Sex-Based Wage Discrimination Under Title VII: Equal Pay for Equal Work or Equal Pay for Comparable Work?

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NOTES

SEX-BASED WAGE DISCRIMINATION UNDER TITLE VII: EQUAL PAY FOR EQUAL WORK OR EQUAL PAY FOR COMPARABLE WORK?

The number of women entering the labor force has risen steadily during the past half-century,¹ but women have not achieved wage equality with their male colleagues in the workplace.² After many years of abortive legislative efforts,³ Congress enacted two statutes now used to remedy sex-based wage discrimination: the Equal Pay Act of 1963⁴ and the Civil Rights Act of 1964.⁵ The Equal Pay Act,


2. "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the women seeking any but the lowest paid jobs." Kahn v. Shevin, 416 U.S. 351, 353 (1974).

"For example, in 1953 the average salary for fulltime working women was sixty-three percent of the salaries of fulltime men workers. By 1973 the average salary of fulltime women workers was only fifty-seven percent of fulltime working men average salary." Gitt & Gelb, supra note 1, at 723.

"Yet 35 percent of all working women have clerical jobs, while only about 5 percent are in mid-management jobs and less than 1 percent are counted as top management . . . ." Levy, 'Comparable Worth' May Be Rights Issue of '80s, Washington Post, Oct. 13, 1980, (Washington Business) at 20, col. 3.

"Women—who account for 42 percent of the work force—today earn 59 cents for every $1 men earn, government statistics show. Twenty-five years ago, it was 64 cents for every $1." Levy, supra note 1, at 3, col. 2. "The average female college graduate . . . makes $2000 less a year than the average male high school dropout." Id. at 20, col. 3.

See also U.S. Bureau of Labor Statistics, Department of Labor Employment and Earnings, Household Data Annual Averages (January 1980); Women's Bureau, Department of Labor, Fully Employed Women Continue to Earn Less Than Fully Employed Men of Either Race 88-33 (August 1978).

3. Gitt & Gelb, supra note 1, at 724.


an amendment to the Fair Labor Standards Act of 1938,\(^6\) prohibits employers from paying sex-based wage differentials to individuals performing the "same" jobs.\(^7\) Congress designed the Equal Pay Act to enforce a policy of equal pay for equal work. Title VII of the Civil Rights Act, a broad-based prohibition of a variety of discriminatory practices, prohibits discrimination based on sex with respect to "compensation, terms, conditions or privileges of employment . . . ."\(^8\)

Until recently the courts failed to delineate the scope of each statute with respect to the congressional aim of eliminating sex-based wage discrimination. Moreover, neither Congress nor the courts defined the appropriate relationship between the statutes. The Bennett Amendment,\(^9\) an addition to Title VII, was Congress' sole attempt to explicate the relationship between the two laws;

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Until the Reorganization Act of 1978, the U.S. Department of Labor administered and enforced the Equal Pay Act as an amendment to the FLSA. The stated purpose of Labor Department enforcement was to eliminate "the need for a new bureaucratic structure to enforce equal pay legislation; . . . compliance should be made easier because both industry and labor have a long established familiarity with existing fair labor standards provisions." H.R. REP. No. 309, 88th Cong., 1st Sess. 2 (1963), reprinted in [1963] U.S. CODE CONG. & AD. NEWS 687, 688.

In analyzing any FLSA case, once one determines that coverage exists, one must examine the numerous exceptions to the FLSA to determine whether the respondent is exempt. Since passage of the Education Amendments of 1972, however, the FLSA's exemption for executive, administrative, and professional employees has not applied to the equal pay provisions.

Because proving pay discrimination with respect to professionals is more difficult than proving such discrimination with respect to blue collar workers, courts have been reluctant to enforce the Act in white collar occupations. See Molthan v. Temple Univ., 442 F. Supp. 448 (E.D. Pa. 1977). See also A. Waintroob, The Developing Law of Equal Opportunity at the White Collar and Professional Level, 21 WM. & MARY L. REV. 45 (1979).

In most instances, even though the minimum wage and overtime provisions of the FLSA do not apply to state and local governments, the Equal Pay Act does apply to state and local governments. See Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979); Christopher v. Iowa, 559 F.2d 1135 (8th Cir. 1977); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977).


unfortunately it did not clarify the ambiguities present in the legislation.

The Bennett Amendment, a floor amendment, provides that an employer may pay his employees different wages based on gender, if the provisions of the Equal Pay Act authorize such differentiation. The Equal Pay Act authorizes differences in pay to men and women when they perform "equal work," if such payment falls into one of four enumerated exceptions—"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." The Bennett Amendment, therefore, incorporates provisions of the Equal Pay Act into Title VII. After the amendment's enactment, the courts had to determine whether all provisions of the Equal Pay Act, or only the four enumerated exceptions, now constituted part of Title VII.

Congress' intention on this issue remains obscure because one plausibly can construe the Bennett Amendment to relate the Equal Pay Act and Title VII in either of two ways. One can read the amendment narrowly as an expression of congressional intent that the Equal Pay Act be the sole standard for finding sex-based wage discrimination. If so interpreted, the statute ensures that the reach of Title VII is coextensive with that of the Equal Pay Act, and consequently confines litigation of sex-based wage discrimination claims to the equal pay for equal work formula. Thus, a plaintiff must show that her employer's conduct violated the equal work standard of the Equal Pay Act in order to prove sex-based wage discrimination under Title VII. The payment of unequal wages to men and women performing comparable but un-

10. Id.
12. Id.
14. The United States Court of Appeals for the Third Circuit, in IUE v. Westinghouse Elec. Corp., 23 Fair Empl. Prac. Cas. 588, 592 (3d Cir. 1980), characterized this position as the narrow interpretation of the Bennett Amendment. The interpretation is narrow in the sense that it limits the scope of Title VII to that of the Equal Pay Act. Conversely, the "broad interpretation" of the Bennett Amendment refers to the broad coverage of Title VII over various types of sex discrimination claims, beyond the confines of the Equal Pay Act.
equal work would not violate either statute.\(^{16}\)

If read broadly, the Bennett Amendment only incorporates the four exceptions to the equal pay for equal work standard of the Equal Pay Act into Title VII.\(^{17}\) Under this interpretation, plaintiffs could present a sex-based wage discrimination claim under Title VII without proving that the jobs undergoing comparison were equal. Therefore, under Title VII, courts would permit plaintiffs to prove that an employer intentionally discriminated on the basis of sex by showing that the employer paid women workers less than males in differing jobs because of gender, and not because of the less valuable nature of their labor.\(^{18}\) This standard sometimes is called “equal pay for comparable work.”\(^{19}\)

In 1979, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Ninth Circuit addressed the issues of interpretation of the Equal Pay Act, Title VII, and the Bennett Amendment. The district court in \textit{IUE v. Westinghouse}\(^{20}\) approved the narrow interpretation of the Bennett Amendment, concluding that the Equal Pay Act expresses congressional policy in the limited area of sex-based wage differentials. Title VII merely provides an alternative procedural device for enforcing the same standard: equal pay for equal work.\(^{21}\) In contrast, the Ninth Circuit in \textit{Gunther v. County of Washington}\(^{22}\)
adopted the broad interpretation of the Bennett Amendment. The court held that the congressional intention to eliminate all forms of sex-based wage differentials demands an interpretation that Title VII and the Equal Pay Act are complementary but independent solutions to the same problem.\textsuperscript{23}

Prior to \textit{Gunther}, courts had not seized upon Title VII to fashion relief beyond the substantive parameters of the Equal Pay Act in the area of sex-based wage differentials.\textsuperscript{24} Sex-based wage discrimination claims arising under Title VII involved "substantially equal" jobs as defined by the Equal Pay Act; accordingly, in Title VII cases courts examined claims of "unequal pay for equal work." The Ninth Circuit in \textit{Gunther} was the first court of appeals to hold that the scope of Title VII exceeds that of the Equal Pay Act.\textsuperscript{25}

A plethora of cases raising similar issues followed in the wake of the \textit{Gunther} decision, the most notable being the Third Circuit's reversal of the district court in \textit{IUE v. Westinghouse}.\textsuperscript{26} The Third Circuit's decision in \textit{IUE} propounded many of the arguments first addressed in \textit{Gunther} but articulated them at greater length and with increased clarity.\textsuperscript{27}

\begin{footnotes}
\textsuperscript{23} \textit{Id.} at 889.
\textsuperscript{25} 602 F.2d at 891. Moreover, in denying a rehearing \textit{en banc} to the appellants in \textit{Gunther}, the Ninth Circuit reemphasized its belief that the Bennett Amendment expands Title VII beyond the Equal Pay Act. \textit{Gunther v. County of Wash.}, 623 F.2d 1317, 1319 (9th Cir. 1980) (petition for rehearing denied).
\textsuperscript{26} 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).
\textsuperscript{27} The primary defect in the Third Circuit's opinion was the court's failure to grapple with the practical policy issues implicated by the broad interpretation of the Bennett Amendment. Under that interpretation, a plaintiff can allege that her salary is less than that of other employees solely because of her gender. The court then will have to compare the differing types of work to see whether the wage differential is related to job content or results from discriminatory intent. The discriminatory intent need not be the predominant reason for the wage differential in order to make out a violation, but may be merely part of the motivation of the employer. \textit{Cf. King v. Laborer's Local 818}, 443 F.2d 273, 279 (6th Cir. 1971) (showing of discrimination as a causal factor in discharge or refusal to hire renders employer liable in damages).

Arguably, the courts cannot competently or efficiently compare job content. The dissent
Both the Third and Ninth Circuits recognized that deficiencies in the present laws have hampered congressional efforts to eliminate sex-based wage discrimination. Traditionally, victims of discrimination in employment had only two options, to pursue a claim under Title VII for discrimination in hiring, promotion, or benefits, or to seek to enforce the literal terms of the Equal Pay Act. Ideally enforcement of these laws would expand women's entry into formerly male-dominated occupations and raise their level of compensation to parity with that of their fraternal colleagues. Unfortunately employers exploited the loopholes present in the statutes in order to lower labor costs. Subtle forms of discrimination developed that plagued female participants in the labor force. The Third and Ninth Circuits believed that by expanding Title VII they could provide injured parties with a practical remedy with which to vindicate their rights.

Moreover, the Third Circuit embraced a "broad interpretation" of the Bennett Amendment because it could not justify the application of stricter standards of scrutiny for racial discrimination than sexual discrimination. Under the narrow interpretation of the Bennett Amendment, courts could not eliminate intentional


The Supreme Court has recognized that the Equal Pay Act was essential because women have weaker bargaining power with respect to wages. Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974). Thus, women's willingness to work for less than is appropriate in light of the job content does not justify underpayment of women. Although women as a group command little bargaining power because women are competing for so few jobs, the employer and the union ought not benefit from the discrimination made possible by lack of bargaining power. See also Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L.J. 305 (1968).

29. For a discussion of the loopholes in the pre-Gunther legal framework, see notes 46-50 & accompanying text infra.

30. For a discussion of subtle forms of discrimination, see note 312 infra.


sex-based wage discrimination if the jobs in question were not substantially the same. For example, an action by an employer to deliberately place blacks in certain jobs and then fix their salaries fifteen percent below the preexisting wage level obviously would violate Title VII. Under the pre-Gunther approach, the court could not scrutinize sex-based wage discrimination unless the jobs were equal. Thus with similar facts, the employer would escape liability if the discrimination were sexually based rather than racially based. The Third Circuit maintained that the proper interpretation of the Bennett Amendment would treat sex discrimination as equally invidious as racial discrimination and as meriting the same determination to eliminate both forms of illegal action from American employment practices.

This Note supports the argument implicit in IUE that a distinction between racial discrimination and sexual discrimination under Title VII is not only logically indefensible, but is clearly in conflict with the congressional intention to eliminate all incidents of sex discrimination from American society. A thorough examination of the statutory construction and legislative histories of the Bennett Amendment, Title VII, and the Equal Pay Act, as well as the administrative guidelines and case law on these issues, clearly supports the Third and Ninth Circuit's interpretation of congressional intentions.

This Note will analyze the strengths and weaknesses of the equal-pay-for-comparable-work approach to sex-based wage discrimination as articulated by the Third and Ninth Circuits. Although the Third Circuit's narrow holding in IUE does not go so far as the Ninth Circuit's emphasis on Title VII's broad coverage over equal pay for comparable work claims, the two courts agree generally on the need for an interpretation of the Bennett Amendment and Title VII that facilitates a judicially-led attack against intentional sex discrimination in employment practices. The conclusions of the Ninth Circuit in Gunther and the Third Circuit in IUE represent a new trend in the adjudication of sex-discrimination claims.

THE EQUAL PAY ACT

In the early 1960's, Congress desired to eliminate sex-based wage discrimination from American society. The Equal Pay Act of 1963 was the first legislation directly addressing the problem. A prima facie violation of the Act occurs when the plaintiff shows that two employees of different sexes, in the same establishment, are receiving unequal pay for work that is substantially equal.35

The first important case interpreting the terms of the Equal Pay Act, Schultz v. Wheaton Glass Co.,36 established that "equal work" means "job content" that is substantially equal, but not identical, so as not to destroy the remedial purposes of the Act.37 A number of other courts have adopted this standard,38 and the Supreme Court has approved it implicitly.39 Additionally, the Depart-


The relevant text of the Act reads as follows:

No employer having employees subject to any provisions of this section 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, responsibility, and which are performed under similar working conditions, except where 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) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.


37. Id. at 265.


39. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974). In Brennan, the Supreme Court indirectly approved the Wheaton standard, saying, "it is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable . . . ." Id. at 203 n.24.
ment of Labor⁴⁰ has specified that the standard for comparing jobs cannot rest simply on job titles or classifications, but must depend upon an evaluation of actual performance of tasks;⁴¹ the overall job, not its individual segments, forms the basis of the comparison.⁴²

The courts have had difficulty in applying the "substantially equal" test to employment situations.⁴³ They have tended to focus on distinctions and comparisons cited by the litigants on a case-by-case basis rather than on any consistent principles or indicia of "substantial equality."⁴⁴ The courts have recognized that job content rather than job description is controlling.⁴⁵ The emphasis on job content stemmed from judicial and legislative concern that employers would manipulate job evaluations to their economic advantage.⁴⁶

The "Establishment" Requirement

The Equal Pay Act provides for the payment of equal pay for equal work by both sexes in the same establishment.⁴⁷ The defini-

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⁴⁵. See Brennan v. Victoria Bank and Trust Co., 493 F.2d 896 (5th Cir. 1974).

