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Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII

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"Equal pay for equal work" is perhaps the single demand of working women that has won virtually unanimous support. Yet, equality in pay is further away now than it has been for twenty years.¹ For example, in 1956 the average salary for full time working women was sixty-three percent of the salaries of full time men workers. By 1973 the average salary of full time women workers was only fifty-seven percent of full time working men's average salary.²

This regression occurred notwithstanding the enactment of two anti-discrimination statutes during the 1960's: the Equal Pay Act of 1963³ and Title VII of the Civil Rights Act of 1964.⁴ The Equal Pay Act, an amendment to the Fair Labor Standards Act of 1938,⁵ prohibits wage discrimination on the basis of sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."⁶ Title VII prohibits discrimination based on sex with

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² 1975 Handbook, supra note 1, at 123-32; Earnings Gap, supra note 1, at 6, table 1. See also Oaxaca, Sex Discrimination in Wages, in Discrimination in Labor Markets 124 (O. Ashenfelter & A. Rees eds., 1973); Levitin, Quinn & Staines, Sex Discrimination Against the American Working Woman, 15 Am. Behav. Sci. 237 (1971), which shows that this differentiation is not caused by age, number of years worked, education, or any other factor. The only feasible explanation is sex discrimination.


⁶ Id. § 206(d). The full text of the Equal Pay 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
respect to "compensation, terms, conditions, or privileges of employment.""

The ineffectiveness of the legislation in equalizing general wage patterns for women reflects the compromises that surrounded passage of the Equal Pay Act, and the interpretation of those compromises by the courts. The Equal Pay Act, passed by Congress in 1963 after having been introduced every year since 1945, was much narrower than originally envisioned by its framers. Following its passage, the Equal Pay Act suffered further restrictions by judicial interpretations.

Title VII of the Civil Rights Act of 1964, on the other hand, was broadly drafted with the objective of eradicating employment discrimination in all its forms. Despite its broad language and clearly stated objective, Title VII with respect to wage equalization has been severely limited by case law. Title VII has been used generally as a substitute for or supplement to the Equal Pay Act where the jurisdictional or relief restrictions of the Fair Labor Standards Act would limit recovery under the Equal Pay Act. As a result of judicial interpretation, Title VII has not been used to fashion relief beyond the substantive parameters of the Equal Pay Act. Title VII wage discrimination cases have involved jobs that are "substantially equal" within the definitional pale of the Equal Pay Act; accordingly, courts have become accustomed in Title VII cases to examining claims of unequal pay for equal jobs.

It is the purpose of this article to explore in depth the historical development of equal pay legislation and the authority for remedy-

which requires equal skill, effort, and 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 in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id.

8. See text accompanying notes 92-110 infra.
ing underpayment of women's work through Title VII. It is the authors' thesis that, although the Equal Pay Act was intended to cover the narrow situations where men and women performed the same job, no such limitations are part of the legislative history or objectives of Title VII. Therefore, Title VII can and should be used to remedy wage discrimination cases even where the positions involved are not substantially identical. The failure to do so will perpetuate the increasing economic inferiority of women.

HISTORICAL BACKGROUND OF WOMEN IN THE LABOR MARKET

This limitation on the use of Title VII with respect to disparate wage rates seriously jeopardizes the congressional intent that employment discrimination, whatever its form, be eliminated. The Equal Pay Act provides a remedy only in those situations where women are performing substantially the same job as men; the majority of women, however, are performing jobs which are rarely performed by men, i.e., they are engaged in what are commonly regarded as “women's jobs.” For example, while women's share of total employment increased from eighteen percent in 1900 to thirty-three percent in 1960, the proportion of women in predominately female occupations (occupations in which seventy percent or more of the workers are women) declined only slightly from fifty-five percent to fifty-two percent. A 1970 study revealed that twenty-five percent of all employed women are employed in only five jobs: secretary/stenographer, household worker, bookkeeper, elementary school teacher, and waitress. All of these jobs are filled predominantly by women.

11. The broad remedial and public purposes of Title VII have been recognized in numerous cases. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (“In enacting Title VII . . . Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority.'”); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (“The power to award back pay was bestowed by Congress as part of a complex legislative design directed at an historic evil of national proportions. A court must exercise this power in light of the large objectives of the Act.”); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (“It is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise.”).


The concentration of women into a few jobs is not an accident of historical preference. "Female jobs" are largely the result of union efforts to assure that "men's jobs" were protected from competition. For example, after reformist efforts were successful in obtaining protective legislation for women (and children), restricting the number of hours, overtime, or working days per week that women could work or the maximum weight that women could lift, the AFL-CIO reversed its original position of favoring protective legislation for all employees. Even initially, support for protective legislation for all workers was not unanimous:

In many cases, men who saw their own occupations threatened by unwelcome competitors, demanded restrictions upon the hours of work of those competitors for the purpose of rendering women less desirable as employees. In other cases, men who wished reduced hours of work for themselves, which the courts denied them, obtained the desired statutory reduction by the indirect method of restrictions upon the hours of labor of the women and children whose work interlocked with their own.

By the time the courts had decided that protective legislation for men as well as women was constitutional, the dissenters had gained the upper hand. The AFL-CIO perceived that the effect of protective legislation for women was to remove the competition of women for men's jobs and to make men more attractive as employees. At

16. While it is true that most women now train and apply for the historically "female" occupations, often this is not more than a realistic assessment of the employment opportunities open to them. See note 19 and text accompanying notes 38-45 infra.
18. Because of early questions about whether protective legislation for all workers would be constitutional, the AFL-CIO initially viewed protective legislation for women only as a method of gaining protection for all workers, i.e., by extending favorable holdings on the constitutionality of legislation for women to legislation applying to all workers. See Babcock, supra note 13; note 17 supra.
19. F. Kelley, Some Ethical Gains Through Legislation 133 (1965). Since women initially had been attractive as employees because of their willingness to work for lower wages, the elimination of that competition benefitted men substantially. The problems of long working hours and horrendous working conditions for men eventually was resolved through union efforts.
20. Most of these laws not only limited the hours, days, weights, etc., that an employer could require women to work, they prohibited women from performing the extra work if they chose to do so. Even where the protective laws required that time and a half be paid to women working overtime, the effect of the law was prohibitive since an employer would not ask women to work overtime as long as he had men available to work overtime without the
union insistence, employers tended to limit women to jobs which were "light" and non-essential, so that employers would be free from production restrictions on the more important jobs. Protective laws for women were used increasingly by unions as a device to keep women out of "men's" jobs.

The insistence by unions that women be limited to specific jobs continued well into the twentieth century. Thus, even in Equal Pay Act cases, the courts have recognized the role of the unions in keeping women employed in female job classifications. For example, in Shultz v. Wheaton Glass Co., the court commented that when women were first employed by the defendant corporation, the union insisted that a job classification of "female selector-packer" be created and that females be prohibited from lifting more than thirty-five pounds. The union also insisted that no male selector-packer would be replaced by a female except where a permanent vacancy occurred. The court found that the motive of this separate classification appeared to have been to keep females in a subordinate role.

Employers have not been innocent, however, in the restriction of employment opportunities for women. For instance, in the Wheaton Glass case the employer hired women in 1956 as a last resort when the male labor market had been exhausted. Wheaton Glass reverted to the male labor market as soon as the labor shortage was over:

Just as soon as the labor market permitted, hiring reverted solely to males, although women were abundantly available and it would have been economically more feasible to employ them, especially since their wage rate was 10 percent lower than that of the men. . . . [D]efendant was compelled to resort to employment of females once again in May 1966, when the male labor market had again been exhausted.

Those companies which were willing to hire women preferred to hire them for women's jobs. Thus, employers were able to avoid the impact of the Equal Pay Act by consciously segregating men and women into different jobs. This resulted because men would not

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22. Id. at 266-67. The conflict between unions and employees covered by Title VII has been recognized by the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 42 (1974), where the Court commented that Congress thought it necessary to protect employees against unions as well as employers. See also Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974).


24. Id. at 265; see text accompanying notes 195-213 infra.
work for the low wages that women would, and the union would not tolerate separate wage scales for the same job.25

A telling example of the reason why employers are anxious to segregate the work force is provided by EEOC's challenge before the Federal Communications Commission to a rate-hike proposed by the American Telephone and Telegraph Co. In that case, the EEOC had discovered that one local telephone company justified its insistence on hiring only women as operators because "if males were in operator's jobs, there might be some pressure to equalize the operator's pay with plant craft pay since men would then be serving in both positions."26 Throughout the Bell System nationwide, only 0.1 percent of operators were male.27

Attempts by employers to hire women because of the lower wages which they command in the market and then to segregate them by job classification was proscribed by the Supreme Court in its only Equal Pay Act decision. In Corning Glass Works v. Brennan,28 the Supreme Court recognized that the payment of lower wages to women working on the day shift than to men performing the same job on the night shift29 was in large part the product of the generally higher wage level of male workers and the need to compensate males for performing what were regarded as demeaning women's tasks. The Court noted that paying women less on jobs identical to those performed by men was prohibited by the Equal Pay Act, even though it was only natural for an employer to take advantage of a situation in which women were willing to work for less.

Aside from the ability of employers to take advantage of the lower wage demands of women when women and men are segregated in their jobs, the segregation of men and women into separate jobs involves another problem which is classically illustrated by the AT


27. Id. at 288, 292, 305.


29. Male workers were originally required to work the night shift because of state protective laws prohibiting the employment of women at night. Men who worked on the night time jobs received both higher wages and a "shift differential" which applied to all employees working on the night shift. Id. at 192.
& T case and which is the subject of this article: the undervaluation of jobs performed by women. At the time of the hearing before the FCC, AT & T was highly segregated. Fifty-four percent of the women employed worked in classifications which were nearly 100 percent female. Eighty percent of the female employees were employed in three classifications: operator (99.9 percent female), service representative (ninety-nine percent female), and clerical and stenographic (ninety-three percent female). One of the jobs which was designated as a male job was the classification of "frameman." Prior to 1965, only one company, Michigan Bell, employed women in frame-work:

At Michigan Bell this classification, titled Switchroom Helper, was totally female and had been so for at least 20 years. The job was treated in every respect as a "female" clerical-type job. The "female" (clerical) test battery was administered to applicants; applicants were required to be between 5'3" and 5'10" tall; the rate of pay was within the clerical range rather than the craft range; promotional opportunities were into lateral clerical jobs rather than into higher-rated crafts or management. The Switchroom Helper's job, though craft in function and identical to the all-male Frameman's job in other companies, was typed in every way as a female classification by Michigan Bell.

