A Victory for Comparable Worth: IUE v. Westinghouse Electric Corp.

Alice A. Joseffer
A VICTORY FOR COMPARABLE WORTH: IUE v. WESTINGHOUSE ELECTRIC CORP.*

"Comparable worth," "the last issue to ripen under Title VII" and the first "truly jurisdictional question" to be faced under the law¹ may be one of the most important Equal Employment Opportunity issues of the 1980's.² The essence of the comparable worth theory is that whole categories of jobs are traditionally under-valued and underpaid because they are predominantly "women's jobs"³ and such underpayment constitutes sex-based wage discrimination under Title VII of the Civil Rights Act of 1964.⁴ Although Title VII was drafted to eliminate employment discrimination in all forms,⁵ its scope in sex-based wage discrimination claims has been limited, until recently, by the equal work provision of the Equal Pay Act of 1963.⁶

The Equal Pay Act of 1963⁷ provides that individuals doing equal work⁸ must be paid equal wages. This prohibition against wage discrimination does not apply, however, to individuals doing different jobs. Hence, where significant differences in job content exist, as between bench assemblers and assemblers in heavy assem-

---

3. Id.
4. 42 U.S.C. §§ 2000e-2000e-17 (1976). See Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 Mich. J.L. Rev. 397, 457-65 (1979). According to her theory, a Title VII plaintiff could establish sex-based discrimination in compensation by showing either: (1) total segregation; (2) "a perception" of segregation, where jobs are understood to be "men's jobs" or "women's jobs"; or, (3) 70 to 80 percent of the job occupants are women. Id. at 460-62. Such a showing would establish a prima facie case of discrimination and the burden would shift to the employer to justify the wage structure or rebut the presumption. Id. at 491.
8. See Wheaton Glass Co., 421 F.2d at 265.
bly, plaintiffs claiming an Equal Pay Act violation are without a remedy, even though their jobs may be of comparable worth to their employer.

In 1975, women comprised forty percent of the labor force. They were ninety-nine percent of all secretaries, ninety-eight percent of all household workers and nurses, ninety-six percent of all elementary schoolteachers, seventy-seven percent of all clerical employees, and fifty-eight percent of all nonhousehold related service employees. Unfortunately, only seventy-five percent of all women workers were employed in these occupations. A 1980 comparison of the hourly rates of men and women indicate that women’s rates are only sixty-seven percent of men's hourly rates.

It follows from the occupational segregation statistics cited that it might be desirable to compare dissimilar jobs and require equal pay for jobs of “comparable worth.” There are, however, negative aspects to the application of a comparable worth standard. To achieve parity between full-time working men and women in the United States would cost employers approximately $150 billion. Adding this large sum to employee wages without a comparable increase in productivity would result in massive inflation which would affect all members of society. In addition, during the


10. See Keyserling, Women’s Stake in Full Employment: Their Disadvantaged Role in the Economy—Challenges to Action, in WOMEN IN THE UNITED STATES LABOR FORCE 25, 28 (A. Cahn ed. 1979). See also Reagan, De Facto Job Segregation, in WOMEN IN THE UNITED STATES LABOR FORCE 90, 93-98 (A. Cahn ed. 1979).

11. Address by June Ann O'Neill, director of the Urban Institute's program of policy research on women and families, Equal Employment Advisory Council Symposium (Nov. 21, 1980), reported in DAILY LABOR REPORT, Nov. 24, 1980 at A-6. Ms. O'Neill contended that despite attempts to “decompose” the 33 percent gap between rates of men and women, removing differences attributable to education, experience, shift work patterns, absenteeism, and whether wages are subject to collective bargaining, an unexplained difference of 7 to 10 percent remains, arguably attributable to discrimination. Id. An example of the type of study to which she referred is found in Polachek, Discontinuous Labor Force Participation and Its Effect on Women’s Market Earnings, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR 90 (C. Lloyd ed. 1975).

Another comparison of earnings indicates that in 1975 women's earnings for year-round, full-time work were 59 percent of the median earnings of men for year-round full-time work. Keyserling, supra note 11, at 28.


13. Women working in traditional “women’s jobs” would benefit if their wages were raised to make them comparable to those of “men’s jobs” and their increases would allow
implementation of this standard, employers could be expected to lay off workers to control their labor costs. Women certainly would not be unscathed during this period.

An additional way in which the implementation of this theory would have an adverse impact upon society as a whole is in terms of services provided to the public by state and local governments. Labor costs comprise a large portion of any government budget. An increase in labor costs is likely to result in a corresponding reduction in services because there is no profit factor that can be adjusted. Implementation of comparable worth would also increase already large-scale government regulation of the private sector, removing wage determination from market forces. Finally, it is questionable whether comparable worth analysis could be implemented even if it were desirable, since, in order to make a proper

them to cope with inflation. Those individuals or families who would not be beneficiaries of comparable worth would suffer a reduction of purchasing power. Included would be married women who were not employed out of the home, non-employed single women and their dependents, retired and disabled individuals, and women working in traditionally "men's jobs," among others. Nelson, Opton & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 Mich. J.L. Ref. 231, 293-94 (1980).

Some employers might view increased labor costs as an incentive to revise their organization or revamp their plant to eliminate jobs. Hildebrand, The Market System, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 79, 83-84 (E. Livelynash ed. 1980). Employers may be expected to "export" many "women's jobs" to countries where labor is less expensive. Nelson, Opton & Wilson, supra note 13, at 291. Employers may also contract out certain jobs to avoid comparisons. Id. at 291.

It has been suggested that the implementation of a comparable worth standard could have a negative impact upon precisely those it purports to serve since: "(1) unemployment rates for females will rise, (2) unemployment of females also will rise [sic], (3) the major victims will be the poorest female workers, (4) welfare dependency will grow, (5) female workers will be large losers of job opportunities and (6) there will be some withdrawal of discouraged women workers from the labor force. . . ." Hildebrand, supra note 14, at 106.

Petitioner’s Brief for Certiorari at 106, County of Washington v. Gunther, 49 U.S.L.W. 4623 (1981) [hereinafter cited as Petitioner’s Brief, Gunther]. In contrast, in the private sector, the employer’s margin of profit could theoretically be reduced to compensate for increased labor costs.

Government agencies and/or the courts would be enmeshed in the reconstruction and regulation of wage and salary structures of employers. Hildebrand, supra note 14, at 83-84. Massive regulatory intervention into wage and salary structures would be yet another large scale intervention into the private sector. Id. at 102-05. The end result could be administrative wage control for the entire American economy. Id. at 83. Aside from the clear value consideration as to the type of nation which will exist in future years, there are immediate economic and social considerations.

The EEOC commissioned the National Academy of Sciences to investigate the feasibility of comparing dissimilar jobs. In its interim report, the Academy discussed features
comparison, all variables affecting supply and demand must be
controlled. Such a task has, to date, proven to be too complex to
master.\textsuperscript{19} At present there is, in fact, no operational, practical defi-
nition of "comparable worth."\textsuperscript{20}

Clearly, these economic and social arguments are of a type to
be addressed by Congress. Congress previously has considered
the issue carefully and has seemingly rejected applying the theory of
comparable worth under either the Equal Pay Act or Title VII.\textsuperscript{21}

The issue was recently considered by the United States Su-
preme Court in \textit{County of Washington v. Gunther}.\textsuperscript{22} Contending
that the issue before it was more narrow than the comparable
worth issue,\textsuperscript{23} the Court held that sex-based wage discrimina-
tion of formal job evaluation procedures which indicated their lack of utility for job worth assess-
ment in a labor force highly segregated by sex. D. \textsc{Treiman}, \textit{Job Evaluation: An Analytical

First, the relative ranking of jobs tends to be highly dependent upon which fac-
tors are used in the evaluation and how heavily each factor is weighted. But the
principal procedure for deriving factor weights pegs them to current wage rates
and thereby reflects existing sex differences in wage rates. Second, job evaluation
is inherently subjective, making it possible that well-known processes of sex-role
stereotyping will be operative in this context as well, resulting in an under-
evaluation of jobs held predominantly by women. Third, many employers use
several job evaluation plans—one for shop jobs, one for office jobs, etc., a proce-
dure that makes it impossible to compare the worth of jobs in different sectors
of a firm.