⁴⁶. The House recognized in hearings and on the floor that employers could evade the Equal Pay Act by firing all female employees, refusing to hire them, or segregating them so that they did not perform the same work as men. See, e.g., Hearings on H.R. 3961, 88th Cong., 1st Sess., 145-47 (1963) (statement of John G. Wayman); id. at 232-35 (statement of Ezra G. Hester); id. at 96-105 (statement of S. Herbert Unteberger). See generally 110 Cong. Rec. 2579-82 (1964).

tion of establishment determines the kind of business organization that will be the unit of comparison in evaluating job content. If an employer does not discriminate within a particular establishment, he does not violate the Act. In recognition of the statute's loopholes, courts have attempted to eliminate the employer's ability to infringe upon the spirit and to circumvent the goals of the Equal Pay Act. In some test cases, the courts have interpreted the meaning of "establishment" flexibly in order to fulfill the Act's overriding purpose, the elimination of wage discrimination. In *Brennan v. Goose Creek Consolidated Independent School District,* for example, the United States Court of Appeals for the Fifth Circuit held that although male and female janitors worked in different school buildings, the school district as a whole was the relevant functional unit for establishment purposes.

**Equal Pay Act Standards**

The plaintiff's initial burden of proof is to demonstrate substantial equality, based on similarity of skill, effort, and responsibility, between jobs performed under similar working conditions. Courts generally consider skill, effort, and responsibility to constitute three separate tests and hence prerequisites to the applicability of equal pay sanctions.

Neither the Equal Pay Act nor the Fair Labor Standards Act defines the term "establishment." The Department of Labor's Interpretive Bulletin on the Equal Pay Act suggests that the generally accepted understanding of an "establishment" is a "physically separate place of business, rather than an entire business enterprise which may include many distinct places of business." 29 C.F.R. § 800.108 (1979).

48. For example, as one commentator has noted, "the EPA would perimit an employer to establish a new facility across the street from his present one, place the women employees in the new facility and continue sex-based wage differentials with impunity ...." Kanowitz, *Sex-based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963,* 20 Hastings L.J. 305, 349 (1968).

49. 519 F.2d 53 (5th Cir. 1975).

50. Id. at 56, 58.


The Act's basic structure and operation are ... straightforward. In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Id. at 195 (citations omitted).
The Secretary of Labor has defined skill as experience, training, education, and ability. A finding that two or more employees of opposite sex are unequal in terms of skills and training does not settle the issue whether the jobs are substantially equal. The crucial question is not whether employees of one sex possess additional training or skills, but whether the nature of the duties actually performed requires or utilizes those additional skills.

The majority of Equal Pay Act cases that have involved blue collar and nonprofessional workers turn primarily upon the question of equality of effort. Equal effort is equivalent physical or mental exertion. Extra tasks may support a wage differential if they create significant variations in skill, effort, or responsibility between otherwise equal jobs. In Hodgson v. Brookhaven General Hospital, the Fifth Circuit discussed the equality of effort test:

Jobs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential.

Employers could exploit the "extra effort" standard by assigning additional, but insignificant duties to "male jobs" solely to justify

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As Corning indicates, under the Equal Pay Act, plaintiff need not prove discriminatory intent. Indeed, a finding that an employer acted in good faith in an Equal Pay Act case merely would permit the employer to escape liability for statutory liquidated damages. Good faith would not undercut a finding of a violation. See 29 U.S.C. § 260 (1976).

52. 29 C.F.R. § 800.125 (1979).
53. Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976).
57. 436 F.2d 719 (5th Cir. 1970).
58. Id. at 725.
the payment of wage differentials. The courts have recognized the dubious validity of this justification. In *Laffey v. Northwest Airlines*, the United States Court of Appeals for the District of Columbia held that an employer must show a consistent pattern of performance of additional duties to demonstrate that the added duties are the motivating factor for paying persons of one sex more than persons of the other sex. The vague definitions of equal skill and equal effort allow the courts flexibility in determining job equality.

In comparison with the equal effort cases, relatively few cases have isolated the equal responsibility criterion. Equal responsibility hinges on an evaluation of the degree of accountability required in performance of the job, with emphasis placed on the importance of the job obligation. The Labor Department has promulgated interpretations of the Equal Pay Act standards, including responsibility, giving examples of differences of responsibility that would justify a pay differential. For example, if some sales persons may determine whether to accept personal checks and others may not, the responsibilities of the workers are dissimilar.

Similarly, the equal pay principle does not apply in a comparison of employees who perform otherwise equal jobs under dissimilar working conditions. The Act does not require that working conditions be “equal” but only that they be “similar.” The administrative interpretation notes that “slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay.” In *Corning Glass Works v. Brennan*, the Supreme Court construed the term “working conditions” to encompass the physical surroundings and hazards of a job but not the time of day worked. The kinds of working conditions that form the basis of wage differentials must be those usu-

60. Id. at 450. See also Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976).
62. Id.
63. Id. § 80.132 (1979).
64. Id.
66. Id. at 202.
67. Id. at 202-05.
ally considered in the industrial evaluation of job compensation.\textsuperscript{68}

A plaintiff must fulfill several conditions, then, before the plaintiff can successfully litigate a claim under the Equal Pay Act: the job content must be substantially equal; that is, the job must require equal skill, effort, and responsibility under similar working conditions. Once the plaintiff sustains his burden of proof, the burden shifts to the employer to show that the differential falls within one of the Act's exceptions. Thus the employer's burden to demonstrate that the differential falls within an exception constitutes an affirmative defense.

\textit{Equal Pay Act Exceptions}

After a court evaluates the jobs to determine their substantial equality, the court must determine the applicability of one of the four exceptions permitting wage differentials. To qualify for the exceptions, the wage differentials between workers may not depend in any way on sex.\textsuperscript{69} The first exception or affirmative defense specifies that seniority is an acceptable basis for wage differentials between workers.\textsuperscript{70} Second, a merit system justifies wage differentials if the system applies equally to employees of both sexes.\textsuperscript{71} The third valid wage differential is one paid pursuant to a system that measures earnings by quantity or quality or production, such as a piece-work system.\textsuperscript{72} The last and most comprehensive of the four exceptions allows differentials based on "any other factor other than sex,"\textsuperscript{73} such as training programs\textsuperscript{74} or special economic

\textsuperscript{68} 29 C.F.R. §§ 800.131-.133 (1979).
\textsuperscript{69} 29 C.F.R. §§ 800.142-.143 (1979).
\textsuperscript{73} 29 U.S.C. § 206(d)(1) (1976); 29 C.F.R. §§ 800.144-.145 (1979). \textit{See also} Horner v. Mary Inst., 21 Fair Empl. Prac. Cas. 1069 (8th Cir. 1980) (employer's perception that women generally will work for less than will men is not justification for paying women less, but the employer may consider marketplace value of skills of individuals when determining salaries).
\textsuperscript{74} 29 C.F.R. § 800.148 (1979). In some cases arising under the Act, the jobs are equal, but the employer alleges that the difference in pay arises from a bona fide training program. In general, a bona fide training program must have substance and significance independent of a trainee's regular job. \textit{See} Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), \textit{cert. denied}, 414 U.S. 822 (1973); Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972) (training program must be available to both sexes). The training program of a small com-
benefit to the employer.\textsuperscript{76}

The breadth of this final category has led most courts to construe it narrowly to prevent employers from masking sex-based wage differentials.\textsuperscript{78} For example, in \textit{Schultz v. First Victoria National Bank},\textsuperscript{77} the Fifth Circuit stated that the "market force" theory, that women will work for less than men, is not a valid basis for a wage differential under the Equal Pay Act's fourth exception.\textsuperscript{78} Under the Equal Pay Act, employers may not justify wage differentials on the basis of sex stereotypes.\textsuperscript{79}

\textbf{TITLE VII STANDARDS}

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.\textsuperscript{80} The broad nature of the statute, addressing hiring, promo-
tion, and benefits, as well as compensation, indicated Congress' intention to eliminate all forms of employment discrimination. Unlike the strict categories of discrimination under the Equal Pay Act, Title VII litigation devolves into two broad classifications of employment discrimination: disparate treatment and disparate impact.  

Disparate Treatment

Disparate treatment claims arise when members of a protected class receive treatment different from other applicants or employees. A protected class is a racial, religious, or national group, or one sex. An example of this type of discrimination would be an employer who announces and follows a policy of refusing to hire women for a particular job. An analogous example is an employer who announces he pays women less than men because they do merely "women's work." Such an announced policy of sex-based wage payment is exceptional because an employer usually does not articulate his discriminatory motive for his employment decisions. Circumstantial evidence and factual inferences will serve as the foundation for a discrimination claim. In such cases, the plaintiff must produce statistics showing the relative exclusion of women from certain positions, or the failure to promote women, or the payment of lower wages to women than to men. Other documentary and testimonial evidence as to the defendant's practices and the experiences of individual applicants ought to corroborate

81. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (when plaintiffs' theory is one of disparate treatment, proof of intent is an essential element of the claim). See also R. Peres, DEALING WITH EMPLOYMENT DISCRIMINATION 44-49 (1978).
83. R. Peres, supra note 81, at 44-45.
84. See Johnson v. University of Pittsburgh, 5 Empl. Prac. Dec. 8009 (W.D. Pa. 1973). It is obvious that in a case of sex discrimination we very seldom find a resolution of a board of directors or a faculty committee agreeing to engage in sex discrimination, any more than we would expect to find the same in a conspiracy to violate the antitrust laws. The existence of such discrimination must therefore be found from circumstantial evidence and inferences from the circumstances.
85. R. Peres, supra note 81, at 44-54.
Statistics alone rarely can prove discriminatory practices, particularly in light of Title VII's attack on intentionally discriminatory actions of the employer.\(^{87}\)

In *McDonnell-Douglas Corp. v. Green*,\(^{88}\) the Supreme Court established that in order to prove a prima facie case of disparate treatment of individuals, the Title VII plaintiff must show: (1) he is a member of a protected class; (2) he applied for the job; (3) he was qualified for the job; (4) the employer refused to hire him, or made some other adverse employment decision; (5) the employer continued to seek applicants.\(^{89}\) Once the plaintiff makes out a prima facie case, the burden of proof shifts to the employer to come forward with legitimate reasons for the rejection.\(^{90}\) After the employer comes forward with such reasons, the burden shifts back to the plaintiff to show that the employer's stated reasons were a pretext for discrimination.\(^{91}\)

Once the plaintiff has established discrimination in disparate treatment cases, the defendant has a defense available only in sex, national origin, and religion cases. Section 703(e) of the Civil Rights Act provides an exemption where sex, national origin, or religion is a "bona fide occupational qualification" necessary for the normal completion of the job.\(^{92}\) The bona-fide-occupational-qualification exception thus reflects a judgment that certain functional differences, both physically and culturally defined, exist between the sexes, and that employers legitimately can accommodate

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87. *Id.* at 340-41. But see *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975). "The district court erred in requiring proof of actual discrimination in addition to the statistical data implicating discrimination. Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination." *Id.* at 549. The Fourth Circuit understands appropriate cases as those cases in which statistics clearly underline discriminatory treatment of a class. *Barnett* was just such a case. The community was 25% black, but the defendant employed no black supervisory personnel. Of the 17% of defendant's nonsupervisory personnel who were black, all were assigned to one of 17 job categories. *Id.*
89. *See id.* at 801-02.
90. *Id.* at 802.
91. *Id.* at 804. The facts necessarily will vary in Title VII cases, and therefore the prima facie proof required of the plaintiff will vary depending upon the facts of the case. *Id.* at 802 n.13.
such differences in their hiring patterns.\textsuperscript{93} Yet the courts have construed the bona fide occupational qualification so narrowly as to have only a limited effect on the broad prohibitions of Title VII.\textsuperscript{94}

\textit{Disparate Impact}

Disparate impact cases involve facially neutral employment practices that adversely affect a class protected under Title VII.\textsuperscript{95} Examples of such practices include high school degree requirements or tests that disqualify more blacks than whites,\textsuperscript{96} and minimum height requirements that disqualify more women than men.\textsuperscript{97}

\textsuperscript{93} Rep. Goodell sponsored the amendment of § 703(e) to include sex, citing the example of an elderly woman in a nursing home who desires a female nurse. 110 CONG. REC. 2718 (1964).

During the Senate's consideration of Title VII, Senators Clark and Case offered an interpretive memorandum discussing its provisions. According to the memorandum, the bona-fide-occupational-qualification exception creates a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.

\textit{Id. at} 7213. Another example of a bona fide occupational qualification would be a masseur. \textit{Id. at} 2720 (remarks of Rep. Multer). For further discussion of the bona fide occupational qualification, see note 302 & accompanying text infra.

\textsuperscript{94} See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (practice of hiring only females as flight attendants not protected by bona-fide-occupational-qualification exception); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969) (employer failed to prove position as telephone switchman was within the bfoq exception, despite evidence as to strenuousness of work). See also Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) ("We are persuaded . . . that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.").

\textsuperscript{95} International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). For a discussion of whether a compensation discrimination claim not cognizable under the Equal Pay Act is available under Title VII in the absence of intent to discriminate on a "disparate impact" theory, see id.

\textsuperscript{96} Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs the Supreme Court held that a plaintiff need not prove discriminatory motive if employment practices operate to exclude disproportionately a protected class from employment, unless the employer can justify such practices on the basis of business necessity. \textit{Id. at} 431-32.


[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a
The plaintiff makes out a prima facie case by showing, generally through statistics, that the practice has a disproportionately adverse effect on the protected class. The burden then shifts to the defendant to show that business necessity requires the practice.

