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SEX-BASED WAGE DISCRIMINATION:
ONE STEP BEYOND THE
EQUAL PAY ACT

Both the Equal Pay Act\(^1\) (EPA) and Title VII of the Civil Rights Act of 1964\(^2\) (Title VII) protect workers against sex-based wage discrimination. Unfortunately, neither the EPA nor Title VII has been sufficiently effective in remedying the differential in wage rates between males and females.\(^3\) The EPA has afforded only lim-

1. 29 U.S.C. § 206(d) (1976). The EPA provides in part:
   No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, 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. § 206(d)(1).

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
   (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
   It should be recognized that this Act was designed to redress inequalities between men and women workers. Although male employees can bring suits under both the EPA and Title VII, because most wage discrimination suits involve female plaintiffs, this Note treats plaintiffs as female. For a situation where male employees established a prima facie wage-discrimination claim, see Board of Regents of the Univ. of Neb. v. Dawes, 522 F.2d 380 (8th Cir. 1975), cert. denied, 424 U.S. 914 (1976).

3. Statistics from the Department of Labor reveal that on the average, full-time women workers earn only 60 cents for every dollar earned by men—a percentage no different from the 1960's when anti-discrimination legislation to combat sex-based wage differentials was initiated. Compare Norwood & Waldmann, Women in the La-
ited protection, for it is applicable only to claims of unequal pay based on sex for work that is "substantially equal." Consequently, under the EPA only a portion of the work force is able to challenge allegedly sex-based salary levels. If there is no employee in a "substantially equal" job to serve as a basis for comparison, the claimant is left remediless. In addition to the EPA's minimal impact on sex-


It should be noted that the earnings differential is not as great in job categories associated with higher status and earnings. The great majority of women, however, are not in these positions. See generally Norwood & Waldmann, supra, at 3 (tables 3 & 4).

Some authors argue that the mere segregation of female workers into certain jobs has led to a persistent undervaluation of their net worth due to sex discrimination. See, e.g., Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. MICH. J. L. REF. 397, 416-29 (1979), and studies cited therein. Employment statistics, however, do not support allegations that the entire wage differential is due to discrimination. Various factors not accounted for in these surveys are of prime importance in explaining the earnings differential, such as vocational choice, seniority, educational attainment, a women's mobility, and the amount of overtime worked. See Nelson, Opton, & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. MICH. J. L. REF. 233, 239, 250-53 (1980). On the other hand, studies have shown that even after adjustments are made for these factors, much of the female-male earnings differential remains unexplained. See, e.g., U.S. DEP'T OF LABOR, WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN WOMEN AND MEN 2 (1979). These threshold statistics, while not probative of the extent of sex-based wage discrimination in the market, should serve as an impetus for the legislature and the judiciary to be less conservative in granting plaintiffs the right to investigate and use remedial measures to address discriminatory wage practices where a sufficient foundation for such a claim is developed.


5. Even if the claimant could prove that her salary is excessively low because of sex discrimination, if a male employee performing "equal" work gets paid equally,
based wage discrimination due to its inherently narrow coverage, the EPA has been used by courts to restrict the scope of the expansive and powerful prohibitions on discrimination contained in Title VII when the question of wage-rate discrimination has been raised.\footnote{6} Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .”\footnote{8} The protections offered by Title VII are not confined to particular dis-

she has no cause of action under the EPA. The EPA does not address situations where jobs traditionally filled by women are underpaid by the employer because of gender considerations. Nor does the statute afford a remedy to plaintiffs who hold unique positions even in the face of intentional discrimination. See Rinkel v. Associated Pipeline Contractors, 23 Wage and Hour Cas. 811 (D. Alaska 1978). For problems dealing with comparing professional positions, see Greenfield, From Equal to Equivalent Pay: Salary Discrimination in Academia, 6 J.L. & EDUC. 41, 46 (1977).\footnote{6}

6. The Supreme Court has clearly established that Title VII is to be construed broadly to effectuate Congress’ overriding goal of eradicating invidious employment discrimination “in whatever form.” United Steelworkers v. Weber, 443 U.S. 193, 197 (1979). The Court in Weber concluded that Title VII does not prohibit employers from enacting race-conscious affirmative-action plans to eliminate manifest racial imbalances in traditionally segregated job categories. “Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve.” Id. at 204. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court concluded: “It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant’s race are already proportionately represented in the work force.” Id. at 579. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the majority determined that the major purposes of Title VII are “eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” Id. at 421 (footnote omitted). In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court concluded: “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” Id. at 431. See generally Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702 (1978); Dothard v. Rawlinson, 433 U.S. 321 (1977); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

7. Many cases adhere to the view that to establish a case of sex-based wage discrimination under Title VII, one must prove a differential in pay based on sex for performing “substantially equal” work (i.e., the EPA cause of action). See Calage v. University of Tenn., 544 F.2d 297, 301 (6th Cir. 1976); Orr v. MacNeill & Son, Inc., 511 F.2d 166, 170-71 (5th Cir. 1975); Ammons v. Zia & Co., 448 F.2d 117, 120 (10th Cir. 1971); Johnson v. University of Bridgeport, 20 Fair Empl. Prac. Cas. 1766, 1770 (D. Conn. 1979); Cullari v. East-West Gateway Coordinating Council, 457 F. Supp. 335, 341 (E.D. Mo. 1978).

criminatory acts nor does the discrimination need to be based solely on sexual factors. Employment decisions in which sex is a factor have been held discriminatory regardless of whether there are other legitimate nondiscriminatory motivating factors. An exception to this principle is that an employer may hire an individual on the basis of his or her religion, sex, or national origin in those certain instances where such classification is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." A finding that there were no similarly situated individuals of the opposite sex does not preclude the possibility of a violation.

Generally, Title VII has not been interpreted to enable women to seek judicial relief beyond the substantive parameters of the EPA except where jurisdictional or statute-of-limitations restrictions would bar relief under the EPA. The Ninth Circuit Court of Appeals in Gunther v. County of Washington, a decision recently affirmed by the United States Supreme Court, and the Tenth and Third Circuits in Fitzgerald v. Sirloin Stockade,

9. Such so-called "sex-plus" discrimination is exemplified in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (employer cannot refuse to hire married women with pre-school aged children unless employer is doing so by refusing to hire all individuals with pre-school aged children).


11. See Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (unlawful to have "no marriage rule" applicable only to stewardesses (female) where male flight personnel had no such limitation). But see Stroud v. Delta Air Lines, 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977) (court found that although unmarried women were favored over married women there was no discrimination based on sex).

12. See Waters v. Heublin, Inc., 23 Fair Empl. Prac. Cas. 351 (N.D. Cal. 1979) (court considered EPA claim under Title VII even if it would have been time-barred under the EPA); Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397 (W.D. Pa. 1978) ("establishment" requirement of EPA is not limitation on Title VII equal pay claim).


14. While this Note was being prepared the Supreme Court, in a 5-4 decision, affirmed Gunther. 101 S. Ct. 2242 (1981).
SEX-BASED WAGE DISCRIMINATION

Inc.\textsuperscript{15} and IUE v. Westinghouse Electric Corp.,\textsuperscript{16} have held, however, that a plaintiff is not precluded from bringing a wage-discrimination lawsuit on grounds compatible with Title VII which do not meet the scope of the EPA. This Note addresses the manner in which these recent decisions reinterpret and clarify the status of plaintiffs’ rights in wage-discrimination cases and suggests guidelines for courts to follow in granting women a forum to challenge wage rates grounded on sex discrimination which do not fit within an EPA framework.

This Note urges an interpretation of Title VII which creates a distinct Title VII cause of action for sex-based wage discrimination and which permits claimants to proceed with objective evidence to challenge their employer’s compensation system.\textsuperscript{17} The employer’s own methodology, the job-evaluation plan,\textsuperscript{18} will, in most instances, provide the requisite affirmative proof to establish a prima facie case under Title VII.\textsuperscript{19} As with other Title VII lawsuits, whether the quantum of evidence offered by the claimant establishes a prima facie case depends on the trier of fact.\textsuperscript{20} If, however, a plaintiff’s claim is that she has an “equal” job and is entitled to equal pay, then the EPA’s “substantially equal” test would still be decisive, regardless of whether Title VII or the EPA is utilized as the statutory basis for relief.\textsuperscript{21}

\textsuperscript{15} 624 F.2d 945 (10th Cir. 1980).
\textsuperscript{17} The theory espoused in this Note is not merely a value comparison between the jobs of various employees. Rather, the claimant will have to demonstrate that the employer’s own methodology for determining wage rates is based on unlawful gender considerations.

To date, courts have rejected the idea of “comparable worth” as a means \textit{in and of itself} of establishing a sex-based wage discrimination cause of action. See Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), aff’d, 101 S. Ct. 2242 (1981); Christensen v. Iowa, 583 F.2d 353 (8th Cir. 1977); Gerlach v. Michigan Bell Tel. Co., 24 Fair Empl. Prac. Cas. 69 (E.D. Mich. 1980).

\textsuperscript{18} Job evaluation refers to the formal objective procedure for hierarchically ordering a set of jobs with respect to their content and value or worth, usually for the purpose of compensating employees fairly. See D. TREMAIN, JOB EVALUATION: AN ANALYTIC REVIEW, INTERIM REPORT 1 (National Academy of Sciences 1979) [hereinafter cited as NAS Report]. For a discussion of job evaluation plans, see text accompanying notes 161-173 infra.

\textsuperscript{19} See discussion at text accompanying notes 173-196 infra.

\textsuperscript{20} See text accompanying notes 156-160 infra.

\textsuperscript{21} The \textit{in pari materia} doctrine requires such an interpretation. See text accompanying notes 28-32 & 129-131 infra.
To reach a conclusion that Title VII can and should offer more extensive substantive protection against sex-based wage discrimination than does the EPA, it is necessary to begin with an analysis of the purpose and effect of the Bennett Amendment. The ensuing sections discuss the relevant legislative history of Title VII and the Bennett Amendment, the language chosen by Congress, administrative guidelines, and the case law. The final section examines some of the parameters of the plaintiff's cause of action under Title VII.

TITLE VII AND THE BENNETT AMENDMENT

Courts have had trouble construing Title VII (the broader and more recently enacted statute) with the EPA in the area of compensation discrimination for a variety of reasons. The largest impediment to granting more extensive relief than that provided by the EPA is a provision in Title VII, commonly known as the Bennett Amendment, which refers to the congruence of the statutes and provides that “[i]t shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [EPA].”

This amendment has been interpreted in two ways. Under the first interpretation, the

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22. Title VII is broader in scope in terms of its language as well as its coverage. See notes 1 & 2 supra for text of both statutes. Title VII has no requirement that the jobs be performed “within an establishment” as does the EPA. Thus under the EPA provisions, the A.T. & T. situation, in which jobs performed by women at one plant were found to be unlawfully undervalued compared to the same positions filled by men at other Bell System companies (of which A.T. & T. is one), would not be remedied. For a discussion of the A.T. & T. situation, see Laws, Psychological Dimensions of Labor Force Participation of Women, in EQUAL EMPLOYMENT OPPORTUNITY AND THE A.T. & T. CASE 129-30 (P. Wallace ed. 1976).