\textit{Id.} at 58. It should be noted that job evaluation is merely a procedure to determine pay
hierarchies for jobs where market values are difficult to find. First, wage rates are designated
for "key jobs," those which are assumed to reflect the market rate. Then compensable fac-
tors of the key job are identified and weighted and then applied to non-key jobs for wage-
setting purposes. Hence, job evaluation measures worth in terms of market wages, not job
of comparable worth, as currently articulated, implies that either the content of the job or
the requirements the job places on individuals establish its worth. At present, however,
there is no mechanism for defensibly establishing comparable worth. Certainly job evalu-
ation does not do it." \textit{Id.} at 76-77.

19. It has been noted that to properly compare jobs it is insufficient to hold a few vari-
bles constant. \textit{All} variables affecting supply and demand, including attractiveness of the
work or work location, scarce special talents, and so on, must be controlled to accurately
adjust wage differentials. To date efforts to do so have indicated the unlikelihood of success.
C. \textsc{Lindsay}, \textit{Equal Pay for Comparable Work: An Economic Analysis of a New Anti-
discrimination Doctrine} 32 (1980).

tives} 23, 36 (E. Livernash ed. 1980).

21. \textit{See} text accompanying notes 46-115 \textit{infra}.


23. \textit{Id.} at 4624-25 & n.8.
claims under Title VII are not required to meet the equal work standard of the Equal Pay Act.\textsuperscript{24} Thus, the comparable worth theory continues to be viable for claims under Title VII.\textsuperscript{25}

It is, therefore, worthwhile to consider the Third Circuit's decision in \textit{IUE v. Westinghouse Electric Corp.}\textsuperscript{26} The results of the case turn on statutory construction of both the Equal Pay Act and Title VII, with the majority holding that the equal work standard of the Equal Pay Act is not applicable to Title VII claims of sex-based wage discrimination. The facts of \textit{Westinghouse} make it an especially appropriate case to consider. In the 1930's, Westinghouse's job evaluations were segregated by sex, and, even though the current system of job evaluation which is used does not segregate by sex, plaintiffs contended that a present discriminatory residual effect existed from the prior discrimination. Hence, the Westinghouse pattern is a mirror image of the pattern in society: historical segregation and wage discrimination presently manifesting itself as a residual "undervaluation" of job categories which are predominantly filled by women.

In the late 1930's, all of the job classifications at the Westinghouse Electric Corporation's Trenton, New Jersey plant were seg-

\textsuperscript{24} Id. at 4629. In dissenting, Justice Rehnquist noted:

[T]he court rests its decision on its unshakable belief that any other result would be unsound public policy. It insists that there simply must be a remedy for wage discrimination beyond that provided in the Equal Pay Act. The Court does not explain why that must be so, nor does it explain what that remedy might be. And, of course, the Court cannot explain why it and not Congress is charged with determining what is and what is not sound public policy.

The closest the Court can come in giving a reason for its decision is its belief that interpretations of Title VII which "deprive victims of discrimination of a remedy, without clear congressional mandate" must be avoided.

\textit{Id.}

\textsuperscript{25} Although the Court did not endorse the comparable worth theory, the holding of the Court and the theory are not incompatible.

The comparable worth theory may also have viability in race-based discrimination claims. Blumrosen, \textit{supra} note 4, at 457-59. \textit{But see} Patterson v. Western Development Labs, 13 Fair Empl. Prac. Cas. 772 (D. Nev. 1976), holding that in a race-based wage discrimination claim, plaintiffs have the burden of proving equal work as in gender-based discrimination cases.

In addition, comparable worth claims may be pursued as an affirmative action remedy under Executive Order 11246. Prior to the Supreme Court decision in \textit{Gunther}, Labor Solicitor Carin Clauss stated that even if the Court determined that there is no cause of action for comparable worth claims under Title VII, the Labor Department would pursue such actions under Executive Order 11246. 104 L.R.R.M. 72.

regulated by sex.\textsuperscript{27} Westinghouse's Industrial Relations Manual, Part 3, section 3 (1939), described the structure.\textsuperscript{28} Jobs were "point-rated" according to knowledge, training, responsibility and demands. On the basis of the point-rating, jobs were assigned a numerical value and "key sheets" developed, designating the hourly wage for jobs at each labor grade.\textsuperscript{29} In the step of assigning wage rates to jobs, sex was considered. Rates for "women's jobs" were lower than rates set for "men's jobs," because of the more transient character of the service of the former, the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, extra help needed for the occasional heavy work, and the general sociological factors not requiring discussion herein.

The rate or range for Labor Grades do not coincide with the values on the men's scale. Basically then, we have another wage curve or Key Sheet for women below and not parallel with the men's curve.\textsuperscript{30}

A 1956 "key sheet," highlighted by the plaintiffs showed that the highest women's rate was lower than the lowest men's rate.\textsuperscript{31}

Plaintiffs, the International Union of Electrical Workers (IUE), IUE Local 449, and thirty-four women union members, contended that although the company established a new key sheet in 1965 which did not explicitly designate grades by sex, the new

\textsuperscript{27} 631 F.2d at 1097.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} IUE Petition for Writ of Certiorari at 7 (quoting Court of Appeals Appendix 158, quoting Westinghouse's Industrial Relations Manual).

It should be noted that key job wage rates are assumed to reflect market rates. Therefore, a lower curve for "women's jobs" could be a reflection of their lower value in the market. See note 18 supra. "Under the 1938 manual, the wage rate for the various jobs on the curves were set (and the wage curves were thus constructed) according to the respective labor market rates for the different types of jobs." Westinghouse Petition for Writ of Certiorari at 20-21 n.22 (emphasis added) [hereinafter cited as Westinghouse Petition].

It should also be noted that at the time the manual was in effect, women's protective statutes \textit{required} employers to discriminate on the basis of sex. State statutes prohibited women's access to night work and heavy lifting and required rest periods and amenities such as chairs and rest stations. Kanowitz, \textit{Sex-Based Discrimination in American Law I. Law and the Single Girl}, 11 St. Louis U.L.J. 293, 326-29 (1967); Kanowitz, \textit{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, 350-59 (1968). It is therefore possible that many employers had "men's" and "women's" jobs in the 1930's and could now be subject to scrutiny. Westinghouse Petition, supra at 16.

\textsuperscript{31} Brief for Appellant at 8, IUE v. Westinghouse, 631 F.2d 1094 [hereinafter cited as IUE Brief].
wage scale continued the "deliberately discriminatory" policy of the 1939 wage structure. They alleged that the pay disparity between the traditional women's jobs and the men's jobs constituted gender-based wage discrimination in violation of Title VII of the Civil Rights Act of 1964. To support their contention, the plaintiffs relied on the fact that in 1975 a majority of women were still working in "women's jobs" and that when the unitary key sheet was established, "women's jobs" were generally ranked below "men's jobs."

