female employees notwithstanding that they are engaged in selling different kinds of merchandise.”).

⁸⁴ *Corning Glass Works*, 417 U.S. at 204–05 (comparing work of Corning Glass Works plant inspectors).

⁸⁵ See Malamud, *supra* note 19.

⁸⁶ See, e.g., Exec. Order No. 6206-A (July 9, 1933) (approving Cotton Textile Code as amended and excepting certain workers from minimum-wage and other provisions); NAT'L RECOVERY ADMIN., BULLETIN NO. 3, THE PRESIDENT'S REEMPLOYMENT PROGRAM 7 (July 20, 1933) (excluding, among others, professional persons and employees in managerial or executive capacity from maximum-hours provisions of President's Reemployment Agreement) [hereinafter PRESIDENT'S REEMPLOYMENT AGREEMENT]; 29 U.S.C. § 152(3)

rating salaried workers from wage earners is scarce. Pre–New Deal regulation, in contrast, based its distinction between salaried employees and wage earners on a concern for workers’ health.⁸⁷ Accordingly, maximum-hours legislation was limited to “laborers and mechanics,” presumably since these workers endured physically challenging work conditions.⁸⁸ Supreme Court Justice Hugo Black—then a Senator from Alabama—introduced a thirty-hours bill in 1933, marking a turning point in labor legislation.⁸⁹ This watershed bill abandoned the health rationale⁹⁰ in favor of one based on “work-spreading”—the practice of limiting individuals’ hours and possibly requiring employers to provide mandatory overtime premium pay for the purpose of forcing them to employ more people.⁹¹ Black offered this solution as a step toward resolution of the overwhelming economic crisis facing the nation.⁹² Although Congress did not pass this bill, work-spreading emerged as the primary goal of the National Industrial Recovery Act (NIRA)⁹³ and New Deal legislation more generally. Rather than increasing the buying power for those already employed, the purpose of New Deal maximum-hours legislation was to alleviate unemployment by putting as many people to work as possible.

For a time it seemed as though President Roosevelt intended New Deal legislation to cover all workers, “white-collar class as well as the men in overalls.”⁹⁴ In spite of this stated goal, however, New Deal legislation exempted a significant segment of workers. In the Cotton Textile Code, for example, the groups of workers exempted from its maximum hours provision of the forty-hour week were those

(2000) (excluding supervisors from definition of employee). See generally George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525 (1995).

⁸⁷ For a stomach-turning narrative detailing working conditions in the pre–New Deal era, see UPTON SINCLAIR, *THE JUNGLE* 66–69, 87–88, 104–08 (Modern Library 2002) (1906).

⁸⁸ Eight Hour Law, ch. 352, 27 Stat. 340 (1892) (repealed 1962).

⁸⁹ S. 5267, 72d Cong. (1932) (including in its scope products from any “manufacturing establishment” and expressly not limited to manual workers).

⁹⁰ Protective legislation for women continued to employ this rationale, however. See *supra* note 28 and accompanying text.

⁹¹ See Malamud, *supra* note 19, at 2234.

⁹² See *id.* at 2235.

⁹³ See National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

⁹⁴ NAT’L RECOVERY ADMIN., BULLETIN NO. 1, STATEMENT BY THE PRESIDENT OF THE UNITED STATES OF AMERICA OUTLINING POLICIES OF THE NATIONAL RECOVERY ADMINISTRATION, in LEWIS MAYERS, *A HANDBOOK OF NRA LAWS, REGULATIONS, CODES* 27 (1933).

engaged in supervisory work and various “special crews.”⁹⁵ The President’s Reemployment Agreement of 1933 (PRA)⁹⁶ also exempted “professional persons employed in their profession” and “employees in a managerial or executive capacity, who now receive more than \$35 a week.”⁹⁷ Similarly, the FLSA’s exemptions placed “bona fide executive, administrative, or professional” workers beyond its scope. Since the FLSA exemptions applied to the EPA as it was originally enacted, this exemption in particular deserves detailed analysis. Aside from the plain language of the FLSA, Congress did not give much interpretive guidance as to the scope of its exemptions. The statute expressly delegated authority to the DOL to issue regulations clarifying its scope.⁹⁸ Thus, since the EPA was codified as an amendment to the FLSA, the task of determining the scope of the Act fell to the DOL as well. At the time of the EPA’s passage, the DOL already had defined “bona fide executive” and “administrative” employees as those who had certain managerial duties and had a minimum salary set by the regulations.⁹⁹ The duties of these workers included management, direction of other employees, and authority to hire and fire; these duties could not overlap significantly with those of nonexempt workers. Known as the “long test” for executive or administrative workers, it remains largely unchanged today.¹⁰⁰ “Professional” workers were defined by the DOL as those who customarily and regularly engaged in work that was predominantly varied and intellectual, as opposed to routine or physical in character; those

