September 1989

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https://doi.org/10.15779/Z38M92G

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The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry

M. Neil Browne†
Andrea M. Giampetro-Meyer††

Contemporary debate over efforts to reduce the male-female wage gap tends to focus on the desirability of tampering with market forces. Comparable-worth litigation has run head-on into the "market defense," whereby employers justify apparently discriminatory wage patterns as based on factors other than sex. Pursuing pay equity through collective bargaining has also proven problematic. Professors Browne and Giampetro-Meyer assert that an examination of the market characteristics of the specific labor market in which pay equity is sought should be a fundamental step in the selection and implementation of any pay equity strategy. The authors also suggest that the courts have erroneously approached comparable-worth litigation by relying on abstract market theories, and should instead focus on the realities of the specific markets involved in the litigation at hand.

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† Distinguished Teaching Professor of Economics, Bowling Green State University, Bowling Green, Ohio; Ph.D., University of Texas, 1969; J.D., University of Toledo, 1981.
†† Assistant Professor of Management and Law, Loyola College, Baltimore, Maryland; J.D., William and Mary, 1985.
INTRODUCTION

When opponents of pay equity disparage the so-called “civil rights issue of the eighties,” they commonly rely on hyperbole1 and ideology.2 Opponents of pay equity3 warn that any attempt by the legislature or judiciary to alter existing wage patterns would be too costly4 and would

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1. See, e.g., Hackett, Better From A Distance, in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ECONOMIC ISSUES 76 (T. Swartz and F. Bunello, eds. 1986). Comparable worth is characterized in this article as “the principle that women must be paid more because they are women,” as if anyone would seriously argue such a proposition. That no one has ever advocated paying women more solely because of their gender did not proscribe the characterization.

2. See R. Reagan, Opportunities for Women, in RONALD REAGAN'S WEEKLY RADIO ADDRESSES: THE PRESIDENT SPEAKS TO AMERICA 198 (Israel ed. 1987) for a general statement of the broad policies to help society narrow the earnings gap preferred by those who oppose comparable worth. Especially noteworthy is their level of abstraction. Economic growth, reduced tax rates, and improved pension plans are all proffered as help for women.

3. Browne, The Metaphorical Constraints to Pay Equity: Why So Many Economists Are Outraged by Comparable Worth, 6 POPULATION RES. & POL’Y REV. 29 (1987) points out that economists have been especially active in providing intellectual justification for opposition to comparable worth. Their opposition and derivative legal arguments often have roots in pre-rational metaphors, described in Browne's analysis.

reduce our collective liberties. Their arguments are especially significant for contemporary family and labor market policy because so many households now depend on incomes earned by women.

These warnings are based implicitly upon an acceptance of neoclassical labor market theory. Pay equity strategies question neoclassical labor market theory. By attempting to alter existing relative wages and working conditions, pay equity strategies imply that markets in their present form are not necessarily an optimal device for measuring resource value.

Unfortunately, those who issue and refute such warnings often premise their arguments upon a reflexive adoration of, or contempt for, markets in general. Advocates of various pay equity strategies tend to be understandably wary of any value theory that legitimizes the persistent gender gap in average wages. Opponents almost ritualistically respond with apocalyptic forecasts about the economic effects of altering existing market wage structures.

The resulting debate seems to assume a metaphysical "average market." Generalizations about wage determination tend to ignore the structural characteristics of specific product and factor markets, child-

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6. Only 7 percent of families are composed of a father who works and a mother who stays home to care for their two children. Although most women now work for pay outside the home, they are concentrated in low-paying occupational categories. Sixty percent of all working women are clerks, saleswomen, waitresses, and hairdressers. Cooper, Occupational Segregation and Wage Discrimination, 1983 DET. C.L. REV. 1137, 1138.

7. These models of employer behavior are unaffected by recent research on perception, attitude formation, and employment choice. For an example of a neoclassical reaction to pay equity, see B. Schiller, The Economics of Poverty and Discrimination 212-13 (1984).

8. F. Blau, Equal Pay in the Office 98-100 (1977) makes the point that internal labor markets have few of the characteristics presumed by neoclassical labor market theory. Access to job categories that contain promotion ladders is allocated by the norms of internal labor markets. In these internal labor markets, employers' attitudes toward women can be a component of compensation and promotion decisions to a much greater extent than in neoclassical labor markets.

9. The prescriptive arguments associated with the competitive model can be used to support pay equity strategies. When legislation or court decisions that move toward pay equity have the effect of restructuring particular markets so their performance approximates that which would flow from competitive markets, it is possible to argue that the opponents of idealized market processes are actually those who support the results of current labor markets. A noncompetitive market cannot be defended using models based on competitive assumptions. For an illustration of the use of competitive labor market models to justify pay equity strategies, see Browne & Powers, Comparable Worth, A Stimulus for Reforming Labor Markets, 47 AM. J. ECON. & SOC. 461 (1988).


11. Often the concept of an occupational grouping is an unsatisfactory unit of analysis for discovering how average markets function. Bielby & Baron, Sex Segregation Within Occupations, 76 AM. ECON. REV. 43 (1986) point out, for example, the extent of gender segregation within occupations by employers who perceive such a division as cost minimizing.
hood socialization patterns, the existence of internal labor markets, the historical development of patterns in the division of labor, and the political potency of the economic actors—all of which shape the distribution of factor market returns.

The purpose of this Article is to move the discussion of pay equity remedies toward a greater focus on the characteristics of specific markets. This Article contends that such a focus advances pay equity by identifying which types of markets require particular remedies. The resulting analysis will enable the discussion of pay equity to move beyond the "I'm for the market — I'm against the market" level of the current debate.

The initial section of our Article explains why "the market" has become an important, and problematic, phrase for pay equity seekers. This section points out that courts that reject comparable worth claims by accepting a "market defense" base their rejection of comparable worth upon neoclassical labor market assumptions. It highlights language from Justice (then Judge) Anthony Kennedy's opinion in American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME") v. State of Washington. Decisions like Judge Kennedy's illustrate why litigation has failed to help women achieve pay equity. This section notes briefly that collective bargaining is an alternative to litigation. A collective bargaining strategy recognizes that in many situations a particular labor market is not perfectly competitive and needs to be altered.

12. Children learn at a very early age to view some occupations as appropriate for their gender and others as inappropriate. These images arise long before entry into the labor market. The consequent range of choice made by females is smaller. Marini & Brinton, Sex Typing in Occupational Socialization, in Sex Segregation in the Workplace: Trends, Explanations, and Remedies (B. Reskin ed. 1984).


14. For example, it is especially important to highlight the sex segregation within occupational categories. For instance, 77 percent of sales workers in retail apparel are female; 92 percent of car salespeople are male; 80 percent of those selling appliances are male. B. Bergmann, The Economic Emergence of Women 71 (1986).

Thus, there is no monolithic labor market for salespeople. Instead, there is a segmented labor market segregated by gender, where factors other than expected levels of output and willingness to work for particular wages are operative in hiring, promotion, and compensation decisions.

15. Traditional economic theory asserts that economic markets determine no particular social outcome. However, two authors argue that economic agents in typical markets are neither anonymous nor impotent. S. Bowles & H. Gintis, Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought 66-67 (1986). By studying the relative ability of different market participants to exercise power over society, one can identify the human factor in social phenomena such as the gender wage gap.

16. See Barnett, Comparable Worth Is a Flawed Idea, 12 Hum. Rights 20 (1985), which argues that the use of the market to set wages should not be an absolute defense to a pay discrimination case.

17. 770 F.2d 1401 (9th Cir. 1985).
Sections II, III, and IV analyze the relative prospects for altering women's wages by litigation and collective bargaining, focusing on the nursing industry. Section II focuses on the applicability of comparable worth to the labor market for nurses. This section evaluates the neoclassical labor market assumptions as they apply to the specific market in which nurses must function. Section II asks the question: How close a fit exists there between neoclassical labor market assumptions and the labor market experiences of nurses? It analyzes labor market supply studies for the nursing industry, as well as data on occupational segregation in the health industry.

Section III provides a brief summary of comparable worth litigation. It explains the current legal status of pay equity. Additionally, it looks at nurses in particular and assesses how they have fared in comparable worth cases.

Section IV focuses on the extent to which collective bargaining provides an efficacious channel through which nurses can raise their relative wages. It begins by looking at the historical impact of unions on women's working conditions. Then it examines trends in unionization in the United States in general, and in the health care industry in particular. Finally, it focuses on specific barriers nurses face when they attempt to unionize. This section shows the necessity of looking at the characteristics of particular markets before deciding on a pay equity strategy.