Ferreting out discrimination in all areas of employment decision-making is the concern of Title VII, and hence the purpose of Title VII is to dissuade employers from engaging in intentional discrimination and to address those employment practices that, although fair on their face, have a discriminatory impact. Title VII claims focus on the employer's intent in formulating employment practices, in contrast to the Equal Pay Act's strict liability standards. The courts must decide whether Congress intended the generally extensive character of Title VII to apply to sex-based wage discrimination. The two prominent cases of Gunther v. County of Washington and IUE v. Westinghouse dealt specifically with these issues.

**Gunther v. County of Washington**

In Gunther, plaintiffs were four jail matrons at the Washington County jail in Oregon. The matrons guarded female inmates; significantly discriminatory pattern. Once it is shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any requirement [has] . . . a manifest relationship to the employment in question."


98. Proof of disparate impact usually depends upon statistics comparing the number of blacks or women hired with their availability in the relevant market area. In accord with the laws of probability, the number of blacks or women hired or promoted must be within a "reasonable range" of the number of blacks or women available for employment. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). The definition of "reasonable range" lies within the courts' discretion.

In hiring cases, for entry level or low skilled jobs, the courts look to the percentage of blacks or women in the community work force. Thus, a plaintiff only need prove a discriminatory impact on women in the general population, as in Dothard v. Rawlinson, 443 U.S. 321, 329-31 (1977). In a promotion case, dealing with jobs that legitimately require skills or experience, the courts look to the proportion of blacks or women present in the employer's work force. See Swint v. Pullman-Standard, 15 Fair Empl. Prac. Cas. 144, 150 (N.D. Ala. 1977).


100. 602 F.2d 882 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3332 (1980) (No. 80-429).

101. 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).

102. 602 F.2d at 885.
male guards guarded male inmates and received higher pay. The matrons claimed that the pay differential was sex-based and therefore proscribed by section 703(a) of the Civil Rights Act of 1964.\textsuperscript{103} The first step in the traditional procedure for adjudicating a sex-based wage discrimination claim is an assessment of the equality of the jobs. The district court in \textit{Gunther} found that the jobs under comparison were not substantially equal.\textsuperscript{104} Although both jobs required the same skill, the men’s and women’s labors demonstrated different levels of effort and responsibility.\textsuperscript{105}

Normally in equal pay actions a finding that the jobs are unequal terminates litigation. The matrons claimed, however, that even if the jobs compared were unequal, the court ought to allow them to prove that the discrepancy in wages resulted from sex discrimination.\textsuperscript{106}

After analyzing the relevant legislative histories and administrative regulations, the United States Court of Appeals for the Ninth Circuit concluded that the broad interpretation of the Bennett Amendment best expressed the congressional aim of eliminating sex-based wage discrimination.\textsuperscript{107} In the court’s view, reading the Bennett Amendment to limit section 703(a)’s ban on compensation discrimination to only those practices prohibited by the Equal Pay Act would frustrate the remedial purpose of Title VII\textsuperscript{108} and “insulate other equally harmful discriminatory practices from review.”\textsuperscript{109} An example of a discriminatory practice that should not escape review is the instance of women employed in jobs comparable to, though not substantially equal to, that performed by men. If the jobs are not substantially equal, an employer is free under the Equal Pay Act to decrease the wages of women solely because of their sex. According to the Ninth Circuit, “[s]uch a practice is prohibited by the plain language of § 703 and will continue to be

\textsuperscript{103} Id. at 886, 888.
\textsuperscript{104} Id. at 886.
\textsuperscript{105} Male jailers guarded more prisoners than the matrons, and the matrons spent substantial time performing clerical duties. Id.
\textsuperscript{106} Id. at 886, 888.
\textsuperscript{107} See id. at 890.
\textsuperscript{108} See id.
\textsuperscript{109} Id. (footnote omitted).
our interpretation of the Bennett Amendment.”110

The Ninth Circuit emphasized that Congress intended Title VII to sweep broadly in the area of employment discrimination.111 Therefore, even if the Bennett Amendment incorporates the equal job limitation of the Equal Pay Act into Title VII, such a construction would not affect claims in which the plaintiffs allege unlawful discrimination but not equal work.112 The affirmative defenses contained in the Bennett Amendment would apply only to actions seeking equal pay for equal work in which plaintiff does not allege discriminatory purpose.113 Thus, the Ninth Circuit recognized an additional claim not traditionally included within the Equal Pay Act standard by approving the matrons’ contention that Title VII encompasses claims that deviate from the equal pay for equal work standard.114

[W]e hold that, although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized by one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by § 703(h).115

The Equal Pay Act imposes strict liability; proof that men and women perform substantially equal work, requiring equal skill, effort, and responsibility and performed under similar working conditions, for unequal pay establishes a violation regardless of the intent of the employer.116 Therefore allegations of discriminatory purpose under Title VII need not rely on Equal Pay Act standards. The Ninth Circuit in Gunther emphasized that the Equal Pay Act

110. Id. at 890 n.9.
111. See id. at 890. The decisions of the Supreme Court have emphasized the sweeping nature of Title VII’s prohibitions of discrimination and the duty of the courts to construe Title VII so as to give the greatest possible effect to the statute. See United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).
112. 602 F.2d at 890.
113. Id.
114. Id. at 891.
115. Id.
Sex-Based Wage Discrimination

Applies only when a plaintiff does not receive equal pay for equal work.\textsuperscript{117}

\textit{IUE v. Westinghouse Electric Corp.}\textsuperscript{118}

In contrast to the Ninth Circuit in \textit{Gunther}, the district court in \textit{IUE v. Westinghouse} refused to expand the scope of Title VII beyond the Equal Pay Act.\textsuperscript{119} Plaintiffs brought suit in the district court, alleging \textit{inter alia}\textsuperscript{120} that the Westinghouse Electric Corporation set the pay rates of women lower than the pay rates of men solely because of sex\textsuperscript{121} by deliberately paying lower wages for work done predominantly by women.\textsuperscript{122} As evidence of such discrimination, the plaintiffs pointed to discriminatory effects of a recently discarded wage system at Westinghouse.\textsuperscript{123} Until 1965, the Westinghouse wage system considered the sex of the worker in determining the wage rate assigned to a job.\textsuperscript{124} Also until 1965, the wage rates paid to female workers were lower than the wage rates paid

\begin{itemize}
\item \textsuperscript{117} The court stated:
\begin{quote}
[W]e hold that Equal Pay Act standards apply in Title VII suits when plaintiffs raise a claim of equal pay. When plaintiffs raise a claim of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable.
\end{quote}
\end{itemize}

\begin{itemize}
\item \textsuperscript{118} 602 F.2d at 891.
\item \textsuperscript{119} 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), rev'd, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).
\item \textsuperscript{120} Id. at 452. In August 1980, the United States Court of Appeals for the Third Circuit reversed the district court in \textit{IUE}. The rationale for that decision will be discussed at length at text accompanying notes 136-145 infra.
\item \textsuperscript{121} Plaintiffs alleged the following violations:
\begin{itemize}
\item \textsuperscript{(a)} paying women unequal pay in that male employees performing the same or substantially the same work receive higher pay.
\item \textsuperscript{(b)} paying women lower rates of pay than would be paid them if their skill, effort, and responsibility were evaluated on the same basis as is used in evaluating work performed by males; and
\item \textsuperscript{(c)} failing to afford women the rights of promotion and transfer to better paying jobs on the same basis as males; and
\item \textsuperscript{(d)} otherwise affording women unequal compensation, terms, conditions, and privileges of employment because of their sex.
\end{itemize}
\end{itemize}

\begin{itemize}
\item \textsuperscript{122} 23 Fair Empl. Prac. Cas. 588 n.1 (3d Cir. 1980).
\item \textsuperscript{123} 19 Fair Empl. Prac. Cas. at 451.
\item \textsuperscript{124} Id.
to male workers for jobs that Westinghose considered to be of equal value.\textsuperscript{125}

In 1965, the company established a unitary classification system in which the grades had no explicit sexual designation.\textsuperscript{126} The plaintiffs contended that the present wage scale embodied the deliberately discriminatory policy of the prior plan.\textsuperscript{127} They contended that Westinghouse expanded the number of labor grades in the new scale, placing female jobs below those male jobs, even though the jobs had been at corresponding labor grades before the merger.\textsuperscript{128} They also pointed to the vast majority of women that still were employed in "female jobs."\textsuperscript{129} Although the plaintiffs acknowledged that "there ha[d] been some changes in job content over the years, and some rate adjustments' in their view 'the changes [had] not eradicated the wage inequities established by the [earlier] system.'"\textsuperscript{130}

The district court determined that the plaintiffs did not perform work substantially equal to that performed by male employees.\textsuperscript{131} The question then became whether sex-based wage discrimination claims under Title VII are limited to conduct that also would be actionable under the Equal Pay Act. In the district court's view, the mandated affirmative answer was "purely a matter of statutory construction."\textsuperscript{132} Westinghouse, therefore, had not violated Title VII. In arriving at its conclusion, the district court examined the legislative history of Title VII and the administrative and judicial interpretations of the Equal Pay Act.\textsuperscript{133} Guiding the court was the policy consideration that employees should not be subject to two conflicting standards.\textsuperscript{134} Therefore, the court held that Title VII and the Equal Pay Act establish identical standards of sex-based wage discrimination, specifically, the Equal Pay Act's equal work standard. Judge Barlow summarized his holding by stating that

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 590-91.
\textsuperscript{130} Id. at 591 (citations omitted).
\textsuperscript{131} 19 Fair Empl. Prac. Cas. at 452.
\textsuperscript{132} Id. at 462.
\textsuperscript{133} Id. at 453-57.
\textsuperscript{134} Id. at 453.
SEX-BASED WAGE DISCRIMINATION

"allegations and proof of unequal pay for unequal, but comparable work, does not state a claim upon which relief can be granted . . . ."\textsuperscript{135}

The United States Court of Appeals for the Third Circuit rejected the district court's interpretation and criticized the lower court's justifications for the supremacy of the Equal Pay Act standard in sex-based wage discrimination suits.\textsuperscript{136} The Third Circuit emphasized repeatedly that deviation from a broad interpretation of the Bennett Amendment would result in "a substantial limitation on the scope of Title VII's power to address the problems of sex-based discrimination in employment,"\textsuperscript{137} and hence would conflict with Congress' goals.

Thus, agreeing with the Ninth Circuit's analysis in \textit{Gunther}, the Third Circuit found that Congress did not intend to protect intentionally discriminatory wage practices when it adopted the Bennett Amendment.\textsuperscript{138} The Third Circuit rejected any interpretation of the Bennett Amendment that would permit employers to discriminate against women but would prohibit the same acts if based on race, religion, or national origin.\textsuperscript{139} The court presented a hypothetical wherein an employer was paying welders higher wages than plumbers because the welders were Protestant and the plumbers were Catholic.\textsuperscript{140} A successful plaintiff would have to prove the employer was intentionally discriminating on the basis of religion, an infringement of Title VII. Yet a construction of Title VII as coextensive with the Equal Pay Act would not prohibit the payment of wage differentials if the distinction hinged on sex rather than religion. Because female plumbers would not be engaged in equal work with male welders, the employer intentionally could pay women less, solely because they are women.\textsuperscript{141} The court stated:

\begin{quote}
[It] is clear that Westinghouse could not create job classifica-
\end{quote}

\begin{footnotes}
\textsuperscript{135} Id. at 457.
\textsuperscript{137} Id. at 592.
\textsuperscript{138} Id. at 592-93, 598.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 592.
\textsuperscript{141} Id.
\end{footnotes}
tions whereby different wages were paid to one group solely because of considerations of religion, race or national origin. The statutory issue here is whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irishmen, or any other group protected by the Act.\footnote{142}

By phrasing its holding in terms of job classifications,\footnote{143} the court sought to focus the impact of Title VII on those cases in which an employer intentionally discriminated on the basis of sex. The court recognized that employers could manipulate job classifications to create pay disparities between the sexes;\footnote{144} consequently, the negative impact of such job classifications on discrete groups of individuals may evidence an employer's intent to discriminate. Therefore the court allowed the plaintiffs to present evidence of the employer's discriminatory purpose, regardless of the nature of the jobs under scrutiny.\footnote{145}

One major defect in the Third Circuit's opinion was a failure to answer the important policy objections raised by the dissenting justice, Van Dusen.\footnote{146} He argued that elimination of the equal pay standard for litigation of sex-based wage discrimination claims forces the court to evaluate subjectively the relative worth of different jobs.\footnote{147} When a plaintiff alleges sex-based wage discrimination, he can compare his job to any other job and allege salary differentials as evidence of discriminatory practice.\footnote{148} According to Justice Van Dusen, the intrusion by the judiciary into the realm of business decisionmaking would disrupt totally the free-market system, in direct contradiction to congressional intentions.\footnote{149}

The Third Circuit tried to avoid the policy implications of its decision by restricting its holding to cases involving intentional discrimination on the part of employers in creating job classifica-

\begin{itemize}
\item 142. \textit{Id.} at 590 (footnote omitted).
\item 143. \textit{Id.}
\item 144. \textit{Id.} at 590-91.
\item 145. \textit{Id.} at 590.
\item 146. \textit{Id.} at 598-600, 604 (Van Dusen, J., dissenting).
\item 147. \textit{Id.} at 599-600, 604 (Van Dusen, J., dissenting).
\item 148. \textit{Id.} (Van Dusen, J., dissenting).
\item 149. \textit{Id.} (Van Dusen, J., dissenting).
\end{itemize}
tion systems. In IUE the employer, while making his own job evaluations, engaged in blatantly discriminatory practices. The court of appeals dealt only with allegations of an unfair classification system, not with the worth of differing jobs. In its analysis the court simply ignored potential claims under Title VII alleging unequal pay for comparable work. Although the Third Circuit improved the Ninth Circuit's articulation of the issues, the evasion of such policy problems weakened the force of the decision in IUE.

**Analysis of Congressional Intent**

An evaluation of the language, statutory construction and coverage of the Equal Pay Act, Title VII, and the Bennett Amendment supports the conclusion of the Ninth and Third Circuits that only the four exceptions of the Equal Pay Act are incorporated into Title VII.

