Comparable Worth and the Limitations of the Bennet Amendment

Lillian Miller

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol57/iss3/7
COMPARABLE WORTH AND THE LIMITATIONS OF THE BENNETT AMENDMENT


Both the Equal Pay Act of 19631 and Title VII of the Civil Rights Act of 19642 purport to eradicate sex-based wage discrimination. The Equal Pay Act prohibits unequal pay for women who perform work equal to that of men.3 Title VII prohibits compensation discrimination and other forms of employment discrimination on the basis of sex as well as on the basis of race, color, religion or national origin.4 However, despite the Equal Pay Act and Title VII, many women continue to receive less than their equal share of earnings. The relation of women’s median earnings to men’s median earnings is virtually the same today as it was in 1939, before the passage of any federal legislation against wage discrimination.5 Equal compensation for women seems as far away now as it ever did.

A major reason for the lack of women’s economic progress has been that courts have limited application of equal pay legislation to cases in which women’s jobs were substantially the same as men’s jobs.

3. The Equal Pay Act forbids an employer from discriminating: on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work in jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 29 U.S.C. § 206(d)(1) (1976).
4. Title VII provides in pertinent part: It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin, 42 U.S.C. § 2000e-2(a) (1976).
5. In 1939 the median earnings of full time women workers were 58% of the median earnings of men. In 1977 their median earnings had risen to 59% of the median earnings of men. WOMEN IN THE LABOR FORCE: SOME NEW DATA SERIES, U.S. Dept. of Labor, Bureau of Labor Statistics 6-7 (1979) [hereinafter referred to as Bureau of Labor Statistics].
Even for plaintiffs bringing claims under the broad anti-discrimination provisions of Title VII, courts have insisted that the equal work standard of the Equal Pay Act be met. Since most working women still hold the traditionally female jobs of nurse, teacher, secretary and domestic worker, their earnings have been unaffected by federal legislation. The jobs of these women continue to be undervalued and undercompensated because there has been no way to claim equality with traditionally male jobs.

The decision of the United States Court of Appeals for the Third Circuit in *I.U.E. v. Westinghouse Electric Corp.* was a departure from the usual judicial interpretations of the Equal Pay Act and Title VII. In *I.U.E.* the Third Circuit allowed a sex-based wage discrimination claim to be brought under Title VII on the basis of allegations that the plaintiffs performed work comparable to that of more highly compensated males, rather than on allegations of equal work. The kind of comparable work claimed by the *I.U.E.* plaintiffs has also been referred to as "comparable worth," because female plaintiffs in such cases allege that their work is worth as much to their employers as is the work of male employees.

An assertion of comparable worth does not depend upon similarity of skill, effort, responsibility or working conditions. The *I.U.E.* plaintiffs, individual women workers in Westinghouse's Trenton, New Jersey plant and their union, the International Union of Electrical Workers, conceded that men and women at the plant were not doing the same work. However, they contended that Westinghouse intentionally set female jobs at a lower wage rate than male jobs even though the

---

10. A claim of "comparable work" refers to the comparison of jobs which are similar, but which cannot meet the "substantially equal" work standard of the Equal Pay Act. See Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), aff'd 49 U.S.L.W. 4623 (June 8, 1981). "Comparable worth" or "comparable work value," however, are broader terms referring to situations where the two jobs being assessed may be different in nature or content, yet provide the employer with comparable value. Plaintiffs alleging either the larger category of "comparable work" or the subdivision of that category, "comparable worth," rely upon being able to assert a claim under Title VII without proving that the female jobs in question have "substantially equal" skill, effort, responsibility and working conditions as the male jobs receiving a higher wage.

Although the *I.U.E.* court refers to "comparable work," *I.U.E. v. Westinghouse* has also been referred to as a case involving a claim of "comparable worth." See Brown, *The "Comparable Work" Issue—A Title VII Pandora's Box?*, NAT'L L.J., July 28, 1980, at 27, col. 1.
female and male jobs had been given similar evaluation points. The individual women plaintiffs asserted that since their jobs were as valuable to Westinghouse as men’s jobs, they should receive equal pay even though they had not made a showing of equal work. The Third Circuit concluded that an allegation of comparable worth was sufficient for the plaintiffs to state a claim against Westinghouse.

Although the *I.UE.* decision is in keeping with the anti-discrimination spirit of the Civil Rights Act, the court’s analysis was unsatisfactory. This comment will evaluate the *I.UE.* decision in several ways. It will first review the legislative history behind the Equal Pay Act and Title VII and then discuss the traditional judicial interpretations of these statutes. Next, the facts and reasoning of *I.UE.* will be presented and analyzed in light of statutory language, legislative history, Equal Employment Opportunity Commission guidelines on sex discrimination and relevant case law. Finally, the comment will evaluate policy considerations and likely repercussions of the decision.

**The Equal Pay Act**

The first implementation of equal pay for women occurred during World War II when the War Labor Board decided cases in which women claimed that they had been unfairly compensated. After World War II there were equal pay bills introduced in every Congress until finally, in 1963, the Equal Pay Act was passed as an amendment to the Fair Labor Standards Act of 1938. Although most of the previous bills proposed equal pay for comparable work, the

11. Plaintiffs alleged that Westinghouse’s wage structure was based on a system which had been established in the 1930s and which assigned all jobs points for training, knowledge, and responsibility, even though jobs were segregated by sex. 631 F.2d at 1097.

12. Hereinafter referred to in text and notes as the EEOC.


14. Interestingly enough in light of the *I.UE.* decision, the National War Labor Board entertained claims involving comparable worth as well as claims involving equal work. In General Elec. Co. and Westinghouse Elec. Corp., 28 War Labor Reports 666 (1945), the National War Labor Board granted relief on a claim of comparable worth. The women employees in that case, like plaintiffs in *I.UE.*, claimed that the point evaluation system which should have compensated them equally with male employees receiving similar evaluations did not achieve that result.


17. All of the bills listed in note 15 supra contained the word “comparable.” The only bill to be seriously considered before 1963 was H.R. 8898, which was reported out of committee on May
standard enacted under the Equal Pay Act was equal work. The Act was directed at the limited situation of women being denied equal pay when their jobs were virtually identical with those of men. Its goal was to eliminate the employer practice of paying women only a fraction of what was paid to men for doing the same job.\textsuperscript{18} Despite the rigid requirements of the equal work standard, the Equal Pay Act was intended to end sex-based wage discrimination. Its statement of purpose recognizes that wage differentials based on sex hurt commerce, obstruct employer-employee relations and depress living standards.\textsuperscript{19} The Equal Pay Act forbids an employer from discriminating:

on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work in jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.\textsuperscript{20}

After a plaintiff makes a prima facie showing of equal work, the burden then shifts to the employer to demonstrate that the wage differential falls within one of the four exceptions listed at the end of the Equal Pay Act. Pay differentials are allowed if they result from any of the following: a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.\textsuperscript{21} These exceptions to the equal pay for equal work standard may be used by an employer as affirmative defenses to a plaintiff's claim of sex-based wage discrimination.

Although the Equal Pay Act sets out the definite criteria of equal work, equal skill, equal responsibility and similarity of working condi-
Notes and Comments, it has been left to the courts to determine what those criteria of the equal work standard mean. In *Corning Glass Works v. Brennan*, the United States Supreme Court held that paying male night shift inspection workers a higher wage than female day shift inspection workers was a violation of the Equal Pay Act. The Court determined that meeting the equal work standard did not require showing that a woman's job was identical to a man's job. The Court said that a plaintiff need only show that the two jobs were "substantially equal," rather than identical, in skill, effort, responsibility and working conditions. The Court in *Corning* ruled that the two jobs at issue were "substantially equal" since the time of day during which the two groups of employees worked did not constitute a sufficiently different working condition to justify the employer's pay discrimination. Thus the Court held that the female employees should not be paid less than the male employees.

Lower court decisions of claims brought under the Equal Pay Act followed the *Corning* criteria. Although courts have looked beyond nonessential elements of jobs, they have insisted that the plaintiff meet the burden of showing that the female job in question was "substantially equal" to the more highly compensated male job.