Finally, this paper considers the situations where litigation and collective bargaining would be appropriate for women to try to achieve higher wages. Section V applies general implications of our analysis to pay equity efforts in other industries. It also provides suggestions for nurses who want to raise their wages. In this particular industry, as long as courts remain unfriendly, nurses need to concentrate on state legislative action on pay equity issues.

I

WHY MARKET DEFINITION IS VITAL TO PAY EQUITY SEEKERS

Two channels through which women might be able to reduce the male-female wage gap are litigation and collective bargaining. Specif-

18. An occasional analyst has even gone so far as to argue that comparable worth is the only recourse for enhancing women's wages in the nursing field. See, e.g., Brett, How Much Is a Nurse's Job Really Worth? 83:2 AM. J. NURS. 877 (1983).

19. The wage gap is widely reported in a form indicating that the average woman must work for nine hours to match what the average male makes in five hours. This gap has been narrowing in recent years, not because of female gains, but because the rate of growth in average male wages has been declining while the rate of growth in average female wages has been more stable. M. A. ALDRICH & R. BUCHELE, THE ECONOMICS OF COMPARABLE WORTH, xx-xxi (1986) (data for years 1981-1983).

20. This last alternative is drawing increasing attention, exemplified by the fact that between
PAY EQUITY STRATEGIES

ically, litigation refers to the action of women to persuade courts to accept the doctrine of pay equity. In contrast, through collective bargaining agreements, unions focus on persuading employers, rather than courts, to adopt pay equity.21

Women who attempt to raise their wages by asking a court to adopt pay equity do so under Title VII of the Civil Rights Act of 1964.22 Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.23 Employers are aided by the Bennett Amendment to Title VII,24 which incorporates the four affirmative defenses of the Equal Pay Act25 into Title VII. These four defenses are the existence of (1) a seniority system, (2) a merit system, (3) earnings by quantity or quality of production, and (4) a wage differential based on any factor other than sex.26 The last defense, because of its ambiguity, provides an important device through which employers can justify their wage-setting behavior.

Typically, women in pay equity cases assert that employers pay women who hold predominantly female jobs less than they pay employees who hold jobs of similar value, but which are traditionally held by men.27 Women assert that the employer’s wage-setting behavior violates Title VII. Employers often justify their behavior as based upon a “factor other than sex”: the market. When employers assert a market defense, they say that even though an employer might value a traditionally male and a traditionally female job equally, the male job requires a higher wage in the existing labor market. This argument is based on the assumption of a powerless employer unable to alter the dictates of a local labor market even though he or she might otherwise be an active supporter of a reduced gender wage gap. A second assumption in this argument is the belief that there is one single labor market. In this labor market, employers do not distinguish between males and females; instead they distin-

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22. 42 U.S.C. § 2000(e) to 2000e-17 (1982). In response to generalized attacks on governmental interference in labor markets, Ruth Blumrosen points out that Congress did interfere in the labor market to a great extent through Title VII. Blumrosen, Wage Discrimination, Job Segregation and Women Workers, 6 EMPLOYEE REL. L.J. 77, 110 (1980).
23. 42 U.S.C. § 2000(e)-2. For an overview of laws, orders, regulations and guidelines on local, state and federal levels which prohibit such discrimination, see M. LEVIN-EPSTEIN, PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY (4th ed. 1987).
26. Id. § 206(d)(1).
27. See M. ALDRICH & R. BUCHELE, supra note 19 at 174, which presents evidence that pay discrimination against workers in female-dominated jobs reduces female wages by 10-15 percent.
guish workers on the basis of their prospective productivity alone.\(^\text{28}\)

Recently, in *AFSCME v. State of Washington*,\(^\text{29}\) the United States Court of Appeals for the Ninth Circuit rejected a comparable worth claim. The court, in an opinion written by Judge Kennedy, ruled that a compensation system that is responsive to market forces does not support a Title VII claim.\(^\text{30}\) In rejecting plaintiffs' disparate treatment claim under Title VII, the court stated:

[N]either law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. . . . We recognize . . . that employers may be constrained by market forces to set salaries under prevailing wage rates for different job classifications. We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market.\(^\text{31}\)

Judge Kennedy's opinion thus concluded that "the law does not permit the federal courts to interfere in the market-based system for the compensation of . . . employees."\(^\text{32}\)

Similarly, Morris B. Abram, vice chairman of the U.S. Commission on Civil Rights, summarized the market defense in a report of the Commission: "When an employer sets wage levels in his or her firm according to market wage rates, there is not, and by definition, cannot be, an act of sex-based wage discrimination. It is merely the free and fair operation of a market-based economic system."\(^\text{33}\)

What these judicial opinions and Mr. Abram's statement have in common is an acceptance of neoclassical labor market assumptions. All assume that only one market exists, the market, and that this market approximates the characteristics of purely competitive markets. To become successful in reducing the male-female wage gap through litigation, pay-equity advocates must consequently determine whether these neoclassical labor market assumptions are valid for those industries they hope to affect.

Private collective action is another option for women seeking to raise their relative wages. Labor laws require employers to recognize and

\(^{28}\) *Contra*, E. ALMQQUIST, MINORITIES, GENDER, AND WORK 178-80 (1979) (discussing its study and other studies and concluding that employers discriminate against women as a class).

\(^{29}\) 770 F.2d 1401 (9th Cir. 1985).

\(^{30}\) *Id.* at 1406.

\(^{31}\) *Id.* at 1407 (citations omitted).

\(^{32}\) *Id.* at 1408.

\(^{33}\) Abram, *Concurring Statement of Vice Chairman Morris B. Abram*, in UNITED STATES COMMISSION ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 76 (1985).
bargain with certified unions over a variety of issues, including wages.\textsuperscript{34} Both the union and the employer must bargain in good faith, but neither party is compelled to agree to a particular proposal.\textsuperscript{35} If a union and an employer cannot agree on issues such as wages, employees sometimes resort to their ultimate economic weapon: the strike.

In some industries, unions have enough strength to negotiate successfully for higher wages or, if that strategy fails, to strike to achieve higher wages. However, in other industries, unions might not be powerful enough to make much progress in reducing the male-female wage gap. What characteristics of a particular market should people consider when they want to know the relative efficacy of litigation and collective bargaining as pay equity strategies? Sections II, III, and IV address this question, using the nursing industry as an example.

II

THE APPLICABILITY OF COMPARABLE WORTH TO THE LABOR MARKET FOR NURSES

A. The Need for a Market-by-Market Analysis

This section questions the assumptions judges make when they reject pay equity claims based on a market defense, by evaluating the neoclassical labor market assumptions upon which these judicial opinions are based. First, this section explains why comparable worth must be analyzed in the context of a particular market. This explanation is important because it provides background information that helps the reader appreciate our later discussion focusing on the nursing industry.

Second, this section illustrates the inductive analysis required once the abstract notion of the market is rejected. This illustration provides a sensible basis for policy decisions about wages in a specific labor market. This latter part of Section II focuses on the nursing industry because it has drawn considerable attention in comparable worth discussions.\textsuperscript{36}

By arguing that no one would accept a discriminatory wage for long, foes of comparable worth attempt to establish two points that, if true, fundamentally subvert the concept:

First, the supply side of the labor market is so mobile that any worker temporarily discriminated against would solve her own problem by quitting and then taking a job with an employer who had a more

\textsuperscript{34} 29 U.S.C. §§ 8(a)(5) and 9(a) (1982).


\textsuperscript{36} See Brett, supra note 18, at 879 for a description of the application of comparable worth to nurses. Job evaluation procedures in California, for instance, assigned the same value to electrical foremen and nurses. Yet nurses were were paid approximately 40 percent of the salary received by electrical foremen. Id. (citing Testimony of American Nursing Association President Eunice Cole to U.S. House of Representatives subcommittees on Human Resources, Civil Service, and Compensation and Civil Service, Sept. 21, 1982, COMMITTEE SERIAL No. 53, 97th Cong., 2d Sess. 266.).
accurate perception of her worth. Consequently, discrimination does not exist.