**Statutory Construction**

Congress passed the Equal Pay Act in 1963 and the Civil Rights Act in 1964. Traditionally, courts have followed a general rule of statutory construction that an earlier, narrower statute will restrict the scope of a subsequent statute enacted without the limiting provisions of the first law. If this principle of statutory construction applied, Title VII and the Equal Pay Act would be coextensive.

In conflict with this guideline is the rule cited by the Third Circuit in IUE: "where a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed." Adhering to this rule of statutory construction, the Third Circuit found that the Equal Pay Act standards did not control litigation under Title VII.

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150. Id. at 590. See id. at 604 (Van Dusen, J., dissenting).
151. Id. at 590-91.
152. Id.
154. 23 Fair Empl. Prac. Cas. at 593 (citations omitted) (quoting Richardson v. Jones, 551 F.2d 918, 928 (3d Cir. 1977)).
155. Id. at 593-94.
One rule of statutory construction cannot resolve the issue, however, for the dissent in *IUE* postulated its own rule of statutory construction to support its narrow interpretation of the Bennett Amendment. The dissenting justice argued that the *in pari materia*156 canon of statutory construction should govern the relationship of the laws.157 Under such a canon, a "‘statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.’"158 Thus, the *in pari materia* rule of statutory construction supports the narrow interpretation of the Bennett Amendment.

**Language of the Bennett Amendment**

To ascertain how Congress intended to eliminate sex-based wage

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156. Ballentine's Law Dictionary defines "*in pari materia*" as follows:

Statutes which relate to the same thing or to the same subject or object are in pari materia, although they were enacted at different times and it is a fundamental rule of statutory construction that such statutes should be construed together for the purpose of learning and giving effect to the legislative intention.


157. The dissent argued that the *in pari materia* doctrine demanded similar construction of the Equal Pay Act and Title VII. 23 Fair Empl. Prac. Cas. at 600. *In pari materia*, however, merely means that a court must construe statutes relating to the same subject harmoniously. See Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (1969), cert. denied, 398 U.S. 905 (1970) (Title VII and the Equal Pay Act should “be harmonized to work together in service of the underlying Congressional objective”).

158. 23 Fair Empl. Prac. Cas. at 600 (Van Dusen, J., dissenting) (citations omitted) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)). The majority in *IUE* declined to apply the *in pari materia* canon on the grounds of the Supreme Court’s admonition that “remedies for employment discrimination ‘supplement’ each other and should not be construed so as to ignore the differences among them.” Id. at 593 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 & n.9 (1974)).

This brief examination of some rules of statutory construction reveals the conflict pervading such judicial decisionmaking. The vague language of congressional bills gives the court a carte blanche to interpret the scope of the laws. In reconciling the provisions of the Equal Pay Act and Title VII, each proponent cited rules of statutory construction to support his interpretation. Both sets of rules are valid. The courts are the final arbiters as to which set ought to receive greater weight. The Ninth and Third Circuits determined that the rules having greater validity were those supporting the broad interpretation of the Bennett Amendment.
discrimination one first must evaluate the language of the relevant statutes.\textsuperscript{159} Section 703(a)(1) and (2) of the Civil Rights Act of 1964 indicates that Congress intended a general prohibition against discrimination in compensation with respect to protected classes, without limitation to any particular form of discrimination.\textsuperscript{160} In \textit{United Steelworkers of America v. Weber},\textsuperscript{161} the Supreme Court insisted that courts interpret Title VII to accord with Congress' overall intent to prohibit invidious discrimination against minorities and women.\textsuperscript{162}

The Bennett Amendment provides:

\begin{quote}
It shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by provisions of section 206(d) of Title 29.\textsuperscript{163}
\end{quote}

Section 206(d) of the Equal Pay Act provides that after the plaintiff has proven a prima facie case of discrimination, unequal pay for equal work, the employer has four exceptions available to justify the payment of wage differentials based on sex.\textsuperscript{164} Thus the Bennett Amendment provides that a sex-based wage differential shall not violate Title VII if the Equal Pay Act authorizes the differential. The key word to construe is "authorized." "Authorized" means more than "not prohibited"; it connotes official sanction or approval. Arguably, a court could find that the Equal Pay Act authorizes compensation practices that are discriminatory and rule that the proper interpretation of the Bennett Amendment requires that what the Equal Pay Act does not prohibit explicitly is authorized.

Nothing in the language of the Bennett Amendment suggests that Congress intended the term "authorized" to have a meaning so at variance with its ordinary use by the public, and so at variance with its use by Congress in enacting other statutes. The Con-

\begin{footnotes}
\item[159] Lewis v. United States, 445 U.S. 55, 60 (1980).
\item[162] Id. at 203-04.
\end{footnotes}
gress simply could have used the phrase "not prohibited" in place of authorized if it intended the two statutes to be coextensive; thus the Bennett Amendment would prevent a Title VII challenge to any sex-based wage differential "not prohibited" by the provisions of the Equal Pay Act.

A more natural reading\(^5\) of the Bennett Amendment exempts from the prohibitions of Title VII those wage differentials that Congress sanctioned in enacting the Equal Pay Act. The Ninth Circuit in *Gunther* held that when Congress passed the Equal Pay Act, it authorized those practices permitted by the four affirmative defenses.\(^6\) Likewise, the Third Circuit held that "the plain language of the statute suggests that only the four exceptions of the Equal Pay Act were incorporated as limitations on Title VII."\(^7\)

**Location of the Bennett Amendment**

The Bennett Amendment appears in that part of section 703 dealing with defenses.\(^8\) The Equal Pay Act affirmative defenses

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165. Burns v. Alcala, 420 U.S. 575 (1975). “[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary . . . .” Id. at 580. Thus, the Equal Pay Act does not authorize sex-based wage discrimination merely because Congress did not forbid all possible discriminatory practices in that Act. Discrimination that does not fit into the equal pay for equal work formula merely is not covered by the Equal Pay Act.

166. 602 F.2d 882, 890 (9th Cir. 1979), cert. granted, 49 U.S.L.W. 3332 (1980) (No. 80-429).


168. 42 U.S.C. § 2000e-2(h) (1976). The full text of § 703(h), showing the context in which this language appears in the statute, is as follows:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality or production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer
incorporated into Title VII are, like other provisions of section 703(h), defenses to employment practices that otherwise would constitute a Title VII violation. They are not part of the definition of a violation. As defenses, the employer bears the burden of proving them if the plaintiff has established a prima facie showing of a violation. 169 If Senator Bennett intended to alter the definition of compensation discrimination under Title VII, the simpler and clearer choice lay in incorporating the Equal Pay Act standard into section 703(a), in which Title VII lists prohibited practices. Therefore, one may conclude that the purpose of the Bennett Amendment was to incorporate the defenses of the Equal Pay Act into Title VII, not to limit the type of discrimination suits litigable under the statute. Until Congress adopted the Bennett Amendment, Title VII had no provision comparable to the Equal Pay Act defense for wage differentials based on "any other factor other than sex." 170 Yet the addition of the "factor other than sex" was a


170. One criticism of the broad interpretation of the Bennett Amendment is that other language of § 703(h) already provides exceptions analogous to the Equal Pay Act exceptions. Therefore an interpretation that limits the concern of the Bennett Amendment solely to the four affirmative defenses renders the amendment superfluous. The criticism fails, however, because the Bennett Amendment does not merely reiterate exceptions contained in § 703(h) of Title VII. Although § 703(h) already contained exceptions similar to three of the four exceptions of the Equal Pay Act before Congress adopted the Bennett Amendment, whether a court in 1964 would have construed the similar exceptions of the Equal Pay Act and Title VII in exactly the same manner was by no means clear.

Originally, the Title VII bill did not include any of the language of § 703(h). When the Mansfield-Dirksen substitute bill was introduced, it added what is now the first sentence of § 703(h). 110 Cong. Rec. 11,926, 11,931 (1964). Thereafter, the Senate adopted the Bennett Amendment. Without the Bennett Amendment no assurance existed that these newly added provisions of Title VII would be construed in the same fashion as the comparable defenses in the Equal Pay Act. Indeed, the language of the three Title VII defenses is not identical to the comparable provisions of the Equal Pay Act. The qualification in the first sentence of § 703(h) that seniority and merit systems must be "bona fide" in order to provide a defense to a claim of unequal treatment does not appear in the Equal Pay Act. In 1963 Congress was aware of the importance of the interpretation of the Equal Pay Act defenses. In the course of the Equal Pay Act debate, Congressman Fountain stated: "Certain exceptions are set forth in the bill, one being a 'seniority system.' I think the record ought to show just what is meant by the term 'seniority system'—especially the word 'system' . . . ." 109 Cong. Rec. 9203 (1963). A discussion followed resolving that to qualify for the statutory defense a "system" need not be of a formal nature or described in writing. Id. at 9208. The Labor Depart-
prime objective of employer representatives in the course of development of the Equal Pay Act.\textsuperscript{171} Congress regarded the addition of the "factor other than sex" provision to the Equal Pay Act as an important step, and discussed at length the types of practices that would receive protection as a result.\textsuperscript{172}

Moreover, the incorporation of the "factor other than sex" defense clarifies the burden of proof in an equal pay case brought under Title VII.\textsuperscript{173} Under the Equal Pay Act, the employer bears the burden of showing that its practice falls within one of the four defenses. The incorporation of the fourth affirmative defense clarifies the point that once a Title VII plaintiff has shown she did not receive equal pay for equal work, the burden shifts to the employer to show that its practice falls within one of the four defenses, specifically that the employer based a wage differential on a factor other than sex. For example, if an employer could justify a sex classification as a bona fide occupational qualification under Title VII, he might still be liable for a discriminatory wage differential if unable to validate that the differential was the result of a "factor other than sex."\textsuperscript{174} The Bennett Amendment thus achieved a significant result in ensuring consistency in the interpretation of the defenses employed under the Equal Pay Act and Title VII and in ensuring that the detailed legislative history regarding the meaning of the "factor other than sex" provision of the Equal Pay Act, and

\textsuperscript{171} See, e.g., Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 139 (1963) (statement of John G. Wayman); id. at 102 (statement of W. Boyd Owen); id. at 159 (statement of William Miller); id. at 206 (proposed amendments offered by Counsel of State Chambers of Commerce).

\textsuperscript{172} See, e.g., H.R. Rep. No. 309, supra note 6; 109 Cong. Rec. 9203 (remarks of Rep. Griffin); id. at 9196 (remarks of Rep. Thompson); id. at 9206 (remarks of Rep. Goodell). As the debates reflect, the defense based on a "factor other than sex" was designed to protect a variety of practices such as shift differentials and differentials for temporary work.


\textsuperscript{174} Id. at 1319 n.1.
the Labor Department's interpretations of that provision, would apply under Title VII as well.

Independent Coverage of Equal Pay Act and Title VII

Final support for the broad interpretation of the Bennett Amendment is the vast difference in coverage characterizing the Equal Pay Act and Title VII. If Congress intended the two statutes to be coextensive, then logically the Bennett Amendment should incorporate into Title VII not only the equal work formula of the Equal Pay Act, but also the Act's exemptions, employers, periods of limitations, and all other differences in coverage. Instead, the differing scopes of coverage of Title VII and the Equal Pay Act over regulation of employees and employers and the differing provisions for remedies imply that Congress intended the courts to construe the two statutes separately.

The potential plaintiff's choice of remedy, either Title VII or Equal Pay Act, or both, will depend upon a number of factors. Thus questions of coverage, procedures, statutes of limitations, etc.

175. Seven weeks prior to the enactment of the Bennett Amendment, the Administrator of the Wage and Hour Division had specified a series of factors that could establish this defense: red-circle rates, temporary assignments to lower-rated or higher-rated jobs, bona fide training programs, differentials for heads of households, and differentials for temporary or part-time employees. See 29 Fed. Reg. 5555-56 (1964) (current version at 29 C.F.R. §§ 800.146, 148-150 (1979)).

176. Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b) (1976). The Equal Pay Act coverage provisions, however, derive from the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1) (1976). Usually at least two employees, one male and one female, will be necessary to establish a violation of the Equal Pay Act. The male and female employees need not work for the employer at the same time, however. Thus a female truck driver who receives less compensation than a male successor or predecessor could bring a claim against the employer under the Equal Pay Act. See Pearce v. Witchita County, 590 F.2d 128, 133-34 (5th Cir. 1979); Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976).


177. The absence of statutory prerequisites to suit under the Equal Pay Act is a distinct advantage of the Act over the detailed prerequisites to a suit under Title VII. Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 Ark. L. Rev. 545, 546 n.10 (1978). See generally Sullivan, The Enforcement of Title VII: Meshing Public and Private Efforts, 71 Nw. L. Rev. 480 (1976). For example, claimants first must file a Title VII...
tions, remedies, and the availability of a jury trial may influence a plaintiff to opt for one or the other alternatives. For these reasons, to construe Title VII as relaxing the equal work limitation of the Equal Pay Act in no way would convert the enactment of the 1964 statute into a de facto repeal of the Equal Pay Act. The Equal Pay Act and Title VII both have value within their own particular province of sex discrimination litigation. Therefore, a close reading and comparison of the texts of the two statutes and the Bennett Amendment relating them supports the Ninth and Third Circuit's expansive approach to wage discrimination litigation.

**Legislative Histories**

The uncertain effect of the Bennett Amendment has forced the courts to decide whether Congress intended to adopt a unitary or multi-faceted approach to the problem of sex-based wage discrimi-

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179. Differences exist between the Equal Pay Act and Title VII with respect to the availability of both monetary and injunctive relief. Perhaps the most significant difference is that the Equal Pay Act permits an award of "liquidated damages" in an amount equal to the unpaid wages due, in addition to those unpaid wages. Hence, plaintiff receives double damages. See Richards, Compensatory and Punitive Damages in Employment Discrimination Cases, 27 Ark. L. Rev. 603 (1973).

Under Title VII, all monetary relief is subject to the discretion of the court, although Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), states that if discrimination causes loss, an award of back pay is usually appropriate. Id. at 421. Conversely, under the Equal Pay Act, the court does not have discretion in the award of damages. If the court finds discrimination, it must award the plaintiff back pay equal to the compensation payable if the employer had employed or promoted the plaintiff without discrimination. 29 U.S.C. § 216(a)-(d) (1976).

nation. In deciding the question, the courts have consulted the legislative histories of the Equal Pay Act, Title VII, and the Bennett Amendment. A review of the legislative histories in chronological order reveals ambiguous congressional intentions.