Since the plaintiffs had stated that they did not intend to prove that women and men were paid unequal wages for equal work, the district court considered only the question of "whether a gender based wage discrimination claim may be maintained under Title VII in the absence of allegations that male and female employees are paid disparate wages for the performance of equal or substantially equal work." In finding for the defendant, the district court ruled that "allegations and proof of unequal pay for unequal, but comparable, work does not state a claim upon

32. 631 F.2d at 1097.
33. Id. at 1096.
34. Id. at 1097. It is interesting to note that Westinghouse has implemented special programs to encourage and enable women to move into jobs primarily performed by men, offering special consideration for job placement and special training to interested women. In one such attempt in 1975 only 4 out of 231 women requested "jobs upon which women were not already working in a significant number." Brief for Appellee at 8, IUE v. Westinghouse, 631 F.2d 1094 [hereinafter cited as Westinghouse Brief].
35. 631 F.2d at 1097. It is interesting to note that
[t]here has been collective bargaining with the Union at the Trenton Plant over the last 40 years. . . . As recently as 1968, the Company, Local 449, and the International Union reviewed the wage structure concerning all the jobs in the Trenton Plant. With the exception of seven specified jobs, Local 449 and the IUE explicitly agreed on October 19, 1968 that all jobs in the plant were classified in a proper relationship to each other and that no job's classification should be increased unless there were subsequent changes in the job.

Westinghouse Brief, supra note 34, at 6-7. By 1970 Westinghouse and IUE had signed agreements regarding the remaining seven jobs. Id. at 7.
37. Id. at 450.
38. Id. at 452. Plaintiff's complaint alleged discriminatory practices in compensation, job assignments, transfers and promotions and other terms and conditions of employment. Id. at 451. Westinghouse filed a motion to dismiss, or in the alternative, for partial summary judgment. The motion was directed only at plaintiff's allegations of gender-based compensation discrimination. Id. at 452.
which relief can be granted."\textsuperscript{39}

On appeal the Third Circuit, holding that "intentional discrimination in formulating classifications of jobs violates Title VII,"\textsuperscript{40} reversed the judgment. It should be noted that the actual issue before that court was a statutory one: what was the requisite standard of proof for a prima facie case of gender-based wage discrimination under Title VII? In other words, could a cause of action under Title VII be established without proof of equal work? The court stated, however, that "[t]he statutory issue here is whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irish, or any other group protected by the Act [Title VII]."\textsuperscript{41} That issue does not appear to have been before the court. Title VII does prohibit wage discrimination against individuals based on race, color, religion, or national origin, as well as sex.\textsuperscript{42} However, the requirements for a prima facie case of wage discrimination on the basis of categories other than sex were not at issue. The court did not cite any authority indicating that the requirements must be precisely the same for all categories. Furthermore, the majority did not cite any authority indicating that a group of Italians or Irish would be able to establish a prima facie case of wage discrimination with only evidence of comparable work. The majority's statement of the issue does, however, suggest its emotional appeal. In dissenting, Judge Van Dusen more correctly framed the issue as "whether a sex-based wage discrimination claim can be made out under Title VII on the basis of evidence of comparable work,"\textsuperscript{43} that is "comparisons of the value of different jobs to the wages paid for performing those jobs."\textsuperscript{44} He noted that the union's only evidence of an express policy of discrimination was the 1939 wage manual. Therefore, the only evidence available to demonstrate continuing discrimination was a comparison of jobs and the wages paid employees for these jobs.\textsuperscript{45}

\textsuperscript{39} Id. at 457. The court granted defendant's motion for partial summary judgment. Id.

\textsuperscript{40} 631 F.2d at 1097 (emphasis added).

\textsuperscript{41} Id.

\textsuperscript{42} See note 63 infra for text of the Act.

\textsuperscript{43} 631 F.2d at 1109-10 (dissenting opinion).

\textsuperscript{44} Id. at 1108.

\textsuperscript{45} Id. at 1108-09.
In analyzing the issue, the court considered statutory language, legislative history, associated rulings of the Equal Employment Opportunity Commission (EEOC) and previous case law. The decision, however, ultimately turned on the court's interpretation of the effect of an amendment to Title VII (the Bennett Amendment) and its decision not to apply the in pari materia principle of statutory construction. To properly construe Title VII as to the requisite standard of proof necessary to establish a prima facie case of gender-based wage discrimination, it is necessary to begin with the Equal Pay Act.

I. THE EQUAL PAY ACT REQUIRES EQUAL PAY FOR SUBSTANTIALLY EQUAL WORK

The purpose of the Equal Pay Act is "to insure that those who perform tasks which are determined to be equal shall be paid equal wages." The Equal Pay Act states:

(d) Prohibition of sex discrimination
(1) No employer . . . shall discriminate . . . 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 in jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

47. S. REP. No. 176, 88th Cong., 1st Sess. 1 (1963). The Supreme Court has noted: Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. REP. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages."

(d) Prohibition of sex discrimination
(1) 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
Even though the emphasized language might be read as requiring equal pay for comparable work, this is not the case. The Equal Pay Act simply requires equal pay for individuals doing the same job.

The legislators intended that the jobs to be compared in an equal pay claim would be the same in terms of their content. "It is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different."49 By way of example, it was noted that a truck driver's job and a tug operator's job are dissimilar and that plant and office clerical assignments are normally distinguishable.50 The bill as originally introduced had used the phrase "comparable work." The change in wording was significant. Representative Goodell, sponsor of the bill, stated:

I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.51

---

49. Representative Frelinghuysen, 109 Cong. Rec. 9196 (1963). His comment could apply to the jobs at Westinghouse that are both historically and normally considered by the industry to be different.

50. Representative Goodell, sponsor of the bill that became the Equal Pay Act, gave these examples to demonstrate that only jobs that are the same could be compared. 109 Cong. Rec. 9209 (1963).

51. Id. at 9197. The comparable worth approach explicitly rejected by Congress had been supported by James Carey, President of the IUE. In testifying before the Select Subcommittee on Labor of the House Committee on Education and Labor, he cited an example of what he considered to be wage discrimination under a comparable work standard: "In our Westinghouse plant at Trenton, N.J., the female quality-control worker, who requires 12 months' experience gets $2.10 an hour. The male janitor who requires no experience gets $2.11 ½ an hour." Hearings on H.R. 8898 and H.R. 10226 before the Select Subcommittee on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess., Part 1 at 175-76 (1961). Mr. Carey presented a female Westinghouse employee and IUE member who testified that jobs performed by women in light bulb plants (the same jobs referred to in Westinghouse) were "comparable" to totally different jobs performed by men when the training, skill and value of the work were considered. Id. at 183-89.

In designating "equal" work for equal pay, Congress rejected the approach taken by the
In considering Equal Pay Act claims, the courts have given effect to congressional intent by focusing on "substantial identity of job functions" or "content." Thus, for there to be recourse to the Act, the jobs in question must require equal duties. It is not sufficient to aggregate the requirements of equal skill, effort, responsibility, and similar working conditions to establish job equality. For example, differences in responsibilities cannot be offset by compensating differences in skill in order to equate jobs.

When the plaintiff shows that the employer has paid workers of one sex more than workers of the opposite sex for equal work, a prima facie case of violation of the Act is established. The burden then shifts to the employer to justify the difference. Under the statute this may be done by reference to one or more of the exceptions in the Act: a seniority system, a merit system, a system based on quality or quantity of production, or a differential based on any factor other than sex. The crucial issue is whether a plaintiff alleging sex-based discrimination in pay has the same burden of proof (discrimination in pay for equal work) under Title VII or a lesser burden (discrimination in pay for comparable work).
II. Inclusion of "Sex" in Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 was clearly directed by Congress toward rectifying the nation's long history of racial discrimination. Within the scope of that purpose was elimination of racial discrimination in employment opportunities. Gender protection was added almost as an afterthought and, arguably, as an attempt to defeat the bill. The amendment to include "sex" was offered one day before the Act was passed. Consequently, the "legislative history of Title VII's prohibition of sex discrimination is notable for its brevity." Although the language of the provisions then have the burden of proving that current wage rates were based on a factor other than sex (one of the exceptions under the Equal Pay Act). Another possibility would be that the burden as to discrimination or lack thereof would not shift to the employer but would remain with the plaintiff as the burden of persuasion. In either case, as an evidentiary matter, jobs would have to be compared to determine current disparity in wage rates. See note 4 supra.