Second, if discrimination does exist, the person being discriminated against is at fault because she holds the power to solve her problem. Either she should quit or she is acknowledging her preference to continue in a situation which some outsiders might label as discriminatory.\textsuperscript{37}

Thus, from this perspective, existing market arrangements ameliorate rather than cause discrimination. In short, the market is the best institution for income determination.\textsuperscript{38}

For those attracted to public policy arguments expressed with great theoretical elegance or protective of existing income patterns, the market defense to comparable worth is both simple and shrewd. However, the argument contains a critical flaw. It is metaphysical in the pejorative sense of the word. The generic market assumed in the market defense to comparable worth does not originate from the study of specific labor markets. In fact, it is very rare for critics of comparable worth to even mention the realities of particular labor contexts. Instead, they argue as if "the market" is a monolith characterized by numerous perceptive profit maximizers on the demand side of the labor market and mobile, highly informed prospective employees on the supply side, both bargaining in an egalitarian context wherein neither possesses asymmetrical power.\textsuperscript{39} Some labor markets, e.g. that for professors, do approximate that description. Most, however, violate one or more of the neoclassical labor market assumptions on which the market defense relies.\textsuperscript{40}

Actual labor markets are often characterized by asymmetrical power,\textsuperscript{41} information, and mobility. The greater the discrepancy in the extent of these variables held by employers and employees, the weaker the case for market determination of wages. A labor market in which one set of participants can rig the market on the basis of its superior position is exactly the kind of labor market where comparable worth deserves serious consideration. In such a context, discrimination can flourish. If it does, its existence should not be protected by the spurious


\textsuperscript{40} H. Wachtel, LABOR AND THE ECONOMY 76-77 (1984). In a near-monopsonistic market situation there are only a few buyers of labor. Thus, decisions made by any buyer have a significant effect on the terms of the employment bargain. Instead of being the passive agent, stimulated by competitive labor markets, the buyer of labor attempts to adjust market conditions to lower its costs or increase its revenue. Id. at 94-97.

\textsuperscript{41} See generally J. Galbraith, ECONOMICS IN PERSPECTIVE (1987) and L. Thurow, DANGEROUS CURRENTS (1983) for critiques of the habitual tendency of modern economists to ignore the role of power in market outcomes.
application of an analysis stemming from assumptions not apposite to the
market in question.

To discover where comparable worth makes sense and where it is
incongruous requires a market-by-market analysis. The reason for this
requirement is analogous to the rationale for rule of reason proceedings
in antitrust law. A particular form of conduct, such as price discrimina-
tion or comparable worth, should neither be condemned nor embraced
prior to studying the context in which the effects of the conduct will be
determined. In certain market circumstances, these forms of conduct are
socially beneficial; in others they are harmful.

B. Labor Market Experiences of Nurses

I. The Mobility of Nurses

When the supply of labor in a specific labor market is unlikely to
resign, an employer need not pay a worker what she is worth (however
that concept is defined).\textsuperscript{42} Bargaining power in such a situation is over-
whelmingly in the hands of employers. While the Equal Pay Act of
1963\textsuperscript{43} offers protection to workers performing substantially identical
work, it offers no solution to discrimination in a labor market where im-
mobility prevails. At some compensation level an immobile worker will
quit. That level, however, may be quite dissimilar to the compensation
level predicted in neoclassical labor market models.

The mobility of nurses is affected fundamentally by the predomi-
nance of females in this labor market.\textsuperscript{44} Only 1.9 percent of licensed
nurses are male.\textsuperscript{45} Furthermore, job segregation in this labor market is
marked and apparently stable over time. Perhaps this condition stems
from the historical concentration of women in jobs requiring personal
qualities or skills associated with stereotyped notions about female attrib-
utes and based on assumptions regarding their goal aspirations and at-

\textsuperscript{42} Immobility restricts women in even the most exalted professions. \textit{See B. KAUFMAN, THE
ECONOMICS OF LABOR MARKETS AND LABOR RELATIONS}, 406 (2d ed. 1989). An extensive study
of 1972 graduates of Harvard's schools of law, dentistry, design, divinity, and public health found
that seven years after their advanced degrees, women graduates had consistently lower salaries re-
gardless of marital or family status. For instance, average salaries of graduates of the Harvard
School of Public Health were $37,000 per year for men and $21,300 per year for women.

\textsuperscript{43} 29 U.S.C. § 206.

\textsuperscript{44} Only 3 percent of the 1.8 million American Registered Nurses (RNs) and 5 percent of
nursing school students are male. Rosenfeld, \textit{Where Have All the Nurses Gone?}, 34 IMPRINT 39
(1987). In a February 1988 poll of 8,023 nurses, the editors of \textit{Nursing 88} found that 44 percent of
nurses had not changed jobs within the previous five years. When women did move, one important
factor in the decision was whether their spouse's job moved. \textit{Nursing Shortage Poll Report}, 18
\textit{NURSING 88} 33, 36 (1988).

\textsuperscript{45} Dept. of Health & Human Services, Report to Congress, \textit{Nurse Supply, Distribution and
Requirements} (Feb. 17, 1982).
attachment to the labor force. The cultural image of women as emotional, dependent, and passive creates obstacles to their being admitted into positions of authority.

In the past, women have generally not been career planners. In contrast to a typical male's view of a career as a succession of jobs leading to greater achievement and reward, women have tended to emphasize personal fulfillment and a sense of contribution.

Employers are understandably eager to take advantage of the resulting supply curve of female labor, a curve that indicates that women tolerate lower wages than those received by males. However, this tolerance is fading as more women (an estimated 60 percent) provide sole or essential financial support for themselves or their families. These women's efforts, however, are stymied by occupational segregation by sex and the resulting disparity between male and female wages. While this wage disparity has been narrowing, a large gap continues to exist. In 1970, the average woman's earnings were 59 percent as much as a man's; by 1985 women were earning 65 percent of the average male wage.

A predominance of females is not unique to the nursing labor market. Occupational groups where women are over-represented include teaching, clerical work, service jobs, retail sales, social work, and textile manufacturing. These occupations are characterized by low wages and status, a shortage of unions, comparatively low human capital investment, and relatively low productivity per worker. In spite of these characteristics, the percentage of women in at least one of these occupations, clerical work, has increased as the female labor force has grown.

The crowding of women into a limited number of less-desirable oc-

46. See Lloyd, Division of Labor Between the Sexes, in Sex, Discrimination and the Division of Labor 1-7 (C. Lloyd ed. 1975).
47. See E. JANEWAY, Man's World, Woman's Place at 8-21, 180-187 (1971).
48. However, nurses are starting to recognize that they must plan their careers. See McBride, Orchestrating a Career, 33 Nursing Outlook 244 (1985).
Cupations causes an expansion of the labor supply in those occupations and results in depressed wages. At the same time, it decreases the labor supply for predominantly male jobs, which causes inflated wages in those jobs. Consequently, there is not one labor market where women and men compete equally, but rather a separate female market that remains complementary to the primary, male-dominated market.

Women in American culture tend to see themselves as less free than men to quit a particular job and choose one that would compensate them more generously. As with any other employee who is tied by cultural roles or family responsibility, the nurse has few employment options. She is limited to the employers in her immediate region. Consequently, there is only in a vague sense a national market for nurses.

Nurses thus function within narrowly circumscribed labor markets. Some of the local labor markets offer a substantial number of potential employers; others are dominated by a few employers who doubtless recognize their dominant position in determining the compensation package. Even where a local increase in salary motivates some local nurses to return to work or to increase their hours of employment, it does not normally attract additional nurses into the area. Regional wage differentials play a negligible role in drawing nurses to a different locale.

Further evidence of immobility among nurses is the finding that 75 percent of nursing graduates accept positions in the same state in which they attended school; 50 percent take jobs in the city where they received their degrees. Despite widely varying supply and demand conditions in regional nursing markets, nurses do not move from heavily saturated labor markets such as New England (664 nurses per 100,000 population), to labor markets such as that in the West South Central region, where a relative shortage of nurses exists (302 nurses per 100,000 population).

2. The Market Power of Nurses

The popularity of neoclassical market models has stemmed, at least in part, from the claim that power is diffuse and benign in a world populated by competitive markets. No state or police officials are required to regulate exchanges, for neither buyer nor seller possesses the capacity to alter the decisions of consumers concerning allocation and distribution of

58. Id. at n.31.
59. For a discussion of the theoretical possibility of two markets, see J. Madden, The Economics of Sex Discrimination 89 (1973).
60. M. Aldrich & R. Buchele, supra note 19, at 83.
64. Id.
resources.\textsuperscript{65} The so-called "invisible hand" that oversees market behavior is really the aggregated tastes and behavior of hordes of individually impotent consumers.\textsuperscript{66}

Hence, the absence of market power protects society against the rapaciousness or whim of individual economic actors. The market is impersonal and, therefore, fair. In such a model, a comparable worth action is an attempt by the envious to obtain by political means what a fair market system has denied them.