**Title VII and the Bennett Amendment**

The goals of Title VII of the Civil Rights Act of 1964 are much broader than the goals of the Equal Pay Act. Title VII has a general proscription against discriminatory compensation rather than a specific equal work standard. In addition, Title VII is concerned with discrimination in hiring and discharging employees as well as with discrimination in compensation and conditions of employment. It is aimed at preventing segregation or classification that works to the detriment of a particular group, whether that group be identifiable by race, color, religion, sex or national origin.

The important question for a plaintiff claiming sex-based wage

---

23. *Id.* at 203. Since the plaintiffs in *Corning* had met the burden of complying with the equal work standard, it was then up to the employer to show that the wage differential was covered by one of the exceptions listed in the Equal Pay Act. The employer in *Corning* made no such showing.
26. *Id.*
discrimination is whether she can bring a discriminatory compensation case under Title VII without having to satisfy the equal work standard of the Equal Pay Act. The answer to this question depends upon an analysis of the Bennett Amendment to Title VII. The Bennett Amendment links the Equal Pay Act to Title VII. The extent of the linkage is uncertain because of ambiguity in the language of the Bennett Amendment. The amendment reads as follows:

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 if such differentiation is authorized by the provisions of [the Equal Pay Act].

There have been two different interpretations of the Bennett Amendment, both of which are based upon the words "authorized by the provisions of [the Equal Pay Act]." One interpretation has been that the Bennett Amendment has incorporated all of the Equal Pay Act, including its equal work standard, into Title VII and that no sex-based wage discrimination claim can be brought under Title VII unless there is a showing of equal work. The other interpretation has been that the Bennett Amendment incorporated into Title VII only the four specific defenses of the Equal Pay Act: a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or a differential based on any factor other than sex. Three of those defenses are also expressly recognized by Title VII without reference to the Equal Pay Act. Advocates of this second interpretation have reasoned that since unequal compensation is prohibited by Title VII, instances of unequal compensation that are not covered by the affirmative defenses should be illegal even if the equal work standard is not met.

Clear interpretation of the Bennett Amendment is difficult not

27. Theoretically, Title VII and the Equal Pay Act work together. The Equal Pay Act provides a remedy for "equal pay for equal work" violations and Title VII provides a remedy for the broader category of "employment discrimination." Whether this broader category extends beyond "equal pay for equal work" cases to "comparable worth" situations as well, however, depends upon interpretation of the Bennett Amendment's limitations.
29. Id.
30. This has been the traditional approach of lower courts. See note 24 supra for a list of cases.
32. The three defenses listed in Title VII are: a seniority system, a merit system and a system which measures earnings by quantity or quality. These defenses appear in § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976), in the sentence immediately preceding the Bennett Amendment. See note 118 infra for entire text of sentence.
only because of the paucity of information about the amendment itself but also because the scant legislative history behind the anti-sex discrimination provision of Title VII is so ambiguous. The main thrust of the Civil Rights Act was intended to be against racial discrimination. Up to two days before the bill that was to become the Civil Rights Act of 1964 was sent to the Senate, sex had not been included as a protected category. On February 8, 1964, Representative Smith of Virginia moved to amend the bill by adding the word "sex" after the word "religion." Although the amendment passed two days later, there are indications that Smith hoped to defeat the Civil Rights Act through his amendment. Groups such as the Women's Bureau of the U.S. Department of Labor and the American Association of University Women were opposed to including sex in Title VII. According to Representative Green, those who supported the inclusion of sex in Title VII were legislators who wished to defeat the Civil Rights Act. Representative Green said that such an inclusion would only clutter the bill and "jeopardize our primary purpose." The bill did pass even though most Congressmen who spoke for the Smith amendment voted against the bill.

The legislative history surrounding the Bennett Amendment is as vague as that surrounding the Smith Amendment. In fact, there is even less information available about the Bennett Amendment. Only three senators commented on the amendment before it was passed. In introducing the amendment, Senator Bennett of Utah said that the purpose of his amendment was to "provide that in the event of conflicts the provisions of the Equal Pay Act shall not be nullified." Senator Humphrey spoke next and simply said that "[t]he amendment of the Senator from Utah is helpful. I believe it is needed." Last to speak was Senator Dirksen, who said that all the amendment did was recog-

33. See notes 39-44 infra and accompanying text.
34. 110 CONG. REC. 2577 (1964).
35. Id. Representative Smith introduced the proposed amendment by reading from an obviously frivolous letter from a constituent who complained about the lack of men available for marriage. Thus, Smith seemed to be illustrating how ludicrous he thought his own amendment was. Representative Smith was a Southern Democrat who ultimately voted against the Civil Rights Act. Id.
36. Id. at 2577, 2582.
37. Id. at 2581.
38. Those Congressmen seeming to support the amendment but voting against the Civil Rights Act included Representatives Smith, Andrews, Dowdy, Gary, Gathings, Huddleston, Pool, Rivers, Tuten, and Watson. Id. at 2804-05, 15,897 (1964).
39. Id. at 13,647 (1964).
40. Id.
nize the exceptions that are carried in the Equal Pay Act. These comments do little to determine whether the Bennett Amendment referred to the entire Equal Pay Act or just to the four defenses. Senator Bennett's concern with nullification would seem to speak to incorporating the entire Equal Pay Act, including the equal work standard. However, Senator Dirksen's focus on the exceptions makes plausible the counter interpretation of including only the defenses into Title VII.

In commenting upon the Bennett Amendment, courts have given varying weight to *ex post facto* statements of senators who had voted for the Civil Rights Act. Even Senator Bennett's own statement that in his opinion Title VII incorporated the entire Equal Pay Act has not been treated as an authoritative interpretation. Since the explanation was made a year after the amendment was passed, courts have been unsure as to how much weight to attribute to it.

The United States Supreme Court has stated that Title VII should be used 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." However, no Supreme Court decision has analyzed the Bennett Amendment to determine whether the equal work standard is a limitation on Title VII. Moreover, lower court interpretations of the Bennett Amendment have traditionally appeared only in cases in which plaintiffs had met their burden of showing equal work. In these cases courts did not have to confront the issue of whether there could be equal pay if there was not

41. *Id.*

42. In General Elec. Co. v. Gilbert, 429 U.S. 125, 144 (1976), the United States Supreme Court quoted Senator Humphrey's statement that the Bennett Amendment allowed a continuation of social security benefits which provide differently for men and women. The Court inferred from this statement that the entire Equal Pay Act had been incorporated into Title VII. *But see Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 589 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978),* where the Ninth Circuit said Humphrey was erroneous in his interpretation of how the Bennett Amendment affected social security payments.

43. 111 CONG. REC. 13,359 (1965).

44. *See text accompanying notes 72, 73 & 87 infra.*

45. Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976). In *Bowman* the Court cited Senator Humphrey's remark that the Bennett Amendment was not designed "to alter the meaning of Title VII, but rather merely [to] clarify[] its present intent and effect." *Id.* at 761. Since *Bowman* involved a claim of racial discrimination the Court's observation about the Bennett Amendment is merely dictum.