When other companies realized that females could no longer be excluded from the frameman's position, they began a conversion of the male job of frameman into a female job. The title changed from "frameman" to "framedame," and the rate of pay for framework relative to other crafts also began to reflect its female designation.

This does not suggest that the Equal Pay Act is unimportant; studies have shown that a substantial male-female wage differential persists in jobs performed by both, even after differences in human capital are controlled within occupations. The studies also demonstrate, however, that women in segregated occupations are being underpaid in relation to their education, training, and skill level, and in relation to the skill, effort and responsibility required for their jobs.

In the few instances where this issue has been directly presented to courts, they have responded by addressing the exclusion of women from the higher paying male jobs rather than addressing the underpayment which is attendant to women segregated into

30. EEOC Analysis & Summary, supra note 26, in BABCOCK, supra note 13, at 292.
31. Id. at 294 (emphasis added).
32. Id.
women's jobs. For example, in *Wisconsin NOW v. State of Wisconsin*, the District Court for the Western District of Wisconsin refused to find discriminatory a merit plan which clearly had a disparate effect on women under a *Griggs v. Duke Power Co.* analysis, because the merit pay plan itself did not have the effect of excluding any class of persons from employment opportunities. The court apparently felt that since discrimination in hiring was not alleged, women had the option of transferring into the higher-paying positions. In *Patterson v. American Tobacco Co.*, the District Court for the Eastern District of Virginia declined to consider an argument that women's jobs were being undervalued and instead focused upon permitting women to transfer into men's jobs. The court indicated its reluctance to explore economic valuations of job classifications, although it also found that the evidence presented on that issue was not persuasive.

While the courts may be correct in perceiving that ultimately the most effective solution to the problem of underpaying women may be the integration of all jobs, that approach does not solve the problem of women who are unable or unwilling to transfer into higher paying men's jobs. In the industrial setting, employers segregate men and women primarily by the division of work into "heavy jobs" (reserved for men) and "light jobs" (reserved for women). While cases decided under Title VII have emphasized that women who are able to do heavy jobs must be given an opportunity to do

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34. 417 F. Supp. 978 (W.D. Wis. 1976).
35. 401 U.S. 424 (1971). The Court held that practices which are fair in form but discriminatory in operation violate Title VII. This has been applied by the courts as a "disparate effect" theory. See, e.g., *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975), for an exposition of this theory and methods of proving it.
36. Although the court did not articulate the rationale for its holding, that decision can be justified by the exception contained in § 703(h) of Title VII for bona fide merit systems. 42 U.S.C. § 2000e-2(h) (1970). Applying the rationale developed in *Watkins v. Local 2369, United Steelworkers*, 516 F.2d 41 (5th Cir. 1975), the court held that comparable exemption in § 703(h) for bona fide seniority systems required that personnel decisions made pursuant to such a seniority system could be modified only where the system adversely affects actual victims of prior discrimination. This is the case even where the effect of the system would be to eliminate all of the black employees. The court in *Wisconsin NOW* found a bona fide merit system discriminatory in effect upon women as a group but not against victims of past discrimination, hence, not a violation of Title VII.
38. Allowing women to transfer into men's jobs will not help the problem of underpaying the women who remain in women's jobs. The recruitment of men into what are now women's jobs also is necessary, so that the wages of the persons performing those jobs will raised. See *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969).
39. This enabled the employer and union to emphasize the physical aspect of the work and to reward that physical aspect to a degree which ordinarily would be contrary to common practice. Common labor jobs ordinarily are not highly paid in our society.
so, it is clear that not all women are capable of doing physically heavy labor. This is particularly true for older women in the job market. The median age of women now in the labor force is thirty-seven. While twenty-five to fifty percent of young women probably could perform the heavier jobs, the exclusion of older women from the heavy jobs in their youth has left them without the physical development necessary to perform those jobs now.

Similarly, those women employed in a non-industrial setting will not have had the training (often as a result of past discrimination) which may be necessary to perform the higher paying male jobs. Even assuming that a company is willing to train older women, it is common in the non-industrial sector as well as in the industrial, to assign the taxing work to lower positions in the line of progression. In the non-industrial sector, this may include heavy travel schedules, particularly long hours, gruelling research, or menial tasks. While these are tasks that younger workers are willing and easily able to perform, they are not likely to be attractive to someone who has made substantial commitments elsewhere. And while women are gaining advanced entry into male lines of progression as a remedy for past discrimination, the employer may be able to establish that residency in those lower jobs is necessary in order to acquire

40. Rosenfeld v. S. Pa. R.R. Co., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1970); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).
42. See, e.g., Cheatwood v. S. Cent. Bell Tel. Co., 303 F. Supp. 754 (D. Ala. 1969) (task of coin collector relief work required lifting of 45-80 pounds). In the Title VII context, see Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. S. Bell Tel. & Tel. Co. 408 F.2d 228 (5th Cir. 1969).
43. One of the authors, while speaking to a group of labor women in Cincinnati several years ago after the decision in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1970), was informed by several older employees of Colgate-Palmolive that the company was retaliating against women by forcing older women to take heavier jobs and discharging those women who were unable to perform the job. This occurred despite the fact that the women had not been given the physical training in their youth.
44. It would be unduly formalistic for a court or a company to ignore the fact that age discrimination persists in the hiring of older workers in general. See Note, Age Discrimination in Employment: The Scope of Statutory Exceptions to the Age Discrimination in Employment Act of 1967, 8 Loy. Chi. L.J. 864 (1977). It is particularly unlikely that a company will be willing to train for what is basically an entry level job, a person who is twenty years older than the average age of the persons who normally are trained in those positions. See SCHLEI & GROSSMAN, supra note 12, at 391.
45. See, e.g., Robinson v. P. Lorillard Co., 444 F.2d 791 (4th Cir. 1971); United States v. Local 189, United Papermakers & Paperworkers, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). These cases were treated in an industrial setting, but the principle is applicable to the non-industrial setting as well.
knowledge of the higher ones. Finally, it must be recognized that as a result of prior conditioning, socialization, or experience, including experience with the realities of the job market for women, many women are unwilling to make the psychological commitment necessary to now venture into new territory.

Examining the content of "women's jobs" to determine whether those jobs are paid according to the value of the services and not according to the sex of the persons performing the job is not a new concept. During World War II the National War Labor Board considered the problem of what it termed "intraplant inequality." Thus, in General Electric Co. and Westinghouse Electric Corp., one of the last and perhaps the most famous of the National War Labor Board's decisions, the Board analyzed the job content of various "women's jobs," and determined that those jobs were being paid far below what the job content of the job performed would indicate. Examining the factors considered important in job analyses, and comparing the differentials between men's jobs and to determine the true value of the factors said to explain the differential between women's jobs and men's jobs, the War Labor Board determined that sex alone explained the low wages paid to women. The determination is not substantially different from the implication in Equal Pay Act cases that a differential in pay for equal jobs is attributable to sex, except that in the War Labor Boards cases, the differential was examined for comparable rather equal jobs.

THE SCOPE OF TITLE VII: WAGE DIFFERENTIAL DISCRIMINATION

The two sections of Title VII which are relevant to this article are section 703(a) and section 703(h). Section 703(a) reads in pertinent part:

(a) 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 re-
pect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or, (2) to limit, segregate, or classify his employees . . . 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 . . . sex . . . .

Its language is broad, and by its terms applies to a limitation or classification which in any way would deprive any individual of employment opportunities. Thus, section 703(a) would appear to cover a situation such as the AT & T "framedame" case, where one Bell Company (where the job was performed by women) inappropriately classified and compensated the position at a clerical rather than at a craft level.

The legislative history of Title VII indicates that Congress was aware that the provisions of Title VII would be interpreted broadly to cover many different aspects of employment discrimination. Section 703(e)-(j) contains exceptions where Congress intended to limit or exclude Title VII's coverage, including bona fide seniority systems or merit systems and the results of professionally developed ability tests. Despite these limitations, however, Title VII has been interpreted to prevent the use of professionally developed tests where those tests have had the effect of discriminating against minority applicants and have not met the standards of validation set out by the EEOC guidelines and the American Psychological Association Standards. Similarly, the bona fide seniority system exception has been held to accede to the power of the court to remedy discrimination against minority employees, by permitting those employees to be placed in their "rightful place" within the seniority system despite the fact that placing minorities in their rightful place will detract from the exceptions of white workers. In 1972, in considering amendments to Title VII as originally drafted in 1964, Congress in effect endorsed this broad interpretation of Title VII, indicating that discrimination had proven to be more pervasive, subtle, and complex than had been anticipated in 1964.

Despite the broad language of Title VII and the intent of Congress, the courts that have considered compensation claims under that Act have insisted that plaintiffs prove unequal pay for equal work (as defined in the Equal Pay Act). The justification used by the courts to require equal work in order to collect for unequal pay under Title VII has been traced to the last portion of section 703(h), known as the Bennett amendment. That amendment provides:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act].

Thus, in analyzing the scope of Title VII, the primary question is what, if any, effect does the Equal Pay Act have on the wage differential provision of Title VII?

LEGALISITVE HISTORY OF THE EQUAL PAY ACT AND TITLE VII

History of Equal Pay Legislation in the United States

Although the Equal Pay Act was not passed until 1963, the concept of equal pay for equal work flourished among government officials and agencies as early as 1898, when a federally appointed industrial commission spoke out in favor of equal pay for women. In 1915, the congressionally created Commission of Industrial Relations recommended that Congress recognize "the principle that women should receive the same compensation as men for the same service." That principle was first implemented during World War I when the National War Labor Board applied the concept of equal work for equal pay in more than fifty cases.

1. The War Labor Board Cases

Although equal pay sentiment was frequently espoused after the first war, it was not until World War II, under the administration
of the War Labor Board, that equal pay for equal work was again enforced in industry generally. The War Labor Board, created by Executive Order 9017, was responsible for insuring industrial stability for the duration of the war, and was responsible for mediating disputes between management and labor for establishing salaries during the war. In the four years of its operation, the Board decided numerous cases involving pay scales for women. These cases ranged from simple situations where women replaced men to the more sophisticated issues of intra-plant inequality in pay scales. Because of the influence of the Board, its decisions provide an important backdrop to subsequent equal pay legislation introduced in Congress.