Mr. Celler. Mr. Chairman, I heard with a great deal of interest the statement of the gentleman from Virginia that women are in the minority. Not in my house. I can say as a result of 49 years of experience—and I celebrate my 50th wedding anniversary next year—that women, indeed, are not in the minority in my house. As a matter of fact, the reason I would suggest that we have been living in such harmony, such delightful accord for almost half a century is that I usually have the last two words, and those are, "Yes, dear."

110 CONG. REC. 2577 (1964).

Mr. Celler. As long as there is a little levity here, let me repeat what I heard some years ago, which runs as follows:

"Lives there a man with hide so tough who says, "Two sexes are not enough."

In any event, I refer again to the President's Commission.

110 CONG. REC. 2578 (1964).

Mrs. Griffiths. . . . a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.

110 CONG. REC. 2580 (1964).

Mrs. St. George. We are entitled to this little crumb of equality.

110 CONG. REC. 2581 (1964).

Serious and considered arguments such as those of Representative Green reflected concern that it was not the "time or place for amendment." 110 CONG. REC. 2581 (1964). Mrs. Green, the author of an equal pay proposal in 1962 and member of the President's Commis-
of Title VII is clear, its ramifications are uncertain. It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, . . . because of such individual's . . . sex. Unlike the Equal Pay Act, standards for determining discrimination in compensation are not written into Title VII. The Equal Pay Act specifies the standard of "equal work in jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." Title VII does not, however, specify categories of jobs to be compared or equated for the purpose of establishing discrimination.

There is legislative history, however, which indicates that Equal Pay Act standards requiring proof of equal work apply to wage discrimination claims under Title VII. Senator Clark, a floor manager for the bill, read into the record a memorandum he had prepared to answer objections to the bill. An objection to the sex

The opposing views of the Status of Women noted, "As much as I hope the day will come when discrimination will be ended against women, I really and sincerely hope that this amendment will not be added to this bill." See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 882-83 (1967).

63. Title VII states in part that:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


64. See id.


66. Senator Clark's explanation is significant because of his role as floor manager. For a discussion of the importance of the role of the floor manager, see Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463-64 & n.8 (1937); Ideal Farms, Inc. v. Benson, 288 F.2d 608, 616 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1963).

67. Senator Clark's memorandum answered an objection to the sex antidiscrimination provision in Title VII:

Objection: The sex antidiscrimination provisions of the bill duplicate the cov-
antidiscrimination provisions was that they did not include those provisions of the Equal Pay Act which required equal work. Senator Clark responded: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII."

The *Westinghouse* majority found Senator Clark's statement to be ambiguous and suggested two possible meanings: (1) the equal work standards of the Equal Pay Act apply to Title VII (which would support Westinghouse's position); or, (2) the Equal Pay Act standards apply only when claims of equal work are made, not when equal work is not alleged. Under the latter alternative, a Title VII plaintiff could claim wage discrimination without the burden of proving equal work. Presumably, a showing of comparable work would suffice. Apparently the "ambiguity" stems from Senator Clark's use of the phrase "comparable situation." Westinghouse has noted that

[a] careful reading of Senator Clark's statement clearly reveals that the "comparable situation" to which he refers is wage discrimination generally as opposed to claims involving some other alleged unlawful employment practice, such as hiring or promotions. Senator Clark had made reference in the preceding sentence to such another type of unlawful practice, i.e., job segregation based on sex. He thereafter singled out wage discrimination claims and specifically referred to the Equal Pay Act as the standard to govern all such claims. There is nothing in the passage to suggest that certain kinds of wage discrimination claims would be governed by standards other than the Equal Pay Act.

The *Westinghouse* dissent read the statement of Senator Clark

under 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.

68. *Id.*
69. *Id.*
70. 631 F.2d at 1102.
71. *Id.*
72. Westinghouse Brief, *supra* note 34, at 22 n.38.
within the context of the memorandum in which it was written and determined that it indicates "an intent to preserve the Equal Pay Act's requirement that proof of equal work be a prerequisite to a sex-based wage discrimination claim under Title VII." Hence, proof of "comparable worth" would not suffice in establishing a prima facie case of discrimination under Title VII.

III. THE BENNETT AMENDMENT TO TITLE VII

Despite Senator Clark's statement indicating that the equal work requirement of the Equal Pay Act would apply to gender-based wage discrimination claims under Title VII, Senator Bennett remained concerned that the relationship of the two pieces of legislation might be misconstrued. The Equal Pay Act had been passed after eighteen months of debate and after "very careful study by the appropriate committees of Congress." In contrast, "sex" had been included in Title VII without any real debate. Therefore, Senator Bennett concluded that insufficient legislative attention might have been "paid to possible conflict between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act." Consequently, he introduced an amendment to clarify that relationship. The clarifying amendment, however, is ambiguous.

It shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of 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 of the Equal Pay Act.

73. 631 F.2d at 1112 (dissenting opinion).
74. 110 CONG. REC. 13647 (1964).
75. Id.
76. Section 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h) (1976). The Bennett Amendment is the second sentence in the following section:

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 system 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 dif-
In *Westinghouse*, the majority noted two alternative readings\(^7\) of the amendment to Title VII:\(^8\) (1) Title VII coverage of sex-based discrimination in compensation is limited to situations in which employees are performing equal work, as under the Equal Pay Act; or, (2) Title VII coverage is limited only by the exceptions which limit Equal Pay Act coverage (seniority, merit, quantity or quality of production, any factor other than sex).\(^9\)

Both the majority and the dissent noted that statutory construction begins with an analysis of the language of the statute.\(^80\) They focused on the meaning of the words "authorized by." The majority contended that "authorized by" describes something "expressly permitted."\(^93\) As applied to the amendment, this interpre-

---

\(^7\) Id. at 1099-1100. See also Gunther, 602 F.2d at 889. Alternative readings of the amendment were noted soon after enactment of Title VII. Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 75-76 (1964).

\(^8\) It is not clear exactly what conflicts Senator Bennett, the sponsor of the amendment, intended to resolve. The Equal Pay Act does not affirmatively authorize any differentiation in compensation on the basis of sex. It does contain exceptions for differences in compensation based on a seniority system, a system measuring earnings by quantity or quality of production, or any other factor other than sex. This is merely clarifying language similar to that which was already in section 703(h) [Title VII]. If the Bennett Amendment was simply intended to incorporate by reference these exceptions into subsection (h), the amendment would have no substantive effect.

Another interpretation of the Bennett Amendment seems more plausible. . . . [I]f the Bennett Amendment is to be given any effect, it must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.

---

\(^9\) See note 63 supra for text of Title VII.

\(^80\) Id. at 1100, 1111. Webster's Third New International Dictionary 146-47 (1961) defines "authorize" in the following manner: "Ia: to endorse, empower, justify, or permit by or as if by some recognized or proper authority . . . : SANCTION . . . b . . . to furnish grounds for: JUSTIFY. 2 . . . to vouch for . . . 3 . . . to give legality or effective force to . . . 4a: to endow with authority or effective power, warrant or
COMPARABLE WORTH  201

tation indicates that only the four exceptions of the Equal Pay Act which "permit" unequal pay are incorporated. The dissent suggested that an alternative meaning of "authorized" was "to permit a thing to be done in the future." As the dissent noted, the meaning of the word is not "so clear as to reveal conclusively the correct interpretation of the statute."

The court then considered the Bennett Amendment within the context of the section in which it is contained. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), contains only two sentences. The first sentence provides "it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system or a system which measures earning by quantity or quality of production." The second sentence is the Bennett Amendment. If the Bennett Amendment were read as incorporating only the Equal Pay Act defenses (seniority, merit, quantity or quality, or any factor other than sex), the second sentence (the Bennett Amendment) would essentially just repeat the first sentence since three of these four defenses were already made applicable to Title VII by the first sentence of section 703(h).