46. In General Elec. Co. v. Gilbert, 429 U.S. 125, 143-45 (1976), the Supreme Court indicated that the Bennett Amendment incorporated all of the Equal Pay Act into Title VII. However, since *Gilbert* was a claim about pregnancy benefits rather than wage discrimination, the Court's interpretation of the Bennett Amendment is considered dictum. *But see note 41 on page 762 infra.*

equal work. Relief under Title VII was refused unless the equal work test was met. 48

Until very recently, courts have avoided saying anything about the Bennett Amendment in relation to comparable work claims. For example, in Christensen v. Iowa; 49 the plaintiffs asserted that their jobs as female clerical workers at the University of Iowa had received similar point evaluations and hence were in the same labor grade as the physical plant jobs held predominantly by male workers. 50 The Eighth Circuit said that because the plaintiffs had not demonstrated that the jobs in question were “substantially equal” to each other there was no need to reach the question of interpreting the Bennett Amendment. Because the court saw the equal work standard as a limitation on Title VII, it found analysis of the amendment unnecessary. 51

Since 1979, however, there have been two cases prior to I. U. E. in which courts of appeals have analyzed the Bennett Amendment within

48. In Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), the Third Circuit considered the relationship between the Equal Pay Act and Title VII. The court said that both statutes should be read together so that the Equal Pay Act could not be construed through the Bennett Amendment as undermining the Civil Rights Act. The Wheaton court found that the employer’s motive in giving male selector-packers a 10% higher wage than women selector-packers was discriminatory. Women selector-packers were not called upon when it occasionally was necessary to move crates and bottles, even though they were capable of doing that work. The higher pay to men did not make sense because the additional “flexible” tasks they were asked to do were usually paid at a lower rate than the duties the men shared with the women. Some of the language in Wheaton sounds like comparable worth language. For instance, in assessing the wage differential, the court looked at the economic value of the jobs in question: “[T]here is no finding of the economic value of the element of flexibility on which the district court justified the 10% discrimination in pay rate between male and female selector-packers.” Id. at 264.

Despite the Wheaton court’s recognition of employer motivation, economic value of jobs and significance of Title VII’s broad anti-discrimination policy, Wheaton remains an equal work case. In the court’s view the plaintiffs had met their burden of showing that the job of women selector-packers was substantially equal to the job of men selector-packers. Therefore, the court did not have to consider whether the Bennett Amendment applied to cases of comparable worth. Despite the Wheaton court’s identification of the goals of the Equal Pay Act with the goals of Title VII, the court did not answer the question of the extent to which the Equal Pay Act was incorporated into Title VII.

Decisions after Wheaton continued to hold that claims brought under Title VII must make a showing of equal work. See, e.g., Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

49. 563 F.2d 353 (8th Cir. 1977).
50. Id. at 354. In 1974 the Iowa State Board of Regents had instituted an evaluation structure called the Hayes System which attempted to assess the worth of jobs regardless of market rates. Jobs with similar point evaluations were placed in the same labor grade regardless of job content. Id.
51. Id. at 356. The Christensen court interpreted the purpose of Title VII as the opening up of hiring opportunities. Since both clerical jobs and physical plant jobs were open to men and women, the court found no violation of Title VII. The court also stressed the importance of market realities in setting wages. Perhaps fearing the consequences of “comparable worth,” the Christensen court expressed an unwillingness to interfere with those realities by telling the employer to restructure wage rates. Id.
the context of deciding a comparable work claim. These cases are *Gunther v. County of Washington*⁵² and *Lemons v. City of Denver.*⁵³ In *Gunther* the Ninth Circuit held that sex-based age discrimination claims could be brought under Title VII even if there was no showing of "substantially equal" work. Plaintiffs in *Gunther* were female prison guards whose work entailed effort and responsibility which was significantly different from the work of male prison guards.⁵⁴ The court's analysis of the Bennett Amendment led to the conclusion that the entire Equal Pay Act applies to Title VII cases only when plaintiffs make a claim of "substantially equal" work. According to the *Gunther* court, plaintiffs can claim discriminatory compensation without an equal work allegation because Title VII is not limited by the equal work standard.⁵⁵

In contrast to *Gunther*, the decision of the *Lemons* court was consistent with the traditional judicial interpretation⁵⁶ that the Bennett Amendment incorporated the equal work standard into Title VII. The plaintiffs in *Lemons* were nurses who wanted to be paid on a scale equal to jobs in the community other than those of nurses. They argued that, since nurses had been historically underpaid and since nurses had almost universally been women, the City of Denver was engaging in sex discrimination by perpetuating the pattern of paying nurses low wages. The Tenth Circuit held that because the plaintiffs had not shown that their work was equal to the work of those in the General Administrative Series category with which they sought comparison, there was no reason to grant the plaintiffs relief.⁵⁷

As illustrated by the judicial interpretations of the Equal Pay Act and Title VII, comparable worth has only recently been recognized as a viable claim. The fact that the *Gunther* court and the *Lemons* court did

---

⁵² 623 F.2d 1303 (9th Cir. 1979), aff'd, 49 U.S.L.W. 4623 (June 8, 1981).
⁵³ 620 F.2d 228 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980).
⁵⁴ 623 F.2d at 1308. The male guards were in charge of more than ten times as many prisoners as were the female guards. The female guards did a large amount of clerical work while the males did very little.
⁵⁵ *Id.* at 1311, 1313. Since *Gunther* did not involve claims of jobs having comparable value to the employer, it is not considered a comparable worth case. However, the *Gunther* court's allowing a claim based on comparable work—i.e., similar jobs that do not meet the equal work standard—can be considered a break-through for comparable worth. Both comparable work and comparable worth depend upon going beyond the equal work standard. See notes 10 & 27 supra.
⁵⁶ See notes 9 & 24 supra.
⁵⁷ In the *Lemons* court's view, the Civil Rights Act is supposed to create hiring opportunities, not compensate for disparities which have resulted from past attitudes and practices. Citing Christensen, the *Lemons* court said there is no sex-based wage discrimination claim for plaintiffs who cannot show equal work. Furthermore, the Tenth Circuit stated that employers are not required by the Civil Rights Act to ignore the market in setting wage rates for job classifications. 620 F.2d at 229-30.
not agree in their analyses of the Bennett Amendment makes *I.U.E. v. Westinghouse Electric Corp.* an especially significant decision.

**I.U.E. v. Westinghouse Electric Corp.**
**The Trial Court Decision**

The plaintiffs in *I.U.E.* based their allegations on a wage structure instituted by Westinghouse in the late 1930s. Numerical points, given on the basis of knowledge, required training, specific demands and responsibilities, had been assigned by Westinghouse managers to various job classifications. The total number of points determined the "grade" at which each job was evaluated; the grade, in turn, determined the hourly wage rate. Under this structure female jobs had been paid on a lower wage curve than male jobs, even though female jobs had been given evaluations comparable to more highly paid male jobs.

In the mid-1960s Westinghouse increased the number of labor grades from nine to thirteen. They also instituted a unitary wage scale that eliminated any explicit sexual designation. However, these actions did not result in a proportionate wage increase for women. Almost all of the women were placed in the lower labor grades and almost all of the men were placed in the higher grades. The female dominated categories, such as assembly liner and quality control worker, continued to receive lower wages than the male dominated jobs such as janitor and machine operator. The plaintiffs contended that enlargement and redistribution of labor grades resulted in women holding jobs at a lower grade than the designation given to that job before the addition of labor grades and the development of the unitary wage scale. According to the plaintiffs' claim, redistribution of labor grades perpetuated the blatant sex-based discrimination of previous years so that what appeared to be non-sexist employer conduct was actually a subterfuge for continued discrimination against women.

The district court granted Westinghouse's motion to dismiss, holding that the plaintiffs' allegations did not state a claim upon which relief could be granted under Title VII. The court said that in passing the Equal Pay Act Congress had limited judicial intervention into busi-

---

59. *Id.* Westinghouse's 1939 manual blatantly stated that women with the same point rating as men received lower wages.
60. 631 F.2d 1094, 1097 (1980).
61. *Id.* at 1097-98.
62. *Id.*
63. 19 Fair Empl. Prac. Cas. at 456-57.
ness by rejecting comparable work in favor of equal work as the standard for equal pay. In the district court's view, the Bennett Amendment incorporated the equal work standard into Title VII; therefore, the plaintiffs' claim, because it failed to show equal work, was denied.

**The Appellate Court Decision**

The United States Court of Appeals for the Third Circuit reversed and remanded the decision of the district court. In reaching its conclusion that the Bennett Amendment did not preclude the validity of a comparable worth claim under Title VII, the court emphasized the anti-discrimination thrust of Title VII and then proceeded to examine statutory language, legislative history, EEOC guidelines and case law.