⁹⁵ See Malamud, *supra* note 19, at 2257 (noting that “special crews” included repair shop crews, engineers, watchmen, electricians, and firemen).

⁹⁶ PRESIDENT’S REEMPLOYMENT AGREEMENT, *supra* note 86. The President’s Reemployment Agreement (PRA) came about because the Roosevelt Administration recognized that not all industries were organized enough to support a code like the Cotton Textile Code. Additionally, the hearings required to perfect a workable code would make immediate action impossible. See Franklin D. Roosevelt, On the Purposes and Foundations of the Recovery Program (radio broadcast, July 24, 1933) (transcript available at <http://www.fdrlibrary.marist.edu/042433.html>).

⁹⁷ PRESIDENT’S REEMPLOYMENT AGREEMENT, *supra* note 86, at 7. Like the Cotton Textile Code, the President’s Reemployment Agreement prohibited working in excess of forty hours per week without overtime. *Id.*

⁹⁸ See Fair Labor Standards Act of 1938, Pub. L. No. 718, § 4, 52 Stat. 1060, 1061 (codified as amended at 29 U.S.C. § 204(a) (2000)) (creating and vesting administrative authority in newly created Wage and Hour Division of DOL).

⁹⁹ See 3 Fed. Reg. 2518, 2518 (Oct. 20, 1938).

¹⁰⁰ See 29 C.F.R. §§ 541.1–541.2 (2003) for the current exemption. The “short test,” by contrast, only cursorily examines wages and duties. This test is easier to apply because its higher minimum salary and less thorough examination of substantive duties generates clearer outcomes than the more substance-based “long test.” For a comprehensive look at the history of the FLSA executive exemption, see Marc Linder, *Closing the Gap Between Reich and Poor: Which Side Is the Department of Labor On?*, 21 N.Y.U. REV. L. & SOC. CHANGE 1, 4–20 (1994).

whose work required the exercise of discretion; those whose output could not be easily measured; and those whose job required specialized educational training.¹⁰¹

Roughly, then, the exemptions in New Deal legislation fell into two categories. Supervisory, executive, and administrative workers comprised the first category;¹⁰² these workers primarily engaged in discretionary and management activities. The second group was made up of "special crews" and professional workers, who had specialized skills acquired through training.¹⁰³

B. Justifications for the Exemptions

New Deal labor laws justified exempting white-collar workers on the basis of administrative difficulty, autonomy concerns, and the symbolic value of certain jobs.

1. Administrative Difficulty

In part, these labor laws denied coverage to white-collar workers on the theory that their jobs simply did not lend themselves to work-spreading and so would not be regulated efficiently. This view assumes that the type of work done by executives, professionals, and administrative workers is qualitatively different from that done by wage earners, such that the work done by one white-collar employee cannot be divided among many and therefore is not "spreadable." No one, however, offered empirical proof to support the contention that executives' work was difficult to measure and therefore nonspreadable.

The FLSA nevertheless exempted supervisors, whose work is divisible and fungible. To see why, consider that multiple people are sometimes required to supervise a plant adequately, especially when factories operate twenty-four hours per day.¹⁰⁴ This lends support to the idea that the work was not so qualitatively different from the work of wage earners that it should be exempt from wage and hour laws.

¹⁰¹ See 3 Fed. Reg. 2518, 2518 (Oct. 20, 1938).

¹⁰² See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 13(a), 52 Stat. 1060, 1067 (codified as amended at 29 U.S.C. § 213 (2000)) ("The [minimum wage and maximum hours] provisions . . . shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, [or] professional . . . capacity . . .").