Additionally, Title VII prohibits discrimination in “compensation” as opposed to the EPA’s proscription against discriminatory “wages.” “Compensation” and “wages” are not synonymous. Certain fringe benefits have not been found to be “wages” under the EPA, yet have been protected from discrimination as it affects a female employee’s take home pay under Title VII. Cf. 29 C.F.R. § 800.113 (1979) (explicitly refusing to decide whether “wages” include pension payments).

23. 42 U.S.C. § 2000e-2(h) (1976) (emphasis added). Named after its proponent, Senator Bennett, the Bennett Amendment, known also as section 703(h) of Title VII, has been the authority relied upon for narrowing the scope of Title VII as applied to wage-discrimination suits. See cases cited note 7 supra.

24. Blumrosen, supra note 3, at 481-82, claims that three possible interpretations of the Bennett Amendment are worthy of consideration. In addition to the two described in this Note, she asserts that a third interpretation would incorporate both the “equal work” standard as well as the statutory coverage of the EPA to sex-based
Bennett Amendment limits plaintiff’s compensation-discrimination claims under Title VII to those which would be cognizable under the EPA.\textsuperscript{25} Under the second, broader interpretation, the Bennett Amendment incorporates into Title VII the EPA cause of action as well as the EPA’s four affirmative defenses available to an employer.\textsuperscript{26} Title VII would also afford a worker the opportunity to challenge other discriminatory compensation practices which do not involve “substantially equal” work and thus are not actionable under the EPA.\textsuperscript{27}

Apart from the Bennett Amendment’s reference to the EPA, courts often feel constrained by the EPA’s narrow scope because of the doctrine of \textit{in pari materia}.\textsuperscript{28} This canon of statutory construction is described as follows:

\begin{quote}
In terms of legislative intent, it is assumed that wherever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.\textsuperscript{29}
\end{quote}

Therefore, under this doctrine, even though Title VII is broader than the EPA as a form of remedial legislation, because Title VII and the EPA deal with the same subject matter, Title VII cannot be applied to sex-based wage-discrimination cases in a manner wage-discrimination claims under Title VII. Courts, however, have already interpreted Title VII to extend “equal work” protections to cases where the EPA could not apply due to jurisdictional or time-barred restrictions. \textit{See} cases cited note 12 \textit{supra}. Thus, only the two interpretations discussed in this text are plausible.


\textsuperscript{26} Thus, Title VII would provide relief for claimants who prove what would otherwise be an EPA case, and employers would be able to assert that the wage disparities are legitimate if they are pursuant to a bona fide seniority or merit system, or one that measures earnings by quantity or quality of production, or any other factor besides sex.


\textsuperscript{28} \textit{See} authority cited notes 69 & 70 \textit{infra}.

\textsuperscript{29} A. SANDS, \textsc{Sutherland Statutory Construction} § 51.02 (4th ed. 1973) (footnote omitted).
that would have the effect of nullifying the EPA. Additionally, any construction of Title VII's scope in the area of sex-based wage discrimination must not contravene the legislative policy of the EPA.

The EPA's legislative history demonstrates that Congress specifically substituted "equal work" for "comparable work" as the operative standard out of fear that under the aegis of authorized job comparisons under the EPA, courts and the Department of Labor would attempt to engage in unnecessary and inequitable reevaluations of an employer's pay structure.30 Thus, a claimant under either the EPA or Title VII will not be able to assert that a particular job merits equal pay with a "substantially different" and

30. The EPA of 1963 was the product of extensive debates on an equal pay bill pending during the 87th Congress, Second Session, 1962. The bill originally provided for equal pay for "comparable" work. H.R. 11677, 87th Cong., 2d Sess., 108 CONG. REC. 14765 (1962). During the debate on the bill, an amendment was accepted which changed the words of the statute to refer to "equal" work rather than "comparable" work. 108 CONG. REC. 14771 (1962). The remarks of Representative Landrum depict the general response of Congressmen to this amendment. Representative Landrum noted that utilizing the words "equal work" would prevent "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." Id. at 14768.

In 1963, equal-pay legislation was again introduced containing the "equal work" standard. H.R. 6060, 88th Cong., 1st Sess., 109 CONG. REC. 9192 (1963). The debates before Congress again emphasize the limited scope that the EPA was to have. Representative Frelinghuysen, a member of the House Subcommittee on Labor, explained the use of the words "equal work" as follows:

[We can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek to ensure, where men and women are doing the same job under the same working conditions that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.]


Representative Goodell, the sponsor of H.R. 6060, echoed these sentiments, stating, for the sake of having "a clear legislative history at this point," that the clear intention is to ensure equal pay for "equal" rather than "comparable" jobs.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.

higher compensated job based simply on comparisons of job content.\textsuperscript{31} Title VII's comprehensive anti-discrimination provisions, however, can be utilized in a manner consistent with the EPA's legislative policy to redress other forms of sex-based wage discrimination that the EPA was not designed to remedy.\textsuperscript{32}

\textit{Legislative History}

Although the EPA was not envisioned to be a broad anti-discrimination statute, the Congress that passed Title VII was aware that Title VII and its sex provision "constituted a far-reaching condemnation of employment discrimination."\textsuperscript{33} The subject of sex discrimination in employment was not part of the original Title VII bill, nor was it covered in any of the hearings.\textsuperscript{34} Arising as an amendment during the end of debate on the House floor, the sex provision was accepted as proposed that same day.\textsuperscript{35}

\textsuperscript{31} Courts thus far seem to agree that a prima facie case under Title VII is not established where the claimant simply compares the wages paid to different jobs without indicating that the differential is due to gender discrimination. See Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977) (proof that average pay of male college professors was higher than average pay of females, without more, did not establish prima facie case under Title VII); cf. Smith v. Union Oil Co., 17 Fair Empl. Prac. Cas. 960 (N.D. Cal. 1977) (to establish wage discrimination based on race, plaintiff has burden of showing that different amounts of compensation are paid to minorities and whites for equal work); Patterson v. Western Dev. Laboratories, 13 Fair Empl. Prac. Cas. 772 (N.D. Cal. 1976) (gross comparisons of average salary received by black officials and managers versus that received by white officials and managers do not establish a Title VII violation; neither the work nor the qualifications of these employees was analyzed via regression analysis to determine whether racial factors are significant).

\textsuperscript{32} See text accompanying, and authority cited, notes 174-196 infra.

\textsuperscript{33} Bernstein & Williams, \textit{Title VII and the Problem of Sex Classifications in Pension Programs}, 74 COLUM. L. REV. 1203, 1217 (1974). The prohibition against sex discrimination was added to Title VII by an amendment proposed by Congressman Smith of Virginia, whose motive, according to various commentators, was to defeat Title VII's passage. See Berg, \textit{Equal Employment Opportunity Under the Civil Rights Act of 1964}, 31 BROOKLYN L. REV. 62, 62 (1964); Miller, \textit{Sex Discrimination and Title VII of the Civil Rights Act of 1964}, 51 MINN. L. REV. 877, 880 (1967). Regardless of Representative Smith's motives, the most vocal proponents were the women representatives on the floor of the House. See, e.g., Comments of Congresswomen Griffiths, Bolton, St. George, May, and Kelly, 110 CONG. REC. 2577-84 (1964). Additionally, the "sex" amendment passed while other amendments that would have substantially narrowed the strength of the bill failed. See Gitt & Gelb, supra note 30, at 742-45.

\textsuperscript{34} The Civil Rights Act of 1964 began as a statute designed to eliminate race discrimination. See Statements of President Kennedy accompanying the original Civil Rights bill, 109 CONG. REC. 3245 (1963).

\textsuperscript{35} 110 CONG. REC. 2577 (1964). The amendment was introduced and was
Since the House approved the entire bill only two days later, it is not surprising that the Supreme Court has referred to Title VII’s legislative history as notable “primarily for its brevity.” The legislative history of Title VII is also quite confusing, for neither the House nor the Senate truly set definitive rules as to how to construe Title VII in light of the EPA.

It was not until the full Senate was confronted with the House bill for initial consideration that concern was voiced regarding the recognized area of overlapping jurisdiction between the proposed Title VII and the EPA, that is, sex-based compensation discrimination. During the debate on the proposed Civil Rights Act, Senator Dirksen questioned the scope of the proposed bill, specifically noting that the sex anti-discrimination provisions “extend far beyond the scope and coverage of the Equal Pay Act,” without any provision for the EPA’s “equal work” standard. Senator Clark, one of the floor managers of the bill, responded that Title VII provided broader coverage and fewer exemptions than the EPA, but that the “standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.”

Apparently unsatisfied with Senator Clark’s ambiguous explanation adopted by a vote of 168 to 133 on February 8, 1964. Id. at 2584. The quick adoption of the Smith Amendment is said to evince a congressional belief that there were persuasive reasons for immediate action against sex discrimination, as well as race, color, and religious discrimination. See Margolin, Equal Pay and Equal Employment Opportunity For Women, 19th N.Y.U. Conf. on Lab. 297, 305 (1964).

36. Title VII of the Civil Rights bill was passed by a vote of 290 to 130 on February 10, 1964. 110 CONG. REC. 2804 (1964).
38. 110 CONG. REC. 7217 (1964). See note 47 infra for the memorandum which was introduced to respond to Senator Dirksen’s questions.
39. 110 CONG. REC. 7217 (1964). Senator Clark introduced this exchange with Senator Dirksen into the Congressional Record:

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 a 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.

Id. (objection of Sen. Dirksen and answer of Sen. Clark).
nation regarding possible conflicts between the EPA and Title VII, Senator Bennett introduced his amendment to section 703(h) of Title VII, calling it a "technical correction" to provide that "in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." During the brief two-minute colloquy preceding adoption, only two other speakers voiced their comments on the Bennett Amendment. Senator Humphrey's statement that "[t]he

40. Before introducing his amendment, Senator Bennett said that he did not "believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act." 110 CONG. REC. 13647 (1964) (remarks of Sen. Bennett). The amendment was introduced during the period of cloture after the floor debate. 110 CONG. REC. 13647 (1964). See text of Bennett Amendment at text accompanying note 23 supra.

41. 110 CONG. REC. 13647 (1964) (remarks of Sen. Bennett). The EPA need not be nullified even if Title VII were construed as affording greater protection to claimants in the area of wage discrimination. When plaintiffs seek to prove discrimination by comparing jobs, then the EPA standards are applicable. See text accompanying notes 51-57 & 128-131 infra.

42. The entire history of the Bennett Amendment, prior to its adoption by voice vote, is set forth below:

Mr. BENNETT. Mr. President, I yield myself 2 minutes. . . .
The PRESIDING OFFICER. The amendment will be stated.
The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "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 the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

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. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yea and nay.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself one minute.

We were aware of the conflict that might develop, because the Equal Pay
amendment is fully acceptable” is of no assistance in deciphering its meaning and purpose. Senator Dirksen explained that the amendment was needed to recognize clearly the exceptions contained in the EPA. The import of the statements of Senators Dirksen and Bennett is that the amendment was intended merely to carry forward the exceptions of the EPA in situations where both Title VII and the EPA are useful for determining whether the claimant has proved sex-based wage discrimination.