In examining statutory language, the court emphasized the importance of the Bennett Amendment phrase "authorized by." This phrase links the Equal Pay Act to Title VII; wage differentials are allowed under Title VII only if they are "authorized by" the Equal Pay Act. The court asserted that the common meaning of "authorized by" is "permitted." Based on this definition, the court concluded that the only provisions of the Equal Pay Act incorporated into Title VII were the four defenses permitted by the Act. The court called this the "broad coverage" interpretation because it did not impose the equal work standard as a limitation on Title VII.

The court's analysis of language involved the rejection of the in pari materia canon of statutory construction. Statutes that are in pari materia with one another are those which share the same subject or which have a common purpose. The in pari materia canon prevents a stat-

---

64. 631 F.2d at 1138. The Third Circuit took the plaintiffs' allegations as true for the purpose of considering the motion for summary judgment. *Id.* at 1097 n.3. The court's decision to reverse and remand the decision of the district court entitled the plaintiffs to a trial on the merits.

65. 631 F.2d at 1099-1100.

66. The text of the Bennett Amendment is as follows:

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 if such differentiation is authorized by the provisions of [the Equal Pay Act].


67. 631 F.2d at 1099. In contrast to the Third Circuit's interpretation of the phrase "authorized by" is that of the New Jersey district court. The district court had accepted the defendant's definition of "authorized by" as meaning "prohibited," and had held that "any conduct that is not prohibited by the Equal Pay Act is 'authorized' by that act. . . ." 19 Fair Empl. Prac. Cases 450, 453 (D.N.J. 1979).

ute dealing with a narrow subject from being submerged into a later, more general statute. The court said this canon conflicted with other principles of statutory interpretation, such as allowing for supplemental remedies and regarding omissions in later statutes as being significant. The court reasoned that, since Title VII gave additional remedies to claims of discriminatory employment practices and since the equal work standard was omitted from Title VII, the equal work standard of the Equal Pay Act should not be interpreted as a limitation on the broader, more recent Civil Rights Act.

After examining statutory construction, the court turned to legislative history as a source for understanding the Bennett Amendment. The court evaluated that history as being characterized by "equivocacy and turbidity." The court pointed out that it was unclear whether references to the Equal Pay Act alluded to the entire Act, including the equal work standard, or to only the four exceptions listed in the Act. Working from the premise that the Civil Rights Act has a broad policy against sex discrimination, the court reasoned that there would have been more debate over the Bennett Amendment if the understanding had been that Title VII could not go beyond the equal work criteria of the Equal Pay Act. The court admitted that Senator Bennett's explanation a year after the enactment of Title VII seemed to indicate that all of the Equal Pay Act should be incorporated into Title VII, but the court dismissed the statement because it did not reveal the intent of Congress itself when it passed the amendment.

Next, the court looked to EEOC guidelines and observed that there had been a significant change in the way the EEOC interpreted the relationship between the Equal Pay Act and Title VII. In 1965, the EEOC guidelines on sex-based wage discrimination applied the equal work standard to sex-based wage discrimination claims brought under


70. 631 F.2d at 1101. The court cited Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 n.9 (1974), in which the Supreme Court said differences between statutes should not be ignored, for such differences make supplemental remedies possible.


72. 631 F.2d at 1101.

73. Id. at 1102-03.

74. 111 CONG. REC. 13,359 (1965).

75. 631 F.2d at 1104.

76. Id. at 1105-06.
Title VII. However, by 1972, the criterion of equal work had been eliminated by the EEOC as a test for discriminatory compensation claims. The Third Circuit interpreted the 1965 recognition of the equal work standard as not precluding the possibility that the scope of Title VII was greater than the scope of the Equal Pay Act. This interpretation allowed the court to focus on the less restrictive 1972 guidelines.

The last area the court investigated was case law. Noting that the U.S. Supreme Court had not conclusively defined the relationship between the Equal Pay Act and Title VII, the court looked to Gunther v. County of Washington to support its interpretation of the Bennett Amendment. Distinguishing Lemons v. City of Denver on its facts, the I.U.E. court saw Gunther as the only case that had directly faced the same issues confronted in the instant case.

THE DISSENTING OPINION

Judge Van Dusen's dissenting opinion also focused on the Bennett Amendment as the key to deciding the instant case and, like the majority opinion, analyzed statutory language, legislative history, EEOC guidelines and case law. However, the dissent arrived at different answers in each of the explored areas.

The principle of *in pari materia*, which prevents a more specific statute from being submerged into a more general one, led the dissent to interpret Title VII consistently with the Equal Pay Act's equal work standard. In comparing the wording of the Equal Pay Act with the wording of Title VII, the dissent also found that if the four defenses were the only part of the Equal Pay Act to be incorporated into Title VII, the Bennett Amendment would be "largely redundant." Since Title VII already provided for three of the four defenses listed in the

77. 29 C.F.R. § 1607(a) (1965).
78. Id. § 1604.8 (1978).
79. 631 F.2d at 1106-07.
80. 623 F.2d 1303 (9th Cir. 1979), aff'd, 49 U.S.L.W. 4623 (June 8, 1981).
81. 620 F.2d 228 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980).
82. 631 F.2d at 1107. The I.U.E. court said that Lemons was distinguishable because the Lemons court had found that sex discrimination was not the reason for the wage differential between the Lemons plaintiffs and the employees with whom they sought to be compared.
83. Gunther, like I.U.E., interpreted the Bennett Amendment in relation to a claim that did not allege equal work. Unlike the Lemons plaintiffs, the Gunther plaintiffs alleged intentional discrimination.
84. Id. at 1108-15.
85. See notes 66-67 supra & 107-112 infra and accompanying text.
86. 631 F.2d at 1111.
87. The three defenses listed in Title VII are a seniority system, a merit system, and a system
Equal Pay Act, the dissent thought it was unnecessary to reincorporate them through the Bennett Amendment.\textsuperscript{88}

Judge Van Dusen viewed the admittedly ambiguous legislative history as being favorable to Westinghouse's position that Congress wanted to include all of the Equal Pay Act in Title VII. He found it particularly meaningful that the Equal Pay Act specifically rejected the comparable work standard. In addition, Judge Van Dusen found precedent for weighing Senator Bennett's \textit{ex post facto} statement that the entire Equal Pay Act had been incorporated into Title VII.\textsuperscript{89}

The dissent interpreted both case law and EEOC guidelines as limiting Title VII to equal work standards. Judge Van Dusen read the 1965 EEOC guidelines more narrowly than did the majority, and concluded that they restricted sex-based wage discrimination cases to the equal work test.\textsuperscript{90} Following the judicial preference for administrative agency guidelines which are contemporaneous with a legislative act,\textsuperscript{91} the dissent dismissed the significance of the broader 1972 guidelines.\textsuperscript{92}

With regard to case law, the dissent pointed out that until \textit{Gunther v. County of Washington},\textsuperscript{93} no court of appeals had held that a claim of sex-based wage discrimination could be made without a demonstration that the plaintiff was performing equal work.\textsuperscript{94} The dissent questioned the reliability of \textit{Gunther} because in that decision the Ninth Circuit had failed to apply the \textit{in pari materia} canon to its interpretation of the Bennett Amendment.

At the end of his opinion Judge Van Dusen expressed his fear that the majority's analysis of the Bennett Amendment would destroy the balance between Title VII's general guarantee of equal job opportunities and the specificity of the equal work standard.\textsuperscript{95} The dissent's apprehension was that unless Title VII was restricted by the equal work standard, judges would have no basis upon which to exclude evidence.

which measures earnings by quantity or quality. These defenses appear in § 703(h) of Title VII in the sentence immediately preceding the Bennett Amendment. \textit{See} note 118 \textit{infra} for entire text of that sentence.

The only wage discrimination defense contained in the Equal Pay Act but not in Title VII is “a differential based on any other factor other than sex.” \textsuperscript{29} U.S.C. § 206(d) (1976).

\textsuperscript{88} 631 F.2d at 1112.


\textsuperscript{90} 631 F.2d at 1113-14.