One of the earliest decisions was Brown and Sharp Manufacturing Co., where the company proposed to pay women twenty percent less salary for a comparable quantity and quality of work in the same occupation. The War Labor Board directed the company to include in its contract with the union a principle of “equal pay for equal work,” for females employees who, in “comparable jobs, produced work of the same quantity and quality as that produced by men.” The opinion stressed that unequal pay could not be justified by slight or inconsequential differences in job content or in method of operation. General Order No. 16 later codified this principle by permitting adjustments without prior Board approval to equalize wage rates of women. Thus, from the outset the Board required equal pay for women (1) where women replaced men in jobs, and (2) where women were performing work of “comparable quality and quantity as men.”

The War Labor Board’s most far-reaching decisions, however, concerned “intra-plant inequality.” These cases involved disputes over the rates paid for job classifications which in the past always had been performed by women. In those cases the Board examined

States Railroad Administration in 1918, the Women in Industry Service in 1919, and the National Railroad Administration in 1933. Beginning in 1923 salary grades for federal employees were fixed in the classification act, which included no differential based on sex. See Operations, supra note 56, at 3; Differentials in Pay, supra note 57. See also Note, Detailed Description of Equal Pay Legislation in the States, 46 Colum. L. Rev. 442 (1946).

60. For further information on the duties of the National War Labor Board, see The Termination Report of the National War Labor Board (1945).


62. Adopted Nov. 24, 1942, and amended Jan. 3, 1944 to read:
Increases which equalize the wage or salary rate paid to females with rates paid to males for comparable quality and quantity of work on the same or similar operations and adjustments in accordance with this policy which are based on differences in quality or quantity of work performed may be made without approval of the National War Labor Board.

job content to determine whether a wage differential was based on sex rather than requirements of the job. The leading case, General Electric Co. and Westinghouse Electric Corp., summarized the past decisions which dictated that "intra-plant inequality" could not be sanctioned.

Both General Electric and Westinghouse determined salaries by job evaluations which set a point value for each job. Although higher salaries were allocated to jobs with more points, the evidence demonstrated that at each point level, women's salaries were lower than men's salaries in jobs of equal point levels. After visiting various General Electric factories the Board noted that women workers were paid less than men at every level of plant operation. The differential of eighteen cents per hour that existed where men and women performed comparable work at lower level jobs was inconsistent with the much smaller differential (only four to six cents per hour) that characterized two male jobs (or two female jobs) which differed considerably in effort and conditions.

All but a small fraction of women's jobs which required considerable skill, mental aptitude, and responsibility were rated substantially below common labor jobs performed by males. At the most skilled level, the Board found a wage differential of thirty to forty cents per hour; the women performing these highly skilled jobs still were paid less than the unskilled male sweepers. The Board concluded that these differentials could not be justified on the basis of comparative job content and ordered across the board raises for women and negotiations for increasing some women's salaries even more.

2. Early Congressional Efforts

Although the General Electric Co. and Westinghouse Electric Corp. case was one of the last decisions by the War Labor Board, women's contribution to the war effort and their long fight for equal

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64. Id. at 684.
65. Id. at 684-85.
66. In fact, both companies had systematically paid women less than men at the same classification level. General Electric had promulgated in 1937 a policy of rating women's work 30% below that of men; this differential apparently had continued through 1945. Id. at 689.
67. The company defended the lower wages paid to women as follows: "The more transient character of [women's] service, the relative shortness of their activity in industry, the differences in the environment required, the extra services that must be provided, over-time limitations, extra help needed for the occasional heavy work, and . . . general sociological factors. . . ." Id. at 686. The Board relying on applicable precedents and principles, rejected those arguments on the grounds that "intangible alleged cost factors incident to employment of women could not legitimately be used to reduce the rate to which women would otherwise be entitled on the basis of job content." Id.
pay was not forgotten. An equal pay bill was introduced in every Congress since 1945. The first bill, introduced by Senators Claude Pepper and Wayne Morse on June 21, 1945, provided that it would be an unfair labor practice for an employer engaged in commerce to pay women less than men for comparable work. The bill proposed that an equal pay division in the Women's Bureau of the Department of Labor be established and that enforcement be patterned after the National Labor Relations Act enforcement provisions. After hearings, the bill was favorably reported out of committee; however, there was no further action on the bill prior to adjournment.

Senator Pepper reintroduced his bill in the Eightieth Congress, and Senators Pepper and Morse introduced the same bill in the Eighty-first Congress. Similar bills were introduced in the House at the same time. All of these bills used the word "comparable," and all provided for an enforcement mechanism similar to that under the National Labor Relations Act. Seventy-two similar bills on the subject of equal pay were introduced during the next ten years, but none were the subject of hearings. It was not until the Eighty-seventh Congress that an equal pay act again was seriously considered. At that time, Representative Edith Green introduced H.R. 8898, which underwent hearings in the House and was reported out of committee on May 17, 1962. All of the testimony on the Green bill had been favorable except that of the National Asso-


69. Before his election to Congress, Senator Morse had been a member of the National War Labor Board.


ciation of Manufacturers, which argued that the bill was unnecessary because sound business management required that women be paid at the same rate as men. The manufacturers also argued that the word "comparable" in the bill should be replaced by the word "equal."

The bill as it reached the floor for debate read as follows:

No employer. . . . shall discriminate. . . . between employees on the basis of sex by paying wages to any employee at a wage less than the rate which he pays employees of the opposite sex. . . . for work of comparable character on jobs the performance of which require comparable skills, except where such payment is made pursuant to a seniority or merit increase system or a bona fide job classification program, which does not discriminate on the basis of sex. . . .

This bill contained the word "comparable" as had every previously introduced equal pay bill. During the debates, however, Representative St. George introduced an amendment to substitute the word "equal" for "comparable" in the above-quoted section of the bill. She argued that the word "comparable" was overbroad and gave too much latitude to the fact-finder in pay disputes. St. George feared that by using the word "comparable," women would not receive full equality. Representative Zelenko opposed the amendment on the grounds that the word "equal," would make the bill too rigid and exact and thus unenforceable.

Zelenko went on to expain that the word "comparable" had been used successfully by the National War Labor Board in several cases and described at some length the holdings in the General Motors and Brown and Sharp Manufacturing cases. He summarized:

There is labor experience here. There is a classic word, "comparability." It is the same as "anatomy." You cannot change anatomy. It acquires a certain classic meaning. In labor management decisions, the word "comparability," or "comparable," has a classic meaning, and it means comparable work for comparable skills which lead to equal pay, for no job one as to another is exactly the same. If an employer wishes to avoid the law, all he has to do is change one operation.

80. Id. at 166.
82. Id. at 14,768 (remarks of Rep. St. George).
83. Id. at 14,769 (remarks of Rep. Zelenko).
84. See text accompanying notes 56-67 supra.
The debate as a whole suggests that many of the representatives favoring the term "equal" were concerned with the philosophical meaning of "equal" and with the general political equality of women. For example, Representative St. George, in trying to defeat the word "comparable," suggested: "We might do very well to change the wording of the Declaration of Independence where it says that all men are created free and equal and substitute the word "comparable." Other proponents of the word "equal" were opposed to the bill generally. When the vote was finally taken, the House adopted the word "equal" in lieu of "comparable" by a vote of 138 to 104. The bill subsequently passed as amended and was sent to the Senate.

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; and (3) paying women lower wages irrespective of the value, skill, and 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 that it would outlaw all three types of discrimination.

The bill was approved by the committee and sent to the Senate. In the Senate it was introduced as an amendment to the Foreign Service Buildings Act of 1926, and contained the same language as had passed the House: "equal" rather than "comparable." On October 3, 1962, the bill passed the Senate as an amendment to the act of 1926, but the House refused to pass it as a "rider" and the bill died in the Eighty-seventh Congress.

3. The Equal Pay Act of 1963

The Equal Pay Act finally was passed in 1963, but from the time that it was introduced it contained the word "equal" instead of "comparable." The legislative process served mainly to limit the

86. Id. at 14,770 (remarks of Rep. St. George).
87. Id. at 17,441.
88. Id.
89. Hearings on S. 7444 Before the Subcomm. on Labor of the Senate Labor and Public Welfare Comm., 87th Cong., 2d Sess. 76 (1963). Other testimony at the hearings indicate that those who opposed the bill advocated the use of the word "equal" rather than "comparable." See, e.g., id. at 72.
90. 108 CONG. REC. 22,082 (1962).
91. Id. at 23,013.
scope of the Act to a narrow set of circumstances in which jobs are nearly identical. The bill originally introduced in both the House and Senate read as follows:

No employer . . . shall discriminate [in regard to wages] . . . between employees on the basis of sex . . . for equal work or on jobs the performance of which requires equal skills except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.92

In subsequent hearings in both the House and Senate, several witnesses testified about the use of job evaluation systems, such as the ones referred to by the War Labor Board,93 as a method for comparing jobs for "equality." Such a system compared skill, effort, responsibility, and working conditions rather than just skill, as provided in the proposed bill.94 Witnesses persuaded committee members that by incorporating job evaluation concepts, the proposed equal pay bill would be simpler and fairer to enforce. Before the committee reports could be published, new bills were introduced in both the House and Senate which included the basic elements of job analysis:

No employer . . . shall discriminate [in regard to wages] . . . between employees on the basis of sex . . . for equal work on jobs the performance of which requires equal skill, effort and 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. . . .95

Thus, by the time the new equal pay bill was ready for debate on the floor of Congress it had been narrowed far beyond its original

93. See text accompanying notes 56-67 supra.
scope and covered only jobs that were substantially equal in all respects.  

On May 17, 1963, the Senate passed the bill after a brief debate and sent it to the House.  

On this date, H.R. 6060, the House version of the equal pay bill, was debated, amended, passed, and returned to the Senate.  

The Senate repassed the bill as amended on May 28, 1963.  

The major debate in the House took place on May 23, 1963. These debates are instructive because they demonstrate the limited scope which the legislature intended to give the new Act, and the significant differences between the House and Senate on the key provision of the bill.  

In the first place, the members of the House Subcommittee on Labor explained to the House how and why the bill was written. One important comment by Representative Goodell concerned the use of the word “equal” instead of “comparable”:

Last year when the House changed the word “comparable” to “equal” the clear intention was to narrow the whole concept. We went from “comparable” to “equal” meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.  

This view of the scope of the Act directly conflicts with that of Senator McNamara, Chairman of the Senate Subcommittee on Labor: “[S. Rep. 176] makes it clear that it is not the intent of the Senate that the jobs must be identical. Such a conclusion would obviously be ridiculous.”