**Legislative History of The Equal Pay Act**

In devising the Equal Pay Act, Congress did not attempt to draft a broad antidiscrimination statute. Rather, it devised a "simple and straightforward amendment of the Fair Labor Standards Act,"\(^{181}\) adding one new labor standard to the economic protections previously provided in that act.\(^{182}\) The Equal Pay Act set forth both an objective standard for determining clear instances in which employers had depressed the wages of women workers and a requirement "that these depressed wages be raised, in part as matter of simple justice to the employees themselves, but also as a matter of market economics . . . ."\(^{183}\)

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182. Senator McNamara, the chairman of the Senate Labor Subcommittee, so described the statute when he introduced it on the Senate floor:
   
   As we all know, the FLSA provides that workers must be paid a decent minimum wage; that if employees must put in long hours, they must be paid at an overtime rate; and that children may only be employed under rigid conditions which protect their health and safety.
   
   The bill I now introduce would add one additional fair labor standard to the act; namely that employees doing equal work should be paid equal wages regardless of sex.


183. Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974). The Supreme Court held that the congressional purpose was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man because of his role in society, should be paid more than a woman though his duties are the same." The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages."

Id. at 195 (quoting S. REP. No. 176, 88th Cong., 1st Sess. 1 (1963)).

The Third Circuit in Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), construed the Act as a "broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards in reduced wages for female workers . . . ." Id. at 265.
The Equal Pay Act is a narrow statute that does not have the broad sweep of Title VII. The supporters of the Act never saw it as the answer to sex discrimination in employment. Rather, the supporters recognized the bill, enacted at a time when no federal law prohibited sex discrimination in employment, as a small, first step in gaining equality of employment opportunities for women.\textsuperscript{184}

As originally introduced, the bill provided that employers were to pay "equal wages for comparable work."\textsuperscript{185} After extensive de-
bate, Congress rejected the comparable work standard by substituting "equal" for "comparable" in the text of the bill. Congresswoman Goodell, a floor manager of the bill, expressed the purpose of the substitution as ensuring "that the jobs involved should be virtually identical, that is, very much alike, or closely related to each other." In furtherance of this intent, the sponsors of the bill carefully created limits on the power of the Labor Department, the agency initially charged with enforcing the act, to prevent the agency from rating unequal jobs.

Jobs is attributable to sex, except that in War Labor Board cases the standard for determining the pay differential was that of comparable rather than equal jobs.

In the Senate hearings, James B. Carey, Secretary-Treasurer of the AFL-CIO Industrial Union Department and President of the IBEW, testified that the problem of unequal pay takes three forms:

1. Paying lower wages to women performing the same job as men;
2. Slightly modifying the man's job and then paying a much higher rate of pay than is justified by the modification;
3. Paying women lower wages irrespective of the value, skill, effort of the jobs in relation to that expended in men's jobs, regardless of whether the jobs are similar.

Carey testified that the AFL-CIO supported the proposed equal pay bill and believed it would outlaw all three types of discrimination. See Hearings on S. 7444 Before the Subcomm. on Labor of the Senate Labor-Public Welfare Comm., 87th Cong., 2d Sess. 76 (1963).

In general, courts give little weight to congressional dialogue in ascertaining legislative intent. See Corning Glass Works v. Brennan, 417 U.S. 188, 198-202 (1974). Courts have looked, however, to statements made in floor debates when made by the chairman of the committee reporting the bill or the sponsor of the bill. Both Goodell and Griffin were sponsors of the Equal Pay Act.

Sponsors' statements are examined more closely on the assumption that sponsors have special knowledge of the intent behind the statutory words because they have been working with the bill as it moves through the congressional process. See, e.g., Galvan v. Press, 347 U.S. 522 (1954) (McCarran's statements concerning the McCarran Act); United States v. UMW, 330 U.S. 258 (1947) (LaGuardia's statements concerning the Norris-LaGuardia Act).

For a more extensive discussion of the administrative apparatus responsible for dealing with sex-based wage discrimination claims see notes 223-225 & accompanying text infra.

"We do not expect the Labor Department people to go into an establishment and rate jobs that are not equal. They should not say, 'Well, they amount to the same thing,'
Moreover, Mr. Goodell sought to assuage the fears of American business interests by emphasizing the limited nature of the constraints the Equal Pay Act would place on employers’ freedom of decisionmaking:

[I]t is our intention . . . to provide [by] the use of [the] terms ‘skill, effort, responsibility and working conditions’ a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept we want the private enterprise system, employers and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee’s work and how much he should be paid for it.  

When one views the statement of purpose underlying the Equal Pay Act in conjunction with the narrow scope of the Act, one logically must conclude that Congress intended the Equal Pay Act to prohibit sexually discriminatory compensation to the greatest extent possible, but only in accord with the standard it articulated. As noted by the court in Gunther, the statute failed to address intentionally discriminatory schemes, which are protected to the extent the schemes avoid the equal pay for equal work formula.

Legislative History of Title VII

Unlike the Equal Pay Act, which was confined to the narrow area of wage discrimination, Congress drafted Title VII of the Civil Rights Act of 1964 broadly to include a variety of forms of discrimination. Thus, Congress’ intent in enacting the Equal Pay Act cannot bear much weight in determining the meaning of Title...
Also, in contrast to the lengthy consideration given to the adoption of the Equal Pay Act, Congress never discussed the sex discrimination provisions of Title VII in formal hearings. The word "sex" was not added until the last day of consideration of the bill in the House Rules Committee.

The Senate, which debated and examined the bill at great length after the House passed it, understood the far-reaching impact of the inclusion of sex in the bill. The interpretive memorandum submitted by Senators Clark and Case, the floor managers, stated:

[I]t has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [section 703] are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin.

Congress' treatment of intentional discrimination clearly reveals the desire to distinguish Title VII from the Equal Pay Act. Unlike the Equal Pay Act, Title VII explicitly prohibits intentional discrimination, whatever its form. In the first sentence of section 703(h), Congress twice specified that certain practices otherwise permissible became unlawful if perpetrated with an intention to discriminate. The critically important protection for seniority rights in section 703(h) of Title VII contains the express limitation

195. See notes 188-192 & accompanying text supra.
196. See 109 CONG. REC. 3245 (1963); id. at 11,174 (1963); Gitt & Gelb, supra note 1, at 743.
197. The Rules Committee defeated by an 8 to 7 vote the motion to include sex in the bill. 20 CONG. Q. 344 (1964). After two weeks of debate on various topics, Rep. Smith, an opponent of the bill, proposed the amendment adding "sex" one day before the bill passed. 110 CONG. REC. 2577 (1964).

A number of commentators believe the inclusion of "sex" was merely a diversionary tactic intended to defeat the bill. See, e.g., Kanowitz, supra note 48, at 310-44; Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877 (1967); Vaas, Title VII; Legislative History, 7 B.C. IND. & COMM. L. REV. 431 (1966); Note, Sex Discrimination in Employment, 1968 DUKE L.J. 671, 677 n.36.
198. 110 CONG. REC. 7213 (1964).
depriving any seniority system of protection if "it is established or maintained as the result of an intention to discriminate." 200 Section 703(h) also provides that personnel decisions and wage differentials based on merit systems or systems measuring earnings by quantity or quality of production are permissible under Title VII so long as they are free of discriminatory intent. 201 As the Supreme Court said in Franks v. Bowman Transportation Co., 202 "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." 203

The decisions of the courts of appeals have emphasized the importance of construing Title VII so as to effect the policy of eradicating discrimination. 204 In Culpepper v. Reynolds Metals Co., 205 the Fifth Circuit stated:

Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the U.S. tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and that the intent of Congress is not hampered by a combination of strict construction of the statute and a battle with semantics. 206

In light of Title VII's language and legislative history, and in light of the courts' uniform recognition that Congress intended Ti-
tle VII to sweep broadly against all forms of discrimination in employment, a heavy burden rests on any litigant who contends that the statute does not reach some particular form of race or sex discrimination by a covered employer. To reach a result so at variance with the broad thrust of the statute, one must find support in explicit unambiguous language in the statute or in its legislative history.207

The 1972 Amendments to Title VII confirmed the intent to broadly proscribe all forms of discrimination against women in compensation, not merely those that are the most blatant.208 Both Houses of Congress stated that one of their major concerns was to eliminate the wage disparities caused by pervasive, complex, and subtle discrimination against women in employment.209

This Note thus far has stressed the expansive scope of Title VII and the restrained focus of the Equal Pay Act. Congress designed the Bennett Amendment to link the two statutes and to explicate the proper overlap of the statutes in the area of sex-based wage discrimination. Congress’ failure to clarify its designs for dealing with discrimination in compensation impaired the Bennett Amendment’s ability to accomplish its purpose. An examination of the legislative history of the Bennett Amendment offers insight into congressional aims underlying its adoption.

207. Gunther v. County of Wash., 602 F.2d 882, 890 (9th Cir. 1979), cert. granted, 49 U.S.L.W. 3332 (1980) (No. 80-429). “[T]he broad remedial policy behind Title VII persuades us that Title VII’s plain language should not be limited further in the absence of a clear congressional directive.” Id. at 890.


Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has especially prohibited sex discrimination since its enactment in 1964.


The Bennett Amendment constitutes the third part of section 703(h) of Title VII. Prompted by concern over the possibility of conflict between Title VII and the Equal Pay Act, Senator Bennett introduced an amendment during cloture imposed after the floor debate. Senator Bennett stated that the purpose of the amendment was to prevent the nullification of the Equal Pay Act in the event of conflicts.

The context in which Senator Bennett offered his amendment strongly suggests that he did not intend it to limit the substantive reach of section 703(a)(1), but rather to ensure that conflicts between the statutes never arose. Conflicts could occur when both statutes were applicable, such as in situations in which equal work as defined by the Equal Pay Act is involved, but in which the defenses available under the Equal Pay Act might not be available under Title VII. In order to avoid such conflicts, the Bennett Amendment incorporates the Equal Pay Act defenses into Title VII. As Senator Dirksen, the only senator besides Senator Bennett to discuss the amendment on the Senate floor, explained before its passage, "all that the pending amendment does is recognize those exceptions that are carried in the basic act." He described this bill as merely a "clarification."

Nothing on the face of the amendment was inconsistent with the previous understanding of the interaction of the Equal Pay Act and Title VII. The Equal Pay Act would continue to have vitality in its own sphere without regard to the new mechanisms set up by Title VII. Further, Title VII clearly went far beyond the scope of the Equal Pay Act because it did not contain the same jurisdic-
tional limitations as the Equal Pay Act, and it prohibited types of discrimination not addressed by the Equal Pay Act.

In light of this legislative history, Senator Humphrey and the leadership guiding the bill through Congress accepted the Bennett Amendment, which then passed by voice vote rather than roll

216. See note 176 supra.

217. Under the Equal Pay Act, employers who wished to avoid paying women equal wages could refuse them employment or terminate them. See note 46 supra. Title VII prohibits such practices. 42 U.S.C. § 2000e-2(h) (1976).

The understanding that Title VII went beyond the Equal Pay Act was set forth by Senator Clark, one of the floor managers of Title VII in the Senate, who responded on the floor of the Senate to concerns about a possible conflict between Title VII and the Equal Pay Act:

Objection. The sex anti-discrimination provisions of the bill duplicate the coverage of the EPA of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in the act with respect to equal work on jobs requiring equal skills in the same establishments, and thus cut across different jobs.

Answer. The Equal Pay Act is part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification.

The standards in the Equal Pay Act for determining discrimination as to wages, of course are applicable to the comparable situation under title VII.

110 CONG. REC. 7217 (1964) (emphasis added). Senator Clark's words could be understood as meaning that Title VII is only as broad as the Equal Pay Act. In the alternative, Senator Clark could have intended that when equal work challenges are made, the affirmative defenses of the Equal Pay Act would be applicable whether the claim was raised under the Equal Pay Act or Title VII. The passages are helpful in suggesting that some interest in Congress existed as to the relationship of the two acts prior to the passage of the Bennett Amendment. On balance, the quoted language supports the broad interpretation of the Amendment.

218. 110 CONG. REC. 13,647 (1964). The leadership of the bill had refused to agree to even innocuous amendments that might have had a weakening effect. Between June 4 and June 17, the date the Senate approved the Act, the Senate rejected 23 amendments.

On June 9, the Senate debated and rejected Amendments 606 and 898. Id. at 13,073-93. On June 11, the Senate debated and rejected Amendments 569 and 605. Id. at 13,490-505. On June 12, the Senate debated and rejected Amendments 582, 607 and 962. Id. at 13,648-52, 13,667-69. On June 13, the Senate debated and rejected Amendment 963. Id. at 13,696-97. On June 15, the Senate debated and rejected Amendments 519 and 547. Id. at 13,825-26, 13,837-38. On June 16, the Senate debated and rejected Amendments 550, 846, 855, and 1020. Id. at 13,910, 13,943-47. On June 17, the Senate debated and rejected Amendments 590, 847, 922, 1021, 1022, 1023, and 1024. Id. at 14,179-97. Among the amendments were matters such as the permanent restriction of Title VII's coverage to establishments with 100 or more employees and Senator Tower's original testing amendment. Amendment No. 606, id. at 13,073-93; Amendment No. 605, id. at 13,490-505.
The Senate would not have found any measure intended to immunize intentional discrimination "fully acceptable," and would not have permitted it to pass without real debate or roll call vote. Moreover, Senators Bennett's and Dirksen's descriptions of the amendment were not characterizations of a bill designed to carve out a drastic exception to section 703 that would render sex discrimination in compensation lawful unless prohibited by the Equal Pay Act. Thus, before the Senate adopted the Bennett Amendment, the Equal Pay Act and Title VII were separate and independent in scope; upon adoption of the Bennett Amendment, the standards of the Equal Pay Act for determining wage discrimination applied to Title VII actions involving allegations of equal work. In assessing the interaction of the two statutes, the Ninth Circuit in *Gunther* stated:

EPA standards apply in Title VII suits when plaintiffs raise a claim of equal pay. When plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the EPA arises, because the EPA is inapplicable.  