\textsuperscript{92} 631 F.2d at 1114.

\textsuperscript{93} 623 F.2d 1303 (9th Cir. 1979), \textit{aff'd}, 49 U.S.L.W. 4623 (June 8, 1981).

\textsuperscript{94} \textit{See} \textit{Orr v. MacNeill & Son, Inc.}, 511 F.2d 166 (5th Cir.), \textit{cert. denied}, 423 U.S. 865 (1975); \textit{Ammons v. Zia Co.}, 448 F.2d 117 (10th Cir. 1971).

\textsuperscript{95} 631 F.2d at 1114-15.
Judge Van Dusen feared the court's entanglement in what he believed were decisions which should remain in the marketplace.\textsuperscript{96}

\textbf{Analysis}

\textit{I. U. E. v. Westinghouse} presented the United States Court of Appeals for the Third Circuit with a difficult problem. The facts of the case indicated that women workers at Westinghouse's Trenton plant were not being compensated equally with male workers at the plant. Westinghouse's past history of sex-based wage discrimination\textsuperscript{97} as well as the current wage statistics at the Trenton plant constituted a situation which did not seem in keeping with the spirit of Title VII. Implicit in the court's decision was the belief that equal rights for women should bring an opportunity for equal rewards, and that such rewards should not be prevented by ambiguous legislative history or limited judicial interpretation. Encouraged by the Ninth Circuit's decision in \textit{Gunther}, the \textit{I. U. E.} court analyzed the relationship between the Equal Pay Act and Title VII so that it harmonized with the broad anti-discrimination goals of the Civil Rights Act. The court's interpretation of the Bennett Amendment was based upon the underlying premise that Title VII should be used to prevent job inequality no matter what form that inequality takes. An indication of the court's concern is evidenced by the fact that the court both began and ended its decision with allusions to the broad aims of Title VII.

The difficulty with the \textit{I. U. E.} decision is that while it is directed at the problem of undervaluing and undercompensating women's work, the court's analysis does not withstand objective appraisal. In each step of its analysis of the Bennett Amendment, the court admitted that there were conflicting views of statutory construction, legislative history, EEOC guidelines and case law. Nonetheless, the court seemed determined to circumvent these problems because of its predisposition to find support for Title VII's broad policy.

The Bennett Amendment phrase "authorized by" is ambiguous enough to make either the majority's or the dissent's interpretation

\textsuperscript{96} \textit{Accord}, Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977), where the court said that market realities are instrumental in establishing wages, and it is not the business of courts to get involved in those decisions.

\textsuperscript{97} 631 F.2d at 1097. Westinghouse's industrial relations manual, published in 1939, stated that female employees were paid on a wage scale lower than that used for paying male employees. Westinghouse did not change the labor grades on which the wage scales were based until the mid-1960s. The plaintiffs in \textit{I. U. E.} claimed that the new labor grades instituted in the 1960s perpetuated unequal pay for women. \textit{Id.} at 1098. \textit{See} notes 56-60 supra, and accompanying text.
plausible.98 Similarly, the words used during congressional debate over the Bennett Amendment do not clearly reveal whether all or only part of the Equal Pay Act was to be incorporated into Title VII.99 Rather than pursuing the history of the Equal Pay Act and the tradition of interpreting the Act’s specific requirements, the court found that the ambiguity of the Bennett Amendment was enough to prevent the Equal Pay Act from limiting Title VII.100 The court was careful to limit its holding to finding a Title VII violation only on the basis of intentional discrimination.101 However, in pursuing policy concerns the court lost sight of the limitations which have accompanied not only sex discrimination cases, but other Title VII cases as well.

The I.U.E. court’s lack of understanding is apparent in its comparison of the instant case with a hypothetical situation in which welders would be paid more than plumbers because the welders were Protestants and the plumbers were Catholics. According to the court, this would clearly violate Title VII because it would classify employees in such a manner as to deprive them of employment opportunities such as higher wages.102 However, the majority’s hypothetical situation about welders and plumbers was not based upon the usual judicial interpretation of Title VII. As long as Catholics and Protestants have equal opportunity to become welders or plumbers there could be no Title VII claim. Court decisions on Title VII claims have been directed at granting relief to plaintiffs103 who have not had equal hiring opportunities. Courts have not used Title VII to determine wages or to compare jobs of varying skill or responsibility.104 The closest courts have come to interfering with employer practices has been to examine whether an employment requirement was actually a pretext for hiring

98. The I.U.E. majority said that “authorized by” meant “permitted.” According to this definition, the only wage differentials allowed by Title VII are those permitted by the Equal Pay Act. Such an interpretation incorporates only the four defenses of the Equal Pay Act into Title VII. The dissent in I.U.E. would accept that “authorized by” can mean “prohibited.” Under this interpretation, the equal work standard determines equal pay unless one of the four defenses prohibits that standard from applying.
99. See notes 36-41 supra and accompanying text.
100. 631 F.2d at 1101-03.
101. Id. The I.U.E. plaintiffs, unlike the plaintiffs in Lemons, did not base their claim simply on the historic undervaluation and undercompensation of women workers. The I.U.E. plaintiffs alleged that Westinghouse had intentionally structured labor grades so that jobs normally held by women would receive lower pay.
102. Id. at 1096-97.
103. Religion, race, color, sex and national origin are protected by Title VII. If a plaintiff can show he was not hired because an employer discriminated against any of these categories, he can establish a Title VII claim.
104. See Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).
discrimination.\textsuperscript{105}

Regardless of how important the policy behind Title VII is, an analysis of its interrelationship with the Equal Pay Act should be examined according to objective standards, and not simply accepted as a reflection of a general anti-discrimination thrust.\textsuperscript{106} It is with this caution that a critical assessment of the court's interpretation of the Bennett Amendment should proceed.

\textit{Statutory Construction}

Analyzing a statute according to rules of statutory construction is one way to discover the meaning of a congressional amendment. In interpreting the Bennett Amendment, the Third Circuit rejected the canon of \textit{in pari materia} in order to avoid seeing the equal work standard as a limitation on Title VII. However, case law interpreting rules of construction is more supportive of the dissent's determination that the \textit{in pari materia} principle should be used to assess the relationship between the Equal Pay Act and Title VII. Such an approach would lead to the conclusion that all of the Equal Pay Act, and not just the four defenses, had been incorporated into Title VII.\textsuperscript{107}

In \textit{Morton v. Mancari}\textsuperscript{108} the U.S. Supreme Court articulated the canon of \textit{in pari materia}, saying that "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."\textsuperscript{109} In \textit{Radzanower v.}

\textsuperscript{105} In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the U.S. Supreme Court made it clear that racial discrimination could not be practiced by setting up false hiring qualifications. A high school diploma and intelligence tests were considered discriminatory requirements because they were not related to the jobs in question and because the effect of the requirements was to exclude blacks.

\textit{See} Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), \textit{and} McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), for other cases in which the Supreme Court has defined the purpose of Title VII to be the removal of discriminatory hiring barriers.

\textsuperscript{106} The \textit{I.U.E.} court misapplied a Title VII case to the instant case when it inserted a reference to the Equal Pay Act within a quotation from United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 204 (1979). In \textit{Weber} the issue was the legitimacy of a voluntary, private industry affirmative action program for blacks. The irony that the \textit{Weber} court perceived was not that another law should limit Title VII, but that Title VII itself should be used to frustrate the very goals it was intended to carry out. This is very different from asserting, as the \textit{I.U.E.} court did, that the Equal Pay Act should not limit Title VII. The \textit{I.U.E.} court paraphrased the quotation from \textit{Weber} as follows: "It would be ironic indeed if [the Equal Pay Act] a law triggered by a Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . ." The \textit{I.U.E.} court finished the sentence in its own words: "were to lead to the contraction of their rights under Title VII." 631 F.2d at 1107.

\textsuperscript{107} If the \textit{in pari materia} canon is followed, then the more specific Equal Pay Act provisions cannot be submerged by the later provisions of the more general Civil Rights Act.