The Westinghouse majority concluded "that the repetition of the exceptions in the Amendment ensured that the two statutes would be interpreted in the same manner. With the Bennett Amendment the Equal Pay Act exceptions became 'applicable to Title VII as well.'" The dissent argued that the majority's construction of the Bennett Amendment "renders the Bennett Amendment

right: appoint, empower, or warrant regularly, legally, or officially . . . b: to grant or allot by proper authority . . . ."

631 F.2d at 1100.

82. Authorize. To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right . . . . To permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act.


83. 631 F.2d at 1111 (dissenting opinion).

84. Id.

85. For full text, see note 76 supra.


87. For text of the amendment, see note 76 supra.

88. 631 F.2d at 1101 (quoting General Electric v. Gilbert, 429 U.S. at 144) (emphasis added).
Amendment largely redundant, a construction which is to be avoided." The dissent cited F.A.A. v. Robertson to support its view of statutory construction. There, the Supreme Court stated, "[i]t is axiomatic that all parts of an Act 'if at all possible, are to be given effect.'"

The Supreme Court has also stated that "[w]e would not lightly conclude that a congressional enactment has no purpose or function." Hence, reading the Bennett Amendment as incorporating only the defenses of the Equal Pay Act and not the equal work standard is contrary to the rules of statutory construction.

It is worthy of note, although not mentioned in Westinghouse, that when Senator Bennett introduced his amendment, time for debate had been limited by invocation of cloture. The Senate leadership had urged him not to fully explain the amendment since it was acceptable to the leadership and only a limited amount of time was available to complete work on Title VII. Senator Bennett simply explained that "[t]he purpose of my amendment is to provide that in the event of conflicts the provisions of the Equal Pay

---

89. 631 F.2d at 1111-12 (dissenting opinion). If the majority's view were correct, the Bennett Amendment would then be interpreted to read as follows: It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation . . . if such differentiation is based on any other factor than sex.

Petitioner's Brief at 75, Gunther, supra note 16. The Tenth Circuit had interpreted the Bennett Amendment in Gunther as had the Third Circuit in Westinghouse.

90. 422 U.S. 255, 261 (1975).

91. Id. (quoting Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973)). In Weinberger the court stated that a construction which would render a clause superfluous offends the rules of statutory construction. 412 U.S. at 633.


The government's contention . . . would defeat and destroy the plain meaning of that section. "The cardinal principle of statutory construction is to save and not to destroy." N.L.R.B. v. Jones & L. Steel Corp., 301 U.S. 1, 30. It is our duty, "to give effect, if possible, to every clause and word of a statute," Montclair v. Ramsdell, 107 U.S. 147, 152, rather than to emasculate an entire section. . . .

Id. at 538-39.

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and section of a statute." A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .

2 A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973) (quoting State v. Bartley, 39 Neb. 353, 58 N.W. 172 (1894)).

93. 111 CONG. REC. 13359 (1965).
Act shall not be nullified."

He wanted the provisions of the Equal Pay Act preserved under Title VII but did not specify which "provisions" he meant. "Provisions" could conceivably encompass only the equal work requirements, only the four exceptions, or both.

Representative Celler, the original sponsor of the bill that became the Civil Rights Act of 1964, explained to the House those changes in the House bill which had been made by the Senate. He explained that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended [the Equal Pay Act] satisfies the requirement of [Title VII] ...." The Westinghouse majority agreed with the district court's suggestion that a plausible interpretation of Representative Celler's statement was that Title VII is no broader than the Equal Pay Act. The majority suggested:

An equally plausible construction is that compliance with the "equal work" requirements of the Equal Pay Act met Title VII's requirement on that issue only. We are persuaded that Representative Celler must have intended the later [sic] interpretation since Title VII proscribes a broad range of gender-based discrimination which is not barred by the Equal Pay Act, such as discriminatory promotions, transfers, and firing.

94. Mr. Bennett. Mr. President, after many years of yearning by members of the fair sex in this country, and after 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.

110 CONG. REC. 13647 (1964).

95. The Westinghouse majority found support for the IUE's position in the fact that "a number of other amendments which would have limited the scope of Title VII, and which would have had a much smaller potential impact on the scope of Title VII's coverage, were rejected by the Senate." 631 F.2d at 1105. Therefore, the majority contended that there would have been more discussion if the intent of the amendment had been to limit the scope of Title VII. Id. This analysis has been forcefully criticized for two reasons: (1) the Bennett Amendment did not reduce the scope of Title VII intended by Congress; and, (2) during the period in which the Bennett Amendment was considered, amendments which did significantly limit Title VII were introduced and adopted. Petitioner's Brief, Gunther, supra note 16.

96. 110 CONG. REC. 15896 (1964).
97. 631 F.2d at 1103.
98. Id.
The majority's analysis correctly assumed Representative Celler's statement could only apply to the issue of discrimination in compensation. Title VII affords protection in areas of employment unprotected by the Equal Pay Act. Therefore, satisfaction of the Equal Pay Act's requirements could only mean those requirements regarding equality of compensation (not firing, promotions, transfers). If, however, the majority meant that compliance with the equal pay for equal work requirement satisfies Title VII only when equal work is alleged, no supporting rationale was offered.\footnote{99} Although the dissenting judge agreed with the majority that Representative Celler's statement was "open to varying interpretations,"\footnote{100} he stated that "the most logical interpretation of this remark is that complying with the Equal Pay Act would preclude liability under Title VII for all sex-based wage discrimination claims."\footnote{101}

The court also considered two items of "legislative history" post-dating passage of the Civil Rights Act.\footnote{102} The first originated in 1965 when Senator Bennett introduced an amendment to the Senate's cloture rule to allow an additional five minutes for Senators to explain legislative amendments after the invocation of cloture.\footnote{103} He saw the additional time as necessary for the creation of legislative history.\footnote{104} In support of the amendment, he cited his own experience in not having sufficient time to explain the intent of the Bennett Amendment.\footnote{105} Noting the need, therefore,
"create" legislative history regarding the Bennett Amendment, he introduced a memorandum into the Congressional Record:

"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."

The Westinghouse majority acknowledged that Bennett’s statement supported Westinghouse’s view but discounted it because it was “not persuaded that this passage represents the intent of Congress at the time it passed the Amendment.” To support its view, the majority noted that there was little discussion of the memorandum at the time it was introduced and it was not voted upon. In addition, the majority believed that the 1965 explanation differed from Senator Bennett’s earlier explanation. Whether the two explanations differ is arguable.

With regard to this first item of ex post facto legislative history, the dissent noted the memorandum’s explicit support for Westinghouse’s position and stated: “When the author of a piece of legislation, a short time [one year] after its passage, makes a clarifying statement which is not inconsistent with the prior, ambiguous legislative history, I believe the statement should be given weight.”

The second item of post-Act history was a committee opinion in a 1977 Senate Report on amendments to Title VII. The majority declined to rely on it because it is ex post facto and was not voted upon or approved by Congress as a whole. The Westinghouse dissent did not mention the committee report.

---

106. Id. At the time the memorandum was introduced into the Congressional Record, Senator Dirksen stated that when Senator Bennett introduced the Bennett Amendment, the Senate was in accord with Senator Bennett’s understanding of the Amendment and had accepted it on that basis. Id. at 13360.
107. Id. at 13359.
108. 631 F.2d at 1104.
109. Id.
110. Id.
111. Id.
112. For Senator Bennett’s earlier explanation, see text accompanying notes 93-94 supra.
113. 631 F.2d at 1104 (dissenting opinion).
114. Id.
115. Id. at 1104-05.
IV. EEOC GUIDELINES

The Equal Employment Opportunity Commission (EEOC) is the regulatory agency responsible for enforcing the Civil Rights Act. As such, the Commission's interpretations of Title VII of the Civil Rights Act would normally be considered of great importance by the courts. In 1965, contemporaneously with the enactment of Title VII, the EEOC issued guidelines supporting Westinghouse's position that the Bennett Amendment incorporated the equal work standard of the Equal Pay Act into Title VII. The Supreme Court has stated the role of EEOC guidelines:

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."