In a market where one group of participants in the wage bargain has asymmetrical influence, this group guides market decisions, rather than responding to market decisions as neoclassical theory assumes.\textsuperscript{67} At first glance, nurses would appear to possess market power much greater than that of their employers. Almost 80 percent of U.S. hospitals, the largest employer of nurses,\textsuperscript{68} report difficulty in filling nursing positions.\textsuperscript{69} Other things being equal, an excess demand for nurses should result in higher wages for nurses, luring new nurses and non-working nurses into the labor force. That such developments have not occurred raises suspicions about the location and existence of market power in the labor market for nurses.

The excess demand for nurses has not had the predicted effects. Only 52 percent of female nurses work full time.\textsuperscript{70} The key to understanding why these nurses, many of whom desire full-time work, have not achieved their objective is found in wage patterns in their labor market. Even in the face of a labor shortage, nurses' wages have barely kept pace with inflation.\textsuperscript{71} Indeed, their wages have actually fallen when compared to those of other health care workers. Almost one-half of unemployed nurses reported low salaries as a major reason for leaving nursing, and more than one-half reported low salaries as a major factor in their decision not to return to work.\textsuperscript{72}

How can wages be rigid in the face of a nursing shortage? The explanation is found in the segmentation of the labor supply. The nursing profession consists of many types of nurses with varying degrees of train-

\textsuperscript{66} For the view that the market cannot address political desires, see Sagoff, \textit{At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic}, 23 \textit{Ariz. L. Rev.} 1283, 1286-87 (1981).
\textsuperscript{68} Two-thirds of all nurses in the labor force are employed by hospitals. Corley & Mauksch, \textit{Registered Nurses, Gender, and Commitment} in \textit{The Worth of Women's Work} 136 (A. Statham, E. Miller, H. Mauksch, eds. 1988).
\textsuperscript{69} \textit{Id.} at 25 n.46.
\textsuperscript{70} \textit{Id.} at 13 n.64.
\textsuperscript{72} Huey & Hartley, \textit{ supra} note 48, at 187-88.
ing. A shortage of registered nurses (RNs) may be an opportunity for licensed practical nurses (LPNs) to elevate their status and wages. The competition between RNs and LPNs for jobs contributes to a weak bargaining stance for the nursing profession. Employers of nurses have capitalized adroitly on the competition among nursing components. For instance, employers often bring in LPNs to perform duties formerly reserved for RNs. The employers can thereby keep wage costs down.

The political and social clout of those who hire nurses creates an additional source of market power on the demand side of the labor market for nurses. Through their control of hospital administrative positions, doctors, at least indirectly, control the wages hospitals offer nurses. Doctors have amassed professional power unmatched in the health care industry through the acquisition of control of medical colleges, the creation of an influential professional organization, and the development of Blue Cross/Blue Shield. Doctors are much more than a prospective employer; they collectively constitute a political and economic force with which few successfully tangle.

Nurses are socialized to see physicians as their superiors. They are not autonomous professionals; they are legally bound to execute orders of physicians. While women may generally abandon the notion that submissiveness is an inherently female trait, nurses are still encouraged to manifest subservience. The professional image of nurses as women who nurture, support, and comfort patients, while obediently following doctors' instructions, translates into a lack of influence in the labor market. Given their public image, nurses are often passive in arguing for improved work conditions.

Despite the large number of nurses and the essential nature of their work, nurses have been slow to emerge as an autonomous professional group. The public has credited physicians with the important aspects of health care and granted them economic rewards. Nurses, on the other hand, have been largely responsible for the caring aspects of health care and have received comparatively slight economic rewards. Nurses themselves have often accepted these stereotypes, feeling that seeking greater economic compensation would somehow denigrate the altruistic

75. Sleicher, Nursing Is Not A Profession, in Nursing In Transition 9 (T.A. Duespohl, ed. 1983).
rewards inherent in helping others.\textsuperscript{80}

The economic weaknesses and immobility of nurses could prove beneficial to society in the context of a competitive market for health services: their powerlessness might result in lower health costs for everyone. However, the actual markets for health services, in contrast to those presumed by defenders of current relative wages, are characterized by asymmetrical power.\textsuperscript{81} In such a context, the marketplace does not guarantee that consumers will benefit from low salaries for nurses. Similarly, such a marketplace does not provide an environment in which consumers of health services determine nurses' compensation. On the contrary, the labor market for nurses provides a setting in which the only offset to health-care organizations' demand-side oligarchy is some form of collective or political response. This is an example of the type of labor market where comparable worth arguments deserve serious attention, free of the passion that surrounds arguments based on an abstract state and an equally abstract market.

\section*{III}

\textbf{Litigation as a Pay Equity Strategy}

Courts should recognize individual market characteristics when deciding pay equity cases. So far, courts have failed to focus on the characteristics of specific markets in comparable worth cases. This section summarizes these flawed judicial decisions. It looks at comparable worth cases in general, then focuses on cases that involve this Article's illustrative industry — nursing.

\subsection*{A. Comparable Worth Cases in General}

The United States Supreme Court has ruled on the issue of comparable worth in only one case. In 1981, the Court decided in \textit{County of Washington v. Gunther}\textsuperscript{82} that "intentional" sex discrimination in wages is a proper subject of a Title VII challenge without restriction by the "substantially equal work" standard of the Equal Pay Act.\textsuperscript{83} The Court allowed the possibility of comparable worth claims, recognizing that Title VII represents a more comprehensive vehicle for attacking discrimination than the Equal Pay Act.\textsuperscript{84} Congress intended the judiciary to

\textsuperscript{80} This idea has its origin in the association between care of the sick and religious orders. This linkage led to the belief that nursing is essentially a charitable, self-sacrificing vocation.

\textsuperscript{81} Hospital employment of RN's appears to be a standard illustration of oligopsony. The result is depressed wages for nurses in general, depressed return per years of education, and persistent market disequilibrium. Booton & Lane, \textit{Hospital Market Structure and the Return to Nursing Education}, 20 J. HUMAN RESOURCES 184 (1985).

\textsuperscript{82} 452 U.S. 161 (1981).

\textsuperscript{83} \textit{Id.} at 168.

\textsuperscript{84} \textit{Id.} at 179-80.
construe Title VII broadly to prohibit the “entire spectrum” of practices that result in gender-based employment discrimination.85

The Court’s decision focused on the narrow issue of “whether [Gunther’s] failure to satisfy the equal work standard of the Equal Pay Act in itself precludes [her] proceeding under Title VII.”86 The Court left several issues unresolved, including the viability of a market defense to comparable worth. Lower courts that have resolved pay equity claims both before and after Gunther, however, have addressed the market defense question.

In Christensen v. Iowa,87 for example, female clerical workers at the University of Northern Iowa based their Title VII claim partly on the results of the state Board of Regents' job worth evaluation study.88 This study focuses on each job’s relative worth to the employer, regardless of market prices.89 The study graded the female clerical positions and the predominantly male physical plant positions as equivalent in value to the employer.90 Yet, the physical plant workers received more compensation.91

The employer in Christensen justified its wage-setting practices by relying on a market defense; the employer attributed the higher wages to competition in the labor market. Specifically, the employer asserted that some of the physical plant jobs commanded a higher wage in the community than the job evaluation study had indicated.92 The District Court denied the employees’ Title VII claim. The court agreed with the employer’s market defense, holding that Congress, in enacting Title VII, did not intend to abrogate the laws of supply and demand.93 The court re-

85. Id. at 178, 180.
86. Id. at 166 n.8.
87. 563 F.2d 353 (8th Cir. 1977).
88. Id. at 354.
89. Id. Such studies are habitually lampooned by opponents of comparable worth as an attempt to replace an impersonal (and thus objective) measure of value with human judgments about the value of resources. See generally R. McKenzie, The Fairness of Markets 148-161 (1987). Both supporters and critics of comparable worth would be aided if each were able to claim that their respective methods of wage determination established the "real" value of labor resources.


90. Job evaluation studies are also ridiculed by opponents of comparable worth who claim that human experts lack the skill to assess the worth of a job. Actually, job evaluation studies have been a common method of wage determination at the level of the firm for decades. For instance, it is estimated that two-thirds of all adult women workers in the United States are already covered by some type of job evaluation plan. Barnett, supra note 16, at 20, 22.
91. Christensen, 563 F.2d at 354.
92. Id.
fused to interpret Title VII to require an employer to ignore "the market" in setting wage rates for different jobs. Thus, the employees failed to prove their Title VII claim.