\textsuperscript{109} \textit{Id.} at 550-51.
Touche Ross & Co. the Supreme Court reiterated its position in Morton, stating that the basic principle of statutory construction is that "a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." Since the Bennett Amendment did not specifically reject the equal work standard, application of the canon of in pari materia would prevent the Equal Pay Act's precise equal work standard from being submerged by Title VII's more general provisions. Furthermore, Congress' lengthy debates and careful determination to have an equal work standard make it unlikely that one year later Congress would intend the Civil Rights Act to do away with such specificity.

The majority's alternate approaches to statutory construction are unconvincing as well. Neither the principle of finding supplemental remedies nor the principle of statutory omissions is relevant to the relationship of the Equal Pay Act and Title VII. In Alexander v. Gardner-Denver Co. the Supreme Court held that one can sue under both Title VII and another statute because remedies can supplement each other. However, this holding does not negate the principle of in pari materia, as the majority says it does. The fact that statutes can supplement each other does not mean that a clear limitation on a statute should not be acknowledged. In like manner, recognizing that the omission of a statutory provision from a later statute means that the earlier and later statute each have a different intent does not defeat the in pari materia principle. The equal work standard is not omitted from Title VII if the Bennett Amendment is interpreted so as to incorporate that standard.

In addition to presenting rather weak statutory interpretations, the majority was also unconvincing when it addressed the issue of redundancy. Three of the four exceptions listed in the Equal Pay Act also appear in the part of section 703(h) of Title VII which precedes

111. Id. at 153.
112. See notes 13-20 supra & 121-25 infra and accompanying text.
114. Id. at 48.
116. 631 F.2d at 1101.
117. A seniority system; a merit system; a system which measures quantity or quality of production.
118. § 703(h) consists of two long sentences, of which the Bennett Amendment is the second. The first sentence reads 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 dif-
the Bennett Amendment. It seems likely, therefore, that the Bennett Amendment would incorporate more of the Equal Pay Act than just those exceptions. The court’s reasoning that repetition is important for clarification is not persuasive. Clarity is achieved without that repetition. The Bennett Amendment would have little purpose if it simply repeated the sentence preceding it, making only one addition.\textsuperscript{119} If Congress wanted to include only the four defenses in the Bennett Amendment it could have simply amended Title VII by adding the one defense not contained in the first part of section 703(h). This would have achieved the same result of making the defenses of the two acts coextensive.

\textit{Legislative History}

While the Third Circuit examined the ambiguity of legislative materials on the Bennett Amendment, the court did not explore the legislative history behind the Equal Pay Act. Such an omission impedes an understanding of the Bennett Amendment, for the legislative history behind the Equal Pay Act reveals Congress’ care in specifically choosing the equal work standard.

In debates prior to the passage of the Equal Pay Act, Congress considered and rejected the concept of comparable work\textsuperscript{120} in favor of the principle of equal work.\textsuperscript{121} Representative Goodell, the bill’s sponsor, said that the changing of “comparable” to “equal” was a deliberate action, the intent of which was to narrow the area of wage discrimination to those jobs identical or at least “very much alike or closely related to each other.”\textsuperscript{122}

\begin{itemize}
\item 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 of 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 unlawful employment practice for an employer to give and to act upon the result 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.

\item The only defense that is included in the Equal Pay Act but not in Title VII is “a differential based on any other factor other than sex.” 29 U.S.C. § 206(d) (1976).
\item A showing of comparable work does not require that skill, effort, responsibility and working conditions be substantially equal.
\item The equal work standard requires equal skill, effort, responsibility, and similar working conditions. 29 U.S.C. § 206(d)(1) (1976).
\item 109 CONG. REC. 9197 (1963). Representative Goodell emphasized that Congress did not expect the Labor Department to rate jobs that were not equal. “We do not want to hear the Department [of Labor] say, ‘Well, they amount to the same thing’ and evaluate them so they come up to the same skill or point.” \textit{id}. Representative Goodell went on to say that it was “not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of
This scrupulous defining of the equal work standard makes it questionable that, in passing the Civil Rights Act only one year later, Congress would change the criteria for sex-based wage discrimination claims. The inclusion of sex as a protected class under Title VII was not envisioned as an expansion of women's rights. Even supporters of women's rights did not favor the inclusion of a sex provision in Title VII. The inclusion of sex into Title VII not only came late in the legislative process, it came after very little debate or deliberation. In fact, it is likely that the proposal to include sex discrimination was made insincerely in order to thwart passage of the Civil Rights Act. Although this fact does not diminish the status of sex as a protected category, it makes it doubtful that Congress meant the inclusion of sex to cancel out the Equal Pay Act's equal work standard. In light of these facts, the court's dismissal of legislative history as "equivocal and turbid" is unpersuasive. Moreover, the court's conclusion that legislative history favored the plaintiffs' interpretation of the Bennett Amendment is unfounded. The fact is that the Third Circuit did little to uncover Congress' intent in passing the Civil Rights Act.

Senator Bennett referred to his proposed amendment as a "technical correction" to Title VII. This phrase can be interpreted to support either the defendant's or the plaintiffs' view of the Bennett Amendment. It can be argued that a correction that is merely technical does not limit Title VII very much. On the other hand, a technical correction can define the appropriate relation between the two acts. A more important statement of Senator Bennett's was his explanation of the amendment at the time he introduced it. Senator Bennett's major concern was that the Equal Pay Act not be nullified. However, if all

the employer . . . . It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems." Id. at 9209. Representative Frelinghuysen echoed Representative Goodell in the following statement:

[T]he jobs in dispute must be the same in work content, effort, skill, and responsibility requirements, and in work conditions. As indicated earlier, it is not intended to compare unrelated jobs or jobs that have been historically and normally considered by the industry to be different. Violations usually will be apparent, and will almost always occur in the same work area and where the same tasks are performed.

Id. at 9196. A further illustration of the insistence that the work be equal and not comparable appeared in Representative Griffin's hypothetical example of the jobs of two inspectors of engines. If one inspector made a cursory examination of an engine and the other examined a complex part of an engine, their jobs would not be compared to one another in a claim brought under the Equal Pay Act. Id. at 9198.

123. See note 36 supra and accompanying text.
124. See notes 33-35 supra and accompanying text.
125. 631 F.2d at 1101.
126. 110 CONG. REC. 13,647 (1964).
127. Id. Senator Bennett said, "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."
Senator Bennett was referring to was the four defenses listed in the Equal Pay Act, nullification would not have been much of a threat, since three of those exceptions were already part of section 703(h). However, an amendment was needed if the equal work standard was in danger of being nullified. Title VII could have nullified the Equal Pay Act by its general statement against sex discrimination. By incorporating the whole of the Equal Pay Act into Title VII, the Bennett Amendment limited sex-based wage discrimination to the standard of equal work.

Given this much indication that the Equal Pay Act was to continue to set wage standards, it was merely repetitive that one year after the Civil Rights Act Senator Bennett clearly explained that the equal work standard was a limitation on Title VII. Nevertheless, Senator Bennett's remarks were not unimportant, and the I.U.E. court was not justified in completely dismissing them. It is true that Senator Bennett spoke only what was in his mind a year after the Act was passed and not what was in the minds of Congress when they voted on the Civil Rights Act. Nevertheless, such an unambiguous statement by the proposer of a bill should carry some weight.

128. The dissent in I.U.E. agreed that Senator Bennett's fear of nullification was ambiguous because he did not spell out which provisions he was afraid would be nullified. However, the dissent stated that it would be more logical to read Senator Bennett's remarks as referring to the equal work standard. 631 F.2d at 1113.

129. Senators other than Senator Bennett also recognized the need to maintain the criterion of equal work. In answer to Senator Dirksen's concern that anti-discrimination provisions for sex might extend far beyond the Equal Pay Act because they didn't include equal work limitations, Senator Clark assured Senator Dirksen that as far as wage setting was concerned, the Equal Pay Act would continue to set the standard. 110 CONG. REC. 7217 (1964). Thus, according to Senator Clark, Title VII was construed in pari materia with the Equal Pay Act.