¹⁰³ See Exec. Order No. 6206-A (July 9, 1933) ("While the exception of repair shop crews, engineers, electricians, and watching crews from the maximum hour provisions is approved, it is on the condition that time and one-half be paid for overtime.").

¹⁰⁴ See Malamud, *supra* note 19, at 2293 (quoting Reuben C. Ball, Sec'y of the Nat'l Ass'n of Hosiery Mfrs., who observed that if factory operates twenty-four hours, it is possible to have more than one person supervising).

After the passage of the FLSA, employers *did* engage more employees for work that they previously had argued was impossible to divide.¹⁰⁵ Arthur J. Goldberg, Secretary of Labor during the Kennedy Administration, said as much in the 1962 Equal Pay for Equal Work Hearings. He cited the example of the steel industry, which, with the cooperation of the Steel Workers Union, developed thirty-one job classifications where there previously had been 30,000 independent, individual jobs.¹⁰⁶ These groups developed a scientific system of job evaluation to ensure that employees doing comparable work received the same basic compensation.¹⁰⁷ Bald assertions that certain types of work are incomparable thus did not convince Secretary Goldberg, and they are not generally satisfying bases for sweeping decisions that exclude employees from labor law protections.

2. *Autonomy*

Another argument for exempting white-collar workers is the autonomy rationale: Higher level workers are “sufficiently well compensated and have sufficient control over their hours that they should not be entitled to subject their employers to an overtime penalty for hours worked at the executives’ own discretion.”¹⁰⁸ Although these workers are characterized as independent and capable of exercising discretion as to the terms and conditions of their employment, this depiction easily can be disproved.

In the 1920s, for example, white-collar workers earned less than skilled manual laborers.¹⁰⁹ Marc Linder points out that undervaluing executive labor provides large corporations with a means to evade

¹⁰⁵ *Andrews Reports Wage Law Job Rise*, N.Y. TIMES, Dec. 30, 1938, at 2 (noting that administrator of FLSA saw job gains in thirty-one out of forty-eight states); *Report to Roosevelt on the Wages-Hours Law*, N.Y. TIMES, Nov. 10, 1938, at 30 (reporting job gains).

¹⁰⁶ *See 1962 Hearings*, *supra* note 7, at 16 (statement of Hon. Arthur J. Goldberg, Sec’y of Labor, accompanied by Hon. Esther Peterson, Assistant Sec’y, U.S. Dep’t of Labor, and Carol Cox, Office of the Solicitor, U.S. Dep’t of Labor).

¹⁰⁷ *Id.*

¹⁰⁸ Linder, *supra* note 100, at 20–21; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,561 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541) (stating, in course of defining FLSA exemption more precisely, that “the exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits, greater job security and better opportunities for advancement”).

¹⁰⁹ *See* JURGEN KOCKA, WHITE COLLAR WORKERS IN AMERICA 1890–1940, at 178–79 (Maura Kealey trans., Sage Publ’ns 1980) (documenting anecdotes and statistics of phenomenon of low pay for white-collar workers relative to skilled manual laborers).

hours and wage laws.¹¹⁰ These nominal executives retain little autonomy in scheduling their hours. They also are not sufficiently compensated to justify exemption. In fact, in 1969, the DOL reported that in nineteen percent of establishments surveyed “the lowest paid exempt executive received a weekly salary that was below that of the highest paid nonexempt employee he supervised.”¹¹¹ The autonomy rationale, then, is overinclusive and cannot justify the exemption of vast numbers of executives who enjoy little to no autonomy.

3. *Symbolic Value*

Another ground for exemption, offered on several occasions, is the symbolic value of having an exempt job. The value of these jobs—at the cost of no wage or hour protection—is, to some, “too obvious to require discussion.”¹¹² This argument holds that if exempted workers are not sufficiently compensated, they must be receiving some other benefit from their exemption. The value of the exchange, then, inheres in the (often illusory) possibility of upward mobility¹¹³ and the symbolic value of class identity.