Since Gunther, Judge Kennedy's decision in AFSCME v. State of Washington has been the strongest statement on the market defense. The language in this case demonstrates the power of the market defense. Both Christensen and AFSCME also demonstrate the courts' unwillingness to look at individual market characteristics.

B. How Nurses Have Fared in Comparable Worth Cases

Nurses have not been successful in any comparable worth cases. Nurses first asserted a pay equity claim in Lemons v. City of Denver. In this case, decided prior to Gunther, nurses employed by the City of Denver challenged the City's pay plan. The plan attempted to equalize the pay for city employees with pay for like jobs in the community. The plaintiffs asserted that they did not want to be compared with nurses in the community. They argued that historically nurses have been underpaid because their work has not been properly recognized and because nurses have almost universally been women. Thus, the plaintiffs argued that the City should not mirror this prevailing condition in the community and so perpetuate it in City employment practices.

The nurses instead wanted the City to compare their positions with jobs other than nursing that were of equal worth to the employer. The United States Court of Appeals for the Tenth Circuit held that such comparisons were not called for by the Civil Rights Act.

After Gunther, nurses remained unsuccessful in asserting comparable worth claims. In Briggs v. City of Madison, female city nurses claimed their employer intentionally set their salaries lower than those of comparable male health professionals. In this case, a job evaluation expert who testified on the nurses' behalf offered statistical evidence indicating that the two positions (nurses and the predominantly male

94. Christensen, 563 F.2d at 356.
95. 770 F.2d 1401 (9th Cir. 1985).
97. 620 F.2d 228 (10th Cir. 1980), cert. denied, 449 U.S. 881 (1980).
98. 620 F.2d at 229.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. 536 F. Supp. 435 (W.D. Wis. 1982).
sanitarians) were comparable in value to the city. The city did not contest this testimony. However, the city successfully defended the case by asserting that market forces necessitated the wage differential between men and women. The court stated that under Title VII, an employer's liability extends only to its own acts of discrimination. The court then asserted that "[n]othing indicates that it is improper for an employer to pay the wage rates necessary to compete in the market place for qualified job applicants."

The most crushing blow for nurses in comparable worth cases came two years after Briggs, in Spaulding v. University of Washington. In this case, the predominately female faculty at the University of Washington School of Nursing asserted a comparable worth claim. They alleged sex-based wage discrimination between themselves and the predominately male faculties of the other schools of the university. The Ninth Circuit, in rejecting the nurses' claim, stated that to accept the comparable worth theory "would plunge us into uncharted and treacherous areas." The court held that allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment. The Spaulding decision was heavily relied upon in the AFSCME decision.

Finally, nurses were also unsuccessful in American Nurses Association v. State of Illinois. In this case the plaintiffs, nurses and other state employees, charged the state with sex discrimination in violation of Title VII. In denying the claim, the Seventh Circuit refused to acknowledge comparable worth as a legal concept. The court emphasized the market defense, asserting that a finding of discrimination could not be found "merely because [the state] pays market wages . . . even if the employer is made aware that its pattern of wages departs from the principle of comparable worth to the disadvantage of women." In sum, courts have not been receptive to comparable worth claims brought by women. Courts have relied heavily on the market defense. In doing so, they have failed to focus on the characteristics of specific

105. Id. at 440-441.
106. Id. at 446.
107. Id. at 447.
108. Id.
110. Id. at 692.
111. Id. at 706.
112. Id. at 708.
113. 783 F.2d 716 (7th Cir. 1986).
114. Id. at 718.
115. Id. at 722.
markets as a fundamental analytical step in or rejecting a pay equity strategy.

IV
COLLECTIVE BARGAINING: AN ALTERNATIVE TO COMPARABLE WORTH?

Opponents of comparable worth typically suggest that if women in traditionally female occupations want to raise their wages, they should do so by forming a collective bargaining unit, and use traditional union strategies such as negotiating and striking. This suggestion holds initial appeal because collective bargaining is a more familiar way for employees to increase wages than comparable worth. Additionally, given the courts’ assumption that markets are competitive, women might be more successful through collective bargaining. In some industries, workers might effectively promote a goal of higher wages through unionization; in other industries, employees will have great difficulty achieving that goal if they must rely on union strength. This section considers the feasibility of collective bargaining as a route to pay equity. It again emphasizes the need to look at individual market characteristics.

The section begins with information on the historical impact of unions on women’s working conditions. Next, it looks at collective bargaining trends in the United States today, and examines specific information on collective bargaining trends in the health care industry. Finally, this section focuses on unionization in the nursing industry. It reveals problems nurses face when they attempt to unionize, such as whether nurses should have their own bargaining unit or be included in a broader unit of professional hospital employees, and nurses’ concerns that unionism and professionalism are inconsistent. These problems and others limit the extent to which nurses can raise their wages through organization.

A. The Historical Impact of Unions on Women's Working Conditions

People who see collective bargaining as the most efficacious channel

116. Collective bargaining and comparable worth are by no means mutually exclusive. See Knoebel, The Issue of Comparable Worth, 9 State Ct. J. 4, 8 (Summer 1985). Knoebel cites two instances in which local government unions have achieved settlements with employers that have included equity adjustments based on comparable worth principles.

117. M. ALDRICH & R. BUChELE, supra note 19, at 32-33 point out that during the past decade, unions have been more successful organizing women workers than they have been organizing male workers. One half of all white-collar workers and nearly half of all public sector employees in unions are women.

Unions have been quick to support the principle of comparable worth. Inter alia, unions base this support on the belief that wages adhere to jobs and not persons. In addition, unions have great experience with and respect for job evaluation systems, a prerequisite for implementing comparable worth.
PAY EQUITY STRATEGIES

through which women can raise their wages associate unions with engines of social change.\textsuperscript{118} In a general and historical sense, this metaphor is correct. For example, legislation passed by Congress under the Roosevelt Administration, such as the NLRA, triggered a long-term, successful union movement during which employees as a group gained many benefits in terms of wages and working conditions.\textsuperscript{119}

The metaphor of unions as engines of social change specifically for women, however, seems dubious. When examining the historical impact of unions on workers' conditions, we need to ask who unions have historically benefitted, and what kind of benefits they have achieved for workers. When we focus our attention on women, we see that unions have historically helped free women workers from abuse by employers regarding working hours and unsafe conditions. However, unions in the United States and, in fact, all major industrialized countries,\textsuperscript{120} have failed to achieve significant gains in closing the wage gap between men and women.

Women have long been hopeful that, through unions, they could raise their wages. In the early 1800s, Sarah Monroe, a leader of the United Tailoresses' Society, declared:

If we do not come forth in our defense, what will become of us? . . . Let us trust no longer in the generosity of our employers; seeing that they are men in whose heads or hearts the thought of doing justice to a fellow being never seems to enter.\textsuperscript{121}

She continued by proclaiming that only by organizing themselves and standing up boldly for their rights would women be able to secure for themselves "an adequate and permanent reward" for their labors.\textsuperscript{122}

Over time, the early trade unions achieved significant gains. Through unions, men and women achieved the elimination of a thirteen-hour workday and six-day workweek, grossly unsafe working conditions, and employer abuses such as arbitrary wage reductions and increases in the cost of room and board at company boarding houses.\textsuperscript{123}

Despite nearly two centuries of struggle, Sarah Monroe's second wish, that women secure for themselves an "adequate and permanent" reward for their labors through collective action, has not been achieved.

\textsuperscript{118} WOMEN AND TRADE UNIONS IN ELEVEN INDUSTRIALIZED COUNTRIES II (A. Cook, V. Lorwin, A. Daniels eds. 1984) [hereinafter WOMEN AND TRADE UNIONS].
\textsuperscript{119} Wertheimer, The United States of America, in WOMEN AND TRADE UNIONS, supra note 117, at 289.
\textsuperscript{120} See WOMEN WORKERS IN FIFTEEN COUNTRIES, supra note 21, at 5-8.
\textsuperscript{121} P. Foner, WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM THE FIRST TRADE UNIONS TO THE PRESENT 5-6 (1982).
\textsuperscript{122} Id.
There are several reasons why unions have not historically succeeded in improving women's financial situation.

First, union men often discriminated against women, even in unions that consisted primarily of women. Specifically, men shut women out of union leadership positions. Thus, although women have long been union members, they have historically played a relatively minor role in influencing union decisions. Even today, some unions are composed almost exclusively of women workers and are led almost exclusively by men. Even in their own organizations, women have often been precluded from pursuing the goals that are most important to them. One author pointed out that unions have found it as difficult as other social institutions to realize that men in unions still see women as inferiors. Societal customs rooted in history are still modern barriers to change.