In light of Senator Dirksen's concern and Senator Clark's explanation, Senator Dirksen's subsequent comment to the Congress that all the Bennett Amendment did was carry out the exceptions in the Equal Pay Act did not necessarily mean that Senator Dirksen was referring only to the four affirmative defenses of the Equal Pay Act. 110 CONG. REC. 13,647 (1964). Senator Dirksen's use of the word "exceptions" is not completely clear. Instead of referring to the four defenses, Senator Dirksen could have meant exceptions to what had been the practice of wage-setting in the past, especially since he described the Equal Pay Act as an amendment to the Fair Labor Standards Act. The phrase "carries out . . . exceptions" connotes a positive program rather than limitations.

130. 111 CONG. REC. 13,359 (1965).

131. 631 F.2d at 1104.

132. The I.U.E. court cited Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), aff'd, 49 U.S.L.W. 4623 (June 8, 1981), in support of not valuing ex post facto statements. However, Gunther relied on Galvan v. Press, 347 U.S. 522 (1954), and this reliance was misplaced. Galvan did value ex post facto explanations of a bill, even though it recognized that such statements were not binding. However, as Judge Van Dusen noted in his dissent in I.U.E., Haynes v. United States, 390 U.S. 85 (1968), also said that subsequent views shed light on a bill's purpose. 631 F.2d at 1113.
EEOC Guidelines

The *I. U. E.* court's rejection of the 1965 EEOC guidelines in favor of the 1972 guidelines was contrary to the United States Supreme Court's preference for guidelines which are contemporaneous with the federal legislation they purport to interpret. The 1965 guidelines said that the "standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." The *I. U. E.* court's reasoning that the 1965 guidelines still left room for sex-based wage discrimination claims that do not meet equal work standards seems unreasonable in view of the clear wording of those guidelines. The 1972 guidelines omit the equal work standard as a criterion for deciding Title VII claims. The Supreme Court has made it clear that if EEOC guidelines conflict, courts are to favor the earlier guidelines.

Case Law

The fourth area of the court's analysis was relevant case law. While the court of appeals was correct in saying that the Supreme Court has not explicitly defined the Equal Pay Act's relation to Title VII, it is not true that "caselaw [sic], for the most part, adds little" to the inquiry. Lower federal courts have consistently held that sex-based wage discrimination claims under Title VII must be founded upon a showing of equal work. While courts have commented that the Bennett Amendment incorporated only the four exceptions listed in the Equal Pay Act, such statements have appeared merely as dicta in cases where the Bennett Amendment was not basic to the decision or

133. In General Elec. Co. v. Gilbert, 429 U.S. 125, 141-43 (1976), the United States Supreme Court discussed EEOC guidelines regarding the question of pregnancy as an employment disability. The Court said that the 1965 guidelines were to be followed rather than the 1972 guidelines because more weight should be given to guidelines that are contemporaneous with legislation. The Court also said that although EEOC guidelines do not have the force of government regulations, they do have some persuasive power.

134. 29 C.F.R. § 1607(a) (1965).
135. 29 C.F.R. § 1604.8 (1978).
137. 631 F.2d at 1106.
138. See Roessel v. Joliet Wrought Washer Co., 596 F.2d 183 (7th Cir. 1979); Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3rd Cir. 1977); Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).
139. In Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), and in Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), there was dicta to the effect that the Bennett Amendment included only the four defenses listed in the Equal Pay Act. However both Laffey and Wheaton were cases in which plaintiffs had fulfilled their burdens of compliance with the equal work standard.
where wage discrimination was not the central issue. Because courts assumed that the equal work standard had been incorporated into Title VII, there was no case prior to Gunther v. County of Washington in which a court that was faced with facts of non-equal work had analyzed the Bennett Amendment.

Gunther is cited by the I.U.E. court as the only case in which a court of appeals "has squarely faced the issue" raised in I.U.E.. The Gunther court interpreted the Bennett Amendment as incorporating only the four exceptions of the Equal Pay Act. Gunther, however, misread legislative history and made the Bennett Amendment say something it never was intended to say. The Gunther court looked at only those historic facts which favored the court's holding. It neither explored the ambiguous history behind the inclusion of sex in the Civil Rights Act nor confronted the clear intention of Congress in passing the Equal Pay Act. The Gunther court also ignored rules of statutory construction and failed to analyze the EEOC guidelines in any detail.

The I.U.E. court distinguished Lemons v. City of Denver on the basis that the Lemons court found that sex discrimination did not account for women's low wages in that case. The distinction begs the question. The Third Circuit did not explore the Lemons decision to determine why the Lemons court concluded there was no sex discrimination at issue. If the I.U.E. court had analyzed Lemons it would have found that the Lemons result rested on the traditional interpretation of

140. In Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978), the plaintiffs challenged a retirement plan requiring greater contributions from women. The court said that the retirement plan was unaffected by any of the Equal Pay Act's defenses. The court then went on to say that "all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII." 553 F.2d at 590.
141. 623 F.2d 1303 (9th Cir. 1979), aff'd, 49 U.S.L.W. 4623 (June 8, 1981).
142. 631 F.2d at 1106.
143. The Gunther court, like the I.U.E. court, did not discuss the careful determination of Congress in choosing the equal work standard when it passed the Equal Pay Act of 1963. Furthermore, the Gunther court did not acknowledge, as the I.U.E. court did, that the history behind the Bennett Amendment and the inclusion of sex in Title VII is open to more than one reading. The Gunther court did not adequately recognize the possibility of reading the Bennett Amendment as incorporating all of the Equal Pay Act into Title VII. The court did not analyze Senator Bennett's concern about nullification of the Equal Pay Act, nor did it look at Representative Clark's explanation to Senator Dirksen that the function of the Bennett Amendment was to ensure that the Equal Pay Act would be a limitation on Title VII. See notes 127-29 supra and accompanying text.
144. As the I.U.E. dissenting opinion pointed out, there was no analysis in Gunther of the in pari materia principle of statutory construction. 631 F.2d at 1114 (Van Dusen, J., dissenting).
145. The Gunther court did not discuss the problems of following the 1972 guidelines rather than the 1965 guidelines.
146. 620 F.2d 228 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980).
147. 631 F.2d at 1107.
the Bennett Amendment as well as on the apprehension of the burdens that comparable worth could impose upon courts and upon employers. Even though *Lemons* differed from *I.U.E.* in that the *Lemons* plaintiffs did not allege intentional discrimination, the *Lemons* court's decision was grounded not on the lack of intent, but on the court's interpretation of the relationship between the Equal Pay Act and Title VII. *Lemons*, like all the relevant cases before *Gunther* and *I.U.E.*, stands for the principle that without a showing of equal work there can be no claim for sex-based wage discrimination.

The study of relevant case law, like the study of statutory language, legislative history and EEOC guidelines, does little to justify the decision reached by the *I.U.E.* court.

**POLICY CONSIDERATIONS**

It has become natural for citizens to look to the courts for the solution to problems when legislation does not seem to solve social inequality. Given the history of women in low paying jobs and the ongoing reinforcement of that history, it is easy to understand such a desire for judicial intervention. However, if a court purports to decide policy

148. The *Lemons* court saw the Bennett Amendment as incorporating the entire Equal Pay Act into Title VII. 620 F.2d at 229-30.

149. The *Lemons* court cited Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977), as authority for the proposition that courts are not required to decide claims under Title VII if there is no showing of equal work. It also cited *Christensen* as authority for the proposition that Title VII does not require an employer to ignore the marketplace in setting wage rates for different work classifications. 620 F.2d at 229.