The possibility of movement up the employment hierarchy may encourage exempt employees who are disadvantaged by their exemption to forego any expression of their economic interests. This process silences a liminal class from bringing claims and bars them from political action. Were it not for upward identification, this group would have the potential to expand protections for workers. Though some unions have made organizing efforts with these workers, the unions have achieved little success.¹¹⁴ The perception of some members of this class is that they are paying their dues now because they will be autonomous and well-compensated later.¹¹⁵

¹¹⁰ See Linder, *supra* note 100, at 1–2 (noting label “salaried manager” enables managers to force uncompensated overtime on employees).

¹¹¹ U.S. DEP’T OF LABOR, PT. 541, EARNINGS DATA PERTINENT TO A REVIEW OF THE SALARY TESTS FOR EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES AS DEFINED IN REGULATIONS 26 (1969).

¹¹² See Malamud, *supra* note 19, at 2259 (describing statements made by proponents of Cotton Textile Code at hearing in 1933).

¹¹³ See *id.* at 2224 (“[M]ale white-collar workers . . . viewed themselves as occupying entry-level positions that would lead to jobs in the upper reaches of the business class. They took it for granted that they needed to work long hours to gain the training that would advance their careers.”).

¹¹⁴ See generally Tim Cramm, *Prognosis Negative?: An Analysis of Housestaff Unionization Attitudes in the Wake of Boston Medical Center*, 87 IOWA L. REV. 1601 (2002) (noting difficulties of unionization due to perceptions about unions and hospital management tactics to avoid unions, even though in 1999 NLRB ruled that residents are employees and thus allowed to organize).

¹¹⁵ See Chris Phan, *Physician Unionization*, 20 J. LEGAL MED. 115, 116 (1999) (“Physicians, on the whole, have the longest educational and specialty training path of any profes-

Professionals and executives sometimes attach a symbolic value to exemption status. The Stein Report,¹¹⁶ the culmination of hearings in 1940 held by the DOL on executive, administrative, and professional employees, noted the implication in the exclusion of “prestige, status, and importance.”¹¹⁷ Government intervention to remove these workers from an exempt group might meet with resistance because of their desire to maintain the status that goes along with the exemption. In 1936, economist Frank William Taussig observed that the lower-middle class identified upwards with the “well-to-do.”¹¹⁸ As a result, in the inevitable struggle between economic interests and symbolic interests associated with class identity, the latter has tended to win out.

IV

THE EPA’S DE FACTO EXECUTIVE EXEMPTION

Can any of the above-described rationales adequately justify excluding workers from coverage of the EPA? This Part examines the various rationales that have been offered for the New Deal exemptions to the EPA and questions whether any of them can justify excluding workers from coverage of the Act. This Note argues that only the rationale of administrative difficulty continues to operate. The argument proceeds first, in Part IV.A, by discussing why autonomy and symbolic value do not preclude women from winning EPA claims; it then considers the rationale of administrability as it plays out in the courts. Next, Part IV.B addresses and rejects the argument that liberally interpreting the EPA adopts the theory of comparable worth, which has now been largely abandoned by courts and scholars alike. Finally, Part IV.C recognizes the possibility that this framework faces significant implementation hurdles and sets forth an alternative solution to the problem of pay equity for women at higher levels of employment.

sional. This hard work and dedication to their profession creates an internal belief that physicians should be in control of their own destiny.”)

¹¹⁶ WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, “EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN” REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (1940).

¹¹⁷ *Id.* at 19.

¹¹⁸ See Malamud, *supra* note 19, at 2225 (quoting FRANK WILLIAM TAUSSIG, PRINCIPLES OF ECONOMICS § 39-7 (3d rev. ed. 1923)).

A. *Autonomy, Symbolic Value, and Administrability
Applied to the EPA*

When the white-collar exemption still applied to the Act, the rationales of autonomy and symbolic value arguably held sway. In the current case law, these rationales no longer explicitly inform courts' reasoning in EPA cases. It is possible that they underlie persisting differential treatment of white-collar jobs but are not detectible in the case law. The autonomy argument, as discussed above, is that those holding high-level jobs are compensated well enough and have enough control over their work that they should be excluded from maximum-hours and minimum-wage legislation.¹¹⁹ The symbolic-value rationale, also discussed above, posits that these jobs have value beyond monetary compensation and that this value influences class identity.¹²⁰ However, because the *prima facie* inquiry concerns similarity of work, judges *should not* reach issues of autonomy and symbolic value. That does not mean that these issues do not surface from time to time, however, when judges wax philosophical on the otherwise focused inquiry into job similarity.¹²¹

The administrative-difficulty justification¹²² holds that some kinds of work are qualitatively different than factory-floor jobs. Factory jobs are easily compared to one another. Administrative, professional, and executive jobs, on the other hand, are not easily compared because they are so varied. If the work of an executive cannot be described discretely enough to be amenable to division among other workers, the argument goes, it may be difficult to lay individual jobs side by side and compare them for purposes of the EPA.