Contemporaneous agency interpretations are entitled to considerable weight since they are issued when legislative intent should be fresh in the minds of the administrators.

Udall v. Tallman, 380 U.S. 1, 16 (1965).

The guideline states:

Relationship of Title VII to the Equal Pay Act

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6 (d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703 (h) 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. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703 (h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an
According to the 1965 guidelines,

Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets 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.119

This guideline limits Title VII's coverage of sex-based wage discrimination to the scope of the equal work requirement of the Equal Pay Act.

It should be noted that Title VII coverage is broader than the Equal Pay Act with respect to employee coverage.120 As an amendment to the Fair Labor Standards Act, the Equal Pay Act has the same basic coverage and exemptions as that Act.121 Categories of coverage which are exempt under the Equal Pay Act are agricultural exemptions, industrial and occupational exemptions (example: employees of an independently owned telephone company that has fewer than 750 stations), and white-collar exemptions (executives, administrative employees, professional employees and outside salesmen).122 Unlike the Equal Pay Act, Title VII does not contain numerous exemptions. Hence, Title VII extends wage discrimination protection to categories previously exempted from coverage under the Equal Pay Act.

The EEOC guideline quoted above indicates that newly protected individuals would have to meet the "old" standard of equal work.123 In 1972, however, a new guideline was issued by the EEOC.124 The 1972 guideline notes (as does the 1965 guideline)125

opinion on any matter covered by both Title VII and the Equal Pay Act.


119. Id. (emphasis added).

120. LAB. REL. REP. (BNA), FAIR EMPL. PRAC. MANUAL 411:1. See 29 C.F.R. § 1604.7 (a) (1965).

121. LAB. REL. REP. (BNA), FAIR EMPL. PRAC. MANUAL 411:301.

122. Id. at 411:325-32.

123. See note 118 supra.

124. The new guideline states:

Relationship of title VII to the Equal Pay Act

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

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be
that the Bennett Amendment does not limit the coverage of Title VII to employees covered by the Equal Pay Act. The 1972 guideline also provides that, by virtue of the Bennett Amendment, "a defense based on the Equal Pay Act may be raised in a proceeding under title VII." While the 1972 guideline omits the 1965 statement that the equal work standard applies to Title VII, it does not expressly reject it.

The Westinghouse majority stated that the EEOC had consistently supported the position that the Bennett Amendment incorporated into Title VII only the defenses of the Equal Pay Act and not the equal work standard. In reaching this determination, the majority advanced two arguments. First, it noted that the 1965 guideline did "not state that Title VII's scope is no broader than the Equal Pay Act." To support this argument, the majority quoted language from the 1965 guideline which pertained to employee coverage, not to the range of conceivable wage discrimination claims. Hence, the majority's focus appears to have been misdirected. The second argument advanced was that while the 1965 guideline was in effect, the EEOC in some cases found employers in violation of Title VII for rating "women's jobs" at a lower wage schedule than "men's jobs" (which would not violate the Equal Pay Act). In the cases cited by the majority, proof of equal work was not required. Westinghouse, however, brought to the court's attention the fact that "there are EEOC decisions as late as 1971 that continue to adhere to the official position as set forth in the 1965 regulations." A case cited by Westinghouse

---

(c) Where such a 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.


125. See note 118 supra.
126. See 29 C.F.R. § 1604.8, subsection (a), supra note 124.
127. See id., subsection (b).
128. 631 F.2d at 1105-06.
129. Id. at 1106.
130. Id. See 1965 Guideline, last sentence of subsection (a), supra note 118.
131. 631 F.2d at 1106.
133. Westinghouse Brief, supra note 34, at 34 n.62.
states, "Section 703(h) of Title VII [the Bennett Amendment] makes the standards developed under the Equal Pay Act, 29 U.S.C. 206(d), applicable in Title VII cases." 134. Therefore, cases the EEOC decided under the 1965 guideline were in conflict as to whether proof of equal work was requisite to a claim of gender-based wage discrimination under Title VII. The majority's reliance on case law under the 1965 guideline was, thus, not as persuasive as might appear on the face of the opinion.

Stressing the support given to the equal work standard by the 1965 guideline, the dissent in Westinghouse noted that "[t]he situation before us parallels that presented to the Supreme Court in General Electric Co. v. Gilbert." 135. In Gilbert, plaintiffs alleged that the exclusion of pregnancy from an employer's disability plan constituted sex discrimination in violation of Title VII. 136. Finding that the relevant 1972 EEOC guideline conflicted with earlier EEOC pronouncements, the Court gave the latter guideline little weight. 137. Greater weight was accorded legislative history. 138. The Westinghouse majority, however, found the guidelines in question to be consistent, stating that Gilbert was inapplicable. 139.

Whether an omission of an earlier statement from a later guideline, as in the instant case, constitutes "conflict" is arguable. Nonetheless, the EEOC's current advocacy of the "comparable worth" standard 140. is in conflict with the 1965 guideline's specifica-

135. 3 Fair Empl. Prac. Cas. at 550.
136. 631 F.2d at 1113 (citing General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976)) (dissenting opinion).
137. 429 U.S. at 127-28.
138. Id. at 144-45.
139. Id. at 145.
140. 631 F.2d at 1106. Gilbert is a significant case aside from its statements regarding the consideration due conflicting EEOC guidelines. Although the issue of whether the equal work standards of the Equal Pay Act apply to Title VII was not directly before the Court, the effect of the Bennett Amendment was addressed:

Congress paid especial attention to the provisions of the Equal Pay Act, 29 U.S.C. § 206(d), when it amended § 703(h) of Title VII by adding the following sentence: [the Bennett Amendment]. . . . Because of this amendment, interpretations of § 6(d) of the Equal Pay Act [standard of equal work] are applicable to Title VII as well.

429 U.S. at 143-44.

141. See text accompanying notes 1-2 supra.
tion of the equal work standard and, thus, the EEOC position has been inconsistent over the years. In light of this inconsistency, the EEOC’s current pronouncement should be given little weight.\textsuperscript{142}

\textbf{V. THE EQUAL PAY ACT AND TITLE VII OF THE CIVIL RIGHTS ACT ARE IN PARI MATERIA}

Even in the absence of the Bennett Amendment, the “equal work” standard should be applicable to wage discrimination claims under Title VII. The provisions of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act.\textsuperscript{143} That is, they must be construed in a manner \textit{“conforming with”}\textsuperscript{144} the Equal Pay Act.

In terms of legislative intent, it is assumed that whenever 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{145}

The legislative history of Title VII confirms that Congress “had in mind” the provisions of the Equal Pay Act and its requirement of equal work.\textsuperscript{146} Certainly, there was no express repeal or amendment of those provisions, just as there was no expression of Congressional intent to nullify the Equal Pay Act.