151. *See generally* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J.L. Ref. 399 (1979). According to Professor Blumrosen, the tradition of paying women lower wages continues because employers still categorize and evaluate jobs along sex-discrimination lines. For example, employers exclude physical tasks from jobs for which they hire women, and then pay more for jobs which include physical responsibilities. The wage scale for what are seen as traditional women's jobs becomes established, and employers then argue that they are justified in following the community standard for wages. The custom of paying less for work done by women makes women exploitable, and sex-related job requirements reinforce the custom. The vicious circle continues as women who are shut out of higher paying jobs then crowd into the available lower paying jobs. As the supply of female workers for these increases, entry level wages are depressed. Blumrosen feels that unless the Bennett Amendment is interpreted to allow Title VII to go beyond the equal work standard, the Equal Pay Act remains a shield protecting wage discrimination rather than becoming a sword used to fight against it.

Women's relatively low pay as compared with that of men is apparent from recent statistics published by the Department of Labor. *See* note 5 *supra*. 
questions by basing its decision upon particular acts of Congress, its analysis must make objective sense. The fact that contemporary women have inherited great economic and social burdens should not automatically lead to interpreting statutory provisions, legislative history and case law so as to conform to what the court believes should be the proper solution to these problems. Although it is true that there are important policy considerations in *I.U.E. v. Westinghouse Electric Corp.*, it is also true that the court manipulated language and history to reach a conclusion that does not withstand scrutiny. There may be ways to combat historical sex-based wage discrimination, but construing the Bennett Amendment to say something it was never intended to say should not be one of them.

Moreover, even if a comparable worth theory could be justified on the basis of statutory construction, the acceptance of a comparable worth theory might create as many problems as it would alleviate. For instance, it could cause great upheaval in the economy. It has been estimated that if the aggregate pay for working women in the United States was raised high enough so that the median pay for women would equal that of men, $150 billion a year would need to be added to the civilian payrolls.152 Businesses would find it difficult to gauge prices, since established wage rates would be askew while costs of material would still reflect traditional market rates.153 Employers might feel compelled to cut labor costs through methods that could hurt employees. The Equal Pay Act prohibits reducing the wages of any employee to comply with the equal pay provisions,154 so employers could not try this method of evasion. However, they could export work overseas,155 thus legally paying lower rates and at the same time depriving many workers of regular jobs.

Furthermore, if comparable worth did take hold and women were paid more than they were previously, there might be little motivation for them to leave clerical or assembly line jobs and break into non-traditional employment. The result might be increased sex segregation of employees as well as increased polarization of male and female societal roles. Unless women are motivated to move into new fields, the

goal of equal opportunity, which is the basis of the Civil Rights Act, will not be achieved.

Another major problem of implementing comparable worth would be the difficulty the courts would have in trying to determine what makes one job comparable to another.\textsuperscript{156} In \textit{Gunther v. County of Washington}\textsuperscript{157} the Ninth Circuit pointed out that although going beyond the equal work standard would present "substantial barriers to . . . establish[ing] a discriminatory compensation claim," the problems of proof were "not sufficient reasons to foreclose the plaintiff from the opportunity to establish [such a] claim."\textsuperscript{158} Nevertheless, those problems should be acknowledged. Judges would be asked to make decisions traditionally the province of businessmen and would be measuring the worth of jobs without adequate guidelines.\textsuperscript{159}

A recent paper delivered on the issue of comparable worth\textsuperscript{160} stated that comparable worth has very little substance or reliability. According to Professor Cotton Mather Lindsay of the University of California, it is incorrect to assume that "occupations similar in their demands for knowledge and responsibility will pay equal wages in the absence of discrimination."\textsuperscript{161} Professor Mather said that econometric studies have demonstrated that "experience and education typically explain about one-third of the variance in earnings, even when the sample is restricted to white males. . . ."\textsuperscript{162} Confirmation of how difficult it is to evaluate jobs was evident in the recent report of the National Academy of Science to the EEOC. The Academy had been engaged by the EEOC to construct a reliable job evaluation system. However, the Academy concluded that much more study would be necessary before such a system could be devised.\textsuperscript{163}

The limitation of the Equal Pay Act on Title VII, the economic pressures on employers and the difficulties in effectively comparing dissimilar jobs make it unlikely that in the near future the work of most

\textsuperscript{156} See \textit{Christensen v. Iowa}, 563 F.2d 353 (8th Cir. 1977); \textit{Lemons v. City of Denver}, 620 F.2d 228 (10th Cir.), \textit{cert. denied}, 101 S. Ct. 244 (1980), for discussions of the kinds of burdens courts are fearful of should comparable worth be recognized as a viable claim.

\textsuperscript{157} 623 F.2d 1303 (9th Cir. 1979), \textit{aff'd}, 49 U.S.L.W. 4623 (June 8, 1981).

\textsuperscript{158} \textit{Id.} at 1314.

\textsuperscript{159} There is little evidence that differentials resulting from historical discrimination can be quantified. \textit{See Nelson, supra} note 153.

\textsuperscript{160} \textit{Equal Pay for Comparable Work: An Economic Analysis of Anti-discrimination Doctrine} (a paper delivered at the University of Miami Law and Economics Center, 1980), \textit{partially reprinted in FORTUNE}, Apr. 21, 1980, at 42.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.}
women will be more highly valued or more highly compensated than that of men. Despite this dim prospect, however, the continuing problem of underpaid women is not effectively addressed by court decisions in favor of women if those decisions are poorly reasoned. The solution must be based upon new legislation that clearly and definitively provides for what is not now available under either the Equal Pay Act or Title VII of the Civil Rights Act.

CONCLUSION

The United States Court of Appeals for the Third Circuit held that the plaintiffs in *I.U.E. v. Westinghouse Electric Corp.* stated a claim for sex-based wage discrimination under Title VII even though there was no allegation that they had been performing equal work. In so doing, the court challenged past interpretations of the Bennett Amendment to Title VII which said that the amendment engrafted all of the Equal Pay Act onto Title VII, including the equal work standard.

Moved by policy considerations to give women more pay than traditional female jobs had permitted them, the court interpreted ambiguous words in the Bennett Amendment to mean that only the four exceptions listed in the Equal Pay Act, and not the equal work standard itself, were incorporated into Title VII.

It is understandable that the *I.U.E.* court was moved to use the anti-discrimination thrust of Title VII to attack the serious problem of women's economic inequities. However, the court was neither objective nor thorough in its analysis of statutory provisions, legislative history, EEOC guidelines or case law. The court's verbal manipulations do not conceal that Congress' intent in passing the Bennett Amendment was to prevent violation of the equal work standard so carefully defined in the Equal Pay Act.*

LILLIAN MILLER

* As this article was going to press, the United States Supreme Court decided County of Washington v. Gunther, 49 U.S.L.W. 4623 (June 8, 1981), and by a 5-4 vote affirmed the 9th Circuit's holding that female prison guards could bring a sex-based wage discrimination claim under Title VII even though they had not met the "equal work" requirement of the Equal Pay Act. The Court thus interpreted the Bennett Amendment as only incorporating into Title VII the four defenses of the Equal Pay Act. Carefully stressing the narrowness of its decision, the Court noted specifically that it was not deciding the issue of comparable worth. Instead, its decision was apparently limited to the facts of the case, in which the plaintiffs had charged intentional sex-based discrimination and in which an objective study of the worth and market value of the female jobs at issue had indicated that females should have received more pay than they in fact did.
The Court stated that the suit required neither judicial evaluation of male and female jobs nor judicial quantification of the effect of sex discrimination on wages.

Justice Rehnquist wrote a dissent in which the Chief Justice and Justices Stewart and Powell joined. They noted that the Court's opinion "is so narrowly written as to be virtually meaningless." 49 U.S.L.W. 4629 (Rehnquist, J., dissenting). The dissenting Justices' more fundamental objection to the Gunther decision was the quality of legal analysis it contained. They felt that "the Court conveniently and persistently ignore[d] relevant legislative history and instead rely[ed] wholly on what it believes Congress should have enacted." Id.

Despite the Court's emphasis on the narrow scope of its holding, however, its reading of the Bennett Amendment will undoubtedly make it easier in the future for women to claim equal pay. Indeed, many more such Title VII claims can be expected because equal work standards no longer have to be satisfied in intentional discrimination cases.