Just as the exemptions defined in New Deal legislation are indefensible, however, so too is the *de facto* EPA exemption. The argument carries special weight given the considerable number of women who were salaried white-collar workers at the time of the EPA's passage.¹²³ Since the current employment figures show that greater numbers of women are now employed in white-collar posi-

¹¹⁹ See *supra* note 108 and accompanying text.

¹²⁰ See *supra* note 117 and accompanying text.

¹²¹ See *supra* text accompanying notes 78-80 (discussing *Georgen-Saad v. Texas Mutual Insurance Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002)).

¹²² See *supra* Part III.B.1.

¹²³ See Elizabeth Ford, *More Women Are in White Collars*, WASH. POST, Jan. 8, 1961, at F12 (noting "upward trend" in white-collar employment generally and reporting DOL prediction that white-collar employment for women would increase twenty-five percent compared to fifteen percent increase for men in white-collar employment).

tions, the refusal to attempt such analysis seems even more objectionable.¹²⁴

But judging by the vague comparative analysis conducted by courts today, the resultant perceived individuality of these jobs alone might be enough to bar a prima facie case of equal pay discrimination.¹²⁵ Failing to allow a woman to show that her white-collar job is comparable to a man's eviscerates the 1972 Education Amendments and, in effect, returns the EPA to its New Deal—"exemption" form. In the cases themselves, this assumption surfaces when judges simply refuse to engage in reasoned analysis about job comparability. For example, in reference to a senior vice president, the judge in *Georgen-Saad v. Texas Mutual Insurance Co.* said:

In the case of . . . lower-level workers, the goals of the Equal Pay Act can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims.¹²⁶

As discussed above,¹²⁷ this judge could have, and should have, attempted to compare managerial responsibilities among the senior vice presidents, or the respective levels of skill required by the jobs.

The fact is that the task of comparing high-level management jobs is not an easy one.¹²⁸ This may be one of the reasons for avoiding a more detailed analysis than this court deemed necessary. However, the tools that exist for job evaluation in other areas of the law, such as Title VII, should help.¹²⁹ Given that the courts' readings would

¹²⁴ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 381-82 tbl.588 (122d ed. 2003) (reporting that in 2001 women comprised 50% of "Managerial and professional specialty" category and 63.7% of "Technical, sales and administrative support" group), available at <http://www.census.gov/prod/2003pubs/02statab/labor.pdf>.

¹²⁵ See *supra* Part II.A.

¹²⁶ 195 F. Supp. 2d at 857.

¹²⁷ See *supra* Part II.B.

¹²⁸ See *supra* Part II.B.

¹²⁹ For example, Title VII allows employers "to give and to act upon the results of any professionally developed ability test," provided that the design or use of such test is not motivated by race, color, religion, sex, or national origin. See 29 U.S.C. § 703(h) (2000). When a plaintiff challenges the use of a test as a violation of Title VII, an employer must "validate" the test, or, in other words, show that the test is sufficiently job related that success on the test correlates with success on the job. See 29 C.F.R. § 1607.4(c) (2000); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). An employer who wishes to use such a test typically hires a "job specialist" who evaluates job content and designs a test that corresponds to that content; this specialist testifies as an expert if and when an employee sues the employer. See Anna S. Rominger & Pamela Sandoval, *Employee Testing: Reconciling the Twin Goals of*

render Congress's explicit inclusion of white-collar women in the EPA moot, it is unjustifiable to deny relief just because the analysis is difficult.