In order to properly harmonize these statutes, the \textit{in pari materia}\textsuperscript{147} canon of statutory construction must be applied.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{142} See note 116 supra.
  \item \textsuperscript{144} Harmony. The phrase “in harmony with” is synonymous with agreement, conformity, or accordance with. Black’s Law Dictionary 646 (5th ed. 1979).
  \item \textsuperscript{145} C. Sands, supra note 92, § 46.06. See also T. Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law 209-12 (2d ed. 1874).
  \item \textsuperscript{146} See text accompanying note 94 supra.
  \item \textsuperscript{147} In pari materia. Upon the same matter or subject. Statutes \textit{in pari materia} are to be construed together. “Statutes in pari materia” are those relating to the same person or thing or having a common purpose. Black’s Law Dictionary 711 (5th ed. 1979).
\end{itemize}
Under the canon,

a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute, covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."149

The Equal Pay Act and Title VII each deal with sex-based wage discrimination. The Equal Pay Act is clearly the more specific statute; Title VII is the more general, later enacted statute. Application of the in pari materia principle to these statutes requires that the specific provisions of the Equal Pay Act, including the equal work requirement, not be nullified. If a Title VII plaintiff could proceed under Title VII without the burden of proving "equal work," there would be no logical reason why a plaintiff would seek relief under the Equal Pay Act with its stricter equal work requirement.150 Application of the in pari materia principle would require Title VII plaintiffs to also prove equal work.151

Westinghouse argued that the court should apply the in pari materia principle.152 The majority, however, "decline[d] to apply the canon"153 for two reasons. First, the court contended that the principle was inconsistent with the need to construe remedies for employment discrimination in a supplementary fashion.154 The majority relied on Alexander v. Gardner-Denver Co.,155 a case which did not involve the question of in pari materia. That case held that an individual pursuing a claim through arbitration may also bring a claim under Title VII.156 The two remedies thus "supplement" each other. In the case of gender-based wage discrimination, it is unquestioned that an individual can bring claims under

150. Westinghouse Brief, supra note 34, at 31.
151. "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." 511 F.2d at 171.
152. Westinghouse Brief, supra note 34, at 31-33.
153. 631 F.2d at 1101.
154. Id.
156. Id. at 59-60.
both the Equal Pay Act and Title VII. That reasoning does not, however, preclude reading the statutes in pari materia.

The majority's second reason for declining to apply the principle was that it “conflicts with another rule of statutory construction, namely, ‘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.’” It could be argued that, by virtue of the Bennett Amendment, the equal work requirement was not omitted from Title VII. Furthermore, in the case cited by the majority, the court was not considering whether statutes should be read in pari materia.

The Supreme Court of the United States has vigorously affirmed application of the in pari materia principle. In United States v. United Continental Tuna Corp., the Court considered a case similar to Westinghouse insofar as a failure to construe pertinent statutes in pari materia would have resulted in repeal by implication. The Court's analysis is instructive:

It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored. . . . The principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one. . . . [H]ere the argument is not that the Public Vessels Act can no longer have application to a particular set of facts, but simply that its terms can be evaded at will by asserting jurisdiction under another statute. We should, however, be as hesitant to infer that Congress intended to narrow the scope of a statute. Both types of “repeal”—effective and actual—involve the compromise or abandonment of previously articulated policies and we would normally expect some expression by Congress that such results are intended. Indeed, the expectation that there would be some expression of an intent to “repeal” is particularly strong in a case like this one, in which the “repeal” would extend to virtually every case to which the statute had application.

In another case, Morton v. Mancari, the Supreme Court

157. 631 F.2d at 1101 (quoting Richerson v. Jones, 551 F.2d 918, 928 (3d Cir. 1977), quoting General Electric Co. v. Southern Construction Co., 383 F.2d 125, 138 & n.4 (5th Cir. 1967)).
158. Richerson v. Jones, 551 F.2d 918.
161. Id. at 168-69 (emphasis added).
considered whether the absence of a specific Indian preference provision from 1972 legislation which had been present in 1934 legislation indicated a difference of Congressional intention. The Court held that this absence did not indicate such an intention.

The Westinghouse dissent noted that the legislative history of Title VII, which indicates an intent to avoid conflicts between the two statutes, supports the in pari materia construction of Title VII and the Equal Pay Act. The dissent also found support in relevant EEOC regulations which were enacted contemporaneously with Title VII. "Title VII requires that its provisions be harmonized with the Equal Pay Act." Finally, the dissent averred that "every court of appeals which has addressed the question of applicability of the in pari materia canon to the interpretation of these statutes, including a prior decision of [this court], has held that the canon does apply."

VI. Conflict Among the Circuits?

The majority and dissent in Westinghouse differed as to applicable case law, at least in part, because of differences in the way they framed the issue presented. These same differences also led them to differ on the question of whether there was, in fact, a conflict among the circuits regarding this issue. The majority focused on whether the equal work standard applies to a wage discrimination claim under Title VII where the employer explicitly and deliberately pays lower wages for those types of jobs done predominantly by women. The dissent focused on whether plaintiffs have a cause of action for wage discrimination under Title VII when discrimination can only be proved with evidence of compara-

163. Id. at 537.
164. Id. at 551.
165. 631 F.2d at 1111 (dissenting opinion).
166. Id. at 1110-11.
167. Id. at 1111.
168. 29 C.F.R. § 1604.7(a) (1965).
170. 631 F.2d at 1106-07, 1109.
171. See text accompanying notes 40-45 supra.
172. Id. at 1097.
The majority was of the opinion that only one court of appeals had previously addressed the issue presented in Westinghouse. "In that case, Gunther v. County of Washington, the Ninth Circuit held that Title VII was violated when wages for females were intentionally set, on the basis of sex, lower than wages for men who held different jobs." One of plaintiffs’ contentions in Gunther was that they were denied equal pay for work substantially equal to that performed by male guards. Thus, the plaintiffs contended that their claim fell within the Equal Pay Act. In the alternative, plaintiffs contended that even if the work was not substantially equal, some of the differential between wages paid the male guards and the female matrons could only be explained by discrimination on the basis of sex. Plaintiffs brought their claim under Title VII and argued that, with respect to discrimination in compensation claims, its provisions were broader in scope than those of the Equal Pay Act. The court agreed with the plaintiffs and held that "although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated in Title VII by § 703(h)." Therefore, the case was remanded to the district court for further consideration of evidence that a portion of the discrepancy between salaries of jail matrons and those of male guards might be attributed only to sex. The Westinghouse majority found

173. Id. at 1109 (dissenting opinion).
174. Id. at 1107 (emphasis added).
176. Id. at 886.
177. Id.
178. Id. at 891.
Gunther "persuasive" and noted that the Gunther court's construction of the Bennett Amendment was consistent with its own. The Westinghouse dissent, however, felt that the Gunther decision was undermined by its failure to discuss the application of the principle of in pari materia. The dissent also noted that, until the decision in Gunther, no court of appeals had held that a Title VII claim of sex-based wage discrimination could be established without proof of equal work.

The Westinghouse majority distinguished other cases involving gender-based wage discrimination claims under Title VII on various grounds: (1) that there was no discriminatory intent; (2) that the claimant met the equal work claim and thus there was no need to decide any other approach; and, (3) that the plaintiff had never sought to challenge the equal work standard.

In Lemons v. Denver, a recent Tenth Circuit decision, nurses employed by the City of Denver brought suit against the city seeking relief for gender-based discrimination in compensation. The city's method of classification and job compensation attempted to equalize the pay for city employees with the pay for that type of job in the general community. Denver's nurses, however, did not want to be compared with nurses in the community. They contended that historically nurses have been underpaid because their work is not recognized and because nurses have almost universally been women. Therefore, they wanted to be compared with non-nursing positions which they asserted were of equal worth to the employer. The court of appeals in Lemons, like the dissent in Westinghouse, focused on whether proof of comparable work could establish a claim of gender-based wage discrimination under Title VII.

Plaintiffs are not seeking equality of opportunity in their skills as contemplated by Title VII, but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received, we cannot ven-

179. 631 F.2d at 1107.
180. Id.
181. Id. at 1114 (dissenting opinion).
182. Id.
183. Id. at 1107 n.19.
184. 620 F.2d 228 (10th Cir. 1980).
185. Id. at 229.
186. Id.
tire into it.