This statement was made shortly before the Senate passed the House version of the bill and so constitutes

96. See H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963); S. Rep. No. 158, 88th Cong., 1st Sess. (1963). Both reports recommended the new bills, H.R. 6060 and S. 1409, which provided, in addition to a more detailed definition of equal work, that the Equal Pay Act would be incorporated into the Fair Labor Standards Act, as an amendment to that Act, and would be administered by the Wage and Hour Division of the Department of Labor. This was recommended by several persons at the Committee hearings and was believed to be advantageous in terms of efficiency and ease of enforcement.


98. Id. at 9217-18.

99. Id. at 9761-62.

100. Although the debates are important and informative, it should be noted that the Supreme Court cautioned that a better understanding of the Act can be obtained by considering the way in which Congress arrived at the statutory language than by attempting to reconcile or establish preferences between conflicting interpretations of the Act by individual legislators on the committee reports. Corning Glass Works v. Brennan, 417 U.S. 188, 197 (1974).

101. 109 Cong. Rec. 9197 (1963). This interpretation is not entirely consistent with the actual debate which culminated in the word “equal” being substituted for “comparable.” See text accompanying notes 68-90 supra.

the last congressional word on the meaning of the Act.

The half-hearted support of the House bill by those representatives who had sponsored equal pay legislation reflects its significantly restricted scope compared with earlier versions of the bill. Congresswoman Dwyer called the new bill "quite specific—in fact, excessively specific, in my judgment—about what constitutes equal work."[103] Congresswoman Kelly stated that the bill was only a start.[104] Congresswoman Sullivan believed the bill did not go far enough.[105] Finally, Congressman Dent stated that the bill fell short of doing the job; he had hoped the Senate would substitute the word "comparable" for the word "equal."[106]

The word "equal" resulted in very narrow and restrictive interpretations of the Equal Pay Act from the time of its initial implementation in 1964 until the landmark case of Shultz v. Wheaton Glass Co. in 1970,[107] and the only Supreme Court case, Corning Glass Works v. Brennan decided in 1974.[108] These cases, which held that the standard for comparing jobs was not "identical," but "substantially equal"[109] finally permitted the Act to be enforced.[110]

**History of Title VII of the Civil Rights Act of 1964**

Unlike the Equal Pay Act, which conceptually was straightforward, Title VII of the Civil Rights Act of 1964 presented a host of new concepts and issues, so that the legislators themselves were unsure of what they were creating. The legislative history of that Act, therefore, is quite complicated, and a plethora of articles and books have attempted to explain its meaning.[111] Unfortunately for those seeking to understand the legislative intent as to sex discrimination,[112] or discrimination in compensation[113] or classification, the legislative history in those areas is suprisingly scanty.

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103. Id. at 9197. Representative Dwyer ultimately urged adoption of the bill without the compromise amendments. Id. at 9201 (remarks of Rep. Dwyer).
104. Id. at 9201-02 (remarks of Rep. Kelly).
105. Id. at 9205 (remarks of Rep. Sullivan).
106. Id. at 9200 (remarks of Rep. Dent).
109. 417 U.S. at 201-03; 421 F.2d at 265-66.
110. See Murphy, supra note 9, at 648-49.
112. See text accompanying notes 195-213 infra.
113. See text accompanying notes 154-176 infra.
The word "sex" was not mentioned in the various committee-approved employment discrimination bills because Title VII was part of a larger statute to eliminate race discrimination in various aspects of American life. Therefore, sex discrimination in employment was not subject to hearings. When the bill reached the House floor, Representative Smith, a Southern Democrat who ultimately voted against the passage of the Civil Rights Act, proposed that the bill be amended to prohibit discrimination on the basis of sex.

Those who believe that the inclusion of sex was a diversionary tactic intended only to defeat the Act as a whole cite the fact that Smith and nine other men who spoke in favor of the sex amendment ultimately voted against the bill, that Smith used as an example of sex discrimination a silly letter from a constituent complaining about the shortage of men available for marriage, and that the amendment was opposed by the administration and other staunch supporters of the bill including Representative Celler, who intro-

114. See statements of President Kennedy accompanying original Civil Rights bill and supplementary bill guaranteeing fair and full employment for blacks and other minorities, 109 CONG. REC. 3245 (1963); 109 CONG. REC. 11,174 (1963).
118. Berg, supra note 111, at 79; Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877 (1967); Vaas, supra note 111, at 441-43; Kanowitz, supra note 47, at 310-44.
119. See Miller, supra note 118; Comment, Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 DUKE L.J. 671, 677 n.36. The comments of Smith and other Congressmen who supported the amendment are at 110 CONG. REC. 2577-84 (1964). Their votes against the civil rights bill are at 110 CONG. REC. 2804-05 (1964).
120. 110 CONG. REC. 2577. Representative Smith remarked:
I think we all recognize and it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex [i.e., men] . . . That is about all I have to say about it except, to get off of this subject for just a moment but to show you how some of the ladies feel about discrimination against them, I want to read you an extract from a letter that I received the other day. This lady has a real grievance on behalf of the minority sex, and she says:
I suggest you might . . . favor an amendment or a bill to correct the present "imbalance" which exists between males and females in the United States. . . . The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an "imbalance" of 2,661,000 females. . . . Just why the Creator would set up such an imbalance of spinsters, shutting off the "right of every female to have a husband of her own," is of course, known only to nature.
110 CONG. REC. 2577-78 (emphasis added).
duced the original bill and Representative Green, who supported the bill and had been one of the authors of the Equal Pay Act.\textsuperscript{121} However, four women representatives who also supported the civil rights bill urged the adoption of the sex amendment.\textsuperscript{122} In addition, extensive information about discrimination against women had been considered in the years of hearings on the Equal Pay Act.\textsuperscript{123} Perhaps most importantly, the sex amendment passed while other amendments which clearly would have hurt the bill as a whole were defeated.\textsuperscript{124}

One consideration in the passage of the sex amendment may well have been the weaknesses and gaps in the Equal Pay Act. Besides the exemptions and narrow coverage of that Act, the House had recognized in hearings\textsuperscript{125} and on the House floor\textsuperscript{126} that the Equal Pay Act could be avoided by firing all female employees, refusing to hire them or segregating them so that they did not perform the same work as men. All of these practices would damage women workers and were forbidden by Title VII.

But the strongest statements in favor of adding sex to Title VII were made by the women representatives on the floor of the House, particularly those of Martha Griffiths. She stressed that unless sex was included in the Act both black women and white women would be unable to obtain employment because the anti-discrimination sections would apply only to men.\textsuperscript{127} Representative May stated that since 1923 various women's groups and parties around the country had been lobbying for legislation to protect women from discrimination.\textsuperscript{128} Finally, Representative St. George, who had urged that the

\textsuperscript{121} 110 CONG. REC. 2578, 2582 (1964).
\textsuperscript{122} See comments of Congresswomen Griffiths, St. George, May, and Kelly, 110 CONG. REC. 2577-84 (1964). Rep. Bolton said she would prefer to add sex to the miscellaneous title of the Civil Rights Act. Id.
\textsuperscript{123} See text accompanying notes 92-110 supra. One commentator has stated:

The most illuminating measure of the significance of both the Equal Pay Act and the "sex" amendment to Title VII is this common legislative background. This requires particular emphasis because the mistaken idea has been circulating that, in contrast to race, color and creed discrimination, there is little or no legislative history or documents bearing on the legislative intent or objectives of the "sex" amendment to Title VII.

\textsuperscript{124} 110 CONG. REC. 2584 (1964). The vote was 168 for the amendment and 133 opposed.
\textsuperscript{125} See, e.g., *Hearings on H.R. 3861*, supra note 94, at 220-35.
\textsuperscript{126} 110 CONG. REC. 2579-82 (1964).
\textsuperscript{127} Id. at 2578 (remarks of Rep. Martha Griffiths).
word "equal" be substituted for "comparable" in the equal pay bill, reminded the House that women workers, notwithstanding the passage of the Equal Pay Act the previous year, still did not receive equal pay for equal work. She urged the addition of sex into the employment title of the civil rights bill in order to assure full employment rights for all women.\textsuperscript{129}

It should be noted that even the Southern whites who supported the sex amendment but ultimately voted against the civil rights bill as a whole, were concerned, and not unreasonably, that without the sex amendment the bill if passed would inevitably foster discrimination against women and especially white women.\textsuperscript{130} This is not very different from the concern of Representative Griffiths and is not irrational. Thus, sex had to be included in the Act in order to avoid even more discrimination against women than was tolerated at the time the civil rights bill was enacted.

After the bill had passed the House, the Senate debated procedure on the bill for seventeen days and then went into a fifty-eight day filibuster which was ended only after several important agreements had been reached between the leaders of both parties.\textsuperscript{131} The House amendment covering sex was not altered in the Senate.\textsuperscript{132}

However, after cloture, several technical amendments to the bill were accepted. One of those amendments, proposed by Senator Bennett as an adjustment at the time, has subsequently been used by various courts to limit the scope of Title VII's application to discrimination in payment of wages. A close examination of that amendment demonstrates its limited purpose.

The so-called Bennett amendment is set forth in the third part of section 703(h) of Title VII. The first two parts also had been added in the Senate. The first explains that it is not an unfair employment practice for an employer to differentiate between employees based on seniority, a merit system, quantity or quality of production, or location.\textsuperscript{133} This amendment was part of the

\textsuperscript{129} 110 Cong. Rec. 2578-84 (1964).
\textsuperscript{130} Id. at 2577-78.
\textsuperscript{131} See Vaas, supra note 111, at 445. The compromise bill, called the Dirksen-Mansfield substitute, was explained by Senator Humphrey at 110 Cong. Rec. 12,818-12,820 (1964). The important areas of compromise were the provision of a 60-day deferral period by the EEOC where the State has a fair employment practices commission, the elimination of the right of EEOC to litigate on behalf of charging parties, and limitations on mandatory record keeping functions of employees.
\textsuperscript{132} 110 Cong. Rec. 14,511 (1964); see Miller, supra note 118, at 883 n.34.
\textsuperscript{133} The first part of § 703(h) reads as follows:

Notwithstanding any other provision of this title, 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
Mansfield-Dirksen compromise and was explained by Senator Humphrey as follows: "Thus, this provision makes clear that it is only discrimination on account of race, color, religion, sex, or national origin that is forbidden by the title. The change does not narrow application of the title, but merely 'clarifies its present intent and effect.'"\textsuperscript{134} The second part of section 703(h), the Tower amendment, attempted to limit the effect of Title VII upon the use of written employment tests.\textsuperscript{135} The language was modified through compromise so that any such tests which have a discriminatory effect can be challenged under the Act.\textsuperscript{136}

The Bennett amendment, introduced on June 12, 1964, provided as follows:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of 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].\textsuperscript{137}

Senator Bennett stated: "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. I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill."\textsuperscript{138} The leadership agreed to the amendment and it was passed without a tally.