B. *The Specter of Comparable Worth*

Another reason for avoiding such analysis, however, grows out of a concern for avoiding the "specter" of comparable worth. Comparable-worth theory emerged during the Carter Administration¹³⁰ and appeared as the subject of much literature throughout the 1980s and into the early 1990s.¹³¹ This theory would allow a person to make a pay discrimination claim based on a comparison of the "intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."¹³² Thus, if the skills and training required of nurses and carpenters were the same, comparable-worth theory would require that these jobs to be compensated the same. At least three propositions support this theory.¹³³ The first is occupational segregation: Women are concentrated in relatively few positions.¹³⁴ Second, women are underpaid in comparison to men.¹³⁵ Third, the fact that women are concentrated in the lower-paying occupations accounts for part of the wage gap between women and men.¹³⁶

Congress has never legislated on the theory of comparable worth, though it is not as unpopular as one might think. As of 1994, according to one study, fourteen out of sixteen states examined made some form of wage adjustment for public sector employees to offset

Productivity and Fairness, 10 DEPAUL BUS. L.J. 299, 314 (1998) (summarizing law of, and evaluating methods for, employment test validation).

¹³⁰ See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1728 (1986).

¹³¹ See generally LINDA M. BLUM, BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARABLE WORTH MOVEMENT (1991) (tracing history of comparable-worth movement and outlining broad potentialities for lower-paid women); Ruth G. Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) (examining how job segregation impacts pay differentials and possible legal remedies); Judith P. Vladeck, *Women in the Workplace: Comparable Worth*, 52 FORDHAM L. REV. 1110 (1984) (outlining comparable-worth movement and arguing that only when movement extends to provide wage parity for traditionally female jobs will broader equity result); Weiler, *supra* note 130, at 1730-39 (discussing moderate empirical view of success of comparative worth).

¹³² *County of Washington v. Gunther*, 452 U.S. 161, 167 (1981). The Court did not entertain a claim based on comparable worth, but rather dismissed the EPA and Title VII pay-discrimination claims made by female guards working in the women's section of the county jail, who were paid less than male guards working in the men's section. *Id.* at 165.

¹³³ See CHARLES A. SULLIVAN ET AL., 2 EMPLOYMENT DISCRIMINATION § 7.08, at 534-36 (3d ed. 2002).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

the pay discrepancy.¹³⁷ Moreover, bills espousing the theory have been introduced in Congress,¹³⁸ and the Democratic Party has endorsed the theory in its platforms.¹³⁹

It is important to note, however, that the proposal made here does not rely on comparable worth. Rather, far from asking courts to compare two completely different jobs, this Note only suggests that if, for example, two employees have management responsibilities or if their jobs require equal skill or effort, courts should acknowledge this. History has shown that employers left to their own devices would not hesitate to pay a woman less than a man employed in a substantially equal position. Congress did not intend to impose a system of comparable worth on employers, but it did mean for the EPA to prevent sex discrimination by requiring employers to pay their employees in an internally consistent and justifiable manner.

C. *An Alternative Solution*

Reinterpreting the EPA by returning to first principles—beginning the analysis with the DOL regulations' requirements of equal skill, effort, responsibility, and similar working conditions¹⁴⁰—does not provide the most comprehensive solution possible to this problem. This approach likely will result in relief only at the margins.

Indeed, one might be concerned about either courts' willingness to make the appropriate comparison or about their ability to do so. Courts *do* have this ability, however, and they regularly make complex inquiries related in subject matter to the kind of analysis required here. For example, in Title VII disparate-impact cases, courts consider complicated statistical and psychometric data.¹⁴¹

On the other hand, a concern about courts' willingness to engage in this analysis may not be dismissed as easily. Given a clear mandate from Congress to create a new cause of action in which judges would

¹³⁷ See Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, a Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69, 79 (1994).

¹³⁸ See, e.g., Fair Pay Act of 1999, H.R. 1271, 106th Cong. (1999).

¹³⁹ See, e.g., THE REPORT OF THE PLATFORM COMMITTEE TO THE 1984 DEMOCRATIC NATIONAL CONVENTION 31–32 (1984); see also Thomas H. Hutchinson, *The Fair Pay Act of 1994*, 29 IND. L. REV. 621, 622 (1996) (analyzing bill and its shortcomings).

¹⁴⁰ See *supra* notes 71–73 and accompanying text.