Like the analysis of the language of the relevant legislation, the preceding investigation of the legislative histories of the Equal Pay Act, Title VII, and the Bennett Amendment does not reveal congressional intentions lucidly. Although no one piece of information holds the key to revealing congressional aims, the weight of the legislative history and the language of the statutes favor the broad interpretation of the Bennett Amendment.

219. *Id.* at 13,647.  
220. A year after the bill was passed, Senator Bennett described the chaotic conditions under which his amendment was proposed and adopted.  

On 2 days, June 16 and 17, 1964, there were 56 roll call votes on amendments which were properly before the Senate. Those 56 votes proceeded in an atmosphere of complete chaos because most of the amendments had already used up so much of their allotted hour of debate that there was barely time available to discuss them. This resulted in action by the Senate without the creation of any legislative history . . . .  

*Id.* at 13,359. Senator Bennett's observations only underscore the obvious, that the meager colloquy accompanying his amendment cannot support the exemption of major discriminatory compensation practices from the reach of Title VII.  

The courts in *Gunther* and *IUE*, however, did not rely solely on linguistic or historical evaluations to support their legal conclusions. Both the Ninth and Third Circuits consulted the interpretations of administrative agencies responsible for enforcing the legislation and judicial case law touching on the issue of equal pay for comparable work.\(^{222}\)

**ADMINISTRATIVE INTERPRETATIONS**

Congress has created a number of administrative agencies to address the problem of sex discrimination.\(^{223}\) Initially the Equal Em-

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223. The differing responsibilities and enforcement procedures of the EEOC and the Labor Department provide the potential plaintiff with various avenues to process his complaint. To aid in the administration of Title VII, Congress created the EEOC. 42 U.S.C. § 2000e-4 (1976). Although the original version of Title VII did not contain any specific requirements, the Supreme Court held that an individual must initiate his charge of discrimination with the EEOC before bringing it to the attention of the courts. *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972). Under the original version of Title VII, the EEOC had no enforcement function other than the voluntary compliance it could induce. See, e.g., *Stebbins v. Continental Ins. Co.*, 442 F.2d 843 (D.C. Cir. 1971); *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136 (5th Cir. 1971); *Johnson v. Seaboard Air Line R.R.*, 405 F.2d 645 (4th Cir. 1968).

In considering the initial creation of the EEOC, the Committees on Education and Labor in the House favored stronger enforcement measures. Their proposal for NLRB-like procedures suffered defeat because of congressional fear of agency interference in private decisionmaking. See *Blumrosen, Processing Employment Discrimination Cases*, 90 MONTHLY LAB. REV. 25 (1967); *Kanowitz, supra* note 48, at 318-19.

During the past decade under the Equal Pay Act, the courts have had considerably greater opportunity to reveal their response to sex discrimination than has been the case under Title VII. This is because from the start of the EPA, the Secretary of Labor had authority to seek court enforcement, including explicitly restitution of back pay.


The passage of the Equal Employment Opportunity Act altered the administrative situation. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e-5(a) to (j) (1976)). The act amended Title VII, but retained the general scheme of the prior law, requiring the initial conciliation process through EEOC auspices. As amended, Title VII also now authorizes the EEOC, in cases involving discriminatory practices in the private sector, to bring a civil action against a respondent when it cannot conciliate. The ability to bring a civil action will increase the volume of sex discrimination litigation under Title VII. *Ross & McDermott, The Equal Pay Act of 1963*, 16 B.C. IND. & COMM. L. REV. 1 (1974).
ployment Opportunity Commission (EEOC) was to administer Title VII,\textsuperscript{224} and the Department of Labor was to enforce the Equal Pay Act by virtue of its status as an amendment to the FLSA.\textsuperscript{225} Both agencies promulgated guidelines that the courts consulted in interpreting the scope of relevant legislation governing sex discrimination.

Generally, in applying legislative provisions to varying factual situations, courts must give "great deference" to the regulations of the administrative agencies charged with enforcement of those provisions.\textsuperscript{226} As stated by the Supreme Court in *Skidmore v. Swift*,\textsuperscript{227} the regulations serve "as a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it."\textsuperscript{228}

Initially charged with enforcement of the Equal Pay Act, the Labor Department\textsuperscript{229} promulgated its own guidelines in the area of sex-based wage discrimination. The agency's interpretations of the Equal Pay Act's relationship to other pay laws finds expression in a 1967 bulletin that reads:

[T]he provisions of various State or other equal pay laws may

\textsuperscript{224} The Civil Rights Act created the EEOC to enforce the statute's equal employment provisions, but Congress gave it neither formal rulemaking power nor adjudicatory power. See General Elec. Corp. v. Gilbert, 429 U.S. 125, 141 (1976); 42 U.S.C. § 2000e-4(a) to (g) (1976).


\textsuperscript{227} 323 U.S. 134 (1944).


\textsuperscript{229} See note 225 & accompanying text supra.
differ from the equal pay provisions set forth in the [FLSA]. ... No provisions of the [FLSA] will excuse noncompliance with any State or other law establishing equal pay standards higher than the equal pay standards provided by section 6(d) of the [FLSA].

Clearly the Labor Department approves the use of antidiscrimination laws other than the Equal Pay Act. Although not directly interpreting the Bennett Amendment, the Labor Department bulletin left open the possibility that Title VII might establish a higher equal pay standard.

1965 Guidelines

In 1965 the EEOC promulgated a guideline interpreting the scope of the Bennett Amendment:

Title VII requires that its provisions be harmonized with the Equal Pay Act in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly the Commission interprets 703(h) to mean that standards of equal pay for equal work set forth in the EPA for determining what is unlawful discrimination in compensation are applicable to Title VII.

This guideline is open to two interpretations. The district court in IUE reasoned that the guidelines intended that the Equal Pay Act standard control all sex-based wage discrimination cases, whether...

231. 30 Fed. Reg. 14,925, 14,928 (1965) (formerly codified at 29 C.F.R. § 1604.7 (1965)).
232. Id. The guideline continued:

However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other provisions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
(b) Accordingly the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Dept. of Labor. . . . Relevant opinions of the Administrator interpreting “the equal pay for equal work standard” will also be adopted by the Commission.
(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

Id.
a claim were raised under either the Equal Pay Act or Title VII. Conversely, the Third Circuit in *IUE* and the Ninth Circuit in *Gunther* determined that the 1965 guidelines were intended to apply only to situations in which both statutes are applicable—that is, equal pay standards control only if equal work complaints arise under either statute.

After publication of the 1965 guidelines, the EEOC issued a number of decisions in "comparable work cases." The tenor of these decisions indicates that the EEOC did not deem a finding of "equal work" necessary to state a claim of wage discrimination based on sex under Title VII. The EEOC considered the availability of a defense under the Bennett Amendment, but rejected it:

Section 6(d) of the [FLSA] "authorizes" a pay differential for equal work when certain conditions are met. Here we are not concerned with a situation encompassed by the Equal Pay Act in that "equal work" is not involved. Our concern is with policy which we have found is being administered by Respondent Employer in a manner intended to provide benefits to males without providing equivalent benefits to females.

. . . . Since the policy at issue here is not within the intended scope of the Equal Pay Act, it clearly cannot be "authorized" by the Act within the meaning of Section 703(h) of Title VII.

In a number of these cases, the EEOC found discrimination present when the employer created lower pay scales for jobs held predominantly by women in sex-segregated work forces. Thus, the Commission's consistent position has been that the depression of wages for females in sex-segregated jobs constitutes a violation of Title VII.

236. See authorities cited note 234 *supra*.
1972 Guidelines

In 1972 the EEOC promulgated a second guideline that read:

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII are co-extensive with that of the other prohibitions contained in Title VII . . . .

(b) By virtue of section 703(h) a defense based on the EPA may be raised in a proceeding under Title VII.237

The district court in IUE noted that "[t]he 1972 guideline is not expressly inconsistent with the 1965 ruling, in that it doesn't reject the 'equal work' formula . . . but the implication is clear. The Commission's omission of language expressly incorporating the equal work formula is intended to show that the Commission now disapproves of that language."238 In language more explicit than the 1965 guidelines, the 1972 guidelines support the broad interpretation of the Bennett Amendment. The guidelines speak of sex discrimination in the same terms as other forms of discrimination. Moreover, the decisions of the EEOC under the 1965 guideline clearly establish that the purpose of the 1965 guideline was merely to ensure that equal pay standards controlled equal pay claims filed under Title VII. No inconsistency is apparent between the 1965 guideline and the 1972 guideline; therefore, the 1972 guideline is entitled to "greater deference" by the courts.239 In addition, the courts accord great deference to administrative interpretations that an agency has maintained over a substantial period of time.240 The EEOC consistently has interpreted the Bennett Amendment to render Title VII independent of the Equal Pay Act. Therefore the 1972 guidelines ought to receive prominence in judicial consideration of "equal pay for comparable work" decisions.

Following the 1972 regulations, the EEOC continued to articulate and to further the acceptance of the broad interpretation of the Bennett Amendment. The transfer of power over the Equal

237. 29 C.F.R. § 1604.8 (1979). "Where such a defense is raised the Commission will give appropriate consideration to the interpretations of [the Department of Labor], but will not be bound thereby." Id.
Pay Act from the Labor Department to the EEOC aided in this activity.\textsuperscript{241} Shortly after the transfer became effective, the EEOC announced that it would not adopt the former Labor Department guidelines interpreting the Equal Pay Act, but that it would issue its own interpretations later in 1978.\textsuperscript{242}

The EEOC has emphasized that a primary concern of the agency in drafting regulations pursuant to its transferred authority is the proper interpretation of the Equal Pay Act and Title VII.\textsuperscript{243} EEOC Vice-chairman Daniel Leach stated:

The EEOC reads the language of the Bennett Amendment and the underlying legislative history to mean that Congress understood that discrimination is often subtle and complex—and intended the law to root out and remedy the discrimination which is not readily apparent. This agency reads this to mean that Title VII is broad enough to reach this form of wage inequality.\textsuperscript{244}

The EEOC's commissioning of the National Academy of Sciences (NAS) to conduct studies relative to wage rate discrimination supports the inference that the EEOC will attempt to prove undervaluation of female employment according to a "comparable worth"

\textsuperscript{241} In an attempt to centralize governmental enforcement of federal equal employment legislation, President Carter transferred to the EEOC authority to enforce the Equal Pay Act provisions. The measure was adopted pursuant to the Reorganization Plan No. 1 of 1968, 3 C.F.R. 1061 (1966-1970 compilation), reprinted in 5 U.S.C. app., at 817 (1976), which grants to the executive the power to reorganize agencies in the interest of governmental efficiency. \textit{Id}. In the following request for comment, the Commission itself highlighted the significance of this transfer of authority to the specific issues considered in this Note.

On July 1, 1979, the Commission assumed jurisdiction over the Equal Pay Act pursuant to Reorganization Plan No. 1 of 1978. For the first time, the Commission is responsible for the orderly and harmonious interpretation of both the Equal Pay Act and Title VII as they relate to discrimination on the basis of sex.

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\ldots [B]y and large, neither the Equal Pay Act nor the more general prohibition of Title VII on employment discrimination because of \ldots sex \ldots have been applied to the question of wage rates paid for jobs into which minorities and women have been traditionally segregated.


\textsuperscript{244} \textit{2 EMPLOYMENT PRACTICE GUIDE (CCH) \$ 5070} (1978).
standard.\textsuperscript{245} Employees should receive equal pay for work of equal value to the employer, based on an objective assessment of value.\textsuperscript{246}

The characteristics of the NAS proposed job evaluation plan\textsuperscript{247} further the broad interpretation of the Bennett Amendment. For example, the guidelines encourage comparison of wage rates and job worth of any pair of jobs in an enterprise.\textsuperscript{248} The guidelines make no mention of equal job content as a prerequisite in evaluating the relative worth of differing types of employment.\textsuperscript{249} Moreover, the NAS asserts that the means to eliminate the subtle discrimination and undervaluation of women's work is to have job evaluation systems that clearly delineate the criteria for measuring the worth of a job.\textsuperscript{250} Once dissemination of these criteria occurs, the employee will know what the specific requisites are for earning a particular level of income, regardless of the differing types of jobs included in the evaluation process. Therefore, the NAS job evaluation plan emphasizes the necessity for litigating equal pay for comparable work cases.

The evolution of the EEOC's position reflects the progress and problems of women in employment during the seventeen years since the Equal Pay Act was enacted. The superficially simple remedy of equal pay for equal work has proved to be ill-equipped to respond to many of the formidable barriers faced by women entering, reentering, or attempting to improve their position in the nation's work force. The persistently lower average salary of women compared to the average salary of men testifies to the limitations of the Equal Pay Act.\textsuperscript{251} The present EEOC focus on undervaluation, however, may also be indicative of progress. Unequal pay for

\begin{footnotesize}
\begin{enumerate}
\item In June 1980, the NAS proposed guidelines for the construction of equitable job evaluation plans appeared. Although the report emphasizes that the guidelines are proposed only to help those employers who are voluntarily assessing the equity of their job evaluation procedures, it offers employers a thinly veiled ultimatum—follow these guidelines or risk liability for sex discrimination. See National Academy of Sciences, Draft Guidelines on Job Evaluation Plans, DAILY LAB. REP. (BNA) No. 111, at F-1 to F-8 (June 6, 1980).
\item Id. at F-1.
\item See id. at F-7 to F-8.
\item Id. at F-2 to F-5.
\item Id.
\item Id. at F-4.
\item See Herman, supra note 1, at 195-98.
\end{enumerate}
\end{footnotesize}
equal work is far less prevalent today than in 1963. The EEOC is attempting to address through the reinterpretation of dated legislation an aspect of a problem that may be more social than legal. Ultimately, the remedy for sex discrimination, a change in attitudes toward female labor, must originate in three areas, congressional legislation, judicial decisions, and administrative agencies, to ensure effective enforcement of the laws.