While the House later considered the Senate's amendments to the House bill, Congressman Celler's explanation of the Bennett Amendment's purpose revealed his belief that Title VII would be no broader than the EPA in the area of sex-based wage discrimination. In contradiction to Senator Dirksen's clarification, Congressman Celler declared that the Bennett Amendment “provides that compliance with the (EPA) satisfies the requirements of (Title VII) barring discrimination because of sex . . . .” With only this expla-

Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

110 CONG. REC. 13647 (1964).

43. Id. (remarks of Sen. Humphrey). For the entire colloquy, see note 42 supra.

44. Id. (remarks of Sen. Dirksen).


46. 110 CONG. REC. 15896 (1964) (remarks of Rep. Celler). While a literal reading of Congressman Celler's statement suggests that Title VII is no broader than the EPA for any discriminatory practices, the context in which the words were spoken urges the interpretation that Judge Van Dusen announced in his dissenting opinion in IUE v. Westinghouse Electric Corp. According to Judge Van Dusen, “the most logical interpretation of this remark is that complying with the [EPA] would preclude liability under Title VII for all sex-based wage discrimination claims.” 631 F.2d at 1113 (Van Dusen, J., dissenting). This interpretation takes into account the fact that Congressman Celler was explaining the manner in which the two statutes are to interrelate. Thus, the majority in IUE distorts the meaning of Congressman Celler's words to be that "compliance with the 'equal work' requirements of the Equal Pay Act met Title VII's requirements on that issue only." 631 F.2d at 1103. The Gunther court also gave Congressman Celler's statement cursory treatment and
nation, the House accepted the Senate bill without modification. Thus, the legislative history of the Bennett Amendment does little to clarify the way Congress intended Title VII and the EPA to interrelate and suggests that both the narrower and the broader constructions of the Bennett Amendment are plausible.

One year after the passage of the Civil Rights Act, Senator Bennett himself realized the confusion and absence of careful consideration regarding the applicability of Title VII to sex-based wage-discrimination cases. In an attempted clarification, he introduced into the record a prepared memorandum offering his explanation of the relationship of Title VII to the EPA via the Bennett Amendment. This memorandum, however, is of little utility in determining the intent of those who passed the Civil Rights Act. As post-Act legislative history, it is entitled to minimal significance.

Senator Bennett’s memorandum is as follows:

Section 703(h) of the Civil Rights Act of 1964 states: “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 the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).”

The amendment speaks in terms of a “differentiation . . . authorized by the provisions of section 6(d) of the Fair Labor Standards Act.”

Section 6(d) authorizes two things:

1. Wage differentials as between exempt male and female employees doing the same work; and
2. Wage differentials on equal jobs 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.

The amendment therefore means that it is not an unlawful employment practice: (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for nonexempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.


48. See Manhart v. City of Los Angeles, Dep’t of Water, 553 F.2d 581, 589 (9th Cir. 1976), aff’d in part and rev’d in part on other grounds, 435 U.S. 702 (1978), and cases cited therein (discussion occurring after passage of Bennett Amendment has little significance as not necessarily representing congressional intent).
The statutory language of the Bennett Amendment does not support the view that the scope of the EPA and Title VII are identical in the area of compensation discrimination but merely indicates that Title VII will not bar wage differentials "authorized" or permitted by the EPA. The EPA applies only when a claimant has been denied equal pay for "equal" work, and if the employer can prove that the wage differentiation is due to one of the EPA's affirmative defenses, then it is "authorized." Conversely, where there is no work of substantially similar job content ("substantially equal"), the EPA is inapplicable—those wage differentials are not necessarily "authorized;" they are unaddressed.

Read alongside the legislative history of Title VII these words disclose a congressional intent to avoid subjecting employers to two conflicting standards, those of Title VII and those of the EPA, and to provide that any possible conflict between the regulations of the two statutes should be resolved in favor of the EPA. In other words, the Bennett Amendment's function is to harmonize defenses to practices prohibited mutually by the EPA and Title VII.

49. See text of the Bennett Amendment at text accompanying note 23 supra. This interpretation was adopted by the majority in IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), cert. denied, 101 S. Ct. 3121 (1981). The majority uses the common meaning of the word "authorized" to describe a thing that is endorsed or expressly permitted rather than something which is permitted to be done in the future. Id. at 1100-01. As Judge Van Dusen points out in his dissenting opinion, however, the common meaning of the word is not clear enough to reveal conclusively the correct interpretation of the Bennett Amendment. Id. at 1111 (Van Dusen, J., dissenting).


51. See E.E.O.C. v. Colby College, 439 F. Supp. 631, 634-35 (D. Me. 1977), rev'd on other grounds, 559 F.2d 1139 (1st Cir. 1977). The district court relied upon Senator Bennett's declaration that the purpose of his amendment is to provide that in the event of conflicts between the two statutes, the provisions of the EPA should not be nullified. 439 F. Supp. at 635 (citing 110 Cong. Rec. 13646 [sic] (1964) (remarks of Sen. Bennett) (reprinted at note 42 supra)).

The Supreme Court has noted that "[b]ecause of this [Bennett] amendment, interpretations of § 6(d) of the Equal Pay Act are applicable to Title VII as well. . . ." General Elec. Co. v. Gilbert, 429 U.S. 125, 144 (1976).

Opponents of this interpretation contend that the Bennett Amendment can be given substantive meaning only by holding that it incorporates something more into Title VII than the four affirmative defenses of the EPA. Since the first sentence of Title VII’s section 703(h) already contained three of the four EPA defenses (seniority, merit system, or a system that measures earnings by quan-


The Bennett Amendment may have been unnecessary because of the doctrine of in pari materia. See text accompanying notes 28-30 supra for a discussion of the doctrine’s meaning. In Title VII Congress did not expressly repeal the EPA’s “equal work” requirement for cases alleging claims similar to those the EPA was designed to address. Furthermore, repeals by implication are not favored and must meet certain requisites which are not present in this instance. See Radzanower v. Touche, Ross & Co., 426 U.S. 148, 154 (1976), for a discussion of repeals by implication. Since the doctrine of in pari materia is applicable, the EPA’s standards could not be discarded.

Nonetheless, both statutes can still operate as viable forms of relief from sex discrimination in a manner whereby the EPA would not be nullified and Title VII could provide for a broader range of the kinds of cases involving sex-based wage discrimination which could be addressed. See text accompanying notes 173-196 infra for examples of the types of cases that Title VII could cover.

Vaas, Title VII: Legislative History, 7 B.C. IND. & COMM. L. REV. 431, 449 (1966), claims that Title VII would have been interpreted to incorporate only the EPA’s defenses without the Bennett Amendment, but the presence of the amendment makes such construction clear.

53. See Brief as Amicus Curiae of the Equal Employment Advisory Council at 24, Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980); Nelson, Opton & Wilson, supra note 3, at 271.

The full text of section 703(h) (42 U.S.C. § 2000e-2(h) (1976)) shows the context in which the Bennett Amendment appears:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

tity or quality of production) when the Bennett Amendment was proposed, and the fourth EPA defense ("a factor other than sex") is implicit in the very definition of Title VII's prohibition of discrimination based on sex. Although the words of the Bennett Amendment of section 703(h) appear redundant, however, the amendment serves as a guarantee that the EPA and the meaning and legislative history regarding its affirmative defenses will not be nullified. Furthermore, the Bennett Amendment's location as the third sentence in section 703(h) provides a clue to the appropriate meaning to be accorded to these words. The other two provisions of the same section have been interpreted by the Supreme Court and are treated as affirmative defenses to be established by the employer. Thus, the argument that the Bennett Amendment narrows the potential scope of Title VII in the compensation-discrimination area loses its strength especially when one considers that it was to be a mere "technical correction" to the Civil Rights Bill. More plausible is the notion that the Bennett Amendment incorporates the EPA's affirmative defenses into Title VII where an EPA-type claim is alleged.

The location of the Bennett Amendment is important for another reason. The first sentence of section 703(h) declares that "notwithstanding any other provision of this subchapter" no inten-

54. See full text of section 703(h) at note 53 supra.
55. When EPA-type causes of action are brought under Title VII, the Bennett Amendment forces the plaintiff to focus on EPA standards. As for the redundancy in the statute, it should be pointed out that the anti-discrimination provisions of Title VII are also unnecessarily repetitive. See 42 U.S.C. § 2000e-2(a)(2) (1976), which deals with a subset of the conditions in 42 U.S.C. § 2000e-2(a)(1) (1976). (Text of statute is at note 2 supra).

The EPA still remains a viable remedy for a plaintiff and, for strategic reasons, will probably be invoked if its prerequisites can be met. For instance, the EPA often permits an award of liquidated damages in an amount equal to double the amount of backpay, whereas Title VII has no such provision. See 29 U.S.C. §§ 216(b) & 260 (1976 & Supp. III 1979). Furthermore, the period for recovery of back-pay awards is longer under the EPA than under Title VII. Compare 29 U.S.C. § 216(c) (1976 & Supp. III 1979) (three years prior to suit) with 42 U.S.C. § 2000e-5(g) (1976) (two years prior to the date charges are filed with the EEOC). Lastly, EPA claimants can proceed directly to court, whereas Title VII plaintiffs must first resort to administrative remedies. Compare 29 U.S.C. § 216(b) (1976 & Supp. III 1979) (plaintiff can file suit in court immediately) with 42 U.S.C. § 2000e-5(f)(1) (1976) (plaintiff must file a complaint with EEOC within 180 days and receive EEOC "right to sue letter" prior to filing suit in federal court). See generally Sullivan, supra note 4, at 546-47.


tionally discriminatory practice shall be permitted by Title VII. An interpretation of the Bennett Amendment that implies that no compensation-discrimination lawsuits can be brought under Title VII unless they are simultaneously violative of the EPA would condone explicitly prohibited intentional discrimination in compensation and would be offensive to the plain meaning and purpose of Title VII. It is unlikely that the Congress that enacted the Bennett Amendment would have desired the EPA to thwart its goals against employment discrimination, since the composition of the Congress that enacted Title VII was identical to the Congress that enacted the EPA. It follows that the Bennett Amendment cannot legalize intentionally discriminatory practices, and Title VII cannot be limited to sex-based wage-discrimination claims that would be actionable under the EPA.

Administrative Interpretations

The guidelines issued by the Equal Employment Opportunity Commission (EEOC), the regulatory body responsible for enforcing Title VII's equal employment provisions, are of limited use in interpreting the Bennett Amendment and the EPA's relation to Title VII. Because the EEOC has offered conflicting interpretations in its guidelines and decisions on wage-discrimination claims, the deference traditionally accorded to EEOC guidelines should be relaxed.

58. See note 53 supra for text of § 703(h) (codified at 42 U.S.C. § 2000e-2(h) (1976)).
59. See authority cited note 6 supra.
62. According to the Supreme Court, guidelines promulgated by the agency primarily responsible for enforcement, while not binding, are to be given significant weight unless disregarding them is "justified by very good reasons." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The presumption is that these regulations are valid unless shown to be erroneously in conflict with earlier guidelines on the same topic or with the Act itself. See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (less weight accorded to guidelines not issued contemporaneously with Act and to guidelines that contradict agency's position enunciated earlier).
In 1965, the EEOC promulgated its initial interpretation of the interrelationship between Title VII and the EPA. The 1965 regulations stated that “the Commission interprets section 703(h) [the Bennett Amendment] to mean that the standards of ‘equal pay for equal work’ set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.”