Second, working women's "double burden" — the continuing responsibility most face toward home and children, even when they enter the labor market — compels many women to take part-time work. Unions in almost all countries fail to adequately protect part-time workers. Unions are now beginning to respond to women's special needs and demands, such as day care and maternal leave, primarily because so many women are members of the labor market.

Third, unions have typically justified their failure to help women by treating concerns like day care and maternity leave as political rather than union matters. By politicizing concerns that society has labeled "women's issues," unions can justify ignoring such concerns when they establish their bargaining agenda.

The problem faced by female union members in closing the male-female wage gap is not a uniquely American phenomenon. Women in other major industrialized countries have been similarly unable to raise their relative wages. This fact holds true in countries like Japan, where union women have not made much progress, and in more heavily organized countries like Sweden, where one would have expected women to have experienced progressive changes in their wages relative to men.

Sweden is more progressive in advancing women's issues, and has had more experience with efforts to reduce the male-female wage gap. Nonetheless, Swedish unions have not provided a vigorous push toward pay equity. Women's progress has been hindered by a quota system that discouraged women from entering jobs traditionally held by females, wo-

124. Women and Trade Unions, supra note 118, at 12.


127. Id. at 8-9.

128. Id. at 17.

129. Id. at 29.

130. See generally Women and Trade Unions, supra note 118.
men’s continuing burdens of home and family, and a reluctance to challenge men’s power within the union itself (fearing this might damage solidarity between working-class men and women).

In sum, although American unions have protected women in areas such as safety, they also have often contributed to the problems facing women who work.\textsuperscript{131} They have historically tried to keep women out of unions and out of traditionally male jobs. Also, unions tend to leave broader social issues to legislative bodies.\textsuperscript{132} Given unions’ historic failure in these matters, it is difficult for women to be generally optimistic about the future role of unions in helping them achieve their goals. Additionally, a look at current collective bargaining trends in the United States weakens even further the metaphor of unions as engines of social change for women.

\textbf{B. Trends in Unionization in the United States and in the Health Care Industry}

Opponents of comparable worth who argue that collective bargaining is a good alternative for raising the wages of women workers present their argument at a time when the organized labor movement is depressed. Workers’ organizational efforts are especially problematic in service industries, such as health care, where unions have historically had difficulty gaining support.

In general, a recent study of changing employment patterns of organized workers in the United States found that, between 1980 and 1984, the absolute number of union members in the work force dropped sharply. Additionally, the study revealed an accelerated decline in the proportion of union members during this time period.\textsuperscript{133}

Between 1980 and 1984, “smokestack” industries, the traditional source of union strength, were stagnant or declining.\textsuperscript{134} Jobs held by union members in these industries fell by 1.9 million, while jobs held by nonmembers rose 1.1 million.\textsuperscript{135}

The service industries, however, experienced vigorous employment gains between 1980 and 1984. Employment in these industries rose by five million workers. This increase was due in part to substantial increases in health-care and business services. Despite these employment gains, union membership in service industries fell by 700,000 members during this time period.\textsuperscript{136}

\textsuperscript{132} Id. at 315.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 26-27.
\textsuperscript{136} Id.
In the health care industry, federal legislation has affected unionization trends. Prior to 1974, nonprofit hospitals (the majority of health care facilities) were exempt from federal collective bargaining legislation. In 1974, Congress eliminated this exemption for nonprofit hospitals through the National Labor Relations Act’s health care amendments. Thus, federal labor law now protects nurses.

Despite this legislative protection, current statistics on the health care industry indicate that, except for a period immediately following the enactment of the health care amendments, the legislation has not sparked a substantial rise in the number of unionized hospitals. As of 1980, approximately 27 percent of all U.S. hospitals were unionized, and slightly more than 21 percent of salaried hospital workers were covered by a union contract. Among organizable nurses, 20 percent had collective bargaining contracts by 1980.

After 1980, these statistics worsen. From 1980 to 1982, the rate of increase among health services workers newly covered by union contracts declined by 30 percent. The rate of increase for the American Nurses’ Association (ANA), which represents the majority of unionized nurses, dropped 44 percent during this time period. Furthermore, the number of organizing drives has declined and the number of decertifications in the health care industry has increased since 1980.

We might be able to explain why health care unions are losing strength by looking at some factors that affect union organization efforts. One important factor to consider is the political composition of the NLRB. The NLRB has always been sensitive to political bias because each president can appoint new board members. Since President Reagan’s appointees began to join the board, labor laws that were originally enacted to protect employees provide less protection. New, conservative NLRB rulings have provided industries with additional power to prevent employees from organizing. In the nursing industry, for instance, the

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142. Richman, supra note 139, at 125. Richman obtained this information from NLRB Election Reports, which include the final results of elections within the United States in which one union sought new members and won the election.
143. Id.
145. Id. at 275-76.
NLRB and courts of appeals have ruled that organizers in health care must target large, diverse groups as bargaining units.\textsuperscript{146} Unions have more difficulty organizing larger bargaining units.\textsuperscript{147}

One health care researcher has suggested other reasons why health care unions are losing strength. First, employees may fear that if they attempt to unionize and lose, employers will replace them. Second, federal and state laws now ensure a number of benefits that at one time only union membership could provide. Third, unions have already focused their efforts on "easy" units, while largely ignoring Southern right-to-work states where employees are more likely to resist unions. Finally, unions might be spending less time and effort organizing.\textsuperscript{148}

Despite these gloomy statistics on collective bargaining in the United States in general and the health care industry in particular, some predictors estimate that unions will organize 45 to 65 percent of all hospitals by 1990.\textsuperscript{149} In the nursing industry, some argue that union membership will increase in the future because of nurses' increasing job insecurity, and because of nurses' enhanced power, stemming from their larger contribution to patient care.\textsuperscript{150} These predictors are probably overly optimistic, given the many obstacles nurses face when they attempt to engage in collective bargaining. Perhaps the evolution of the industry may, at some future date, provide a context in which unions will become effective facilitators of pay equity.

C. Barriers that Prohibit Effective Organization in the Nursing Industry

In some industries, collective bargaining might be a good alternative to comparable worth for women in traditionally female occupations. To determine the desirability of this alternative, we need to look at two kinds of information. First, we need to look at relevant general factors that affect union strength. Second, we need to look at specific characteristics of a particular labor market to assess problems unique to that labor market: in this case the nursing industry. This section is organized according to the format one would use if he or she were contemplating the feasibility of union efforts to achieve pay equity in a particular market.

1. Relevant General Factors Affecting Union Strength

Economists have conducted research revealing information that can help determine which factors have a positive effect on union strength.\textsuperscript{151}

\begin{itemize}
  \item \textsuperscript{146} NLRB v. Saint Francis Hospital of Lynwood, 601 F.2d 404 (9th Cir. 1979).
  \item \textsuperscript{147} See \textit{infra} notes 179-183 and accompanying text.
  \item \textsuperscript{148} Richman, \textit{supra} note 140, at 121.
  \item \textsuperscript{149} \textit{Id.} at 122.
  \item \textsuperscript{150} \textit{Id.} at 125.
  \item \textsuperscript{151} This section presents research focusing primarily on union membership. Although union
\end{itemize}
Factors studied include the race, sex, age and educational background of employees, the type of job (blue-collar or white-collar) an employee has, the "saturation" effect when unions' past success inhibits further growth, the anti-union campaign tactics employers use during representation elections, the size of a business establishment, membership is not a perfect indicator of union strength, it does provide evidence of the prospects for organizing and the probable impact of threats by angry employees in the bargaining unit. See Bernstein, *The Growth of American Unions*, 44 AM. ECON. REV. 301, 301 (1954).

Theories exist that support both the view that minority employees have a positive and the view that they have a negative effect on unionism. One theory is that minority employees have a positive effect on unionism because these minorities see the need to join unions in collective defense of their interests. Moore & Newman, *On the Prospects for American Trade Union Growth*, 57 REV. OF ECON. & STATS. 435, 436 (1975). Moore and Newman also explain, however, that other researchers have noted that minorities resist unionism because unions have historically engaged in widespread racial discrimination. Id. Overall, studies conclude that collective protection of minority interests outweighs the influence of racial discrimination and, hence, minorities probably have a positive effect on unionization. Id. at 439; see also Fiorito & Greer, *Determinants of U.S. Unionism: Past Research and Future Needs*, 21 IND. REL. 1, 4 (1982) [hereinafter Fiorito and Greer, Determinants.]