**JUDICIAL DECISIONS**

The legislative process is an assuredly gradual source of social change. As mounting numbers of equal pay for comparable work cases find their way into the federal judicial system, the subtle manifestations of employment discrimination will come under increasing judicial scrutiny. Such judicial decisionmaking will have a more immediate impact on the elimination of sex-based wage discrimination than legislative initiatives.

Most of the cases dealing with sex-based wage discrimination have not examined the relationship between Title VII and the Equal Pay Act. Many of the decisions have focused on redefining the meaning of such Equal Pay Act standards as “job equality” and “establishment.” Until quite recently the few courts that had analyzed the relationship between the statutes had viewed the issues in the context of plaintiffs alleging unequal pay for equal work. Therefore those courts had not considered the possibility of extending Title VII beyond the Equal Pay Act by granting relief to plaintiffs alleging unequal pay for comparable work.

Although an increasing number of decisions have concerned equal pay for comparable work claims and are continuing to redefine the parameter of the concept, no one case has clearly deline-

252. *Id.*
ated the scope of Title VII's coverage over sex-based wage discrimination. Even the Third Circuit in IUE avoided dealing with the intricacies of equal pay for comparable work claims. Yet the Third Circuit's decision in IUE v. Westinghouse has found the best resolution of the problem thus far: expand the scope of Title VII to subject evidence of intentional discrimination to scrutiny, but with sufficient limits to prevent the judiciary’s unwarranted intrusion into employers’ labor decisions. A brief overview of the development of the case law in the field of sex-based wage discrimination will explicate the strengths and weaknesses of the equal pay for comparable work standard.

The cases dealing with sex-based wage discrimination devolve into three groups: (1) claims alleging unequal pay for equal work under the Equal Pay Act; (2) claims alleging unequal pay for equal work under Title VII; and (3) claims alleging unequal pay for comparable work under Title VII.

**Unequal Pay for Equal Work Under Title VII**

A number of cases interpreting the Bennett Amendment have arisen under Title VII. Three courts of appeals have stated that the plaintiff in a Title VII sex-based wage discrimination case must show unequal pay for equal work. The Tenth Circuit in Ammons v. Zia Co., finding that a female “editor-writer” was not the victim of sex discrimination, stated that “to establish a case of discrimination under Title VII one must prove a differential in pay based on sex, for performing equal work.”

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256. See 23 Fair Empl. Prac. Cas. at 599-600, 604 (Van Dusen, J., dissenting); notes 146-147 & accompanying text supra.
259. 448 F.2d 117 (10th Cir. 1971).
260. Id. at 120. In Ammons, the plaintiff worked as an “editor-writer,” writing operational checklists and maintenance procedures. In addition to her writing tasks, she per-
The decision in *Ammons* contained no discussion of the language of the Bennett Amendment or its legislative history, but merely alluded to it by quoting a part of the Bennett Amendment. Moreover, in each case the plaintiff claimed that although she did equal work, she was not receiving pay equal to that of male employees. Therefore, the courts did not face the question whether a plaintiff could establish a Title VII compensation claim in any other way.

Conversely, two appellate courts' decisions support the broad view of the Bennett Amendment that a female plaintiff can establish a Title VII claim of sex discrimination in compensation without showing that she performed work equal to that of any male employee. In *Roesel v. Joliet Wrought Washer Co.*, the plaintiff argued that her job was equal to that of another female employee, whose pay the employer had raised previously in order to avoid charges of sex discrimination. The United States Court of Appeals for the Seventh Circuit held that the plaintiff could be the victim of discrimination in compensation even though she presented no evidence directly comparing her job with that held by a man. The court held that the employer violated Title VII by paying the plaintiff a lower salary than it would have paid to a

formed general office chores, such as typing, dictation, and answering the phone. Such duties required less responsibility than those assigned to higher paid men. Plaintiff's main allegation was that she was paid less than three men engaged in the same writing tasks. The district court found that the work plaintiff performed was not the same work male writers performed. In affirming the lower court, the court of appeals held that in order to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing "equal work." *Id.*

Similarly, the Fifth Circuit in *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 65 (1975), finding that the duties of the plaintiff as head of the accounting department were dissimilar to the duties of the heads of other departments, concluded that the lack of equal work necessarily precluded a finding of sex-based wage discrimination. *Id.* at 170-71. The plaintiff offered evidence of sex bias, including testimony that the employer would never consider paying a woman more than a man. *Id.* at 171.

*See also* *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978) (Equal Pay Act and Title VII coextensive).


262. 596 F.2d 183 (7th Cir. 1979).

263. *Id.* at 186.

264. *Id.*
man doing the same work.\textsuperscript{266} Therefore, the court allowed the plaintiff to prove that discriminatory motivation influenced her salary, without demanding strict adherence to the equal pay for equal work standard.\textsuperscript{266}

The second appellate court to speak to the issue of "comparable work" via an equal pay allegation under Title VII was the United States Court of Appeals for the District of Columbia in \textit{Laffey v. Northwest Airlines}.\textsuperscript{267} In \textit{Laffey}, the court stated: "The Bennett Amendment refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the EPA."\textsuperscript{268} The court made no mention of the equal work standard as necessary to a Title VII sex-based wage discrimination suit. Although the question of the applicability of the equal work limitation to Title VII turned out to be insignificant in \textit{Laffey} because the court found the jobs to be equal, the District of Columbia Circuit's interpretation of the Bennett Amendment accords with that of the Ninth and Third Circuits.

**Unequal Pay for Comparable Work Under Title VII**

Only a limited number of courts have analyzed equal pay for comparable work issues.\textsuperscript{269} In \textit{Christensen v. Iowa}\textsuperscript{270} plaintiffs

\textsuperscript{265} \textit{Id.} at 187.

\textsuperscript{266} The flexible interpretation of Title VII in \textit{Roesel} has not been expanded to the Equal Pay Act. In \textit{Rinkel v. Associated Pipeline Contractors}, 17 Fair Empl. Prac. Cas. 224 (D. Ala. 1978), the plaintiff, who held a unique position, contended that the court ought to allow her to pursue her Equal Pay Act claim despite the lack of an equivalent position. \textit{Id.} at 226. She maintained that the comparison contemplated by the Equal Pay Act is only an evidentiary device designed to enable the jury to determine if an employee's compensation is unreasonably low. Thus she contended that evidence showing an employer would have paid a male doing her job higher wages is evidence of discrimination. The court rejected her theory, stating, "The Equal Pay Act clearly on its face is intended to prevent an employer from discriminating within any establishment. Thus the comparison referred to in the legislative history ... is not a mere evidentiary device but rather is a part of a substantive claim for relief." \textit{Id.} Therefore under the Equal Pay Act, the statute's narrow standards are enforced strictly, whereas the broad focus of Title VII mandates an attack against any form of sex discrimination.


\textsuperscript{268} \textit{Id.} at 446.


\textsuperscript{270} 563 F.2d 353 (8th Cir. 1977).
based their cause of action on an allegation of unequal pay for comparable work in violation of Title VII. The female plaintiffs were clerical workers at a state university who believed that payment of higher wages to male plant workers of similar seniority constituted sex discrimination under Title VII. The plaintiffs claimed that the higher payment to male workers perpetuated wage differences resulting from past societal discrimination.

Longstanding discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an over-supply of workers and depressed wages in those jobs. Therefore, [the university's] reliance in part upon the prevailing wage rates in determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college.

In response, the university argued that it paid higher wages to male workers because wages in the local labor market were higher, and therefore the university had to pay more to attract applicants. The United States Court of Appeals for the Eighth Circuit held that the plaintiffs failed to demonstrate that the wage differentials between clerical and plant employees resulted from sex discrimination rather than from legitimate motives. Because of the plaintiffs' failure to make out a prima facie case of discrimination, the court did not resolve conclusively the conflict over the interpretation of the Bennett Amendment. Nevertheless, the Eighth Circuit articulated many of the recurrent policy-oriented criticisms of the broad interpretation of the Bennett Amendment. The court could not accept a construction of Title VII that would establish a

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271. Id. at 354.
272. Id.
273. Id. at 355-56.
274. See id. at 355.
275. Id. "By way of distinction to the facts of the case, we might note that if the record had established that the university relied on prevailing community wage rates in setting pay scales for male-dominated jobs but paid less than community wages for jobs primarily staffed by women, we would necessarily reach the Bennett Amendment issue." Id. at 355 n.5.
276. Id. at 355.
SEX-BASED WAGE DISCRIMINATION

prima facie violation of Title VII whenever “employees of different sexes receive disparate compensation for work of differing skills . . .” In the court’s view, such a construction ignores the market reality that wages are not determined solely by the value of a job to an employer; the supply of workers and the demand for their services often dictate the employees’ level of income. Therefore, merely demonstrating that two workers of different sexes receive different income does not prove sex-based wage discrimination.

In Christensen, the court did not preclude a finding of sex-based wage discrimination under Title VII if plaintiff presented evidence of intentional discrimination. Rather, the decision prohibited only those claims of sex-based wage discrimination that rested solely on statistics showing wage differentials as proof as discrimination.

In Lemons v. City and County of Denver, the United States Court of Appeals for the Tenth Circuit grappled with issues closely resembling those confronted in Christensen. Seeking reclassification of their jobs, nurses employed by the city of Denver argued that, for the purpose of wage determination, the city should compare their salaries with those of nonnursing positions of equal worth to the city and not with salaries of other nurses employed in the community because nurses historically have been undercompensated. The court held that Congress did not intend Title VII to remedy this type of wage disparity and refused to grant relief.

The courts under existing authority cannot require the city

277. Id. at 356.
278. Id.
279. The court stated:
We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

Id. (footnoted omitted).
280. Similarly, in Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977), the court held that mere proof that the average pay of male college professors exceeded the average pay of female college professors did not establish a prima facie violation of Title VII. In this case, the court required “substantial equality” between the jobs under comparison. Id. at 580.
281. 22 Fair Empl. Prac. Cas. 959 (10th Cir. 1980).
282. Id. at 959.
within its employment to reassess the worth of services in each position in relation to all others, to strike a new balance in the relationship. . . . Plaintiffs herein are not seeking equality of opportunity for their skills as contemplated by Title VII . . . but would instead cross job description lines in areas of entirely different skills.\(^{283}\)

By denying relief in the absence of proof of intentional discrimination, the courts in *Christensen* and *Lemons* acknowledged the need for some limitation on a Title VII cause of action alleging unequal pay for comparable work. Without a narrowly defined cause of action, the floodgates would open to allow discrimination claims based on all types of job comparisons.\(^{284}\) Other courts likewise have achieved this narrowing by allowing only those claims turning on intentional discrimination. In *Fitzgerald v. Sirloin Stockade*,\(^{285}\) the Tenth Circuit allowed a plaintiff to prove discrimination without the equal work standard because she presented extensive evidence of the intentionally discriminatory practices of her employer.\(^{286}\) The court did not construe the Bennett Amendment as making the Equal Pay Act coextensive with Title VII, but neither did the court allow litigation of all claims of equal pay for comparable work. Rather, the Tenth Circuit struck the balance eventually adopted by the Third Circuit that evidence of intentional discrimination may provide the basis for a cause of action under Title VII without the equal pay for equal work standard.\(^{287}\)

Unlike the Third Circuit, the Ninth Circuit’s decision in *Gunther* did not adopt a restrained approach. The Ninth Circuit’s initial decision in *Gunther* contained a holding so broad as to allow a plaintiff to litigate any type of discrimination under Title VII.\(^{288}\) After *Gunther*, courts almost certainly would compare different

\(^{283}\) *Id.* at 959-60.

\(^{284}\) “I am unable to believe that the Congress of the United States has mandated that every person in the U.S. be evaluated skillwise, productive-wise and otherwise to the job of every other person, and they have a completely new pay scale set up by some group of experts . . . .” *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906, 909 (D. Colo. 1978), *aff’d*, 22 Fair Empl. Prac. Cas. 959 (10th Cir. 1980).

\(^{285}\) 22 Fair Empl. Prac. Cas. 262 (10th Cir. 1980).

\(^{286}\) *Id.* at 267-68.

\(^{287}\) *Id.*

types of jobs to discern evidence of discrimination. Subsequently, the Ninth Circuit recognized the error in such an expansive holding and, in an opinion denying a petition for rehearing en banc to the appellants in Gunther, limited its initial stance: "We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case."289

The Third Circuit in IUE v. Westinghouse heeded well the Ninth Circuit's retreat from an overly expansive reading of Title VII by holding that "intentional discrimination in formulating classifications of jobs violates Title VII . . . ."290 By phrasing its decision in terms of intentional discrimination manifested through the use of job classification systems, the court attempted to avoid extreme pronouncements. Because the court recognized the invidious nature of sex-based wage discrimination, it could not accept an interpretation of the Bennett Amendment that would protect intentionally discriminatory employment practices. Yet the court was also aware of the case law preceding its decision and did not want to repeat the errors of the Ninth Circuit's initial decision in Gunther.291 Therefore, the Third Circuit's decision allows plaintiffs to bring a cause of action alleging intentional discrimination, but does not permit suits based on allegations that an employer discriminated by perpetuating general societal undervaluation of "women's work."292

290. 23 Fair Empl. Prac. Cas. 588, 590 (3d Cir. 1980).
291. See id. at 598 & n.18.
292. The primary failure of the Third Circuit's decision was its reluctance to articulate starkly its position. One could interpret the decision as allowing employees to allege sex-based wage discrimination founded solely on the evidence that other employees received higher pay for comparable work. The courts would then be forced to evaluate the worth of differing types of jobs. 23 Fair Empl. Prac. Cas. 588, 598-600 (3d Cir. 1980) (dissenting opinion). Clearly, the majority's opinion would not allow a plaintiff to prove discrimination simply by alleging differentials in pay. Rather, the plaintiff must prove that his employer intentionally discriminated against him via some particular term or condition of employment. The dissent mistakenly believed that the majority's decision in IUE was as broad as the Ninth Circuit's initial decision in Gunther. The cause of this misinterpretation lies with the failure of the Third Circuit to enunciate clearly the rationale for its narrow position.
Equal Scrutiny of Sex and Race Discrimination Under Title VII

Whether the Supreme Court will approve the Third Circuit's interpretation of the Bennett Amendment remains to be seen. The Supreme Court has never addressed itself directly to the proper interpretation of the amendment. Nevertheless, one may glean some guidance from the Court's decisions in related areas. For example, in *Corning Glass Works v. Brennan*, the Court noted that the Equal Pay Act prohibited paying women less for jobs identical to those performed by men. Although the Court did not discuss Title VII implications, its rejection of sex-based "market forces" as an affirmative defense under the factor-other-than-sex category may lend support to a Title VII argument for the insufficiency of such an employer justification.