Contrary to what appears a simple reading of these EEOC regulations, various EEOC decisions under these regulations reject an interpretation of the Bennett Amendment which refuses to extend Title VII coverage to compensation-discrimination claims which are not cognizable under the EPA. In 1972, the EEOC issued a revised guideline which provides that “[b]y virtue of the [Bennett Amendment], a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.” This guideline refers to situations where wage rates are adjusted upward from base wage and markedly disproportionate share of system’s benefits are received by those jobs from which until recently females were excluded, employer is guilty of discrimination; and, since situation is not encompassed by the EPA because “equal work” is not involved, it cannot be “authorized” by that Act within the meaning of the Bennett Amendment; EEOC Dec. No. 70-695 (April 13, 1970), in [1973] EEOC Dec. ¶ 6148, at 4253 (employer unlawfully discriminated against female employees by classifying employees by sex in calculating wage rates and paying women excessively low wages); EEOC Dec. No. 70-112 (Sept. 5, 1969), in [1973] EEOC Dec. ¶ 6108, at 4159 (same holding as above).

Thus, in General Electric Company, the Supreme Court refused to follow EEOC guidelines on the pregnancy-disability issue because the latest guidelines were held inconsistent with earlier ones. Id. at 141-42.
only to the EPA’s affirmative defenses and deletes the “equal work” formulation. Whether the EPA’s substantive criteria need ever determine wage-discrimination claims under Title VII is an issue the Commission chose not to discuss. Since these current guidelines appear inconsistent with those in effect earlier, the EEOC guidelines are of minimal utility in determining the scope of wage-discrimination claims.


Although the Bennett Amendment represents congressional recognition of a need to strike an appropriate relationship between Title VII and the EPA, because of overlap in the coverage of the two statutes, courts have inadequately analyzed and applied the principles and policies that breathe life into the statutes. While the courts have adopted the rules that the statutes should be read in pari materia and should be construed in harmony, they have failed to harmonize the two. With regularity, courts have applied

(c) Where such defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.


66. Id.


68. See discussion in note 62 supra.


71. See generally Blumrosen, supra note 3, at 475-90; Gitt & Gelb, supra note 30, at 751-59. Both agree with Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L. J. 305, 344-46 (1968), who describes the various public-policy rationales for not limiting Title VII’s compensation provisions solely to those addressed by the EPA. Kanowitz states:

It is difficult to believe that the specific legislative history of the Equal Pay
the "equal-work" standard as a substantive limitation upon wage-discrimination claims under Title VII.\textsuperscript{72} To see how \textit{Gunther},\textsuperscript{73} \textit{Fitzgerald},\textsuperscript{74} and \textit{IUE}\textsuperscript{75} clarified the function of the Bennett Amendment and the scope of Title VII vis-à-vis the EPA, it is necessary to examine the rationale of earlier cases that have construed Title VII in such a constricted manner.

\textbf{The Wheaton Glass Decision and the Bennett Amendment}

The concept of treating Title VII and the EPA in pari materia arose in an EPA case that discussed the interrelationship between the two statutes. In \textit{Shultz v. Wheaton Glass Co.},\textsuperscript{76} the Third Circuit utilized the policies underlying Title VII to render a judicial construction of the EPA that, for the first time, permitted courts to scrutinize work performed in different sex-based job classifications to determine whether differences in work were substantial (i.e., the "substantially equal" test). According to the defendant, Wheaton Glass Company, the job classifications of female selector-packer and male selector-packer denoted separate jobs involving different tasks. The employer alleged that the ten percent higher wages received by the male selector-packers were justified since these men performed extra tasks and were flexible in their work assignments.\textsuperscript{77} The court, however, found that the jobs had only minor distinctions in the work performed and deserved equal pay.\textsuperscript{78} The flexibility factor was present in both male and female selector-packer jobs and there was no proof adduced that the so-called extra tasks were performed by all of the men or that these tasks took up a significant amount of time.\textsuperscript{79}

In deciding that the employer violated the EPA, the Third

\textsuperscript{73} \textit{Gunther v. County of Washington}, 602 F.2d 882 (9th Cir. 1979), \textit{aff'd}, 101 S. Ct. 2242 (1981).
\textsuperscript{74} \textit{Fitzgerald v. Sirloin Stockade Inc.}, 624 F.2d 945 (10th Cir. 1980).
\textsuperscript{77} \textit{Id.} at 262-63.
\textsuperscript{78} \textit{Id.} at 263.
\textsuperscript{79} \textit{Id.} at 262-63.
Circuit acknowledged that, generally, differences in job classifications were thought to be beyond the coverage of the EPA. The court was aware, however, that if this view were followed as a cardinal rule, a gap in the EPA would be created. Employers would give different job titles to "substantially equal" jobs and pay the females lower wages. Relying on Title VII's prohibition against discrimination of employees because of sex in job classification, the court stated that both statutes are in pari materia in the area of sex discrimination. The court then declared that neither the EPA nor Title VII permits artificial classification plans to prevent inquiry as to whether there exists an equal-pay violation. Taking note of the Bennett Amendment, the Third Circuit justified its extension of the EPA's remedial powers to provide redress for EPA claimants in "substantially equal" work, intimating that any other construction would undermine the Civil Rights Act. Thus, the Third Circuit actually utilized the policy underlying Title VII's anti-discrimination provisions to broaden the types of cases the EPA could address.

Although the court specifically declined to "delineate the precise manner in which these two statutes must be harmonized to work together in service of the underlying Congressional objective," the opinion cites an Article by Professor Kanowitz who strongly believes that "section 703(h) 'merely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act . . . together with such interpretative rulings thereon . . . .'" Unfortunately, other courts that cite Wheaton Glass as precedent for the appropriate way to construe Title VII with the EPA have disregarded the Third Circuit's treatment of the Bennett Amendment and the reference to Kanowitz. Instead of permitting Title VII's anti-discrimination policy to broaden the EPA's scope, these courts have interpreted Wheaton Glass as enabling the EPA to constrict Title VII.

80. Id. at 265.
81. Id.
82. Id. at 266.
83. Id. at 265-66.
84. Id. at 266. In discussing the Bennett Amendment's purpose and the policies of Title VII, the court of appeals recognized that "[s]ince 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." Id.
85. Id.
86. Id. at n.15.
87. Kanowitz, supra note 71, at 346 (quoting Opinion Letter, October 12, 1965, CCH EMPL. PRAC'T. GUIDE ¶ 17,252.09 (1966)).
Cases Subsequent to Wheaton

In another EPA decision, the Fifth Circuit in Hodgson v. Brookhaven General Hospital agreed with the Wheaton Glass court that the purpose of Title VII and the EPA should be harmonized, yet misinterpreted Wheaton Glass as suggesting that equal pay is required for sexually classified jobs which are in fact substantially different in job content if the reservation of the higher-paying jobs for men would be prohibited by Title VII. The court then rejected the idea of automatically granting equal pay to such persons because permitting a recovery of the total wage differential between different jobs would be unjust if greater effort is required in the higher-paying jobs and/or most women would not have sought employment in these jobs.

Even though the Wheaton Glass construction of the application of both statutes does not extend as far as the Fifth Circuit’s Hodgson decision contended, subsequent cases have relied on this erroneous interpretation of Wheaton Glass to limit the availability of Title VII to address sex-based wage-discrimination claims that are not unlawful under the EPA. For instance, in Wetzel v. Liberty Mutual Insurance Co., the plaintiffs alleged, inter alia, that without regard to whether the two jobs at issue were “equal,” Liberty Mutual violated Title VII by segregating its work force and considering the sex of its employees in establishing the compensation of the claims-representative position (female) at a lower rate than that of the claims adjuster (male). The Pennsylvania court reiterated the fears of the Hodgson court, claiming that:

An employer who violates Title VII by segregating job classifications by sex is not liable for the entire difference between the wages for the higher paid male jobs and the lower paid female

88. 436 F.2d 719 (5th Cir. 1970).
89. Id. at 727. The court observed: “At least one federal court of appeals has suggested that equal pay should be required for a ‘male’ job and a ‘female’ job which are in fact unequal if the reservation of the higher paid jobs to males would be impermissible under Title VII.” Id.
90. Id.
91. See Johnson, supra note 4, at 609. The Brookhaven court incorrectly analyzed the Wheaton Glass decision. Wheaton Glass involved jobs which were found to be “substantially equal” and therefore within the ambit of the EPA. The Wheaton Glass court was concerned with real differences in job content. 421 F.2d at 264-66.
93. Id. at 399-400.
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jobs to each female who was thus denied a job opportunity unless the two jobs being compared were substantially equal in skill, effort and responsibility. These courts have held that only those women who can show that they have been denied their "rightful place" in a higher-paying position or a promotion will be entitled to this amount of damages.\footnote{44. Id. at 400 (emphasis added). The court, however, failed to discuss whether the employer could be liable for part of the wage differential under Title VII.}

Even though the two jobs involved "substantially equal" work and the pay differential thus constituted a Title VII violation,\footnote{45. Id. at 407.} the\footnote{46. Id. at 400-01.} Wetzel court concluded that "this portion of Title VII incorporates the requirement of the Equal Pay Act that a plaintiff who was hired for a lower-paying job must prove that she did work equal in skill, effort and responsibility to that performed by men in higher paying jobs ...."\footnote{46. Id. at 400-01.}

The first extension of the EPA into the seemingly sole remedy for sex-based wage discrimination occurred shortly after the Wheaton Glass decision was rendered. In\footnote{97. 448 F.2d 117 (10th Cir. 1971).} Ammons v. Zia & Co.,\footnote{47. 448 F.2d 117 (10th Cir. 1971).} the Tenth Circuit adopted the language of the Wheaton Glass court as the foundation for its determination that plaintiffs seeking to prove a sex-based compensation violation under Title VII have the burden of proving both that the differential in pay is based solely on sex and that the jobs performed are equal.\footnote{48. Id. at 119-20.} The plaintiff's complaint relating to her salary was that she was paid less than three of the other workers in the plant for performing the same work.\footnote{49. 448 F.2d at 118. In addition to the wage claim, the plaintiff failed to prove that she was ultimately discharged because of her sex.} Since she failed to show that she was paid less than others performing "substantially equal work," the court found she did not meet her burden of proof under Title VII.\footnote{50. Id. at 120-21.} In reality, however, Ammons was merely an EPA case brought under Title VII, and the
plaintiff would not have carried her burden in either cause of action. Additionally, the Tenth Circuit neglected to discuss either the legislative history or the purpose of the Bennett Amendment. Thus, as in *Wheaton Glass*, the court in *Ammons* did not conclusively delineate the manner by which both statutes should be harmonized.