Some studies indicate that the presence of older workers in a labor market has a positive influence on unionization. Moore & Newman, supra note 152 at 439. Reasons older workers might place an emphasis on unions are that older workers are usually concerned with issues like job security and seniority status, which are traditional union concerns. Id. Also, older workers are less likely than younger workers to see collective action in a pejorative light because they remember a time when unions were very acceptable to the public. Id. However, other studies indicate that older workers might have a decreased demand for union services because they expect to receive their flow of nonpension benefits for a shorter time period than younger workers. Hirsch, supra note 153 at 149. One study explained that younger workers might be more militant than older workers, so they might be more likely to unionize. The counter-argument is that younger workers are less likely to recognize the historical role of unions, so they might fail to see how unions could benefit them. Fiorito & Greer, *Gender Differences*, supra note 153 at 152.

The saturation effect means that unions' past successes will inhibit further growth when unions either experience diminishing returns on their organizing efforts or experience difficulties in organizing certain employee units. Fiorito & Greer, *Gender Differences*, supra note 153 at 147. Another characteristic of unions that might affect union strength is the quality of leadership in unions. Bernstein, supra note 151 at 316. This author used John L. Lewis and his efforts in organizing the CIO in the late 1930s as an example of leadership that helped unions gain strength.


Usually, unionization levels are higher in establishments that employ large numbers of workers. Large firms are easier to organize than smaller ones because the cost of organizing larger
and the presence of right-to-work laws in some states.160 When we focus our attention on the nursing industry, studies on the following factors are particularly relevant: the sex of employees, the educational background of employees, and the type of job (blue-collar or white-collar) in which a person is employed.

First, economists who have studied the relationship between the sex of the employee and the strength of unionization generally assert that the higher the percentage of women in the labor force, the weaker the strength of unions.161 These studies indicate that women are less likely than men to join unions because they see themselves as temporary, secondary workers.162 Also, women perceive that unions typically discriminate against them and fail to emphasize wage and benefit issues that are important to women.163 Thus, the benefits women expect from becoming union members are not as great as those men expect.164 Although some studies suggest that women might be more likely to join unions in the future,165 their desire to join now is weak.

Second, economists have studied the relationship between an employee's educational background and unionization.166 These studies show that the more education an employee has, the less likely she is to

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160. Right-to-work laws are expected to provide protection to employees who do not want to become union members. Not surprisingly, these laws have a negative impact on unionization. Fiorito & Greer, Gender Differences, supra note 153 at 146. However, researchers have discovered that the effects of right-to-work laws are not always significant. Id. While the overall effect of right-to-work laws on contract coverage is likely to be small, their effect on union membership may be more significant. The reason for this effect on union membership is that employees become "free riders": enjoying the benefits of union membership without paying dues. The free rider problem is reduced when union members put pressure on nonunion members to join. Hirsch, supra note 153 at 150-51.

161. Other researchers point out that sex per se probably has little effect on union membership. Rather, other factors peculiar to women lead to lower unionization rates among women. For instance, women are more likely to work in industries in which unionization is not prevalent, such as those consisting of white-collar (or pink-collar) jobs. Fiorito & Greer, Gender Differences, supra note 153 at 161-62. A few studies focus on gender-related factors, such as labor force attachment, industrial and occupational segregation, and exposure to unions. Id. at 161-62. Researchers who discover significance in these gender-related factors tend to argue that gender differences in unionism will diminish as occupational distributions become more gender-neutral. Id. at 162.


163. Id. at 436.

164. Hirsch, supra note 153, at 149.

165. First, these studies emphasize that the federal government has recently reduced the priority attached to sex discrimination cases. The government's relative lack of interest in sex discrimination could encourage women to help themselves through collective action. Fiorito & Greer, Gender Differences, supra note 153, at 146. Second, studies indicate that employees with greater family responsibilities are more likely to favor unions. Fiorito & Greer, Determinants, supra note 152, at 7. As more women become breadwinners, they may see a greater need to join unions in an effort to raise their wages.

166. Fiorito & Greer, Determinants, supra note 152, at 7.
seek union services. Studies explain that more educated workers generally have greater individual bargaining power and, hence, derive fewer benefits from collective action than employees with weaker educational backgrounds. Also, employees with more education might possess the ability to identify with managers' concerns and thus would be less likely to seek union representation.

Third, there is the relationship between the type of job (blue-collar or white-collar) in which a person is employed and union strength. Studies indicate that white-collar employees are less likely to be unionized than blue-collar employees. White-collar employees are less likely to unionize because they typically enjoy greater mobility, greater identification with management, and a high probability of being in jobs that historically had low levels of unionization, such as part-time sales and clerical positions.

In sum, all of these general factors, which are relevant to the nursing industry, have inverse relationships with union strength. This tentative assertion is consistent with the statistics the preceding subsection presented on unionization in the health care industry. Before determining the desirability of collective bargaining as a good route to pay equity for nurses, we must look at specific circumstances that make the nursing industry unique.

2. Specific Barriers Nurses Face During and Beyond Organization Campaigns

Industries in which unionization is already prevalent or in which employees have a strong interest in organizing, where members of the particular group share mutual goals, and where the group has few internal conflicts, are good candidates for successful collective bargaining. The nursing industry does not fit this description because of the problems delineated below. The problems nurses face when they attempt to organize and engage in collective bargaining diminish the attractiveness of collective bargaining as an alternative to comparable worth.

a. Appropriate Representative

One problem that weakens nurses' ability to organize is the group's inability to resolve the question of which type of organization should represent them. Nurses have two general alternatives: the American Nursing Association (ANA) and its state affiliates (which directly represent

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167. Id.
168. Id.
169. See, e.g., Doyle, supra note 156.
170. Id. at 14.
171. Hirsch, supra note 153, at 149.
172. See notes 134-150 and accompanying text.
nurses), and nonprofessional or industrial representation through unions such as the National Union of Hospital and Health Care Employees (NUHHCE).

State affiliates of the ANA represent the majority of unionized nurses. As of 1984, these professional organizations represented approximately 130,000 employees, almost all of them registered nurses. NUHHCE represented approximately 15,000 to 20,000 registered nurses. The ANA achieved this position of dominance in part because it started organizing nurses long before nonprofessional unions made any organizing efforts.

The ANA has recently begun to lose ground to nonprofessional unions such as the NUHHCE, primarily because state nurses' associations are burdened by a conflict over whether they are professional associations or unions. In part because of the ANA's internal problems, the NUHHCE thinks state nursing associations have been "dismal failures" as collective bargaining agents. The nurses' associations, however, think that nonprofessional representation of nurses would mean a loss of adequate representation at the bargaining table and a decrease in the quality of patient care.

Until nurses can agree whether professional associations or nonprofessional unions promote their interests most effectively, their ability to extend organization to more groups of nurses will be sharply limited.

b. Appropriate Bargaining Units

Perhaps the most significant problem nurses face when they attempt to organize under current labor law is the issue of which bargaining unit is appropriate for nurses. Bargaining unit determinations are significant at two stages in the bargaining process. First, the unit's initial ability to organize is affected by the bargaining unit determination because labor law statutes currently require a unit to establish a 30 percent showing of interest before a representation election takes place. Second, the bargaining unit determination affects the union's bargaining power. When a unit includes employees with different skills and interests, the union will

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173. The ANA has been registered as a labor organization since 1957, even though state nurses' associations directly represent employees in collective bargaining. Zimmerman, How It Is With Nurses Thirty-Two Months After the Taft-Hartley Amendments, in LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 105 (A. Knapp ed. 1977).

174. Richman, supra note 140, at 125.

175. For a thorough discussion of the development of collective bargaining from the ANA's organization in 1896 to 1961, see Kruger, Bargaining and the Nursing Profession, 84 MONTHLY LAB. REV. 699 (1961); see also Baird, Barriers to Collective Bargaining in Registered Nursing, 20 LAB L.J. 42 (1969).

176. Richman, supra note 140, at 125.

177. Cooper & Brent, supra note 138, at 1081.

178. Id. at 1062.
have difficulty representing all the employees in that unit.  

In the nursing industry, bargaining unit determinations are problematic because both the NLRB and courts of appeal now require that professional nurses be included in large, comprehensive units. The larger units the NLRB and courts favor today usually include all other professional employees of health care institutions.

This emphasis on large bargaining units makes nurses' organizing efforts more difficult. Union spokesmen predict that the NLRB and courts' approach will undoubtedly make organization more difficult for nurses in the future.

c. Supervisors Are Not Protected by Federal Labor Laws

Another potential problem for nurses is the issue of which nurses can engage in collective bargaining with the protection of federal labor laws. A commentator who suggested ways health care institutions can weaken nurses' collective bargaining power recommended that employers give some or all of their nurses supervisory powers, e.g., the power to fire employees or make scheduling decisions.