Actually, there was nothing on the face of the amendment that was inconsistent with the previous understanding of the interaction of the Equal Pay Act and Title VII. It was always assumed that the Equal Pay Act would continue to be enforced in its own sphere without regard to the new mechanisms set up by Title VII. Further, it was understood that Title VII went far beyond the scope of the

\textsuperscript{seniority or merit system, on 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 intent to discriminate because of race, color, religion, sex, or national origin.


134. 110 Cong. Rec. 12,722 (1964).

135. The second part of § 703(h) reads as follows:

[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally devised 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.


138. Id. (remarks of Sen. Bennett).
Equal Pay Act because it did not contain the same jurisdictional limitations as the Act and prohibited all kinds of discrimination permitted by the Equal Pay Act. This understanding explicitly was set forth by Senator Clark, one of the floor managers of Title VII in the Senate, who responded to concerns about a possible conflict between Title VII and the Equal Pay Act on the floor of the Senate:

*Objection.* The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act 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 that 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.

Thus, at the time the Bennett amendment was passed by the Senate, it was quite clear that both the Equal Pay Act and Title VII were separate and independent in scope, except that the standards in the Equal Pay Act for determining discrimination in wages was applicable to the “comparable” situation under Title VII. In other words, if a claimant charged she was being paid less at a job which was equal in skill, effort, and responsibility to men’s jobs, the Equal Pay Act standards were appropriate. However, the Bennett amendment on its face spoke less to the coverage of the Equal Pay Act than to the defenses under that Act. Differentiations in amount of pay were only authorized under the Equal Pay Act as defenses; those defenses only came into play once the plaintiff had demonstrated substantial job equality. Therefore, where a differential in pay for

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139. The Fair Labor Standards Act, which contained the Equal Pay Act, was limited in coverage to certain employees directly involved in interstate commerce. This section was amended in 1966 to broaden the coverage to include employees in enterprises in interstate commerce, 29 U.S.C. § 207 (1970). For the definition of employers in a Title VII context, see 42 U.S.C. § 2000e-(b) (1970).

140. As suggested at text accompanying notes 125-127 *supra,* under the Equal Pay Act women could be refused employment or terminated by an employer who wished to avoid paying them equal wages. This was prohibited under Title VII. 42 U.S.C. § 2000e-2(h) (1970).

141. 110 CONG. REC. 7217 (1964) (emphasis added).
substantially equal work has been demonstrated under Title VII, the Bennett amendment provides the same defenses as exist under the Equal Pay Act. Where a differential is shown to exist on jobs which are comparable but not substantially equal, Title VII should apply without the restrictions of the Bennett amendment.

One other part of Title VII’s legislative history has been cited recently for the proposition that Title VII is limited to the scope of the Equal Pay Act in the area of compensation. Senator Humphrey, floor manager in the Senate of the civil rights bill, was asked by Senator Randolph during the course of the floor debate if social security benefit plans, as well as other industrial benefit plans which treated women and men differently, would become illegal upon passage of Title VII. Humphrey replied that the Bennett amendment, which already had been passed, guaranteed that those plans could continue in operation.¹⁴²

Justice Rehnquist, in his opinion for the Court in the recent pregnancy disability benefits case, General Electric Co. v. Gilbert,¹⁴³ apparently inferred from Humphrey’s remark the suggestion that the Bennett amendment incorporated into Title VII the Equal Pay Act and its interpretations.

However, this interpretation of legislative intent is erroneous for several reasons. First, Senator Humphrey’s remarks were made after the Bennett amendment had been adopted. Therefore, its value in interpreting the intent of that amendment is minimal, even assuming that on this amendment, Senator Humphrey’s statements are instructive of legislative intent.¹⁴⁴ This is particularly so

¹⁴³. 97 S. Ct. 401, 412 (1976).
¹⁴⁴. In general, what is said in debate is given little weight in ascertaining legislative intent. See Corning Glass Works v. Brennan, 417 U.S. 188, 198-202 (1974). See also F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 155 (1975); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.13 (4th ed. 1972). However, courts have looked to statements made in floor debates when made by the chairman of the committee reporting the bill or the sponsor of the bill. Humphrey as floor manager of the Civil Rights bill would qualify as sponsor.

The rationale examining sponsors’ statements is that sponsors would have special knowledge of the intent behind the statutory words since they had been working with the bill as it moved through the congressional process. In fact, courts have often emphasized in using sponsors’ statements their participation in drafting the bill. See, e.g., Galvan v. Press, 347 U.S. 522 (1954) (McCarran’s statements concerning the McCarran Act); United States v. United Mine Workers, 330 U.S. 258 (1947) (LaGuardia’s statements concerning the Norris-LaGuardia Act); Brennan v. Corning Glass Works, 480 F.2d 1254 (3rd Cir. 1973), rev’d on other grounds, 417 U.S. 188 (1974); United Elec. Coal Co. v. Rice, 80 F.2d 1 (7th Cir. 1935) (Norris’ statements concerning the Norris-LaGuardia Act). This is certainly not the case as to Humphrey’s statement; he did not participate in drafting the Bennett amendment. Under the rationale of allowing sponsors’ statements, it would be better to look to Bennett’s own statement as to the meaning of the amendment.
since Humphrey was not the sponsor of the amendment, and no other evidence in the legislative history of Title VII supports his interpretation. Furthermore, Senator Humphrey had no special knowledge either of the intended meaning of the Bennett amendment or the law under the Equal Pay Act; in fact, his interpretation of the result even under the Equal Pay Act was incorrect. Finally, Senator Humphrey's statement is particularly suspect insofar as it was made at a time when passage of the Act was still uncertain, and thus may have demonstrated no intent so clearly as the intent to get the bill passed.

Import of Statutory History

Courts have often said that more important than statements made during debate on a bill is the process by which a bill has been passed. The legislative steps culminating in the Equal Pay Act of 1963 suggest that it should be limited to the narrow situation where men and women are performing substantially the same jobs. The history of Title VII suggests a broad prohibition of employment discrimination limited only by the exceptions contained in section 703(e)–(j). In this respect, it is particularly noteworthy that in 1964 Congress did not define "compensation" in Title VII in the terms used in the Equal Pay Act. The previous year, the Equal Pay Act had been narrowly drafted solely to avoid the results reached by the War Labor Board in the General Electric Co. and Westinghouse Electric Corp. case in analyzing "comparable" jobs.

Considering the vague history of the Bennett amendment, and the fact that Title VII is to be construed broadly and independently, it seems clear that the Equal Pay Act controls litigation under Title VII only if it authorizes the challenged differentiation in wages. The differentiation must be one expressly covered by the Equal Pay Act; and as suggested above, the Equal Pay Act was intended to cover only a very narrow category of cases. If the Equal Pay Act fails to

145. Berg, supra note 111, at 81.
146. Manhart v. City of Los Angeles, 13 Fair Empl. Prac. Cas. 1625 (9th Cir. 1976).
147. See, e.g., 2A SUTHERLAND, supra note 144, at § 48.15. There is a great incentive for sponsors to make statements that will aid the bill's passage and will allay other legislators' fears about the bill. This appears to be the role Humphrey was assuming when he assured Senator Randolph that the Bennett amendment insures that the social security system of benefit payments would not be disrupted by Title VII. In any event, as the Ninth Circuit noted in Manhart, Senator Humphrey was incorrect in his interpretation. 13 Fair Empl. Prac. Cas. at 1625.
prohibit a differential, in the sense that it does not apply to that differential, then the Act does not apply. Although the Equal Pay Act does not cover jobs worth the same points on a job evaluation, or situations where women are grossly underpaid, this does not mean that Title VII does not cover such differentials. What is does mean is that the Equal Pay Act does not authorize these differentials, rather it had not dealt with them at all.

Essentially, this was the holding in an early EEOC decision in which the Commission found that women performing clerical work were underpaid vis-a-vis men doing craft work in violation of Title VII.150 The EEOC considered the possibility of a defense under section 703(h), the Bennett amendment, but rejected it:

Section 6(d) of the Fair Labor Standards Act “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 a 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.

The above-quoted provision of Section 703(h) was intended to ensure consistency in the administration of Title VII and the Equal Pay Act. Since the policy at issue here is not within the intended scope of the Equal Pay Act, it clearly cannot be “authorized” by that Act within the meaning of Section 703(h) of Title VII.151

This decision in effect was incorporated into the EEOC’s interpretive regulation describing the relationship of Title VII to the Equal Pay Act. The regulation reads in pertinent part:

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.152

the proposition that a comparison of jobs involving job functions which are substantially identical is outside the purview of the Equal Pay Act.

150. EEOC Decisions 6300 (1971).
151. Id. (emphasis in the original).
152. 20 C.F.R. § 1604.8 (1976). An earlier version of this EEOC regulation required that EEOC rulings be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations in which both statutes are applicable.

29 C.F.R. § 1604.7(a) (1973). Not that harmonization was required only where both statutes
Both the EEOC’s decisions and regulations have consistently interpreted the Bennett amendment narrowly, giving full effect to Title VII in the area of sex as well as other types of discrimination. These interpretations are consistent with the legislative history and remedial purposes of Title VII, and should be applied by the courts as well.  

WAGE DIFFERENTIAL PROTECTION IN THE COURTS

Interpretation of Section 703(h): The Wheaton Glass Decision

One of the first cases to discuss section 703(h) of Title VII was an Equal Pay Act case. In Shultz v. Wheaton Glass Co., the Third Circuit cited Title VII in the context of analyzing whether or not extra tasks which were given to men otherwise performing the same job as women made the job so dissimilar as to be outside the purview of the Equal Pay Act. The court of appeals recognized that Congress, in passing the Equal Pay Act, had rejected the experience of the War Labor Board in determining whether inequities existed between dissimilar occupations and required that the jobs be substantially equal. However, the court also opined that Congress had intended that only bona fide job classification programs that do not discriminate on the basis of sex would serve as a valid defense to discrimination under the Equal Pay Act. Citing the provision in Title VII prohibiting discrimination in the classification of employees, as well as in their employment and compensation, the Wheaton Glass court found that Congress did not intend that artificial job classifications provide an escape from the operation of the Equal Pay Act.