The Bennett Amendment was actually transformed into a limitation on Title VII's ability to remedy sex-based wage discrimination by the Fifth Circuit in *Orr v. Frank R. MacNeill & Son, Inc.* In that case, the Fifth Circuit reversed the lower court decision that granted relief to a female employee who claimed sex discrimination in compensation in jobs which were dissimilar but where there was intentional discrimination by the employer. While the plaintiff failed to prove that the jobs at issue were identical, she was able to show that they were similar and that the vice president of the company, who had fixed her salary, had stated to another person that he would not pay her as much as a man. Citing *Wheaton Glass*, the district court concluded “that the jobs in this case are not as ‘substantially equal’ as the ones in other cases where recovery has been permitted; however, to deny plaintiff recovery because of the dissimilarities when such blatant discrimination exists, would be to restrict Title VII of the Civil Rights Act by the Equal Pay Act—a construction surely not intended by Congress or approved by the Courts.”

The court of appeals reversed the holding of the district court on the grounds that the evidence was insufficient to show that the jobs were “substantially equal.” Citing the EPA, the language of the Bennett Amendment, *Ammons, Hodgson*, and *Wheaton Glass*, the Fifth Circuit held that Title VII must be construed in harmony with the EPA and that the best way to accomplish this is to require plaintiffs to meet the substantive “equal work” test of the EPA in order to prove a wage-discrimination claim under Title VII.

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101. 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975).
103. 10 Fair Empl. Prac. Cas. at 696.
104. Id. at 696-97.
105. 511 F.2d at 170-71. The court concluded: “To establish a case under Title VII, it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation.” Id. at 171. For persuasive evidence that the Fifth Circuit would now find a Title VII wage-discrimination violation on some other basis than that encompassed by the EPA, see cases cited note 109 infra.
These early decisions of the Fifth and Tenth Circuits restricted Title VII’s prohibition against sex-based compensation discrimination to the scope of the EPA without properly analyzing either the broader policy issues at stake, the possible scope of Title VII, or the significance of the Bennett Amendment. Instead of construing the EPA and Title VII in a manner whereby they would not undermine one another, the opposite has occurred, with courts improperly using *Wheaton Glass* to narrow Title VII rather than broaden the EPA.


Subsequent to *Orr*, most cases dealing with wage-discrimination claims brought under Title VII involved plaintiffs whose theory of liability assumed that “equal work” was a necessary part of their claim. In the context of these proceedings, courts properly relied on *Ammons* and applied the EPA standards. These courts were never faced with the necessity of deciding whether “equal work” was a necessary part of a Title VII plaintiff’s case. In other cases, where the plaintiffs tried to use Title VII to bring a wage-discrimination claim, the facts and circumstances suggested that the plaintiff would not have been able to establish a prima facie case under either Title VII or the EPA.


107. This would be the best way to harmonize the two statutes since both overlap in these circumstances. As noted in *Gunther*, “any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under ‘Title VII’ or under the ‘Equal Pay Act.’” *Gunther v. County of Washington*, 602 F.2d 882, 888 (9th Cir. 1979), *aff’d*, 101 S. Ct. 2242 (1981).

108. In those cases where claimants challenged the standards used by the court, no adequate foundation was laid to establish that the wage rate was due to gender discrimination. In *Lemons v. City & County of Denver*, for example, the plaintiffs sought to prove that the City of Denver discriminated against its nurses because, rather than compare the “value” of these positions as calculated on a job evaluation plan to other positions in the city’s labor force, the City of Denver internally evaluated these jobs and then paid these positions the prevailing wage in the community. 17 Fair Empl. Prac. Cas. 906, 908-10 (D. Colo. 1978). The market rate, they argued, historically results in higher wages to male-dominated jobs than to female-dominated jobs even where, as in this case, the organization’s internal job evaluation suggests otherwise. *Id.* As the Colorado District Court noted, “[t]he entire theory of the plaintiffs’ case is that the [city] does not discriminate among its own employees, but rather that there is occupational discrimination which has come down through
The courts in these cases relied on precedent declaring that Title VII compensation lawsuits required the "equal work" standards. Yet there was no reason to upset the holdings of the prior cases. Only Gunther, Fitzgerald, and IUE contained sufficient evidence of employer discrimination to persuade the courts to reevaluate the way EPA and Title VII should interrelate in sex-based wage-discrimination lawsuits.\footnote{109}

Importing the EPA's substantive restrictions into Title VII denies plaintiffs a forum to challenge rate structures which, they might otherwise be able to demonstrate, reduce their compensation solely due to their sex.\footnote{110} Such a construction of Title VII appears antagonistic to the congressional mandate to rid the employment environment of discrimination.\footnote{111} Even cases that accept the premise that, by the terms of the Bennett Amendment, salary disparities that do not violate the EPA are not proscribed by Title VII hesitate to apply this harsh analysis to deprive a plaintiff of a remedy under analogous remedial legislation.\footnote{112} Since the Bennett

the centuries and that Congress intended that the courts should take over the restructuring of the economy of the United States of America." \textit{Id.} at 908. Determining that the City of Denver acted in good faith, the Tenth Circuit Court of Appeals declared that under existing authority, courts cannot require an employer to reassess the worth of services in each position in relation to all others and to strike a new balance and relationship in total disregard of community conditions. 620 F.2d 228, 229 (10th Cir.), \textit{cert. denied}, 101 S. Ct. 244 (1980); \textit{accord}, Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (theory espoused by plaintiffs ignores economic realities because value of job to employer is only one factor affecting wages); \textit{see} cases cited notes 17 & 31 \textit{supra}.

109. There were, however, some cases prior to these three recent decisions which, in dicta, state that the Bennett Amendment only incorporates the defenses found in the EPA into Title VII. \textit{See}, e.g., City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 712 (1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), \textit{cert. denied}, 434 U.S. 1086 (1978).

Since the \textit{Gunther} decision, other courts have agreed with the Ninth Circuit's interpretation of the Bennett Amendment—that it brings in the four affirmative defenses and EPA theory only where both statutes are applicable. \textit{See}, e.g., EEOC v. Aetna Ins. Co., 22 Fair Empl. Prac. Cas. 607, 611 n.5 (4th Cir. 1980); Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 569 n.14 (5th Cir. 1979), \textit{cert. granted}, 447 U.S. 920 (1980); \textit{cf.} Gerlach v. Michigan Bell Tel. Co., 24 Fair Empl. Prac. Cas. 69, 83 (E.D. Mich. 1980) ("Bennett Amendment should be read consistently with the balance of Section 703(h) and held inapplicable to discrimination in compensation that is the result of an intention to discriminate on the basis of sex").

110. Utilizing current employer practices, a plaintiff may be able to demonstrate the extent of unlawful wage disparities without having to second guess an appropriate compensation rate as a remedy. \textit{See} authority cited note 178 \textit{infra}.

111. \textit{See} cases cited note 6 \textit{supra}.

112. In Molthan v. Temple Univ., 442 F. Supp. 448 (E.D. Pa. 1977), for instance, the plaintiff attempted to use salaries in comparable jobs in other hospitals to substantiate that she was discriminatorily paid less than other directors in her hospi-
Amendment applies only to sex-based wage differentials, such an interpretation appears to provide women with less of a remedy than is accorded to blacks and other protected classes—a result contrary to the legislative history behind the addition of sex as a protected category to Title VII. Moreover, the narrow applica-

ational because of her sex. The district court would not accept such proof but noted:

If the plaintiff in this case alleged and proved that Temple consistently paid its male employees the salaries prevailing in the area for persons in comparable positions, but consistently paid its female employees salaries lower than those prevailing in the area for persons in comparable positions, liability under § 1983 might be established. Information concerning the salaries paid at other institutions would, of course, be relevant under such a theory.

Id. at 451 n.1.

113. A determination that the Bennett Amendment permits disparate treatment between employees for sex-related reasons (where “authorized” by the EPA) would result in different interpretations of Title VII for different protected groups.

114. Except as specifically limited, such as the bona fide occupational qualification defense, Title VII’s prohibition against sex discrimination is co-extensive with its prohibition against other forms of discrimination (race, religion, and national origin). See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), in which the Supreme Court required that the “adverse effect” test of Griggs v. Duke Power Co., 401 U.S. 424 (1971), be applied to standards which had exclusionary effects on women as it is to those affecting blacks. Cf. City of Los Angeles, Dep’t of Water & Power v. Manhart, 435 U.S. 702, 709 (1978) (“a statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification”) (footnote omitted); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976) (with Title VII “Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin”) (footnote omitted) (emphasis added).

The Congressmen who were faced with the Civil Rights Act and the impact of the inclusion of “sex” in the bill were not apprised of any intended different application of the bill’s provisions among any of the protected groups. An interpretive memorandum submitted by Senators Clark and Case, the bill’s floor managers, provided that: “To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.” 110 CONG. REC. 7213 (1964) (emphasis added).

Two Northern District of California court cases recognized that different degrees of protection are granted to women and blacks under the wage-discrimination provisions of Title VII. Smith v. Union Oil Co., 17 Fair Empl. Prac. Cas. 960 (N.D. Cal. 1977); Patterson v. Western Dev. Laboratories, Inc., 13 Fair Empl. Prac. Cas. 772 (N.D. Cal. 1976). In both instances, the court chose to coordinate treatment and narrow the utility of Title VII in addressing compensation claims involving Negro male employees by holding the EPA’s “equal work” standard as controlling. This court incorrectly resolved the problem of whether the Bennett Amendment, which has no direct impact on any protected classification other than sex, limits the scope of Title VII in wage discrimination claims for other protected groups. While the California district court appropriately followed the Title VII mandate that no pro-
tion of Title VII contravenes the principle of providing aggrieved individuals with an additional remedy to combat invidious discrimination in employment.\(^{115}\)

Although policy factors suggest that Title VII should provide a wider spectrum of compensation-discrimination protection, only the Ninth\(^{116}\) and Third\(^{117}\) Circuits have analyzed the meaning and purpose of the Bennett Amendment and Title VII to determine whether congressional intent supported such a broad construction. The Tenth Circuit\(^{118}\) has also recognized a Title VII wage-discrimination claim where the defendant had claimed preclusion under the EPA, but the court did not review the legislative history or the pertinent case law in arriving at its conclusion.