¹⁴¹ See generally CHARLES A. SULLIVAN ET AL., 1 EMPLOYMENT DISCRIMINATION § 4.02, at 264–80 (3d ed. 2002) (describing sophisticated statistical problems that courts face in discrimination litigation). For cases addressing the use of psychometric experts to validate tests used by employers to test potential employees, see e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478 (3d Cir. 1999); and *Gillespie v. Wisconsin*, 771 F.2d 1035 (7th Cir. 1985).

likely take up their analysis with rigor, judges are left to heed vague admonitions and apply empty standards. Consequently, *stare decisis* acts to block progress: If courts simply can refer back to cases that justify a dismissive approach, there is little incentive to apply a higher level of scrutiny.

With these concerns in mind, a second, more radical solution may prove more effective: restoring the EPA to its original form. Such a solution would require Congress to repeal the 1972 Amendments that removed the white-collar exemption from the EPA. At first blush, this solution may seem counterintuitive. This Note does not make this suggestion without reservation. However, on balance, one might think it better not to maintain the appearance of a remedy for women when, in practice, no such remedy is available. Confronting this reality might galvanize action and encourage legislative attempts to correct the problem. A more cautious “wait-and-see” approach, on the other hand, might have the opposite effect, sapping the political will to effect change.

One recent legislative attempt, while ultimately rejected by Congress, provides a useful illustration of the kind of political action required to remedy the wage gap. The proposed Paycheck Fairness Act¹⁴² eliminates the requirement that a plaintiff in an EPA claim compare herself to a man within the same “establishment.”¹⁴³ With this amendment, a woman in Florida could use a man in Arizona as a comparator. This provision would be especially helpful to executive women because they sit at the top of a hierarchy and therefore often have no comparators in their own establishment. Though this bill addresses only one part of the problem, this is the direction in which Congress would have to go in order to remedy the wage gap for white-collar women in the workplace.

CONCLUSION

This Note addresses the problematic role of the EPA in remedying the wage gap among women in administrative, professional, and especially executive positions. The state of the law with respect to the EPA demonstrates that the Act’s remedy has not lived up to expectations. The fault for this shortcoming lies not in the EPA’s language or in its inception. Rather, the Act suffers from an overly restrictive judicial understanding of “work.” To further cripple the EPA, *stare decisis* embeds these narrow understandings into case law.

¹⁴² H.R. 1688, 108th Cong. 7 (2003); S. 76, 108th Cong. 6 (2003).

¹⁴³ *See id.*

The problem of the wage gap at high levels of employment demands and deserves more attention. Without a discussion of the challenges that these jobs pose to the Act and why those challenges should not bar claims for white-collar women, judges should not wield legislative authority to rewrite Congress's repudiation of the white-collar exemption. Congress removed the exemption; judges have no place writing it back into the statute.

This Note's first proposal is merely to go back to first principles and "reinterpret" the EPA.¹⁴⁴ This would require courts to delve further into what it means for work to be "equal" or "substantially equal." Refusal to reason through this element of an EPA claim cheapens the inquiry, ultimately raising concerns that classist prejudices preclude relief for administrative, professional, and executive women.

The second proposal recognizes that a judicial reinterpretation of the Act is unlikely and may not result in a massive improvement over the status quo. The repeal of the 1972 Amendments, restoring the white-collar exemption to the EPA, would have the advantage of transparency and is likely to stir up some old-time activism.

Taken as a whole, society's treatment of white-collar women leaves much to be desired. Along with issues of pay, the always-present glass ceiling prevents women from reaching the highest levels of employment. In addition, women seeking to challenge discriminatory hiring and promotion practices and hostile work environments face increasingly unsympathetic courts. As a matter of expressive value, the problem of lower pay, especially when seen in conjunction with these other problems, sends a clear message that women aspiring to higher levels of employment are not welcome.

¹⁴⁴ A similar suggestion has been made in this publication before. See Diana Kasdan, Note, *Reclaiming Title VII and the Pregnancy Discrimination Act: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309 (2001) (arguing for reinterpretation of Title VII, despite contrary holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974), in light of legislative history indicating that in prohibiting sex discrimination, Congress intended to proscribe discrimination against women based on pregnancy).