The court discussed further the relationship between Title VII and the Equal Pay Act:

Although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act. This is recognized in the provision of § 703(h) of the Civil Rights Act [42 U.S.C. § 2000e-

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153. Generally, EEOC guidelines are accorded great deference by the courts. See Albermarle Paper Co., v. Moody, 422 U.S. 405, 432 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1975). However, in General Electric Co. v. Gilbert, 97 S. Ct. 401, 410-12 (1976), the Court refused to follow EEOC guidelines on the disability issue because the Court found that the latest guidelines were inconsistent with earlier opinions. This objection does not, of course, pertain to this situation.


155. The extra tasks given to the men were viewed by the court in light of the history of the creation of lighter jobs for women resulting from union efforts to keep women from competing with men. See text accompanying notes 16-22 supra.
that an employer's differentiation upon the basis of sex in determining rates of compensation shall not be an unlawful practice under the Civil Rights Act if the differentiation is authorized by the Equal Pay Act. Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of § 703(h) would undermine the Civil Rights Act.\textsuperscript{156}

The \textit{Wheaton Glass} court declined to specify the precise manner in which the two statutes should be harmonized to achieve the congressional objective. It held that, aside from Title VII, the Equal Pay Act itself permits inquiries into Pay Act violations where an employer has developed artificial job classifications to circumvent the legislation's proscriptions.

\textit{Post-Wheaton Glass Developments}

The principle holding of \textit{Wheaton Glass} was that Title VII and the Equal Pay Act should be construed to support rather than undermine each other. The Fifth Circuit in \textit{Hodgson v. Brookhaven General Hospital},\textsuperscript{157} agreed that the purposes of Title VII and the Equal Pay Act are interrelated and that the two provisions must be harmonized. The court of appeals rejected, however, the suggestion in \textit{Wheaton Glass} that Title VII could be used to expand the coverage of the Equal Pay Act to jobs which were not substantially identical, even if reservation of higher paying jobs would conflict with Title VII.\textsuperscript{158}

Thereafter, two courts of appeals cited language from \textit{Wheaton Glass} to hold that in Title VII cases plaintiffs must prove unequal pay for equal work in order to make out a claim for discrimination in compensation. In \textit{Ammons v. Zia},\textsuperscript{159} the plaintiff worked as an "editor-writer" writing operational check lists and maintenance procedures. Twelve men worked with her in the publication section as "procedures writers" or "technical writers." In addition to her writing tasks, plaintiff was given certain non-writing duties, including typing, dictation, and answering the telephone—duties which required less responsibility than those assigned to the higher paid men. Only the plaintiff was refused clearance for duties in the Apollo test area.

\textsuperscript{156} 421 F.2d at 266.
\textsuperscript{157} 463 F.2d 719 (5th Cir. 1970).
\textsuperscript{158} In \textit{Brookhaven General Hospital}, the Fifth Circuit reasoned that it would be unfair to allow an Equal Pay Act recovery for women in higher paying but unequal jobs, since some women may not have intended to seek employment in the higher paying jobs. \textit{See id.} at 722.
\textsuperscript{159} 448 F.2d 117 (10th Cir. 1971).
Plaintiff's primary complaint was that she was paid less than three of the men performing the same work as writers. The district court had found that the work which the plaintiff performed was not the same as the work which male procedure writers performed and was not performed entirely in the same place, i.e., plaintiff was not allowed in the Apollo test area. Sex was found to be a bona fide occupational qualification reasonably necessary for working in the test area. That court also found that plaintiff was not as well qualified by education and experience as some of the male writers and that plaintiff was assigned clerical work only because she was the best qualified employee in the publication section to perform the work. No evidence was presented concerning the comparative value of the jobs if they were not substantially identical in content. Therefore, the court found that the defendant had not engaged in an unlawful employment practice by discriminating against the plaintiff with respect to her compensation.

In affirming the findings of 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. The court cited no authority for that proposition, but did cite Wheaton Glass for the definition of "equal work" as requiring a demonstration that the jobs were "substantially equal." In addition, at the outset of its opinion, the court quoted language in Wheaton Glass that the Equal Pay Act and Title VII serve the same fundamental purpose and that the Equal Pay Act should be construed in a manner that would not undermine the Civil Rights Act of 1964.

Without further explanation, the Ammons court applied the burden of proof outlined in Wheaton Glass. Although at first the court suggested that the meaning of the term "authorized" by the Equal Pay Act (as set out in section 703(h)) applies to the company's burden to prove that a differentiation falls within one of the exceptions to the Equal Pay Act, the court later required the plaintiff to meet Equal Pay Act standards, i.e., equal work, in proving a prima facie case. This requirement was imposed without any analysis of the purpose of section 703(h) or of the legislative history of that

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161. 29 U.S.C. § 206(d) (1970). The Equal Pay Act authorizes unequal pay for equal jobs if the employer can prove that the difference is based on a (i) seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) any factor other than sex. Id.
provision. However, plaintiff apparently agreed that this was the proper standard.

Similarly, in *Orr v. McNeill & Son, Inc.*, the Fifth Circuit reversed a finding by the district court that plaintiff had established a prima facie case of sex discrimination in compensation under Title VII. Plaintiff was the manager of the accounting department of a small insurance company; she also was a vice-president of the company. The men whose salary provided the basis for plaintiff’s claim that she was underpaid were managers of the fire claims department and the general claims department and also were vice-presidents. A fourth department manager (of the casualty department) had made less than plaintiff from 1966 to 1970, but in 1970 his salary was equal to that of plaintiff. He was not a vice-president of the company.

Although alleging in her complaint that she performed equal work on positions requiring equal skill, effort, responsibility, and under similar working conditions, the plaintiff in *Orr* never argued that the jobs were substantially identical, recognizing that, since different departments were involved, the jobs in fact were different. However, the district court apparently assumed (possibly because of the allegations in the complaint) that Equal Pay Act standards determined whether a wage differential existed. Applying those standards, the district court found that the jobs were not as substantially equal in this case as jobs in other cases where recovery had been permitted. Nonetheless, the two department managers who consistently had been paid more than plaintiff testified that plaintiff’s job was as important as the jobs which they performed. On this basis, the district court held that to deny plaintiff recovery because of the dissimilarity in the jobs would be tantamount to restricting Title VII to the Equal Pay Act—a construction that the court did not believe had been intended by Congress or the courts.

The Fifth Circuit reversed the determination of the district court on the grounds that the evidence did not sustain the district court’s

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162. 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 65 (1975).
166. 10 Fair Empl. Prac. Cas. at 699.
167. The court of appeals pointed out that one of the male department managers had testified that plaintiff’s job was equally important in response to a leading question. 511 F.2d 169-70.
168. 10 Fair Empl. Prac. Cas. at 699-700.
determination that the jobs were substantially equal. Citing Brookhaven General Hospital, Ammons, and Wheaton Glass, the Orr panel observed that the sex discrimination provisions of Title VII must be construed in harmony with the Equal Pay Act. The court then referred to the Bennett amendment in the context of the Equal Pay Act. On the basis of a cursory analysis, the court of appeals held that in order to recover under Title VII, plaintiff must prove that a wage differential is based upon sex and the performance of equal work for unequal compensation. The Fifth Circuit found no basis for holding that the jobs of the plaintiff and the other men were equal, even though each phase of the operation was important.

Thus, both the Tenth Circuit and the Fifth Circuit have restricted Title VII's prohibition against sex discrimination in compensation to the scope of the Equal Pay Act with virtually no analysis of the broader policy or scope of Title VII, the meaning of section 703(h), or the degree to which a narrow statute should or may restrict coverage of a broader one. The reliance of those courts upon Wheaton Glass and Brookhaven General Hospital is especially misplaced. In Wheaton Glass the court indicated the Equal Pay Act and Title VII should not be construed in such a manner as to undermine one another. The similar purposes of the Equal Pay Act and Title VII were held to imply that the Equal Pay Act should not be narrowly interpreted in instances where employers were violating Title VII by excluding women from positions which they were capable of performing. Hence, in Wheaton Glass the court suggested that Title VII could broaden the scope of the Equal Pay Act, at least in terms of interpreting the availability of the defenses contained in that Act. Although the Eighth Circuit in Brookhaven General Hospital rejected that suggestion and held that Title VII did not broaden the scope of the Equal Pay Act, the decision does not suggest that the Equal Pay Act could narrow the scope of Title VII.

Furthermore, the result reached in Orr is contrary to a result reached by another panel of the Fifth Circuit in Davis v. Passman. In that case a former employee of a congressman brought an action

169. While the quality of these decisions may be explained by the corresponding quality of evidence in the lower courts and the fact that the plaintiffs were confused as to the applicable Title VII standard, the broad language of Ammons and Orr is appropriate if the courts were merely confronted with a situation where a differential attributable to sex had not been proved.
170. 421 F.2d at 266. In Wheaton Glass Co., the court was concerned with whether the employer's contention that the pay differential was based upon a factor other than sex be given credence. See id. at 264.
171. 544 F.2d 865 (5th Cir. 1977).
for sex discrimination under the fifth amendment, alleging that she had been discharged from her position because of her sex. Plaintiff had brought her action under the fifth amendment rather than Title VII because section 717 of Title VII excludes from coverage "positions in the legislative branch of the federal government which are not in competitive service."\(^\text{172}\) Defendant argued that plaintiff's action was precluded by the Supreme Court decision in *Brown v. General Services Administration*,\(^\text{172}\) where the Court had held that federal employees could not avoid the procedural requirements of section 717\(^\text{172}\) by bringing an action directly under either the constitution or another statute providing a remedy for employment discrimination. Although Justice Stewart had framed the issue in *Brown* as "whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment,"\(^\text{174}\) the Fifth Circuit held that *Brown* established Title VII as the exclusive judicial remedy for federal employment discrimination to which Title VII applies. In areas not touched by Title VII, however, other remedies are not affected.