In the meantime, we can consider wage discrimination claims which involve departures from equal pay for equal work. This would be applicable to both the Equal Pay Act and Title VII. . . . The equal pay for "comparable work" concept had been rejected by Congress in favor of "equal work" in 1962. The Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act.187

Thus, the court held that the plaintiffs were seeking relief beyond the limits of Title VII.188 "This type of disparity was not sought to be adjusted by the Civil Rights Act, and is not within the equal protection clause. . . . [P]laintiffs are seeking relief far beyond that contemplated by Congress or the Constitution."189 Focusing on discriminatory intent, the Westinghouse majority distinguished Lemons on the grounds that the city "had not set the wages for women lower than the wages for men on account of their sex."190 The Westinghouse majority did not perceive explicit deliberate discrimination in Lemons as it had in Westinghouse. It was significant to the Westinghouse majority that the Lemons trial court had found that "the City draws no distinction between male and female employees."191

Prior to Lemons, the Tenth Circuit had addressed the equal work issue in Ammons v. Zia Co.192 Plaintiff contended that she had established a prima facie case of discrimination in compensation by showing that she was not permitted to qualify for entry to an Apollo test area.193 She was the only employee in her work group who did not receive clearance for duty in the test area where all her male co-workers were allowed to enter. The court determined that "higher compensation appears not to have been keyed to qualifications relating to test area clearance,"194 and further held that she "failed to sustain her burden of showing that she was paid less than others performing 'substantially equal work.'"195 The court applied the Equal Pay Act standard to the Title VII

187. Id. at 229-30 (emphasis on "equal" added).
188. Id.
189. Id. at 229.
190. 631 F.2d at 1107.
192. 448 F.2d 117 (10th Cir. 1971).
193. Id. at 118.
194. Id. at 119.
195. Id. at 120.
claim. The Westinghouse majority did not discuss Ammons but would presumably have distinguished it on the grounds that there was no explicit intentional discrimination in wages. Wages were not set according to sex.

In the Fifth Circuit case of Orr v. MacNeill, the plaintiff alleged that she had been discriminated against in compensation on the basis of sex in violation of Title VII. Plaintiff, as manager of the accounting department of an insurance company, was paid less than the male managers of other departments in the company. The court determined that the evidence failed to show sex discrimination in compensation because the plaintiff had failed to sustain her burden, under Title VII, of proving equal work. "Although various phases of a business organization are essential to its operation, it does not follow that the phases involve equal work such as must be shown in an action based on sex discrimination. Congress certainly did not intend such a result." The Westinghouse majority distinguished Orr, a case similar to Ammons, noting, "the facts suggest the plaintiff would not have been able to establish facts similar to the facts of this case."

Another case the Westinghouse majority distinguished on sim-

196. 511 F.2d 166 (5th Cir. 1975).
197. Id. at 168-69.
198. Id. at 171. The court noted, the District Court included in its findings the statement that the jobs in this are not as "substantially equal" as in other cases where recovery has been permitted. Does this mean that the jobs in this case are less than substantially equal? We cannot say. We do say that the evidence does not sustain the District Court's determination that the jobs here are substantially equal.

Id. at 170. The court's footnote follows:

2. There is a temptation, which will be suppressed, to discuss whether "substantially equal" is equal, whether less than equal is unequal and therefore "less than substantially equal" is also unequal. Such an exercise in syllogistic semantics would serve no useful purpose here.

Id. The court's comments highlight the imprecision of applying the equal work standard to various fact situations and suggest that there may be differing degrees of "substantially equal." In Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), the court considered evidence that male pursers were paid more than female stewardesses in violation of the Equal Pay Act and Title VII. Id. at 452. Finding that the plaintiffs proved "substantial equality" of jobs, the court held that the alleged differences in occupational duties did not justify the wage differential. Id. at 453-54. If the Laffey court had decided Orr, the outcome might have been different. If "equal work," which has come to mean "substantially equal work" is capable of a wide range of applications, it is likely that "comparable worth" would be even less precise and less standard in application.

199. 511 F.2d at 171.
200. 631 F.2d at 1107 n.19.
The plaintiff, formerly employed by the college as an associate professor, brought a complaint based upon Title VII of the Civil Rights Act and the Fourteenth Amendment. The complaint was later amended to set forth a claim under the Equal Pay Act of 1963. The court found that, although

the evidence revealed that the average male faculty salary was higher than that of females, there was no showing of any salary differential for teaching positions which were substantially equal, and in presenting her statistical evidence, the plaintiff made no comparison of salaries discipline by discipline or department by department.

Therefore, the court found that plaintiff had failed to establish a prima facie case.

The Sixth Circuit considered a Title VII claim of gender-based discrimination in compensation in Calage v. University of Tennessee. Plaintiff claimed that the University failed to pay her the same wages for the same work performed by men (food services management). The court determined that the salary disparity was justified by the different duties assigned to each. The Westinghouse majority correctly noted that Calage was not a case in which the plaintiff sought to challenge the equal work standard. Nevertheless, it is a case in which the court determined that the Equal Pay Act standard is applicable to Title VII claims of gender-based wage discrimination.

Thus, the majority was able to distinguish earlier cases that had applied the Equal Pay Act standards to Title VII claims primarily on the basis of their lack of express intentional discrimination. Hence, there is no conflict among the circuits if the issue is whether the equal work standard is applicable to claims under Title VII when there is explicit intentional discrimination. There is, however, conflict among the circuits if, as perceived by the dissent, the issue is simply whether evidence of comparable work can establish a prima facie case of wage discrimination under Title

202. Id. at 580-81.
203. Id. at 580.
204. Id.
205. 544 F.2d 297, 298 (1976).
206. Id.
207. Id. at 300, 302.
208. 631 F.2d at 1107.
VII. CONCLUSIONS

Advocates of comparable worth favor comparing the work performed by individuals despite differences in job content to determine whether discrimination exists in compensation. Under the traditional "equal work" standard, such comparisons are disallowed.

In Westinghouse, the court addressed the issue of whether the "equal work" standard of the Equal Pay Act is applicable to claims of gender-based wage discrimination under Title VII; whether a plaintiff can establish a prima facie case of sex discrimination under Title VII without proof of equal work. As prior discussion indicates, proper statutory construction of the Bennett Amend-
ment points to the incorporation of the equal work standard into Title VII. The majority, however, held that proof of equal work is not required. In reaching its decision, the court dealt with the language and legislative history of the Bennett Amendment to Title VII. As to the legislative materials, the court noted, "[s]ome are ambiguous and, as the parties before us have demonstrated, an ingenious and intelligent mind may find support in all of them for either interpretation" (either incorporation of the equal work standard and the four exceptions or incorporation of only the exceptions).

Even in the absence of the Bennett Amendment, the equal work standard should apply to Title VII by virtue of the application of the in pari materia principle. So viewed, the Westinghouse majority opinion erroneously "declined" to apply it and failed to give EEOC guidelines contemporaneous with the enactment of Title VII due consideration. In considering case law, the majority distinguished those cases which upheld the equal work standard in Title VII claims on the basis of lack of explicit intentional discrimination.

Perhaps the holding in Westinghouse is limited to cases involving intentional discrimination. "Nothing we have found suggests that this act [Title VII] was to be weakened so as to 'authorize' the explicit discrimination in compensation the plaintiffs assert that Westinghouse practiced." The existence of the 1939 wage manual, evidence of previous discrimination, was apparently determinative of the outcome of the case. Even if Westinghouse is limited, as is suggested, the impact of the decision may be great. Presumably, many employees currently working for employers who had separate pay scales at some past time would have a cause of action for wage discrimination under Title VII. An expansive reading of Westinghouse, however, would indicate a disregard of the equal work standard and allow the comparable worth standard

213. See text accompanying notes 63-115 supra.
214. See text accompanying notes 39-40 supra.
215. See text accompanying notes 80-115 supra.
216. 631 F.2d at 1102.
217. See text accompanying notes 147-69 supra.
218. See text accompanying notes 116-42 supra.
219. See text accompanying notes 170-208 supra.
220. 631 F.2d at 1107.
221. See note 30 supra.
to be applied indiscriminately without regard to the existence of any explicit discriminatory intent. Under existing statutes, however, there is no authority for the results under either the limited or the more expansive reading of Westinghouse.

Alice A. Joseffer