**Gunther: Giving Clout to Title VII.**—The first case to categorically analyze and articulate the proper application of the EPA’s “equal work” requirement to Title VII compensation claims in light of the Bennett Amendment was *Gunther v. County of Washington.*\(^{119}\) *Gunther* was a Title VII wage-discrimination suit brought by female jail matrons who alleged, *inter alia,* that they were discriminatorily paid less than male corrections officers for work which was “substantially equal.”\(^{120}\) Finding that the jobs were not “substantially equal,” the district court dismissed the wage-discrimination claims.\(^{121}\) On appeal, the Ninth Circuit af-
firmed the district court's finding that the jobs were not "substantially equal,"122 but the court further held that the plaintiffs were not precluded from asserting their other claim against the defendant, "that, even if the work was not substantially equal, the defendants nevertheless violated Title VII if some of the difference in salary between the plaintiffs and the male guards can be attributed to sex discrimination."123

Furthermore, since the Supreme Court has determined that sex is a bona fide occupational qualification for the position of prison guard,124 in certain circumstances the segregation of male and female employees in this position would be lawful. Had the Gunther court taken a contrary position and ruled that Title VII cannot reach forms of sex-based wage discrimination which do not meet the EPA's "equal work" criteria, these women could neither sue for higher wages, nor could they try to transfer to the higher-paying jobs to escape the alleged discrimination.125 The Gunther court selectively discussed portions of the legislative history of the Bennett Amendment126 and reasoned that it was designed to settle the potentially conflicting situation which would arise if the four affirmative defenses contained in the EPA were not incorporated into Title VII.127

Gunther implies that plaintiffs may use evidence of wage or compensation discrimination to assert sex-discrimination claims under Title VII against their employers. Employers are exempt from Title VII liability in the four affirmative-defense situations set forth

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122. 602 F.2d at 888.
123. Id. at 886. The plaintiff's claim was allowed by the court. Id. at 891.
126. The Ninth Circuit examined only the statements of Senators Bennett and Dirksen, which support a construction of Title VII which is broader than the EPA in the area of compensation discrimination. See text and discussion of these statements at text accompanying notes 39 & 42 supra.
127. 602 F.2d at 890. At this point the Ninth Circuit did not analyze other portions of the legislative history. In its later opinion upon the defendant's motion for rehearing, the Ninth Circuit further explained the Bennett Amendment's purpose in the following manner: "The Bennett Amendment . . . serves the purpose of clarifying Congress' intent with respect to the relationship of Title VII and the Equal Pay Act," and "clarifies the burden of proof in an equal pay case brought under Title VII." 623 F.2d 1303, 1319 (9th Cir. 1980). At that time the Ninth Circuit also examined other relevant statements made during the consideration of Title VII, which were found supportive of its earlier conclusion. Id. at 1317-21.
in the EPA.128 The Ninth Circuit did not propose any of the alternate (non-EPA) modes of adducing compensation discrimination which claimants may utilize to meet their burden of proof under Title VII. Rather, the court defined the appropriate limitations of Title VII in light of the doctrine of in pari materia.129 If the plaintiff's case consists solely of comparing her work to that of another employee, she will have to show that her job requirements are "substantially equal" to the similarly situated male in order to establish a prima facie case (that is, the EPA case).130 Thus, where plaintiffs raise a claim that they are entitled to equal pay, using Title VII as an avenue of relief, the EPA's principles and standards are still applicable.131 Title VII will not permit claims that persons in job A are entitled to a percentage of the salary received by persons in job B based on mere comparisons of work.

The Tenth Circuit: Another Approach to the Issue?—In Fitzgerald v. Sirloin Stockade, Inc.,132 the Tenth Circuit upheld the trial court's decision in favor of a female employee who claimed, inter alia, that she was discriminatorily underpaid even though she was unable to assert an EPA claim against her employer. The plaintiff in Fitzgerald was a former female employee who alleged under Title VII that while she was employed in various capacities she was sexually discriminated against in the areas of promotion and compensation.133 While she worked in the advertising department, the director of the department gave up most of his duties, which she, although not qualified for the title of director, performed obtaining neither the position of advertising manager, which she was qualified for, nor the salary of her predecessor.134

After the district court ruled in plaintiff's favor on both counts, defendant Sirloin Stockade appealed the case, focusing one of its contentions on the Bennett Amendment, which defendant claimed

128. 623 F.2d at 1321. See note 55 supra for the argument that the EPA will still remain a viable remedy even though Title VII reaches a broader range of cases.
129. See text accompanying notes 28-32 supra.
130. 623 F.2d at 1321. See text accompanying notes 173-195 infra for a discussion of the implications for claimants who would like to use Title VII as their avenue for relief.
131. Under Title VII, where the employer's compensation structure is invalidated, unrelated jobs may eventually be compensated equally by virtue of a court-imposed reevaluation of the employer's pay practices. In these cases, however, the plaintiff's proof must consist of affirmative evidence of some discriminatory employer practice other than a mere comparison of jobs.
132. 624 F.2d 945 (10th Cir. 1980).
133. Id. at 948-49.
134. Id. at 949.
mandates that Title VII wage-discrimination claims are controlled by the EPA. According to Sirloin Stockade, since the plaintiff conceded that she did not perform the same work as the advertising director, there could be no finding of wage discrimination.135

The Tenth Circuit held that the employer's ability to appeal the charge of wage discrimination depended upon "whether discrimination with regard to compensation which is outside the purview of the Equal Pay Act could violate Title VII."136 As to this issue, the court concluded:

This is not a case in which a discriminatory activity is specifically sanctioned under the Equal Pay Act exceptions and liability is, nonetheless sought under Title VII. Here, a finding of discrimination under Title VII does not conflict with the provisions of the Equal Pay Act. It was found that the plaintiff was discriminated against solely because of her sex in a manner which is not within the scope of the Equal Pay Act.137

The court awarded the plaintiff relief calculated to constitute the difference between the salary she was receiving and that to which she was entitled based on the actual work she was performing.138

_Fitzgerald_ lacks both a discussion of the relevant statutory history and a differentiation between this case and those cases that have held otherwise. Nonetheless, the case is important because it focuses on the issue of whether there can be a Title VII case when the employer is blatantly discriminating against female employees in a manner not within the scope of the EPA affirmative defenses. The court answers this question in the affirmative: So long as the matter is not within the scope of the EPA and does not offend EPA standards or policy, the Bennett Amendment will not bar such a claim.139

_IUE v. Westinghouse: Further Support for Title VII Claimants._

—After tackling the brief legislative history of the Bennett Amendment, subsequent administrative interpretations, and the judicial treatment of Title VII and the EPA, the Third Circuit reached a conclusion similar to that of the _Gunther_ court and ruled that even

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135. _Id._ at 950-51.
136. _Id._ at 953 n.2.
137. _Id._ at 953-54 n.2.
138. _Id._ at 955-56.
139. In addition, the reasoning in _Fitzgerald_ limits the Tenth Circuit's prior holding in Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), _cert. denied_, 101 S. Ct. 244 (1980), to the factual circumstances of the case which evidenced that the plaintiffs failed to show that the wage disparity was the result of unlawful discrimination. See discussion of _Lemons_ at note 108 _supra_.

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though they could not meet the requirements of the EPA, the female workers at the Westinghouse plant in Trenton, New Jersey, could sue their employer over an allegedly discriminatory compensation plan that set pay scales on the basis of sex.140 Although the Third Circuit's holding is desirable, the IUE court did not necessarily use the best reasoning to support its outcome.

According to the appellants,141 the Westinghouse rate structure intentionally compensated women at a rate below their established value to the company, since the company's compensation system evolved from a plan which specifically stated that wage rates should be set lower for incumbents in predominately female job classifications.142 The women contended that the salary increases they received over time did not eradicate the wage inequities embodied in Westinghouse's wage structure because wage increases were applied to existing rates on a cents-per-hour or on a percentage basis.143 The trial court held that even if the wage scale had been set in the intentionally discriminatory manner alleged by

140. IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), cert. denied, 101 S. Ct. 1321 (1981). Although the Third Circuit analyzed the case as a wage-discrimination claim, its conclusion is worded in terms of a discriminatory classification scheme: "Because we hold that this alleged intentional discrimination in formulating classifications of jobs violates Title VII, we will reverse." 631 F.2d at 1097. This phraseology referring to unlawful "classification" is also visible where the Third Circuit discusses Title VII's protection against discrimination in compensation on religious grounds. See id. at 1100. This should not deter future courts from using this opinion as precedent. The basis of liability under Title VII is that the employer allegedly used a compensation system which sets wage rates lower for female-intensive classifications. Thus, the issue is really whether this employer practice of paying less for certain classifications is unlawful.

141. The appellants (plaintiffs in the district court opinion) consisted of a class of female employees, both unionized and nonunionized, who worked at Westinghouse's Trenton plant. 19 Fair Empl. Prac. Cas. 450, 451 (D.N.J. 1979).

142. Brief for Appellant at 4-11, IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980). The female employees and their union claimed that the employer's present wage structure subsumed the discriminatory wage policy that the company's Industrial Relations Manual evidenced was in practice in the 1930's. Although job evaluation and a point-assigned value to each job based on various job-related factors were used, the sheet which set forth the hourly wage for jobs at each labor grade was segregated by sex. The manual specifically instructed plant officials to compensate women's jobs at a lower rate than men's jobs that had received the same point rating. In 1965, the company established its present compensation plan by merging the two key sheets, increasing the number of grades, and generally affording women's jobs labor grades that were below those of male jobs that had been at a corresponding labor-grade level prior to the merger. Id; see 631 F.2d at 1096-97.

the plaintiffs, Title VII had not been violated, since the Bennett Amendment "authorizes" wage differentials that do not violate the EPA.\textsuperscript{144} On appeal, the Third Circuit reversed, carefully analyzing the phrase in the Bennett Amendment "if such differentiation is authorized by."\textsuperscript{145}

The two-judge majority opinion began its inquiry with the language of the Bennett Amendment which was held to support, by the plain language alone, IUE's interpretation that only the four wage differentials expressly permitted by the EPA are incorporated into Title VII.\textsuperscript{146} The ensuing discussion confused various canons of statutory construction. In interpreting the language of the Bennett Amendment, the court declared that the doctrine of \textit{in pari materia} shall not be applicable,\textsuperscript{147} yet it reached the same result regarding the scope of Title VII as if it had utilized such principles.\textsuperscript{148} The majority merely refused to include the substantive scope of the EPA (the "equal work" requirement) as an inherent limitation on all Title VII wage-discrimination claims—a result not necessarily in opposition to the \textit{in pari materia} doctrine.

\begin{itemize}
\item \textsuperscript{144} 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979).
\item \textsuperscript{145} 631 F.2d at 1099.
\item \textsuperscript{146} The majority uses the common meaning of the word "authorized" to describe a thing as endorsed or expressly permitted rather than something permitted to be done in the future. 631 F.2d at 1100-01. As Judge Van Dusen points out in his dissenting opinion, however, the common meaning of the word is not clear enough to reveal conclusively the correct interpretation of the Bennett Amendment. \textit{Id.} at 1111 (Van Dusen, J., dissenting).
\item \textsuperscript{147} \textit{Id.} at 1101. The majority declined to apply the \textit{in pari materia} canon, since it found other statutory principles supporting its interpretation against applying the "equal work" standard to Title VII for all wage-discrimination claims. The court emphasized the principle that "remedies for employment discrimination supplement' each other and should not be construed so as to ignore the differences among them." \textit{Id.} (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 n.9 (1974)). The court also relied on the principle that "where a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed." \textit{Id.} (quoting Richerson v. Jones, 551 F.2d 918, 928 (3d Cir. 1977) (quoting General Elec. Co. v. Southern Constr. Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967))).
\item \textsuperscript{148} It is interesting to note that had the court failed to apply a statutory interpretation that harmonizes the two pieces of legislation in the overlapping area of sex-based wage discrimination, the court would have acted erroneously. By refusing to accord such an interpretation to the statutes, the majority would be intimating that plaintiffs may be able to base a Title VII wage-discrimination claim for equal pay on mere comparisons of work of totally unrelated content—a construction explicitly rejected by Congress. \textit{See} note 30 \textit{supra}. This interpretation is also contrary to the raison d'\'etre of the Bennett Amendment—to prevent the nullification of the EPA.
\end{itemize}

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Gunther enunciated the seemingly proper interpretation of the Bennett Amendment and the types of permissible Title VII lawsuits. Although the IUE majority probably reached the same conclusion, perhaps in its analysis it hastily disavowed the canon harmonizing the two statutes for fear of an automatic substantive bar to any causes of action broader than those addressed by the EPA. In view of the plaintiffs’ allegations that the employer’s salary handbook contains an express statement of intentional discrimination, the plaintiffs are within the realm of cases protected by Title VII even under Gunther’s guidelines.