In *Davis*, the court of appeals primarily addressed the issue of the effect upon constitutional rights of a statute drafted more narrowly than the constitutional rights implemented by the statute. However, the language in that case is relevant to the interpretation of one statute by another:

Title VII among other things implements constitutional rights, but here an open declaration of non-implementation because of the exemption accorded Congress does not import into our case the exclusivity of Title VII actions. When the statute affords relief from a constitutional invasion, the statutory methodology should be followed, but when the statute does not attempt to implement the constitutional rights sought to be vindicated, we cannot then use the statute as the sword to demean or eliminate constitutional rights.\(^\text{175}\)

The court also rejected defendant's contention that since Congress believed when it extended Title VII to federal employment that no other statute existed to remedy discrimination in federal

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172. Section 717 of Title VII, 42 U.S.C. § 2000e-16(a) (1970), extends the coverage of Title VII to employees of the federal government (excluding positions in the legislative branch not in competitive service), but provides a different procedure for implementing the Title VII rights. Instead of filing a charge with EEOC, federal employees must file a charge with their own agency and with the Civil Service Commission prior to bringing a Title VII action.


174. *Id.* at 821.

175. 544 F.2d at 876.
employment, coupled with a failure to enact such a remedy, Congress had demonstrated an intent to remedy only discrimination proscribed by Title VII: "For, as is well established, Congress, need not address all facets of a problem in a single piece of legislation. It is free to enact remedial legislation element by element at a pace most acceptable to the legislative mind."\(^{176}\)

Had the Fifth Circuit panel in *Orr* and the Tenth Circuit in *Ammons* similarly analyzed the effect of one remedy upon another, it is difficult to imagine that those courts would have reached the same results. The same principle that precludes preemption of constitutional remedies by a statute not fully implementing constitutional rights, precludes a finding that the broad coverage of Title VII is preempted by the more narrow language of the Equal Pay Act, where the Equal Pay Act does not address the situation sought to be remedied under Title VII.

**Toward a Reasoned Interpretation of Section 704(h)**

A similar principle expressed by the New York Court of Appeals in *Brooklyn Union Gas Co. v. Appeal Board\(^{177}\)* demonstrates the proper statutory analysis. There, defendant argued that the broad language of New York's human rights law prohibiting discrimination in compensation, terms, conditions, or privileges of employment should be interpreted in light of the more narrow language contained in a disability benefits law also dealing with the subject of the action—the provision of disability benefits for maternity. The disability law specifically excluded pregnancy from the minimum coverage that an employer was required to provide. Finding that the purpose of the disability benefits law (to establish a minimum benefits package that employers are required to provide) was different from the objective of the human rights law, the court held that an employer is obliged to comply with whichever statute imposes the greater obligation. The court held that although prior to passage of the human rights law exclusion of benefits for maternity had legislative blessing (by virtue of its exclusion from the disability benefits law), this does not mean that the practice was assured continuing acceptability absent explicit condemnation. To so hold would emasculate the human rights law. The court held significant the fact that in the human rights law the legislature chose not to exempt benefits also exempted by the disability benefit law.

Although *Brooklyn Gas* involved an interpretation of the New

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176. *Id.* at 875.
York human rights law rather than Title VII, the principle is the same. There is no reason why the broad purpose, language, and coverage of Title VII should be restricted by the Equal Pay Act, particularly where, in enacting Title VII, Congress declined the opportunity to define discrimination in the terms of the Equal Pay Act. The Supreme Court has stated that Title VII is independent from and a supplement to other statutory remedies for discrimination. Where the legislative history of Title VII suggests that the sex provision was added to broaden, rather than substitute for, the rights already available to women, it is particularly inappropriate to hold that Title VII has been supplanted by a more narrow statute.

Finally, it should be noted that the result of implying into Title VII the Equal Pay Act restriction to equal pay for equal work, may very well be to provide women with less of a remedy under Title VII than is available to blacks or other protected classes. The possibility of such a result has already been recognized in Patterson v. Western Development Laboratories, Inc. where the court resolved the problem of different coverage for women and other protected groups by holding that the Bennett amendment was applicable to race as well as sex claims. Citing Orr, Ammons, and Wheaton Glass, the court held that plaintiff’s burden of proof under Title VII is the same as it is under the Equal Pay Act, i.e., to establish that wage differential exists for equal work. Since plaintiff had not attempted to demonstrate equal work, the court dismissed plaintiff’s claim that defendant was discriminating because of race in compensation.

The result reached in Patterson is inappropriate since it applies the vague language of a sex discrimination amendment to a situation of race discrimination where sex discrimination language clearly is inapplicable. However, Patterson does demonstrate the pernicious effects of the shoddy analyses of the Bennett amendment that have been accepted. The decision implicitly recognizes that the language of Title VII is broad enough to cover salary discrimination.

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178. The fact that sex was added so late in the process does not detract from the significance of the fact that Congress declined to define compensation in the narrow language of the Equal Pay Act was well-known to Congress in 1964 (one year later). See text accompanying notes 133-147 supra. Had Congress wished to limit Title VII’s coverage of compensation to the confines of the Equal Pay Act, it could easily have done so in the hearings and consideration of the bill as it applied to race, color, national origin, or religion. See Kanowitz, supra note 47, at 313-20.


181. The court in Patterson complained that plaintiff had made no effort to have a statistician testify as to the meaning of the statistics or to compare the work or job qualifications of minorities and whites. Id. at 775.
in unequal jobs. It also reaches the sound conclusion that nothing in Title VII should be construed to provide women with less protection than is provided to other minorities. The District of Columbia Circuit also recently concluded that Title VII applies as fully to sex discrimination claims in compensation as to race discrimination claims.

The failure of the courts to properly analyze the relationship between Title VII and the Equal Pay Act has had particularly unfortunate consequences for plaintiffs attempting to recover under Title VII for sex discrimination in compensation or classification. While the failure of the courts to make the analysis may be attributable to practical concerns (such as the desire to avoid a new and complex genre of Title VII suits) rather than legal considerations, these concerns should not be permitted to sanction a pervasive problem of discrimination which is within the scope of Title VII.

Other Limiting Trends in Sex Discrimination Cases

Two other lines of sex discrimination cases may affect wage differential claims. In both “hair-length” cases and the recent “sex-plus” cases (generally involving requirements in jobs filled only by women), the courts seem to be struggling to articulate a theory to justify employer decisions which appear to be reasonable, even though those decisions adversely affect members of a particular sex. One articulated rationale for this result is the belief that sex discrimination was not intended to be addressed as thoroughly as race discrimination; therefore, employers’ decisions affecting members of a particular sex are given more deference than would be a decision affecting minorities.

For example, in considering challenges—usually by men—to employers’ hair grooming codes that establish a different standard for the hair length of male employees than for female employees, the court held Title VII inapplicable, even though a standard which

182. While it is true that the bona fide occupational qualification exemption contained in § 703(e) does not apply to discrimination because of race, that exception does apply to discrimination based on religion, national origin, or religion. Furthermore, that exception applies only to the hiring or employing of workers, and not to compensation; see 42 U.S.C. § 2000e-2(e) (1970): "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. . . ." Both the courts and the EEOC have held that the bfoq exception is to be interpreted very narrowly. Indeed, the Ninth Circuit has held that the bfoq exception applies, in the case of sex, only in those situations in which a particular sex is generically required, such as a wet nurse. Rosenfeld v. S. Pac. R.R. Co., 444 F.2d 1219 (9th Cir. 1971).

treats women differently than men falls within the proscription of Title VII. In their haste to find that Title VII does not prohibit this type of minimal infringement on employment opportunities, the courts have resorted to disturbing dicta which, if taken at face value, suggest a cavalier attitude toward sex discrimination in general.\(^{184}\)

Thus, in *Willingham v. Macon Telephone Publishing Co.*,\(^{185}\) 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. This also was the result reached by the Courts of Appeals for the District of Columbia Circuit,\(^{186}\) Second Circuit,\(^{187}\) Fourth Circuit,\(^{188}\) Sixth Circuit,\(^{189}\) Eighth Circuit,\(^{190}\) and Ninth Circuit.\(^{191}\)

While the result of these cases is defensible, the 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 race discrimination cases. There is nothing in the legislative history of the sex amendment which would indicate that Congress intended such a result.\(^{192}\) Any implications 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 divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of

\(^{184}\) As noted in the dissents to several of these cases, the courts deciding adversely to hair challenges have perverted the Act by refusing to define the different treatment as discriminatory. The court should hold that a prima facie case has been made under the statute, but the employer’s interest justifies such requirements. See, e.g., Barker v. Taft Broadcasting Co., 14 Fair Empl. Prac. Cas. 697 (6th Cir. 1977); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Willingham v. Macon Tel. Publishing Co., 582 F.2d 538 (5th Cir. 1979).

\(^{185}\) 507 F.2d 1084 (5th Cir. 1975) (en banc).


\(^{187}\) Longo v. Carlisle De Coppett & Co., 537 F.2d 685 (2d Cir. 1976).

\(^{188}\) Earwood v. Continental Southeastern Lines, 539 F.2d 1349 (4th Cir. 1976).


\(^{190}\) Knott v. O. Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975).

\(^{191}\) Baker v. Cal. Land Title Co., 507 F.2d 885 (9th Cir. 1974).

\(^{192}\) See H.R. REP. No. 238, 92d Cong., 1st Sess. (1971); 527 F.2d at 1251 n.2.
social concern given to any type of unlawful discrimination." This statement was interpreted by the Eighth Circuit, and other courts considering the issue, as requiring a guarantee of equal job opportunities for men and women. This approach does not help those persons who are limited for other reasons to jobs filled exclusively by members of one sex. The real issue is whether employers have unfettered discretion in regulating women (or men) where no men (or women) compete in the job.

**Differential Job Classifications As Discrimination Under Title VII**

Courts have explored Title VII's restrictions on an employer's ability to impose sex-based job qualification in several "sex-plus" cases. "Sex-plus" refers to a situation where an employer distinguishes between employees on the basis of sex plus one other characteristic. In *Phillips v. Martin Marietta Corp.*, the Supreme Court rejected the employer's contention that a refusal to hire mothers of preschool age children is not solely sex-based discrimination. The employer had argued that his employment decision was based on sex plus maternity of preschool age children. The Court held that the proper question was whether mothers of preschool age children were being treated differently than fathers of preschool age children, and if so, whether the employer could establish a bona fide occupational qualification for this treatment without clarification. The court remanded the case for development of the factual issues relevant to proof of a bfoq.

The more difficult analysis of sex-plus occurs when the employer has imposed some requirement upon the employees in jobs filled exclusively by women. The most important cases to consider this question have been in the airlines industry, where often only women are hired for the position of stewardess or flight cabin attendant.