Prominent among the Supreme Court decisions offering guidance is *City of Los Angeles, Department of Water & Power v. Manhart*, showing the Court's equation of sexual and racial discrimination. In *Manhart*, the Court held that an employer cannot lawfully require female employees to make larger contributions to its pension fund than its male employees, even though women on the average live longer than men and therefore likely will re-

The court could have avoided causing further confusion as to the scope of Title VII by simply stressing the dangers inherent in a "comparable worth" approach. The court's failure to rebut these concerns left ambiguities in the decision amenable to further misconstruction by courts in future decisions.

294. Id. at 204-05.
296. The use of Supreme Court treatment of race discrimination to support a Title VII cause of action alleging unequal pay for comparable work is not novel; courts regularly apply race discrimination precedents in sex discrimination cases. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). In *Willingham v. Macon-Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), the Fifth Circuit stated:

The language of the Supreme Court in *Griggs* regarding racial discrimination applies with equal (but not greater) force to sexual discrimination: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past in favor of an identifiable group of white employees over other employees."

*Id.* at 1091 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).
ceive larger pension payments for a longer period of time.\textsuperscript{297} The Court observed that such a practice would be plainly unlawful if based on race: "Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market could not reasonably be construed to permit a take-home-pay differential based on a racial classification."\textsuperscript{298} Because "Congress had decided that classifications based on sex, like those based on national origin or race are unlawful,"\textsuperscript{299} the Court held that the sex-based differential at issue in \textit{Manhart} was likewise unlawful. Discrimination in wages on the basis of sex is not different in kind from discrimination on the basis of sex in fixing payments for pension benefits. The Supreme Court holding that such differentiation violates Title VII thus supports the position that allegations of lowered wages on the basis of sex states an offense under Title VII and that a broad interpretation of the Bennett Amendment is consistent with eradicating such discrimination. The alternative view, reading the Bennett Amendment as an incorporation of the equal pay for equal work formula into Title VII, would provide women with a weaker remedy under Title VII than is available to blacks or other protected classes.

The United States District Court for the Northern District of California recognized the possibility of such a result in \textit{Patterson v. Western Development Laboratories}.\textsuperscript{300} In that case, the court resolved the problem of different coverage for women and other protected groups by holding that the Bennett Amendment applied to race as well as sex claims.\textsuperscript{301} The result reached in \textit{Patterson} is inappropriate because it applied the vague language of a sex discrimination amendment to a situation of race discrimination in which a sex discrimination provision clearly did not apply. \textit{Patterson} implicitly recognized, however, that the language of Title VII is broad enough to cover salary discrimination in unequal jobs. The court also reached the sound conclusion that nothing in Title VII should serve to provide women with less protection than that pro-

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\item[]\textsuperscript{297} 435 U.S. at 709-11.
\item[]\textsuperscript{298} \textit{Id.} at 709 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971)).
\item[]\textsuperscript{299} \textit{Id.}
\item[]\textsuperscript{300} 13 Fair Empl. Prac. Cas. 772 (N.D. Cal. 1976).
\item[]\textsuperscript{301} \textit{Id.} at 775.
\end{enumerate}
vided to other minorities.302

In spite of the disparate protection of females that a narrow interpretation of the Bennett Amendment permits, however, other lower federal courts have avoided broadening Title VII to encompass equal pay for comparable work claims. In Willingham v. Macon-Telegraph Publishing Co.,303 the Fifth Circuit found that the attenuated history of the sex amendment to Title VII indicated that Congress probably did not intend for its proscription of sexual discrimination to have significant and sweeping implications. The court, therefore, declined to extend the scope of Title VII to situations of "questionable application" without some stronger congressional mandate.304 The United States Courts of Appeals for the District of Columbia,305 Second Circuit,306 Fourth Circuit,307 Sixth Circuit,308 and Ninth Circuit309 have reached similar results.

Although the narrow approach of these cases is plausible, the

302. Although the bona fide occupational exemption contained in § 703(e) does not apply to racial discrimination, the exception does apply to discrimination based on religion or national origin. Furthermore, the bona-fide-occupational-qualification exception applies only to the hire or employment of workers, and not to compensation. See 42 U.S.C. § 2000e-2(e) (1976). The courts and the EEOC have held that the bona fide occupational qualification requires a narrow interpretation. See Rosenfeld v. Southern Pac. Ry., 444 F.2d 1219 (9th Cir. 1971); 29 C.F.R. § 1604.1(a) (1979). For further discussion, see notes 92-94 & accompanying text supra.

303. 507 F.2d 1084 (5th Cir. 1975) (en banc).

304. Id. at 1090. The court seemed to be struggling to articulate a theory to justify employer decisions that appear to be reasonable, even though those decisions adversely affect members of a particular sex. Because sex discrimination was not intended to be addressed as thoroughly as race discrimination, employers' decisions affecting members of a particular sex are given more deference than employers' decisions affecting minorities. See id.

For example, in considering challenges to employers' hair grooming codes that establish a different standard for the hair length of male employees than for female employees, the court in Willingham held Title VII inapplicable, even though a standard that treats women differently than men falls within the proscription of Title VII. Id. at 1092. In their haste to find that Title VII does not prohibit this type of minimal infringement on employment opportunities, the court resorted to disturbing dicta, which if taken at face value suggest a cavalier attitude toward sex discrimination in general. See id. at 1090-91. The court in Willingham should have held that a prima facie case had been made under the statute, but that the employers' interest justified the hair length requirements.


language used in support of the result is dangerous because of its assumption that the late addition of sex to Title VII permits sex discrimination to be interpreted more narrowly than the race discrimination cases. Nothing in the legislative history of the sex amendment indicates that Congress intended such a result. Any inferences to that effect were dispelled clearly by the discussions of sex discrimination in the 1972 amendments to Title VII. Both the House and Senate committee reports stated: "This committee believes that women's rights are not judicial diversions. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." Therefore, the only defensible interpretation of the Bennett Amendment and Title VII treats the existence of sexual and racial discrimination as equally wrong, meriting equal determination to rid both from American society.


312. One commentator has observed:

Women continue to be employed largely in the industries that have historically been their source of employment, such as service, wholesale and retail trade and public service sectors. Most of the women who went to work in the last ten years found employment as clerical workers, professional and service workers other than those in households. They have not made large inroads in the more technically oriented industries and occupations.

... [A] difficult problem, which is voiced increasingly is that of the systemic and historical undervaluation of work performed by women.

The Equal Pay Act was directed at such undervaluation but only where women and men were performing essentially the same work in the same establishment. It did not address the more pervasive discrimination which affects women who perform work which although different from that traditionally performed by men, is of equal value. An example would be a highly trained women [sic] court stenographer versus a male compliance officer.

Herman, supra note 1, at 195, 198. See also Gitt & Gelb, supra note 1, at 725-32. Under our present statutory treatment of sex-based wage discrimination, registered nurses in Denver, while earning less than Denver house-painters and tree-trimmers, have no legal remedy on a theory of discrimination in compensation. Washington Post, Nov. 13, 1979, at 85, col.1. The lesser earning power of women has resulted both from unequal pay for equal work and from the much subtler social phenomenon that work traditionally performed by women draws wages inferior to those paid for work performed by men. The Bureau of Labor Statistics based a wage study on the 1970 census and found that the higher the percentage of women
When the equal pay for comparable work issue reaches the Supreme Court, its own precedents in the race discrimination setting and the above statements in the House and Senate committee reports should inform its decision. At that time the Court ought not destroy the force of its former statements decrying sex discrimination by adopting a narrow interpretation of the Bennett Amendment. Rather, the court ought to follow the path of compromise established in IUE, thus reinforcing the value of equal opportunity without interfering with employers’ private decisionmaking.

Economic Objections to the Comparable Work Doctrine

Major obstacles to acceptance of a cause of action alleging unequal pay for comparable work are judicial interference with free market regulation of wages and the lack of objective standards for comparing jobs and their worth. Claims of traditional undervaluation of “women’s work” thus raise numerous practical difficulties for the courts. In the few instances in which this issue has been presented directly to the courts, they have responded by addressing the exclusion of women from the higher paying male jobs, rather than by addressing the underpayment that is attendant to women segregated into women’s jobs. The courts’ reluctance re-

313. The court granted certiorari in Gunther v. County of Wash., 49 U.S.L.W. 3332 (1980) (No. 80-429). Although the Court has not specified the proper interpretation of the Bennett Amendment in an equal pay case, the decision in City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978), addressed similar issues in an analogous context. The Supreme Court in dicta remarked, “All the Bennett Amendment did was to incorporate the exemptions of the EPA into Title VII.” 435 U.S. 702, 709 (1978). See also notes 295-299 & accompanying text supra.

314. For example, in Wisconsin NOW v. Wisconsin, 417 F. Supp. 978 (W.D. Wis. 1976), the United States District Court for the Western District of Wisconsin refused to find discriminatory a merit plan that clearly had a disparate effect on women under the test of Griggs v. Duke Power Co., 401 U.S. 424 (1971), because the merit pay plan itself did not have the effect of excluding any class of persons from employment opportunities. The court found that “the complaint does not allege any discriminatory practice, act, or effect” in the defendant’s hiring, training, or promotion practices. 417 F. Supp. at 982. “[R]ather it alleges numerous ways in which the merit plan has a discriminatory impact on women and minorities.” Id. “[A]n allegation of racial and sexual imbalance is [in]sufficient to state a claim for relief from discriminatory hiring and promotional practices in the absence of any allegation that plaintiff . . . was in some way discriminated against with regard to hiring and promo-
reflects a desire common throughout the United States to preserve the free market system wherein the laws of supply and demand regulate wages. A broad decision, as in *Gunther*, although motivated by the admirable aim to eliminate all sex-based wage differentials, would impinge on the free market system. The lack of standards for evaluating wage discrimination prohibited by Title VII would necessitate an evaluation of employment practices that stretches far beyond the bounds of judicial prerogative or expertise. The courts have never encouraged such a massive intrusion into the sphere of private decisionmaking. The New York law firm of Epstein, Becker, Barsody and Green expressed the concerns of business and labor about the "comparable worth" doctrine:

Moreover implementation would necessitate a massive intrusion and interference with collective bargaining relationships in derogation of long-established and well-supported principles of Federal labor law. Fundamental supply and demand market mechanisms thus would be eliminated from their traditional role in determining wages, in favor of the utilization of a single, grossly subjective factor, the supposed current worth of the job to the employer.

315. [This] is a [comparable work] case which is pregnant with the possibility of disrupting the entire economic system of the United States of America.

... [W]hat he is saying is that I should open the Pandora's box in this case of restructuring the entire economy of the United States of America.

... Neither the Congress of the United States nor the United States Supreme Court ... want Judges to run the country in that fashion.


316. DAILY LAB. REP. (BNA) No. 4, at A-8 (Jan. 7, 1980).

An "equal pay for comparable work" policy addresses wage differences between occupations. Rather than requiring employers to pay equal wages to men and women competing in the same market, the comparable work standard establishes a common price in two unrelated markets. Implicitly, the doctrine rests on the "crowding" view of discrimination: wo-
The Third Circuit's decision in *IUE* has provided a workable compromise: broaden the attack on sex discrimination within the limits of our economic system by allowing claims of unequal pay for comparable work only if accompanied by proof of intentional discrimination. Undoubtedly, at some point the plaintiff still must establish the comparable nature of her work, and over time, courts will be forced, with the aid of experts, to deal with economic valuations. Nevertheless, the Third Circuit's solution narrows the class of plaintiffs. Moreover, the equal protection of females and minorities contemplated by the language and legislative intent behind Title VII demand this judicial foray into heretofore uncharted areas.

**Conclusion**

The Ninth Circuit in *Gunther* and the Third Circuit in *IUE* were the first courts of appeals to attempt exhaustively and analytically to delineate the heretofore ambiguous relationship between Title VII and the Equal Pay Act. The judicial task they faced was essentially a matter of statutory construction, but their decisions have serious implications for the future of labor decisionmaking.

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Advocates of "equal pay for comparable work" argue that differentials result solely from discrimination; hence the removal of wage differentials will erase the effects of prejudice. Yet wage differentials commonly reflect much more than the effects of prejudice. Wage differentials guide labor toward occupations and geographic locations where labor is in short supply, and discourage labor from entering occupations containing excessive labor resources. Clearly the laws of supply and demand govern entry into labor markets and wage rates in labor markets. Moreover, wage rates are influenced by the cost of acquiring skills, the varying productivity of classes of workers, and simply the attractiveness of certain careers and locations. A vast variety of variables influence the setting of wage rates. See C. Lindsay, *Equal Pay for Comparable Work* (1980).

Ideally, the appropriate wage in any occupation exists in the absence of discrimination: teachers' wages may have trended downward by "crowding" into this occupation, but the extent of the depression is unknowable. Teachers may earn less than electricians because teachers' work is more "pleasant," requires more supervision or less skill, or simply because electricians are in shorter supply. Thus mere identification of wage disparities between different jobs does not prove discrimination. See Malkiel & Malkiel, *Male-Female Pay Differentials in Professional Employment*, 63 Amer. Econ. Rev. 693 (1973).

317. See notes 193-209 & accompanying text supra.
The pathbreaking decision in Gunther failed to recognize the dangers inherent in an embrace of an open-ended interpretation of the Bennett Amendment. Although sex-based wage discrimination cannot be justified, its elimination must be achieved through practical solutions. The Ninth Circuit’s solution in Gunther was admirable, but unworkable. Therefore, a much needed narrower decision of the Third Circuit in IUE has enabled the courts to fulfill the antidiscrimination intentions of congressional initiatives without totally disrupting the American economy.

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