The IUE majority was not totally convincing in its argument that the plain words of the Bennett Amendment, its legislative history, and the regulations promulgated relating thereto totally support the construction of the statute implying that, in addition to EPA claims, a plaintiff can assert other causes of action relating to wage discrimination under Title VII. Because of the lack of clarity and guidance provided by Congress, it is difficult to accord any one interpretation of the interrelationship between Title VII and the EPA. Indeed, nothing in the language of the Bennett Amendment or its legislative history indicates to what extent Congress intended to make the EPA and Title VII coterminous in wage-discrimination cases. The only certainties in the legislative history of Title VII and its Bennett Amendment are policy-based premises: The EPA is not to be nullified, and Title VII is to provide broad remedial relief.

The Gunther, Fitzgerald, and IUE courts, however, reached

149. See text accompanying notes 128-131 supra.
150. See notes 40, 41 & 47 supra.

Because there were no substantive changes, the broad interpretations of Title VII applied by courts have been seen as intended by the Congress that enacted the original bill. As for some of the judicial interpretations of Title VII, it appears that even though Title VII contains exceptions whereby Congress intended to limit the scope of the Act’s coverage, Title VII has been applied to severely limit the availability of such defenses. Even though a bona fide seniority system is an exception, the Supreme Court has required changes to put minorities in their “rightful place” at the expense of other workers. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.2 (1976). Similarly, the use of professionally developed tests must meet various standards of validation. See Griggs v. Duke Power Co., 401 U.S. 424, 433-36 (1971). See generally Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 GEO. WASH. L. REV. 824, 846-84 (1972).
the result most consistent with Title VII's underlying purpose of providing a strong weapon against all forms of employment discrimination.\textsuperscript{152} Regardless of job equality, if the employer's subjectivity is manifestly causing an unreasonably lower take-home wage for female employees than for male employees, Title VII should be the means for challenging these wage disparities.

Although the legislative history is not dispositive of the issue, various policies underlying the usefulness of Title VII as a remedy to end discrimination should compel courts to reach the conclusion that Title VII can afford protection to claimants who seek to prove compensation discrimination and are unable to utilize the EPA. These policies include the use of Title VII as a means to combat discrimination,\textsuperscript{153} as an additional remedy for employment discrimination,\textsuperscript{154} and as a means for women to assert their rights on an equal basis with other protected classes.\textsuperscript{155} These underlying policies are apparent throughout \textit{IUE}, \textit{Fitzgerald}, and \textit{Gunther}, and are most obvious in the closing lines of the Third Circuit's opinion in \textit{IUE}:

It would be ironic indeed if the Equal Pay Act, a law triggered by a Nation's concern over centuries of sexual discrimination and intended to improve the lot of those who had been excluded from the American dream for so long were to lead to the contraction of their rights under Title VII.\textsuperscript{156}

\textbf{IN THE AFRERMATH, WHAT IS A TITLE VII WAGE-DISCRIMINATION LAWSUIT?}

This section explores examples of the types of Title VII causes of action which may be asserted, some of the factors courts should consider, and some of the problems courts will face in handling Title VII wage-discrimination claims. In order to understand the wage-discrimination cause of action, it is necessary to provide a brief background of Title VII causes of action in general as well as the management technique of evaluating and formulating wage rates and salary structures.

\textit{The Title VII Cause of Action}

A Title VII claimant may advance either of two theories of discrimination. The disparate-treatment theory enables the plaintiff to

\begin{itemize}
\item \textsuperscript{152} See note 114 supra.
\item \textsuperscript{153} Id. See generally authority cited note 146 supra.
\item \textsuperscript{154} See cases cited note 115 supra.
\item \textsuperscript{155} See discussion in note 114 supra.
\item \textsuperscript{156} IUE v. Westinghouse Elec. Corp., 631 F.2d at 1107 (footnote omitted).
\end{itemize}
allege that she has been treated differently by virtue of her sex. The disparate-impact theory, a judicial creation,\textsuperscript{157} prohibits employment practices that are facially neutral in their treatment of different groups but which actually fall more harshly on one group than on another.\textsuperscript{158}

The Title VII cause of action is basically a three-step process. The plaintiff must first establish a prima facie case of discrimination before the burden shifts to the defendant to rebut the plaintiff's evidence or else to justify his treatment.\textsuperscript{159} If the defendant then meets that burden, the plaintiff can succeed only by showing that this justification is a pretext for unlawful discrimination.\textsuperscript{160}

**Basic Framework for Setting Wage Rates**

Employers set wage rates through job-evaluation systems.\textsuperscript{161} Although there are basically four types of job-evaluation sys-

\textsuperscript{157} See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The Court stated: 
``[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability." The Court also observed that 
``Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation." Id. (emphasis in original).

\textsuperscript{158} The distinction between disparate-treatment and disparate-impact cases is best described by the Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977):

``Disparate treatment'' such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. **Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.** . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . **Proof of discriminatory motive, we have held, is not required under a disparate impact theory.**

Id. at 335-36 (citations omitted) (emphasis in original).

\textsuperscript{159} See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Although McDonnell Douglas established a four-part test for establishing a prima facie case of discrimination in individual cases involving hiring, the Court stated that proving discrimination could not be restricted to one method: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

\textsuperscript{160} McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

\textsuperscript{161} W. GLUECK, PERSONNEL: A DIAGNOSTIC APPROACH 408 (1974). "Job evaluation is the formal process by which the relative worth of various jobs in the organi-
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their methodology is similar. The first step usually entails an analysis of the tasks that comprise each job, based on a combination of observation of the work performed, interviews with or questionnaires filled out by job incumbents, and interviews with supervisors. From the job analysis, job descriptions are developed, providing an inventory of the demands and contributions of the job. Jobs are then grouped into related families so that they can be rated on an appropriate job-evaluation system. Based on

zation is determined for pay purposes. Essentially it attempts to relate the amount of the employee's pay to the size of his job's contribution to organizational effectiveness." Id.

162. There are four basic types of job evaluation plans, each allowing for a substantial amount of subjectivity:

1. Job ranking—This method, usually used in small firms, involves merely subjectively ranking all the jobs in the firm by order of importance or difficulty. See LAB. REL. REP., LAB., REL. EXP. (BNA) 911, § 12 [hereinafter cited as LAB. REL. EXP.]; NAS Report, supra note 18, at 2.

2. Job classification—In this system, a series of job levels or grades is predetermined, with categories delineated based on various job factors and each job is classified or “slotted” into what the evaluators consider to be the proper relative grade. See LAB. REL. EXP., supra; NAS Report, supra note 18, at 3.

The last two systems do not consider the job as a whole, but measure each of its components: The relative worth of the job is determined by the combination of the values assigned to each of its components. See LAB. REL. EXP., supra.

3. Factor comparison—This system uses a comparison scale consisting of the basic factors (“compensable factors”) of a group of key jobs (“benchmark jobs”) whose existing wage rates, relative worth, and relative importance of the factors determining worth are agreed upon by the evaluators. The key jobs are ranked on each factor in order of value of that factor to provide the comparison scale. Other jobs are then ranked on each factor for comparison to the benchmark jobs. The scores are added to create a total score for each job, and the jobs are then ranked. See LAB. REL. EXP., supra; NAS Report, supra note 18, at 3.

4. Point system—In this evaluation system a set of compensable factors is chosen and for each factor, a scale is devised to represent increasing levels of worth. Points are scored on each factor, following the guidance of examples which are usually provided to show the definition of each degree of each factor. All points are totalled to get the job’s worth in relation to the point total of other jobs. See LAB. REL. EXP., supra.


164. See id. ¶ 40,060-62.

165. Often several evaluation systems are used by an employer to cover different categories of jobs, i.e., a plan for exempt administrative positions, a “shop” plan, and a non-exempt clerical plan. See NAS Report, supra note 18, at 6, 153-54. Separate systems are used because the “compensable factors” vary between types of jobs. Id. at 153. Additionally, “the only way to create a job hierarchy which conforms to external wage hierarchies and enhances internal equity is to restrict questions of internal equity to those subsets of jobs that can be said to fall within the same labor market.” Id. at 154. For instance, a firm might maintain a job evaluation plan for locally recruited non-competitive clerical and technical positions, one for hourly rated
various "compensable factors" which are visible components of a job, jobs are then evaluated with respect to their "worth" to the organization, and then hierarchically ranked. Finally, using the results of the job evaluation, wage rates and salary levels are set up.

Wage-setting is based only partially on the resultant job-evaluation "score" and is usually produced by an amalgam of external factors such as market forces, politics, union influence, and emotion. Unfortunately, job evaluation is not a totally rational and equitable system for compensating employees because it involves subjective judgments and biases at each step. An inherent limitation on the accuracy of job-evaluation systems is that they are often constructed in a manner that automatically reflects the current wage structure. If the market contains discriminatory wage rates, the employer's job-evaluation plan is likely to mirror the situation. Additionally, employers often use separate job-evaluation plans to cover different categories of jobs. With separate job-evaluation plans, only jobs in the same "family" are compared, precluding comparison of how certain "compensable factors" are evaluated across sectors in the organization. More to the point, the "worth" of jobs having totally dissimilar duties and responsibilities cannot be compared.

positions and another for executive and professional positions recruited nationally. Since it is difficult to compute the exact worth of a job to an enterprise, proxies for effectiveness are utilized—"compensable factors." These are components of the job, i.e., skills required, effort required, amount of responsibility involved, and working conditions. See W. GLUECK, supra note 161, at 409-09. The basic tenet of job evaluation is that the system is based on the job and not the incumbent. Id. at 409.


See generally Blumrosen, supra note 3, at 434-41. The room for bias and subjectivity in job evaluation permits ingrained societal prejudices to be co-opted into the wage structure if the employer's methodology for compensating his work force is left immune from challenge. Even with Title VII causes of action, the market rate may still prove to be a defense for the employer. See cases cited in note 17 supra and note 190 infra.

Sometimes the designer of the system judges how much each factor should contribute to the total worth of the job. Other times the weight to be accorded to each factor is derived empirically through regression analysis. NAS Report, supra note 18, at 6.

Id. at 8, 54-55.

See discussion at note 162 supra.

See generally Blumrosen, supra note 3, at 440; Nelson, Opton & Wilson, supra note 3, at 255 n.101.
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Job Evaluation and the Title VII Wage-Discrimination Cause of Action

Despite all its fallacies, job evaluation remains an important tool for plaintiffs seeking to establish a prima facie wage-discrimination case under Title VII. By utilizing the employer's own evaluation system, in which the "worth" of a job has been determined to some extent, plaintiffs can show discrimination in compensation across dissimilar jobs (limited by the range of jobs in the plan's coverage) without involving courts in entirely subjective wage-setting. Rather than rest their case on mere comparisons of job content in the abstract,174 claimants will be analyzing how the employer's wage structure was formulated. Since Title VII bars employer practices that are based on the intent to discriminate or have the effect of discriminating against women, some of the subjectivity underlying an employer's salary structure can now be disputed.