If employers were to give nurses an adequate amount of authority, they would be "supervisors" under the National Labor Relations Act. The NLRA does not protect the collective activities of supervisors. Thus, the more supervisory powers employers give nurses, the weaker unions' ability to organize nurses.

d. Lack of Internal Cohesion

Nurses who want to organize to achieve pay equity also suffer from internal conflicts among various types of nurses. Registered nurses (RNs) can obtain a bachelor of science degree through a college program, a diploma from a three-year nursing school program or an associate degree through a two-year technical program. Licensed practical nurses (LPNs) typically obtain an associate degree through a one-year technical program.

Currently, these groups of nurses have difficulty agreeing on the goals their professional organizations should promote. Some nurses are
striving to increase their professional status by pushing legislation that would eventually require all nurses to have college degrees. Other nurses, however, resist this change because they think their training has prepared them adequately for the services they provide. This example illustrates a problem that creates tension among various groups of nurses and subsequently, reduces their ability to coalesce to promote higher wages for their entire profession.

e. Unionism and Professionalism

A problem closely related to the preceding problem is the issue of whether unionism is consistent with professionalism. The ANA has struggled with this question for a long time,\textsuperscript{185} because the organization does not want to promote any activity that threatens their attempts to achieve greater professional status.

Today, some nurses still think unions are abhorrent. A 1982 poll by RN magazine, however, showed that 59 percent of staff nurses believe that unionism and professionalism are compatible.\textsuperscript{186} Some nurses have argued that collective bargaining is a “new reality” for nurses that provides an opportunity that will benefit nurses, management, and health care as a whole.\textsuperscript{187} These nurses argue that professionals have traditionally relied on collective action to achieve professional goals through lobbying; hence, union action is not a radical change.\textsuperscript{188} Organizing efforts by nurses will still be hampered by the views of nurses who are not yet convinced that they can be both professional nurses and union members.

f. Problems Beyond Initial Organization

Even when nurses successfully organize, they must overcome other problems before they can effectively promote higher wages. One problem for nurses might be that they will not choose or be able to raise their wages substantially through collective bargaining. Clearly, if nurses organized, raising wages would be one of their goals. The priority nurses would place on that goal, however, is uncertain.

If nurses were to push for higher wages, they would probably succeed in raising their wages to some extent. One study indicated that when a union is present in a hospital, salaries of union members rise approximately 6 percent.\textsuperscript{189} Another study, however, (this one focusing on RNs and LPNs) concluded that a union might not have any direct

\textsuperscript{186} Bruggink, Finan, Gendel & Todd, \textit{supra} note 141, at 406.
\textsuperscript{188} \textit{Id.} at 37.
impact on RNs’ wages. This study blamed unions’ failure to affect wages on RNs’ reluctance to use their most effective weapon — the strike. Because nurses are reluctant to strike, they might have difficulty bargaining effectively for higher wages. LPNs, the study found, were more likely to strike because they are not as concerned about professional status as are RNs. The study indicated a 5.6 percent increase in hourly wage rates for LPNs. Thus, LPNs might be better able to use collective bargaining as a pay equity strategy.

Even if nurses were heavily unionized, they might not make higher wages a priority. Professional unions, such as the ANA, might be restrained in collective bargaining activity by lack of enthusiasm from members who have an interest only in professional goals, such as inservice education programs. One study of Canadian registered nurses showed that nurses thought professional goals were more important than traditional goals, such as improvement of wages and working conditions. Hence, even if nurses were to unionize, they might not emphasize higher wages.

In sum, although collective bargaining appears to be an easy way for some people to avoid considering comparable worth seriously, collective bargaining presents many problems for nurses that might preclude their using this device to achieve higher wages. Those who advocate collective bargaining as an alternative to legislative action seeking pay equity need to recognize these problems and reconsider the strength of their position.

CONCLUSION

Which pay equity strategy — collective bargaining or litigation — provides the most promise for reducing the male-female wage gap?

As our analysis has illustrated, the question is a difficult one to answer, for the determination of which strategy is the “best” depends on a myriad of factors. These factors include the extent to which a particular market approximates the one comparable worth opponents assume, the ability of courts to recognize inadequacies in neoclassical labor market assumptions (and, subsequently, the weaknesses in a market defense), the strength of unions in a particular industry, and the extent to which a

190. Bruggink, Finan, Gendel & Todd, supra note 141, at 414.
191. Id. at 414-15.
193. Both foes and advocates of pay equity tend to assume that actual markets take the form that is intellectually compatible with the conclusion they have in mind. While abstraction is required in discussions of pay equity, abstraction from reality need not become the negation of reality. Dugger, Ideological and Scientific Functions of Neoclassical Theory of the Firm, 10 J. ECON. ISSUES 318 (1976).
union in a particular industry places the goal of higher wages for women near the top of its list of priorities.

As this paper has demonstrated, nurses who want to achieve higher wages will be unable to use litigation as an effective strategy as long as courts accept a market defense that is based upon questionable assumptions about the labor market for nurses. The labor market for nurses does not function as ideally as courts assume, for the supply side of labor for nurses is largely immobile, and nurses do not enjoy an equal bargaining relationship with their employers. If courts were to recognize that the labor market for nurses is far from being perfectly competitive, they would be more amenable to rejecting an employer's market defense.

In other industries, we can apply the same kind of analysis, but the results will vary according to the competitiveness of an industry's labor market. In industries with relatively competitive labor markets, such as the labor markets for doctors and professors, courts could accept a market defense because those markets more closely approximate neoclassical labor market assumptions.

Most labor markets that consist primarily of female workers, however, are similar to the labor market for nurses in that the women generally are immobile and experience unequal bargaining relationships with their employers. The labor markets for secretaries and elementary school teachers are two examples of such markets. Like the nursing industry, women in these occupations who use a litigation strategy to achieve higher wages will succeed only if the court hearing their case recognizes the inadequacies of neoclassical labor market assumptions and, consequently, rejects an employer's market defense.

In general, unions will probably not provide much help to women unless the unions pursue strategies that help eliminate women's double burden. Whether unionization provides a more promising route to pay equity than litigation depends on the characteristics of the particular industry involved. If a particular industry has a strong union that promises to place an emphasis on increasing wages for women, women who strive for pay equity through unionization are probably acting wisely. One example of an industry that can probably use traditional union methods such as collective bargaining and striking is the industry that comprises state, county and municipal employees. AFSCME, the union that represents these employees, is relatively strong and has demonstrated that it will strike for higher wages for women. Unfortunately, as Section IV illustrated, most industries that consist primarily of women do not have strong unions. Additionally, even when unions represent women, raising wages is not necessarily their primary goal. In the nursing industry, for example, nurses are often more concerned about professional development than improving their wages.
Until courts become more friendly toward pay equity seekers, and unionization among women becomes stronger, the most promising route to pay equity in many industries — including the nursing industry — is through state legislation. A minority of states has passed comparable worth legislation\(^{194}\); other states are studying the issue of pay equity.

Generalizations about wage determination in “the market” or unionization as an alternative method of setting wages ignore the many factors that make a specific strategy apposite in particular industries as a device for alleviating the gender wage gap.\(^{195}\) Both opponents and proponents\(^{196}\) of pay equity need to focus on the characteristics of particular markets and unions before they debate the desirability of particular pay equity strategies.

\(^{194}\) See Comment, Comparable Worth: The Struggle for Pay Equity, 65 Or. L. Rev. 145, 145 n.3 (1986).

\(^{195}\) Although an analysis of international data goes beyond the scope of the paper, it applies, mutatis mutandis, to wage gaps in many countries. See case study Austria, 1979-1984, 10 Econ. Bull. for Europe 3 (1985); J. Farley, Women Workers in Fifteen Countries (1985).

\(^{196}\) M. Aldrich & R. Buchele, supra note 19, at 57, correctly criticize the over-zealous behavior of job evaluation partisans. Job evaluation is hardly free of bias. That its biases are different from those activated by labor markets is clear, but the biases fueling comparable worth are no less real. For instance, the job evaluations supporting pay equity efforts seem to be weighted against blue-collar jobs and manual labor.

Similarly, those who report the gender wage gap should, in fairness, point out that no one argues that human capital differences do not explain at least a portion of the gap. See Concoran, Duncan, and Hill, The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics, in Women and Poverty 7, 12-13 (B. Gelpi, N. Hartsock, & M. Strober, eds. 1986) for an estimate of that portion.