In *Sprogis v. United Airlines Co.*, the Seventh Circuit stated in dictum that a "no marriage rule" which was applied only to women in the stewardess position constituted a violation of Title VII, even if sex were found to be a bfoq for the position. The *Sprogis* court held

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193. See note 192 supra. The dangerous language used in these “appearance” cases is reflected in a recent case, *Jarrell v. Eastern Airlines, Inc.*, 14 Fair Empl. Prac. Cas. 799 (E.D. Va. 1977), where the court found that *Earwood* required a different weight standard be applied to women than to men in the same position (i.e., women were required to meet the weight recommended for persons of “light” or “medium” frames while men were permitted to meet the recommended limits for large frames). This was not a violation of Title VII despite the fact that substantially more women than men were excluded by such a standard and the different standards were based on sexual stereotypes.


196. 444 F.2d 1194 (7th Cir. 1971).
that in enacting Title VII, Congress intended to eliminate the disparate treatment of men or women resulting from sex-based classifications. The court looked beyond the narrow category of flight cabin attendant, finding a disparate impact resulting from the universal application of the no marriage rule to women only among United's flight personnel. The Seventh Circuit found it irrelevant that the no marriage rule applied only to females in the single category of flight cabin attendants, since Title VII prohibits disparate treatment whether it occurs throughout the company or is confined to a particular position.

Judge Stevens dissented in Sprogis on the basis that since only women were hired for employment in the stewardess category, women were preferred rather than discriminated against for that position. Applying the "but for" test for discrimination and finding that plaintiff had not shown that she would have had any greater opportunities is she were male, Judge Stevens found no Title VII violation. Judge Stevens criticized the majority for first considering the reasonableness of the rule, rather than first analyzing whether discrimination had occurred, and then considering whether a bfoq existed.

While Judge Stevens may be correct in his observation that the majority's emphasis was misplaced, the court nevertheless undertook the type of disparate treatment analysis that is required to fully implement Title VII. Many women are employed in "women's jobs" and, at times, the segregation of male and female employees is advantageous to the employer. Rather than rewarding the employer for its initial discrimination in hiring and assignment, Sprogis adopted the reasonable and more effective approach of comparing the treatment of women with that of men who were similarly though not identically situated. This type of Title VII analysis

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197. Judge Stevens noted that men were hired for the stewardess position only for the Hawaiian run, which entailed special requirements and characteristics. Id. at 1203 (Stevens, J., dissenting); see id. at 1198-99.

198. Since no men were hired as flight cabin attendants, no married men were eligible for the position either.

199. This is what the Fifth Circuit and the District of Columbia Circuit did in their consideration of hair length regulations, but in those cases the court reached a contrary result. In Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc), the court began its opinion by analyzing the purpose of the employer's rule and its importance to the business. From that analysis, the court went on to find that the rule was not the sort of employer practice that was intended to be covered by Title VII. See note 184 supra.

200. The no marriage rule was instituted at the behest of husbands of stewardesses who apparently complained to the company that their wives were so frequently away from home. 444 F.2d at 1200-01.

201. Other flight personnel who are comparably although not identically situated to women in the stewardess position include pilots, navigators, and purser. See id. at 1198.
extends beyond the narrow limitations of the Equal Pay Act protections.

Despite the common sense of this approach, the Fifth Circuit recently reached a contrary result in *Stroud v. Delta Airlines, Inc.*, finding no Title VII violation even though the exclusion of males from the stewardess position was a violation of Title VII. Citing the broad language of the Supreme Court in *Alexander v. Gardner-Denver Co.*, and *Griggs v. Duke Power Co.*, the Fifth Circuit concluded that the plaintiff was not a person who had been disfavored by a rule favoring a member of another class. Instead, the court concluded that certain women—unmarried women—are favored over certain other women—stewardesses who were married. Because men were not favored over women (since no men were hired for the position), the court could find no sex discrimination.

The *Stroud* decision establishes that in the Fifth Circuit, the employer can impose whatever requirements, terms, or conditions he wishes so long as he segregates male and female employees. If the employer thoroughly discriminates against women (or men), he can reap the fruits of that discrimination in terms of further exploitation of his workers. Since women already are programmed into predominantly female occupations, the advantage to the employer of continuing to exclude men from female occupations is evident.

Some support for a narrow interpretation of the sex discrimination prohibition can be gleaned from Justice Rehnquist's opinion for the Court in *General Electric Co. v. Gilbert*. In *Gilbert*, plaintiffs contended that General Electric's disability plan, which excluded all pregnancy-related disabilities, constituted sex discrimination in violation of Title VII. Since the Supreme Court recently held the denial of disability benefits for pregnancy not violative of the equal

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202. 544 F.2d 898 (5th Cir. 1977).

The Fifth Circuit in *Stroud*, held that the women stewardesses did not have standing to assert rights of prospective male flight attendants who could complain of their illegal exclusion. The viability of that decision is somewhat in doubt in light of *Waters v. Hublein*, 13 Fair Empl. Prac. Cas. 1409 (9th Cir. 1976), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), in which those courts held that white plaintiffs had standing to sue to enjoin discrimination against groups to which those persons did not belong, i.e., minority groups. The detriment to the plaintiff in this situation of segregation is a real one insofar as it is highly questionable whether a no marriage rule would have been imposed had males been employed in the position.

205. This view derives some support from the grooming cases where the courts determined whether employees in the class not covered by the alleged discriminatory practice were benefitted by the rule.

protection clause. Justice Rehnquist concluded that Title VII similarly does not require that disability incurred by pregnancy be treated the same as other types of disability, since such discrimination is not gender-based. In terms of comparative value, the plan was not found to have a disparate effect upon women. In considering the effect of the EEOC guidelines construing disability plans which excluded pregnancy to be violative of Title VII, Justice Rehnquist cited Senator Humphrey's opinion that the Bennett amendment made it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement for women, may continue in operation under this bill [Title VII] if it becomes law."

These statements facially suggest that sex discrimination will be analyzed in the context of strictly gender-based discrimination (applying to all women) and in the context of special treatment which always has been accorded women. It also could be read to suggest that sex discrimination is not facially present in areas where men and women do not compete. However, "broad" interpretation of Gilbert is unwarranted for several reasons. First, Justice Rehnquist spoke for only four members of the Court, since two justices concurred briefly and narrowly and three justices dissented.

207. Geduldig v. Aiello, 417 U.S. 484 (1974). As noted by Justice Brennan in dissent, it is absurd to think that Congress in 1964 intended that the sex discrimination prohibition of Title VII would be interpreted in accordance with a case that was decided twelve years later. Indeed, at the time that Title VII was passed, the fourteenth amendment did not prohibit states from restricting the employment of women as bartenders. See Goesart v. Cleary, 335 U.S. 464 (1948).

208. Justice Rehnquist meant that since not all women are pregnant and thus discriminated against by the plan, the plan cannot be said to discriminate against women; rather, it only discriminates against pregnant women. See note 212 infra. However, as pointed out by Justice Brennan, it offends common sense to suggest that such a plan at minimum is not strongly sex-related. 97 S. Ct. at 416 (Brennan, J., dissenting).

209. Id. at 412, quoting 110 Cong. Rec. 13,663-64 (1964).

210. If the equal protection context, Kahn v. Shevin, 416 U.S. 351 (1974) supports the view that special "benefits" for women will be permitted. In that case, the Court upheld property tax exemptions accorded widows but not widowers. Justice Rehnquist cited Kahn in his dissent from Califano v. Goldfarb, 97 S. Ct. 1021, 1036 (1977) in which the Court held unconstitutional a requirement that widowers, but not widows, prove dependency in order to qualify for certain social security benefits. See also Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

211. Justices Stewart and Blackmun agreed only that the pregnancy exclusion was not discriminatory per se, and specifically rejected any suggestion that plaintiffs were precluded from showing that the plan had a discriminatory effect. 97 S. Ct. at 413 (Stewart, J., concurring; Blackmun, J., concurring in part).

212. Justices Stevens, Brennan and Marshall dissented. Justice Stevens dissent is particularly interesting insofar as it rejects the implication of his dissent in Sprogis that exclusion of disability benefits for pregnancy is not sex discrimination because men and women are not
Since these implications are derived from unclear statements made in dictum, they are in any event suspect, particularly since the comments conflict with earlier and later opinions by the Court in both Title VII and equal protection cases. Further, Senator Humphrey's interpretation of the Bennett amendment was erroneous under any standard and cannot be said to reflect the intent of Congress since it was made after the amendment had been passed.

Thus, while courts must look to the Supreme Court for guidance in a developing area of the law, Gilbert provides little guidance for future sex discrimination cases, save that pregnancy is a special problem. Five of the justices in Gilbert overtly discounted any suggestion that the Court intended to retract from the broad interpretation set out in Griggs; this must be taken to mean that sex discrimination is to be accorded full status under the law.

**CONCLUSION**

This article is proffered as a suggestion of the problem rather than a definitive answer. The problem is that sex-based employment discrimination takes subtle and intricate forms. As a rule, the courts have refused to hear the more complex challenges to sex discrimination in jobs. Certainly the courts have been deluged, even overwhelmed, by Title VII challenges that are often protracted affairs involving battles of experts and technical testimony. The desire to avoid expansion into new, equally complex areas is understandable; one way to do this is to limit sex discrimination cases to situations where men and women identically situated are treated differently, or to guarantee that women willing to perform “men’s jobs” are able to do so. But Congress recognized in 1972 that discrimination is more subtle and complex than had been imagined in 1964 and, therefore, renewed efforts to alleviate discrimination were necessary. Congress also voiced its judgment that sex discrimination is

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213. For instance, in Phillips v. Martin-Marietta Co., 400 U.S. 542 (1971), the Supreme Court implicitly rejected the notion that a practice, in order to be discriminatory, must apply to all women rather than only some. Similarly, the Court recently has held that Title VII is broader in its interpretation of discrimination than is the equal protection clause. Washington v. Davis, 426 U.S. 229, 246-48 (1976); see Comment, Washington v. Davis: Splitting the Causes of Action Against Racial Discrimination in Employment, 8 Loy. Chi. L.J. 225 (1976). Kahn v. Shevin, 416 U.S. 351 (1974) suggests that benefits between the sexes can differ, although that case can be read as requiring that women, not men, receive special benefits.

as serious as the other types of discrimination prohibited by the Act. Under these circumstances, it is the responsibility of the courts to analyze the law in light of the discrimination Congress has sought to alleviate. In this area, that analysis has yet to be made.*

* The authors gratefully acknowledge the research assistance of Ms. Priscilla Dawn Sikkema, a student at Wayne State University Law School, Ms. Sondra Thornally Martin, and Ms. Terry Helbush, both students at Golden Gate University School of Law.