Analyzing the manner in which values are assigned to "compensable factors" may reflect discrimination. The job evaluation's emphasis should be on duties that are usually performed, and credit should be given to the qualifications needed for an employee to perform tasks that reflect the actual job content. The job analyst, however, may emphasize certain duties to ensure that one job receives a higher rate of pay while minimizing or even neglecting certain job tasks performed by another (that is, skills involved in traditionally female jobs), resulting in a lower "rank" and less pay for women. That courts are able to ascertain whether the choice of "compensable factors" in an employer's job-evaluation plan skews the rank of "female" jobs to the female employee's detriment is illustrated by Thompson v. Boyle.175

Thompson v. Boyle, brought under the EPA, dealt with male bookbinder and female journeyman bindery worker (JBW) positions at the U.S. Government Printing Office (GPO). The testimony of the defendant's job evaluator revealed that he assigned higher point scores to "male" jobs for lifting certain materials which were comparable in weight to those lifted by women (48 points for

174. These types of cases must meet the substantive prerequisites of the EPA because neither Title VII nor the EPA will permit statutory violations to be established solely on comparisons of the relative value of job content between two sufficiently dissimilar jobs. See text accompanying notes 29-32 & 129-131 supra.

175. 24 Wage and Hour Cas. 744 (D.D.C. 1980). The plaintiffs in Thompson v. Boyle established an EPA violation. The case is useful, regardless of the statutory foundation utilized, to demonstrate that the compensation discrimination Title VII can address may often be ostensibly clear.
men” vs. 12 points for “women”), and higher point scores to “male” employees for the handling of confidential data, giving none to “women” who handled the same material. The defendant’s job evaluator also underestimated the experience and skill factors in JBW work, ignored training requirements, and awarded no points for training or experience in sewing because “the sewing was of the variety most women knew how to perform.” Where the jobs are not equal, Title VII now appears, on the basis of Gunther, Fitzgerald, and IUE, to protect employees whose wages are set based on evaluations resulting in discriminatory treatment if that treatment is the cause of lower wages for jobs filled mostly by one sex as opposed to the other.

Where an employer divides his employees into groups for evaluation purposes, the assignment itself may be improper under Title VII. Through econometric analysis—a quantitative technique using mathematical models to represent an employer’s behavior on the whole—it can be estimated whether the employee’s sex had any effect on the compensation received. For instance, where traditionally female jobs are in the “clerical group” and a similarly titled male job (such as “cleaner”) is evaluated by a different evaluation plan (“males” receiving more pay), the wage disparity may be discriminatory. Another example of improper separation of “male” employees from “female” employees is the IUE dual-wage-classification issue. Assume an employer evaluates both “male” and “female” jobs by one evaluation system (which means that the jobs will probably be somewhat related) and these jobs “score” on the same level. If the employer then separates the “female” scores from the “male” scores and pays them less, a court should find that the plaintiff has met her burden of showing discriminatory intent.

Although an existing EPA regulation states that equal point value does not by itself mean the jobs at issue are “equal,” this

176. Id. at 751.
177. Id.
179. See note 142 *supra* for a discussion of plaintiff’s allegations in the IUE case.
180. This would comport with the typical Title VII paradigm for intentional discrimination. See text accompanying notes 157-160 *supra*.
181. 29 C.F.R. § 800.121 (1979); see Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257, 260 (E.D. Wis. 1970) (fact that jobs performed by male and female employees may have same total point value under evaluation system in use by em-
regulation refers to the threshold determination of whether the jobs are "equal" and is silent regarding the employer's intent. If interpreted otherwise, this regulation would be inconsistent with the congressional purpose of eliminating intentional discrimination.\textsuperscript{182} If there are legitimate reasons for the wage disparity, the employer can assert them on his rebuttal.\textsuperscript{183} This type of Title VII claim is likely to be used frequently because prior to the enactment of the EPA and Title VII, separate wage schemes were permissible and often encouraged.\textsuperscript{184}

A disparate-impact theory may also be borne out if the plaintiff can show that a facially neutral practice, such as the choice of compensable factors, results in an increased wage rate for jobs held mostly by males. Unless the factors chosen accurately reflect the features of the job, the rank will not be an accurate representation of the organizational structure. For example, in \textit{Thompson v. Boyle}, the court noted that the job-evaluation system used had not been adapted for use at the GPO bindery and that certain aspects of the plan were irrelevant to the tasks performed at the GPO.\textsuperscript{185} Additionally, the Seattle office of the EEOC had rejected the plan on the ground of built-in sex bias because it did not grant points for physical effort for repetitive operations with light objects, which might have added points to the evaluations of "female" jobs.\textsuperscript{186} To rebut this disparate-impact charge, an employer can show that use of the particular plan is based on business necessity and that there is no better way to evaluate all of his or her organization's jobs.\textsuperscript{187}

If the employee is performing a unique job, discrimination can be demonstrated as it was in \textit{Fitzgerald v. Sirloin Stockade, Inc.}\textsuperscript{188} By examining the job tasks performed and the salary by a predecessor or successor, a court may conclude that a proportion of this salary was unfairly denied to the claimant. If the employer usually

\begin{itemize}
  \item See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974). The Court stated: "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." \textit{Id.} at 237.
  \item For a discussion of the classic three-step Title VII paradigm, see text accompanying notes 159-160 \textit{supra}.
  \item See \textit{Blumrosen, supra} note 3, at 443 & n.109.
  \item 24 \textit{Wage and Hour Cas.} at 750.
  \item \textit{Id.}
  \item See authority cited in note 10 \textit{supra}.
  \item 624 F.2d 945 (10th Cir. 1980).
\end{itemize}
pays "the market rate," by comparing the salary in this unique job to that received by a similarly situated male incumbent in a nearby organization, a claimant not only establishes the existence of discrimination, but simultaneously demonstrates the amount of back pay deserved as relief.

Of course, under Title VII each case will present its own factual determination as to whether the evidence points to discrimination. Courts should hesitate to substitute their judgment for the judgment of those possessing expertise in the area, but only where the wage structure appears rational and thoroughly considered.189

An apparent limitation on an employer's liability and an affirmative defense available to employers under Title VII is the current market rate.190 If the employer pays higher wages to certain workers because higher wages are paid for such work in the local labor market, the difference in wages is legitimate. Thus, the degree of change that Title VII will actually have on wage rates for males and females who are not performing "equal" work is questionable. Plaintiffs will certainly be able to refute the relevance of the labor market on which the employer-defendant patterns his wages.191

In these Title VII claims, courts will of necessity be using the tabooed "comparable work" evidence as a supplementary aid to their scrutiny of whether the employer's compensation practices discriminate by sex. This poses the question of whether such an

189. See, e.g., Wheeler v. Armco Steel Corp., 24 Wage and Hour Cas. 651 (S.D. Tex. 1979), for a situation where the court deferred to managerial discretion where it seemed legitimate.

190. See, e.g., Christiansen v. Iowa, 563 F.2d 353 (8th Cir. 1977), where the court stated:
The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

Id. at 356.

191. For instance, the wages surveyed should reflect similar skills, experience, and seniority to the extent data are available.

An interesting issue will be whether this defense will apply to those companies that actually create the market rate. Intra-industry wage standardization has grown through the years, especially with the influx of multi-employer bargaining, trade associations, and union interest in a standard wage. Where industry standards are accepted, often some company or companies assume the position as pace-setter, e.g., U.S. Steel in the steel industry. See generally COLLECTIVE BARGAINING 224-27 (2d ed. N. Chamberlain & J. Kuhn 1965).
application contravenes the intent of Congress to avoid ascertaining the worth of "comparable work." As the dissenting judge in the IUE case noted, even where there is an alleged express policy of discrimination that has been perpetuated since 1939, only through the evidence of the worth of "comparable work" can the appellants prove that this policy still exists.

A forceful argument can be made that the equal-work comparison apparently contemplated by the EPA is only an evidentiary device to determine if pay is unreasonably low in a job that merits equal pay. In the Title VII cause of action, jobs are not being compared. It is the employer's compensation practices that are challenged. No one is telling the employer how much to pay any group of employees, but only that he must apply the same principles to all on a nondiscriminatory basis. This may, however, only be a distinction without a difference. Title VII will permit judicial inspection of the employer's pay practices, and this may involve questioning the fundamental evaluations of the employer's jobs, that is, how he determined their "worth." In certain situations, the policy behind an employer's salary schedule may suffice on its own to establish a prima facie case, such as where the employer pays 10% above the market rate to all jobs except those mainly occupied by women, or where the employer uses one pay formula for one legitimately sexually segregated group of employees and a higher-paying one for the other. But even in these simpler cases, disagreement is sure to arise as to the proper compensation to be awarded as a remedy.

192. See discussion in note 30 supra.
195. See, e.g., Board of Regents of the Univ. of Neb. v. Dawes, 522 F.2d 380 (8th Cir. 1975), cert. denied, 424 U.S. 914 (1976) (employer used different formulas for calculating wages for female employees and male employees).
196. Beyond the scope of this Note is the issue of damages. As an aside, courts should take note that equitable remedies are rather difficult to provide. Nevertheless, it would be a perversion of justice to permit a wrongdoer to be relieved from the duty to make reparations because the amount of damages is unascertainable. See Story Parchment Co. v. Patterson Parchment Co., 282 U.S. 555, 563-64 (1931).
Reasonable inferences of the extent of damages can provide a basis for the recovery awarded. At least one sex-discrimination case has applied this classic tort treatment of the damages issue to provide a back-pay award even though the amount of damages was indefinite. See Meadows v. Ford Motor Co., 510 F.2d 939, 943-44 (6th Cir. 1975), cert. denied, 425 U.S. 998 (1976). The Meadows court also relied on...
While it may be difficult to analyze the employer's compensation structure and impose damage awards that guarantee accurate and adequate relief for all parties concerned, judicial flexibility is accepted as inevitable in the discrimination area. Rather than shy away from determining if pay is unreasonably low because of sex-based discrimination, courts should welcome the challenge and conform to the mandate of Title VII to rid the employment environment of discrimination.

CONCLUSION

In affirming Gunther v. County of Washington, the United States Supreme Court accepted the Ninth Circuit's interpretation of the Bennett Amendment as not precluding a Title VII sex-based wage-discrimination claim. As a result, a plaintiff who cannot frame a cause of action within the ambit of the EPA but has reasonable grounds for believing that her wages or compensation rate may be based on impermissible sexual factors can bring a Title VII sex-based wage-discrimination claim as long as the wage rate is not exempted under the EPA's affirmative defenses.

The recognition that the EPA is not an appropriate remedy for the more subtle and sophisticated types of wage discrimination, for it can address only situations where jobs are "substantially equal," provided the impetus for the Ninth, Tenth, and Third Circ-
cuits to clarify the construction to be given to the EPA and Title VII. Although the Supreme Court, in affirming Gunther, left unresolved such questions as the formulation of remedies, the sufficiency of plaintiff's claims, and the availability of the market rate as a complete defense for an employer, it is now settled that Title VII can redress the intricate and complicated forms of discrimination that may be hidden within an employer's wage-setting and compensation machinery.

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